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NEPA and Hurricane Response, Recovery, and Rebuilding Efforts

Linda Luther, Resources, Science, and Industry Division

March 24, 2006

Abstract. This report provides an overview of NEPA requirements relevant to the hurricanes response and recovery efforts, its application to emergency and nonemergency actions related to the disaster, NEPA's role in two past flood and hurricane control projects that have been discussed in the press, and legislative proposals that relate to the NEPA process.

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Linda Luther
Environmental Policy Analyst
Resources, Science, and Industry Division

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NEPA and Hurricane Response, Recovery, and Rebuilding Efforts

Summary

As local, state, and federal agencies respond to Hurricanes Katrina and Rita, agency officials must determine the extent to which certain environmental laws and regulatory requirements will apply to their response, recovery, and rebuilding efforts. The requirements of the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. § 4321 et seq.) has drawn particular attention in the wake of the disaster.

Signed into law by President Nixon on January 1, 1970, NEPA was the first of several major environmental laws passed in the 1970s. It declared a national policy to protect the environment and created a Council on Environmental Quality (CEQ) in the Executive Office of the President. To implement the national policy, NEPA required that a detailed statement of environmental impacts be prepared for all major federal actions significantly affecting the environment. The “detailed statement” would ultimately be referred to as an environmental impact statement, or EIS.

For many federal actions undertaken in response to an emergency or major disaster, NEPA’s environmental review requirements are exempted under provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act); CEQ regulations also allow for “Emergency Alternative Arrangements” for the preparation of EISs. In the wake of the Katrina and Rita, congressional interest in the NEPA process has focused primarily on projects for which no exemptions or the potential for Alternative Arrangements exist.

Some Members of Congress have discussed the need for legislation that would provide waivers to or streamline methods of compliance with NEPA’s environmental review requirements. The need for those provisions, some Members of Congress assert, originates from two areas of concern: the role that NEPA-related litigation may have played in delaying past flood-control projects (two projects, in particular, have been widely reported in the press) and NEPA’s role in high energy prices caused by delays in energy development projects such as oil exploration projects and refinery permitting. Others argue that NEPA is being used as a scapegoat after the New Orleans flooding. Further, they charge that delays in energy-related projects are often unfairly attributed to NEPA, when a “delay” may represent the time it takes for multiple agencies to coordinate a response to complicated project proposals that may require compliance with multiple local, state, and federal environmental laws.

This report provides an overview of NEPA requirements relevant to the hurricanes response and recovery efforts, its application to emergency and nonemergency actions related to the disaster, NEPA’s role in two past flood and hurricane control projects that have been discussed in the press, and legislative proposals that relate to the NEPA process. It will be updated as developments warrant.

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NEPA and Hurricane Response, Recovery, and Rebuilding Efforts

Introduction

In the wake of Hurricanes Katrina and Rita, the federal government has engaged in a variety of actions in response to the disaster and will continue to be involved in actions to help the Gulf Coast states recover and rebuild. Many of the actions proposed in relation to the disaster would require compliance with local, state, and federal environmental laws and regulations.

The requirements of the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. § 4321 et seq.) have drawn particular attention from some Members of Congress and other interested stakeholders (e.g., professional associations, community organizations, and environmental groups). Among other provisions, NEPA generally requires federal agencies to assess the environmental impacts of an action before proceeding with it.

Emergency response actions, such as providing essential relief to victims, managing disaster debris, and repairing or restoring public facilities damaged by the disaster, are exempted from NEPA's requirements under provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). NEPA's environmental review requirements may, however, be applicable to long-term recovery projects, such as the construction of new flood control mechanisms.

NEPA Provisions Relevant to the Hurricanes

NEPA requires all federal agencies to consider the environmental impacts of a proposed action before proceeding with it. To document such consideration, NEPA requires the preparation of an environmental impact statement (EIS) for federal actions that will significantly impact the environment.¹ The "significance" of an action's environmental impacts must be determined case-by-case, based on an analysis of the context and intensity of the impacts.² If it is not clear whether a project would have significant impacts, an Environmental Assessment (EA) must be prepared in order to make that determination.

