Monograph Series

Project 2025: Implications for Climate and the Environment

President Trump's Executive Order Declaring a National Energy Emergency: Legal Challenges and Related Issues

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ABOUT THE MONOGRAPH SERIES

The Heritage Foundation launched Project 2025 in 2023. Titled "Mandate for Leadership: The Conservative Promise," it presents a comprehensive collection of proposals on critical topics, many with implications for U.S. energy and environmental policy. Despite receiving significant media attention, few have read the entire 900+ page document or mapped its potential implications for climate change and environmental impacts.

Over 100 conservative organizations contributed to Project 2025, but it is not explicitly linked to the new Administration. The document calls for a significant and often radical overhaul of the federal government, with a particular focus on agencies and actions connected to climate change and environmental and energy law and policy. Many of these proposals have already been put forward and it is fair to anticipate that the underlying legal theories will be pursued.

This Monograph Series presents analyses to examine the potential implications that could result from the implementation of proposals set forth in Project 2025 and how they may affect action on climate change and the environment.

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ABOUT THE CENTER FOR LAW, ENERGY & THE ENVIRONMENT

CLEE channels the expertise and creativity of the Berkeley Law community into pragmatic policy solutions to environmental and energy challenges. CLEE works with government, business, and the nonprofit sector to help solve urgent problems requiring innovative, often interdisciplinary approaches. Drawing on the combined expertise of faculty, staff, and students across the University of California, Berkeley, CLEE strives to translate empirical findings into smart public policy solutions to better environmental and energy governance systems.

President Trump's Executive Order Declaring a National Energy Emergency: Legal Challenges and Related Issues

This Monograph reviews President Trump's Executive Order 15146, which reflects policies set forth in Project 2025 by declaring a "National Energy Emergency" and directing the heads of various federal agencies and departments to "identify and exercise any lawful emergency authorities available to them, as well as all other lawful authorities they may possess, to facilitate the identification, leasing, siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands."

The Executive Order ("EO") is designed to promote domestic fossil fuel production and undermine renewable energy production. This Monograph evaluates possible legal challenges to the emergency declaration itself and to actions related to, and carrying out, the declaration. The analysis of Presidential authority under a declared emergency should be of general interest because it is also relevant to other emergency declarations issued by the second Trump Administration.

On April 23, 2025, just as this Monograph was nearing completion, the United States Department of Interior ("DOI") announced three separate but related actions taken in response to the Executive Order, invoking emergency authorities under the National Environmental Policy Act (NEPA), the Endangered Species Act ("ESA"), and the National Historic Preservation Act (NHPA). DOI's three actions were "designed to expedite the review and approval, if appropriate," of the kinds of energy projects mentioned in the EO.

Specifically, DOI announced that it had adopted (i) an alternative NEPA compliance process "to allow for more concise documents and a compressed timeline[,]" (ii) an expedited ESA Section 7 interagency consultation process, and (iii) "alternative procedures for compliance with Section 106 of the ["NHSA"] for proposed undertakings responding to the energy emergency."[1]

The Monograph has been augmented to include analysis addressing the lawfulness of all three of these DOI actions. We conclude that they are not lawful.

[1] Department of the Interior Implements Emergency Permitting Procedures to Strengthen Domestic Energy Supply (https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic) (accessed on April 24, 2025).

TABLE OF CONTENTS

INTRODUCTION..... 6

SUMMARY OF CONCLUSIONS..... 9

BACKGROUND..... 14

I. National Energy Emergency Declaration 14

II. Overview of How the Executive Order Operates 15

III. Breakdown of Operative Provisions of the Executive Order 16

IV. National Emergencies Act 22

ANALYSIS..... 26

I. Although the declaration of a National Emergency is a nonjusticiable political question, subsequent Executive Branch actions taken in response to a declared emergency are generally subject to judicial review. 26

A. Direct judicial review of the President's declaration of a national emergency is almost certainly not available, as the courts will likely consider the propriety of the declaration to be a nonjusticiable "political question." 27

B. A Successful Congressional Termination of the President Trump's National Energy Emergency Seems Very Unlikely. 30

C. Statutory Constraints 30

II. The National Energy Emergency may not be the type of emergency intended for many of the statutes and regulations specified in the Executive Order as including provisions for emergencies, or for statutes or regulations likely to be specified later. 36

A. The Federal Eminent Domain Power 37

B. The Defense Production Act 38

C. Emergency Fuel Waivers 45

D. Clean Water Act and other US Army Corps of Engineers Permitting 48

E. Emergency Ocean Dumping Under the Marine Protection Research and Sanctuaries Act 51

F. Endangered Species Act 55

1. ESA Emergency Regulation..... 55

2. Endangered Species Committee..... 59

G. The National Environmental Policy Act 62

H. National Historic Preservation Act 66

I. 10 U.S.C. Section 2808 (Construction authority in the event of a declaration of war or national emergency) 69

CONCLUSION..... 78

INTRODUCTION

Among the many themes found in *Mandate for Leadership: The Conservative Promise: Project 2025 Presidential Transition Project* ("*Project 2025*") are attacks on regulatory efforts to combat climate change and proposed actions for increased production of fossil fuels such as oil, natural gas, and coal. The authors of *Project 2025* even suggest that the policies of the Biden Administration and some states have created to what amounts to a nationwide fossil fuel shortage, adversely affecting both the domestic economy and American foreign policy:

> Access to affordable, reliable, and abundant energy is vital to America's economy, national security, and quality of life. Yet ideologically driven government policies have thrust the United States into a new energy crisis just a few short years after America's energy renaissance, which began in the first decade of the 2000s, transformed the United States from a net energy importer (oil and natural gas) to energy independence and then energy dominance.
>
> Americans now face energy scarcity, an electric grid that is less reliable, and artificial shortages of natural gas and oil despite massive reserves within the United States—all of which has led to higher prices that burden both the American people and the economy.
>
> The new energy crisis is caused not by a lack of resources, but by extreme "green" policies. Under the rubrics of "combating climate change" and "ESG" (environmental, social, and governance), the Biden Administration, Congress, and various states, as well as Wall Street investors, international corporations, and progressive special-interest groups, are changing America's energy landscape. These ideologically driven policies are also directing huge amounts of money to favored interests and making America dependent on adversaries like China for energy. In the name of combating climate change, policies have been used to create an artificial energy scarcity that will require trillions of dollars in new investment, supported with taxpayer subsidies, to address a "problem" that government and special interests themselves created.
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> ***
>
> [I]ncreased energy scarcity will allow government, either directly or through access to banks and Wall Street investors, to decide who is "worthy" to receive funding for energy projects. In the end, government control of energy is control of people and the economy. This is one reason why the trend toward nationalization of our energy industry through government mandates, bans on the production and use of oil and natural gas, and nationalization of the electric grid is so dangerous.
>
> At the same time, adversaries like China, Russia, North Korea, Iran, and non-state actors are constantly engaged in cyberattacks against our energy infrastructure. We have already seen what supposedly "minor" attacks, such as

> the cyberattack on the Colonial Oil Pipeline or the physical attack on electric infrastructure in North Carolina, can do. A coordinated cyber and physical attack on natural gas pipelines and the electric grid during an extended cold spell could be catastrophic. Yet the current [Biden] Administration's first concern is plowing taxpayer dollars into intermittent wind and solar projects and ending the use of reliable fossil fuels.
>
> A conservative President must be committed to unleashing all of America's energy resources and making the energy economy serve the American people, not special interests.[2]

Project 2025 includes extensive criticism of people and entities who advocate for governmental regulation and other actions to address climate change. For example, the authors assert that, under President Biden, "[e]mbedded activists" within the Environmental Protection Agency ("EPA") "have sought to evade legal restraints in pursuit of a global, climate-themed agenda, aiming to achieve that agenda by implementing costly policies that otherwise have failed to gain the requisite political traction in Congress. Many EPA actions in liberal Administrations have simply ignored the will of Congress, aligning instead with the goals and wants of politically connected activists."[3]

Project 2025 also criticizes "the Left" for its focus on climate change broadly. "Mischaracterizing the state of our environment generally and the actual harms reasonably attributable to climate change specifically is a favored tool that the Left uses to scare the American public into accepting their ineffective, liberty-crushing regulations, diminished private property rights, and exorbitant costs."[4]

According to *Project 2025,* the incoming President, working with Congress where necessary, should reduce the regulatory burdens created by various federal environmental review and permitting requirements. For example, the authors urge the new President to direct the Council on Environmental Quality ("CEQ") to modify existing regulations for implementing the National Environmental Policy Act ("NEPA"). The "the overall goal" should be "streamlining the [NEPA] process." [5] Changes to the NEPA regulations should also "limit the scope for judicial review of agency NEPA analysis and judicial remedies, as well as … vindicate the strong public interest in effective and timely agency action."[6]

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[2] *Project 2025*, pp. 363-364, footnotes omitted.

[3] *Id*. at p. 418.

[4] *Id*. at p. 419.

[5] *Id*. at p. 60.

[6] *Ibid*.

The authors add that, under President Biden, the Department of the Interior ("DOI") abused NEPA processes, the Antiquities Act,[7] and "bureaucratic procedures" in order "to advance a radical climate agenda, ostensibly to reduce greenhouse gas emissions, for which DOI has no statutory responsibility or authority." [8]

With these sentiments in mind, *Project 2025* calls for NEPA Reforms. "Congress never intended for [NEPA] to grow into the tree-killing, project-dooming, decade-spanning monstrosity that it has become. Instead, in 1970, Congress intended a short, succinct, timely presentation of information regarding major federal action that significantly affects the quality of the human environment so that decisionmakers can make informed decisions to benefit the American people."[9]

The authors also have their sights set on the Endangered Species Act ("ESA").[10] "Meaningful reform of [ESA] requires that Congress take action to restore its original purpose and end its use to seize private property, prevent economic development, and interfere with the rights of states over their wildlife populations."[11]

On the first day of his second presidency, consistent with these themes from *Project 2025*, President Trump signed Executive Order ("EO") 14156, declaring a "National Energy Emergency" and directing various federal agencies and departments to take specific actions.[12] Although *Project 2025* did not specifically call for this emergency declaration, EO 15146 is clearly intended to contribute to multiple *Project 2025* policy objectives: increasing the extraction, production, and transportation of fossil fuels such as oil, natural gas, and coal; shifting away from the production of renewable energy resources such as solar and wind power; and reducing the economic burdens created by federal environmental review and permitting requirements.

The National Energy Emergency EO directs the heads of various federal agencies and departments to "identify and exercise any lawful *emergency authorities* available to them, as well as all other lawful authorities they may possess, to facilitate the identification, leasing,

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[7] Antiquities Act of 1906, Public Law 59–209. See also Center for Law, Energy & the Environment, Berkeley Law, Monograph Series: Project 2025: Implications for Climate and the Environment, *Reducing the Size of National Monuments* (Paper 3) (March 2025).

[8] *Project 2025*, p. 521, footnotes omitted.

[9] *Id*. at p. 533.

[10] 16 U.S.C. § 1531 et seq.

[11] *Project 2025*, p. 533.

[12] Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025).

siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands."[13] The National Energy Emergency declaration is based on assertions, such as those found in *Project 2025*, that U.S. energy production and infrastructure are currently insufficient to meet the needs of the country.

Although the operative text of EO 14156 refers broadly to "energy" and "energy resources," these terms are specifically defined so as to include fossil fuel resources such as oil, natural gas, and coal but to exclude renewable energy resources such as solar and wind power. Section 8(a) of the EO states that "[t]he term 'energy' or 'energy resources' means 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[.]"[14]

SUMMARY OF CONCLUSIONS

The EO expressly invokes the National Emergencies Act ("NEA")[15] as a source of legal authority for issuing the National Energy Emergency declaration. Notably, during his first Administration, President Trump relied on that same statute when he proclaimed "a National Emergency Concerning the Southern Border of the United States" and directed the Secretary of Defense to order military personnel "to assist and support the activities of the Secretary of Homeland Security at the southern border."[16] That 2019 proclamation prompted litigation that resulted in court opinions relevant to how courts going forward might consider future federal agency actions taken to implement EO 14156. The leading case, however, from the Ninth Circuit Court of Appeals, is not citable precedent, in that it was vacated by the United States Supreme Court at the request of the Biden Administration.[17]

While federal case law seems clear that a President's declaration of a national emergency under the NEA cannot successfully be challenged in court, to the extent that declarations raise nonjusticiable "political questions," subsequent individual federal agency actions taken pursuant to EO 14156 are subject to judicial review.

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[13] *Id*., § 2, italics added.

[14] *Id*., § 8(a).

[15] The National Emergencies Act can be found at 50 U.S.C. §§ 1601 – 1651.

[16] Declaring a National Emergency Concerning the Southern Border of the United States, Pres. Proc. No. 9844, 84 Fed. Reg. 4949, (Feb. 15, 2019).

[17] *Sierra Club v. Trump* (9th Cir. 2020) 977 F.3d 853 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56).

After describing the legal principles that likely preclude judicial review of the National Energy Emergency declaration itself, this Monograph analyzes the various individual statutes and regulations cited in the EO as providing potential opportunities for fast-tracking oil, natural gas, and coal production. The Monograph describes general legal principles that apply where Presidents are using emergency powers and describes principles of judicial review relevant in such situations. The Monograph then examines the operative language in particular statutes and regulations identified in EO 14156 and assesses whether and to what extent those statutes and regulations allow federal agencies to limit or avoid compliance with normally applicable environmental statutes and regulations in light of the emergency declaration.

As explained below, federal agency actions taken in response to emergencies must be *reasonably related* to such emergencies or to the purposes or language of the statutes or regulations that authorize the agencies to respond to such emergencies. Actions that do *not* satisfy this principle are subject to judicial invalidation.

In instances in which the President or federal agencies, in responding to the declared emergency, take actions that seem very different from, or substantially more consequential than, what the operative statutes seem to allow, the courts should apply the "major questions doctrine," under which courts look for "clear Congressional authorization" for agency actions of major "economic and political significance."[18] Agency actions that go beyond Congressional authorization are therefore subject to court challenge.

For example, EO 15146 identifies the Defense Production Act ("DPA"),[19] "a federal statute that gives the president the authority to compel the private sector to work with the government to provide essential material goods needed for the national defense."[20]

We conclude that the DPA seems ill-suited to dealing with the National Energy Emergency. One permissible strategy for bolstering the national defense is to "maximize domestic energy supplies[.]"[21] But the President may not, in pursuing that strategy, "require priority performance of contracts or orders, or … control the distribution of any supplies of materials, services, and facilities in the marketplace" without making certain findings, including that the energy resources at issue are "*scarce*, critical, and essential" either "to maintain or

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[18] *Biden v. Nebraska* (2023) 600 U.S. 477, 506. See also *West Virginia v. EPA* (2022) 597 U.S. 697, 721-723.

[19] Public Law 81-774, 50 U.S.C. 4501 et seq.

[20] Lawson and Rhee, *Usage of the Defense Production Act throughout history and to combat COVID-19* (June 3, 2020), Yale School of Management, p. 1 (https://som.yale.edu/blog/usage-of-the-defense-production-act-throughout-history-and-to-combat-covid-19) (accessed on April 14, 2025).

[21] 50 U.S.C. § 4511(c).

expand exploration, production, refining, transportation[,]" "to conserve energy supplies[,]" or "to construct or maintain energy facilities[.]"[22]

Although EO 14156 asserts that "[t]he energy and critical minerals ('energy') identification, leasing, development, production, transportation, refining, and generation capacity of the United States are all far too inadequate to meet our Nation's needs,"[23] it is by no means clear that the Trump Administration could marshal evidence showing that energy supplies in the United States are truly "scarce" within the meaning of the DPA, for which "[s]carcity implies an unusual difficulty in obtaining the materials, equipment, or services in a time frame consistent with the timely completion of the energy project."[24]

Nor is it clear that the Administration can cite real evidence showing that, without direct Presidential intervention to bolster energy production to ensure adequate supplies for the military, there would be "a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship."

Moving beyond the DPA, the Monograph also concludes that Presidents and federal agencies likely exceed their authority when they attempt to use a very expansive NEA-declared "emergency" such as the National Energy Emergency in connection with statutes or regulations that, by their own terms, employ narrower concepts of "emergency. Three examples of such regulations directly relevant to the EO are the following: 50 C.F.R. section 402.05, which applies to "Interagency Cooperation" under the Endangered Species Act (ESA);[25] 33 C.F.R. section 325.2(e)(4), which applies to the processing of "Department of the Army Permits"; and 40 C.F.R. section 220.3(c), which applies to "ocean dumping permits" issued by the Department of the Army and EPA.

Although President Trump's declaration of a National Energy Emergency may not itself be subject to direct judicial review, the expansive concept of "emergency" that informs that declaration appears to be too broad to trigger the emergency provisions of these three regulations, which reflect narrower, more traditional notions of emergencies, including "acts of God, disasters, [or] casualties[.]" Nor is the National Energy Emergency something that will "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

[22] *Id*. § 4511(c)(2)(A), italics added.

[23] Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[24] 15 C.F.R. section 700.21.

[25] 16 U.S.C. § 1531 et seq.

under standard procedures." Similarly, the National Energy Emergency is *not* "marked with a degree of urgency" such that normally unacceptable ocean dumping is the only "feasible solution" to the emergency.

The Monograph also addresses two other emergency regulations, even though they are not mentioned or even impliedly referenced in the EO. They are relevant because the Department of Interior ("DOI") invoked them when, just prior to the publication of this Monograph, DOI adopted expedited procedures for qualifying energy projects under the National Environmental Policy Act ("NEPA"),[26] the ESA, and the National Historic Preservation Act ("NHPA").[27] The first such regulation is a NEPA regulation adopted by the DOI: 43 C.F.R. section 46.150. The second is a regulation implementing the NHPA: 36 C.F.R. section 800.12. Both provisions address emergency circumstances.

Like the three other emergency regulations mentioned earlier, both of these regulations assume a concept of "emergency" narrower than President Trump's National Energy Emergency. Section 46.150 assumes that, in an "emergency," responsible officials must take "actions necessary to control the *immediate impacts* of the emergency that are *urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources*."[28] Section 800.12 similarly suggests that emergencies require "*immediate response[s]*" to avoid or minimize "*immediate threats to life or property*."[29]

The Monograph also evaluates the relationship of the National Energy Emergency declaration to possible future deliberations of the so-called Endangered Species Act Committee. That body has the authority, under specified circumstances and with specified findings, to authorize exemptions to the normal statutory prohibition against federal agency actions that would "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species[.]"[30] We conclude that, given the specificity of the findings required to support such exemptions, the National Energy Emergency should not be the dispositive factor in the approval of such exceptions.

Finally, the Monograph analyzes the extent to which the National Energy Emergency declaration will empower members of the military, under 10 U.S.C. section 2808, to perform

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[26] 42 U.S.C. § 4321 et seq.

