IMPLEMENTING EO 13807 - COORDINATING NEPA AND COMPLIANCE WITH OTHER FEDERAL LAWS

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MAY 2019

Prepared for the National Association of Environmental Professionals (NAEP) Annual Conference

Introduction

In 2017, the president issued Executive Order (EO) 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure." This order seeks to reduce delays in environmental review and permitting for infrastructure projects that require an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). EO 13807 primarily applies to major infrastructure projects where authorization from multiple federal agencies is required, where an EIS will be prepared, and where the project sponsor has identified the reasonable availability of funds sufficient to complete the project. "Infrastructure projects" are defined as projects intended to develop physical assets that support services to the general public in a range of sectors, including surface transportation, aviation, ports, water resources, energy production and generation, electricity transmission, broadband internet, pipelines, water infrastructure, and other sectors as determined by the Federal Permitting Improvement Steering Council.

To streamline and accelerate environmental review, EO 13807 sets a goal of reducing the time needed to complete an EIS to an average of two years, from Notice of Intent (NOI) to Record of Decision (ROD). The order also requires a single ROD when multiple federal agencies must give approvals (known as the "One Federal Decision" policy); directs agencies to develop a permitting timetable that identifies completion dates for environmental reviews and authorizations; and requires any permits and approvals to be issued within 90 days after the ROD is published.

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The Council on Environmental Quality (CEQ) and the Office of Management and Budget (OMB) have developed guidance for implementing the executive order, and in 2018 the heads of twelve federal agencies executed a Memorandum of Understanding (MOU) on implementing the order (OMB and CEQ 2018; U.S. Department of the Interior et al. 2018). To aid in meeting the two-year EIS target schedule and effectively implement One Federal Decision, the MOU lays out additional guidance on developing permitting timetables and requires "concurrence points" at key stages of project review, including determining the purpose and need, identifying alternatives to be carried forward in the EIS, and identifying a preferred alternative. The MOU also provides guidance on determining lead and cooperating agencies, clarifies lead and cooperating agency responsibilities, and establishes dispute resolution procedures. The MOU emphasizes the importance of preliminary project planning and states that lead agencies should engage in prescoping in order to identify and begin discussions with potential cooperating and participating agencies regarding potentially significant environmental issues, affected community and stakeholders, the extent of analysis that will be required, and the schedule for completion of environmental review.

The goal of this paper is to evaluate the EO and associated MOU and their ability to be implemented in a way that integrates the NEPA process with various other legal responsibilities. This paper focuses on three other major laws that often need to be addressed prior to a federal agency making a decision: Clean Water Act, Endangered Species Act, and National Historic Preservation Act. Each law-specific section describes challenges and opportunities in trying to streamline the NEPA and federal permitting process, especially for major infrastructure proposals.

Clean Water Act

Driven by growing public concern over water quality and pollution, Congress passed the Federal Water Pollution Control Act Amendments in 1972 and later in 1977 (33 USC § 1251 et seq.)— commonly referred to as the Clean Water Act (CWA). The objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 USC § 1251 (a)). The CWA requires a permit for the "discharge of any pollutant" from a point source into waters of the United States (33 USC § 1311). Section 401 of the Act requires that any applicant for a federal license or permit to conduct an activity that could result in a discharge into waters of the United States must first have the affected state certify that such activities would not violate state water quality standards (33 USC § 1341). Although the CWA authorizes the issuance of several different permits, the focus of this discussion is Section 404—Permits for dredged or fill material (33 USC § 1344).

The United States Army Corps of Engineers (USACE) oversees the issuance and enforcement of Section 404 permits for discharge of dredged and fill material into waters of the United States. "Waters of the United States" is broadly defined to include all navigable waters that could be used in interstate or foreign commerce, including tributaries and adjacent waters such as wetlands (40 CFR § 122.2). Depending on the action being proposed and the water upon which it would occur, Section 10 of the Rivers and Harbors Appropriations Act of 1899 (33 USC § 403) could also be triggered, resulting in joint applications and permits.

