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Expediting Infrastructure Development without Conceding Reasoned Decision Making and Public Comment: Streamlining NEPA Compliance for Facility Upgrades and Expansions

Maribeth Hunsinger*

On August 15, 2017, the White House issued Executive Order 13,807, which cited the need to improve domestic infrastructure as the basis for its mandate to cap the amount of time federal agencies may spend preparing an Environmental Impact Statement for certain major infrastructure projects. This development followed Executive Order 13,766, which called for streamlining and expediting the NEPA process for infrastructure projects, particularly those deemed to be of “high priority” to the nation. Executive Order 13,807 spurred subsequent steps toward agency implementation, including the Council on Environmental Quality’s “Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process” and the Department of the Interior’s Order 3355. Certainly, there is merit to the position that streamlining the Environmental Impact Statement requirements under NEPA could improve failing U.S. infrastructure. For example, the United States currently trails peer economies in the reliability of its infrastructure. Moreover, the current Environmental Impact Statement process requires great expense on the part of both agency and project. In fact, streamlining NEPA requirements may even be framed as a bipartisan cause, since developers and environmentalists alike advocate focused, succinct review of environmental impacts.

However, while streamlining Environmental Impact Statement preparation has the potential to benefit constituents on both sides of the development debate, arbitrarily limiting such preparation without case-specific analysis will likely compromise NEPA’s ultimate goals of reasoned decision making and informed

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public comment. Moreover, while the newest policy mandates propose changes to limit Environmental Impact Statement preparation for all types of projects, recent judicial decisions suggest that the judiciary will nevertheless strictly enforce existing standards of assessment and information sharing for NEPA compliance. This Note examines the tradeoffs between timely infrastructure development and environmental compliance, in order to assess the potential of Executive Order 13,807 to meet its stated objective of fast tracking energy infrastructure development. I argue that, while streamlining Environmental Impact Statement preparation can dually serve developmental and environmental interests under the appropriate circumstances, the proposed limitations will likely compromise NEPA's objectives of reasoned decision making and informed public comment. Instead, policies geared toward expediting infrastructure development should implement process improvements explicitly targeted toward facility upgrades, because streamlining the Environmental Impact Statement process for upgrades and expansions will have a lesser impact on regulatory goals than streamlining the process for new facilities. This Note concludes by considering a series of process improvements, which, if applied specifically to facility upgrades and expansions, may serve to accelerate project development and execution more effectively than existing policy. This strategy would also dovetail with the current administration's designation of many upgrades to existing domestic infrastructure as "high priority."

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INTRODUCTION

The health and reliability of U.S. infrastructure currently does not reflect America’s status as a global superpower—far from it, in fact. The American Society of Civil Engineers awarded the United States a grade of D+ in infrastructure in its 2017 Infrastructure Report Card, and the nation ranks eleventh in infrastructure competitiveness in the World Economic Forum’s global assessment.¹ The National Environmental Policy Act (NEPA) influences further domestic infrastructure repair, expansion, and new development by requiring that any “major Federal action[] significantly affecting the quality of the human environment” must undergo a comprehensive study and produce an Environmental Impact Statement (EIS).² NEPA established the Council for Environmental Quality (CEQ) in part to administer the EIS process.³ Critics of the EIS process argue that it impedes domestic infrastructure development by adding “needlessly” complex, costly, and time-consuming analysis to an already expensive and lengthy development process.⁴

1. *2017 Infrastructure Report Card: America’s Grades*, AM. SOC’Y OF CIVIL ENG’RS, www.infrastructurereportcard.org/americas-grades/ (last visited Apr. 22, 2018) [hereinafter *America’s Grades*, AM. SOC’Y OF CIVIL ENG’RS]; WORLD ECON. FORUM, *THE GLOBAL COMPETITIVENESS REPORT 2016–2017*, at 47 (2016), http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf.

2. 42 U.S.C. § 4332(2)(C) (2012).

3. *Id.* §§ 4342, 4344.

4. See U.S. Dep’t of Interior, Order No. 3355, § 3 (Aug. 31, 2017).

It is against this backdrop that the White House issued multiple executive orders that will impact environmental review under NEPA. Executive Order 13,766 (E.O. 13,766), for example, calls upon the Chairman of the Council for Environmental Quality (CEQ Chairman) to streamline and accelerate the environmental review and permitting processes for certain infrastructure projects that the federal government deems to be of “high priority.”⁵ Executive Order 13,807 (E.O. 13,807) seeks to prevent environmental review from delaying infrastructure projects. It does so by requiring that the environmental review and permitting processes for “major” infrastructure projects be completed within two years, and that all federal authorization decisions for major infrastructure projects be completed within ninety days of the issuance of the Record of Decision (ROD).⁶ In support of its decision, the current administration argues that “[i]nefficiencies in current infrastructure project decisions . . . have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure.”⁷ The Department of the Interior followed E.O. 13,807 with its own Order 3355, which proposed to streamline NEPA reviews by limiting EISs to 150 pages, or 300 pages for “unusually complex” projects, and by limiting Final EIS completion timeline to one year from the issuance of a Notice of Intent (NOI).⁸

There is merit to the position that streamlining NEPA could lead to faster and more efficient U.S. infrastructure development, thereby improving domestic infrastructure. On average, it takes forty-nine months to complete an EIS, at an average cost of \$4.19 million.⁹ Including Environmental Assessment (EA) preparation brings the timeline to seventy months.¹⁰ This means that the construction start date for large infrastructure projects, on average, moves out more than five years to accommodate environmental review.¹¹ The call to stimulate infrastructure development is an issue of bipartisan interest.¹² As such, the call for a streamlined environmental review process could have bipartisan appeal as well. Project advocates seek an efficient, timely process that will

5. Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017).

6. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464, 40,466 (Aug. 15, 2017). The agency issues an ROD at the end of the EIS process. This ROD explains the agency’s decision, describes the alternatives the agency considered, and discusses the agency’s plans for mitigation and monitoring. *National Environmental Policy Act Review Process*, EPA, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last updated Jan. 24, 2017).

7. Exec. Order No. 13,807, 82 Fed. Reg. at 40,463.

8. U.S. Dep’t of Interior, Order No. 3355, § 4.

9. PHILIP ROSSETTI, AM. ACTION FORUM, ADDRESSING DELAYS ASSOCIATED WITH NEPA COMPLIANCE 1 (2017), <https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/research/addressing-delays-associated-nepa-compliance/>.

10. *Id.*

11. *See id.* at 3.

12. For example, President Obama signed the Fixing America’s Surface Transportation Act (FAST Act) into law on December 4, 2015. The FAST Act authorized \$305 billion for surface transportation infrastructure over fiscal years 2016 to 2020. *Fixing America’s Surface Transportation Act or “FAST Act”*, U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/fastact/> (last modified Feb. 14, 2017).

accelerate the development timeline. Similarly, environmental advocates seek a clear, simplified process that will improve public access and participation.¹³

However, NEPA's requirement of preparing an EIS for high-impact projects is a critical component of ensuring that agencies gather relevant information, examine alternatives, explain decision making, and share findings with the public.¹⁴ Prolonged EIS reviews are in large part due to "the need for interagency coordination that fully addresses all legal obligations."¹⁵ NEPA's provisions for public participation have tangibly impacted alternative selection and risk analyses associated with prior federal actions.¹⁶ Moreover, the outcomes of recent judicial decisions regarding NEPA challenges, and EIS challenges in particular, indicate that circuit courts are unlikely to relax the standards of review for NEPA compliance in an EIS.¹⁷

While it is likely that changes to the way the federal government manages environmental review will be necessary to improve the competitiveness of American infrastructure, any efforts to revise the existing process must balance the importance of preserving "NEPA's goals of informed decisionmaking and informed public comment."¹⁸ I argue in this Note that the current administration is unlikely to achieve its goals of "[m]ore efficient and effective [f]ederal infrastructure decisions" that can "transform [the U.S.] economy" by simply imposing arbitrary limitations on EIS preparation.¹⁹ At best, agencies will simply fail to meet the specified limitations of E.O. 13,807 and its progeny, and the system will maintain the status quo while these agencies face "budgetary punishment."²⁰ At worst, however, agencies will nominally meet these limitations, but at the expense of producing an EIS that does not serve NEPA's objectives.²¹ Moreover, if a failure to serve NEPA's objectives invites increased judicial challenge, then the time required to develop a major infrastructure projects could actually increase.²² In the absence of judicial challenge, the

13. See Anne Shepherd & Christi Bowler, *Beyond the Requirements: Improving Public Participation in EIA*, 40 J. ENVTL. PLAN. & MGMT. 725, 735–36 (1997).

14. See ENVTL. LAW INST., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT 5–6 (2010), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf.

15. ROSSETTI, *supra* note 9, at 1.

16. See ENVTL. LAW INST., *supra* note 14, at 6.

17. See, e.g., *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (holding that FERC's EIS for a pipeline project should have either estimated the downstream greenhouse gas emissions from burning the natural gas transported by the pipeline or "explained more specifically why it could not have done so").

18. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

19. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,463 (Aug. 15, 2017).

20. Norman Carlin & Kevin Ashe, *Time Will Tell Whether Trump Executive Order Succeeds in Reducing Time for Federal Environmental Review and Permits for Major Infrastructure Projects*, GRAVEL 2 GAVEL (Sept. 1, 2017), <https://www.gravel2gavel.com/2017/09/time-will-tell-whether-trump-executive-order-succeeds-reducing-time-federal-environmental-review-permits-major-infrastructure-project.html>.

21. See ROSSETTI, *supra* note 9, at 3.

22. See *id.*

situation would become, arguably, even worse: Significant impacts associated with major projects would go unchecked.²³

Identifying policies that accelerate infrastructure development while preserving NEPA objectives is a difficult task: The alternative solutions are necessarily complex and potentially infinite. The remedy will likely require a combination of procedural changes and process improvements with respect to NEPA compliance.²⁴ Furthermore, potential process improvements are numerous and varied.²⁵ Different types of projects, however, may be more or less suited to process improvements aimed at accelerating EIS preparation by virtue of their relative impacts on the surrounding environment.²⁶ By recognizing that “one size does not fit all” in the context of project acceleration, policy makers may be able to address immediate development needs without substantially impacting reasoned decision making and informed public comment.

This Note posits that process improvements aimed at accelerating the preparation of a legally sound EIS will be most successful when applied to facility upgrades or expansions, compared with new facility projects. When assessing a facility upgrade, agencies already possess information about the environmental impacts of the existing infrastructure, and the nature of the infrastructure itself predetermines some strategic decisions.²⁷ By applying process improvements specifically to critical upgrades, rather than to all infrastructure projects, policy makers will more effectively balance the acceleration of domestic infrastructure development with the preservation of NEPA objectives.²⁸ In turn, maintaining compliance with NEPA’s goals will ultimately prevent further delays vis-à-vis less judicial challenge.²⁹ Finally, if agencies effectively streamline a subset of major infrastructure projects, they will free additional resources to work toward EIS completion on new facility projects.

This Note concludes by discussing in further detail specific process improvements, some of which have been proposed for the EIS process generally, that can be applied to facility upgrade and expansion projects: parallel sequencing, issue prioritization, and expansion of categorical exclusions. These strategies would streamline EIS preparation for upgrades while raising fewer environmental impact concerns than streamlining new facility projects. This is a

23. *See id.*

24. *See id.* at 1–2.

25. *See id.* at 2–3.

