One Federal Decision and Regulatory Streamlining: A game changer for the planning and development of the nation’s water resources infrastructure, or just another idea from inside the Beltway?

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ABSTRACT

Efforts to accelerate the planning and development of the nation’s water resources infrastructure projects under the domain of the U.S. Army Corps of Engineers (USACE or Corps), as well as to streamline the regulatory permitting process, began in earnest with recent water resources legislation, starting with the Water Resources Reform and Development Act of 2014 (WRRDA 14), followed by the Water Resources Development Act of 2016 (WRDA 16), and most recently, the Water Resources Development Act of 2018 (WRDA 18). The Trump Administration’s “One Federal Decision,” which establishes a coordinated and timely process for environmental reviews of major infrastructure projects, seeks to implement lasting changes to the cumbersome regulatory review of infrastructure projects across the federal government. This paper sets forth the background on these initiatives and provides an update on the progress of the efforts to date as they apply to the USACE Civil Works program.

Introduction

Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (EO 13807), was issued on August 15, 2017. Intended to “ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent,” and in order to address inefficiencies leading to delayed investments and increased costs, the EO declares that the Federal government “must change the way it processes environmental reviews and authorization decisions.”¹ To that end, the EO establishes the process known as “One Federal Decision,” requiring a more unified environmental review and authorization process.² It applies to major infrastructure projects, defined as those (1) that require multiple authorizations, (2) for which the

² See id. at Sec. 4. “Authorization” is defined as “any license, permit, approval, finding, determination, or other administrative decision issued by a Federal department or agency,” required for an infrastructure project. Id. at Sec 3(a). Note that it is not the Congressional authorization required for water resources projects described at pages 3-5.
lead Federal agency has determined to prepare an environmental impact statement (EIS) in accordance with the National Environmental Policy Act (NEPA), and (3) for which the project sponsor has identified reasonably available funds to complete the project. Among the many goals and objectives set forth in the EO, one of the most significant is to complete all Federal environmental reviews and authorization decisions within two years.

Subsequently, those Federal agencies subject to EO 13807 entered into a Memorandum of Understanding (MOU) by which they established a cooperative relationship to carry out their respective obligations. The MOU sets forth in detail the signatories’ roles and responsibilities, including determining a lead agency, establishing a permitting decision timetable, and providing for resolution of disputes. Thereafter, the individual agencies were directed to develop their own implementation guidance.

**Background**

The U.S. Army Corps of Engineers (USACE or the Corps) is responsible for the development, maintenance and oversight of much of the nation’s water resources infrastructure through its Civil Works program. This includes flood risk management, navigation, ecosystem restoration, hydropower, water supply, recreation, and environmental stewardship, as well as providing emergency response services.

In addition to planning, designing and building water resources projects, the Corps also has a separate regulatory responsibility. Those responsibilities are administered through Section 10 of the Rivers and Harbors Act of 1899, applicable to the navigable waters of the United States; Section 404 of the Clean Water Act, covering the discharge of dredged or fill material into waters of the U.S., including wetlands; and Section 103 of the Marine Protection, Research and Sanctuaries Act, governing the transportation of dredged material for open ocean disposal. In addition, Section 14 of the Rivers and Harbors Act of 1899, as amended, and codified in 33 U.S.C. 408, commonly referred to as Section 408, allows the Corps to grant permission for the alteration or use of a civil works project.

The Corps’ project development process includes environmental decision-making primarily in the planning phase. That planning program provides a structured approach to the formulation of projects responsive to local, state and national needs, premised upon the project’s contribution to national economic development while protecting the environment. In addition to the complex, and often lengthy internal review process, Corps’ studies are also subject to extensive external reviews, including under NEPA.

Both the Civil Works planning program and the Corps’ regulatory obligations are subject to One Federal Decision. The environmental review mandate in EO 13807 is but one component

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3 See id. at Sec 3(e).
4 See id. at Sec. 2(h).
7 See generally id. § 1344 (2018).
8 See generally id. § 1413 (2018).
of the Corps’ broader effort known as “Revolutionize USACE Civil Works.”9 As part of the goal to secure long-term reforms on how infrastructure projects are regulated, funded, delivered and maintained, the Corps has established three objectives in its comprehensive approach: (1) Accelerate Project Delivery, to start and finish projects faster; (2) Transform Project Financing and Budgeting, to achieve more efficient project delivery using alternative financing tools and new budgeting processes; and (3) Improve Permitting and Regulation Reform, streamline permit processes and eliminate duplicative reviews to expedite delivery of projects.10

