

## Infrastructure Proposal Stresses Environmental Streamlining and Reform

By Fred R. Wagner and Chelsea O'Sullivan on January 29, 2018

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In advance of the State of the Union address, leaked copies of the administration's infrastructure legislative outline appeared in the media. While this outline failed to address key questions facing both the White House and Congress concerning how to pay for an infrastructure initiative it described dozens of reforms to permitting requirements for federal decisions impacting virtually every major environmental program.

Many of these proposals are not new. They appear in previous legislation, such as MAP-21 and the FAST Act. The administration simply seeks to extend these reforms to a broader cross section of infrastructure sectors. Others have been articulated in one of the several streamlining executive orders issued during the Trump administration's first year.

However, many other suggestions represent significant departures from current practice, in terms of which agencies have authority over permit decision-making, the relative roles of state and federal agencies, and how courts adjudicate environmental review and permitting actions across the federal government.

Here is a summary of some of the key proposals found in the outline:

### *Key Proposals for Environmental Review Generally*

- Require lead agencies to complete the environmental review and issue a Finding of No Significant Impact (FONSI) or a Record of Decision (ROD) within 21 months, and within three months of that decision require permitting agencies, including state agencies of delegated federal programs, to make a determination on the necessary permits. If permitting agencies fail to make a decision in the three-month window, the matter is automatically reviewed by the Federal Permitting Improvement Steering Council. In conjunction, courts are instructed not to find FONSI and RODs issued within the 21-month time frame insufficient “based on a lack of analysis if the court finds that the agency made a good faith effort to provide adequate analysis within the allotted time and resources available.”
- Consolidate environmental review with the lead agency by confirming that the lead agency has the final authority to determine the purpose and need and to select the range of alternatives, requiring the lead agency to develop a single federal environmental review document and single ROD that will be signed by the lead agency and all cooperating agencies, and allowing lead agencies to issue the Federal Environmental Impact Statement (FEIS) and the ROD at the same time, extending to other infrastructure projects the authority MAP-21 granted to surface infrastructure projects.
- Require the Council on Environmental Quality to review and revise its regulations to streamline NEPA.
- Allow federal agencies to use the Categorical Exclusions of any other federal agency.
- Allow certain activities, such as final design activities of design-build contractors an acquisition and preservation of rights-of-way, to occur prior to completion of NEPA review.
- Allow all lead federal agencies to opt in and apply the provisions under 23 USC §139 (providing for efficient environmental review of highway and transit projects) to other infrastructure projects.

- Allow federal agencies to accept funds from non-federal entities, including private project sponsors, to support environmental review and permitting.

### *Key Proposals Regarding the Clean Water Act Section 404 Program*

- Eliminate the Interagency Review Team to streamline the review of mitigation bank and increase the efficiency of the mitigation bank approval time frames.
- Eliminate automatic USACE review of all agency determinations that a project meet the requirements of a USACE Nationwide Permit, but retain USACE's authority to reinitiate its review if it determines an agency has improperly found NWP criteria met.
- Streamline the Section 404 permitting process by consolidating "waters of the United States" jurisdictional determinations with the USACE, removing EPA's authority to veto a USACE-issued Section 404 permit, and eliminating the duplication between the Clean Water Act Section 404 process and the Rivers and Harbors Act Section 408 process.

### *Key Proposals Regarding the Clean Water Act Section 402 and 401 Programs*

- Require states to determine the completeness of a 401 Certification application within 90 days of submission and, once application is deemed complete, make a decision to issue or deny the 401 Certification within three months. If the state fails to make a completeness determination in the allotted time frame, the administrator may make the decision, and if the state fails to make a decision on the 401 Certification within the time frame, the project applicant can appeal to the lead agency.
- Extend a National Pollutant Discharge Elimination System permit time limit to ten years and allow for automatic renewals if more stringent permit limits are not required based on water quality needs.

