Infrastructure Series: Paying for and Permitting Water Infrastructure

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This is the fourth issue of WilmerHale's 10-in-10 Infrastructure Series. In this series, our attorneys share insights on current and emerging issues affecting infrastructure project developers in the United States. Attorneys from various practice groups at the firm 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.

President Trump's February 12, 2018, Infrastructure Plan highlighted the need for investment in the nation's water infrastructure. The Plan included general provisions that could support water infrastructure, and specific provisions intended to increase federal, state, local and private resources for water infrastructure. Implementation of the Plan will depend on whether Congress acts on proposed legislative reforms, which will be challenging in an election year. Nevertheless, there are opportunities and resources available now to assist in developing water infrastructure projects, including streamlined permitting under Title 41 of the Fixing America's Surface Transportation Act (FAST-41), expanded credit assistance programs and state programs.

Water Infrastructure Needs

Water infrastructure in the United States is in dire need of increased investment and development. In its 2017 Infrastructure Report Card, the American Society of Civil Engineers gave America's dams, drinking water systems and levees a D grade, and gave wastewater treatment facilities a D+. The report card estimated that approximately $200 billion of investment is needed annually through 2025 to raise the infrastructure grade and maintain global competitiveness. In its most recent needs assessment reports (2015 and 2016), the US Environmental Protection Agency (EPA) estimated that funding needs for drinking water and wastewater infrastructure are $655 billion over the next 20 years.

A major obstacle to improving water infrastructure is the difficulty of finding funding and securing investments in such projects. The municipal bond market is the primary source of investment in the

capital projects for water infrastructure. However, municipalities pay billions of dollars in interest on those bonds, which limits their ability to make new investments. As a result, the condition of water infrastructure continues to deteriorate.

General Provisions of the Infrastructure Plan Addressing Water

Several of the Plan's general provisions may apply to water infrastructure projects, including:

- ***Infrastructure Incentives Program.*** This new program proposes to allocate $100 billion in grants over 10 years to state and local governments through the Department of Transportation, the Army Corps of Engineers (Corps) and EPA. Qualifying infrastructure projects include water supply, hydropower, water resource projects, drinking water facilities, wastewater facilities and stormwater facilities. To qualify, grant applicants would need to provide 80 percent of the funding for the project, while the federal grant money could supply 20 percent of the funding.
- ***Rural Infrastructure Program.*** This new program would propose $50 billion over 10 years for capital investments in rural infrastructure, including drinking water, wastewater, stormwater, flood risk management, water supply and waterways projects. Overall, $40 billion would be distributed to state governors for infrastructure projects, and $10 billion would be distributed as rural performance grants under a rural infrastructure investment plan. An undetermined amount would be dedicated for tribal infrastructure
- ***Transformative Projects Program.*** This new program proposes $20 billion over 10 years for innovative or “transformative” projects in sectors including clean water and drinking water
- ***Existing Infrastructure Financing Programs.*** The Plan proposes to allocate $14 billion to expand existing credit programs, including the Water Infrastructure Finance and Innovation Act (WIFIA) program, which provides loans from the US Treasury at Treasury rates, thus lowering capital cost for borrowers. The Plan also includes a number of specific recommendations to expand the projects eligible for WIFIA assistance and to reduce the costs associated with securing a WIFIA loan. In addition, the Plan proposes to allocate $6 billion to expand the availability of Private Activity Bonds, tax-exempt bonds available for issuance by private entities for specific types of projects that have a public purpose.

Specific Provisions of the Infrastructure Plan Addressing Water

In addition to the general provisions described above, the Plan included several specific water-related proposals, such as:

- Authorizing EPA to provide assistance to privately owned public treatment works through the Clean Water State Revolving Fund (SRF);
- Exempting from federal environmental and permitting laws projects with only *de minimis* federal funding; and
- Modifying the Clean Water Act and Corps authorities to incentivize private investment in public project.

With regard to Private Activity Bonds, the Plan included specific provisions intended to increase use

for water resource projects. In particular, the Plan proposed removing existing state volume caps on clean water and drinking water projects and expanding eligible facilities to include hydroelectric facilities, flood control and stormwater facilities (in addition to water supply facilities).

