
New Executive Order on Infrastructure Ups the Ante on Streamlining the Environmental Review and Permitting Process

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Since its earliest days, the Trump Administration has focused on eliminating delays in infrastructure projects, portraying environmental reviews and permitting as major choke points requiring change. On January 24, 2017, the White House issued Executive Order ("EO") 13766, on "[Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects](#)." That order directed the Chairman of the Council on Environmental Quality ("CEQ") to designate "high priority" infrastructure projects and put them on a fast track, with expedited procedures and deadlines for completion of environmental reviews and permit approvals. To reinforce these efforts, on August 15, 2017, the President signed another EO, on "[Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects](#)," which establishes procedures designed to make sure federal agencies complete federal reviews and authorization decisions within two years, or risk penalties for noncompliance. The new EO expands the portfolios of the CEQ and Office of Management and Budget ("OMB"), significantly enhancing the gatekeeping role the White House will play in infrastructure project management.

The 11-page, highly detailed EO includes numerous procedures, deadlines, and directives for establishing plans, timetables, accountability and tracking systems, and consequences, all intended to succeed where previous administrations have failed in speeding up the environmental review and permitting process for major infrastructure projects. With leading roles for CEQ and OMB, the EO includes a 30-day deadline for CEQ to develop an action list to ensure interagency coordination and simplification of National Environmental Policy Act ("NEPA") reviews, a 180-day time frame for OMB to set up accountability systems and translate them into specific agency goals that are tied to funding levels and federal executive bonus programs, and a further 180-day period during which OMB must issue guidance on tracking and scoring programs to be used in measuring agency adherence to deadlines. The EO's activation of provisions imposing consequences for nonperformance on agency funding levels and executive bonuses distinguishes it from previous attempts to expedite infrastructure projects.

Other provisions require the establishment of a "One Federal Decision" process, directing that each major infrastructure project must have a lead federal agency, responsible for shepherding the project through the authorization process in coordination with designated points of contact at each involved agency. The result of the process will be a single Record of Decision ("ROD") that is to be completed within a specified time frame, with construction authorization decisions to follow within 90 days. Additional requirements direct CEQ and OMB to develop guidance for applying the One Federal Decision mechanism whenever the lead agency is a state, tribal, or local agency.

A key feature of the EO is agency accountability. The EO requires federal agencies to follow a process that automatically elevates issues of missed permitting milestones to senior officials, and authorizes CEQ to mediate interagency disputes. It enhances operational support for the role of the Federal Permitting Improvements Steering Council ("FPISC") that was created by the [Fixing America's Surface Transportation Act](#) ("FAST" Act) of 2015, which put in place infrastructure streamlining procedures for surface transportation projects. And the EO lays out specific responsibilities for the Departments of the Interior and Agriculture on facilitating energy projects and for Interior on providing a strategy and recommendations to OMB for a multi-agency reorganization effort to further the aims of the EO.

Close to the end of the lengthy EO, after pages devoted to the multiple moving parts of the new permitting and authorization processes, a short provision abruptly revokes EO 13690 of January 30, 2015 on "[Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input](#)," an Obama Administration directive that required federal agencies to take climate change into account in assessing flood risks in building infrastructure projects. The revocation has sparked immediate controversy.

Without question, the new EO is extremely complicated, and parties interested in infrastructure projects - broadly defined to include transportation and transit, aviation, ports, energy production and generation, pipelines, and water infrastructure - need to examine it closely to understand and navigate the new streamlining requirements. Under the EO, the processes for establishing new procedures, deadlines, systems, and measures do not appear to be subject to public comment, but stakeholders should consider ways to provide input on how these new provisions are developed. Opposition to the new approaches is likely to result in court challenges.

Clark Hill is experienced in working with interested parties to develop informed strategies and effective implementation in complex regulatory matters at all stages of the process, including appellate challenges. For more information, please contact Karen C. Bennett, Jane C. Luxton, Kenneth von Schaumburg, William J. Walsh, or another member of Clark Hill's Environment, Energy & Natural Resources or Administrative Law Practice Groups.