

NEPA Beyond 50:

*EIA for Infrastructure Investment*¹

With the Biden Administration’s focus on transportation infrastructure and renewable energy development, the federal environmental review process under the National Environmental Policy Act² (“NEPA”) is facing renewed pressure to produce timely, effective environmental review and authorization decisions. The Council on Environmental Quality (“CEQ”) has once again been charged with revising its regulations that bind the agencies of the Federal government to one coherent framework for evaluation of the environmental impact of proposals for agency action, relying on a lead agency to set a schedule. Major infrastructure projects can be overseen by an interagency council to ensure timely NEPA processes under Title 41 of the FAST Act. In 2020, CEQ adopted a presumptive 2-year timeframe from the publication of the Notice of Intent (“NOI”) to the Record of Decision (“ROD”). The Biden administration has also adopted NEPA timelines through provisions in the Infrastructure Investment and Jobs Act (“IIJA”) designed to limit the environmental review process to 2 years. This paper examines recent changes to the environmental review and authorization processes of the U.S. government, with particular attention to authorities applicable to timing, interagency coordination, and offshore wind energy development.

A. CEQ Rule Changes

During the Trump Administration, CEQ finalized regulations that revamped the rules implementing the National Environmental Policy Act. As NEPA turned 50 years old, the new rules represent the first comprehensive overhaul of the statute’s implementing regulations since they were adopted in 1978. Since its enactment in 1970, NEPA and the 1978 CEQ regulations have been a source of friction between proponents and critics of the federal environmental review process. Hundreds of court cases have interpreted the statute and regulations, establishing a common law of NEPA. CEQ’s 2020 regulations are wide-ranging and have significant ramifications for many types of actions that are carried out by the federal government, receive federal funding, or require a permit or other approval from a federal agency.

The regulations established presumptive timelines for Environmental Impact Statements (“EIS”) and environmental assessments (“EAs”). Under the new regulations, an EIS cannot take more than 2 years to complete (as measured from the date the NOI is published to the date of the ROD). The time limits can be exceeded only when a “senior agency official” provides written approval and sets new limits.³ The previous version of the rules stated that while agencies are encouraged to set time limits on a case-by-case basis, “prescribed universal time limits for the entire NEPA process are too inflexible.” In the 2020 regulations, an EA cannot take more than 1 year to complete (as measured from the date of decision to prepare an EA to the publication of a

¹ Author contributors to this paper were Ted Boling, Partner, Perkins Coie LLP, Washington, D.C., Julie Wilson-McNerney, Counsel, Perkins Coie LLP, Seattle, Washington, Jacob Aronson, Associate, Perkins Coie LLP, San Francisco, California, and Megan McLean, Associate, Perkins Coie LLP, Washington, D.C. Any opinions of the authors in this paper should not be construed to be those of Perkins Coie LLP.

² 43 U.S.C. §§ 4321–4347

³ 40 C.F.R. §§ 1502.7, 1501.10(b)(2).

final EA), unless a senior agency official approves exceeding these limitations in writing and sets new limits.⁴ These provisions took effect on September 14, 2020 and authorized federal agencies to apply the 2020 regulations to environmental documents initiated before the effective date.

In 2021, CEQ began an equally comprehensive reconsideration of those revised regulations through a phased approach. On April 20, 2022, CEQ issued its final Phase 1 rulemaking to amend the revised regulations. In its final Phase 1 rule, CEQ clarifies that that “agencies can and should continue to apply their existing NEPA procedures, consistent with the CEQ regulations in effect, while CEQ completes its review of and revisions to the 2020 regulations in its Phase 2 rulemaking.”⁵ Amongst other changes, the Phase 1 amendments restore the “purpose and need” regulation for an EIS back to the text that was in effect until the 2020 revisions. CEQ made clear that it had removed the requirement to consider an applicant’s goals and agency’s statutory authority from the purpose and need regulation, 40 CFR 1502.13, and the definition of reasonable alternatives, 40 CFR 1508.1(z), only because the language is “unnecessary and confusing.” 87 FR 23458. CEQ also finalized its definition of “effects” as including direct, indirect, and cumulative effects. The final rule revises the definition of “effects” and “impacts” as “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable.”

No agency has yet to undertake a comprehensive revision of its NEPA procedures to incorporate the changes made in the 2020 CEQ regulations. In April 2021, the Secretary of the Interior ordered the Bureau of Ocean Energy Management and the other bureaus of the Department to follow the 2020 CEQ regulations, the Department’s own NEPA regulations, and established policies and procedures. Where compliance with the 2020 CEQ regulations creates a conflict with the Department’s NEPA regulations, the Secretarial Order directs bureaus to refer the conflict to the Department for resolution with CEQ. The following discussion of NEPA in the context of offshore wind projects is based on this current patchwork of old, new, and evolving requirements. CEQ has indicated that it will propose its Phase 2 rulemaking in June of 2022.⁶

B. The IJA’s Amendments to NEPA Timelines

The Biden Administration has also shown an interest in streamlining the NEPA process, as evidenced by provisions in the Infrastructure Investment and Jobs Act (“IIJA”) related to surface transportation projects. The IIJA contains some important changes to the federal environmental review process for surface transportation projects. Most significantly for complex surface transportation projects, the new infrastructure law codifies some of the principles from President Trump’s now-revoked “One Federal Decision”⁷ policy by requiring federal agencies to schedule their environmental review processes within an agency average of 2 years and requiring

⁴ 40 C.F.R. §§ 1501.5(e), 1501.10(b)(1).

