

**Create Expedited Reviews to Transform American Infrastructure Now (CERTAIN) Act –
Discussion Draft**

(a) CERTAINTY.—

(1) IN GENERAL.—Except as provided in this subsection or existing law, a Federal agency may not revoke, rescind, withdraw, terminate, suspend, amend, alter, or take any other action to interfere with an authorization unless—

(A) the Federal agency is required to take such action by order of a court of competent jurisdiction;

(B) the holder of the authorization has materially breached the terms of the authorization, or otherwise violated applicable law;

(C) the authorization was obtained through fraud, intentional concealment, or material misrepresentation;

(D) such action is necessary to prevent specific, immediate, substantial, and proximate harm or damage to life, property, national security, or defense that was not considered in the underlying environmental review process or final agency action for the authorization; or

(E) the Federal agency has received a request from the holder of the authorization or project sponsor to take such action.

(2)

(A) REQUIREMENT.—The actions described in paragraph (1) shall be, as appropriate and where feasible, supported by clear and convincing evidence and reasonably limited in duration and scope by the agency to address the specific issue such action is intended to address.

(B) PETITIONS BY FEDERAL AGENCIES.—No Federal agency may petition a court for vacatur or voluntary remand of an authorization unless the holder of the authorization or the project sponsor consents in writing to such a petition.

(3) SAVINGS CLAUSE.— Nothing in paragraph (1) shall be construed to provide any Federal agency new, enhanced, or expanded authority, or to limit any existing authority, concerning any authorization.

(b) NOTICE.—Before an agency takes an action described in paragraph (a)(1), the agency shall notify the holder of the authorization and the project sponsor in writing of such action, including by providing a detailed explanation of the action, identifying the statutory authority relied upon for the action, and providing the evidence supporting the action.

(c) TIMELINES AND PROCESS

“(1) **PROJECT SPONSOR NOTIFICATION.**— For actions proposed by application to establish a right of way, permit, or any other federal authorization, notwithstanding any other law, and not later than 60 days after the date on which a project sponsor submits, 30 days after the project sponsor resubmits pursuant to subparagraph (C), or 30 days after the enactment of this Act for applications pending as of such date, an application, the agency shall publicly document the receipt of the application in writing and online and:

“(A) Notify the project sponsor in writing that the application was received, and identify the receiving official; and

(B) Notify the project sponsor in writing whether the application, upon submittal or resubmittal, is complete, pursuant to the requirements of applicable law; or

(C) If the application is not complete, request from the project sponsor, in writing, additional information that the agency needs to deem the application complete, pursuant to the requirements of applicable law, that shall;

(i) be clear, comprehensive, and specific, regarding the additional information required from the project sponsor;

(ii) establish a timeline for both the project sponsor’s submission of such information and the agency’s subsequent review and response; and

(iii) be repeated upon any resubmittal of the application, until the agency notifies the project sponsor that the application is complete pursuant to paragraph (B) or denies the application; or

(D) Notify the project sponsor that no federal environmental reviews or authorizations are required for the project.

(2) AGENCY DETERMINATION. —

(A) If the agency determines and notifies the project sponsor that an application is complete pursuant to paragraph (1)(B), within 60 days of transmitting such notification, the agency shall, as applicable;

(i) issue a public Notice of Intent to prepare an environmental assessment for such action;

(ii) issue a public Notice of Intent to prepare an environmental impact statement for such action; or

(iii) Notify the project sponsor in writing that:

(I) the agency has made a threshold determination that the agency is not required to prepare an environmental document with respect to a proposed agency action pursuant to the requirements of section 106(a) of the National Environmental Policy Act of 1969; and

(II) which determination was made pursuant to the provisions of section 106(a) of the National Environmental Policy Act; and

(iv) issue:

(I) public notices of intent to initiate any related environmental reviews required under federal law, other than those conducted pursuant to the National Environmental Policy Act, if applicable; and

(II) if an agency lacks sufficient information to issue a notice described in (I), the lead agency, in consultation with applicable participating agencies, shall issue a notice outlining the information described in subsection (g)(4)(B)(ii) and (iii) with respect to the project, and, in consultation with the project sponsor, a schedule – which shall be incorporated into the schedule described in subsection (g)(4)(B)(i) – for the project sponsor to submit, and for the applicable agency to review, necessary applications, pursuant to the requirements described in this subsection.

