



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV - 7 2016

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Internal Analysis of Potential U.S. Environmental Protection Agency Projects and Permits for Title 41 of the Fixing America's Surface Transportation Act

FROM: Rob Tomiak *Rob Tomiak*
Chief Environmental Review and Permitting Officer
Director, Office of Federal Activities
U.S. Environmental Protection Agency

TO: Cynthia Giles
Councilmember
Assistant Administrator, Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Title 41 of the Fixing America's Surface Transportation Act (FAST-41) was enacted in December 2015. FAST-41 covers construction of certain infrastructure projects that require permits (or other authorizations)¹ and environmental reviews² by a Federal agency and fall into a particular sector. Infrastructure projects covered by FAST-41 include activities involving construction of infrastructure for energy production (renewable and conventional energy), electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the Federal Permitting Improvement Steering Council (FPISC or the Council).³ To be a covered project, the activities must also be subject to the National Environmental Policy Act (NEPA) and: (i) be likely to require an investment of more than \$200,000,000 and not qualify for abbreviated authorization or environmental review processes; or (ii) be a project with a size and complexity, which in the Council's opinion would benefit from enhanced oversight and coordination, such as activities that would involve permitting or review by more than two

¹ Authorizations are any "license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of a covered project administered by a Federal agency..." 42 U.S.C. § 4370m(3).

² Environmental reviews are "agency procedures and processes for applying a categorical exclusion or for preparing an environmental assessment, an environmental impact statement, or other document required under NEPA." 42 U.S.C. § 4370m(11).

³ The FPISC is a council made up of representatives from the Department of Agriculture, the Department of the Army, the Department of Commerce, the Department of the Interior, Department of Transportation, the Department of Defense, the Department of Energy, the EPA, the Federal Energy Regulatory Commission, Homeland Security, the Department of Housing and Urban Development, the Advisory Council on Historic Preservation, the Council on Environmental Quality, and the Office of Management and Budget. 42 U.S.C. § 4370m-1(b)(2)(B).

Federal agencies or activities that would require an environmental impact statement (EIS). 42 U.S.C. §§ 4370m *et seq.*

The Office of Management and Budget (OMB) and the FPISC have asked the EPA to identify where the EPA has retained authority for issuing permits, how long past permitting decisions took, and what are the associated sectors for issued permits. As new covered projects are designated, the lead or facilitating agencies will invite all permitting agencies to be participating agencies, post information about the permits to an online Permitting Dashboard, and help develop a coordinated project plan (CPP) with permitting timetables. This memorandum documents EPA's internal analysis on EPA's permits as related to FAST-41 and prescribes what the EPA's actions should be if requested to participate in FAST-41 as a participating agency.

Additionally, after the Council publishes best practices on a number of areas, including stakeholder engagement, timely decisions, improving coordination, increasing transparency, and creating training materials, the EPA will need to initiate a national process with public participation to determine whether any of the best practices are applicable "on a delegation- or authorization-wide basis to permitting," and, as appropriate, make model recommendations to States with delegated permitting authority. 42 U.S.C. § 4370m-5.

I) EPA as the Lead Agency for a Covered Project

We reviewed whether the EPA would be the lead agency for any activities that would meet the definition of "covered project" under FAST-41 by examining both Clean Water Act Title II grant funding and the Water Infrastructure Finance Innovation Act (WIFIA). FAST-41 defines lead agency as the "agency with principal responsibility for an environmental review of a covered project under NEPA" and its implementing regulations. 42 U.S.C. § 4370m(15). We have determined that the EPA would not be the NEPA lead agency for any covered projects under FAST-41. Since the EPA would not be a NEPA lead agency for covered projects, we do not believe that the EPA should ever be the facilitating agency who receives initial notification from a project sponsor under FAST-41. 42 U.S.C. § 4370m(13). The EPA is not listed as a facilitating agency for any of the designated project types in the draft implementation guidance.

