

## DISSENTING VIEWS

In the wake of the greatest recession since the Great Depression, more than 2.5 million construction and manufacturing workers are still out of work. Passage of Federal surface transportation legislation is critical to both the nation's continued economic recovery and our long-term economic competitiveness. We desperately need increased infrastructure investment to create American jobs, restore our nation's economic growth, greatly improve quality of life in our communities, and reduce the nation's dependence on imported oil. If investment levels are adequate and directed toward the system's greatest needs, the benefits of this investment will reach every American and every business and offer reduced congestion, improved travel times, expanded transportation options, improved safety, and direct and indirect job creation.

We had hoped that the Committee on Transportation and Infrastructure would develop legislation demonstrating a commitment to reforming the nation's surface transportation programs to meet the needs of the 21<sup>st</sup> Century, and addressing the nation's well documented surface transportation needs. Unfortunately, H.R. 7 fails on both fronts. As reported by the Committee, the bill fails to provide the necessary investment levels to build the nation's surface transportation network, and undermines the intermodal nature of the nation's surface transportation system. In fact, the bill cuts Federal-aid highway investment by \$15.8 billion ó destroying 550,000 family-wage jobs over the coming years.

With the nation's surface transportation network at a crisis point, we are deeply troubled that, instead of coming together to build on the longstanding, bipartisan traditions of this Committee and develop a forward-looking proposal that meets nation's surface transportation infrastructure needs, our Republican colleagues have put forth a proposal that cuts funding, destroys jobs, undermines safety, and dramatically limits public participation in the surface transportation process. This bill is filled with special-interest provisions and ideological attacks on long-standing surface transportation programs and policies. In addition, the changes made by H.R. 3864, as reported by the Committee on Ways and Means, undermine the user-financed system that has provided dedicated revenues for both highway and public transit investment for decades.

We are saddened that, for the first time in the Committee's storied history, the majority is bringing a partisan surface transportation bill to the Floor. As currently drafted, this bill lacks credibility, and will not become law. We urge our Republican colleagues to end this partisan game and work with us to invest in our nation and put Americans back to work.

### 1. FUNDING AND REVENUES

We are particularly troubled with the impact of H.R. 7 on American jobs. Despite our Republican colleagues' insistence that H.R. 7 is a critical aspect of their job creation agenda, the legislation actually cuts Federal-aid highway investment by \$15.8 billion when compared to the fiscal year 2011 investment level. This cut will destroy 550,000 family-wage jobs over the coming years. The Transportation Construction Coalition, which represents 28 national transportation construction and labor organizations, has written to the Committee that any cuts

from current investment levels ðare real, and all involved should be clear that this is a step away from job creation and preservation.ö

We are also very concerned that **only five States** will receive more in Federal-aid highway investment over the life of the bill when compared to a five-year investment total based on current law funding levels (FY 2011). As reported, H.R. 7 short-changes surface transportation investment, allowing the nation's infrastructure investment deficit to continue to grow, and significantly undermines the job creation potential of this legislation.

**Federal-Aid Highway Funding**  
**Comparison of Current Law and H.R. 7**  
*(in dollars)*

State	5-Year Investment Based on Current Law (FY 2011)	5-Year Investment Based on H.R. 7 (FY2012-2016)	Difference
Alabama	3,936,513,785	3,577,320,987	-359,192,798
Alaska	2,601,654,825	1,562,249,935	-1,039,404,890
Arizona	3,796,307,150	3,529,808,058	-266,499,092
Arkansas	2,686,373,045	2,226,235,526	-460,137,519
California	19,043,669,975	18,319,117,341	-724,552,634
Colorado	2,774,530,160	2,684,197,639	-90,332,521
Connecticut	2,606,039,695	2,270,861,848	-335,177,847
Delaware	877,699,050	809,537,781	-68,161,269
District of Columbia	827,890,730	802,318,331	-25,572,399
Florida	9,830,701,585	8,949,798,846	-880,902,739
Georgia	6,699,554,405	6,168,169,871	-531,384,534
Hawaii	877,571,265	812,421,352	-65,149,913
Idaho	1,484,055,620	1,248,018,780	-236,036,840
Illinois	7,376,867,925	6,492,135,827	-884,732,098
Indiana	4,943,973,945	4,414,789,297	-529,184,648
Iowa	2,496,689,110	2,345,749,617	-150,939,493
Kansas	1,960,762,820	2,135,084,672	174,321,852
Kentucky	3,447,472,360	3,023,919,656	-423,552,704
Louisiana	3,641,649,935	3,109,807,385	-531,842,550
Maine	957,785,850	877,980,374	-79,805,476
Maryland	3,109,330,355	3,322,040,295	212,709,940
Massachusetts	3,151,260,980	3,182,985,435	31,724,455
Michigan	5,462,948,555	5,245,485,840	-217,462,715
Minnesota	3,383,394,820	3,070,272,344	-313,122,476
Mississippi	2,509,452,930	2,235,048,579	-274,404,351
Missouri	4,911,992,200	4,190,625,827	-721,366,373

State	5-Year Investment Based on Current Law (FY 2011)	5-Year Investment Based on H.R. 7 (FY2012-2016)	Difference
Montana	2,128,864,565	1,612,281,940	-516,582,625
Nebraska	1,499,728,110	1,546,696,794	46,968,684
Nevada	1,884,077,085	1,476,268,498	-407,808,587
New Hampshire	857,281,050	824,643,931	-32,637,119
New Jersey	5,180,583,835	5,111,470,674	-69,113,161
New Mexico	1,905,403,175	1,773,405,471	-131,997,704
New York	8,709,302,770	8,103,420,242	-605,882,528
North Carolina	5,401,430,945	5,205,726,556	-195,704,389
North Dakota	1,288,163,500	1,286,572,625	-1,590,875
Ohio	6,954,907,100	6,521,011,770	-433,895,330
Oklahoma	3,290,688,480	2,907,164,872	-383,523,608
Oregon	2,593,421,530	2,294,326,235	-299,095,295
Pennsylvania	8,513,165,010	7,564,818,148	-948,346,862
Rhode Island	1,134,738,290	906,229,415	-228,508,875
South Carolina	3,257,529,525	3,218,463,389	-39,066,136
South Dakota	1,463,248,565	1,286,729,334	-176,519,231
Tennessee	4,384,546,675	3,940,348,353	-444,198,322
Texas	16,373,844,700	16,225,291,901	-148,552,799
Utah	1,671,634,775	1,512,605,524	-159,029,251
Vermont	1,053,052,205	812,816,960	-240,235,245
Virginia	5,280,022,395	4,919,101,465	-360,920,930
Washington	3,517,425,230	3,253,568,918	-263,856,312
West Virginia	2,267,507,355	1,813,712,495	-453,794,860
Wisconsin	3,904,064,605	3,282,857,230	-621,207,375
Wyoming	1,329,239,180	1,407,412,707	78,173,527
<b>HIGHWAY FORMULA TOTAL</b>	<b>201,240,013,730</b>	<b>185,412,926,890</b>	<b>-15,827,086,840</b>

*Prepared by Committee on Transportation and Infrastructure Democratic staff based on information provided by the Federal Highway Administration (current law column) and Committee Republican staff (H.R. 7 column).*

One of the most troubling aspects of the proposal is the source of funding for public transportation programs. Specifically, H.R. 3864, as ordered reported by the Committee on Ways and Means, eliminates the deposit of 2.86 cents of every gallon of gasoline into the Mass Transit Account of the Highway Trust Fund. Instead, the legislation transfers \$40 billion from the General Fund to a new "Alternative Transportation Account" established to fund transit programs and four highway programs previously funded out of the Highway Trust Fund.