[27] 54 U.S.C.A. § 300101 et seq.

[28] 43 C.F.R. § 46.150(a), italics added.

[29] 36 C.F.R. § 800.12, italics added.

[30] See 15 U.S.C. § 1536(a)(2), (h).

physical work to address any identified "vulnerabilities" in the nation's energy transportation and refining infrastructure. The EO includes language suggesting that the use of military labor on such infrastructure might be a way to avoid compliance with normally applicable environmental laws.

The Monograph concludes that the potential for direct work done by military personnel on private refineries and pipelines and similar energy infrastructure under section 2808(a) will likely be very limited, as (i) the National Energy Emergency does not "require[] the use of the armed forces" and (ii) any such work done on private energy facilities would not qualify as "military construction projects." If the Trump Administration attempts to direct the military to undertake construction projects not authorized by section 2808, such actions should be subject to potentially meritorious legal challenges.

In light of the foregoing, and as explained in detail below, lawsuits challenging discrete federal agency actions taken in response to the National Energy Emergency may, depending on circumstances, include arguments contending that such actions are not reasonably related to the emergency itself or to the purposes of the particular statutes or regulations being waived, sidestepped, or ignored; or the arguments may invoke the major questions doctrine where the outcome of the federal agency action is contrary to the apparent purpose of the operative statute or regulation or represents a policy outcome substantially different from what Congress apparently intended or authorized under the statute or its implementing regulations.

Many such contentions would be made pursuant to the Administrative Procedures Act ("APA"), under which federal agency actions can be challenged as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (5 U.S.C. § 706(2)(A).) Under the APA, "[a]n agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.'"[31]

BACKGROUND

I. National Energy Emergency Declaration

[31] *Ohio v. Environmental Protection Agency* (2024) 603 U.S. 279, 292.

On January 20, 2025, President Trump issued Executive Order 14156, which declared a National Energy Emergency under the National Emergencies Act.[32] Section 1 of the EO is entitled, "Purpose." It asserts that "[t]he energy and critical minerals ('energy') identification, leasing, development, production, transportation, refining, and generation capacity of the United States are all far too inadequate to meet our Nation's needs. We need a reliable, diversified, and affordable supply of energy to drive our Nation's manufacturing, transportation, agriculture, and defense industries, and to sustain the basics of modern life and military preparedness. Caused by the harmful and shortsighted policies of the previous administration, our Nation's inadequate energy supply and infrastructure causes and makes worse the high energy prices that devastate Americans, particularly those living on low- and fixed-incomes."[33]

Section 1 of EO 14156 goes on to state that the "active threat to the American people from high energy prices is exacerbated by our Nation's diminished capacity to insulate itself from hostile foreign actors. Energy security is an increasingly crucial theater of global competition. In an effort to harm the American people, hostile state and non-state foreign actors have targeted our domestic energy infrastructure, weaponized our reliance on foreign energy, and abused their ability to cause dramatic swings within international commodity markets. An affordable and reliable domestic supply of energy is a fundamental requirement for the national and economic security of any nation. [¶] The integrity and expansion of our Nation's energy infrastructure — from coast to coast — is an immediate and pressing priority for the protection of the United States' national and economic security. It is imperative that the Federal government puts the physical and economic wellbeing of the American people first."[34]

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[32] The EO also invokes 3 USC section 301, which provides the President with general authority to delegate functions vested by law in the President, as well as functions requiring Presidential approval, to the heads of federal departments and agencies and to other federal officials appointed by and with the advice and consent of the Senate.

[33] Exec. Order No. 14156, § 1, 90 Fed. Reg. 8433 (Jan. 20, 2025). On the same day on which he issued EO 14156, President Trump issued a related Executive Order (14154) entitled, "Unleashing American Energy." It asserts that "[i]t is … in the national interest to unleash America's affordable and reliable energy and natural resources. This will restore American prosperity—including for those men and women who have been forgotten by our economy in recent years. It will also rebuild our Nation's economic and military security, which will deliver peace through strength." (Exec. Order No. 14154, § 1, 90 Fed. Reg. 8353 (Jan. 20, 2025).)

This related but separate EO includes the following general commands and directives, each of which includes its own specifics: *Immediate Review of All Agency Actions that Potentially Burden the Development of Domestic Energy Resources*; *Revocation of and Revisions to Certain Presidential and Regulatory Actions*; *Unleashing Energy Dominance through Efficient Permitting*; *Prioritizing Accuracy in Environmental Analyses*; *Terminating the Green New Deal*; *Protecting America's National Security*; *Restoring America's Mineral Dominance*; and *General Provisions*. (Exec. Order No. 14154, §§ 3 – 9, 90 Fed. Reg. 8353 (Jan. 20, 2025).)

[34] Exec. Order No. 14156, § 1, 90 Fed. Reg. 8433 (Jan. 20, 2025).

Additionally, Section 1 states that "[t]he policies of the previous administration have driven our Nation into a national emergency, where a precariously inadequate and intermittent energy supply, and an increasingly unreliable grid, require swift and decisive action. Without immediate remedy, this situation will dramatically deteriorate in the near future due to a high demand for energy and natural resources to power the next generation of technology. The United States' ability to remain at the forefront of technological innovation depends on a reliable supply of energy and the integrity of our Nation's electrical grid. Our Nation's current inadequate development of domestic energy resources leaves us vulnerable to hostile foreign actors and poses an imminent and growing threat to the United States' prosperity and national security."[35]

Finally, Section 1 states that "[t]hese numerous problems are most pronounced in our Nation's Northeast and West Coast, where dangerous State and local policies jeopardize our Nation's core national defense and security needs, and devastate the prosperity of not only local residents but the entire United States population."[36]

Taken together, these "findings" support the declaration of a national emergency.[37] The EO next sets forth several provisions regarding how to address the emergency. These are summarized or quoted verbatim in Section III of the Monograph below. First, however, Section II of the Monograph includes a description of the overall structure of EO 14156 and its various moving parts.

II. Overview of How the Executive Order Operates

The overall approach taken by EO 14156 is to create a continuous, fast-moving feedback loop between key federal environmental regulatory agencies and top Administration officials by which (i) the agency officials will review their operative statutes and regulations in search of provisions that, under "emergency" conditions, will allow the agencies to dispense with normally applicable regulatory requirements, (ii) those same agency officials will send to key Administration officials "*summary reports*" describing what the agency officials have found, and (iii) those key Administration officials will prepare "*status reports*" summarizing how specific opportunities for regulatory streamlining under emergencies might be carried out.

These reports will be continuously updated with the apparent, if unstated, objective of developing a roadmap for minimizing the need, in pursuing oil, gas, and coal projects, for

[35] *Ibid*.

[36] *Ibid*.

[37] *Ibid*.

compliance with the normal requirements of laws such as the Clean Water Act, the Rivers and Harbors Act, the Marine Protection Research and Sanctuaries Act, the Endangered Species Act, and the Marine Mammal Protection Act. One apparent aim is that, by declaring a National Energy Emergency, the Trump Administration can unlock obscure provisions of these key environmental laws to allow for the fast-tracking of oil, gas, and coal projects in response to that declared emergency.

The Administration also intends for EO 14156 to enable federal agencies such as the Department of Defense to fast-track work on projects involving the extraction, production, refining, and transportation of fossil fuels through use of non-environmental federal laws such as federal eminent domain authorities, the Defense Production Act,[38] and 10 U.S.C. section 2808.[39] Reports similar to those described above will also address these laws and the fast-tracking opportunities that they might provide.

The Section immediately below includes a step-by-step breakdown of how this interagency feedback loop is intended to function. The initial deadlines imposed on agencies were very short, and most of them had already come and gone by the date on which this Monograph was completed (April 25, 2025).

III. Breakdown of Operative Provisions of the Executive Order

Section 2 of the EO is entitled, "*Emergency Approvals*." It declares that "[t]he heads of executive departments and agencies […] shall identify and exercise any lawful emergency authorities available to them, as well as all other lawful authorities they may possess, to facilitate the identification, leasing, siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands. If an agency assesses that use of either Federal eminent domain authorities or authorities afforded under the Defense Production Act (Public Law 81-774, 50 U.S.C. 4501 et seq.) are necessary to achieve this objective, the agency shall submit recommendations for a course of action to the President, through the Assistant to the President for National Security Affairs."[40]

Section 2 also directs the EPA to consider adopting emergency fuel waivers under 24 U.S.C. section 7545(c)(4)(C)(ii)(III) (from the Clean Air Act) in order "to allow the year-round sale

[38] Public Law 81-774, 50 U.S.C. 4501 et seq.

[39] The subject matter of section 2808 is "construction authority in the event of a declaration of war or national emergency."

[40] Exec. Order No. 14156, § 2(a), 90 Fed. Reg. 8433 (Jan. 20, 2025).

of E15 gasoline to meet any projected temporary shortfalls in the supply of gasoline across the Nation."[41]

Section 3 of EO 14156, which consists of parts (a), (b), and (c), is entitled "*Expediting the Delivery of Energy Infrastructure*." [42] Section 3(a) states that "[t]o facilitate the Nation's energy supply, agencies shall identify and use all relevant lawful emergency and other authorities available to them to expedite the completion of all authorized and appropriated infrastructure, energy, environmental, and natural resources projects that are within the identified authority of each of the Secretaries to perform or to advance."[43]

Section 3(b) directs agencies to "identify and use all lawful emergency or other authorities available to them to facilitate the supply, refining, and transportation of energy in and through the West Coast of the United States, Northeast of the United States, and Alaska." [44]

Section 3(c) states that "[t]he Secretaries shall provide such reports regarding activities under this section as may be requested by the Assistant to the President for Economic Policy." [45]

Section 4, which also consists of multiple parts, is entitled, "*Emergency Regulations and Nationwide Permits Under the Clean Water Act (CWA) and Other Statutes Administered by the Army Corps of Engineers*." [46] Section 4(a)(i) directs the United States Army Corps of Engineers ("USACE"), within 30 days of the issuance of the EO (i.e., by February 19, 2025), to identify actions to facilitate the nation's energy supply that could be subject to emergency treatment under section 404 of the Clean Water Act (33 U.S.C. § 1344), section 10 of the Rivers and Harbors Act (33 U.S.C. § 403), and section 103 of the Marine Protection Research and Sanctuaries Act (33 U.S.C. § 1413).[47]

Section 4(a)(ii) directs that such actions shall be described in a "summary report" to be submitted by February 19, 2025, to all of the following: the Director of the Office of Management and Budget ("OMB"); the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works; the Assistant to the President for Economic Policy; and

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[41] *Id*., § 2(b).

[42] *Id*., § 3(a).

[43] *Ibid*.

[44] *Id*., § 3(b).

[45] *Id*., § 3(c).

[46] *Id*., § 4.

[47] *Id*., § 4(a)(i).

the Chairman of the Council on Environmental Quality ("CEQ"). "Such report may be combined, as appropriate, with any other reports required by this order." [48]

Section 4(b) instructs the agencies to use the USACE's emergency permitting provisions to the fullest extent possible to facilitate the nation's energy supply.[49]

Section 4(c) provides that, within 30 days following the submission of the initial "summary report" mentioned above (i.e., by approximately March 31, 2025), each department and agency shall provide a "status report" to the OMB Director, the Assistant Secretary of the Army for Civil Works, the Director of the National Economic Council, and the Chairman of the CEQ. This status report shall (1) list the actions taken pursuant to Section 4(a)(i), (2) list the status of any previously reported planned or potential actions, and (3) list any new planned or potential actions that fall within Section 4(a)(i). "Such status reports shall thereafter be provided to these officials at least every 30 days for the duration of the national emergency and may be combined, as appropriate, with any other reports required by this order." [50]

Section 5 is entitled, "*Endangered Species Act (ESA) Emergency Consultation Regulations*." [51] Section 5(a) directs that, no later than 30 days of the issuance of the EO (i.e., by February 19, 2025), "the heads of all agencies tasked in this order" shall accomplish two tasks.

First, these agency heads must "identify planned or potential actions to facilitate the Nation's energy supply that may be subject to the regulation on consultations in emergencies,

[48] *Id.*, § 4(a)(ii).

[49] *Id.*, § 4(b).

[50] *Id.*, § 4(c).

[51] *Id.*, § 5.

50 C.F.R. 402.05[52], promulgated by the Secretary of the Interior and the Secretary of Commerce pursuant to the Endangered Species Act ('ESA'), 16 U.S.C. 1531 et seq." [53]

And second, the agency heads must "provide a summary report, listing such actions, to the Secretary of the Interior, the Secretary of Commerce, the OMB Director, the Director of the National Economic Council, and the Chairman of CEQ. Such report may be combined, as appropriate, with any other reports required by this order." [54]

Section 5(b) directs agencies "to use, to the maximum extent permissible under applicable law, the ESA regulation on consultations in emergencies, to facilitate the Nation's energy supply." [55]

Section 5(c) directs that, within 30 days of the submission of the "summary" report required by Section 5(a) (i.e., by approximately March 31, 2025), each agency head shall provide a "status report" to the Secretary of the Interior, the Secretary of Commerce, the OMB Director, the Director of the National Economic Council, and the Chairman of CEQ. Each such status report shall (1) list actions taken pursuant to Section 5(a), (2) list the status of any previously reported planned or potential actions, and (3) list any new planned or potential actions within these categories. "Such status reports shall thereafter be provided to these officials at least every 30 days for the duration of the national emergency and may be combined, as appropriate, with any other reports required by this order. The OMB Director may grant discretionary exemptions from this reporting requirement." [56]

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[52] 50 C.F.R. section 402.05 provides as follows:

> (a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director [i.e., the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative] 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.
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> (b) Formal consultation shall be initiated as soon as practicable after the emergency is under control. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

[53] Exec. Order No. 14156, § 5(a)(i), 90 Fed. Reg. 8433 (Jan. 20, 2025).

[54] *Id*., § 5(a)(ii).

[55] *Id*., § 5(b).

[56] *Id*., § 5(c).

Section 5(d) directs that "[t]he Secretary of the Interior shall ensure that the Director of the Fish and Wildlife Service, or the Director's authorized representative, is available to consult promptly with agencies and to take other prompt and appropriate action concerning the application of the ESA's emergency regulations. The Secretary of Commerce shall ensure that the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or the Assistant Administrator's authorized representative, is available for such consultation and to take such other action." [57]

Section 6 is entitled, "*Convening the Endangered Species Act Committee*." [58] Section 6(a) directs that the so-called Endangered Species Act Committee convene not less than quarterly to consider applications for exemptions from the normal species and habitat protection obligations of section 7 of the Endangered Species Act (16 U.S.C. § 1536).

That statute within the ESA requires interagency consultations intended to insure that proposed federal agency actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species[.]"[59] Under ESA section 7, however, this protection for endangered and threatened species and their critical habitat is subject to one limited exception: a Cabinet-level "Endangered Species Committee" may be convened to determine whether to grant an exemption.

An exemption may be granted if, by a vote of not less than five of its seven members after a required hearing, the Committee makes all of the following determinations: (i) there are no reasonable and prudent alternatives to the agency action; (ii) the benefits of the proposed action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; (iii) the action is of regional or national significance; and (iv) neither the federal agency concerned nor the exemption applicant has made any irreversible or irretrievable commitment of resources that has foreclosed the formulation or implementation of any reasonable and prudent alternative measures to protect the affected endangered or threatened species or their critical habitat.

The Committee must also establish "such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects

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[57] *Id.*, § 5(d).

[58] *Id.*, § 6.

[59] *Id.*, § 6(a); 16 U.S.C. § 1536(a)(2).

of the agency action upon the endangered species, threatened species, or critical habitat concerned."[60]

Section 6(b) of the EO provides that "[t]o the extent practicable under the law, the Secretary of the Interior shall ensure a prompt and efficient review of all submissions described in [Section 5(a)], to include identification of any legal deficiencies, in order to ensure an initial determination within 20 days of receipt and the ability to convene the Endangered Species Act Committee to resolve the submission within 140 days of such initial determination of eligibility."[61]

Section 6(c) provides that, in the event that no applications for exemptions are pending, the committee convene to identify obstacles to domestic energy infrastructure deriving from implementation of the ESA or the Marine Mammal Protection Act (16 U.S.C. Ch. 31) with the aim of developing procedural, regulatory, and interagency improvements.[62]

Viewed as a whole, Section 6 of the EO seems intended to ensure that, if parties involved in proposed oil, gas, and coal production projects feel stymied by the possibility that their projects could jeopardize the continued existence of an endangered of threatened species or result in the destruction or adverse modification of critical habitat, the Endangered Species Committee will be prepared to meet relatively quickly with the possibility of granting an exemption from the normal prohibition against such outcomes.

Section 7 of the EO is entitled, "*Coordinated Infrastructure Assistance*." [63] Section 7a directs the Secretary of Defense, in collaboration with the Secretaries of Interior and Energy, to "conduct an assessment of the Department of Defense's ability to acquire and transport the energy, electricity, or fuels needed to protect the homeland and to conduct operations abroad. * * * This assessment shall identify specific vulnerabilities, including, but not limited to, potentially insufficient transportation and refining infrastructure across the Nation, with a focus on such vulnerabilities within the Northeast and West Coast regions of the United States. The assessment shall also identify and recommend the requisite authorities and resources to remedy such vulnerabilities, consistent with applicable law."[64] Within 60 days of the issuance of

[60] 16 US.C. § 1536(h) (Grant of exemption).

[61] Exec. Order No. 14156, § 6, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[62] *Id.*, § 6(c).

[63] *Id.*, § 7.

[64] *Id.*, § 7(a).

the EO (i.e., by March 21, 2025), this assessment shall be submitted to the Assistant to the President for National Security Affairs.[65]

Section 7(b) invokes construction authority under 10 U.S.C. section 2808 to authorize the Secretary of the Army to address any vulnerabilities identified in the assessment. Any recommended actions shall be submitted to the President for review, through the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy.[66]

IV. National Emergencies Act

As noted earlier, President Trump declared the National Energy Emergency with statutory authority given to the President by Congress under the National Emergencies Act ("NEA"), which was originally enacted in 1976.[67] As discussed below, NEA provides the procedural steps by which (i) the President may declare an emergency initially lasting up to a year, (ii) Congress may terminate the emergency by a joint resolution subject to a Presidential veto, and (iii) the President, absent such termination by Congress, may continue an emergency declaration already in effect beyond the initial year for additional annual increments of time.

Under the NEA, "any special or extraordinary power" to be exercised by the President must be found in statutes other than the NEA itself and must be expressly identified by the President within an executive order. In other words, the NEA does not give the President a blank check to declare emergencies and then override or ignore any statutes that, in the President's judgment, might seem to complicate or slow down efforts to deal with such emergencies. As discussed below, however, the NEA does make it difficult for Congress to terminate an emergency that a President is determined to keep in effect for multiple years.

