
Infrastructure Series: Trump's Infrastructure Plan and the Future of Infrastructure Reform

FEBRUARY 22, 2018

This is the inaugural issue of WilmerHale's 10-in-10 Infrastructure Series. Over the next 10 weeks, our attorneys will share insights on current and emerging issues affecting infrastructure project developers in the United States. Attorneys from across various practice groups at the firm will offer their take on issues ranging from permitting reform to financing to litigation and share their insights from working with clients in a variety of infrastructure sectors, from water infrastructure, to energy development, to infrastructure development on tribal lands.

Last week, the Trump Administration outlined its vision for improving the nation's infrastructure in the much-anticipated Infrastructure Plan. Infrastructure has been a policy priority for the President since his election campaign, and the Administration has already taken a number of executive actions to streamline permitting and reduce regulatory barriers for infrastructure projects, including through an August 15 [Executive Order](#) and directives to streamline the National Environmental Policy Act (NEPA) by the [Department of the Interior](#) and [Council on Environmental Quality](#).

Building on these executive actions, the Infrastructure Plan proposes far-reaching legislative reforms to NEPA and other federal environmental statutes. The Plan also calls for \$200 billion in federal dollars to incentivize private, state and local investment in infrastructure.

While an infrastructure bill passing in this Congress remains unlikely, the Plan signals the Administration's reform priorities and what developers might expect as the focus of future legislative and regulatory efforts. We expect many of the regulatory reforms proposed will be implemented via executive authorities.

Does This Plan Apply to My Project?

While the Plan does not include a definition of "infrastructure," that term has been interpreted very broadly in related legislation and Executive Orders to include projects ranging from energy generation and transmission, to water infrastructure, to highways, ports and railway. The Plan itself calls out water resources, Brownfield/Superfund sites, and development on tribal lands and in rural communities for specialized grants. It also includes a number of provisions to facilitate the

development of mitigation banks. Many of the permitting reforms included in the Plan would apply to any project requiring federal agency approval.

What Are the Proposed Reforms?

The Infrastructure Plan outlines a number of legislative reforms intended to streamline the permitting of infrastructure projects. This includes the following:

- **The “one agency, one decision”** approach to permitting, which would require federal agencies with jurisdiction over the same project to complete a single environmental review document and Record of Decision (ROD) (or Finding of No Significant Impact) to support the issuance of their respective permits. Agencies are already encouraged to adopt this approach under an August 15, 2017 [Executive Order](#), and federal agencies are already working to implement it through interagency guidance. A statutory mandate would help ensure (and likely speed up) adoption of this principle. The proposal would also make the single federal decision a requirement, as opposed to merely an encouraged practice. Finally, codifying this requirement in legislation would guard against legal challenges to agencies' authority to use a single environmental analysis and ROD.
- **Firm Deadlines.** The Plan also proposes to create a two-year statutory deadline for permitting infrastructure projects (21 months to complete NEPA and three months to complete the permit decision documentation). Again, the notion of a two-year time limit on NEPA is not new. President Trump called for two-year average timelines for projects in the [August 15 EO](#), and agencies are working on developing mechanisms to comply with this requirement. For example, the Department of the Interior is already working to implement an [internal directive](#) to reduce the time for preparing an EIS to one year. The Infrastructure Proposal would make the two-year target a “firm deadline.”
- **Environmental Statute Reform.** The Plan also proposes to amend key environmental statutes, such as NEPA and the Clean Water Act. Among other things, the Plan calls for legislation clarifying the scope of alternatives analysis required under NEPA and limiting resource agency comments to portions of the NEPA analysis relevant to their areas of expertise. The Plan also proposes authorizing federal agencies to use Categorical Exclusions established by another federal agency.
- **Simplifying Reviews.** The Plan includes a number of proposals to eliminate steps in the review process that are viewed as redundant or unnecessary. This includes eliminating the requirement for EPA review and comment on draft and final Environmental Impact Statements under Section 309 of the Clean Air Act. It also includes a proposal to prohibit federal agencies from intervening in Federal Energy Regulatory Commission proceedings under the Federal Power Act and to require agencies to participate as a cooperating agency in NEPA reviews upon request. Another proposed reform is to eliminate EPA's role in making jurisdictional determinations under Section 404 and veto 404 permits granted by the Army Corps of Engineers. Finally, the Plan calls for removing overlapping reviews of historic sites and national park lands by the Department of the Interior, the U.S. Department of Agriculture and the Department of Housing and Urban Development.
- **Facilitating Mitigation.** The Plan also includes a number of proposals that would remove

regulatory barriers to developing compensatory mitigation to offset project impacts. This includes a proposal to streamline the approval and oversight of mitigation banks under the Army Corps of Engineers' 2008 Mitigation Rule. A related proposal would expedite the permitting of projects that enhance the environment through mitigation as an incentive to undertake such enhanced mitigation. Finally, the Plan calls for a pilot program that would experiment with negotiating mitigation measures to avoid and compensate for environmental impacts of transportation projects as an alternative to NEPA review.

- **Private Resources for Permitting.** The Infrastructure Plan includes a proposal to expand existing agency authorities to accept funding from non-federal entities to support federal reviews and the preparation of environmental documents.
- **Judicial Reform.** Finally, the Plan includes a number of proposals to limit judicial review of final agency decisions related to infrastructure projects. This includes limiting injunctive relief to “exceptional circumstances” and revising the statute of limitations for infrastructure permits to 150 days.

What Happens Next?

The Infrastructure Plan proposes a set of far-reaching legislative reforms. It is now up to Congress to decide which of the proposals to advance, when and how. The initial reaction to the Plan has largely followed party lines, with Democrats expressing concern about short-cutting environmental reviews and lack of dedicated funding and Republicans touting the move to end “analysis paralysis.” It remains to be seen whether a bipartisan group can agree on a subset of the proposed reforms, especially in light of the approaching midterm elections. While a stand-alone infrastructure bill would be a very heavy lift in this Congress, at least some of the proposals will likely be considered as Congress takes up the federal budget, the Water Resources Development Act, and other similar vehicles in the coming months.

And while it remains to be seen whether any of the proposals will materialize into law, many of them can be advanced even without legislation, through the development of agency guidance and reform of existing regulations. The Infrastructure Plan signals the Administration's reform priorities: reducing duplication, setting aggressive timelines, and reforming NEPA and other environmental statutes and their implementing regulations. We can expect that agencies will continue to work to implement these priorities within their existing authorities, even in the absence of an infrastructure legislative package.

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