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Legislative Schedules
Week of June 29, 2009

The House and Senate are taking this week off for the Independence Day District Work Period.

Congress will return to D.C. on Monday, July 6 (Senate) and Tuesday, July 7 (House).

Inside This Issue

House Subcommittee OKs Surface Bill, But Legislation's Future Outlook Is in Doubt

The House Highways and Transit Subcommittee last week approved, by voice vote, an ambitious but incomplete bill reauthorizing federal surface transportation programs for the next six fiscal years.

The unnumbered draft legislation was then favorably reported to the full Transportation and Infrastructure Committee. But while T&I chairman James Oberstar (D-MN) says that he wants the full committee to mark up the bill in late July, aides privately said that a full committee markup would have to wait until the House Ways and Means Committee, the Democratic House leadership, and the Obama Administration come to an agreement on how to pay for the legislation. (Which, at this point, looks like it will take much longer than a month.)

The legislation was exhaustively summarized in last week's issue of *TW*.

Highways and Transit Subcommittee chairman Peter DeFazio (D-OR) opened the markup session by calling the legislation a "work in progress" and asking members to hold off on amending the bill until a full amendment process can be held on a more fleshed-out bill in full committee.

DeFazio then led off with a strong pushback against the White House proposal to delay the bill and instead pass an 18-month extension:

"That is not acceptable. Eighteen months of the status quo means that we will not begin to address the backlog of maintenance for the legacy system, and we certainly won't begin to build out a new 21st century infrastructure. Eighteen months of funding means no state will start a project that takes more than eighteen months — they can't. So immediately major projects are off the table. That is not acceptable to this committee. It also means we would forgo millions of jobs, which I think is the last thing that this Administration would want."

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White House Scaling Back FY10 Infra. Bank Plans

The White House has informally told the House and Senate Appropriations Committees that the Obama Administration does not believe that the full $5 billion appropriation for a National Infrastructure Bank, requested in the budget for fiscal year 2010, will be necessary. Instead, the White House feels that an appropriation of around $2 billion, focused primarily on transportation infrastructure, will suffice in FY 2010.

But the Administration is still not close to putting proposed rules for the Bank down on paper and giving them to Capitol Hill to allow legislation implementing the Infrastructure Bank (NIB) to be drafted.

If the Appropriations Committees go along with the reduction in NIB funding, the move would have huge implications for other discretionary programs at the Transportation Department and the Department of Housing and Urban Development.

The House and Senate "THUD" subcommittees

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Highway Bill

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Oberstar and DeFazio were successful in preventing any Democratic members of the subcommittee from offering any amendments during the markup. T&I ranking member John Mica (R-FL) and subcommittee ranking member Jimmy Duncan (R-TN) were not able to convince their members not to offer amendments but were able to get them to withdraw their amendments after a brief discussion. (See list of all amendments offered and withdrawn on the following page).

As such, the markup was more of a general debate on the bill, with one member's opening statement having roughly the same weight as another member's withdrawn amendment.

Rep. Nick Rahall (D-WV, the second-most-senior Democrat on T&I, mentioned the need to keep the existing donor-done highway formula structure in place and criticized the draft bill for abolishing the separate rail-highway grade crossing program (23 U.S.C. 130) two years into the bill and folding it into the Highway Safety Improvement Program.

Rahall also, as chairman of the House committee overseeing public lands and territories, questioned the draft bill's consolidation of all federal land and territory highway programs into one single program, saying that "I'm not sure what the Indians have to do with the Puerto Ricans or the people living on Guam or on forest highways…"

Former chairman Don Young (R-AK), the most-senior Republican on the panel, indulged in nostalgia, saying that the 2005 SAFETEA-LU surface law that he authored was "probably the only piece of positive legislation that passed Congress" while the Republicans were in charge from 1995-2006.

Rep. Tom Petri (R-WI), the former longtime chair of the subcommittee, got into specifics he wanted the bill to address — FHWA rules not allowing the use of proprietary products on federal-aid construction projects, the use of recycled foundry sand in projects, the regulation of "wet lines" on tanker trucks, and the bill's requirement that ignition interlocks be installed in the cars of all first-time DUI offenders (Petri's home state of Wisconsin has the most booze-friendly DUI laws of any state).

Rep. Howard Coble (R-NC) stressed the need for a higher rate of return for donor states.

(*Ed. Note:* At this point in the markup, an interesting trend started — Oberstar began to respond to everybody's statement on the bill, even though it was DeFazio's markup to run. DeFazio eventually passed through visible annoyance at this to a more Zen-like state during the five-hour markup.)

