



New White House Guidance and Multi-Agency MOU Continue Push to Expedite Environmental Reviews and Permitting for Major Infrastructure

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The Office of Management and Budget and Council on Environmental Quality, on March 20, 2018, issued a Memorandum instructing federal agencies how to implement the “One Federal Decision” policy established in Executive Order 13807 (the “Memorandum”). (Click [here](#) for an overview of Executive Order 13807.) In turn, on April 9, 2018, 12 federal agencies executed a Memorandum of Understanding (“MOU”) to implement this policy. These efforts are intended to streamline National Environmental Policy Act, Endangered Species Act Section 7, and other environmental reviews and permitting decisions. They represent the most recent attempt, spanning multiple Presidential administrations, to eliminate inefficiencies and delays associated with these environmental reviews and authorizations perceived to impede infrastructure development.

The Memorandum and MOU outline how signatory agencies will coordinate to set project timelines and prepare joint environmental impact statements (“EISs”) and records of decision (“RODs”). Replete with language like “goal” and “as soon as practicable,” the MOU attempts to create firm expectations for agencies while preserving agency flexibility for especially complex projects. For example, the Memorandum states that “[w]hile the actual schedule for any given project may vary based upon the circumstances of the project and applicable law, agencies should endeavor to meet the two-year goal established in E.O.

13807.” Nonetheless, the stated objectives and procedures are welcome steps to keep infrastructure projects moving.

A host of energy, transportation, utility, water, and other projects could benefit from more efficient environmental reviews under the MOU. Specifically, the MOU applies to “major infrastructure projects” in the above sectors requiring “multiple authorizations by Federal agencies” and for which the lead federal agency will prepare an EIS. An important additional criterion is a sufficient demonstration by the project proponent of adequate funding to construct the project if and when authorized. As the Memorandum instructs “each federal agency with responsibility to conduct environmental reviews” for major infrastructure projects to enter into the MOU, signatory agencies include the Advisory Council on Historic Preservation, Army Corps of Engineers, Department of Agriculture, Department of Commerce, Department of Energy, Department of Homeland Security, Department of Housing and Urban Development, Department of Interior, Department of Transportation, Environmental Protection Agency, Federal Energy Regulatory Commission, and the Federal Permitting Improvement Steering Council (created under separate authorization to facilitate interagency reviews).

For individual projects covered by the MOU, signatory agencies will coordinate to establish a single “Permitting Timetable” identifying project milestones and interim and final deadlines for environmental reviews and permitting decisions. Updated quarterly and posted on the [Federal Permitting Dashboard](#), for most projects these Permitting Timetables will establish a schedule of no more than two years for the completion of environmental reviews. The Memorandum recommends that signatory agencies meet this two year schedule by allowing fourteen months for scoping and preparation of a draft EIS, eight months for public comment

and preparation of a final EIS, and publication of the final ROD within two months of the final EIS. These are very aggressive targets for the most complex projects. Yet, these deadlines are not ironclad. The MOU directs signatory agencies to meet this two year schedule and the Permitting Timetable for project milestones to the “maximum extent practicable.” Additionally, the two year schedule begins only upon publication of the notice of intent (“NOI”) to prepare an EIS. Aimed at closing a loophole in prior streamlining guidance, the MOU prescribes when the NOI should occur – “as soon as practicable” after determining a project qualifies as a major infrastructure project and after consultation is “sufficiently developed” to permit scoping and public comment.

In addition to these Permitting Timetables, project proponents will also benefit from signatory agency commitments under the MOU to coordinate on joint EISs and RODs. Under the MOU, the lead agency conducting an environmental review will coordinate with other agencies to prepare and publish a single EIS with sufficient information to inform decisions from all necessary federal agencies. Determination of the lead agency is a key step, as that agency subsequently yields considerable control over the process and decisions. The MOU specifies how the lead federal agency and other cooperating agencies will conduct concurrent environmental reviews and secure written buy-in from other cooperating agencies on key “concurrence points” for the environmental review, including designation of the purpose and need, alternatives to be carried forward for analysis, and the preferred alternative. Per the MOU, the coordinated NEPA analysis often will allow lead agencies to publish a single ROD for all federal agencies to support any necessary permitting decisions. Federal agencies then are directed to issue all permitting decisions within 90 days of the issued ROD.

Dovetailing on recent other Executive Branch streamlining efforts, the MOU will help prevent agency backtracking on prior decisions and provide consistent, transparent, and expeditious timelines for permitting decisions among various agencies. However, the MOU's various exceptions to these procedures, many of which are at the lead agency's discretion, have the potential to reduce the streamlining benefits intended for project proponents. The extent to which these high-level commitments percolate to agency staff and field offices will be key to successful implementation. The ever-present risk of litigation and associated need for a robust administrative record to defend the ROD also will remain key concerns as projects proceed on an expedited basis. Thus, despite the MOU's welcome provisions, project proponents should continue to plan for proactive agency engagement to keep projects on track.

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