Natural Resources and Infrastructure Committee Newsletter
June 12, 2020

We are committed to providing our members with timely responses to state research requests and the essential knowledge needed to guide state action. The NCSL Coronavirus (COVID-19) Resources for States webpage is updated daily to reflect new information in policy areas ranging from education to health care costs and access.

We’ve included some of the latest agriculture, energy, environment and transportation policy issues in Washington, D.C., below. If you have any questions that aren’t answered there, please reach out to me, Ben Husch (ben.husch@ncsl.org), or my colleague Kristen Hildreth (kristen.hildreth@ncsl.org) and we will point you in the right direction.

**EPA Issues New Rule Curtailing States’ Rights to Implement Clean Water Act**
The Environmental Protection Agency (EPA) finalized a rule affecting the implementation by states of Section 401 of the Clean Water Act. The rule places significant new limits on state authority to certify, condition or deny any activity that would result in the discharge of pollutants into the waters of the United States. The final rule includes reductions in state timelines for review and certification, restrictions on the scope of certification reviews and conditions, and modifications of other related requirements and procedures. For further details, read NCSL’s Info Alert.

**Executive Order to Allow Emergency Authorities to Accelerate Infrastructure Projects**
President Donald Trump signed an executive order instructing the Transportation, Interior, Agriculture and Defense departments to use emergency and other authorities to accelerate infrastructure projects designed for environmental, energy, transportation, natural resource and other uses. The order relies on a National Environmental Permitting Act (NEPA) provision that allows federal agencies to determine “alternative arrangements” for complying with the environmental review requirements of NEPA during a national emergency. The order notes the importance of economic stimulus considering the impact on the economy of COVID-19. The order follows EPA’s new ruling on Section 401 of the Clean Water Act, significantly reducing states’ authority to approve infrastructure projects within their own boundaries, as well as a number of federal court decisions overturning federal permits for infrastructure projects, including the Keystone XL pipeline, forcing a halt to construction. It will almost assuredly come before the federal courts to determine its legality.

**Federal Court Rulings Will Slow Energy Infrastructure Projects**
The U.S. Court of Appeals for the 9th Circuit ruled that it will not freeze a previous decision by the Montana District Court prohibiting the Army Corps of Engineers from using a nationwide water permit
for oil and natural gas infrastructure projects. The ruling means that without intervention from the U.S. Supreme Court, construction on such infrastructure projects, including the Keystone XL pipeline, will likely be suspended until the 9th Circuit rules on the full merits of the case in 2021. In a separate but related case, Chief Judge Brian Morris of the U.S. District Court in Montana ruled that a 2018 Bureau of Land Management (BLM) instruction memorandum violated a 2015 BLM rule concerning the recovery of sage grouse populations. The ruling, if not overturned, will require the BLM to reclaim 440 leases covering 336,000 acres in Montana and Wyoming with both the federal government and the states having to return funds to the companies that acquired the land as part of the leases. In a third case, the 9th Circuit ruled that local governments can continue seeking climate-related damages from oil companies in state courts.

**House Transportation Committee Unveils Infrastructure Package**
The House Transportation and Infrastructure Committee released the Investing in a New Vision for the Environment and Surface Transportation (INVEST) in America Act. The nearly $500 billion bill would reauthorize federal surface transportation programs for five years, through fiscal year 2024, as current program authorizations expire in less than four months, on Sept. 30. While the bill’s release and anticipated approval by the committee are important steps in the overall process for reauthorizing federal surface transportation programs, several additional steps and unanswered questions remain before a reauthorization is signed into law. The most pressing of these questions is how to pay for the bill. A short-term extension of existing federal programs remains the most likely outcome, though with many variables, a host of potential outcomes are possible between now and the end of September. For further details, read NCSL’s Info Alert.

