

**BULLDOZING INFRASTRUCTURE  
PLANNING AND THE  
ENVIRONMENT THROUGH TRUMP’S  
EXECUTIVE ORDER 13807**

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INTRODUCTION .....	511
I. IMPOSING DEADLINES AND REALLOCATING AUTHORITY... 517	
A. <i>The CAP Goal</i> .....	519
B. <i>One Federal Decision</i> .....	520
1. Increased Lead Agency Control.....	521
2. OMB Oversight .....	525
C. <i>CEQ Repurposed</i> .....	528
II. DISCONNECTING INFRASTRUCTURE DEVELOPMENT FROM SOUND PLANNING .....	531
A. <i>Prior Initiatives Better Promote Efficiency and Effectiveness</i> .....	532
1. Early Efforts in Permit Coordination.....	532
2. Recent Infrastructure Permitting Initiatives .....	535
B. <i>EO 13807 Does Not Seek Effective or Efficient Planning</i> .....	538
C. <i>EO 13807 Ignores the Primary Cause of Delay</i> .....	545
D. <i>EO 13807’s Directives to OMB Devalue Planning</i> .....	548
E. <i>Bolstering Development Agencies Demotes Environmental Review</i> .....	549
F. <i>Reallocation Ignores Costs, Benefits, and Alternative Allocations of Authority</i> .....	550
CONCLUSION .....	553

INTRODUCTION

The United States’ infrastructure is in trouble. Tunnels are

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falling apart,<sup>1</sup> and water pipes are lead-laced.<sup>2</sup> Independent analyses rate U.S. infrastructure an appalling D+,<sup>3</sup> and countless government studies confirm the need to mend, expand, and upgrade public infrastructure in a wide range of sectors.<sup>4</sup> Prominent progressive<sup>5</sup> and conservative<sup>6</sup> policymakers, from Donald

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1. Aria Bendix, *The 6 Worst Tunnels in the World Have Leaking Walls and Slippery Roads—Take a Look*, BUS. INSIDER (May 1, 2019), <https://www.businessinsider.com/worlds-worst-tunnels-2019-4#locals-call-the-lefortovo-tunnel-in-russia-the-tunnel-of-death-5> [<https://perma.cc/WSZE-ETTJ>]; see also AM. ROAD & TRANSP. BUILDERS ASS'N, 2019 BRIDGE REPORT, <https://artbabridgereport.org/> (last visited June 26, 2019) [<https://perma.cc/56M9-K6H9>] (noting more than 47,000 U.S. bridges require repair).

2. See Matt Kahn, *Flint is Family*, ELLE (Aug. 8, 2016), <https://www.elle.com/culture/career-politics/a37628/flint-michigan-water-crisis-latoya-ruby-frazier/> [<https://perma.cc/EJP8-DAJB>]; see also OFFICE OF WATER, EPA, DRINKING WATER INFRASTRUCTURE NEEDS SURVEY AND ASSESSMENT (2018), [https://www.epa.gov/sites/production/files/2018-10/documents/corrected\\_sixth\\_drinking\\_water\\_infrastructure\\_needs\\_survey\\_and\\_assessment.pdf](https://www.epa.gov/sites/production/files/2018-10/documents/corrected_sixth_drinking_water_infrastructure_needs_survey_and_assessment.pdf) [<https://perma.cc/7Q7D-KBAK>] (discussing \$472.6 billion public water system needs over next twenty years).

3. See, e.g., Am. Soc'y of Civil Eng'rs, *Making the Grade Videos*, 2017 INFRASTRUCTURE REPORT CARD, <https://www.infrastructurereportcard.org/making-the-grade/making-the-grade-videos/> (last visited June 26, 2019) [<https://perma.cc/T9MS-XX4A>] (detailing a \$1.1 trillion funding gap for roadways, a \$109.4 billion unmet need to protect dams and levees, and a \$177 billion funding gap to prevent longer and more frequent power outages).

4. See, e.g., CONG. RESEARCH SERV., INFRASTRUCTURE INVESTMENT AND THE FEDERAL GOVERNMENT (2018), <https://fas.org/sgp/crs/misc/IF10592.pdf> [<https://perma.cc/JQR3-4QHJ>] (describing federal policy options to address infrastructure investment needs); OFFICE OF WATER, *supra* note 2 (finding \$472.6 billion needed to ensure safety of U.S. public water systems); JEFFREY M. STUPAK, CONG. RESEARCH SERV., ECONOMIC IMPACT OF INFRASTRUCTURE INVESTMENT 2 (2018) (noting federal infrastructure spending decreases from 4% of GDP in the 1960s to about 2.5% in 2016); *High Risk List*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/highrisk/overview> (last visited July 1, 2019) [<https://perma.cc/92LL-SPMN>] (asserting about \$159 billion needed for U.S. surface transportation system maintenance).

5. See, e.g., Igor Bobic, *House Democrats Kick Off Push to Tackle Infrastructure 'Crisis'*, HUFFPOST (Mar. 7, 2019), [https://www.huffpost.com/entry/infrastructure-funding-democrats-trump\\_n\\_5c7fe17ae4b020b54d80f347](https://www.huffpost.com/entry/infrastructure-funding-democrats-trump_n_5c7fe17ae4b020b54d80f347) [<https://perma.cc/YX2M-ECCZ>]; *My Green Manufacturing Plan for America*, TEAM WARREN (June 4, 2019), <https://medium.com/@teamwarren/my-green-manufacturing-plan-for-america-fc0ad53ab614> [<https://perma.cc/49KZ-88VC>] (calling for \$2 trillion for clean energy infrastructure); *Bernie Sanders on Infrastructure*, FEELTHEBERN.ORG, <https://feelthebern.org/bernie-sanders-on-infrastructure/> (last visited June 28, 2019) [<https://perma.cc/R89H-VVEK>].

6. See, e.g., *Barrasso: Our Economy Relies Heavily on Well-Being of Our Nation's Roads and Bridges*, U.S. SENATE COMM. ON ENV'T & PUB. WORKS (Mar. 6, 2019), <https://www.epw.senate.gov/public/index.cfm/2019/3/barrasso-our-economy-relies-heavily-on-well-being-of> [<https://perma.cc/r9ny-rbhb>] (quoting Republican Senator Barrasso as stating “[i]t is essential that Congress invests in our infrastructure and specifically our surface transportation”); Lacey Crisp, *Senators*

Trump<sup>7</sup> to Alexandria Ocasio-Cortez,<sup>8</sup> concur that America's infrastructure must be transformed.

So at the outset of the Trump Administration, many hoped Congress and the President could reach a bipartisan infrastructure agreement. Members of Congress from both parties asserted that repairing and upgrading infrastructure was a top priority.<sup>9</sup> In their first meeting, President Trump and congressional Democrats claimed to make progress toward a \$2 trillion infrastructure development plan.<sup>10</sup> Crucially, however, the parties did not discuss funding, with each side claiming the other was expected to identify possible sources.<sup>11</sup> Unsurprisingly, in the next meeting, prospects for an infrastructure accord were derailed by other disagreements.<sup>12</sup>

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*Sherrod Brown, Rob Portman Seeking Solution to Fix Ohio's Crumpling Infrastructure*, CLEVELAND 19 NEWS (Jan. 8, 2018), <https://www.cleveland19.com/story/37218507/push-to-invest-in-infrastructure/> [<https://perma.cc/J4JT-6LJV>] (stating Republican Senator Rob Portman "supports bipartisan efforts to rebuild America's aging infrastructure"); Scott Wong, *Trump Ally in House Calls for Doubling Gas Tax to Pay for Infrastructure*, THE HILL (May 1, 2019, 1:14 PM), <https://thehill.com/policy/transportation/441619-trump-ally-in-house-calls-for-doubling-gas-tax-to-pay-for> [<https://perma.cc/3A49-8JR8>] (quoting former Representative Chris Collins affirming the need to fund infrastructure development).

7. See, e.g., Aaron Burke, *The First Trump-Clinton Presidential Debate Transcript, Annotated*, WASH. POST (Sept. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/the-first-trump-clinton-presidential-debate-transcript-annotated/> [<https://perma.cc/MSF5-KKLL>] ("[W]e have a country that needs new roads, new tunnels, new bridges, new airports, new schools, new hospitals.").

8. Bianca Vierra, *Ocasio-Cortez May Make Environmental Policy a Political Priority*, EARTH.COM (July 7, 2018), <https://www.earth.com/news/ocasio-cortez-environmental-policy/> [<https://perma.cc/5G4R-H94R>] (calling for significant investment in "the development, manufacturing, deployment, and distribution of . . . green energy" through a Green New Deal).

9. See, e.g., Mark Weiner, *Schumer: Congress Could Strike Infrastructure Deal in Trump's First 100 Days*, SYRACUSE.COM (Nov. 30, 2016), [https://www.syracuse.com/politics/2016/11/schumer\\_congress\\_could\\_strike\\_infrastructure\\_deal\\_in\\_trumps\\_first\\_100\\_days.html](https://www.syracuse.com/politics/2016/11/schumer_congress_could_strike_infrastructure_deal_in_trumps_first_100_days.html) [<https://perma.cc/2MH9-9LUN>].

10. Peter Baker et al., *Trump, Angered by 'Phony' Inquiries, Blows up Meeting with Pelosi and Schumer*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/us/politics/donald-trump-speech-pelosi-schumer.html> [<https://perma.cc/H3KR-QPN5>]; Anita Kumar et al., *Behind the 1-Day Cease Fire Between Donald, Chuck and Nancy*, POLITICO (Apr. 30, 2019, 7:32 PM), <https://www.politico.com/story/2019/04/30/schumer-pelosi-trump-infrastructure-plan-1293303> [<https://perma.cc/93KX-5D82>]; Tanya Snyder, *7 Reasons Not to Buy the Infrastructure Hype*, POLITICO (Apr. 30, 2019, 7:00 PM), <https://www.politico.com/story/2019/04/30/trump-infrastructure-hype-1397172> [<https://perma.cc/APQ6-YTZT>].

11. Baker, *supra* note 10; Snyder, *supra* note 10.

12. Trump spent the few minutes of the meeting on May 22, 2019, complaining that he would not work with Democrats on infrastructure so long as they were investigating his administration. See Baker, *supra* note 10.

Instead, the Administration's primary contribution to infrastructure policy to date has been an executive order that, by disregarding both the lessons of past infrastructure development and recent progress toward regulatory streamlining, will likely reduce the quality of U.S. infrastructure and cause unnecessary environmental harm. On August 15, 2017, President Trump issued Executive Order 13807, entitled "Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (EO 13807).<sup>13</sup> The stated purpose of EO 13807 is to support national infrastructure development by making the federal permitting and authorization process more "coordinated, predictable, and transparent."<sup>14</sup> At least formally, EO 13807 establishes new processes and structures for coordinating environmental review under the National Environmental Policy Act (NEPA)<sup>15</sup> and other federal permitting and authorization processes for major infrastructure projects.<sup>16</sup> These projects tend to be some of the most substantial projects undertaken, funded, or approved by the federal government in terms of their size, complexity, and potential economic and environmental effects.

EO 13807 makes two overarching changes. The first instructs agencies to meet a Cross-Agency Priority (CAP) Goal, which requires agencies to complete environmental reviews and provide authorization decisions within an average of two years after publishing a notice of intent (NOI) to prepare an environmental impact statement (EIS) under NEPA.<sup>17</sup> This aggressive change seeks to drastically cut the time and resources spent planning for and assessing major infrastructure projects—all without a scrap of credible evidence justifying such a change.<sup>18</sup> As detailed in Part II below, the Administration's claims are

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13. Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017).

14. *Id.* at 40,463.

15. 42 U.S.C. § 4321 (2018).

16. Exec. Order No. 13,807, 82 Fed. Reg. at 40,464.

17. *Id.*

18. The Trump Administration, for instance, claims that "the final Environmental Impact Statements issued in 2016 took an average of 5.1 years to complete." *President Donald J. Trump's Plan to Expand Infrastructure Investment Will Build a Stronger American Economy*, WHITE HOUSE (Mar. 28, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-plan-expand-infrastructure-investment-will-build-stronger-american-economy/> [https://perma.cc/459P-7BCW]; see also *President Donald J. Trump's Administration is Improving Inefficient Permitting Reviews*, THE WHITE HOUSE (Apr. 9, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-administration-improving-inefficient-permitting-reviews/> [https://perma.cc/K96F-6RME].

based on data that predates significant initiatives adopted by the Obama Administration and Congress to promote more efficient and effective review. More fundamentally, the only source publicly cited to support the notion that environmental reviews could or should be completed in two years was researched and refuted by the nonpartisan Congressional Research Service.<sup>19</sup>

EO 13807's second central change establishes the One Federal Decision policy, which, among other things, requires federal agencies to publish all authorization decisions for major infrastructure projects in a single Record of Decision (ROD) document.<sup>20</sup> The Executive Order and its subsequent memoranda and guidance also significantly increase the role of the Office of Management and Budget (OMB)<sup>21</sup> and lead construction agencies throughout infrastructure permitting and environmental review. In so doing, EO 13807 makes environmental review and permitting of infrastructure projects increasingly centralized and hierarchically coordinated.

Taken together, EO 13807's CAP Goal and One Federal Decision policy double down on devaluing environmental protection. Notwithstanding Trump's unfounded fabrications that "it takes 20 and 25 years just to get approvals to start construction of a fairly routine highway,"<sup>22</sup> EO 13807 is manifestly ill-considered. Unfortunately, EO 13807 pays little, if any, attention to how it impacts the effectiveness—or even the cost-effectiveness—of environmental review and permitting decisions. It purports to make review cheaper and faster without providing the

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19. PHILIP K. HOWARD, COMMON GOOD, TWO YEARS NOT TEN YEARS: REDESIGNING INFRASTRUCTURE APPROVALS (2015), <https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf> [<https://perma.cc/E5V5-D72W>]; Memorandum from Cong. Research Serv. to House Comm. on Transp. and Infrastructure, Subcomm. on Highways and Transit (June 7, 2017), <https://fas.org/sgp/crs/misc/twonot.pdf> [<https://perma.cc/E5V5-D72W>].