The issuance of a permit under the CWA triggers the requirement for USACE to fulfill its statutory NEPA responsibilities. Many USACE districts have developed programmatic NEPA analyses to address their nationwide and general permit program. These nationwide and general permit decisions are often covered under programmatic NEPA decision documents tied to the issuance of their permits. Individual permits do not involve programmatic NEPA and require more individual review vis-à-vis an environmental assessment (EA) or environmental impact statement (EIS) for each permit issued. The difference between a general or nationwide permit and an individual permit can vary between USACE districts, but often coincides with acreages anywhere from 0.5 acre to 5 acres or greater. The issuance of the permit also triggers USACE's responsibilities to comply with other laws and public interest factors such as the Endangered Species Act and National Historic Preservation Act, described below.

Sometimes the 404 permit is the only federal nexus to an applicant's project, which makes integrating USACE's NEPA and other regulatory responsibilities easier to coordinate in a timely manner. However, prior to initiating those regulatory processes, USACE must first determine that the 404 permit application is complete. In order to manage limited staff and funding, USACE typically does not assign staff resources to a project until after receiving a complete application. In other instances, the USACE permit is not the only federal nexus, but rather one of several necessary federal permits or as part of a larger federal action. In these situations such as on a major infrastructure project, EO 13807 requires scheduling and integrating these regulatory processes to accelerate multiagency concurrent review times, which can be challenging.

Effective integration of NEPA and other federal regulatory processes requires early participation by USACE staff so that concurrent NEPA reviews can be initiated, or so USACE can join as cooperating agency. Failure to integrate the processes can result in variations between alternatives, impact analyses, and proposed mitigation, as well as a confused public and project sponsor. There are times when the scope of the NEPA analyses associated with issuing a 404 permit is much smaller than the larger project, such as in proposed projects with limited wetland impacts or stream crossings. In these instances, USACE will often do a separate shorter NEPA process on the more limited scope. This most often happens when USACE tier from a programmatic NEPA EA or EIS.

For those projects where USACE's involvement is larger, the direction provided in the EO and the MOU can help integrate a multi-agency NEPA process and the issuance of any associated federal permits and reviews. The first provision for better integration and efficiency is the development of a permitting timetable for major infrastructure projects. The timetable includes both NEPA and authorization/permit milestones (e.g., ESA Section 7, CWA Section 404, and NHPA Section 106). The agencies are also encouraged to engage in preliminary project planning or prescoping. During this period, the lead agency would work with cooperating agencies to identify the scope of the analysis, potentially significant environmental impacts, affected public, and the schedule. In addition, agencies are encouraged to develop preliminary project plans. One way to help streamline the process is to get all the involved agencies to clearly define their roles, decision-making, and an agreed upon purpose and need. Sometimes the purpose and need may be a requirement by the lead federal agency for a NEPA document's scope of work. The lead federal agency then could circulate the draft purpose and need to participating agencies for comment before the scope of work is approved to save time during the NEPA process. The MOU also describes specific concurrence points in the NEPA process. These milestones are concurrence on the purpose and need,

alternatives to be carried forward for evaluation, and the preferred alternative. If USACE is the lead or cooperating agency for their role in issuing a 404 permit, this process is intended to more effectively integrate the 404 and NEPA process. Concurrence on the scope of analyses for each participating agency's review and the lead federal agency during the scope of work is also another method to streamline and save time during NEPA.

The integration and streamlined schedules can be challenging to accomplish. Staff and funding issues make it difficult for agencies to engage early and assign dedicated staff. Staff turnover because of retirement or resignations can also lead to delays if there are no staff with redundant project knowledge available to take over. A possible solution to allay this problem is to ensure detailed notes are taken during meetings and especially at each individual concurrence point that details how decisions were made and/or arrived at. The lead federal agency should ensure that all stakeholders receive copies of these notes and to store them in a repository for all reviewers to access and refer back as necessary.

