



# Trump Executive Order: Environmental Streamlining or Political Quagmire?

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On June 4, 2020, President Trump signed an executive order to provide federal agencies the foundation to speed up environmental permitting in the wake of COVID-19. While the move was lauded by many, others view the executive order as an impermissible use of executive power to circumvent environmental protections. The Center for Biological Diversity has already announced its plans to pursue litigation challenging the EO, alleging violations of the Endangered Species Act.

Executive Order 13927, “Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities,” (EO) was issued pursuant to the National Emergencies Act and directs agencies to use existing authority to speed up environmental review processes to alleviate the economic emergency caused by COVID-19.

Below we provide an overview of the EO, as well as a brief discussion of potentially relevant underlying authority for expeditious environmental review.

## What Activities are Targeted by the EO?

The EO specifically identifies the following activities and statutory frameworks as being important to accelerate in the wake of the economic repercussions of COVID-19:

- Transportation infrastructure projects;
- Civil works projects within the jurisdiction of the U.S. Army Corps of Engineers (Corps);
- Delivery of infrastructure and other projects on federal lands;
- National Environmental Policy Act emergency regulations and procedures;
- Endangered Species Act emergency consultation procedures;

- Emergency regulations and nationwide permits under the Clean Water Act (CWA), Rivers and Harbors Act, and Marine Protection Research and Sanctuaries Act; and
- Other authorities providing for emergency or expedited treatment of infrastructure improvements.

President Trump declared COVID-19 to constitute a national emergency under the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, via Proclamation 9994 on March 13, 2020. According to the EO, between the March 13, 2020 declaration of emergency and May 23, 2020, and as a result of the measures undertaken to mitigate the impacts of the virus, the unemployment rate reached nearly 15 percent and more than 41 million Americans filed for unemployment. The EO states that intervention in the form of quelling unnecessary regulatory delay is important to prevent a “protracted economic recovery with persistent high unemployment.”

### **What Does the EO Direct Federal Agencies to Do?**

In general, and with respect to each statutory construct or infrastructure type described therein, the EO directs the relevant agency or agency head (e.g., the Corps, the U.S. Fish and Wildlife Service, the Secretary of Transportation, etc.) to:

- Identify planned or potential projects to facilitate the nation’s recovery that may qualify for emergency treatment under existing law;
- Use all emergency or other authority available to the agency to expedite processing projects;
- Produce a summary report of projects that have been expedited within 30 days of the date the EO was issued; and
- Produce a status update on project permitting within 30 days of the initial summary report.

### **Review Under the National Environmental Policy Act (NEPA)**

The EO notes that the Council on Environmental Quality (CEQ) has built flexibility into its regulations and policies with respect to responding to emergency situations and encourages use of such regulations to expedite environmental review. CEQ regulations found at 40 C.F.R. 1506.11 authorize alternative arrangements for NEPA compliance in the case of emergencies (CEQ Emergency Regulations). Neither the CEQ Emergency Regulations nor the broader NEPA regulations define the term “emergency.”

CEQ has issued guidance on NEPA review requirements in the case of emergencies, which provides a step-by-step process for determining the appropriate path forward for NEPA environmental review of all actions proposed in response to an emergency situation. The CEQ Emergency Guidance clarifies that alternative arrangements will be based on emergency-specific facts and circumstances, that NEPA compliance is not waived during the emergency, and that any alternative arrangement for compliance may be subject to judicial review of a final agency action.

According to CEQ’s list of emergency NEPA arrangements, since 1980 there have been 47 alternative arrangements for NEPA compliance. These alternative arrangements appear to primarily address situations where a specific action was necessary to respond to a site-specific emergency (e.g., stabilizing the structural elements of a historic building to prevent collapse and potential asbestos exposure while the agency completed the EIS on the underlying renovation).