20. Exec. Order No. 13,807, 82 Fed. Reg. at 40,466. The single-document ROD requirement can be altered at the discretion of the project sponsor and/or lead federal agency coordinating the authorization process. *See id.*

21. *Office of Management and Budget*, THE WHITE HOUSE, <https://www.whitehouse.gov/omb/> (last visited June 28, 2019) [<https://perma.cc/UH8T-8QCE>].

22. *See, e.g., Transcript of Trump Press Conference Aug. 15*, MCCLATCHY DC BUREAU, <https://www.mcclatchydc.com/news/politics-government/article167364607.html> (last visited June 28, 2019) [<https://perma.cc/7TDX-V4G6>] (“[T]oday, it can take as long as a decade and much more than that. Many, many stories where it takes 20 and 25 years just to get approvals to start construction of a fairly routine highway. Highway builders must get up to 16 different approvals involving 9 different federal agencies governed by 29 different statutes. One agency alone can stall a project for many, many years and even decades.”); *see also* Section II.B.

resources agencies say they need to be more efficient and effective. Agencies are instead simply measured by how quickly they approve projects through OMB performance assessments that entirely disregard the efficacy of agency review. EO 13807 thus appears calculated to both hasten the review processes and reduce the quality of that review.

EO 13807 also offers little support for reallocating authority. It gives no evidence or justification on how it might achieve more efficient review and permitting or how it might lead to more effective decisions and projects. It privileges OMB, which is not a neutral review agency,<sup>23</sup> and demotes agencies with expertise dedicated to advancing environmental protection. It ignores the potential costs of coordination, the potential benefits of less (or differently) coordinated agency action, and the costs and benefits of overlapping authority in environmental review and permitting. It largely ignores a number of long-standing and legitimate concerns about inter-agency coordination of environmental review and permitting, including those related to compliance monitoring and enforcement. And yet, the Trump Administration is now attempting to codify these changes in proposed regulations modifying NEPA, and bipartisan support may be emerging in Congress to adopt legislation that “[c]odifies key tenets of the ‘One Federal Decision’ policy to streamline project delivery and federal approvals.”<sup>24</sup>

This Article explores how EO 13807 bulldozes infrastructure planning and suggests modifications to EO 13807 that truly promote efficiency and effectiveness. First, Part I describes the CAP Goal and One Federal Decision and how each attempts to transform the existing framework for federal infrastructure

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23. See ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL APPROACH 240–41 (2019).

24. Press Release, Senate Env’t and Pub. Works Comm., EPW Committee Leaders Introduce Most Substantial Highway Legislation in History (July 29, 2019), [https://www.epw.senate.gov/public/\\_cache/files/6/2/625bacd0-b17c-4416-8620-e5ff055b2988/371A1DFB7DCFCE38D52F6E05114599C3.atia-one-pager.pdf](https://www.epw.senate.gov/public/_cache/files/6/2/625bacd0-b17c-4416-8620-e5ff055b2988/371A1DFB7DCFCE38D52F6E05114599C3.atia-one-pager.pdf) [<https://perma.cc/XY98-9Q2R>] (describing highway bill unanimously approved by Senate Environment and Public Works Committee); see also America’s Transportation Infrastructure Act of 2019, S. 2302, 116th Cong. (as introduced in Senate, July 29, 2019), [https://www.epw.senate.gov/public/\\_cache/files/2/f/2f412342-ca2b-440f-8053-a3c25c303db3/F0CE190B720489058518305C1D359AC4.americas-transportation-infrastructure-act-edw19827-.pdf](https://www.epw.senate.gov/public/_cache/files/2/f/2f412342-ca2b-440f-8053-a3c25c303db3/F0CE190B720489058518305C1D359AC4.americas-transportation-infrastructure-act-edw19827-.pdf) [<https://perma.cc/UZ65-GVU8>] (codifying CAP Goal and One Federal Decision). For the Trump Administration’s proposed regulations to modify NEPA, see Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684, 1,691 (Jan. 10, 2020).

planning and development. Part II then assesses whether those changes are reasonably likely to achieve the proposed goals or cause other problems. The Article concludes by offering other measures that would more effectively improve the efficiency and quality of government planning, promote public health and conservation, and advance sorely needed infrastructure development.

## I. IMPOSING DEADLINES AND REALLOCATING AUTHORITY

EO 13807 seeks to derail effective infrastructure planning by imposing aggressive deadlines for reviewing large-scale projects and granting substantially more authority over environmental planning to OMB and infrastructure agencies. In April 2018, OMB, the White House Council on Environmental Quality (CEQ), and the heads of twelve federal agencies<sup>25</sup> executed a memorandum of understanding (MOU) to provide further details about the process for implementing the executive order.<sup>26</sup> OMB also issued a memorandum on September 26, 2018, setting forth guidance for the heads of executive departments and agencies to implement certain aspects of EO 13807,<sup>27</sup> and OMB and CEQ issued guidance on implementing the order for states assigned or delegated responsibility to comply with NEPA.<sup>28</sup>

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25. Memorandum No. M-18-13 from Mick Mulvaney, Dir. Office of Mgmt. & Budget, and Mary Neumayr, Chief of Staff, Council of Env'tl. Quality, to Heads of Exec. Dep'ts & Agencies (Mar. 20, 2018), <https://www.ferc.gov/legal/mou/2018/MOU-One-Federal-Decision.pdf> [<https://perma.cc/BSX3-NPSU>] (stating the signing agencies included the Departments of Interior, Agriculture, Commerce, Housing and Urban Development, Transportation, Energy, and Homeland Security, along with the U.S. Army Corps of Engineers, Environmental Protection Agency, Federal Energy Regulatory Commission, Advisory Council on Historic Preservation, and Federal Permitting Improvement Steering Council (FPISC)).

26. *Id.*

27. Memorandum No. M-18-25 from Mick Mulvaney, Dir. Office of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies (Sept. 26, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/09/M-18-25.pdf> [<https://perma.cc/Y24Y-BPV5>].

28. Memorandum No. M-19-11 from Russell T. Vought, Acting Dir., Office of Mgmt. and Budget, and Mary Neumayr, Chairman, Council on Env'tl. Quality, to the Secretary of Transp. (Feb. 26, 2019), <https://www.whitehouse.gov/wp-content/uploads/2017/11/20190226OMB-CEQ327.pdf> [<https://perma.cc/5ZGU-KMEE>] (noting that state agencies are not subject to EO 13807's OMB accountability system for tracking Federal agency performance in review and permit processing but are encouraged to do similar tracking); Council on Env'tl. Quality, Exec. Office of the President, *Infrastructure & Executive Order 13807*, WHITE HOUSE, <https://www.whitehouse.gov/ceq/initiatives/> (last visited June 29, 2018) [<https://perma.cc/HHF2-JNR8>].

As stated in the original order, EO 13807 applies to all “major infrastructure” projects, defined as infrastructure projects for which (1) construction requires authorization from multiple federal agencies and an EIS under NEPA, and (2) the project sponsors have determined that there is a “reasonable availability of funds sufficient to complete the project.”<sup>29</sup> EO 13807 defines an infrastructure project as:

[A] project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband Internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the [Federal Permitting Improvement Steering Council].<sup>30</sup>

The EO also establishes that all highway infrastructure projects under 23 U.S.C. § 139 or 33 U.S.C. § 2348 and water infrastructure projects under the Clean Water Act 42 U.S.C. § 4370m–4370m-12 qualify as high priority projects under Executive Order 13766.<sup>31</sup> The Gateway Program, which would link New Jersey and New York and supplement century-old tunnels that are falling into disrepair and are at risk of failure,<sup>32</sup> is an illustrative example.

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29. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017).

30. *Id.* at 40,464.

31. *Id.* at 40,468. EO 13766 also establishes a “high priority infrastructure project” designation for infrastructure projects. Under EO 13766, at the request of a Governor, or by “the head of any executive department or agency, or on his or her own initiative,” the CEQ chairman will decide within thirty days whether high priority infrastructure project-status will be granted for infrastructure projects. The high priority project designation requires that CEQ coordinate with the “head of the relevant agency to establish, in a manner consistent with law, expedited procedures and deadlines for completion of environmental reviews and approvals.” Exec. Order No. 13,766, 3 C.F.R. § 8657 (2017).

32. Cameron Davidson, *The Tunnel That Could Break New York*, POLITICO <https://www.politico.com/magazine/story/2018/07/06/gateway-tunnel-new-york-city-infrastructure-218839> (last visited July 29, 2019) [<https://perma.cc/AM6U-MY9Y>].



Through the CAP Goal and One Federal Decision initiatives, EO 13807 centralizes authority over infrastructure planning and environmental review and allocates it primarily to the agencies charged with infrastructure development. It also appreciably extends the supervisory authority of OMB over such planning processes. The following Sections examine the CAP Goal and One Federal Decision in turn.

### A. *The CAP Goal*

EO 13807 directs OMB to establish a Cross-Agency Priority (CAP) Goal on Infrastructure Permitting Modernization in consultation with the Federal Permitting Improvement Steering Council (FPISC).<sup>33</sup> OMB was required to set the CAP goal within 180 days of EO 13807's effective date.<sup>34</sup> The Executive Order requires active engagement between OMB and the FPISC-member agencies as they establish and implement this goal.<sup>35</sup> In addition, agencies with "environmental review, authorization, or consultation responsibilities for infrastructure projects must modify their Strategic Plans and Annual Performance Plans under the GPRA Modernization Act of 2010<sup>36</sup> to include agency performance goals related to the completion of environmental reviews and authorizations for infrastructure projects consistent

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33. FPISC Agencies include: Department of Agriculture, Army Corps of Engineers, Department of Commerce, Department of the Interior, Department of Energy, Department of Transportation, Department of Defense, Environmental Protection Agency, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Department of Homeland Security, Department of Housing and Urban Development, Advisory Council on Historic Preservation, Office of Management and Budget, and Council on Environmental Quality. See *Federal Permitting Improvement Steering Council (FPISC) Agencies*, PERMITTING DASHBOARD, <https://www.permits.performance.gov/about/federal-permitting-improvement-steering-council-fpisc-agencies> (last visited June 29, 2018) [<https://perma.cc/8LRG-5LZB>]. The Fixing America's Surface Transportation Act (FAST Act) established the FPISC and mandated that the heads of federal agencies designate a member to serve on it. Pub. L. No. 114-94, § 41002, 129 Stat. 1312 (2015).

34. Exec. Order No. 13,807, 82 Fed. Reg. at 40,464.

35. The CAP Goal states four strategies: (1) standardizing interagency coordination, (2) improving predictability and transparency, (3) increasing agency accountability, and (4) identifying and implementing best practices. Each strategy has deliverables. See *Modernizing the Infrastructure Permitting Process*, PERFORMANCE.GOV, [https://www.performance.gov/CAP/action\\_plans/FY2018\\_Q1\\_Modernize\\_Infrastructure\\_Permitting.pdf](https://www.performance.gov/CAP/action_plans/FY2018_Q1_Modernize_Infrastructure_Permitting.pdf) (last visited June 29, 2019) [<https://perma.cc/65EA-RFF9>].

36. GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866-84 (2011) (codified as amended in scattered sections of 5 and 31 U.S.C.).

with the new CAP Goal on Infrastructure Permitting Modernization.”<sup>37</sup> Moreover, every permit approval of a major infrastructure project and publication of the project’s ROD must occur within an average of approximately two years<sup>38</sup> after publication of the NOI to prepare an EIS.<sup>39</sup>

This is a very aggressive schedule for the types of projects covered by EO 13807. Major infrastructure projects are complex proposals that, as defined in the order, require preparation of an EIS and thus will have significant effects on the environment.<sup>40</sup> By way of reference, less than a quarter of EISs are currently completed in two years.<sup>41</sup>

Notably, the CAP goal does not seek to improve the quality of the environmental review process.<sup>42</sup> In fact, the EO is silent on the effect of its mandate on the quality of environmental or permit review, as well as on how to reconcile this mandate with other legal requirements.<sup>43</sup> EO 13807 just directs agencies to focus on timing requirements and provides no incentive to improve the quality or depth of the environmental review process.

### *B. One Federal Decision*

EO 13807 also establishes One Federal Decision, which con-

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37. Exec. Order No. 13,807, 82 Fed. Reg. at 40,464–65 (citation added).

38. *Id.* at 40,463; Memorandum No. M-18-13, *supra* note 25, at A-2. Words like “average” and “approximately” appear to provide lead agencies potentially some latitude in meeting the CAP Goal, as it remains unclear whether each project will individually be held to a two-year timeline.

39. Exec. Order No. 13,807, 82 Fed. Reg. at 40,464; *see* Memorandum No. M-18-13, *supra* note 25, at A-9 (“If the lead agency determines that the NOI must be revised, supplemented, corrected, reissued, or withdrawn,” the lead agency must submit the proposed revisions to the other agencies and project sponsor and update the Permitting Timetable. The two-year timetable will restart when the new NOI is published.).

40. *See* 42 U.S.C. § 4332(2)(C) (2019) (stating projects for which an EIS are required are “major Federal actions significantly affecting the quality of the human environment . . .”); *see supra* note 29 and accompanying text.

41. Keith J. Benes, *Streamlining Infrastructure Permitting: Two Steps Forward, One Step Back*, ATLANTIC COUNCIL (Oct. 10, 2017), <https://www.atlanticcouncil.org/blogs/new-atlanticist/streamlining-infrastructure-permitting-two-steps-forward-one-step-back> [<https://perma.cc/8VFT-82F5>].

