

# Trump Orders Use of Emergency Authority to Expedite Infrastructure Projects

JUNE 10, 2020

Last Thursday, President Trump issued an Executive Order (Order) entitled *Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities*, which expands on a series of initiatives by the Trump Administration to address the economic impacts of COVID-19. The Order is intended to expedite infrastructure projects by requiring agencies to take "all reasonable measures to speed infrastructure investments." Such "reasonable measures" include exercising emergency statutory provisions in the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Water Act (CWA), and other laws to bypass environmental procedural requirements. In addition to infrastructure, transportation, and civil works projects, the Order applies to energy, environmental, and natural resources projects on federal lands.

The Order directs federal agencies to use all relevant emergency and other authorities to expedite work on the following:

- **Transportation Infrastructure Projects:** All authorized and appropriated highway and other infrastructure projects under the oversight of the Secretary of Transportation.
- **Civil Works Projects with the Army Corps of Engineers:** All authorized and appropriated civil works projects that are within the authority of the Secretary of the Army.
- **Infrastructure Projects on Federal Lands:** All authorized and appropriated infrastructure, energy, environmental, and natural resources projects on federal lands managed by the Department of Defense, the Department of the Interior, and the Department of Agriculture.

Due to the state of emergency as a result of the pandemic, the Order also directs agencies to invoke specific emergency authorities under the NEPA, ESA, CWA, and other laws to bypass or shorten environmental regulatory procedures to avoid "unnecessary regulatory delays" that could hamper a more expedient economic recovery, including the following:

- **NEPA:** The Order directs agencies to utilize the emergency regulations and procedures under NEPA, stating that NEPA accommodates "significant environmental impacts without observing the regulations" by allowing agencies to consult with the Council on Environmental Quality (CEQ) and develop "alternative arrangements" in emergency circumstances. Alternative provisions that should be considered in connection with the emergency procedures

include other statutory exemptions, categorical exclusions, analyses that have already been completed, and concise and focused analyses.

- **ESA:** The Order instructs agencies to use the ESA regulation on consultations in emergencies set forth in 50 C.F.R. § 402.05. Under the Order, the U.S. Fish and Wildlife Service must be available to consult with federal agencies and to take other prompt and appropriate action concerning the application of the ESA's emergency regulations.
- **USACE:** The Order directs agencies to use emergency treatment permitting provisions pursuant to the regulations and nationwide permits promulgated by USACE or jointly with the Environmental Protection Agency (EPA), pursuant to Section 404 of the CWA, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection Research and Sanctuaries Act of 1972.
- **Other Laws:** The Order calls on agencies to review and exercise use of all statutes, regulations, and guidance documents that may provide for emergency or expedited treatment (including waivers, exemptions, or other streamlining) with regard to agency actions pertinent to infrastructure, energy, environmental, or natural resources matters.

The Order requires the relevant agencies to prepare and submit summary reports identifying (1) all projects that have been expedited under the Order; and (2) any planned or potential actions to facilitate economic recovery that may be subject to the emergency authorities prescribed by the NEPA, ESA, CWA, or other authorities as discussed in the Order. Such reports must be submitted to the Office of Management and Budget (OMB), the Assistant to the President for Economic Policy, and the CEQ within 30 days of the Order and every 30 days thereafter throughout the duration of the COVID-19 national emergency. It is likely that these summary reports will provide information for environmental groups and other potential plaintiffs seeking to challenge expedited work conducted pursuant to the Order.

The June 4<sup>th</sup> Order comes on the heels of President Trump's Executive Order issued on May 19, 2020, the *Executive Order on Regulatory Relief to Support Economic Recovery*, which instructs agencies to permanently or temporarily rescind, modify, waive, or provide exemptions from regulations and other requirements that may inhibit economic recovery. Agencies are further directed to:

- identify regulatory standards that may inhibit economic recovery and take appropriate action, including by issuing proposed rules as necessary to rescind, modify, waive, or exempt persons or entities from those requirements;
- exercise temporary enforcement discretion or grant extensions of time in enforceable agreements with respect to regulatory standards that may inhibit economic recovery;
- utilize to the fullest extent possible any emergency authorities that are available or previously implemented by the administration to support economic development;
- accelerate programs designed to provide compliance assistance for regulated entities with regard to pre-enforcement rulings;
- consider the list of principles of fairness set forth in the May 19<sup>th</sup> Order in administrative enforcement and adjudication, and revise agency procedures and practices in light of those principles; and
- evaluate whether any of the temporary regulatory standards or other regulatory flexibilities implemented pursuant to the May 19<sup>th</sup> Order, if made permanent, would promote economic recovery.

### **How Does This Affect My Project?**

Many legislators and environmental organizations have condemned the Executive Orders as an attempt to use COVID-19 to justify the rollback of environmental protections and fast-track environmentally destructive policies. Accordingly, businesses with infrastructure, transportation, or civil works projects or energy, environmental, or natural resource projects on federal land should recognize that, while the Order may offer an opportunity to expedite certain aspects of a project, there is a likelihood that the Order and work expedited thereunder will be challenged in court. Further, depending on the specific statutory program, the emergency procedures may not offer a permanent waiver of legal requirements under the NEPA, ESA, or CWA for the full duration of the project. Thus,

pursuing emergency relief under the Order may open the project to challenges in the future, which may ultimately offset benefits gained by pursuing emergency relief.

Please do not hesitate to contact Eleni Kouimelis (312-558-5133, [ekouimel@winston.com](mailto:ekouimel@winston.com)), Matt Walker (312-558-7514 [mawalker@winston.com](mailto:mawalker@winston.com)), or your Winston relationship attorney if you have any questions.

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