Ten Environmental Topics to Watch in the New Infrastructure Bill

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While a spending bill rather than traditional “environmental” legislation, this week’s passage by the United States Senate of major infrastructure legislation has broad environmental implications. Multiple provisions are designed to incentivize progress toward achieving previously stymied goals. In addition to significant reauthorization and spending on roads, bridges, and other forms of transportation, the bill also contains a variety of provisions aimed at addressing climate change, improving the nation’s water supply, encouraging electrification of the nation’s transportation system, cleaning up and reusing contaminated lands, and modernizing the electric transmission system.
This 2,700-page bill is the Senate’s first successfully passed comprehensive infrastructure legislation in several years, and after months of haggling ultimately achieved truly bipartisan approval, by a vote of 69-30. It calls for spending approximately $1.2 trillion, including approximately $550 billion in new spending, over the next eight years.

The final version of the Senate bill is less ambitious than the infrastructure program initially laid out by the Biden Administration earlier this year. Nonetheless, it represents a major commitment of resources and, if ultimately passed, will result in greatly increased federal support for both traditional infrastructure and for important environmental programs that previously have not been included in infrastructure bills, ranging from electrification of the transportation system to cleanup of abandoned mines and other contaminated sites. It also is a precursor to an even larger budget reconciliation bill with more environmental- and energy-related changes.

**Ten Environmental Topics to Watch**

1. **Project Development Funding and Streamlining**

The bill’s entrée is billions of long-awaited dollars in appropriations for a variety of surface transportation projects across the country, such as highways, bridges, rail, airports, ports, bikeways, and walkways. More generally, the bill (particularly its “Project Delivery and Process Improvement” subtitle) continues previously enacted transportation laws’ tradition of streamlining environmental reviews and permitting. For example, the bill codifies the “One Federal Decision” framework of more collaborative and timely federal permitting established by President Trump’s Executive Order 13807, despite the Biden Administration’s prior rescission of that program. Among other things, and subject to certain exceptions, the bill generally requires completion of NEPA reviews within two years, establishment of a schedule with project proponent input, a presumptive 200-page limit for NEPA documents (minus appendices), joint NEPA documents for multiple federal agency approvals, expansion and borrowing of agencies’ NEPA categorical exclusions, and all authorization decisions within 90 days of a published Record of Decision. If codified, these provisions may moot certain litigation claims against and administrative efforts to rewrite similar provisions in the Council on Environmental Quality’s 2020 amendments to federal government-wide regulations implementing NEPA. The bill also would aim to shorten the timeline for identifying transportation projects’ impacts to parkland, historic sites, and certain other areas under Section 4(f) of the U.S. Department of Transportation Act of 1966. As further accountability measures, the bill calls for measurement and reporting to Congress on NEPA completion timelines and specifically on federally-funded transportation projects that are either more than 5 years behind schedule or $1 billion above budget.

2. **Wastewater - First-Ever Support for Clean Water Infrastructure Resiliency**

In addition to a substantial commitment of resources to wastewater treatment infrastructure overall, Section 50205 authorizes $125 million ($25 million per year
for fiscal years 2022 through 2026) to support planning, design, and construction of projects that increase the resilience of publicly owned treatment works to a natural hazard. Eligible projects include the modification or relocation of existing treatment works, conveyances, or discharge system components that are at risk of being significantly impaired or damaged by a natural hazard, and the development and implementation of projects to increase the resilience of those systems. The existence of separate, dedicated funding support for the relocation of existing infrastructure would enable clean water utilities to move vulnerable assets out of harm’s way without taking away from the finite funding available to support critical repair and restoration projects. Also, depending on how EPA’s program defines impairment by natural hazards, this funding could be available to support modifications to combined sewer systems that suffer increased overflow events during extreme weather events, effectively augmenting funding support for wet weather projects generally.

3. **Drinking Water - Infrastructure and Treatment of Emerging Contaminants**

The bill authorizes significant spending in fiscal years 2022 through 2026 to upgrade drinking water infrastructure and to address emerging contaminants and other threats to drinking water quality, availability, access, and affordability. The bill authorizes approximately $55 billion to support planning, design, and construction of infrastructure projects aimed at expanding access to clean drinking water. The bill appropriates additional funds through the Drinking Water State Revolving Fund for specific uses, including $10 billion to address emerging contaminants such as PFAS and $15 billion to facilitate lead pipe replacement and other measures to reduce lead in drinking water. The bill includes provisions directing funding to small and disadvantaged water systems and Tribal communities to promote operational sustainability. It also authorizes the EPA to enact new drinking water regulations to address emerging contaminants and to conduct a study of household affordability. The bill sets aside $8.3 billion for water infrastructure projects in Western states aimed at mitigating the impact of drought, such as investment in water treatment, storage, and reuse facilities ($1 billion for water recycling systems, and more than $1 billion for water storage and groundwater storage projects). The funding would enable drinking water utilities to achieve and maintain compliance with existing drinking water regulations as well as with new and updated regulations that are in development and on the horizon.