For Clean Water Act Title II grant funding, in the unique case of small territories and the District of Columbia, the EPA must prepare a NEPA analysis. We searched EPA's EIS database, which contains environmental impact statements by all agencies, and there is no record of an environmental impact statement for state revolving fund (SRF) projects. We also reviewed the drinking water and clean water SRF allotments, including the SRF tribal set-asides, for the latest available fiscal year online. The allotments by states, tribes, and territories indicate that the amount of federal investment is well below the \$200,000,000 threshold that would make something a "covered project."

WIFIA authorized in 2014 a new financing mechanism for water and wastewater infrastructure projects to be managed by EPA Headquarters. At this time, Congress has not appropriated funds for the EPA to issue loans under the program. Since WIFIA is intended to capitalize larger water projects not often included in states' management of drinking water and clean water SRFs, if funds are appropriated it is possible that future loans may be used for projects covered by FAST-

41. However, as a financing mechanism, WIFIA is not itself a permitting process within the context of FAST-41.

II) EPA Authorizations for FAST-41 Covered Projects

FAST-41 requires the Executive Director, in consultation with the Council, to develop recommended performance schedules with “authorizations most commonly required for each category of covered projects.” 42 U.S.C. § 4370m(c)(1)(C). An “authorization” includes permits under Federal law issued by Federal agencies to site, construct, reconstruct, or commence operations of a covered project. The EPA forwarded comments to OMB and CEQ regarding what permit processes we consider to be “abbreviated” (e.g., decisions made within one year) and requested that changes be made to that effect in the implementation guidance on the interpretation of abbreviated authorization. EPA permitting programs that are delegated to states, tribes, or local governments (or where states, tribes, or local governments have approved or authorized programs) are not included as part of the FAST-41 process unless, for state delegated, approved, or authorized permitting programs, the state voluntarily opts in.⁴

We reviewed all of EPA’s permitting authorities and concluded that the Clean Water Act Construction General Permit for stormwater discharges from construction activities in a limited number of states, territories, and Indian Country lands is likely the only permit the EPA issues that would be commonly required for covered projects. Sponsors of covered projects may need to seek coverage under this Construction General Permit. This permit is an abbreviated authorization.

Additional permits that the EPA issues that may be needed for covered projects, but are not commonly required include: (i) Clean Air Act (CAA) prevention of significant deterioration permits; (ii) CAA minor new source review permit; (iii) Resource Conservation and Recovery Act hazardous waste treatment, storage, and disposal permits; (iv) Safe Drinking Water Act (SDWA) Underground Injection Control permits for Class VI wells; and (v) Toxic Substance Control Act polychlorinated biphenyl approvals. As these authorizations are not commonly required, we did not submit information on these permits to OMB and FPISC for publication on the Permitting Dashboard. EPA offices that issue these permits should be aware that if one of these permits issued by the EPA is needed for a covered project, the EPA will be invited as a participating agency under FAST-41 and be subject to the permitting timetables developed under the coordinated project plans for those projects. The facility or lead agency must first consult with the EPA to establish the permitting timetable, and if the EPA is also a cooperating agency, then the EPA will need to concur on the permitting timetable.

The other EPA permits we surveyed are not needed to site, construct, reconstruct, or commence operations of a covered projects, including: (i) CAA Title V permits and (ii) SDWA Underground Injection Control permits for Class I through Class V wells. Additionally, EPA

⁴ EPA requested the removal of Clean Water Act (CWA) 401 certifications from the list of commonly required permits. The CWA directly grants all states CWA Section 401 certification authority, and currently all states have retained their authority. Tribes must be authorized by EPA for CWA 401 certification authority; currently, 53 tribes have 401 authority. In addition, U.S. territories are considered “states” under the CWA.

issued CAA nonattainment new source review permits are rarely issued and usually would not involve the investment of more than \$200,000,000. These permits also do not by themselves trigger NEPA review. As such, these permits should not be included as part of the FAST-41 process.

