

Trump Administration Seeks to Scale Back Environmental Requirements for Infrastructure Projects

February 2018

Authors: [Seth Kerschner](#), [Laura Mulry](#)

The Trump Administration is proposing to revise federal environmental requirements and procedures in order to streamline the permitting and approval processes for infrastructure projects. The Administration's draft proposals, of which there are more than 50, contemplate amending major environmental statutes, redefining the roles and procedures of federal agencies, and limiting judicial action, including by limiting the circumstances under which courts can halt project activities. Federal environmental laws that may be revised include the National Environmental Policy Act ("NEPA")¹, the Endangered Species Act (the "ESA"), the Clean Water Act, and the Clean Air Act. The proposals would require significant actions by multiple federal agencies and Congress before implementation.

The Trump Administration indicates that the proposals will reduce redundancies and delays in the environmental permitting and approval processes for infrastructure projects. The proposals limit the Environmental Protection Agency's ("EPA") review, rating, and veto authority over environmental permits and analyses of infrastructure projects, set firm deadlines on environmental reviews, and allow federal agencies to delegate environmental review power to the states. The proposals also require a general rewrite of NEPA regulations with the goal of streamlining the NEPA review process. One proposal with the aim of timely agency reviews limits the NEPA review process to two (2) years in total (*i.e.*, 21 months to conclude the NEPA document, plus three months for permits to be issued).

One proposal requires a "One Agency, One Decision" environmental review structure. The proposed structure would require that each infrastructure project have a single designated lead federal agency to oversee the environmental review of the project in coordination with "cooperating agencies," which process would result in the lead agency issuing one document concluding the NEPA process. Another proposal allows federal agencies to issue categorical exclusions under NEPA (that indicate that an action has no significant environmental impact) without conducting their own analyses if a related categorical exclusion was first issued by another agency, making agencies' categorical exclusions interchangeable. One proposal would exempt categorical exclusion decisions from judicial review under the Administrative Procedure Act, a law that infrastructure project opponents often employ to halt or delay projects. Biological Opinions issued under the

¹ NEPA is a procedural environmental law that requires federal agencies to assess the environmental impacts of major federal actions, including approvals of infrastructure projects.

ESA would also no longer be subject to legal challenge, according to one proposal. Also of note, one proposal provides the Secretary of the Interior with unilateral authority to approve rights of way for natural gas pipelines in national parks, which approval currently requires congressional authorization. One proposal seeks to lengthen the terms of permits under EPA's Clean Water Act National Pollutant Discharge Elimination System permitting program and allow automatic renewals of these permits.

Opposition has already been voiced regarding many of these proposals, including opposition based on concerns that these proposals will adversely impact public health and the environment. Legal challenges on proposals that become implemented are also expected. Some of the proposals are expected to be more generally supported, such as the "One Agency, One Decision" proposal for environmental reviews, the proposal requiring that only "feasible alternatives" be considered in the NEPA process, and the proposed 150-day statute of limitations period for all challenges to permits or approvals for infrastructure projects. Other proposals may be more controversial. For instance, one proposal requires that courts reviewing the sufficiency of a final agency decision for a project (which decision has to be completed within 21 months) "shall not deem an agency's decision insufficient based on a lack of analysis if the court finds that the agency made a good faith effort to provide adequate analysis within the allotted time and resources available"; some commentators note that this proposal could allow for arbitrary and capricious agency decisions to be upheld so long as a "good faith effort" is made.

The President has already issued two executive orders intending to streamline and expedite the environmental permitting and review processes for infrastructure projects. On January 24th, 2017, the President issued Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects. Under this order, in addition to requiring one lead federal agency for the environmental review process, the governor of a state, the head of any executive agency or the chairman of the White House Council on Environmental Quality can request that an infrastructure project be designated as a "high priority" project, for which expedited procedures and deadlines for completion of environmental reviews and approvals will be authorized. On August 15th, 2017, the President issued Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure, which directs executive agencies to complete all environmental reviews for major infrastructure projects within two (2) years and to complete all decisions for major infrastructure projects within 90 days of the issuance of the Record of Decision. This executive order revokes President Obama's Federal Flood Risk Management Standard that encouraged federal agencies to consider risks related to rising sea levels, heavier rains, and flooding when approving infrastructure projects with federal taxpayer funding.

The draft proposals are expected to be finalized by the Trump Administration and sent to Congress by the end of February 2018; they can be found [here](#).

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States

T +1 212 819 8200

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.