**Department of Transportation Announces Infrastructure-Related Funding**
The U.S. Department of Transportation (USDOT) announced that it is funding a variety of new surface transportation projects ranging from bus transit to railroad. The USDOT’s Federal Transit Administration (FTA) awarded $891 million in funding to 12 transit infrastructure projects through FTA’s Capital Investment Grants Program. A list of the projects can be found here. Additionally, FTA announced $130 million in grants for 40 states and the District of Columbia through its Low-No Emission (Low-No) Grant program, which funds the deployment of transit buses and infrastructure that are based on advanced propulsion technologies. Further, the USDOT’s Federal Railroad Administration (FRA) awarded more than $302 million in grant funds under the Federal-State Partnership for State of Good Repair Program to help repair and rehabilitate railroad infrastructure across the country. The grants will fund 12 projects in nine states.

**Federal Court Rules Local Governments Can Seek Climate-Related Damages in State Courts**
The U.S. Court of Appeals for the 9th Circuit ruled that local governments can continue seeking climate-related damages from oil companies in state courts. The court noted in its ruling that “the question whether the Energy Companies can be held liable for public nuisance based on production and promotion of the use of fossil fuels and be required to spend billions of dollars on abatement is no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction.”

**Appeals Court Voids Federal Approval of Dicamba; Significant Impacts to Agriculture Likely**
The U.S. Court of Appeals for the 9th Circuit voided EPA’s approval of Dicamba, one of the most popular herbicides used in agriculture. The judges stated that EPA had “substantially understated risks” that the agency acknowledged Dicamba poses. Furthermore, the justices noted that EPA’s
registration decision failed to recognize the “enormous social cost to farming communities” where the herbicide’s use “has turned farmer against farmer, and neighbor against neighbor.” Researchers at the National Institutes of Health earlier this year said dicamba can increase the risk of liver cancer and other cancers. Herbicides cannot be sold or distributed in the U.S. without EPA registration. U.S. Department of Agriculture Secretary Sonny Purdue issued a statement criticizing the decision. Following the court order, EPA issued an updated order, which also outlines limited, temporary uses for leftover products that would “mitigate some of the devastating economic consequences” of the court decision.

Federal Highway Trust Fund Receipts Lower Than Anticipated
The Treasury Department released updated collection amounts for the federal Highway Trust Fund for May 2020 showing that total receipts (minus adjustments) were nearly 80% lower than in May 2019, while total receipts (minus adjustments) for the fiscal year through May 2020 were 10% below those for the same period in FY 2019. The Congressional Budget Office had previously forecast that the trust fund would become insolvent in the summer of 2021, though that date has likely moved closer without a new infusion of federal funds. Likewise, the Federal Highway Administration’s report on vehicle miles traveled in April shows a nearly 40% drop from April 2019.

U.S. Reports More Energy Use From Renewables
The U.S. Energy Information Administration reported the nation consumed more energy from renewable sources last year than it did from coal for the first time since before 1885. Specifically, the nation consumed 11.5 quadrillion British thermal units (quads) from renewable sources in 2019, a 1.4% increase, and 11.3 quads of coal, a nearly 12% decline.

Federal Sage Grouse Plans in Montana and Wyoming Voided by Court
Chief Judge Brian Morris of the U.S. District Court in Montana ruled that a 2018 Bureau of Land Management (BLM) instruction memorandum and 440 leases covering 336,000 acres in Montana and Wyoming violated 2015 sage grouse plans. In his ruling, Morris faulted BLM for failing to actively encourage the prioritization of oil and gas leasing outside sage grouse habitat, as the 2015 plans required. The federal government and the states will have to return funds to the companies that acquired land as part of the leases.

USDOT Updates Hours of Service Rules for Commercial Drivers
USDOT issued a new final Hours of Service rule for commercial truck drivers. The rule will, in certain circumstances, include additional hours of service. Short-distance drivers will be allowed to drive up to 14 hours instead of 12, while time spent loading and unloading a truck will be counted as breaks from driving. One of the primary changes to the rule is a requirement that drivers take a 30-minute rest break after eight hours of driving. The new rules require a 30-minute break after eight hours of consecutive driving, rather than on-duty time.

Thanks for reading. We will be back later this month to fill you in on other federal happenings—stay healthy and stay safe.

Best,
Ben and Kristen