



February 10, 2022

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Ms. Stephanie Pollack
Deputy Administrator
Federal Highway Administration
United States Department of Transportation
Washington, D.C. 20590

Re: Docket No. FHWA-2021-0021; Infrastructure Investment and Jobs Act
Request for Information

Dear Deputy Administrator Pollack:

The American Highway Users Alliance (the “Highway Users” or “we”) is pleased to provide comments in response to the Federal Register notice in this docket,¹ which concerns the Federal Highway Administration’s (FHWA’s) implementation of the provisions of the recently enacted Infrastructure Investment and Jobs Act.²

The Highway Users is the united voice of the motoring public -- promoting safe, uncongested highways and enhanced mobility for people and business. The Highway Users, a 300-member coalition, includes companies, trade associations, safety advocacy groups, and motoring clubs. Our members represent or support millions of road users from the truck, bus, auto, RV, and motorcycling modes. Our membership includes companies (and associations of companies) that not only use the roads, but also manufacture vehicles and automotive equipment, fuel, asphalt, concrete, signage and other products that are essential to or improve the road user experience in terms of safety, efficiency, and other ways -- improving the economy and the quality of life of all Americans.

Our basic view is that FHWA should distribute the funds under the new law promptly and without restrictions or burdens other than those expressly required by statute. Most of what we discuss below applies those concepts to particulars in the legislation and how it might be implemented.

The Legislation Itself is Positive

The Highway Users is very pleased that the Infrastructure Investment and Jobs Act is now law. This important law achieves a multiyear reauthorization of trust fund supported highway programs and provides additional highway appropriations, particularly for bridges. States and others are now better able to plan and implement needed projects to maintain and improve the nation’s highways and transportation system. The highways will become safer and more

¹ 86 Federal Register 68297 (December 1, 2021).

² Public Law No. 117-58, sometimes referred to as “IIJA” and sometimes as the bipartisan infrastructure law (BIL).

efficient, improving mobility for people and business and strengthening America’s economy and international competitiveness.

We are particularly pleased that Congress increased funding for highways generally and for highway safety in particular, as well as provided the vast majority of highway funds through formula programs, which are most efficient in delivering the benefits of highway investment.

We also appreciate that the Administration provided a strong push for increased transportation infrastructure investment, which was an essential part of the process that resulted in the legislation.

We are also very pleased that Congress included provisions codifying a One Federal Decision environmental review process and other reforms to expedite project delivery. The streamlining of environmental review processes continues to be an important objective that, in turn, will facilitate timely highway investments that advance safety and the economy. Similarly, Congress considered and did not include in the bipartisan bill any general restriction on new highway capacity or a “fix it first” requirement -- thereby maintaining State flexibility to advance capacity enhancement projects – which can only be advanced if they are included in the product of the transportation planning process.

But Some Initial Implementation Steps are Concerning and Other Steps Are Needed

While the legislation provided important funding and made important decisions that project delivery must be streamlined, some early pronouncements from FHWA do not reveal any focus on important opportunities to make infrastructure investments to strengthen the economy and the highway transportation system or to expedite project delivery.

The goal of streamlined environmental review must be recognized and acted on promptly by USDOT and FHWA, consistent with the clear direction taken by the Congress. The absence of a reference to the new law’s streamlining provisions, much less prompt action to effectuate them, in the Deputy Administrator’s widely distributed December 16 memorandum on implementation of the new law,³ was disappointing and does not reflect the importance of the issue to bipartisan support for the legislation in the Congress.

Similarly, Congress considered and correctly did not include in the bipartisan bill any general restriction on new highway capacity or a “fix it first” requirement. While certain narrow elements of the overall Federal highway program, such as CMAQ, may not be open to new general capacity highway investment in many circumstances, Congress did not generally discourage new highway capacity projects in the new infrastructure law. Congress took a balanced approach. A few program elements are focused on other than new highway capacity but other, larger programs were not restricted in that way. Further, States are already emphasizing highway preservation projects. Projects to add general purpose highway capacity advance only when they are included in the list of investments that are brought forward after completion of the complex planning process. Those projects are not brought forward casually,

³ Memorandum, December 16, 2022, “Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America.”

and are subject to public comment at the planning phase and the project phase. The decision of a State or local government to advance highway capacity projects must be respected.