In an updated report issued in 2021 entitled, *National Emergency Powers*, the Congressional Research Service summarized the history behind, and the general structure of, the NEA as follows:

> The President of the United States has available certain powers that may be exercised in the event that the nation is threatened by crisis, exigency, or emergency circumstances (other than natural disasters, war, or near-war situations). Such powers may be stated explicitly or implied by the Constitution, assumed by the Chief Executive to be permissible constitutionally, or inferred

[65] *Ibid*.

[66] *Id*., § 7(b).

[67] 50 U.S.C. §§ 1601–1651.

> from or specified by statute. Through legislation, Congress has made a great many delegations of authority in this regard over the past 230 years.
>
> There are, however, limits and restraints upon the President in his exercise of emergency powers. With the exception of the habeas corpus clause, the Constitution makes no allowance for the suspension of any of its provisions during a national emergency. Disputes over the constitutionality or legality of the exercise of emergency powers are judicially reviewable. Both the judiciary and Congress, as co-equal branches, can restrain the executive regarding emergency powers. So can public opinion. Since 1976, the President has been subject to certain procedural formalities in utilizing some statutorily delegated emergency authority.
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> The National Emergencies Act (50 U.S.C. §§1601-1651) eliminated or modified some statutory grants of emergency authority, required the President to formally declare the existence of a national emergency and to specify what statutory authority activated by the declaration would be used, and provided Congress a means to countermand the President's declaration and the activated authority being sought.[68]

Within the NEA, 50 U.S.C. section 1621 is the specific statute authorizing the President to declare a national emergency. Notably, the section does not define "emergency" or lay out any criteria limiting what constitutes an emergency. It does, however, include language indicating that the President's emergency powers under the NEA are subject to clear limitations.

Subdivision (a) of section 1621 states that "[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register."

Subdivision (b) adds, in pertinent part, that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter."

As this quoted language makes clear, Presidential declarations of emergency under the NEA apply only "[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power[.]" The NEA does *not* give the President, or expressly recognize in the office of the President, an independent power to declare an emergency as a means of empowering the President to disregard or suspend any federal statutes or regulations that do *not* give the President special or extraordinary powers to deal with emergency-type situations. Rather, an emergency declaration under the NEA only allows the President to exercise those special or extraordinary powers *already expressly granted to the President* by particular statutes. In addition, the President must immediately inform

[68] https://www.congress.gov/crs-product/98-505 (accessed on March 28, 2025).

Congress of an emergency declaration, which shall remain in effect "only in accordance with this chapter" (i.e., the NEA).

According to a recently published law review article, "[t]he Brennan Center for Justice has identified 137 statutory authorities that may become available to Presidents after the declaration of a national emergency. These statutes allow executive branch officials to engage in actions that would not otherwise be permissible, such as suspending regulation of hazardous waste, allowing the government to take over land to manufacture explosives, lifting protections on farmland, waiving restrictions on maintaining the defense industrial base, undertaking military construction projects from unobligated funds, postponing assessment of military sexual harassment, seizing assets, selling alien property, prohibiting agricultural exports, or keeping patents secret."[69]

Another section of the NEA, 50 U.S.C. section 1622, limits the power of the President by giving Congress the means of terminating a declared emergency, though in practice this Congressional power will likely be ineffective where a President is determined to keep the declared emergency going. Under subdivision (a)(1) of the statute, "[a]ny national emergency declared by the President in accordance with this subchapter shall terminate if ... there is enacted into law a *joint resolution* terminating the emergency." (Italics added.) Under subdivision (b), Congress must "consider a vote on a joint resolution to determine whether that emergency shall be terminated" every six months.

The President can maintain the upper hand here, as a practical matter, because a joint resolution adopted pursuant to section 1622 is subject to a Presidential affirmation or veto, with a veto having the effect of negating the resolution absent a subsequent veto override. Because such overrides require two-thirds votes of both the House of Representatives and the Senate, it will be very difficult, if not impossible, for most joint resolution to actually terminate the declared emergencies to which they are directed.

Congress clipped its own wings in requiring a joint resolution under section 1622 when it amended NEA in 1985[70] in response to a then-recent United States Supreme Court decision in *Immigration and Naturalization Service v. Chadha*.[71] In that case, the Court found unconstitutional a former section of the Immigration and Nationality Act authorizing a

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[69] Dickinson, *Protecting the U.S. National Security State from a Rogue President* (2025) 16 Harv. Nat'l Sec. J. 1, 25 (footnotes omitted). See also *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE, (last updated June 11, 2024), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use (accessed on April 16, 2025).

[70] See 99 Stat. 405, 448.

[71] 462 U.S. 919 (1983) (*Chadha*).

one-House veto of Presidential actions allowing deportable aliens to remain in the United States. The Court reasoned that, because the Congressional action at issue was essentially legislative in character, such action had to be subject to the constitutional requirements of passage by a majority of both Houses and presentation to the President for approval or veto.[72]

The NEA as originally drafted provided for a "concurrent resolution" rather than a "joint resolution." The 1985 NEA amendment requiring a joint resolution solved the problem created by *Chadha* because "[a] joint resolution follows the same process as an ordinary law: it must be passed by both chambers of Congress and signed by the President, or, in the event of a presidential veto, passed again by both chambers with a two-thirds majority."[73]

Although emergencies declared by Presidents under the NEA initially last only one year, Presidents have the power to extend them, with no limit on the number of potential extensions. Under subdivision (d) of section 1622, any declared national emergency "not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary." On its face, this language seems to permit Presidents to notify Congress annually that an extant emergency is going to remain in place for at least another year.

Yet another section of the NEA (50 U.S.C. section 1631) provides additional limitations on Presidential power under the NEA:

> When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.[74]

Under this provision, the President must specify the specific laws that authorize emergency action before taking such emergency actions under those laws.

The President must also keep Congress informed of how much money an emergency is costing the federal government. Under 50 U.S.C. section 1641(c), "[w]hen the President

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[72] *Id*. at pp. 944-959; see also Rizzo, *Polarization and Reform: Rethinking Separation of Emergency Powers* (2022) 5 Cardozo Int'l & Comp. L. Rev. 671, 682-683 (Rizzo).

[73] Rizzo, 5 Cardozo Int'l & Comp. L. Rev. at p. 682, citing *Beacon Prods. Corp. v. Reagan* (1st Cir. 1987) 814 F.2d 1, 3.

[74] 50 U.S.C. § 1631.

declares a national emergency …, the President shall transmit to Congress, within ninety days after the end of each six-month period after such declaration, a report on the total expenditures incurred by the United States Government during such six-month period which are directly attributable to the exercise of powers and authorities conferred by such declaration. Not later than ninety days after the termination of each such emergency … , the President shall transmit a final report on all such expenditures."

This need under the NEA for the President to invoke specific existing authority for the exercise of emergency powers likely explains the approach taken in the National Energy Emergency EO, in which President Trump tasked various federal agency officials with scouring the statutes and regulations under which they operate for sources of emergency authority. The EO names only one such authority with specificity: 50 C.F.R. section 402.05, a regulation promulgated under the Endangered Species Act. The EO also mentions 10 U.S.C. section 2808, which authorizes military personnel to "undertake military construction projects," but only during declared wars or a declared national emergency "that requires use of the armed forces[.]" Under 50 U.S.C. section 1631, additional sources of emergency authority for addressing the declared National Energy Emergency will have to be identified in subsequent EOs.

ANALYSIS

I. Although the declaration of a National Emergency is a nonjusticiable political question, subsequent Executive Branch actions taken in response to a declared emergency are generally subject to judicial review.

This section of this Monograph first explains why the courts are very unlikely to subject President Trump's action declaring a National Energy Emergency to judicial review (though the Supreme Court has not yet weighed in on this subject). Rather, the courts will likely treat the emergency declaration as involving a nonjusticiable "political question" regarding which the President's authority is essentially beyond judicial challenge. For this reason, the authors of this Monograph do not recommend or encourage litigation directly challenging the emergency declaration.

Second, this section briefly explains why Congress is not likely to successfully "terminate" the emergency, given the structure of the NEA as discussed above. Again, the authors do not recommend pressuring Congress as a fruitful means of challenging the declaration.

Third, and most importantly, this section identifies possible grounds for legal challenges to Presidential or agency actions taken pursuant to the declared emergency – even though, at the time this Monograph was completed, those future actions remained unknown. Opportunities for legal challenges may arise, for example, where the Presidential or agency

actions are not *reasonably related* to the declared emergency or to the purposes or language of the statutes or regulations normally governing the pertinent agency actions. Alternatively, agency actions could be challenged under the "major questions doctrine," under which courts look for "clear Congressional authorization" for agency actions of major "economic and political significance." Where agency actions have consequences very different from, or substantially more consequential than, what the operative statutes seem to contemplate, this doctrine might apply. In addition, federal agencies might improperly attempt to rely on particular statutes or regulations that include with their own definitions of "emergency" that are too narrow to include the (very expansive) National Energy Emergency. Or such agencies might inappropriately disregard limitations in statutes or regulations that do not permit or authorize the actions the agencies are attempting to take.

A. Direct judicial review of the President's declaration of a national emergency is almost certainly not available, as the courts will likely consider the propriety of the declaration to be a nonjusticiable "political question."

A common initial response to some of President Trump's declarations of national emergencies has been to assert that he has misapplied the concept of "emergency" and declared emergencies to exist when in fact they do not. On its face, this reaction would seem to state what could be a worthy legal argument. After all, the term "emergency," though somewhat elastic, must be subject to some common-sense limitations, it would seem. In the specific case of the purported National Energy Emergency, moreover, there seems to be little evidence of an ongoing emergency in the normal sense of the word. Rather, the United States is producing more oil than any other time in its history and has been the top global oil producer for several years.[75] America is also the world's leading producer of natural gas.[76]

From a legal standpoint, however, such an argument is likely to fail. In the past, the courts have refused to address the merits of legal challenges to the existence of declared emergencies, treating such challenges as raising nonjusticiable "political questions." Although the authors of this Monograph found no Supreme Court precedent addressing this precise issue, the authors found no lower court cases in which the courts were willing to second-guess the existence of a Presidentially declared emergency.

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[75] *U.S. Field Production of Crude Oil,* U.S. Energy Information Administration <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=M> (as of March 20, 2025); Kreil, *United States Produces More Crude Oil Than Any Country, Ever*, U.S. Energy Information Administration (March 11, 2024) < https://www.eia.gov/todayinenergy/detail.php?id=61545> (as of March 20, 2025).

[76] International Energy Agency, *Where does the world get its natural gas?* https://www.iea.org/world/natural-gas (accessed on April 16, 2025) (showing that in 2022 the United States produced almost twice as much natural gas as its closest competitor, Russia).

During his first term in 2019, President Trump declared a national emergency at the southern border and later attempted to use emergency authority to fund the construction of a border wall even in the absence of a Congressional authorization.[77] Several lawsuits were filed challenging the emergency declaration on grounds that it was unlawful because an actual emergency did not exist.[78] In each case, the courts dismissed these claims without consideration of their possible merits, finding that the declaration of a national emergency is a nonjusticiable issue because it involves a political question.[79]

As articulated by the United States Supreme Court, the political question doctrine seeks to protect the constitutional separation of powers. Under this doctrine, the judiciary may not rule on controversies that involve policy choices and value determinations that are reserved to the legislative and executive branches under the Constitution.[80] In determining whether a controversy involves a political question, the Court, in *Baker v. Carr*, laid out several factors relevant to the existence of a nonjusticiable political question.[81] Looking at pertinent prior precedents, the Court described these factors as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[82]

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[77] Declaring a National Emergency Concerning the Southern Border of the United States, Pres. Proc. No. 9844, 84 Fed. Reg. 4949, (Feb. 15, 2019); *Sierra Club v. Trump* (9th Cir. 2020) 977 F.3d 853, 861-863 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56).

[78] See, e.g., *Center for Biological Diversity v. Trump* (2020) 453 F.Supp. 3d 11; see also *California v. Trump* (N.D.Cal. 2019) 407 F. Supp. 3d 869 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56) (determining the National Emergency at the Southern Border did not justify use of military construction funding to build southern border wall).

[79] *California v. Trump* (N.D.Cal. 2019) 407 F.Supp. 3d 869, 888 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56); *Center for Biological Diversity v. Trump* (D.D.C. 2020) 453 F.Supp. 3d 11, 31.

[80] *Baker v. Carr* (1962) 369 U.S. 186, 217.

[81] *Ibid.*

[82] *Ibid*.

If any one of these factors is inherent in the controversy, the question at hand is a political question that may not be ruled upon by the judiciary.[83]

Several courts have determined that the presidential declaration of a national emergency is a political question that is not reviewable by a court.[84] For instance, in *Center for Biological Diversity v. Trump*, which involved an emergency declared pursuant to the NEA, the court made the following observations:

> Although presidential declarations of emergencies—including this Proclamation—have been at issue in many cases, *no* court has ever reviewed the merits of such a declaration. * * * In part, this is because the declaration of a national emergency raises questions about national security or foreign policy. And "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," since the Constitution commits those issues to the Executive and Legislative Branches. * * *
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> *Baker*'s second factor even more strongly suggests that this is a political question. The NEA provides no "judicially discoverable and manageable standards" to help the Court determine whether the situation at the border is a "national emergency." * * * [¶] * * * [T]he statute simply allows the President to declare an emergency to activate special emergency powers created by Congress. Nothing else guides how the President should make this decision.
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> *** Congress provided no guidance to help courts assess whether a situation is dire enough to qualify as an "emergency." And with good reason. *Cf.* The Federalist No. 70, at 231 (Alexander Hamilton) (Benediction Classics, 2017) ("Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks[.]"). Whether a crisis reaches the point of a national emergency is inherently a subjective and fact-intensive inquiry. Any standard that the Court chose would require it to make "integral policy choices" about this country's national security, immigration, and counterdrug policies.[85]

Although the extended quotations immediately above come from a single District Court judge in the District of Columbia, the reasoning is consistent with the precedents of higher courts; and extensive legal research revealed no examples of any successful challenge to an

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[83] *Ibid*.

[84] *U.S. v. Yoshida Intern., Inc.* (C.C.P.A. 1975) 526 F.2d 560, 579 (interpreting the Trading With the Enemy Act (TWEA), as amended (50 U.S.C. App. § 5(b)); *California v. Trump* (N.D.Cal. 2019) 407 F.Supp. 3d 869, 888 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56); *Center for Biological Diversity v. Trump* (D.D.C. 2020) 453 F.Supp. 3d 11, 31.

[85] *Center for Biological Diversity v. Trump*, 453 F.Supp. 3d at p. 33, original italics.

emergency declaration. The authors of this Monograph therefore believe that this same reasoning would likely carry the day in any direct challenge to President Trump's declaration of the National Energy Emergency. Indeed, by failing to define "emergency" within the NEA, Congress may well have intended to afford Presidents unreviewable discretion in national emergency declarations in order to allow Presidents to respond to all types of emergencies quickly and with flexibility.[86]

B. A Successful Congressional Termination of the President Trump's National Energy Emergency Seems Very Unlikely.

As discussed earlier in Section IV of the "Background" portion of this Monograph, the NEA gives Congress the power to terminate the declaration of a national emergency through the adoption of a joint resolution enacted into law.[87] As also mentioned earlier, such an action requires a majority vote in both houses of Congress and presentment to the President, who could veto the resolution. Although there have been moments in American history where Congress could muster the two-thirds vote needed in each house to override a Presidential veto, the year 2025 is almost certainly not such a moment. In the very unlikely event that the current Congress would vote to terminate the National Energy Emergency, President Trump would likely veto such action. The possibility of an override of such a veto seems very remote and unlikely, given that the President's Republican Party currently controls both the House of Representatives and the Senate.

C. Statutory Constraints

While there are few, if any, real legal constraints on a President's declaration of a national emergency and while there is little chance that the current Congress will successfully attempt to terminate President Trump's National Energy Emergency, there are other constraints on the President's emergency authority and legal principles relevant to how far a President can attempt to stretch executive authority without clear direction from Congress.

These principles can be gleaned from leading court precedents dealing with particular statutes giving the President certain powers that can be exercised only during declared emergencies. These emergency powers are not unlimited. As will be explained below, the leading court cases, though not decided under the NEA, reveal that Presidential actions taken pursuant to declared emergencies must be *reasonably related* both to the declared

[86] See e.g. *U.S. v. Spawr Optical Research, Inc.* (9th Cir. 1982) 685 F.2d 1076, 1080 (finding that Congress delegated broad and extensive powers to the President under the Trading with the Enemy Act [TWEA] so that Presidents could meet national emergencies with the degree of flexibility required).

[87] 50 U.S.C. § 1622.

emergencies and to the specific statutory powers delegated to the President to address such emergencies. Presidential actions cannot exceed, or be inconsistent with, the powers expressly granted to the President under the particular statutes at issue. Where a President is asserting authority seemingly well beyond what is allowed under the operative statute, the so-called "major questions doctrine" may come into play.

As the Court of Customs and Patent Appeals stated in *U.S. v. Yoshida*, although "courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the actions taken in response thereto or in reliance thereon. It is one thing for courts to review the judgment of a President that a national emergency exists. It is another for courts to review his acts arising from that judgment."[88]

In *U.S. v Yoshida*, the court considered an importer's claim that President Nixon's emergency declaration increasing duties on imports was invalid.[89] In 1971, the President issued Proclamation 4074, declaring a national emergency in response to a growing economic crisis.[90] The court held the increase in duties under the Trading with the Enemy Act (TWEA) was lawful because there was a *rational relationship* between the President's action and the national emergency.[91] The court warned, though, that, "[t]he mere incantation of 'national emergency' cannot, of course, sound the death-knell of the Constitution. Nor can it repeal prior statutes or enlarge the delegation in [statute]."[92]

Rather, the court stated, "[a] standard inherently applicable to the exercise of delegated emergency powers *is the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action*."[93] Thus, to exercise emergency power, the President's action must have a rational relationship to the power delegated by Congress in statute as well as the national emergency declared. In *Yoshida*, the court found based on the pertinent statutory language that the power delegated to the President in the TWEA included the power to regulate importation.[94] Additionally, there was a "reasonable relationship to the particular emergency confronted," as the duty increase served to stabilize

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[88] *U.S. v. Yoshida Intern., Inc.* (C.C.P.A. 1975) 526 F.2d 560, 579 (*Yoshida*).

[89] *Id*. at pp. 566, 571.

[90] *Id*. at p. 567.

[91] *Id*. at pp. 578–579.

[92] *Id*. at p. 583.

[93] *Id*. at p. 578, italics added.