There can also be disagreement between agencies on the level of design or detail necessary to make a NEPA decision compared to issuing a permit. For example, USACE may require a high level of design and engineering in order to accurately quantify impacts for issuing a defensible permit. The lead federal agency may only be able to design up to a preliminary engineering design level (approximately 30 percent design). These differences need to be discussed and scoped early between a lead federal agency and a permitting agency such as USACE. Additionally, changes in project design can result in additional surveys if locations change or surveys are determined to be dated. Agency disagreement on especially contentious projects can cause delays as a preferred alternative is identified. However, the MOU lays out a dispute resolution process to try to avoid agency disagreement.

Issuing 404 permits for large, complex projects is challenging given NEPA requirements and the compressed EO schedule. Additional resources in terms of staff and funding may be required to fully implement the EO and One Federal Decision approach for all major projects that are proposed. Projects currently being reviewed under the integrated process will help provide a general roadmap and lessons learned to help improve future processes. However, the purpose of the CWA and reasons for its passage should not be sacrificed or compromised to allow for faster schedules and decisions.

Endangered Species Act

In 1973, the Endangered Species Act (ESA) was signed into law to address the decline of native fish, wildlife, and plants because of "economic growth and development untampered by adequate concern and conservation" (16 USC § 1531(a)). To address this concern, Congress established the ESA to conserve endangered and threatened species ecosystems, provide a program for endangered and threatened species conservation, and implement a number of international treaties and conventions (16 USC § 1531(b)).

Section 7 of the ESA requires federal agencies to do two things in meeting species protection and conservation goals. Section 7(a)(1) requires all federal agencies to use their programs and authorities to further ESA-listed species conservation (16 USC § 1536 (a)(1)). In addition, each federal agency must "insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or

threatened species or result in the destruction or adverse modification of [designated critical] habitat" (16 USC § 1536 (a)(2)). This requirement is known as Section 7 Consultation and will be the focus of this section.

In order to comply with Section 7 (a)(2), federal agencies must first determine if their federal action could affect ESA-listed species and/or designated critical habitat. Regulations for implementing Section 7 (a)(2) are codified in 50 Code of Federal Regulations (CFR) Part 402. Effects analyses can fall into one of three categories, which then dictates the type of consultation required and the likely timeframe necessary to receive concurrence or authorization from the United State Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration Fisheries Service (NOAA), the two agencies (the Services) with oversight of the ESA. Generally, the FWS oversee terrestrial and freshwater species, while NOAA oversees marine species. The first determination that a federal agency can make is that the proposed project will have "no effect" on any listed species or designated critical habitat (USFWS and NMFS 1998). This is an internal agency decision made by qualified staff that does not require concurrence or approval from the Services. These types of determinations can be made in a timely manner depending on the project's action area, type of action, likely presence of listed species or habitat, and survey timing.

If there could be effects to listed species from an agency's actions, the agency must make a determination as to whether they believe the effects would or would not adversely affect ESA- listed species or designated critical habitat. This is typically done through the development of a biological assessment or evaluation. Biological assessments are specifically required for federal actions that are "major construction activities;" however, the same type of information is developed for other types of agency actions as well (50 CFR § 402.12(b)(1)).

If the determination is that the action may affect, not likely to adversely affect the listed species or designated critical habitat, the action agency seeks concurrence of their conclusions from either of the Services, depending on the species listed. The Services have 30 days to provide their concurrence with the effect determination or require the initiation of formal consultation.

If the action agency determines that its actions may result in adverse effects to listed species or designated critical habitat, it requests the initiation of formal consultation with the Services, including the biological assessment that supports its conclusions. The Services then have 30 days to determine whether all the necessary information defined in 50 CFR § 402.14 (c) was submitted (USFWS and NMFS 1998). The formal consultation clock does not start until all the necessary information is received by the Services. Once they determine the information is complete, they have 90 days to develop a biological opinion and incidental take statement. The Services then have another 45 days to deliver a final biological opinion, resulting in a total period of 135 days (USFWS and NMFS 1998). If necessary, extensions can be requested from the Services or action agency.

