

ROAD SCIENCE

by Tom Kuennen, Contributing Editor

Will a New Bill Mean a New Start?

The deadline for SAFETEA-LU is looming, but a new surface transportation bill will give the industry a chance to reform highway project delivery and environmental restraints after strangleholds were placed on it in the post-Interstate years.

Reform. Accountability. Fast project delivery. These are goals being articulated this year by the highway community for the reauthorization of the current federal surface transportation program that's due Sept. 30. Reauthorization offers stakeholders such as state DOTs a fresh opportunity to speed up project delivery and to reform the environmental constraints placed on roadbuilding during the last four decades. That September date marks when the existing surface transportation program — *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users* (SAFETEA-LU) — will expire. SAFETEA-LU was enacted in

August 2005. New legislation is needed to ensure that funding for highway projects continues uninterrupted. The new bill is giving the industry a chance to reform highway project delivery and environmental restraints after strangleholds were placed on it in the post-Interstate years following the *Intermodal Surface Transportation Efficiency Act of 1991* (ISTEA).

Now, as the reauthorization debate begins in earnest, with the clock ticking, stakeholders are debating funding levels, the emphasis on pavement preservation versus capacity improvements, acceptance of congestion (“road”) pricing, and the future of the fed-

eral gas tax as a revenue source. But most seem to be in agreement on the need for reform and the streamlining of project delivery.

Choking highway construction

ISTEA was the watershed event in federal aid for highways programming, as ISTEA's flexible funding provisions repudiated the strict categorical funding of Interstate era authorizations. But even

(Top) Urban interstate construction in California in the 1960s; today it takes much longer to get projects underway and completed.

Photo courtesy of GOMACO Inc.

without the federal impetus, the wind had been blowing against the unbridled highway construction of the Interstate era.

The 1960s constituted the culmination of the accelerated Interstate road program, and there was a lot of work going on. But beginning in 1962, federal law required that federal aid highways in urban areas be constructed to conform to comprehensive planning that would take into account all modes of transportation.

The conformity requirement appeared in President John F. Kennedy's Federal-Aid Highway Act of 1962. Henceforth, Interstate construction would be subject to the "3-C" process of "continuing, comprehensive, and cooperative" planning. States and cities with a population of more than 50,000 would have to develop future programs that considered other transportation modes, and to follow guidelines of other federal agencies.

Despite this, criticism grew. "From sea to shining sea we are strangling in a concrete strait-jacket that pollutes the environment and makes driving a nightmare," wrote Helen Leavitt in her 1970 screed, *Superhighway Superhoax*.

Partly in response, the Green movement in America received its first national legislative impetus during the Nixon Administration (1969-1974). The National Environmental Policy Act (NEPA) of 1969 was followed immediately by the first Clean Air Act (1970). But it wasn't until much later — with the Clean Air Act Amendments of 1990 and ISTEA of 1991 — that the act was modified to provide more serious linkage between transportation and air-quality planning.

As air quality became a controller of highway construction, other themes materialized. Land-use patterns were no longer accepted as inevitable and independent of highway construction, but highway construction became thought of as a growth-management tool when combined with other transportation policies.

Roadbuilding became more



complicated under ISTEA as federal, state, and local elected officials found themselves sharing its power. These powers included metropolitan planning organizations' (MPOs) new role in programming road projects.

Also, ISTEA has brought different modes of transportation — including bicycles, pedestrians, and transit — to the table. Their growing influence has led not to less money being available for highways, but more money available for everybody.

Now, federal interest inexorably is shifting from new capital projects to system preservation, even as local jurisdictions try to support major capital projects that will benefit them economically.

The system is broke

The net result is that more money is being spent on highways, but a gnawing uncertainty is present that the process is grinding to a halt.

Right after NEPA, in 1971, the average time to complete Federal Highway Administration (FHWA) environmental impact statements was about 2.3 years; by 1980, it had risen to 4.3 years, and to five years in 1993. It hit a peak of about 6.5 years in 2002. Since then, the industry has worked hard to "streamline" this environmental review process, while maintaining its overall fairness.

