

August 21, 2017

Administration Issues Executive Order Designed to Streamline Federal Environmental Permitting Reviews for Infrastructure Projects

Order Establishes a Two-Year Timeline for Processing Federal Environmental Reviews and a One Federal Decision Policy for Major Infrastructure Projects

SUMMARY

On August 15, the President issued an Executive Order Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (the “Order”)¹ with the intention of streamlining Federal environmental approval procedures that can delay infrastructure projects. Stakeholders and commentators have widely acknowledged that the approval process for large infrastructure projects can take up to 10 years or more, delaying essential U.S. infrastructure needs.² The Order builds on prior legislative and regulatory efforts to speed the approval of infrastructure projects³ by establishing a goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within two years. A “major infrastructure project”⁴ is defined in the Order as a project to develop public or private assets providing services to the general public that requires multiple authorizations by Federal agencies and an environmental impact statement (“EIS”)⁵ under the National Environmental Policy Act (“NEPA”).⁶ In addition to the two-year timeline, the Order establishes a One Federal Decision policy that will require the designation of a lead Federal agency with responsibility for navigating each major infrastructure project through the Federal environmental review and authorization process and, where feasible, a single Record of Decision (“ROD”) from each participating Federal agency. The Order directs all Federal agency authorization decisions for major infrastructure projects to be completed within 90 days following the issuance of all required ROD(s).

BACKGROUND

During the 2016 presidential campaign, both major party candidates argued that the United States suffered from major deficiencies in infrastructure, and both candidates advocated devoting substantial resources to enhancing the country's infrastructure.⁷ Since the inauguration, various government agencies and members of the Administration have been studying the infrastructure challenges facing the United States in an attempt to develop viable policies to facilitate the prompt development of infrastructure projects and attract more private capital. Many stakeholders agree on the need for permitting reform at the Federal, state and local level to address increasing delays in the approval process.⁸ NEPA, the primary statute governing environmental approvals at the Federal level, requires a detailed review of the environmental effects of a proposed project, and completing the process can often take several years.⁹

The NEPA process applies to projects involving major Federal action, such as the issuance of Federal permits or the provision of Federal financing. Environmental review under NEPA involves three increasingly rigorous levels of analysis: Categorical Exclusion ("CATEX") determination, Environmental Assessment ("EA"), and EIS.

Under existing law and regulation, a Federal action may be categorically excluded from a detailed environmental analysis if the Federal action does not "individually or cumulatively have a significant effect on the human environment."¹⁰ If the Federal agency (or agencies, as several agencies can be involved) determines that no CATEX applies, the agency must then prepare an EA to determine whether or not the proposed action has the potential to cause significant environmental effects. The EA is a summary document providing evidence and analysis to determine whether the more rigorous EIS is necessary. If the EA indicates that an EIS is necessary, the agency is then required to conduct a highly detailed analysis of potential environmental impacts, reasonable alternatives to the project, mitigation measures, and whether the project complies with applicable laws and executive orders.

The EIS process begins when an agency publishes a notice of intent ("NOI") to publish the EIS in the Federal Register. A draft EIS is then published for a notice and comment period of a minimum of 45 days, which prompts agencies to consider all substantive comments and, if necessary, conduct further analyses before a final EIS is published.¹¹ The public comment process often involves multiple rounds of review and amendment of the draft EIS and offers project opponents opportunities to delay or modify the EIS and influence the project design. The Order aims to impose a time limit on this potentially lengthy EIS process.

THE EXECUTIVE ORDER

The Order provides for the following:

1. Section 4: Agency Performance Accountability
 - a. **Performance Priority Goals** – The Order directs the Director of the Office of Management and Budget (“OMB”), in consultation with the Federal Permitting Improvement Steering Council (“FPISC”), to establish, within 180 days following the Order, a Cross-Agency Priority Goal on Infrastructure Permitting Modernization (“CAP Goal”) to reduce the average time for completing Federal environmental reviews and authorizations to approximately two years following the date of the publication of a NOI, or other benchmark deemed appropriate by OMB.
 - The Order directs the OMB, within 180 days following the establishment of the CAP Goal, to issue guidance for establishing a performance accountability system to track each major infrastructure project, including
 - whether major infrastructure projects are processed using the One Federal Decision policy;
 - whether major infrastructure projects have a permitting timetable, and whether agencies are meeting the established milestones in such permitting timetable;
 - whether major infrastructure projects follow an effective process for elevating instances where permitting timetable milestones are, or are anticipated to be, missed or extended; and
 - the time and costs of processing the environmental reviews.
 - b. **Accountability** – The Order requires that the accountability system include a scoring mechanism mandating that
 - the applicable agencies submit information to OMB and, at least once per quarter, OMB produce a scorecard of agency performance and overall progress toward achieving CAP Goal targets;
 - an agency submit an estimate of the cost of a delay to a project where an agency’s inability to meet a permitting timetable milestone results in a significant delay; and
 - the OMB consider each agency’s performance during budget formulation and determine whether appropriate penalties should be imposed for those agencies that fail to meet a permitting timetable milestone.
2. Section 5: Process Enhancements
 - a. **Processing of Major Infrastructure Projects** – The Order instructs Federal agencies to use the One Federal Decision policy; to develop and follow a permitting table to be updated at least quarterly by participating agencies; and to employ an effective process to elevate and address issues when the permitting timetable is behind schedule.
 - b. **One Federal Decision** – The Order requires that each major infrastructure project have a lead Federal agency that is responsible for navigating the project through the Federal environmental review and authorization process and coordinating one ROD among all participating Federal agencies.

