

# Rebuild Stronger: Removing Federal Red Tape to Unleash Investment and Empower Our Country to Build

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In implementing President Trump's [Executive Order on Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities](#), federal agencies are tasked with reviewing "all statutes, regulations, and guidance documents that may provide for emergency or expedited treatment (including waivers, exemptions, or other streamlining) with regard to agency actions pertinent to infrastructure, energy, environmental, or natural resources matters," reporting to the White House, and using "such statutes and regulations to the fullest extent permitted to facilitate the Nation's economic recovery."

Along with [Executive Order 13924 on Regulatory Relief to Support Economic Recovery](#), this order illustrates how in the same way we removed barriers that inhibited pandemic response by health care professionals, businesses, workers, government employees, and innovators, we can remove barriers that can unnecessarily inhibit a stronger economic recovery as our country starts to reopen for business. These rules are often outdated and overly burdensome, with a disproportionate burden for small business owners and regressive impacts on the most vulnerable Americans. Decades of regulatory accumulation, with unnecessary or duplicative rules and requirements piling one on top of the other without any meaningful review of their impact or efficacy, can undermine economic growth and result in unintended consequences. Beneath that weight, our regulatory system is often not sufficiently nimble to anticipate or respond to crises. To their credit, federal agencies have rescinded, suspended, and fast-tracked hundreds of rules to fight the disease as well provide flexibility to American businesses, workers, and innovators to deliver essential goods and services. These orders constitute a starting gun for these agencies to redouble these efforts and think more broadly about removing barriers to a stronger economic recovery. As a [recent essay](#) put it, building things – whether skyscrapers, wind turbines, roads, bridges, apartments, schools, ventilators, or hospital beds – is "how we reboot the American dream" after COVID-19.

There are a number of barriers for individual employers and workers finding ways to contribute to federal infrastructure and recovery projects and this red tape often includes lengthy reviews by regulatory agencies. When federal dollars or approval are involved, these regulatory hurdles can stop projects altogether through endless delays, years of litigation, and thousands of pages of paperwork. These reviews can [add a decade or more to key construction projects](#) and, according to [estimates](#) from the Texas A&M Transportation Institute, contribute between \$87,000 and \$1.3 million of cost for every month of delay, depending on the size of the project. A [recent study](#) from scholars at Brookings Institution found that these federal reviews and red tape, along with accompanying citizen lawsuits, are a major reason why the cost of building one mile of interstate highway tripled, after adjusting for inflation, between the 1960s and 1980s. These federal requirements, while well-intentioned, can needlessly hold up important projects, from hospitals to repairs of road and bridges to renewable energy generation to manufacturing facilities for critical products, that would result in health, environmental, and safety progress.

The often-superfluous restrictions identified here could be removed immediately by the administration, but we strongly encourage legislative action to ensure that regulatory reforms are permanent and legally durable. AFP recently released its COVID-19 regulatory [recommendations](#) for Congress, including removing barriers to jumpstart the economy, making regulatory changes permanent, seeking additional feedback on regulations, expanding legislative accountability for regulations, reforming administrative procedures and the deregulatory process, sunseting regulations, and codifying a red tape reduction

program. We also outlined a starting point for lawmakers to build a stronger post-COVID economy in [Recover Stronger: A Starting Point to Build An Economy that Works for All](#).

While the order specifically discusses the National Environmental Policy Act, Endangered Species Act, and Clean Water Act, there are several statutes, orders, and regulations with explicit emergency or waiver provisions that should be immediately invoked to unleash economic recovery and critical infrastructure projects:

## DAVIS-BACON PREVAILING WAGE REQUIREMENTS

The Davis-Bacon Act mandates that workers on all federally funded or federally assisted construction projects be paid no less than the “prevailing wages” in the area in which the project is located, effectively requiring that federal projects use union-wage and benefit scales and follow union work rules. These rules [inflate](#) federal construction costs by nearly 10 percent and the Congressional Budget Office [found](#) that eliminating this requirement would save taxpayers approximately \$13 billion. Without these requirements, wages would still be competitive and this outdated mandate prevents participation on federal projects by the [87 percent](#) of construction workers who choose not to be members of a union.

- Emergency / Waiver Provisions: 40 U.S.C. § 3147 (“The President may suspend the provisions of this subchapter during a national emergency.”)
- Precedents: [September – November 2005](#)

## NATIONAL HISTORIC PRESERVATION ACT REVIEWS

Section 106 of the National Historic Preservation Act requires that agencies using federal funds must consider the effects of their projects on historic properties. These reviews [create significant delays and repetition](#) with few preservation benefits, and have often [prevented streamlined, concurrent reviews](#) across agencies.