[94] *Id* at p. 579.

international trade positions and balance payment deficits.[95] For these reasons, the court upheld the President's emergency authority to increase duties as consistent with the power delegated by Congress.[96]

In *U.S. v. Spawr Optical Research Inc.*, the Ninth Circuit Court of Appeals also had occasion to discuss a reviewing court's approach to considering federal agency actions taken in response to emergencies declared under the TWEA. There, the court upheld a criminal conviction obtained under the authority of President Ford's executive order restricting specific exports with certain foreign countries.[97] The conviction was for the unlicensed export of laser mirrors to the Soviet Union. In issuing his EO, President Ford relied on two ongoing national emergencies relating to the Korean War and an international monetary crisis.[98] Citing to *Yoshida*, the court stated, "[a]lthough we will not address the essentially-political questions, we are free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress."[99] The court found that limiting exports of strategic items had a *rational relationship* to the prevention of aggression and armed conflict.[100] The court also found Congressional approval of the President's reliance on the TWEA to maintain export regulations.[101]

Although the courts in *Yoshida* and *Spawr Optical* both upheld Presidential actions taken in response to emergencies, the United States Supreme Court recently struck down a Presidential action purportedly responding to an emergency. In *Biden v. Nebraska*,[102] the Court held that President Biden exceeded the emergency authority granted to the Executive Branch under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act").[103] In that case, several states sued the Biden administration on the theory that the Secretary of Education had acted unlawfully in canceling $430 billion in student loan debt based on a Presidential declaration of a national emergency in response to the COVID-19 Pandemic.[104]

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[95] *Id*. at pp. 579–580.

[96] *Id*. at. pp. 583–584.

[97] *U.S. v. Spawr Optical Research, Inc.*, 685 F.2d at p. 1083.

[98] *Id*. at pp. 1079–1080.

[99] *Id*. at p. 1081.

[100] *Ibid.*

[101] *Ibid.*

[102] 600 U.S. 477.

[103] 20 U.S.C. § 1098aa et seq.

[104] *Biden v. Nebraska,* 600 U.S. at pp. 505-506.

Without questioning whether the pandemic created a true emergency, the Court found that the debt cancellation exceeded the President's emergency authority under the HEROES Act.

That statutory scheme gives the Secretary of Education the authority to "*waive or modify* any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or *national emergency*."[105] The statute specifies that "[t]he Secretary may issue waivers or modifications only 'as may be necessary to ensure' that 'recipients of student financial assistance under title IV of the [Education Act] who are *affected individuals* are not placed in a worse position financially in relation to that financial assistance because of their status as *affected individuals*.'"[106] "An 'affected individual' is defined, in relevant part, as someone … who 'suffered direct economic hardship as a direct result of a . . . national emergency, as determined by the Secretary.'"[107]

On its way to concluding that the Secretary's actions cancelling $430 billion in student debt were not permitted under the HEROES Act, the Court first analyzed the text of the statute, finding that the debt cancellation actions were not examples of the "modifications" or "waivers" allowed under the Act.[108] The Court emphasized that the word "modify" is intended to cover only changes much smaller than those made by the Secretary. "[S]tatutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress."[109] "Instead, that term carries 'a connotation of increment or limitation,' and must be read to mean 'to change moderately or in minor fashion."[110] "The Secretary's plan has 'modified' the cited provisions only in the same sense that 'the French Revolution "modified" the status of the French nobility'—it has abolished them and supplanted them with a new regime entirely."[111]

The challenged debt cancellation also was not a "waiver." "The addition of these new and substantially different provisions cannot be said to be a 'waiver' of the old in any

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[105] 20 U.S.C. § 1098bb(a)(1), italics added.

[106] *Biden v. Nebraska*, 600 U.S. at p. 486, citing 20 USC § 1098bb(a)(2)(A), italics added.

[107] *Biden v. Nebraska*, 600 U.S. at p. 486, citing 20 USC § 1098ee(2)(C)–(D).

[108] *Biden v. Nebraska*, 600 U.S. at pp. 494-498.

[109] *Id*. at p. 494, citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* (1994) 512 U.S. 218, 225.

[110] *Biden v. Nebraska*, 600 U.S. at p. 494.

[111] *Id*. at p. 496.

meaningful sense." [112] "The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver—it not only nullifies existing provisions, but augments and expands them dramatically."[113] "[W]hen the Secretary seeks to *add* to existing law, the fact that he has 'waived' certain provisions does not give him a free pass to avoid the limits inherent in the power to 'modify.' However broad the meaning of 'waive or modify,' that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here."[114]

In response to the argument that, in enacting the HEROES Act, Congress intended to delegate to the Secretary broad discretion to respond to emergencies, the Court invoked the "major questions doctrine."[115] Under that doctrine, announced in 2022 in *West Virgina v. EPA*,[116] the Court explained that "there are 'extraordinary cases' … in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority" on the agency.[117] In such cases, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims."[118]

In *Biden v. Nebraska*, the Court, citing *West Virgina v. EPA*, determined that, given the history and breadth of authority asserted by the President and the economic and political significance of his actions, there was "'reason to hesitate before concluding that Congress meant to confer such authority.'"[119] The Court found the Secretary of Education had never claimed power of such magnitude in the past, and pointed out that, under the new interpretation, the Secretary "would enjoy virtually unlimited power to rewrite the Education Act. This would 'effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation' into an entirely different kind[.]'"[120]

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[112] *Id*. at p. 498.

[113] *Id*. at p. 499.

[114] *Id*. at p. 500, original italics.

[115] *Id*. at p. 501.

[116] 597 U.S. 697.

[117] *Id*. at pp. 721-722, citing *FDA v. Brown & Williamson Tobacco Corp*. (2000) 529 U.S. 120, 159–160.

[118] 597 U.S. at p. 723, citing *Utility Air Regulatory Group v. EPA* (2014) 573 U.S. 302, 324. See also *West Virginia v. EPA*, *supra,* 597 U.S. at pp. 721-722, discussing *Alabama Assn. of Realtors v. Department of Health and Human Servs*. (2021) 594 U.S. 758, 763-765; *Gonzales v. Oregon* (2006) 546 U.S. 243, 267; and *National Federation of Independent Business v. OSHA* (2022) 595 U. S. 109, 117.

[119] *Biden v. Nebraska*, 600 U.S. at p. 501, quoting *West Virginia v. EPA* (2022) 597 U.S. 697, 721.

[120] *Biden v. Nebraska*, 600 U.S. at p. 502.

Additionally, the economic impact of the challenged debt cancellation would be significant, as it would cost taxpayers up to $519 billion, a significant portion of the economy.[121] The Court also found that the sharp debates in Congress in response to the Secretary's action indicate political significance.[122] "[T]his is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. The Secretary's assertion of administrative authority has 'conveniently enabled [him] to enact a program' that Congress has chosen not to enact itself."[123]

Given all of these considerations, the Court determined the Secretary's action was of such significance and consequence that it could only have been authorized by Congress through a clear delegation justifying such significant action.[124] Finding no such clear authorization, the Court held that this type of action should have been left to Congress, and that the Secretary's action was unlawful.[125]

Biden v. Nebraska demonstrates that Presidential actions taken pursuant to declared emergencies can sometimes have such major consequences, and can sometimes lead to results so different from anything clearly contemplated by Congress in actual statutory language, that the Presidential actions can be challenged in court under major question doctrine. In response to such arguments, courts can consider factors such as history, the significance of the legal authority asserted, and the political and economic significance of the challenged Presidential action. And the courts may determine, in light of such factors, that some Presidential actions taken in response to declared emergencies are so consequential, and so hard to square with relevant statutes, that the Presidential actions must be set aside as being in excess of Presidential authority under those statutes.

In light of all of the foregoing, lawsuits challenging discrete federal agency actions taken in response to the National Energy Emergency may, depending on circumstances, include arguments contending that such actions are not reasonably related to the emergency itself or to the purposes of the particular statutes or regulations being waived, sidestepped, or ignored; or the arguments may invoke the major questions doctrine where the outcome of the federal agency action is contrary to the apparent purpose of the operative statute or regulation or represents a policy outcome substantially different from what Congress apparently intended or authorized under the statute or its implementing regulations.

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[121] *Ibid.*

[122] *Id*. at pp. 503-504.

[123] *Id*. at p. 503.

[124] *Id*.at p. 506.

[125] *Id.* at pp. 506-507.

For would-be litigants, it will be important to review the statute authorizing the federal agency's emergency action to assess whether the agency action bears a reasonable relationship to the national emergency as well as to the purposes and directives of the authorizing statute itself. Additionally, if there is no clear Congressional authorization for the federal agency action, would-be litigants should consider whether the political or economic significance of the action may also support arguments under the major questions doctrine. Each agency action will need to be reviewed individually and in the context of the specific authorizing statute.

In the following section (II), this Monograph provides some initial legal analysis of possible future federal agency actions that might be taken in response to the National Energy Emergency. In doing so, the Monograph addresses authorizing statutes and regulations already identified in President Trump's Executive Order, as well as statutes and regulations that are likely to be invoked in later orders or proclamations.

II. The National Energy Emergency may not be the type of emergency intended for many of the statutes and regulations specified in the Executive Order as including provisions for emergencies, or for statutes or regulations likely to be specified later.

The EO declaring the National Energy Emergency provides a broad directive for executive agencies and departments to use emergency authority, and other available lawful authorities, to "facilitate the identification leasing, siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands."[126] Following this broad directive, the EO instructs agencies to use several specific statutes and regulations that, presumably, allow for the exercise of some sort of emergency authority.[127]

As discussed previously, the apparent intent behind the EO is to provide authority to these various agencies to reduce roadblocks to fossil fuel energy projects in the United States. While many of the statutes and regulations referenced in the EO do provide emergency authority, they also include criteria that projects must satisfy in order to gain the streamlining benefits that the regulations or statutes provide. The following subsections of this Monograph (A through I) review the statutes and regulations specifically enumerated in the EO (as well as two other statutes, NEPA and the NHPA) and assess the likelihood that each referenced statute or regulation will successfully serve the intended purposes of the EO if subjected to judicial scrutiny.

A. The Federal Eminent Domain Power

[126] Exec. Order No. 14156, § 2, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[127] *Id*., §§ 3-7.

As noted immediately above, the EO directs agencies and departments "to facilitate the identification, leasing, siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands." [128] One of the first references to specific authorities in the EO states that, "[i]f an agency assesses that use of either Federal eminent domain authorities or authorities afforded under the Defense Production Act are necessary to achieve this objective, the agency shall submit recommendations for a course of action to the President."[129]

As explained by the Supreme Court, "[e]minent domain is the power of the government to take property for public use without the consent of the owner. It can be exercised either by public officials or by private parties to whom the power has been delegated. And it can be exercised either through the initiation of legal proceedings or simply by taking possession up front, with compensation to follow. Since the founding, the United States has used its eminent domain authority to build a variety of infrastructure projects. It has done so on its own and through private delegatees, and it has relied on legal proceedings and upfront takings. It has also used its power against both private property and property owned by the States."[130]

The National Energy Emergency EO does not state how the federal government's eminent domain power would be used to satisfy the objectives of the EO, but historically, the federal eminent domain power has been used not only by federal government itself, [131] but also via delegation by private parties to facilitate the construction of bridges, pipelines, and similar linear facilities.[132] For instance, in *PennEast Pipeline*, quoted above, the Supreme Court affirmed a pipeline company's authority under the Natural Gas Act to use the federal eminent domain power to build a natural gas pipeline.[133] Notably, however, the private condemnation authority created by statute under the Natural Gas Act does not extend to commodities other than

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[128] *Id.*, § 2.

[129] *Ibid*.

[130] *PennEast Pipeline Company, LLC v. New Jersey* (2021) 594 U.S. 482, 487-488 (*PennEast Pipeline*). See also U.S. Const., 5th Amendment ("nor shall private property be taken for public use, without just compensation").

[131] See, e.g., *PennEast Pipeline Company*, *supra*, 594 U.S. at pp. 493-494.

[132] *Id*. at p. 495.

[133] See *id*. at pp. 508-509.

natural gas.[134] Indeed, "*[o]il* pipeline siting is *not* federally regulated unless the pipeline is sited on land under federal jurisdiction. Therefore, *state law governs oil pipeline siting*."[135]

Private natural gas pipelines are likely one type of linear infrastructure project that the Trump Administration seeks to assist under the National Energy Emergency declaration. Such facilities will facilitate natural gas production and transportation, consistent with the stated goals of the EO. The EO should not be very helpful, however, with respect to the use of eminent domain for *oil* pipelines, which are dependent on the eminent domain powers of individual states.

B. The Defense Production Act

The EO specifically references the Defense Production Act ("DPA") as a specific authority that agencies and departments might use "to facilitate the identification, leasing, siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands." [136]

"The DPA gives the president the authority to compel the private sector to work with the government to provide essential material goods needed for the national defense."[137] The Act "allows the president to designate specific goods as 'critical and strategic' and require the private businesses to accept and prioritize government contracts for these goods."[138]

The DPA was enacted in 1950 during the Korean War and over time has been amended to confer broad authority on the President to influence and control domestic industry to protect the national defense. The Congressional Research Service describes its origins and early history as follows:

> In the DPA, Congress has found that "the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services for the national defense and to prepare for and respond to military conflicts, natural or man-caused disasters, or acts of terrorism within the United

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[134] *Transcontinental Gas Pipe Line Company, LLC v. 6.04 Acres, etc.* (11th Cir. 2018) 910 F.3d 1130, 1160-1161.

[135] Jensen, *Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation* (2017) 29 Fordham L.Rev. 320, 321, italics added, footnotes omitted.

[136] Exec. Order No. 14156, § 2, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[137] Lawson and Rhee, *Usage of the Defense Production Act throughout history and to combat COVID-19* (June 3, 2020), Yale School of Management, p. 1 (https://som.yale.edu/blog/usage-of-the-defense-production-act-throughout-history-and-to-combat-covid-19) (accessed on April 14, 2025).

[138] *Id*. at p. 2.

States." Through the DPA, the President can, among other activities, prioritize government contracts for goods and services over competing customers, and offer incentives within the domestic market to enhance the production and supply of critical materials and technologies when necessary for national defense. * * *

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The DPA was modelled [on] the First and Second War Powers Acts of 1941 and 1942, which gave the executive branch broad authority to regulate industry during World War II. Much of this authority lapsed after 1945, and the beginning of the Cold War (and particularly the June 1950 outbreak of the Korean War) led the Truman Administration to identify a need for greater executive powers to control defense production and manage the nation's economy.

As initially enacted on September 8, 1950, the DPA granted broad authority to the President to control aspects of industrial and economic policy. Containing seven separate titles, the legislation allowed the President to, inter alia, demand that manufacturers give priority to defense production, to requisition materials and property, expand government and private defense production capacity, ration consumer goods, fix wage and price ceilings, force settlement of some labor disputes, control consumer credit and regulate real estate construction credit and loans, provide certain antitrust protections to industry, and establish a voluntary reserve of private sector executives who would be available for emergency federal employment.

Of the DPA's seven initial titles, four—Title II (Authority to requisition), Title IV (Price and wage stabilization), Title V (Settlement of labor disputes), and Title VI (Control of consumer and real estate credit)—terminated in 1953 when Congress allowed them to lapse.[139]

As noted, only three (I, III, and VII) of the original seven titles of the DPA remain in place. In an article published in 2019, the Heritage Foundation summarized the key provisions of the three remaining titles as follows:

Title I. Title I authorizes the President to prioritize certain defense programs, contracts, and orders, and allocate resources accordingly. *This title aims to secure the adequate availability of materials from the private sector for use in the defense sector. According to this provision, the person or corporation tasked with a prioritized contract or order is required to accept and fulfill the contract or order by the date specified. The allocations authority gives the President the authority to redistribute materials, equipment, and industrial facilities in order to stimulate defense production in necessary areas*. * * *

[139] Neenan and Nicastro, *The Defense Production Act of 1950: History: Authorities, and Considerations for Congress*, Congressional Research Service (Oct. 6, 2023), pp. 1, 2 (https://www.congress.gov/crs-product/R43767) (accessed on March 20, 2025).

Title III. To secure a steady supply of materials essential for national defense[.] Title III establishes the President's authority to invest in specific industries. The goal of Title III is to expand the domestic capacity and supply for defense-related materials. Under this provision, the President is empowered to use a variety of financial incentives to create, maintain, and expand domestic industrial capabilities to produce goods and material critical for national defense.

Due to statutory restrictions on DPA loan authorities, they have not been used in more than 30 years. Hence, federal grants, authorized in Section 303, have been the predominant manifestation of Title III authorities. Projects are funded by the Defense Production Act Fund, a Treasury account established by the act. Typically, Title III projects pursue a cost-sharing goal of 50 percent government funding and 50 percent recipient funding, which helps to catalyze private-sector investment for issues essential to national defense. However, this ideal cost-sharing goal does not always occur.

Before using Section 303 authorities under Title III, the DPA requires the President, on a non-delegable basis, to issue a presidential determination authorizing use of Title III authorities to address a domestic industrial base shortfall meeting three statutory criteria:

1. The industrial resource, material, or critical technology item is essential to national defense;
2. Without presidential action under this section, U.S. industry cannot reasonably be expected to provide the capability for the needed industrial resource, material, or critical technology item in a timely manner; and
3. Purchases, purchase commitments, or other action pursuant to this section are the most cost effective, expedient, and practical alternative method for meeting the need.

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Title VII. Title VII includes an array of provisions that complement the underlying purpose of the DPA. This title creates the basis for voluntary agreements, in which the President may consult with members of the defense industry to develop strategies and plans of action about how to better provide for national defense. Further, Title VII establishes both the Committee on Foreign Investment in the United States and the Defense Production Act Committee (DPAC).[140]

[140] Watkins and Spoehr, *The Defense Production Act: An Important National Security Tool, But It Requires Work* (Heritage Foundation October 15, 2019) (Watkins and Spoehr), Backgrounder, No. 3443, pp. 2-5, italics added, footnotes omitted. (https://www.heritage.org/defense/report/the-defense-production-act-important-national-security-tool-it-requires-work) (accessed on April 14, 2025)

EO 14156 does not specify any particular DPA provision to be used to address the National Energy Emergency; but it seems likely that the intent is to use the DPA to increase energy production for military uses. This objective implicates Title I of the DPA, on which the discussion below is focused.

Under 50 U.S.C. section 4511(a), the President is authorized "(1) to require that performance under contracts or orders […] which he deems necessary and appropriate to promote national defense shall take priority over performance under any other contract or order, […] and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense."[141]

Under 50 U.S.C. section 4511(b), "[t]he powers granted in [section 4511] shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that *such material is a scarce and critical material essential to the national defense*, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship."[142]

15 C.F.R. section 700.21 states that *"[s]carcity implies an unusual difficulty in obtaining the materials, equipment, or services* in a time frame consistent with the timely completion of the energy project." (Italics added.) The determination of scarcity should be made by the Department of Commerce, which may consider the following factors: "(i) Value and volume of material or equipment shipments; (ii) Consumption of material and equipment; (iii) Volume and market trends of imports and exports; (iv) Domestic and foreign sources of supply; (v) Normal levels of inventories; (vi) Rates of capacity utilization; (vii) Volume of new orders; and (viii) Lead times for new orders."