While we realize that this change is outside the jurisdiction of this Committee, we are appalled that our Republican colleagues have allowed this fundamental change in the funding of

our surface transportation system to be adopted. By breaking the link between highways and transit and funding from the Trust Fund, this legislation represents the balkanization of surface transportation programs and leaves public transportation without a dedicated revenue source. Transit programs will have to compete with every other discretionary priority funded by the General Fund of the Treasury. A lack of dedicated revenue will further undermine the ability of public transportation providers to plan for long-term investments.

This short-sighted change to appease a minority of the Republican caucus who insist on cutting Federal spending at any cost is an inconceivable step backwards in surface transportation policy. More than 600 organizations agree with our view and have written letters of opposition to this financing mechanism.

## **2. BUY AMERICA**

H.R. 7 also misses an opportunity to create more American jobs and to revive American manufacturing by failing to close all existing loopholes in Buy America laws. We acknowledge and support the adoption, during Committee consideration, of some provisions originally included in H.R. 3533, the "Invest in American Jobs Act of 2011", to prohibit the segmentation of highway, transit, and rail projects to evade Buy America requirements and the inclusion of more stringent notice requirements prior to the issuance of a waiver from Buy America rules. However, we are concerned that some of the changes in the bill to address environmental streamlining may undermine the application of these provisions. More importantly, H.R. 7 fails to close several gaping loopholes in Buy America laws.

*Transit Rolling Stock Loophole:* H.R. 7 continues to allow transit rolling stock procurements to be comprised of only 60 percent U.S.-made components. Currently, the Federal Transit Administration (FTA)'s regulations count the full cost of a component toward the domestic origin threshold if at least 60 percent of the subcomponents of the component are made in the United States. In practice, this means that a piece of rolling stock can be compliant with Buy America requirements even with as little as 36 percent of the total cost of the components of a bus or rail car being produced in the U.S. Despite the existing 60 percent domestic content standard for transit, foreign-owned railcar manufacturers and suppliers continue to keep higher-value manufacturing activities — such as design and engineering — in their home countries. Keeping higher-value manufacturing activities outside of the U.S. means far more jobs are created and sustained in the home countries of these companies, and innovation and capabilities continue to develop outside of the U.S. A full domestic content requirement will bring more jobs, skills, and economic activity to the U.S.

We strongly urge changes to H.R. 7 to ensure that rolling stock is subject to the same 100 percent domestic origin standards as steel, iron, and manufactured goods, and that the requirement to move from 60 percent to 100 percent be phased in over time. We strongly believe all future Federal investment in rolling stock should fully support American jobs. Some may argue that moving beyond 60 percent domestic content is impractical. In reality, as domestic content requirements increase, U.S. companies will step forward to fill the gap. In the last few years, as FTA has made waiver applications publicly available, several U.S. manufacturing companies have demonstrated their ability to produce transit bus and rail car

components, such as software and streetcar rails, that were previously assumed to be unavailable domestically.

*Rail Loopholes:* The bill also fails to significantly strengthen and close loopholes for Buy America requirements applicable to rail projects. It fails to eliminate the exemptions from Buy America for Amtrak for capital projects that are less than \$1 million, for high-speed and intercity passenger rail projects that are less than \$100,000, and for the Railroad Rehabilitation and Improvement Financing (RRIF) loan program.

*Waiver Loopholes:* H.R. 7 also does not require the Secretary of Transportation to publish criteria to be used to determine whether a public interest waiver of Buy America requirements is warranted. Currently, the Secretary has complete discretion to decide on what basis to issue a public interest waiver, and these factors can vary from wavier to wavier and from one Administration to the next. We urge inclusion of language to define and set forth specific criteria that will be used by the Federal Highway Administration, the Federal Transit Administration, the Federal Railroad Administration, and Amtrak when considering whether to grant a public interest waiver. H.R. 7 also does not address the multitude of standing public interest and nationwide waivers that have been in place for decades. For instance, the Federal Highway Administration has a standing waiver for all manufactured goods, put in place during the initial rulemaking to implement Buy America in 1983. Similarly, the Federal Transit Administration has a general public interest waiver in place for software, even though software development is now done in the U.S. We believe that a review within one year, and every five years thereafter, of all such standing waivers is warranted.

### **3. LIMITING ENVIRONMENTAL REVIEW AND PUBLIC PARTICIPATION FOR HIGHWAY AND RAIL PROJECTS**

The review process that is established under the National Environmental Policy Act (NEPA) and substantive environmental protections provided by a host of other Federal laws are intended to ensure that the impacts of transportation projects funded with Federal dollars are fully analyzed, other Federal agencies and the public have input into the decision-making process, a range of alternatives are considered, and environmental impacts are mitigated. Although H.R. 7 does not actually amend NEPA or other environmental laws directly, the effect of the legislation is to significantly limit or preclude their application to projects authorized under Title 23 and to rail projects. We have serious concerns that the changes made in the bill, which are extremely broad and far reaching, and significant detrimental impacts to both environmental review and public participation in the development and approval of such projects.

According to the Federal Highway Administration (FHWA), only about four percent of all projects funded through FHWA programs require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). Of the remaining projects funded by FHWA, 96 percent are processed as categorical exclusions ó the least intensive environmental review process under NEPA ó and all project review is completed, on average, in 2.4 to six months. In the case of FTA, 99 percent of projects are processed as categorical exclusions, and all review resolved, on average, in less than six months. Despite this, NEPA and other Federal environmental laws are frequently cited as the main cause of delays in project delivery. Available data shows, however,

that a lack of funding, changes in project design and scope, low priority and local controversy, and the complexity of a project are generally cited as more significant factors in project delivery delay than environmental review.

Still, in an effort to improve the effectiveness of environmental review processes with respect to highway and transit projects, significant changes to Title 23 were made in the last reauthorization bill (Pub. L. 109-58). The majority of these changes have been implemented, and according to FHWA, the efficiency of environmental reviews has improved significantly since their adoption. Still, there has been an ongoing push by our Republican counterparts to further limit environmental review under the guise of project streamlining. While we strongly support efficient review of projects to ensure timely project delivery, we believe it is possible to balance these needs with adequate opportunity for public input and environmental review. Unfortunately, H.R. 7 ignores that balance with respect to projects authorized under Title 23. Of further concern, the bill applies the same "streamlining" provisions part and parcel to rail projects that receive Federal funds, despite the fact that there is no data nor has the Committee held one hearing indicating a correlation between the NEPA review process and a delay in rail project delivery.