**Water Resources Development Acts**

Water resources bills, known as “WRDAs,” authorize a variety of navigation, flood control, and environmental projects and studies carried out by the Corps. The majority of these projects are cost-shared with the Corps’ non-federal sponsors. Equally important, WRDAs establish U.S. policy on water resources development and protection. Significantly, just about every lawmaker in Congress has a Corps project in his or her district, making these bills among the seemingly rare opportunities for bipartisanship. Historically, this legislation was enacted every two years or so. However, after a massive bill enacted in 2007 over then-President George W. Bush’s veto, and an increased focus on pork-barrel spending, WRDAs became a lightning rod, portrayed as flagrant examples of wasteful spending. This was an unfortunate mischaracterization, however, as arguably, water resources projects are scrutinized to a greater extent than any other capital investment program in the government through highly detailed studies, comprehensive analyses using merit-based criteria, and extensive public involvement. Nonetheless, after a series of false starts, Congressional leaders in 2013 and 2014 worked diligently to craft a project approval process that did not violate the ban on earmarks.11 Ultimately, the Water Resources Reform and Development Act was enacted in 2014 by overwhelming margins in both the House and Senate.

Among the many significant provisions modifying the development and management of the Corps’ civil works portfolio, WRRDA 14 codified an ongoing Corps initiative to expedite its planning process. Responding to a growing chorus of criticism that the Corps just takes too long, in 2012, the Corps instituted what became known as the “3x3x3” process, meaning that feasibility studies would be completed within three years, at a cost of not more than $3 million, with three concurrent levels of review throughout the process. That program, part of the Corps’ SMART12 planning, was a hallmark of WRRDA 14 and included as the first provision in the title on program reforms and streamlining.13

As a companion to the process improvements contemplated by the accelerated review and vertical integration set forth in the 3x3x3 initiative, WRRDA 14 designated the Corps as the lead agency for the necessary environmental reviews during the feasibility study process, coordinating with other federal agencies, which could include the U.S. Environmental Protection Agency (EPA), the Council on Environmental Quality (CEQ) and the U.S. Fish and Wildlife Service (FWS).14 The purpose of the provision was to require that such reviews be conducted in an expeditious manner

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10 See id.
13 See 33 U.S.C. § 2282c(a).
14 See id. § 2348.
without making any substantive changes to the underlying laws, including, for instance, NEPA. Nevertheless, there was some outcry that this provision would inevitably have a detrimental effect on NEPA and other reviews. Senator Barbara Boxer, then Ranking Member of the Senate Environment and Public Works Committee and a champion of environmental causes, was forced to vigorously defend the move.

No doubt, prior to the implementation of these streamlining reforms, the already rigorous and thorough process had become overly burdensome, in some instances becoming impracticable. Required components had accreted due to the growth of law and policy, as a result of legal and technical challenges, and with individual requirements added to address some sort of shortcoming identified in a previous project. However, there was some concern that imposing a statutory requirement to complete studies within a specified time period irrespective of the availability of funds, previous statutory requirements, new requirements, and without consideration of the appropriate scope of a study, including economic, environmental and engineering requirements, would undermine the planning process rather than improve it.

While there are no performance metrics or other readily available data to measure the success of the 3x3x3 initiative, anecdotal information suggests that both the Corps’ internal process improvements, along with the external agency coordination, have resulted in a more efficient feasibility study process. Generally speaking, the concerns have not come to fruition. In the instances where the timeline would not be met, the Corps has the statutory authority to extend the timeline for a period not to exceed three years if it is determined that the study is too complex. Factors to be considered in making such a determination include the size, type, location, scope, and overall cost of the project; whether the project will use innovative design or construction techniques; whether the project will require significant action by other Federal, state, or local agencies; and whether there is significant public dispute as to either the nature or effects of the project, or the economic or environmental costs or benefits of the project. In addition, delays may result from issues outside of the feasibility study process, including local funding concerns, real estate issues, and engineering challenges.

Similarly, designating the Corps as lead agency for environmental reviews reiterated the current NEPA practice of having the agency with the most skin in the game take the lead and has not led to a lower standard of review. Rather, the early engagement process, particularly among the resource agencies, has resulted in the identification of concerns earlier in the study process. The various federal agencies often have competing missions and priorities, exacerbated by turf battles, and the early engagement provides an opportunity to resolve concerns both in a timely way and in a manner that better frames the feasibility study. The Corps, unlike the prior practice of other agencies, conducts its feasibility process concurrent with the NEPA process. In this way, environmental concerns raised early on can be addressed more efficiently during the study process, and help frame the alternatives to be considered.

