Understanding the Scope of Emergency Permitting

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Summary

- Executive Order 14,154, issued by President Trump on the first day of his second term in office, declares that it is "in the national interest to unleash America's affordable and reliable energy and natural resources."
- The same day, in Executive Order 14,156, President Trump declared a "National Energy Emergency" pursuant to his authority under the National Emergency Act (NEA).
- President Trump's attempt to expedite federal permitting in the face of National Energy Emergency likely to face legal challenges.

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On the first day of his second term in office, President Donald Trump declared that it is "in the national interest to unleash America's affordable and reliable energy and natural resources." Exec. Order 14,154, Unleashing American Energy, 90 Fed. Reg. 8353, 8353 (Jan. 29, 2025). To achieve this, the president directed federal agencies to identify actions that "impose an undue burden on the identification, development, or use of domestic energy resources," particularly "oil, natural gas, coal, hydropower, biofuels, critical mineral, and nuclear energy resources." *Id.* at 8354. The president further directed agencies to "use all possible authorities, including *emergency* authorities, to expedite the adjudication of Federal permits" for "any project an agency head deems essential for the Nation's economy or national security." *Id.* at 8355–56 (emphasis added).

The same day, by separate executive order, President Trump declared a "National Energy Emergency" pursuant to his authority under the National Emergency Act (NEA). Exec. Order 14,156, Declaring a National Energy Emergency, 90 Fed. Reg. 8433 (Jan. 29, 2025). In this order, President Trump declared that the "United States' insufficient energy production, transportation, refining, and generation constitutes an unusual and

extraordinary threat to our Nation's economy, national security, and foreign policy." *Id.* at 8434. Notably, the order limits the definition of "energy" and "energy resources" to "crude oil, natural gas, lease condensates, natural gas liquids, refined petroleum products, uranium, coal, biofuels, geothermal heat, the kinetic movement of flowing water, and critical minerals." *Id.* at 8436. To address this matter of national security, President Trump again directed agency heads to "identify and exercise any lawful *emergency* authorities available to them . . . to facilitate the [development] of domestic energy resources." *Id.* at 8434 (emphasis added).

The declaration of a national emergency is not a particularly unique occurrence: In fact, every president since the NEA was enacted in 1976 has declared at least one. Elizabeth M. Webster, Cong. Rsch. Serv., Rep. 98-505, National Emergency Powers 12 (2021). Despite this somewhat frequent use of the NEA, President Trump's declaration of a "National Energy Emergency" and directive to federal agencies to use any and all emergency permitting authorities have raised unique questions regarding the scope of the president's emergency power and its relationship to federal permitting and environmental review.

The scope of President Trump's directive is broad, and the universe of relevant legal authorities expansive. But not all laws governing the development of energy resources have emergency provisions, and even where there are emergency authorities on point, those powers may be limited. *See* Olivia Guarna & Michael Burger, *Demystifying President Trump's "National Energy Emergency" and the Scope of Emergency Authority*, Sabin Ctr. for Climate Change L., Feb. 14, 2025 (collecting relevant statutes and regulations with and without emergency provisions). The president's Executive Order Declaring a National Energy Emergency identifies two of the most significant emergency authorities: section 4 directs agencies to use the Army Corps of Engineers' emergency permitting regulation and section 5 directs the Department of the Interior (DOI) to use the agency's regulation on emergency Endangered Species Act (ESA) consultations. Exec. Order 14,156, 90 Fed. Reg. at 8434–35.

The Army Corps' emergency regulation authorizes division engineers "to approve special processing procedures in emergency situations." 33 C.F.R. § 325.2(e)(4). This applies to permitting under section 404 of the Clean Water Act (33 U.S.C. § 1344), section 10 of the Rivers and Harbors Act (*id.* § 403), and section 103 of the Marine Protection Research and Sanctuaries Act (*id.* § 1413). The regulation defines an "emergency" as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." 33 C.F.R. § 325.2(e)(4). Examples include natural disasters and catastrophic facility failures due to external causes, such as

a bridge collapsing after being struck by a barge. U.S. Army Corps of Eng'rs, Regul. Div., Ft. Worth Dist., *Emergency Procedures* 1 (2014). The Corps also may use alternative permitting procedures, such as regional general permits, to expedite processing of permit applications in emergency situations. *Id.*; 33 C.F.R. § 325.2(e)(1)–(2).

The Endangered Species Act's emergency inter-consultation regulation provides that "[w]here 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 [ESA]." 50 C.F.R. § 402.05(a). In this context, "emergencies" are "situations involving acts of God, disasters, casualties, national defense or security emergencies, etc." *Id.* During the emergency consultation process, the agency's role is to "offer recommendations to minimize the effects of the emergency response action on listed species or their critical habitat," not to "stand in the way of the response efforts." U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Consultation Handbook 8-1 (1998).

Perhaps surprisingly, the executive order does not specifically mention the National Environmental Policy Act's (NEPA) emergency regulations. The Council on Environmental Quality (CEQ) promulgated regulations authorizing emergency NEPA procedures during President Trump's first term and again under President Biden. 40 C.F.R. § 1506.12 (2020); 40 C.F.R. § 1506.11 (2024). However, at the direction of President Trump, CEQ recently rescinded its existing NEPA regulations, which are to be replaced by agency-specific NEPA regulations. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10,610 (Feb. 25, 2025). Thus, in the interim, agencies without their own NEPA-implementing regulations appear to lack emergency procedures for NEPA review.