### **Review Under the Endangered Species Act (ESA)**

When discussing the ESA, the EO cites directly to 50 C.F.R. 402.05 (Emergency Consultation Regulations). This provision allows the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) to conduct an expedited consultation under section 7(a)(2) of the ESA where emergency necessitates. The Services' emergency consultation provision applies to situations involving acts of God, disasters, casualties, and national defense or security emergencies, among other things.

### **Review Under the Clean Water Act (CWA) and Other Statutes Under Corps Jurisdiction**

The EO cites to unnamed regulations as providing the Corps the authority to expedite permitting under section 404 of the CWA, section 10 of the Rivers and Harbors Act (RHA), and section 103 of the Marine Protection Research and Sanctuaries Act (MPRSA). The EO directs the heads of all agencies to use available Corps emergency permitting provisions to facilitate the economic recovery of the nation and to identify planned or potential actions to facilitate economic recovery that may be subject to emergency treatment.

Corps regulations found at 33 C.F.R. § 325.2(e)(4) contain the agency's emergency permitting procedures. As described in the preamble to the 2017 CWA nationwide permits (NWP), the Corps' emergency permitting procedures are to be used when the emergency is not covered by an NWP or regional general permit issued under CWA section 404. Under the regulations, the Corps' division engineers are authorized to approve special processing procedures in emergency situations. Here, an "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. *Id.* In addition to the Corps' emergency permitting regulations, several NWPs contemplate covering emergency maintenance and other activities.

### **Expeditious Processing of Approvals Relating to Transportation Infrastructure Projects**

The EO directs the Secretary of Transportation to use all relevant emergency and other authorities to expedite work on and completion of authorized and appropriated highway and other transportation infrastructure projects within the jurisdiction of the Secretary.

The EO sections on expediting delivery of transportation infrastructure and civil works projects and projects on federal lands do not cite to any particular authority for emergency authorizations or review. However, there are a number of provisions potentially relevant to transportation. Two examples include:

- Title 41 of the Fixing America's Surface Transportation Act (FAST-41), which was enacted in 2016 to improve the timeliness and predictability of federal environmental review and authorization for certain infrastructure projects across a variety of sectors; and
- Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), which was enacted in 2012 and provides funding for surface transportation programs across the country and for which the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and the DOT amended their regulations in 2013 to adopt a NEPA categorical exclusion for emergency actions (78 Fed. Reg. 11593 (Feb. 19, 2013)).

### **Civil Works Projects Within the Purview of the Corps**

Similar to the EO directive relating to transportation infrastructure projects, EO section 4 directs the Secretary of the Army to use all relevant emergency and other authorities to expedite work on and completion of all authorized and appropriated civil works projects within the jurisdiction of the Secretary.

The EO does not specifically name any underlying authority; however, there are several mechanisms through which expedited processing might occur. For example, civil works projects are eligible for coverage on the FAST-41 permitting dashboard, which currently lists several civil works projects.

### **Delivery of Infrastructure Projects on Federal Lands**

The EO directs the Secretaries of Defense, Interior, and Agriculture to use relevant emergency and other authorities to expedite work on and completion of authorized and appropriated infrastructure, energy, environmental, and natural resource projects on federal lands. The statutes governing federal lands do not appear to have specific statutory or regulatory provisions authorizing expedited approvals of projects on federal lands; however, use of any of the above-referenced statutory provisions, including those relating to ESA section 7 consultation or NEPA, may be available, where applicable.

### **What Does This Mean for Your Projects?**

While there are a number of mechanisms through which a project proponent might receive expedited approvals on the basis of an emergency, it is not clear that any of the emergency procedures and provisions explicitly contemplate the use of expedited or alternative permitting or approval where the emergency is limited purely to economic effects. Further, those projects availing themselves to this EO may incur additional scrutiny from third-parties that oppose the project and/or the EO itself. Project proponents should work with their counsel to identify potentially applicable mechanisms for expeditious processing of required federal approvals and to help advance recommendations to the relevant agency where appropriate.