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(B)

(i) The determination that an application is complete under paragraph (2)(A) may not be revoked, but does not preclude agencies from requesting further information from project sponsors during the environmental review process; and

(ii) in subsequent rounds of application review after the initial notification, if applicable, pursuant to paragraph (1)(C), the agency shall not identify new information required to deem the application complete that was not identified in the initial written information request provided to the applicant pursuant to subparagraph (1)(C)(i), unless agency demonstrates that the information is absolutely necessary to fulfill statutory obligations.

(C) If the agency has not notified the project sponsor that the application is complete within six months after the date of the notification under subparagraph (1)(A), the application shall be deemed complete pursuant to the provisions of paragraph (2)(A), unless the agency provides a written attestation to the project sponsor within six months of the notification referenced in subparagraph (1)(A)—

(i) stating that the project sponsor failed to respond to the request for additional information; or

(ii) identifying why the information provided by the project sponsor was materially deficient, in a clear, comprehensive, and specific, manner; and

(D) If, 90 days after the agency provides a written attestation pursuant to subparagraph (C), the application has not been deemed complete, the application shall be deemed complete pursuant to the provisions of paragraph (2)(A) unless the agency sends another written attestation pursuant to subparagraph (C), which shall be repeated at least every 30 days until:

(i) it deems the application complete pursuant to the provisions of paragraph (2)(A); or

(ii) it denies the application

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(E) If an agency fails to issue a notice pursuant to paragraph (1) by the applicable deadline, the application shall be deemed to be complete pursuant to subparagraph (1)(B).

(d) PREVENTING UNNECESSARY DELAYS

(1) The Council on Environmental Quality shall, in consultation with applicable federal agencies:

(A) issue guidance to federal agencies and project sponsors to facilitate the implementation of the provisions of this Act;

(B) take such actions as are necessary within the statutory authority of the Council, including this Act, to facilitate timely and efficient completion of the environmental review process

(2) The Chair of the Council on Environmental Quality – in consultation with the chief environmental review and permitting officers of applicable agencies, and the project sponsor – shall, as necessary and upon written request to the Council by a project sponsor, mediate any disputes regarding the environmental review process outlined in subsection (g) of this Act.

(3) If a dispute remains unresolved 30 days after the date on which the dispute was submitted to the Chair of the Council on Environmental Quality, the Chair shall have the authority to:

(A) facilitate a resolution of the dispute; and

(B) if absolutely necessary to resolve the dispute by the end of the 60-day period beginning on the date of submission of the dispute to the Chair, provide specific direction to the entities party to the dispute on how to resolve the dispute by the end of the 60-day period beginning on the date of submission of the dispute to the Chair.

(4) Any action taken by the Chair of the Council on Environmental Quality pursuant to subparagraph (3)(B) shall not be considered a final agency action.

(5) **REPORTING AND OVERSIGHT.**— Not later than one year after the date of enactment of this Act, and annually thereafter, the Council on Environmental Quality shall submit to the Committees on Energy and Natural

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Resources and Environment and Public Works of the Senate and to the Committees on Energy and Commerce and Natural Resources of the House of Representatives a report describing—

(A) the number and nature of disputes submitted under this subsection during the preceding year;

(B) the time required to resolve such disputes;

(C) any instances in which the Council failed to meet the time frames established under this subsection; and

(D) recommendations for additional administrative or legislative measures to further reduce unnecessary delays in the environmental review process.

(e) JUDICIAL REVIEW.—

(1)

(A) Any agency action referenced in subsection (a)(1), or any delay referenced in paragraph (2) shall be subject to judicial review under chapter 7 of title 5, United States Code.

(B) A person seeking judicial review of an agency action referenced in subsection (a)(1), or any delay referenced in paragraph (2), shall obtain review of such action or delay in the United States Court of Appeals for any circuit wherein the project is located

(2) If an agency fails to meet a deadline under this Act, or under 42 U.S.C. 4336a(g), such delay shall create a rebuttable presumption of unreasonable delay which the applicant may challenge in a court of competent jurisdiction pursuant to section 706(1) of title 5, United States Code, or any other applicable provision of law

(3) For any claim brought regarding such action, the court of competent jurisdiction shall issue a decision for such challenge—

“(A) as expeditiously as practicable; and

“(B) not later than the date that is 180 days after the date on which the civil action is filed.”

(4) If a court of competent jurisdiction finds that agency action was unreasonably delayed the court shall set a specific deadline it deems appropriate for the agency to take the required action.

(f) DENIAL OF AUTHORIZATIONS AND APPLICATIONS. —

(1)

(A) Any denial of an authorization or application for a project shall be subject to judicial review under chapter 7 of title 5, United States Code.

