

On February 12, the Trump Administration released the President's long-awaited infrastructure proposal, providing further details on the principles the Administration has been discussing since the President released his FY 2018 budget proposal last May. A copy of the 53-page proposal is available [here](#).

As expected, the proposal calls for US\$200 billion in direct federal funding over 10 years for new infrastructure grant programs, increased funding for Department of Transportation (DOT) and United States Department of Agriculture (USDA) loan programs, expanded Private Activity Bonds (PABs) and a federal capital financing fund. The proposal does not identify a revenue source for this new spending.

In several fundamental ways, the plan seeks to re-write the rules of how infrastructure projects are advanced and funded at the federal level.

The plan offers a significantly reduced federal share for infrastructure project grants under its Infrastructure Incentives Initiative, shifting greater funding responsibility to states and local governments. At the same time, the plan greatly expands infrastructure finance tools that provide lower-cost loans to both public and private infrastructure project sponsors and makes long-sought improvements to several categories of infrastructure PABs to provide privately advanced projects with enhanced access to tax-exempt debt. Beyond PABs, the plan includes several tools to increase private sector infrastructure investment, including liberalized tolling provisions, simplified rules for the disposition of federal assets and support for asset recycling.

With the stated aim of completing federal environmental and other permitting approvals within two years, the proposal would significantly revise a number of federal environmental review and project delivery requirements, including requirements under the National Environmental Policy Act (NEPA). Additionally, the proposal would provide state and local governments more control over infrastructure projects through the delegation of permitting authority and relaxed federal requirements for smaller projects. State and local governments would also be permitted to repay the federal portion of completed infrastructure projects to release them from the federal requirements associated with federal infrastructure grants.

Congressional Democrats have already voiced opposition to the proposal, arguing that the plan's US\$200 billion is insufficient to address the nation's growing backlog of infrastructure needs, and that the plan shifts funding burdens to states and localities but offers no solution to the chronic shortfall in revenues to the Highway Trust Fund.

I. New Infrastructure Grant Programs

Three new federal infrastructure grant programs are proposed: Infrastructure Incentives Initiative; Rural Infrastructure Program; and Transformative Projects Program.

Infrastructure Incentives Initiative: The proposal would provide US\$100 billion for the Infrastructure Incentives Initiative, a DOT, Environmental Protection Agency (EPA) and United States Army Corps of Engineers (USACE) program designed to incentivize state and local governments to raise their own revenues – or attract private revenues – through federal discretionary grants for projects with significant contributions of non-federal funds from public and private sources. Where federal highway and transit formula programs now fund up to 80% of project costs, federal grants under this new incentive initiative would be limited to 20% of project costs. While a chief aim of this program is to encourage states and localities to identify new revenue streams for infrastructure projects, states and local governments would earn partial credit for non-federal revenues raised in the previous three years.

The program would fund projects in a broad range of infrastructure sectors, including surface transportation, airports, passenger rail, ports and waterways, flood control, water supply, hydropower, water resources, drinking water facilities, wastewater facilities, stormwater facilities, and brownfield and Superfund sites. Projects would be evaluated based on objective criteria such as the size of the project and the amount of new, non-federal funding for both capital costs and operations and maintenance. Grant awards would also be subject to project milestones and any agreement that does not meet its milestones within two years would be voided; though, the lead federal agency would have the authority to extend the agreement for one additional year.

Rural Infrastructure Program: Understanding that many rural infrastructure projects are not able to attract private financing, the White House proposal would provide US\$50 billion, the majority of which would be apportioned to states as block grants, for a Rural Infrastructure Program. The program would also provide dedicated funding for infrastructure investment in US territories and tribal areas. The goals of this program are to modernize rural infrastructure systems, increase rural economic growth and competitiveness, and expand access to markets, customers and employment opportunities. Eligible projects would include transportation, broadband, power and electricity, drinking water and wastewater improvements.