⁵ 87 Fed. Reg. 23452, 23461 (Apr. 20, 2022).

⁶ Office of Information and Regulatory Affairs, Office of Management and Budget, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0331-AA07>

⁷ Section 7(b) of Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021), rescinded the previous Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, with direction to the Office of Management and Budget and the Council on Environmental Quality to consider whether to recommend that a replacement order be issued.

agencies to complete all federal authorizations for a project within 90 days after issuance of the ROD.

The FAST Act (“FAST-41”), enacted in December 2015, codifies an Obama administration initiative to cut environmental review and permit decision-making timelines for infrastructure projects, while improving outcomes for communities and the environment. It accomplishes this by establishing streamlining procedures for covered infrastructure projects and creating a council of agency deputy secretaries to better coordinate and expedite agency reviews. FAST-41 initially had a 7-year “sunset” limitation, meaning it would expire in December 2022. But the IJA removed the sunset provision, making FAST-41 permanent.

FAST-41 created the Federal Permitting Improvement Steering Council (Permitting Council), an interagency council of deputy secretaries with responsibility for overseeing federal agencies’ implementation of the FAST-41 process, with an executive director appointed by the president. FAST-41 also requires each federal agency to designate a Chief Environmental Review and Permitting Officer who reports directly to a deputy secretary on all matters related to environmental reviews and authorizations, providing accountability for agency performance by giving a specific individual responsibility for overseeing an agency’s compliance with FAST-41. Among other responsibilities, the Permitting Council uses an online database (the Permitting Dashboard) to track the status of federal environmental reviews and authorizations for covered projects; issues annual recommendations for best practices in several categories related to infrastructure permitting; and publishes recommended performance schedules for environmental reviews and authorizations for specific categories of infrastructure projects.⁸

FAST-41 procedures are intended to provide a more predictable and efficient environmental review and permitting process for “covered projects.” Covered projects are infrastructure projects in various specified sectors that are: (1) subject to NEPA, likely to cost over \$200 million, and not eligible for abbreviated authorization or environmental review; (2) covered by a programmatic plan designed to facilitate development of carbon dioxide pipelines; or (3) subject to NEPA and designated by the Permitting Council as likely to benefit from enhanced oversight and coordination.⁹ Among other procedural requirements applicable to covered projects, the lead or facilitating agency must create a coordinated project plan, which is a concise plan for coordinating public and agency participation in, and completion of, any required federal environmental review and authorization for the project, and which must include a permitting timetable with intermediate and final completion dates for action by each participating agency on any federal environmental review or authorization required for the project. FAST-41 also sets a 2-year statute of limitations for filing a lawsuit to challenge covered projects. NEPA claims must be filed by a party that submitted a comment during the environmental review and comments must have been “sufficiently detailed comment so as to put the lead agency on notice of the issue on which the party seeks judicial review,” unless “the lead agency did not provide a reasonable opportunity for such a comment on that issue.”

In addition to making FAST-41 permanent, the IJA incorporates aspects of the One Federal Decision policy that had been rescinded by President Biden’s Executive Order 13990.

⁸ Permitting Dashboard, <https://www.permits.performance.gov/projects>

⁹ Covered projects do not include surface transportation and water resources projects that are subject to separate streamlining provisions under 23 U.S.C. § 139 and 33 U.S.C. § 2348, respectively.

The FAST-41 environmental review process for covered projects includes many interim deadlines for agency actions. Meeting these deadlines has been challenging for projects involving complex environmental issues or strong disagreements among agencies. However, the IJA envisions even more aggressive timelines: the Permitting Council must aim to develop recommended performance schedules that do not exceed 2 years, “to the maximum extent practicable, and consistent with applicable Federal law.” The relevant agencies and Permitting Council must provide an explanation if a recommended performance schedule exceeds 2 years. The IJA’s 2-year goal for recommended performance schedules runs counter to the reality that about 75% of all infrastructure projects take longer because they must be coordinated with other federal, state, tribal, and local requirements, funding, and political decisions.¹⁰