- Emergency / Waiver Provisions: 36 CFR § 78.3(a), providing that, in an emergency, a federal agency head may waive responsibilities.

## PROJECT LABOR AGREEMENTS

Project Labor Agreements (PLAs), which the Obama Administration’s Executive Order 13502 strongly encouraged federal agencies to use for construction projects, require the primary contractor for government contracts sign a collective bargaining agreement as a condition of winning a project bid. PLAs [can inflate](#) construction costs by 12 percent to 18 percent.

- Emergency / Waiver Provisions: The president has the authority to rescind Executive Order 13502 and implementing regulations under the Federal Acquisition Regulations System (48 CFR § 2-52). Alternatively, the administration could determine that use of project labor agreements will not “advance the Federal Government’s interest in achieving economy and efficiency in Federal procurement” under section 3(a) of the order.

## NATIONAL ENVIRONMENTAL PROTECTION ACT (NEPA)

NEPA requires federal agencies to consider, review, and consult other agencies regarding the environmental effects of their proposals and actions in federal-aid project delivery. NEPA rules affect everything from road construction, to energy development, to fire reduction on dangerously overstocked forest lands, to clean water storage and delivery projects. This antiquated law has served to slow the completion of projects, increased costs to taxpayers, and contributed to endless administrative appeals and litigation that subject too many projects to death-by-delay. It currently [takes an average](#) of five-to-seven years to finish the environmental review process for a federal-aid project, such as a highway. Pursuing alternative NEPA arrangement would have minimal environmental consequences. These reviews often hold up environmentally beneficial projects, from offshore wind turbines for greater energy diversity to highway projects to reduce congestion and attendant pollution. The overly broad and outdated mandate of NEPA does not include a comparison of costs and benefits, and it ignores dozens of other state and federal regulations which ensure environmental protection with or without the lengthy NEPA process. In addition, previous “categorical exclusion” waivers from NEPA demonstrate that a streamlined process will have a negligible impact on environmental outcomes. These waivers were granted by the Obama Administration for [more than 95](#)

percent of the 190,000-plus projects funded under the American Recovery and Reinvestment Act as well as for the bulk of state transportation programs.

- Emergency / Waiver Provisions: Council on Environmental Quality (CEQ) Regulations, 40 CFR § 1506.11, which provides that where emergency circumstances necessitate taking action without observing the provisions of NEPA regulations, the federal agency taking the action should consult with CEQ regarding alternative arrangements.
- Precedents: [American Recovery and Reinvestment Act Projects](#)

## JONES ACT

The Jones Act prohibits the transportation of cargo between points in the U.S. unless it is U.S.-built, U.S.-flagged, and at least 75% U.S.-crewed. This requirement hinders maritime trade during pandemic response and more than doubles the costs of shipping goods to and from Puerto Rico.

- Emergency / Waiver Provisions: 46 U.S.C. § 501 allows for the head of an agency “responsible for the administration of the navigation or vessel inspection laws shall waive compliance with those laws to the extent the Secretary [of Defense] considers necessary in the interest of national defense.”
- Precedents: [September 2017](#)

## RENEWABLE FUEL STANDARD (RFS)

The RFS requires transportation fuel sold in the U.S. to contain a minimum volume of renewable fuels. The RFS originated with the Energy Policy Act of 2005 and was expanded and extended by the Energy Independence and Security Act of 2007 (EISA), and it is implemented on an annual basis by U.S. EPA. The RFS mandates consumer demand for politically connected biofuel companies at the expense of hard-working Americans and the environment. Required 2020 RFS volumes will dramatically exceed consumer demand for biofuels, well above 10 percent of gasoline, resulting in greater compliance costs, skyrocketing prices for credits, and bureaucratic nightmares.

- Emergency / Waiver Provisions: 42 U.S.C. §7545(o)(7)(A), which provides that the EPA Administrator can waive RFS volumes if they find that there is inadequate domestic supply or that implementation of the RFS would severely harm the economy or environment of a state, a region, or the United States.

## EXECUTIVE ORDER 11988 - FLOODPLAIN MANAGEMENT REVIEWS

This order requires all construction of federal or federally aided buildings, structures, roads, or facilities, which encroach upon or affect the base floodplain, to assess hazards and address significant encroachments.

- Emergency / Waiver Provisions: 42 FR 26951 – Section 8 of the order clarifies that the provisions do not apply to certain assistance and emergency work.

