

Create Expedited Reviews to Transform American Infrastructure Now (CERTAIN) Act Discussion Draft — Section-by-Section

(a) CERTAINTY

Except as provided in this bill or existing law, a Federal agency may not suspend construction or operation of a project, or revoke, suspend, amend, or take any other action to interfere with an issued authorization unless:

- (A) the agency is required to do so by order of a court of competent jurisdiction;
- (B) the holder of the authorization has materially breached the terms of the authorization, or violated applicable law;
- (C) the authorization was issued based on fraud, intentional concealment, or material misrepresentation, or the holder of the authorization violated the law;
- (D) such action is necessary to prevent specific harm to life, property, national security or defense, and such harm was not considered in the environmental review for the project;
or
- (E) the agency has received a request from the holder of the authorization to take such action

Any action referenced in this subsection must be supported by clear and convincing evidence, and reasonably limited to address the specific issue necessitating such action.

Federal agencies are also prohibited from petitioning courts for vacatur or voluntary remand unless the holder of the authorization consents to such a petition.

(b) NOTICE

Before an agency takes an action described in subsection (a), it is required to notify the holder of the authorization, and must provide a detailed written explanation of the action, identifying the statutory authority relied upon for the action, and providing the evidence supporting the action.

(c) TIMELINES AND PROCESS

Upon receipt of an application to build a project, the receiving agency must, within 60 days (or 30 days for applications pending as of enactment), notify the project sponsor that the application was received and by whom. Additionally, the agency must notify the applicant whether the application is complete, or that no federal reviews are needed for the project (depending on the requirements of applicable law). For applications that are resubmitted after an agency requests additional information, the agency is required to respond within 30 days of resubmission.

If the application is not complete, the agency must, in a clear and comprehensive way, request additional information needed to deem the application complete and establish a timeline for reviewing the application. Once the agency notifies the project sponsor that the application received is complete, the agency shall, within 60 days of such notification:

- (a) issue a public notice of intent to prepare an environmental document pursuant to the National Environmental Policy Act (NEPA) or notify the project sponsor that the project is categorically excluded from NEPA or is a major federal action; and

CERTAIN Act Discussion Draft— Section-by-Section

- (b) issue a public notice of intent, in coordination with applicable participating agencies, to initiate any additional environmental reviews required under Federal law

The determination that an application is complete may not be revoked and the reviewing agency may not identify new information that is required to deem an application complete after the initial back and forth, if that information was not identified in the agency's initial request for additional information (unless the information is absolutely necessary to fulfill statutory obligations).

If the agency has not notified the project sponsor that the application for an authorization is complete within 6 months from when the agency noticed receipt of the application, the application (not the project) shall be deemed complete, unless the agency provided the project sponsor with a written statement that the sponsor failed to comply with a request for further information or that the information provided was materially deficient. If the application has not been deemed complete within 90 days of such written statement, the application shall automatically be deemed complete, unless another statement is sent at least every 30 days until the application is deemed complete or denied by the agency.

If the applicable agency does not meet any of these timelines or deadlines, the application is deemed complete.

(d) PREVENTING UNNECESSARY DELAY

The Council on Environmental Quality (CEQ) shall issue voluntary guidance to facilitate federal agency compliance with this Act, and take necessary actions within their statutory authority to ensure timely completion of environmental reviews. CEQ is also further empowered in this section to mediate disputes between stakeholders regarding environmental reviews and, if a dispute remains unresolved within 30 days after the dispute was submitted to CEQ, is provided the authority to provide specific direction to the entities party to the dispute on how to resolve the dispute within the required period.

Actions taken by CEQ to mediate disputes under this subsection are not subject to judicial review. CEQ is also directed to provide annual reports to Congress on the frequency and nature of disputes, as well as recommendations to reduce permitting delays generally.

(e) JUDICIAL REVIEW

Agency actions to suspend or revoke authorizations for a project, or missing deadlines under this bill or other applicable environmental laws, shall be subject to judicial review. If an agency misses a deadline, such delay creates a rebuttable presumption of unreasonable delay for an agency to disprove. A reviewing court shall issue a decision on such claims within 180 days from when the action was filed.

(f) DENIAL OF AUTHORIZATIONS AND APPLICATION

An agency may not deny an authorization or application for a project unless the agency provides a written determination in which it establishes that the denial is supported by the record and authorized by the relevant statute. Denials shall be considered final agency actions subject to judicial review.