Action agencies often develop their effect analysis concurrent with their NEPA process. In fact, the ESA regulations suggest that Section 7 procedures can be consolidated with the procedures of other laws like NEPA. In addition, the regulations suggest that the results of consultation should be reported in the final NEPA documents (50 CFR § 402.6).

A key component of the information necessary to initiate formal consultation is a description of the proposed agency action. This can be difficult when trying to integrate it with the NEPA process. In a NEPA process, the action agency may identify a preferred alternative in the draft environmental impact statement (EIS), but confidence in it actually being selected for implementation is only high after the release of a final EIS. Therefore, the formal consultation process typically occurs between the release of the draft and final EIS, but only after public and agency comments on the draft EIS have been considered and agency leadership supports the selection of an alternative for implementation. This can be challenging if the two-year EIS schedule does not allow sufficient time between the draft and final EISs.

One aspect of the formal consultation process that can limit the ability to meet the timing direction of the EO is the Services' ultimate determination as to whether the agency action would jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. If the Services make a jeopardy determination, the biological opinion will include reasonable and prudent alternatives to the proposed agency action (50 CFR § 402.14 (h)(3). This determination, if occurring late in the NEPA process, could result in the need to change the preferred action alternative or modify it consistent with the biological opinion. Depending on the level of change or associated impacts, an agency may need to publish a supplemental EIS and re-engage the public before finalizing the EIS (40 CFR § 1502.9).

Regardless of whether a jeopardy determination is made, schedule delays could also occur prior to the finalization and release of the biological opinion during the period when the federal action agency is able to review a draft biological opinion. Disagreement as to the scope of the proposed action or its impacts as described and assessed in the biological opinion could result in further schedule delays. Early engagement with the Services and the assignment of designated staff is crucial to working through complex issues and disagreements associated with the effects to ESA- listed species in a timely manner.

In addition to the potential substantive issues that could arise during formal consultation, the Services must also try to implement the EO with less funding, fewer staff, and increased workload. For example, fiscal year 2019 Presidential budgets for FWS Ecological Services which implements the ESA, including Section 7 consultations, proposed a $28 million reduction from fiscal year 2017 budget levels (OMB 2018).

Other challenges facing the action agency relates to the species surveys that may be necessary for assessing the effects of its actions. Although a two-year schedule should allow sufficient time, it depends on the timing and seasonality of species. For example, some species of plants can only be surveyed during narrow germination windows. Migratory species of fish and wildlife can only be surveyed while present in the action area. Baseline surveys could be completed prior to the initiation of the NEPA process; however, the coverage of these types of surveys is limited to the proposed action area. If that area changes through the development of alternatives in the NEPA process, new surveys could be necessary. With proper planning and coordination with the Services and other government fish and wildlife agencies, the number and timing of surveys can be accomplished in a manner to limit their impact on the overall schedule. In addition, the compiling of survey data from projects in close proximity can also help narrow survey areas and provide additional documentation of the presence of listed species.

Another option for better meeting the timelines directed by the EO is through the development and use of programmatic biological opinions. These programmatic opinions are intended to fulfill consultation for multiple projects. This approach can help the Services meet the timelines associated with the EO and the One Decision approach. However, programmatic biological opinions take time to develop and require agency foresight and planning to make sure they are in place when projects are proposed.

The Section 7 consultation process can be implemented in such a way as to integrate it with the NEPA process and meet EO timelines and the One Decision approach. However, it requires a thoughtfulness and pre-planning approach to avoid surprises during the process that could result in delays. As stated earlier, all federal agencies have a directive to "use their programs and authorities to further ESA-listed species conservation." At a minimum, this should cover the responsible implementation of Section 7 in such a way that limits effects to listed species while allowing a federal agency to meet their authorized purposes in a timely manner.