42. Goal Action Plans & Progress Updates can be found here: *Modernizing the Infrastructure Permitting Process*, PERFORMANCE.GOV, [https://www.performance.gov/CAP/CAP\\_goal\\_12.html](https://www.performance.gov/CAP/CAP_goal_12.html) (last visited June 30, 2019) [<https://perma.cc/3Z74-X92Q>].

43. *Id.*

solidates all agency environmental reviews and permitting processes into a single process and ROD. It includes a permitting timetable that is developed by a lead agency in consultation with other jurisdictional agencies, uploaded onto a Permitting Dashboard database,<sup>44</sup> and updated quarterly. Lead agencies are required to publish the permitting timetable, including all cooperating agencies' milestones, for each project.

The permitting timetable requires each agency with jurisdiction to meet timing goals for each specific project.<sup>45</sup> EO 13807 directs federal agencies to issue permits and approvals within ninety days after the NEPA process is completed.<sup>46</sup> "Authorization" decisions generally must be made by each agency within ninety days of the issuance of the ROD.<sup>47</sup> However, the lead agency has the authority to extend the deadline in certain circumstances.<sup>48</sup> And, as more fully examined in the following subsections, One Federal Decision increases lead agency control and intensifies OMB oversight.

### 1. Increased Lead Agency Control

A significant component of One Federal Decision is a substantial concentration of lead agency authority over the environmental review and permitting processes of other federal agencies. EO 13807 establishes a lead agency for interagency coordination of permitting.<sup>49</sup> This builds on the requirement of

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44. The Federal Permitting Dashboard was created after a 2011 presidential memorandum called for the development of a "centralized online tool that aggregates the information for each of the priority projects described under section 1 of this memorandum, in a manner that facilitates easy access, enables the public to assess the status of permits required for infrastructure projects, and engages the public in new and creative ways of using the information." See Office of the Press Sec., Exec. Office of the President, *Presidential Memorandum—Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review*, OBAMA WHITE HOUSE (Aug. 31, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more> [https://perma.cc/XZ7V-6KEK]. The FAST Act then codified the Federal Permitting Dashboard, setting out requirements for agencies to update and track infrastructure projects in it. See Pub. L. No. 114-94, §§ 11605, 41002–03, 129 Stat. 1312 (2015).

45. Memorandum No. M-18-13, *supra* note 25, at A-5.

46. Agencies must approve the project within ninety days of issuance of the ROD, provided they have enough information to make a decision. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,466 (Aug. 24, 2017).

47. See Memorandum No. M-18-13, *supra* note 25, at A-1.

48. Exec. Order No. 13,807, 82 Fed. Reg. at 40,466.

49. In cases "where the lead agency is disputed," Memorandum M-18-13 lays

a lead agency under NEPA.<sup>50</sup>

Through NEPA, Congress mandated formal federal inter-agency coordination over data generation, planning, and information analysis. NEPA instructs federal agencies, prior to preparation of the EIS, to “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”<sup>51</sup> Under NEPA, the lead agency is primarily responsible for supervising “the preparation of an environmental impact statement.”<sup>52</sup> The lead agency<sup>53</sup> must request the participation of each cooperating agency<sup>54</sup> at the earliest time and use the environmental analysis and proposals of cooperating agencies “to the maximum extent possible consistent with its responsibility as lead agency.”<sup>55</sup>

CEQ regulations require each federal agency with jurisdiction or special expertise to comment, even if the agency replies that it has no comment.<sup>56</sup> Such cooperating agencies must participate in the NEPA process at the earliest possible time, must participate in the process for determining the scope of an EIS,<sup>57</sup> and may take over responsibility for developing portions of the

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out a framework for potential lead and cooperating agencies to reach consensus as to which agency will be the lead agency. The original agency that the project sponsor contacted (called the “originating agency”) is charged with notifying the Project Points of Contact (POC) at each potential lead and coordinating agency of the dispute. Memorandum No. M-18-13, *supra* note 25, at A-4. Agencies will then have ten business days to object. *Id.* Then, the originating agency will convene a meeting with the other agency Project POCs within fifteen days of the end of the feedback period. *Id.* “During the meeting, the agencies will agree on an agency to be the lead agency.” *Id.* If the new framework does not effectively resolve the dispute over which agency is designated the lead agency, it will be resolved using the CEQ procedures detailed in NEPA. 40 C.F.R. 1501.5 (1979).

50. Memorandum No. M-18-13, *supra* note 25, at A-4.

51. 42 U.S.C. § 4332(2)(C) (2018); *see also* 40 C.F.R. § 1503.1(a)(1)(2019).

52. Lead Agencies, 40 C.F.R. § 1501.5. Federal, state, or local agencies may act as joint lead agencies. *Id.*

53. NEPA’s regulations provide for the appointment of a lead agency where more than one federal agency proposes or is involved in the same action or is involved in a group of actions directly related to each other. *Id.* § 1501.5(a)(1)–(2).

54. Cooperating agencies must assist lead agencies in the preparation of an EIS. 40 C.F.R. § 1501.6(b)(3)–(5). A “cooperating agency” is defined as “any other Federal agency which has jurisdiction by law,” and “any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency.” 40 C.F.R. § 1501.6.

55. *Id.* § 1501.6(a)(1)–(2).

56. *Id.* § 1503.2.

57. *Id.* § 1501.6(b)(1)–(2).

EIS for which they have special expertise.<sup>58</sup> NEPA also requires the proposing agency to make the EIS and the comments and views of the appropriate federal, state, and local agencies available to the President, CEQ, and the public.<sup>59</sup>

EO 13807 and corresponding guidance developed by OMB and CEQ provide lead agencies significant additional authority over the federal environmental review and permitting process. First, lead agencies are given authority over the baseline issue of what projects even fall under EO 13807. The lead agency thus decides what is a “major infrastructure project”<sup>60</sup> under EO 13807 and “is therefore subject to One Federal Decision.”<sup>61</sup> In addition, the lead agency determines whether the project sponsor identified a “reasonable availability of funds.”<sup>62</sup> The project sponsor reports the availability of funds to the lead agency, and the lead agency then determines whether the reported availability of funds is sufficient to move forward.<sup>63</sup>

Second, the lead agency develops the permitting timetable. The agency establishes an initial draft of the timetable “as soon as practicable after the project is sufficiently advanced to allow the determination of relevant milestones and generally before

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58. *Id.* § 1501.6(b)(3).

59. 42 U.S.C. § 4332(2)(C) (2018). CEQ regulations also mandate that agencies “cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements,” including by engaging in joint planning processes, joint environmental research and studies, joint public hearings, and joint environmental assessments. 40 C.F.R. §§ 1500.4(n), (h), 1506.2(b)(1)–(4).

60. “‘Major infrastructure project’ means an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.” Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017).

61. Memorandum No. M-18-13, *supra* note 25, at A-2.

62. *Id.* “The funding criterion of E.O. 13807 ensures that agencies are expending resources on the environmental review and authorization of project proposals that are likely to be constructed. Public and private funds shall be considered ‘reasonably available’ whether or not they are contingent on completion of environmental reviews and issuance of necessary authorizations for the project.” *Id.* at A-1.

63. *Id.* at A-2. If a lead agency determines that a major infrastructure project is not being processed in accordance with One Federal Decision (OFD), they must specify the reason the project should not be processed using OFD. Memorandum No. M-18-25, *supra* note 27, at 3.

the publication of an NOI.”<sup>64</sup> During the drafting of the permitting timetable, the lead agency must consult with the project sponsor and cooperating and participating agencies<sup>65</sup> and provide an opportunity for the other agencies to object.<sup>66</sup> However, if an agency with authorization responsibility for the project objects to a milestone, the objecting agency will be responsible for including an alternative proposed milestone that still comports with the two-year goal.<sup>67</sup> If the lead agency does not accept the alternative proposed milestone, the lead agency is authorized to elevate the discrepancy to a “senior official” of the objecting cooperating agency.<sup>68</sup> Importantly, the lead agency ultimately has the authority to decide the terms of the permitting timetable, including those deadlines that other agencies must follow.<sup>69</sup>

Third, the lead agency is expressly given substantial control over the environmental review process of the entire project. The lead agency is authorized to “prepare a single EIS for the project in coordination with the other Federal cooperating agencies with authorization decision responsibilities.”<sup>70</sup> Again, the lead agency must consult with other agencies<sup>71</sup> and obtain a written concurrence from all cooperating agencies<sup>72</sup> at three points in the authorization process: (1) on a purpose and need statement for the major infrastructure project prior to the issuance of an NOI, (2) on the range of alternatives that could potentially be analyzed in the Draft EIS, and (3) the preferred alternative that will be included in the Final EIS.<sup>73</sup> However, the lead agency is charged with “identifying the range of alternatives to be analyzed, identifying the preferred alternative and determining whether to develop the preferred alternative to a higher level of detail.”<sup>74</sup>

Finally, the lead agency is given the sole discretion to decide whether to extend the deadline for any federal agency to issue permits and approvals within ninety days after the ROD is finalized. As such, the lead agency alone is authorized to decide

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64. Memorandum No. M-18-13, *supra* note 25, at A-4.

65. *Id.*

66. *Id.* at A-5.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at A-6.

71. *Id.* at A-10.

72. 40 C.F.R. § 1501.6 (2018).

73. Memorandum No. M-18-13, *supra* note 25, at A-10.

74. *Id.* at A-7, A-10.

whether to grant any project sponsor requests for a different permitting timeline, whether “[f]ederal law prohibits the agency from issuing its approval or permit within the 90-day period,” or whether “an extension would better promote completion of the project’s environmental review and authorization process.”<sup>75</sup>

## 2. OMB Oversight

In addition to increasing lead agency control, EO 13807 also charges OMB with assessing agency performance toward One Federal Decision. This gives OMB significant authority to review and assess the work of all other agencies, presumably to ensure that environmental review and permitting duties for major infrastructure projects are performed hurriedly and cheaply.

EO 13807 accomplishes this in a number of ways. First, the EO establishes a Performance Accountability System and instructs OMB to administer it and review and evaluate agency reports.<sup>76</sup> It also mandates that OMB set guidance for the Performance Accountability System within 180 days of establishing a CAP goal.<sup>77</sup> OMB issued M-18-25 on September 26, 2018, with additional details about the Performance Accountability System and reporting requirements.<sup>78</sup>

The Performance Accountability System purports to set up a means for reviewing agency progress in environmental review and permit processing but focuses solely on assessing the time- and cost-consciousness of agencies. All jurisdictional agencies are expected to report to OMB progress on implementing the EO 13807 framework as they review major infrastructure projects. Specific categories for reporting include:

- (1) whether major infrastructure projects are processed using the “One Federal Decision” framework;
- (2) whether major infrastructure projects have a complete Permitting Timetable;
- (3) the extent to which agencies are meeting major milestones in the Permitting Timetable for major infrastructure projects;
- (4) whether delays for major infrastructure projects follow a process of elevation to senior agency officials;
- (5) the

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75. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,466 (Aug. 24, 2017).

76. Memorandum No. M-18-25, *supra* note 27, at 1.

77. The memorandum establishing guidance for compliance with the CAP goal Performance Accountability System was issued on September 26, 2018. *Id.* at 1.

78. *Id.* at 2.

length of time it takes to complete the processing of environmental reviews and authorizations for each major infrastructure project; and (6) the cost of the environmental reviews and authorizations for each major infrastructure project.<sup>79</sup>

Agencies must enter data pertaining to the six numbered categories into the Federal Permitting Dashboard.<sup>80</sup>

The Performance Accountability System also seeks to systematize procedures that are designed to pressure agency officials to hasten review. Agencies are required to establish and implement a process that “elevates schedule delay issues to senior agency officials when it is anticipated that one or more milestones will be missed or need to be extended such that a delay of more than 30 days of the final target completion date of the relevant agency action will occur.”<sup>81</sup> Agencies were required to submit general elevation processes within forty-five days of the issuance of the OMB Guidance Memorandum M-18-25 on September 26, 2018.<sup>82</sup>

In the event of a delay or extension, agencies must detail “whether the agency used its elevation process to refer the matter to appropriate senior agency officials.”<sup>83</sup> If significant project delay<sup>84</sup> is caused by a federal agency, that agency is responsible for reporting on the cost of the delay to the project.<sup>85</sup> Agencies must develop a cost estimate report after consultation with the project sponsor, other agencies, and OMB to determine the estimated additional expense of this delay and to report this

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79. *Id.* at 3 (citation omitted). Agencies are also required to implement, and report on their implementation of, the best practices developed and issued in the FPISC’s annual report entitled “Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects.” The memorandum states that agencies will not be required to submit separate data to report on implementation of the FPISC’s best practices recommendations; rather, the evaluation of the implementation of these best practices will be based on a “best practices report.” *Id.*

80. *Id.* See *supra* note 44 and accompanying text (providing a description of the Permitting Dashboard).

81. Memorandum No. M-18-25, *supra* note 27, at 5.

82. *Id.*

83. *Id.* (“OMB will use this information to assess agency performance on elevation procedures.”).

84. A significant delay is “when the total length of delay is or is expected to be more than 50 percent of the overall length of the original timetable, as measured from the first milestone date of the first action to the final milestone date of the final action listed in the Permitting Timetable.” *Id.* at 6.

85. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,465 (Aug. 24, 2017).



amount.<sup>86</sup> The lead agency is responsible for submitting the estimate of the cost of delay to OMB no later than sixty days after the significant delay is identified.<sup>87</sup> Such cost-estimate reports are only required when the delay is caused by factors within the federal government's control.<sup>88</sup>

Lead agencies, for their part, must generate and upload a Permitting Timetable into the Federal Agency Portal for each major infrastructure project. Progress towards project milestones must be updated at least quarterly.<sup>89</sup> And the lead agency must submit an assessment of the cost of the environmental review and permitting—but only the administrative cost, and not the benefits. As stated by the OMB guidance: “At project completion, the lead agency, in consultation with cooperating and participating agencies, must report the estimated cost to the Government for the environmental review and authorization process. Agencies should include the cost of their Full-Time Equivalent (FTE) hours and contractor costs related to the project.”<sup>90</sup> Agencies are also required to submit to OMB a general methodology for calculating such costs.<sup>91</sup> This methodology is subject to review and approval by OMB, and must be implemented within ninety days of receiving OMB's approval.<sup>92</sup>

Once agencies submit all required information, OMB is charged with producing a “scorecard” on agency performance and “overall progress” on CAP goal targets at least once per quarter.<sup>93</sup> Scoring is based on the implementation of and progress toward the CAP goals, which are primarily focused on increasing the pace at which major infrastructure projects are reviewed and approved in order to allow infrastructure

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86. *Id.* at 40,466.