A) Commonly Required EPA FAST-41 Permits

Clean Water Act (CWA) Permits

1) Construction General Permit (CGP) for Stormwater Discharges

Agency	"Abbreviated" Authorization/Review Process	Justification
EPA	<p>Construction General Permit for Stormwater Discharges</p> <p>EPA Construction General Permit coverage for Stormwater Discharges (under the Clean Water Act National Pollutant Discharge Elimination System) is available for operators of eligible construction activities in the following areas:</p> <ul style="list-style-type: none"> • Idaho, Massachusetts, New Hampshire, New Mexico, and the District of Columbia; • American Samoa, Guam, Johnston Atoll, Midway and Wake Islands, Northern Mariana Islands, and Puerto Rico; • Most Indian Country lands within Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming; • Areas within Colorado, Delaware, Vermont, and Washington subject to construction by a federal operator; and • Limited areas of Oklahoma and Texas. 	<p>Generally, the operator is authorized under the permit 14 calendar days after submitting a complete Notice of Intent (NOI).</p>

EPA's Construction General Permit (CGP) for Stormwater Discharges under the CWA Section 402, 33 U.S.C. § 1342, National Pollutant Discharge Elimination System (NPDES) covers stormwater discharges from construction projects (except for certain exempt oil and gas facilities) that disturb one or more acres of land or are part of a common plan of development or sale that will ultimately disturb one or more acres of land. Depending on the location of the construction site, either the state (if it has been authorized to implement the NPDES stormwater program) or the EPA will administer the permit. FAST-41 only covers EPA issued permits, unless the state voluntarily opts in. In areas where the EPA is the permitting authority, operators of regulated construction sites are generally permitted under EPA's CGP. Coverage under EPA's CGP for Stormwater Discharges is available for operators of eligible construction activities in the following areas:

- Idaho, Massachusetts, New Hampshire, New Mexico, and the District of Columbia;
- American Samoa, Guam, Johnston Atoll, Midway and Wake Islands, Northern Mariana Islands, and Puerto Rico;

- Most Indian Country lands within Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming;
- Areas within Colorado, Delaware, Vermont, and Washington subject to construction by a federal operator; and
- Limited areas of Oklahoma and Texas.

Generally, the operator is authorized under the permit within 14 calendar days after submitting a complete Notice of Intent to EPA and as such, these permits are abbreviated authorizations. An operator will be considered to be covered under EPA's CGP for Stormwater Discharges after the EPA acknowledges receipt of the operator's NOI on EPA's website, unless the EPA notifies the operator that the authorization has been delayed or denied. To avoid short amounts of additional time causing need to request a modification and update the Permitting Dashboard and/or coordinated project plan, we recommend a slightly conservative performance schedule of four weeks for the permitting timetable.

B) Potential EPA Permits for FAST-41 Covered Projects, but Not Commonly Required

The following permits, detailed below, when issued by the EPA may potentially be needed for covered projects, but are not included in the permit inventory as we do not expect them to be commonly required for covered projects. Before establishing the permitting timetable as part of the coordinated project plan, the facilitating or lead agency must consult with the EPA on appropriate permit timeframes, including any intermediate (if applicable) and final completion dates. If the EPA is also a cooperating agency, then the EPA will need to concur on the permitting timetable. 42 U.S.C. § 4370m-2(c)(2).

Clean Air Act (CAA) Permits

1) Prevention of Significant Deterioration (PSD) Permits

The CAA PSD program applies to the construction of major stationary sources and the major modification of existing major sources. The PSD program applies to sources in areas that are designated as attainment or unclassifiable for the National Ambient Air Quality Standards. Sources that are not large industrial facilities are usually not subject to the PSD program. Additionally, sources can take emission or operational limits that are enforceable as a practical matter to limit their potential to emit below relevant thresholds and avoid the applicability of PSD (see Minor New Source Review Permits, below). The EPA is required to make a permit decision on a PSD permit application within one year after the application is complete as determined by the EPA. CAA Section 165(c), 42 U.S.C. § 7475(c).