Rep. Mario Diaz-Balart (R-FL) made two points (both of which he later emphasized by offering and withdrawing amendments). The first was the donor state rate of return issue (he offered and withdrew a non-binding sense-of-Congress clause that the rate of return for donor states should be at least 92 percent. The second was the fact that Florida leads the nation in using its existing flexibility to transfer highway funding between programs to bring its bridges up to code, and he did not see why Florida should be punished (under sec. 1119 of the bill which abolishes that transfer authority for all states) because of the sins of other states.

Rep. Jerrold Nadler (D-NY) brought up the other side of the donor-donee debate, namely that because so many rich people and rich corporations pay taxes in New York, that the state is a net donor in every federal program except highways, and he blamed that on the fact that New York City's mass transit system is so good. He then noted that the existing donor-donee equity bonus formula rewards states that are energy-inefficient in transportation and punishes the states that are more efficient.

Rep. Robert Latta (R-OH) criticized the need for sec. 7010 of the bill, which mandates a rulemaking for the safe transport of lithium batteries as a hazardous material.

Rep. Jerry Moran (R-KS) offered and withdrew an amendment requiring a five percent set-aside of bridge program funds to go to bridges not on the federal-aid system (current law has a fifteen percent set-aside; the bill has zero).

DeFazio responded that with so many deficient bridges on the National Highway System, and that the state would have flexibility within the STP program to use that funding for off-system bridges.

Rep. Gary Miller (R-CA) offered and withdrew an amendment striking a provision of the bill that would make housing affordability a criteria in metropolitan planning rules and complained that while "livability" was a primary goal of the legislation, the word is not defined in the bill or elsewhere in law.

Rep. Henry Brown (R-SC) offered and withdrew an amendment requiring DOT to consider emergency evacuation time, Interstate designation, and Interstate segment completion as factors when evaluating Projects of National Significance. DeFazio responded with a sense that Brown's criteria were perhaps designed to push the PNRS funding towards a particular megaproject in Brown's district that met all those new criteria and said that the bill should not do that (even though the 2005 SAFETEA-LU earmarked 100 percent of the money in a similar program.)

Rep. Charles Dent (R-PA) offered an amendment to add hydrogen fuel cells to a list of alternative fuel sources, to which Oberstar responded that the Dent amendment addressed an inadvertent oversight and would be incorporated into the bill when marked up at full committee.

Rep. Connie Mack (R-FL) quixotically offered and withdrew an amendment striking all provisions

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Highway Bill

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of law that force the Davis-Bacon federal prevailing wage law to apply to highway and transit projects. Oberstar, knowing that Mack is at least 100 votes short on this topic on the House floor, again promised Mack that he could have a vote in full committee or on the floor on the topic if he wished.

Rep. Mary Fallin (R-OK) offered and withdrew two amendments. The first would raise the total project cost threshold for a project having to file a project management plan from $500 million to $1 billion and would raise the threshold for filing an annual financial plan from $100 million to $500 million.

Fallin spoke of paperwork burdens, but Oberstar responded that his language was in conjunction with the recommendations of the DOT Inspector General following the financial disaster that was the Big Dig project in Boston, and that moving the top threshold from $500 million to $1 billion would raise serious accountability and transparency concerns.

Fallin's second amendment dealt with exemptions from federal hours of service regulations for certain agricultural vehicles. Oberstar, who is extremely rigid in his opposition to any loosening of hours of service rules (based on a story he often tells of witnessing a gruesome accident due to driver fatigue years ago), was noncommittal.

Rep. Aaron Schock (R-IL) offered and withdrew an amendment requiring DOT take into account equitable geographic distribution and rural/urban balance when distributing Projects of National Significance funds.

Oberstar promised to work with Schock to find some way to guarantee equitable distribution of funds in the PNS process but emphasized that his ultimate goal was for DOT to take an independent, objective look and make its own decisions on the projects, unlike in SAFETEA-LU where the entire program wound up getting earmarked by Congress.

With that, the subcommittee ordered the bill favorably reported to the full committee, and the waiting process began.

An initial hearing by the Ways and Means Committee on the following day (see article on page 8 of this issue) did not give the sense that Ways and Means is particularly close to solving the $200 billion revenue problem needed to provide full funding for the Oberstar bill.

And with the Obama Administration and the Senate squarely behind an eighteen-month extension of existing programs (which needs to be passed by July 31 if it also is to contain the $7 billion in extra funding needed to bail out the Highway Trust Fund and prevent a partial shutdown of highway spending over the August recess), then the staff of the T&I Committee would need to shift its focus from the multi-year bill to drafting an extension soon — as soon as next week, perhaps (since extensions of these programs are much more complicated than simply inserting a new expiration date).