*Waivers of NEPA for Certain Projects:* The bill completely waives the application of NEPA for all highway and rail projects where the Federal share of the cost is less than \$10 million or 15 percent of the cost of the project. This arbitrary threshold for declaring a project to be exempt from a NEPA review process ignores the potential scope and impacts of the project on both the environment and the local community. This arbitrary approach is of particular concern in cases where a large-scale project may have a Federal cost share that does not meet the percentage threshold. This outright waiver also means that the provisions to prohibit segmentation to avoid compliance with Buy America laws adopted during Committee consideration of the bill may not apply to these projects.

The bill would also exempt the reconstruction of any road, highway, bridge, or rail project that is damaged in an emergency from any further review under NEPA and a wide range of other environmental laws if replacement is in the same location, with the same capacity, dimension, and design as before the emergency. Although we strongly agree that the quick replacement of public infrastructure after an emergency is the highest priority, it is not clear why an exemption from environmental laws is needed to accomplish this goal. Currently, any facility rebuilt with Emergency Relief program funds are categorically excluded under NEPA. Additionally, the Council on Environmental Quality and other Federal agencies already have policies, procedures, and legal authorities in place to expedite any needed reviews, and there are numerous examples that demonstrate the ability to expedite emergency infrastructure decisions.

For instance, in the case of levees and other flood control structures damaged in the New Orleans metropolitan area after Hurricane Katrina, reconstruction took place in ten months. As another example, in the case of the I-35W bridge collapse in Minneapolis, Minnesota, reconstruction took place in 339 days with no waiver of environmental laws. In both examples, the reconstruction activities were carried out in accordance with current environmental laws and regulations, which had virtually no impact on time required to complete the reconstruction work. However, in both situations, it was the availability of full funding for the projects that may have

been the most important factor for their expedited completion. In our view, this fact highlights a major concern with the focus of this bill ó it claims to expedite project delivery by eliminating substantive and procedural environmental protections, but short-changes long-term funding of transportation programs. These examples show that the real causes of delay may be exactly the opposite of this bill's focus.

*Limits on the Review Process:* We are also concerned that, in addition to significantly limiting the universe of highway and rail projects that would be subject to review and public participation under NEPA, the bill places limitations on the review process itself. Specifically, H.R. 7 limits consideration of alternatives that would need to be considered as a project is analyzed; limits the assessment of cumulative impacts; mandates the use of certain documents in the review process and allows the use of documents that are not subject to agency consultation or judicial review; limits input by other Federal agencies and sets arbitrary timelines for agency participation that, if not met, deems the agencies to be in concurrence with the decisions of the Secretary of Transportation; establishes timelines for approvals or determinations under other Federal laws that, if not met, then the project is deemed to be in compliance with those laws; and limits or precludes judicial review in numerous circumstances.

*Short Circuiting the Public Process:* In addition, the bill allows States to acquire real property interests, carry out final design activities, and let contracts before a NEPA review process has been completed. This process raises serious questions about project outcomes being predetermined and undermines the public's role in the selection of a preferred alternative.

Again, while we support timely project delivery, it is already the case that the vast majority of projects require the minimal review process established under NEPA. For those remaining four or five percent of projects, it is understandable that, because of their size, complexity, or potential impact to local communities or the environment, a more robust Federal, state, and local review and input is warranted. To further limit or bias the review process of these larger and more complex projects that warrant a broader review and analysis, as this bill does, is to limit the ability of the public to fully consider alternatives and to ignore the potential impacts of these projects to the environment and the community.

*State Delegation:* For both highway and rail projects, the bill authorizes the Secretary of Transportation to establish a program that would allow States to use state laws and procedures to conduct reviews and make approvals in lieu of any Federal environmental laws and regulations if the Secretary determines the State's environmental review and approval procedures are "substantially equivalent" to the Federal laws and regulations. This delegation of authority has been allowed in the case of NEPA under a pilot program that only one State has taken advantage of to date. Although we support the continuation of this pilot program, a one-state pilot program does not provide enough information or data on which to make permanent changes to law that affect all States; nor does it provide the data that would support turning the implementation and enforcement of all Federal environmental laws over to the States.

In addition, in the case of other environmental laws, we are concerned that the Secretary of Transportation is charged with making a determination regarding the adequacy of state programs and not the Federal agencies responsible for and expert in these laws. In other words,

this bill gives the Secretary of Transportation the sole authority to delegate the statutory responsibilities and authorities of other Federal agencies. There is no requirement for the Secretary to receive the concurrence of these agencies before doing so. In addition, unlike the provisions set forth in the last reauthorization to grant States authority to assume the Secretary of Transportation's responsibilities for NEPA review, this new provision does not stipulate that States that assume these new responsibilities shall be solely responsible and solely liable for complying with and carrying out the laws and does not require States who establish such programs to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of these responsibilities. The fact that these requirements do not apply to this section, while they do apply to the responsibilities to carry out and enforce NEPA, would imply that no such assumption of responsibility is expected. We question, then, who would bear legal responsibility if Federal laws were not adequately implemented and enforced. This issue is further complicated by the fact that the bill stipulates compliance with a permit issued by a State under a Secretarially-approved program is deemed in compliance with Federal law regardless of whether the requirements of the Federal law are actually being met.

This provision also ignores the fact that several Federal laws, including the Clean Water Act and the Clean Air Act, already have a statutory process for delegating responsibilities to the States under certain circumstances. For example, under the Clean Water Act, 46 of 50 States have been approved by the Environmental Protection Agency (EPA) to manage their Clean Water Act point source permitting program, and all States have been approved by EPA to manage their Clean Air Act programs. However, if this provision were to become law, it is possible a State that did not qualify for such delegation (or had such delegation revoked) under the Clean Water Act or the Clean Air Act could then be given this responsibility by the Secretary of Transportation for transportation projects, in direct conflict with other Federal laws.

*Limitation on Law Suits:* We are also concerned that the bill bars any claim arising under Federal law for any project unless it is filed within 90 days after the final approval of the project is published in the Federal Register. Current law allows 180 days for claims to be filed and that deadline was already shortened from six years in the last reauthorization. This limit on the public's right to challenge a project decision combined with all the other amendments in the bill intended to limit the NEPA process will have significant impacts on the public participation in the development and delivery of transportation projects.

*New Activities Classified as Categorical Exclusions:* We are concerned that H.R. 7 categorizes any project within a right-of-way, any extension of a rail line in a right of way, or the replacement of any railroad-related facilities as a class of action categorically excluded from review under NEPA, regardless of the scope of the project. While we support the concept of expedited procedures within the existing footprint of a facility, the arbitrary application of the categorical exclusion authority under NEPA ensures that many projects that could have significant impact on the environment and local communities will not go through any significant review. For instance, a community may have a two-lane road today, but own enough right-of-way to support an eight-lane superhighway. Under H.R. 7, the State and local transportation agencies could expand that road to eight lanes with no consideration of alternatives, no analysis of impacts, and no public input in the decision-making process.

