



The Daily Dish

Expediting Infrastructure into the Unknown

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Eakinomics: Expediting Infrastructure into the Unknown

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The Trump Administration has made two attempts recently to boost infrastructure development recently. Will these efforts work?

To recap, on June 4, President Trump signed an executive order (EO) that broadly calls on all agencies (with the exception of independent agencies) not only to “speed infrastructure investments” but also to “speed other actions in addition to such investment that will strengthen the economy and return Americans to work.” The EO is transparently a response to the unprecedented economic impact of the COVID-19 pandemic, which has led to historic levels of unemployment. It calls for agencies to complete speedier reviews of these projects, which the administration hopes, in turn, will expedite their implementation and create jobs sooner rather than later as a result.

Even more recently, the Council on Environmental Quality's Final Rule – Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA) – was issued earlier this month. Decisions by government agencies that impact the environment, such as the construction of infrastructure projects, like highways, pipelines, and ports, are subject to review under NEPA. This rulemaking aims to reduce the complexity and duration of review times that have increased over the decades since NEPA's enactment.

Both the EO and the rulemaking are aimed at expediting infrastructure projects, as delays caused by the complexities of regulatory review can both push back construction and increase costs. As these costs are often passed on to consumers or taxpayers, we all win when infrastructure projects are built more efficiently. But the problem is that neither the EO nor the rule are likely to reduce those costs because they are fodder for activists and attorneys.

The EO rests on the authority granted to the federal government to act in response to emergencies, typically natural disasters. It requested that the Departments of Transportation, Interior, Agriculture, and Defense, as well as the Army Corps of Engineers, each provide a summary report listing all such projects that will be expedited within 30 days of the EO's release, or July 3, 2020. This day has come and gone with the administration refusing to provide any information on the projects in consideration. In response, the validity of the EO has been broadly questioned. Is this truly the kind of emergency our laws were intended to address? And public interest groups have wondered how they can voice their concerns about projects secretly selected to skip typical steps such as notice and comment. Their voice will likely be heard in the courtroom, a growing trend in recent years.

The rule, on the other hand, overwrites decades of legal developments in a complex web of regulatory mandates and agency coordination and guidance, some of which were hard fought for by activists who have already

declared they're ready to keep fighting. What's more, the rule will be subject to the Congressional Review Act, which allows the repeal of a new rule issued within 60 legislative days before Congress's adjournment prior to an election. That uncertainty leaves infrastructure developers to work with agencies trying to sort this rule out while potentially finding themselves in the courtroom, and while running the risk of the rule's repeal. I can see why they wouldn't be thrilled to take advantage of all this expediting they've been granted.

It is perfectly understandable for the administration to want to expedite infrastructure projects during the pandemic. The outcome of its actions, however, may simply be more litigation and delays.