26. *See National Environmental Policy Act (NEPA) Guidance*, U.S. DEP’T OF JUST., BUREAU OF JUST. ASSISTANCE, <https://www.bja.gov/Funding/nepa.html> (last visited Nov. 1, 2017) (identifying categorical exclusions for minor renovations, limited expansion, and expansion of support facilities, each of which presents minimal NEPA impact).

27. *See* WORLD BANK GROUP [WBG], *ROADS AND THE ENVIRONMENT: A HANDBOOK* 5–6, World Bank, Technical Paper No. 376 (1997), <http://documents.worldbank.org/curated/en/904041468766175280/pdf/multi-page.pdf>.

28. *See id.*

29. *See* ROSSETTI, *supra* note 9, at 2–3.

particularly compelling strategy because the examples of “high-priority” infrastructure projects proposed in E.O. 13,766 are predominantly upgrade projects, rather than new projects.³⁰ While this Note focuses primarily on domestic *energy* infrastructure development, which is at the forefront of contemporary national policy conversations, most of the comments and insights contained in this Note are also applicable to other types of infrastructure projects, including surface transportation and aviation.

I. INFRASTRUCTURE DEVELOPMENT AND ENVIRONMENTAL IMPACT
ASSESSMENT IN THE UNITED STATES: BACKGROUND AND RELEVANT CASE
LAW

In order to evaluate the potential impact of policy alternatives to E.O. 13,766 and its progeny, it is important to first understand the regulatory and legal context in which such policies emerge. Part I of this Note provides the reader with such context. Part I.A describes the current state of infrastructure in the United States to demonstrate the criticality of upgrading domestic infrastructure networks. Next, Parts I.B and I.C discuss statutory frameworks with which project developers and agencies must comply: NEPA and the EIS. Finally, Part I.D summarizes outcomes of recent judicial challenges to NEPA compliance on major energy infrastructure projects and highlights potential implications for near- and medium-term standards of EIS review.

A. Health and Reliability of Infrastructure in the United States

While the United States enjoys its status as a military and economic superpower, its aging infrastructure system has failed to keep up with neither the needs of its population nor the actions of its global competitors. Despite America’s recent incremental progress toward improving its infrastructure, the American Society of Civil Engineers (ASCE) awarded the United States a “cumulative GPA” of D+ in its 2017 “Infrastructure Report Card.”³¹ Energy, individually, received a grade of D+.³² With respect to energy infrastructure, the ASCE report disclosed that most domestic transmission and distribution lines were constructed in the 1950s and 1960s, and that these facilities have not been upgraded despite having only a fifty-year life expectancy.³³ Moreover, the more than 640,000 miles of high-voltage transmission lines in the lower forty-eight

30. Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017) (noting that projects of “high priority for the Nation” include “improving the [domestic] electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways”).

31. *America’s Grades*, AM. SOC’Y OF CIVIL ENG’RS, *supra* note 1.

32. *Id.* Energy (D+) was among six categories for which the grades remained unchanged since the last report card was issued in 2013. The other five categories were Aviation (D), Bridges (C+), Dams (D), Drinking Water (D), and Roads (D). *Id.*

33. AM. SOC’Y OF CIVIL ENG’RS, 2017 INFRASTRUCTURE REPORT CARD: ENERGY (2017), <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Energy-Final.pdf> [hereinafter AM. SOC’Y OF CIVIL ENG’RS, ENERGY].

states are at full capacity.³⁴ “Without greater attention to aging equipment, capacity bottlenecks, and increased demand,” ASCE warned, “Americans will likely experience longer and more frequent power interruptions.”³⁵

ASCE’s findings with respect to the reliability of American electricity infrastructure does not come as a surprise to those familiar with the nation’s grid. Despite the recent introduction of advanced computing, much electricity is transmitted using mechanical circuit breakers and controls from the 1950s.³⁶ The 2003 blackout in the Midwest and Northeast—the grid’s fourth catastrophic failure in ten years—left fifty million people without power, on a day when no significant weather threatened the region.³⁷ The blackout cost the nation an estimated ten billion dollars.³⁸ Analysts ultimately attributed the blackout to aging grid infrastructure that lacked the ability to consistently handle transcontinental power transmission.³⁹ This led to dangerous voltage oscillations and power surges that ultimately triggered a cascading blackout.⁴⁰ Responding to the crisis, former energy secretary Bill Richardson warned, “[w]e’re a superpower with a third world electricity grid.”⁴¹

America’s energy infrastructure concerns are not limited to the power grid: Although oil and gas delivery remains the safest and most efficient domestic energy supply chain, a large percentage of high-pressure natural gas transmission lines were installed before 1980.⁴² Additionally, oil refiners have operated at 90 percent capacity or above since 1985, with limited new additions.⁴³ This, combined with sporadic failures in existing oil and gas facilities, supports an argument for increased maintenance spending and new infrastructure development.⁴⁴

America’s aging railways, dams, levees, and roads also signal a threat to both citizens’ safety and the country’s economic well-being.⁴⁵ The Department of Transportation estimates it could cost as much as one trillion dollars just to bring the current Interstate and highways system in the United States up to date.⁴⁶ The American Road & Transportation Builders Association, meanwhile, issued

34. *Id.*

35. *Id.*

36. RICHARD MUNSON, FROM EDISON TO ENRON: THE BUSINESS OF POWER AND WHAT IT MEANS FOR THE FUTURE OF ELECTRICITY 128 (2005).

37. *Id.* at 125–30.

38. *Id.* at 126.

39. *Id.* at 128–30.

40. *Id.*

41. David Adam, A ‘Third World Electricity Grid’, GUARDIAN (Aug. 15, 2003), <https://www.theguardian.com/world/2003/aug/16/usa.davidadam>.

42. AM. SOC’Y OF CIVIL ENG’RS, ENERGY, *supra* note 33, at 2.

43. *Id.*

44. *Id.*

45. Cadie Thompson, *There’s a \$1 Trillion Crisis Threatening the American Way of Life as We Know It*, BUS. INSIDER (Mar. 6, 2017), <http://www.businessinsider.com/american-infrastructure-falling-apart-2017-2>.

46. *Id.*

a report indicating that 41 percent of U.S. bridges are more than forty years old and have not undergone any significant improvements.⁴⁷ In 2017, hurricanes in the southeastern United States again highlighted the decrepit state of dams in the country when the Army Corps of Engineers announced that it would release water from Houston's Addicks and Barker reservoirs into the urban centers in an effort to control catastrophic flood activity following Hurricane Harvey.⁴⁸

Finally, America is also underperforming in the infrastructure sector compared to other global economies, particularly those with levels of economic and technological advancement. Despite being ranked third in overall global competitiveness, the United States ranks eleventh out of 138 economies worldwide for infrastructure competitiveness, according to the World Economic Forum's Global Competitiveness Index.⁴⁹ Finding ways to stimulate investment in domestic infrastructure is key to promoting the nation's public safety, access to essential goods and services, economic wellbeing, energy independence, and global competitiveness.⁵⁰

B. National Environmental Policy Act Framework

NEPA, which is the basis for the federal requirement to prepare an EIS, serves as the nation's "basic national charter for protection of the environment."⁵¹ Congress established NEPA for the purposes of encouraging "productive and enjoyable harmony between man and his environment," promoting efforts to minimize damage to the environment, and enriching the Nation's understanding of ecological systems and natural resources.⁵² Section 101 further indicates Congress's intention of balancing environmental, health, and safety concerns with social and economic interests.⁵³ NEPA is primarily information-forcing, in that the statute "does not compel a particular result" or environmental mitigation,⁵⁴ but this fact does not prevent NEPA-based environmental review from being a "notoriously lengthy process."⁵⁵ To ensure

47. *Id.*

48. Adam Rogers, *With Harvey, Imperfect Engineering Meets a Perfect Storm*, WIRED (Aug. 31, 2017), <https://www.wired.com/story/houston-dams-probable-maximum-flood-vs-500-year-flood/>. In the late-2000s, the Corps had rated the dams and spillways on both the Addicks and Barker reservoirs as "extremely high-risk" infrastructure, in part because they were not designed to accommodate the city's urban growth, and in part because the consequences of failure would be so high. *Id.* Faced with unreliable infrastructure and rising flood waters, the Corps elected to preemptively drain the reservoirs before the dams collapsed. *Id.*

49. WORLD ECON. FORUM, *supra* note 1, at 47. Countries with similar economic output, such as Singapore, Japan, France, Germany, Switzerland, and the United Kingdom, made the top ten. *Id.*

50. *See id.* at 35.

51. 40 C.F.R. § 1500.1 (2017).

52. 42 U.S.C. § 4321 (2012).

53. *See id.* § 4331(b)(3)–(5). Section 101 establishes a broader definition of NEPA's objectives, including "attain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." *Id.*

54. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1324 (D.C. Cir. 2015).

55. ROSSETTI, *supra* note 9, at 1.

that federal agencies meet their NEPA obligations, section 202 of NEPA provides for the Council on Environmental Quality (CEQ) within the Executive Office of the President.⁵⁶

Congress did not intend NEPA to enforce specific environmental mitigation measures on the parts of the relevant agencies.⁵⁷ Rather, the statute directs agencies “only to *look hard* at the environmental effects of their decisions.”⁵⁸ The primary aims of NEPA, as the United States Court of Appeals for the District of Columbia (D.C. Circuit) recently affirmed, are to (1) promote reasoned federal decision making and (2) enable informed public comment.⁵⁹ NEPA promotes reasoned decision making by forcing agencies to critically assess the environmental consequences of proposed actions.⁶⁰ The statute promotes informed public comment by requiring agencies to disclose any such environmental consequences to the public in the form of an EIS.⁶¹

Important features of environmental review under NEPA are that it is limited to major projects, it typically requires interagency coordination, and it includes review of alternatives to the proposed course of action. Before taking any action, a lead agency must first determine whether the proposed action constitutes a “major [f]ederal action[] significantly affecting the quality of the human environment.”⁶² In such cases, NEPA requires the agency to prepare a “detailed statement” that discusses and discloses the environmental impact of the decision.⁶³ Prior to making any such detailed statement, the responsible agency must consult with any other federal agency that has legal jurisdiction over or special expertise with respect to any environmental impact involved and obtain the comments and view of any local, state, or federal agencies who are authorized enforce environmental standards.⁶⁴ As the lead agency is conducting its review

56. 42 U.S.C. § 4342. In addition to ensuring that federal agencies comply with NEPA and assisting the President in preparing an annual Environmental Quality Report, the duties of CEQ also include overseeing federal agency implementation of the environmental impact assessment process, as well as issuing regulations and other guidance to federal agencies regarding NEPA compliance. *Id.* § 4344. NEPA also notes that CEQ may employ such officers and employees “as may be necessary” to carry out its functions under NEPA, and that members will utilize “to the fullest extent possible” the services of agencies, organizations, and individuals. *Id.* §§ 4343, 4345. The role of CEQ in the procedural administration of NEPA and the EIS process is discussed more thoroughly in Part I.C.

57. See *Myersville Citizens*, 783 F.3d at 1324.

58. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991) (emphasis added).

59. See *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1367 (D.C. Cir. 2017).

60. See *id.*

61. See 40 C.F.R. § 1502.1 (2017).

62. 42 U.S.C. § 4332(2)(C) (2012).

63. *Id.* The detailed statement must include: “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” *Id.* These requirements provide the basis for CEQ’s maintenance and administration of the EIS process. See 40 C.F.R. §§ 1500.1–1508.28.