Infrastructure Permitting Reforms in the Plan

Obtaining federal funding for water infrastructure through the programs described above requires compliance with the National Environmental Policy Act (NEPA) and a range of other environmental laws, which can involve numerous agencies. Streamlining the permitting process for infrastructure projects is a fundamental aspect of the president's infrastructure initiative. As discussed in a previous issue of this 10-in-10 Infrastructure Series, the Infrastructure Plan builds on ongoing administrative efforts to streamline permitting for infrastructure projects. If enacted, the Plan's permitting reforms—including the "one agency, one decision" approach, the imposition of a two-year statutory deadline, the reform of permitting requirements and the simplification of the review process—would apply to water infrastructure projects. This aspect of the Plan, however, is not without controversy, and whether Congress will be able to successfully work through those issues is unclear at this time.

Currently Available Opportunities and Resources

Notwithstanding the difficulty in enacting the Plan this year, there are still opportunities and resources available now to assist in developing water infrastructure projects, including:

- ***FAST-41.*** FAST-41 was enacted in 2015 with strong bipartisan support. FAST-41 creates a government-wide framework for a streamlined review of major infrastructure projects which expressly include water resource projects. The improved process involves advanced planning for covered projects, by identifying a lead agency to prepare a project timetable and requiring simultaneous rather than sequential review by the relevant agencies. To be eligible as a covered project, a water infrastructure proposal must meet several key criteria, including (1) requiring an environmental impact statement pursuant to NEPA, (2) being subject to review by two or more federal agencies, (3) having a cost estimate exceeding $200 million, and (4) demonstrating financial and technical feasibility. Several administrative actions, including two executive orders by President Trump (13766 and 13807), are ensuring that speeding up permitting for major infrastructure projects remains a high priority for the Trump Administration.
- ***Credit Assistance Programs.*** There is bipartisan support for expanding the range of credit assistance programs available to help tackle water infrastructure needs across the country. For example, there are bipartisan bills in the House of Representatives and Senate (e.g., S. 2364/H.R. 4902) that would reauthorize and expand the resources available under WIFIA. Similarly, there is a bipartisan bill to remove the state volume caps on Private Activity Bonds for water projects with a public benefit (H.R. 3009). Both of these proposals are included in the Infrastructure Plan, which bodes well for their ultimate enactment. Of course, even where strong support exists, there remains a need to address the costs of these bills to the US Treasury.

Congress also appears poised to maintain significant funding to support water infrastructure under existing authorities, despite deep cuts to key water resource programs proposed in the Trump Administration's budgets. Although at this writing, the final 2018 Omnibus Appropriations bill has yet to emerge, the relevant committees in both the House and Senate have proposed to increase funding levels for key water programs such as SRFs, WIFIA and the Interior Department's WaterSMART program, which focuses on improving water conservation and assisting with water management strategies to address climate change and future demands. Moreover, the two-year budget deal enacted by Congress in February increased the budget caps by over $300 billion for the next two years, ensuring robust funding levels for most programs, including an additional $10 billion for infrastructure.

- ***State Programs.*** Several states—driven by ongoing drought issues, water quality crises, crumbling infrastructure and an oversubscribed federal budget—have allocated significant resources to fund water infrastructure projects. In 2014, California enacted a water bond allocating $7.5 billion for a comprehensive set of water needs, including additional storage, groundwater cleanup, watershed restoration, drinking water systems and water recycling projects. New York has taken similar action, enacting a Water Infrastructure Improvement Act in 2015 with over $400 million in grants, followed by a Clean Water Infrastructure Act in 2017, providing $2.5 billion for infrastructure and water quality protection, including $1.5 billion in grants to local governments. Other states have taken similar steps, and these state and local resources provide opportunities to cost-share with federal programs, enhancing the resources available to develop much-needed projects.

Conclusion

Infrastructure permitting processes will continue to improve at the federal level through better coordination, particularly for large-scale projects. In addition, strong bipartisan support continues for existing programs, which are likely to be expanded through pending legislation and federal appropriations.

To successfully move forward with projects to improve the water infrastructure system, project developers should seek to capitalize on the current focus on infrastructure and existing, expanded and new programs. Demonstrating technical and financial feasibility will be essential for securing government funding assistance and permitting support. Toward that end, project developers should identify key funding partners early; identify applicable programs at federal, state and local levels; and ensure that legal issues (such as securing water rights and rights-of-way and addressing environmental and other property-related issues) are addressed in the early project planning stages.

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