

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

Sec. 1.—SHORT TITLE

This Act may be cited as the “Create Expedited Reviews to Transform American Infrastructure Now Act” or the “CERTAIN Act”.

Sec. 2.—AUTHORIZATION CERTAINTY

Except as provided in this subsection or explicitly provided in another provision of 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;
- (b) the action is necessary to prevent specific, immediate, substantial, and proximate harm to life, property, or national security, and such harm was not considered, or could not have been reasonably anticipated, in the environmental review for the project;
- (c) the agency has received a request from the holder of the authorization to take such action;
or
- (d) the agency determines, no earlier than 7 days after providing advanced notice to the holder of the authorization at issue, that:
 - a. The holder of the authorization has materially breached the terms of the authorization, or violated applicable law; or
 - b. The authorization was issued based on fraud, intentional concealment, or material misrepresentation.

Any action described in this subsection must be supported by clear and convincing evidence, and limited in duration and scope to address the specific issue necessitating such action. Before an agency takes an action described in this section, it must notify the holder of the authorization, and provide a detailed written explanation of the action, identifying the statutory authority relied upon for the action, and providing the evidence supporting the action.

Judicial review of actions described in this section will be reviewable under the Administrative Procedure Act (APA), either in the U.S. court of appeals for any circuit where the project for which the authorization was issued is located, or in the U.S. court of appeals for the District of Columbia circuit. Federal agencies are also prohibited from petitioning courts for vacatur or voluntary remand unless the holder of the authorization consents to such a petition.

Nothing in this section provides any agency with new, enhanced, or expanded authority, or to limit any authority explicitly provided in any other provision of law.

Sec. 3.—TIMELINES AND PROCESS FOR APPLICATION REVIEW

Upon receipt of an application to build a project, the receiving agency must immediately notify the project sponsor that the application was received and by whom and, within 14 days (or 30

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days for applications pending as of enactment), publicly document the receipt of the application online and any additional information requested by the agency.

Within 30 days of notifying the applicant that the application was received – or 45 days for applications pending as of enactment – the agency must notify the applicant whether the application is complete or incomplete. If the application is not complete, the agency must clearly and specifically request any additional information needed to deem the application complete and establish a timeline for review. Such a request shall be repeated until the agency determines that the application is complete, or that the applicant is not acting in good faith (pursuant to the process laid out below).

If an agency has not determined an application is complete or denied the application within 60 days of requesting additional information, the application shall be deemed complete, unless the agency provides the applicant a written attestation showing that the applicant failed to provide information requested, or that information provided was materially deficient. If an agency has not determined an application is complete or denied the application within 30 days of providing such a written attestation, the application shall be deemed complete, unless the agency provided the applicant with a second written attestation.

If an agency has not determined an application is complete or denied the application within 30 days of providing a second written attestation, the application shall be deemed complete, unless the agency determines the applicant is not acting in good faith. Such a determination shall be treated as a denial of the application.

An agency may not revoke the determination that an application is complete, or request additional, wholly new information that was not included or referenced in an initial request for additional information unless the agency demonstrates that the new information is necessary to fulfill a statutory obligation with regard to the applicable authorization. This ensures that agencies adhere to statutory requirements when permitting projects.

Once the agency notifies the project sponsor that the application received is complete, or the application is deemed complete, the agency must, within 30 days, notify the applicant if an environmental document pursuant to the National Environmental Policy Act (NEPA) is required, or notify the applicant that a categorical exclusion applies, or that the project does not require a NEPA analysis.

If a NEPA review is required, the agency shall, within 30 days of notifying the applicant that such a review is required, issue a public notice of intent to conduct such review. If the agency is unable to make a NEPA determination at that time, it must build the determination into the coordination plan established under section 6.

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Project sponsors who apply to more than one Federal agency for an authorization for a project shall notify each relevant Federal agency of each application submitted within 7 days of submitting each application. Applicants shall not be required to file applications concurrently or simultaneously.

An agency may not deny an application or determine that an applicant is not acting in good faith unless the agency provides a written statement which describes the reason for the denial or determination, establishes that the denial or determination is supported by the record, and establishes that the denial or determination is authorized by the relevant statute.

Sec. 4.—PREVENTING UNNECESSARY DELAYS IN ENVIRONMENTAL REVIEWS

The Council on Environmental Quality (CEQ) is required to issue voluntary, non-binding guidance to facilitate federal agency compliance with this Act within 180 days.

CEQ is also authorized to mediate disputes between stakeholders regarding environmental reviews. If a dispute remains unresolved within 30 days after the dispute was submitted, CEQ is required to facilitate a resolution to the dispute and, if necessary, provide specific direction to the entities party to the dispute on how to resolve the dispute within 60 days of when the dispute was originally submitted. Any action taken by the Chair of CEQ shall not be considered a final agency action reviewable under the APA.

CEQ is also directed to provide reports to Congress, within one year of enactment and every two years thereafter, on the frequency and nature of disputes, the time required to resolve disputes, any outstanding disputes, and recommendations to reduce permitting delays generally.

Sec. 5.—JUDICIAL REVIEW OF ACTIONS RELATING TO AUTHORIZATIONS

Agency actions to suspend or revoke authorizations for a project, agencies missing deadlines under this bill or other applicable environmental laws, and agency denials of applications for authorizations shall be subject to judicial review under the APA, either in the U.S. court of appeals for any circuit where the project for which the authorization was issued is located, or in the U.S. court of appeals for the District of Columbia circuit.