(B) A person seeking judicial review of a denial of an authorization or an application for a project shall obtain review of such action in the United States Court of Appeals for any circuit wherein the project is located.

(2) An agency may not deny an authorization or application for a project unless in a written determination provided contemporaneously to the project sponsor describing the reasons for the denial, it establishes that the denial is supported by the record, authorized by the relevant statute, and:

(A) Any denial of an authorization or application shall be considered a final agency action, and the project sponsor for such authorization may challenge the decision which shall be subject to judicial review; and

(B) Nothing in this subsection shall be construed to impact the ability of a project sponsor and an agency to resolve denials informally, administratively, nor preclude pathways for judicial review outlined elsewhere in applicable law, including rehearing.

(g) PROCESS COORDINATION.—

(1) LEAD AGENCY – If there are two or more participating Federal agencies with respect to the environmental review for any project, such agencies shall determine, if they have not already, no later than 30 days after deeming an application complete, which agency shall be the lead agency, based on the provisions of Sec. 107(a)(1) of the National Environmental Policy Act. The lead agency shall have the authority and responsibility, consistent with applicable law:

(A) to take such actions as are necessary and proper, within the statutory authority of the lead agency, and in coordination with other

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participating agencies, to facilitate the expeditious resolution of the environmental review for the project; and

(B) to prepare or ensure, in coordination and consultation with participating agencies, that any environmental reviews are completed in accordance with this Act and applicable Federal law; and

(C) as applicable, to consider and respond to comments received from participating agencies and Tribes, and coordinate public comment on environmental reviews for the project;

(2) PARTICIPATING AGENCIES –

(A)

(i) Not later than 60 days after deeming an application complete with respect to a project pursuant to subsection (c)(1)(B), the lead agency shall, if it has not already done so for the project, identify any other Federal and non-Federal agencies that have jurisdiction by law or special expertise over the project, and shall invite such agencies in writing to become participating agencies in the environmental review for the project; and

(ii) Such agencies shall be given 30 days to respond to such request;

(B)

(i) Any federal agency that is invited by the lead agency to participate in the environmental review for a project shall confirm in writing to the lead agency by the deadline identified in paragraph (A)(ii) that it agrees to be a participating agency, in order for it to be designated as a participating agency. If the federal agency does not provide such confirmation in writing to the lead agency by the deadline identified in paragraph (A)(ii), the project sponsor may submit a request to the Council pursuant to subsection (d)(2); and

(C)

(i) any non-federal agency that is invited to be a participating agency in the environmental review for a project must confirm in

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writing to the lead agency by the deadline identified in paragraph (A)(ii) that it agrees to be a participating agency, in order for it to be designated as a participating agency.

(ii) If the non-federal agency does not provide such confirmation in writing to the lead agency by the deadline, this shall have the effect of waiving any jurisdiction or authority regarding the project, including the federal environmental review and related authorizations.

(iii) if the non-federal agency is an Indian tribe, subparagraph (ii) shall not apply to the Indian tribe.

(3) When performing environmental reviews, each lead and participating agency shall:

(A) Carry out the obligations of that agency under other applicable laws concurrently, and in conjunction, with other required reviews for the project, pursuant to the requirements of applicable law, including if applicable, under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

(B) formulate and implement administrative, policy, and procedural mechanisms to enable the agency to comply with this Act, and to ensure completion of the environmental review in a timely, coordinated, and environmentally responsible manner;

(C) All Federal authorizations and environmental reviews for a project shall rely on a single environmental document, inclusive of each kind of environmental document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) under the leadership of the lead agency and in partnership with participating agencies. If the lead agency makes a threshold determination under clause (c)(2)(A)(iii) for a project, the lead agency in partnership with participating agencies is still required to utilize a single environmental document that all federal authorizations and environmental reviews for the project shall rely on; and

(4) Coordination plan

(A) Not later than 90 days after an invitation described in subsection (g)(2)(A), the lead agency, in consultation with participating

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agencies, shall, if it has not already done so for the project, establish and publish a plan for coordinating public and agency participation in, completion of, and comment on the environmental review. The coordination plan may be incorporated into a memorandum of understanding, a Coordinated Project Plan as required under 42 U.S. Code § 4370m-2(c), or, for applications already in progress as of the date of enactment of this act, another similar document.

