Will Expediting NEPA Reviews for Infrastructure Speed Up Projects?

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"At a time when job growth must be a top priority," the president proclaimed, "it is critical that agencies take steps to expedite [environmental] permitting and review." We must "ensur[e] that smart infrastructure projects move as quickly as possible from drawing board to completion." NEPA practitioners may be forgiven if they believe these words were uttered in 2017 by President Trump, as part of his campaign to streamline infrastructure approvals. They are, in fact, from Obama's 2011 memorandum on Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review. Is this déjà vu all over again?

Since 1970, the environmental review process under the National Environmental Policy Act has grown in complexity — the mean time between the Notice of Intent to prepare an Environmental Impact Statement and the Notice of Availability of a final EIS currently stands at approximately five years. As a result, Congress and the executive branch have engaged in numerous efforts to improve the efficiency of the review process under NEPA and other laws.

Over the last several years, these efforts have resulted in presidential directives, reports and recommendations from the Council on Environmental Quality, and Congress's adoption of Title XLI of the Fixing America's Surface Transportation Act of 2015. The FAST Act created the Federal Permitting Improvement Steering Council to impose greater discipline in interagency coordination, and established an on-line dashboard to promote transparency and track progress on covered projects.

Trump continued this trend by issuing an executive order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process of Infrastructure. Building on the arguments of predecessors, his EO claims that the "federal government, as a whole, must change the way it processes environmental reviews and authorization decisions." The EO calls on the Office of Management and Budget and the Federal Permitting Council (still awaiting a permanent director) to establish goals for processing environmental reviews.

Welcomed by proponents of reform as a step forward, the Trump EO raises as many questions as it answers.

First, the EO establishes an aspirational goal that "processing of environmental reviews and authorization decisions for new major infrastructure should be reduced to not more than an average of approximately two years." Moreover, recent news reports indicate that the Department of the Interior has gone further by imposing mandatory page limits on EIS documents. Some practitioners have noted the irony that artificial deadlines and page limits could lead to less defensible final products and longer delays.

Artificial deadlines and page limits could lead to less defensible products and delays

Second, OMB is required to track agency progress on a quarterly basis and consider imposing "appropriate penalties" on federal agencies, within the limits of existing law, that fail to be timely

Third, the EO establishes a One Federal Decision process. It goes beyond the common sense edict of requiring a single agency to lead environmental reviews by requiring multiple federal agencies involved in a covered project generally to issue a single Record of Decision. Observers question whether requiring this level of synchronization among a diverse set of agencies, each acting under different statutory frameworks, deadlines, and procedures, will in fact simplify the process.

Meanwhile, litigation continues apace, as judges and parties grapple with how to address greenhouse gas emissions and climate change in NEPA reviews — particularly in light of the policy vacuum left by this administration's decision to withdraw (but not replace) various policies and guidance documents.

The D.C. Circuit complicated the issue by issuing two NEPA decisions seemingly pointing in different directions. In one case, involving review of a natural gas pipeline linking several southeastern states, the court ruled that the Federal Energy Regulatory Commission "must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so." Eschewing a bright line rule, the court added the caveat that "quantification of greenhouse-gas emissions" is not "required every time." Indeed, a different panel of the same court — just seven days earlier — concluded it was appropriate for the Energy Department to study greenhouse gas emissions associated with approving a liquefied natural gas export facility but it was not feasible to quantify them. On remand, the court directed FERC to explain whether the Social Cost of Carbon metric — developed by the Obama administration and rescinded this year — has utility for "converting emissions estimates to concrete harms" posed by climate change.

NEPA practitioners will be paying close attention to the interplay between the legal and policy arenas as these developments unfold.