Yet, at the same time, section 3017 of the bill, as reported, also stipulates that the Secretary of Transportation shall treat *an activity carried out under Title 23 as a class of action categorically excluded under NEPA*. Thus, **any** highway, transit, bridge, tunnel, multimodal project or railway crossing that receives Federal-aid highway funding is subject to only the most cursory review and virtually no public input, regardless of the scope of the project.

*270-Day Time Limit:* Finally, with respect to projects carried out under Title 23, section 3018 of H.R. 7, as reported, provides that, notwithstanding any other provision of law, any environmental review process for a highway project under NEPA or any other applicable environmental law shall be completed within 270 days after it is initiated, and if it is not completed, it shall be deemed to have no significant impact on the environment under NEPA and be considered a final agency action, warranting no further review. Furthermore, the bill limits the ability to appeal this action, and does not make clear what occurs in cases where reviews or permit processes under other environmental laws are not complete.

As stated earlier, more than 90 percent of FHWA and FTA projects are already categorically excluded under NEPA from needing a broad review that warrants the development of an EIS. The projects that do warrant the development of an EIS are those projects that will have the most significant environmental and community impacts and need greater deliberation and public input. These projects will likely be larger and more complex. Establishing an arbitrary and unreasonable deadline on the review process does not make sense.

We are also concerned that the project sponsor could simply delay the NEPA review process and, with the passage of 270 days, would be deemed in compliance with the law. Any delays in the ability to implement review and permit requirements could simply result in compliance with those laws after 270 days regardless of whether the requirements were actually met. Or, if the States were to assume NEPA authority or authority for other environmental laws as discussed above, any delays in the ability to implement review and permit requirements could simply result in compliance with those laws after 270 days regardless of whether the requirements were actually met.

In short, while we strongly support timely project delivery, we do not think the drastic changes made in this bill in the name of streamlining are necessary to achieve that goal, and we remain very concerned about the impacts these changes will have on the public participation process and the assessment of impacts to the environment.

*Presidential Permit:* We acknowledge that our Republican colleagues agreed to an amendment during Committee consideration offered by Mr. DeFazio to strike section 3003, "Expedited Permits", from the bill. This section authorized the President to issue an "expedited permit" for any transportation infrastructure project (including highway, bridge, rail, transit, or interstate pipeline projects) if the President determined that the project will enhance the economic competitiveness of the United States. Not only did the provision give the President unfettered authority to approve a project, it also deemed any project approved using this authority to be in compliance *with all applicable Federal laws and regulations*. Furthermore, neither the submission of a project for consideration or the approval of any permit would have been subject to judicial review. Section 3003 would have allowed the President to approve any

project, anytime, anywhere, anyhow without consideration of alternatives under NEPA. Further, other Federal laws, such as those governing civil rights, worker safety and labor standards, and water and air pollution could have also been waived. We are pleased that this provision was deleted and would strongly oppose any attempt to revisit this issue during Floor action.

#### 4. FEDERAL-AID HIGHWAYS

*Lack of Accountability:* Although we support our Republican colleagues' efforts to restructure and consolidate Federal-aid highway programs, we are, however, concerned that the program as proposed will become nothing more than a block grant to the States, with little or no accountability for achieving specific outcomes with the Federal investment. As the Government Accountability Office has stated, the lack of clear Federal goals and the flexibility given to States under current surface transportation programs undermines the effectiveness of these programs in addressing key surface transportation challenges.<sup>1</sup> H.R. 7 expands this flexibility with few if any linkages between performance requirements and accountability for achieving outcomes. Despite our Republican colleagues' claims that this bill will allow States to invest in their most critical infrastructure needs, it is not clear how this will be achieved or overseen; nor will there be any significant consequences for States that fail to achieve this outcome. If we are to ensure that taxpayers receive the most for their investment in surface transportation programs, the bill must require transparency in funding decisions by States and include provisions linking performance management and accountability in the use of Federal gas tax revenue.

*Disadvantaged Business Enterprise:* We are pleased that the Disadvantaged Business Enterprise (DBE) program is continued in H.R. 7. This program is critical to ensuring equal opportunity in surface transportation contracting. We are concerned, however, that our Republican colleagues rejected efforts during Committee consideration to strengthen this program by increasing oversight, prohibiting excessive or discriminatory bonding requirements, and statutorily requiring annual adjustments to the personal net worth cap. These proposals would have made improvements to the program to address the under-representation and continuing discrimination in surface transportation contracting.

*Highway Bridge Funding:* We are also concerned about the treatment of highway bridges in H.R. 7. With one in every four bridges in the nation classified as deficient, we believe that investments in addressing highway bridge deficiencies should be a priority in the use of Federal-aid highway funding. Although States would be required to invest an amount equal to 10 percent of their National Highway System (NHS) and Surface Transportation Program (STP) funds on highway bridge projects on the NHS, the amount of funds provided for bridges is significantly less than the \$4.85 billion currently provided under the Highway Bridge Program. We support efforts to double the NHS bridge set-aside from 10 to 20 percent.

We are also concerned that the formula established for the new NHS program does not include a factor relating to bridge conditions. This approach moves away from the needs-based formula in the distribution of the existing Highway Bridge program and shifts core highway formula funding away from States with significant bridge investment needs.

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<sup>1</sup> *Surface Transportation: Restructured Federal Approach Needed for More Focused, Performance-Based, and Sustainable Programs.* GAO-08-400; Washington, DC; March 2008.

*Transportation Enhancements:* H.R. 7 also undermines transportation options and pedestrian safety through the elimination of the current transportation enhancement (TE) set-aside. This set-aside allows States to choose to implement low-cost transportation options that improve quality of life and enhance roadway safety. Pedestrians and cyclists currently account for approximately 13 percent of all fatalities involving motor vehicles. The TE set-aside allows States to develop appropriate facilities for these modes, which is essential in reducing the highway fatality rate.

*Public Lands Highway Program:* We are also concerned about the changes to the Federal lands programs under the bill. While we are not necessarily opposed to efforts to consolidate and streamline the current program, we are concerned that the bill would give Federal Land Management agencies significant flexibility in the administration of these programs at the expense of the State and local governments. Specifically, we oppose the elimination of funding that goes directly to States and local governments through the elimination of the Public Lands Highways program. Currently, 41 States receive funding under this program, with most of the funds going to State and county road projects. The elimination of the Public Lands Highways program will require State and local governments to assume the costs of maintaining and improving roads that provide access to and through Federal lands. The bill imposes a significant cost on States and local governments who own the roads but who do not derive any significant revenues from the Federal land.