Generally, every state in the United States has a SIP-approved or delegated PSD permitting program. The EPA only issues PSD permits in some reservation areas of Indian country and for some territories (e.g., Puerto Rico and the U.S. Virgin Islands). There are a small number of counties in California that do not have approved PSD programs; however, there are very few

sources in these areas and as a result, permitting activity is very low. Notably, areas not currently authorized can seek authorization or delegation from the EPA. As such, we do not expect EPA-issued PSD permits will be commonly required for covered projects. If a covered project needs a PSD permit issued by the EPA in one of these reservation areas of Indian country or territories, then the EPA will be invited as a participating agency and EPA's PSD permit may be included in the coordinated project plan. As the EPA is required to make a permit decision on a PSD permit application within one year after the application is complete as determined by the EPA, PSD permits should be considered abbreviated authorizations.

2) Minor New Source Review Permits

CAA minor new source permits include: synthetic minor permits, true minor permits, and general permits. Synthetic minor permits are issued to sources that otherwise have the potential to emit a regulated New Source Review pollutant (other than greenhouse gases) in amounts that are at or above relevant thresholds, but that have agreed to an operational restriction or emission limit that restricts their potential to emit to below the relevant thresholds. Such restrictions or emission limits must be enforceable as a practical matter. Synthetic minor permits are generally issued a few months after they are requested. True minor permits are issued to sources with a potential to emit less than the relevant thresholds. General permits are a subset of true minor permits and are usually applied to a number of similar units or emissions sources to simplify the permit issuance process. General permits are developed in advance for a particular unit or source category and, after the opportunity for public comment, they become the standard permit that is used for that particular unit or source category. The EPA must make a permit decision within a specified timeframe (e.g., 90 days for general permits; 135 days for true minor permits; a year for synthetic minor permits and minor modifications at major sources). 40 C.F.R. § 49.154(b)(4); 40 C.F.R. § 49.158(b)(7); 40 C.F.R. § 49.156(e)(3).

Generally, every state has a SIP-approved minor new source review permitting program. The EPA only issues minor new source review permits in certain areas of Indian country and we do not expect such permits will be commonly required for covered projects. If a covered project needs a minor new source review permit issued by the EPA in one of these areas of Indian country, then the EPA will be invited as a participating agency and EPA's new source review minor permit may be included in the coordinated project plan. However, the EPA is required to make a permit decision on a minor new source review permit application within short time frames after the application is complete as determined by the EPA, as identified in applicable regulations. For these reasons, minor new source review permits should be considered abbreviated authorizations.

Clean Water Act (CWA) Permits

1) General Industrial Permit

EPA's General Industrial Permit under the CWA Section 402, 33 U.S.C. § 1342, National Pollutant Discharge Elimination System (NPDES) covers activities associated with the exploration, development, or production of oil or gas or geothermal resources, including transportation of crude oil or natural gas by pipeline. Coverage under EPA's General Industrial

Permit is limited to the following areas: American Samoa, the District of Columbia, Guam, Idaho, Johnston Atoll, Massachusetts, Midway Island, New Hampshire, New Mexico, Northern Mariana Islands, Puerto Rico, Wake Island, some federal facilities, and permits in Oklahoma and Texas. We do not expect that this will be a commonly required authorization for a covered project. If a covered project needs coverage under EPA's General Industrial Permit in one of these locations, then the EPA will be invited as a participating agency. Generally, the operator is authorized under the permit within 14 calendar days after submitting a complete Notice of Intent to the EPA and as such, these permits are abbreviated authorizations. To avoid short amounts of additional time causing need to request a modification and update the Permitting Dashboard and/or coordinated project plan, we would recommend a slightly conservative performance schedule of four weeks for the permitting timetable.

