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The Infrastructure Investment and Jobs Act: A Pivotal Moment for Water Public-Private Partnerships in the United States

WRITTEN BY

MK Houston | Robert A. Gallagher | Alexander Z. Bulkin | Anna Wildeman

Introduction

America's water infrastructure has long faced a critical need for funding and modernization. According to the American Society of Civil Engineers, there is a $105 billion funding gap for drinking water and wastewater infrastructure projected over the next two decades.[1] The Infrastructure Investment and Jobs Act (IIJA) addresses this issue head-on, allocating $55 billion to water infrastructure — the largest federal investment of its kind in the nation's history.[2] However, the significance of the IIJA extends beyond its substantial funding. It distinguishes itself through a deliberate emphasis on efficiency, innovation, and collaboration in project delivery — a strategic focus that aligns seamlessly with the core principles driving successful public-private partnerships (P3s). As a result, the IIJA emerges as a catalyst, paving the way for the increased use of P3s in transforming America's water infrastructure. This convergence of the IIJA's ambitious objectives with the inherent advantages of P3s presents an extraordinary opportunity to revitalize our water systems, creating infrastructure that is resilient, sustainable, and capable of meeting future challenges.

USACE Funding for Water Infrastructure

In a decisive move, the IIJA allocated $17.1 billion to the U.S. Army Corps of Engineers (USACE), spotlighting this agency's critical role in the future of American water infrastructure.[3] As a key player in tackling the nation's water infrastructure challenges, Congress has delegated an array of additional construction, rehabilitation, and oversight responsibilities to the agency.

The investment is thoughtfully distributed, covering the breadth and depth of the water sector's most pressing needs. Indeed, $1.5 billion is set aside for river and harbor rehabilitation, while an additional $200 million is earmarked for water-related environmental infrastructure.[4] Furthermore, in recognition of the growing urgency of coastal resiliency planning, coastal storm risk management efforts have been granted an allocation of $2.55 billion.[5]

The IIJA funding will also fuel construction and expansion of inland waterways projects ($2.5 billion), fund shore protection projects ($200 million), and support inland flood risk management projects ($2.5 billion).[6] This diversified allocation underscores the IIJA's comprehensive approach to safeguarding our national water assets and protecting communities from the escalating threat of natural disasters. But the allocation isn't just about pouring money into construction; it's about ensuring equitable outcomes. Projects set to directly benefit

economically disadvantaged communities are given priority — a clear alignment with the objectives of the USACE Civil Works Private Partnerships Pilot Program, initiated by USACE in 2019 to accelerate the delivery of civil works projects by leveraging the efficiencies and innovation of P3s.[7]

This unprecedented funding injection primes the USACE to harness the power of P3s in transforming water infrastructure in the United States. Indeed, the substantial backing equips the USACE to explore and expand its Civil Works Private Partnerships Pilot Program, paving the way for an exciting era of collaboration that leverages the strengths of both the private and public sectors.[8] This historic investment in the USACE is as much a declaration of faith in the agency as it is a recognition of the role of P3s within the IIJA's vision. As we turn our attention to the Environmental Protection Agency (EPA) grant programs and their new focus on environmental and social justice initiatives, the potential for P3s to serve as agents of transformation within our water infrastructure landscape grows increasingly clear.

EPA Grant Programs for Environmental and Social Justice Initiatives

The IIJA also addresses the environmental and social ramifications — both positive and potentially negative — of water infrastructure development. Acknowledging the substantial impact infrastructure projects can have on communities they serve, the IIJA advocates for a developmental approach that champions sustainability and social justice, while introducing and authorizing a range of grant programs for the EPA to administer.

