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Executive Order Aims to Speed Up Environmental Reviews of Infrastructure Projects

President Donald J. Trump issued Executive Order 13807, on August 15, 2017, which is intended to accelerate the environmental review and permitting for infrastructure projects that require an environmental impact statement under the National Environmental Policy Act. Notable changes include:

- setting a two-year target for completing an EIS;
- generally requiring a single Record of Decision to be issued jointly by all federal agencies whose approval is needed for a project;
- generally requiring federal agency permits and approvals to be issued within 90 days after completion of the NEPA process;
- revoking an executive order issued by President Barack Obama that set more stringent standards for the siting of federally funded projects in flood-prone areas; and
- requiring federal agencies to set agency-wide performance goals for completing environmental reviews for infrastructure projects and report regularly on their progress toward meeting those goals.

Aside from the retraction of the floodplain order, the executive order does not eliminate any existing requirements, and its overall policy direction is similar to previous attempts to streamline environmental reviews. Nonetheless, the procedural changes required by the executive order may help to expedite environmental reviews for some projects. In addition, the executive order may lead to further changes in federal regulations, guidance and practices, which could have more far-reaching implications for infrastructure project development.

Context

The executive order follows steps taken in recent years by Congress and presidential administrations to streamline environmental reviews of infrastructure projects. This executive order builds on recent statutory streamlining provisions, such as [Title 41 of the Fixing America's Surface Transportation Act \(FAST-41\)](#) and 23 U.S.C. § 139 ([Section 139](#)). The executive order also follows previous executive orders issued by President Obama ([Executive Order 13604](#)) and President George W. Bush ([Executive Order 13274](#)) to improve the environmental review and permitting process for infrastructure projects.

The procedural changes in the executive order share many of the same ingredients included in FAST-41 and other previous efforts to streamline the environmental review process, including:

- designating a lead federal agency;
- encouraging early and open coordination among federal, state, tribal and local agencies, and early engagement with the public;
- establishing a "permitting timetable" (schedule) for completion of all required federal reviews and approvals;
- posting the schedules for federal environmental reviews on an online "Dashboard" and updating the Dashboard to reflect progress toward each schedule milestone; and
- using the Council on Environmental Quality to mediate interagency disputes among federal agencies concerning their environmental reviews or authorizations for infrastructure projects.

In addition, the executive order reiterates that changes made to implement the order should be consistent with the processes established in FAST-41, Section 139 and other existing statutes, and guidance relating to efficient and timely environmental reviews for infrastructure projects.

Applicability

The executive order primarily affects major infrastructure projects that satisfy three criteria: (1) they require authorizations from multiple federal agencies, (2) an EIS will be prepared pursuant to NEPA and (3) the project sponsor has identified the reasonable availability of funds sufficient to complete the project. Such projects may be in a broad range of sectors, including:

- surface transportation (roadways, bridges, railroads and transit);
- aviation;
- ports, navigational channels and water resources;
- energy production and generation (conventional and renewable);
- electrical transmission;
- broadband internet;
- pipelines;
- stormwater, sewer and drinking water infrastructure; and
- other sectors as may be determined by the Federal Permitting Improvement Steering Council.

Notably, the executive order does not include any exemption for projects that are subject to streamlining requirements under existing legislation. Therefore, a project that is subject to the environmental review process established in FAST-41 or Section 139 must also comply with the streamlining provisions in this executive order.

Key Elements of the Executive Order

Two-Year Target for Environmental Reviews and Permitting. The executive order directs the Office of Management and Budget and federal agencies to set goals to complete environmental reviews and authorization decisions no more than an average of two years after publication of a notice of intent to prepare an EIS or another appropriate benchmark selected by OMB.

"One Federal Decision" Policy. For infrastructure projects that require authorizations from multiple federal agencies, the executive order directs the lead, cooperating and participating agencies to issue their decisions in a single ROD. There are several important exceptions to this "One Federal Decision" policy. A single ROD is not required if:

- the project sponsor requests that agencies issue separate NEPA documents;
- a cooperating or participating agency has already satisfied its NEPA obligation; or
- the lead agency determines that a single ROD would not best promote completion of the project's environmental review and authorization process.