Resource Conservation and Recovery Act (RCRA) Permits

EPA's hazardous waste permitting program established under RCRA helps ensure the safe treatment, storage, and disposal of hazardous wastes by establishing specific requirements that must be followed when managing hazardous wastes. Owners and operators submit applications for a hazardous waste permit to treat, store, or dispose of hazardous waste. The EPA only issues RCRA permits in Iowa, Alaska, and generally, most areas of Indian country, as they do not have authorized programs under RCRA. RCRA Section 3004, 42 U.S.C. § 6924.

We anticipate that the only time a RCRA permit will be needed for a covered project would be to construct, reconstruct, or commence operations of a facility that manages hazardous waste onsite or a hazardous waste recycling facility, if the facility is not otherwise exempt from RCRA hazardous waste requirements, located in Iowa or Alaska (or in areas of Indian country where the EPA issues permits), and, as such, is not a commonly required permit under FAST-41. Other types of hazardous waste treatment, storage, and disposal facilities would not fall into one of the sectors under FAST-41. If a covered project needs a RCRA permit issued by the EPA that would be required to construct, reconstruct, or commence operations of the covered project in one of these states or areas of Indian country, then the EPA will be invited as a participating agency.

Safe Drinking Water Act (SDWA) Permits

1) Class VI Geologic Sequestration

Class VI Underground Injection Control (UIC) well permits are for the long term storage (or sequestration) of carbon dioxide (CO₂). 40 C.F.R. § 144.18. They are not exploration or production wells. The facilities producing CO₂ and capturing CO₂ such as coal-fired power plants, petroleum refineries, and ethanol production plants would need Class VI UIC permits only if they choose to sequester the CO₂ in deep underground rock formations. They may choose to pipe the CO₂ offsite for enhanced oil recovery, where they would need Class II UIC permits since that activity is related to oil and gas recovery. The EPA is currently the only permitting authority for Class VI wells nationwide.

Four final Class VI permits were issued for a cancelled Carbon Capture and Storage (CCS) project in Illinois and are no longer active. Two additional permits are currently active, but the

company is not actually injecting CO₂.⁵ We have little information indicating if additional Class VI wells will be built in the foreseeable future. Additionally, SDWA UIC permits are not subject to NEPA, so there must be some other trigger for NEPA review that would make a project eligible under FAST-41. Therefore, we do not believe that Class VI SDWA UIC permits should be included on the permit inventory as commonly required for a covered project. If a CCS project needed such a permit issued by the EPA and was subject to a NEPA review based on another trigger, then the EPA will be invited as a participating agency.

Toxic Substance Control Act (TSCA) Permits

EPA's polychlorinated biphenyl (PCB) Approval (Permit) program established under TSCA helps ensure that the storage, cleanup, and disposal of PCBs will not pose unreasonable risks by establishing specific requirements that must be followed when managing these wastes (see 40 C.F.R. Part 761). EPA approval is often required when a company stores, cleans up, and/or disposes of PCBs. Companies may also need approval for alternative sampling or decontamination procedures. PCBs are no longer commercially produced in the United States and, as such, would not be used for the construction of new infrastructure. However, some reconstruction projects might include PCB removal. We do not expect that it will be common that there would be such reconstruction projects that would be over \$200,000,000 that would require PCB removal and, as such, we did not include PCB approvals on the permit inventory. If a covered project needs a PCB approval issued by the EPA, then the EPA will be invited as a participating agency.

C) EPA Permits Not Subject to FAST-41

Clean Air Act (CAA) Permits

1) Title V Permits

Title V of the CAA requires major sources of air pollutants to obtain and operate with a permit. This "title V" (or "operating") permit is not the same as a pre-construction authorization. The CAA generally requires a new construction permit prior to commencement of construction, while title V requires an application within one year of commencement of operation and allows the EPA up to eighteen months after receipt of the application to issue the operating permit. Processing for these two types of permits may be separated by many years, as the EPA does not implement a combined construction and operating permitting program. Prior to issuance of the title V permit, the source owner or operator may operate the source, so long as it has obtained the appropriate construction permit and it submits its operating permit application by the required deadline.