50 U.S.C. section 4511(c) addresses the subject of domestic energy. This provision authorizes the President, by rule or order, to "require the allocation of . . . materials[143],

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[141] The DPA defines "national defense" as "programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act and critical infrastructure protection and restoration." (50 U.S.C. § 4552(14).)

[142] Italics added.

[143] In this context, the term "materials" is defined as "(A) any *raw materials* (including *minerals*, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply; and (B) any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items." (50 U.S.C. § 4552(13), italics added.)

equipment, and services in order to *maximize domestic energy supplies*[,]" so long as certain findings are made.[144] The President may also pursue this objective by giving priority to certain orders or contracts – again so long as certain findings can be made.[145]

One required finding is that the affected "materials, services, and facilities are scarce, critical, and essential" either "(i) to maintain or expand exploration, production, refining, transportation; (ii) to conserve energy supplies; or (iii) to construct or maintain energy facilities[.]"[146] Another required finding is that "maintenance or expansion of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities *cannot reasonably be accomplished without exercising the authority specified*."[147]

The DPA has been used to aid the energy industry in several instances in history. For example, in the 1970s, several Arab nations restricted exports of petroleum to the United States.[148] In response, in 1973, President Nixon used the DPA to prioritize deliveries of domestic petroleum to the military.[149] In 1974, the DPA was used to advance the Trans-Alaska Pipeline to strengthen the domestic petroleum supply.[150] In these instances, there were significant reductions in petroleum imports to the United States leading to shortages and scarcity, directly or indirectly affecting the military.

Because those kinds of shortages do not exist at present, there is a question as to whether the DPA is a tool that truly fits current circumstances. As explained above, powers under the DPA to intervene in civilian energy markets for the benefit of "national defense" can only be exercised where all of the following findings can be made:

- each energy source ("material") at issue "is a scarce and critical material essential to the national defense";

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[144] *Id*. § 4511(c)(1), italics added.

[145] *Ibid*.

[146] *Id*. § 4511(c)(2)(A), italics added.

[147] *Id*. § 4511(c)(2)(B), italics added.

[148] Hart, *The Defense Production Act: National Security as a Potential Driver if Domestic Manufacturing Investment*, Bipartisan Policy Center (Feb. 2024) <bipartisanpolicy.org/download/?file=/wp-content/uploads/2024/02/The-Defense-Production-Act-National-Security-as-a-Potential-Driver-of-Domestic-Manufacturing-Investment.pdf> (as of March 20, 2025).

[149] *Ibid*.

[150] *Ibid*.

- "the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship";

- the affected "materials, services, and facilities are scarce, critical, and essential" either "(i) to maintain or expand exploration, production, refining, transportation; (ii) to conserve energy supplies; or (iii) to construct or maintain energy facilities"; and

- "maintenance or expansion of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified."

It seems unlikely that the Administration can make a showing of all of these required elements. Most importantly, there appears to be no evidence of such a level of energy scarcity under current circumstances as to justify full or partial Executive Branch control over energy production and distribution in order to augment supplies available to the military. There appears to be plenty of energy available for both domestic and military uses. Creating more energy supplies might be desirable, but such a prospect does not mean that current supplies are "scarce." As mentioned previously, domestic oil production is at an all-time high; and in contrast to past circumstances in which the DPA was invoked to facilitate oil production or to change its distribution, there have not been dramatic reductions in petroleum imports.[151] As also noted earlier, America is the world's leading producer of natural gas.[152]

There have been no recent petroleum shortages, such as those in the 1970s, that limit military energy supplies. Additionally, there are likely several alternatives to increase domestic energy for national defense that can be pursued without Presidential intervention, indicating that intervention is not necessary. As noted above, 50 U.S.C. section 4511(c)(2)(B) requires the President to find that his actions "cannot reasonably be accomplished without exercising the authority specified." The EO does not make any such finding, which might be difficult, or impossible, to make going forward.

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[151] U.S. Field Production of Crude Oil, U.S. Energy Information Administration <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=M> (as of March 20, 2025); Kreil, United States Produces More Crude Oil Than Any Country, Ever, U.S. Energy Information Administration (March 11, 2024) < https://www.eia.gov/todayinenergy/detail.php?id=61545> (as of March 20, 2025).

[152] International Energy Agency, *Where does the world get its natural gas?* https://www.iea.org/world/naturalgas (accessed on April 16, 2025) (showing that in 2022 the United States produced almost twice as much natural gas as its closest competitor, Russia).

Interestingly, the conservative Heritage Foundation expressed skepticism in 2019 about past attempts by Presidents to use their powers under Title III of the DPA to facilitate the production of energy supplies, and more specifically biosynthetic fuels, biofuels, and coal:

> **Domestic Energy.** According to the DPA, national defense can include programs for energy production or construction. This provision has been used to stimulate domestic energy production for commercial uses, an overstep currently allowed by the law. In FY 2013, the U.S. government contributed $3.61 million of Title III funding to a project that aimed to "establish a domestic, large-scale, commercial, feedstock flexible, manufacturing capacity" of bio-synthetic paraffinic kerosene (BSPK). The 2013 *Annual Industrial Capabilities Report* described the reasoning behind this program, which stressed the importance of energy diversification for the purposes of "energy security and environmental stewardship." *While this may be a worthwhile goal, this investment was not relevant to national security to the degree that it justified government investment with dollars appropriated for national defense*.
>
> Another example of an inappropriate use of Title III funding was the Obama Administration's 2012 initiative to advance the production of biofuel. Similar to the BSPK project, the Administration touted the need for energy security and environmental consciousness. In total, the Advanced Drop-In Biofuel Production Project, as it was named in the 2014 *Annual Industrial Capabilities Report*, was allotted a whopping $230.5 million of Title III funding. This project was marketed to support Naval operations by providing a diverse production of domestic energy. Following a 1980 amendment that "authorize[d] the President's purchase of synthetic fuels for national defense," the DPA does allow investment in domestic biofuel energy. However, President Barack Obama's use of Title III to further this non-defense project diverted Title III funding from the defense industrial base. *The overly broad definition of national defense allowed President Obama to advance an environmental agenda by packaging it as a national security issue*.
>
> The issue of exploiting the DPA for non-defense reasons transcends Administrations; reports surfaced in mid-2018 that the Trump Administration was considering invoking the act to keep domestic coalmines in operation. A White House memo claimed that "federal action is necessary to stop the further premature retirements of fuel-secure generation capacity." *While President Donald Trump ultimately did not follow through with his proposal, this move shows how easy it would have been to misuse the powers of the act to promote a non-defense-related agenda. The DPA should not be used to further any form of a "Buy American" agenda; that is not the goal of the act*. Rather, its authorities are there to step in where there is a domestic capacity shortfall for a national security requirement.[153]

[153] Watkins and Spoehr, *supra*, pp. 6-7, italics added, footnotes omitted.

Although the Heritage Foundation's criticism of the stretching of the concept of "national defense" addressed specific instances of Presidential actions taken under Title III of the DPA, the same logic applies to actions taken under Title I. The definition of National Defense found in 50 USCA section 4552(14) applies to both Titles. Presidents are naturally tempted to use their broad powers under the DPA to facilitate policy outcomes unrelated, or only loosely related, to national defense. Here, as noted above, America's role as the world's leading producer of oil and natural gas undermines any notion that Presidential intervention under the DPA is needed to prevent possible energy shortages in the military.

C. Emergency Fuel Waivers

In Section 2(b), Executive Order 14156 instructs the EPA Administrator to consider issuing emergency fuel waivers under the Clean Air Act (CAA). The EO states that, "[c]onsistent with 42 U.S.C. 7545(c)(4)(C)(ii)(III), the Administrator of the [EPA] […] shall consider issuing emergency fuel waivers to allow the year-round sale of E15 gasoline to meet any projected temporary shortfalls in the supply of gasoline across the Nation."[154]

E15 gasoline contains up to 15 percent ethanol. A Department of Energy website has the following to say about this fuel:

> The U.S. Environmental Protection Agency (EPA) defines E15 as gasoline blended with 10.5% to 15% ethanol. In 2011, EPA approved E15 for use in light-duty conventional vehicles of model year 2001 and newer, through a Clean Air Act waiver request, based on significant testing and research funded by the U.S. Department of Energy. Stations are not required to sell E15, but some have started offering E15 due to state and federal incentives for upgrading equipment and better profit margins when compared with regular gasoline. E15 is available in 31 states at just over 3,000 stations. E10 remains the limit for passenger vehicles older than model year 2001 and for other non-road and small engines and vehicles that use gasoline, such as lawn mowers, motorcycles, and boats.
>
> **Vehicles approved for E15 use**:
> - Flexible fuel vehicles
> - Conventional vehicles of model year 2001 and newer.
>
> **Vehicles prohibited from using E15**:
> - All motorcycles
> - All vehicles with heavy-duty engines, such as school buses and delivery trucks
> - All off-road vehicles, such as boats and snowmobiles
> - All engines in off-road equipment, such as chain saws and gasoline lawn mowers

[154] Exec. Order No. 14156, § 2(b), 90 Fed. Reg. 8433 (Jan. 20, 2025).

- All conventional vehicles older than model year 2001.

> There are additional regulations for stations selling blends above E10. For more information, visit the Codes, Standards, and Safety page.
>
> Regulations to reduce evaporative emissions that can contribute to ground-level ozone impact the ability to sell E15 during the summer ozone season in parts of the country without a Reformulated Gasoline program. These regulations were established prior to E15 entering the market. The EPA issued emergency fuel waivers that allowed E15 to be sold during the summers of 2022 and 2023 in response to events that impacted petroleum markets.[155]

The Clean Air Act provision cited in Section 2(b) of the EO – 42 U.S.C. 7545(c)(4)(C)(ii)(III) – states, in pertinent part, as follows:

> (ii) The Administrator may temporarily waive a control or prohibition respecting the use of a fuel or fuel additive required or regulated by the Administrator pursuant to subsection (c), (h), (i), (k), or (m) of this section or prescribed in an applicable implementation plan under section 7410 of this title approved by the Administrator under clause (i) of this subparagraph if, after consultation with, and concurrence by, the Secretary of Energy, the Administrator determines that— […]
>
> (III) *it is in the public interest to grant the waiver* (for example, when a waiver is necessary to meet projected temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).[156]

EO 14156 provides no support for the notion that there have been any recent gasoline shortfalls in the United States, though the material quoted earlier from the Department of Energy website refers to EPA issuing "emergency fuel waivers that allowed E15 to be sold during the summers of 2022 and 2023 in response to events that impacted petroleum markets." Given this historical background, which occurred under the Biden Administration, it certainly seems possible that similar waivers might be granted in the future.

Even so, it is unclear whether waivers of controls or prohibitions respecting fuels or additives can be granted based solely on President Trump's National Energy Emergency. The need to address temporary supply shortfalls is just one example the CAA provides as the basis for a waiver "in the public interest" (a seemingly somewhat elastic concept).

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[155] United States Department of Energy, *Alternative Fuels Data Center* https://afdc.energy.gov/fuels/ethanol-e15 (accessed on April 1, 2025).

[156] 42 U.S.C. § 7545(c)(4)(C)(ii)(III), italics added.

When the current EPA Administrator "consider[s]" whether to issue "emergency fuel waivers" to allow the year-round sale of E15 gasoline as directed by the EO, the Administrator will have to address how the waivers would be "in the public interest." Since such waivers presumably could lead to an increase in ground-level ozone formation in summer months in some circumstances, any notion of "public interest" that the Administrator comes up with may have to account for that negative environmental tradeoff. The current EPA Administrator may ultimately assert that the National Energy Emergency provides a sufficient basis for the issuance of waivers, notwithstanding possible negative health effects.

Such a finding could be challenged in court under the APA as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (5 U.S.C. § 706(2)(A).) Under the APA, as noted earlier, "[a]n agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.'"[157] "In reviewing an agency's action under that standard, a court may not substitute its judgment for that of the agency."[158] "But it must ensure, among other things, that the agency has offered 'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'"[159] "Accordingly, an agency cannot simply ignore 'an important aspect of the problem.'"[160]

D. Clean Water Act and other US Army Corps of Engineers Permitting

Section 4 of EO 14156 directs the Secretary of the Army to identify planned or potential actions to facilitate the Nation's energy supply that may be subject to emergency treatment pursuant to the regulations and nationwide permits promulgated by the US Army Corps of Engineers ("USACE") or jointly by the USACE and EPA.[161] This directive addresses regulations and permits under section 404 of the Clean Water Act, section 10 under the Rivers and Harbors Act, and section 103 of the Marine Protection Research and Sanctuaries Act.[162] Section 4 of the EO then directs these agencies to utilize the U.S. Army Corps of Engineers' emergency regulations to the fullest extent possible under law to facilitate the Nation's energy supply.[163]

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[157] *Ohio v. Environmental Protection Agency* (2024) 603 U.S. 279, 292.

[158] *Ibid*., internal quotation marks omitted.

[159] *Ibid*.

[160] *Id*. at pp. 292-293. See also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. E.P.A.* (D.C. Cir. 1985) 768 F.2d 385 (decision of EPA to grant waiver of Clean Air Act's restrictions on new fuels or fuel additives for new methol-gasoline blend fuel was arbitrary, capricious, and an abuse of discretion).

[161] Exec. Order No. 14156, § 4, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[162] *Ibid.*

[163] *Ibid.*

Section 404 of the Clean Water Act authorizes the USACE to permit discharges of dredged or fill materials into navigable waters.[164] Section 10 of the Rivers and Harbors Act restricts obstructions of navigable waterways of the United States.[165] Section 103 of the Marine Protection Research and Sanctuaries Act regulates the discharge of dredged material into ocean waters.[166] The USACE is charged with regulating each of these permit programs.

USACE regulations governing the "Processing of Department of the Army Permits" are found in 33 C.F.R. Part 325. Section 325.2 addresses the processing of applications for such permits. Subsection (e)(4) provides emergency procedures for special processing of applications in "emergency situations." It provides that "[d]ivision engineers are authorized to approve special processing procedures in emergency situations. An 'emergency' is 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. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable." [167]

Though not specifically enumerated in EO 14156, 33 C.F.F. section 325.2(e)(4) is likely the relevant USACE emergency regulation. As noted, 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."[168] Where such an emergency exists, division engineers may approve special processing procedures authorizing "corrective action" in less time than would be normally needed for the issuance of a USACE permit.[169]

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[164] 33 U.S.C. § 1344(a).

[165] 33 U.S.C. § 403.

[166] 33 U.S.C. § 1413.

[167] 33 C.F.R. § 325.2(e)(4).

[168] 33 C.F.R. § 325.2(e)(4), italics added.

[169] *Ibid*.

Considering the very specific criteria listed under the definition of an emergency authorizing such emergency procedures for USACE permitting, an emergency declaration under the National Emergency Act ("NEA") does not appear to be necessary. Nor would any and all emergencies declared by a President under the NEA necessarily meet the definition found in section 325.2(e)(4). Notably here, President Trump's National Energy Emergency does not appear to present any direct "unacceptable hazard to life," "significant loss of property," or "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." In other words, the concept of "emergency" found in section 325.2 is far more confined than the very expansive concept found in EO 14156.

While the Administration may argue that there is a risk of significant economic hardship from reliance on foreign countries for national energy consumption, any such alleged hardship would be by no means be "unforeseen." Additionally, it is not clear why standard permitting procedures would be inadequate to take any needed "corrective actions."

In short, the National Energy Emergency declared in EO 14156 is an example of the proverbial "square peg" that does not fit within the "round hole" created by section 325.2. President Trump does not have the power, through the issuance of an EO declaring a broad national emergency, to effectively rewrite the language of a duly enacted federal regulation such as 33 C.F.R. section 325.2(e)(4).

The regulation provides a special processing procedure for emergencies where human life, significant property loss, or significant economic loss are imminent, though economic loss requires additional criteria that must be satisfied for an emergency finding. The regulation covers instances of natural or human-caused disasters such as flooding or fires that may require corrective action that would fall under permitting authority to avoid loss of human life and significant property loss.

The USACE has provided guidance that includes examples of emergency situations arising because of natural disasters, or failure of a facility, like a bridge, due to external causes. The USACE website has the following to say on this subject:

> **When an emergency is occurring.**
>
> These are very serious situations that could result in the loss of life, the loss of property, and/or a significant economic hardship if steps to remedy the situation are not immediately pursued. This may include emergencies due to a natural disaster (e.g., flood, hurricane, earthquake, etc.) or a catastrophic (sudden and complete) failure of a facility due to an external cause (e.g., a bridge collapse after being struck by a barge). The USACE addresses the permitting process for emergency situations in its regulations at 33 CFR 325.2(e)(4). The USACE regulations define 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."
>
> In emergency situations, USACE Division Engineers, in coordination with the USACE District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The USACE also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. In addition, USACE regulations at 33 CFR 323.4 state certain activities involving the discharge of dredged or fill material are not prohibited by or otherwise subject to regulation including some maintenance and emergency reconstruction activities listed at 33 CFR 323.4(a)(2). The appropriate USACE office should be contacted immediately when an emergency situation has been identified. [170]

The circumstances described in EO 14156 as creating a National Energy Emergency do not at all resemble the type of emergencies to which 33 CFR 325.2(e)(4) is addressed. This conclusion is underscored by other guidance from the USACE, which states, "[i]f the work would not be completed for several months, it would not normally be considered an emergency per the USACE definition at 33 CFR 325.2(e)(4)."[171] Responses to the National Energy Emergency are likely to include large extraction and infrastructure construction projects that will typically take more than several months to complete. These energy projects would not be undertaken in response to the kinds of imminent emergencies the regulation seeks to cover.

In short, if the USACE attempts to apply section 325.2 to the National Energy Emergency and thereby dispense with normal USACE permitting procedures, such agency action will be subject to a the argument that, because the expansive amorphous emergency declared via Executive Order 14156 is not an "emergency" for purposes of that regulation, USACE acted in excess of its authority under the regulation and its action was "arbitrary, capricious, an abuse of discretion, [and] or otherwise not in accordance with law" under the APA.[172]

E. Emergency Ocean Dumping Under the Marine Protection Research and Sanctuaries Act

[170] *When an Emergency is Occurring*, U.S. Army Corps of Engineers, New England District Website <https://www.nae.usace.army.mil/Missions/Regulatory/Emergency-Situations/> (accessed on March 20, 2025).

[171] *Emergency Permitting Procedures*, U.S. Army Corps of Engineers, Albuquerque District Website <https://www.spa.usace.army.mil/Missions/Regulatory-Program-and-Permits/Emergency-Permitting/> (accessed on March 20, 2025).

[172] 5 U.S.C. § 706(2)(a).