¹ For more information about NEPA's requirements, see CRS Report RL33152, *The National Environmental Policy Act: Background and Implementation*, by Linda Luther, and CRS Report RS20621, *Overview of NEPA Requirements*, by Pamela Baldwin.

² 40 C.F.R. § 1508.27.

Regulations that specify how agencies must implement NEPA's EIS requirements were promulgated in 1978 by the Council on Environmental Quality (CEQ) in the Executive Office of the President.³ In addition, CEQ regulations directed federal agencies to adopt and enforce their own regulations or procedures implementing NEPA's environmental review requirements that are specific to typical classes of actions undertaken by that agency.⁴ The CEQ regulations also directed agencies to develop categories of actions that are determined through agency experience to typically have no significant environmental impact, and thus may generally be categorically excluded from the requirement to prepare an EA or EIS. Such actions are referred to as categorical exclusions.

NEPA has been interpreted to be a procedural statute that does not require agencies to elevate environmental concerns above others. Instead, NEPA requires only that the agency assess the environmental consequences of an action and its alternatives before proceeding. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other benefits outweigh the environmental costs and moving forward with the action.

Most agencies use NEPA as an umbrella statute, meaning it is a framework to coordinate or demonstrate compliance with any studies, reviews, or consultations required by any other environmental laws. The use of NEPA in this capacity can lead to confusion. The need to comply with another environmental law, such as the Clean Water Act or Endangered Species Act, may be identified within the framework of the NEPA process, but NEPA itself is not the source of the obligation.

Unlike other environment-related statutes, no individual agency has enforcement authority with regard to NEPA's environmental review requirements.⁵ This lack of enforcement authority is sometimes cited as the reason that litigation is chosen as an avenue by individuals and/or groups that disagree with how an agency meets NEPA's mandate or EIS requirements for a given project (e.g., they may charge that an EIS is inadequate or that the environmental impacts of an action will in fact be significant when an agency claims that they are not). Critics of the NEPA process charge that individuals and/or groups who disapprove of a federal project will use litigation to delay or halt it. Others argue that litigation only results when agencies do not comply with NEPA's procedural requirements.

³ 40 C.F.R. §§ 1500 *et seq.*

⁴ Two agencies that will play a significant role in response and recovery actions are the Federal Emergency Management Agency (FEMA) and the U.S. Army Corps of Engineers (the Corps). Each agency has its own regulations to guide its implementation of NEPA. Those environmental regulations can be found at 44 CFR § 10 (FEMA) and 33 CFR § 230 (the Corps) .

⁵ CEQ is charged with providing oversight and guidance to agencies with regard to EIS preparation. EPA is required to review and comment publicly on the environmental impacts of proposed federal activities, including those for which an EIS is prepared. EPA is also the official recipient of all EISs prepared by federal agencies. However, neither agency has enforcement authority with regard to an agency's environmental review requirements.

NEPA Exemptions and Alternative Arrangements

In responding to emergencies and major disasters, existing provisions of the Stafford Act or CEQ's regulations either statutorily exempt certain activities from NEPA or allow for alternative means of complying with CEQ's regulatory provisions. Certain response actions specifically excluded from NEPA by the Stafford Act (at 42 U.S.C. § 5159) include the following:

- The provision of certain federal resources or assistance essential to meeting immediate threats to life and property resulting from a major disaster. (See actions specified under 42 U.S.C. §§ 5170a and 5170b.)
- The repair, restoration, and replacement, to pre-disaster condition, of public facilities or certain private nonprofit facilities, damaged or destroyed by a major disaster. (See 42 U.S.C. § 5172.)
- Debris removal from public or private land after a major disaster. (See 42 U.S.C. § 5173.)

It is important to understand that, as with actions that are categorically excluded, an action statutorily excluded from NEPA is not exempt from the requirements of the other environmental statutes. An agency would still be responsible for complying with all other applicable local, state, and federal laws and regulations relating to health, safety, and the environment.⁶ This would encompass federal environmental statutes including, among others: the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), the Coastal Zone Management Act, the Coastal Barrier Resources Act, the Endangered Species Act, and the National Historic Preservation Act.

