

# **Bond Case Briefs**

*Municipal Finance Law Since 1971*

---

## **To Speed Up Infrastructure Projects, Trump Revisits Environmental Regs.**

***The White House's push to build more infrastructure — and quickly — will likely bring changes to some of the country's most iconic environmental laws.***

President Trump has made no secret over the course of his campaign and early administration that he thinks it takes too long for infrastructure projects to get approved and built. A report from The Wall Street Journal last week indicated just how much he'd like to speed things up: The president wants states to start building within 90 days of getting federal money, compared with the years it can take for projects to start now.

The biggest hold-ups for most projects, though, come from federal — not state — regulations. State and county transportation officials say federal environmental, safety and workplace reviews can more than double the time it takes to complete a project.

But, they add, a GOP-controlled Congress and new administration provides the perfect opportunity to re-evaluate many of those long-standing environmental laws.

"We are not talking about trying to go out and gut the environmental process," says Tim Hill, the administrator in charge of environmental services for the Ohio Department of Transportation (ODOT). "That's not what states are about. They support clean air. They support clean water. They want to make good, common-sense decisions. But they want common-sense decisions in a process that allows flexibility."

Of course, many environmental groups are wary of any major changes to landmark environmental laws, especially because Congress has already sped up many parts of the reviews in recent years.

"They already won," says Scott Slesinger, the legislative director for the Natural Resources Defense Council (NRDC). "The problem isn't and has never been [environmental reviews] that have caused the delays. It's other stuff. It's money. It's local opposition. It's supply-chain problems."

Trump has already begun the process of rolling back some environmental regulations, but his administration largely hasn't specified what changes they'd like to see in order to speed up infrastructure projects. Experts, however, point to several areas that are most likely to get more scrutiny.

### **Clean Water Act**

In February, Trump signed an executive order instructing the Environmental Protection Agency to start the years-long process of defining more specifically which types of waterways fall under the Clean Water Act.

The order was cheered by the National Association of Counties, which has complained that the Obama administration's interpretation of the act is too expansive.

Congress passed the Clean Water Act in 1972, but a series of court decisions since 2001 left in question which waters were regulated by it. Everybody agrees that the law applies to navigable rivers and lakes. Beyond that, though, things get trickier — particularly when it comes to wetlands and areas that are sometimes, but not always, covered in water.

In 2015, Obama sought to settle the debate by including small streams and wetlands under the act. But Brian Namey, a spokesman for the National Association of Counties, says Obama only muddied the waters further.

“What the previous administration did to clarify the definitions [only confused them more],” he says. “We are going to work with the new administration to make clearer rules. Counties need clarity.”

One of the reasons road builders are so concerned about the existing rule is that the more expansive definitions give opponents of a project more opportunities to sue to stop or delay it, says Nick Goldstein, the vice president of regulatory affairs for the American Road and Transportation Builders Association.

But Schlesinger of the NRDC says the worries over the Obama-era interpretation are overblown. He argues that the industries most affected by the more expansive rule he issued are home building and oil and gas development — not transportation.

Beyond the issue of what kind of waterways are covered by the Clean Water Act, Congress could also look at whether the permit application process required by the law is duplicative. ODOT’s Hill says projects that include, say, bridges over streams need both an environmental impact statement that includes the project’s effect on waterways and a separate approval from the U.S. Army Corps of Engineers that covers many of the same areas.

## **Endangered Species Act**

Congress is already looking at revising the landmark 1973 environmental law, for reasons that go far beyond transportation and infrastructure projects.

For one, the law restricts land development, which can hamper oil drilling, home construction, farming and ranching. For another, the process of delisting a species that has recovered is very contentious.

Nevertheless, the Endangered Species Act touches upon “almost every project that we process,” says ODOT’s Hill. It’s “been around for 30 or more years and has not been through any substantial changes since its inception. So [it’s] definitely due for a rework.”