As noted in the preceding subsection (IIC), Section 4 of the EO directs the Secretary of the Army to "identify planned or potential actions to facilitate the Nation's energy supply that may be subject to emergency treatment pursuant to . . . the Marine Protection Research and Sanctuaries Act of 1972 ["MPRSA"], 33 U.S.C. 1413[.]"[173]

The United States District Court for the Eastern District of New York described the general requirements of the MPRSA as follows in 2020:

> Congress enacted the MPRSA in 1972 to mitigate the environmental impact of unregulated dumping in ocean waters, and to prohibit the unauthorized transportation or dumping of waste from the United States into ocean waters. 33 U.S.C. § 1411. The MPRSA generally applies to ocean waters beyond U.S. territory, and in this regard, complements the Clean Water Act, which prohibits the discharge of pollutants into the navigable waters of the United States. 33 U.S.C. §§ 1311, 1362(12).
>
> ***
>
> The MPRSA governs site designations as well as permitting for disposal at such sites. Under the law, EPA and the Army work together throughout these processes. Specifically, *Section 1413 of the MPRSA provides that the Secretary of the Army may issue permits for the disposal of dredged material, on the conditions that the Secretary has determined that such dumping "will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities*." 33 U.S.C. § 1413(a). *To determine whether proposed dumping meets this standard, the Army Corps of Engineers is directed to consider the regulatory criteria established by EPA pursuant to Section 1412(a),* which states that the EPA "Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:
>
> > (A) The need for the proposed dumping.
> >
> > (B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.
> >
> > (C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.
> >
> > (D) The effect of such dumping on marine ecosystems, particularly with respect to—
> >
> > > (i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

[173] Exec. Order No. 14156, § 4, 90 Fed. Reg. 8433 (Jan. 20, 2025).

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and non-living resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.[174]

It is not clear why President Trump identified MPRSA as a statutory scheme that might be slowing down, or getting in the way of, energy production. More specifically, it is not clear what categories of energy extraction, refinement, production, or transportation might be affected by rules governing the permissible locations for ocean dumping and the kinds of materials that can be dumped and how.

As explained in the extended quotation above, 33 U.S.C. section 1413 empowers the Secretary of the Army to issue permits "for the transportation of dredged material for the purpose of dumping it into ocean waters, where the Secretary determines that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." Perhaps President Trump is interested in making material dredged on land, such as might occur in some types of energy operations, easier to dispose of in the ocean. Perhaps he has the sense that the operators of offshore oil and gas platforms might benefit from relaxed ocean dumping rules. Regardless, the analysis below addresses the kinds of "emergency" that may lawfully justify relaxed rules on ocean dumping.

Numerous regulations have been enacted to carry out the MPRSA. One of them, found at 40 C.F.R. section 220.3, "provides for the issuance of general, special, emergency, and research permits for ocean dumping under section 102 of the Act [i.e., 33 U.S.C. § 1413]." Section 220.3(c) deals with Emergency Permits. It provides as follows:

[174] *Rosado v. Wheeler* (E.D. New York 2020) 473 F.Supp.3d 115, 122-123, italics added.

> For any of the materials listed in § 227.6, except as trace contaminants, after consultation with the Department of State with respect to the need to consult with parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter that are likely to be affected by the dumping, *emergency permits may be issued to dump such materials where there is demonstrated to exist an emergency requiring the dumping of such materials, which poses an unacceptable risk relating to human health and admits of no other feasible solution. As used herein, "emergency" refers to situations requiring action with a marked degree of urgency, but is not limited in its application to circumstances requiring immediate action*. Emergency permits may be issued for other materials, except those prohibited by § 227.5, without consultation with the Department of State when the Administrator determines that there exists an emergency requiring the dumping of such materials which poses an unacceptable risk to human health and admits of no other feasible solution.[175]

As with 33 C.F.R. section 325.2(e)(4), discussed in the preceding subsection (IIC) of this Monograph, the question arises whether the National Energy Emergency declared in EO 14156 qualifies as an "emergency" under this section (40 C.F.R. section 220.3(c)). The answer appears to be "no."

The National Energy Emergency describes an ongoing *nationwide* condition that can only be ameliorated through a prolonged nationwide effort to increase energy production through multiple energy projects occurring simultaneously and over time all over the country. This *national* emergency does not provide a rational basis for *individual* energy operations to dump into the ocean noxious materials that are normally considered unreasonably harmful to "the marine environment" and "ecological systems." It may be that individual energy operators might like to save money and time by avoiding the normal permitting requirements for ocean dumping; but the mere desire to avoid such inconveniences is not enough to justify an emergency permit under 40 C.F.R. section 220.3(c). A simple desire to save time and money does not create "a marked degree of urgency" under a commonsense reading of this regulation. Nor would such a desire create a situation that "admits of no other feasible solution."

Any attempts by USACE or EPA to try to shoehorn the broad National Energy Emergency into the much narrower concept of "emergency" found in 40 C.F.R. section 220.3(c) could be challenged under the APA as being "arbitrary, capricious, an abuse of discretion, [and] or otherwise not in accordance with law[.]"[176] Alternatively, such attempts could be challenged under the major questions doctrine, as the outcome of such agency actions could not fairly and reasonably be reconciled with the statutory language of the MPRSA, which places great

[175] Italics added.

[176] 5 U.S.C. § 706(2)(a).

emphasis on the need to protect "fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches."

F. Endangered Species Act

1. ESA Emergency Regulation

Section 5 of President Trump's National Energy Emergency EO specifically invokes 50 C.F.R. section 402.05, a regulation adopted pursuant to the Endangered Species Act ("ESA").[177] Section 402.05 provides rules regarding how interagency consultations under Section 7 of the ESA[178] should be conducted in "emergency circumstances." Section 5 of the EO commands that "[a]gencies are directed to use, to the maximum extent permissible under applicable law, the ESA regulation on consultations in emergencies, to facilitate the Nation's energy supply." [179]

As explained earlier, section 7 of ESA requires interagency consultations intended to insure that proposed federal agency actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] [[180]] habitat of such species[.]"[181]

50 C.F.R. section 402.05(a) states 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[[182]] determines to be consistent with the requirements

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[177] 16 U.S.C. § 1531 et seq.

[178] *Id*. § 1536.

[179] Exec. Order No. 14156, § 5, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[180] "Upon listing a species as endangered or threatened, the Secretary is required to 'concurrently ... designate any habitat of such species which is then considered to be *critical habitat*.'" (*Center for Biological Diversity v. United States Fish and Wildlife Service* (9th Cir. 2023) 67 F.4th 1027, 1031 (*CBD*), citing 16 U.S.C. § 1533(a)(3)(A)(i), italics added.) "Critical habitat designations must be based on the conditions that existed at the time of listing,… and 'the best scientific data available and after taking into consideration the economic impact, ... national security, and any other relevant impact, of specifying any particular area as critical habitat.'" (*CBD*, *supra*, 67 F4th at p. 1031, quoting 16 U.S.C. § 1533(b)(2).)

[181] 16 U.S.C. § 1536(a)(2).

[182] As used here, "Director" refers to "the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative." (50 C.F.R. § 402.02.) Section 402.05 is a "joint regulation" adopted by both the United States Fish and Wildlife Service and the National Marine Fisheries Service, both of whom provide ESA consultations with other federal agencies.

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."[183]

Section 402.05(b) states that "[f]ormal consultation shall be initiated as soon as practicable *after the emergency is under control*. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service[[184]] will evaluate such information and issue a biological opinion[[185]] including the information and recommendations given during the emergency consultation." [186]

When subsections 402.05(a) and 402.05(b) are read together, it is clear that the regulation contemplates a factual scenario in which (i) emergency circumstances arise, (ii) the interagency consultation process under the ESA is put on hold, (iii) the emergency circumstances are brought "under control," (iv) formal consultation is "initiated as soon as practicable after the emergency is under control," and (v) the Service ultimately issues a biological opinion. As is apparent, the regulation assumes an emergency of finite duration that can be brought "under control," after which a normal Section 7 consultation, with normal environmentally protective measures, is undertaken (just later than usual).

As quoted above, section 402.05(a), after mentioning "emergency circumstances," lists "acts of God, disasters, casualties, national defense or security emergencies*,* etc." In light of these enumerated examples, several district courts have held that these "emergencies" under the regulation must include elements of surprise and unexpectedness and thus must also be "unpredictable and unexpected in some way." [187] Thus, although the concept of emergency here is somewhat elastic, it does have limitations and may well not be capacious enough to include the National Energy Emergency, which in theory could last many years if periodically renewed as allowed under the NEA.

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[183] 50 C.F.R. § 402.05(a), italics added.

[184] "Service" here refers to either the United States Fish and Wildlife Service or the National Marine Fisheries Service, both of whom provide ESA consultations with other federal agencies.

[185] The March 1998 *ESA Section 7 Consultation Handbook*, on page 4-15, briefly describes a Biological Opinion as follows: "[a] formal biological opinion consists of a description of the proposed action, status of the species/critical habitat, the environmental baseline, effects of the action, cumulative effects, the Services' conclusion of jeopardy/no jeopardy and/or adverse modification/no adverse modification, and reasonable and prudent alternatives, as appropriate."

[186] 50 C.F.R. § 402.05(b), italics added.

[187] *Washington Toxics Coalition v. U.S. Dept. of Interior, Fish and Wildlife Service* (W.D.Wash. 2006) 457 F.Supp.2d 1158, 1195 (*Washington Toxics*).

In reviewing agency actions invoking emergencies under section 402.05, courts will generally be deferential to the agencies to the extent that the court will apply the arbitrary and capricious standard of review under the Administrative Procedure Act.[188] If, however, an agency's decision does not support a finding that the emergency was unpredictable or unexpected, the finding may be overturned as arbitrary and capricious.[189]

Both the plain text of section 402.05 and the existing cases interpreting it strongly suggest that President Trump's National Energy Emergency is not the type of "emergency" that triggers the special rules allowed under the regulation. The National Energy Emergency is neither unpredictable nor unexpected. It just reflects the current President's policy belief that the United States should take additional steps to increase oil, natural gas, and coal production, so as to bring about what he believes will be economic and foreign policy benefits. In contrast, the kinds of emergencies contemplated by section 402.05 include Acts of God, disasters, and occurrences resulting in casualties. Although "national defense or security emergencies" are mentioned, there is no indication that such emergencies include long-standing foreign policy relationships between nations or long-term economic conditions that have arisen over years or decades and may not be subject to material change for considerable periods of time. Rather, relevant "national defense or security emergencies" under section 402.05 might include unexpected short-term events such as terrorist attacks leading to the kinds of consequences normally associated with natural disasters (e.g., floods, fires, social chaos, casualties, etc.).

As the courts have determined, the enumerated examples of "emergency circumstances" found in section 402.05 involve unexpected and imminent threats that make normal Section 7 consultation impracticable. This fact is underscored by subsection (b), which requires that formal consultation commence as soon as practicable after the emergency is "under control."[190]

Courts have declined to find emergencies under section 402.05 where the purported "emergencies" at issue were predictable.[191] For example, in the *Forest Service Employees* case, the federal district court in Montana held that the use of chemical fire retardant by the U.S. Forest Service during wildfires was "not unexpected but guaranteed," and thus was not excused from consultation under section 402.05.[192] Similarly, in *Defenders of Wildlife*, the district court in

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[188] *Friends of Merrymeeting Bay v. U.S. Dept. of Commerce* (D.Maine 2011) 810 F.Supp.2d 320, 328–329.

[189] *Ibid.*

[190] 50 C.F.R. § 402.05(b).

[191] *Washington Toxics,* 457 F.Supp.2d at p. 1195*; Forest Service Employees for Environmental Ethics v. U.S. Forest Service* (D.Mont. 2005) 397 F.Supp.2d 1241, 1256–1257 (*Forest Service Employees*).

[192] *Forest Service Employees*, 397 F.Supp.2d at p. 1257.

the southern district of Mississippi found that the opening of a dam spillway was not an emergency under section 402.05 because it was expected and capable of being prepared for.[193] Although these district court decisions have limited precedential value, the courts reached logical conclusions based on the plain text of section 402.05. The decisions are persuasive.

As with the use of chemical retardant in *Forest Service Employees* and the opening of a dam spillway in *Defenders of Wildlife*, the current state of fossil fuel energy production in the United States is not "unexpected." According to EO 14156, this state of affairs is the result, at least in part, of "the harmful and shortsighted policies of the previous administration" and the "dangerous State and local policies" of "our Nation's Northeast and West Coast[.]"[194] Given that the Democratic Party controlled the White House from January 20, 2009, through January 20, 2017, and again from January 2021, through January 20, 2025, and has also controlled the Governors' offices and legislatures in many Northeastern and West Coast states since early 2009, the current state of the national energy economy hardly appeared out of nowhere.

Furthermore, to the extent that President Trump has declared that a National Energy Emergency existed on the day of his second inauguration, it is by no means clear what is needed – other than substantially increased oil and gas production – to bring the purported emergency "under control." Since it may take years to ramp up production to the levels the President believes are needed to abate the emergency, it makes little sense to put Section 7 consultations on hold during such a prolonged period. No physical conditions (e.g., raging flood waters or wildfires) are preventing normal interagency consultation. There is no practical reason why normal consultation procedures should be put on hold.

To the extent that the President intends that Section 7 consultations should not be conducted on oil, gas, and coal projects during the entire duration of the current "emergency," such an outcome would be contrary to the will of Congress as expressed in the Endangered Species Act, which remains on the books. Just as the Supreme Court held that former President Biden went too far in using an executive order as a means of attempting to forgive student loan debt in response to the "emergency" created by the COVID-19 pandemic, President Trump would arguably be going too far if, through EO 14156, he essentially attempts to rewrite the ESA in order to exempt fossil fuel production projects from some of its strictures. As the Court said of the Biden Administration, "[a] decision of such magnitude and consequence on a matter of earnest and profound debate across the country must res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[195]

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[193] *Defenders of Wildlife v. United States Army USACE of Engineers* (S.D.Miss. Nov. 22, 2022) WL 18456141.

[194] Exec. Order No. 14156, § 5, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[195] *Biden v. Nebraska* (2023) 600 U.S. 477, 504 (2023), quoting *West Virginia v. EPA* (2022) 597 U. S. 697, 735 (2022), internal quotation marks omitted.

In short, just as possible attempts to invoke the National Energy Emergency to obtain altered USACE permitting procedures under both 33 CFR section 325.2(e)(4) and 40 C.F.R. section 220.3(c) should be subject to potentially meritorious judicial challenges, the same will be true of similar attempts to suspend or avoid ESA Section 7 consultations through the invocation of 50 C.F.R. section 402.05. The argument would be that, because the expansive and amorphous emergency declared via Executive Order 14156 is not an "emergency" for purposes of section 402.05, the agency invoking that regulation acted in excess of its authority under the regulation, and its action was "arbitrary, capricious, an abuse of discretion, [and] or otherwise not in accordance with law" under the APA.[196]

On April 23, 2025, just as this Monograph was nearing completion, DOI relied on section 402.05 when it announced that, for certain categories of energy projects, it was adopting an "expedited Section 7 consultation process."[197] Qualifying projects are those that "seek to identify, lease, site, produce, transport, refine, or generate energy resources as defined in section 8(a) of EO 14156; and for which the project applicant(s) have submitted plans of operations, applications for permits to drill, or other applications."[198] This expedited process "involves the appropriate bureau notifying the Fish and Wildlife Service that it is using emergency consultation procedures. Following such notification, the appropriate bureau can then proceed with deciding whether to approve the action."[199]

For reasons discussed above – namely, that the expansive National Energy Emergency does not come within the narrower concept of emergency used in section 402.05 – DOI's action of late April 2025 creating an expedited Section 7 consultation process for various energy projects is unlikely to survive a legal challenge.

2. Endangered Species Committee

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[196] 5 U.S.C. § 706(2)(a).

[197] Department of the Interior Implements Emergency Permitting Procedures to Strengthen Domestic Energy Supply (https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic) (accessed on April 24, 2025).

[198] Alternative Arrangements for Informal Section 7 Consultation: Alternative Procedures for Informal, Expedited Consultation under Section 7 of the Endangered Species Act for Energy Projects amid the National Energy Emergency (https://www.doi.gov/sites/default/files/documents/2025-04/alternative-procedures-section-7-consultation-2025-04-23-signed_1.pdf) (accessed on April 24, 2025).

[199] Department of the Interior Implements Emergency Permitting Procedures to Strengthen Domestic Energy Supply (https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic) (accessed on April 24, 2025).

As mentioned earlier, Section 6 of the EO instructs the Endangered Species Act Committee to convene not less than quarterly to consider applications for exemption under Section 7 of the ESA.[200] Section 7(a)(2) of ESA requires that each federal agency "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species … *unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h)*."[201]

The ESA Committee includes the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the EPA, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and an individual of each affected State appointed by the President.[202]

For the Committee to grant such exemptions, specific criteria described in ESA section 7(h) must be satisfied.[203] That provision states that the Committee shall grant the exemption if:

i. there are no reasonable and prudent alternatives to the agency action;

ii. the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

iii. the action is of regional or national significance; and

iv. neither the federal agency concerned nor the exemption applicant has made any irreversible or irretrievable commitment of resources that has foreclosed the formulation or implementation of any reasonable and prudent alternative measures to protect the affected endangered or threatened species or their critical habitat.[204]

In granting an exemption, moreover, the Committee must also establish "such reasonable mitigation and enhancement measures, including, but not limited to, live

[200] Exec. Order No. 14156, § 6, 90 Fed. Reg. 8433 (Jan. 20, 2025).

[201] 16 U.S.C. § 1536(a)(2), italics added.

[202] *Id*. § 1536(e)(3).

[203] *Id*. § 1536(e)(2).

[204] *Id*. § 1536(h)(1)(A).

propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned."[205]

According to the Congressional Research Service, as of June 7, 2023, only two exemptions of this type had ever been granted by the Committee.[206] Notably, the Committee Exemptions are not authorized by emergency circumstances; rather, the criteria listed above under subsection (h) must be satisfied.[207] Because these criteria all require supporting evidence, they cannot be satisfied without the time-consuming preparation of a formal report addressing the whether the criteria can all be met.[208] Thus, a considerable amount of process and analysis will be necessary to consider and grant an exemption pursuant to subdivision (h) of ESA section 7. The exemption option, then, does not represent the kind of quick regulatory shortcut for which President Trump may have hoped.

In considering whether the National Energy Emergency would justify an exemption, the Committee would have to consider how the emergency affects its analysis of the statutory criteria that must be satisfied before an exemption is granted. The emergency arguably might be most relevant to the following questions: whether there are "no reasonable and prudent alternatives to the agency action"; whether "the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat"; whether the proposed "action is in the public interest"; and whether "the action is of regional or national significance."

