INSIGHT: Infrastructure EO May Lead to Policy Reversals, Litigation

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A new executive order seeks to accelerate federal approvals of infrastructure and development projects, relying on various emergency authorities in environmental statutes. Sidley Austin attorneys say the scope of these provisions, as well as their interaction with other laws, is uncertain, and investors and developers should be cautious of potential judicial challenges.


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President Donald Trump issued an executive order (EO) June 4, aiming to speed up infrastructure projects.

The administration is prioritizing infrastructure development to address the national emergency concerning Covid-19, which resulted in "a dramatic downturn in our economy."

Expediting infrastructure investment, putting workers back to work and allowing U.S. citizens to "develop[] and enjoy[] the benefits of world-class infrastructure," the president contends, will help rectify the economy. Thus, the EO aims to streamline project development by reducing unnecessary regulatory burdens and is most relevant to those developing or investing in projects that require federal authorizations and environmental review.

Project proponents should proceed cautiously with expedited review and approval, as the EO and federal authorizations thereunder surely will be challenged in litigation just as previous executive and agency actions related to Covid-19 have been.

Transportation, Civil Works, and Federal Land Projects

The EO directs federal agencies to use all relevant and emergency authorities allowed by law to expedite infrastructure investment and development in the following areas:

- **Transportation Infrastructure.** The Department of Transportation shall expedite work on and completion of all authorized and appropriated highway and other infrastructure projects.
- **Civil Works Projects.** The Army Corps of Engineers (Army Corps or Corps) shall expedite work on all authorized and appropriated civil works projects.

- **Projects on Federal Lands.** The Departments of Defense, Interior and Agriculture shall expedite work on all authorized and appropriated infrastructure, energy, environmental and natural resources projects on federal lands under their respective authorities.

To facilitate this accelerated investment, the EO directs federal agencies to utilize existing emergency provisions in various permitting schemes *to the fullest extent possible* in order to remove or limit regulatory requirements that could otherwise delay project development.

The EO focuses on three such schemes:

- **National Environmental Policy Act (NEPA).** Agencies are directed to make "alternative arrangements" with the CEQ for complying with NEPA due to emergency situations. The EO also directs agencies to explore whether planned projects can forgo NEPA reviews due to existing statutory exemptions, categorical exclusions or previously completed analyses.
- **Endangered Species Act (ESA).** Agencies are directed to utilize existing regulations set forth in 50 C.F.R. § 402.05 to expedite or bypass consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service under the ESA.
- **Clean Water Act.** Agencies are directed to utilize emergency Army Corps permitting provisions promulgated pursuant to Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and Section 103 of the Marine Protection Research and Sanctuaries Act.

Potential Litigation Risks

While the EO highlights the administration's commitment to reducing regulatory barriers, project proponents should be wary of potential litigation risk. The administration's discretion extends only as far as congressional authorization, and the emergency provisions cited by the EO have not been tested.

Project investors and developers should look closely at the specific regulatory requirements and keep two issues in mind: scope of the emergency provisions and interaction with other federal, state and local laws.

First, the scope of the emergency provisions the EO references may not apply to the full range of projects enumerated in the EO or reduce the regulatory hurdles the administration hopes to remove. A few examples:

- **NEPA.** Under the Stafford Act, certain actions necessary to respond to emergencies and major disasters are exempt from NEPA, such as rendering assistance to an immediate threat to life and property, restoration of public facilities damaged by a natural disaster or removing debris from private lands following a natural disaster. As yet, this has not been applied to a public health

emergency or pandemic. Consequently, there is no firm legal precedent for invoking this exemption for Covid-19-related reasons.

- **ESA.** 50 C.F.R. § 402.05 does not waive ESA consultation requirements; rather, it allows for *informal* consultation in situations where emergency circumstances mandate the need for expedited consultation. And this "exemption" is temporary, not permanent; formal consultation is required as soon as practicable after the emergency is under control.
- **Army Corps Permitting.** Under 33 C.F.R. § 325.2(e)(4), the Corps may approve special processing procedures in "emergency situations" when standard permitting cannot be completed in time to foreclose "an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship …." Irrespective of whether Covid-19 and the associated economic effects qualify as an "emergency situation," these regulations still require the Army Corps to take reasonable efforts to receive comments on project applications from affected stakeholders and publish associated special procedures for doing so.

Separately, under 40 C.F.R. § 1506.11, CEQ can provide for "alternative arrangements" when agencies must take action having a significant environmental impact during emergencies.

However, this by no means waives NEPA requirements—"[a]gencies and the Council [on Environmental Quality] will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review." It remains unclear whether economic effects of the pandemic would be "immediate," rather than secondary, effects.

Second, large-scale infrastructure projects often involve significant coordination with nonfederal regulators pursuant to state and local laws. While this EO may reduce regulatory obstacles at the federal level, there is no guarantee of a concomitant state or local provision to complete the procedures in the EO.

Further, the EO does not address specific requirements under other statutes, such as the National Historic Preservation Act of 1966 and its state equivalents, that frequently apply as part of the federal review and authorization of infrastructure projects.

Ultimately, project proponents should exercise caution when relying on the federal government's push to avail itself to the limited emergency exceptions available under environmental laws and question whether accelerated federal permit reviews on the front end will result in headaches and protracted litigation on the back end. In addition, the long-term future of this EO, as with other executive actions, depends on the results of elections this November.

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