AMENDMENTS OFFERED IN THE HOUSE HIGHWAYS AND TRANSIT SUBCOMMITTEE TO H.R. ____, SURFACE TRANSPORTATION AUTHORIZATION ACT OF 2009

All amendments were offered, discussed, and then withdrawn by their sponsors. No votes, no amendments agreed to.

1. **Moran (R-KS)** amendment allowing states to use not less than five percent of their Critical Asset Investment formula funds on off-system bridges.
2. **Gary Miller (R-CA)** amendment striking the requirement in section 1508 of the bill that metropolitan planning take into account land use patterns, adequate housing supply, and greenhouse gas emission reductions.
3. **Gary Miller (R-CA)** amendment making the existing Surface Transportation Project Delivery Pilot Program permanent and ensuring California's continued participation therein.
4. **Brown (R-SC)** requiring DOT to consider emergency evacuation time, Interstate designation, and Interstate segment completion as factors when evaluating Projects of National Significance.
5. **Capito (D-WV)** amendment allowing West Virginia a truck weight exemption for trucks up to 126,000 pounds on a specific 11-mile stretch of Interstate 77.
6. **Mario Diaz-Balart (R-FL)** amendment striking section 1119(a) of the bill which repeals 23 U.S.C. 126 and allowing continued transferability of bridge apportionments.
7. **Dent (R-PA)** amendment declaring vehicles powered by hydrogen blend fuel cells to be "clean fuel vehicles".
8. **Mack (R-FL)** amendment repealing Davis-Bacon Act applicability to the federal-aid highway and public transportation programs.
9. **Mario Diaz-Balart (R-FL)** amendment expressing the sense of Congress that the final bill should have a 92 percent rate of return for highway donor states.
10. **Fallin (R-OK)** amendment raising the threshold for a project having to file a financial plan from $500 million to $1 billion.
11. **Fallin (R-OK)** amendment exempting trucks carrying certain agricultural shipments from federal hours of service requirements.
12. **Schock (R-IL)** amendment requiring the Secretary take into account equitable geographic distribution and rural/urban balance when distributing Projects of National Significance funds.

Infrastructure Bank

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were given their budget allocations for fiscal 2010 (the "302(b)" allocations) with the full $5 billion for the NIB in mind. The table at top right of this page shows how prominently the $5 billion for the NIB plays into the total $68.87 billion THUD discretionary budget request submitted by the White House (as re-estimated by the Congressional Budget Office).

The following table shows how the budget request compares with the budget authority (new spending commitments) allowed to the House and Senate subcommittees under the current 302(b) ceilings.

THUD Request Including $5 Billion For NIB:

FY 2010 Admin. THUD Request (BA):	68,869
House THUD 302(b):	68,821
House Required BA Reduction:	-48
	-0.1%
Senate THUD 332(b):	67,700
Senate Required BA Reduction:	-1,169
	-1.7%

While the House allocation basically meets the request with the full $5 billion for NIB, the Senate allocation would require a 1.7 percent cut, on average, in the bill's discretionary funding (or some kind of accounting gimmick).

But if one assumes that the request for the NIB is reduced from $5 billion to $2 billion, the situation looks much different:

THUD Request With Only $2 Billion For NIB:

FY 2010 Admin. THUD Request (BA):	65,869
House THUD 302(b):	68,821
House Allowable BA Increase:	+2,952
	+4.5%
Senate THUD 302(b):	67,700
Senate Allowable BA Increase:	+1,831
	+2.8%

The Senate could then increase budget authority for THUD discretionary programs by an aggregate 2.8 percent and the House by 4.5 percent. (This ignores the fact that the revised budget request, in total, would still be a huge increase above 2009 after stimulus spending is subtracted.)

However, if the THUD subcommittees cut the NIB back to $2 billion and try to spend all the extra money, their problem is that not all programs are created equal, since the subcommittees also face constraints on the outlays (the eventual release of cash from the Treasury to pay off spending commitments) for their programs.

Under the full budget request, the House subcommittee's allocation requires THUD outlays to be cut by $408 million below the budget request: the Senate subcommittee faces a $534 million reduction.

