

C O M M E N T

The Trump Administration's First Steps Toward Streamlining Environmental Reviews

by Norman F. Carlin and Kevin J. Ashe

Norman F. Carlin is a Partner with Pillsbury Winthrop Shaw Pittman LLP. He helps industry, developer, and public agency clients navigate the environmental impact review process under the California Environmental Quality Act and the National Environmental Policy Act. Kevin J. Ashe is an Associate in the Environmental and Natural Resources practice area at Pillsbury Winthrop Shaw Pittman LLP.

On August 15, 2017, President Donald Trump issued an Executive Order (EO) entitled “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.”¹ EO No. 13807 seeks to expedite federal review and approval of infrastructure projects by imposing new timelines and procedures, including a two-year deadline for completing reviews under the National Environmental Policy Act (NEPA)² and issuing permits for major infrastructure projects. While the EO itself is broadly framed and leaves many aspects of implementation to be worked out, subsequent actions by the Council on Environmental Quality (CEQ) and the U.S. Department of the Interior (DOI) have already begun to implement the EO’s directives.

EO No. 13807 follows the Trump Administration’s prior EO No. 13766,³ which called for streamlined environmental review and approval of “high-priority” projects. Among other things, EO No. 13766 required the chair of CEQ to coordinate with federal agencies to establish expedited procedures and NEPA review deadlines. This Comment focuses on the later EO and discusses its prospects for implementation.

I. EO No. 13807

EO No. 13807 applies to a wide range of infrastructure projects, including roadways, bridges, railroads, and transit; aviation and ports; energy production and generation (fossil-fuel, renewable, nuclear, and hydropower); electricity transmission; broadband Internet; pipelines; and water resources, stormwater, sewer, and drinking water projects.

1. Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/15/presidential-executive-order-establishing-discipline-and-accountability>.
2. 42 U.S.C. §§4321 et seq.
3. Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017).

The EO defines “major infrastructure projects” as those requiring a full environmental impact statement (EIS) under NEPA and multiple permits, approvals, or other authorizations from federal agencies (collectively, “authorizations”), and for which sufficient and reasonably available funding has been identified. EO No. 13807 includes a number of features intended to streamline NEPA reviews and project approvals.

A. Cross-Agency Priority Goal and Two-Year Target for EIS Completion

EO No. 13807 requires the Office of Management and Budget (OMB) to establish by February 11, 2018, a federal Cross-Agency Priority (CAP) Goal on Infrastructure Permitting Modernization, building on an existing program under the Government Performance and Results Modernization Act of 2010.⁴ The CAP Goal will provide, where permitted, for NEPA review and authorization processes for infrastructure projects to be “consistent, coordinated, and predictable.” In addition, the CAP Goal will require completion of NEPA reviews for major infrastructure projects in “not more than an average of approximately two years” from the notice of intent to prepare an EIS. The CAP Goal must be incorporated into each federal agency’s strategic and annual performance plans, and progress must be reviewed by agency leadership.

B. “One Federal Decision”

The EO requires approval of major infrastructure projects in “One Federal Decision” via the Record of Decision (ROD), which the “lead agency” (that is, the agency preparing the EIS) issues on or after completion of the EIS. The lead agency’s ROD must also “record any indi-

4. Pub. L. No. 111-352, 124 Stat. 3866 (2011).

vidual agency decision” by other federal agencies whose authorizations are required for project construction, and those agencies must issue their authorizations within 90 days after the ROD. In addition, the EO gives the lead agency new, but largely undefined, responsibility for “navigating the project” through the authorization processes of other agencies and utilizing a “more unified environmental review and authorization process.”

The “cooperating agencies” (those with special expertise or jurisdiction by law over resources affected by a project) and “participating agencies” (a special category of agencies with an interest in highway and public transportation projects, with which the lead agency must coordinate) must identify points of contact for each project, cooperate with the lead agency, and timely respond to its requests for information. The lead, cooperating, and participating agencies must agree at the outset to a single permitting timetable with interim and final milestones for each agency’s actions, the final ROD, and all federally required authorizations.

