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## Infrastructure Series: Agencies Establish One Federal Decision Framework for Project Reviews

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*This is the seventh 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. This client alert was also published by [Law360](#).*

This week, a dozen federal agencies signed a Memorandum of Understanding (MOU) committing to “a more predictable, transparent, and timely Federal review and authorization process for delivering major infrastructure projects.”<sup>1</sup> Under the MOU, federal agencies with responsibilities to review or authorize infrastructure projects commit to a number of policies intended to create a more coordinated and streamlined federal review process. This includes:

- **One Federal Decision.** Developing a single Environmental Impact Statement (EIS) and Record of Decision (ROD) to document all required agency reviews for proposed infrastructure projects.
- **Target Deadlines.** Issuing all project approvals within 90 days of the issuance of the ROD, with the goal of completing the permitting process within two years of publication of the Notice of Intent (NOI).
- **Permitting Timetable.** Establishing—and complying with—a coordinated permitting timetable with target deadlines for intermediate and final milestones that facilitate meeting the two-year target deadline for permit approvals.
- **Concurrent Reviews.** Completing all required federal reviews concurrently rather than sequentially.
- **Dispute Resolution.** Elevating interagency disputes for quick resolution.

The MOU implements the targets and policy directives in [Executive Order 13807](#) and builds on Congress's similar efforts to streamline federal environmental reviews through [Title 41](#) of the Fixing America's Surface Transportation Act (FAST-41).

**Which projects are covered under the MOU?**

The MOU applies to all “major infrastructure projects,” as that term is defined in Executive Order 13807. This covers projects in a broad range of sectors—from energy generation to electricity transmission lines and pipelines to water resources projects. A project in any of these sectors would qualify as a major infrastructure project if it requires multiple federal authorizations and the preparation of an EIS.<sup>2</sup> In addition, the project sponsor must show “reasonable availability” of funds to complete the project.<sup>3</sup>

### **Which types of reviews are included?**

The MOU applies to all federal environmental reviews or authorizations required for the project, including review and consultation obligations under the National Environmental Policy Act (NEPA), National Historic Preservation Act and Endangered Species Act (ESA). In the MOU, agencies commit to review their internal regulations, including NEPA regulations, and make any necessary modifications to facilitate the implementation of a one federal decision framework. This could result in broader reforms to underlying environmental regulations. For example, the Department of the Interior (DOI) has indicated that as part of its implementation of the MOU, it would look to reform the ESA and “create regulations to better reflect the intent of the original legislation.”<sup>4</sup>

### **How does this relate to previous streamlining efforts?**

The MOU builds upon previous efforts to better coordinate federal reviews and streamline the complex federal process. The MOU reaffirms many of the statutory requirements in FAST-41, including the requirement to designate a federal lead and develop a coordinated project schedule for each infrastructure project, the responsibilities of cooperating agencies, and the requirement to complete reviews concurrently where possible. The MOU builds upon these requirements with a number of significant new commitments, including:

- A commitment to comply with the permitting timetable set by the lead agency;
- A commitment to prepare one federal EIS and ROD in order to facilitate better coordination;
- A commitment that agencies will come together to provide feedback at specific concurrence points to facilitate coordinated reviews and a single decision record;
- For FERC-led projects, a commitment that each agency whose authorization is required will participate as a cooperating agency at FERC's invitation, to minimize duplicative reviews and the potential for delays.

### **What impact will this MOU have on project reviews?**

The MOU includes a number of important principles that would improve permitting efficiency and coordination. The ultimate impact of the MOU on pending or newly proposed projects will depend to a large extent on its implementation. A number of important issues will have to be addressed as the first projects start going through this process, including:

- ***Refining the Two-Year Target.*** Under the MOU, the two-year target permitting timeline begins with the publication of the NOI. The MOU further provides that the lead federal agency will publish the NOI only after it consults with cooperating agencies and determines

that the project proposal is sufficiently developed. However, there are currently no clear or consistent standards regarding when data is sufficient to complete agency review. As agencies implement the MOU, it will be important to establish a process for coordinating agency decisions regarding the adequacy of the data presented, as well as the ability to quickly elevate and resolve disputes related to the adequacy of data or need for additional data.

- ***Voluntary Nature of the Agreement.*** At the end of the day, the commitments in this MOU are not mandated by statute. In fact, in some cases, it would take careful analysis to reconcile the target dates and the single decision framework with existing statutes and regulations. For example, the Forest Service pre-decisional objection process requires the publication of a draft ROD to provide the public an opportunity to review it and file formal objections with the agency before the ROD is finalized. Lead agencies would have to carefully design the approach to a given project to address agency-specific processes such as this while preserving the one federal decision framework. In addition, because there's no statutory mandate to adhere to the permitting timetable, there will be a need for continued leadership engagement and effective communication and training of agency permitting staff.
- ***Ensuring NEPA Adequacy.*** Because there have been no changes to the underlying statutory requirements, each agency will have to determine that the final EIS and ROD meet its respective statutory obligations, including the “hard look” standard under NEPA. This can be especially tricky where agencies like the Army Corps of Engineers have a different standard of analysis (i.e., the “least environmentally damaging practicable alternative”). The lead agency would have to carefully manage the process of coordinating input from all agencies to ensure that the final NEPA document and ROD meet each agency's respective statutory and regulatory requirements. The MOU itself recognizes this challenge and provides that the lead agency will be responsible for ensuring that “the final EIS (FEIS) includes an adequate level of detail to inform decisions by all agencies with review or authorization decision responsibilities for the proposed project.”
- ***Addressing Limited Agency Resources.*** Successful implementation of the coordination process and ambitious timelines outlined in the MOU will require significant resources. This can be addressed in part by using available agency authorities to allow cost-sharing, retain third-party consultants or (in some cases) use applicant-prepared NEPA documentation. But much of the coordination and review responsibilities will remain with agency staff; therefore, it will be important to have dedicated agency staff.

### **What's next?**

Over the coming months, agencies will work on developing appropriate internal policies and procedures to comply with the MOU. Each agency has committed to transmit an implementation plan to the Council on Environmental Quality and Office of Management and Budget within 90 days. Much of this work is already underway. For example, DOI has established a project permitting task force dedicated to streamlining its permitting process. The agency is also in the process of reviewing NEPA, ESA, and other environmental regulations and policies to identify necessary

reforms. These implementation plans, along with the on-the-ground experience of the first projects that avail themselves of the new one federal decision approach will be illustrative of how the newly streamlined permitting process will work in practice going forward.

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<sup>1</sup> [Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807](#) at A-1.

<sup>2</sup> E.O. 13807 of August 15, 2017, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> U.S. Department of the Interior Press Releases, “Secretary Zinke Committed to President Trump’s Latest Infrastructure Initiative” (April 9, 2018).