Transportation-HUD Subcommittee Budget Authority (Mill. of $)

	FY 2009 Enacted	FY 2010 Request
Title I: Department of Transportation		
USDOT Non-Emergency Appropriations (Regular)	16,999	18,177
USDOT Rescissions of Appropriations	(39)	-
USDOT Rescissions of Contract Authority	(3,480)	-
Equals: USDOT Net Total for 302(b)	**13,480**	**18,177**
Title II: Housing and Urban Development		
HUD Non-Emergency Appropriations	38,662	41,977
HUD Rescissions of Appropriations	(793)	(28)
HUD Advance Appropriations	4,400	4,400
HUD Offsetting Receipts and Collections	(735)	(867)
Equals: HUD Net Total for 302(b)	**41,535**	**45,483**
Title III: Other Independent Agencies		
National Infrastructure Bank	-	5,000
Other Agencies Non-Emergency Appropriations	304	296
Other Agencies Rescissions of Appropriations	(1)	-
Equals: Other Agencies Net Total for 302(b)	**303**	**5,296**
Scorekeeping Adjustments		
Adjustment for Pipeline Safety User Fees	(75)	(87)
Less HUD Advance Appropriations	(4,400)	(4,400)
Plus Prior Year HUD Advance Appropriations	4,158	4,400
Other Scorekeeping Adjustments	(1)	-
Total Scorekeeping Adjustments	**(318)**	**(87)**
Total THUD Subject to 302(b) Ceiling	**55,000**	**68,869**

CBO estimates that first-year spending for the NIB would be so slow that only five percent of the budget authority would "spend out" in the first year. So cutting the new budget authority from $5 billion to $2 billion would only reduce 2010 outlays by $150 million — still leaving the THUD subcommittees with more needed outlay reductions.

(The subcommittee staffs hope that they will be able to pick up more outlays from other subcommittees that don't need all of theirs, or from the House's central outlay reserve.)

Then, if the subcommittees want to spend some of that extra $3 billion in no-longer-needed NIB funding on other programs, the extra 2010 outlays stemming from those programs also faces the total outlay ceiling.

Capital-intensive programs "spend out" through outlays very slowly, whereas salary-intensive outlay accounts, and accounts that have a lot of transfer payments to non-federal persons or entities, spend out quickly.

If the appropriators wanted to increase funding for FAA Operations by, say, $1 billion in budget authority, that would increase 2010 outlays by about $900 million, according to CBO.

Extra BA for Amtrak outlays at 100 percent in the first year because Amtrak is technically a non-federal entity. On the other hand, an extra $1 billion for transit new starts would only lead to $150 million in extra first-year outlays.

The same principles apply on the housing side of the budget. Voucher programs outlay quickly (85 percent outlays in the first year) while the Public Housing Capital Fund and HOME Investment Partnerships only outlay at two percent or less in the first year, with project-based programs falling somewhere in the middle.

The key to spending the potential extra $3 billion in budget authority freed up by the reduced NIB request, then, is how much in extra outlays can be (in the House) taken from the $711 million central outlay reserve fund, or (in both chambers) poached from other subcommittees that don't need all their outlays. Because the calculations also work in reverse — if you get an extra $50 million in outlays, you can increase BA for, say, new starts by $333 million.

Building these spending increases into the budget will, of course, increase the baseline for these programs next year and in the future.

House Passes Homeland Security Appropriations Bill

On June 24, the House of Representatives passed the bill funding the Department of Homeland Security for fiscal year 2010 by a bipartisan vote of 389 to 37.

The wide vote margin belies the partisan controversy over the bill (H.R. 2892) — to be precise, the controversy was not over the bill itself, but over the procedures under which the Democratic leadership let the House consider the bill.

There is a long (210+ year) tradition of considering the general appropriations bills in the House under open rules — which means that any member can stand up and offer any germane amendment without prior notice, if the amendment does not violate the Budget Act or other House rules relating to legislation on appropriations bills.

Because of the time crunch this year (since the new President submitted his budget several months late), House Appropriations Chairman David Obey lost his patience for the process 22 minutes into amendment debate on the first appropriations bill up this year (Commerce-Justice-Science) and convinced the leadership to have the Rules Committee to issue new rules only allowing hand-picked amendments to be allowed to be offered to appropriations bills.

Republicans responded by dragging out the voting process on every amendment allowed (and every other item up for a vote on the day the appropriations bill was considered). A GOP aide said that if they did not make a stand on this issue, then after a year or two of restrictive rules, no one would remember the previous 210-ish years of open rules on appropriations bills.

Obey himself told a crowd on June 25 that the process irritated him so much that he was grinding his teeth so fiercely that morning that he broke one of his teeth off and had to go the dentist mid-day. And did not get novacaine.

But aside from the dispute over the rule for considering the bill, the debate on the bill (and the votes on many amendments) appeared bipartisan, and mostly immigration-related. The only strictly transportation-related amendment offered to the bill, a Duncan (R-TN) amendment to freeze federal air marshal spending at last year's level, failed by a 134-294 vote.