In addition to statutory exclusions to NEPA, CEQ regulations allow for "Alternative Arrangements" in the event of an emergency.⁷ In such circumstances, the federal agency taking an action should consult with CEQ about what those arrangements may be and the time frame within which they must be completed. These Alternative Arrangements do not waive the requirement to comply with NEPA regulations, but establish an alternative means of compliance. Agencies and CEQ are to limit such arrangements to actions necessary to control the immediate impacts of the emergency. For example, in 1998, the U.S. Forest Service worked with CEQ to establish alternative regulatory compliance arrangements to implement emergency actions to restore portions of approximately 103,000 acres of forested lands on the National Forests and Grasslands in Texas that were damaged by a windstorm. The agency believed it would have taken up to six months using normal NEPA

⁶ Local, state, and federal environmental laws and regulations may still provide some exemption or regulatory allowance in the event of an emergency.

⁷ 40 CFR § 1506.11. The Corps has regulatory provisions similar to CEQ's that address emergency actions. FEMA's regulations reference statutory exemptions provided under the Stafford Act.

procedures before it could start restoring the damaged ecosystem, which included critical habitat for the red-cockaded woodpecker and bald eagle.⁸

On September 8, 2005, CEQ released a memorandum that provides guidance on “emergency Alternative Arrangements” under NEPA that are specific to Hurricane Katrina.⁹ According to CEQ, activities that may be completed in accordance with these arrangements include the disposal of unsorted disaster debris (waste that includes both hazardous and nonhazardous constituents) at a specific site or the permanent replacement of certain major facilities.

On March 23, 2006, FEMA published a notice specifying Alternative Arrangements for agency grants to repair or reconstruct critical infrastructure in the New Orleans Metropolitan Area.¹⁰ “Critical infrastructure” includes:

- Hospitals and health-care facilities,
- Utilities and wastewater treatment plants,
- Permanent police and fire stations,
- Government and court administration buildings,
- Detention centers (jails), and
- Permanent schools.

If the reconstruction at issue simply restored previously existing facilities to pre-disaster conditions, the action would be exempt from NEPA under the Stafford Act (see discussion of 42 U.S.C. § 5159, above). However, FEMA anticipates that grant applications from Louisiana “will more strongly reflect future demands than returning to pre-disaster conditions. Proposed projects will not necessarily be the same size, nature or location; will use current building codes, and construction methods; and take advantage of current community and urban planning principles, and hazard mitigation opportunities.”¹¹ Under such conditions, NEPA *would* apply.

NEPA’s Role in Past Flood Control Projects

NEPA’s role in two past flood control projects has received attention in the press in the wake of Katrina,¹² which, in turn, has draw the attention of some

⁸ March 23, 1999 statement of Sandra Key, Associate Deputy Chief, Programs and Legislation, U.S. Department of Agriculture’s Forest Service, before the Subcommittee on Forests and Forest Health, U.S. House of Representatives Committee on Resources, Hearing Concerning Chairman’s Draft Legislation on Alternative NEPA Arrangements.

⁹ See “Emergency Actions and NEPA” at [<http://ceq.eh.doe.gov/nepa/nepanet.htm>], as of March 24, 2006.

¹⁰ 71 *Federal Register* 14712-14716; see also FEMA’s webpage “Alternative Arrangements: National Environmental Policy Act Alternative Arrangements for Rebuilding Critical Physical Infrastructure in the New Orleans Metropolitan Area,” at [<http://www.fema.gov/ehp/noma/>], as of March 24, 2006.

¹¹ 71 *Federal Register* 14715.

¹² The two original articles, that have since been cited in other press accounts, are Ralph (continued...)

Members of Congress.¹³ At issue in those press accounts is whether or not NEPA-related litigation played a role in delaying New Orleans hurricane and flood protection projects.¹⁴

Lake Pontchartrain and Vicinity Barrier Project. The Lake Pontchartrain and Vicinity Barrier Project was approved by Congress in the Flood Control Act of 1965. The original design would have involved the construction of a barrier system at the entrances to Lake Pontchartrain to protect New Orleans from storm surges. In 1974, the Corps issued a final EIS for the project. In response, a group of community and environmental organizations, including a group called “Save our Wetlands,” filed suit asserting that the Corps’ EIS did not comply with NEPA.¹⁵ The group argued that the Corps had not considered the impact that the barrier system would have on local fisheries and that, they argued, alternative hurricane protection measures, such as building up existing levees, had not been considered.

