

Developments in Federal
and State Law

Michael B. Gerrard
Editor


LexisNexis™

ENVIRONMENTAL
LAW IN
NEW YORK

ARNOLD & PORTER KAYE SCHOLER LLP

Volume 29, No. 01

January 2018

Environmental Reviews for Infrastructure Projects in the Trump Era

Edward McTiernan, Ethan G. Shenkman, and Michael B. Gerrard

IN THIS ISSUE

Environmental Reviews for Infrastructure Projects in the Trump Era..... 1

Revisiting *RCRA Endangerment Claims: A New Way to Regulate Point Source Discharges*..... 5

LEGAL DEVELOPMENTS 6

◆ AIR QUALITY 6

◆ ASBESTOS..... 7

◆ ENERGY 7

◆ HAZARDOUS SUBSTANCES..... 8

◆ LAND USE..... 8

◆ NOISE..... 10

◆ OIL SPILLS & STORAGE..... 10

◆ SEQRA/NEPA 11

◆ SOLID WASTE 13

◆ TOXIC TORTS..... 13

◆ WATERS..... 13

◆ WILDLIFE AND NATURAL RESOURCES..... 14

NEW YORK NEWSNOTES..... 14

WORTH READING..... 17

UPCOMING EVENTS..... 17

In early September 2017, elected officials from New York and New Jersey met at the White House with President Trump, senior White House advisers, and Transportation Secretary Elaine Chao to discuss the Gateway project, a major infrastructure project that would modernize and increase the capacity of rail service between New York and New Jersey, including by building a

new, two-track tunnel under the Hudson River.¹ The September meeting reportedly focused on high-level issues regarding the project’s funding, but even once that crucial issue is resolved, the project likely faces years of coordinated federal and state review. And the Gateway project is not alone. It is one of many multi-agency infrastructure projects in the pipeline in the New York City metropolitan area—not to mention multitudes of projects around the state and country—that must navigate environmental review and permitting under the National Environmental Policy Act (NEPA) and an array of other federal and state statutes.

President Trump, like his predecessors, is seeking to streamline federal environmental review and permitting of major infrastructure projects. This article discusses the steps the Trump administration has taken to expedite these processes.

Before Trump

NEPA was signed into law by President Richard Nixon on January 1, 1970,² ushering in the now-familiar requirement that agencies take a “hard look” at the environmental impacts associated with major federal actions. Since then, the environmental assessment process has expanded, and the mean time between the notice of intent to prepare an environmental impact statement (EIS) and the notice of availability of a final EIS presently stands at approximately five years.³ As a result, Congress and the executive branch have engaged in numerous reform efforts to expedite and streamline the NEPA process.

¹ Shane Goldmacher & Patrick McGeehan, *Hudson Rail Tunnel Is Focus of Meeting Between Trump and State Officials*, N.Y. TIMES, Sept. 7, 2017, <https://www.nytimes.com/2017/09/07/nyregion/trump-gateway-hudson-tunnel.html>; GATEWAY PROGRAM, <http://www.gatewayprogram.org/index.html> (last visited Oct. 23, 2017); *The Gateway Program*, AMTRAK, <https://nec.amtrak.com/content/gateway-program> (last visited Oct. 23, 2017).

² Pub. L. No. 91-190, 83 Stat. 852.

³ See *NAEP Annual NEPA Report – 2015*, NAT’L ASS’N ENVTL. PROF’LS, <http://www.naep.org/nepa-2015-annual-report> (last visited Nov. 13, 2017) (based on final EISs made available in 2015).

In 2011, President Obama issued a memorandum on “Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review,” which led to development of the Federal Infrastructure Projects Permitting Dashboard that tracks major infrastructure projects through the review and permitting process, including New York’s replacement of the Tappan Zee Bridge. In subsequent years, the reform efforts continued, resulting in an Obama executive order,⁴ reports and recommendations from the Council on Environmental Quality (CEQ),⁵ a multi-agency how-to guide for synchronizing federal review processes,⁶ and enactment of the Fixing America’s Surface Transportation Act of 2015 (the FAST Act).⁷ The FAST Act included new reforms for reviews of surface transportation projects,⁸ which were already subject to streamlining efforts under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005.⁹ The FAST Act also included streamlining provisions that apply to a broader spectrum of infrastructure projects, now dubbed “FAST-41” projects.¹⁰