AMENDMENTS OFFERED IN THE HOUSE TO H.R. 2892, FY 2010 HOMELAND SECURITY APPROPRIATIONS

- **Price (D-NC)** manager's amendment increasing funding for firefighter grants, nonprofit security grants, the Metropolitan Medical Response System, and the Western Hemisphere Travel Initiative; prohibiting funds in the bill being used for first class travel, with certain exceptions, and to close or transfer operations of the FEMA recovery office in Orlando; and prohibiting negative personnel action against DHS employees who interact with the public and choose to use surgical masks, N95 respirators, gloves or hand sanitizers – *agreed to by recorded vote of 345 ayes, 85 noes.*
- **Bilirakis (R-FL)** amendment increasing funding for Immigration and Customs Enforcement salaries and expenses by $1.7 million offset by reducing funding for the Office of the Secretary and Executive Management, to be used to expand the Visa Security Program, which places ICE personnel overseas at high-risk locations to screen visa applications – *agreed to by recorded vote of 423 ayes, 6 noes.*
- **Duncan (R-TN)** amendment to hold funding for Federal Air Marshals to $819.5 million (the FY 2009 level), instead of increasing it to $860.1 million in the bill – *rejected by recorded vote of 134 ayes, 294 noes.*
- **King (R-IA)** amendment to shift $1 million for Customs and Border Protection salaries and expenses by $1 million to go towards removing the lookout posts that have been established along the U.S.-Mexico border –*agreed to by recorded vote of 240 ayes, 187 noes.*
- **King (R-IA)** amendment to prohibit any funds in the Act from being used to employ illegal workers as defined in the Immigration and Nationality Act – *agreed to by recorded vote of 349 ayes, 84 noes.*
- **Lewis (R-CA)** amendment to add $34 million to U.S. Customs and Border Protection, intending to fund 200 additional Border Patrol agents, offset by reducing funding for the Offices of the Secretary and Executive Management; Under Secretary for Management; Chief Financial Officer; and Chief Information Officer – *agreed to by recorded vote of 375 ayes, 55 noes.*
- **Neugebauer (R-TX)** amendment to reduce spending in this act by $2,755,000,000 across multiple accounts – *rejected by recorded vote of 113 ayes, 318 noes.*
- **Poe (R-TX)** amendment to increase by $32 million funds available for the National Predisaster Mitigation Fund, offset by reducing by the same amount funds available for FEMA Management and Administration – *rejected by recorded vote of 202 ayes, 230 noes.*
- **King (R-NY)** amendment to add $50 million in funding to the Domestic Nuclear Detection Office, with $40 million intended for the Securing the Cities initiative and $10 million intended for the procurement of radiation portal monitors, offset by a reduction in the Department's Office of the Secretary and Executive Management and the Office of the Under Secretary for Management – *agreed to by recorded vote of 282 ayes, 148 noes.*
- **Flake (R-AZ)** amendment to prohibit funds in the bill from going to Global Solar, Arizona, for portable solar charging rechargeable battery systems, and reduce the overall cost of the bill by a commensurate amount – *rejected by recorded vote of 110 ayes, 318 noes.*
- **Flake (R-AZ)** amendment to prohibit funds in the bill from going to the National Institute for Hometown Security, Kentucky, and would reduce the overall cost of the bill by a commensurate amount – *rejected by recorded vote of 114 ayes, 317 noes.*
- **Flake (R-AZ)** amendment to strike an earmark for the Harris County Flood Control District, Texas, from FEMA's National Predisaster Mitigation Fund – *rejected by recorded vote of 82 ayes, 348 noes.*
- **Flake (R-AZ)** amendment to strike an earmark for the City of Emeryville, CA, from FEMA's National Predisaster Mitigation Fund – *rejected by recorded vote of 110 ayes, 322 noes.*
- **Flake (R-AZ)** amendment to strike the $1 million earmark for SEARCH of Sacramento, CA, for interoperable communications, technical assistance and outreach programs – *rejected by recorded vote of 112 ayes, 320 noes.*
- **Rogers (R-KY)** motion to recommit the bill with instructions to add an amendment to add $50 million to the E-Verify program at the expense of the Under Secretary for Management – *agreed to by recorded vote of 234 yeas, 193 noes.*

Grassley: Tax Dodges Helped Contribute To DC Metro Fatalities

Sen. Chuck Grassley (R-IA) pointed out late last week that a type of tax shelter he has long complained about may have contributed to the level of fatalities in the June 22 crash of two trains on the Washington Metro subway system's Red Line which left nine persons dead.

