Administrative Law Limits to Executive Order 13807

Alyssa Wright

I. Introduction

On August 15, 2017, President Trump issued an executive order that would "eliminate and streamline some permitting regulations and speed construction" of infrastructure projects.[1] This Executive Order, E.O. 13807, intends to speed up the environmental review and permitting process under the National Environmental Policy Act ("NEPA").

NEPA is intended to ensure that environmental concerns are considered in federal agency decision-making.[2] It "imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."[3] In order to meet these procedural requirements, President Nixon created the Council on Environmental Quality ("CEQ"), which advises the president and "create[s] guidelines for federal agencies to follow in discharging their duties under the state."[4] President Carter further empowered CEQ by making the Council's guidelines binding on agencies.[5] While the president directs CEQ, the relationship between CEQ and the President is, at times, complicated as CEQ's role becomes more tied to precedent and procedure than presidential environmental policy.[6] CEQ's regulations have become entangled with NEPA

[1] Lisa Friedman, Trump Signs Order Rolling Back Environmental Rules on Infrastructure, N.Y. Times, Aug. 15, 2017, at A17.
[2] Randy J. Sutton, Annotation, *Jurisdiction of Federal Court in Action Under National Environmental Policy Act (NEPA), 42 U.S.C.A. §§ 4321 to 4347, as Determined by Whether Federal Defendants Have Undertaken "Major Federal Action"*, 53 A.L.R. Fed. 2d 489 (2017).
[3] *Id.*
[4] Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ELR 10287, 10287 (2015).
[5] *Id.*
[6] *Id.*

and judicial precedents, creating a complicated system of law.[7] As a practical matter, administrative procedure has made it difficult for the President to substantially shift environmental policy guidance issued by CEQ.[8]

One of the primary ways that presidents are able to direct executive agencies is through the use of Executive Orders. Unfortunately for President Trump, executive orders cannot, in themselves, change policy.[9] Executive Orders cannot impair or affect "the authority granted by law to an executive department, agency, or the head thereof."[10] Furthermore, the order must be

> . . . implemented consistent with applicable law and subject to the availability of appropriations . . . [and] is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.[11]

Any changes that the President directs agencies to make to existing regulations must follow existing administrative procedures.[12] Despite the goals outlined in E.O. 13807, dramatic change is unlikely to happen quickly due to the constraints of administrative procedure under the Administrative Procedures Act (APA).

II. Background

a. NEPA, CEQ, and the Environmental Review Process

The Council on Environmental Quality is the division of the Executive Branch that oversees environmental permitting and review.[13] On September 14, 2017, the CEQ published an "initial list of actions it will take to enhance and modernize the Federal environmental review an

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[7] *Id.*
[8] *See* Aaron Blake, *What is an executive order? And how do President Trump's stack up?,* The Wash. Post, Jan. 27, 2017.
[9] Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15 2017).
[10] *Id.*
[11] *Id.*
[12] *See* 5 U.S.C.S. § 552(a) (2017).
[13] *See* Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ELR 10287, 10287 (2015).

authorization process for infrastructure projects."[14] E.O. 13807 "directs federal agencies to seek to complete environmental reviews within [two] years, to jointly issue a single Record of Decision which covers all individual agency decisions related to a particular infrastructure project, and to issue necessary permits or authorizations within 90 days."[15] Previously, the environmental review process took four years to complete.[16]

In order to meet this goal of reducing the length of the environmental review process, E.O. 13807 directs that the Office of Management and Budget ("OMB") to establish a "CAP Goal", which is a "[f]ederal tool for accelerating progress in priority areas that require active collaboration among multiple agencies[17] The OMB has until February 11, 2018, to establish a goal.[18] "All Federal agencies with environmental review, authorization, or consultation responsibilities for infrastructure projects [must] modify their Strategies Plans and Annual Performance Plans . . . consistent with the new CAP Goal on Infrastructure Permitting Modernization . . . ."[19] Additionally, the OMB must "issue guidance for establishing a performance accountability system to facilitate achievement of the CAP Goal" by the February deadline.[20] Executive agencies are therefore instructed to create their own guidance in response to Executive Order 13807, to be reviewed by the OMB.