*Mandates on States and Limits on Local Decision-making:* Although the bill purports to provide States broad flexibility to manage their Federal-aid highway programs, we are concerned that the proposal includes a number of new provisions and mandates that would undermine local decision-making and control. Specifically, H.R. 7 includes a mandate that State departments of transportation use private-sector firms for engineering and design services on Federal-aid highway projects. The bill also requires States to conduct an analysis of all projects costing more than \$500 million to determine if the use of public-private partnerships should be considered. Such provisions limit the ability of States to manage their programs, and steer them toward choices they may not have made otherwise, and which may be more costly.

Similarly, H.R. 7 includes a provision allowing the Governor of a State to modify a local Transportation Improvement Plan (TIP) without the agreement of the effected Metropolitan Planning Organization (MPO). This provision undermines current law and local control and shifts the balance of power within metropolitan regions.

*State Infrastructure Banks:* We do not support the inclusion of a new program to reward States that establish a State Infrastructure Bank (SIB). We recognize the role SIBs can play in a State's surface transportation program, and do not object to increasing the amount of formula funding that a State can choose to use toward capitalizing a SIB. However, only 32 States (including Puerto Rico) have established a SIB. There are many reasons why States may choose not to capitalize a SIB: lack of statutory authority, concerns over impact on its debt limit and bond rating, or inability to generate revenue to repay a SIB loan. The creation of this new program incentivizes States to establish an entity that they may not believe is in their best interest.

*Projects of Regional and National Significance (PNRS) Program:* We are also concerned that H.R. 7 does not include a program to provide funding for high-cost transportation projects of national or regional importance to the surface transportation system. Under the current state-based formula distribution of Federal-aid highway funds, large, freight-based, multi-jurisdictional projects do not fare well. We believe that the establishment of a competitive, merit-based grant program will provide funding for the development of projects with national or regional benefits as opposed to local benefits that will improve the operation of the nation's intermodal freight transportation network and strengthen the nation's economic competitiveness.

*Undermines the Obligation to Mitigate Project Impacts on the Environment:* We recognize that surface transportation projects have an impact on the natural environment, including wetlands and natural habitat. Federal law, including the Clean Water Act, attempts to reduce the impact by establishing a process to, first, avoid and minimize potential impacts to the environment, whenever possible, and to ensure that those impacts are adequately mitigated should they occur. As recent flooding events demonstrate, unrestrained development and unmitigated impacts to wetlands can exacerbate the size and scope of flooding events, and put downstream communities at greater risk.

In recent years, both the Government Accountability Office (GAO) and the National Academy of Sciences have reviewed the adequacy of Federal mitigation activities, including the mitigation of surface transportation projects. Both organizations have questioned whether the current statutory obligations are adequate to address the impacts of projects to the environment, and have highlighted instances where project sponsors have avoided meeting their legal mitigation responsibilities altogether.

In that light, we are concerned with the provisions in H.R. 7 that propose significant changes to the Title 23 mitigation requirements. H.R. 7 dilutes the statutory requirement for mitigation by allowing project sponsors to delay any efforts to redress losses until after a project is completed. These changes would allow project sponsors to defer any efforts to mitigate project impacts, even financial contributions to commercial mitigation banks or third-party mitigation efforts, until the very end of the process, potentially when the funding for the project has been fully obligated, the impacts to the environment have already occurred, and the chances of additional funding solely for mitigation activities would be exhausted.

In our view, this intentional and unnecessary delay for mitigation requirements further marginalizes the importance of restoring losses to wetlands and habitat, as required by Federal law, and increases the likelihood of potential flooding and other consequences from unmitigated impacts of construction projects. In addition, this bill marks the first time that project sponsors would be statutorily authorized to mitigate any and all potential impacts to the environment after the project is completed – a standard that is inconsistent with the current provisions of Title 23 (concurrent with or in advance of project construction) or the statutorily obligations followed by other agencies, such as the Corps of Engineers, in section 906 of the Water Resources Development Act of 1986 (mitigation shall be undertaken before any construction of the project commences, or concurrently with the physical construction of such project).

We are equally concerned about the elimination of the current law requirement that any mitigation activities funded under Title 23 be carried out in accordance with applicable Federal law and regulations. We can only surmise that this change was intended to further weaken the statutory requirements that sponsors adequately mitigate the impacts of projects on the environment.

We are unaware of any evidence to suggest that the current mitigation timing has been a burden, especially if the selected mitigation option is undertaken through financial contributions to a commercial mitigation bank or other third-party activity. No hearings were undertaken, or testimony received, that suggests the mitigation changes proposed in H.R. 7 are warranted, or what their potential impact might be; however, there is strong evidence that further weakening of the statutory mitigation obligations will further reduce the chances of mitigation success.

## 5. PUBLIC TRANSPORTATION

As discussed under the funding section, we are deeply concerned with the changes to the sources of funding for public transportation programs. Removing dedicated, user-financed transit funding from the Highway Trust Fund is a short-sighted change that breaks long-standing transportation policy. In addition to our strong objection to this change, there are a number of other programmatic and policy concerns contained in Title II of the bill, as reported.

*Bus and Bus Facilities:* We are concerned with changes to the distribution of funds under the Bus and Bus Facilities grant program. H.R. 7 distributes funds under this program through a newly-created formula rather than on a discretionary basis as was the case before this bill. While we do not object to the funds being distributed by formula, a change in program eligibility now prohibits any transit system that operates heavy rail, commuter rail, or light rail to receive funding under the program. This bill significantly limits the availability of Federal bus grant funding for the nation's transit systems in large population centers. In these difficult economic times, transit systems do not have extra funds available to undertake capital and maintenance projects without Federal funds; they struggle to find sufficient non-Federal sources of funds to keep their systems operating. We do not understand the rationale for this change and oppose its inclusion in the bill.

*Privatization:* We strongly oppose provisions in Title II of H.R. 7 that mandate and subsidize the privatization of public transit service. Specifically, section 2012 authorizes a higher Federal share (90 percent) for the capital cost of buses and bus-related facilities and equipment purchased with any FTA grant funds, if a public transit agency contracts out 20 percent or more of its fixed-route bus service. At a time when Federal resources available to invest in transit are dwindling, we do not support directing more of these resources to for-profit private bus companies nor do we think it is appropriate for the Federal Government to tip the scales in favor of private companies offering transit service. Further, a subsidy is not needed to spur privatization. During the past decade, the percentage of contracted, fixed-route bus service in the U.S. has doubled on its own, without Federal taxpayer assistance.

H.R. 7 also makes private entities eligible to receive Federal grants funds directly, as subrecipients, under the Bus and Bus Facilities program and the Coordinated Access and

Mobility program. Private operators already have ample opportunity to compete for contracts with a public transit provider. Private operators are already used extensively, for example, in paratransit service. Competing for service that the public sector cannot provide sufficiently or appropriately is already something private companies do successfully.

Section 2004 of H.R. 7 further strikes the requirement that local policies and decision-making determine the degree to which private enterprise participation under various transit programs is utilized. By doing so, this change essentially mandates private-sector participation in the planning process. Although the bill strikes the local control language, it leaves in place sanctions if the State or MPO do not meet certain criteria to include the private sector. This represents unwarranted Federal intrusion into local decisions. The Federal Government should set transit policy - not micro-manage the choices made at the local level to meet the transit needs of communities.