64. 42 U.S.C. § 4332(2)(C).

of the proposed action, NEPA requires it to analyze “appropriate” alternatives to the recommended course of action, including the alternative of taking no action at all, commonly referred to as the “no-action alternative.”⁶⁵

The D.C. Circuit has repeatedly upheld NEPA’s status as an information-seeking statute, confirming that NEPA does not require particular action.⁶⁶ NEPA, holds the D.C. Circuit, is “a purely procedural requirement that ‘does not impose substantive duties’” or outcomes, but rather “prescribes the necessary process for preventing uninformed—rather than unwise—agency action.”⁶⁷ An agency remains free to conclude that environmental costs are outweighed by other facts, even if environmental impacts are disproportionately high, provided that adverse environmental effects of the proposed action are adequately evaluated.⁶⁸ When courts review NEPA claims, they do so to ensure that the agency took a “hard look” at the environmental consequences of its decision.⁶⁹ As long as the agency’s choice of methodology for reaching its conclusion is “reasonable and adequately explained,” a court will grant deference to that methodology.⁷⁰ Nevertheless, the courts will only consider an EIS adequate if the EIS considers all direct and *indirect* environmental impacts for which an agency’s decision is the legally relevant cause.⁷¹ The outcome of recent judicial challenges to EISs for major energy infrastructure projects is discussed further in Part I.D.

C. Council for Environmental Quality and the Environmental Impact Statement

NEPA designates CEQ as the agency responsible for implementing its procedural provisions, including requirements for preparing the environmental assessment (EA) and the EIS. CEQ oversees NEPA implementation by issuing guidance and interpreting regulations.⁷² CEQ issued its “Regulations for Implementing the Procedural Provisions of NEPA” (CEQ Regulations) as guidelines for EIS preparation.⁷³ These regulations propone efficiency, meaning they are not necessarily barriers to streamlined EIS implementation in their

65. *Id.* § 4332(2)(E).

66. *See, e.g.,* Sierra Club v. FERC (*Sabal Trail*), 867 F.3d 1357, 1367–68 (D.C. Cir. 2017).

67. *Grand Council of the Crees (of Quebec) v. FERC*, 198 F.3d 950, 959 (D.C. Cir. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989)).

68. *Methow Valley Citizens Council*, 490 U.S. at 350; *see also* *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004).

69. *Communities Against Runway Expansion*, 355 F.3d at 685.

70. *Id.* at 689.

71. *See Sabal Trail*, 867 F.3d at 1373–74.

72. NEPA.GOV, <https://ceq.doe.gov/> (last visited Oct. 8, 2017). CEQ also reviews and approves federal agency procedures for implementing NEPA requirements, approves alternative procedures to comply with NEPA in the event of an emergency, and helps to resolve disputes between federal agencies, other governmental entities, and members of the public. *Id.*

73. 40 C.F.R. §§ 1500.1–1508.28 (2017). After signing NEPA into law, President Richard Nixon issued Executive Order 11,514, “Protection and Enhancement of Environmental Quality,” which directed CEQ to issue guidelines on EIS preparation. Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 5, 1970).

current form.⁷⁴ However, the regulations balance these efficiency measures with measures to assure reasoned decision making: An EIS must state how alternatives will achieve NEPA requirements and agencies are instructed not to commit resources prejudicing the selection of alternatives before it has made a final decision.⁷⁵ Perhaps most important, the EIS shall not serve as a means of “justify[ing] decisions already made.”⁷⁶

The CEQ Regulations provide that an EIS is to serve as an “action-forcing device” that provides a “full and fair discussion” of significant environmental impacts in order to inform decision makers and the public of the impacts and potential design or implementation alternatives.⁷⁷ Throughout their lifecycle, though, the CEQ Regulations have also set forth the objective that EIS implementation must be streamlined and efficient.⁷⁸ NEPA’s purpose is not to generate paperwork or undue delay just for the sake of it.⁷⁹ In describing the affected environment, an EIS must do so in a manner that is “no longer than is necessary to understand the effects of the alternatives” and that “avoid[s] useless bulk.”⁸⁰ Agencies are encouraged to “tier” an EIS in order to eliminate repetitive discussion of issues and to incorporate material into an EIS by reference in order to “cut down on bulk without impeding agency and public review of the action.”⁸¹

Agencies should implement procedures that make the NEPA process useful to decision makers and the public, but that ideally “reduce paperwork and the accumulation of extraneous background data.”⁸² A review of the CEQ Regulations indicates that “reducing paperwork,” including through “appropriate” page limits, and “reducing delay,” including through “appropriate” time limits, are already key objectives of NEPA’s procedural implementation.⁸³

74. See 40 C.F.R. §§ 1502.5–1502.8.

75. *Id.* § 1502.2.

76. *Id.* § 1502.5.

77. *Id.* § 1502.1.

78. See *id.* § 1500.4–1500.5. For example, critics initially lamented that EISs were lengthy and responsible for delaying the decision-making process, and some observed that these issues arose due to the lack of uniformity among federal agencies and the lack of certainty about the requirements of the CEQ Regulations. As a result, CEQ has updated its regulations to promote uniformity and efficiency. Dinah Bear, *NEPA at 19: A Primer on an “Old” Law with Solutions to New Problems*, 19 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,060, 10,061–65 (1989).

79. 40 C.F.R. § 1500.1.

80. *Id.* § 1502.15.

81. *Id.* §§ 1502.20–1502.21. With respect to incorporation by reference though, the agency cautions that incorporated material must be reasonably available for inspection. This indicates that NEPA’s goals cannot be compromised in the name of efficiency. *Id.* § 1502.21.

82. *Id.* § 1500.2.

83. See *id.* §§ 1500.4–1500.5. The CEQ Regulations instruct agencies to reduce excessive paperwork through means such as “setting appropriate page limits,” using “plain language,” following a “clear format,” discussing only briefly issues that are not significant, and emphasizing the parts of the EIS that are important to decision makers and the public. *Id.* § 1500.4. The Regulations also instruct agencies to reduce delay through strategies such as “integrating the NEPA process into early planning,” using the scoping process to determine the “real” issues, and integrating NEPA requirements with other environmental review requirements. *Id.* § 1500.5.

Part 1502 further mandates that an EIS shall be “analytic rather than encyclopedic”; impacts shall be discussed “in proportion to their significance,” such that there is only brief discussion of insignificant issues; and an EIS shall be “concise” and “no longer than *absolutely necessary* to comply with NEPA.”⁸⁴ Part 1502 also sets forth requirements for timing, page limits, and writing.⁸⁵ The text of the EIS should “*normally* be less” than 150 pages, or less than 300 pages for projects of unusual scope or complexity.⁸⁶ In a broad sense, at least, these considerations comport with the current drive for accelerated and streamlined environmental review in infrastructure projects.

Also of importance to establishing background for further discussions of process improvement is Part 1501, which considers whether an agency must prepare an EIS.⁸⁷ Under Part 1501, a federal agency shall consider whether the proposal is one that is categorically excluded from the EA or EIS processes.⁸⁸ A “categorical exclusion” refers to an action which “do[es] not individually or cumulatively have a significant effect on the human environment,” and the CEQ Regulations require neither an EA nor an EIS for such action.⁸⁹ For major energy infrastructure projects, a categorical exclusion typically does not exist due to the potentially significant environmental effects of such projects.⁹⁰ This holds even in the case of major facility upgrades. While smaller upgrades and repairs may be covered under categorical exclusions for certain facility maintenance and operations activities, a significant upgrade likely will fall outside of these exclusions.⁹¹ If an activity is not categorically excluded, the agency shall prepare an EA, and, based on the findings in its EA, shall make its determination as to whether to prepare an EIS.⁹² Unless the agency determines there is no basis on which to prepare an EIS,⁹³ it must begin the EIS scoping process.⁹⁴

84. *Id.* § 1502.2 (emphasis added).

85. *Id.* §§ 1502.5–1502.8.

86. *Id.* § 1502.7 (emphasis added).

87. *Id.* §§ 1501.1–1501.8.

88. *Id.* § 1501.4(a)(2).

89. *Id.* § 1508.4.

90. *See id.*

91. *See, e.g., Categorical Exclusion Determinations: B4.13*, U.S. DEP’T OF ENERGY, OFF. OF NEPA POL’Y & COMPLIANCE, <http://energy.gov/nepa/categorical-exclusion-determinations-b413> (last visited Oct. 12, 2017) (indicating that federal projects to upgrade and rebuild power lines approximately twenty miles in length or less are categorical exclusions).

92. 40 C.F.R. § 1501.4.

93. *Id.* If the agency determines there is no basis on which to prepare an EIS, it must prepare a finding of no significant impact (FONSI) and, under certain circumstances, make the FONSI available to the public for review prior to its final determination. *Id.*

94. The EIS process consists of several stages, many of which offer opportunity for public engagement. In the first stage, the reviewing agency publishes a NOI in the Federal Register and provides notice to affected parties. *Id.* § 1501.7. The agency completes a “Draft EIS” that discloses “all major points of view on the environmental impacts of the alternatives” and responds to comments. Provided the Draft EIS fulfills “to the fullest extent possible” the requirements for final statements in section 102(2)(c) of NEPA, the agency prepares, circulates, and files a “Final EIS.” *Id.* §§ 1502.9, 1502.14.

The CEQ Regulations, even as they are currently written, certainly leave the door open for the implementation of measures to streamline and expedite EA and EIS preparation for projects that are not categorically excluded from NEPA review.⁹⁵ The various distinct stages of the EIS process, as described in the CEQ Regulations, demonstrate a commitment to the efficient implementation of NEPA procedures, including an efficient use of federal resources.⁹⁶ However, the CEQ Regulations also exhibit a commitment to maintaining NEPA's goals of providing necessary information for decision makers and the public to adequately evaluate proposals and their alternatives.⁹⁷ The balance between these two priorities must be considered in implementing any measures to streamline and expedite NEPA review.

D. Sabal Trail and the "LNG-Terminal Trilogy"

In addition to understanding the statutory and regulatory frameworks for EIS preparation, an analysis of the EIS process must consider how courts have enforced NEPA in recent challenges involving the adequacy of an EIS for a major project. The D.C. Circuit, under the Administrative Procedure Act, often has jurisdiction over such challenges either under statutes for review of certain agency actions or under general jurisdiction.⁹⁸ The D.C. Circuit recently heard four challenges to EISs prepared under NEPA for energy infrastructure projects, including three LNG projects ("the LNG-terminal trilogy") and one interstate pipeline project (*Sabal Trail*).⁹⁹ *Sabal Trail* illuminates the stringency of current appellate interpretation of environmental review requirements, and specifically the EIS, while making important clarifications regarding the court's decision in the preceding "LNG-terminal trilogy" cases.¹⁰⁰

In *Sabal Trail*, the D.C. Circuit vacated the prior approval by the Federal Energy Regulatory Commission (FERC) for the Southeast Market Pipeline Project (the SEMP Project).¹⁰¹ The court found that FERC's EIS did not sufficiently consider the indirect impacts greenhouse gas (GHG) emissions from burning natural gas transported in the pipelines.¹⁰² The SEMP Project would serve Florida's growing demand for natural gas and electric power. In addition, increasing importation of natural gas would allow Florida utilities to retire coal-

95. *See id.* §§ 1500–1508.

96. *See id.* §§ 1500.4–1500.5.