National Historic Preservation Act

Originally passed in 1966, the National Historic Preservation Act (NHPA; 54 USC § 300101 et seq.) was the most comprehensive preservation law of the time, establishing permanent institutions and a clearly defined process for historic preservation in the United States. The act was in response to post-World War II urban renewal, which aimed to improved communities and make room for the exploding population, but also destroyed much of the nation's historic properties in the process. Section 106 of the NHPA (54 USC § 306108) requires federal agencies to consider the effects of their undertakings on historic properties, provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment, and resolve any adverse effects on historic properties through the process provided in the Section 106 regulations (36 CFR § 800 et seq.). Historic properties are defined as sites, structures, buildings, districts, or objects listed in or eligible for listing in the National Register of Historic Places (NRHP), and may include resources of traditional religious and cultural significance to Indian tribes. The steps of the Section 106 process are informed through consultation with the State Historic Preservation Office (SHPO), federally-recognized Indian tribes, Alaska Natives, and Native Hawaiian organizations, local governments, and other interested parties.

The NHPA and NEPA are two of the principal federal laws governing the treatment of cultural resources. As major infrastructure projects requiring the preparation of EISs, many of the projects subject to EO 13807 will likely result in potential impacts to cultural resources and thus compliance with both Section 106 of the NHPA (Section 106) as well as NEPA will often be necessary.

In determining whether a federal action "significantly" affects the quality of the human environment under NEPA, federal agencies must consider impacts to cultural resources and historic properties, including proximity to "historic or cultural resources" (40 CFR § 1508.27(b)(3)), or the degree to which the action may adversely affect "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places" or may cause loss or destruction of "significant scientific, cultural, or historical resources" (40 CFR § 1508.27(b)(8)).

Coordinating Section 106 and NEPA review not only streamlines both compliance processes but is encouraged or required by the regulations themselves. NEPA's regulations require coordination with other types of environmental review "at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays in the process, and to head off potential conflicts" (40 CFR § 1501.2) and directs agencies to prepare draft EISs concurrently and integrated with related environmental impact analyses to the fullest extent possible (40 CFR § 1501.25(a)). Similarly, Section 106 regulations encourage agencies to coordinate Section 106 and NEPA as early as possible to meet the requirements of both in a timely manner (36 CFR § 800.8(a)(1)). Although they are independent statutory requirements, the process for compliance with each law may require similar studies to identify affected resources, and similar levels of tribal consultation and public engagement. EO 13807 does not add any new requirements specifically in terms of coordinating Section 106 and NEPA, but it does impose a target two-year schedule for EIS completion and requires any permits and approvals be issued within 90 days of a ROD. Coordinating the two processes can reduce duplication of effort and streamline the reviews, ensuring that they are completed in a timely and efficient manner, and thus helping projects comply with the requirements of EO 13807.

In 2013, the CEQ and the ACHP published a guidance document entitled NEPA and NHPA: A Handbook for Integrating NEPA and Section 106. The document includes general guidance on coordinating and integrating the Section 106 and NEPA review processes and is an excellent resource (CEQ and ACHP 2013). The goal of this paper is to provide further practical suggestions for streamlining and coordinating Section 106 and NEPA, to assist in compliance with specific requirements of EO 13807.

Effective coordination of NEPA and Section 106 begins early in the process. In the interest of efficiently coordinating NEPA and Section 106 reviews (along with other required reviews), ideally the same agency should act as lead agency under both NEPA and Section 106. Developing plans and schedules for cultural resource identification studies, consultation and public engagement, and other requirements common to both Section 106 and NEPA will help to guide the processes and keep them on track. Schedules should be tied to important milestones, such as the publication of the NOI, draft EIS, and final EIS. Schedules and milestones for Section 106 review should also be incorporated into project NEPA permitting timetables.