Transformative Projects Program: To fund higher-risk projects that may be unable to secure financing through the private sector, the proposal would include US\$20 billion for the Transformative Projects Program to provide discretionary grants focused on innovative and transformative infrastructure projects that are capable of generating revenue and providing net public benefits. The Department of Commerce would administer this program, leading an interagency selection committee composed of representatives from other relevant federal agencies. While a much smaller funding pot than the Infrastructure Incentives Initiative, the Transformative Projects Program would provide higher federal shares of project funds – 30% for demonstration projects, 50% for project planning and 80% for capital construction. Capital construction project sponsors would be required to share with the federal government the revenues generated by each project.

II. Enhanced Finance Tools

To achieve the related goals of leveraging limited federal funding to produce US\$1.5 trillion in infrastructure investment and attract greater private capital, the proposal would significantly expand funding and eligibility for federal credit assistance programs and PABs. The proposal would direct US\$14 billion for the expansion of the Transportation Infrastructure Finance and Innovation Act (TIFIA), Railroad Rehabilitation and Improvement Financing (RRIF), Water Infrastructure Finance and Innovation Act (WIFIA) and Rural Utility Service (RUS) programs.

Transportation Infrastructure Finance and Innovation Act: The proposal would broaden TIFIA program eligibility to include airports and ports.

Railroad Rehabilitation and Improvement Financing: The proposal would fund RRIF credit risk premiums for short-line freight and passenger rail projects.

Water Infrastructure Finance and Innovation Act: The plan eliminates the current US\$3.2 billion lending limit and expands the types of projects eligible for WIFIA funding. It authorizes EPA to fund non-federal flood mitigation, navigation and water supply projects and authorizes USACE to defederalize water resources projects and transfer title and ownership to a non-federal entity. The plan eliminates the limitation that eligible water systems be “community” water systems, so that a public authority that sells water directly to another water provider would be eligible (e.g., a desalination plant), and expands WIFIA to allow water system acquisitions and restructurings of completed or substantially-completed systems. The plan also expands eligibility to water quality contamination projects at brownfield rehabilitation and Superfund sites.

The plan removes the restriction on reimbursing costs incurred prior to loan closing and permits EPA to require only one letter from a rating agency for a project applicant, instead of two. It would also permit EPA to waive the program’s current “springing lien” provision, such that the federal government, as the WIFIA lender, could remain subordinate to any senior debt in the event of bankruptcy, insolvency or liquidation.

Private Activity Bonds: To directly support greater private investment in infrastructure projects, the plan would broaden the range of public-purpose infrastructure projects eligible to take advantage of the tax benefits of PABs through (1) establishing new categories of exempt facility PABs for projects such as flood control and stormwater facilities and rural broadband service, (2) expanding eligibility under qualified surface transportation facilities to include any project eligible for credit assistance under the TIFIA program, and (3) lifting state volume caps applicable to some categories of PABs and the nationwide volume cap on surface transportation PABs. Additionally, the plan would reduce borrowing costs by eliminating the Alternative Minimum Tax (AMT) preference on PABs. The plan would require that public infrastructure projects have public attributes: (1) state or local governmental ownership or private ownership with rates subject to state or local control, and (2) be available for general public use.

III. Water Infrastructure

Environmental Protection Agency: The proposal would expand several authorities and tools to encourage private sector investment in water infrastructure projects, including expanding eligibility for the Clean Water State Revolving Fund (CWSRF) to privately owned public-purpose treatment works. The proposal would also provide EPA the authority to test alternative and innovative approaches to overall water infrastructure project development, similar to FHWA’s Special Experimental Project Number 15 (SEP-15) authority to waive federal requirements for federal-aid highway projects, in hopes of increasing innovation, improving efficiency, and developing new revenue streams.

Additionally, the proposal includes provisions to reduce the regulatory burden on projects funded with a *de minimis* federal share, such as when a project is primarily funded by state, local and private entities. It also proposes to eliminate discrepancies under the Clean Water Act between publicly and privately owned treatment works to provide a level playing field for all service providers.

