January Legislative and Regulatory Report

LEGISLATIVE

Congress Discusses Infrastructure Policy

On January 29, Democrats in the U.S. House of Representatives announced their policy framework for an infrastructure package, including surface transportation reauthorization principles. The framework includes priorities developed by House Democrats of the Committees on Transportation and Infrastructure, Energy and Commerce, and Ways and Means. While the proposal does not outline specific programs or revenue streams, it does provide policy directions and funding goals.

The “Moving Forward Framework” proposes a five-year, $760 billion investment plan aimed to address critical infrastructure needs, guided by three core principles: safety enhancements, environmental resiliency, and bringing infrastructure into a state of good repair. Of this total, $434 billion would be directed to highway and transit programs, including multimodal freight infrastructure. Specifically, the framework would increase the cap on existing freight programs to provide greater flexibility in multimodal freight investments. The Democrats’ proposal also enables revenue collected into the Harbor Maintenance Trust Fund to be fully allocated for port and harbor dredging needs.

Following the release of the Democrats’ plan, House Republicans of the Committee on Transportation and Infrastructure expressed interest in developing bipartisan transportation policy that incorporated their priorities, including: addressing Highway Trust Fund stability, innovative technologies, project delivery streamlining, investments in rural transportation networks, prioritizing current federal surface transportation programs, and ensuring state flexibility.

That same week, Congress held two hearings to discuss infrastructure policy. The Senate Commerce Subcommittee on Transportation and Safety’s January 28 hearing examined USDOT’s efforts to revitalize America’s rural transportation networks; the accessibility of federal grant programs; and underinvestment in our nation’s ports. The witness panel included representatives from USDOT’s Office of the Secretary and Build America Bureau, and the Northwest Seaport Alliance.

In a January 29 hearing, the House Ways and Means Committee discussed strategies for sustainable, long-term infrastructure investment, with several Members advocating for a bipartisan effort in achieving this. Committee members along both sides of the aisle agreed increased investments in infrastructure are needed, but disagreed on how to generate the additional revenue. Democrats generally supported raising the federal gas tax, while Republicans favored public-private partnerships, expanded eligibility for financing tools, and encouraging states and localities to generate their own revenue streams. There was bipartisan support to further examine future vehicle-miles-traveled fee opportunities. Witnesses on the panel represented the American Association of State
Highway and Transportation Officials, the New Jersey Department of Transportation, and the banking, finance, and municipal bond industries.

REGULATORY

EPA Issues Cleaner Trucks Initiative ANPR

The U.S. Environmental Protection Agency published an advanced notice of proposed rulemaking to accelerate plans for new emission standards. The proposal, titled the Cleaner Trucks Initiative, will update nitrogen oxides emission standards for heavy-duty vehicles through a coordinated 50-state program.

The CTI, initiated in November 2018, advances EPA’s long-term goal of establishing a nationwide NOx reduction strategy. Within the last decade, EPA reports NOx emissions in the U.S. have decreased over 40 percent. However, the agency estimates heavy-duty vehicles will be one of the primary NOx contributors in 2028. In addition to updating NOx standards, which were last revised in 2001, EPA identifies potential methods that would streamline the certification process and reduce compliance costs for engine manufacturers.

The agency requests input on how it should prioritize the new regulations to ensure robust in-use compliance, specifically asking the degree to which the standards should align with the California Air Resources Board’s (which are expected to take effect prior to EPA’s national standards). The ANPR outlines a series of emerging technologies that could help engineers achieve modern NOx standards by 2027, the same implementation year as the final provisions of the Heavy-Duty Phase 2 greenhouse gas emission standards. As technology assessments continue, the agency requests input on the cost, emission reduction effectiveness, impact on fuel consumption/ CO2 emissions, market acceptance factors, reliability, and the feasibility of the technology being available for widespread adoption in the 2027 and later timeframe. Based on feedback from this ANPR, EPA expects to release a proposed rulemaking later this year, followed by a final rule in early 2021. Comments are due February 20, 2020.

Judge Issues Preliminary Injunction on AB-5 Compliance for Trucking Industry

On January 16, a federal judge granted a preliminary injunction against California Assembly Bill 5, prohibiting the state from enforcing the new labor law against motor carriers. Granting a motion filed by the California Trucking Association, the U.S. Southern District Court of California issued a temporary restraining order on California’s AB-5 hours before it took effect. Motor carriers and drivers in the state will be exempt from compliance pending the resolution of CTA’s lawsuit.

In November 2019, CTA filed an amended lawsuit against the state’s labor law, asserting its “ABC test” for worker classification would restrict around 70,000 truck drivers in California from operating as independent contractors. CTA argued the three-pronged test would significantly disrupt motor carrier prices, routes, and services, which is preempted under the Federal Aviation Administration Authorization Act of 1994. They also asserted
that AB-5 contradicts the U.S. Constitution and Motor Carrier Safety Act. With the effective date fast approaching, and no resolution to its lawsuit, CTA requested AB-5’s enforcement be postponed. On December 31, Judge Roger Benitez temporarily blocked the state’s ability to implement AB-5 on motor carriers pending a January 13 hearing. Following this hearing, the judge ruled in favor of CTA’s request, postponing trucking industry compliance with AB-5 until a final verdict is reached. In his closing remarks, the judge agreed it was likely California’s labor law violated the FAAAA.