97. *See id.* § 1502.14.

98. *See* LAWRENCE D. ROSENBERG & RICHARD M. RE, BASIC LEGAL DOCTRINES FREQUENTLY ARISING IN THE D.C. CIRCUIT 1–3 (2012), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/34-basic_legal_doctrines.authcheckdam.pdf.

99. *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017); *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016).

100. *Sabal Trail*, 867 F.3d at 1357.

101. *Id.* at 1374.

102. *Id.*

fired power plants in favor of cleaner natural-gas fired plants.¹⁰³ However, opposition arose from environmental groups, landowners, and local communities.¹⁰⁴

Under section 7 of the Natural Gas Act, FERC has jurisdiction to approve the construction of interstate natural-gas pipelines if it finds the project will serve the public interest.¹⁰⁵ NEPA, in turn, requires FERC to prepare an EIS prior to approving a project that would “significantly affect[] the quality of the human environment.”¹⁰⁶ In 2016, FERC issued approved permits for the SEMP Project segments under the Natural Gas Act.¹⁰⁷ FERC found a need to increase supply of natural gas in the Southeast, and ultimately determined that the SEMP Project was consistent with public convenience and necessity.¹⁰⁸ Sierra Club challenged whether FERC had sufficiently considered environmental justice or climate change impacts associated with the project. The D.C. Circuit countered that FERC had laid out a variety of mitigations to address potential impacts and had considered four route alternatives proposed by Sierra Club.¹⁰⁹ Although the EIS acknowledged that the project would generate air and noise pollution, and would disproportionately impact lower-income communities, the court ultimately indicated it would uphold deference to FERC’s methodology and decision making in this space.¹¹⁰

The majority opinion nevertheless faulted FERC for its failure to consider indirect GHG impacts from the downstream use of fuel from the SEMP Project, noting that “[i]t’s not just the journey, . . . it’s also the destination.”¹¹¹ The majority held that, “at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible.”¹¹² The GHG emissions associated with natural-gas power plants were not only reasonably foreseeable, but also the principle purpose of the SEMP Project.¹¹³ FERC had the ability to deny permits if it deemed the proposed pipeline to be too harmful to the environment, and therefore was a “legally relevant cause” under the test established in *Department of Transportation v. Public Citizen*.¹¹⁴

103. *Id.* at 1364.

104. *Id.* Environmental groups pointed out that increased use of natural gas could hasten climate change, while landowners along pipeline routes took issue with property seizure through eminent domain. Communities along pipeline routes cited environmental justice concerns, arguing that the Project disproportionately impacts low-income and minority populations. *Id.*

105. 15 U.S.C. § 717f (2012).

106. 42 U.S.C. § 4332(2)(C) (2012).

107. *Sabal Trail*, 867 F.3d at 1364.

108. *Id.*

109. *Id.* at 1370–71.

110. *Id.*

111. *Id.* at 1371.

112. *Id.*

113. *Id.* at 1372.

114. *Id.* at 1373. In *Department of Transportation v. Public Citizen*, the Supreme Court unanimously held that NEPA did not require the Federal Motor Carrier Safety Administration to evaluate environmental effects of increased truck traffic between the U.S. and Mexico. The Supreme Court’s rationale was that the agency did not have the ability to prohibit Mexican trucks from entering the United States. Since the

Thus, the D.C. Circuit found that NEPA required FERC to consider the indirect effects of GHG emissions from proposed or future end-user power plants.¹¹⁵

The D.C. Circuit also distinguished the present case from the LNG-terminal trilogy, a series of three challenges to FERC decisions licensing LNG terminals in which the D.C. Circuit applied the *Public Citizen* rule.¹¹⁶ In each of these cases, the D.C. Circuit assessed whether FERC, in licensing physical upgrades to LNG terminals under authority delegated by the Department of Energy, was required to evaluate the climate-change effects of exporting natural gas.¹¹⁷ In each case, the court applied *Public Citizen* to find that FERC was not required to consider the climate-change effects of exporting natural gas.¹¹⁸ The majority clarified that the D.C. Circuit so held because FERC was forbidden to rely on the effects of gas exports as a justification for denying such an upgrade license.¹¹⁹ Conversely, in *Sabal Trail*, while the Florida Electrical Power Plant Siting Board had the sole authority to license power plant siting and operation in Florida, FERC still had the authority to deny a pipeline certificate on the basis of adverse environmental effect.¹²⁰

The D.C. Circuit's decision in *Sabal Trail* and its discussion of the LNG-terminal trilogy precedents provide a relatively straight-forward prognosis of how current courts will treat NEPA challenges for energy infrastructure projects. It appears courts will continue to grant deference to agency decisions based on the information gathered during EIS process, as evidenced by the D.C. Circuit's deference to FERC's methodology in weighing environmental justice impacts of pipeline routing alternatives.¹²¹ Nevertheless, it seems that courts will continue to strictly enforce the procedural implementation of NEPA's information-gathering and public-comment requirements, as evidenced by the D.C. Circuit's mandate that FERC must consider even indirect impacts for which it is a relevant cause, including GHG emissions from end-user power plants in Florida.¹²² Strategies to streamline and modernize environmental review will likely meet

agency did not have that ability, it could not be the "legally relevant cause" of the environmental effects of increased truck traffic, and therefore was not obliged to consider these impacts in its EIS. 541 U.S. 752, 769–70 (2004).

115. *Sabal Trail*, 867 F.3d at 1374–75.

116. *See id.* at 1372–73; *see also* *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016).

117. *Sabal Trail*, 867 F.3d at 1372–73.

118. *Id.*

119. *Id.* at 1373. Congress delegated to FERC the authority to "approve or deny an application for the siting, construction, expansion, or operation of an [export] terminal," just as it granted FERC the authority to approve the construction of interstate natural gas pipelines. 15 U.S.C. §§ 717b(e)(1), 717f (2012).

120. *Sabal Trail*, 867 F.3d at 1372–73. Judge Janice Brown argued in her dissent that since the Florida Electrical Power Plant Siting Board ultimately controls power plant operation in Florida, FERC is not actually in the position to control the environmental effects of natural gas exports through its pipeline permit approvals. *Id.* at 1381–82 (Brown, J., dissenting).

121. *See id.* at 1370–71 (majority opinion).

122. *See id.* at 1374.

successful judicial challenge if they prevent agencies from gathering and sharing the information required for reasoned decision making and informed public comment.¹²³

II. FROM “EXPEDITING ENVIRONMENTAL REVIEWS” TO “ESTABLISHING DISCIPLINE AND ACCOUNTABILITY”: RECENT DEVELOPMENTS IMPACTING NEPA COMPLIANCE

During his presidential campaign, President Donald Trump communicated that his administration would treat infrastructure and energy as focus issues, promising to create twenty-five million jobs through “infrastructure spending, tax reduction, trade deal reform and lifting restrictions on American energy development.”¹²⁴ Since President Trump took office in November 2016, his administration has issued a series of executive orders tailored to increasing “high priority” domestic infrastructure projects, and particularly energy infrastructure projects.¹²⁵

Despite the appearance of the current administration’s substantial attentions to stimulating infrastructure investment, skeptics point out that promises and policies do not seem to be substantiated with tangible funding: Beth Osborne, a senior policy advisor at the nonpartisan Transportation for America, commented, “For someone who says he wants to invest in infrastructure, I don’t see any evidence of it in this budget.”¹²⁶ Nevertheless, the White House has made tangible policy decisions relevant to furthering infrastructure development against the constraints of environmental assessment and permitting.¹²⁷ Additionally, CEQ and the Department of the Interior, and possibly additional federal agencies, have already taken steps that “dovetail” with the federal goal of “streamlining and expediting” infrastructure projects by making adjustments

123. See generally *id.*

124. *Trump Promises to Make Infrastructure a Major Focus*, PBS NEWSHOUR (Nov. 12, 2016), <http://www.pbs.org/newshour/bb/trump-promises-make-infrastructure-major-focus/>.

125. See Exec. Order 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,467 (Aug. 15, 2017). In June, the White House promoted “Infrastructure Week,” during which it held events to promote the administration’s trillion-dollar plan to revamp the nation’s infrastructure. Brooke Singman, *Trump Touts ‘New Era’ with \$1 Trillion Infrastructure Plan*, FOX NEWS (June 7, 2017), <http://www.foxnews.com/politics/2017/06/07/trump-touts-new-era-with-1-trillion-infrastructure-plan.html>.

126. Thomas Frank, *Trump Has Promised Big Spending on Infrastructure. His Budget Cuts It*, CNN (Mar. 16, 2017), <http://www.cnn.com/2017/03/16/politics/trump-infrastructure/index.html>.

127. See Exec. Order No. 13,766, 82 Fed. Reg. at 8657; Exec. Order No. 13,807, 82 Fed. Reg. at 40,463.

to the EIS process.¹²⁸ These policy initiatives appear to have manifested as page limits and time constraints on the EIS.¹²⁹

The following section discusses key aspects of these policy mandates that are critical for evaluating their potential impact to infrastructure development timelines and NEPA compliance. Parts II.A and II.B review the substance and potential impacts of President Trump's recent energy infrastructure-related executive orders, while Part II.C explores the recently unearthed Department of the Interior Order that indicates initial steps to execute presidential mandates.

A. *Executive Order 13,766: "Expediting Environmental Reviews"*

On January 24, 2017, the Trump Administration kicked off a series of executive orders that purported to stimulate domestic infrastructure development with Executive Order 13,766, entitled "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects" (E.O. 13,766).¹³⁰ E.O. 13,766 portrays environmental reviews and permitting as "choke points" inhibiting infrastructure project development.¹³¹ The order advocates maximizing the efficiency and effectiveness of federal infrastructure decisions, while still respecting environmental, property rights, and public safety concerns.¹³² To that end, the order opines, "it is the policy of the executive branch to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects."¹³³

E.O. 13,766 also directs the CEQ Chairman to expedite procedures and deadlines for completion of environmental reviews and permit approvals in order to "fast track" certain vital projects.¹³⁴ E.O. 13,766 is especially concerned with streamlining and expediting environmental reviews and approvals for projects that are a "high priority" for the Nation, including projects to repair and upgrade electric grid, telecommunications, port, airport, pipeline, bridge, and highway infrastructure.¹³⁵ Notably, it appears that the majority of these high priority

128. See Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16,576, 16,576 (Apr. 5, 2017). Pursuant to E.O. 13,784, the notice stated the guidance was being withdrawn for "further consideration" in line with recent executive orders, such withdrawal indicates government agencies and regulatory bodies are reacting swiftly to President Trump's call for NEPA reform. *Id.*; see also U.S. Dep't of Interior, Order No. 3355 (Aug. 31, 2017).

129. See, e.g., U.S. Dep't of Interior, Order No. 3355, § 4 (limiting EISs to 150 pages or 300 pages for "unusually complex" projects and instituting a target completion date of one year from the issuance of a NOI).

130. Exec. Order No. 13,766, 82 Fed. Reg. at 8657.

131. Clark Hill PLC, *New Executive Order on Infrastructure Ups the Ante on Streamlining the Environmental Review and Permitting Process*, JD SUPRA (Aug. 21, 2017), <http://www.jdsupra.com/legalnews/new-executive-order-on-infrastructure-42260/>.

