



## **\$1.2 Trillion Infrastructure Legislation Provides Funding and NEPA Streamlining for Key Environmental and Infrastructure Projects**

<https://argentco.com/post/1-2-trillion-infrastructure-legislation-provides-funding-and-nepa-streamlining-for-key-environmental-and-infrastructure-projects/>

By Hina Gupta, Esq.

On November 15, 2021, President Biden signed the landmark \$1.2 trillion infrastructure legislation package, more commonly referred to as the Infrastructure Investment and Jobs Act (IIJA or Act). The 2,700+-page Act has been touted as providing key funding to rebuild and modernize the nation's roads, bridges, public transportation, broadband, energy and resource infrastructure needs. The Act also includes a significant amount of funding amount directed by the federal government towards cleaning up pollution and funding to protect the communities against the detrimental effects of climate change. The Act could help make significant strides towards the Biden administration's goal of reaching 100 percent clean energy by 2035. In addition to the more-discussed funding provisions, the Act also contains substantive provisions designed to streamline the environmental permitting processes, particularly for the National Environmental Policy Act (NEPA) environmental reviews for "major projects" under NEPA, which includes most infrastructure projects being funded by IIJA, and amends certain NEPA streamlining provisions for infrastructure projects covered under the Fixing America's Surface Transportation (FAST) Act of 2015 .

### **Background**

In June 2021, President Biden signed off on an bipartisan agreement to allocate trillions of dollars in infrastructure improvements across the country. The agreement proposed to spend \$973 billion over five years—totaling \$1.2 trillion over eight years—on infrastructure projects. On August 10, 2021, the Senate passed the IIJA. After weeks of debate on amendments and tension along party lines, especially concerning what is considered "core infrastructure," on November 5, 2021, the House approved the Act. There are several environmental and climate-related investments in the Act.

### **Key Provisions of the Infrastructure Investment and Jobs Act**

#### **Climate Resilience and Ecosystem Restoration**

The IIJA designates over \$50 billion for climate resilience in order to help communities prepare for extreme fires, floods, storms and drought—in addition to a major investment in the weatherization of homes. This represents one of the largest investments in the resilience of physical and natural systems for the country. The Act provides financial resources for communities that are recovering from or are vulnerable to disasters, increases funding for the Federal Emergency Management Agency (FEMA) and the U.S. Army Corps of Engineers (Corps) programs that help reduce flood risk and damage, and provides additional funding to the National Oceanic and Atmospheric Administration for wildfire modelling and forecasting. The IIJA includes an assignment of over \$2 billion in funding to the Departments of the Interior and Agriculture for ecosystem restoration and \$1 billion for Great Lakes restoration. The Act also sets aside \$350 million to build wildlife corridors, to ensure animals can get under, around or over roads to migrate, mate and maintain biodiversity

#### **Physical Infrastructure Improvements**

The IIJA allocates about \$110 billion for roads, bridges, highways, and surface transportation projects, including \$40 billion of new funding for bridge repair, replacement, and rehabilitation, and around \$16 billion for major projects that are too large or complex for traditional funding programs. The investment aims to repair and rebuild the roads and bridges “with a focus on climate change mitigation, resilience, equity, and safety for all users, including cyclists and pedestrians.”

The Act also provides a major investment, of about \$39 billion, for repair of public transit, and \$66 billion allocation for passenger and freight rail. These transit funds are intended to be allocated to modernizing bus and rail fleets and increasing access to communities that currently lack public transportation options. The rail funds could eliminate Amtrak’s maintenance backlog and increase railway service areas outside the Northeast and mid-Atlantic regions. The package includes \$12 billion in partnership grants for intercity rail service, including high-speed rail. These public transit investments will help reduce greenhouse gas emissions by repairing, upgrading, and modernizing the nation’s transit infrastructure.

Another \$17 billion is allocated towards port improvements and \$25 billion towards airport improvements. The intent is to allow for reduced congestion and emissions, and promoting electrification and utilizing other low-carbon technologies.

## Clean Energy

The IIJA provides a roughly \$73 billion investment in upgrading power infrastructure such as new transmission lines and the expansion of renewable energy. For example, the Act allocates \$16.3 billion to the Department of Energy (DOE) for energy efficiency and renewable energy, with specific funds allocated for continued development of battery storage technology to provide backup for variable renewable generation. This allocation also includes \$21.5 billion to establish a new Office of Clean Energy Demonstrations within the DOE to research carbon capture, hydrogen power, resilient and adaptable electric grids, and other technologies. The IIJA will distribute \$3 billion over five years for demonstration projects on the processing of battery materials and the construction and retrofitting of processing facilities, as well as an additional \$3 billion for grants for similar activities relating to manufacturing and recycling batteries to reduce the life cycle environmental impacts of battery components.

The Act further commits \$7.5 billion funding to zero- and low-emissions buses, ferries, and vehicles, including investment towards zero- and low-emission school buses, and another \$7.5 billion for building a nationwide network of plug-in electric vehicle chargers, including deployment of EV chargers along highway corridors to facilitate long-distance travel.