*Operating Assistance:* H.R. 7 fails to provide flexibility to transit systems to use Federal funds to maintain service and transit worker jobs at times of economic crisis. Currently, transit systems located in urbanized areas above 200,000 in population may only use their Federal funds for capital projects and maintenance. With local sales tax revenues down and state and local budgets stretched thin, transit systems are having trouble securing the additional funds for operating and often have no choice but to raise fares or cut service. We strongly support the inclusion of language to allow transit systems to use a portion of their Urbanized Area Formula grant funds to keep buses and trains running in a time of economic hardship: when the unemployment rate in their area is at least seven percent or when the price of gas rises by more than 10 percent. Further, although some flexibility to use Federal funds for operating was included during Committee consideration for small transit systems that operate less than 100 buses during peak hours, we believe providing maximum flexibility for these small systems is warranted.

## 6. SAFETY

*NHTSA Grant Funding:* We are greatly concerned with the funding cuts contained in Title V of the bill for highway safety grants to States. As reported, the bill cuts over \$380 million over the life of the bill in grants to States. The bill provides only \$493 million per year for the single consolidated section 402 grant program. Comparatively, in FY 2011, Congress provided \$572 million for NHTSA's separate grant programs. The bill cuts NHTSA safety grant funding by 16 percent per year. In a time of tight budgets, States can ill afford to make up this difference on their own; as a result, States will be able to carry out fewer activities to enhance highway safety.

*Motor Carrier Safety Grants:* H.R. 7 delegates broad authority to the States to carry out the Motor Carrier Safety Assistance Program (MCSAP), yet significantly reduces the Federal oversight over State use of Federal funds. We are concerned that the bill changes the program guidance for MCSAP to allow a State to go up to three years without an approved safety plan before fully withholding MCSAP grant funds. States will be able to continue to spend Federal funds on activities even if the Secretary of Transportation determines that the State's commercial vehicle safety expenditures are not achieving the State's own safety goals.

*Hours of Service:* Section 6502 of H.R. 7 requires the Secretary of Transportation to conduct a field study by April 2013 related to changes to the restart provisions in the hours of service rule published by the Federal Motor Carrier Safety Administration (FMCSA) on December 27, 2011. This section further directs the Secretary to stay the rule and conduct a new rulemaking if the results of the study do not support the changes published by FMCSA. Congress mandated, in section 408 of the ICC Termination Act of 1995 (Pub. L. 104-88), that the Department of Transportation (DOT) conduct a rulemaking "dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle safety" because the hours of service rules governing commercial truck and bus drivers had not been changed since 1962. FMCSA issued a final rule implementing this mandate on April 28, 2003. Since then, the courts have twice vacated the rules issued by FMCSA, including specifically vacating the 34-hour restart provision in 2007. Although we do not object to the requirement for FMCSA to conduct further study, we are greatly concerned with a legislative mandate to stay the rule based on the results of a single study, when FMCSA has considered numerous studies and data already in developing this rule. Attempts to legislatively delay implementation of a final rule will continue the uncertainty over what rules govern on duty time for commercial truck drivers, and will not improve safety.

Section 6602 eliminates Fair Labor Standards Act (FLSA) minimum wage and overtime pay protections for drivers operating under contracts with rail carriers to transport rail carrier employees. An exemption from FLSA requirements has existed for motor carriers since 1935. The motor carrier exemption states that the overtime provisions of the FLSA do not apply to any employee for whom the Secretary of Transportation has the authority to establish qualifications of drivers and maximum hours of service for all drivers regardless of the size of the vehicle. Prior to the passage of SAFETEA-LU, this exemption applied to all employees of motor carriers or private motor carriers, including drivers of vehicles weighing 10,000 pounds or less. The exemption was based on DOT's authority under section 31502 of Title 49 to prescribe requirements for maximum hours of service. However, DOT has never subjected commercial drivers of vehicles weighing less than 10,000 pounds to any Federal safety standards, including hours of service. A definitional change in SAFETEA-LU removed DOT's authority to establish qualifications and maximum hours of service for drivers of vehicles weighing less than 10,000 lbs. As a result, the motor carrier exemption for drivers of lighter-weight vehicles was eliminated and a new class of drivers became eligible for overtime pay under FLSA. Section 6602 exempts drivers of lighter-weight vehicles, presumably passenger vans, under contract with rail carriers to transport rail workers to and from worksites from FLSA requirements. We are very concerned that these drivers are also not covered by DOT hours-of-service rules, meaning that as a result of this change, no Federal wage and hour laws would apply to these workers.

*Agriculture exemptions:* H.R. 7 also contains several exemptions for farmers and agriculture haulers from driver safety and hours of service rules. Although we do not object to targeted and reasonable exemptions to facilitate the movement of goods to market for America's farmers and agricultural community, we believe that any exemption must carefully consider the safety impacts.

A study conducted by FMCSA in May 2010 found that agricultural carriers overall had higher out-of-service and violation rates than non-agricultural carriers related to the safe

operation of commercial motor vehicles, driver qualifications, and vehicle maintenance. Agricultural carriers exempt from hours of service had even higher out-of-service and violation rates than non-exempt agricultural carriers.

Several exemptions from Federal motor carrier safety regulations already exist for farmers, including an hours-of-service exemption during harvest and planting time within 100 miles, and an exemption from the requirements to hold a commercial drivers license if a farmer travels within 150 miles in a State.

Section 6505 of the bill expands the existing hours-of-service exemption to a 150-mile radius of a farm or the source of the commodities, but also includes 150 miles from a wholesale or retail distribution point to a farm or where the supplies will be used and 150 miles from the wholesale distribution point to a retail distribution point. These second-stage movements have always been interpreted by FMCSA as outside the scope of the existing exemption, and do not have to involve a farmer directly. Section 6601 of the bill exempts farm or ranch owners or operators, and their employees or family members, from all requirements to hold a CDL, be medically qualified, pass a drug and alcohol test, and hours-of-service rules. To qualify for the exemption, the vehicle must be equipped with a special farm license plate or other designation by the State, and must weigh less than 26,000 pounds. For vehicles weighing more than 26,000 pounds, the exemptions still apply if the vehicle is traveling less than 150 miles from the farm or ranch. These changes represent a significant expansion of the current allowances, without any requirements that FMCSA evaluate the impacts of such exemptions to ensure that they result in an equivalent level of safety.