### *Key Proposals Regarding the Clean Air Act*

- Eliminate the EPA's review and assessment of EIS's under Section 309 of the Clean Air Act.
- Amend the Clean Air Act to clarify that metropolitan planning organizations need conform only to the most recent National Ambient Air Quality Standard.
- Amend the Clean Air Act to allow transportation conformity to apply one year after EPA approves emission budgets needed for the conformity determination.

### *Key Proposals Regarding the Endangered Species Act*

- Clarify that where the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) has made a jeopardy determination, the reasonable and prudent alternatives analysis in a biological opinion is not a final agency action triggering NEPA review.
- Provide flexibility in listing petition deadlines, to allow for prioritization of listing petitions and provide for a short-term independent panel within the FWS and NMFS to evaluate and complete reviews of delisting petitions. Additionally, allow FWS and NMFS to consider conservation efforts in place to benefit a species, including voluntary efforts, when making a listing/delisting determination.
- Allow delegation of authority for intrastate activities to states to carry out habitat conservation planning, issuance of incidental take permits, and related NEPA review.
- Require FWS and NMFS to designate critical habitat within a year of the final approval of a species recovery plan.

### *Key Proposals Regarding the National Historic Preservation Act*

- Remove duplicative federal agency responsibilities to review Section 4(f) determinations.
- Allow the Department of Transportation to use an agreement reached under the Section 106 process to meet its obligations under the Section 4(f) process to eliminate duplicative review.
- Eliminate National Park Service approval for identifying and procuring replacement property when property funded by Land and Water grants is being converted to a different use.
- Authorize the Secretary of the Interior to approve rights-of-way for natural gas pipelines across land administered by the National Park Service, consistent with authority for other types of rights-of-way.

### *Key Proposals Regarding the Federal Power Act*

- Amend the Federal Power Act to prohibit federal agencies invited to cooperate with FERC under a NEPA review from also intervening in a licensing proceeding, consistent with FERC policy and regulations.

### *Key Proposals Regarding State Delegation*

- Authorize other federal agencies to delegate NEPA responsibilities to states, similar to the current authority of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA).
- Broaden NEPA assignment under the Surface Transportation Project Delivery Program to allow states to assume responsibility for project-level conformity determinations under the Clean Air Act and determinations for flood plain protections and noise policies.
- Allow states to assume some or all of FHWA's right-of-way approval responsibility.

### *Key Proposals Regarding Pilot Programs*

- Establish and implement a pilot program to address the impacts of a project based on performance standards rather than environmental review.
- Establish and implement a pilot program to address the impacts of a project through negotiated mitigation agreements, which would include mitigation strategies such as purchase of offsets, avoidance of impacts, or an in-lieu fee dedicated to an advanced mitigation fund.

### *Key Proposals Regarding Judicial Review*

- Require that stopping a project shall be available as a judicial remedy only under exceptional circumstances.
- Revise the statute of limitations for any federal permit or decision for an infrastructure project to 150 days, consistent with the statute of limitations established for surface transportation projects.
- Clarify that categorical exclusions developed by federal agencies should be given deference and are not subject to judicial review under the Administrative Procedure Act.
- Codify that a Biological Opinion is not a final agency action and is not subject to a legal challenge.

In the days to come, we will provide more in-depth analysis of these proposals in this space. For now, here's a trivia question coming out of MAP-21, which was enacted in 2012: Who were the two Senate co-sponsors of the environmental streamlining provisions of that statute?

While you ponder your answer, consider this: In the view of many experts, infrastructure has the potential to be a (the only?) possible topic of bipartisan legislative action prior to the 2018 mid-term elections. In the past, building that legislative coalition was based on finding common ground for key projects around the country (formerly known as earmarks) and a perceived equitable distribution of federal support for such projects. Only recently was environmental review and permit streamlining added to that equation. Even those reforms were, for the most part, bipartisan. In the absence of a funding solution, will a new coalition be possible?

Now, the answer to the trivia question: Senators Barbara Boxer and James Inhofe led the fight for MAP-21's environmental streamlining provisions – possibly the most liberal and most conservative members of that body at that time. Reactions to this infrastructure outline and to the president's State of the Union address will indicate whether such a partnership is even remotely possible now.

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