C. The Offshore Wind Speed of NEPA

While there are currently only two operational offshore wind projects in the United States (both pilot-scale, 7 turbines with 42 MW total capacity), the wind pressure is rapidly increasing. In 2021, the Biden-Harris Administration launched an offshore wind strategy to achieve a new national target of deploying 30 gigawatts by 2030 and create jobs up and down the supply chain, from factories in the heartland to shipyards on the coasts.¹¹ In February of 2021, the Department of the Interior auctioned six leases off New York and New Jersey for a record-shattering \$4.3 billion. These leases are projected to generate up to 7 gigawatts of clean energy, power two million homes, and create thousands of jobs in manufacturing, construction, operations, maintenance, and service industries in nearby communities. The Biden-Harris Administration has supported offshore wind development with a whole-of-government approach, including Department of Transportation port investments to help develop areas that will be used to build and stage offshore wind turbine components, and efforts are underway across the Departments of Commerce, the Interior, and Energy to promote biodiversity and cooperative ocean use and support innovation across the supply chain.¹²

There are currently 22 active offshore wind leases on the East Coast, with two more leases scheduled for auction in the Carolina Long Bay on May 11, 2022. The Secretary of the Interior has announced plans to develop additional wind energy areas around the country, including the West Coast and Gulf of Mexico where the Bureau of Ocean Energy Management (BOEM) has initiated steps towards leasing. This focus on the urgent expansion of U.S. offshore wind energy generation has already produced two decisions authorizing large-scale offshore wind projects. On May 21, 2021, Secretary of the Interior Deb Haaland and Secretary of Commerce Gina Raimondo announced approval of the Record of Decision (ROD) for construction and operation of the 800 megawatt Vineyard Wind project — the first large-scale, offshore wind project in the United States.¹³ Their ROD, which was signed jointly signed by and

¹⁰ Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

¹¹ FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/>

¹² FACT SHEET: Biden-Harris Administration Races to Deploy Clean Energy that Creates Jobs and Lowers Costs, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/12/fact-sheet-biden-harris-administration-races-to-deploy-clean-energy-that-creates-jobs-and-lowers-costs/>

¹³ Biden-Harris Administration Approves First Major Offshore Wind Project in U.S. Waters, <https://www.doi.gov/pressreleases/biden-harris-administration-approves-first-major-offshore-wind-project-us-waters>

addresses permitting decisions by BOEM, U.S. Army Corps of Engineers, and the National Marine Fisheries Service, adopts mitigation measures to help avoid, minimize, reduce, or eliminate adverse environmental effects that could result from the construction and operation of the project. These mitigation, monitoring, and reporting requirements were developed through a three-year environmental review process that included input, consultation, and coordination with stakeholders, Tribes, and federal and state agencies. Six months later, the Secretary of the Interior announced the ROD for the approximately 130 megawatt South Fork Wind project to be located approximately 19 miles southeast of Block Island, Rhode Island, and 35 miles east of Montauk Point, New York.¹⁴

Currently, there are nine offshore wind projects listed as “In Progress” and three projects listed as “Planned” on the Permitting Dashboard.¹⁵ All of the offshore wind projects “In Progress” formally initiated their environmental review processes with a Notice of Intent to prepare an EIS in 2021. Only two projects, Revolution Wind¹⁶ and Sunrise Wind,¹⁷ have identified milestones for tracking progress on applications for permits and all of the nine projects list some or all of their required permits as “In Progress” without specific milestones to guide their coordination with the environmental review process. This is true even for projects that are scheduled to produce a draft EIS in the summer of 2022. This use of a “planned” status, rather than specific milestones for authorizations related to the environmental review process, is inconsistent with FAST-41 requirements for a coordinated project plan, which is a concise plan for coordinating public and agency participation in, and completion of, any required federal environmental review and authorization for the project, and which must include a permitting timetable with intermediate and final completion dates for action by each participating agency on any federal environmental review or authorization required for the project.¹⁸ The lack of an effective coordinated project plan is a concern for overall project management, as the IJIA 2-year goal for recommended performance schedules must confront the reality that about 75 percent of all infrastructure projects take longer because they must be coordinated with other federal, state, tribal, and local requirements, funding, and political decisions.¹⁹ The schedule for production of a draft EIS is a marker for the overall efficiency and effectiveness of the environmental review process. Based on data in the CEQ 2020 report, the period from the NOI to the notice of availability for a draft EIS comprises 58.4 percent of the total time to complete an EIS. Lengthy EIS completion times may be the result of interagency disagreements or the result of decisions that warrant reconsideration. Transparency in this environmental review is the key to hitting a national target of deploying 30 gigawatts by 2030.

¹⁴ Interior Department Approves Second Major Offshore Wind Project in U.S. Federal Waters, <https://www.doi.gov/pressreleases/interior-department-approves-second-major-offshore-wind-project-us-federal-waters>

¹⁵ Permitting Dashboard, https://www.permits.performance.gov/projects?title=&term_node_tid_depth=All&term_node_tid_depth_1=2406&field_permitting_project_adpoint_administrative_area=All&field_project_status_target_id=All&field_project_category_target_id=All&field_eo_mip_value=All

¹⁶ <https://www.permits.performance.gov/permitting-project/revolution-wind-farm-project>

¹⁷ <https://www.permits.performance.gov/permitting-project/sunrise-wind-farm>

¹⁸ 42 U.S.C. § 4370m-2(c)(1)(A).

¹⁹ Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.