(g) PROCESS COORDINATION

Agencies are required, when initiating environmental reviews, to identify the lead agency for interagency reviews within 30 days of deeming an application complete. The lead agency shall have authority to take actions within their statutory authority to ensure expeditious environmental reviews, ensure coordination and cooperation between stakeholders, and to consider and respond to comments from participating agencies, tribes, and the public.

The lead agency shall identify any other agencies that have jurisdiction or expertise over a project, and invite such agencies to become participating agencies in the environmental review for the project, within 60 days of deeming an application complete. Any federal agency invited by the lead agency shall confirm in writing that it agrees to act as a participating agency within 30 days. Any non-federal agency invited by the lead agency shall confirm in writing that it agrees to act as a participating agency within 30 days, otherwise any such jurisdiction or authority the invited agency has with respect to the federal environmental review process for the project shall be waived (unless that non-federal agency is an Indian tribe).

Each lead and participating agency shall carry out their obligations under applicable law concurrently and in conjunction with the review required under NEPA (if applicable) and ensure completion of timely and coordinated reviews which result in a single environmental document.

Within 90 days of inviting agencies to participate in reviews, the lead agency shall establish a plan for coordinating public and agency participation in/comment on the environmental review. The coordination plan established under this section shall include:

- (a) a schedule for completion of the environmental review
- (b) a list of authorizations required for the project, as well as a determination as to whether each required authorization is routine or complex
- (c) the environmental reviews required to issue an authorization for the project

In establishing the schedule above, the lead agency shall consider the responsibilities and resources of participating agencies, the complexity of the project, the time required by an agency to conduct an environmental review, the sensitivity of resources that could be affected by the project, and the ability of communities and stakeholders to meaningfully participate in the environmental review process.

The lead agency may, with the consent of the project sponsor, shorten or lengthen the timelines established in the coordination plan, so long as doing so would not conflict with timelines

CERTAIN Act Discussion Draft— Section-by-Section

established by applicable law, or impair the agency's ability to conduct necessary analysis. A project sponsor that consents to an extended or shortened schedule shall waive their right to judicial review of such delay unless the agency misses the updated deadline.

(h) DEADLINE FOR FEDERAL AUTHORIZATION

Once the final environmental document for a project has been published, the lead agency, and any participating agency shall issue all necessary complex authorizations within 90 days. The lead agency, or any participating agency with jurisdiction over such an authorization, shall issue a final decision on all routine authorizations within 30 days of receiving a request for such authorization from the project sponsor. The lead agency may extend the deadlines in this subsection as necessary with the consent of the project sponsor. A project sponsor that consents to an extended or shortened schedule shall waive their right to judicial review of such delay unless the agency misses the updated deadline.

(i) ACCOUNTABILITY

The lead agency and any applicable participating agency shall, immediately upon missing a deadline established under the coordination plan – or other timelines, deadlines, or milestones provided under this act for environmental reviews – provide the public, project sponsor, applicable agencies, and CEQ with a notice of the agency's failure to meet the schedule. Within 30 days of that notice, the agency which failed to meet such deadline shall provide an additional notice, with periodic updates, outlining the remaining agency decisions and reviews that remain outstanding, and an updated schedule which shall not exceed 6 months beyond the date of the initial notice.

The agency shall also provide project sponsors with the opportunity for administrative review by a senior career agency official of the agency's failure to meet the applicable deadline, to be completed within 90 days.

(j) DEFINITIONS

Defines terms used throughout the bill.

(k) FEDERAL PERMITTING CAPACITY

The head of each federal permitting agency is directed to develop and submit a report on agency capacity to process authorizations to the Office of Personnel Management (OPM), the Committee on Natural Resources, and the Environment and Public Works Committee. Upon receipt of agency reports on capacity, OPM shall develop a plan to increase capacity at the agency.

Agencies are authorized, upon a finding that they need to increase workforce capacity, to hire candidates necessary to process authorizations in a timely manner (such certification shall terminate within 5 years of when it was issued, or when the agency head determines there is no

CERTAIN Act Discussion Draft— Section-by-Section

longer a shortage of employees, whichever is sooner). There are such sums authorized as are necessary to comply with the provisions of this subsection.