

Insights: Alerts

Infrastructure Acceleration Effort Takes First Step in Right Direction – President Signs Executive Order to Streamline Environmental Review Process

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As has been widely discussed over the past decade, the U.S. transportation and energy infrastructures—from highways and bridges to airports, rail and ports to power generation and distribution—have seen a significant degradation and have significant cyber exposure. Roads and bridges designed for a 50-year lifespan and limited daily traffic counts are seeing lifespans for 70, 80, and even 100 years, and their capacities are well exceeded. Likewise, the risk of hackers damaging or wreaking havoc on the energy distribution system is a real world threat. Look no further than the 2007 I-35W Mississippi River Bridge collapse in Minneapolis as a relatively recent example. One of President Trump's campaign promises was the need for significant infrastructure modernization, fortification, and improvement. The problem has been that he has provided little in the way of guidance or direction on (a) how this is to be funded; (b) how projects are to be prioritized; and (c) how the review and approval process will be improved.

Calling for \$1 trillion in infrastructure spending, the President's proposed 2018 Budget calls for \$200 billion in direct federal spending over the coming decade, along with a goal to reform how such projects are regulated, delivered, maintained, and funded. Unfortunately, the \$200 billion line item lacked any real details on what or how the money would be spent. One place where the President has placed his priorities is found in a list of “top 50” priority projects released during his campaign. See, <https://www.documentcloud.org/documents/3409546-Emergency-NatSec50Projects-121416-1-Reduced.html>. Focused predominantly on big visibility projects, this list does not address the smaller, but still critical, infrastructure issues and concerns, such as the bridges and roadways that Americans drive over (and under) on a daily basis. It is these “less sexy” types of projects that the American Society of Civil Engineers (ASCE) looks to in grading the current infrastructure. In issuing its 2017 Report Card, the ASCE graded the U.S. as a whole as a D+. See, <https://www.infrastructurereportcard.org/>. These sorts of more mundane projects warrant significant investment, but it appears politicians are hesitant to truly champion them as they lack the visibility and “political” clout that they seek during reelection.

In addition to the \$200 billion in federal spending, the balance of the \$1 trillion needs to come from alternative sources including states, localities, and private ventures. The increase in privatized highway and bridge projects, as well as Public Private Partnerships (PPPs or P3s) must become part of the lexicon and recognition of governments at all levels. This recognition is just starting but one must imagine that it will take on increased

momentum and use over the coming decade.

With this background, on August 15 the President signed an Executive Order (EO) (See, <https://www.whitehouse.gov/the-press-office/2017/08/15/presidential-executive-order-establishing-discipline-and-accountability>), which seeks to establish and “...ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent...” Environmental Impact Statements and reviews cause a significant cost and time impact on the start of projects and the Administration seeks to reduce the average permit issuance time from 10 to two years. See, <https://www.whitehouse.gov/blog/2017/06/08/president-trumps-plan-rebuild-americas-infrastructure>.

Given the President’s focus on infrastructure investment, this EO seeks to focus on efforts to “strengthen our economy, enhance our competitiveness in world trade, create jobs, and increase wages for our workers, and reduce the costs of goods and services for our families.” It also recognizes that the current infrastructure is in poor condition and that it costs Americans thousands of dollars a year (presumably in lost time spent sitting in traffic and damage, wear, and tear to vehicles). In attempting to increase private investment, the Administration has recognized that environmental reviews and permit decisions not only delay such investments but result in increased costs, thereby hampering such projects. As a result, the President has established the following policy/goals for executive agencies:

- (a) Safeguard our communities and maintain a healthy environment;
- (b) Ensure that Federal authorities make informed decisions concerning the environmental impacts of infrastructure projects;
- (c) Develop infrastructure in an environmentally sensitive manner;
- (d) Provide transparency and accountability to the public regarding environmental review and authorization decisions;
- (e) Be good stewards of public funds, including those used to develop infrastructure projects, and avoid duplicative and wasteful processes;
- (f) Conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner in order to give public and private investors the confidence necessary to make funding decisions for new infrastructure projects;
- (g) Speak with a coordinated voice when conducting environmental reviews and making authorization decisions; and
- (h) Make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within two years.

