FHWA RETIREES NEWSLETTER

5TH EDITION FOLLOW-UP JANUARY 2022

IN THIS ISSUE

Greetings!

Our fifth edition included a legislative report by Susan Binder. Due to timing her report described the administration's proposed infrastructure legislation with her insightful overview. Before we went to press the legislation passed, but we decided to go ahead with her article and promised a follow up with a report on the legislation as enacted. Here is Susan's after enactment report.

Legislative Update

By Susan Binder

Now that the bipartisan infrastructure legislation was enacted in November as PL 117-58, we can study it for what it *actually* contains as well as *monitor* how FHWA will implement it as part of the overall massive Federal effort. In the following brief description, I'll concentrate on some of the key policy directions to provide a flavor for the legislation that many are calling transformative. The manner in which it finally came together reveals how different players and expectations influenced, and continue to influence, Federal investment programs. USDOT is branding the law as the Bipartisan Infrastructure Law (BIL) even though its key sponsors named it the Infrastructure Investment and Jobs Act (IIJA).

As this bill was being crafted along with the budget reconciliation bill, there was great uncertainty whether and how the individual bills would relate to each other. With hindsight of a couple of months, it is clear that separating the two bills meant that BIL became law while the Build Back Better (BBB) legislation remains in limbo. The tensions between traditional infrastructure and broad, progressive policies were apparent as the strategies to leverage each were employed. While interpreting the new law, I would caution to distinguish between them. The Biden Administration is eager to enact policy direction consistent with the BBB that would also impact transportation – how that would play out in the interim or with passage is unknown.

The headlines have focused on the scale of funding and new programs that have the potential for "transformation." The scope of this Act is extremely broad and goes way beyond transportation alone. For surface transportation, it is a 5-year reauthorization including $550 billion for new investments for all modes of transportation. In total, $1.2 trillion in funding is authorized over ten years, including water,

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LEGISLATIVE UPDATE (CONTINUED FROM PAGE 1)

power and energy, environmental remediation, public lands, broadband, and resiliency. Of that amount, $383.3 B is attributable to the Federal Highway Trust Fund (FHTF) in contract authority. This is $273 B over the FAST Act baseline. It also contains $184.1 in "advanced" or "direct" appropriations from the General Fund – this is very unusual meaning that even though these programs do not have HTF contract authority, they don't require subsequent appropriation action. In contrast, until the full obligation limitation is set for this year's contract authority program, the continuing resolution only allows release of FAST Act levels. This is the reverse of the preferential position that highway programs have long enjoyed.

Along with its size, overlap across provisions, and policy initiatives of the Administration, there will be much work by our former colleagues in the executive branch to integrate and organize implementation steps across the Act. Echoing the "whole of government" pressure that we saw during ARRA, much of the oversight and interpretations are likely to be at the Department level or higher, which could expedite or delay. Unfortunately, I believe that there is little appreciation for what the FHWA field and HQ shops will need to do (and are uniquely positioned to do) to put the funding to work (beyond releasing apportionments and holding listening sessions) without jeopardizing what I see as good governance.

As an indication of the scale of this Act, it extends and increases formula funding for transportation – with an increase of ***30% in highway formula funds, 34% increase in transit formula funding, and a 5-fold increase in passenger and freight rail funding.*** Of the programs considered to be HTF, 90% will be distributed by formula. It is clear that even though the basic tenants and intergovernmental relations of the Federally assisted, State administered FAHP model have not been changed by this law, the Administration is eager to assert its priorities to address climate and safety goals. This could significantly impact the "legacy" formula programs. In a memo from Deputy Administrator Pollack, guidelines have been issued to "encourage state highway authorities to invest in climate and equity friendly projects that improve safety and accessibility for multi-modal road users, while simultaneously prioritizing repair over new construction." FHWA has been clear that it will encourage recipients to prioritize projects that "maximize the existing right-of-way for accommodation of non-motorized modes and transit options that increase safety, accessibility and/or connectivity." We'll have to see how they achieve that during implementation over the coming months.

In part, USDOT will be challenged by the 21 new transportation-related, competitive grant programs, in addition to 13 existing programs. Thus, more funding than in the past will be decided from the top-down, at the Federal level. Those funds may not be available until USDOT develops criteria and processes for each program and solicited individually through a Notice of Funding Opportunity.

LEGISLATIVE UPDATE (CONTINUED FROM PAGE 2)

It is clear that there will be a strong interest in awarding these grants to local governments at various levels beyond states, focus on equity and increase use of race and income as factors. An executive order named "Justice40" requires that 40% of Federal investments be directed toward disadvantaged communities. Soliciting, selecting, and preparing grant agreements for such projects will not be fast – easily a year before the funds are actually available. There is talk about combining some of these program solicitations to expedite them since there is such overlap in many of the goals they aspire to, but I'm not certain they will be able to satisfy the provision sponsors.

How were the issues highlighted in the first installment of this article ultimately treated? A quick rundown:

- The VMT pilots were retained but the basic funding sustainability issues inherent in the Federal HTF were not. The transportation funding comes out of the GF with little pretense for "pay-for's" within transportation.
- The FAHP "legacy" categories (essentially formula based) continue with even broader eligibility to accommodate targeted priorities. These include resiliency eligibilities, emission related, and EV charging under STBG, NHPP, and CMAQ categories. How these eligibilities will be applied and reflected in adjustments to oversight requirements (including planning and construction standards) is yet to be seen.
- A variety of new programs, mostly discretionary in nature, have been created to mirror progressive goals. The ones described in the last article survived, the biggest being:
  - Resilience (combination of formula and grants) Promoting Resilient Operations for Transformative, Efficient and Cost-saving Transportation – PROTECT at $8.7B
  - National Infrastructure Project Assistance (mega projects) at $5 B;
  - Safe Streets and Roads for All at $5 B;
  - Formula Carbon Reduction program at $6.42B
  - Continuing the bridge formula program (with changes to its distribution factors) along with a new competitive bridge program funded at $3.265 B.
- Earmarks were not included even though the House had reintroduced the concept.

The visibility and emphasis on freight programs continues to increase. A new Office of Multimodal Freight Infrastructure and Policy is created in OST.

Stay tuned! And safe, over the New Year."

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