In 1977, Judge Charles Schwartz, Jr. ruled that the Corps’ final EIS did not comply with the requirements of NEPA. However, in his ruling, the judge stated:

[This] opinion should in no way be construed as precluding the Lake Pontchartrain project as proposed or reflecting on its advisability in any manner. The Court’s opinion is limited strictly to the finding that the environmental impact statement of August, 1974 for this project was legally inadequate. Upon proper compliance with the law with regard to the impact statement this injunction will be dissolved and any hurricane plan thus properly presented will be allowed to proceed.

In response to the court injunction, the Corps conducted a re-evaluation study of the project. The study concluded that the barrier plan should be abandoned in favor of a “high-level plan.” The high-level plan included a variety of elements including raising and strengthening existing hurricane protection levee systems; completing certain hurricane protection levee systems; repairing and rehabilitating seawalls; and building new hurricane levees.¹⁶ According to a 1982 GAO report,

¹² (...continued)

Vartabedian and Peter Pae’s “A Barrier That Could Have Been,” *Los Angeles Times*, September 9, 2005; and John Berlau’s, “Greens vs. Levees: Destructive river-management philosophy,” *The National Review Online*, September 8, 2005.

¹³ See House Committee on Resources’ NEPA Task Force, press release “U.S. Reps to Review Environmental Reg’s Role In Affordable Energy, Post-Katrina Development,” September 9, 2005, available at [<http://resourcescommittee.house.gov/nepataskforce/press/0809virginia.htm>], as of March 24, 2006.

¹⁴ For legal analysis of the case law related to these projects, please contact the CRS American Law Division.

¹⁵ *Save Our Wetlands v. Rush*; the Judge’s Order, as well as background information regarding the case, posted by Save Our Wetlands, is available at [<http://www.saveourwetlands.org/hbpnotsaved.html>], as of March 24, 2006.

¹⁶ The Corps’ *Water Resources Development in Louisiana 1998*, see “Lake Pontchartrain (continued...)”

upon reevaluating the project alternatives, the Corps found that making more protective levees and flood walls would be more cost effective than inlet barriers.¹⁷

The outcome, then, was that the Corps pursued alternative flood protection systems; it is difficult to know whether the Corps would have ultimately proceeded with the original barrier plan absent the requirement to improve its EIS and the opposition to the project by some members of the public. Nor is it possible to know whether the original plan would have been more successful in protecting New Orleans.

Mississippi River Flood Control Project. The second project discussed in the press relates to a Mississippi River flood control project involving over 1,610 miles of flood control protection. Completion of the entire project will require construction of 128 separate components across seven states, including Louisiana. The primary purpose of the project is improved flood protection from the Mississippi River, not hurricane protection (e.g., storm surge from the Gulf of Mexico).

The final EIS for the project was completed in 1976. In 1996, the Mississippi River Basin Alliance, with other conservation groups, filed suit on the basis that a supplemental EIS was needed to account for new information and new circumstances that had arisen over the previous 20 years; and changes to the project since the final EIS was issued. Settlement negotiations in the case resulted in a Consent Decree that obligated the Corps to prepare a supplemental EIS. The Consent Decree included a provision that allowed the Corps to proceed with project components scheduled for construction, while a supplemental EIS was being prepared for the segment of the levee at issue.¹⁸ According to the parties in this case, the levee segment at issue is located primarily between Vicksburg, Mississippi and Baton Rouge, Louisiana, 100 miles north of New Orleans.

After distributing the supplemental EIS, and receiving public comment on it, the Corps issued its final EIS in July of 1998. Subsequently, the Mississippi River Basin Alliance and others filed suit again, this time charging that the 1998 final EIS was

¹⁶ (...continued)

and Breton Sound Basins,” with discussion of the Lake Pontchartrain and Vicinity Hurricane Protection, pp. 106-107, available online at [<http://www.mvn.usace.army.mil/pao/bro/wat%5Fres98/>], as of March 24, 2006. For information regarding the status of the Project before Hurricane Katrina, see the Corps’ Current Project List, online at [<http://www.mvn.usace.army.mil/pd/projsasp/mainlist.asp>], as of March 24, 2006.