While certainly great goals, it remains to be seen if implementation can match these desires. For context, the EO defines “Infrastructure Project” as any project “...to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation,

including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the [Federal Permitting Improvement Steering Council].” The EO defines “Major infrastructure project” as a project for which “multiple authorizations by Federal agencies will be required to proceed with construction,” which requires a NEPA environmental impact statement [EIS] and for which the project sponsor has available funds sufficient to complete the project.

While the definitions themselves are seemingly straightforward, they do read in the form of focusing on those projects with the aforementioned political visibility, not the more common rehabilitation or modernization projects to existing infrastructure that are currently needed and which often times cost far less than out-of-the-ground new construction.

The EO creates certain goals for accelerating the EIS-related permitting processes, including active collaboration among the various agencies with oversight of such projects but does not provide any real discussion on what that process and streamlining may consist of or what oversight is covered outside of the environmentally related one. These goals are broken down into (a) CAP Goals – which are the Federal Government Priority Goals established through the Government Performance and Results Modernization Act of 2010 (PL 111-352) (GPRA); and (b) Agency Goals – consisting of compliance with GPRA performance goals for agencies relating to the completion of EIS reviews and authorization on infrastructure projects. Under this guise, the EO creates a “One Federal Decision” procedure in which one agency takes the lead and responsibility for:

“...navigating the project through the Federal environmental review and authorization process, including the identification of a primary Federal point of contact at each Federal agency. All Federal cooperating and participating agencies shall identify points of contact for each project, cooperate with the lead Federal agency point of contact, and respond to all reasonable requests for information from the lead Federal agency in a timely manner.”

The EO further requires that the various agencies agree to an approval timeline and that each agency decision on a given application is placed in a central repository or “dashboard” on a project-by-project basis to create a “Record of Decision” (ROD). All authorization decisions from the Federal Government are to be completed within 90 days of the issuance of a ROD by the lead agency, so long as the “...final EIS includes an adequate level of detail to inform agency decisions pursuant to their specific statutory authority and requirements.” That 90-day period may be extended by the lead agency if it is determined that an agency is prohibited by federal law from issuing its permit or approval within the 90-day period, the project sponsor seeks an alternative time line or the lead agency determines that additional time would “better promote completion of the project’s environmental review and authorization process.”

Also of some interest is the creation of a dispute resolution procedure for situations where different agencies have disputes involving Federal environmental review or authorization decisions "...for any infrastructure project pertaining to any environmental law, regulation, order, or policy..." In such a case, the Council on Environmental Quality is authorized to act as the mediator.

Some other interesting points to highlight include the fact that the EO:

(a) Creates and assigns to the Departments of the Interior and Agriculture, the duty as respective lead agencies for "facilitating the identification and designation of energy right-of-way corridors on Federal lands for Government-wide expedited environmental review for the development of energy infrastructure projects."

(b) Without explanation, the EO revokes EO 13690, dated January 30, 2015, which was issued by President Obama and established a Federal Flood Risk Management Standard and sought stakeholder input.

As anyone who has dealt with any governmental body knows, speed is not a word normally applied to administrative or governmental reviews and processes. With this EO, the current Administration seeks to place its foot on the accelerator at least in an effort to get one pitfall out of the way of large infrastructure projects, namely the dreaded environmental review process. While a decent start, it will remain to be seen if the agencies can timely get their streamlining processes in place and allow One Federal Decision to work in a way that actually does speed the process. Getting divergent agencies to work across lines is never an easy thing, and in this case, the short deadlines are doubtful to be met.

Likewise, getting the environmental process shortened is a great first step, but it is but one of many that need to be addressed. Getting permits and approvals for construction of projects on a non-environmental basis (for example, energy generation plant permitting from the Department of Energy; non-environmental-related construction approval from the U.S. Army Corps of Engineers for water-related matters such as harbor construction) and getting any grants or loan guarantees approved and processed from various agencies such as the Federal Highway Administration, USDA, etc., still remain cumbersome and time-consuming processes.

Until those other procedures are addressed by the Government, it remains to be seen how this first step will move the remaining processes and procedures forward.

We shall continue to report on the President's Infrastructure Modernization efforts as these developments happen, with a sincere hope that the Government can successfully streamline the entire "cradle-to-grave" process.

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