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White House Releases Final Proposal to Streamline Infrastructure Permitting

On February 12, 2018, the White House released a set of proposals to streamline the federal environmental review process for infrastructure projects. The 55-page "Legislative Outline for Rebuilding Infrastructure in America" (the Plan) is far-reaching in scope: it calls for directly amending major environmental statutes and significantly altering the roles of federal environmental agencies and the federal courts.

But by comparison to the draft plan leaked in late January (discussed in our [earlier post](#)), the streamlining measures in the final Plan have been substantially scaled back. In this update, we highlight the most significant changes to the Plan compared to the earlier draft. We also note a few areas in which the proposals have been modified or expanded, as well as some other proposals that could reduce the number of projects requiring federal environmental review.

Agency Roles

The Plan still calls for reducing the roles of federal environmental agencies in the environmental review process under the National Environmental Policy Act and other laws. For example, it eliminates the U.S. Environmental Protection Agency's role in reviewing and rating environmental impact statements under Section 309 of the Clean Air Act, and eliminates EPA's ability to veto permits issued by the U.S. Army Corps of Engineers under the Clean Water Act.

The Plan drops previous proposals to:

- require the lead agency to develop a single purpose and need statement to be used by all cooperating agencies in the EIS and permitting reviews for a project; and
- assign responsibility to the lead agency to determine the final range of alternatives to be used by cooperative agencies in their environmental and permitting documents.

Deadlines

The Plan still proposes to set a 24-month deadline to complete the environmental review process under NEPA (21 months to finish the NEPA process, plus three months for federal permit approvals to be issued). The administration, however, dropped previous proposals to empower the Federal Permitting Improvement Steering Council to reassign responsibility for a permitting decision when the deadline for that decision is not met and to impose financial penalties on agencies that miss permitting deadlines. The Plan instead provides that "appropriate enforcement mechanisms" will be developed to ensure permitting decisions are issued on time.

The Plan also scales back a previous proposal to tighten the deadline for a state to issue a water quality certification under Section 401 of the Clean Water Act. The prior proposal would have allowed states 90 days to determine that an application is complete and authorized EPA to make the determination in the event a state fails to meet that deadline, with three months thereafter for states to make a certification decision. The Plan instead suggests reducing the time periods for state completeness and certification decisions, without offering more specific details.

Flexibility

The Plan retains many changes that would provide agencies with increased flexibility in the NEPA process, such as a proposal to allow any federal agency to rely upon a categorical exclusion (CE) issued by any other federal

agency.

However, the Plan drops a proposal that would have allowed all infrastructure projects to combine the Final EIS prepared under NEPA and the Record of Decision (ROD) documenting the agency's final permit decision. Under current law, this flexibility is authorized only for highway, transit and rail projects; for all other projects, a waiting period of 30 days is required between the Final EIS and ROD.

Species and Habitat Protection

The Plan retains proposed changes to the Clean Water Act, Clean Air Act and other laws, but it eliminates nearly an entire section of draft proposals related to compliance with the Endangered Species Act and Marine Mammal Protection Act. For example, the Plan omits proposals to:

- provide additional time for the U.S. Fish and Wildlife Service and National Marine Fisheries Service to act on petitions to list or delist a species;
- allow states to be delegated authority for carrying out habitat conservation planning and issuing incidental take permits for intrastate activities affecting endangered species;
- allow FWS and NMFS to issue incidental take permits as part of informal consultation under Section 7 of the ESA;
- strengthen the ability for FWS and NMFS to rely on voluntary conservation efforts in making listing and delisting decisions for endangered species; and
- extend the timing of critical habitat designations to one year after a listing decision.

Judicial Review

The Plan retains several proposals to modify the role of the federal courts in reviewing federal agencies' actions in the environmental review process, including:

- establishing a uniform 150-day statute of limitations for actions challenging federal approvals of infrastructure projects, as compared to the multi-year periods that currently apply to many projects;
- limiting the circumstances under which courts can grant injunctions halting project activities; and
- precluding judicial review for claims alleging that project data has become outdated, if the federal agency has followed its own guidance regarding "currentness" of data.

The final Plan, however, leaves out previous proposals to:

- exempt the establishment of categorical exclusions under NEPA from judicial review;
- codify that a biological opinion issued under the ESA is not a final agency action subject to legal challenge;
- require challenges to federal agency actions approving certain types of infrastructure projects to be brought directly in the federal courts of appeals, rather than being brought initially in the district courts; and
- prevent courts from deeming an agency's NEPA decision insufficient based on a lack of analysis where the agency made a good-faith effort to provide adequate analysis within the abbreviated 21-month timeframe.

Expanded Streamlining Proposals

In a few areas, the Plan expands proposals in comparison to the leaked draft, including:

- **Alternatives Beyond Agency's Jurisdiction.** The draft proposal recommended clarifying that agencies need not consider "infeasible" alternatives under NEPA. The final Plan clarifies that alternatives are

infeasible if they are "outside the scope of an agency's authority or an applicant's capability."

- **NPDES Permits.** The draft proposal would have lengthened the time limit for a National Pollutant Discharge Elimination System permit under Section 402 of the Clean Water Act from 5 to 10 years; the Plan instead proposes a time limit of 15 years.
- **Energy Projects on National Park Land.** The draft proposal would have authorized the U.S. Secretary of the Interior to approve rights-of-way across National Park Service land for natural gas pipelines; the Plan expands this proposal to include oil pipelines and "facilities necessary for the production of energy" as well. This change would broaden the types of facilities that can be authorized to cross NPS-administered land without congressional approval.
- **Streamlined Procedures for Additional Rail Projects.** The Plan would allow all rail projects to take advantage of streamlined procedures for environmental review under 23 U.S.C. § 139. Under current law, these streamlined procedures apply only to highway, public transit and rail projects under the jurisdiction of the U.S. Department of Transportation.

Proposals That Would Limit the Applicability of NEPA

The Plan also includes several proposals that, while not directly affecting environmental requirements, would have the effect of exempting certain types of projects altogether from the need to comply with NEPA and other federal requirements:

- **Block Grants.** The Plan would provide \$40 billion in block-grant funding to the states for a Rural Infrastructure Program, to be distributed at the discretion of the governor. Because a federal agency would not control the distribution of those block-grant funds, the use of those funds likely would not trigger the need for compliance with NEPA.
- **Projects With De Minimis Federal Share.** The Plan would amend federal law to exempt certain surface transportation and water infrastructure projects from federal requirements when the federal share of the project's funding is "minimal." By defining such projects as non-federal, the need for NEPA review would be avoided. The Plan, however, does not specify a threshold level of federal funding beyond which a project constitutes a major federal action.
- **Airport Projects.** The Plan would eliminate the need for Federal Aviation Administration approval of airport projects that do not involve "critical airfield infrastructure." By eliminating the need for FAA approval, this proposal would avoid triggering the need for NEPA compliance for construction projects involving airport facilities such as terminals, hangars and service roads.

What's Next?

The majority of the administration's proposals require legislation, and many of those legislative proposals face long odds in Congress. In addition, the administration's proposed changes to infrastructure funding programs—which place increased reliance on the private sector, as well as on state and local funding sources—also face long odds.

Nonetheless, if an infrastructure bill moves forward, it is likely that it will include permitting changes in some form. Moreover, the Plan's proposal for the Council on Environmental Quality to revise long-standing NEPA regulations would not require congressional approval and could have a substantial effect on the environmental review process. We will continue to monitor developments and report on how those changes may affect environmental reviews for major infrastructure projects.

Authors

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