[14] Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43,226 (proposed Sept. 14, 2017).
[15] *Id.*
[16] *Id.*
[17] Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15 2017).
[18] *Id.*
[19] *Id.*
[20] *Id.*

E.O. 13807 specifically instructed the CEQ to "develop an initial list of actions it will take to enhance and modernize the Federal environmental review and authorization process."[21] The CEQ published their initial list on September 14, 2017. In this list, the CEQ stated that it would:

> (1) Develop, with the Office of Management and Budget, and in consultation with the Federal Permitting Improvement Steering Council (Permitting Council), a framework for implementing "One Federal Decision";
> (2) Coordinate with the Permitting Council, Department of Transportation, and the Army Corps of Engineers, with regard to projects that may qualify as high-priority infrastructure projects pursuant to Executive Order 13766 of January 24, 2017;
> (3) Review existing CEQ regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA) to identify changes needed to update and clarify those regulations;
> (4) Issue additional guidance as may be necessary, including through a NEPA practitioners' handbook, to simplify and accelerate the NEPA process; and
> (5) Form and lead an interagency working group to review agency regulations and policies to identify impediments to the efficient and effective processing of environmental reviews and permitting decisions.[22]

As a practical matter, this initial list of actions does not actually require any action, merely review of existing regulations and procedures, with more guidance to come at some unspecified time in the future. It does not does not specify what rules CEQ should review specifically, requiring instead that they review their entire guidance on NEPA's procedural provisions.

NEPA:

> establishes policy, sets goals, and provides means for carrying out the policy. . . . The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements . . . . NEPA procedures must insure that the environmental information is available to public officials and citizens before decisions are made and actions are taken. The information must be of high quality. Accurate

[21] *Id.*
[22] Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43,226 (proposed Sept. 14, 2017).

> scientific analysis, expert agency comments, and public scrutiny are essential to implementing the NEPA.[23]

In effect, NEPA sets policy for other executive agencies in order to enforce environmental goals established by science and existing policy. NEPA establishes the CEQ, which creates the guidelines that federal agencies follow under the statute. The rules set by CEQ are binding on all regulations implementing NEPA.[24]

The typical process that CEQ undergoes in writing regulations can be defined in three ways: notice and comment rulemaking, interpretative rulemaking, and guidance. These three methods encapsulate most regulations formed by executive order.

1. Notice and Comment Rulemaking

Notice and comment rulemaking is the most extensive method of forming federal regulations. Despite being understood as an "informal" method, this process is designed to "improve the quality of rulemaking . . . but also to provide fairness to interested parties"; it is a time-consuming process that is mandated by the Federal Administrative Procedures Act ("APA").[25] Establishing any one regulation through this "informal" method of rule-making is a significant time investment. The APA provides that:

> [g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include:
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> (1) A statement of the time, place, and nature of public rule making proceedings;
> (2) Reference to the legal authority under which the rule is proposed; and
> (3) Either the terms or substance of the proposed rule or a description of the subjects and issues involved.[26]

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[23] Council on Envtl. Quality, Exec. Office of the President, Regulations for Implementing the Procedural Provisions of The National Environmental Policy Act, 40 C.F.R. 1500-1508 (2005).
[24] Jamison E. Colburn, *Administering the National Environmental Policy Act,* 45 ELR 10287, 10287 (2015).
[25] Nat'l Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (1986), quoting Small Refiner Lead Phase-Down Task Force v. EPA, 227 U.S. App. D.C. 201 (1983).
[26] 5 U.S.C.S. § 553(b) (2017).

Following the publication of the notice in the Federal Register, the agency:

> shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[27]

Thus, the review that the CEQ undertakes in looking at existing rules cannot necessarily be changed by Executive Order. Even once the regulatory change process begins, the process still takes time and the actual change may not be as significant as anticipated. Amendments to administrative rules must undergo notice and comment, much like the original rules.[28]

Following the notice-and-comment review period, affected parties may challenge rule changes.[29] Courts have the authority to review rules created by agencies to determine if they have created an "arbitrary and capricious" rule failing to respond to comments offered, failing to take into account science, failing to explain its decision, or by creating a rule so implausible that it could not be seen as falling within the scope of the agency's expertise.[30] As one may expect, the process of creating a rule following this "informal" process is slow and arduous, subject to both the input of the public and, potentially, of judicial review.[31]

Beyond following the notice and comment rulemaking outlined by the United States Code, there is also a standard of review by the courts, governed by the APA.[32] "The court must hold unlawful and set aside agency action, findings, and conclusions that are arbitrary,

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[27] 5 U.S.C.S. § 553(c) (2017).
[28] Brian Wolfman and Bradley Girard, *Argument analysis: "Interpretive rules," notice-and-comment rule making, and the tougher issues waiting in the wings*, SCOTUSblog (Dec. 3, 2014, 9:50 AM), http://www.scotusblog.com/2014/12/argument-analysis-interpretive-rules-notice-and-comment-rule-making-and-the-tougher-issues-waiting-in-the-wings/.
[29] 5 U.S.C.S. § 553(c) (2017).
[30] Prometheus Radio Project v. FCC, 652 F.3d 431, 444 (2011).
[31] *See* id.
[32] *See* id.

