Updates
April 19, 2018

Federal Agencies Sign MOU to Require “One Federal Decision” on Major Infrastructure Projects

On April 9, 2018, the heads of a dozen federal agencies executed a memorandum of understanding on implementation of Executive Order 13807, which directed federal agencies to expedite environmental review and permitting for major infrastructure projects. The Office of Management and Budget and the Council on Environmental Quality also issued a guidance memorandum to accompany the MOU. The MOU and OMB-CEQ guidance are the first major steps taken to implement EO 13807.

EO 13807 set forth a new framework—known as "One Federal Decision"—for federal agency cooperation on environmental review and permitting for major infrastructure projects. The order directed federal agencies to use a single, coordinated process for compliance with the National Environmental Policy Act and other federal environmental laws, including preparation of a single environmental impact statement and a single record of decision (ROD). The order also directed that the NEPA process be completed within an average of two years from issuance of the Notice of Intent (NOI), which is the formal start of the NEPA process, to the issuance of the ROD, which documents federal approval of the project. The order further directed that all federal permits for the project approved in the ROD be issued within 90 days after issuance of the ROD, subject to limited exceptions.

The MOU and the OMB-CEQ guidance are significant because they provide important new details on how federal agencies will implement EO 13807. More broadly, they signal a continued, high-level policy emphasis on expediting infrastructure project reviews by requiring improved coordination among all federal agencies within a single process.

This update highlights one significant new requirement in the MOU—the use of "concurrence points" at key milestones—as well as several clarifications provided in the MOU and CEQ-OMB guidance. This update also summarizes several unresolved issues regarding interpretation of EO 13807. For a detailed description of EO 13807 itself, refer to our previous update.

New Requirement for "Concurrence Points" at Key Milestones

The MOU institutes a new policy requiring that lead agencies obtain written concurrence at three milestones from all cooperating agencies whose authorizations are required for the project. The required concurrence points include:

- **Determining the Purpose and Need.** Cooperating agencies with an approval role will be asked to concur in the Purpose and Need statement for the project. The MOU recommends that this concurrence point occur "prior to issuance of an NOI," so any time associated with obtaining concurrence on the Purpose and Need would precede the two-year process defined in EO 13807.
- **Identifying the range of alternatives to be carried forward for analysis in the EIS.** Cooperating agencies with an approval role will be asked to concur in the range of alternatives to be analyzed in detail in the Draft EIS. The MOU recommends that the lead agency obtain the cooperating agency's concurrence "prior to presenting the results of alternatives screening to the public."
- **Identifying a preferred alternative.** Cooperating agencies with an approval role will be asked to concur in the identification of the preferred alternative. The MOU states that the preferred alternative "should be" identified in the Draft EIS and "must be" identified in the Final EIS.

To minimize the potential for delays at concurrence points, the MOU directs cooperating agencies to respond to a request for concurrence within 10 business days, and allows the lead agency to presume concurrence if the cooperating agency does not respond within that time. It also provides that concurrence simply means that "the information is sufficient for that stage, and the environmental review process may proceed to the next stage of the NEPA process."

As noted above, concurrence is required only from "cooperating agencies whose authorization is required for the project." Thus, the lead agency would not need to obtain concurrence from a cooperating agency that has no approval role, nor from agencies (whether they have approvals roles or not) that have not been designated as cooperating agencies in the NEPA process.

This new requirement—which is not mandated by any statute, nor by the executive order—raises several issues that will need to be addressed in practice or through additional guidance, such as:

- Which cooperating agencies will need to concur? The MOU states that concurrence is required only from cooperating agencies "whose authorization is required." But what constitutes an "authorization," e.g., would a Biological Opinion under the Endangered Species Act be considered an authorization? And would concurrence be required from an agency if there is only a *possibility* that the agency's approval will be needed, e.g., if some alternatives require the agency's approval, while others do not?
- How will the obligation to obtain concurrence change interagency dynamics in the NEPA process? In theory, agency disagreements at concurrence points will be resolved quickly through elevation procedures described in the MOU. In practice, resolving such disagreements can be time-consuming and document-intensive.
- Can the lead agency proceed without concurrence? There will likely be situations in which an impasse takes many months to resolve. Given the strong policy direction to maintain a two-year schedule, lead agencies may seek the flexibility to "keep the process moving" while continuing to negotiate with the cooperating agency to obtain concurrence, rather than pausing the process due to an impasse at a concurrence point.

New Benchmarks for Completing NEPA Process Within Two Years

The executive order directs federal agencies to complete the environmental review process for major infrastructure projects, on average, within two years from publication of the NOI through issuance of the ROD. The order did not specify timeframes for specific stages of the process *within* this overall two-year period.

The MOU recommends the following intermediate milestones for use in developing a two-year schedule for the environmental review process:

- Publication of the Draft EIS within 14 months after publication of the NOI.
- Publication of the Final EIS within 8 months after publication of a Notice of Availability of the Draft EIS.
- Publication of the ROD within two months after publication of the Notice of Availability of the Final EIS.

The MOU makes clear that actual schedules may vary, and these time frames are simply recommended as a starting point for developing the schedule (known as a "permitting timetable") that is required under the executive order.

Increased Emphasis on "Prescoping" and "Preliminary Planning"

Recognizing the difficulty of completing the environmental review process in two years, the MOU directs the lead agency to undertake "prescoping" and "preliminary planning" before the NEPA process begins. According

to the MOU, these efforts may include activities such as:

- identifying the lead agency;
- identifying and beginning discussions with potential cooperating and participating agencies;
- developing the permitting timetable, as well as a "preliminary project plan" that specifies how the agencies will work together;
- identifying potentially significant environmental issues, as well as potential avoidance, minimization and mitigation strategies;
- identifying the potentially affected communities and stakeholders;
- determining the extent of the analysis needed of various impacts; and
- determining the overall time frame needed to complete environmental review and authorization decision processes.

