



DEPARTMENT OF STATE

22 CFR Part 161

[Public Notice: 11070]

RIN 1400-AF02

Environmental Protection: Regulations for Implementation of the National Environmental Policy Act (NEPA)

AGENCY: Department of State.

ACTION: Final rule with comments.

SUMMARY: The U.S. Department of State (Department) is issuing a final rule to update the Department's Regulations for Implementation of the National Environmental Policy Act (NEPA) to reflect a recent Executive Order that revised the process for the development and issuance of Presidential permits for certain facilities and land transportation crossings at the international boundaries of the United States.

DATES: This rule is effective [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments will be received until [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted at <https://www.regulations.gov> by searching for Docket Number DOS-2020-0013. Comments may also be submitted to M. Ross Alliston, NEPA Coordinator, at AllistonMR@state.gov, or at Office of Environmental Quality and Transboundary Issues, U.S. Department of State, 2201 C Street NW, Room 2726, Washington, D.C. 20520.

FOR FURTHER INFORMATION CONTACT: M. Ross Alliston, NEPA Coordinator, Office of Environmental Quality and Transboundary Issues, U.S.

Department of State. 2201 C Street NW, Room 2726. Washington, D.C. 20520. (202) 647-4828, AllistonMR@state.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The President of the United States has authority to require permits for cross-border infrastructure based on his Constitutional powers over foreign affairs and national security vested by Article II of the Constitution. In Executive Orders 11423 and 13337, acting pursuant to the Constitution and the laws of the United States, including Section 301 of Title 3 of the United States Code, the President provided the Secretary of State the authority to receive applications for, and to issue or deny, Presidential permits for certain types of border facilities.

In 1968, under Executive Order 11423, President Lyndon B. Johnson designated and empowered the Secretary of State to receive applications and to issue permits for certain types of cross-border infrastructure. Executive Order 11423 also provided that, in the event of certain interagency disagreements, the President would make the final decision to issue or deny a permit. The types of infrastructure included: i) pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products, coal, minerals, or other products to or from a foreign country; (ii) facilities for the exportation or importation of water or sewage to or from a foreign country; (iii) monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country; and (iv) bridges, to the extent that congressional authorization is not required.

In 2004, under Executive Order 13337, President George W. Bush revised the process to be followed by the Secretary of State in issuing Presidential permits for facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels while maintaining that, in the event of certain interagency disagreements, the President would make the final decision to issue or deny a permit. Because determinations regarding approval or denials of Presidential permits are Presidential actions, the requirements of NEPA, the National Historic Preservation Act of 1966, the Endangered Species Act of 1973, the Administrative Procedure Act, and other similar laws and regulations that do not apply to Presidential actions were inapplicable to such determinations, including determinations that were made by the Secretary of State or his delegate pursuant to Executive Order 11423 and 13337. However, as a matter of policy the Department of State conducted environmental reviews of Presidential permit applications consistent with NEPA in the course of preparing determinations pursuant to those Executive Orders.

On April 10, 2019, President Donald J. Trump issued Executive Order 13867, entitled “Issuance of Permits With Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States,” 84 FR 15491, April 15, 2019, which revoked Executive Orders 11423 and 13337 and thus revoked the authority of the Secretary of State to issue or deny Presidential permits that had been granted by those Executive Orders. Section 1 of Executive Order 13867 provides that the purpose of the order is to promote cross-border infrastructure and facilitate the expeditious delivery of advice to the President regarding Presidential permitting decisions, which are an exercise of the President’s foreign affairs authority. U.S. Constitution, Art. II, Sec. 2.

While Section 3 of Executive Order 13867 leaves previously issued permits undisturbed, Section 2 of the Executive Order revises the procedures concerning applications for the issuance or amendment of Presidential permits for the construction, connection, operation, or maintenance of certain facilities at the international boundaries of the United States. Under the revised process, the Secretary of State receives applications and provides a recommendation to the President as to whether issuance or amendment of a permit would serve the foreign policy interests of the United States, but the Secretary does not make any decision to issue, deny, or amend a permit. The Secretary's recommendations are based on consultation with such other agency heads as the President may direct, as well as with domestic or foreign government officials as the President may deem necessary. Under Section 2(i) of Executive Order 13867, any decision to issue, deny, or amend a Presidential permit is made solely by the President. The President is not a "federal agency" to which NEPA applies (40 CFR 1508.12).

Section 2(j) of Executive Order 13867 instructed the Secretary of State, consistent with applicable law, to review the Department of State's regulations and to make any appropriate changes to them to ensure consistency with that Executive Order by May 29, 2020. Following such review, it has been determined that the Department's NEPA regulations at 22 CFR part 161 should be amended to reflect Executive Order 13867. In particular, the Department's NEPA regulations should be updated to remove all references to any permitting authority that has been revoked by Executive Order 13867.

