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## Infrastructure Series: Federal Agency Efforts to Streamline Permitting

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*This is the second issue of WilmerHale's 10-in-10 Infrastructure Series. In this series, our attorneys share insights on current and emerging issues affecting infrastructure project developers in the United States. Attorneys from various practice groups at the firm offer their take on issues ranging from permitting reform to financing to litigation, and share their insights from working with clients in a variety of infrastructure sectors, from water infrastructure to energy development to infrastructure development on tribal lands. Read [all issues](#) in this series and our other recent publications. This client alert was also published by [Law360](#).*

As discussed in last week's [issue](#) of WilmerHale's Infrastructure Series, the Trump Administration's Infrastructure Plan outlines a number of legislative reforms intended to streamline the permitting of infrastructure projects. In addition to legislative proposals, the Administration has taken a number of executive actions to streamline permitting. In this issue, we provide an overview and analyze the implications of the most significant of these efforts.

### **What has the Trump Administration said about streamlined permitting?**

President Trump has issued three Executive Orders that call for streamlined permitting for infrastructure.

- On January 24, 2017, days after taking office, President Trump issued Executive Order 13766 directing federal agencies to expedite environmental review and approvals for “high priority” infrastructure projects. This Executive Order established permitting reform as one of the Administration's top priorities.
- On March 28, 2017, President Trump issued Executive Order 13783 calling for immediate review of all agency actions that “potentially burden the safe, efficient development of domestic energy resources.”
- On August 15, 2017, Executive Order 13807 directed federal agencies to seek to complete environmental reviews within two years, to jointly issue “One Federal Decision” covering all individual agency decisions related to a particular project, and to issue all necessary permits or authorizations within 90 days.

In addition to these Executive Orders, the President discussed permitting reform in the 2018 State of the Union, setting a one- or two-year goal for federal permits for infrastructure projects.

### **How have agencies responded?**

In response to these directives, federal agencies are taking steps to review their permitting regulations and internal guidance and identify specific reforms that would create more efficient reviews.

**White House Council on Environmental Quality (CEQ).** On September 14, 2017, CEQ issued a [list of actions](#) it planned to take to implement Executive Order 13807 and to enhance and modernize the federal environmental review and authorization process. These actions include:

- Developing a framework for implementing “One Federal Decision”—along with the Office of Management and Budget and the Federal Permitting Improvement Steering Council (FPISC), which was established under Title 41 of the Fixing America's Surface Transportation Act (FAST-41);
- Coordinating with the FPISC, US Department of Transportation and US Army Corps of Engineers with regard to “high priority” infrastructure projects pursuant to Executive Order 13766;
- Reviewing its regulations under the National Environmental Policy Act (NEPA) to identify necessary changes and clarifications;
- Issuing guidance to simplify and accelerate the NEPA process; and
- Coordinating an interagency working group to identify impediments to efficient environmental reviews and permitting.

Implementation of these action items is underway. Some of the reforms already under consideration include expanding categorical exclusions and revisiting the idea of mitigated Findings of No Significant Impact. In addition, CEQ is working to clarify guidance to agency staff on certain issues, such as the sufficiency of public involvement and notice, cumulative impacts analysis, and the source and adequacy of information relied on in environmental reviews.

The CEQ list also indicates that reforms to other environmental reviews are on the table, including reviews under Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act and Section 404 of the Clean Water Act, which are often done concurrently with NEPA.

The CEQ list is very ambitious and will take a significant amount of time to implement. Meanwhile, the White House recently withdrew its nominee for CEQ chairperson. The lack of a confirmed CEQ chairperson will make implementation of CEQ's far-reaching reforms even more challenging.

**Federal Permitting Improvement Steering Council.** To date, the multi-agency FPISC or its member agencies have designated 37 infrastructure projects as “covered projects” under FAST-41. These projects range from natural gas pipelines to wind and solar generation facilities to transmission lines. The Federal Energy Regulatory Commission (FERC) is serving as lead agency for more covered projects than any other agency, with the Department of the Interior a close second. Covered

projects—which can be tracked online on the [Permitting Dashboard](#)—can benefit from several specific agency policies and tools to improve coordination of federal reviews, increase transparency and accountability, and increase predictability.

**US Environmental Protection Agency (EPA).** Reflecting Administrator Scott Pruitt's philosophy that “regulations are just supposed to make things regular,” EPA has proposed a standard, six-month time frame for all permit decisions by September 30, 2022. This objective was set forth in EPA's [Strategic Plan for FY 2018-2022](#), issued on February 12, 2018, which included a commitment to speed up the processing of permits and modifications with the intent of avoiding delays that impact construction of major infrastructure projects.

Infrastructure projects may require permits under the Clean Water Act or Clean Air Act. Clean Water Act permitting has been embroiled in disputes over the definition of “waters of the United States” (WOTUS) since EPA issued a new WOTUS rule in June 2015. On February 6, 2018, EPA [delayed](#) the applicability date of the WOTUS rule. Meanwhile, EPA will work on a narrower rule, which could streamline permitting simply by making a smaller universe of waterbodies subject to EPA permitting programs.

Regarding the Clean Air Act, EPA has issued two guidance memoranda intended to streamline permitting. On December 7, 2017, EPA issued [guidance](#) to establish that it would not “second guess” emissions projections that owners or operators of major stationary sources perform when they determine whether they need to obtain a Clean Air Act permit. On January 25, 2018, EPA issued [guidance](#) enabling “major sources” of air pollution to be reclassified as “area” sources. Because the latter are subject to less stringent pollution control standards, the guidance is consistent with the goal of streamlined permitting.

