Bond Case Briefs

Municipal Finance Law Since 1971

Infrastructure Update: America's Water Infrastructure Act of 2018.

Prospects for a major infrastructure bill are uncertain, but several initiatives at the United States Army Corps of Engineers should facilitate some projects in the energy sector—including ports, terminals, and navigation channels, and a wide variety of linear projects, such as transmission lines and pipelines that interface with federal water projects and thus require approval from the Corps.

America's Water Infrastructure Act of 2018 ("AWIA," aka "WRDA 2018"). President Trump signed America's Water Infrastructure Act of 2018 on September 13, 2018. Primarily focused on the Corps, "water resource development acts" are the vehicles used by Congress—ideally every two years—to authorize federal infrastructure projects for purposes such as navigation, flood control, hydroelectric power, and municipal and industrial water supply. The latest installment, AWIA, is notable for its continued focus on public-private partnerships and regulatory reform. Numerous provisions expand opportunities for non-federal partners to expedite federal projects. Examples include opportunities either to "contribute" or to "advance" funds to expedite construction of federally approved projects, and even to construct projects to be owned, operated and maintained by the Corps.

For example, Section 1153 of the AWIA improves the "Section 204" program, which allows non-federal interests to take the initiative to construct federal water projects that have been approved by Congress, but that have not been funded for construction. Subject to cost-sharing requirements applicable to all federal water projects, costs incurred by the non-federal partner that would have been borne by the Corps are potentially eligible for reimbursement upon completion. While there is some risk that reimbursement will be denied or delayed, this risk may be acceptable for certain critical projects. Because the congressional "authorization" and "appropriations" processes are separate, being controlled by different committees, and because many authorized projects are never funded for construction, this program provides an important new mechanism for non-federal interests to get the job done.

Until now, Section 204 projects have been impeded by a requirement that non-federal "constructors" obtain any applicable permits that would be required of a non-federal party, including permits that would not be required of the Corps. Section 1153 fixes this problem by allowing Section 204 "constructors" to stand in the shoes of the Corps from a permitting perspective. Contracting procedures will be used to ensure that non-federal constructors adhere to all standards or requirements that would apply to the Corps. By eliminating the need to apply for additional permits, however, Section 1153 will significantly streamline the procedure, making Section 204 significantly more attractive. The Corps will issue implementing guidance providing further details.

Reform of the "Section 408" Approval Process. Clients that interact with the Corps should also take note of recent changes to the Section 408 approval process. Section 408 (33 U.S.C. § 408) requires Corps approval before any person can "alter" or "occupy" a federal water project or related "works." Because federal water projects include extensive real estate holdings, including levee systems and waterways, Section 408 is triggered by many types of projects, including transmission

and pipeline projects merely requiring an easement to cross federal lands or navigable waterways. Because the Section 408 approval process is notoriously slow, this program has been a significant obstacle to many private projects.

On September 13, 2018, the Corps issued a new guidance revising and reforming its Section 408 approval procedures. See Engineer Circular (EC) 1165-2-220 (13 Sept. 2018). The new guidance creates "categorical exemptions" for certain types of projects. Other improvements include greater delegation of decisions; introduction of a multi-phased review option for incremental reviews; timelines for written notifications; and procedures to better align and integrate Section 408 with certain reviews conducted by the Corps' Regulatory Program.

Conclusion

The AWIA and the new Section 408 procedures reflect a broad, bipartisan focus on infrastructure development and regulatory reform. This focus is expected to continue in the new Congress. Other significant regulatory reforms consistent with this focus are also pending, including a full-scale reorganization of the regulatory functions of the Corps and the government-wide "One Federal Decision" initiative to reform environmental review procedures. Clients pursuing major infrastructure projects should track these developments carefully to identify new opportunities.

King & Spalding

November 19, 2018

Copyright © 2026 Bond Case Briefs | bondcasebriefs.com