The law currently protects 1,276 species that are either threatened or endangered. New wildlife are added all the time, especially because the law gives private citizens the ability to sue to add new species. In other words, it’s rare for a large project to go from start to finish without having to adjust to a new listing.

Making matters worse, the federal government often lists new protected species before it determines its plan for rehabilitating them. That means that transportation agencies can go several years without knowing for sure whether they will meet the federal criteria. During that time, frequent communication with the U.S. Fish and Wildlife Service is required on every individual project in order to make sure the new projects are in compliance once the rehabilitation plan is completed.

“When they put a new species on that list without that homework being done first, transportation

agencies are at loss,” says Hill.

## **National Environmental Policy Act**

The National Environmental Policy Act (NEPA) is one of the most sweeping environmental laws on the books, and, depending on your perspective, one of the most onerous.

It requires anyone receiving federal money to assess the environmental impact of the projects as well as their impact on businesses, residents and historic sites.

The scope of the review depends on the size of the project. Projects that cost less than \$5 million — which are the vast majority of transportation projects — are generally excluded from the impact study. Slightly larger projects, like a new intersection or highway on-ramp, require a more involved process called an “environmental assessment.” The biggest projects, like ones that require new rights of way, require a full environmental impact statement.

It’s the biggest projects that tend to get the most attention, and they’re the ones with the longest approval process. For projects approved in 2011, for example, the average time the NEPA process took was more than six years.

Congress responded to criticism about the lengthy reviews when it wrote its last two major surface transportation funding bills in 2012 and 2015. Federal lawmakers, for example, expanded the types of projects that were exempt from the reviews. They also allowed states to conduct their own NEPA reviews on behalf of the federal government, which California, Florida, Ohio, Texas and Utah have opted to do. Hill says Ohio saved \$4.6 million in the first three months of doing the reviews itself.

Shannon Eggleston, the director of environment programs for the American Association of State Highway and Transportation Officials, sees another opportunity to streamline the process. She points to a provision that blocks federal money from being spent on environmental reviews for a project until all the funding to pay for that project has been identified.

The result, she says, is that “there’s not on-the-shelf, ready-to-go projects.”

## **Buy America**

As part of his infrastructure push, Trump has emphasized making U.S. companies “buy American and hire American.” Congress has already enacted several Buy America provisions covering a range of infrastructure including highways, rail cars and water pipes. But if Trump opts to go further, it could undermine his goal of expediting infrastructure projects.

Goldstein, from the road builders group, says the issue with Buy America provisions is not location but cost.

“If you’re talking about something that costs under a dollar — like a nut or a bolt — should you be required to go to spend many dollars to buy an American screw?” he asks.

Buy America laws already complicate the building of transit projects, says Rob Healy, the vice president of government affairs for the American Public Transportation Association. For example, when transit agencies have to relocate utility lines, they have to ensure that they are using American-made pipes and other components to do so. But that makes it hard to re-use the same pipes because utilities don’t track the origins of those components with the detail required by Buy America provisions.

Healy notes that the most recent federal transportation law, the FAST Act, which was signed in December 2015, increases the percent of U.S.-made components required to be in new buses and rail cars from 60 percent to 70 percent by 2020.

“We just had this increase,” he says. “Let us implement it before we go to a higher domestic content requirement.”

## **Funding**

If there’s any agreement on what could speed up new infrastructure projects, it’s on the need for more federal spending.

Slesinger from the NRDC says better funding of federal environmental agencies would help provide staff to do the needed environmental reviews for infrastructure projects more quickly.

An influx of new money would also allow transportation planners to make plans farther into the future. The current federal spending plan for transportation only goes through 2020, and it relies on one-time money. That doesn’t bode well for planners who want to build a project that will take more than three years to finish.

“You don’t have a lot of projects because they’re not funding a lot of projects,” says Schlesinger. “If the pool of projects is small, you can’t blame that on NEPA.”

GOVERNING.COM

BY DANIEL C. VOCK | MARCH 13, 2017