Part of that effort was in 2002, when President George W. Bush issued an executive order — the

Urban interstate congestion in Orange County, Calif., 40 years later; slow traffic emits more air pollution than moving traffic.

Photo by Tom Kuennen

Environmental Stewardship and Transportation Infrastructure Review — which invigorated federal agencies involved in environmental streamlining for transportation projects. By mid-2004 the average time had plunged back down to just more than five years.

August 2005's SAFETEA-LU contains restrictions on the time allowed to challenge a project. It includes a 180-day statute of limitations for lawsuits challenging federal agency approvals. This was longer than the 90-day period suggested by some stakeholders but was a step in the right direction. It also contains a 12-month grace period before highway funding could be sanctioned, for metro areas that fall out of conformity with Clean Air Act requirements.

It also mandates a 60-day (two-month) deadline for comments on draft environmental impact statements from both other federal agencies, and the public at-large.

December report blasts regs

But there is more to the problem than just environmental regulations. The situation was defined in December 2008 in a report by the General Accounting Office, or GAO, which described how federal highway projects were disadvantaged under the

ROAD SCIENCE



Washington Metro is the epitome of modern-era mass transit projects, but even transit projects are encumbered with delivery obstacles.

Photo courtesy of AAA Foundation for Traffic Safety

burden of federal requirements, with no documented benefits.

The report – *Federal Requirements for Highways May Influence Funding Decisions and Create Challenges, but Benefits and Costs Are Not Tracked* – threw a spotlight on how highway projects are bogged down by unrelated federal requirements, even to the point where they will choose not to use federal funds for certain projects when they can be done faster with state funding exclusively.

When a state accepts federal funding for a highway project, GAO observes, it is subject to several federal requirements. For example, states must make sure that projects go through an environmental review process, established under NEPA; highway contractors must pay their employees at least the Davis-Bacon prevailing wage; minority- and women-owned firms must not be discriminated against in the

award and administration of highway projects via the Disadvantaged Business Enterprise (DBE) program; and highway contractors must use American-made iron and steel to comply with the Buy America program.

“In addition,” GAO said, “the inflation that occurs during project delays reduces the purchasing power of federal funds allocated to the states. As a result, according to some state transportation officials, states have sometimes sought to use nonfederal funds for projects to avoid the costs or delays involved in complying with federal requirements.”

The GAO gathered information from a literature review, a nationwide survey of state transportation department officials and structured interviews with some of these officials, case studies of selected states, and interviews with other industry stakeholders.

It found that 39 of the 51 state DOTs that were surveyed reported that, in the past 10 years, federal requirements had influenced their decision to use non-federal funds for highway projects that were eligible for federal aid. Thirty-three of these

39 state DOTs reported that the NEPA requirement factored into their decision to use nonfederal funds, while five or fewer of the same 39 state DOTs reported that the Davis-Bacon prevailing wage requirement, the DBE program, or the Buy America program factored into their decision to use non-federal funds.

Reform and streamlining

However, reform is on the way, if major stakeholders in surface transportation have their way.

While it got little attention during the election furor, in summer 2008 then Department of Transportation Secretary Mary Peters articulated a new Bush Administration policy which would have reformed and streamlined existing program categories, while promoting tolling, intelligent transportation, and congestion pricing. Peters urged “a clean break from the past when it comes to transportation in this country,” describing a comprehensive plan to refocus and reform how federal funds are spent for highways and transit.

Simplification of existing programs would be a major element of the policy. “Under our new approach, planners will no longer have to slice and dice every federal dollar into niche programs that do little to improve commutes,” Peters said. “Instead, state and local officials will be able to make investments based on what works and what gets people where they need to go as quickly and as reliably as possible.”

Reform was a major element of the plan. “Our plan also will reform the nation’s transportation programs,” Peters said. “We consolidate the 102 various transportation programs that have sprouted up over the past two decades. These programs dilute the effects of federal funding by forcing state and local officials to fund projects such as recreational trails, while projects that would make a difference for commuters

languish. Under our proposal, there will be eight core spending programs that are as targeted as they are flexible.”

And with reform would come the streamlining of project delivery. “We pilot changes to the federal review process so it will not take the 13 years on average to design and build new highway and transit projects, it does today,” Peters said. “Moving people and protecting the environment do not have to be mutually exclusive.”

