ENVIRONMENT & NATURAL RESOURCES

WILL STREAMLINING NEPA IMPLEMENTATION WORK?

Among federal regulatory regimes, few cry out for improvement as much as the environmental review process mandated by the National Environmental Policy Act of 1969 (NEPA). The Trump administration has taken major steps to make the process less burdensome and more efficient. Whether these steps succeed going forward is an open question, though, with federal courts most likely to have the final say.

NEPA requires federal agencies that grant approvals for development projects—infrastructure such as highways, bridges, and power plants, as well as commercial, industrial, mineral, and oil and gas—to determine whether a project will have a significant environmental impact. If this determination is positive, the agency must prepare a detailed analysis known as an environmental impact statement (EIS).

The problem is that implementing NEPA has become complex, long, and costly, with extended delays common. A permit review, for example, typically takes five to seven years (and sometimes 10 or more), while an EIS has many moving parts and often costs $2 million to $3 million. The Empire State Building, which opened in 1931, by contrast, was *completed* in just one year and 45 days.

But that's not all: Once a project is approved, it's usually challenged in federal court. Cases can last three to four years, meaning that the project developer must be prepared to spend millions and often wait at least a decade before breaking ground—and that's if the challenge is rejected. And if the project actually survives this gauntlet, the sheer passage of so much time could jeopardize its financing or render it out of sync with changing market conditions.

The Trump administration has acted aggressively to streamline the NEPA process and reduce its complexity. Regardless of one's political views, it's hard to dispute that this is a desirable goal.

"I'm hard-pressed to think of another administration in the last 40 years as focused on fixing the NEPA approval process," says R. Timothy McCrum, a partner in Crowell & Moring's Environment & Natural Resources Group and a former attorney-advisor with the Energy and Resources Division of the Solicitor's Office at the U.S. Department of the Interior. "Cutting the time and costs of a NEPA review is something everyone should agree on."

EXECUTIVE ORDER 13807: THE NEW PLAYBOOK

On August 15, 2017, the president issued Executive Order 13807, the first in a series of major steps taken by the administration to streamline the NEPA process.

The order laid out how the administration intended to bring greater rigor to the process, specifically for infrastructure. Among its key directives:

- Establishing a "One Federal Decision" system in which a designated federal agency leads an infrastructure project through the process and coordinates the participation of the other agencies involved. Once the lead agency issues a centralized Record of Decision that includes the decisions of all agencies, all authorization decisions must be completed within 90 days.
- Slashing the time for reviews and authorizations to not more than an average of approximately two years.
- Creating a performance accountability process to track major infrastructure projects.

TRENDS TO WATCH

McCrum expects several NEPA trends to play out starting

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in 2019 and, given the amount of time even an expedited process should consume, in subsequent years.

- **Shorter approval times.** In McCrum's experience, the most important factor in obtaining agency approval of a project is the agency's level of commitment to the project—the stronger the commitment, the more likely the approval. "Because most federal agency leaders are committed to implementing Trump's agenda, they'll succeed in reducing approval times," he says. "We're already seeing indications of this at the Department of the Interior, where the commitment runs very high."

  The caveat, of course, is that the threat of anti-project litigation is as great as ever. Project developers can help reduce this threat in two ways. First, they should engage outside counsel experienced in working with agencies and planning for potential litigation. Second, they should make it a point during the review process to emphasize their project's economic benefits in terms of jobs created, spending generated, taxes raised, etc.

- **Turning a traditional argument on its head.** Agencies have often rationalized their long review times in part by saying that they strive to make the environmental impact statement as litigation-proof as possible. Skeptics see this as a convenient excuse for bureaucratic foot-dragging.

  McCrum believes that project opponents will use this rationale against the agencies as approval times shorten. "They can go to court and say that because the agency rushed the review in its eagerness to meet the administration's guidelines, it failed to subject the project to an appropriate level of scrutiny. If courts agree, they could force the administration to backtrack, on the flimsy-but-historical premise that being thorough means taking longer."

  This scenario, he adds, highlights the necessity for project supporters to work closely with agencies to build a robust case for project approval.

- **Increased litigation.** While the administration may well succeed in accelerating NEPA reviews, its efforts will likely compel project opponents—particularly non-governmental organizations, which are skeptical of NEPA reform—to litigate more frequently and aggressively.

  "Thousands of administrative appeals and federal court judicial review actions have been brought under NEPA since the law took effect in 1970," McCrum says, "and there's no reason to expect the volume of these challenges to decline. Federal courts will ultimately decide whether the administration's efforts prevail."

  State courts will weigh in, as well, most probably in California, whose Environmental Quality Act is the nation's toughest state-level NEPA equivalent. Richard McNeil, a partner in Crowell & Moring's Environment & Natural Resources Group, notes, "There's certainly a sense among many California NGOs that they have a heightened obligation to challenge Trump's environmental policies. If the federal government won't protect the environment, this thinking goes, then challenges brought under state laws may be necessary to fill the void."

IT'S DIFFERENT IN CALIFORNIA

While several states have their own equivalents to the National Environmental Policy Act, California's stands out for its wider scope and stricter standards.

The California Environmental Quality Act mandates that every state and local agency action (including approvals of private-party development) adequately consider environmental protection. CEQA applies to all public actions (i.e., not just public projects), and requires state and local agencies to adopt all feasible mitigation measures to reduce or eliminate the environmental impacts of proposed projects—a step not required of federal agencies under NEPA.

"Because of CEQA, project developers must play by two different sets of rules in California," says Crowell & Moring's Richard McNeil. "The outcome of CEQA review could be very different from the outcome of NEPA review of the same project, which can cause big headaches. And opponents of projects could bring simultaneous litigation in federal and state courts, where cases can have very different lengths and results."

The Trump administration's efforts to streamline environmental reviews may have met its match in California, McNeil adds. "Given the extent of CEQA's procedural requirements and the state's pro-environment stance, there'll be a limit to how successful federal streamlining can be in moving forward proposed projects subject to both NEPA and CEQA."