October Legislative and Regulatory Report

LEGISLATIVE

House Passes Legislation to Fully Utilize Harbor Maintenance Trust Fund Dollars

After years of frustration on the part of ports and transportation authorizing committees, the Full Utilization of the Harbor Maintenance Trust Fund Act (H.R. 2440) passed the House of Representatives on October 28, 2019. The bill, introduced by House Transportation and Infrastructure Committee Chairman Peter DeFazio (D-OR), will ensure that funds collected for port and harbor improvements are utilized for their intended purpose. Passed by a vote of 296 to 109, the bill amounts to approximately $34 billion in infrastructure investment for the next decade.

In 1986, Congress established the Harbor Maintenance Tax charging shippers a 0.125% ad valorem import tax, or a tax based on the value of cargo entering the United States through our seaports. Funds collected by this tax are deposited into the Harbor Maintenance Trust Fund. The HMTF’s balance (roughly $9.5 billion) has been used to offset Federal budget deficits for years, tying up funds that could otherwise be spent on harbor maintenance dredging.

Alongside four original co-sponsors, including House Transportation and Infrastructure Committee Ranking Member Sam Graves (R-MO), Chairman DeFazio introduced H.R. 2440 to ensure that going forward, HMTF funds will be available for dredging. The Committee estimates that in addition to the $9.5 billion balance in the HMTF, an additional $24.5 will be collected over the next ten years.

The legislation has been referred to the Senate Budget Committee.

Senate Passes FY20 THUD Appropriations Bill

In June 2019 the House of Representatives passed an appropriations minibus consisting of four bills providing fiscal year 2020 funding for several federal agencies, including the U.S. Department of Transportation. The Senate Appropriations Committee subsequently approved its own transportation funding bill in September. The two versions were similar in overall spending amounts but differed on exact allocations for certain grant programs as well as added policy stipulations, known as policy riders. As the end of fiscal year 2019 neared, it became clear that lawmakers would need additional time to pass a full-year appropriations package. Instead, Congress passed a continuing resolution extending FY19 funding levels through November 21.

In October the Senate began its consideration of the House-passed minibus, introducing an amendment striking the House’s bill text and inserting legislative text similar to the version approved by the Senate Appropriations Committee in September. The amended bill, H.R. 3055, passed the Senate on October 31, by a vote of 84 to 9. A conference committee of Senate and House Members will now work to resolve the differences.
between the bills passed in each chamber. Considering the limited time remaining before the current CR expires on November 21, Congress could opt for another short-term extension if they are unable to agree on a final appropriations package prior to that deadline.

REGULATORY

NAS Emissions Report Looks at Emerging Technologies' Impact on GHG

In August 2016, the Environmental Protection Agency and National Highway Traffic Safety Administration issued a final rule aimed at reducing greenhouse gas emissions and fuel consumption by new, medium-and-heavy duty vehicles. The rule, commonly referred to as Phase Two, incorporated several recommendations from the National Academy of Sciences’ 2014 report, “Reducing the Fuel Consumption and Greenhouse Gas Emissions of Medium- and Heavy-Duty Vehicles, Phase Two, First Report.” Unlike the Phase 1 rule, issued in 2011 and also setting fuel and emission standards for light vehicles, Phase 2 regulates medium- and heavy-duty trucks.

NAS released its final report on Phase 2 on October 18, 2019, to provide recommendations for the 2022 to 2030 timeframe. The report covers vehicle technology progress, alternative technologies and approaches, economic assessment, regulatory framework and interim evaluation. NAS suggests that NHSTA and EPA devise rigorous efficiency regulations for spark ignition engines, such as optimized low-carbon or renewable sources. In order to meet Phase 3 standards, NAS recommends that the agencies regularly assess the life cycle of GHG emissions and fuel consumption for all emerging technologies. Additionally, NAS proposes industry stakeholders and the federal government undertake research on waste heat recovery as this approach can improve engine efficiency up to 4 percent.

The report also provides guidance for NHTSA and EPA to develop a regulatory framework that will set benchmarks of program effectiveness in the future and encourages the agencies to create a compliance method to determine whether trucks are meeting emission standards. NAS suggests that NHTSA coordinate with EPA on the desired GHG and fuel consumption reductions by the 2030-2050 time period. Similarly, NAS advises that an interim evaluation be conducted on implementation progress.

STB Issues Three Policy Updates on Demurrage and Accessorial Charges

In May 2019, the Surface Transportation Board held a two-day hearing to receive stakeholder feedback on the way demurrage and accessorial charges are assessed in the rail industry. Based on issues addressed during the hearing, STB published three decisions on October 7, 2019 related to these charges.

STB issued a proposed policy statement providing guidance on methods the Board will use to assess the reasonableness of demurrage and accessorial charges. STB stated it
will primarily evaluate if these charges fulfill their original intent of incentivizing the efficient use of rail assets. Specifically, STB discusses the application of demurrage in relation to free time, bunching, overlapping charges, invoicing and dispute resolutions, credits, notice of major tariff changes, and warehousemen liability. STB concludes by emphasizing the importance of transparency and mutual accountability between shippers and rail carriers.

Secondly, STB published a notice of proposed rulemaking for two modifications to demurrage billing requirements. STB suggests requiring demurrage invoices include certain information to assist recipients in determining the accuracy of the invoice and the party responsible for the charges. STB also proposes Class I carriers send demurrage invoices directly to certain shippers rather than third-party intermediaries. The NPRM notes that these requirements would only apply to Class I railroads but strongly encourages Class II and III carriers to comply, should the changes be adopted.

The third notice proposes STB provide additional clarification in stating that regulatory exemptions for several miscellaneous commodities and boxcar transportation do not apply to demurrage charges. STB also suggests revoking demurrage exemptions for certain agricultural products to more consistently align with similar regulatory practices regarding non-intermodal transportation.

Comments on all three proposals are due on November 6, 2019.

**FMCSA Considers Washington Meal and Rest Break Rules**

Washington Trucking Associations filed a petition requesting the Federal Motor Carrier Safety Administration issue a determination that federal hours of service regulations preempt the Washington state’s meal and rest break provisions. Filed in April 2019, WTA asserts that the state’s rules conflict with FMCSA’s HOS requirements and “impose an unreasonable burden on interstate commerce.” Washington laws impose mandatory 30-minute meal breaks for each five-hour on-duty period and a paid 10-minute rest break for every four-hour working window.

In December 2018, FMCSA issued a decision on a similar petition submitted by American Trucking Associations involving California’s meal and rest break regulations. FMCSA granted ATA’s petition allowing drivers to be exempt from California’s regulations after determining their contradiction with federal HOS provisions. The state of California and the International Brotherhood of Teamsters subsequently filed separate appeals in opposition of FMCSA’s decision; these lawsuits are currently still pending.

Comments on WTA’s petition are due November 8, 2019.