¹⁷ General Accounting Office, Report to the Secretary of the Army: “Improved Planning Needed By The Corps Of Engineers To Resolve Environmental, Technical, And Financial Issues On The Lake Pontchartrain Hurricane Protection Project,” GAO/MASAD-82-39, August 17, 1982, available online at [<http://archive.gao.gov/d42t14/119206.pdf>], as of March 24, 2006.

¹⁸ Terms of the Consent Decree in this case were provided in a September 22, 2005 telephone interview with Melissa Samet, an attorney with American Rivers, a party to the case.

deficient.¹⁹ One of their claims was that the alternatives analysis (a required element of an EIS) failed to adequately evaluate an appropriate range of alternatives. However, a U.S. District Court ruled, and a Circuit Court affirmed, that the Corps *had* satisfied NEPA's requirement. In delineating its standard of review in the case, the Circuit Court stated that "NEPA exists to ensure a process, not a result."²⁰ The Corps was free to continue with this project and it is now in the construction stage.

There is no information available to suggest that the Corps' work on the segment of the project in southern Louisiana (that could affect river flooding in New Orleans) was delayed by this litigation.

NEPA's Role in Long-Term Response Actions

NEPA's role in two broad categories of federal actions has drawn the attention of some Members of Congress. The first category includes projects intended to facilitate the long-term recovery of the impacted region. These actions include those taken in direct response to Katrina and Rita. Examples of such projects may include flood-control or hurricane protection projects (e.g., new wetlands restoration projects or new levee construction projects); and federally-funded construction of new housing (as opposed to federal funding of the repair or reconstruction of previously existing housing or projects that were covered under an existing NEPA analysis). The second category of actions may include those undertaken as an indirect result of the two hurricanes. Primarily, these include energy development projects undertaken in response to increased oil and natural gas prices (e.g., oil exploration projects and expedited refinery permitting and construction).

Both classes of projects would not likely qualify for the Stafford Act exemptions or Alternative Arrangements that apply under emergency conditions. However, it is not unprecedented for Congress to provide statutory exemptions to NEPA or to specify changes in environmental review requirements for specific projects.²¹ Such exemptions and changes to the NEPA process are found in a variety of current legislative proposals that would either waive NEPA or streamline its provisions for certain hurricane recovery projects or energy development projects, two of which are discussed below.

Legislative Proposals Regarding Hurricane Recovery Projects.

Current legislative proposals go beyond the existing provisions of the Stafford Act that exempt from NEPA activities that repair, restore, and replace public facilities or private nonprofit facilities, damaged or destroyed by a major disaster. Introduced on September 22, 2005, in the Senate (S. 1765) and on September 28, 2005, in the House (H.R. 3958), "The Louisiana Katrina Reconstruction Act" would exempt certain projects from NEPA. Under § 501 of the bill, a commission known as the "Protecting Essential Louisiana Infrastructure, Citizens and Nature Commission,"

¹⁹ *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170 (5th Cir. 2000).

²⁰ *Ibid*, 175.

²¹ See CRS Report 98-417, *Statutory Modifications of the Application of NEPA*, by Pamela Baldwin.

referred to as the Pelican Commission, would be established. One duty of the Pelican Commission would be to enter into a contract with the Corps to develop a work plan for the design and implementation of programs intended to

- Protect the Louisiana coastal area from future flooding and devastation caused by hurricanes;
- Restore and reconstruct critical wetlands; and
- Provide for navigational interests.²²

In developing the work plan, projects within the “major disaster area” declared by the President on August 29, 2005 would be considered “priority projects.” Also included as priority projects are, at a minimum, certain hurricane protection projects (including the Lake Pontchartrain and Vicinity Barrier Project, discussed above); Louisiana Coastal Area ecosystem restoration and storm surge protection projects; flood control projects; and navigation projects.