US Army Corps of Engineers: The plan would provide state and local governments greater control and flexibility over water resources development projects. Specifically, the proposal would expand USACE’s authority to accept contributed funds from non-federal interests to expedite project execution even if no federal funds have been appropriated. The plan would provide the Secretary of the Army the authority to waive the maximum total cost limitation for congressionally authorized projects, so that USACE would not need to seek a new congressional authorization for projects that exceed their previously expected costs. The proposal would also establish a streamlined deauthorization process for projects approaching the end of their useful life and projects operated by non-federal entities that do not require federal oversight. The plan would authorize private entities engaged in certain water resources development projects with USACE to impose and retain fees to pay for costs associated with carrying out the project. Finally, the plan would allow USACE to enter into long-term infrastructure asset contracts with private entities by extending the permissible contract period from five to 50 years.

IV. Highways

Tolling: Provides states with increased flexibility to toll interstates and requires that those toll revenues be reinvested in infrastructure. While this provision has the potential to raise significant additional revenue for infrastructure investment, we expect several transportation stakeholders to oppose an expansion of tolling on existing interstates.

Commercial Rest Areas: Provides states with flexibility to commercialize interstate rest areas; though, any revenues generated would be required to be reinvested in the corridor in which they were generated. Restricts states from charging fees for access to essential services such as water or restrooms.

Major Projects: Raises the cost threshold for major project requirements from US\$500 million to US\$1 billion, removing some federal oversight requirements for these projects.

Utility Relocation: Authorizes utility relocation to take place prior to NEPA completion, but would only allow federal reimbursement of relocation costs for projects that are completed.

Repayment of Federal Funds: Authorizes the repayment of federal funds to eliminate federal requirements associated with federal infrastructure funding. This would provide states with the general authority to repay funds and be released from federal requirements without congressional action.

Small Highway Projects: Provides relief from federal procurement requirements for smaller projects that are predominantly outside of the right-of-way of a federal-aid highway.

Final Design Activities: Allows design-build contractors for highway projects to conduct final design activities before the NEPA process is complete.

Right-of-Way Acquisitions: Allows states to assume FHWA's responsibilities for approving right-of-way acquisitions. DOT would retain the authority to terminate this delegation if a state improperly carries out these responsibilities.

V. Airports

FAA Oversight: Limits Federal Aviation Administration (FAA) approval and oversight to critical airfield infrastructure projects, removing FAA's current approval and oversight authority over non-aviation development activities such as terminals, access and service roads, hangars and other facilities.

Alternative Project Delivery: Expands an existing pilot program that allows airports to privatize by removing the limitation on the number of airports that can participate, currently limited to 10 airports, and reducing the required support of air carriers from 65% to a simple majority.

Incentive Payments Under the Airport Improvement Program (AIP): Eliminates the restriction on providing incentive payments to contractors for accelerated construction under the AIP program.

Oversight of AIP Funds: Limits FAA oversight to post-expenditure audits rather than grant application reviews and approvals.

Passenger Facility Charges (PFCs): Extends the streamlined non-hub application process for imposing PFCs to small hub airports, reducing the documentation that would be required of small hub airports during the PFC application process.

TIFIA: Broadens TIFIA eligibility to include airport projects.

VI. Transit

Value Capture for Capital Investment Grant (CIG) Program: Requires value-capture financing as a condition for receiving CIG program funding.

CIG Pilot Program: Codifies the CIG pilot program that provides an expedited process for transit public-private partnerships (P3) projects and increases the maximum federal share for projects developed under the pilot program to 50%, from the current 25% maximum share.

Constraints on P3s: Eliminates constraints in current law that impede the use of public-private partnerships (P3s) and public-public partnerships in transit capital projects.

Acquisition and Preservation of Rail Rights-of-Way: Allows for advance acquisition and preservation of rail rights-of-way before the NEPA process is complete.

VII. Relief from Federal Requirements

De Minimis Federal Share: Provides flexibility and relief from the application of federal requirements when an infrastructure project is primarily funded through non-federal funds.