87. Memorandum No. M-18-25, *supra* note 27, at 6.

88. *Id.*

89. *Id.* at 1.

90. *Id.* at 5–6.

91. *Id.* at 6 (“Within 90 days of the issuance of this Memorandum, agencies must submit to OMB for review and approval a methodology of how they plan to calculate the costs of the environmental and authorization decisions for each major infrastructure project and a brief description of the level of effort (e.g., time and resources) that would be required to calculate these costs.”).

92. *Id.*

93. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,465 (Aug. 24, 2017). Goal Action Plans & Progress Updates can be found here: *Modernizing the Infrastructure Permitting Process*, PERFORMANCE.GOV, [https://www.performance.gov/CAP/CAP\\_goal\\_12.html](https://www.performance.gov/CAP/CAP_goal_12.html) (last visited June 30, 2019) [<https://perma.cc/2357-F4X8>].

construction to begin sooner.<sup>94</sup> Conspicuously, OMB's assessments do not reflect any interest in measuring or strengthening the efficacy of the environmental review process.<sup>95</sup>

Moreover, these scorecards have significant consequences for agencies being assessed. The Executive Order directs OMB to "consider each agency's performance during budget formulation."<sup>96</sup> OMB is also authorized to penalize agencies whose performance fails to meet performance accountability goals.<sup>97</sup> It directs OMB to "determine whether appropriate penalties, including those authorized at 23 U.S.C. 139(h)(7) and 33 U.S.C. 2348(h)(5), must or should be imposed, to the extent required or permitted" for significant failures to meet a permitting timetable milestone or as deemed appropriate by the Director of OMB when considering the "causes of any poor performance."<sup>98</sup> Under either Title 23 or Title 33, agencies could have their office budgets reduced by \$20,000 a week for each project that fails to meet a deadline.<sup>99</sup> OMB is thus given considerable authority through the Performance Accountability System to discipline agencies and hasten their environmental review and permitting duties without regard to improving their efficacy.

### C. CEQ Repurposed

Similarly, EO 13807 also assigns the Council on Environmental Quality (CEQ) a variety of tasks that sacrifice program effectiveness in order to promote cut-rate processing of permitting and environmental review. NEPA initially created CEQ to observe federal agency compliance with NEPA evaluation and disclosure duties. CEQ has issued binding regulations governing NEPA implementation by other agencies.<sup>100</sup> NEPA thus sought

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94. Exec. Order No. 13,807, 82 Fed. Reg. at 40,465.

95. *Id.*

96. *Id.*

97. Memorandum No. M-18-25, *supra* note 27, at 2.

98. *Id.*

99. See 23 U.S.C. § 139(h)(7) (2018), 33 U.S.C. § 2348(h)(5) (2018).

100. 42 U.S.C. §§ 4342–47 (2018); 40 C.F.R. § 1500.3 (2018). CEQ has promulgated implementing regulations for NEPA and provided guidance to federal agencies on compliance with NEPA's requirements. See 40 C.F.R. § 1500. CEQ also has authority to mediate interagency disputes arising between federal agencies concerning environmental review or authorization decisions and is charged with facilitating the "resolution of any conflicting positions of the relevant agencies." Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,468 (Aug. 24, 2017).

to ensure that each federal agency met its responsibilities to consider and reduce the effect of its decisions on the environment by establishing CEQ as a formal coordination tool in data generation, information analysis, and planning.

Trump's Executive Order, however, amplifies a recent trend<sup>101</sup> focused on using CEQ coordination to reduce the processing costs and time of agency review rather than promote better planning. EO 13807 mandates that CEQ provides "expanded role[s] and authorities for lead agencies."<sup>102</sup> It also tells CEQ to interpret NEPA to further simplify and accelerate environmental analysis under the statute.<sup>103</sup> In addition, EO 13807 directs CEQ to form an interagency work group to review NEPA processes,<sup>104</sup> which CEQ later stated it plans to do.<sup>105</sup>

More specifically, EO 13807 requires CEQ to adopt a list of actions to promote coordination and efficiency in environmental review.<sup>106</sup> CEQ started this process, and, in its initial list of actions, explained it would review existing regulations to identify changes. CEQ also said it would "issue such additional guidance to agency heads" as it deems necessary "to simplify and accelerate the NEPA process for infrastructure projects, including infrastructure-specific guidance to be compiled in a NEPA practitioners' handbook for infrastructure project proposals."<sup>107</sup> To promote quicker and less exhaustive review, CEQ further states that it plans to address: (1) the level of public involvement; (2) expansion of deference to lead agencies on the statement of pur-

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101. *See infra* Part II.

102. Exec. Order No. 13,807, 82 Fed. Reg. at 40,467.

103. *Id.* at 40,468.

104. *Id.*

105. Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43,226, 43,227 (Sept. 14, 2017) ("To comply with Section 5(e)(iii), CEQ will convene an interagency Executive Order 13807 Working Group, consisting of agency Chief Environmental Review and Permit Officers, the OMB Director, and representatives of other such Federal agencies as CEQ shall deem appropriate. The working group shall review the NEPA implementing regulations and other environmental review and authorization procedures . . . to determine barriers to 'efficient and effective processing of environmental reviews and authorizations for infrastructure projects.'").

106. CEQ published its initial list of actions on September 8, 2017, including that it would (1) work with OMB and FPISC to create a "framework providing for the implementation of One Federal Decision"; and (2) refer requests for designation of State projects as high priority projects to the FPISC, Department of Transportation and US Army Corps of Engineers as appropriate. *Id.* at 43,226–27.

107. *Id.* at 43,227.

pose and need and the range of alternatives analyzed; (3) appropriate cumulative impacts analysis methodologies; (4) the sources of information that may be relied upon in analyzing impacts; (5) reliance on prior studies, analyses, or decisions for projects within the same general locations; and (6) reliance on state, local, and tribal environmental impact analyses to meet traditionally federal NEPA requirements.<sup>108</sup>

With the goal of cutting costs and time in mind, CEQ also states that it intends to “revise, modify[,] or supplement its existing guidance regarding” a wide variety of procedures required under NEPA.<sup>109</sup> CEQ specifically calls out potentially expanding the availability and use of categorical exclusions,<sup>110</sup> amending how environmental assessments (EAs) are prepared,<sup>111</sup> and revisiting how mitigation, monitoring, and mitigated findings of no significant impact (FONSI)<sup>112</sup> should be used.<sup>113</sup> In this context, on January 10, 2020, CEQ released its long-awaited proposed overhaul of NEPA that, among other changes, seeks “to codify and make generally applicable a number of key elements” of EO 13807, “including development by the lead agency of a joint schedule, procedures to elevate delays or disputes, preparation of a single EIS and joint ROD to the extent practicable, and a two-year goal for completion of environmental reviews.”<sup>114</sup>

Finally, EO 13807 states that CEQ is required to identify any agencies that are not achieving efficient environmental review under NEPA and develop an action plan for those agencies to address existing impediments to efficient review.<sup>115</sup> CEQ subsequently stated it will turn to the interagency working group overseeing NEPA review to “identify agencies that require an action plan to address the identified impediments.”<sup>116</sup> Based on

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108. *Id.*

109. *Id.*

110. These are categories of projects listed in agency regulations that are subject to a very truncated environmental review. 40 C.F.R. § 1508.4 (2018).

111. Environmental assessments are abridged environmental reviews that are subject to more limited content and timing requirements than more detailed environmental impact statements. 40 C.F.R. § 1508.9(a)(2).

112. A FONSI is a document briefly explaining why a project would not have a significant impact on the environment. *See* 40 C.F.R. § 1508.13.

113. Initial List of Action to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. at 43,227.

114. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684, 1,691 (Jan. 10, 2020).

115. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,468 (Aug. 24, 2017).

116. Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. at 43,227.

this review, federal agencies will be required to develop “action plans setting forth the actions they will take,” identify “timelines for completing those actions, and submit their action plans to CEQ and OMB for comment.”<sup>117</sup> CEQ specifically demands that each of those action plans “shall, at a minimum, establish procedures for a regular review and update of categorical exclusions.”<sup>118</sup> Beyond NEPA, CEQ is even exploring ways to cut time and resources used on other statutory processes designed to protect endangered species, historical sites, and clean water resources.<sup>119</sup>

Through the CAP Goal and One Federal Decision, EO 13807 thus seeks to markedly change the allocation of authority for large-scale infrastructure projects. It increases lead agency and OMB control of federal permitting and environmental review processes. It also tasks CEQ with converting NEPA and other federal processes into environmental review and permitting accelerators. As detailed in the next Part, however, these changes are likely to impair federal planning, lead to shoddy infrastructure development, and harm the environment.

## II. DISCONNECTING INFRASTRUCTURE DEVELOPMENT FROM SOUND PLANNING

EO 13807 is a significant and detrimental departure from various prior initiatives directed at enhancing environmental review and infrastructure permitting. To be sure, there has been a range of concerted attempts to erode NEPA since its enactment. These include increased reliance on categorical exclusions and mitigated FONSIIs to avoid more detailed review,<sup>120</sup> as well as a range of “streamlining” efforts focused on promoting more efficient agency review.<sup>121</sup>

Trump’s Executive Order is markedly different. Though

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117. *Id.*

118. *Id.*

119. *Id.* (“CEQ anticipates that the working group will address a number of issues relating to environmental reviews, including but not limited to consultations pursuant to Section 7 of the Endangered Species Act, compliance with Section 106 of the National Historic Preservation Act, and permitting and certifications pursuant to the Clean Water Act.”).

120. See David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 *AZ. ST. L.J.* 3, 35 (2018); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 *COLUM. L. REV.* 903, 903 (2002).

121. See *infra* Section II.A.

many of those prior streamlining efforts were far from perfect, most at least attempted to ensure that infrastructure planning and environmental review were not just efficient but also effective. EO 13807 instead neglects regulatory efficacy, careful infrastructure planning, and environmental review in favor of minimizing resources and time spent.<sup>122</sup> It also ignores existing information supporting the need for additional resources to engage in sound environmental review and infrastructure planning.<sup>123</sup>

Furthermore, EO 13807's reallocation of infrastructure planning and environmental review authority ignores a number of considerations relevant to promoting administrative efficiencies and regulatory effectiveness.<sup>124</sup> Instead, it seems reasonably calculated to give more authority to government institutions, such as OMB and the infrastructure construction agencies, which are least interested in environmental conservation through careful and adaptive planning.<sup>125</sup> EO 13807 thus is designed to inhibit and minimize infrastructure planning as much as possible. The following Sections offer a history of prior streamlining efforts and detail an array of ways in which Trump's Executive Order falls dramatically short.

#### *A. Prior Initiatives Better Promote Efficiency and Effectiveness*

Agencies are already subject to a significant number of coordinating provisions designed to streamline the infrastructure-permitting process. Though some date back decades, others emerged as recently as the Obama Administration. Most of these efforts have helped make environmental permitting and review more efficient without substantially compromising planning quality.

##### 1. Early Efforts in Permit Coordination

Over the years, Congress and Presidential administrations instituted many initiatives directed at increasing the efficacy and efficiency of the environmental review process. For example,

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122. *See infra* Section II.A.

123. *See infra* Section II.B.

124. *See infra* Section II.C.

125. *See infra* Section II.D, II.E.

EO 13807 reiterates that permitting processes must be consistent with the Red Book, a handbook first issued in 1988 and most recently updated in 2015. The Red Book aims to “facilitate effective coordination of environmental reviews that have differing regulatory requirements.”<sup>126</sup> Though only a guidebook that does not establish or modify existing policies,<sup>127</sup> the Red Book already helps harmonize and streamline federal agency permitting processes.<sup>128</sup> And one of the Red Book’s major contributions is helping agencies facilitate concurrent environmental reviews within differing statutory and regulatory schemes.<sup>129</sup>

NEPA itself has also been the subject of various efforts to increase agency coordination. CEQ long ago explained that “[i]nteragency coordination is hampered because agencies often have different timetables,” dissimilar modes of public participation, and conflicting requirements that arise from different statutory missions.<sup>130</sup> Many administrative and legislative initiatives ensued. CEQ formed a NEPA review task force in 2002 whose recommendations led to adopted guidance and handbooks.<sup>131</sup> In 2012, CEQ’s Chair, Nancy Sutley, also issued guidance in an effort to promote timely and efficient NEPA reviews.<sup>132</sup> Other initiatives similarly focused on promoting early interagency coordination, negotiating timelines to review critical documents and decisions, expediting issue resolution, and utilizing new information technology to create efficiencies in information generation and NEPA tracking.<sup>133</sup>

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126. U.S. ARMY CORPS OF ENGINEERS ET AL., 2015 RED BOOK 1 (2015).

127. *Id.* at 3.

128. For example, during the 2012 Red Book revision process, the working group expanded the Red Book’s resources to also support synchronization of section 106 consultations under the National Historic Preservation Act, essential fish habitat consultations under Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act, Marine Mammal Protection Act consultation, and compliance with the Bald and Golden Eagle Protection Act. *Id.*

129. *Id.* at 1.

130. COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS, at x (1997).

131. NATIONAL ENVIRONMENTAL POLICY ACT TASK FORCE, MODERNIZING NEPA IMPLEMENTATION (2003).

132. Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act, 77 Fed. Reg. 14,473 (Mar. 12, 2012).