*Positive Train Control:* The bill extends the deadline for implementation of Positive Train Control (PTC) on passenger rail lines from December 31, 2015, to December 31, 2020, and could extend the deadline for PTC on rail lines that transport toxic-by-inhalation hazardous materials to anytime after 2020. PTC systems are designed to automatically prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position. Congress mandated installation of PTC on a bipartisan basis in the Rail Safety Improvement Act of 2008 (Pub. L. 110-432), in the wake of one of the most tragic rail accidents in U.S. history. On September 12, 2008, a head on collision between a freight train and commuter train in Chatsworth, California, took the lives of 25 passengers and seriously injured 130 others. PTC has been on the National Transportation Safety Board's (NTSB) list of most wanted safety improvements for more than 20 years. In the past 10 years alone, the NTSB has investigated 52 rail accidents, including four transit accidents, where the installation of PTC would likely have prevented the accident. These accidents include five serious accidents in 2005: Graniteville, South Carolina; Anding, Mississippi; Shepherd, Texas; Chicago, Illinois; and Texarkana, Arkansas. These figures, however, do not include the numerous accidents that the Federal Railroad Administration has investigated. In August 1999, the Railroad Safety Advisory Committee published a report entitled *Implementation of Positive Train Control Systems*, which stated that out of a select group of 6,400 accidents that occurred from 1988 through 1997, 2,659 of those accidents could have been prevented had some form of PTC been implemented.

We recognize the complexities of installing PTC and therefore the need to allow additional time for the freight and commuter railroads to implement the 2008 mandate; however, a deadline of 2020 or beyond is far too long. We believe that a better approach would be to provide the Secretary with the authority to extend the current deadline for individual railroads for no more than three years, or December 31, 2018. In a letter dated February 1, 2012, to a Member of Congress, NTSB Chairman Deborah A.P. Hersman expressed its disappointment in the delay of PTC contained in H.R. 7.

In addition to extending the PTC mandate, H.R. 7 allows freight railroads to implement an alternative strategy in lieu of installing PTC. The alternative strategy could provide far less protection than required under the PTC mandate; it would only have to reduce the risk of a release to the same extent PTC would. According to DOT, it would not have to be designed to achieve all that PTC is required to prevent, including train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong positions. We believe this subsection should be clarified to ensure that whatever alternative strategy is utilized by the railroads and approved by the Secretary provides a level of safety at least equal to the level of safety that would have been provided if PTC had been implemented.

*Rail and Hazardous Materials Regulations:* While H.R. 7 purports to improve regulations and regulatory review, it may, in fact, make it much more cumbersome and time-consuming for DOT to issue regulations or guidance to protect the public from possible safety trends or to respond to imminent safety threats. The bill also introduces uncertainty by requiring any regulation to be based on evidence, but fails to define what it means by evidence. It also mandates that any substantive agency guidance to recipients of Federal assistance be subject to the requirements of the Administrative Procedure Act, which include public notice and comment procedures, which could prevent DOT from quickly being able to issue significant guidance in response to imminent safety hazards.

*Hazardous Materials Safety:* We oppose provisions of the bill which remove safety and health protections and endanger workers and the traveling public. Over the last decade, there have been 170,446 incidents involving transportation of hazardous materials, resulting in 134 fatalities, 2,783 injuries, and more than \$631 million in property damage. Although transportation incidents involving hazardous materials are declining, the hazardous materials industry remains one of the most dangerous industries in which to work.

*Elimination of OSHA Authority:* Provisions in the bill needlessly eliminate the authority of the Occupational Safety and Health Administration (OSHA) to protect workers who load, unload, and handle hazardous materials; design, manufacture, test, and mark hazardous materials packaging, and work at fixed facilities where hazmat is stored, including rail cars that store hazmat inside these facilities.

Since 1970, OSHA has promulgated a number of regulations that address the handling of hazardous materials at fixed facilities. These include regulations governing process safety management of highly hazardous chemicals and requirements for handling and storing specific hazardous materials, such as compressed gases, flammable and combustible liquids, explosives

and blasting agents, liquefied petroleum gases, and anhydrous ammonia. OSHA regulations also address hazard communication requirements at fixed facilities, including container labeling and other forms of warnings, material safety data sheets, and employee training. In addition, facilities that handle and store hazardous materials must comply with OSHA regulations that address more general types of workplace hazards, such as walking and working surfaces, means of egress, noise, air-quality, environmental control, personal protective equipment, and fire protection.

In 1990, Congress mandated in the Hazardous Materials Transportation Uniform Safety Act (Public Law 101-615) that Department of Transportation (DOT) regulations would not preempt OSHA regulations, allowing both agencies to regulate in the hazmat arena: DOT to regulate transportation and OSHA to regulate worker safety. It would undermine worker safety, and create needless confusion, for DOT to now displace such OSHA protections and the agency's enforcement authority over these important regulations.

*Hazmat Training:* Similarly, H.R. 7 relieves certain employers who transport hazardous materials from one of the most important workers safety protections: training. Under current law, the definition of a "hazmat employer" is a person who employs or uses at least one hazmat employee on a full-time, part-time, or temporary basis; or is self-employed. H.R. 7 eliminates the phrase "or uses" from the definition thereby relieving employers who use contractors to load, unload, or handle hazardous materials from having to train those workers. Under the bill, only employers who directly employ personnel on a full- or part-time basis would have to comply with such training requirements.

H.R. 7 also eliminates the hazmat train-the-trainer program, which provides \$4 million in competitive grants per year to nonprofit hazmat employee organizations to train instructors to train hazmat employees. The National Labor College provides one such program on behalf of the rail unions for training rail workers, called the Rail Workers Hazardous Materials Training Program. The training is more comprehensive than required of railroads and does not replace, but rather builds upon, the training provided by hazmat employers. The program is funded, in part, through the National Institute of Environmental Health Sciences, the North American Railway Foundation, and DOT.

H.R. 7 further fails to address stronger training standards for emergency responders. Emergency responders who may be called to the scene of an accident need to receive more advanced training when responding to incidents related to the release of hazardous substances. Current law does not require States, local governments, and Indian tribes that receive Hazardous Emergency Preparedness (HMEP) grants from DOT to train fire fighters or other first responders at a specific level. As a result, most fire fighters only receive awareness training, which is not sufficient. We believe H.R. 7 should require entities receiving HMEP grants to train fire fighters at the Operations Level, at a minimum.

*Hazmat Exemptions:* With respect to exemptions from hazardous materials regulations, known as special permits, we are concerned with several provisions in the bill. In 2010, the Committee on Transportation and Infrastructure and the DOT Inspector General conducted investigations of DOT's special permit program. The investigations found that DOT did not adequately review applicants' safety histories when issuing hazmat exemptions; ensure

applicants will provide an acceptable level of safety; coordinate with the affected operating administrations; and conduct regular compliance reviews of individuals and companies that have been granted exemptions. Several provisions in H.R. 7 are contrary to these findings.

*Limitation on Denial of Hazmat Applicants:* The bill prohibits the Secretary from denying applications for hazmat exemptions for having an out-of-service rate that is greater than the national average. In other words, an applicant cannot be denied an exemption for having a poor safety record.

*Provides Permanent Hazmat Exemptions:* The bill also requires DOT to permanently adopt, in its regulations, every exemption that DOT has issued over the last six years; as long as it is a matter of general application, has future effect, and is consistent with hazardous materials safety. According to DOT, this means that more than 5,000 exemptions could now become permanent. A perfect example of one such exemption is a permit that authorizes the transportation of certain explosives that are forbidden or that exceed quantities authorized for transportation by cargo aircraft. According to DOT, as a result of this bill, that exemption would now be fully incorporated in regulation.