SULLIVAN & CROMWELL LLP

- Following the issuance of an ROD, all Federal authorization decisions for the construction of a major infrastructure project must be completed within 90 days, barring extenuating circumstances.
 - The lead Federal agency may extend the 90-day deadline if the agency determines that Federal law prohibits the agency from issuing its approval or permit within the 90-day period, the project sponsor requests that the permit or approval follow a different timeline, or the lead Federal agency determines that an extension would better promote completion of the project's environmental review and authorization process.
 - The Council on Environmental Quality ("CEQ") and OMB are required to develop a framework for implementing the One Federal Decision policy, in consultation with FPISC.
- c. **Dashboard** – The Order provides that all projects be tracked on the Permitting Dashboard established under the FAST Act, which tracks the status of Federal environmental reviews and authorizations for infrastructure projects.¹²
- d. **Executive Order 13766** – The Order discusses the process for implementing the Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, dated January 24, 2017,¹³ an earlier order signed by the President designed to expedite environmental review and approval of "high-priority" infrastructure projects.
- e. **CEQ** – The Order requires that, within 30 days following the Order, the CEQ develop an initial list of actions it will take to enhance and modernize the Federal environmental review and authorization process.
- f. **FPISC** – The Order directs that the FPISC Executive Director may, upon request of an FPISC member agency or a project sponsor, work with the lead agency or any cooperating and participating agencies to facilitate the environmental review and authorization process for any infrastructure project.
- g. **Energy Corridors** – The Order names the Departments of the Interior and Agriculture, as appropriate, as the lead agencies for facilitating the identification and designation of energy right-of-way corridors on Federal lands.
- h. **Department of the Interior** – The Order directs the Department of the Interior to provide to OMB a strategy and recommendation for a multi-agency reorganization effort.

CHANGE TO EXISTING FEDERAL CLIMATE CHANGE POLICY

Section 6 of the Order revokes Executive Order 13690 of January 30, 2015 ("Order 13690"), which updated Federal flood protection standards in recognition of the anticipated future effects of climate change with respect to rainfall patterns and rising sea levels.¹⁴ Order 13690 was aimed at reducing new infrastructure projects' exposure to flooding by requiring that new public infrastructure projects meet specific criteria,¹⁵ and the Order's stated rationale for the revocation was to reduce burdensome regulations. Supporters have praised the revocation for eliminating the more expensive building costs associated with Order 13690's more demanding flood standard,¹⁶ while critics have expressed concerns about the increasing frequency of major flood events and their potential impact on the nation's infrastructure.¹⁷

POTENTIAL IMPACT

Although improving the efficiency of the Federal environmental permitting process is a desirable goal, it remains unclear how significant a practical effect the Order will have on accelerating approvals for major infrastructure projects. Efforts by previous administrations have had only limited success in reducing approval bottlenecks, and the Order lacks any enforcement mechanism other than a directive that failure to meet deadlines be taken into account when making budgetary decisions. That being said, increased involvement by OMB and the tracking and scoring of agency performance, together with the threat of budget cuts to underperforming agencies, may increase pressure on Federal agencies to reduce delays in the NEPA approval process. Ultimately, however, statutory revisions to NEPA and revisions to implementing regulations (as well as to state and local approval processes) would likely be required to significantly streamline the approval process for major infrastructure projects, and the prospects and timing of such significant reforms remain uncertain. Moreover, because of the sometimes complex web of state and local approval processes, achieving a streamlined Federal approval process will still leave in place myriad state and local permitting issues that may delay a particular project.

