

INSIGHTS

Federal Agencies Agree to Speed Project Permitting

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The U.S. DOT and 10 other federal agencies signed a [Memorandum of Understanding \(MOU\)](#) on April 9, 2018, which became effective on April 10, 2018. The MOU [\[1\]](#) is intended to implement Executive Order 13807 (Aug. 15, 2017), which established a “One Federal Decision” policy for infrastructure projects that require authorizations by multiple federal agencies. Under the MOU, a lead federal agency must be designated to be responsible for addressing compliance with the National Environmental Policy Act (NEPA), and the preparation of a single Environmental Impact Statement (EIS). The lead agency will establish a single Permitting Timetable that all federal agencies must follow. The MOU mandates that all federal authorizations must be resolved within 90 days of issuance of the lead agency’s Record of Decision (ROD) on the EIS, with limited exceptions.

There have been problems on large pipeline construction projects in recent years getting all federal agencies to agree on an approach to permitting review and timetables. The MOU addresses that by requiring all agencies to work on a single approach and timeline, and to develop the policies necessary to do so. It also requires all environmental review to be complete no later than two years from issuance of a Notice of Intent (NOI) to prepare an EIS for a new project. Additionally, the MOU specifies three “concurrence points” at which all involved agencies are requested to reach consensus on NEPA project review and approval: (1) Purpose and Need; (2) identification of Alternatives; and (3) selection of the Preferred Alternative.

For new natural gas pipeline construction projects, FERC will continue to be the lead agency preparing an EIS, but any cooperating agencies must now comply with a uniform schedule for review and input. Although not required by the MOU, state, local and tribal agencies will be invited to voluntarily participate in the single permitting timetable process.

The MOU was welcomed by many as a means to achieve permit streamlining, a concept that Congress has attempted to address over the years, as noted in our prior posts regarding both House and Senate efforts [see prior pipelaws posts, [August 4, 2017](#), [July 5, 2017](#)]. It also harkens to President Trump’s January 2017 [Presidential Memorandum](#) addressing permit streamlining for domestic manufacturing. As a representative of the U.S. Chamber of Commerce said of this new MOU, “It shouldn’t take longer to approve a project than to build it.” Opponents of new infrastructure projects, including pipelines, note that the courts are still deliberating on whether and to what extent large projects need to consider climate change impacts under NEPA. Challenges such as that are not addressed directly by the MOU, but in theory the MOU will foster a consolidated position by all federal agencies involved.

While the MOU stands to improve the coordination and timing among federal agencies, it is only aspirational, speaking in terms of “goals” and “milestones” that are ultimately non-binding. It may also place more burdens on project applicants, to ensure that all agencies are, in fact, coordinating and adhering to the timetable, etc., and that any disputes are identified and resolved in a timely manner.

In addition, challenges to permits and approvals at the local and state level will be unaffected by this MOU. New infrastructure projects continue to face opposition by environmental or citizen groups, and increasingly states too have posed challenges to large scale projects. For example, as noted in our [prior post](#) of July 5, 2017, projects such as Millennium Pipeline Company that received prior FERC approval have found themselves in the U.S. Courts of Appeals addressing state challenges. The Second Circuit recently issued a favorable decision in the [Mellennium appeal](#), however, holding firm to the plain language in the Clean Water Act that the timeline for a state’s action in response to a request for a water quality certification is one year from receipt of the request.

[\[1\]](#) The MOU was signed by the heads of the Department of Transportation; the Federal Energy Regulatory Commission; the Environmental Protection Agency; Department of Energy; U.S. Army Corps of Engineers; Department of the Interior; Department of Agriculture; Department of Commerce; Department of Housing and Urban Development; the Advisory Council on Historic Preservation and the Federal Permitting Improvement Steering Council.