While the targets are ambitious, some flexibility is provided. The project sponsor (the local government or private entity that is applying for federal funding and/or authorization for the infrastructure project) may request that the agencies issue separate NEPA documents. The lead agency may waive the single ROD requirement if it “determines that a single ROD would not best promote completion of the project’s environmental review and authorization process.”⁵ The 90-day deadline may be extended if federal law prevents the issuance of any authorization within 90 days, the lead agency determines that more time would “better promote completion of the project’s environmental review and authorization process,” or the project sponsor requests “a different timeline.”⁶ Moreover, the CAP Goal is completion of review and permitting in a two-year period on average, rather than a strict deadline applicable to each project.

C. Tracking and Reporting

Despite such flexibilities, the EO does have teeth. Lead agencies must update permitting timetables at least quarterly and report to OMB, and missed milestones from the timetables must automatically be elevated to senior agency officials. OMB must implement an accountability system that tracks and scores each agency’s performance and issue quarterly performance scorecards. In addition to use of “One Federal Decision,” meeting permitting timetable milestones, and progress toward the CAP Goal, the scoring will track the cost of environmental review and authorizations, the added project costs attributable to delays, and implementation of best practices to ensure timely decisions. OMB must also consider each agency’s performance

during budgeting and determine whether budgetary penalties should be imposed for those that significantly fail to meet a permitting timetable milestone, after considering the causes of any poor performance.

D. Interagency Streamlining Efforts

OMB and CEQ, in consultation with the Federal Permitting Improvement Steering Council (FPISC) and an interagency working group, are charged with developing an implementation framework and guidance to fill in the broad outlines of the “One Federal Decision.” CEQ is further directed to issue regulations, guidance, and directives as necessary, among other things, to “ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEQ’s authority to interpret NEPA to simplify and accelerate the NEPA review process.”⁷

In addition, CEQ is directed to mediate interagency disputes and facilitate resolution of conflicting positions on any infrastructure project “pertaining to any environmental law, regulation, order or policy”—not limited to “major” projects or to CEQ’s traditional NEPA jurisdiction. FPISC is also directed to “work with the lead agency or any cooperating and participating agencies to facilitate the environmental review and authorization process for any infrastructure project,” and is provided budget support.⁸

E. Energy Right-of-Way Corridors and Reorganization to Expedite Energy Projects

Another provision of EO No. 13807 assigns DOI and the U.S. Department of Agriculture as lead agencies for designation of “energy right-of-way corridors” on federal lands. The agencies are directed to develop a strategy for a “multi-agency reorganization effort” to expedite NEPA reviews of energy infrastructure projects, such as electric power transmission lines, natural gas pipelines, and large-scale renewable energy facilities. The strategy will be incorporated into implementation of President Trump’s EO No. 13781,⁹ which requires OMB to propose a plan to reorganize federal agencies to improve efficiency, effectiveness, and accountability, and may include transferring some agency functions to state or local governments or the private sector.

F. Rollback of Flood Risk Management Standard in Obama EO

Apart from EO No. 13807’s accelerated deadlines and streamlining goals, one provision has been highly pub-

5. 82 Fed. Reg. at 40466.

6. *Id.*

7. *Id.* at 40468.

8. *Id.*

9. Exec. Order No. 13781, 82 Fed. Reg. 13959 (Mar. 16, 2017).

licized in the wake of recent hurricanes and flooding in Florida, Puerto Rico, and Texas: the rollback of floodplain risk management standards established by the Obama Administration.

EO No. 11988¹⁰ first directed federal agencies to evaluate projects sited in floodplains, to avoid adverse impacts from occupancy and modification of floodplains to the extent possible, and to avoid direct or indirect support of floodplain development where there is a practicable alternative. EO No. 11988 initially defined “floodplain” as an area subject to a 1% or greater chance of flooding each year based on historical data (referred to as the “base flood” or “100-year flood” standard).

President Obama’s EO No. 13690¹¹ expanded the definition of floodplain to include areas that are susceptible to a 500-year flood; up to two or three feet (depending on the type of project) above the base flood elevation; or determined to be at risk based on “a climate-informed science approach.” Agencies were required to conduct the same “practicable alternatives” analysis as under EO No. 11988, but to incorporate climate science into the analysis. EO No. 13690 was controversial, viewed by the Obama Administration and many advocates as ensuring prudent project siting when investing federal funds, but by climate skeptics as an unnecessary hindrance to project development. With EO No. 13690 rescinded, the 100-year flood standard of EO No. 11988 was restored.