One of these programs is the Midsize and Large Drinking Water System Infrastructure Resilience and Sustainability Program. Through this initiative, grants are provided to fund projects aimed at enhancing resilience to natural hazards, extreme weather events, and the growing threat of cybersecurity vulnerabilities. With an annual funding of $50 million from FY 2022-26, the program targets public water systems serving communities with populations of 10,000 or more.[9]

Another program established under the IIJA is the State Competitive Grants for Underserved Communities. This program gives priority to states with a significant proportion of underserved communities, providing assistance for projects that improve public water systems within these areas. It receives an annual funding of $50 million from FY 2022-26.[10] The IIJA also modifies and reauthorizes the Assistance for Small and Disadvantaged Communities Program, which grants funds to support public water systems serving small and disadvantaged communities. The funding for this program is set at $70 million for 2022, $80 million for 2023, $100 million for 2024, $120 million for 2025, and $140 million for 2026.[11] The IIJA also renews the Drinking Water Infrastructure Risk and Resilience Program for Small Communities, as outlined in the amended Section 1459A of the Safe Drinking Water Act. This program offers grants aimed at enhancing resilience to natural hazards, providing a funding of $25 million per FY 2022-26.[12]

The IIJA's focus on environmental and social justice reflects a shift in the U.S. regulatory landscape, showcasing a growing commitment to build economic and infrastructure strategies around equity and sustainable development. Alignment with this emergent regulatory ethos provides P3s with a unique opportunity. P3s, known for their innovative financing structures and flexible project delivery models, are well-positioned to contribute significantly to the environmental and social justice goals emphasized by the IIJA. P3s often demonstrate a firm commitment to social objectives, setting rigorous local employment requirements and fostering economic growth and revitalization. P3s also promote environmental objectives, incentivizing private companies to develop and

deploy innovative technologies that reduce pollution, conserve resources, and protect the environment.

Ultimately, the IIJA will serve as a catalyst, spurring the growth and development of water P3s, while targeting environmental and social justice outcomes. The intersection of the IIJA's goals with P3s' capabilities could enhance the acceptance and implementation of these partnerships, heralding a new period of sustainable and equitable water infrastructure delivery.

WIFIA Funding

Building upon the IIJA's comprehensive funding for water infrastructure, the legislation also introduces significant enhancements to the Water Infrastructure Finance and Innovation Act (WIFIA) program. Established in 2014, the WIFIA program has been a critical component in the advancement of water infrastructure P3s in the United States. Designed to address the nation's mounting water infrastructure needs, WIFIA offers long-term, low-interest loans to eligible borrowers, including P3 developers, for water and wastewater infrastructure projects. The program's affordable financing options have been pivotal in facilitating collaboration between the public and private sectors, promoting innovative project delivery methods and ultimately enhancing the overall efficiency and sustainability of the country's water infrastructure systems.

The IIJA's enhancements to the WIFIA program include expanding the scope of eligible projects, reducing transaction costs for borrowers and increasing appropriations for the EPA and the USACE.[13] By encompassing a broader scope of water infrastructure endeavors, such as drinking water, wastewater, stormwater, and water reuse projects, the IIJA enables WIFIA to support a more diverse array of initiatives.[14] Additionally, IIJA lowers transaction costs for WIFIA borrowers by reducing the number of required investment-grade credit ratings from two to one, streamlining the borrowing process and making it more accessible.[15]

The IIJA also bolsters the lending capabilities of the EPA and USACE WIFIA programs through increased appropriations. Under the IIJA funding, EPA is set to receive $50 million annually for WIFIA loans for FY 2022-26, which translates to an annual lending authority exceeding $5 billion.[16] For the same period (FY 2022-26), the USACE is allocated $75 million for its WIFIA-related program. Of this total, $64 million is specifically dedicated to direct loans, guaranteed loans, safety projects, and dam maintenance, while the remaining $11 million is earmarked for administrative expenses.[17]

