

# COVID-19: PRESIDENT TRUMP'S INVOCATION OF EMERGENCY AUTHORITY TO STREAMLINE ENVIRONMENTAL REVIEW FOR INFRASTRUCTURE PROJECTS

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## **U.S. Construction and Infrastructure, and Environment, Land and Natural Resources Alert**

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The Trump administration issued two executive orders (EOs) in the past month seeking to encourage economic development through regulatory reform and relief as the United States navigates the reopening of business and activities throughout the country after the peak of COVID-19. Both EOs offer potential opportunities and risks to stakeholders. Our regulatory and policy team is well positioned to help stakeholders navigate the implementation of these important EOs.

Last week, on 4 June 2020, the President issued an *EO on Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities* (Infrastructure EO) directing federal agencies to waive environmental laws to speed up federal approval for new mines, highways, railways, pipelines, and other projects given the current economic "emergency." Specifically, the Infrastructure EO calls on the Departments of Transportation, Defense, Interior, and Agriculture, along with the U.S. Army Corps of Engineers, to use all relevant emergency and other authorities to expedite work on, and completion of, all projects that are within their authority to perform or to advance.

Just three weeks ago, on 19 May, the President issued an *Executive Order on Regulatory Relief to Support Economic Recovery* (Regulatory Relief EO) in the wake of the lifting of COVID-19 shelter-in-place orders across the country. As we discussed in our prior alert, the Regulatory Relief EO directs all federal agencies to identify regulations that may inhibit economic recovery and consider taking measures to temporarily or permanently rescind, modify, or waive those standards, or exempt entities or persons from them, consistent with applicable law, and consider exercising temporary enforcement discretion.

In the environmental context, both EOs offer the potential for significant gains to the regulated community if agencies shorten or simplify permitting and approval processes. While the Regulatory Relief EO focused on revising regulations that inhibit economic recovery, the Infrastructure EO issued last week directs federal agencies to use their lawful "emergency" authorities and other powers to respond to the national COVID-19 emergency and to facilitate the nation's economic recovery. The Infrastructure EO also directs agencies to streamline environmental reviews under the National Environmental Policy Act (NEPA) and consultation under the Endangered Species Act (ESA).

With respect to NEPA, the EO directs the Council on Environmental Quality (CEQ) to work with federal agencies to apply flexibility in complying with NEPA obligations where “emergency circumstances make it necessary to take actions with significant environmental impacts without observing the [NEPA] regulations[.]”

With respect to the ESA, the EO directs the Department of Interior to apply its emergency authorities to expedite ESA Section Consultations. It also mandates that the secretary of the interior ensure that the Fish and Wildlife Service and the National Marine Fisheries Service (hereinafter collectively referred to as the “Services”) “be available to consult promptly with agencies and to take other prompt and appropriate action concerning the application of the ESA's emergency regulations.”<sup>1</sup>

## LOOKING AHEAD

One challenge agencies will face is how to interpret and implement their emergency authorities. For example, the ESA's emergency regulations allow for interagency consultation to occur in an expedited manner and through informal alternative procedures in “emergency” situations that include but are not limited to those involving acts of God, disasters, casualties, and national defense or security emergencies.<sup>2</sup>

According to agency guidance, emergency consultations are usually initiated by telephone or facsimile by the action agency, followed as soon as possible (within 48 hours if possible) by written correspondence from the Services.<sup>3</sup> Thereafter, the Services' role is to offer recommendations to minimize the effects of the emergency response on actions on listed species or their critical habitat.<sup>4</sup> The Services are instructed not to stand in the way of the emergency response efforts. There are several critical elements to this process:

- If the initial review indicates that the emergency response action may result in jeopardy or adverse modification to listed species or their critical habitat, and no means of reducing or avoiding this effect are apparent, the Services must advise the appropriate federal agency as such and document its conclusions.
- If incidental take is anticipated during the emergency response, the Services can advise the action agency during informal consultation about ways to minimize the take, but generally the incidental take statement in such a situation does **not** need to include reasonable and prudent measures or terms and conditions to minimize the take.<sup>5</sup>
- Formal consultation will be initiated once the “emergency” is deemed under control.<sup>6</sup> Procedurally, formal consultation after cessation of the emergency is the same as consultation under normal circumstances, except that the action agency must also provide a description of the emergency, a justification for the expedited consultation, and an evaluation of the impacts of the emergency on affected species and their habitats.<sup>8</sup>
- Following after-the-fact formal consultation, the Services issue an emergency biological opinion.

This one example reveals some of the complexity involved when invoking emergency authorities for federal agencies. Nonetheless, the Infrastructure EO has the potential to affect a wide range of infrastructure, energy, environmental, and natural resources projects and provide significant benefits to the regulated community to reduce and minimize the time and resources required to obtain approvals through federal agencies. Effectively, the EO directs agencies to consider and streamline permit approvals and other regulatory actions for “all

authorized and appropriated civil works projects” within the context of an emergency response to the COVID-19 pandemic.

As with implementation of every EO, the devil is in the details. Each agency will need to decide how to staff and prioritize its regulatory actions and determine which existing and future approvals are deemed to be part of a national emergency response. And agencies, of course, must act within the scope of their statutory authority and in compliance with statutory directives. What changes are and are not “consistent with applicable law” and how agencies ultimately implement the EO will be a central point of discussion with agencies and may become the focus in any litigation over agency actions taken pursuant to the EOs.

## FOOTNOTES

<sup>1</sup> Infrastructure EO, ¶7(d).

<sup>2</sup> 50 C.F.R. 402.05(a); See also 16 U.S.C. § 1536 (j), (p).

<sup>3</sup> U.S. FISH AND WILDLIFE SERVICE, ESA SECTION 7 CONSULTATION HANDBOOK 8.2(A) (Mar. 1988) (Consultation Handbook).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 8.2(D).

<sup>6</sup> 50 C.F.R. § 402.05(b).

<sup>7</sup> 50 C.F.R. § 402.05(b); see also Consultation Handbook, 8.2(B).

<sup>8</sup> Consultation Handbook, 8.2(C).

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