In short, agencies are being encouraged to do more work up-front—before the NOI is issued—as a way of shortening the time needed to complete the NEPA process itself. Project sponsors may find that the pre-NEPA phase lengthens, while the NEPA process itself becomes shorter.

Flexibility in Setting "Two-Year" Timetable

The MOU confirms that the two-year time period is a goal, not an absolute requirement. Agencies are encouraged to strive for that goal as an average, but the MOU recognizes that in some cases a longer period will be needed to comply with applicable law.

In addition, the MOU and the OMB-CEQ guidance include specific provisions that could allow the environmental review process to exceed two years:

- The OMB-CEQ guidance allows a lead agency, when it establishes the permitting timetable, to omit the estimated dates for specific environmental reviews and permit decisions if the "design of the project" is not yet "sufficiently advanced" to determine those dates. In such instances, the lead agency need only include an estimate of when enough information will be available to set those dates. This would allow agencies to adopt an initial two-year schedule that omits key steps, e.g., a Section 404 permit or the need for formal consultation under the Endangered Species Act, and then later revise the schedule to include additional time to meet those requirements.
- The OMB-CEQ guidance provides that if a lead agency revises or reissues the NOI, the two-year schedule will reset to begin on the new publication date. This would allow the lead agency to restart the two-year clock by issuing a revised NOI for a change in project scope, consideration of an additional alternative, preparation of a supplemental EIS or other reasons.

Thus, while the MOU places a strong emphasis on establishing a two-year schedule, the MOU also allows significant flexibility to take more time.

Additional Unresolved Issues

In addition to the issues noted above, there are many questions about how EO 13807 and the new MOU will be implemented in practice. These questions arise from the interplay between the streamlined process called for in the executive order and the existing streamlining procedures mandated under federal statutes and regulations applicable to infrastructure projects, as well as the requirements of NEPA itself and regulations implementing NEPA.

- **Overlap with Other Streamlining Requirements.** Many of the projects subject to the streamlining procedures under EO 13807 are also subject to streamlining procedures required by federal law, including

FAST-41, 23 U.S.C. § 139 and 33 U.S.C. § 2348. Agencies may face challenges melding the various statutory requirements with the new procedures mandated under EO 13807. In addition, the applicability provisions vary—for example, a project may be subject to EO 13807 but not FAST-41, or vice-versa. Determining which procedures apply will require careful analysis.

- **Demonstrating "Reasonable Availability" of Funds.** The MOU applies to infrastructure projects only if the lead agency determines that the project sponsor has demonstrated "reasonable availability" of the funds needed for construction of the project. The OMB-CEQ guidance states that "[t]he burden of demonstrating the reasonable availability of funds is on the project sponsor." It remains to be seen how strictly federal lead agencies will enforce compliance with this requirement, and what documentation they will require project sponsors to submit.
- **Applicability to EISs Initiated Before August 15, 2017.** The OMB-CEQ guidance memo states that the "two-year goal" in the executive order applies only to EISs initiated after August 15, 2017. By implication, this statement *may* mean that EISs initiated before August 15, 2017, are exempt from the requirements of EO 13807 and the MOU—but that conclusion is not stated explicitly. Consequently, clarification may be needed on whether there are aspects of the executive order and/or the MOU, e.g., concurrence points, that apply to EISs initiated before August 15, 2017.
- **Applicability to EISs Initiated After August 15, 2017.** Another unresolved issue is how federal agencies will apply the new concurrence requirements to projects for which an EIS was initiated after August 15, 2017. For such projects, it seems clear that the executive order and MOU would apply, but because the NEPA process may already be well under way, some key milestones may already have been passed without concurrence being obtained. If full compliance with the MOU were required, lead agencies could be required to seek concurrence for milestones that have already been completed.
- **Effect on Legal Defensibility.** It is unclear how courts will consider the two-year timetable when assessing the adequacy of NEPA documents. Courts apply a "rule of reason" when assessing compliance with NEPA, and under that standard, they may give some weight to the executive order's two-year goal when determining what constitutes a reasonable level of effort. At the same time, the executive order does not change any existing legal requirements, so it is possible that efforts to achieve the two-year goal may heighten litigation risks under NEPA or other laws.
- **Agency-Specific Implementation Guidance.** Each agency that signed the MOU committed to develop a plan to implement the One Federal Decision framework within 90 days (i.e., by early July). Given that requirement, individual federal agencies will likely be issuing their own procedures and/or entering their own MOUs that further specify the steps they will take to implement the executive order. Project sponsors will need to review these agency-specific documents in assessing applicable requirements.
- **Implications for States With NEPA Assignment.** The executive order directed CEQ and OMB to develop guidance for implementing the One Federal Decision framework when the lead agency is a state exercising the responsibility of a federal agency under an assignment program. For example, under 23 U.S.C. 327, the Federal Highway Administration has assigned its responsibilities under NEPA and other laws to several state transportation departments. The MOU and OMB-CEQ guidance released this month do not address assignment programs, so it appears that future guidance will be issued to clarify how states with assignment will comply with EO 13807.

Authors

Laura G. Zagar

Partner
LZagar@perkinscoie.com 415.344.7198

Christian Termyn

Counsel
CTermyn@perkinscoie.com 415.344.7018

Christian Termyn

Counsel
CTermyn@perkinscoie.com 415.344.7018

Explore more in

Environment, Energy & Resources | Infrastructure Development | Mining | Forest Products | Oil & Gas

Related insights

Update

Securities Enforcement Forum DC 2024: Priorities in the Election’s Wake

Update

One Rocky Sleigh Ride: Antitrust and AI Pricing