Revocation of the Obama floodplain standard came at an untimely moment. Shortly afterward, Hurricanes Harvey, Irma, and Maria hit, causing extensive damage and flooding in Texas, Florida, Puerto Rico, and elsewhere. Hurricane Harvey, which brought an unprecedented four feet of rainfall, was the third 500-year flood in the Houston area in the past three years, suggesting that historical data no longer provide reliable predictions of flood magnitude. Following the hurricanes, the Trump Administration has reportedly begun working on a new flood risk management standard.¹² Meanwhile, the 100-year flood standard remains in effect.

II. CEQ Notice of Planned Implementing Actions

EO No. 13807 required CEQ to develop an initial list of planned implementation actions within 30 days. CEQ did so, issuing its list in a *Federal Register* notice¹³ and accompanying fact sheet¹⁴ on September 14, 2017. The listed actions are:

1. Consult with OMB and FPISC to develop a framework for implementing EO No. 13807’s “One Federal Decision” mechanism
2. Coordinate with FPISC, the U.S. Department of Transportation, and the U.S. Army Corps of Engineers to identify “high-priority” projects pursuant to EO No. 13766
3. (a) Revise or supplement existing guidance on categorical exclusions and environmental assessments (EAs), efficient NEPA reviews, mitigation, and interagency collaboration and conflict resolution; (b) review CEQ’s existing regulations implementing NEPA procedural provisions to identify needed updates and clarifications; and (c) issue additional guidance as necessary to simplify and accelerate NEPA reviews, including a practitioner handbook on infrastructure project proposals addressing the following issues: public involvement, deference to the lead agency’s statement of purpose and need and range of alternatives, cumulative impacts analysis, reliance on prior analyses and decisions on projects within the same general location, and reliance on prior state, local, and tribal environmental reviews
4. Form and lead an interagency working group to review agency regulations and policies that may impede efficient environmental review and permitting

The prospect of new or revised CEQ regulations and guidance is worth noting in particular. NEPA is a short statute, providing a framework statement of policy rather than detailed direction on procedures for conducting environmental reviews. While each federal agency is directed to develop its own regulations and procedures for NEPA reviews, agencies and courts rely on CEQ’s NEPA regulations and on CEQ guidance in interpreting and applying NEPA requirements.¹⁵

CEQ’s notice states its intent to revisit existing guidance on specified topics and to identify needed changes to update and clarify its procedural regulations. However, CEQ could go further and adopt potentially substantial modifications to NEPA regulations. Given the bare-bones nature of NEPA itself, there could be considerable room for regulatory revision without conflicting with the statute. On the other hand, in a recent report on reducing regulatory burdens on domestic energy development, a U.S. Department of Energy (DOE) task force proposed reforming DOE’s NEPA processes to ensure consistency with CEQ’s existing regulations, suggesting that substantial changes to those regulations were not expected.¹⁶

10. Exec. Order No. 11988, 42 Fed. Reg. 26951 (May 25, 1977).

11. Exec. Order No. 13690, 80 Fed. Reg. 6425 (Feb. 4, 2015).

12. Juliet Eilperin, *After Harvey, the Trump Administration Reconsiders Flood Rules It Just Rolled Back*, WASH. POST, Sept. 1, 2017, https://www.washingtonpost.com/politics/after-harvey-the-trump-administration-reconsiders-flood-rules-it-just-rolled-back/2017/09/01/c3a051ea-8e56-11e7-8df5-c2e-5cf46c1e2_story.html?utm_term=.b4e847c5cd56.

13. Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43226 (Sept. 14, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-09-14/pdf/2017-19425.pdf>.

14. Fact Sheet, CEQ, Council on Environmental Quality to Take Action to Enhance Environmental Review and Permitting Process for Infrastructure

Projects (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/ceq/CEQ-Fact%20Sheet_FRNotice_9-8-17.pdf.

15. CEQ’s NEPA regulations can be found at 40 C.F.R. §§1501-1508. See Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ELR 10287 (Apr. 2015).

16. Department of Energy, Final Report on Regulatory Review Under Executive Order 13783 (Oct. 25, 2017), <https://energy.gov/downloads/final-report-regulatory-review-under-executive-order-13783>.