4. **Environmental Justice (“EJ”)**

Though the bill only mentions the term “environmental justice” twice, it has been touted as taking key steps to advance EJ and simultaneously criticized for insufficiently addressing EJ. But many of its provisions do in fact support the “whole-of-government” approach to addressing an expansive conception of EJ. For instance, the bill directs the Department of Transportation to prioritize funding under its existing Congestion Mitigation and Air Quality Improvement Program towards “disadvantaged communities or low-income populations living in, or immediately adjacent to” nonattainment areas for fine particulate matter. Also, the bill directs the Department of Energy to prioritize grants for energy efficiency improvements to
schools serving low-income or rural areas, calls on the Secretary of Agriculture to prioritize funding for projects that will reduce wildlife risks to Tribal and low-income communities, and establishes a battery manufacturing and recycling grant program that will prioritize projects addressing the protection of communities located near recycling and materials reprocessing facilities, which may be EJ communities. By vesting a variety of agencies with EJ responsibilities (such as the Department of Transportation, the Department of Energy, the Environmental Protection Agency, and the Department of Agriculture) the bill also reflects President Biden’s “whole-of-government” multi-faceted approach to environmental justice.

Further, in keeping with the spirit of Justice40 — the Administration’s goal of delivering 40% of overall benefits from federal investments to EJ communities in specific areas, including clean energy, clean transit, affordable and sustainable housing, and training and workforce development — the bill calls on various agencies to prioritize grants, projects and programs to disadvantaged, low-income and minority communities. For example, the bill instructs the Department of Transportation to establish a grant program to deploy new charging and refueling infrastructure for a variety of vehicles (e.g., electric, hydrogen, propane, and natural gas), and in doing so reserves 50% of funds for this program for low- and moderate-income neighborhoods, among others. The bill further establishes a grant program supporting “advanced energy projects” which encompasses everything from reducing greenhouse gas emissions to developing energy storage systems, and prioritizes projects with a higher level of job creation in low-income communities or for dislocated workers that worked in manufacturing, coal power plants, or coal mining.

5. Climate Change

The bill contains several climate change provisions, although they fell well short of the Biden Administration’s original ambitions. Collectively, about $150 million would target clean energy and climate change measures. A significant proportion of that funding is focused on low-carbon energy, energy storage (specifically battery technology), and grid modernization. Funds also are allocated to advancing carbon capture, sequestration, and utilization (CCSU) technology and to addressing climate change impacts, such as droughts, flooding, wildfire mitigation, and coastal erosion. Other infrastructure spending may also aid the Administration’s climate goals by channeling funds into infrastructure improvements that would indirectly reduce GHG emissions. For example, spending on ports and airports is likely to improve efficiency and reduce some emissions at those facilities.

Also, some of the bill’s climate-focused funds are to be distributed with an EJ focus (as discussed above). For example, under a Healthy Streets Program, Department of Transportation grants would prioritize projects that focus on low-income or disadvantaged communities, and would encourage the construction of “cool pavements” and “porous pavements, expand tree cover, mostly in urban areas, mitigate urban heat islands, improve air quality, and reduce stormwater runoff, among others. Also, the Department of Energy’s Orphaned Well Site Plugging, Remediation, and Restoration Program (to plug, remediate, and reclaim orphaned production, injection, and monitoring wells located on federal land) would prioritize funding based on public health and safety and also consider any disproportionate health or environmental burden of orphaned wells on communities of color, low-
income communities, and Tribal and indigenous communities.

6. **Zero-emission vehicles**

As another aspect of its climate change actions, the bill provides funding for decarbonizing the transportation sector, targeting $7.5 billion to create a national electric vehicle charging network, another $7.5 billion for electric school buses, and billions more for mass transit improvements, including through low or zero-carbon buses. These provisions parallel recent municipal-level efforts to replace diesel bus fleets. The sufficiency of this new federal spending (scaled back somewhat from earlier targets) may be assessed in the coming months in tandem with President Biden’s recently established goal for “50 percent of all new passenger cars sold in 2030 be zero-emission vehicles.” (Executive Order on Strengthening American Leadership in Clean Cars and Trucks, August 5, 2021.)