Thus, we were surprised to read in the December 16 implementation memo (at 4-5) what amounts to direction to FHWA field staff to educate states that capacity enhancing projects can take longer in the environmental review process than projects to maintain current capacity. But that is already known to the States. While FHWA acknowledges in the memo (at 5) that adding general purpose capacity to highways and bridges is not prohibited, that is hardly news. The news in the memo was a general discussion (at 4-5) that can only be said to highlight to states and others FHWA's reasons why States should not invest in new capacity.

The news that was missing from the memo was any sign that FHWA is working to streamline the project delivery process and implement section 11301 of the Infrastructure Investment and Jobs Act.

And streamlining is not an abstract concept. It is relevant to economic growth and the public interest.

To pick one example, as USDOT and FHWA know, the country currently faces supply chain difficulties that are economically significant and frustratingly persistent. These include some difficulty in promptly and/or cost-effectively procuring materials needed for transportation construction projects, whether preservation projects or otherwise. And, to the extent these supply difficulties slow down work, it is a negative for efforts to attract workers to the industry, including new and minority workers.

The new infrastructure legislation, however, provides important tools to help address the multi-faceted supply challenges – more funding that can be used to improve traffic flow, whether through preservation or capacity investments, including on routes important to freight movement; and tools to expedite project delivery for such investments. While we don't suggest that FHWA alone can solve supply chain difficulties, it can take action that contributes to a virtuous cycle by streamlining project delivery processes and expediting the delivery of formula and discretionary funds provided by the new law. The funds, in turn, support projects that improve the movement of freight.

In any event, we look forward to learning what FHWA is doing to streamline the project delivery and environmental review process, not only for projects that require preparation of an environmental impact statement (EIS), but also for projects that should benefit from treatment under a categorical exclusion. Section 11301 of the new law calls for reform to expedite both major projects requiring an EIS and projects deserving categorical exclusion treatment by both USDOT and other agencies.

Congress also considered and did not include in the legislation any amendment to 23 USC 150 establishing or enabling new highway performance measures or targets, correctly passing on a path to complication of the highway program.

We also note at this early stage of implementation of the new law, our concern that that the December 16 memo states (at 5-6) that the memo will influence FHWA's more specific guidance

and other program actions implementing the new law and administering Federal highway programs.

We recommend that, instead, specific actions implementing the infrastructure law should be developed based on statute – not just particular provisions of the new infrastructure law but also the declaration of policy set forth at 23 USC 101(b) and intended to guide highway program implementation. Among key points set forth there by the Congress are those in paragraphs 101(b)(3) and (4) (paragraphs one and two having been in place for decades). Included objectives are “expedited project delivery” and a “a strong and vigorous national economy.” Environmental concerns are noted, but transportation’s role in supporting a vigorous economy is featured as well.

So, we recommend that implementation of the legislation follow the carefully balanced approach taken by Congress and reflected in title 23 and the new infrastructure law. The December 16 memo is an early one and we hope to see that next implementation steps by FHWA will reveal a balanced approach, consistent with Congressional action.

We turn now to more specific comments that we hope will assist FHWA in implementation of the legislation – getting the funding out promptly without restrictions beyond those required by statute.

FHWA should advise States that use of construction materials and processes that use less carbon than materials and processes in general use in a state as of the time of enactment of the new infrastructure law are an eligible use of funds by the state under the new carbon reduction program

Section 11403 of the new infrastructure law established a new highway program element, the “Carbon Reduction Program,” codified at 23 USC 175 and supported by apportionments of over \$6 billion during FYs 2022-2026. The provision clearly includes efforts to reduce “transportation emissions,” which are defined as CO₂ emissions from “on road highway sources.” See 23 USC 175(a)(2).

But, per 23 USC 175(c)(1)(G), eligible projects by a State also include the “development” of a carbon reduction strategy under 23 USC 175(d).

Under section 175(d)(2)(D), that State strategy can include –

(D) at the discretion of the State, quantify[ing] the total carbon emissions from the production, transport, and use of materials used in the construction of transportation facilities within the State.

The wording of subsection (d) is clearly geared to “carbon reduction,” not solely to reducing transportation emissions from on road highway sources. The different wording must be given meaningful effect by FHWA.

Accordingly, in administering the carbon reduction program, FHWA must clearly allow states to use those program funds to achieve carbon emissions reduction through procurement of pavements and paving activities. To avert ambiguity and to seize on this opportunity to reduce

carbon, this eligibility must be specifically included in any guidance issued to States and MPOs on the carbon reduction program or in any rules for the program. Reduction of carbon emissions from modern pavement technologies compared to pavement technologies currently in widest use has been confirmed through research from the Federal Highway Administration. Accordingly, FHWA must make use of the flexibility in the wording of the statute so that States can use carbon reduction program funds to achieve carbon emission reductions through pavements and pavement technologies—including designs, materials, and practices.