132. Exec. Order No. 13,766, 82 Fed. Reg. at 8657.

133. *Id.*

134. Clark Hill PLC, *supra* note 131.

135. *Id.* Ultimately, the CEQ Chairman is responsible for identifying these high priority infrastructure projects, and he or she is instructed to consider the project's importance to the general

projects will be categorical upgrades and expansions, not greenfield projects. This is the first sign that the underlying motivations E.O. 13,766 may be met through process improvements specifically for facility upgrades and expansions, rather than uniformly updating—and potentially compromising—the EIS process for all projects.¹³⁶

B. Executive Order 13,807: “Establishing Discipline and Accountability”

On August 15, 2017, the White House issued Executive Order 13,807 (E.O. 13,807), entitled “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” in order to “ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent.”¹³⁷ The order presents a compelling argument for the need to increase infrastructure investment in the United States, stating that “America needs increased infrastructure investment to strengthen our economy, enhance our competitiveness in world trade, create jobs and increase wages for our workers, and reduce the costs of goods and services for our families.”¹³⁸ E.O. 13,807 further posits that streamlining the environmental review and authorization processes will stimulate such infrastructure investment, but stops short of assessing whether there may be opportunities implement such processes on a project-by-project or category-by-category basis.¹³⁹

In order to achieve its goals of “discipline and accountability,” E.O. 13,807 calls for, among other things, CEQ to take actions to “enhance and modernize” the federal environmental review process, and to form an inter-agency working group to resolve agency-specific barriers to efficient review for “major” infrastructure projects.¹⁴⁰ The order defines a “major” infrastructure project as an infrastructure project for which (1) the authorization of multiple federal agencies is required in order to proceed with construction, (2) the lead federal agency has determined it will prepare an EIS under NEPA, (3) and the project sponsor has sufficient funds to complete the project.¹⁴¹ The order also provides further clarification as to the designation of “high priority” infrastructure projects under E.O. 13,766: The term “high priority” refers to all infrastructure projects

welfare, value to the Nation, and environmental benefits, among other factors, in making such a determination. Exec. Order No. 13,766, 82 Fed. Reg. at 8657. The CEQ Chairman may make such a determination at his or her own initiative, or following request by the Governor of a State or by the head of any executive department or agency. *Id.*

136. See Exec. Order No. 13,766, 82 Fed. Reg. at 8657.

137. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,463 (Aug. 15, 2017).

138. *Id.*

139. *Id.* The order still further cites “[i]nefficiencies in current infrastructure project decisions” that have “delayed infrastructure investments, increased projects costs, and blocked the American people from enjoying improved infrastructure” as support for its position that modernizing the EIS process will stimulate infrastructure investment and development in the United States. *Id.*

140. *Id.* at 40,467–68.

141. *Id.* at 40,464.

subject to 23 U.S.C. section 139, 33 U.S.C. section 2348, or 42 U.S.C. section 4370m-12, as well as similar projects.¹⁴² This clarification further bolsters the conclusion that a significant portion of the high priority projects spurring urgent action under these executive orders will be facility upgrades.¹⁴³

E.O. 13,807, however, provides for a number of process improvements without distinguishing between measures for urgent projects and measures for all projects generally.¹⁴⁴ E.O. 13,807 includes provisions for “Agency Performance Accountability” and “Process Enhancements” that foreshadow tangible limitations to the EIS process.¹⁴⁵ With respect to the former, the order mandates that the Director of the Office of Management and Budget establish a Cross-Agency Priority Goal on Infrastructure Permitting Modernization that sets an average target of approximately two years, measured from NOI, for processing environmental reviews and authorization decisions.¹⁴⁶ With respect to the latter, the order provides for a “One Federal Decision” framework in which each major infrastructure has a lead federal agency that is responsible for “navigating” the environmental review and authorization process.¹⁴⁷ The order instructs CEQ to develop an initial list of actions to enhance and modernize the federal environmental review and authorization process, which CEQ did promptly.¹⁴⁸

E.O. 13,807 cites “[i]nefficiencies in current infrastructure project decisions” that have “delayed infrastructure investments, increased projects costs, and blocked the American people from enjoying improved infrastructure” as support for its position that “modernizing” the EIS process will stimulate infrastructure investment and development in the U.S.¹⁴⁹ It is still early to assess the impact that such modernization will have on the process, and the CEQ initial list of actions reveals little about the inevitable substantive changes that it will eventually implement.¹⁵⁰

142. *Id.* at 40,467.

143. *See id.*

144. *Id.* One such strategy is the creation of “energy right-of-way corridors” on federal lands. *Id.* at 40,468.

145. *Id.* at 40,464, 40,466.

146. *Id.* at 40,464. The order also provides for agencies to integrate performance goals into their individual plans, and for a performance accountability system to be established that will track each major infrastructure project. *Id.* at 40,465.

147. *Id.* at 40,466. This does not seem particularly novel relative to the existing framework in which a lead agency coordinates and communicates with other agencies for comments and insight. It remains to be seen, then, whether “navigating” means the lead agency is coordinating the process or dominating the process without feedback from other relevant federal agencies. *See id.*

148. *Id.* at 40,467; *see* Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43,226, 43,226–27 (Council of Env'tl. Quality Sept. 14, 2017).

149. Exec. Order No. 13,807, 82 Fed. Reg. at 40,463.

150. *See* Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. at 43,226–27.

C. Department of the Interior Order 3355: An Example of Agency Implementation

While it is still early to assess the full agency response to E.O. 13,807, the White House's bid to streamline the environmental review process also spurred Order No. 3355 by the Department of the Interior (Order 3355), which may be indicative of future responses of other agencies.¹⁵¹ The purpose of Order 3355 was to "immediately implement certain improvements to [NEPA] reviews conducted by the Department of the Interior" in order to begin implementation of E.O. 13,807.¹⁵²

The Department of the Interior must apply NEPA to many of its potential projects, and Order 3355 acknowledges NEPA's goals of "ensuring that information regarding environmental impacts is available to decisionmakers and the public before decisions are made."¹⁵³ However, the Department also points out that the purpose of NEPA's requirements "is *not* the generation of paperwork."¹⁵⁴ To avoid the generation of "needlessly complex" analysis and paperwork that acts as an "impediment[] to efficient development," the order seeks to bring "even greater discipline" to the existing process by making CEQ's suggested EIS page limits more stringent, and by setting aggressive timelines for EIS preparation and completion.¹⁵⁵ For an EIS, each lead agency shall have a target to complete the Final EIS within one year from the issuance of an NOI to prepare such an EIS.¹⁵⁶ Any timelines that exceed this target by more than three months must be approved by the Assistant Secretary with responsibility for the matter.¹⁵⁷ Moreover, no EIS shall be more than 150 pages, or 300 pages for "unusually complex" projects.¹⁵⁸

Order 3355's mandates rely on process guidelines already suggested in the CEQ regulations. Nevertheless, Order 3355 appears to be distinct from the CEQ guidance in that the CEQ Regulations generally suggest flexible, case-specific analysis to accompany the enforcement of its targets and process improvements. Order 3355, on the other hand, indicates a likely future trend toward rigid requirements that compromise the quality of EIS preparation.¹⁵⁹

151. U.S. Dep't of Interior, Order No. 3355 (Aug. 31, 2017).

152. *Id.* § 1.

153. *Id.* § 3.

154. *Id.* (emphasis added).

155. *Id.*

156. *Id.* § 4.

157. *Id.*

158. *Id.* This limit excludes appendices. *Id.* Order 3355 cites tiering and incorporation, both of which are enumerated in the CEQ Regulations as legitimate process improvements and as techniques for meeting these targets. *Id.*

159. See U.S. Dep't of Interior, Order No. 3355, § 4. Conversely, the CEQ Regulations suggest that the EIS should *normally* not be more than 150 pages, and they indicate that agencies should adhere to the 150-page target as "appropriate" guidance, not a rigid requirement. 40 C.F.R. §§ 1500.4, 1502.7 (2017).

III. ACCELERATING INFRASTRUCTURE DEVELOPMENT WITHIN THE CONSTRAINTS OF NEPA COMPLIANCE: WHY FACILITY UPGRADES ARE THE KEY TO SUCCESS

It is difficult to predict exactly how the recent policy mandates will play out, but there is a strong possibility that they negatively impact compliance with NEPA's objectives without significantly improving project timelines. In the best-case scenario, the recent mandates will succeed only in maintaining the status quo. In the worst-case scenario, these mandates will inadvertently promote undesirable environmental impacts, or at the very least set the stage for increased judicial review. Part III.A examines in further detail the potential impacts of indiscriminate application of these policy mandates in the absence of further refinement.

However, the tension between encouraging development and promoting NEPA's objectives means that the task of identifying a more appealing alternative is a difficult one—how does one balance development and environmental interests? Consideration of NEPA process improvements, such as those suggested in the E.O. 13,766 and its progeny, reveals that their implementation would generally pose less risk to NEPA's objectives if they were implemented specifically for facility upgrades and expansions.¹⁶⁰ This is because many of the variables for upgrade projects have been determined by the original project, and it is less likely that streamlining strategies will lead to oversight of important alternatives or significant consequences.¹⁶¹ Part III.B considers how the appropriate balance between infrastructure development and environmental review may be achieved through more limited application of efficiency measures to urgent projects, and in particular to facility upgrades and expansions.

A. *Evaluating the Potential Impact of Recent Policy Decisions Affecting Infrastructure Projects in the United States*

At first glance, the current policy mandates do not run explicitly counter to NEPA or the existing CEQ Regulations.¹⁶² After all, CEQ has stated that an EIS is to be “concise, clear, and to the point” and “no longer than absolutely necessary to comply with NEPA,” and the CEQ Regulations already establish flexible guidelines such as limiting the EIS to 150 pages.¹⁶³ However, it is important to note that the CEQ Regulations currently call for case-specific

160. See Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017); see also Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43,226, 43,226–27 (Council of Envtl. Quality Sept. 14, 2017).

161. See WORLD BANK GROUP [WBG], *supra* note 27, at 5–6.

162. Compare Exec. Order No. 13,766, 82 Fed. Reg. at 8657, with Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. at 43,226–27.

163. 40 C.F.R. §§ 1502.1, 1502.2(c), 1502.7 (2017).

assessment of guidelines such as required page length: Length, for example, “var[ies] first with potential environmental problems and then with project size.”¹⁶⁴ The CEQ Regulations do not appear to set strict time limits on the environmental review and authorization process, either.¹⁶⁵ However, if Order 3355 is any indication of federal response to the recent executive orders, CEQ and federal agency interpretations may enforce arbitrary limits on the EIS process without engaging in case-specific inquiry to balance NEPA objectives.¹⁶⁶ The impact of such actions could range from maintaining the status quo to promoting adverse environmental impacts.

Despite procedural flaws, NEPA has cemented itself as an important part of the agency decision making and public comment processes of major federal actions—and it is the primary statutory means by which to gather information with respect to environmental impacts on a large, federal energy infrastructure project.¹⁶⁷ Public participation has made a difference in many cases. According to CEQ, for example, agencies have revised their proposed alternatives in response to public input solicited through NEPA review.¹⁶⁸ In some cases, the public has identified errors in the underlying data, leading agencies to ultimately reverse their decision to move forward.¹⁶⁹

An effective environmental assessment process that satisfies the desire for public comment also benefits developers. While developers may see the environmental assessment process as a costly and time-consuming set of hurdles, the EIS provides a valuable framework for considering location and design issues in parallel with environmental issues.¹⁷⁰ In what is sometimes referred to as “green capitalism,” the consideration of environmental impacts early in the project life can lead to improved relations between the developer, the planning authority, and the local communities. This may lead to a smoother consent process and, in turn, “a worthwhile financial return on the extra expenditure incurred.”¹⁷¹ Moreover, NEPA can make it easier for stakeholders to achieve project approval because it provides for coordination of necessary compliance actions by a single, lead agency.¹⁷²

Though the EIS process achieves valuable results, critics are validated in their position that it is lengthy and costly. The U.S. Government Accountability

164. *Id.* § 1502.2(c).