In a June 24 letter to House Majority Leader Steny Hoyer (D-MD), the Metro system's leading advocate in Congress, Grassley said that "...WMATA disregarded risks to passenger safety in order to fulfill a contract entered into as an accommodation party to a tax shelter. By entering into tax shelter contracts, the WMATA appears to have allowed banks – rather than experts on passenger safety — to dictate what kind of trains Metro riders use and for how many years they are in service."

The tax shelters in question are called SILOs and LILOs—Sale-In, Lease-Out and Lease-In, Lease-Out transactions. Under such deals, which were actively encouraged by the Federal Transit Administration under the previous four Presidents, foreign financial entities would purchase or lease rolling stock from U.S. transit agencies, which would then lease the cars or buses back from the foreign entity. The foreign entity would receive a break on its taxes and then kick a set amount back to the transit agency.

Grassley declared war on SILOs and LILOS in 2003, on the grounds that if the U.S. government actively encourages foreign companies to take advantage of such tax dodges in America, it would be a bit much to criticize them for letting U.S. companies take similar tax dodges in foreign countries.

SILOs were shut down in the 2004 tax bill but pending deals that had been approved by FTA were grandfathered. (LILOs had been shut down by IRS regulation a few years earlier.)

The controversy comes from the fact that during last week's accident, the oldest "1000-series" passenger cars on the trains involved (built by Rohr Industries, a now-defunct company) "telescoped" upon impact or crushed back upon themselves. Though the crash itself was not caused by the lack of crashworthiness in the 1000-series cars, the fatalities and injuries were much higher because of the telescoping.

The National Transportation Safety Board identified this weakness in an April 2006 report on a November 2004 Metrorail crash. At the end of its investigation, the NTSB wrote to Metro that:

> The Safety Board concluded that the failure of the carbody (underframe) end structure of the 1000-series Metrorail cars may make them susceptible to telescoping and potentially subject to a catastrophic compromise of the occupant survival space...The National Transportation Safety Board therefore makes the following safety recommendation[s] to the Washington Metropolitan Area Transit Authority:
>
> ...Either accelerate retirement of Rohr-built [1000-series] railcars, or if those railcars are not retired but instead rehabilitated, then the Rohr-built passenger railcars should incorporate a retrofit of crashworthiness collision protection that is comparable to the 6000-series railcars. (R-06-2).[1]

The official response from Metro (the Washington Metropolitan Area Transit Authority) declined to take the NTSB's advice and blamed SILO/LILO deals:

> WMATA does not plan to do a heavy overhaul on the 1000 Series, Rohr railcars. Instead WMATA plans to replace these railcars with the 7000 Series railcars on which design has already started. WMATA is constrained by tax advantage leases, which require that WMATA keep the 1000 Series cars in service at least until the end of 2014. The 296 Rohr railcars make up over a third of WMATA's current rail fleet and have performed well for over thirty years. The railcars will be replaced around 2014.[2]

The NTSB then closed the case, saying that:

> The Board also notes that WMATA does not plan to retire the Rohr-built cars because the organization is constrained by tax advantage leases, which require that the 1000-Series cars remain in service at least until the end of 2014. In view of WMATA's response to the Board's recommendation, it appears that further dialogue on this issue would prove futile. Consequently, we have no choice but to classify Safety Recommendation R-06-2 Closed Unacceptable Action.[3]

Hoyer and other DC-area legislators have indicated that they will push for up to $150 million in capital grants for WMATA during the FY 2010 appropriations process, to fulfill the first year of an authorization provided by title VI of last year's Amtrak authorization law (Division B of P.L. 110-432).

During the stimulus debate earlier this year, Grassley stayed on the issue, opposing any funding that would allow transit agencies to use U.S. taxpayer funds to pay off the foreign counterparties in SILO/LILO deals.

Grassley told Hoyer last week that "I was opposed then, as I am now, to taxpayer dollars being used to pay off the counterparties to these transactions.

"All WMATA funding, including any new funding, should be dedicated to improving the safety and reliability of the public transit system. As you contemplate providing WMATA with $3 billion of funding, I ask that you prohibit payments to the bank with which WMATA entered into the tax shelter from any WMATA funds."

1/ The full NTSB letter to WMATA is here: http://www.ntsb.gov/recs/letters/2006/r06_1_2.pdf

2, 3/ NTSB posted WMATA's response and its final action here: http://www.ntsb.gov/safetyrecs/private/history.aspx?rec=R-06-002&addressee=Washington%20Metropolitan%20Area%20Transit%20Authority

House Subcommittee Approves Corps of Engineers Water Budget

A House subcommittee on June 25 approved, by voice vote, a draft $33.3 billion appropriations bill funding the Department of Energy and federal water resources infrastructure programs for fiscal year 2010.