Oberstar seeks streamlining

At the late October Chicago annual meeting of the American Road & Transportation Builders Association (ARTBA), U.S. House Transportation & Infrastructure Committee Chairman Jim Oberstar (D-Minn.) articulated a vision of how highways should be funded that was different from Peters’, downplaying the role of private sector funding as an alternate to the gas tax. “The gas tax must remain the cornerstone of the surface transportation program,”

Oberstar told *Better Roads*.

But like Peters, his essential theme was the need to reform and streamline the existing system. Oberstar’s bill would restructure the existing act to be project outcome-based, and require that performance benchmarks — validated through interagency cooperation, such as between the Environmental Protection Agency and the Federal Highway Administration — be established for continued project funding.

“We will get all agencies together [in one room] and they will get on the same page,” Oberstar said. “We will bring all the assistant secretaries of transportation in one room to foster intermodalism. We will have benchmarks and they will be met or we will run over you!” Enhanced environmental streamlining would be part of the bill. “The long waits [for projects] are not serving the people,” Oberstar said.

AASHTO promotes reform

Among all the stakeholders, the long-suffering state DOTs are

most outspoken. The American Association of State Highway & Transportation Officials (AASHTO) has developed a series of documents with the theme, *Transportation: Are We There Yet?* And three of them focus exclusively on reform, accelerated project delivery, and the rebuilding of highways, respectively.

“Americans have a right to demand that transportation investments meet community needs, are spent wisely and accountably, and improve their quality of life,” AASHTO said. “While transportation investment must be increased, top-to-bottom reforms are needed to guarantee that taxpayers will get their money’s worth. What we need is a program that will be accountable for results, make investments based on community needs, and deliver projects on-time and on-budget.”

Reflecting Mary Peters’ wishes, AASHTO wants fewer programs. “The current laundry list of over 100 different program objectives for highways, and another 50 for the transit program makes it

1/2 Page Horizontal

ROAD SCIENCE

difficult to identify true program priorities,” AASHTO said. “The federal program must refocus on six objectives of genuine national interest,” the first of them being preservation and renewal.

AASHTO said to ensure accountability for federal funding, goals should be established for the national objectives. AASHTO, in consultation with MPOs, cities, counties, transit agencies, the American Public Transportation Association (APTA), and U.S. DOT, should develop national performance goals for each objective.

Project selection could then be aligned with the national objectives, AASHTO said. “AASHTO supports the development of a state-driven performance management process in which each state DOT, and its MPOs, would focus federal funding on meeting national performance goals,” the group said. “Each state would adopt performance targets, such as reduction of fatalities, relating to the national goals in their long-range planning process.”

But with this performance management must come accountability. “To improve accountability for achieving national objectives, each state will be called on to develop specific measures through which they can track and report on results,” AASHTO said. “Each state would determine its own performance targets and the appropriate strategies to meet those targets. Not every state will improve on every performance measure every year. Not every state will lead on every issue. What matters is that they start off in the right direction.”

Back to the Basics

AASHTO proposes that the federal highway program get back to the basics established in 1991, when 90 percent of federal funds were apportioned by formula to states, and spent according to the priorities established by the states and their MPOs.



Project acceleration should take prominence among national priorities, the state DOT officials said. “Today, a typical highway project can take from 10 to 15 years to complete; up to six years for the environmental process, and up to nine years for planning, design, and construction.

And reform is needed to cut project delivery times in half, AASHTO notes. “Congress should mandate that federal agencies collaborate with states to make it possible to do in five to seven years what currently takes 10 to 15 years,” AASHTO says. “Collaboration between natural resource protection agencies and transportation agencies should be mandated by Congress so they find ‘win-win’ solutions to improve both environmental and transportation outcomes.”

Unfortunately, there isn’t a silver bullet for speeding up the delivery of transportation projects, the group said. Issues as diverse as restrictions on early right-of-way procurement, laborious environmental review and permitting processes, limitations on innovative contracting, and duplicative administrative tasks all contribute to what some have described as

Bicycle paths share surface transportation funds with highways as “transportation enhancements,” and will remain a part of the funding mix.