7. **Supply Chain Streamlining**

Tucked away in the bill are several provisions important to certain manufacturing, mining, and energy sectors, as those provisions aim to encourage improved supply chains for battery components and critical minerals. One provision encourages a viable domestic battery materials processing industry and battery supply chain. It provides for grants for certain demonstration projects and new, retooled, or expanded facilities. Another provision strives to satisfy the need for critical minerals by increasing their exploration, responsible production, and recycling within the United States. It seeks to streamline approvals with “maximum efficiency and effectiveness” in the review of applications, leases, permits, and other authorizations for critical mineral-related activities on federal lands, and calls for training and performance metrics.

8. **Energy Provisions – Grid Modernization**

The bill calls for spending $65 billion to modernize and expand the nation’s electric transmission grid. These provisions include several grant and loan programs aimed at increasing the resiliency of the electric grid, both to prevent cyber-attacks and to improve the grid’s ability to withstand natural disasters such as wildfires. The bill also includes several substantive provisions aimed at making it easier to construct electric transmission, most notably amendments to the Federal Power Act to ease permitting for transmission constructed in federally-designated “National Interest Electric Transmission Corridors,” and authorization for the federal Power Marketing Agencies (e.g., Bonneville Power Administration) to act as “anchor tenants” in order to act as ‘anchor tenants’ in order to facilitate financing for major transmission projects.

The bill also includes support for a variety of energy technologies, including advanced and small-modular nuclear power, green hydrogen, and carbon capture, sequestration, and use technologies. Support is also devoted to existing power technologies, including a $6 billion grant program designed to keep existing nuclear plants operating in the face of low prices in electricity markets. It also supports improving the efficiency and reducing the environmental impacts of hydroelectric
power plants. Finally, the bill would substantially expand federal support for energy efficiency in buildings, both through grant programs and through programs to encourage the development of advanced efficiency technologies. Proposed amendments to deter efforts to cease natural gas hookups in new and refurbished buildings were defeated.

9. **Partial Reinstatement of Superfund Tax to Fund Remediation**

The bill re-imposes the Superfund excise tax on certain chemicals that lapsed at the end of 1995, and doubles the tax rate per ton of product. The bill expands the reach of the chemical excise tax by applying it to any imported substance in which taxable chemicals constitute more than 20% of the weight (or more than 20% of the value) of the imported substance, instead of the 50% threshold in the earlier tax. The bill would apply the chemical excise tax for 10 years (through the end of 2031). This is longer than the 5-year reauthorization cycle that applied to the original tax, perhaps reflecting past challenges that multiple Congresses have faced with respect to tax reauthorization. The bill does not revive the expired Superfund taxes on petroleum or corporate income.

10. **Superfund/Brownfields Appropriations**

The bill appropriates an additional $3.5 billion for Superfund expenditures, to remain available until expended, and transfers $3.5 billion in general revenues to the Superfund for remediation of legacy contaminated sites on the National Priorities List (NPL). In a departure from the typical requirement, the additional funds will not be subject to the State cost share requirements under CERCLA Section 104(c)(3). This means that EPA can spend these particular funds on remedial action at NPL sites with no additional burden on States.

The bill also provides an additional $1.5 billion for EPA brownfields activities (principally grants under CERCLA Section 104(k)), at a level of $300 million per year for fiscal years 2022 through 2026. These funds similarly will not be subject to the 20% matching fund requirement under Section 104(k)(10), substantially lessening the burden on eligible entities.

**Next Steps**

The Senate bill now goes to the House and may receive final approval later this year. If approved, considerable work will be required for federal agencies to adopt rules and roll out the programs. Once in place, those programs would become a major source of federal support for the next several years.

But the adoption of the bipartisan package is not the end of the debate on infrastructure. Capitol Hill Democrats are moving toward a “reconciliation” package – one that addresses budget issues and therefore can pass the Senate by a simple majority – which is likely to call for significant additional infrastructure spending and to contain a variety of additional provisions addressing climate change, renewable energy, environmental justice, and other environmental topics. The Senate took the first step in this direction, advancing a “blueprint” for the reconciliation legislation in a 50-49 party line vote early on August 11, 2021, with
critical moderate Democrats voting to advance the bill. That blueprint calls for $3.5 trillion in spending focused on health care, anti-poverty measures, education, and climate change. While it will be challenging for Democrats to translate the blueprint to a fully-baked bill and pass it, they have signaled aggressive movement.

Companies and other stakeholders should continue to carefully monitor these legislative developments as they have significant short-term and long-term business implications. While certain legislative provisions may face litigation, the likelihood of success is lower than for challenges to agency regulations and individual project approvals. Other challenges may await subsequent federal agency actions to implement the new law once enacted.

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