Absent other facts or considerations supporting the findings required by ESA section 7(h), the Committee would have to find that an individual project's limited contribution to addressing the National Energy Emergency is of such significance as to support affirmative answers to all four of these inquiries. This outcome may be most difficult to achieve with respect to the question of whether there are "no reasonable and prudent alternatives to the agency action." Particularly where the proposed action involves a discrete oil, gas, or coal extraction or transportation project, it may prove challenging to marshal evidence supporting the notion that other viable options for producing or transporting the fossil fuels in question are not reasonably available.

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[205] *Id*. § 1536(h)(1)(B).

[206] Sheikh and Ward, *Endangered Species Act (ESA) Section 7 Consultation*, Congressional Research Service (June 7, 2023) <https://crsreports.congress.gov/product/pdf/IF/IF12423> (accessed on March 20, 2025).

[207] 16 U.S.C. § 1536(e)(2).

[208] *Id.* § 1536(g)(5).

In short, EO 14156 does not alter the detailed evidentiary showings required for the Endangered Species Committee to grant an exemption from the normal requirement that a proposed federal action cannot go forward where it is likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat for such species. At best, the EO creates an additional consideration for the Committee to plug into statutory criteria that, on their face, have nothing obvious to do with such a national emergency.

And exemptions do not let applicants off the hook for mitigation for the harm that projects cause to endangered or threatened species and their critical habitat. Even where exemptions are granted, the Committee must still establish "such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned."[209]

G. The National Environmental Policy Act

EO 14156 says nothing about any emergency provisions found in the National Environmental Policy Act (NEPA)[210] or in the (now-former) regulations implementing NEPA originally adopted in 1978 and later amended by the Council on Environmental Quality (CEQ). Nor does it say anything about a Department of Interior (DOI) NEPA regulation dealing with emergencies, 43 C.F.R. section 46.150.

The CEQ NEPA regulations formerly applied broadly across the federal government to all agencies. But CEQ removed those former regulations from Title 40 of the Code of Federal Regulations by action described in the Federal Register on February 25, 2025,[211] with wording corrections made in the March 19, 2025, edition.[212]

The basis for CEQ's removal of these NEPA regulations was the holding in *Marin Audubon Society* v. *Federal Aviation Administration*,[213] in which the Court of Appeals held that, because CEQ had promulgated the regulations at the direction of an Executive Order issued President Carter without any underlying *statutory* directive to do so, the regulations were not

[209] *Id*. § 1536(h)(1)(B).

[210] 42 U.S.C. § 4321 et seq.

[211] 90 Fed. Reg. 10610 – 10616 (Feb. 25, 2025).

[212] 90 Fed. Reg. 12690 (March 19, 2025).

[213] D.C. Cir. 2024) 121 F.4th 902.

"binding regulations."[214] The court explained that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by government departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes."[215]

The former CEQ NEPA regulations included 40 C.F.R. section 1506.11 (Emergencies). It said that "[w]here 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*. Other actions remain subject to NEPA review." (Italics added.) Notably, although former section 1506.11 did *not* define "emergency circumstances," its language was clear that such circumstances were assumed to create "immediate impacts."

As recently as December 30, 2024, in the waning days of the Biden Administration, CEQ had published guidance on this subject in the Federal Register.[216] As described therein, the concept of "emergency" was similar to those discussed above in 50 C.F.R. section 402.05 (Interagency Cooperation under the Endangered Species Act), 33 C.F.R. section 325.2(e)(4) (processing of Department of the Army Permits"), and 40 C.F.R. section 220.3(c) (ocean dumping permits issued by the Department of the Army and EPA).

This Biden Administration guidance noted that "CEQ has approved, and agencies have applied successfully, numerous alternative arrangements to allow a wide range of proposed actions in emergency circumstances including *natural disasters, catastrophic wildfires, threats to species and their habitat, economic crises, infectious disease outbreaks, potential dam failures, and insect infestations*."[217]

This guidance is no longer current, of course, as 40 C.F.R. section 1506.11 no longer exists. There are now no broadly applicable NEPA regulations authorizing CEQ to modify environmental review requirements under NEPA in emergencies.

Nor does the NEPA statute itself provide any such authority. Until recently, NEPA was a comparatively bare-bones statutory scheme complemented by very extensive CEQ regulations.

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[214] *Id*. at pp. 912-915.

[215] *Id*. at pp. 908-909, citing *Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 302.

[216] 89 Fed. Reg. 106448 (Dec. 24, 2024).

[217] *Ibid*., italics added. See also Alternative Arrangements Pursuant to 40 CFR Section 1506.11 – Emergencies (Updated May 2019) (https://ceq.doe.gov/docs/nepa-practice/Alternative_Arrangements_Chart_051419.pdf) (accessed on April 24, 2025).

But these regulations no longer exist, as just discussed. In recent years, additional statutes were added to NEPA under the concept of "Federal Permitting Improvement."[218] Even as amended with these new provisions, however, NEPA still contains no language authorizing Presidents to dispense with the Act's normal requirements in emergencies. The key feature of NEPA, which Congress has never revisited since 1970, remains the command in 42 U.S.C. section 4332 that federal agencies must prepare Environmental Impact Statement (EISs) for "major federal actions significantly affecting the human environment."

Although the former CEQ NEPA regulations applied across the entire federal government, some individual departments had adopted their own NEPA regulations, which remain on the books. One such set of remaining department-specific NEPA regulations is that found within 43 C.F.R. Part 46. These regulations were promulgated by DOI.[219]

43 C.F.R. section 46.150 addresses "Emergency responses." It is noteworthy and important in that, on April 23, 2025, just as this Monograph was nearing completion, DOI relied on this section when it announced that, for certain projects, DOI was "adopting an alternative National Environmental Policy Act compliance process to allow for more concise documents and a compressed timeline."[220] Qualifying projects are those that "seek to identify, lease, site, produce, transport, refine, or generate energy resources as defined in section 8(a) of EO 14156; and for which the project applicant(s) have submitted plans of operations, applications for permits to drill, or other applications."[221]

According to DOI, under these special NEPA procedures, "[p]rojects analyzed in an environmental assessment, normally taking up to one year, will now be reviewed within approximately 14 days"; and "[p]rojects requiring a full environmental impact statement, typically a two-year process, will be reviewed in roughly 28 days."[222]

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[218] See 42 U.S.C. §§ 4370m – 4370m-11.

[219] The logic of the *Marin County Audubon* decision may call into question the validity of these regulations, though they are still on the books.

[220] Department of the Interior Implements Emergency Permitting Procedures to Strengthen Domestic Energy Supply (https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic) (accessed on April 24, 2025).

[221] Alternative Arrangements for NEPA Compliance: Alternative Arrangements for Compliance with the National Environmental Policy Act amid the National Energy Emergency (https://www.doi.gov/sites/default/files/documents/2025-04/alternative-arrangements-nepa-during-national-energy-emergency-2025-04-23-signed_1.pdf) (accessed on April 24, 2025).

[222] Department of the Interior Implements Emergency Permitting Procedures to Strengthen Domestic Energy Supply (https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic) (accessed on April 24, 2025).

Similar to the previously discussed regulations promulgated under the Clean Water Act, the Endangered Species Act, and the Marine Protection Research and Sanctuaries Act, 43 C.F.R. section 46.150 assumes that "emergencies" are phenomena that create "immediate impacts" and require "urgently needed actions" in order "to mitigate harm to life, property, or important natural, cultural, or historic resources." The provision reads in full as follows:

> This section applies only 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 in accordance with the provisions in subparts D and E of this part.
>
> (a) The Responsible Official may take those actions *necessary to control the immediate impacts of the emergency that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources*. When taking such actions, the Responsible Official shall take into account the probable environmental consequences of these actions and mitigate foreseeable adverse environmental effects to the extent practical.
>
> (b) The Responsible Official shall document in writing the determination that an emergency exists and describe the responsive action(s) taken at the time the emergency exists. The form of that documentation is within the discretion of the Responsible Official.
>
> (c) If the Responsible Official determines that proposed actions taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are not likely to have significant environmental impacts, the Responsible Official shall document that determination in an environmental assessment and a finding of no significant impact prepared in accordance with this part, unless categorically excluded (see subpart C of this part). If the Responsible Official finds that the nature and scope of the subsequent actions related to the emergency require taking such proposed actions prior to completing an environmental assessment and a finding of no significant impact, the Responsible Official shall consult with the Office of Environmental Policy and Compliance about alternative arrangements for NEPA compliance. The Assistant Secretary, Policy Management and Budget or his/her designee may grant an alternative arrangement. Any alternative arrangement must be documented. Consultation with the Department must be coordinated through the appropriate bureau headquarters.
>
> (d) The Department shall consult with CEQ about alternative arrangements as soon as possible if the Responsible Official determines that proposed actions, taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are likely to have significant environmental impacts. The Responsible Official shall consult with appropriate bureau headquarters and the Department, about alternative arrangements as soon as the Responsible Official determines that the proposed action is likely to have a significant environmental effect. Such alternative arrangements will apply only to the proposed actions necessary to

control the immediate impacts of the emergency. Other proposed actions remain subject to NEPA analysis and documentation in accordance with this part.

As is the case with 50 C.F.R. section 402.05 (Interagency Cooperation under the Endangered Species Act), 33 C.F.R. section 325.2(e)(4) (processing of Department of the Army Permits"), and 40 C.F.R. section 220.3(c) (ocean dumping permits issued by the Department of the Army and EPA), 43 C.F.R. section 46.150 assumes that an "emergency" is phenomenon resulting in a short-term crisis requiring urgent action to mitigate harm to life, property, and vulnerable natural resources. The National Energy Emergency is not this kind of phenomenon. For that reason, DOI's action of late April 2025 creating alternative NEPA procedures for various energy projects is unlikely to survive a legal challenge.

In summary, the Trump Administration has eliminated a former CEQ NEPA regulation (40 C.F.R. section 1506.11), applicable to all federal agencies, that allowed CEQ to authorize some procedural shortcuts in "emergency circumstances." Though that key term was not defined, such circumstances were thought to generate "immediate impacts." Past Administrations, in guidance such as that published in December 2024, had interpreted "emergency circumstances" far more narrowly than the definition of "emergency" implicit in the National Energy Emergency declared in EO 14156.

NEPA itself contains no authority similar to what was found in former section 1506.11. Thus, the Trump Administration, despite its NEA-declared National Energy Emergency, can point to nothing in NEPA itself by which Congress has authorized Presidents, in emergencies, to dispense with the normal requirements created by the Act, including the preparation of EISs.

Nevertheless, DOI has recently relied on one of its own NEPA regulation, 43 C.F.R. section 46.150, in formulating expedited NEPA procedures in response to EO 14156. This provision remains on the books, but appears to have the same limited scope that the former CEQ regulation had. Thus, 43 C.F.R. section 46.150 does not appear to provide a legally sound basis for the Trump Administration's action in late April 2025 creating these very abbreviated NEPA requirements.

H. National Historic Preservation Act

As with NEPA, EO 14156 says nothing about any emergency provisions found in the National Historic Preservation Act ("NHPA")[223] or its implementing regulations. But because the requirements of the NHPA often apply to federal permitting decisions, this scheme is worth mentioning here.

[223] 54 U.S.C.A. § 300101 et seq.

The website for the Advisory Council on Historic Preservation (ACHP) summarizes the NHPA as follows:

> With passage of the National Historic Preservation Act (NHPA) in 1966, the federal government embarked on a new era of leadership in the preservation of our nation's historic properties.
>
> The NHPA established a partnership between the federal government and state, tribal, and local governments that is supported by federal funding for preservation activities. The National Park Service provides matching grants-in-aid from the Historic Preservation Fund to State Historic Preservation Officers, Tribal Historic Preservation Officers, and local governments certified as having qualified preservation programs. The NHPA also created the ACHP, the first and only federal agency created solely to address historic preservation issues.
>
> The NHPA established a framework to foster a new ethic through all levels and agencies of the federal government. Section 106 of the NHPA requires federal agencies to consider the impact of their actions on historic properties and provide the ACHP with an opportunity to comment on projects before implementation. Because of Section 106, agencies have to assume responsibility for the consequences of their actions on historic properties and be publicly accountable for their decisions. Section 110 calls on all federal agencies to establish preservation programs and designate Federal Preservation Officers to coordinate their historic preservation activities.
>
> The NHPA has been amended and expanded a number of times since its original passage. In 2014, Public Law 13-287 moved the Act's provisions from title 16 of the United States Code to title 54, with minimal and non-substantive changes to the text of the Act and a re-ordering of some of its provisions.[224]

The subject of "Emergency situations" is addressed in 36 C.F.R. section 812. Subdivision (a) states that "[t]he agency official, in consultation with the appropriate [state historic preservation officers or tribal historic preservation officers], affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to *a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property*." (Italics added.)

Subdivision (b) provides as follows:

> (b) Alternatives to agency procedures. In the event an agency official proposes an emergency undertaking *as an essential and immediate response to a disaster or emergency declared by the President*, a tribal government, or the Governor of a

[224] https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act (accessed on April 24, 2025).

State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

> (1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or
>
> (2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.[225]

Although this regulation does not define "emergency," the language italicized above suggests that what the authors of the regulation had in mind were traditional short-term emergencies requiring "immediate response[s]" to avoid or minimize "immediate threats to life or property." As with the other regulations discussed in the preceding three subsections of this Monograph, any attempt by the Trump Administration to dispense with the normal procedures of the NHPA in order to address the National Energy Emergency would be trying to pound a square peg into a round hole.

On April 23, 2025, just as this Monograph was nearing completion, DOI relied on 36 C.F.R. section 812 when it announced that, for certain categories of energy projects, DOI was adopting "alternative procedures for compliance with Section 106 of the National Historic Preservation Act[.]"[226] Qualifying projects are those that "seek to identify, lease, site, produce, transport, refine, or generate energy resources as defined in section 8(a) of EO 14156; and for which the project applicant(s) have submitted plans of operations, applications for permits to drill, or other applications." [227] According to the DOI, "[b]ureaus will follow alternative procedures for compliance with Section 106 of the National Historic Preservation Act for proposed undertakings responding to the energy emergency, which include notifying the

[225] Italics added.

[226] Department of the Interior Implements Emergency Permitting Procedures to Strengthen Domestic Energy Supply (https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic) (accessed on April 24, 2025).

[227] Emergency Process for Section 106 Compliance: Using the Emergency Provisions to Comply with Section 106 of the National Historic Preservation Act in Response to the National Energy Emergency (https://www.doi.gov/sites/default/files/documents/2025-04/alternative-procedures-section-106-compliance-2025-04-23-signed_1.pdf) (accessed on April 24, 2025).

Advisory Council on Historic Preservation, State and Tribal Historic Preservation Officers, and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected by a proposed undertaking and affording them an opportunity to comment within seven days of the notification. Following that notification and comment period, the appropriate bureau will take into account any comments received and then decide whether to approve the proposed undertaking."[228]

For reasons discussed above – namely, that the National Energy Emergency seems far too broad to come within the narrower concept of emergency used in section 812 – DOI's action of late April 2025 creating alternative procedures for complying with section 106 of the NHPA for various energy projects is unlikely to survive a legal challenge.

I. 10 U.S.C. Section 2808 (Construction authority in the event of a declaration of war or national emergency)

Section 7(a) of Executive Order 14156 directs the Secretary of Defense, in collaboration with the Secretaries of Interior and Energy, to assess the Department of Defense's ability to acquire and transport the energy, electricity, or fuels needed to protect the homeland and to conduct operations abroad. "The assessment shall identify specific vulnerabilities, including, but not limited to, potentially insufficient transportation and refining infrastructure across the Nation, with a focus on such vulnerabilities within the Northeast and West Coast regions of the United States. The assessment shall also identify and recommend the requisite authorities and resources to remedy such vulnerabilities, consistent with applicable law." [229]

Section 7(b) of the EO, citing the NEA, invokes section 2808 of title 10 of the United States Code and makes its authority available to the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, for the purpose of "address[ing] any vulnerabilities identified in the assessment mandated by subsection (a). Any such recommended actions shall be submitted to the President for review, through the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy."

Read together, Sections 7(a) and 7(b) purport to authorize the U.S. Army to employ the emergency authority available under 10 U.S.C. section 2808 to address any vulnerabilities to the

[228] Department of the Interior Implements Emergency Permitting Procedures to Strengthen Domestic Energy Supply (https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic) (accessed on April 24, 2025).

[229] Exec. Order No. 14156, § 7(a), 90 Fed. Reg. 8433 (Jan. 20, 2025).

transportation and refining infrastructure needed by the Department of Defense (especially on the West Coast and in the Northeast) to acquire and transport the energy, electricity, or fuels needed to protect the homeland and to conduct operations abroad.

Whether this aspect of EC 14156 will prove to be lawful in practice will depend on the nature of the specific actions the Army attempts to undertake and whether such actions occur on military land or on private property. The authority available under 10 U.S.C. section 2808 has clear limits.

Subsection (a) of that statute provides that, "[i]n the event of a declaration of war *or the declaration by the President of a national emergency in accordance with the National Emergencies Act … that requires use of the armed forces*, the Secretary of Defense, *without regard to any other provision of law*, may undertake *military construction projects*, and may authorize the Secretaries of the military departments to undertake *military construction projects*, not otherwise authorized by law that are *necessary* to support such use of the armed forces."[230]

As the italicized language indicates, section 2808 provides that, where a NEA-declared emergency "requires the use of the armed forces," the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force may "undertake military construction projects" without regard for what would normally be applicable laws (including environmental laws). The motivation behind Section 7 of the EO may be to allow the U.S. Army (as opposed to private actors) to undertake physical work addressing vulnerabilities to transportation and refining infrastructure (particularly on the West Coast and in the Northeast) without having to comply with normally applicable laws, such as various environmental laws.

Whether section 2808 may be employed for such physical work depends on (i) whether the National Energy Emergency "requires the use of the armed forces"; (ii) whether projects fixing vulnerabilities to "transportation and refining infrastructure" for "energy, electricity, or fuels" would be "military construction projects"; and (iii) whether such projects "are necessary to support … use of the armed forces."

The most easily answered of these questions may be whether the Army's work on "transportation and refining infrastructure" for "energy, electricity, or fuels" would qualify as "military construction projects." Based on the statutory definition of the latter term, the answer appears to be no – unless such projects are located on military lands or have some other clear nexus to "military installations."

Section 2801(a) of 10 U.S.C. states that "[t]he term 'military construction' as used in this chapter or any other provision of law includes any construction, development, conversion, or

[230] 10 U.S.C. § 2808(a), italics added.

extension of any kind carried out *with respect to a military installation*, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road[.]" (Italics added.)

In turn, section 2801(c)(4) defines "military installation" as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control."

Unfortunately, these two definitions – of "military construction" and "military installation" – each include a term whose meaning is not entirely clear. In the definition of "military installation" in section 2801(c)(4), the meanings of the words "base, camp, post, station, yard, [and] center" seem straightforward and clear. These are military facilities of known attributes. For purposes of EO 14156, it seems obvious that work done by the Army on energy refining or transportation infrastructure located outside military facilities would *not* qualify as work carried out with respect to "a base, camp, post, station, yard, [or] center[.]"

