

INSIGHTS

White House Encourages Coordination of Infrastructure Permitting Through One Federal Decision Memorandum

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On April 9, 2018, the White House announced that twelve federal agencies had signed the [One Federal Decision Memorandum](#) (“MOU”), establishing a coordinated and timely process for environmental reviews of major infrastructure projects. The MOU addresses one of President Trump’s signature policy promises from the 2018 state of the union – to reduce the infrastructure permitting process to at most two years.

The MOU comes in response to [Executive Order 13807](#), signed by the President on August 15, 2017. The Executive Order directed federal agencies to, among other things, develop a two year permitting timeline for “major infrastructure projects,” and designate a “lead agency” to shepherd projects through the permitting process. The President specifically sought to address inefficient and duplicative practices such as multiple agencies producing separate Environmental Impact Statements.

The MOU and its accompanying [Implementation Memorandum](#) provide instruction to and agreement among agencies on how to improve the coordination and execution of permitting reviews. Benchmark improvements include:

- A single Environmental Impact Statement for all agencies
- A single Record of Decision except in specified circumstances
- A two-year average time period for concluding all environmental reviews and authorization decisions for major infrastructure projects
- Written concurrences from cooperating agencies at interim milestones in the consolidated Permitting Timetable governing the multi-agency review-and-authorization process for a project

In evaluating the potential impact of these actions in comparison to prior initiatives to improve the permitting process, two additional factors should be considered.

First, this Administration appears committed to improving infrastructure permitting beyond issuing these documents. The current actions anticipate further change within the Executive Branch, at the White House's direction, whereas similar actions under past administrations represented the culmination of an initiative.

Second, specific requirements in the Implementation Memorandum and MOU will require agencies to change their current processes in order to comply, instead of past efforts which largely encouraged Agencies to achieve better results using existing methods.

For example, the new guidance requires written concurrence from cooperating agencies at specific interim milestones within an established, consolidated permitting timetable. The guidance also requires agencies, with some exceptions, to develop a consolidated record supporting the One Federal Decision, instead of isolated administrative records within each agency. Implementing these and other changes will require modification of the status quo for many agencies. Indeed, the guidance calls for signatory agencies to submit plans (within 90 days) to implement the MOU through new guidance or regulations.

The following is a summary of key points from the Implementation Memorandum and MOU and a detailed list of specific provisions.

General Agreements - Outlines the overarching features of the MOU including a requirement for federal agencies to work together to develop a single Environmental Impact Statement and Record of Decision ("ROD"), and to issue all necessary authorization decisions within 90 days of the ROD.

Permitting Timetable – Provides guidance on the milestones to be included in the Permitting Timetable, including estimated milestones for which the project sponsor is to develop and submit complete applications and any other information required for Federal authorization of the project, including required authorization decisions by non-Federal entities.

Agency Roles and Responsibilities – Provides further details on the duties of lead agencies in preparing the federal EIS and outlines roles for cooperating and participating agencies. For example, cooperating agencies may only provide written comment on issues within their substantive areas of expertise.

Scoping and Concurrence Points – Provides for using the NEPA scoping process to develop relevant analyses, studies and engineering designs needed in order for all agencies to be able to sign a single ROD. Requires that the environmental review process be conducted concurrently with the applicable authorization decision processes, and, as such, the lead agency should obtain a written concurrence from all cooperating agencies whose authorization is required for the project at three key milestones: 1) Purpose and Need, 2) Alternatives To Be Carried Forward

for Evaluation, and 3) the Preferred Alternative.

Elevation of Delays and Dispute Resolution – Directs agencies to use dispute resolution procedures within applicable laws and to defer to staff who have day-to-day project involvement. Where disputes are anticipated to delay a Permitting Milestone, disputes are to be elevated within the federal agencies.

Exceptions – Provides a number of exceptions to the MOU including the ability of lead agencies to extend the 90 day decision deadline.

We'll be talking about this and other topics related to the legal and political issues facing infrastructure development at our Spring 2018 Environmental Law Seminar on May 9, 2018 in Houston. For those interested in learning more about the seminar or determining if you are eligible to register for the event, please contact Christy Kobeski at christy.kobeski@bracewell.com or (206) 204-6224.