133. Helen L. Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENVTL. L.J. 317, 328 (2015).

These initiatives led to some improvements in planning coordination, particularly by those federal agencies most frequently called to engage in NEPA analyses. Importantly, however, nearly all of these early efforts focused on promoting not only more efficient processing but also more effective environmental review. CEQ guidelines in 2014, for example, were aimed at how to “expedite,” “modernize,” and “reinvigorate Federal agency implementation of NEPA,” including how to conduct efficient, consistent, *and thorough* environmental reviews.<sup>134</sup> CEQ also engaged in a number of initiatives promoting interagency coordination to resolve conflict.<sup>135</sup> One such step was a 2002 CEQ guidance memorandum urging cooperation when preparing NEPA analyses by requiring federal agencies to identify and recruit other agencies capable of cooperating on NEPA documents.<sup>136</sup> CEQ also convened a NEPA Task Force that made intergovernmental collaboration a significant focus.<sup>137</sup>

Coordination problems certainly persisted, at least in part. NEPA processes often still lacked “early and continued coordination between agencies,” resulting in “unnecessary sequential reviews and delays in the decision-making process.”<sup>138</sup> Some concluded that these processes were still inefficient and did not foster quality outcomes, particularly for large projects with multiple federal approvals.<sup>139</sup> An Obama-era Executive Order sought to address similar concerns by offering best practices for interagency permit synchronization.<sup>140</sup> Nonetheless, critics ar-

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134. See Horst Greczmiel, *Modernizing the National Environmental Policy Act: Taking Steps to Improve Efficiency*, OBAMA WHITE HOUSE (Aug. 22, 2014), <https://obamawhitehouse.archives.gov/blog/2014/08/22/modernizing-national-environmental-policy-act-taking-steps-improve-efficiency> [https://perma.cc/BC8Y-AMVX].

135. Serassio, *supra* note 133, at 327–28.

136. Memorandum from James Connaughton, Chairman, Council of Envtl. Quality, on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act 1, 2 (Jan. 30, 2002), [https://www.energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-CoopAgenciesImplement.pdf](https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplement.pdf) [https://perma.cc/TTM6-H6ZK].

137. NATIONAL ENVIRONMENTAL POLICY ACT TASK FORCE, *supra* note 131, at 26; P. Lynn Scarlett, *National Environmental Policy Act: Enhancing Collaboration and Partnerships*, RESOURCES MAG. (July 13, 2012), <https://www.resourcesmag.org/common-resources/the-national-environmental-policy-act-enhancing-collaboration-and-partnerships/> [https://perma.cc/VR86-CB6C].

138. Serassio, *supra* note 133, at 330.

139. See David J. Hayes, *Leaning on NEPA to Improve the Federal Permitting Process*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10,018, 10,019 (2015).

140. Exec. Order No. 13,604, 77 Fed. Reg. 18,887, 18,889 (Mar. 22, 2012).



gue the Executive Order's failure to require agencies to implement these changes made it unlikely to lead to systemic, long-term improvement in multiple-agency large infrastructure project permitting approval.<sup>141</sup>

Indeed, some of the prior Congressional efforts to make a particular agency's NEPA process more efficient appear to have actually hampered interagency coordination by taking "a surgical approach to NEPA" and "enacting legislation that amends specific federal agencies' NEPA procedures or exempts certain federal actions from NEPA review."<sup>142</sup> As a result, agency processes vary considerably, and changes intended to increase efficiencies in one agency may be negated by another's procedures.<sup>143</sup> More importantly, these changes arguably diminished NEPA's effectiveness by making it difficult for interested stakeholders to determine when and how they can most effectively participate.<sup>144</sup> As detailed in the next Section, however, several efforts immediately preceding EO 13807 sought to improve interagency coordination while continuing to recognize the importance of promoting both efficient and effective federal infrastructure planning.

## 2. Recent Infrastructure Permitting Initiatives

Most of the Obama Administration's and Congress's most recent efforts at modifying federal planning have specifically focused on streamlining and harmonizing infrastructure permitting and review. President Obama's Executive Order No. 13604,<sup>145</sup> which itself builds on a host of other Obama Administration initiatives,<sup>146</sup> sought to address the lack of coordination

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141. Hayes, *supra* note 139, at 10,020–21.

142. Serassio, *supra* note 133, at 321.

143. *Id.* at 321–22.

144. *Id.* at 322.

145. Exec. Order No. 13,604, 77 Fed. Reg. at 18,887.

146. The order expands on and advances the Administration's prior efforts. *Id.* at 18,888; Exec. Order No. 13,580, 76 Fed. Reg. 41,989, 41,989 (July 12, 2011); Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011); *Presidential Memorandum—Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review*, OBAMA WHITE HOUSE (Aug. 31, 2011), <https://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more> [https://perma.cc/R5AD-EFZR].

identified as a root cause of infrastructure permitting problems.<sup>147</sup> It did this by developing a set of performance standards and deadlines directed at promoting regulatory efficiency and effectiveness.<sup>148</sup>

A subsequent federal interagency steering committee released an implementation plan in 2014.<sup>149</sup> The plan identified a suite of actions to promote coordination, including: (1) developing a mechanism for elevating and resolving interagency issues and disputes; (2) expanding the use of programmatic approaches for routine activities and those with minimal impacts; and (3) establishing a dedicated team, staffed by dedicated subject matter experts and supported by rotating “detailees” from participating agencies, to support the ongoing improvement of permitting and review responsibilities.<sup>150</sup>

The interagency steering committee’s plan also established a clearinghouse to share best practices across agencies and lessons learned from an initial set of projects.<sup>151</sup> It also further developed and deployed an online Permitting Dashboard to facilitate early collaboration, reduce time associated with permitting, and increase accountability by making more project information available to the public.<sup>152</sup> Obama officials expanded the Dashboard to include an internal platform allowing agency members to develop collaborative schedules, share project documents, and quickly communicate with each other.<sup>153</sup> Guidance from the

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147. See generally Hayes, *supra* note 139.

148. Exec. Order No. 13,604, 77 Fed. Reg. 18,887, 18,888–90 (Mar. 22, 2012) (directing agencies to set and adhere to timelines and schedules for completion of reviews, set clear permitting performance goals, and track progress against those goals).

149. See STEERING COMM. ON FED. INFRASTRUCTURE PERMITTING & REVIEW PROCESS IMPROVEMENT, IMPLEMENTATION PLAN FOR THE PRESIDENTIAL MEMORANDUM ON MODERNIZING INFRASTRUCTURE PERMITTING 4–8 (2014) (identifying four strategies, fifteen goals, and ninety-six near- and long-term milestones to further institutionalize best practices and lessons learned).

150. See *id.* at 7–8.

151. See *id.* at 8.

152. Memorandum No. M-15-20 from Shaun Donovan, Dir., Office of Mgm’t and Budget, and Christina Goldfuss, Dir., Council on Env’tl. Quality, to Heads of Fed. Dep’ts and Agencies 1, 1–2 (Sept. 22, 2015), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2015/m-15-20.pdf> [<https://perma.cc/DGZ7-3NPS>].

153. REPORT TO THE PRESIDENT, REBUILDING AMERICA’S INFRASTRUCTURE: CUTTING TIMELINES AND IMPROVING OUTCOMES FOR FEDERAL PERMITTING AND REVIEW OF INFRASTRUCTURE PROJECTS i, 3 (2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/reports/report-to-the-president-rebuilding-americas-infrastructure.pdf> [<https://perma.cc/ZFM6-F8FQ>].

Obama OMB and CEQ called on agencies to begin using this Dashboard to establish metrics for permitting and environmental review of complex infrastructure projects.<sup>154</sup> Importantly, the implementation plan also proposed significant increases in agency funding to enhance agency capacity to implement suggested reforms.<sup>155</sup> As detailed earlier, EO 13807 taps into this Dashboard to track the permitting process and to help OMB measure agency compliance with the One Federal Decision framework.<sup>156</sup>

Finally, through the Fixing America's Surface Transportation Act (FAST Act) of 2015,<sup>157</sup> Congress, in a rare act of bipartisanship, sought to streamline environmental review and permitting for transportation infrastructure by codifying many of the Administration's reforms outlined in the implementation plan.<sup>158</sup> The FAST Act focused primarily on providing funding for transportation projects.<sup>159</sup> However, it also adopted several of the Obama Administration's proposals to streamline environmental review and permitting for all infrastructure projects. The adopted proposals included: (1) a new permitting body dedicated to permit efficiency; (2) a requirement that federal agencies concurrently review project-related information and environmental reviews to the maximum extent possible; (3) using environmental review documents prepared under state law procedures in federal NEPA documents;<sup>160</sup> and (4) the creation of a bureau intended as a single site for states and local governments to receive

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154. See Memorandum No. M-15-20, *supra* note 152, at 7–8 (defining complex projects that must be posted on the dashboard starting October 2015).

155. The plan listed several legislative proposals that allow agencies greater flexibility in using federal funds for improving permitting review. STEERING COMM. ON FED. INFRASTRUCTURE PERMITTING & REVIEW PROCESS IMPROVEMENT, *supra* note 149, at 44–45.

156. Memorandum No. M-18-25, *supra* note 27, at 3.

157. Pub. L. No. 114-94, 129 Stat. 1312 (2015).

158. Press Release, The White House, Statement by the Press Secretary on H.R. 22 (Dec. 4, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/04/statement-press-secretary-hr-22> [<https://perma.cc/9JSB-G3U4>]; Keith Lang, *Obama Signs \$305B Highway Bill*, THE HILL (Dec. 4, 2015), <http://thehill.com/policy/finance/262171-obama-signs-305b-highway-bill> [<https://perma.cc/CR79-TZJV>].

159. *The Fixing America's Surface Transportation Act or "FAST Act."* U.S. DEP'T TRANSP., (Dec. 4, 2015), <https://www.transportation.gov/fastact> [<https://perma.cc/B7YG-98T8>].

160. 23 U.S.C. § 330(a)(1) (2018).

federal financing, funding, and/or technical assistance.<sup>161</sup> Additionally, the FAST Act required that the executive director of the FPISC maintain and update data on the projects posted to the recently deployed Permitting Dashboard.<sup>162</sup> This included information on a concise plan to coordinate interagency permitting and review, along with performance timetables that did not exceed the average project time for reviews and authorizations in similar project categories.<sup>163</sup> Together, both the Obama Administration's efforts and the FAST Act were reasonably directed at improving existing issues in streamlining and coordinating infrastructure project permitting.

*B. EO 13807 Does Not Seek Effective or Efficient Planning*

EO 13807 takes the federal government down a different, concerning, and thoroughly unnecessary path. Congress and the Obama Administration had already adopted nascent strategies to increase permit-review efficiency while acknowledging the continued need for effective, rigorous analysis and protections. In contrast, EO 13807 removes any pretense of being concerned about effective project planning and environmental review. As a result, it needlessly increases risks not only to infrastructure development but also to public health and environmental resources.

Prior initiatives included tools, such as the Permitting Dashboard, that might plausibly enhance regulatory effectiveness in addition to administrative efficiencies if designed and implemented correctly.<sup>164</sup> Those initiatives already preferred

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161. U.S. DEPT OF TRANSP., JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF THE CONFERENCE, 1–2, 12–13 (Dec. 1, 2015); Jeffrey W. Leppo & Jared R. Wigginton, *New Highway Law Streamlines Federal Permitting and Environmental Review for Large Infrastructure Projects*, STOEL RIVES LLP (Dec. 17, 2015), <http://www.stoel.com/new-highway-law-streamlines-federal-permitting-and-environmental-review-for-large-infrastructure-projects#sthash.vodYzxQP.dpuf> [<https://perma.cc/HMR3-BHSQ>].

162. Pub. L. No. 114-94, § 41003, 129 Stat. 1312 (2015).

163. *Id.*

164. *Cf.* Christy Goldfuss, *5 Recommendations to Speed Infrastructure Permitting Without Gutting Environmental Review*, CTR. FOR AM. PROGRESS (Sept. 6, 2018, 9:01 AM), <https://www.americanprogress.org/issues/green/news/2018/09/06/457466/5-recommendations-speed-infrastructure-permitting-without-gutting-environmental-review/> [<https://perma.cc/4UG5-U4QW>] (“The permitting dashboard is still very much a work in progress, but it has significant untapped potential that could be improved through an investment in resources to ensure that it is upgraded on a regular basis.”).

permit coordination and efficiency, although arguably to the detriment of promoting effective infrastructure planning and environmental review. The FAST Act in particular sought to promote more efficient processing that might reduce effectiveness by hindering public participation and, potentially, the conservation goals of NEPA and other relevant environmental statutes. For example, the FAST Act placed limits on judicial review of the NEPA process that seemed to trade democratic and environmental protection goals for administrative efficiency.<sup>165</sup> Additionally, the FAST Act reduced the likelihood that project opponents could obtain preliminary injunctions for NEPA permitting violations, potentially limiting “the heart of NEPA’s purpose: ensuring that key environmental issues are adequately analyzed before permitting decisions are made.”<sup>166</sup>

EO 13807, however, barely feigns to be concerned with enhancing or even maintaining effective planning and environmental review. In fact, the Trump Administration has not even fully implemented the FAST Act’s streamlining measures,<sup>167</sup> and EO 13807 contradicts other FAST Act provisions in ways that actually have delayed review.<sup>168</sup>

The core features of EO 13807 are dedicated to radically reducing the time agencies spend on review and permitting while also reducing the amount of resources agencies dedicate to such functions. The CAP Goal and Permitting Timetable require each agency to meet timing goals.<sup>169</sup> Similarly, CEQ’s additional responsibilities are also directed largely to truncating environmental review and ensuring “that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much

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165. To challenge agency authorizations, project opponents must submit comments sufficient to put the agency on notice and file actions challenging federal authorization within two years. See Edward McTiernan & Michael B. Gerrard, *Expediting Environmental Permitting of Infrastructure Projects – The 2015 FAST Act and NEPA*, COLUM. L. SCH.: CLIMATE L. BLOG (Dec. 23, 2015), <http://blogs.law.columbia.edu/climatechange/2015/12/23/expediting-environmental-review-and-permitting-of-infrastructure-projects-the-2015-fast-act-and-nepa/#sthash.rr0QO72f.dpuf> [<https://perma.cc/5997-77U8>].