The FAST Act focused on expediting infrastructure projects by creating a Federal Permitting Improvement Steering Council (FPISC) with an executive director to facilitate coordinated reviews of “covered projects,” codifying requirements for the federal permitting dashboard to track progress and increase transparency, and requiring use of “best practices” for impact assessment and environmental permitting across all federal agencies.¹¹

In September 2016, the FPISC executive director initially designated 34 projects that would be subject to the FAST Act’s

coordination requirements.¹² They included two post-Superstorm Sandy resiliency initiatives in New York and New Jersey: the East Side Coastal Resiliency project in New York City¹³ and the Hudson River Project: Resist, Delay, Store, Discharge in Hoboken.¹⁴

In January 2017, just before leaving office, the Obama administration issued detailed FAST-41 implementation guidance,¹⁵ as well as Recommended Best Practices and Performance Schedules.¹⁶ In addition, FPISC posted a comprehensive inventory of all federal licenses, approvals, permits, and other authorizations potentially relevant to covered projects—a useful checklist for environmental practitioners.¹⁷

Trump’s Executive Orders on Infrastructure Review

After inauguration, President Trump immediately took on the issue of environmental reviews that he said “routinely and excessively delayed” infrastructure projects.¹⁸ One of his first executive orders, “Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects,” issued on January 24, 2017 (the “January EO”), required the CEQ chairperson to determine—either on her own initiative or at the request of a governor or federal agency head—whether an infrastructure project qualified as “high priority,” and to oversee the development of expedited review procedures for such projects. The order did not, however, explain how this new initiative would be integrated with the FAST Act. Nevertheless, between February and August 2017, six governors requested designation of projects in their states or territories as high priority.¹⁹

⁴ Exec. Order No. 13604, 77 Fed. Reg. 18887 (Mar. 28, 2012).

⁵ See Alan Kovski, *White House Council Issues Draft Handbook to Speed California Infrastructure Projects*, [2013] Daily Env’t Rep. (BNA) No. 44, at A-3 (Mar. 6, 2013).

⁶ FED. HWY. ADMIN., PUB. NO. FHWA-HEP-15-047, SYNCHRONIZING ENVIRONMENTAL REVIEWS FOR TRANSPORTATION AND OTHER INFRASTRUCTURE PROJECTS: 2015 RED BOOK (Sept. 2015).

⁷ Pub. L. No. 114-94, 29 Stat. 1311.

⁸ See Pub. L. No. 114-94, §§ 1301–1318, 9001–9002, 11501–11504, 29 Stat. 1311, 1375–1405, 1612–19, 1690–93.

⁹ See Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005).

¹⁰ See Pub. L. No. 114-94, §§ 41001–41014, 29 Stat. 1311, 1741–62; see also *Fast-41*, PERMITTING DASHBOARD, <https://www.permits.performance.gov/about/fast-41> (last updated June 5, 2017).

¹¹ See 42 U.S.C. §§ 4370m–1, 4370m–2(b).

¹² Memorandum for the Federal Infrastructure Permitting Improvement Steering Council from Richard Kidd, Executive Director, regarding Establishment of Covered Project Inventory (Sept. 22, 2016). As of June 2017, there were 32 such projects. FED. PERMITTING IMPROVEMENT STEERING COUNCIL (FPISC), FAST-41: FY 2016 ANNUAL REPORT TO CONGRESS, at 1 (Apr. 2017).

¹³ *East Side Coastal Resiliency*, PERMITTING DASHBOARD, <https://www.permits.performance.gov/projects/east-side-coastal-resiliency> (last visited Nov. 13, 2017).

¹⁴ *Hudson River Rebuild by Design Project: Resist, Delay, Store, Discharge*, PERMITTING DASHBOARD, <https://www.permits.performance.gov/projects/hudson-river-project-resist-delay-store-discharge-n> (last visited Nov. 13, 2017).

¹⁵ Memorandum for Heads of Federal Departments and Agencies from Director of Office of Management and Budget (OMB) and Managing Director of Council on Environmental Quality (CEQ) regarding Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects (Jan. 13, 2017).

¹⁶ See FPISC, FAST-41: FY 2016 ANNUAL REPORT TO CONGRESS app. 1 & 2 (Apr. 2017).