## Clean Water

The IIJA invests over \$50 billion in water infrastructure improvements to protect against droughts and floods, and weatherization technology aimed to increase resilience of water systems. Another \$55 billion is invested in advancing clean drinking water—the Act allocates \$15 billion to replace all of the nation’s lead pipe, \$200 million to address lead in school drinking waters, and contribute to addressing “forever” contaminants like per- and polyfluoroalkyl substances (PFAS). Earlier in October, Biden administration issued a PFAS Strategic Roadmap that outlined various actions that the U.S. Environmental Protection Agency will take between 2021 and 2024 regarding PFAS, including developing a Notice of Proposed Rulemaking to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. (See: <https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024>)

## Environmental Remediation

The IIJA begins the process of reinstating the Superfund tax “polluter pays” principle, and also provides \$21 billion in environmental remediation investment, including Superfund and brownfield sites, abandoned mines, and for the closure of orphan gas wells.

## NEPA Streamlining Provisions

The IIJA also includes key NEPA streamlining provisions. In order to obtain bipartisan support, § 11301 of the Act amends § 139 of title 23 of the United States Code to provide permanent NEPA streamlining provisions to the federal permitting and environmental review process for "major projects" as defined under NEPA, called as the "One Federal Decision" or "OFD." The OFD streamlining provisions effectively decrease the federal permitting timeline for infrastructure projects by requiring, among other things: 1) federal agencies to coordinate immediately and create a joint project schedule; 2) one agency to lead the NEPA process; 3) the lead agency to invite other agencies to participate in the environmental review within 21 calendar days instead of the prior time limit of 45 calendar days; 4) agencies to work at the same time and not wait in turn; 5) the NEPA review process to be completed within two years from the publication of the notice of intent, pursuant to a schedule developed by the lead agency; 6) the generation of a readable review document with a presumptive 200-page limit for the alternatives analysis portion of an Environmental Impact Statement (EIS); and 7) the production of a timely "record of decision" within 90 days of the agencies' issuance of the final EIS. In fact, a number of these provisions reflect requirements and objectives set forth in Executive Order 13807, issued by President Trump in 2017.

In addition to reviving elements of Executive Order 13807, the IIJA also reauthorizes and amends those sections of the FAST Act of 2015 to streamline review of certain large infrastructure projects. For example, one provision of IIJA amends and permanently reauthorizes § 41002 (42 U.S.C. 4370m) of the FAST Act that pertain to environmental permitting. The federal permitting provisions of IIJA (Section 70801) amends the performance schedules for the Federal Permitting Improvement Steering Council formed under the FAST Act to have the most efficient possible processes, including alignment of federal reviews of projects, reduction of permitting and project delivery time, and consideration of the best practices for public participation. The federal agencies now have a recommended performance schedule of two years to permit the covered projects. The Act makes the permitting reforms established by the FAST Act, which were set to expire in 2022, permanent and extends them to projects sponsored by Indian tribes or located on tribal land. Another important amendment to the FAST Act provisions under the IIJA include requiring a single, joint interagency EIS for a project, where an EIS is required.

In addition, the IIJA includes several provisions related to NEPA processing that would apply only to the transportation projects, including several provisions with respect to categorical exclusions. The Act also establishes a new categorical exclusion under NEPA for certain oil and gas pipeline gathering lines, and expands the scope of the existing categorical exclusion for projects of limited federal assistance to include those that receive \$6 million or less in federal funding and have overall implementation costs of \$35 million or less.

Critics of the Act's streamlining provisions argue that the provisions would decrease the public's ability to participate in the permitting process, and make it easier for agencies to ignore impacts on communities most affected by permitting decisions. But industry groups have long argued that the current environmental permitting is needlessly lengthy and complicated, and has prevented badly needed infrastructure from reaching the intended communities.

## Conclusion and Implications

The Infrastructure Investment and Jobs Act provides key funding opportunities for those with infrastructure projects across a wide variety of industries, including transportation, telecommunications, energy and water. The Act focuses and creates new opportunities in not just on traditional infrastructure projects such as roads, tunnels and bridges, but also focusses on new technologies such as electrification technology, broadband infrastructure and a new focus on water. However, how soon the Act leads to actual results will depend on how soon the federal agencies are able to implement programs and regulations to implement the Act provisions, and how soon the states and local agencies, as the owners and operators of most infrastructure, are able to mobilize their own resources to design and build or repair the infrastructure projects. The White House has recognized the importance of implementation by announcing a new [executive order](#) on November 15, 2021, to guide how the bill is implemented. The EO establishes an Infrastructure Implementation Task Force to

support inter-agency coordination and directs agencies to follow the Biden administration's priorities in implementing the Act.

In spite of the magnitude of the funding provisions, some critics see the IIJA, by itself, to be insufficient to meet the investment needed to meet the climate change and clean energy goals. The proposed Build Back Better Bill, HR 5376, in comparison, is seen as a bigger tool for significant shift in climate change policy by including \$555 billion in clean energy funding [see: <https://www.congress.gov/bill/117th-congress/house-bill/5376?q=%7B%22search%22%3A%5B%22build+back+better%22%2C%22build%22%2C%22back%22%2C%22better%22%5D%7D&s=1&r=1>]

This includes \$320 billion in tax credits for solar panels, building efficiency, and electric vehicles, making it cheaper and easier to deploy clean renewable energy. But for now, the Build Back Better Bill's chances of passage in Senate appear to be very low. For more information on the IIJA, see: <https://www.congress.gov/bill/117th-congress/house-bill/3684>