

A large, stylized handwritten signature in black ink, which is the signature of Donald Trump. The signature is written in a cursive, somewhat jagged style with a prominent 'D' and 'T'.

Donald Trump signature, courtesy of <https://www.goodfreephotos.com>.

Late Thursday, the White House issued another in a seemingly endless series of administrative orders. Under the typically overblown title “[EO on Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities](#),” it was touted by the President’s team as a way to speed infrastructure permitting and another step in the anti-regulatory agenda they have pursued since Trump’s inauguration. It is intended to restrict environmental review in order to facilitate construction of highways, pipelines and other projects.

The pandemic is surely an excuse for, rather than a true motivator of, this latest attempt to cut back on environmental review. Trump has been obsessed with sidestepping or eliminating environmental review, especially for energy and infrastructure projects, since he entered the oval office. See, for example, this [Executive Order from January 2017](#), and [this one from 2019](#). This latest EO makes no attempt to hide that. After noting that the coronavirus pandemic has brought about “a dramatic downturn in our economy,” it states that the administration has been working from the outset to streamline “an outdated regulatory system that has held back our economy.”

The question remains, as it so often does with this administration, can he really do that? And will the action fulfill the strong words with which it is issued? Let’s take a look at this latest Executive Order to see.

A lot of the Order is devoted to simply telling the agencies under Trump’s control how they should approach their jobs. It directs them to “take all appropriate steps” to “facilitate the Nation’s economic recovery;” and to “take all reasonable measures” to speed actions “that

will strengthen the economy,” while protecting public health and the environment “as required by law.” In other words, use what authority you have to advance Trump’s preferred agenda. Which of course could be said in a cabinet meeting or phone call without the hoopla of putting that [infamous black Sharpie](#) to a fancy piece of paper. This is just posturing for the political base.

Later, the EO signals what authority the President hopes there might be to actually short-circuit environmental review requirements. There’s less there than meets the eye.

The EO points to regulations implementing NEPA and the ESA that authorize streamlining in the face of emergencies.

The NEPA provision, 40 CFR § 1506.11, says:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. . . .

The ESA consultation provision, 50 CFR 402.05, is similar:

Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)-(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.

So, what counts as an “emergency”? Would a slow economic recovery from virus lockdowns fit that bill? (Putting aside, of course, that the administration also wants to [claim the recovery is not slow](#).)

The answer is no, for both NEPA review and ESA purposes. Here’s why.

The words used in the regulations don’t fit an economic downturn. The ESA version is

clearer on this point: “This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.” That’s a list of events that happen suddenly, pose serious risks to life and property, and require an immediate response. As the ESA Consultation Handbook explains:

An emergency . . . includes response activities that must be taken to prevent imminent loss of human life or property. . . . Under no circumstances should a Services representative obstruct an emergency response decision made by the action agency where human life is at stake.

The NEPA guidelines show a similar intent: departures from the norm are limited to those “necessary to control the immediate impacts of the emergency.” Again, consistent with the ordinary use of the term “emergency,” the idea is that there is no time to spare.

No one thinks NEPA analysis or ESA consultation should be required before the federal government responds to an act of war, or fights a conflagration, or rescues people from a flood. Those are the circumstances these exceptions target. A flagging economy and high unemployment certainly do require interventions, but not on the same time frame as a wildfire or hurricane.

The policy intuitions behind NEPA and the ESA support this interpretation. Both require that agencies consider the consequences before acting. Those procedural requirements are intended to put the environment on something approaching a more equal footing with the economy. NEPA recognized that the environment was getting short shrift in agency decisions driven by short-term politics and narrow missions. The ESA sought to counteract the invisibility of environmental impacts in decision making, noting explicitly that many species had

been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.

Environmental Impact Statements and ESA consultations generate information needed to evaluate the trade-offs government agencies make between economic development and the environment. A desire for faster economic development cannot justify short-circuiting those decisions.

If agencies are too cowardly or too mission-driven to push back on this EO, the federal courts should not hesitate to hold them to their legal obligations. Yes, there are circumstances in which emergencies may justify more rapid and less thorough environmental review, or even review after the fact. But the President calling something an emergency does not make it so.