It is important to note that the Corps’ study process is grounded upon solving problems raised at the local or basin-wide level, whether combatting a flooding issue or ensuring a competitive navigation channel. As a result, the process necessarily includes not just the federal agencies, but also state and local governments, and the nonfederal project sponsor. For example, the Norfolk Coastal Storm Risk Management Study is a comprehensive investigation of flood risk management problems and solutions in the City of Norfolk. The study came about as a result of findings from a larger effort, the North Atlantic Coast Comprehensive Study, authorized by

\[15 \text{See id. § 2282c.}\]
Congress as a result of Hurricane Sandy in October 2012, to identify and address the flood risks of vulnerable coastal populations in that region.

With the City of Norfolk as the local sponsor, the study complied with the requirements of 3x3x3 and saw interagency coordination of the environmental impact statement throughout the process. While the level of discussion, coordination, and consultation varied among the different entities, a quick look of involved agencies reveals the depth and breadth of the review. At the Federal level, outreach was made to the EPA, U.S. Coast Guard, U.S. Navy, Federal Emergency Management Agency (FEMA), National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS), and the FWS. State regulatory agencies included the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and the Virginia Department of Historic Resources. Other interested stakeholders included the Norfolk Historical Society, Delaware Nation, Delaware Tribe of Indians, and the Pamunkey Indian Tribe. As of this writing, the local sponsor awaits the release of the final report from the Chief of Engineers and project authorization in a future WRDA.\textsuperscript{16}

The two-year timeline in EO 13807 and One Federal Decision, discussed more fully below, are now incorporated into the Corps’ planning process, within the three-year study scope. In terms of practical application, the initial three to six months of a feasibility study provide the initial scoping and coordination with other agencies, resulting in the publication of the Notice of Intent (NOI) to prepare an EIS, which kicks off the two-year timeline. The completion of the two-year process culminates with the transmittal by the district commander of the final feasibility report or other decision document. Thereafter, the Corps issues its “Chief’s Report” with the recommended project alternative.

**One Federal Decision**

In order to carry out EO 13807, the Office of Management and Budget (OMB) and CEQ, in consultation with the Federal Permitting Improvement Steering Council (Permitting Council), directed each agency with responsibility to conduct environmental reviews or make authorization decisions with respect to major infrastructure projects to enter into a “Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807” (MOU). The Permitting Council was created by the FAST Act, the Fixing America’s Surface Transportation Act enacted in December of 2015.\textsuperscript{17} Composed of agency Deputy Secretary-level members and an Executive Director appointed by the President, it sought to standardize interagency consultation and coordination practices to improve the environmental review and authorization process for covered infrastructure projects. FAST-41, so named for the section of the law creating the Permitting Council, codified the use of a “permitting dashboard” that had been in effect to track review and permitting milestones for transportation projects.\textsuperscript{18}

Key elements of One Federal Decision are that agencies will develop a single Permitting Timetable that identifies actions and associated milestones for applicable environmental reviews, prepare a single EIS and a single Record of Decision (ROD), and, critically, complete the environmental reviews and authorization decisions within two years of publication of the NOI and

\begin{footnotes}
\footnotetext[18]{See id. § 4370m-2; see also Permitting Dashboard, Federal Infrastructure Projects (Feb. 17, 2016), https://www.permits.performance.gov/about/fast-41.}
\end{footnotes}
actually issue the final decision within 90 days thereafter.\textsuperscript{19} The timetable is to be made available to the public through the dashboard.\textsuperscript{20}

The MOU signatories commit to implementing the process early, with the aim of avoiding schedule delays and resolving conflicts as they arise. To that end, there are three specific concurrence points along the way. Initially, prior to issuance of the NOI, cooperating agencies\textsuperscript{21} will review the lead agency’s purpose and need statement and determine if it meets their NEPA obligations.\textsuperscript{22} Second, concurrence will be sought on the alternatives to be carried forward for analysis in the EIS.\textsuperscript{23} And finally, the lead agency will seek written concurrence on the preferred alternative from all agencies whose authorization is required.\textsuperscript{24} Further, the MOU includes provisions to address delays and to resolve disputes in a timely manner. This framework, if properly and consistently implemented, will prohibit instances where an agency who opposes a particular project or alternative fails to raise objections until nearing the end of the process, after the investment of considerable time and money by both the government and the non-federal project sponsor. The MOU seeks to eliminate what was viewed as a common practice where objecting agencies would use process and procedure to slow-roll their reviews, hoping to force supporters to give up or make major changes as to eliminate the initial objective of the project. The MOU shines a light on this practice and seeks to eliminate it.