90-Day Deadline to Complete Authorization Decisions. The executive order directs agencies to complete all authorization decisions within 90 days of the lead agency's issuance of the ROD in most circumstances. Again, there are several important exceptions. The lead agency may extend the 90-day deadline if:

- an extension is required to comply with federal law;
- the project sponsor requests an extension; or
- the lead agency determines that an extension would better promote completion of the project's environmental review and authorization process.

Revocation of Federal Flood Risk Management Standard. The executive order revokes President Obama's [Executive Order 13690](#), which established a Federal Flood Risk Management Standard (FFRMS) and amended

[Executive Order 11988](#), a previous order that had directed federal agencies to consider floodplain impacts when approving or funding projects. With the revocation of Executive Order 13690, the FFRMS itself is revoked, the FFRMS Guidelines are no longer in effect, and the original version of Executive Order 11988 comes back into effect.

Reporting on NEPA Completion Times. The executive order directs OMB to issue guidance for establishing a performance accountability system. This accountability system will track agency compliance with permitting timetables, and the time and costs of processing environmental reviews and authorizations. The executive order also requires OMB to publish a quarterly scorecard of agencies' progress toward meeting permitting timetable milestones and achieving the two-year target for processing environmental reviews and authorizations. It directs OMB to consider an agency's performance in meeting these goals when formulating budgets and determining whether to impose budget penalties.

Lead Agencies for Energy Corridors on Federal Lands. The executive order designates the U.S. Departments of the Interior and Agriculture to be the lead agencies for facilitating the identification and designation of energy right-of-way corridors on federal lands for expedited environmental review for the development of energy infrastructure projects. These departments already have this role for most projects on federal lands.

Review of NEPA Regulations and Guidance. The executive order directs CEQ to form an interagency working group to review NEPA implementing regulations and other environmental review and permitting policies to identify impediments to efficient and effective environmental reviews and authorizations of infrastructure projects. Agencies must develop action plans to address identified impediments and must establish procedures for regularly reviewing and updating categorical exclusions. While it is not clear what actions CEQ will take, it is conceivable that CEQ could implement this directive by revising its NEPA regulations ([40 C.F.R. Parts 1500-1508](#)), which have remained largely unaltered since 1980.

Reorganization Study. The executive order directs the Department of the Interior to develop a strategy and recommendations for a multi-agency reorganization that would further the goals of the executive order.

What the Executive Order Does Not Change

- The executive order does not change NEPA itself or other federal environmental review and permitting requirements, except for retraction of the FFRMS. Agencies must still conduct environmental reviews in accordance with NEPA and comply with other statutory permitting, approval and consultation requirements.
- The executive order does not apply to infrastructure projects unless an EIS is required. Therefore, it does not directly affect the environmental review process for the infrastructure projects that are approved with categorical exclusions or environmental assessments.
- The executive order does not change the streamlining procedures enacted by FAST-41, Section 139 or other legislation. Those existing procedures are required by federal law and must continue to be followed, in addition to complying with this executive order.
- The executive order does not apply to federal actions that require NEPA review but do not involve infrastructure project development. For example, it does not appear to apply at this point to federal land management, forestry and most mining projects.

Cautionary Notes for Project Developers

- In practice, coordinating a single ROD could delay issuance of the ROD. For example, many infrastructure projects require permits from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act. The Corps' NEPA approval is typically issued at the same time the Corps issues its Section 404 permit. If no federal agency can issue a ROD until the Corps has sufficient information to issue a Section

404 permit, the issuance of the ROD by a funding agency could be delayed, which in turn could delay the project sponsor from beginning work on the project.

- While the goal of having agencies complete environmental reviews within two years is laudable, agencies and project sponsors may decide that they need more time to complete NEPA documents that are sufficient to survive a legal challenge. Indeed, agencies may not have adequate resources to achieve this goal for all covered projects.
- While the stringent siting standards established in Executive Order 13690 are no longer in effect, risks from flooding will still need to be analyzed under NEPA. In addition, the original version of Executive Order 11988 comes back in to effect. Under that order, federal agencies still must ensure that federally approved projects in floodplains include all "practicable" measures to avoid or minimize impacts from flooding.
- An open question is how the Executive Order will apply to states that have received assignment of the U.S. Department of Transportation's NEPA responsibilities under 23 U.S.C. § 327. With assignment, the state serves as the lead federal agency in the NEPA process for certain transportation projects.

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