Less clear is the meaning of the phrase "other *activity* under the jurisdiction of the Secretary of a military department," as the phrase appears in section 2801(c)(4). (Italics added.) As a matter of legislative drafting, the use here of the word "activity" following a list of physical facilities seems odd. "[I]nstallations" (which are things) normally do not consist of component "activities" (which are not things). Rather, installations normally consist of component physical structures or open land areas. But because the reference to "other activity" comes within the definition of "military installation," any qualifying "activity" presumably must have something to do with some type of military structure or land subject to military jurisdiction.

The other unclear term in the two definitions is the word "includes," as it appears in the definition of "military construction" in section 2801(a). The word "includes" introduces a list of activities "carried out with respect to a military installation" (namely, "construction, development, conversion, or extension of any kind carried out with respect to a military installation"). Although the use here of the word "includes" may imply that this list of activities is not intended to be all-inclusive, the term nevertheless seems to have limited elasticity, for reasons discussed below.

In *Fischer v. United States*,[231] the Supreme Court resolved an interpretive issue similar to the one raised by the word "includes" as it appears in section 2801(a). That case required the Court to interpret a component of the Sarbanes-Oxley Act of 2002 that the Department of Justice had invoked against certain defendants who had entered into the United States Capitol

[231] (2024) 603 U.S. 480.

during demonstrations on January 6, 2021. The specific statutory language at issue is found in 18 U.S.C. § 1512(c), which consists of two parts. As the Court explained, the first subsection "imposes criminal liability on anyone who corruptly 'alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding.' 18 U.S.C. § 1512(c)(1). The next subsection extends that prohibition to anyone who *'otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so.' § 1512(c)(2). We consider whether this '*otherwise*' clause should be read in light of the *limited reach* of the specific provision that precedes it."[232]

In answering this question in the affirmative, the court noted that "[t]he purpose of the 'otherwise' clause is … to cover some set of 'matters not specifically contemplated' by (c)(1)."[233] The Justice Department favored a broad interpretation, by which illegally entering into the Capitol was an action that "obstructs . . . an[] official proceeding, or attempts to do so." One of the charged defendants, Joseph Fischer, argued for a much narrower reading, by which the "otherwise" language in subsection (c)(2) referred only to activities *similar in kind* to the specific examples of prohibited activities set forth in subsection (c)(1), all of which involved some sort of evidence tampering.

The Court sided with Mr. Fischer, holding that "subsection (c)(2) was designed by Congress to capture other forms of evidence and other means of impairing its integrity or availability beyond those Congress specified in (c)(1)."[234] In other words, violations covered by subsection (c)(2) had to be similar in kind to those specifically identified in subsection (c)(1). It would have been very odd for Congress to have legislated specifically with respect to a very narrow range of conduct, as set forth in subsection (c)(1), and then to have included, immediately thereafter in subsection (c)(2), "catch-all language" capturing a far larger universe of activities.

Here, by analogy, Congress very likely did not intend its use of the word "includes," as used in 10 U.S.C. section 2801(a), to allow the term "military construction" to include activities that are not even remotely similar to the general description provided for the term, which was expressly limited to work done with respect to "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department with respect to a military installation[.]"

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[232] *Id*. at p. 483, italics added.

[233] *Id*. at p. 486.

[234] *Id*. at p. 492.

EO 14156, however, appears to be premised on an understanding of the term "military construction" so broad that it covers activities having nothing whatever to do with "military installations." In fact, the EO appears to contemplate having the Army conduct physical work with respect to facilities such as oil and gas pipelines covering large swaths of private property.

As the Supreme Court said in *Biden v. Nebraska* in striking down, under the "major questions doctrine," the former President's attempt to use a declared emergency relating to the COVID 19 pandemic as a basis for forgiving student loan debt in the absence of any clear Congressional authorization, "[a] decision of such magnitude and consequence on a matter of earnest and profound debate across the country must res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[235]

The location of section 2808 within Title 10 of the US Code also militates against an overly broad interpretation of the term "military construction." Sections 2801 and 2808 are found within Subchapter 1 (Military Construction) of Chapter 169 (Military Construction and Military Family Housing) of Part IV (Service, Supply, and Property) of Subtitle A (General Military Law) of Title 10 (Armed Forces). If Congress intended to give the President emergency authority to order the Army to do work on private oil and gas facilities in violation of normally applicable environmental laws, Congress likely would not have placed that broad authority within a corner of the U.S. Code ostensibly focused only on "military construction."

Further illumination on this issue, and on other issues arising under section 2808, can be discerned from the very limited case law interpreting the statute, most of which arose out of President Trump's invocation of section 2808 in connection with another "emergency" he declared during his first term. Many of these cases are not citable as precedent, as explained below. But they are suggestive of how future courts might resolve similar issues arising in connection with EO 15146.

On February 14, 2019, President Trump invoked his authority under the NEA to declare that "a national emergency exists at the southern border of the United States." [236] On September 3, 2019, the Secretary of Defense announced the diversion of $3.6 billion in funds appropriated by Congress for military construction projects for use instead for border wall construction projects in California, Arizona, New Mexico, and Texas.[237] On September 5, 2019,

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[235] *Biden v. Nebraska* (2023) 600 U.S. 477, 504, quoting *West Virginia v. EPA* (2022) 597 U. S. 697, 735, internal quotation marks omitted.

[236] Pres. Proc. No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); *Sierra Club v. Trump* (9th Cir. 2020) 977 F.3d 853, 862 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56).

[237] *Sierra Club v. Trump*, *supra*, 977 F.3d at p. 862.

the Secretary, pursuant to section 2808, authorized construction work on these wall projects without the need for compliance with environmental laws.[238]

In response, several states and organizations brought lawsuits, in which they asserted, in part, that section 2808 did not authorize the funding and construction of the border wall projects.[239] These cases provide some guidance as to how courts might view the directives found in Section 7 of EO 14156.

Despite the Trump Administration's arguments that its actions under section 2808 were not subject to judicial review at all because they required "inescapably discretionary judgment," several courts held otherwise.[240] For instance, the D.C. District Court held that there were several "statutory reference points" to guide judicial review, stating that "the Court can objectively determine whether the Defense Secretary is using funds from § 2808 to engage in 'military construction' and whether that construction supports the use of the armed forces."[241] The court recognized some limits to the scope of its review, however, stating that "the statute lacks *judicially manageable* standards to determine whether the military construction is 'necessary.' That decision crosses the line into military policy, since review of that decision 'would necessarily involve second guessing the Secretary's assessment of ... the military value' of the military construction."[242]

In *Sierra Club v. Trump*, the Ninth Circuit came to similar conclusions, but found that the question of whether the construction was "necessary" was in fact justiciable.[243] Although the court's opinion was later vacated by the Supreme Court after President Biden terminated

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[238] *Id*. at p. 863.

[239] See *Sierra Club v. Trump*, *supra*, 977 F.3d 853 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56); *El Paso County, Texas v. Trump* (5th Cir. 2020) 982 F.3d 332; *Center for Biological Diversity v. Trump* (D.D.C. 2020) 453 F.Supp.3d 11; *Washinton v. Trump* (W.D.Wash. 2020) 441 F.Supp.3d 1101; and *California v. Trump* (N.D. Cal. 2019) 407 F.Supp.3d 869 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56).

[240] *Center for Biological Diversity v. Trump* (D.D.C. 2020) 453 F.Supp.3d 11, 37; *Sierra Club v. Trump* (9th Cir. 2020) 977 F.3d 853 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56).

[241] *Center for Biological Diversity v. Trump*, 453 F.Supp.3d at p. 37; see also *Washington v. Trump* (W.D.Wash 2020) 441 F.Supp.3d 1101, 1124–1125 (finding Washington's claims justiciable because they were "questioning whether the eleven border barrier projects meet the definition of 'military construction' set forth in § 2801. Such statutory interpretation is well within the domain of this Court").

[242] *Center for Biological Diversity v. Trump*, 453 F.Supp.3d at p. 38.

[243] *Sierra Club v. Trump*, *supra*, 977 F.3d at pp. 879–883 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56).

President Trump's emergency,[244] thereby rendering the opinion uncitable as precedent, the court's reasoning remains interesting and potentially indicative of what future courts might hold in dealing with issues that could arise under Section 7 of EO 14156. This Monograph therefore discusses the Ninth Circuit opinion in detail below.

In *Sierra Club v. Trump*, the court held that the work done by the Department of Defense on eleven border wall construction projects was unlawful because the statutory requirements of section 2808 were not satisfied. First, the wall was neither intended to support the armed forces nor necessary to support them.[245] Rather, the court held, the border wall projects were intended to support civilian agencies such as the Department of Homeland Security (DHS) and Border Patrol, not the armed forces.[246] Because the DHS is not a part of the armed forces, the wall projects did not support the armed forces.

Second, the Ninth Circuit concluded that, although the border wall projects provided increased efficiency and effectiveness, these benefits did not make the projects "necessary" within the meaning of section 2808.[247] The court interpreted the term "necessary" to mean something "required" or "needed."[248] President Trump's EO stated that the purpose of the border wall was to increase efficiency, not that the wall was required.[249] In support of its conclusion, the court pointed to the fact that Congress had declined to fund the border wall and had voted twice to terminate President Trump's declaration of a national emergency.[250] The

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[244] Rather than address the merits of the issues raised in lower court decisions dealing with President Trump's border wall emergency, the Supreme Court granted the new Administration's Motion to Vacate and Remand in Light of Changed Circumstances. (2021 WL 2458459.) In that Motion, the Biden Administration argued that "[b]ecause DoD has unequivocally announced that the challenged funds will not be used for any further construction at the specified border-wall sites, there is no need for this Court to address the questions presented at this time and in the present posture. Because of the changed circumstances, the equitable relief that the district court previously entered and that the court of appeals affirmed – namely, a declaration that the government's 'intended' use of the transferred funds for certain border-wall construction projects is unlawful, and a permanent injunction against engaging in that construction using those funds, … is no longer appropriate. And the close-out and remediation measures provided for in [the Department of Homeland Services's] plan may fundamentally alter whatever disputes remain between the parties. At a minimum, the lower courts should address the impact of the changed circumstances on the issues presented in this case before those issues would warrant this Court's review." (*Id.* at p. *3.)

[245] *Sierra Club v. Trump*, *supra*, 977 F.3d at pp. 879–883 (cert. granted, judgment vacated sub nom. *Biden v. Sierra Club* (2021) 142 S.Ct. 56).

[246] *Ibid.*

[247] *Ibid.*

[248] *Id*. at p. 881.

[249] *Id*. at p. 883.

[250] *Id*. at p. 881.

court reasoned that, if these border wall projects had truly been necessary, Congress would not have voted against funding them.[251]

Next, the court determined that the border wall projects were not "military construction projects" as required by section 2808.[252] The Trump Administration made two, alternative arguments in claiming (unsuccessfully) that the border wall projects were military construction projects. First, the Administration claimed that the land on which construction would be occurring had been "brought under military jurisdiction and assigned to a military installation—Fort Bliss in El Paso, Texas."[253] Alternatively, the Administration argued that, "because the projects ha[d] been brought under military jurisdiction," the wall projects qualified as "other activity under the jurisdiction of the Secretary of a military department," as that phrase appears in the definition of "military installation" found section 2801(c)(4).[254]

The court rejected both of these arguments. As to the first, the court found that the projects did not qualify as "military construction" because they were not physically connected to Fort Bliss, but rather were mostly occurring hundreds of miles away from Fort Bliss.[255] Nor were the projects functionally part of Fort Bliss. "The Federal Defendants cite no operational ties between the projects and any of the military activities conducted at Fort Bliss."[256] "For example, the Federal Defendants highlight that the Green River Test Complex site in Utah is considered part of the White Sands Missile Range in New Mexico, even though the two are in different states and located hundreds of miles apart. But these sites share a close functional connection. Throughout the 1960s, the military tested Athena missiles by launching them from the Green River Test Complex to detonate on the White Sands Missile Range."[257] But, in contrast, "[n]o such functional nexus exists, or has even been alleged, here." [258]

As noted above, the court also rejected the second alternative argument, by which the border wall projects were purported examples of "other activit[ies] under the jurisdiction of the Secretary of a military department" within the meaning of the definition of "military

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[251] *Ibid.*

[252] *Id.* at p. 884.

[253] *Id*. at p. 883.

[254] *Ibid*.

[255] *Id.* at p. 884.

[256] *Ibid.*

[257] *Ibid.*

[258] *Ibid.*

installation" found in 10 U.S.C. section 2801(c)(4). In doing so, the court reasoned that "[t]he terms 'base, camp, post, station, yard, [or] center' supply meaning and provide boundaries to the term 'other activity,' and they are not mere surplusage."[259] "The Federal Defendants do not explain how the border wall construction projects are similar to bases, camps, posts, stations, yards, or centers, and we find that they are not." [260]

The court's conclusions mainly derive from the plain language of section 2808(a) and the definitions found in section 2801. The key terms and phrases are the following:

- "requires use of the armed forces";
- "military construction projects";
- "military installation"; and
- "necessary to support such use of the armed forces."

The court's reasoning could be used to formulate strong arguments that, notwithstanding Section 7 of EO 14156, section 2808 does *not* provide authority for the Army to perform physical work on projects such as privately owned oil and gas pipelines or coal-carrying private railroad tracks running across private land, at least where such private facilities are not located close to military facilities and do not supply such facilities. Such construction activities would *not* seem to qualify as "military construction"; and they would not appear to be "necessary to support … use of the armed forces." Recall that, where section 2808 does properly apply, the Army can proceed with its work "without regard to any other provision of law" (such as environmental laws) – an outcome that is presumably disfavored as a general policy matter.

Nor is it by any means clear that the National Energy Emergency is the kind of emergency that "*requires* the use of the armed forces[.]" Rather, given that oil, gas, and coal production is generally the result of primarily private activities conducted by private parties (though typically with some sort of governmental authorization such as permits), this particular "emergency" is one that seems to require mainly a private sector response. To the extent that help from the federal government may be required to foster more such private activity, it is by no means clear that the Armed Forces of the United States, acting at the direction of the President, are the logical federal governmental entities to provide such support. Indeed, to the extent that existing environmental laws are impeding additional fossil fuel production and transportation, Congress is the logical federal governmental body to address this problem, if indeed it is a problem. The policy question of how to balance economic benefits against environmental impacts is a quintessentially legislative question.

[259] *Id.* at p. 885.

[260] *Id.* at p. 886.

CONCLUSION

Through EO 14156, issued on the day of his second inauguration, President Trump declared a National Energy Emergency, using authority delegated by Congress to the President of the United States through the National Emergencies Act (NEA). He took this action despite the fact that, on the day he issued the EO, the United States was the world's leading producer of oil and natural gas. Among the stated goals of the EO were to enhance America's "energy security" and to increase the country's "potential to use its unrealized energy resources domestically, and to sell to international allies and partners a reliable, diversified, and affordable supply of energy."

The EO defines "energy" and "energy resources" to mean "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[.]." Notably absent from this definition are references to solar and wind power, neither of which directly generate greenhouse gases.

The EO, then, represents an Executive Branch commitment to increased fossil fuel use and production and a movement away from prior federal policies intended to deal head-on with the scientific reality that fossil fuel combustion is a major contributor to climate change. Whereas the Biden Administration developed policies, and signed legislation, intended to facilitate the production of renewable energy, the second Trump Administration has demonstrated its overt hostility to such carbon-free energy. Under EO 14156, as it seems intended to function, increased fossil fuel production would be enhanced by, among other things, the weakening of environmental controls over oil, gas, and coal extraction and transportation.

Although the actual declaration of a National Energy Emergency appears to be a nonjusticiable "political question" that cannot be challenged in court on its merits, opportunities for meritorious legal challenges to Administration actions are likely to arise as EO 14156 is implemented over time.

Notably, the United States Supreme Court did not hesitate to invalidate actions taken by President Biden pursuant to an Executive Order he issued in response to a declared emergency involving the COVID-19 pandemic. In *Biden v. Nebraska*, the Court set aside an EO granting forgiveness of student loan debt, something that the Court concluded was not authorized by the operative statute, the HEROES Act. After invoking the "major questions doctrine," the Court concluded that President Biden's action granting loan forgiveness was an example of "the Executive seizing the power of the Legislature."

As EO 14156 is implemented over time, reviewing courts might reach the same conclusion with respect to particular actions taken by the Trump Administration to dispense with normal environmental controls in connection with oil, gas, and coal projects. Although Congress, through the NEA, has authorized the President to declare emergencies under that statute, Congress did not thereby authorize the President to ignore the fact that, in other federal statutes and regulations dealing with "emergencies," the term "emergency" might be defined too narrowly to encompass every emergency declared by every President.

Nor does the NEA give the President the power to simply ignore the express requirements of federal statutes and regulations. If a President believes that such requirements are too unwieldy or take too much time and effort to satisfy, the President is free to recommend to Congress that it pass new laws to streamline, or even abrogate, such requirements. The President, however, cannot effectively rewrite laws or ignore them simply because he does not like them.

As the Supreme Court emphasized in *Youngstown Sheet & Tube Co. v. Sawyer*,[261] "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States[.]'"[262]

Occupants of the White House have an obvious temptation to declare "emergencies" when no true emergencies exist in order to try to gain access to emergency powers found in various statutes. In the view of the authors of this Monograph, Presidents should not be rewarded for stretching the concept of "emergency" far beyond its normally understood meaning. Where the majorities in Congress, for whatever reasons, choose not to challenge a President, the Judiciary becomes the only branch of the American federal government that can check a President inclined to declare dubious emergencies as a strategy for enlarging Executive power.

Politicians have long used emergencies, real or imagined, to try to consolidate and expand their power. In the Roman Republic, "the dictatorship [was] usually regarded as 'a temporary revival of the monarchy used in times of emergency' as it effectively concentrated the whole power of the state in a single person. Unlike the consuls, the dictator could make decisions that remained unchecked by any other office of government – neither by some fellow

[261] 343 U.S. 579 (1952).

[262] *Id*. at pp. 587-588.

magistrate, nor by any political institution such as the senate or the popular assembly."[263] To protect the Republic, the dictator, "a sort of super consul," was entrusted with power for only a very limited amount of time, six months.[264] The Republic had died by the time Julius Caesar became dictator for life.[265]

[263] Lukas van den Berge, *Roman Dictatorship: Emergency Government and the Limits of Legality Towards a Janus-Faced Approach to Legal History* (van den Berge) (2023) Utrecht University School of Law Research Papers (Working paper), p. 5.

[264] Robert J. Bonner, *Emergency Government in Rome and Athens* (Dec. 1922), The Classical Journal, Vol. 18, No. 3, p. 144, 145.

[265] van den Berge, *supra*, at pp. 6-7.