¹⁷ *Federal Environmental Review and Authorization Inventory*, PERMITTING DASHBOARD, <https://www.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory> (last updated Mar. 8, 2017).

¹⁸ Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017).

¹⁹ *Infrastructure Initiatives & Executive Order 13807*, WHITE HOUSE, <https://www.whitehouse.gov/ceq/infrastructure> (last visited Nov. 13, 2017) (providing links to requests from governors of California, Florida, Louisiana, Nebraska, Utah, and the U.S. Virgin Islands).

On August 15, 2017, President Trump issued an additional executive order on “Establishing Discipline and Accountability in the Environmental Review and Permitting Process of Infrastructure” (the “August EO”).²⁰ The August EO asserted that the “Federal Government, as a whole, must change the way it processes environmental reviews and authorization decisions” and set forth a far more detailed prescription for reform.

The August EO expressly builds upon the FAST Act framework, providing that all FAST-41 projects would qualify as high priority infrastructure projects under the January order, as would surface transportation projects subject to the SAFETEA-LU streamlining provisions and certain water resources projects subject to acceleration under the Water Resources Development Act of 2007.²¹ The August EO further provides that the CEQ chairperson can satisfy her responsibilities under the January EO by referring projects to the FPISC executive director, the Secretary of Transportation, or the Assistant Secretary of the Army for Civil Works.

Fostering Accountability: Performance Goals and “Appropriate Penalties”

The August EO calls upon the Office of Management and Budget (OMB) to coordinate with the FPISC and establish goals for processing environmental reviews and authorizations. Among other things, they must establish a “CAP Goal” (Cross-Agency Priority Goal) on “Infrastructure Permitting Modernization” pursuant to the Government Performance and Results Act Modernization Act of 2010 (GPRA), which provides for the coordinated development of long-term performance goals across policy areas.²² Agency performance will be measured against to-be-determined benchmarks that must include the following aspirational goal: “processing of environmental reviews and authorization decisions for new major infrastructure should be reduced to not more than an average of approximately 2 years,” measured from the date of a notice of intent to prepare an EIS (or other benchmark selected by OMB).

The August EO also charges OMB with general responsibility for tracking and incentivizing improved performance of all agencies. Achievement of the agency performance goals will be integrated into performance plans for agency personnel, and OMB will devise a “performance accountability system” that tracks major infrastructure projects and scores agencies’ performance on a quarterly basis. The August EO also requires OMB to consider agency performance as part of the budget process and to consider imposing penalties on agencies that fail to meet milestones. “[A]ppropriate penalties” could include rescission of agency funds.

“One Federal Decision”

Next, the August EO attempts to advance the goal of one-stop shopping by creating a new “One Federal Decision” process. OMB and CEQ are charged with developing a framework in which a single federal agency will be responsible for navigating an infrastructure project through the environmental review and authorization process. In addition, the August EO calls for federal agencies to document their regulatory decisions relating to the same project in a single Record of Decision (ROD)—except where the project sponsor requests separate documents, an agency’s NEPA obligations have already been fulfilled, or the lead federal agency determines that a single ROD “would not best promote completion” of the process. The requirement for a single, multi-agency ROD has the potential to save time and reduce uncertainty. However, agencies occasionally have differing views on topics discussed in a ROD, such as mitigation of unavoidable impacts. The single-ROD requirement thus has the potential to trigger intensive interagency negotiations as permitting agencies attempt to reach consensus.

Other aspects of the One Federal Decision framework include a requirement that all agency authorization decisions be completed within 90 days of the lead federal agency’s issuance of the ROD.

Energy Corridors

President Trump’s August EO also briefly addresses the frequently contentious issue of routing energy transmission infrastructure. The Departments of Interior and Agriculture have been ordered to work together as lead agencies to identify energy right-of-way corridors on federal land that would be eligible for expedited review. It is unclear how this requirement will work in practice, or how it fits in with the designation of energy corridors under Section 368 of the Energy Policy Act of 2005.²³

Climate Change and Resilience

The August EO rescinded without comment the Federal Flood Risk Management Standard (FFRMS) put in place by executive order by President Obama in 2015.²⁴ The FFRMS required federal actions in or affecting floodplains to meet specified levels of resiliency based on “climate-informed science.” Considering federal involvement in roads, sewer systems, ports, and coastal military installations, the decision to walk away from a unified approach to dealing with rising sea levels and storm flooding is already controversial. Indeed, as demonstrated by several recent decisions where courts found that agencies failed to adequately assess climate-related impacts

²⁰ Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).

