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Executive Order Reinforces Measures To Reform Infrastructure Project Review.

On August 15, President Trump signed an Executive Order calling for streamlined federal review of major infrastructure projects. The Order applies to federal approvals for infrastructure projects in the following sectors:

- surface transportation;
- aviation;
- water resources;
- energy production and generation (including fossil fuels, renewable energy and hydropower);
- electricity transmission;
- broadband internet;
- pipelines;
- stormwater and sewer infrastructure; and
- drinking water.

Under the Order, additional sectors may be determined by the Federal Permitting Improvement Steering Council (FPISC).

The Order builds on prior efforts to streamline infrastructure permitting by (1) setting new goals for federal reviews of covered projects and (2) establishing formal methods to hold agencies accountable for the efficiency of their reviews.

Federal Permitting Goals

The Executive Order establishes several new targets for federal reviews, including:

- requiring one federal decision record for each major infrastructure project;
- requiring final agency decisions within 90 days of completing the federal decision record (an approach adopted by the Federal Energy Regulatory Commission); and
- setting a two-year average target for agencies to complete the permitting process for infrastructure projects.

These are ambitious goals, and their effectiveness will depend on the details of their implementation. For example, the two-year target is an “average of approximately 2 years, measured from the date of the publication of a notice of intent to prepare an environmental impact statement or other benchmark deemed appropriate by the Director of [the Office of Management and Budget (OMB)].” The baseline for this average, the benchmark used to start the two-year timeline, and the consequences for deviating from it will determine how effective this goal will be at driving project-specific progress.

In addition, the Executive Order’s emphasis on “one federal decision” may result in fewer designations of “joint” lead agencies for proposed projects. See, e.g., 43 C.F.R. 46.220. Such designations are rare, however, and the Executive Order allows project proponents to request that

separate agencies issue separate decisions under the National Environmental Policy Review Act (NEPA).

Finally, implementing a final agency action within 90 days of completing NEPA analysis may prove challenging if other key reviews, such as consultation under Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act, are ongoing, and the Executive Order allows an exception for cases where federal law prohibits the agency from issuing its approval or permit within the 90-day period.

Agency Accountability

The Executive Order includes a number of provisions intended to institutionalize permitting reforms through agency management tools, such as cross-agency priority (CAP) goals, individual federal employee performance plans, and quarterly scorecards prepared by the OMB that would assess how each agency is performing and the federal government's overall progress toward the goal of improved federal permitting. In addition to these provisions, the Order lays out mechanisms for holding agencies accountable for failing to comply with project schedules, including, in certain cases, requiring agencies to prepare an estimated cost of any delay in permitting and even allowing OMB to impose financial penalties in agency budgets for failure to meet timetable milestones.

Building on Past Reforms

The Order follows President Trump's January 24, 2017, Executive Order directing federal agencies to expedite environmental review and approvals for "high priority" infrastructure projects, and his July 19, 2017, Executive Order establishing a Presidential Advisory Council on Infrastructure within the US Department of Commerce.

President Trump's Executive Orders also build upon initiatives launched under the Fixing America's Surface Transportation Act (the FAST Act), enacted in December 2015. Title 41 of the FAST Act (FAST-41) was intended to help address the complexity of the federal review process for infrastructure projects. 42 U.S.C. § 4370m. The Order clarifies that all projects that meet the criteria for FAST-41 projects qualify as priority projects. Thus far, 34 projects have been designated as covered projects under FAST-41. The status of each project can be tracked online using the Federal Infrastructure Projects Dashboard.

The Order also does away with some prior direction to agencies by revoking a January 30, 2015 Executive Order (EO 13690), which required federally-funded infrastructure projects to meet a new flood risk reduction standard. The revocation of EO 13690 is intended to ease requirements to protect projects from flooding. While this may streamline the permitting process, it may also complicate the allocation and management of risk associated with future flood impacts.

Conclusion

The latest Executive Order, building upon FAST-41, may help enable the promise of infrastructure investments to be more fully realized. Its effectiveness in doing so will depend largely on the way in which the ambitious goals laid out in the Order are implemented.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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