

White House Proposes to Streamline Environmental Reviews for Infrastructure Projects

The Washington Post last week [reported](#) a leaked White House document that revealed a far-reaching set of proposals to streamline the environmental review process for infrastructure projects. The [23-page document](#) included more than 50 distinct items, affecting not only the National Environmental Policy Act but many other federal laws as well. Although a White House official noted the proposal was a "discussion draft" and not official policy, it sheds light on ideas currently being considered by the Trump administration. On a similar note, last night's State of the Union address included a call to "streamline the permitting and approval process, getting it down to no more than two years, and perhaps even one." In this update, we take a closer look at what's actually included in the draft White House proposal.

What Makes These Proposals Significant?

While previous streamlining efforts have established lofty goals for expediting environmental reviews, they generally have avoided directly amending major environmental statutes or substantively altering the roles of federal environmental agencies or the federal courts.

What sets this new draft proposal apart is the extent to which it would directly amend federal environmental laws, redefine federal agency roles and procedures, set new limits on judicial review, and potentially shift more federal responsibilities to states. If enacted in full, these proposals would substantially re-shape the environmental review process under NEPA, the Endangered Species Act, the Clean Water Act, the Clean Air Act and other laws.

But while these proposals are undoubtedly significant, there is much that would not change even if these proposals were to be implemented. Infrastructure projects that receive federal funding would continue to require environmental review and approvals under NEPA and a panoply of other federal and state laws. Decision-making responsibilities would continue to be distributed among numerous federal and state agencies. And federal courts would continue to have the power to review and set aside federal agencies' decisions. Moreover, the proposals would not necessarily make the process less complex, and in some ways may add complexity—e.g., by allowing a federal council to reassign decision-making roles when deadlines are not met.

Moreover, given the obvious political hurdles to this type of legislation, it seems unlikely that all or even most of these proposals will become law in their current form. These proposals are significant primarily as an indication of the administration's overall policy direction and as an important input into the ongoing efforts to develop federal infrastructure funding legislation.

What Types of Changes Are Proposed?

The proposals in this package cover virtually every major federal law that affects the environmental review process for infrastructure projects. We summarize some of the most important changes below.

Agency Roles. The proposals would reduce, in some cases substantially, the roles of federal environmental agencies in the environmental review process. The Environmental Protection Agency, in particular, would have diminished responsibilities: it would give up its role in commenting on and rating all environmental impact

statements, would no longer have power to "veto" Section 404 permits under the Clean Water Act, and would no longer have the final word on jurisdictional determinations for "waters of the United States." The proposals also would limit the scope of federal agencies' comments in the NEPA process to issues within their expertise or jurisdiction, and they would change the U.S. Department of the Interior's role in reviewing transportation projects that use parklands and historic sites.

Deadlines. The proposals would allow up to 24 months to complete the environmental review process (21 months to finish the NEPA document, plus three months for permits to be issued). The proposal also includes deadlines for specific reviews and determinations under other laws, such as state-issued water quality certification decisions under Section 401 of the Clean Water Act. There are serious questions as to whether these time periods can be achieved in practice. But even if not followed strictly, the deadlines could lead to an increased emphasis on timely agency reviews.

Delegation. Several of the proposals would expand the existing authority for federal agencies to assign (delegate) their environmental review responsibilities to states. Currently, the U.S. Department of Transportation can assign its NEPA and related responsibilities to states for highway, transit and railroad projects. This program would be expanded to encompass other federal agencies and other types of projects. Assignment would be allowed in other contexts, too, such as the authority to issue "incidental take" permits under Section 10 of the ESA. Over time, the expansion of assignment programs could transition much of the responsibility for federal environmental reviews and approvals to states.

Judicial Review. The proposals would make several notable changes to the role of the federal courts in reviewing federal agencies' compliance with federal environmental laws, including:

- setting a consistent 150-day statute of limitations for actions challenging federal approvals of infrastructure projects (currently, this period is up to 6 years);
- giving the federal Courts of Appeals exclusive jurisdiction over most challenges;
- greatly limiting the circumstances under which courts can grant injunctions halting project activities; and
- eliminating the opportunity to challenge Biological Opinions issued under the ESA.

Flexibility. Several of the proposals seek to remove specific impediments in existing regulations or statutes that limit agencies' flexibility in the environmental review process. For example:

- The U.S. Fish and Wildlife Service and the National Marine Fisheries Service would be given the flexibility to issue incidental take statements as part of informal consultation under Section 7 of the ESA.
- The U.S. Army Corps of Engineers would be allowed to approve wetlands mitigation banks without needing to involve an Interagency Review Team.
- The USDOT would be allowed to rely upon agreements reached under the National Historic Preservation Act to satisfy Section 4(f) of the USDOT Act, rather than making the legal determinations otherwise required under Section 4(f).
- All federal agencies would be allowed to use Categorical Exclusions (CE) issued by other federal agencies to satisfy NEPA—in effect, making agencies' CE lists interchangeable.
- National Pollutant Discharge Elimination System permits could be issued for up to 10 years, rather than being limited to 5 years, and could be automatically renewed.
- All federal agencies would be authorized to accept funding from project applicants to pay for the agencies' costs of conducting environmental reviews for the applicant's project.

Industry-Specific Changes. The proposals include a host of changes that would affect the environmental review process for specific industry sectors or project types, including highways, transit, water infrastructure, energy and telecommunications. Some notable proposals include:

- exempting "small-cell" wireless communication devices from federal environmental reviews to help accelerate the rollout of 5G wireless networks;
- authorizing the Secretary of the Interior to approve rights of way for natural gas pipelines across National Park Service-administered land; and
- amending the Federal Power Act to prohibit federal agencies from intervening in Federal Energy Regulatory Commission licensing proceedings if they have been invited by FERC to participate as a cooperating agency in the NEPA process.

Pilot Programs. The proposals include new pilot programs that, while described only in general terms, appear to provide an alternate avenue for approving infrastructure projects without needing to complete the NEPA process. For example, one program would be available to projects that meet environmental performance criteria specified by the lead agency; the concept would be to require better environmental outcomes in return for greater procedural flexibility.

What's Next?

Because many of these proposals involve legislative changes, the likelihood that they will be enacted is uncertain at best—and even if some are enacted, it is far from clear that they would be enacted as part of a comprehensive "infrastructure bill." It is equally possible, and perhaps more likely, that individual elements of this proposal may be incorporated into funding legislation within a particular sector, such as energy, water, telecommunications or surface transportation.

Proposals for non-legislative changes may have a greater chance of being implemented. Of these, the most noteworthy involves the proposal to amend the Council on Environmental Quality regulations governing compliance with NEPA. Updates to the CEQ regulations could bring about major changes in NEPA practice without the need for legislation.

We will continue to monitor legislative developments, rulemakings and agency guidance that affect the environmental review process, and we will be publishing additional updates that look more closely at specific proposals affecting individual statutes, industries and project types.

© 2018 Perkins Coie LLP

Authors



[Laura G. Zagar](#)

Partner

LZagar@perkinscoie.com [415.344.7198](tel:415.344.7198)

Explore more in

Related insights

Update

[CFPB Finalizes Proposed Open Banking Rule on Personal Financial Data Rights](#)

Update

[FDA Food Import and Export Updates for Industry](#)