

The Infrastructure Investment and Jobs Act and Remedial Programs



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The Infrastructure Investment and Jobs Act (IIJA) contains a number of provisions that may prove very important to cleanup lawyers. Known colloquially as the BIF—the bipartisan infrastructure framework—or sometimes as the “bipartisan infrastructure bill,” even though it is no longer a bill, IIJA authorizes over a trillion dollars to an enormous variety of programs. Assuming all that money is actually appropriated, some will pass through established programs. Other will require new processes or programs to spend it as Congress intended. A lot of that money will affect programs, issues and matters with which environmental practitioners deal regularly. I focus here on some remedial programs as examples. One can choose other slices. See, e.g., Rappold, et al., “The Top 5 New Environmental Issues for Commercial Property Owners or Managers,” 12 Nat’l L. Rev. No. 93, fifth set of issues (Jan. 14, 2022).

IIJA covers 1,039 pages in Statutes at Large. Pub. L. No. 58, 117th Cong., 1st Sess. (Nov. 15, 2021), 135 Stat. 429-1467, posted at [//www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf](https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf). Much of the spending under the IIJA will flow through state and local governments. Accordingly, on Jan. 31, the White House issued [Building a Better America](#) (the guidebook), a 429-page guidebook for state, local, tribal and

territorial governments. It also launched a website, build.gov, regarding implementation of the infrastructure program.

When a federal program existed addressing a subject covered by the IIJA, in general Congress organized the new funding and new programs within the existing statutory framework. That requires a little bit of research in order to piece together exactly what was done.

Tracking every program of interest in this statute would be impossible in this space. I offer a few examples by way of inducing interest and suggesting what yet needs to be done.

The guidebook organizes several authorizations and grant programs into the category of “environmental remediation”: “Superfund site” cleanup, brownfield remediation and revitalization, orphan oil and gas well plugging, and abandoned mine land reclamation (which I am not going to address here for want of space). The IIJA makes billions of dollars available in each category.

The provisions affecting sites addressed under the federal Superfund program under the Comprehensive Environmental Response, Compensation, and Liability Act are fairly straightforward. They primarily act to increase the funds available to federal agencies— primarily the EPA—to administer that program. A key distinguishing feature of the CERCLA program is the Hazardous Substance Response Superfund. Like conventional environmental programs, CERCLA authorizes the government to demand that parties liable under Section 107 implement response actions to address releases of hazardous substances from facilities for which those parties are liable and authorizes the government to order those parties to do so. However, CERCLA offers an important alternative enforcement mechanism by creating the Superfund. Rather than only equipping the EPA with escalating sanctions like civil penalties to levy against liable parties who will not agree to implement a cleanup, the Superfund allows the EPA to do the cleanup work itself and then to recover those costs back from liable parties. In effect, CERCLA gives the government a cleanup checkbook, and therefore additional negotiating leverage with responsible parties. The IIJA authorizes appropriation of \$3.5 billion to that program, a large amount relative to the Superfund’s other resources. Importantly, states do not have to provide the ten percent match for amounts spent on remedial actions (that is, permanent cleanups) from these additional amounts provided to the Superfund under Section 104(c)(3) of CERCLA.

In addition, as has been widely reported, the IIJA reinstates the “Superfund tax,” a tax on producing or importing a list of chemical substances. The Internal Revenue Service issued a notice last year to implement this provision, inviting comments as to whether the IRS should issue further regulations or guidance. See [Internal Revenue Service Notice 2021-66](#). This is a tax that was in place for years partially to fund the Hazardous Substance Response Superfund. Therefore, its reinstatement appears to be relatively mechanical.

Practitioners will have an interest in where this new Superfund money is spent; the priorities determine where enforcement interest will focus. Other than certain provisions concerning tribal lands, which does not affect Pennsylvania, the Superfund provisions of IIJA do not specify. The EPA’s only pronouncements on the subject so far have suggested a focus on environmental justice as a rationale for CERCLA attention, or perhaps CERCLA attention as a mechanism to improve environmental justice. See, e.g., [Memorandum from Lawrence Starfield re: Strengthening Environmental Justice Through Cleanup Enforcement Actions](#) (July 1, 2021). The revised model statement of work for remedial design and remedial action, issued in August 2021 shortly after the Starfield Memo, merely imposes additional public participation obligations in environmental justice communities, so it does not specify prioritization yet.

Similarly, the increased “brownfields” funding provided by IIJA does not change any programs but provides a good bit of additional funding for brownfields grants to state and municipal governments and redevelopment authorities under the program already in place under Section 104(k) of CERCLA.

The Superfund provisions do provide an example of how additional public money can be a double-edged sword for private parties arguably responsible for environmental problems. More funding means more enforcement activity. Even if the government funds cleanup activities with new federal money, the existing statute exposes responsible parties to claims for cost recovery to repay those additional expenditures. The government cleans up your site with public money, but then you may have to pay them back.

That same problem may vex newer or revamped programs like oil and gas well plugging. IIJA Section 40601 amends Section 349 of the Energy Policy Act of 2005 to establish a program for identifying and plugging abandoned wells on federal land, but also to fund state programs to identify and to plug abandoned wells on state or private land. Pennsylvania’s initial share of these funds could exceed \$100 million, with more hundreds of millions potentially available.

Pennsylvania has a program to plug “orphan wells” using public money under the Oil and Gas Act. “Orphan wells” have to have been abandoned prior to 1985; wells abandoned more recently have to be cleaned up by those responsible for them. If the commonwealth plugs an orphan well, owners and operators of the well owe the commonwealth cost recovery. The statute defines “the owner or possessor of surface real property, on which an abandoned well is located, who did not participate or incur costs in and had no right of control over the drilling or extraction operation of the abandoned well” *not* to be an “owner” of the well; there is no parallel exemption for “operators.” But observe that the Environmental Quality Board did attempt to impose some responsibility for abandoned wells on applicants for new well permits in the vicinity when it called for a well survey in its unconventional well regulations, a provision that did not survive judicial review. See *Marcellus Shale Coalition v. Department of Environmental Protection*, 185 A.3d 985 (Pa.), *on remand*, 193 A.3d 447 (Pa. Commw. Ct.), *appeal quashed mem.*, 198 A.3d 330 (Pa. 2018).

If you want to plug wells with new money, you have to find them. In order to find them, you have to get parties to identify them to the DEP. They are not going to do that unless they have a fairly clear safe harbor not to be responsible for costs associated with well plugging; otherwise, they will want the money spent somewhere else. How all this large amount of new federal money will be spent and under what priorities remains to be worked out.

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