In addition, the bill prohibits the Secretary from charging fees to applicants for exemptions from hazmat regulations. The President's Fiscal Year 2012 budget proposed establishing fees to assist DOT staff in processing the more than 13,000 annual applications.

H.R. 7 contains other provisions that could have a significant deleterious effect on safety, which we believe should be stricken from the bill. These sections include provisions that (1) significantly limit DOT's authority to conduct hazmat inspections and investigations; (2) relieve carriers of liability for any violations stemming from pre-transportation functions, such as loading operations; (3) preempt certain State procedures, standards, and penalties; (4) eliminate DOT's authority to issue a regulation prohibiting the transportation of Class 3 flammable liquids, such as gasoline, in the external product piping of cargo tank motor vehicles; and (5) prevent the Secretary from issuing guidance and regulations to protect the public from trending or possible safety hazards.

*Incorporation of Industry-Developed Standards in Regulations:* H.R. 7 also allows DOT to continue to incorporate industry-developed standards by reference in regulations and then allow the industry to charge the public for access to those standards. We believe that H.R. 7 should adopt the approach taken in the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Public Law 112-90), which prohibits the Secretary from issuing guidance or a regulation that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site.

*DOT Inspectors:* DOT currently has only 35 inspectors responsible for overseeing more than 300,000 hazmat entities. The bill's cut to DOT's hazmat program from more than \$42 million, provided in Fiscal Year 2012, to \$39 million annually thereafter, will make it even harder for DOT to enforce hazmat regulations and ensure public safety.

## 7. PASSENGER RAIL

We are deeply concerned that H.R. 7 includes several provisions that will harm or eliminate freight and passenger rail programs, including Amtrak, in a very short-sighted approach that ignores our nation's growing infrastructure needs and fails to recognize that adequate investment in freight and passenger rail is crucial for national economic growth, global competitiveness, the environment, and quality of life.

H.R. 7 eliminates the program that provides capital grants for short line and regional railroads (49 U.S.C. 22301). The bill also fails to reauthorize the rail line relocation and improvement capital grant program, which was authorized in SAFETEA-LU through 2009 (49 U.S.C. 20154). In addition, the bill eliminates the congestion grant program, which provides grants to States and Amtrak for financing the capital costs of facilities, infrastructure, and equipment for high priority rail corridor projects necessary to reduce congestion or facilitate ridership growth in intercity rail passenger transportation; this program is currently authorized for \$100 million in 2012 and \$100 million for 2013 (49 U.S.C. 24105).

*Amtrak Capital Funding:* Consistent with our Republican colleagues' long-standing opposition to Amtrak, the bill includes several provisions to reduce Federal assistance for Amtrak. Last year, Amtrak set a new all-time ridership record of nearly 30.2 million passengers for FY 2011, the eighth ridership record in the last nine years. We are deeply committed to seeing Amtrak continue to succeed and are extremely troubled by the efforts of our Republican counterparts to continue to try to dismantle and bankrupt our national passenger railroad.

The bill reduces Amtrak's operating grants by nearly \$308 million over the next two years from current levels authorized in the Passenger Rail Investment and Improvement Act of 2008 (Public Law 110-432). Although the bill cuts Amtrak's operating grants, it fails to provide a corresponding increase in Amtrak's capital grants to help Amtrak upgrade tracks, bridges, and other infrastructure; pursue efforts to expand *Acela Express* capacity; advance initial planning work for the Gateway Program to provide additional capacity into Manhattan for intercity, commuter and high-speed rail services; improve station accessibility under requirements of the Americans with Disabilities Act; and continue the development of a next-generation reservation system.

*Prohibition on Amtrak Contracting with Outside Counsel:* The bill also prevents Amtrak from using its Federal funds to hire or contract with outside counsel or file any lawsuit, or defend itself, against a passenger rail operator, including a Class I railroad. The impact of this prohibition would severely impair Amtrak's ability to defend itself and the Federal taxpayer's investment. This provision is an open invitation for operators to sue Amtrak and an invitation for its competitors to engage in illegal activity because Amtrak could do nothing to defend itself. It could also have an immediate impact on the safety of Amtrak's operations. If, for example, a train operated by another entity collided with an Amtrak train so that entity could avoid any liability for its wrongdoing and negligence by simply suing Amtrak. Given that Amtrak would, at a minimum, be precluded from retaining counsel to defend itself or bring a counterclaim against the other entity for its malfeasance, Amtrak would bear full responsibility for any deaths or injuries caused by the other entity so even where it was clear that the other operator was solely

responsible for the entire accident. If the host railroad over which Amtrak operates failed to take responsibility for its contractual commitments to maintain a safe and reliable right of way, Amtrak would be precluded from enforcing its contractual or statutory rights.

Amtrak is further prohibited from using Federal funds to pursue any litigation against a passenger rail operator arising from a competitive bid process in which Amtrak and the passenger rail operator participated. The Committee has held no hearings or briefings on this issue. Some Republican Members have raised concerns with a pending case that Amtrak has filed against Veolia, claiming Amtrak files frivolous lawsuits against its competitors after losing a bid. Nevertheless, to date, the U.S. District Court judge handling the case has denied all three attempts by Veolia to dismiss the lawsuit, including a motion to dismiss, motion for summary judgment, and motion for interlocutory appeal; the case is now set for trial.

*Amtrak's Food and Beverage Service:* The bill also requires the FRA to bid-out Amtrak's food and beverage service to the lowest cost bidder. This will result in the elimination of 2,000 Amtrak jobs, in a so-called "Jobs Act". Further, the bill allows the FRA to take Federal funding from Amtrak and provide it to the winning bidder to cover any losses. The winning bidder essentially needs only to claim they will lose less money than Amtrak; they are not required to show they will turn a profit.

*Bidding out Amtrak Routes:* Further, the bill makes permanent a pilot program established in PRIIA that allows any passenger rail provider to bid for any of Amtrak's routes. The bill allows that provider to operate the routes in renewable periods of five years. The bidder would be provided the operating grants that Amtrak would have gotten to operate over the route(s). We fail to see how transferring Amtrak's operating grants to a private company creates any savings or benefits for the Federal taxpayer.

*Prohibition Against the Use of Funds for California High-Speed Rail:* Finally, the bill prohibits the use of any highway, transit, or passenger rail funds to be used for the development of high-speed rail in the State of California. The prohibition includes innovative financing tools such as Transportation Infrastructure Finance and Innovation Act (TIFIA) or Railroad Rehabilitation & Improvement Financing (RRIF) loans. We oppose this provision. We believe that California needs to find a solution to its congestion and we should not prevent the State from being able to decide how best to address its transportation needs.

NICK J. RAHALL, II

*Ranking Member, Committee on Transportation and Infrastructure*

PETER A. DEFAZIO

*Ranking Member, Subcommittee on Highways and Transit*

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