President Trump Orders Expanded Use of Emergency Powers to Streamline Infrastructure

Monday, June 8, 2020

On Thursday, June 4, 2020, President Trump signed an Executive Order (EO) on “Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities.” Relying on the COVID-19 declared national emergency, the EO directs federal agencies to invoke their existing emergency authorities under the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Clean Water Act (CWA), and other laws to expedite economic recovery, including taking “all reasonable measures” to speed infrastructure and public works projects. While consistent with prior administrative directives to expedite project permitting, this latest EO likely will have little practical effect on individual projects and generate increased litigation for projects that rely on it.

The EO aspires to expedite a variety of projects that fall under the jurisdiction of several specific federal agencies:

- All authorized and appropriated highway and other infrastructure projects within the authority of the U.S. Department of Transportation;
• All authorized and appropriated civil works projects under the purview of the U.S. Army Corps of Engineers; and

• All authorized and appropriated infrastructure, energy, environmental, and natural resources projects on federal lands managed by the Department of Defense, the Department of the Interior, and the Department of Agriculture.

The EO’s main action item is periodic reporting by affected federal agencies to the White House. Agency heads must provide a summary report listing all projects expedited under their emergency authorities no later than July 4th (30 days after the EO’s issuance date), and provide status reports every 30 days thereafter. The EO specifies no end date for the national emergency or use of emergency authorities.

The EO principally relies on the government-wide NEPA regulation for emergency situations. 40 C.F.R. § 1506.11. It also invokes the ESA implementing regulation on Section 7 consultations in emergencies (50 C.F.R. § 402.05 2) and the CWA Section 404 regulations and nationwide permits addressing emergency circumstances. Lastly, the EO directs agencies to review “other authorities” potentially applicable to emergencies, including “all statutes, regulations, and guidance documents that may provide for emergency or expedited treatment (including waivers, exemptions, or other streamlining).” Overall, the EO intends to allow critical infrastructure and public works projects to move forward more quickly, by abbreviating or waiving legally required environmental reviews, interagency consultation, and public comment.

While the goals of reducing time and paperwork are laudable, the EO will likely be less impactful than other recent efforts (such as One Federal Decision). The emergency exemptions available under NEPA, the ESA, the CWA, and other laws are quite limited pursuant to regulations and case law. They are meant for very narrow or discrete circumstances, not for indefinite national conditions. Moreover, they do not entirely or permanently waive environmental requirements, but rather allow for deferred or alternative procedures that achieve statutory aims. For example, the NEPA emergency regulation provides that when emergency circumstances make it necessary to take actions with significant environmental impacts without observing the typical NEPA process, agencies may consult with the Council on Environmental Quality to make “alternative arrangements” to take such actions. The effort and resources required to develop such “alternative arrangements” may not save time in the overall NEPA review. Nor can an EO legally displace regulations or case law.

Predictably, environmental organizations have already indicated a likely forthcoming challenge to the EO. Though a direct challenge may face jurisdictional obstacles, individual project approvals relying on the EO may be more vulnerable to lawsuits. And given the EO’s focus on timing, preliminary injunction motions at the commencement of lawsuits likely would be a centerpiece of those lawsuits, which likely would offset any advantage that may have been gained from relying on the EO.

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