FHWA should advise States of the new opportunity to incentivize safety in the course of projects by electing to apply a 100 percent Federal share to safety contingency funds to incorporate safety enhancements to work zones

Sec. 11107 of the new infrastructure law amends 23 USC 120(c)(3) to provide for a Federal share of up to 100 percent, at the discretion of the State, of costs for “contractual provisions that provide safety contingency funds to incorporate safety enhancements to work zones prior to or during roadway construction activities.” 23 USC 120(c)(3)(B)(vi). FHWA has the opportunity now to ensure that this excellent safety reform is utilized.

In the Highway Safety Improvement Program (HSIP) guidance issued February 2, 2022, FHWA highlighted (page 10) examples of projects supported with HSIP apportionments that are eligible for a 100% Federal share. FHWA should, similarly, advance safety, including work zone worker safety, by promptly advising States of the opportunity provided by 23 USC 120(c)(3)(B)(vi) for certain work zone costs, on projects undertaken with a range of other apportioned funds, to be supported by a 100% Federal match.

Promptly complete action to revise the Manual on Uniform Traffic Control Devices (MUTCD), including adoption of recommendations to improve signage advising of EV charging stations

In section 11129 of the new infrastructure law, Congress showed interest in prompt action to update the MUTCD. We urge FHWA to promptly update the MUTCD. We appreciate that revision of the MUTCD is a large task, but were disappointed to read in the recently released USDOT safety strategy that the “target” for completing the current MUTCD revision is sometime in 2023.⁴

Accordingly, in the recently closed docket inviting comment on programs in the legislation that provide funding for EV charging,⁵ the Highway Users and others recommended that FHWA break out the issue of improved road signage to help motorists find EV charging stations from the complex MUTCD revision docket and resolve it earlier, consistent with the Administration’s interest in increased EV use.

Safe Streets for All Program Should Emphasize Infrastructure Investments

In the new infrastructure law Congress created a new safety program, “safe streets for all.” The essence of the program is that local governments may apply for planning funds or project funds. We urge USDOT and FHWA to emphasize highway safety infrastructure projects in awarding

⁴ National Roadway Safety Strategy, U. S. Department of Transportation, January 2022, page 34.

⁵ Docket No. FHWA-2021-0022.

funds under this program. For example, USDOT can administer the program so that the award of planning grants is linked to an applicant following up with thoughtful and effective safety infrastructure projects. USDOT/FHWA should look for ways to promote that outcome. One way would be to indicate a funding preference, in choosing among applications for safety planning grants, for applications that also include a commitment to following up the planning with safety infrastructure investments.

Consider the Implications of Proposed Actions for the Motorcoach Industry.

Before closing we also ask that FHWA take care, in its program administration and decision-making, to be mindful of the concerns of the intercity bus industry and its millions of passengers. As this industry significantly serves lower income customers, attention to it would be consistent with the Administration's equity concerns. A number of transportation provisions in Federal law govern "motor carriers," a term which generally includes motor carriers of property (trucks) and motor carriers of passengers (motorcoaches, i.e., buses). The Highway Users membership includes both trucking and motorcoach interests. But the motorcoach industry is less prominent. For example, there was discussion in the development of the new infrastructure law of the need for more truck parking. Yet, motorcoaches also have needs for parking and turnouts. We will address particular FHWA issues relevant to motorcoaches as appropriate and as they arise, but we wanted to call this important industry to your attention at this time.

Other Issues and Dockets

Before closing we note that the Highway Users likely will be participating in additional dockets as FHWA proceeds to implement the new infrastructure law.

As noted earlier, as FHWA develops specific implementation actions and proposals, we recommend careful consideration of provisions and policies developed by the Congress. Accordingly, we believe that in all future guidance and rulemakings the key points of departure for decisions should be statute. Clearly that would include the specific statutory provision or provisions being implemented as well as Congressional statements of policy for title 23.

Conclusion

The Highway Users thanks the FHWA for its consideration and asks that any further action on the subject matter addressed in these comments be in accord with these comments. We look forward to working with FHWA to make implementation of the new law a success.

Sincerely,

Laura C. Perrotta

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