Case Study: The South Platte River and Tributaries Project

The South Platte River and Tributaries Project stands as a prime example of the power of water P3s in delivering comprehensive and resilient water infrastructure solutions, while advancing environmental and social justice. As a pivotal component of Denver's visionary One Water Plan, this ambitious P3 project is set to tackle pressing water infrastructure challenges along the South Platte River, fueled by a substantial $350 million federal appropriation from the IIJA.[18]

Recognized as the fourth pilot in the USACE Civil Works Private Partnerships Pilot Program, the project epitomizes the spirit of innovation and collaboration that drives successful P3 initiatives.[19] In close collaboration with the city and county of Denver, the USACE is finalizing a locally led delivery approach. This means that the city and county of Denver will be responsible for leading the overall delivery of the project, including the competitive

procurement process to select a private sector developer. The USACE will provide technical assistance and oversight, but the city and county will be the lead agency. Employing the provisions of Section 204 of the Water Resources Development Act of 1992, the corps will then facilitate reimbursements to the city and county of Denver for completed work, enabling substantial cost savings estimated to total up to $194 million and a significantly accelerated project timeline compared to conventional delivery methods.[20]

The cost savings and accelerated timeline are the result of several factors, including:

- **Increased Local Control:** The city and county of Denver will have more control over the project, which can help to ensure that it meets the needs of the community. Locally led projects have a better understanding of the local context. This can help them to identify and address potential challenges early on, which can help to avoid delays and cost overruns.

- **Increased Community Engagement:** The locally led approach will allow the city and county to engage with the community throughout the project. When the local community is directly involved in the planning and implementation of a project, they are more likely to support it. This can help to reduce delays and opposition, which can lead to a more efficient project delivery process.

At the heart of the South Platte River and Tributaries Project lies multifaceted goals focused on ecosystem restoration and flood-risk reduction. The project ambitiously aims to restore approximately 160 acres of vital riparian corridor and wetland habitat, augmenting the area's ecological richness.[21] In tandem, nearly 100 acres of aquatic habitat will be revitalized, ensuring the harmonious coexistence of diverse aquatic species. The project is also dedicated to reconnecting 190 acres of previously isolated habitat, promoting the free flow of life-sustaining ecosystems along the South Platte River.[22]

This endeavor is not confined to environmental aspirations alone. The South Platte River and Tributaries Project bears the hallmark of social equity, offering vital flood-risk reduction measures to economically disadvantaged neighborhoods. By integrating flood mitigation strategies into the project's blueprint, the project directly addresses environmental injustices that have historically burdened vulnerable communities.[23] Furthermore, the project's commitment to environmental sustainability is exemplified by its focus on climate resiliency and the potential reduction of stream temperatures, forging a path toward a more resilient and adaptive urban river corridor.[24]

In essence, the South Platte River and Tributaries Project exemplifies the possibilities inherent in water P3s, transcending traditional boundaries to holistically address complex water infrastructure challenges. It showcases the prowess of collaboration and innovation in fostering sustainable and equitable solutions that simultaneously meet environmental, social, and financial objectives. Through its embodiment of environmental and social justice principles championed by the IIJA, this transformative project represents a beacon of hope, illuminating the path toward a brighter and more sustainable future for our communities and our water infrastructure.

Conclusion

The IIJA represents a watershed moment for water infrastructure in the United States, introducing unprecedented funding and support for innovative financing mechanisms. As a result, water P3s are well-positioned to reap

considerable benefits, enabling communities and utilities to achieve their environmental, social, and financial objectives, while contributing to the enhancement of the nation's infrastructure.

At Troutman Pepper, our commitment to handling the legal aspects of water P3 development is supported by our diverse team of experienced experts who are ready to provide clear guidance tailored to each unique situation. As the IIJA continues to impact the water infrastructure landscape in the United States, our team stays focused on offering advice and support, helping clients make the most of the funding opportunities and innovative financing mechanisms brought about by this legislation.

For more information regarding the IIJA, check out "Federal Infrastructure Bill Paves the Way Toward More Transportation Infrastructure Public-Private Partnerships."

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