

Administration's infrastructure initiative unveiled

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The administration's infrastructure initiative is historic in its breadth and impact. Some highlights in the administration's "Legislative Outline for Rebuilding Infrastructure in America" that will be important to consider are summarized in five points below.

Point One: The White House proposal includes opportunities for the private sector to advance vital energy infrastructure projects to facilitate the production, delivery, storage, and use of energy resources.

- US\$100 billion incentives program: distributed by the Department of Transportation, U.S. Army Corps of Engineers, and the Environmental Protection Agency, through an application process. Requires non-federal revenue contributions and includes Incentive Grant Awards.
- Projects cover a broad range of projects, from railroads and other forms of transportation to rural infrastructure, transmission and energy projects, and disposition of federal real property.
- Pilot Projects are also contemplated, as follows:
 - performance-based pilot: Select 10 projects that are configured to meet environmental performance standards, including enhanced mitigation and design elements, in lieu of complying with National Environmental Policy Act (NEPA) and other environmental review processes
 - negotiated mitigation pilot: Secretary of Transportation could establish an alternative-dispute resolution process in lieu of NEPA based on mitigation agreements and markets, including purchase of offsets, avoidance of impacts, and a mitigation fund

Point Two: The White House proposal contains federal funding to supplement local, state, and private sector funding sources and fosters the acquisition of federal assets.

- Rural Infrastructure Program: US\$50 billion funded through state allocations to modernize rural infrastructure systems, encourage rural connectivity through public and private investment, and closing local infrastructure gaps. Eligibility includes broadband, governmental generation, transmission, and distribution facilities.

- **Transformative projects program:** US\$20 billion fund provided on an award basis for bold, innovative, and transformative infrastructure projects, including in the areas of energy, commercial space, and broadband sectors.
- **Acquisition of federal assets:** The proposal seeks to streamline and simplify the process for disposition of federal real property (examples include transmission assets).

Point Three: Government funding will be limited at all levels, necessitating policy changes to allow and attract private investment.

- **Federal funding:** The White House plan expects to leverage US\$1.5 trillion in projects over ten years with US\$200 billion in real federal dollars -- roughly 13 percent of the total project funding amount.
- **State and local funding:** State and local governments historically fund about 20 percent of infrastructure projects with a federal component; they will need to attract significant private investment to fund major projects.
- **Private investment:** Many state and local governments currently have legislation in effect that prohibits or otherwise limits private ownership of what were traditionally considered "public works." State and local governments will need to amend existing laws and regulations to allow for private ownership, operation, and investment in such projects.

Point Four: The White House proposal contains a number of concepts for streamlining and simplifying the environmental review and permitting processes for infrastructure projects.

- **One agency, one decision:** Provides a firm deadline of 21 months for a single lead agency to complete a single environmental review document and issue a final decision. In addition, the proposal includes a firm deadline of three months for issuance of any permits.
- **NEPA reforms:**
 - eliminate consideration of alternatives outside an agency's authority or capability, and likewise, eliminate comments from other agencies' beyond their authority or expertise
 - direct the Council on Environmental Quality to revise regulations to provide more streamlined processes and standards
 - eliminate the Environmental Protection Agency's (EPA) additional review of other agencies' Environmental Impact Statements
 - authorize agencies to use other agencies' categorical exclusions (CXs)
 - allow for one NEPA document for Clean Water Act determinations by the United States Army Corps of Engineers (USACE) for both Section 404 and 408 permits
- **Mitigation:** Eliminate interagency second tier of review for EPA and USACE's Mitigation Rule. Give weight to and streamline projects that involve mitigation or consist of environmentally friendly designs.
- **Clean Water Act and related USACE matters:**
 - empower the USACE to determine the applicability of the Clean Water Act for Section 404 permits instead of EPA

- remove EPA's veto authority for Section 404 permits
 - allow non-federal entities that implement a civil works project to rely on USACE environmental reviews and not get a second permit
 - streamline the time period for States to issue a Section 401 Water Quality Certification
 - Clean Water Act permit term: Increase the term from five years to 15 years and provide for automatic renewal
 - extend U.S. Army Corps. Of Engineers (USACE) long-term contract period from 5 years to 50 years under the Water Resources Reform and Development Act
 - streamline a de-authorization process for USACE projects operated by non-federal entities to avoid triggering the alternation of use Section 408 requirements
- Telecommunications: Expedite reviews under NEPA and the National Historic Preservation Act for small cells and Wi-Fi attachments.
 - FERC Proceedings: Amend the Federal Power Act and other laws to allow agencies to participate as a cooperating agency and also permit some level of participation in FERC proceedings.
 - Donations to federal government: Provide universal authority for federal agencies to accept funds from non-federal entities to support review of permit applications and other environmental documents.
 - Nationwide permits: permit the USACE to use nationwide permits without having to submit a separate application to its own agency for further review.
 - National Park Service (NPS): remove NPS approval of "equivalent substitute" lands when Land and Water Conservation Fund lands are needed for an infrastructure project. Similarly, eliminate Congressional approval for rights-of-way across NPS lands for pipeline and energy facilities and vest the Secretary of the Interior with approval authority.
 - Allow utility relocation to occur prior to completion of NEPA reviews, which can be a multi-year, slow process.

Point 5: The White House Proposal also contains several reforms to reduce the burden and cost of litigation.

- Make rail projects eligible for FAST Act streamlining provisions and reduce the statute of limitations to challenge such projects in court from two years to 150 days.
- Limit injunctive relief under NEPA to "exceptional circumstances" to avoid undue delay to projects.
- Many statutes that provide a legal claim to challenge infrastructure projects have a statute of limitation of up to six years. The proposal would establish a uniform statute of limitations of 150 days to challenge decisions and permits on infrastructure projects, which is the current standard for surface transportation projects.
- Remove the ability to sue for stale data when an applicant is following agency guidance on how often data needs to be updated.

These are some of the critical issues that we will be watching closely as the administration moves forward with its infrastructure package. There will be many moving parts that will require close monitoring and engagement, from developing capital investment strategies to maximizing the benefits of streamlined processes and minimizing the legal risks associated with such change. In this vein, it will be vital to engage early and often with the administration and Congress to ensure that the final formulation of this landmark legislation ultimately fulfills your objectives.

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