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Blog Post

President Trump Signs Executive Order to Expedite Infrastructure Projects Due to Economic Emergency

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On June 4, 2020, President Trump signed an executive order requiring federal agencies to fast-track infrastructure projects and to take certain other actions to facilitate the nation's economic recovery from the COVID-19 emergency. In particular, the executive order requires federal agencies to use emergency provisions under the National Environmental Policy Act ("NEPA") and other federal environmental laws to waive or bypass certain environmental review requirements. This streamlined environmental review process under NEPA and other federal environmental laws would likely lead to faster approval for infrastructure and energy development projects; however, the executive order is expected to be challenged in court.

Key Takeaways

- **Certain federal agencies are required to fast-track authorized and appropriated projects.** The executive order requires the Secretary of Transportation, Secretary of Agriculture, Secretary of the Interior, Secretary of Defense and Secretary of the Army to use all relevant emergency authorities and other authorities to expedite work on, and completion of, all authorized and appropriated infrastructure projects, civil works projects, and infrastructure, energy, environmental and natural resources projects on federal land (except Indian trust land), to the extent within their authority.
- **Federal agencies are required to use "emergency authorities" under NEPA, the Endangered Species Act and the Army Corps of Engineers' regulations and permits to accelerate the regulatory review process.** The executive order cites an emergency provision in NEPA regulations that permits federal agencies to consult

with the White House Council on Environmental Quality (“CEQ”) to bypass the typical environmental review process and make “alternative arrangements” for complying with NEPA in certain emergency circumstances. Using this authority, CEQ has approved alternative arrangements to expedite two projects on account of economic considerations (the building of an automotive assembly plant in the city of Detroit in 1980, when it was in a state of emergency due to an economic crisis, and the spraying of a pesticide to address a threatened fruit fly infestation that would impact the agricultural industry in California in 1990); most other expedited projects have related to natural disasters, such as hurricanes, fires and volcanic eruptions. The executive order also cites the emergency consultation provision in regulations under the Endangered Species Act and the emergency provisions in regulations and nationwide permits promulgated by the U.S. Army Corps of Engineers (or jointly by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency) pursuant to Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and Section 103 of the Marine Protection, Research and Sanctuaries Act. Federal agencies are required to use such emergency authorities, as well as streamlined review options under NEPA, to fast-track infrastructure projects and other actions.

- **Federal agencies are required to use emergency or expedited authorities to fast-track projects.** The executive order includes a catch-all provision requiring federal agencies to use statutes and regulations that provide for emergency or expedited treatment for agency actions relating to infrastructure, energy, environmental or natural resources matters.
- **Federal agencies are required to provide a report listing all projects and actions that have been or may be fast-tracked pursuant to the emergency authorities within 30 days of the executive order.** The agencies are required to provide status reports every 30 days thereafter, for the duration of the COVID-19 national emergency.
- **The executive order could significantly expedite infrastructure and energy development projects; however, its application may be limited.** The average environmental impact statement process under NEPA takes 4.5 years. By encouraging the use of alternative arrangements and streamlined environmental review options under NEPA, the executive order could shave years off the timeline for completing projects. However, while the executive order suggests agencies have broad authority to waive or bypass environmental review requirements in an emergency, the emergency regulations are fairly limited in scope and do not waive such requirements in their entirety. For example, the use of “alternative arrangements” under NEPA is limited to “actions necessary to control the immediate impacts of the emergency” and establishes a different, less time-consuming means of compliance rather than waiving compliance with NEPA. In addition, it is not clear that the emergency authorities apply to national economic emergencies. Whether a

project can be fast-tracked will depend on how the agencies interpret and apply the executive order.

- **Expected court challenges may limit the effectiveness of the executive order.**
The executive order will likely be challenged in court, both generally and as applied to individual projects. On June 9, 2020, the Center for Biological Diversity notified President Trump that the executive order violates the Endangered Species Act and, if not rescinded, it will pursue litigation; notices and litigation from other environmental groups are expected to follow. To the extent the executive order survives these general challenges, its application to individual projects will also likely be challenged. Regardless of whether or not an agency successfully demonstrates to a federal court that the statutory emergency provisions were properly applied to a particular infrastructure project at issue, litigation would likely delay the project considerably.

Interested and affected parties should monitor these developments with their environmental counsel.

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Authors

[Carleigh Trappe Rodriguez](#)

Partner / [Washington, D.C.](#)

[Michelle Sliwinski](#)

Associate / [Washington, D.C.](#)

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