As described more fully above, the requirements of EO 13807 have been incorporated into the Corps’ planning program. In addition, One Federal Decision applies to the Corps’ regulatory program. In that regard, the Corps could be either a cooperating agency for a project that includes regulated work in the waters of the U.S. or it could be the lead agency responsible for preparing an EIS for a major infrastructure project.

A detailed memorandum sets forth the implementation guidance for regulatory compliance.\textsuperscript{25} Generally, the Corps’ involvement will be in instances where an applicant seeks an individual permit, and not when the Corps’ NEPA requirements have been satisfied through a Nationwide or Regional General Permit.\textsuperscript{26} In addition to detailing the scope of USACE involvement, the guidance mandates that risk-informed decision making will be incorporated into all phases of environmental review.\textsuperscript{27} That concept is further described:

Risk-informed decision making does not mean simply accepting heightened legal risk as a way to hasten the overall process without careful consideration of agency obligation. Rather, it means critically considering the portions of a proposal that are within USACE authority, determining information needs and requesting information relevant to agency

\textsuperscript{19} See generally Memorandum of Understanding, supra note 5.
\textsuperscript{20} See id. at A-6.
\textsuperscript{21} See generally 40 C.F.R. § 1501.6.
\textsuperscript{22} See Memorandum of Understanding, supra note 5, at A-10.
\textsuperscript{23} See id.
\textsuperscript{24} See id. at A-11.
nEO.pdf.
\textsuperscript{26} See id. at 4.
\textsuperscript{27} See id. at 3.
authority(s), and performing sufficient and timely analyses directly relevant to required USACE decisions.\textsuperscript{28}

The guidance also addresses when applicants may need a real estate review or permission under Section 408, which permits alteration or use of a project.\textsuperscript{29} As a separate initiative, the Corps has recently updated its Section 408 engineering circular after receiving public comment.\textsuperscript{30} Key changes in the new EC include the use of categorical permissions, based on the same concept as nationwide permits; a new approach for multi-phase reviews; and a more targeted approach to environmental compliance. In particular, the EC seeks to better align the 408 process with the regulatory program and environmental compliance requirements, with timelines integrated into the process.

A massive project that stands to benefit from the interagency cooperation called for under One Federal Decision is the Mid-Barataria Sediment Diversion Project, a complex civil works and ecosystem restoration project. Proposed by the local sponsor, the Louisiana Coastal Protection and Restoration Authority (CPRA), the project will divert sediment from the Mississippi River to the mid-Barataria Basin to deliver sediment, fresh water, and nutrients to reduce land loss and sustain wetlands.\textsuperscript{31}

As the lead federal agency, the Corps’ New Orleans District is responsible for administering Section 10 and Section 14 of the Rivers and Harbors Act of 1899,\textsuperscript{32} Section 404 of the Clean Water Act,\textsuperscript{33} along with its NEPA obligations. In addition to several state agencies involved in the project, other Federal agencies include the Permitting Council and EPA, as well as the Departments of Homeland Security (Coast Guard), Commerce (National Oceanic and Atmospheric Administration), Agriculture (Natural Resources Conservation Service), and Interior FWS.

Originally filed in 2016, the parties to the project subsequently agreed to utilize the principles of EO 13807, thereby reducing the initial timeline for completion of the EIS and issuance of required decisions and permits by 22 months, from 2022 to 2020.

**Conclusion**

When considered collectively, EO 13807 and One Federal Decision, as well as WRRDA 14, WRDA 16, and most recently, WRDA 18, enhance and improve the development and oversight of water resources projects to provide much needed certainty, predictability, and a timely decision process, while adhering to the environmental protections provided by NEPA and similar authorities. Across the federal government, they provide the opportunity to accelerate infrastructure investments, reduce or eliminate unnecessary duplication, and produce better coordination of the activities of various agencies that may be involved in any particular project.

\begin{itemize}
\item \textsuperscript{28} Id. at 3.
\item \textsuperscript{29} See id. at 4.
\item \textsuperscript{32} 33 USC §§ 403, 408.
\item \textsuperscript{33} See id. §1344.
\end{itemize}