III. DOI Secretarial Order No. 3355

DOI has also acted to implement EO No. 13807. On August 31, 2017, the Secretary of the Interior issued Order No. 3355,¹⁷ directing DOI agencies to limit the size of their EISs to 150 pages in most cases, or 300 pages for unusually complex projects, excluding appendices. The Secretary's order also sets a target to complete a final EIS by one year after the issuance of the notice of intent to prepare the EIS (i.e., one year sooner than EO No. 13807's two-year goal). Exceeding page limits or the deadline by more than three months must be approved by the Assistant Secretary of the Interior.

Each DOI bureau is required to provide the Deputy Secretary with a proposal for target page limitations and time deadlines for the preparation of EAs, and each Assistant Secretary is tasked with providing recommendations to streamline NEPA reviews. The recommendations must consider potential regulatory revision, revised or new guidance or policies, and development of additional categorical exclusions.

It is all too easy to imagine judicial review of EISs prepared in accordance with the Secretary's order being problematic. For example, the Bureau of Land Management's EISs for large energy projects on federal land typically take years to prepare and range in the thousands of pages—and courts not uncommonly find even such deliberate and lengthy EISs inadequate. EISs complying with the strict time and length limits of the order may be vulnerable to claims that they are insufficient for purposes of public disclosure and informed agency decisionmaking as required by NEPA. However, the page limits exclude appendices, so one fairly obvious response will be to move large amounts of material there.

IV. Prospects for EO Implementation

Project developers and environmental advocates have long disputed whether and how much infrastructure projects are delayed by protracted environmental reviews, and whether or not such delays are justified by environmental benefits. EO No. 13807 and the CEQ notice take a strong stand on the side of streamlining.

However, both the EO and the list of CEQ's planned actions are only frameworks that leave much to be worked out in future implementation. Except for the rescinded floodplain management standard, neither provides any direct substantive relief from any of the burdens of NEPA

compliance. Moreover, except for budget support for FPISC, the EO does not identify new resources either for the speedier completion of EISs and permitting or for the additional agency staff time that its many new planning, coordinating, monitoring, and reporting requirements will consume. Arguably, those extra administrative burdens will detract from agency staff's time to work on actually completing expedited EISs. Still, the threat of budgetary punishment for missing timetable milestones provides a strong incentive for staff to do their best.

Even project sponsors may be ambivalent about the EO's effects, eager for their projects to advance but less eager to face litigation risk from rushed and potentially vulnerable EISs. As noted above, there is reason to expect that courts will be skeptical, in particular, of the strict EIS page and time limits in the DOI Secretary's order.

Time will tell whether EO No. 13807 and its implementation succeeds in creating the efficient environmental review and permitting process the Trump Administration envisions. At this early stage, however, the most likely avenue for effective NEPA streamlining is the prospect of eventual regulatory revisions. The EO directed CEQ to issue regulations, guidance, and directives; the CEQ notice is the first step toward doing so, and the eventual consequences could be significant.

For example, notwithstanding the Trump Administration's efforts to back away from regulating greenhouse gases (GHGs), recent NEPA cases such as *Sierra Club v. Federal Energy Regulatory Commission*¹⁸ and *WildEarth Guardians v. Bureau of Land Management*¹⁹ rejected EISs for inadequate analysis of GHG impacts. However, those cases relied on the existing CEQ regulations and prior cases decided under those regulations in their analyses of indirect and cumulative impacts. President Trump's recent nomination of former Texas regulator and prominent fossil fuels defender Kathleen Hartnett White as chair of CEQ may presage a change in CEQ's views.²⁰

If CEQ does make substantial changes to its regulations—and assuming those changes survive inevitable claims that they are inconsistent with the NEPA statute—agencies and courts would have to look to those revised regulatory requirements, potentially reaching different results in subsequent decisions. Thus, while EO No. 13807 and the CEQ notice consist mostly of framework and process, with few substantive specifics, the process they have launched could ultimately transform federal environmental review.

17. Secretarial Order No. 3355 (Aug. 31, 2017), <https://elips.doi.gov/elips/0/doc/4581/Page1.aspx>.

18. *Sierra Club v. Federal Energy Regulatory Comm'n*, 867 F.3d 1357, 47 ELR 20104 (D.C. Cir. 2017).

19. *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 47 ELR 20115 (10th Cir. 2017).

20. Brady Dennis & Chris Mooney, *Trump Taps Climate Skeptic for Top White House Environmental Post*, WASH. POST, Oct. 13, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/10/13/trump-taps-climate-skeptic-for-top-white-house-environmental-post/?utm_term=.4de539660487.