Projects implemented by the Pelican Commission in accordance with the work plan would be deemed to comply with all applicable requirements of NEPA.²³ In addition to waivers of NEPA’s requirements, § 502 of the bills would allow the President, for the two-year period after enactment of the bill, to issue an emergency permit for:

[A]ny project carried out in response to, or as a part of the reconstruction effort relating to, Hurricane Katrina or a related condition, as the President determines to be in the best interests of the United States.

The types of projects that would qualify for an emergency Presidential permit are broader than the types of projects that may qualify for a NEPA waiver under the Pelican Commission’s work plan. These projects would also be exempted from NEPA under §§ 652 — Authority to facilitate reconstruction.²⁴ Under that section, it is specified that the President’s emergency permitting authority applies to the authority of: the Administrator of the Environmental Protection Agency and the Secretary of Agriculture with regard to the application of pesticides to control the mosquito population (under the Federal Water Pollution Control Act and the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et. seq.)); and the Secretaries of Agriculture and the Interior with regard to laws to expedite salvaging timber in the area and securing timber supply for the pulp and paper industry. Further, with regard to the Presidential emergency permitting process, any project or activity relating to the recovery, reconstruction, or repair in any area deemed a major disaster area would not be required to complete a statement or analysis (i.e., an EIS or EA) under any law or regulation administered by the CEQ.

Legislative Proposals Regarding Energy Development Projects.

During the passage of the Energy Policy Act of 2005 (P.L. 109-58, H.R. 6), NEPA’s

²² S. 1765 and H.R. 3958, § 501(d)(1).

²³ S. 1765 and H.R. 3958, § 501(d)(8).

²⁴ S. 1765 and H.R. 3958, under Title VI — Hurricane Protection and Environmental Restoration, Chapter 4 — Environmental Regulations.

potential role in delaying certain energy development projects was debated. It was charged by some Members of Congress that changes to the NEPA implementation process were needed to reduce delays and more efficiently facilitate delivery of needed projects. Other Members of Congress argued that delays attributed to the NEPA process may be the result of a variety of factors such as poor implementation of already-existing regulations (either individual agency or CEQ regulations).

The Energy Policy Act of 2005 includes a variety of provisions that are intended to expedite the process for completing or complying with NEPA's environmental review requirements (for more information about these provisions, see CRS Report RL32873, *Key Environmental Issues in the Energy Policy Act of 2005 (P.L. 109-58, H.R. 6)*, coordinated by Brent D. Yacobucci). In the wake of Hurricanes Katrina and Rita, some Members of Congress have begun to look at additional legislative proposals to expedite NEPA. The projects drawing the most attention are those that involve expanding refinery capacity. This may include waiving environmental requirements, including NEPA, for siting and permitting new and expanded refineries. The first such bill, the "Fuel Supply Improvement Act of 2005" (H.R. 3836), was introduced by Congressman Shadegg on September 20, 2005. The bill specifies expedited refinery permitting requirements that would be applicable to refinery repair or reconstruction at an "existing refinery undertaken in the area affected by Hurricane Katrina and undertaken as a result of Hurricane Katrina."

On October 7, the "Gasoline for America's Security Act of 2005" (H.R. 3893) passed in the House. The stated intent of the bill is to expedite the construction of new refining capacity in the United States. Among other measures, the bill would provide for presidential designation of potential refinery sites on federal lands and military bases that are closing. The bill would also expedite the process for complying with certain environmental requirements by establishing "process coordination" procedures for obtaining certain "federal authorizations." The bill defines federal authorizations as permits, special use authorizations, certifications, opinions, or other approvals required under federal law. The process coordination procedures (including the authorization to establish deadlines and certain limits on judicial review) would apply, at the request of a state governor, to the process for obtaining necessary federal authorizations for the siting, construction, expansion, or operation of any new refining capacity (§§ 101-102) and the siting of crude oil or refined petroleum product pipeline facilities (§§ 201-202).

The process coordination procedures appear to apply only to the procedures for obtaining federal authorizations, not to the environmental review process under NEPA. However, under § 102(b) the bill would designate the Department of Energy as the lead agency for coordinating applicable federal authorizations and any related environmental reviews for refineries. Similarly, under § 202(b), the Federal Energy Regulatory Commission would be designated as the lead agency for coordinating applicable federal authorizations and any related environmental reviews for pipeline facilities