capricious, an abuse of discretion, or otherwise not in accordance with law or unsupported by substantial evidence."[33] This adds another layer of complexity to any possible attempts to change existing federal rules on infrastructure. According to the Supreme Court:

> The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choices made. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[34]

Following the end of the notice and comment period, if the "final rule departs from the proposed rule, it must be a logical outgrowth of the proposed rule."[35] The proposed rule must follow from the initially proposed rule.[36] Any significant change that would be a "'fundamental policy shift' as opposed to a 'natural drafting evolution'" cannot be considered a "logical outgrowth" of the initial proposed rule, and thus may be forced to undergo the notice and comment period for a second time. [37]

2. Interpretive Rulemaking

Interpretive rulemaking, in contrast, is a much less arduous process than notice-and-comment rule making.[38] "Under the APA, only 'substantive' agency rules must meet the Act's notice, comment and publication requirements before final implementation."[39]

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[33] *Id.*
[34] *Id.*, quoting Motor Vehicles Manufacturing Association of the United States v. State Farm, 463 U.S. 29, 43 (1983).
[35] Citizens for Better Forestry v. United States, 481 F. Supp.2d 1059, 1072-73 (2007).
[36] *Id.*
[37] *Id.* at 1073.
[38] *See* Guadamez v. Bowen, 859 F.2d 762, 771 (1988).
[39] *Id.*

Interpretive rules are thus exempted because they merely "express an agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing Agency activities."[40] Interpretive rules avoid the arduous process of notice-and-comment and thus can be released by the agency without input from the public.[41] While still subject to judicial review, changing these kinds of rules is much less onerous due to the ability of the agencies to avoid the notice-and-comment process.[42] The agency's definition of a particular term in existing regulations may change the meaning of the regulation, and the "[court] defers to the agency's construction of the language of its own regulation, unless it is plainly erroneous or inconsistent with the regulation."[43]

If the CEQ's review of existing policies following E.O. 13807 seek to re-evaluate the existing procedural rules overseeing infrastructure projects, without substantially changing or amending them, it is possible that such changes in interpretation could happen more quickly if seen as an "interpretive" rule-making rather than a change substantial enough to trigger the informal "notice and comment" rule-making procedures previously discussed.

3. Agency "Guidance" Rulemaking

The final method that the CEQ may use in shifting the established regulations would be to issue new "guidance" regarding existing environmental regulations.[44] Policy statements, much like interpretive rules, are not required to go through the notice-and-

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[40] *Id.*
[41] 5 U.S.C.S. § 553(b) (2017).
[42] *See* id.
[43] Beazer East, Inc. v. United States EPA, Region III, 963 F.2d 603, 606 (1992).
[44] See *Adoption of Recommendations*, 79 F.R. 35,988, 35,992 (June 25, 2014).

comment form of rulemaking.[45] Guidance with substantive content is seen as a legislative rule that agencies would have to issue through notice-and-comment rulemaking.[46] Guidance that creates a binding rule and prevents future rulemaking or an alternative is a legislative rule.[47] Guidance is intended to set up expectations and standards, not to dictate what must be done specifically, therefore leaving how to accomplish the goals and standards set out by the guidance up to relevant agencies and the states.[48]

III. Conclusion

Neither the executive order itself nor the CEQ initial list of actions describe in precise terms how the infrastructure regulations should be changed, nor do they precisely detail what, exactly should be changed, or a timeline as to how.[49] The regulations CEQ identifies as those that should be altered, and to what extent, will dictate what further actions they can take to implement the over-arching goal of the executive order. What method of rule-making they use will further affect how long any changes they intend to make will take.

Because we are still within the initial 180 days of the issuance of this executive order, the OMB has not written its CAP Goal yet. As such, it is unclear what, exactly, the CEQ will review and how long they will take to complete that review before any further action can be taken by CEQ or other executive agencies. The goals outlined in E.O. 13807 are ambitious, but due to the nature of administrative procedure, any changes

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[45] *Id.*
[46] *Id.*
[47] See Mary Whisner, *Some Guidance About Federal Agencies and Guidance,* 105 Law Lib. J. 385
[48] GE v. EPA, 290 F.3d 377, 382-83 (2002).
[49] *Id.*

likely to happen as a result of the executive order will take time and will still be subject to existing procedures outlined in the APA.