166. Hayes, *supra* note 139, at 10,021.

167. Goldfuss, *supra* note 164; see also *infra* note 240 and accompanying text.

168. Scott Slesinger, *No, It Doesn’t Take 10 Years to Get Approval to Build a Simple Road*, THE HILL (Feb. 10, 2018, 1:00 PM), <https://thehill.com/opinion/energy-environment/373245-no-it-doesnt-take-10-years-to-get-approval-to-build-a-simple-road> [<https://perma.cc/JS7F-MMAX>] (noting that EO 13807 “contradict[s] the authorities and responsibilities already set up by the FAST-41 bill, causing more delay instead of speeding things up”).

169. Memorandum No. M-18-13, *supra* note 25, at A-5.

as possible including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process."<sup>170</sup> The additional authority lodged in OMB to review and assess other agencies through the Performance Accountability System focuses entirely on speeding up and reducing the effort federal agencies dedicate to environmental review and permitting. Virtually all of the data that agencies are required to report,<sup>171</sup> and that OMB is tasked with evaluating for its scorecard,<sup>172</sup> relate to timing, processing costs, and compliance with compressed timelines and deadlines.

These measures of "success" thus focus on making review cheaper and faster, not effective or cost effective. This is short-sighted and unjustifiable. As stated by Kevin Good, Director of Infrastructure Policy at the Center for American Progress, "[G]utting environmental review will do little to improve the state of our infrastructure but will lead to more projects that unnecessarily harm our human and ecological environments."<sup>173</sup> Report after report details how cutting corners on planning and environmental review hurts natural resources and communities.<sup>174</sup> It is reasonable to conclude that unwarranted rushing might lead to poorly designed, less safe, and more environmentally damaging projects than otherwise would have occurred.<sup>175</sup>

Even if one ignores the effect of EO 13807 on the quality of

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170. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,468 (Aug. 24, 2017).

171. Memorandum No. M-18-25, *supra* note 27, at 3.

172. Exec. Order No. 13,807, 82 Fed. Reg. at 40,465.

173. Kevin DeGood, *Debunking the False Claims of Environmental Review Opponents*, CTR. AM. PROGRESS (May 3, 2017, 9:01 AM), <https://www.americanprogress.org/issues/economy/reports/2017/05/03/431651/debunking-false-claims-environmental-review-opponents/> [<https://perma.cc/5DHF-F62M>].

174. See, e.g., Kevin DeGood, *Build First, Ask Questions Later: How Weakening Environmental Review Will Hurt Our Communities and Natural Habitats*, CTR. FOR AM. PROGRESS (May 3, 2017, 9:00 AM), <https://www.americanprogress.org/?p=430668> [<https://perma.cc/2YYS-2SKV>]. For instance, State Route 40 in West Baltimore uprooted hundreds of mostly African-American homes, churches, and businesses for a "one-mile, six-lane road" that has so little traffic flow that people "hardly notice" when it is closed. Johnny Miller, *Roads to Nowhere: How Infrastructure Built on American Inequality*, THE GUARDIAN (Feb. 21, 2018), <https://www.theguardian.com/cities/2018/feb/21/roads-nowhere-infrastructure-american-inequality> [<https://perma.cc/W4EP-5XYG>].

175. DeGood, *supra* note 173 ("Imposing artificial deadlines for completion of environmental review will save the country little while substantially increasing the likelihood that state and local governments as well as the private sector will construct major facilities that cause unnecessary harms—potentially requiring hundreds of millions or billions of dollars in remediation later.").

agency decisions, the Executive Order's CAP target lacks credible support as a tool for improving agency efficiency. An efficient but thorough permitting process provides sufficient administrative resources for making credible agency decisions, taking into account transaction and decision costs.<sup>176</sup> As such, an inexpensive and swift process can be inefficient if it fails to dedicate sufficient resources to making sound decisions.

Unfortunately, the Trump Administration has not provided any reliable data supporting the conclusion that requiring an average of about two years for completion of environmental reviews and analyses is either necessary or practicable. Of course, prior studies found the average time for permit approval on projects requiring significant environmental review has steadily increased since the 1970s.<sup>177</sup> But many infrastructure projects are not captured by these studies, as they are relatively small and subject to minimal environmental review.<sup>178</sup> For example, "96 percent of federal highway projects have only minimal or no environmental review before they proceed."<sup>179</sup> Furthermore, studies showing a steady increase since the 1970s all precede the

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176. Cf. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1181 (2012) (discussing agency decision and transaction costs as core components of efficiency); Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D*, 51 HARV. J. ON LEGIS. 19, 27 (2014) ("Efficiency involves committing no more resources—including the administrative costs a program imposes on government and the compliance costs imposed on the private sector—to addressing a problem than necessary.").

177. See, e.g., Transportation for America, "State Transportation Funding: States Successfully Raising New Transportation Revenue," TRANSP. AM. (2015), <http://t4america.org/maps-tools/statetransportation-funding/> [https://perma.cc/HR3V-266H] (finding the average time to complete NEPA analysis for Federal Highway Administration projects changed from 2.2 years in the 1970s, to 4.4 years in the 1980s, to 5.1 years during 1995-2001, to 6.6 years in 2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT LITTLE INFORMATION EXISTS ON NEPA ANALYSES 1, 14 (April 2014) <https://www.gao.gov/assets/670/662543.pdf> [https://perma.cc/8VQB-RW8C] (concluding that the average time to complete an EIS is 4.6 years); NAT'L ASS'N OF ENVTL. PROF., NAEP Annual Report, <https://www.naep.org/nepa-2015-annual-report> (last visited June 30, 2019) [https://perma.cc/YFT4-G4L9] (finding that, of 194 final EISs published in 2015, the average time was five years, with 16 percent prepared in two years or less); Russell Berman, *Why President Trump Is Going It Alone on Infrastructure*, THE ATLANTIC (Mar. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/03/trump-infrastructure-speed-permitting/556706/> [https://perma.cc/9VT2-Q7HE].

178. See Adelman & Glicksman, *supra* note 120, at 50 (stating "the vast majority of agencies' decisions that have the potential to significantly impact the environment require only perfunctory review . . . . [I]n comparison, the number of EISs prepared is tiny and has been gradually declining over the last decade or so.").

179. Scott Slesinger, *supra* note 168, (responding to President Trump's claim in

substantial initiatives dedicated to permit streamlining adopted and implemented by the Obama Administration and the FAST Act. And even if there has been a steady increase in time spent on reviewing and processing large infrastructure projects, the Administration provided no evidence that such increases are excessive or unnecessary. If the average amount of time spent on environmental review in the 1970s was in any way more optimal, the Trump Administration should be able to show this or at least explain how.

In fact, the Administration does not provide any credible evidence supporting the need for, or the viability of, a two-year average processing target whatsoever. The only public evidence used to support a two-year target is a refuted analysis by Philip Howard of the nonprofit Common Ground (Howard Report).<sup>180</sup> The Howard Report claims that major infrastructure projects regularly take ten years to approve but could take two years through changes in the U.S. “permitting system.”<sup>181</sup> It also asserts that: (1) “[t]he main barrier to an infrastructure initiative is not financing, but an absurdly complex and lengthy permitting system”;<sup>182</sup> (2) “avoidable delay on major [infrastructure] projects is six years”;<sup>183</sup> and (3) costs from “avoidable delays” for road and bridge construction projects amounting to \$427.8 billion over six years.<sup>184</sup>

However, the Howard Report has been thoroughly discredited by the non-partisan U.S. Congressional Research Service (CRS)<sup>185</sup> and various other analyses.<sup>186</sup> The CRS specifically analyzed the three aforementioned claims in the Howard Report and determined that each of the conclusions (as well as other claims) was insupportable. CRS found that:

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his 2018 State of the Union address that it takes ten years to build “a simple road”).

180. PHILIP HOWARD, TWO YEARS NOT TEN YEARS: REDESIGNING INFRASTRUCTURE APPROVALS (2015), <https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf> [<https://perma.cc/GE2T-VXQN>].

181. *Id.* at 3.

182. *Id.* at 24.

183. *Id.* at 6.

184. *Id.* at 10.

185. Memorandum from Cong. Research Serv. to House Committee on Transp. and Infrastructure, Subcommittee on Highways and Transit (June 7, 2017), <https://fas.org/sgp/crs/misc/twonot.pdf> [<https://perma.cc/E5V5-D72W>].

186. *See, e.g.*, DeGood, *supra* note 173 (noting that the report incorrectly states that the White House lacks needed authority to resolve interagency disputes when existing law expressly provides such authority); Benes, *supra* note 41; Berman, *supra* note 177 (detailing how the Administration was “significantly overstating the length of time it takes the federal government to approve infrastructure projects”).



- The Howard Report provides no evidence that permitting delays project completion more than funding, and the evidence the report cites actually supports the opposite conclusion;<sup>187</sup>
- No evidence supports the Howard Report's claim that federal permitting or environmental review delays projects;<sup>188</sup> and
- The Howard Report relies on unreliable calculations of the costs of delay.<sup>189</sup>

The CRS report even concluded that “most projects identified in the [Howard] report generally do not involve ‘federal actions’ subject to review under NEPA.”<sup>190</sup> In short, the claims that there are massive avoidable delays and administrative costs, and that the two-year target is needed and viable, have no basis in evidence.

Indeed, it is difficult to fathom how a goal based on an approximate average of time could be reasonably calibrated to

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187. Memorandum from Cong. Research Serv., *supra* note 185, at 6 (“No evidence is provided in the Howard report to support the conclusion that permitting has a greater impact than funding on the infrastructure project categories identified in that report. Instead, the other reports and studies cited in the Howard report contradict its conclusion that permitting, rather than funding, presents a greater challenge to completing the infrastructure projects.”).

188. *Id.* at 7 (“It is not clear how the assumption of a six-year delay was determined. The report notes that there is little cumulative data associated with projects that were ‘delayed,’ but that there is ‘ample anecdotal evidence of actual years of delay’ for different types of infrastructure projects. However, no such anecdotal evidence is provided. With respect to the potential for ‘avoidable delays,’ no evidence is provided to support the assertion that large U.S. projects take a decade or longer ‘to permit.’ . . . CRS reviewed the history and details of projects explicitly identified in the report which were, presumably, examples of projects delayed by permitting. That review found no evidence to support an assertion that the projects identified were delayed by federal regulatory requirements (permitting) or environmental reviews.”).

189. *Id.* at 8 (“The \$427.8 billion estimate related to road and bridge projects is reached after identifying certain economic costs associated with delaying construction, then multiplying those costs by certain factors attributable to permitting-related delays. The Howard report provides no evidence that either the costs cited or the multipliers accurately gauge costs of delay that can be tied to regulatory approvals and/or the NEPA process.”); *see also* DeGood, *supra* note 173 (“Using assumptions based on federal data, the actual value of savings from artificially shortening environmental review drops from \$427.8 billion to \$13.8 billion.”).

190. Memorandum from Cong. Research Serv., *supra* note 185, at 7.

achieve administrative efficiency,<sup>191</sup> let alone advance more effective environmental review. This is because the CAP goal appears to be fundamentally based on a premise that all major infrastructure projects require roughly the same amount of review and planning, regardless of the type, size, complexity, and informational uncertainties raised. Of course, some categories of infrastructure projects may require substantially more time or attention than others, and it makes little sense to hold every agency or project to approximately the same CAP goal.<sup>192</sup> As infrastructure expert Kevin DeGood put it, it is arbitrary to define “delay as any review that takes more than two years,” and “[t]his artificial, one-size-fits-all deadline is completely disconnected from the reality of complex projects.”<sup>193</sup>

Such a massive reduction could only reasonably be accomplished through substantially compromising the environmental assessment and infrastructure-planning process. Ironically, hurrying review may actually *decrease* administrative efficiencies rather than increase them. As stated by Keith Benes, a former State Department attorney who managed permitting reviews for major infrastructure projects such as the Keystone XL pipeline:

Complying with these arbitrary limits is likely to result in more successful court challenges to the validity of these statements because these arbitrary deadlines would encourage agencies to inadequately evaluate projects or miss issues. Currently, less than one quarter of EIS’s are completed in two years or less, while approximately 5 percent are completed in one year or less.<sup>194</sup>

There is thus substantial reason for concern that these changes could possibly “disrupt existing agency processes for complying with NEPA without creating substantially better outcomes.”<sup>195</sup>

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191. For instance, it is far from clear why an agency that spends twenty months assessing a relatively small and simple project should be adjudged as being more efficient than one that took three years to review a very complex, multiphase project.

192. It is also unclear how the CAP goal based on an average of time would be applied to, or enforced against, any particular project or agency.

193. DeGood, *supra* note 173.

194. Benes, *supra* note 41.

195. MARK FEBRIZIO, PUBLIC INTEREST COMMENT ON THE COUNCIL ON

Other commentators pointed out that the Administration's varied efforts at "[p]rioritizing efficiency may potentially come at the expense of robust public involvement."<sup>196</sup> Indeed, as evidenced by the Trump Administration's handling of the FPISC's First Annual Stakeholder Engagement Forum on April 30, 2019, that might be precisely the point. Even though the event was billed as a forum for stakeholders, it was by invitation only and closed to the press, with only government officials and industry representatives allowed to participate.<sup>197</sup> EO 13807 appears to be part of a larger plan to reduce public participation and further increase industry access in contravention of NEPA's goals and sound development planning.