Both NEPA and Section 106 require some level of public engagement and consultation. Section 106 requires that the lead agency "seek and consider the views of the public" throughout the process (36 CFR § 800.2(d)). Similarly, public involvement is a key part of NEPA review, with the NEPA guidelines directing that agencies "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" (40 CFR § 1506.6(a)).

Engaging with a wide range of stakeholders in the early stages of project planning, even before NEPA scoping, will help to gather information that will lead to more informed development of alternatives, early identification of appropriate stakeholders, earlier identification of potential significant issues and data gaps, and ultimately will provide for a better defined NOI and more focused NEPA process. Engaging early also enables greater transparency and allows stakeholders to have a voice earlier in the process and to feel involved and informed throughout, which builds trust and good working relationships.

Separate from public engagement, consultation has a very specific meaning as defined in the Section 106 regulations. Government-to-government tribal consultation is mandatory under Section 106 when the federal action could adversely affect a historic property that is of religious or cultural significance to an Indian tribe or Native Hawaiian organization. Under NEPA, tribal consultation is not explicitly required. However, the Constitution, treaties, other statues, EOs and policies require agencies to consult when an action may affect the interests of a Federally recognized tribe (i.e., tribal cultural resources, treaty or trust land, or ceded territory rights).Consultation to fulfill government responsibilities under these other laws and executive orders, including the American Indian Religious Freedom Act, EO 12898, and EO 13175, is often completed in coordination with the NEPA process.

As with public engagement, beginning tribal consultation as early as possible will have benefits throughout the entire process, and is a recommended best practice by ACHP, CEQ, and the National Association of Tribal Historic Preservation Officers (NATHPO) (CEQ and ACHP 2013; ACHP 2017; NATHPO 2011). Government-to-government tribal consultation is an integral—and mandatory— part of the Section 106 process and can be time consuming. Working with the federal agency to begin consultation at the earliest opportunity maximizes the amount of time for consultation and can help ensure that the consultation process receives the attention that it deserves, allowing tribes to feel involved and informed throughout the process, which builds trust and good working relationships that will facilitate the consultation process. Early consultation may also help to identify resources of concern to Indian tribes or Native Hawaiian organizations that may not be identifiable through other methods; early identification of these resources could contribute to the development of alternatives for the EIS and would foster the development of appropriate mitigation.

For some tribes, informal engagement that does not require involvement of the federal agency can also be used to gather information/input early. This requires that relationships be built early on early on and that the tribe be open to taking part in more informal engagement; however, if executed correctly, informal engagement can potentially allow input from tribes earlier, allow a tribe to provide information directly to a project proposer who will know what is and isn't feasible so comments can be responded to more efficiently, and can supplement and support formal consultation conducted by the federal agency.

Another component of early project planning that can help to streamline coordinated NEPA and Section 106 review is to begin the identification of cultural resources and historic properties that could potentially be affected by the federal action. First, it is important early on to define the Area of Potential Effects (APE) for both Section 106 and NEPA analysis. In the context of Section 106, the APE is defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties" (36 CFR § 800.16(d)). In practice, the APE is often equivalent to the NEPA study area for effects to historic properties and cultural resources. Early definition of the APE may mean that the boundaries of an undertaking have not been fully refined, or that a preferred alternative under NEPA has not yet been selected, and thus a larger APE may need to be defined in order to cover all potential areas of effect. However, if defined correctly, the APE may be refined as alternatives are better defined to narrow the scope of the effects/impact analysis.

A significant difference between Section 106 and NEPA, which should be kept in mind when defining an APE and planning resource identification studies, is the types of resources that must be addressed. Under Section 106, only impacts to historic properties – that is, resources listed in or eligible for listing in the NRHP—must be considered. However, NEPA requires analysis of impacts to both historic properties and to "cultural resources" more broadly. The term "cultural resources" is not explicitly defined in NEPA or elsewhere, but typically includes a broader range of resource types that may be culturally significant, including sites, structures, geographic locations, landscapes, natural resources, and sometimes intangible resources like cultural institutions, regardless of their eligibility for listing in the NRHP. Under NEPA, "cultural resources" often also includes natural or biological resources that are subject to ceded territory treaty rights to hunt, fish, and/or gather. These resources often have a significant cultural significance to tribes. While the process for the identification of resources is generally similar between Section 106 and NEPA, the wider range of cultural resources that needs to be considered under NEPA will need to be considered.