The House Energy and Water Development Appropriations Subcommittee approved the draft bill, which is tentatively scheduled to be considered by the full Appropriations Committee on July 7.

The draft bill appropriates a total of $5.54 billion for the civil works (water resources) program of the U.S. Army Corps of Engineers for FY 2010. This is $416 million, or 8.1 percent, above the Obama Adminsitration's budget request, since the Corps is one of those agencies that legislators of both parties always tend to like more than Presidents from either party.

The draft bill appropriates $139 million more than the non-emergency FY 2009 spending level. But ever since Hurricane Katrina, the off-budget emergency appropriations for the Corps have rendered the regular budget an increasingly bad indicator of how much the Corps is doing.

U.S. ARMY CORPS OF ENGINEERS (CIVIL WORKS) FUNDING (Millions of Dollars)

	FY 2009 Enacted	FY 2010 Request	FY 2010 House	House vs FY 2009 Mil. $	House vs FY 2009 Pct.	House vs Request Mil. $	House vs Request Pct.
Investigations	168	100	142	(26)	-15.5%	42	42.0%
Construction	2,142	1,718	2,123	(19)	-0.9%	405	23.6%
Mississippi River & Tributaries	384	248	251	(133)	-34.6%	3	1.2%
Operations & Maintenance	2,202	2,504	2,511	309	14.0%	7	0.3%
Regulatory Program	183	190	190	7	3.8%	-	0.0%
FUSRAP	140	134	134	(6)	-4.3%	-	0.0%
Floor Control & Coastal Emergencies	-	41	-	-	n/a	(41)	-100.0%
Expenses	179	184	184	5	2.8%	-	0.0%
Assistant Sec. of the Army	5	6	6	1	20.0%	-	0.0%
Total, USACE (Civil Works)	**5,402**	**5,125**	**5,541**	139	2.6%	416	8.1%
Plus FY 2009 Emergency Approps.:	**10,361**	**-**	**-**	**(10,361)**	**-100.0%**	**-**	**n/a**
Total, USACE With Emergencies	**15,763**	**5,125**	**5,541**	**(10,222)**	**-64.8%**	**416**	**8.1%**

After all, in an agency that got $10.36 billion in emergency funding in 2009 versus only $5.40 billion in regular funding, a drop of $139 million in the regular budget is nowhere as important as the (as yet unknown) prospect of whether or not billions more in emergency funding will eventually be provided before fiscal 2010 is over.

The biggest departures from the budget request in the draft bill are, unsurprisingly, in the Investigations account and the Construction account. Construction, because that account forms the core of the projects that are so lovingly itemized down to the dollar in the Appropriations Committee report on the bill, at the request of countless members of Congress — the account receives $405 million (24 percent) more than the budget request, and roughly the same amount as last year.

Investigations receives a bump because that account pays for the feasibility studies, without which a project cannot be approved. So small increases in the Investigations budget lead to large increases in the Construction budget years down the road. Investigations gets $142 million, which is $42 million (42 percent) more than the budget request.

The other accounts get the requested amount, except Flood Control and Coastal Emergencies, which is the account most fungible with emergency appropriations.

Obama Nominates Another NTSB Member

On June 24, President Obama announced his intention to nominate Christopher A. Hart to be a member of the National Transportation Safety Board for a term ending December 31, 2012. The nomination was transmitted to the Senate on June 25 and referred to the Senate Commerce, Science and Transportation Committee.

Hart's qualifications for the post are, it is safe to say, not in dispute. He previously served as a member of the NTSB from 1990-1993. Since 1995 he has worked in risk management at the Federal Aviation Administration to create processes for using information proactively to help identify and address potential safety issues before they cause mishaps. He is currently listed as the Deputy Director of the Air Traffic Safety Oversight Office.

Hart's previous positions have included Deputy Administrator of the National Highway Traffic Safety Administration, Deputy Assistant General Counsel at the U.S. Department of Transportation, attorney with the Air Transport Association of America, and managing partner of Hart, Carroll & Chavers, a Washington, D.C., law firm. Mr. Hart is a pilot with commercial, multi-engine, and instrument ratings.

Hart is an attorney (J.D., Harvard Law School) with two engineering degrees (M.S.E., B.S. E., Aerospace Engineering, Princeton).

Senate Commerce Hopes To Move FAA Bill In July

Once Congress reconvenes from the July 4 recess next week, the chairman of the Senate Commerce, Science and Transportation Committee would like to advance his version of a multi-year Federal Aviation Administration reauthorization bill.