If an agency misses a deadline, such delay creates a rebuttable presumption of unreasonable delay for an agency to disprove. If a court finds that agency's action or inaction violated the law or caused unreasonable delay, the court shall compel the appropriate agency to take corrective action and provide specific deadlines for such corrective action. A reviewing court shall issue a decision on such claims within 90 days from when the action was filed.

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For the purposes of Federal Energy Regulatory Commission orders issued under the Federal Power Act or Natural Gas Act, the final rehearing order shall be considered the final agency action which can trigger judicial review.

Nothing in this section shall be construed to impact the ability of an applicant and an agency to resolve the denial of an application for an authorization informally, or administratively.

Sec. 6.—PROCESS COORDINATION

If there is only one Federal agency with legal jurisdiction or special expertise with respect to a complex authorization for a project, that agency shall be the lead agency for the purposes of this section. If two or more agencies have legal jurisdiction or special expertise with respect to a complex authorization for a project, such agencies shall designate the lead agency within 30 days of deeming an application complete.

The lead agency shall have authority to ensure expeditious completion of reviews, to ensure an environmental review is completed and a final agency action document is issued in accordance with this Act, to ensure coordination and cooperation between participating agencies and stakeholders, and to consider and respond to comments from participating agencies and coordinate public comment for the review.

The lead agency shall identify any other agencies that have jurisdiction or expertise with respect to 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. Each such agency—except for tribal governments—shall respond to the invitation not later than 30 days after receiving the invitation, unless a shorter deadline is specified under Federal law. If a Federal agency does not provide a response, in writing, to the lead agency by such deadline, the applicant may submit a request to CEQ for dispute resolution pursuant to section 4.

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 shall result in a single final agency action document.

This consolidated document may, if necessary to expeditiously complete reviews and issue authorizations, contain a performance schedule for the completion of any remaining environmental reviews for authorizations for the project, which shall not exceed one year from the publication of such document.

Each final agency action for a complex authorization contained within a single final agency action document shall remain legally independent and severable. Nothing in this section shall

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require that all participating agencies complete their respective authorizations before any individual agency may issue its final agency action within its statutory authority. Upon judicial review of a single final agency action document, relief shall be limited to the specific authorization challenged unless a court determines that other authorizations are legally dependent on the challenged authorization.

Within 90 days of inviting agencies to participate in reviews, the lead agency shall, in consultation with the participating agencies, 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 list of authorizations required for the project, as well as a determination as to whether each required authorization is routine or complex;
- (b) a schedule for completion of the environmental review for the project, which shall remain consistent with other relevant time periods established under Federal law. Such a schedule shall ensure the preparation of a single final agency action document, and shall include intermediate and final milestones for action by each agency, which shall also facilitate the ability of agencies to carry out environmental reviews concurrently;

In establishing the schedule above, the lead agency shall consider the responsibilities of, and resources available to, participating agencies, the size and 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 established by applicable law, or impair the agency's ability to conduct necessary analysis. The lead agency shall lengthen or shorten a schedule by issuing a revised schedule within 30 days after the applicant provides consent. An applicant that consents to an extended or shortened schedule may not challenge the failure of an agency to meet any deadlines in the previous schedule.

The lead agency shall consult with participating agencies throughout the environmental review on setting and amending timelines, collecting and analyzing information, and otherwise carrying out tasks necessary for the timely completion of the review. The establishment of the coordination plan (including the project schedule) is not a major Federal action under NEPA.

For projects requiring review under NEPA, the relevant Federal agency shall make a draft version of the environmental impact statement publicly available for at least 30 days before publishing a final version. Within 30 days of finalizing an environmental impact statement,

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environmental assessment, or finding of no significant impact, the relevant Federal agency shall publish such document.

Federal agencies are also required to publicly issue a final decision (final agency action) on an application for a complex authorization within 90 days after the date, whichever is earliest, on which:

- (a) the Federal agency applies a categorical exclusion with respect to the authorization;
- (b) the Federal agency publishes a finding of no significant impact with respect to the authorization;
- (c) the Federal agency publishes a final environmental impact statement with respect to the complex authorization; or
- (d) a lead agency or a participating agency completes an environmental review with respect to another complex authorization for the same project, if NEPA does not apply to the authorization in question.

Federal agencies are required to make a decision on applications for routine authorizations within 30 days after receiving a complete application for such routine authorizations. If the relevant Federal agency does not issue a decision within 30 days, the application shall be deemed approved.

Federal agencies are required to complete environmental reviews for complex authorizations and issue a final agency action:

- (a) within 6 months of the date on which the application was deemed complete, if a categorical exclusion applies, or if NEPA does not apply to the authorization;
- (b) within 1 year of the date on which the agency determined an environmental assessment was required;
- (c) within 2 years of the date on which the agency determined an environmental impact statement was required.

A 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 – provide the public, project sponsor, applicable agencies, and CEQ with a notice of the agency’s failure to meet such deadline. 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.

Agencies 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. Such review

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shall be initiated within 30 days of an agency’s failure to adhere to the schedule, and shall be completed within 90 days.

Sec. 7.—FEDERAL PERMITTING CAPACITY

The head of each federal permitting agency is directed to develop and submit a report on agency staffing and capacity to process authorizations to the Office of Personnel Management (OPM), the House Committee on Natural Resources, the House Committee on Energy and Commerce, the Senate Environment and Public Works Committee, and the Senate Energy and Natural Resources Committee.

Upon receipt of agency reports finding insufficient staff capacity, if applicable, 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 authorization shall terminate within 5 years of when it was issued, or when the agency head determines there is no longer a shortage of employees, whichever is sooner). There are such sums authorized as are necessary to comply with the provisions of this Section.

Sec. 8.—DEFINITIONS

Defines terms used throughout the bill.