Taken as a whole, EO 13807 will not improve or even maintain the quality of federal decision-making. It is not even likely to lead to more efficient planning. And as detailed below, it ignores the primary cause of delay: a lack of agency resources.

### C. *EO 13807 Ignores the Primary Cause of Delay*

Agencies need resources to review and build projects. When they do not have those resources, projects are delayed. EO 13807 ignores the fact that federal agencies lack sufficient funding for infrastructure development. In fact, by requiring accelerated review without increasing federal agency resources to implement its directives, EO 13807 exacerbates the primary problem that federal infrastructure development faces.

Many studies have confirmed that lack of funding is a key, if not the primary, cause of delay on infrastructure development.<sup>198</sup> For instance, in a study commissioned by the U.S. Department of the Treasury "to identify 40 proposed transportation

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ENVIRONMENTAL QUALITY'S ADVANCE NOTICE OF PROPOSED RULEMAKING UPDATE TO THE REGULATIONS FOR IMPLEMENTING THE PROCEDURAL PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 7-8 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3235482](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235482) [<https://perma.cc/9TWX-QFRF>].

196. *Id.* at 7.

197. Maxine Joselow, *Wheeler Talks Permitting at Closed-Door Event*, GREENWIRE (Apr. 30, 2019), <https://www.eenews.net/greenwire/stories/1060246925/> [<https://perma.cc/9LQB-U4X3>].

198. *See, e.g.*, Memorandum from Cong. Research Serv., *supra* note 185, at 6; AM. SOC'Y OF CIVIL ENG'RS, 2013 REPORT CARD FOR AMERICA'S INFRASTRUCTURE (2013); AM. SOC'Y OF CIVIL ENG'RS, FAILURE TO ACT: CLOSING THE INFRASTRUCTURE INVESTMENT GAP FOR AMERICA'S ECONOMIC FUTURE (2016), <https://www.infrastructurereportcard.org/> [<https://perma.cc/QC4R-D2R6>]; AM. WATER WORKS ASS'N, BURIED NO LONGER: CONFRONTING AMERICA'S WATER

and water infrastructure projects in the United States of major economic significance, but whose completion has slowed or is in jeopardy,” thirty-nine of the forty projects needed more funding.<sup>199</sup> One analysis concluded that “the principal restraint facing state and local governments contemplating megaprojects is money, not environmental review.”<sup>200</sup> In fact, Congressman Raúl M. Grijalva observed that even examples offered by the Trump Administration in support of EO 13807 involved delays largely due to lack of funding and public support rather than regulatory red tape.<sup>201</sup>

Unfortunately, federal agencies list shovel-ready projects that dwarf the agencies’ annual budgets.<sup>202</sup> Moreover, municipal funds for infrastructure development have been decreasing rather than increasing. Through July 2018, new municipal deals to fund transportation, utilities, and power projects totaled \$50.7 billion, down 19.4 percent from the previous year.<sup>203</sup> That

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INFRASTRUCTURE CHALLENGE (2012); HDR, COST OF PROJECT DELAYS: AN ESTIMATE OF FOREGONE BENEFITS AND OTHER COSTS RELATED TO SCHEDULE DELAYS OF INLAND WATERWAY PROJECTS (2012), <http://www.nationalwaterwaysfoundation.org/study/HDRstudy.pdf> [<https://perma.cc/NL3T-9EH3>]; DEP’T OF THE TREASURY WITH THE COUNCIL OF ECON. ADVISERS, A NEW ECONOMIC ANALYSIS OF INFRASTRUCTURE INVESTMENT (2012), <http://www.treasury.gov/resource-center/economic-policy/Documents/20120323InfrastructureReport.pdf> [<https://perma.cc/BWV9-DQDE>]; CTR. FOR AM. PROGRESS, GETTING AMERICA’S FREIGHT BACK ON THE MOVE: A PLAN FOR INVESTING IN OUR FREIGHT INFRASTRUCTURE (2012), <https://www.americanprogress.org/issues/technology/report/2012/08/14/11994/getting-americas-freight-back-on-the-move/> [<https://perma.cc/S35L-ALMZ>]; see also Berman, *supra* note 177.

199. DEP’T OF THE TREASURY, 40 PROPOSED U.S. TRANSPORTATION AND WATER INFRASTRUCTURE PROJECTS OF MAJOR ECONOMIC SIGNIFICANCE 1 (2016), <https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf> [<https://perma.cc/532Q-UFFB>].

200. DeGood, *supra* note 173.

201. See Press Release, U.S. House of Representatives Nat. Res. Comm., Democrats Debunk Trump’s Claims that the Environmental Review Process Stands in the Way of the Republican Infrastructure Plan, (Apr. 4, 2018), <https://naturalresources.house.gov/media/press-releases/democrats-debunk-trumps-claims-that-the-environmental-review-process-stands-in-the-way-of-the-republican-infrastructure-plan> [<https://perma.cc/9TAH-3WSL>].

202. See, e.g., Berman, *supra* note 177 (“[T]he Army Corps of Engineers, which has listed projects totaling \$97 billion that are ready to be started, but has an annual budget of only \$5 billion.”).

203. Robin Respaut & Hilary Russ, *Infrastructure Borrowing Drops as U.S. States Await Trump Plan Details*, THOMSON REUTERS (Aug. 6, 2017, 6:04 PM), <https://www.reuters.com/article/us-usa-municipals-infrastructure/infrastructure-borrowing-drops-as-u-s-states-await-trump-plan-details-idUSKBN1AM0VB> [<https://perma.cc/MHT6-5VDW>].

decline outpaces a broader drop in the U.S. municipal bond market overall.<sup>204</sup>

To date, the Trump Administration has offered little to address these leading impediments to infrastructure development. Trump's infrastructure proposal,<sup>205</sup> even if it were adopted, would actually cut \$200 billion in aid to states and municipalities and transfer it via tax credits to private investors in the hope that it would spur \$800 billion in investment that ostensibly would be profitable through user charges.<sup>206</sup> Yet the assumptions for this proposal are quite questionable; most infrastructure deficiencies involve smaller projects that are unattractive to private investors.<sup>207</sup>

EO 13807 worsens the funding problem by imposing a number of coordination and other procedural mandates on federal agencies without any additional resources to achieve them. While EO 13807 uses the budget process and other penalties<sup>208</sup> to induce agencies to meet its two-year goal, it neither provides nor identifies any new resources for doing so.<sup>209</sup> In fact, the Administration simultaneously proposed massive cuts in budgets and staff for federal agencies.<sup>210</sup> As such, it is, at best, unclear

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204. *Id.*

205. See *Building a Stronger America: President Donald J. Trump's American Infrastructure Initiative*, WHITE HOUSE (Feb. 12, 2018), <https://www.whitehouse.gov/briefings-statements/building-stronger-america-president-donald-j-trumps-american-infrastructure-initiative/> [<https://perma.cc/FV4G-2PCD>].

206. Respaut & Russ, *supra* note 203.

207. Ted Mann, *Donald Trump's Infrastructure Plan Faces an Urban-Rural Divide in Congress*, WALL ST. J. (June 8, 2017), <https://www.wsj.com/articles/donald-trumps-infrastructure-plan-faces-an-urban-rural-divide-in-congress-1496925503> [<https://perma.cc/A4Q2-V6YU>] ("President Donald Trump's [February 2018] plan to tap the private sector to rebuild \$1 trillion worth of roads, bridges and rails has encountered an early problem: geography. . . . That is because private investors are looking for infrastructure projects that throw off steady streams of revenue, from which they derive their profits, and those tend to be found near population centers.").

208. Memorandum No. M-18-25, *supra* note 27, at 2.

209. Norman F. Carlin, *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/time-will-tell-whether-trump-executive-order-succeeds-reducing-time-federal-environmental-review-permits-major-infrastructure-project/#page=1> [<https://perma.cc/Q3HU-ZSY4>].

210. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN (2017); see also DeGood, *supra* note 173 ("[T]he massive budget and staff cuts that the Trump administration has proposed for the Environmental Protection Agency as well as other departments reveal that any talk of NEPA reform is a hollow gesture on the

how agencies can achieve EO 13807's new timing goals without sacrificing careful planning.<sup>211</sup>

Thus, without a massive increase in government funding for both infrastructure development and environmental review, EO 13807 is likely to impair infrastructure planning and environmental assessment for some of the most complex and impactful projects considered by federal agencies. But as the following Section attests, planning of those projects will also suffer under EO 13807.

#### *D. EO 13807's Directives to OMB Devalue Planning*

EO 13807's allocation of more authority to OMB to oversee other federal agencies reinforces the Administration's efforts to neglect careful infrastructure planning and flout environmental safeguards. OMB is not a neutral choice for an institution tasked with evaluating the performance of agencies in their permitting and environmental review functions. By lodging authority in the OMB, EO 13807 devalues careful planning and privileges partisan and industry concerns. As "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency,"<sup>212</sup> OMB's Office of Information and Regulatory Affairs (OIRA) might seem to be a plausible institution for such tasks. Nevertheless, OMB-OIRA's role in overseeing other agencies has proven to be vulnerable to particular partisan positions on substantive regulatory issues.

From its inception, OIRA has reflected an anti-regulatory bias and has regularly elevated efficiency considerations over other values, even when the organic statutes of the agencies whose regulations it reviews create a different hierarchy of values.<sup>213</sup> A Government Accountability Office report, for instance,

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way to evisceration.").

211. Carlin, *supra* note 209.

212. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). As a former OIRA Administrator has put it, "OIRA helps to collect widely dispersed information—information that is held throughout the executive branch and by the public as a whole. OIRA is largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside the federal government." Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013).

213. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1262 (2006) (referring to the "profound institutional bias against regulation" reflected in the OIRA review process); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. REV. 1083

found that OIRA was most frequently in communication with regulated industry, while another study found that 56 percent of OIRA meetings on proposed regulations were with industry groups (compared to only 10 percent with public interest non-profit groups).<sup>214</sup> OMB has frequently been criticized for its lack of transparency and skewing access toward the regulated community.<sup>215</sup>

EO 13807 thus directs OMB, an agency primarily oriented toward inhibiting regulation, to assess other agencies based only on how well they speed up review. Lodging such authority in OMB reinforces the conclusion that the Administration's objective is not to improve agency analyses or decision-making, but rather to get it over with as quickly and cheaply as possible. Punctuality, not planning, is the goal here.

*E. Bolstering Development Agencies Demotes  
Environmental Review*

EO 13807 also includes a number of initiatives designed to significantly increase the authority of lead agencies over environmental analysis and permitting. EO 13807 creates a permitting framework under which infrastructure development and construction agencies will most often be the lead agencies and agencies that have a primary mission of environmental protection will not. Because agencies such as the Environmental Protection Agency, the National Park Service, and the Fish and Wildlife Service are unlikely to have the greatest involvement in a given public infrastructure project, they rarely will be designated the lead agency.<sup>216</sup> Instead, agencies that have a primary

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(2007) (criticizing OIRA's politicization of the science used in agency risk assessments); Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019 (2015). *But cf.* Sunstein, *supra* note 212, at 1874–75 (“Federal officials, most of them nonpolitical, know a great deal, and the OIRA process helps to ensure that what they know is incorporated in agency rulemakings.”).

214. Wagner, *supra* note 213, at 2059–60 (citing U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 11 (2003)); Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 853, 871 (2003)).

215. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-205, IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (2009).

216. See 40 C.F.R. § 1501.5(c) (2019) (stating the “[m]agnitude of [an] agency’s

mission of infrastructure development—such as the Department of Transportation’s Federal Highway Administration, the U.S. Army Corps of Engineers, the Department of Energy, and the Bureau of Reclamation—will likely be lead agencies in environmental review under EO 13807.

Giving one agency significantly more authority to oversee the environmental review and permitting processes of other agencies may seem facially neutral. However, the core mission of infrastructure agencies is infrastructure development, not environmental protection. Many of those agencies have a long record of not including environmental protection as a core priority.<sup>217</sup> Highway agencies, for example, have overlooked if not actively resisted community input and consideration of environmental harms as far back as the famous *Overton Park* case in Memphis.<sup>218</sup> Thus, it is reasonable to describe shifting primary authority to infrastructure agencies as further discounting environmental protection goals in federal agency permitting.

*F. Reallocation Ignores Costs, Benefits, and Alternative Allocations of Authority*

As with its CAP targets, EO 13807 does not offer any evidence supporting its reallocation of authority. It does not even consider other possible arrangements that might be more efficient or effective. Instead, EO 13807 appears to assume without explanation that providing additional coordination authority to lead agencies and OMB will massively reduce administrative

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involvement” is the most important factor for designating a lead agency under NEPA).

217. See, e.g., Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 LAW & HISTORY REV. 965, 977 (2015) (referring to prevailing environmental groups’ characterization of the “official indifference and hostility” of state and federal highway agencies to environmental considerations in the *Overton Park* case); ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 247 (8th ed. 2019) (noting that Congress adopted NEPA “to limit so-called program- or mission-oriented agencies that carry out their mandates at the expense of the environment”).

218. See Sabin, *supra* note 217 (discussing opposition and lawsuit against development of Overton Park in Nashville into a highway); *Jane Jacobs and the Fight for Washington Square Park*, WASH. SQUARE PARK CONSERVANCY (Mar. 7, 2017), <http://washingtonsquareparkconservancy.org/news/2017/03/07/jane-jacobs-and-the-fight-for-washington-square-park/> [https://perma.cc/W2HD-EYCG] (detailing the battle to prevent a portion of Washington Square Park in New York City from being developed into a highway).



costs.<sup>219</sup>

Though coordination can help agencies work together to streamline their activities,<sup>220</sup> it is not costless. Adding coordination mechanisms—particularly those requiring extensive negotiations between agencies and additional reporting by one agency to another—would actually increase certain administrative costs.<sup>221</sup> It is plausible that the extensive coordination requirements imposed by EO 13807 could reduce other administrative costs to such an extent that it outweighs these costs. However, there are no statements or evidence in EO 13807 or its auxiliary guidance that make or support such an assertion.