Section 106 allows for phased identification of historic properties in certain circumstances, such as when the APE is quite large (36 CFR § 800.4(b)(2)). Using this approach, identification studies may be staged in a way that uses less intensive methods on a larger APE early in the process, and more intensive methods as the APE is refined. This allows for identification studies to begin in the early stages of Section 106 and NEPA review, even before the final project footprint has been defined, and can help to control the costs of identification studies. However, it is important to maintain a detailed and accurate record to document the changes to the APE and identification study methods as the process evolves so they can be incorporated into the NEPA administrative record.

If adverse effects to historic properties are identified, the Section 106 process concludes with the development of an agreement document, such as a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), to resolve those effects. Federal agencies must conclude the Section 106 process before approving the expenditure of funds on an undertaking or before the issuance of any license, permit, or approval for an undertaking to proceed (36 CFR § 800.1(c)). CEQ and ACHP advise federal agencies not to issue a final NEPA decision document until the Section 106 process has been completed, in order to avoid a situation where the Section 106 process results in a finding that requires revisions to the NEPA document (CEQ and ACHP 2013). Section 106 agreement documents, particularly for major infrastructure projects, can be complex, legally-binding documents that require the cooperation and agreement of multiple agencies and stakeholders, and thus can be time-consuming to prepare. Therefore, it is a good idea to initiate discussion regarding the development of a MOA or PA early in Section 106 consultation, and to plan its development so that it can be executed prior to or in coordination with the issuance of a ROD.

Conclusion

The EO and MOU outline a process for streamlining federal decision-making for major infrastructure projects. On their surface, they seem reasonable and coordinated; however, they fail to take into consideration workload, staffing, and funding levels in agency offices around the country. Although there is a lot of merit in trying to reduce the time it takes to prepare an EIS and receive the necessary permits and authorizations, an unfunded mandate may not be the most successful approach. Permits and authorizations

associated with the CWA, ESA, and NHPA can and have been successfully integrated with the NEPA process. However, the major complaint has been the time it takes to complete the process. The NEPA process has not significantly changed in the last two decades. What have changed are the number of proposed projects, staff and funding availability, and legal review associated with controversial projects.

Programmatic approaches to compliance and decision-making may be the best approach to streamlining reviews. However, it will take upfront investment and effort to develop the approaches for future use. Programmatic approaches can be useful in many aspects, but large complex projects will still require site-specific standalone processes. Leveraging and incorporating programmatic analyses may help streamline even these site-specific projects.

Legal review has shaped how NEPA and the other three laws have been interpreted and implemented. The courts have been reviewing the implementation of these laws since they were promulgated. The legal remedy of a deficient NEPA process is a remand to the lead agency to redo the portions of the process and analyses that are found arbitrary and capricious. Increasing the speed at which the processes are being implemented fails to adequately consider the cost and schedule ramifications of legal remands and the requirement to redo work. Some legal experts suggest that "speedy project approvals" may result in courts giving less deference to the government and more judicial reversals (King and Northey 2019). Projects being prepared under the EO and MOU are starting to be completed and will be indications as to how the new streamlined process will be viewed by the courts.

The EO and MOU layout a framework for more efficient NEPA and regulatory review of large projects. CEQ reports that the average time it takes to complete an EIS is five years (King and Northey 2019). The new timelines shave three years off the average. Perhaps the streamlining strategy will help reduce overall schedules and result in innovations in planning and compliance and interagency cooperation. However, agencies need to also ensure that the new EO-proposed strategy does not diminish the environmental and cultural protections and informed decision-making that Congress intended with the original laws.

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