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New Presidential and Interior Orders Target Environmental Permitting, NEPA Reviews, and Flood Risk Standards for Infrastructure and Energy Projects

Infrastructure has been a headline topic since before the 2016 election, and perhaps never more so than during the unprecedented storm season. The current Administration, like its predecessors, has pursued means to expedite project permitting decisions largely by focusing on perceived time, cost, and paperwork inefficiencies associated with environmental reviews under the National Environmental Policy Act (NEPA). (Click [here](#), [here](#), and [here](#) for our summaries of prior 2017 relevant Executive and Secretarial Orders.) The latest [Executive Order](#) (EO) on this topic, published on August 24, 2017, experienced a muted rollout, and largely reinforces existing efforts and trends. One new element of the EO is its rescission of federal flood standards – which is already being reexamined in response to weather events in Texas and Florida. An August 31, 2017 [Department of the Interior Order](#), which “dovetails with” the EO, has the potential to add real teeth to the remainder of the EO by imposing uniform page and time limits on NEPA documents. And agency responses to these Orders may yield more NEPA reforms in the near future. It remains to be seen whether these latest actions actually result in quicker and successful environmental reviews and permitting.

Executive Order 13807

This EO is intended to “Establish Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.” It seeks to streamline both environmental reviews and ultimate permitting for an extensive array of energy, transportation, water, and other “infrastructure projects.” Several of its provisions replicate existing government initiatives, including tracking projects on a public “dashboard,” setting timetables and

deadlines, fostering prompt and effective dispute resolution among agencies, and forcing agencies to coordinate and share best practices for NEPA reviews. It directs that there be “One Federal Decision” for “major infrastructure projects,” whereby a single federal agency serves as the lead point of contact for all NEPA review and customarily issues a single Record of Decision (ROD) on behalf of all involved agencies. Moreover, all permit decisions should occur within 90 days of the ROD, and “not more than an average of approximately 2 years” after issuance of the Notice of Intent (NOI) to prepare a NEPA Environmental Impact Statement (EIS) or “other benchmark.” The EO also calls for implementing actions by the Council on Environmental Quality (CEQ), Office of Management and Budget, and the Federal Permitting Improvement Steering Council, and additional reporting by individual agencies.

Like previous Orders, however, much of the EO appears aspirational in nature, and contains ambiguities and exceptions allowing lengthier reviews and permitting. For example, there is no specified time period within which the lead agency must publish the NOI under NEPA following its receipt of a project proposal or permit application, and a milestone other than the NOI may be used when “appropriate.” The 2-year and 90-day periods also may be extended based on individual project circumstances, and there is no clear penalty for missing preset deadlines. Agencies also remain free to decide that one ROD might not be “best” for a given project. While the timing goals in the EO may be achieved for some projects, the legal requirements of multiple statutes that often apply to complex infrastructure projects may require more time. The EO’s definition of “authorization” also excludes potentially applicable state and local requirements. Forcing a project to meet the specified timeframes also could detract from the strength of the underlying administrative record and correspondingly render permitting decisions more vulnerable to challenge by project opponents. Moreover, already constrained agency staff may need to allocate limited resources to additional reporting requirements rather than actual permitting activities.

Flood Standards

Executive Order 13807 saves its most substantively impactful provision for last. Section 6 states that: “Executive Order 13690 of January 30, 2015 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input), is revoked.” This rescission removes requirements for federal agencies to entirely avoid, or mandate higher base elevations for, development within 100-year and 500-year floodplains. The Federal Flood Risk Management Standard and implementing Guidelines were motivated by concerns about increased flood risks stemming from climate change. The rescission aimed to address ambiguities and onerous added construction costs based on the widely applicable flood standards. The timing of the EO was inopportune, however, given the occurrence of Hurricanes Harvey and Irma only weeks later. Most notably, the EO did not indicate a replacement standard. In light of continuing storms and severe flooding, there now is renewed effort to explore and craft more workable flood standards for federally funded or approved projects.

Interior Secretarial Order 3355

In furtherance of NEPA streamlining, the Deputy Secretary of the Interior has issued blanket limits on the page length and timeframe for NEPA documents. The Order applies to all Interior agencies, such as the U.S. Fish and Wildlife Service, Bureau of Land Management, Bureau of Ocean Energy Management, and National Park Service. Where an Interior bureau serves as the lead agency under NEPA, an EIS must be no longer than 150 pages, or 300 pages “for unusually complex projects.” Additionally, the Order sets a “target” for completion of the EIS within one year from the NOI, with deviations of no more than three months. Assistant Secretary-level approval is required to exceed these limits. Though existing CEQ regulations at 40 C.F.R. § 1502.7 suggest the same page limits, the current Order purports to make them mandatory for Interior agencies. The Order also instructs bureaus to consider limits for less detailed Environmental Assessments, and to recommend other streamlining measures within 30 days.

These prescriptions are bold, and should refocus agency resources on shorter and faster NEPA documents. Like the recent EO, however, these limits may prove unsuitable for particularly complex projects facing likely litigation. It is unclear what further implementing actions will emerge from the Interior Department in the coming weeks, or whether other agencies will follow Interior’s lead and adopt similar limitations.

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