* * *

ENDNOTES

- ¹ See “Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,” August 15, 2017, *available at* <https://www.whitehouse.gov/the-press-office/2017/08/15/presidential-executive-order-establishing-discipline-and-accountability>.
- ² See, e.g., Federal Permitting Improvement Act of 2015, S.280, 114th Cong., *available at* <https://www.congress.gov/bill/114th-congress/senate-bill/280?q=%7B%22search%22%3A%5B%22%5C%22federal+permitting+improvement+act%5C%22%22%5D%7D&r=1>; Exec. Order No. 13604, “Executive Order — Improving Performance of Federal Permitting and Review of Infrastructure Projects” (March 22, 2012), *available at* <https://obamawhitehouse.archives.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>; “Two Years, Not Ten Years: Redesigning Infrastructure Approvals,” by Philip K. Howard, Common Good, September 2015, *available at* https://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf.
- ³ In reverse chronological order, the President’s Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, dated January 24, 2017; the Fixing America’s Surface Transportation Act of 2015 (FAST Act); the Moving Ahead for Progress in the 21st Century Act (MAP-21) in 2012; the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005; the Transportation Equity Act for the 21st Century (TEA-21) in 1998.
- ⁴ See Order, § 3(e).
- ⁵ For more information on the EIS process, see “National Environmental Policy Act Review Process – Environmental Impact Statement (EIS),” Environmental Protection Agency, last updated January 24, 2017, *available at* <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.
- ⁶ See National Environmental Policy Act, as amended, 42 U.S.C. § 4321 et seq., *available at* https://www.fsa.usda.gov/Internet/FSA_File/nepa_statute.pdf.
- ⁷ “What Trump, Clinton and Voters Agreed On: Better Infrastructure,” by Emma G. Fitzsimmons, dated November 9, 2016, *available at* <https://www.nytimes.com/2016/11/10/nyregion/what-trump-clinton-and-voters-agreed-on-better-infrastructure.html?mcubz=1>.
- ⁸ See, e.g., Howard, *supra* note 2.
- ⁹ For example, the most recent data available from the Federal Highway Administration, Fiscal Year 2011, found that, for the 23 transit projects for which an EIS was required, the median amount of time from the project’s NOI to the ROD was 6.6 years. See “Estimated Time Required to Complete the NEPA Process,” U.S. Department of Transportation Federal Highway Administration, *available at* <https://www.environment.fhwa.dot.gov/strmlng/nepatime.asp>.
- ¹⁰ 40 CFR 1508.4, *available at* https://www.ecfr.gov/cgi-bin/text-idx?SID=6b8e629cbac80e3d59550a7e90b32058&mc=true&node=pt40.37.1508&rqn=div5#se40.37.1508_14.
- ¹¹ See “National Environmental Policy Act Review Process — Environmental Impact Statement (EIS),” *available at* <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.
- ¹² See “Permitting Dashboard,” Federal Infrastructure Projects, *available at* <https://www.permits.performance.gov/>. For statutory authority, see 42 U.S.C. 4370m-2: Permitting process improvement, *available at* <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section4370m-2&num=0&edition=prelim>.

ENDNOTES (CONTINUED)

- ¹³ See “Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,” dated January 24, 2017, *available at* <https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high>.
- ¹⁴ See “Executive Order – Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input,” January 30, 2015, *available at* <https://obamawhitehouse.archives.gov/the-press-office/2015/01/30/executive-order-establishing-federal-flood-risk-management-standard-and->.
- ¹⁵ The criteria included a requirement to use the best available climate change science and to construct projects to designated historic flood elevation standards.
- ¹⁶ See, e.g., “Abraham praises repeal of Obama-era flood plain expansion plan,” dated August 15, 2017, *available at* <https://abraham.house.gov/media-center/press-releases/abraham-comments-flood-plain-expansion-repeal>.
- ¹⁷ See, e.g., “Curbelo: Executive Order Rolling Back Flood Risk Management Is Irresponsible, Would Waste Taxpayer Dollars,” dated August 15, 2017, *available at* <https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1655>.

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to Christopher L. Mann or any of our other lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Michael B. Soleta (+1-212-558-3974; soletam@sullcrom.com) in our New York office.

CONTACTS

New York

Werner F. Ahlers	+1-212-558-1623	ahlersw@sullcrom.com
Ronald E. Creamer Jr.	+1-212-558-4665	creamerr@sullcrom.com
Scott B. Crofton	+1-212-558-4682	croftons@sullcrom.com
Sergio J. Galvis	+1-212-558-4740	galviss@sullcrom.com
Christopher L. Mann	+1-212-558-4625	mannc@sullcrom.com
David C. Spitzer	+1-212-558-4376	spitzerd@sullcrom.com

Washington, D.C.

Samuel R. Woodall III	+1-202-956-7584	woodalls@sullcrom.com
-----------------------	-----------------	--

London

Nikolaos G. Andronikos	+44-20-7959-8470	andronikosn@sullcrom.com
Ronald E. Creamer Jr.	+44-20-7959-8525	creamerr@sullcrom.com
Ben Perry	+44-20-7959-8477	perryb@sullcrom.com
Stewart M. Robertson	+44-20-7959-8555	robertsons@sullcrom.com

Paris

Olivier de Vilmorin	+33-1-7304-5895	devilmorino@sullcrom.com
---------------------	-----------------	--

SULLIVAN & CROMWELL LLP

Hong Kong

Garth W. Bray	+852-2826-8691	brayg@sullcrom.com
Jamieson J. Logie	+852-2826-8616	logiej@sullcrom.com
Chun Wei	+852-2826-8666	weic@sullcrom.com

Sydney

Waldo D. Jones Jr.	+61-2-8227-6702	jonesw@sullcrom.com
--------------------	-----------------	--