**US Department of the Interior.** On August 31, 2017, Interior Secretary Ryan Zinke issued Order 3355 calling for streamlined NEPA reviews by Interior Department bureaus. The Order establishes a one-year target for environmental impact statements (EISs), calculated from the issuance of a Notice of Intent to prepare an EIS. The Order also limits EISs to 150 pages, or 300 pages for “unusually complex projects.” These limits may only be exceeded with approval from an Assistant Secretary in coordination with the Solicitor.

Pursuant to Order 3355, Deputy Secretary David Bernhardt has been leading a departmentwide effort to improve NEPA reviews by establishing new best practices and exploring new categorical exclusions or revising existing ones. The Order also tasks each Assistant Secretary with identifying impediments to effective review of infrastructure projects and developing a plan to redress them; considering ways to facilitate review of major infrastructure projects; and identifying infrastructure projects that are fitting candidates for “One Federal Decision.”

- **Bureau of Land Management (BLM).** In a report dated September 27, 2017, BLM set forth a series of recommendations to address the directives in Order 3355. The recommendations are categorized into six themes: (1) improving the NEPA process; (2) leveraging data and technology; (3) expanding coordination and external engagement; (4) integrating effectively with other laws; (5) aligning internal business processes; and (6)

improving land use planning.

According to the report, implementing the recommendations will require legislative, regulatory and/or policy remedies and may take a matter of months or years. Among the recommendations are developing BLM guidance on how to elevate infrastructure project EISs for review, developing a memorandum of understanding with FERC and other agencies on roles and responsibilities on interagency infrastructure projects, and developing a process to routinely track costs of environmental reviews and authorizations for each EIS-level project.

While the BLM report states that it was developed by a team of BLM subject matter experts with input from a variety of stakeholders, it was not released publicly until this month. The report has now come under the scrutiny of several members of the House Committee on Natural Resources. In a February 22, 2018, letter to Secretary Zinke, Representatives Raúl Grijalva of Arizona, Alan Lowenthal of California and Donald McEachin of Virginia asked for more detail on the process that led to the report, the status of each of the recommendations and the rationale behind certain conclusions in the report. BLM has already begun to implement some of the recommendations in its report.

For example, on January 31, 2018, Brian Steed, BLM's Deputy Director for Policy and Programs, issued [Instruction Memorandum No. 2018-034](#), which updated BLM's oil and gas leasing policy in connection with land use planning and lease parcel reviews.

Under the updated policy, BLM eliminated the use of master leasing plans (MLPs). While the Obama Administration developed MLPs to encourage stakeholder input early in the planning process, the updated policy states that MLPs "created duplicative layers of NEPA review." The updated policy directs field officials not to initiate any new MLPs or complete ongoing MLPs, but to instead use resource management plans (RMPs) to guide leasing decisions going forward. The updated policy also clarifies that "the BLM will not routinely defer leasing when waiting for an RMP amendment or revision to be signed."

Regarding lease parcel reviews, the updated policy reduced the parcel protest period from 30 days to 10 days and created a 60-day deadline for the resolution of protests. BLM also encouraged state offices to use regional teams to facilitate timely protest resolution and ensure consistency among offices.

In addition, the new policy removed public participation requirements during the NEPA process for potential leases. While the previous policy stated that state and field offices "will" provide for public participation, the new policy states that they "may" provide for public participation during the NEPA process. As a result, interested groups, individuals and potentially affected property owners will need to be more proactive and vigilant about BLM leasing and NEPA activities.

- **Bureau of Ocean Energy Management (BOEM).** Interior's offshore regulator, the BOEM, is

also developing policies intended to streamline the permitting of offshore wind energy projects. On January 12, 2018, BOEM released new draft guidance intended to increase flexibility and efficiency in approving offshore wind project plans. Borrowing a concept from European offshore regulators, the draft guidance outlines a “Design Envelope” approach to Construction and Operations Plans for offshore wind projects.

Under the new guidance, developers would have the option to describe a “reasonable range of project designs,” such as a range of foundation types, turbine sizes, different candidate ports, and different options for installing and siting required transmission. The Design Envelope could also be used where a lessee intends to develop its lease in phases, by describing the reasonable parameters for later development phases. BOEM’s proposal is intended to allow maximum project design flexibility while minimizing the need for additional federal approvals. BOEM is soliciting comments on the proposal and intends to publish a final guidance document later this year.

**US Forest Service.** In January 2018, the Forest Service published an [Advance Notice of Proposed Rulemaking](#) announcing an effort to reform the agency’s NEPA regulations “with the goal of increasing efficiency.” The notice cited the increasing percentage of agency resources spent on fire suppression as one of the key factors behind the streamlining efforts. Some of the reforms the agency is contemplating include steps to “complete project decision making in a timelier manner, to improve or eliminate inefficient processes and steps, and where appropriate increase the scale of analysis and the amount of activities authorized in a single analysis and decision.”

The Forest Service sought public comment, which closed on February 2, 2018, regarding superfluous or outdated processes and analysis requirements; landscape-scale approaches that would facilitate restoration of National Forest System lands; new classes of categorical exclusions; and ways to expand and enhance coordination of reviews with other federal agencies, as well as state, tribal or local environmental reviews. The Forest Service will now consider the comments and develop revisions to its NEPA procedures in consultation with CEQ.

## Conclusion

We can expect that agencies will continue to work to implement the Administration’s priorities within their existing authorities, even in the absence of an infrastructure legislative package. These reform efforts present significant opportunities to remove unnecessary inefficiencies; they also carry some risk of litigation. Given limited agency resources and ambitious reform agendas, it may be a long time before these directives and reform efforts are fully implemented and can benefit specific projects. In the meantime, however, sponsors of complex infrastructure projects should leverage the Administration’s proposals and existing tools such as FAST-41 to help keep agencies on track and advocate for coordinated reviews to keep projects from languishing.

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