(B) The lead agency shall establish as part of such coordination plan, after consultation with each participating agency for the project and with the project sponsor:

(i) a schedule for completion of the environmental review process for the project, which shall be consistent with any other relevant time periods established under federal law, as well as the process requirements, timelines, and deadlines under this Act;

(ii) a list of the authorizations required for the project, including a determination as to whether each required authorization is routine or complex; and

(iii) the environmental reviews that are required to issue an authorization for the project

(C) In establishing the schedule referenced in subparagraph (B), the lead agency shall consider factors such as:

(i) the responsibilities of participating agencies under applicable laws;

(ii) resources available to participating agencies, including staffing capacity;

(iii) overall size and complexity of the project

(iv) the overall time required by an agency to conduct an environmental review and make decisions under applicable Federal law relating to a project (including the issuance or denial of a permit or license) and the cost of the project;

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(v) the sensitivity of the natural and historic resources that could be affected by the project

(vi) the ability of communities and stakeholders to participate, as applicable, in the environmental review process, depending on the applicable schedule

(D) Discretion on project schedule

(i) Except as provided in clause (ii) or (iii), the lead agency may lengthen or shorten a schedule established under subparagraph (B) for good cause, with the consent of the project sponsor;

(ii) the lead agency may not lengthen a schedule if doing so causes the lead agency or participating agencies to conflict with timelines or deadlines under other applicable laws, unless the project sponsor consents to such an extension

(iii) the lead agency may not shorten a schedule if doing so would, in the opinion of the lead agency or the applicable participating agency, impair the ability of the lead agency or applicable participating agency to conduct necessary analyses or otherwise carry out relevant statutory obligations of the agency for the project

(iv) a project sponsor that consents to an extended or shortened schedule shall waive their right to judicial review pursuant to subsection (e)(2) unless the agency misses deadlines in the updated schedule.

(E) Nothing in this subsection shall be construed to reduce or increase any time period provided for environmental reviews, or public comment in the environmental review process, as applicable, under Federal law, including a regulation.

(F) The establishment of the coordination plan and project schedule required by this subsection shall not be considered a Major Federal Action under the National Environmental Policy Act of 1969.

(h) DEADLINE FOR FEDERAL AUTHORIZATIONS.—

(1) Within 90 days of the agency publishing the final environmental document as referenced in subparagraph (4)(A), the lead agency, and any participating agency, shall issue a final decision on and provide public notice of all necessary complex authorizations.

(2) Deadline for routine authorizations.—The lead or participating agency with jurisdiction over routine authorizations shall issue a final decision on such authorizations not later than 30 days after receiving a request from the project sponsor for such routine authorizations; and

(3) If the lead agency determines that it is not able to meet the deadlines in this subsection, it may extend such deadline, with the consent of the project sponsor, only so long as to issue all necessary authorizations for the project. A project sponsor that consents to such an extension shall waive their right to judicial review pursuant to subsection (e)(2), unless the agency misses the new deadline.

(4) Transparency.—

(A) Upon the completion of a final environmental document by a lead agency and participating agencies, the lead agency shall, within 30 days, publish the final environmental document.

(B) Prior to the finalization of an environmental impact statement, the lead agency shall make a draft environmental impact statement available for public comment for at least 30 days.

(i) ACCOUNTABILITY.— In any case where the lead agency or participating agencies have not met the deadlines under subsection (h), or adhered to the schedule established under subsection (g), or issues more than two attestations pursuant to subparagraph (c)(2)(D), the lead agency and applicable participating agencies, immediately upon missing the deadline or deviating from the schedule, shall:

(1) provide the public, the project sponsor, the lead agency, participating agencies, the Council on Environmental Quality, and the Secretaries or Administrators of the lead and participating agencies:

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(A) An initial notice of the failure of the applicable agency to adhere to the schedule, issue an authorization, complete an applicable environmental review, or other additional required milestone; and

(B) No later than every 30 days after a transmittal pursuant to clause (A), an additional notice that describes:

(i) the agency decisions and environmental reviews that remain outstanding as of the date of the additional notice;

(ii) an updated schedule, developed by the lead agency in consultation with the participating agency, that shall not exceed six months from the date of the initial notice.

(2) provide the project sponsor with an opportunity for administrative review of the failure of the applicable agency to adhere to the schedule, issue an authorization, complete an applicable environmental review, or other additional required milestone, to be completed within 90 days by career agency Senior Executive Service officials from the lead agency and applicable participating agencies, unless such review is waived by the project sponsor.

