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Congress Amends NEPA in Effort to Reform Federal Permitting

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On June 3, 2023, President Biden signed into law the Fiscal Responsibility Act. The law increased the debt ceiling and, among other things, amended the National Environmental Policy Act (NEPA). NEPA is a bedrock environmental law that has not seen substantive amendment since it was enacted in 1969. The recent amendments, known as the "Builder Act," attracted support from an array of lawmakers and stakeholders who could rally around a common goal of making NEPA reviews more efficient to facilitate construction of essential infrastructure. Whether the Builder Act accomplished that goal remains to be seen and some stakeholders have described this effort as merely a down payment on needed reform of the federal permitting process.

NEPA is a broadly applicable law that requires the federal government to stop, look, and listen before it leaps – agencies must inform the public and consider alternatives to proposed federal actions and the reasonably foreseeable environmental impacts of those actions before making decisions. Federal agencies must comply with it before issuing a broad spectrum of approvals needed for commercial projects including permits, leases, right-of-way, and grants. Over the years, multiple Administrations of both parties have attempted to reform the NEPA review process. Efforts at NEPA reform have ranged from limited statutory reforms relevant to a particular sector, to the creation of the Federal Permit Improvement Steering Council intended to facilitate multi-agency permitting reviews, to the use of Executive Orders to mandate process improvements.

The Builder Act does a number of things: (1) it codifies principles of NEPA law from case law and regulations, with some tweaks; (2) it enshrines the three levels of NEPA review in statute: Categorical Exclusions, Environmental Assessments, and Environmental Impact Statements; (3) it aims at creating efficiencies by formalizing the coordinated process for multi-agency reviews with a lead agency; (4) it imposes page and time limitations along with a right of judicial review for an agency that does not meet its deadline; (5) it attempts to facilitate reliance on "Categorical Exclusions" from additional NEPA review; (6) it addresses the use of scientific and technical information; and (7) it codifies certain definitions, some of which are meant to constrain the breadth of review of a private project.

A handful of examples:

1. The law codifies the longstanding requirement that agencies consider only the "reasonably foreseeable environmental effects" of a proposed agency action. The precise meaning of that single phrase in any given scenario, such as the scope of analysis of impacts on climate change, drives many disputes over the adequacy of an agency's NEPA review.

2. Under the Builder Act, an agency must consider a reasonable range of alternatives to a proposed action, but they must be "technically and economically feasible" and meet the "purpose and need" of the project.

3. The law requires federal agencies to "prescribe procedures to allow a project sponsor to prepare an environmental assessment or EIS …." While this has always been legally permissible, some agencies have not been willing to afford applicants this opportunity. Applicant-prepared NEPA analyses help project sponsors meet a more efficient schedule without compromising the analysis.

4. The Builder Act imposes deadlines: two years for an EIS and one year from an EA from a triggering date. The law even allows a project sponsor to seek a court order if an agency fails to act under the deadline. However, if the agency determines that the deadline cannot be met, it may extend the deadline "in consultation with"—but requiring not agreement with—the applicant.

5. The law seemingly intends to codify what has become known as a the "small federal handle doctrine." The doctrine holds that if a federal agency only has "control and responsibility" over a small portion of a private project, that project does not become federalized to the point of requiring NEPA review. The Act states that a "major federal action" does not include a non-Federal action "with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project."

We expect to see guidance and, some day, regulations implementing the Builder Act from the White House Council on Environmental Quality. In the meantime, federal agencies will be determining how (and when) to implement many of these provisions. Feel free to contact us with questions about how this may impact your pursuit of federal authorizations.