

## Updates

June 09, 2020

### President Orders Federal Agencies to Further Expedite Environmental Project Approvals Using Emergency Powers

Pressing ahead on his efforts to reduce delays in federal approvals necessary for major infrastructure projects, President Donald Trump on June 4 called for more streamlining in another executive order, *Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities*. The new order extends the emergency finding and call for regulatory relief contained in the president's May 19 Executive Order [13924](#) and orders federal agencies to adopt additional time-saving measures.

Reducing delays in federal environmental approvals has been a priority for the administration since it issued an August 15, 2017, Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*.

Much of the focus of the administration's effort has been on the National Environmental Policy Act (NEPA), 43 USC §§ 4321-47, which requires federal agencies to evaluate environmental effects before undertaking any "major federal action" that may "significantly impact the environment." Executive Order 13807 encouraged agencies to reduce most NEPA reviews to two years or less, as originally anticipated by the White House Council on Environmental Quality (CEQ). CEQ coordinates NEPA policy across the entire federal government; its regulations, 40 CFR §§1500-15, are themselves being [overhauled](#).

### **Executive Order Requirements**

The new order requires executive branch agencies, as defined in 44 USC § 3502, to "take all appropriate steps to use their lawful emergency authorities" in order to "speed infrastructure investments and to speed other actions in addition to such investments that will strengthen the economy and return Americans to work." The order notes that agencies will still be obliged to provide "appropriate protection for public health and safety, natural resources, and the environment, as required by law."

The order calls for the expediting of federal action across a host of programs that have long drawn criticism for delay. Among the agencies subject to the order are the U.S. Environmental Protection Agency (EPA), the U.S. Department of Transportation (DOT), the U.S. Army Corps of Engineers (Corps), the U.S. Department of Agriculture (including the Forest Service), and the U.S. Department of Interior (including the Bureau of Land Management, the Fish and Wildlife Service, and the National Park Service). The Federal Energy Regulatory Commission is not subject to the order.

All agencies involved in NEPA reviews are directed to identify planned or potential projects whose approvals can be expedited under either existing categorical exclusion authority or CEQ's existing emergency provision, 40 CFR § 1506.11. That regulation allows agencies, in consultation with CEQ, to proceed without strict compliance with the CEQ regulations, as "necessary to control the immediate impacts of the emergency." Each agency must submit its initial report within 30 days and update it every 30 days thereafter.

Reducing NEPA review time to anything close to two years would provide welcome relief to the regulated community. Recent [studies](#) by the National Association of Environmental Professionals and others have consistently concluded that complex environmental impact statements typically take around five years, and

occasionally take 10 or more. As review times have lengthened over the last two decades, NEPA's critics have objected that the delays in completing the review process can kill worthy projects.

All agencies are further instructed to conduct the same analysis with regard to consultation under the Endangered Species Act, 16 USC §§ 1531 *et seq.*, and to evaluate and report on other existing emergency authorities that may support accelerating approvals.

In addition to subjecting them to the mandates to all agencies, the order includes specific instruction to the DOT and the Corps. DOT is directed to evaluate its ability to expedite highway and other transit projects under its jurisdiction. The Corps is instructed to do the same with regard to civil works projects in its jurisdiction, and additionally to look for opportunities to accelerate issuance of Clean Water Act Section 404 dredge-and-fill permits using emergency authorities or nationwide permits. Section 404 permits for large projects have frequently been another source of project delay, as the Corps has struggled to process permit applications under the oversight of EPA.

The impact of the order will come into sharper focus when the 30-day reports are submitted. The emergency authority of CEQ and other NEPA-implementing agencies has not been tested in the courts, but undoubtedly will be.

The degree of discretion CEQ and other agencies hold to alter NEPA requirements in emergency situations has been only infrequently litigated, usually in the national security or natural disaster context. In *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), the U.S. Supreme Court held the U.S. Circuit Court for the Ninth Circuit erred in issuing an injunction against the Navy's decision to proceed with a routine sonar training exercise prior to completing its evaluation of the sonar's impact on marine mammals. The Ninth Circuit had ruled that CEQ's emergency rule could not be invoked to avoid foreseeable delays. The Supreme Court ruled the injunction was impermissibly granted without reaching the regulatory interpretation issue. There is some support for the proposition that avoiding economic harm may suffice. In a 1981 case arising from Detroit's efforts to find a new site for a General Motors plant, the court agreed that the U.S. Department of Housing and Urban Development was justified to treat a looming financial deadline as a NEPA emergency. *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).

The order is likely to face several challenges in the courts. On June 9, for instance, the Center for Biological Diversity filed a 60-day notice of intent to sue the administration under the Endangered Species Act. Its notice letter asserted that the order justified "wholesale circumvention of the ESA's prohibition on harming endangered or threatened species in order to facilitate routine economic activity."

## **Anticipated Next Steps**

Not referenced in the order but likely to emerge soon are the revised CEQ regulations, released in draft form on January 10. CEQ submitted them to the U.S. Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) on [June 1](#). OIRA is charged with ensuring rules have been properly promulgated and do not impose excessive costs. The agency is generally allowed up to 90 days to review final rules, but the administration is widely expected to urge a much shorter review. Agency regulations issued within the last 60 working days of a congressional session are subject to potential congressional disapproval under the Congressional Review Act (CRA). When that period of vulnerability begins depends upon how many days the U.S. Congress is in session and when it adjourns. In most years, rules issued later than June may be subject to

CRA veto.

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