²¹ The FPISC executive director, in consultation with CEQ and OMB, can designate other projects as high priority.

²² See Pub. L. No. 111-352, § 5, 124 Stat. 3866, 3873 (Jan. 4, 2011).

²³ Pub. L. No. 109-58, § 368, 119 Stat. 594, 727.

²⁴ See Exec. Order No. 13690, 80 Fed. Reg. 6425 (Feb. 3, 2015).

when preparing an EIS,²⁵ project sponsors who ignore these issues may put their projects in peril. By jettisoning a uniform standard, the August EO could have the unintended consequence of introducing uncertainty to environmental impact analyses that address resiliency. The absence of uniform guidance after the withdrawal of CEQ's guidance on consideration of greenhouse gas emissions and climate change effects in NEPA reviews²⁶ may similarly lead to uncertainty and increased litigation risk.

Other Expediting Efforts

In September, the Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration proposed regulations for the "Program for Eliminating Duplication of Environmental Reviews" pursuant to Section 1309 of the FAST Act. The regulations would establish a pilot program in which up to five states could substitute environmental reviews under state laws for NEPA review of surface transportation projects.²⁷ Although the pilot program would allow states to circumvent NEPA, other federal environmental requirements would continue to apply.²⁸

In the months since President Trump took office, agencies also have undertaken internal reviews of their procedures and practices. For example, on October 24, 2017, the Department of the Interior (DOI) published its report on actions that potentially burden the domestic production of energy resources,²⁹ as required by President Trump's executive order on "Promoting Energy Independence and Economic Growth."³⁰ Among other things, the Bureau of Land Management plans to eliminate Master Leasing Plans for oil and gas and re-establish Resource Management Plans as the vehicle for identifying lands available for leasing. The DOI asserts that this change will streamline NEPA review and reduce the time for processing lease sales.³¹

The Department of the Interior has also imposed page limits for environmental review documents, reportedly requiring that EISs not exceed 150 pages (300 pages for "unusually complex" projects) unless a high-level official approves a longer document.³² The Interior Department also set a target of one year for completing NEPA studies.

In September, the Environmental Protection Agency (EPA) moved the Office of Federal Activities (OFA)—the EPA division that oversees NEPA reviews—to the Office of Policy within the EPA administrator's office. Previously the OFA was located within the Office of Enforcement and Compliance Assurance.³³ EPA also created a new Permitting Policy Division within the OFA. Some outside lawyers have suggested that this reorganization could presage a change in EPA's role in scrutinizing the environmental impact analyses of sister agencies.³⁴

What's Up Next

At the time of this writing, the Trump administration has only begun to implement the August EO. Future steps include:

- By February 11, 2018, OMB must establish, in consultation with the FPISC, the CAP Goal on Infrastructure Permitting Modernization.
- Agencies will thereafter modify their Strategic Plans and Annual Performance Plans to be consistent with the new CAP Goal, and integrate these goals into performance plans for appropriate officials.
- Within 180 days of the establishment of the CAP Goal (or after a longer period of time as deemed necessary by OMB), OMB will issue guidance in consultation with the FPISC for the establishment of a new performance accountability system.
- Eventually OMB will produce quarterly scorecards for agency performance and progress towards achieving the CAP Goal.
- CEQ and OMB will work together to develop a framework to implement One Federal Decision.
- CEQ will lead an interagency working group to review NEPA implementing regulations to identify impediments to efficient and effective environmental reviews and authorizations for infrastructure projects.
- Agencies will develop action plans to address the identified impediments.

²⁵ See *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. Aug. 22, 2017); *Mont. Env'tl. Info. Ctr. v. U.S. Office of Surface Mining*, 2017 U.S. Dist. LEXIS 129018 (D. Mont. Aug. 14, 2017). These decisions focused on the review of projects' potential greenhouse gas emissions, not resilience or adaptation.

²⁶ See Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

²⁷ 82 Fed. Reg. 45220 (Sept. 28, 2017).

²⁸ 82 Fed. Reg. at 45221 (proposed 23 C.F.R. § 778.103).

²⁹ DEPT. OF INTERIOR, FINAL REPORT: REVIEW OF THE DEPARTMENT OF THE INTERIOR ACTIONS THAT POTENTIALLY BURDEN DOMESTIC ENERGY (Oct. 24, 2017).