II. Purpose of the Regulatory Action

This rulemaking fulfills the instruction in Executive Order 13867 that the Secretary of State review the Department of State's regulations and make any appropriate

changes to them to ensure consistency with that Executive Order. This final rule updates 22 CFR part 161 to reflect the fact that the Secretary of State no longer has the authority to issue Presidential permits for cross-border infrastructure projects. The current regulations refer to authority previously exercised under Executive Orders 11423 and 13337 at §§ 161.7(c)(1) and 161.10. Because the authority referred to in these two places has been revoked, they are removed from Part 161.

Finally, since part 161 was last updated in 1980, this rule provides several nonsubstantive administrative updates.

III. Regulatory Analyses

Administrative Procedure Act (APA)

This rule is exempt from notice and comment rulemaking because it relates to a foreign affairs function of the United States. *See* 5 U.S.C. 553(a)(1). Specifically, the President's authority to grant or deny a border-crossing permit for international infrastructure is rooted in the President's inherent constitutional authority over foreign affairs as well as his authority as Commander-in-Chief. Presidents have exercised that inherent authority to authorize border crossing facilities since the Grant Administration. *See* Hackworth, *Digest of International Law*, Vol. IV, § 350 (1942).

In exercise of this constitutional foreign affairs authority, the President had authorized the Secretary of State, pursuant to Executive Orders 11423 and 13337, to receive applications and to issue or deny Presidential permits for certain types of cross-border facilities. Exercising the same authority, the President acted, in Executive Order 13867, to revoke the authority of the Secretary of State and to reserve to himself the cross-border permitting decisions described therein.

Notwithstanding the Department's determination that this rulemaking is exempt from notice and comment and without prejudice to this determination, the Department will accept public comment for 30 days after the date of publication.

Regulatory Flexibility Act

Because this final rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act (RFA). Notwithstanding the inapplicability of the RFA, the Department has determined and hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities, given that the final rule has the potential to have an economic impact only on entities large enough to propose, finance, and construct cross-border infrastructure projects. Moreover, even if the final rule did have an economic impact on small entities, it would not affect a substantial number of them, because in no year has the Department ever received more than ten applications concerning cross-border infrastructure projects.

Unfunded Mandates Reform Act of 1995

This amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12866 and 13563, Regulatory Planning

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). The Department believes that the benefits of this rulemaking outweigh any cost to the public, which is anticipated to be minimal. This rule has been designated as a significant rulemaking under Executive Order 12866.

Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*

This rule is not subject to the requirements of EO 13771 because this rule results in no more than *de minimis* costs.

Executive Order 12988, *Civil Justice Reform*

The Department of State reviewed this rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden. No retroactive effect will be given to this rule, and no administrative appeal procedures must be exhausted before an action against the Department may be initiated.

Executive Order 12372, *Intergovernmental Review of Federal Programs*

This rule is not subject to Executive Order 12372. This rule updates the Department's NEPA regulations and does not implicate provision of non-Federal funds by State and local governments. Similarly, the Department's NEPA regulations do not implicate Federal financial assistance or direct Federal development within the scope of Executive Order 12372.

National Environmental Policy Act

In this final rule, the Department proposes to implement the Presidential directive in Section 2(j) of Executive Order 13867 to bring the Department of State's regulations into conformity with Executive Order 13867. The Council on Environmental Quality (CEQ) does not direct agencies to prepare a NEPA analysis before establishing agency NEPA procedures as required by the CEQ regulations for implementing the procedural provisions of NEPA pursuant to 40 CFR 1505.1 and 1507.3. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), *aff'd*, 230 F. 3d 947, 954-55 (7th Cir. 2000). Moreover, the Department of State has no discretion to deviate from the presidential instructions set forth in Executive Order 13867, and nondiscretionary actions are not subject to NEPA analytical requirements. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 756, 770 (2004).

Executive Order 13132, *Federalism*

The policies contained in this final rule do not have any substantial direct effect on states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this final rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal

governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

The Department has determined that this rulemaking does not create or revise any information collection that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

List of Subjects in 22 CFR Part 161

Environmental impact statements.

Accordingly, for the reasons set forth above, title 22, chapter I, subtitle Q, part 161 is amended as follows:

PART 161 – REGULATIONS FOR IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

1. The authority citation for part 161 is revised to read as follows:

AUTHORITY: 22 U.S.C. 2651a and 2656; 42 U.S.C. 4321 *et seq.*; E.O. 11514, 34 FR 4247, 3 CFR, 1966-1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26927, 3 CFR, 1977 Comp., p. 123; E.O. 13867, 84 FR 15491.

2. In part 161, remove the words “Office of Environment and Health” and add in their place the words “Office of Environmental Quality and Transboundary Issues” wherever they occur.

§ 161.6 [Amended]

3. Amend § 161.6 in paragraph (a)(2) introductory text by removing the words “Congressional Relations” and adding in their place the words “Legislative Affairs”.

§ 161.7 [Amended]

4. Amend § 161.7 by removing and reserving paragraph (c)(1).

§ 161.10 [Removed and Reserved]

5. Remove and reserve § 161.10.

Zachary A. Parker,
Director,
Office of Directives Management,
U.S. Department of State.

Billing Code: 4710-09

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