Photo courtesy of AAA Foundation for Traffic Safety

“death by a thousand paper cuts,” according to AASHTO.

Expanding state roles in environmental processes

The organization believes that the 2009 surface transportation law may be written to reduce onerous elements of the National Environmental Policy Act.

“Under SAFETEA-LU, new provisions of law (Section 6004 and 6005) were enacted to help streamline the federal environmental process by allowing state DOTs to assume FHWA’s NEPA responsibilities,” AASHTO said. “Currently, any state may assume full U.S. DOT environmental review responsibilities for categorical exclusion projects. Additionally, a pilot program was created allowing five states to assume full U.S. DOT environmental review responsibilities for all types of projects. These provisions need to be further refined and expanded to take full advantage of their potential.”

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ROAD SCIENCE

The five-state pilot program should be institutionalized as a permanent program and expanded so all states can have the option to participate. States should be allowed to assume U.S. DOT responsibilities without reducing flexibility to acquire right-of-way and perform design work prior to the completion of the NEPA process.

“The program should clarify that a state can assume U.S. DOT’s responsibility for making project-level conformity determinations under the Clean Air Act, along with all other project-level environmental review responsibilities,” AASHTO said.

Reform with a new vision

The American Road & Transportation Builders Association also supports states’ control over environmental reviews of projects. In its reauthorization policy document, *A New Vision & Mission for America’s Federal Surface Transportation Program*, ARTBA urges that the next bill ensure the timely delivery of transportation benefits by enhancing the U.S. DOT’s authority over the environmental planning process, and provide opportunity for all interested and qualified states to have control over environmental reviews.

ARTBA is the most aggressive fighter on behalf of highways against constrictive environmental programs, and supports an active legal arm. Three laws outside the ability of reauthorization legislation to change need reform, ARTBA said, and their criticism needs to be considered as surface transportation legislation is discussed.

ARTBA calls for reform of the so-called State Implementation Plan (SIP) for clean air. “The SIP process has become a complicated, costly, and largely ineffective way to further pursue attainment of the ambient air quality standards,” ARTBA said. “It is highly doubtful the current SIP process can be sufficiently revised



Wetlands mitigation is built into the highway permitting process; in 2006 Federal Highway Administration data showed highways providing 2.6 acres of wetlands mitigation for every acre impacted by highway projects.

Photo courtesy of Tom Kuennen

or reformed to allow it to work as intended.”

Instead, ARTBA says the SIP process should be replaced with a cooperative and flexible multi-jurisdictional (federal, state, and local) air-quality management process that allocates responsibility appropriately, for example, when states have no control over mobile sources from outside that state; addresses air quality holistically, replacing the current process of looking at air quality on a pollutant-by-pollutant basis; and allows establishment of appropriate, progressive air quality improvement goals instead of the

current practice of setting unrealistic attainment deadlines that are not in alignment with federal compliance dates, nor are necessarily protective of the public health and welfare.

Wetlands reform is a particular problem, ARTBA said. “In *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers (Corps)*, the U.S. Supreme Court refused to extend federal wetlands jurisdiction over man-made ditches and remote wetlands,” ARTBA said. “However, because the court’s decision was not issued by a majority of the justices, these issues will continue to be examined by lower courts on a case-by-case basis.”

FHWA: Performance improvements sought

While change may be anticipated as the Obama administration ramps up, and DOT Secretary-designate Ray LaHood (R-Ill.) takes charge, at writing the Federal Highway Administration reflected — in its own low-key way — the reform and streamlining program described by DOT Secretary Peters.

“The U.S. DOT will meet with AASHTO to discuss issues and concerns about potential options for implementing a performance-based federal program, and to discuss in more detail AASHTO’s thinking about how to achieve greater accountability for meeting performance targets,” said FHWA Associate Administrator for Infrastructure King Gee at the October annual meeting of AASHTO.

King articulated a number of performance improvement areas that could become part of this program, including reduction of annual highway fatalities, improvement in reliability of travel times, improved pavement condition of the National Highway System, enhanced bridge conditions for all public roads, and faster completion times for environmental impact statements. **BR**