This may prove to be an insignificant roadblock to permitting, as certain agencies, including the U.S. Forest Service (USFS) and DOI, already have agency-specific NEPA regulations authorizing emergency response procedures. The USFS and DOI regulations provide that "if the Responsible Official determines that an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis and documentation . . . [t]he responsible official may take actions necessary to control the immediate impacts of the emergency and are urgently needed to mitigate harm to life, property, or important natural or cultural resources." 36 C.F.R. § 220.4(b); 43 C.F.R. § 46.150. These regulations do not further define "emergency."

Without doubt, the use of these, and other, emergency authorities will be the subject of legal challenges. For instance, an argument may be made that there is no actual energy emergency and, therefore, any agency action based on the president's emergency declaration is arbitrary and capricious. However, such an attack is unlikely to find success. In *Center for Biological Diversity v. Trump*, the D.C. Circuit Court dismissed challenges to

President Trump's first-term declaration of an emergency at the U.S.-Mexico border, finding that the challenges amounted to a nonjusticiable political question. 435 F. Supp. 3d 11, 30 (D.D.C. 2020). The court noted that "no court has ever reviewed the merits of such a declaration," both "because the declaration of a national emergency raises questions about national security or foreign policy" and "[t]he NEA provides no judicially discoverable and manageable standards to help the Court determine whether the situation at the border is a national emergency." *Id.* at 31–32 (internal quotation marks omitted). Acknowledging the difficulty of bringing a facial attack, some environmental groups have already indicated that these challenges are more likely to come on a permit-by-permit basis. *Environmentalists Face Legal Hurdles Challenging Fast-Tracked 404 Permits*, Inside EPA's Water Pol'y Rep., Feb. 24, 2025, at 1, 4.

A permit-specific challenge brought pursuant to the Administrative Procedures Act may question whether the declared "National Energy Emergency" fits within the relevant regulatory definition of an "emergency." While there is very little caselaw on the subject, in cases involving similar challenges courts have looked closely at the exigency of the circumstances. As the Western District of Washington explained in a case involving the ESA's emergency consultation regulation, "the general-purpose ordinary language meaning of 'emergency' itself includes the element of surprise and unexpectedness." *Wash. Toxics Coal. v. U.S. Dep't of Int., Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1195 (W.D. Wash. 2006), *aff'd*, 726 F. App'x 605 (9th Cir. 2018) (unpublished). Or, as the District of Montana explained, "[t]he [ESA's] emergency exception is meant for unexpected exigencies," not anticipated actions. *Forest Serv. Emps. for Env't Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1257 (D. Mont. 2005). More recently, the Southern District of Mississippi concluded that the opening of a spillway for flood control is a planned and expected event and, therefore, it was arbitrary and capricious for the agency to rely on an emergency ESA consultation when evaluating whether spillway openings jeopardize endangered species and their critical habitats. *Defs. of Wildlife v. U.S. Army Corps of Eng'rs*, No. 1:20CV142-LG-RPM, 2022 WL 18456141, at *7 (S.D. Miss. Nov. 22, 2022), *appeal dismissed*, 2023 WL 4744067 (5th Cir. Mar. 2, 2023). Challengers also may argue that the alleged "emergency" does not pose a risk of an unacceptable hazard to life, a significant loss of property or natural or cultural resources, economic hardship, or a national defense or security concern.

Even if there is an "emergency" as defined by regulation, there are still limits to emergency powers. The Army Corps' regulation states that, "[e]ven in emergency situations, reasonable efforts must be made to receive comments from interested federal, state, and local agencies and the affected public." 33 C.F.R. § 325.2(e)(4). The ESA emergency consultation regulation makes clear that emergency consultation is not a substitute for formal ESA consultation, and "[f]ormal consultation shall be initiated as soon as practicable after the emergency is under control." 50 C.F.R. § 402.05(b). And, under the

USFS and DOI NEPA regulations, even where an emergency response is authorized, the responsible official must "take into account the probable environmental consequences of the emergency action and mitigate foreseeable adverse environmental effects to the extent practical." 36 C.F.R. § 220.4(b)(1); 43 C.F.R. § 46.150(a). Failure to adhere to any of these limitations creates grounds for a legal challenge.

Finally, challengers may question whether there is any statutory basis for these emergency permitting regulations. For instance, section 7 of the ESA authorizes certain exemptions from consultation "for reasons of national security" and in areas "declared by the President to be major a disaster area . . . for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster." 16 U.S.C. § 1536(j), (p). Yet, the ESA emergency consultation regulation arguably reaches beyond this statutory language. Even more apparent, NEPA itself appears to lack any statutory exemption for emergencies. These arguments are more likely to be successful in light of the Supreme Court's recent decision overturning *Chevron*, as courts will now review agency interpretation of statutory authority through a more critical lens. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

In conclusion, the application of these emergency permitting authorities has historically been limited, their scope has not been well developed through case law, and significant questions remain as to their validity. As challenges are brought on a permit-by-permit basis, courts may reach inconsistent holdings, further complicating the implementation of the president's executive orders. However, if the president's strategy is ultimately successful, we are likely to see these emergency authorities applied more frequently in conjunction with presidential emergency declarations.

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