165. *See id.* § 1502.5.

166. *See* U.S. Dep’t of Interior, Order No. 3355 (Aug. 31, 2017).

167. *See* 42 U.S.C. §§ 4321, 4332 (2012).

168. ENVTL. LAW INST., *supra* note 14, at 6. Public participation has made a difference in various types of projects, from land management, to roads and infrastructure, to use of pesticides. *Id.*

169. *See id.* For example, a citizen commenter correctly identified mathematical errors in a 1500-page Corps of Engineers draft EIS that analyzed the risk profile of introducing non-native oysters into the Chesapeake Bay. The Corps of Engineers revised its EIS in response to this citizen’s input, and ultimately determined the risk profile was too great to move forward. *Id.*

170. *See* JOHN GLASSON ET AL., INTRODUCTION TO ENVIRONMENTAL IMPACT ASSESSMENT 7 (4th ed. 2012).

171. *Id.*

172. *See* ROSSETTI, *supra* note 9, at 3.

Office (GAO) notes that there exists limited information on costs and benefits of completing NEPA analyses because agencies do not routinely track the cost of completing NEPA analysis—and because, according to reports from CEQ, EPA, and other agencies, there is no government-wide mechanism to do so.¹⁷³ Nevertheless, GAO has shared some astounding cost and schedule estimates from the Department of Energy (DOE) that support the assertion that EIS preparation for major energy infrastructure projects is a formidable activity: The DOE's median EIS contractor cost for calendar years 2003 through 2012 was \$1.4 million, and its average contractor cost for those years was \$6.6 million.¹⁷⁴ Additionally, GAO noted that, according to information published in the Federal Register, the 197 Final EISs in 2012 had an average preparation time of 4.6 years.¹⁷⁵

Just as promoting infrastructure is an issue of bipartisan interest,¹⁷⁶ streamlining NEPA compliance and the EIS process is as well: Delays related to environmental review and authorization sometimes serve to delay socially beneficial results. For example, the D.C. Circuit's judgment in *Sabal Trail* will delay the supply of additional natural gas to Florida, meaning that (a) Florida utilities will not be able to meet their local natural gas demand next year, and (b) coal-fired power plants that were going to be decommissioned in favor of cleaner-burning natural gas-fired power plants will continue running.¹⁷⁷

Similarly, a nine-year CEQA challenge to the Richmond Refinery Modernization Project not only delayed a modernization project that would increase the domestic supply of oil, but it actually delayed the installation of safety upgrades intended to reduce the risk of a plant fire.¹⁷⁸ The billion-dollar modernization project was first submitted to the city in 2006 but was delayed after environmental groups sued the city and the refinery in 2008, arguing that the project would increase pollution.¹⁷⁹ The project, which included the replacement of aging refinery process piping with more reliable piping, was scaled back and approved by the Richmond City Council in 2014.¹⁸⁰ This same challenge delayed the replacement of three Chevron SuezMax ships with two

173. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 6–13 (2014).

174. *Id.* at 12.

175. *Id.* at 13.

176. See *supra* note 12 for a discussion of the FAST Act and the bipartisan desire to encourage upgrades of critical infrastructure in the United States to meet the needs of a growing domestic population and an aging infrastructure network.

177. See *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1363–64 (D.C. Cir. 2017).

178. Karina Ioffe, *Richmond Refinery Modernization Project Moves Forward*, MERCURY NEWS (Apr. 14, 2015), <http://www.mercurynews.com/2015/04/14/richmond-refinery-modernization-project-moves-forward/>.

179. *Id.*

180. *Id.* As part of the project, Chevron plans to replace seventeen piping circuits with alloys that are more resistant to corrosion. Corroded pipe was determined to be the cause for the August 2012 fire at Richmond Refinery that caused thousands of area residents to seek respiratory treatment at local hospitals. *Id.*

cleaner-running vessels.¹⁸¹ While CEQA is considered to have more substantive bite than NEPA, the Richmond Refinery example still serves as an important example of public benefits that can be delayed if environmental review is not streamlined.¹⁸²

The preceding discussion highlights the potential bipartisan benefits of streamlining the EIS process, in addition to that of simply accelerating infrastructure development. However, in identifying process improvements, policy makers must carefully balance these perceived benefits with the potential risks to the “historic effectiveness and integrity” of the NEPA process.¹⁸³ The remainder of this section explores the costs, benefits, and potential outcomes of a streamlining strategy motivated primarily by schedule considerations. It is unlikely that such a strategy, without further refinement, will achieve the current administration’s vision of expediting domestic infrastructure development.¹⁸⁴ Such a strategy ultimately leaves NEPA and its protections for reasoned decision making and public comment vulnerable to failure.¹⁸⁵

1. *The Best-Case Scenario: Maintaining the Status Quo*

Streamlining strategies such as mandatory timelines for NEPA documents and EIS page limits have clear benefits: Mandatory timelines will reduce delays and schedule uncertainty, while EIS page limits can reduce costs and help to avoid “encyclopedia mania.”¹⁸⁶ However, these benefits are offset by risks such as impossible schedules, legal challenges, inadequate impact analysis, and “cookie cutter” approaches that do not sufficiently respond to complexity variations in EISs.¹⁸⁷ Unfortunately, the recent executive orders appear to call for expediting current processes without providing additional resources to meet rigorous standards of analysis in a compressed timeframe.¹⁸⁸ Advocating stringent limitations on the EIS process, without providing for case-by-case inquiries for EIS complexity, will leave agencies grossly unable to achieve both

181. *Id.*

182. See EXEC. OFFICE OF THE PRESIDENT & CAL. OFFICE OF PLANNING & RESEARCH, NEPA AND CEQA: INTEGRATING STATE AND FEDERAL ENVIRONMENTAL REVIEWS (DRAFT FOR PUBLIC REVIEW AND COMMENT) 4 (2013), https://www.energy.gov/sites/prod/files/NEPA_CEQA_Draft_Handbook_March_2013_0.pdf. CEQA’s environmental mitigation requirements weigh more heavily toward substantive environmental enforcement than NEPA’s focus on pure information gathering. *Id.* On the other hand, the numerous exemptions to enforcing the environmental mitigation requirements raise questions as to whether CEQA should really be considered to have that much more bite than NEPA. See *id.* at 7.

183. Roger P. Hansen et al., *NEPA and Environmental Streamlining: Benefits and Risks*, 9 ENVTL. PRACTICE 83, 93 (2007).

184. See *id.* at 93–95

185. See *id.*

186. *Id.* at 94.

187. *Id.*

188. See Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

cost and schedule targets *and* analytical rigor.¹⁸⁹ Ultimately, an agency will have to sacrifice one or the other, such that limited change to the status quo is affected.

As noted previously in this paper, CEQ Regulations regard mandatory time limits for NEPA compliance as “too inflexible.”¹⁹⁰ The regulations instead encourage agencies to set time limits on a case-by-case basis that considers factors such as the degree of controversy and the consequences of delay.¹⁹¹ Because projects requiring NEPA compliance vary in scope and complexity, “one size does not fit all” with respect to procedural requirements for compliance.¹⁹² Even page limits, which offer the potential benefit of making EIS documents faster and less difficult to comprehend, should be flexible based on the type of the project.¹⁹³ While the CEQ Regulations advocate appropriate page limits, the regulations also note that these limits can be adjusted based on the scope and complexity of the project.¹⁹⁴

Many project cost and schedule overruns on large-scale projects are precipitated as a result of “the interdependence between project participants in promoting and approving unrealistic and unachievable targets.”¹⁹⁵ In the private sector, such unrealistic and unachievable targets are often the product of senior management or other decision makers implementing policies that dictate “optimistic” estimates—that is, those estimates that exhibit “an inclination to put the most favorable construction upon actions or events or to anticipate the best possible outcome.”¹⁹⁶ Within the context of the new regulations stemming from E.O. 13,807, the estimates are not just optimistic; they do not appear to be based on any project-specific or industry-specific cost and schedule analysis.¹⁹⁷ It follows that, without additional resources, agencies will likely be unable to meet all of the substantive requirements of an EIS within the given deadline.¹⁹⁸

This setup constitutes the likely best-case outcome of current policy mandates: Agencies maintain the integrity of the EIS process, but in doing so fail to meet the strict limitations on timelines and page limits.¹⁹⁹ While this case would have limited negative impact, with the exception of resources spent on policy implementation, it also would not have the desired positive impact with

189. Hansen et al., *supra* note 183, at 93–95.

190. *Id.* at 91.

191. *Id.*

192. *Id.*

193. *See id.* at 91, 94.

194. 40 C.F.R. § 1502.7 (2017).

195. Edmond Condon & Francis T. Hartman, *Playing the Game* (Project Mgmt. Inst. 2004), <https://www.pmi.org/learning/library/overruns-poor-incomplete-information-productivity-communications-8290>.

196. *Id.*

197. *See* Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

198. *See* Exec. Order No. 13,766, 82 Fed. Reg. at 8657; Exec. Order No. 13,807, 82 Fed. Reg. at 40,463.

199. *See* Hansen et al., *supra* note 183, at 93–94.

respect to expediting project development timelines. In this sense, the agencies would effectively be maintaining the status quo.

2. *The Worst-Case Scenario: Compromising Reasoned Decision Making and Informed Public Comment*

If an agency conducting an EIS is set up for failure, such failure could potentially take one of two forms: 1) the agency fails to meet the page limits and time constraints, thereby rendering efforts to streamline the process ineffective; or 2) the agency meets the page limits and time constraints but fails to obtain or publish the information required to support reasoned decision making and informed public comment. The former alternative is the “best-case scenario” examined in the previous part. Michael Saul, a senior attorney at the Center for Biological Diversity, seems to think the latter alternative is more likely.²⁰⁰ Saul said of E.O. 13,807 and the resultant Order 3355, “The Trump administration quietly and arbitrarily limited critical reviews that protect the environment and public health.”²⁰¹ Such a move, Saul lamented, “will do real harm to people and wildlife” because agencies will likely forfeit satisfactory NEPA analysis in favor of meeting designated EIS preparation targets.²⁰²

If the best-case scenario is a process that effectively maintains the status quo, then the worst-case scenario is a process that compromises reasoned decision making and informed public comment.²⁰³ This worst-case scenario, if left unchecked by the processes of public participation and judicial review, may ultimately manifest as a failure to consider critical impacts and a subsequent implementation of a project alternative that has unintended environmental consequences.²⁰⁴ Perhaps more likely, given the enthusiasm of environmental groups for challenging environmental justice and climate change oversights in contemporary EISs, this scenario will lead to drawn out judicial challenge and review that delays the project significantly—maybe even longer than would have development of a legally sound EIS.²⁰⁵

E.O. 13,766 and its progeny are not setting realistic goals. For example, less than one quarter of EISs are completed in two years and approximately 5 percent of EISs are completed in less than one year.²⁰⁶ Complying with an arbitrary deadline, like E.O. 13,807’s two-year target for EIS completion, would likely

200. Michael Doyle, *Order Limits Most NEPA Studies to a Year, 150 Pages*, E&E NEWS: GREENWIRE (Sept. 6, 2017), <https://www.eenews.net/stories/1060059865/print>.