³⁰ See Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

³¹ DEPT. OF INTERIOR, FINAL REPORT: REVIEW OF THE DEPARTMENT OF THE INTERIOR ACTIONS THAT POTENTIALLY BURDEN DOMESTIC ENERGY 10–11 (Oct. 24, 2017).

³² Michael Doyle, *Order Limits Most NEPA Studies to a Year, 150 Pages*, E&E NEWS (Sept. 6, 2017), <https://www.eenews.net/stories/1060059865>.

³³ Juan Carlos Rodriguez, *EPA Permit Reviews Could Weaken Under Reorganization*, LAW360 (Sept. 25, 2017), <https://www.law360.com/articles/966357/epa-permit-reviews-could-weaken-under-reorganization>.

³⁴ Juan Carlos Rodriguez, *EPA Permit Reviews Could Weaken Under Reorganization*, LAW360 (Sept. 25, 2017), <https://www.law360.com/articles/966357/epa-permit-reviews-could-weaken-under-reorganization>.

In September 2017, CEQ published the initial list of actions it would take to “enhance and modernize” the environmental review and authorization process pursuant to the August EO.³⁵ In particular, the list identified guidance that CEQ plans to revise, modify, and supplement, including guidance on categorical exclusions; preparation of environmental assessments; and appropriate use of mitigation, monitoring, and mitigated findings of no significant impact. CEQ will also review its NEPA regulations “to identify changes needed to update and clarify those regulations” and issue and compile guidance to “simplify and accelerate” the NEPA process for infrastructure projects.

Obstacles and Opportunities

Reduced Resources. The core reforms contained in the August EO build upon past efforts and have the potential to help reduce delays and unpredictability that have become part of the environmental review and permitting process. Unfortunately, federal agencies are all being asked to do more—and to do it faster and with fewer personnel and resources. In addition, many key appointments at agencies essential to the success of the August EO have yet to be made. For example, the executive director position at the FPISC—the person responsible for carrying out the FAST Act’s streamlining mandate—remains open. That position does not require Senate confirmation. In addition, CEQ lacks a permanent leader as of this writing, though in October 2017 the president nominated Kathleen Hartnett White, a former chairperson of the Texas Commission on Environmental Quality, to head the agency.

Litigation Risks of Sped-Up Reviews. Litigation over major federal infrastructure decisions seems almost inevitable, and any shortcuts while developing the administrative record for an EIS or permit decision could have disastrous consequences for the project sponsor. For example, courts might view the Department of the Interior’s restrictions on page lengths for EISs as arbitrary and inappropriate, particularly if there is evidence that the restrictions led to information being left out. Adherence to the August EO’s two-year timeframe for decisionmaking (or the Department of the Interior’s one-year target for completing NEPA studies) could also lead to important factors receiving insufficient attention or curtailed data collection. Lack of resources could compound problems posed by streamlining mandates if short-staffed agencies cut corners to meet deadlines.

Nevertheless, with time and sufficient management attention devoted to improving environmental reviews and permitting (not merely expediting decisions), agencies may be able to develop innovative procedures and practices that take the necessary “hard look” at environmental impacts while promoting economic development.

Edward McTiernan is a partner in the New York office of Arnold & Porter Kaye Scholer LLP and former General

Counsel of the New York State Department of Environmental Conservation. Ethan G. Shenkman is a partner in the Washington, D.C. office of Arnold & Porter Kaye Scholer. From 2014 to January 2017, he served as Deputy General Counsel at the U.S. Environmental Protection Agency. From 2010 to 2014, he was Deputy Assistant Attorney General at the U.S. Department of Justice’s Environment and Natural Resources Division. He previously served for nine years as a career attorney and litigator at the Department of Justice. Michael B. Gerrard is the Andrew Sabin Professor of Professional Practice and the director of the Sabin Center for Climate Change Law at Columbia Law School. He is senior counsel to Arnold & Porter Kaye Scholer.

³⁵ 82 Fed. Reg. 43226 (Sept. 14, 2017).

¹ 2017 U.S. Dist. LEXIS 27435 (N.D. Ala. Feb. 10, 2017).

² *Tenn. Riverkeeper*, 2017 U.S. Dist. LEXIS 27435, at *22–23.