

Permit streamlining, NEPA compliance, and an expanded role for CEQ

29 September 2017

In one of his earliest [Executive Orders 13766](#), January 24, 2017, President Trump laid the groundwork for subsequent actions to help “Expedite Environmental Reviews and Approvals for High Priority Infrastructure Projects.” In his most recent [Executive Order 13807](#), “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” President Trump continues to emphasize the elimination of procedural obstacles to the timely development and completion of infrastructure projects, including in the area of environmental review. 82 Fed. Reg. 40,463 (August 15, 2017).¹

If at first...another Executive Order

EO 13807 requires all federal agencies “processing environmental reviews and authorizations for major infrastructure projects” to implement a suite of procedures known as “One Federal Decision.”² “Major infrastructure projects” refers to, among other things, transportation, water resources projects, and energy production and generation, including from fossil, renewable, nuclear, and hydro sources “for which multiple authorizations by federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) . . . , and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.”³

Under “One Federal Decision,” federal agencies overseeing the review of major infrastructure projects are directed to issue a joint Record of Decision (ROD) covering all individual agency decisions related to the project, and to issue all necessary permits or authorizations within 90 days of issuance of the ROD by the lead agency.⁴ EO 13807 also directs the Office of Management and Budget (OMB), in consultation with the Federal Permitting Improvement Steering Council (FPISC) (established by the “Fixing America’s Surface Transportation” (FAST) Act),⁵ to work to reduce the average time for review and authorization of new major infrastructure projects to two years and to adopt a corresponding system for tracking and reviewing project approvals.⁶

CEQ responds...

Responding to EO 13807, the Council on Environmental Quality (CEQ) has published an initial list of actions it intends to undertake to implement “One Federal Decision,” and to otherwise “enhance and modernize the Federal environmental review and authorization process.” In a notice dated September 8, 2017, CEQ published its mandated list of initial actions. See [82 Fed. Reg. 43,226](#) and the attached summary fact sheet (September 14, 2017). While details are limited, CEQ did announce that it intends to revise, modify, or supplement its existing guidance regarding:

- Establishing, applying, and revising categorical exclusions under the National Environmental Policy Act (NEPA);
- Preparing environmental assessments;
- Improving the process for preparing efficient and timely environmental reviews under NEPA;
- The appropriate use of mitigation and monitoring and appropriate use of mitigated findings of no significant impact; and
- Environmental collaboration and conflict resolution.⁷

CEQ also announced that it intends to review its existing NEPA regulations “to identify changes needed to update and clarify those regulations,” and to issue any additional guidance to agency heads that CEQ deems “necessary to simplify and accelerate the NEPA process for infrastructure projects, including infrastructure-specific guidance to be compiled in a NEPA practitioners’ handbook for infrastructure project proposals.”⁸ Finally, to comply with the specific provision of EO 13807 requiring agencies to issue all necessary permits or authorizations within 90 days of issuance of the ROD, CEQ announced its intent to convene an “Executive Order 13807 Working Group” to review the NEPA implementing regulations and other environmental review and authorization procedures and policies of federal agencies that are members of FPISC (which includes among others the Department of the Interior, the Department of Agriculture, the Department of Energy and the Environmental Protection Agency (EPA)). In addition to NEPA, the Executive Order 13807 Working Group will consider a number of additional statutes including “consultations pursuant to section 7 of the Endangered Species Act, compliance with section 106 of the National Historic Preservation Act, and permitting and certifications pursuant to the Clean Water Act.” Although the President has rescinded an Executive Order of President Obama pertaining to compensatory mitigation for the public and private sector lead projects, CEQ will revisit this issue.⁹

...And so does DOI and EPA

Without awaiting further guidance from CEQ, Secretary of the Interior Zinke has responded to EO 13807 by issuing guidance to “modernize the Department’s NEPA processes” (Order No. 3355, August 31, 2017). Among other specific directives, the Secretary’s Order requires that EISs be no longer than 150 pages (or 300 pages for “unusually complex projects”), and that they be completed within one year from issuance of a notice of intent. Anticipating the possibility of

overlap, if not conflict, with the CEQ mandate, DOI will participate in the Executive Order 13807 Working Group that has been tasked to identify “agency-specific impediments to efficient and effective reviews” The Executive Order 13807 Working Group will consist of agencies’ chief environmental review and permit officers, among others.

The EPA also recently moved the Office of Federal Activities from the Office of Enforcement and Compliance Assurance into the Office of the Administrator. The Office of Federal Activities is charged with reviewing all environmental impact statements prepared by federal agencies under NEPA, as well as ensuring that EPA itself is in compliance with NEPA. This relocation may indicate plans for more direct leadership involvement in EPA’s review of NEPA compliance by other federal agencies, as well as direct participation in CEQ’s Executive Order 13807 Working Group.

Just the beginning

While the CEQ notice last week does not foreshadow the outcome of its review, the notice does describe an ambitious undertaking that has the potential to affect many of the most fundamental components of NEPA review. Without an appointed chair or members, CEQ staff, and current acting Director Ted Boling specifically, will be relied upon to complete these tasks, and effect inter-agency coordination by means of the Executive Order 13807 Working Group. Boling will be assisted by Sarah Shattuck, on detail from DOI, who is CEQ’s Deputy Associate Director for NEPA. Although the notice includes no explicit provision for public comment, it appears that Boling and Shattuck will consult broadly with interested constituencies inside and outside of government. We plan to stay abreast of on-going developments and will continue to monitor the progress of this initiative and keep clients informed on a regular basis.

1 EO 13807

2 See id. at 40,466.

3 Id. at 40,464.

4 See id. at 40,466.

5 42 U.S.C. §§ 4370m – 4370m-12

6 Id. at 40,464.

7 Id. at 43,227.

8 Id.

9 Id.

Contacts



Hilary C.
Tompkins

Partner



Douglas P.
Wheeler

Senior Counsel

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