For existing EPA-issued operating permits, which are issued under 40 C.F.R. Part 71, the regulations provide opportunities for making some changes at a source without a permit revision or other administrative delay. These include incorporation of various types of trading programs,

⁵ FutureGen in Illinois was planning to construct four Class VI wells, but due to funding considerations abandoned the project. Archer Daniels Midland, also in Illinois, currently has two active, but non-operating Class VI permits.

reasonably anticipated operating scenarios, and operational flexibility, including for off-permit changes (changes that are not addressed or specially prohibited by the permit). CAA Section 502(b)(10), 42 U.S.C. § 7661a.(b)(10). Under Part 71 regulations, there are different types of permit revisions including administrative amendments and minor modifications which allow for certain types of changes to happen fairly quickly. For both administrative and minor permit amendments, the source may immediately implement the requested change upon submittal of the request for revision. Other permit revisions that are more substantial can be undertaken through the significant modification process. In most cases, the source continues operation throughout the significant modification process and the projects would likely not involve the investment of more than \$200,000,000.

For these reasons, CAA Title V permits should not be included in any coordinated project plans for covered projects.

2) Nonattainment New Source Review Permits

The CAA New Source Review (NSR) preconstruction permitting program is divided into two sub-programs: the Prevention of Significant Deterioration (PSD) program (detailed above) and the Nonattainment New Source Review program (NA NSR). The NA NSR program applies to sources located in areas that are designated as nonattainment for any of the National Ambient Air Quality Standards.

The EPA has not issued a NA NSR permit in years. This is due to the fact that the EPA is the NA NSR permitting authority only in Indian country, and no source owners or operators have requested a NA NSR permit to the EPA in years. We do not expect that to change in the near future and if a NA NSR permit were to be requested it will likely not be for a project that meets the definition of covered project under FAST-41. New Source Review permits, including NA NSR permits, are not required to undergo a NEPA review as a condition to obtain a NSR permit so there must be some other trigger for NEPA review and most projects that require NA NSR permits do not have investments higher than \$200,000,000.

Safe Drinking Water Act (SDWA) Permits

1) Class I, II, and V Wells

SDWA Underground Injection Control (UIC) permits are needed for the operation of UIC wells. 40 C.F.R. Part 144. UIC Classes I and V permits are generally used for the energy and power plants sectors, and UIC Class II oil and gas-related permits are needed for extraction or development purposes as part of oil and gas field development. However, UIC Class II permits would not be needed for natural resource exploration activities. All of these UIC permits are not specifically needed to site, construct, reconstruct, or commence operations of covered projects, and as such, should not be included in any coordinated project plans. Additionally, there are other means available for project sponsors to manage any fluids generated.

The EPA is the permitting authority for the UIC program for Class I through Class V injection wells in American Samoa, Northern Marianas, the District of Columbia, the Virgin Islands, New

York, Pennsylvania, Virginia, Kentucky, Michigan, Minnesota, Iowa, Arizona, Hawaii, and areas of Indian country; for Class I and Class V injection wells also in Alaska, California, Montana, South Dakota, Colorado, and Indiana; and for Class II injection wells also in Florida and most areas of Indian country (except for Navajo Nation and Fort Peck Tribes, who have primacy for the Class II UIC program).

cc: Andrew Sawyers, Director, Office of Wastewater Management
Peter C. Grevatt, Director, Office of Ground Water and Drinking Water
Stephen D. Page, Director, Office of Air Quality Planning and Standards
Barnes Johnson, Director, Office of Resource Conservation and Recovery