(j) DEFINITIONS

(1) Participating agencies: the term ‘participating agencies’ means any agency that is participating in the environmental review, inclusive of the lead agency. It also shall include cooperating agencies, as defined in the National Environmental Policy Act of 1969

(2) Environmental document: the term “environmental document” means an environmental assessment, environmental impact statement, finding of no significant impact, or final determination of application of a categorical exclusion for a project, including any supplement thereto or any document prepared pursuant to court order, and also shall include, when used in the context of environmental reviews where an agency makes a threshold determination under subsection (e)(2)(A)(iii)(I), a single consolidated document that collates all applicable environmental reviews and determinations for the project..

(3) Authorization: The term “authorization” means any license, permit, approval, finding, determination, certification, consent, or other administrative decision required under Federal law (including regulations) to design, site,

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construct, reconstruct, or commence operations for a project or related activity, inclusive of the definition provided in 42 U.S. Code § 4370m, and includes any licenses, permits, approvals, findings, determinations, decision, record, or environmental document that supports such authorization or is required to ensure compliance with applicable environmental laws. The term does not include any license, permit, approval, finding, determination, or other administrative decision required under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.), consistent with that Act’s independent regulatory framework.

(4) Environmental review. –

(A) In general- The term “environmental review” means the process for preparing for a project an environmental impact statement, environmental assessment, categorical exclusion, or other document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) Inclusions- The term “environmental review” includes the process and schedule, including a timetable for and completion of any environmental permit, approval, review, or study required for a project under any Federal law other than the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(5) Complex authorization: the term ‘complex authorization’ means any final agency action for a project that—

(A) requires the preparation of any environmental document, as defined in this Act;

(B) requires formal consultation under section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) or results in the issuance of a biological opinion;

(C) requires consultation under section 106 of the National Historic Preservation Act (54 U.S.C. 306108);

(D) grants a new or expanded right-of-way, easement, lease, or comparable real-property interest; or

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(E) requires an individual permit under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) or an individual water quality certification under section 401 of that Act (33 U.S.C. 1341).

(6) Routine authorization: the term ‘routine authorization’ means any Federal authorization that is not a complex authorization.

(k) FEDERAL PERMITTING CAPACITY.

(1) IN GENERAL.—Not later than 90 days after the date of enactment of this Act, and every five years thereafter, the head of each agency listed under section 41002(b)(2)(B) of the FAST Act (42 U.S.C. 4370m-1(b)(2)(B)) shall submit to the Director of the Office of Personnel Management, the Committee on Natural Resources, and the Environment and Public Works Committee a report on the personnel capacity of the agency to process authorizations and environmental documents for projects in a timely manner, which shall include—

(A) the capacity of the agency – broken down by state and region – to engage with communities affected by projects when preparing environmental documents; and

(B) a finding by the agency whether there are a sufficient number of employees of the agency – broken down by field office – to comply with sections 107(g) and 112(a)(4) of the National Environmental Policy Act of 1969 (42 U.S.C. 4336a(g) and 4336f(a)(4)) and engage with communities.

(2) IMPLEMENTATION PLAN.—Upon receipt of the report, if an agency finds under subsection (1)(B) that there are an insufficient number of employees of the agency to comply with sections 107(g) and 112(a)(4) of the National Environmental Policy Act of 1969 (42 U.S.C. 4336a(g) and 4336f(a)(4)) and engage with communities, the Director of the Office of Personnel Management shall develop and execute a plan to increase personnel capacity at the agency.

(3) DIRECT HIRE AUTHORITY.—

(A) IN GENERAL.—Notwithstanding section 3304 of title 5, United States Code, and without regard to the provisions of sections 3309 through 3318 of such title 5, if the head of an agency described in paragraph (1) issues a certification that there is a severe shortage of candidates or a critical hiring need for applicable positions to carry out the responsibilities and activities of the agency with respect to processing authorizations and environmental

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documents for projects in a timely manner, the agency head may, subject to subparagraphs (B) and (C), recruit and directly appoint highly qualified individuals into the competitive service.

(B) LIMITATION.—The recruiting and appointment of highly qualified individuals under subparagraph (A) shall be consistent with the merit principles of section 2301 of title 5, United States Code, and the agency shall comply with the public notice requirements of section 3327 of such title 5.

(C) TERMINATION.—A certification issued under this subsection shall terminate on the earlier of—

(i) the date that is 5 years after the certification is issued; or

(ii) the date on which the agency head determines that there is no longer a severe shortage of candidates or a critical hiring need for covered positions to carry out the responsibilities and activities of the agency related to permitting.

(4) AUTHORIZATION OF APPROPRIATIONS.—In addition to amounts otherwise available, there is authorized to be appropriated such sums as is necessary to comply with the provisions of this subsection.