201. *Id.*

202. *Id.*

203. *See id.*

204. *See* Keith J. Benes, *Streamlining Infrastructure Permitting: Two Steps Forward, One Step Back*, ATLANTIC COUNCIL: NEW ATLANTICIST (Oct. 10, 2017), <http://www.atlanticcouncil.org/blogs/new-atlanticist/streamlining-infrastructure-permitting-two-steps-forward-one-step-back>.

205. *See id.* (noting that the “backward steps” in E.O. 13,807 will “likely undermine environmental integrity of permitting decisions and potentially put permitting decisions at higher risk of being invalidated in court challenges”); *see also* Sierra Club v. FERC (*Sabal Trail*), 867 F.3d 1357, 1374 (D.C. Cir. 2017).

206. Benes, *supra* note 204.

encourage agencies to inadequately evaluate projects or ignore issues.²⁰⁷ Uniformly constraining the existing components of the process has the potential to turn EIS preparation into a “check the box” exercise, as agencies will seek to nominally provide the requested information without necessarily having time to adequately analyze such information for decision making or to allow time for public input.²⁰⁸

This phenomenon is coupled with the fact that the D.C. Circuit has clearly held that an EIS must consider all direct and indirect impacts for which it is the legally relevant cause.²⁰⁹ Not only is the court unlikely to relax NEPA’s requirements for information gathering in an EIS, but as climate change becomes a more critical downstream consideration for energy projects, the amount of analysis an agency must undertake to consider all relevant direct and indirect impacts will necessarily increase.²¹⁰ Furthermore, streamlining strategies that limit public involvement may also prolong the process by generating more public opposition and, again, prompting litigation.²¹¹ All of these considerations weigh in favor of the thesis that an EIS prepared under the pressure of uniform targets will likely invite judicial challenge. Accordingly, such projects risk being tied up in litigation for considerable time before execution.²¹²

The current administration’s strategies to “streamline” the EIS process by limiting an agency’s capacity to effectively meet the EIS requirements, and thereby avoid judicial challenge, are not feasible options for accelerating infrastructure development without further consideration of feasibility. I argue that artificially limiting the length or duration allowed to complete an existing EIS, rather than substantively reforming the *process* for completing an EIS for certain project types, is not the most effective—or even *an* effective—way of achieving the increase in infrastructure development and modernization that the country so desperately needs. Without additional resources, agencies that meet the mandated timelines will do so at the expense of gathering relevant, detailed information.

B. Advocating a Better Approach: Applying Process Improvements to High-Priority Facility Upgrades and Expansions

While it is certainly possible that streamlining and expediting the EIS process will result in much-needed stimulus to U.S. infrastructure investment and development, the current proposals appear to advocate untenable and unsubstantiated measures to achieve this expediency.²¹³ It seems likely that

207. *Id.*

208. *See id.*

209. *See Sabal Trail*, 867 F.3d at 1373.

210. *See id.*

211. Hansen et al., *supra* note 183, at 90.

212. *See id.*

213. *See Benes, supra* note 204.

agencies will fail to preserve NEPA objectives.²¹⁴ Alternatively, agencies may fail to meet the imposed constraints, or may repeatedly request variances to the constraints. Either way, the administration's attempts to expedite the process will be rendered ineffective, as they will have specified streamlining targets without developing effective underlying processes to support them.²¹⁵

Finding a tenable means of shortening the EIS process while maintaining NEPA's substantive goals would benefit developers and environmental groups alike, and would likely be welcomed by federal, state, and local agencies and applicants.²¹⁶ However, implementing measures that are too extreme in their bid to expedite the EIS process would not be good environmental stewardship.²¹⁷ Such measures, rooted specifically in schedule constraints, could seriously undermine the streamlining process.²¹⁸ Under the current system, agencies responsible for EISs under NEPA are incentivized to produce a document that withstands legal scrutiny, not to produce a document in an expeditious or timely manner.²¹⁹ Short of realigning such incentives by limiting judicial review, or by substantially limiting environmental regulation, there does not appear to be a "magic bullet" that will achieve a significantly reduced EIS timeline.²²⁰

In all likelihood, effectively streamlining the EIS will require integrating policy revisions with process innovations. Significant prior scholarship and commentary in the legal community is focused on potential revisions to NEPA and its statutory EIS requirements that would reform NEPA in a way that fosters more sustainable patterns of development planning.²²¹ For this reason, I will instead focus the remainder of this Note on potential process innovations. Common streamlining processes advocated in recent legislative and administrative proposals include: establishing a coordinated compliance process, codifying existing regulations in law, delineating lead agency authority, delegating authority to states, specifying categorically excluded or exempt projects, and establishing limits on judicial review.²²² These suggestions are similar to those set forth in E.O. 13,766 and E.O. 13,807.²²³ Neither set of suggestions, though, considers the distinction between applying such

214. *See id.*

215. *See* Hansen et al., *supra* note 183, at 93–94.

216. *Id.* at 93.

217. *Id.* at 93–95.

218. *See id.*; *see also* Benes, *supra* note 204.

219. ROSSETTI, *supra* note 9, at 3.

220. *See id.*

221. *See, e.g.,* Stephen Jay et al., *Environmental Impact Assessment: Retrospect and Prospect*, 27 ENVTL. IMPACT ASSESSMENT REV. 287, 296–98 (2007).

222. LINDA LUTHER, CONG. RESEARCH SERV., RL33267, THE NATIONAL ENVIRONMENTAL POLICY ACT: STREAMLINING NEPA 11–14 (2007).

223. Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464–66 (Aug. 15, 2017).

improvements to existing facilities and applying them to new facilities.²²⁴ In order to facilitate the effective streamlining of the EIS process for high priority infrastructure projects, I advocate implementing these or other process improvements specifically to facility upgrades and expansions rather than uniformly across all project types.

Unfortunately, full case-by-case consideration for all major infrastructure projects is itself unwieldy, and is liable to work against the administration's goal of accelerating timelines. Once we distinguish between projects that are brand new and those that are upgrades or repairs to existing facilities, however, the risks to the integrity of the NEPA process begin to subside.²²⁵ Facility upgrade projects have fewer unknowns.²²⁶ Often the siting alternatives are heavily dictated by the existing projects, and major project-level environmental impacts are already known or, with respect to the upgrade itself, easier to anticipate.²²⁷ Fewer unknowns translates to less risk of misjudging or entirely missing potential human and environmental impacts.²²⁸ It makes sense that process improvements would manifest themselves differently in new projects than in upgrade projects. The process of planning and executing an EIS for a new project should be treated differently than the process of planning and executing an EIS for an upgrade project precisely because the impacts associated with these two project types are themselves different.²²⁹ The focus for environmental review of new projects is to prevent impacts, whereas the focus for upgrade or expansion projects is to rehabilitate and mitigate further impacts.²³⁰

In summary, I argue that developing policy that distinguishes between new projects and upgrade projects, and applies streamlining methods to expedite the latter, is the key to successfully accelerating project development timelines for energy infrastructure. Process improvements that incrementally improve the efficiency and timing of EIS preparation will pose less risk to the integrity of the NEPA process where there are fewer unknown variables.²³¹

The category of facility upgrade projects includes many types of projects denoted as being "of high priority to the Nation" in E.O. 13, 766, such as improvements to the existing U.S. electric grid and telecommunications systems,

224. See Exec. Order No. 13,766, 82 Fed. Reg. at 8657; Exec. Order No. 13,807, 82 Fed. Reg. at 40,463–66; LUTHER, *supra* note 222, at 11–14 (making no distinction between the NEPA process for improvements to existing facilities and projects for new facilities).

225. See WORLD BANK GROUP [WBG], *supra* note 27, at 5–6.

226. See *id.*

227. See *id.*

228. See *id.*

229. See *id.* (noting the differences in completing environmental assessments between new road and road rehabilitation projects, which can be extrapolated to conducting such assessments for infrastructure projects generally).

230. *Id.* Note that the terms "rehabilitate" and "mitigate" do not imply that the state of the environment at the site of the proposed upgrade must be brought back to the pre-development state—rather they suggest that degradation should be halted if possible. See *id.* at 6.

231. See *id.*

as well as upgrades to pipelines and ports.²³² Ideally, increasing the efficiency of NEPA compliance for upgrades and expansions will also make additional agency resources available to participate in NEPA compliance for new infrastructure projects. This infusion of additional resources should, in turn, increase the NEPA compliance timeline for new facility projects as well. Thus, by mandating policies that provide for streamlining upgrade and expansion projects specifically, the administration can better attain a healthy balance between facilitating the development of critical domestic infrastructure and maintaining NEPA's ultimate goals.²³³

IV. IMPLEMENTING PROCESS IMPROVEMENTS TO STREAMLINE NEPA COMPLIANCE FOR HIGH-PRIORITY FACILITY UPGRADE AND EXPANSION PROJECTS

Applying project management techniques specifically to high-priority facility upgrade and expansion projects will allow agencies to streamline NEPA compliance while, ideally, limiting the impact to NEPA's integrity of that streamlining. The three process improvements discussed in this section may be particularly effective in achieving this objective given the scope and current context of the EIS process: parallel sequencing (Part IV.A), issue prioritization (Part IV.B), and expansion of categorical exclusions (Part IV.C). The benefits of each of these strategies must be evaluated relative to the risks. However, by specifically targeting infrastructure upgrades for which there is substantial preexisting information, an agency can mitigate these risks. Furthermore, by distinguishing upgrades from new projects, agencies can preempt the additional time and effort that would be required to do a case-by-case analysis of process improvement impacts for each major infrastructure project. While applying these techniques specifically to upgrade projects will not eliminate all risks to NEPA's objectives, the current state of U.S. infrastructure and the critical nature of high-priority projects justifies some added risk from these streamlining techniques.

A. *Parallel Sequencing: Concurrently Planning Projects and Preparing EISs*

Given the lengthy timeline for EIS completion, interests of both developers and the general public (in the case of critical upgrades) may be served by allowing some development and site execution activities to go forward on an urgent project while the EIS is still in progress. Such coordination would be easy using basic schedule management techniques, such as critical path methodology.²³⁴ This strategy would not necessarily reduce the time for EIS completion, but would help to tighten the overall timeline for NEPA compliance

232. See Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

233. See generally WORLD BANK GROUP [WBG], *supra* note 27, at 6–7 (providing an overview of an ideal environmental assessment process).

234. See ADEDEJI B. BADIRU, PROJECT MANAGEMENT: SYSTEMS, PRINCIPLES, AND APPLICATIONS 121, 199–200 (2012).

and project development by allowing project planning and development to start earlier.

This is perhaps the most controversial suggestion of the three, given that an important NEPA constraint is that project development cannot begin until an EIS has been completed and the lead agency has determined that the selected alternatives are acceptable and do not present unreasonable environmental impacts.²³⁵ There is a good reason for this constraint: If a project team proceeds with developing particular alternatives, and the EIS indicates a need to pursue a different alternative, the project team will forfeit all of the capital it has expended prior to completion of the EIS. Or, worse, the EIS could support a decision not to move forward at all.