Concurrently, in a separate case brought against the California law, the Los Angeles Superior Court ruled AB-5 was preempted by the FAAAA. In 2018, the Los Angeles City Attorney sued NFI Industries for alleged misclassification of its truck drivers as independent contractors instead of employees. The lawsuit, however, was filed while California still followed the previous, less stringent worker classification standard known as the “Borello test.” The City Attorney and NFI Industries filed separate arguments on which test the alleged misconduct would fall under. On January 8, Judge William Hightberger ruled in favor of NFI’s claim which argued AB-5’s preemption by the FAAAA. The judge did not rule on NFI’s additional arguments that the labor statute violated the Dormant Commerce Clause or that it may not be retroactively applied.

**White House Council on Environmental Quality Proposes NEPA Updates**

The Council on Environmental Quality issued several proposed amendments to the National Environmental Policy Act aiming to streamline the environmental permitting and review process for infrastructure projects. On January 10, 2020, the White House’s CEQ announced the notice of proposed rulemaking as the first major reform to NEPA regulations since 1978.

Signed into law in 1970, NEPA requires agencies to conduct evaluations on the environmental effects of any major federal action. In 2017, President Trump’s “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects” Executive Order directed CEQ to issue regulations to improve the Federal environmental review and permitting process for major infrastructure projects and implement the One Federal Decision policy. In June 2018, CEQ solicited public input on these revisions, which were incorporated into the recent NPRM. Based on the comments received, the Council found it took four to seven years to complete environmental impact statements that, on average, exceeded 600 pages.

The proposed changes include provisions that would expedite the permitting process and timeframe for most projects. The proposed rulemaking establishes goals for agencies to generally complete EISs within two years and maintain a 300-page limit. It also sets a one-year time frame and 75-page limit for environmental assessments. Per the NPRM, multiple agencies involved in a project will only be required to submit one EIS and project leaders will correspond with one agency rather than coordinating with all parties.

CEQ simplified its definition of environmental “effects,” specifying an effect must have a causal connection to a project, while also removing the need to reference direct or
indirect effects. Further, NEPA regulations will no longer require analysis of the cumulative effects related to proposed projects. In previous rulings, courts interpreted this requirement as studying how likely a project would contribute to climate change. CEQ cited these analyses, even with detailed guidance, have been difficult to identify and often deterred agencies from examining significant, more relevant effects. Additionally, the proposed rulemaking modifies the major actions that fall under NEPA regulations, exempting projects with minimum federal funding or involvement from the review process.

A sizable portion of agency actions fall under categorial exclusions included in NEPA regulations. While Congress has broadened the applicability of CEs, the NPRM expands upon this by instructing agencies to identify actions which do not have significant environmental effects and are therefore excluded from NEPA review requirements. It also codifies a procedure already available to USDOT under the FAST Act, which permits agencies to apply a CE included in another agency’s NEPA procedures.

The NPRM was met with applause from Republican lawmakers, who believe it will allow large infrastructure projects to advance faster and at a reduced cost. Democrats, however, released statements criticizing the proposal, citing concerns that the changes stand to have negative impacts on the environment and public health.

Comments on the NPRM are due March 10, 2020. CEQ will also hold two hearings on the proposed changes, the first on February 11 in Denver, Colorado and the second on February 25 in Washington, DC.

**USDOT Solicits FY20 INFRA Grant Applications**

The U.S. Department of Transportation released the notice of funding opportunity for the fiscal 2020 round of the INFRA grant program. Published on January 13, 2020, the Department announced $906 million will be made available in FY20 funds for this round of INFRA. Additionally, up to $150 million in previously authorized funds can be utilized for this year’s grant awards. From 2016 to 2020, the Fixing America’s Surface Transportation Act of 2015 provided an aggregate limit of $500 million of total available INFRA funds to be allocated towards non-highway projects. Approximately $158 million of this amount remains available for multimodal projects.

The FY20 NOFO contains similar criteria to previous rounds of the program, with a few exceptions. This year, consistent with its new Rural Opportunities to Use Transportation for Economic Success Initiative, USDOT placed an emphasis on projects that support rural transportation networks, including the deployment of broadband in rural communities. The Department will also consider a project’s significance to freight and goods movement as a factor in evaluating the economic vitality criterion. The FY20 NOFO expanded on the ”large project” determination requirements by outlining the seven conditions an applicant should demonstrate to be considered. USDOT clarified how it will determine whether a project fulfills each requirement, which had not been specified in previous NOFOs.
INFRA applications are due February 25, 2020.

**FMCSA Delays Entry-Level Driver Training Rule**

FMCSA announced an interim final rule implementing a two-year delay on compliance with the Entry-Level Driver Training Rule, originally intended to take effect February 7, 2020. The ELDT final rule, issued in 2016, outlines the minimum training standards for first-time applicants seeking a Commercial Driver’s License or additional license endorsement. It also requires fleets and State Driver Licensing Agencies enroll in FMCSA’s new ELDT registry to receive training authorization and verify applicants successfully completed the curriculum. The extension will provide additional time for FMCSA to finalize the Training Provider Registry and for state licensing agencies to reconfigure their systems to process information from the TPR.

In July 2019, FMCSA proposed extending the compliance date for two provisions within the ELDT rule: the requirement that training providers upload driver-specific training certification information to the TPR; and the requirement that SDLAs confirm driver applicants are in compliance with the ELDT requirements prior to taking certain skills or knowledge tests. Based on feedback, in which stakeholders expressed concern over increased confusion and paperwork burdens associated with a partial extension, FMCSA ultimately decided to delay compliance on all provisions of the ELDT rule. The compliance deadline is now February 7, 2022.