



MEMORANDUM

March 20, 2018

To: The Honorable Sheldon Whitehouse
Attention: Aaron Goldner

From: Peter Folger, Specialist in Energy and Natural Resources Policy, [REDACTED]
[REDACTED]
Paul W. Parfomak, Specialist in Energy and Infrastructure Policy, [REDACTED]
[REDACTED]

Subject: Summary of telephone conversation regarding CCUS projects and CO₂ pipelines as covered projects under FAST-41 guidance

Per your request, this memo is a summary of our telephone conversation on Friday, March 16, 2017, discussing your questions about proposed legislative language (draft section 201) you provided to us. One of your questions was whether carbon capture, utilization, and storage (CCUS) infrastructure, and CO₂ pipelines, specifically, would be considered “covered projects” under P.L. 114-94, the Fixing America’s Surface Transportation Act, Section 41 (FAST-41), as provided on p. 18 of the January 13, 2017, guidance memorandum (M-17-14) from the Office of Management and Budget (OMB) for heads of federal departments and agencies.¹ You also asked whether the draft section 201 language was possibly unnecessary, given the description of covered projects in the OMB memorandum. The draft section 201 language you provided is as follows:

SEC. 201. INCLUSION OF CARBON CAPTURE INFRASTRUCTURE PROJECTS.

Section 41001 of the FAST Act (42 U.S.C. 4370m) is amended—

(1) in paragraph (6)—

(A) in subparagraph (A)—

(i) in the matter preceding clause (i), by inserting “carbon capture,” before “renewable or conventional”;

(ii) in clause (i)(III), by striking “or” at the end;

(iii) by redesignating clause (ii) as clause (iii); and

(iv) by inserting after clause (i) the following:

¹ The url you provided for the OMB January 13, 2017 memorandum is <https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/Official%20Signed%20FAST-41%20Guidance%20M-17-14%202017-01-13.pdf>. FAST-41 refers to Title XVI of P.L. 114-94, Fixing America’s Surface Transportation Act (FAST Act).

“(ii) is covered by a programmatic plan or environmental review developed for the primary purpose of facilitating development of a carbon dioxide pipeline network; or”;

(B) by adding at the end the following:

“(C) Associated definition.—For purposes of subparagraph (A), the term ‘construction of infrastructure for carbon capture’ includes construction of any facility, technology, or system that captures, utilizes, or sequesters carbon dioxide emissions and CO₂ pipelines.”

Per our telephone conversation, it is likely that CO₂ pipeline projects would be considered “covered projects” as defined and described in the OMB guidance, if they meet the standards and certain criteria outlined in that memo, because construction of “pipelines” is explicitly mentioned as one of the eligible categories of infrastructure under the Title 41, Section 41001(6) of the FAST Act:

The term “covered project” means any activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for renewable or conventional energy production, 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 Council that--

(i) (I) is subject to NEPA;

(II) is likely to require a total investment of more than \$200,000,000; and

(III) does not qualify for abbreviated authorization or environmental review processes under any applicable law; or

(ii) is subject to NEPA and the size and complexity of which, in the opinion of the Council, make the project likely to benefit from enhanced oversight and coordination, including a project likely to require--

(I) authorization from or environmental review involving more than 2 Federal agencies; or

(II) the preparation of an environmental impact statement under NEPA.

The above definition does not qualify the type of pipeline included (e.g., water, oil, etc.) so it appears that CO₂ pipelines would be included within the scope of the definition if they satisfy the other criteria set forth in the definition. It is also likely that CCUS infrastructure construction projects would be considered covered projects as a subcategory of conventional energy production infrastructure, to the extent they would support control of carbon emissions from electricity generation or would support oil production through CO₂ flooding in enhanced oil recovery. This latter classification would be open to some interpretation, however, so CRS cannot state definitively that it would apply.

FAST-41 and the OMB guidance January 13, 2017, memorandum include two categories or standards for inclusion as a covered project: “objective” standards and “discretionary” standards.² The objective standards are as defined above in Section 41001(6)(i). The discretionary standards are as defined in Section 41001(6)(ii), in particular a project likely to require (1) authorization or environmental review involving more than two federal agencies, or (2) preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).

² Per the January 13, 2017, OMB memorandum, “objective” standards mean the project (1) is subject to NEPA, (2) is likely to require a total investment of more than \$200 million, and (3) does not qualify for abbreviated authorization or environmental review processes under applicable law. The “discretionary” standards mean the project is subject to NEPA and the size and complexity of such a project make the project likely to benefit from enhanced oversight and coordination, requiring (1) authorization or environmental review involving more than two federal agencies, or (2) preparation of an environmental impact statement under NEPA.

Because the overall siting of CO₂ pipelines is under state, not federal, jurisdiction any federal agency involvement would be limited to those portions of the pipeline that would be under the jurisdiction of federal agencies. Examples of federal agencies from which permissions or reviews might be required include the U.S. Army Corps of Engineers (the Corps) for water crossings, the Bureau of Land Management for crossing most federal lands, and the U.S. Fish and Wildlife Service for portions that could affect endangered species. Depending on proposed location and route, it is conceivable that some proposed CO₂ pipelines would require review or permits from more than two federal agencies, but that others might require a review or permit from only one. It is also conceivable a CO₂ pipeline project might require review from only one federal agency and be subject to NEPA, but might not require an EIS. For example, a pipeline water crossing may be permitted by the Corps under nationwide permits without conducting an EIS.³ Thus, there is some question as to whether every CO₂ pipeline project would be considered a covered project solely under the discretionary standards.

The draft language you provided as section 201 amending the FAST Act would add certainty that CCUS infrastructure projects and CO₂ pipeline projects would be considered covered projects, if the language were enacted into law, and the specific project met the standards for eligibility. CCUS infrastructure and CO₂ pipeline projects considered covered projects under current law would still be considered covered projects if draft section 201 were enacted (i.e., section 201 would not affect eligibility for projects already considered covered under current law).

For further questions please contact the authors.⁴

³ For more information regarding the Corps' nationwide permits program, see CRS Report 97-223, *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments*, by Nicole T. Carter .

⁴ Adam Vann, Legislative Attorney, contributed to this memorandum ([REDACTED]).