This strategy runs the risk of encouraging capital outlay before alternatives are fully vetted—thereby resulting in either forfeiting sunk costs if a different alternative is ultimately selected, or using capital outlay as a post-hoc justification for a suboptimal alternative.²³⁶ An additional concern that this approach raises is the policy consideration that the EIS process could be somewhat “cheapened” by the fact that a project would begin to move forward before the agency has determined that it does not produce unreasonable environmental impacts.²³⁷ That is, the idea that NEPA fosters reasoned decision making would be undermined by the fact that the decision to proceed would already be made before the EIS is complete.

While the concern of using the EIS as “post hoc justification” for a decision already made is legitimate in this interest, it is also important to consider this concern in the context of “high-priority” infrastructure projects. For the purposes of meeting the need for critical infrastructure upgrades, such upgrades may not be able to escape post hoc justification by virtue of their criticality. If this is the case, then the preparation of an EIS is less about *whether* these projects will be executed, and more about *how* they will be executed. We must reconcile ourselves, then, with the idea that the decision to proceed may already effectively have been made with respect to certain projects, and execute the EIS process accordingly.

Ultimately, the concerns regarding post hoc justification and irretrievable commitment of resources are less compelling in the case of a critical facility upgrade than in the case of a greenfield project. Many of the major siting

235. See 40 C.F.R. § 1506.10 (2017).

236. Of particular concern is judicial precedent upholding the congressional intent that an agency must prepare an EIS *before* an irreversible and irretrievable commitment of resources is made. See *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000); see also 40 C.F.R. § 1502.16. In *Metcalf v. Daley*, for example, the Ninth Circuit held federal agencies violated this principal when they signed an agreement with the Makah Tribe regarding gray whale hunting and worked to implement the agreement prior to environmental review. 214 F.3d at 1145. However, this does not mean that environmental review must always precede agency’s preliminary consideration of action. Parallel sequencing would require that early-stage development activities for brownfield project work is considered not to be “irreversible and irretrievable.” See *id.*

237. See *Metcalf*, 214 F.3d at 1145.

decisions will already be determined by the existing infrastructure, fewer front-end development dollars will be spent, and the upgrade itself is likely of critical need or it would not have been proposed.²³⁸ While the option of conducting some project activities during EIS preparation may not be generally appealing, it would offer an effective means of reducing the overall project timeline for projects with fewer unknown variables.²³⁹ Coordination would be relatively easy to manage using basic project management techniques.²⁴⁰ Parallel sequencing would also be more palatable in the context of urgently upgrading an existing project, where there are fewer unknowns and a critical need for change.²⁴¹

B. Issue Prioritization: Focusing on Impacts Likely to Spur Judicial Challenge

The second strategy, issue prioritization (or “task prioritization,” in project management parlance), allows an agency to meet NEPA’s requirements as best as possible within the context of the review duration limits insinuated in E.O. 13,807.²⁴² By focusing specifically on tasks likely to elicit public challenge and judicial review, an agency can concentrate its resources on the considerations of greatest interest to the public—a set of considerations that will likely coincide with considerations of greatest potential environmental impact.²⁴³ The benefit of optimizing a limited pool of resources must be balanced against the concern that issues less likely to incur judicial challenge may be deprioritized or overlooked.

At its core, issue prioritization is a process of managing the relative importance and urgency of different EIS requirements in order to work within the scope and capability of limited project resources.²⁴⁴ Not all requirements are created equally, and of particular concern for an agency evaluating a critical infrastructure project is whether particular elements of the report will incite public controversy and judicial challenge.²⁴⁵ If an agency optimizes its resource allocation such that more resources are focusing on the impacts that are likely to spur judicial challenge, it may be able to meet an accelerated timeline while still providing the information that is of interest to the public for participation and comment. Assessing whether an element will be controversial may be as easy as reviewing recent judicial challenges—for example, environmental justice and climate change were key concerns in *Sabal Trail* and in each of the three cases comprising the LNG Trifecta.²⁴⁶

238. See WORLD BANK GROUP [WBG], *supra* note 27, at 5–6.

239. See *id.* at 7.

240. See BADIRU, *supra* note 234, at 121, 199, 200.

241. See *id.*

242. See Martin Schedlbauer, *Requirements Prioritization Strategies*, PM TIMES (Feb. 22, 2011), <https://www.projecttimes.com/articles/requirements-prioritization-strategies.html>.

243. See *id.*

244. See *id.*

245. See ROSSETTI, *supra* note 9, at 2–3.

246. See *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1365 (D.C. Cir. 2017); *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016).

A critique of this strategy is that concentrating on the most controversial tasks to accelerate the completion timeline will inevitably lead to less scrutiny of potential alternatives and impacts.²⁴⁷ In turn, the agency may miss a less obvious, but nevertheless substantial, negative impact.²⁴⁸ As with parallel sequencing, this concern is mitigated by applying the strategy specifically to facility upgrades and expansions. For existing facilities, there will be more information available about environmental impacts to date, such that the agency will run less risk of overlooking potentially serious environmental impacts.²⁴⁹ Additionally, elements such as siting and routing will likely be similar to the facility's existing footprint.²⁵⁰

Focusing on rigorously analyzing the issues most likely to elicit public challenge and judicial review may risk overlooking potentially serious impacts. However, this concern is mitigated both by the fact that issues likely to be subject to challenge are likely to coincide with greater environmental impacts, and by the fact that, for facility upgrades, the agencies and developers may already be aware of such issues. Thus, issue prioritization offers an efficient way of meeting efficiency targets while substantially mitigating the risk of judicial challenge or oversight of major impacts.

C. Categorical Exclusions: Expanding the Pool of Actions Not Subject to an EIS

Another strategy that could be used to streamline the EIS process is to categorically exclude from NEPA those infrastructure upgrades that are most urgent to national health, welfare, or security.²⁵¹ Categorical exclusions are not a foreign concept to NEPA or the CEQ Regulations—the CEQ Regulations require neither an EA nor an EIS for projects that “do not individually or cumulatively have a significant effect on the human environment.”²⁵² While major energy infrastructure projects are not typically eligible for categorical exclusion due to the potentially significant environmental effects of such

247. See Hansen et al., *supra* note 183, at 93–94.

248. See *id.*

249. See WORLD BANK GROUP [WBG], *supra* note 27, at 5–6.

250. See *id.*

251. Again, this likely encompasses the U.S. electricity grid. See MUNSON, *supra* note 36, at 128–30.

252. 40 C.F.R. § 1508.4 (2017). The DOE has already set forth a list of categorical exclusions for small projects that are applicable to general agency actions: facility operations; safety and health; site characterization, monitoring, and general research; electric power and transmission; conservation, fossil, and renewable energy activities; environmental restoration and waste management activities; and international activities. *Categorical Exclusion (CX) Determinations By CX*, U.S. DEP'T OF ENERGY, OFF. OF NEPA POL'Y & COMPLIANCE, <http://energy.gov/nepa/categorical-exclusion-cx-determinations-cx> (last visited Oct. 12, 2017).

projects, agencies may consider relaxing this prohibition for those projects that are deemed to be of highest priority in line with the recent executive orders.²⁵³

This proposal raises a similar concern to that raised with issue prioritization: Exempting from EIS preparation a major infrastructure project “significantly affecting the quality of the human environment” creates a substantial risk of adverse environmental impact that will be mitigated by neither agency information-gathering nor public participation.²⁵⁴ However, this may be justified by the urgency of certain high-priority infrastructure upgrades. Once again, the fact that substantial information is already available for upgrade projects, coupled with the fact that some development decisions will be predetermined, mitigates this concern with respect to facility upgrades and expansions.²⁵⁵ Particularly complex upgrades, such as the U.S. grid, may still have a variety of design and execution alternatives to consider. The practical effect of categorical exclusion is that these alternatives would still theoretically be considered, but the analysis would not be shared with the public.²⁵⁶ Moreover, these risks would be offset by the fact that categorical exclusions for especially urgent projects could offset the need to significantly tighten the EIS process for other projects—thereby maintaining integrity of the EIS and freeing agency resources to diligently prepare the remaining assessments.

Expanding the scope of categorical exclusions to cover urgent infrastructure projects can accelerate critical infrastructure projects while maintaining the integrity of, and freeing agency resources for, the preparation of EISs for less critical projects. As with parallel sequencing and issue prioritization, the concern of overlooking significant impacts is mitigated by allowing this practice only for high-priority infrastructure upgrades.

CONCLUSION

The current health and reliability of U.S. infrastructure, and U.S. energy infrastructure in particular, indicates a critical need for domestic policies that will stimulate infrastructure investment and development. Streamlining and expediting the preparation of NEPA’s EIS requirement is one such policy, as the existing delays and constraints associated with the EIS process do serve to slow the process of developing new projects and facility expansions—and, in turn, act

253. See Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,468 (Aug. 15, 2017).

254. See 42 U.S.C. § 4332(2)(C) (2012). One may be particularly concerned that such exemption eliminates the no-action alternative for major infrastructure projects, which must be evaluated under 40 C.F.R. section 1502.14 (requiring agencies to “rigorously explore and objectively evaluate all reasonable alternatives,” including the no-action alternative). 40 C.F.R. § 1502.14(a). However, once again, the criticality of infrastructure upgrades may offer some reconciliation if the exemptions are applied only to the most urgent of projects, such as upgrading the electricity grid (for which the no-action alternative is effectively not an option).

255. See WORLD BANK GROUP [WBG], *supra* note 27, at 5–6.

256. See 40 C.F.R. § 1501.4(a)(2).

as serious deterrents to potential developers.²⁵⁷ To achieve this end, E.O. 13,766 and E.O. 13,807 suggest implementing rigid, uniform targets and processes for all project types.²⁵⁸

However, without the supply of additional resources or the relaxation of existing procedural requirements, such a strategy, at best, is likely to fail as a means of expediting infrastructure project development. At worst, it may lead to oversight of critical environmental impacts. An increase in the prevalence of such oversights may lead to more judicial challenges, which could in turn cause project delays that are as long or longer than the additional time required for an agency to prepare a legally sound EIS.²⁵⁹ Perhaps more frightening is the prospect that such oversights may go unchallenged, leading to potentially serious environmental impacts that could otherwise have been mitigated through robust alternatives assessment.²⁶⁰ Ultimately, uniform application of policies that significantly limit existing NEPA procedures, such as those outlined in E.O. 13,766 and E.O. 13,807, risks compromising NEPA's objectives.

An incremental and case-specific approach to process improvement, on the other hand, may still allow for improvements in the environmental review process and timeline while limiting the aforementioned risks to NEPA's goals of reasoned decision making and informed public comment. Successful streamlining of the EIS process, which encourages infrastructure development while preserving NEPA's aims, is more likely to be achieved by identifying process improvements to be applied specifically to facility upgrades and expansions. Unlike new facility projects, facility upgrade projects often already have predetermined sites and known environmental impacts. These attributes make facility upgrade projects better candidates for incremental process improvements such as task prioritization, parallel sequencing, and report standardization. Moreover, streamlining facility upgrade projects should serve to increase the availability of resources to concentrate on new infrastructure projects. Ideally, such a strategy would allow for increased efficiency in the EIS process as a whole, while encouraging EISs that withstand judicial challenge and preserve NEPA's goals of reasoned decision making and informed public comment.

257. See, e.g., Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (noting that such delays "have increased project costs and blocked the American people from the full benefits of increased infrastructure investments").

258. See *id.*; Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464–66 (Aug. 15, 2017).

259. See ROSSETTI, *supra* note 9, at 2.

260. See *id.* at 1–2.

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