VIII. Brownfield and Superfund Sites

The proposal would expand funding opportunities and establish tools to manage and address legal and financial risks for land revitalization projects under the brownfields and Superfund programs in order to facilitate and promote greater investments in the sites.

Most notably, it would create a Superfund Revolving Loan Fund, similar to the Brownfields Revolving Loan/Grant Program, and authorize Superfund sites on the National Priorities List to be eligible for brownfields grants. It would also clarify and expand the current liability exemptions to ensure state and local governments are exempt from liability for all property acquisitions undertaken. The proposal would remove restrictions that prohibit EPA from incorporating infrastructure elements, such as pipelines and power lines, into cleanup design and implementation.

IX. Environmental Permitting and Streamlining

Delegation to States: The proposal includes provisions intended to streamline the environmental review and permitting process by delegating authority to states and local governments.

- Expands the DOT NEPA Assignment Program, which allows FHWA and FTA to assign its NEPA responsibilities to states, to other agencies and infrastructure projects. States would still be required to sign a memorandum of understanding with the assigning agency. Currently, six states participate in the program.
- Broadens the NEPA Assignment Program to allow states to assume the responsibility for making project-level conformity determinations required under the Clean Air Act and determinations regarding flood plain protections and noise policies.

Pilot Programs:

- **Performance-Based Pilot:** Establishes a pilot program, limited to 10 projects, to experiment with using environmental performance measures instead of the environmental review process. The lead federal agency would develop performance standards with public input and in coordination with cooperating federal agencies. Projects would include design elements and enhanced mitigation to meet the goals and objectives of NEPA without being constrained by NEPA's procedural requirements.
- **Negotiated Mitigation Pilot:** Establishes a pilot program to establish an alternative review process, in lieu of NEPA requirements, based on negotiated mitigation agreements allowing participants to instead purchase mitigating offsets, avoid anticipated impacts or pay a fee to an advanced mitigation fund.

Federal Role: The proposal seeks to advance infrastructure projects more quickly and lower project costs by cutting regulatory red tape and streamlining federal project delivery requirements.

- **"One Agency, One Decision":** Establishes deadlines of 21 months for lead agencies to complete their environmental reviews and issue a Finding of No Significant Impact (FONSI) or Record of Decision (ROD) and three months after the issuance to make permitting decisions.
- **Reducing Inefficiencies:**
 - **Single Document:** Requires the lead agency to develop a single environmental review document and a single ROD
 - **Feasible Alternatives:** Clarifies that alternatives outside the scope of an agency's authority or an applicant's capability are not feasible alternatives for the purposes of NEPA
 - **CEQ Regulations:** Directs CEQ to revise its regulations to streamline the NEPA review process
 - **Eliminate Redundancy in Clean Air Act Section 309 Reviews:** Eliminates EPA's responsibility under Section 309 of the Clean Air Act to review and comment on Environmental Impact Statements (EIS); this would not change EPA's separate regulatory responsibility to comment during the development of EISs on matters within EPA's jurisdiction
 - **Focusing Agency Analysis:** Focuses the scope of federal agencies' authority to comment on NEPA analyses to areas that are relevant to their areas of special expertise or jurisdiction
 - **Categorical Exclusions (CE):** Allows any federal agency to use a CE that has been established by another federal agency and directs agencies to identify documented CEs that can be changed to undocumented CEs without undergoing the CE substantiation and approval process
 - **Concurrence for Incorporating Documents and Decisions:** Allows for the incorporation of transportation planning documents into NEPA documents without the concurrence of cooperating agencies
 - **Eliminating Interagency Review Team:** Eliminates the required second review by an interagency review team for the approval of mitigation banks under the Mitigation Rule