Even if the Administration's reconfiguration were somehow supported, EO 13807 ignores other relevant normative considerations. These include, among other things, whether environmental review and permitting processes lead to effective infrastructure planning or mitigate possible harms to environmental resources and human communities. Again, these considerations were completely neglected in developing EO 13807.

To be sure, conflict among regulators can slow the review process, particularly for large-scale infrastructure projects.<sup>222</sup> Clarifying authority through coordination can reduce administrative costs. Indeed, a number of observers have previously raised concerns regarding federal agency coordination under NEPA.<sup>223</sup>

But it is just not clear—because the Administration does not offer any supporting evidence or even an explanation—that EO

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219. Cf. *Transcript of Trump Press Conference Aug. 15*, MCCLATCHY DC BUREAU, <https://www.mcclatchydc.com/news/politics-government/article167364607.html> (last visited June 28, 2019) (stating that delays in permit review “cost our economy billions of dollars”).

220. See CAMACHO & GLICKSMAN, *supra* note 23, at 44–45 (“Although efforts to coordinate require investments of time and resources that are unnecessary when agencies act independently, this disadvantage may be offset by reductions in duplication of effort and inconsistent action, potentially even resulting in a net administrative efficiency gain.”).

221. *Id.* at 47 (“Adding layers of consultation and collaboration requirements to an overlapping regulatory landscape will undoubtedly divert agency resources, and it is worth considering whether the advantages of particular communications or collaborations are worth these disadvantages.”).

222. DEPT OF THE TREASURY, *supra* note 199, at 13 (finding “[l]ack of consensus among stakeholders was an impediment for half of the projects” reviewed).

223. See, e.g., CAMACHO & GLICKSMAN, *supra* note 23, at 105–07; Helen L. Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENVTL. L.J. 317, 330 (2015); Hayes, *supra* note 139, at 10018–19.

13807's particular configuration is the best approach. Alternative coordination approaches, such as allocations that provide lead-agency authority to agencies with significant expertise in environmental assessment and protection, might better streamline permit processing and environmental review. Sticking with the status quo of more independent, overlapping analyses might promote more effective outcomes, even if it is less administratively efficient.

EO 13807 does not just largely overlook the advantages and disadvantages of increasing coordination. It also ignores the advantages and disadvantages of changing the extent of overlap in authority in permitting and environmental review between federal agencies. Perhaps any major inefficiencies in permitting come not from lack of coordination but rather from too much overlap in authority.<sup>224</sup> If so, a more appropriate solution might be to reduce the extent of overlap, rather than mandate more coordination. EO 13807 does not even contemplate these possibilities.

Finally, even if one concentrates only on enhancing agency coordination, EO 13807 misses important opportunities to do so beyond the initial environmental review and permitting stages of infrastructure development. Specifically, Trump's Executive Order ignores the lack of interagency coordination in compliance monitoring and enforcement. A key way to improve infrastructure planning may actually be to promote better and more coordination not in the initial permitting stage but in compliance monitoring.<sup>225</sup> Requiring coordination in monitoring and adaptive management might help reduce delays in initial permitting stages while improving planning over the long term.

Unfortunately, EO 13807 completely ignores the wide range of possible improvements in the allocation of federal oversight authority over infrastructure development. The Administration's actions thus are likely to add administrative costs and divert scarce agency resources. They also increase the likelihood that poor coordination among federal agencies throughout the planning and development process will persist.

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224. CAMACHO & GLICKSMAN, *supra* note 23, at 41–43.

225. *Id.* at 108–09.

## CONCLUSION

Careful and transparent planning has become, and should continue to be, a bedrock objective of federal infrastructure development. Before NEPA, federal agencies were free to ignore the effects of development on the environment and communities.<sup>226</sup> Federal agencies failed to coordinate and even worked at cross-purposes.<sup>227</sup> In the decades since, the fundamental achievement of NEPA has been how it relies on and stimulates democracy and good government through mandating opportunities for participation, interagency coordination, and generation and analysis of information in federal decision-making.<sup>228</sup> Indeed, this catalytic function is a significant reason NEPA is regularly referred to as the Magna Carta of global environmental law.<sup>229</sup>

In 2008, for instance, public advocacy enabled by NEPA transformed a dangerous proposal initially approved by the Nuclear Regulatory Commission. The original plan would have stored and capped millions of tons of uranium mill tailings on

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226. See, e.g., COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, *supra* note 130, at 17 (“Prior to NEPA, however, the public had limited opportunities to engage in the debate about social, economic, and environmental costs and benefits. Nor did the public have much recourse to challenge the federal government on decisions affecting their communities.”).

227. See *id.* at 21 (“During the debate preceding the passage of NEPA, many members of Congress expressed concern that federal agencies were not working cooperatively and in some cases were working at cross purposes. As a result, one of the underlying purposes of NEPA was to provide a framework for a coordinated approach to environmental problem-solving across agencies.”).

228. See, e.g., *id.* at 7 (“The Study participants felt that NEPA’s most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions.”); ENVTL. LAW INST., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT 3 (2010), <https://www.eli.org/sites/default/files/eli-pubs/d20-03.pdf> [<https://perma.cc/49PT-HH96>] (“NEPA democratized decisionmaking.”); P. Lynn Scarlett, National Environmental Policy Act: Enhancing Collaboration and Partnerships, presented at Rocky Mountain Mineral Law Foundation Special Institute on the National Environmental Policy Act (Oct. 28–29, 2010), [http://lynnsscarlett.com/uploads/3/4/0/9/34093313/sp\\_nepa\\_collaboration\\_narrative\\_final.pdf](http://lynnsscarlett.com/uploads/3/4/0/9/34093313/sp_nepa_collaboration_narrative_final.pdf) [<https://perma.cc/4ESM-BMLW>] (Former Acting United States Secretary of the Interior under George W. Bush stated that NEPA has “[a]id[ed] out the central architecture for agency collaboration, cooperation, and public participation in evaluating federal actions.”).

229. See, e.g., Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and A Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1509–10 (2012); Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J.L. & POL’Y 293, 293 (2010).

the Colorado River and jeopardized the drinking water supply for millions of people residing in Phoenix, Las Vegas, San Diego, and Los Angeles.<sup>230</sup> Instead, the final plan moved the tailings to an alternative location away from drinking water supplies.<sup>231</sup>

More instrumentally, NEPA leverages a combination of agency analysis of generated information, threats of litigation, actual litigation, and negative publicity to ensure federal agencies internalize many of the potential environmental and other public costs into planning and development.<sup>232</sup> Though not flawless, NEPA transformed government decision-making to catalyze participation, government accountability, and better information.<sup>233</sup>

Yet there are limits to this influence. Unfortunately, the Trump Administration's active efforts, such as EO 13807, disregard environmental concerns while truncating and diminishing the participatory process itself. Trump appears to be using consensus on the critical need for infrastructure to undermine processes developed over decades to ensure that projects are well designed, potential harms are mitigated, and reasonable alternatives are explored.

There certainly is room to improve the efficiency of infrastructure planning, and Congress's and the Obama Administration's most recent streamlining reforms focused on doing just that. These substantive, procedural, and structural changes are much more likely to aid and expedite productive infrastructure

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230. ENVTL. LAW INST., *supra* note 228, at 12.

231. *Id.* at 12–13. Since 2008, the pile of radioactive tailings onsite has been shrinking. Amy Joi O'Donoghue, *10 Years and 9.5M Tons Later, Radioactive Moab Tailings Pile Shrinking*, DESERET NEWS (Apr. 23, 2019, 2:08 PM), <https://www.deseretnews.com/article/900067265/radioactive-moab-tailings-pile-shrinking.html> [<https://perma.cc/9EQ6-43GY>].

232. *See, e.g.*, COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, *supra* note 130, at 7 (“Federal agencies today are better informed about and more responsible for the consequences of their actions than they were before NEPA was passed. As a result, agencies today are more likely to consider the views of those who live and work in the surrounding community and others during the decision-making process.”); Mandelker, *supra* note 229, at 294 (describing a “legion of studies,” most of which conclude that NEPA “has had a moderately positive effect” at “getting agencies to incorporate environmental values into their decision making”).

233. COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, *supra* note 130, at 17 (“Since its enactment, NEPA has significantly increased public information and input into agency decisionmaking. NEPA opened up for public scrutiny the planning and decision-making processes of federal agencies, in many cases providing the only opportunity for the public to affect these processes.”); ENVTL. L. INST., *supra* note 228, at 5.

development in the United States than EO 13807. The most straightforward change would be authorizing necessary funding—not only for infrastructure repairs and development but also for agency planning and project review. Importantly, the FAST Act authorized the FPISC to establish “a fee structure for project proponents to reimburse the United States for reasonable costs incurred in conducting environmental reviews and authorizations for certain projects.”<sup>234</sup> Yet the Trump Administration has done little to implement this provision.<sup>235</sup>

Streamlining also is likely to be advanced more quickly through thorough implementation of—and subsequent review of the efficacy of—extant streamlining provisions, including those authorized through the FAST Act. The Obama Administration and Congress essentially began to develop a learning infrastructure<sup>236</sup> for improving agency permit review. That budding framework tracked and shared information. It mandated employment of dedicated staff with expertise on facilitating permit streamlining, established a collective Permitting Dashboard and clearinghouse to share best practices, created a one-stop shop for state and municipal capacity building, and crafted metrics for permitting and review.<sup>237</sup> Implementing those requirements would advance sound infrastructure planning far better than establishing arbitrary deadlines and slashing agency funding.

Yet the core challenge for infrastructure planning—and the more appropriate area for reform—is not improving administrative efficiency. Rather, policymakers should design planning processes that achieve quality, durable, and environmentally sound infrastructure. As such, reform efforts must be tailored to promote not only more efficient but also more effective decision-making. Information generation, public participation, and inter-agency coordination must occur when they would meaningfully affect planning decisions, and not as after-the-fact pro forma exercises.<sup>238</sup> This is particularly needed both early in the plan-

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234. 42 U.S.C. § 4370m-8(a) (2012).

235. Goldfuss, *supra* note 164.

236. See Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1 (2009).

237. See *supra* notes 154–171 and accompanying text.

238. See, e.g., James T. B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74, 87 (“Both agencies and environmentalists would like to see the NEPA process become more efficient and meaningful. Boilerplate environmental review may be enough to satisfy judicial review but is worth little in the overall planning process.”); *id.* at 90 (“If environmental review is conducted as part of a planning

scoping process and during monitoring of project implementation.<sup>239</sup>

A better planning process would also include basic acts neglected by the Trump Administration, like actually appointing those tasked with implementing the learning infrastructure and training the federal workforce in how it works.<sup>240</sup> Systematically studying, adjusting, and disseminating information about permitting processes themselves would also help.<sup>241</sup> Even EO 13807's newly created Performance Accountability System might be useful if it were actually tethered to reviewing agencies' performance based on how well they improved development and minimized environmental harms—instead of how cheaply and quickly they circumvented planning.

It is precisely because of the important and pressing need for durable infrastructure development that the *legal* infrastructure supporting and legitimizing it must remain robust. The United States ought to develop smart, sustainable approaches that encourage public and private investment, innovation, energy efficiency, and reliance on renewable resources. But it also should not bulldoze the ecological resources wildlife and humans require to survive and thrive. Though at times inefficient, the best way to navigate this tension is to convene affected interests and experts to generate and analyze relevant information and possible solutions.

Vital infrastructure development and planning innovation may not currently be possible given the Trump Administration's

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process, rather than as a corollary to planning, NEPA can aid decisionmakers in their duties, and they can avoid the delays associated with post hoc environmental reviews.”).

239. See DAVID J. HAYES & NIDHI THAKAR, CENTER FOR AMERICAN PROGRESS, A 4-POINT PLAN FOR RESPONSIBLY EXPANDING RENEWABLE ENERGY PRODUCTION ON AMERICAN'S PUBLIC LANDS AND OCEANS (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/08/25132805/RenewableEnergy-report1.pdf> [<https://perma.cc/26UJ-WPEK>] (recommending NEPA regulatory changes to require applicant and stakeholder participation, as well as interagency coordination, early in the process).

240. Goldfuss, *supra* note 164 (“[T]he Trump administration has still not appointed anyone to lead the FPISC, which indicates a lack of high-level investment in permitting. The administration should make it a priority to fill these positions if it wants to see expedited permitting timelines.”).

241. *Id.* (“Leaders of permitting in the Executive Office of the President (EOP) should prioritize developing a strong community of practice across the government so that practitioners can regularly share case studies, training tools, and data needs. . . . Congress should work with the U.S. Government Accountability Office to study and gather information about federal contracting practices for environmental review across the federal government.”).

willingness to promote government dysfunction, thwart participation, disregard past lessons, and even undermine the scientific process itself. Fortunately, the federal planning infrastructure, designed and refined over decades, provides various mechanisms—such as opportunities to participate and comment, citizen-suit provisions, and interagency checks—for resisting and weathering these threats to democratic principles and institutions. Yet the low volume of citizen suits under NEPA<sup>242</sup> highlights the difficulties environmental and good-government advocates may have repelling these attacks on federal planning.

In this sense, EO 13807 serves as an important reminder of how regulatory effectiveness is influenced by more than just substantive legal requirements. Agency processes and allocation of authority across government institutions also undoubtedly play a role. Yet, more fundamentally, governmental effectiveness, and indeed legitimacy, is shaped by the proficiency and integrity of empowered government officials, and how much they—and ultimately the broader public—are interested in advancing the public interest.

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242. See Adelman & Glicksman, *supra* note 120, at 7–8. See also John Ruple & Kayla Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENVTL. L. (forthcoming 2020), <https://ssrn.com/abstract=3433437> [<https://perma.cc/P7VV-XTK4>] (finding only one in 450 NEPA decisions were litigated and that the rate of NEPA challenges declined during the thirteen-year study period).