## U.S. DEPARTMENT OF TRANSPORTATION NOISE STANDARDS

Standards require federally funded highway construction projects to analyze noise impact and mitigation measures and incorporate noise abatement measures.

- Emergency / Waiver Provisions: 23 CFR § 772 allows for the classification of Type III projects not subject to these noise standards.

## FEDERAL COMMUNICATIONS COMMISSION LICENSES AND CONSTRUCTION PERMITS

Under the Communications Act of 1934, the FCC regulates wire and radio communications service, including approval, modification, and renewals of construction permits and station licenses. COVID-19 has dramatically expanded challenges and altered demand for broadband and broadcast networks, with potential strains on American internet networks.

- Emergency / Waiver Provisions: Under 47 U.S.C. § 308, the FCC may grant, modify, or renewals of construction permits and station licenses, including without a formal application, if a national emergency has been declared by the president, the Commission finds that certain emergency conditions exist, or it is not feasible for licensees to follow normal procedures.

## U.S. DEPARTMENT OF TRANSPORTATION WILDFLOWER HIGHWAY LANDSCAPING REQUIREMENTS

Requires that a portion of any landscaping project undertaken on the federal-aid highway system be used on planting native wildflowers.

- Emergency / Waiver Provisions: 23 CFR § 752 provides for exceptions to these landscape and roadside development requirements.

## CLEAN WATER ACT

Section 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act of March 3, 1899, and section 103 of the Marine Protection Research and Sanctuaries Act of 1972 provide certain requirements for regulations and nationwide permits overseen by the Army Corps of Engineers and U.S. EPA. For projects, these requirements may include permits for dredging, bridges, dredge or fill material, and any discharges into certain waters, as well as water quality certification and reviews to ensure consistency with State Non-Point Source Pollution Management Program.

- Emergency / Waiver Provisions: 33 U.S.C. § 1321(a)(12); 33 C.F.R. § 325.2(e)(4); and 33 C.F.R. § 337.7 outline waiver provisions related to acts of God or war, emergencies that require expedited procedures for the processing of permit applications by the Corps of Engineers, and emergencies requiring expedited direct action by the Corps of Engineers

## CLEAN AIR ACT

Interaction with the Clean Air Act can trigger a variety of review and preconstruction requirements. For example, transportation conformity is required by the Clean Air Act to ensure that federal funding and approval are given to highway and transit projects that are consistent with state air quality implementation plans. In addition, grandfathered requirements in the Act, including elaborate and confusing restrictions on “new sources” that extend to certain modifications, can discourage building new factories and other facilities (even when these projects would improve air quality on the whole).

- Emergency / Waiver Provisions: 42 U.S.C. § 7412(i)(4); 42 U.S.C. § 7418(b); and 42 U.S.C. § 7606(d) allow for waivers from national emission standards for hazardous air pollutants from stationary sources when in the interests of national security, for federal emission sources where “in the paramount interest of the United States,” and for federal procurement when in the paramount national interest.

## COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

CERCLA governs liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites, and may impact any project that might take right-of-way containing a hazardous substance.

- Emergency / Waiver Provisions: 42 U.S.C. § 9607(b)(1), (2); 42 U.S.C. § 9604(a), 40 C.F.R. § 300.400, which provide for an act of God or war defense and emergency removal actions.

## ENDANGERED SPECIES ACT

Outlines procedures for federal agencies to follow when taking actions that may jeopardize listed species and requires extensive consultation on federal actions with the U.S. Departments of Interior or Commerce. These requirements can deter projects worth [tens of billions of dollars](#) in economic impact.

- Emergency / Waiver Provisions: 50 CFR § 402.05, which provides a modified consultation procedure for emergency situations under section 7 of the Endangered Species Act.

## THE COASTAL ZONE MANAGEMENT ACT

This Act can impact projects affecting areas under the control of the State Coastal Zone Management Agency, occurring within the boundaries of a designated coastal barrier unit, or developmental activities located in coastal zone areas.

- Emergency / Waiver Provisions: 16 U.S.C. § 1456(c)(1)(B) allows for an exemption if “the President determines that the activity is in the paramount interest of the United States.”

## RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

Outlines treatment and disposal of solid and hazardous waste and may affect any project that takes right-of-way containing a hazardous waste.

- Emergency / Waiver Provisions: 40 C.F.R. § 264.1(g)(8); 42 U.S.C. § 6961(a), which allow the president to determine it to be in the "paramount interest" of the nation to exempt any federal solid waste management facility and allow for standard applicable to treatment, storage, and disposal facilities to be waived in times of emergency.