- **Expanding Streamlining Procedures:** Allows all lead federal agencies for infrastructure projects to utilize streamlining provisions currently authorized for highway and transit projects
- **Expediting Communications Equipment:** Allows expedited procedures for reviewing small cell and Wi-Fi attachment telecommunications equipment projects under NEPA and the National Historic Preservation Act (NHPA)
- **Incentives for Enhanced Mitigation:** Expedites environmental or permitting reviews for projects that enhance the environment through mitigation, design or other means
- **Funding From Non-Federal Entities to Support Reviews:** Broadens authority for federal agencies to accept funds from non-federal entities to support the review of permit applications and other environmental documents

- **Clean Water Act Efficiencies:** Includes provisions intended to eliminate redundancy, duplication and inconsistency in the application of Clean Water provisions, including by authorizing federal agencies to use nationwide permits without additional USACE review, removing EPA's authority to veto a Section 404 permit, and allowing the use of one NEPA document for both Section 404 and Section 408 actions.
- **Clean Air Act Efficiencies:** Includes provisions intended to reduce inefficiencies in Clean Air Act reviews, including by clarifying that Metropolitan Planning Organizations need only conform to the most recent National Ambient Air Quality Standard.
- **Historic Properties:** Removes Department of Interior, USDA, and Department of Housing and Urban Development responsibility to review individual Section 4(f) determinations.

Judicial Reform:

- Limits injunctive relief to exceptional circumstances, but does not define what those circumstances would include
- Revises the statute of limitations for federal infrastructure permits or decisions to 150 days; current statutes of limitations for many infrastructure projects allow for legal challenges for up to six years after decisions have been issued
- Directs federal agencies to establish guidelines regarding when new studies and data are required for environmental review and permitting decisions, and precludes courts from reviewing claims based on the currentness of data if projects are in compliance with agency-established guidelines

X. Federal Lands and Real Property

Federal Divestiture of Assets: Authorizes expanded federal divestiture of infrastructure assets upon determining that such assets could be better managed by state, local or private entities. Examples of assets cited include the George Washington and Baltimore Washington Parkways, the Ronald Reagan Washington National and Dulles International Airports, and several power-generating facilities across the country.

Capital Financing Fund: Establishes a Federal Capital Financing Fund, capitalized with US\$10 billion, to create a funding mechanism that is similar to a capital budget but operates within the traditional federal budget rules to facilitate the purchase of real property assets. Agencies would be required to repay the fund in 15 equal annual amounts using discretionary appropriations.

Federal Real Property: Expands authorities to allow for the disposal of federal assets.

- Codifies Executive Order 12803 allowing accelerated depreciation for the disposition of non-federal assets
- Streamlines the federal real property disposal process to allow the federal government to offer assets for sale at fair market value, without preferences or rights of first refusal by state and local governments
- Permits federal agencies to retain the proceeds from selling real property for reinvestment in mission-critical facilities
- Expands allowable uses of the General Services Administration (GSA) Disposal Fund to provide GSA the authority to help other federal agencies identify, prepare and divest properties prior to a report of excess
- Eliminates the requirement, when disposing of non-GSA properties, to transfer funds above an identified threshold to the Land and Water Conversation Fund

Federal Lands Infrastructure: Establishes an Interior Maintenance Fund composed of revenues from amounts due to the US from mineral and energy development on federal lands and waters. Provides that half of the receipts generated by expanded federal energy development, up to a total of US\$18 billion, will be deposited into the fund to address the deferred maintenance and capital needs for infrastructure on public lands.

XI. Workforce Development

The proposal also includes provisions designed to strengthen the American workforce and ensure there are skilled workers to fill jobs created by increased infrastructure investment. This would include expanding eligibility for the Pell Grant program to short-term programs that lead to a credential or certification in an in-demand field; reforming career and technical education programs to promote STEM education and expand apprenticeship programs; and reforming the Federal Work Study program to enhance support for students pursuing career and technical education. The proposal would also reform licensing requirements to ensure that workers with out-of-state skilled trade licenses are permitted to work on infrastructure projects that include federal funding.

XII. Conclusion

This proposal is now in the hands of Congress, which seeks to craft a bill that could gain bicameral, bipartisan support in a contentious election year. As is often the case, the sticking points will likely be how much to spend and how to pay for it.

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