According to several aides to various Commerce members, chairman Jay Rockefeller (D-WV) would like to introduce his bill soon after Congress returns, perhaps as early as next week, and mark the bill up in the Commerce Committee before the end of July. (The timing of the markup depends on further hearings on aviation safety.)

Hearings Explore Highway Trust Fund Revenue Options

A pair of Congressional hearings last Thursday examined the tenuous state of the finances of the Highway Trust Fund but reached no conclusions about what should be done to fix the short-term or long-term revenue gaps.

The Senate Environment and Public Works Committee heard testimony from Transportation Secretary Ray LaHood and others on the short-term impacts of a default in Trust Fund balances, while the House Ways and Means Committee heard testimony that focused more on the long-term funding solutions.

At the House hearing, Undersecretary of Transportation Roy Keinitz reiterated the Obama Administration's support for an 18-month extension of current surface transportation program spending (through March 2011), which he said would require a cash infusion into the Trust Fund of about $20 billion ($18 billion for the Highway Account, and $20 billion for the Mass Transit Account) and said that the 18-month legislation could include "modest but important reforms" in the programs such as improvements in data recording, program accountability, and "livable communities."

A Government Accountability Office representative delivered some interesting testimony, excerpted on the following page, pointing out that Congress caused the Trust Fund default by (a.) using the SAFETEA-LU law to neuter the "Byrd Test" provision that had kept the Highway Account self-sufficient since 1956 and (b.) ignoring the reductions in spending ("negative RABA") that should have aligned spending to tax receipts. (As *TW* has said repeatedly over the last four years.)

Even though several panelists, including the chairman of the National Surface Transportation Infrastructure Financing Commission, advocated an increase in federal taxes on gasoline and diesel fuel to pay for increased transportation spending, the only Ways and Means member willing to pick up the torch and advocate the tax increase was the indefatigable Earl Blumenauer (D-OR).

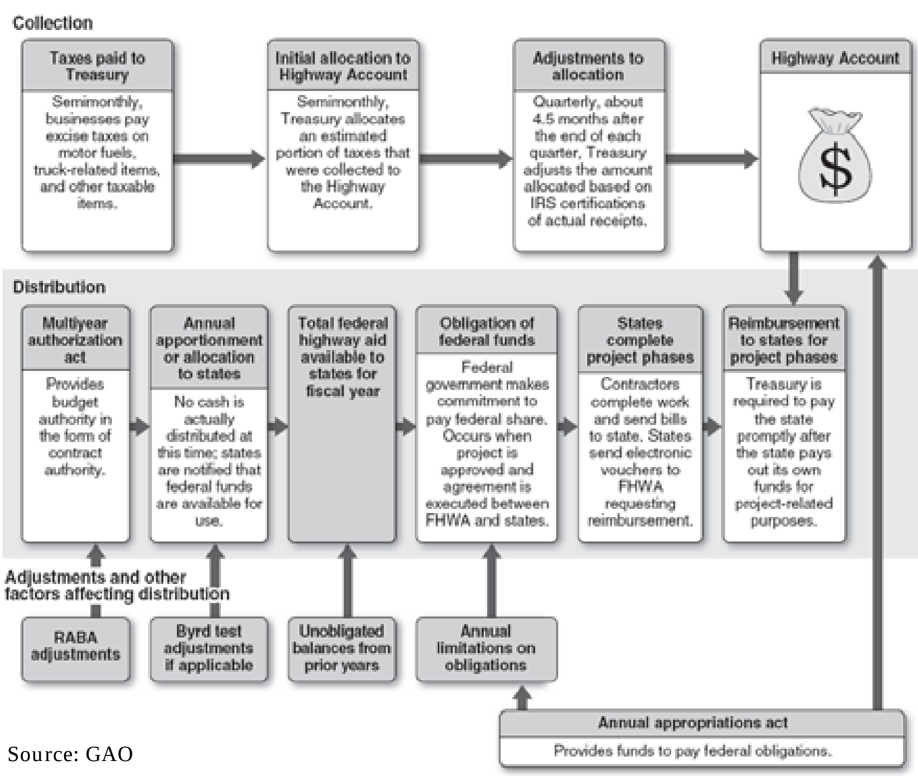
And one very important issue raised its head during the Ways and Means hearing — several committee members from highway "donor states" said that as long as their state's gas tax receipts were used to subsidize projects in other states, they would have a great deal of trouble supporting any gas tax increase.

Elsewhere in the House last week, 43 Democratic members of the Transportation and Infrastructure Committee signed a letter to President Obama to express their "profound disappointment" in his 18-month extension proposal, saying it "fails to acknowledge the severity and urgency of the challenges facing the nation's surface transportation system at this critical time. It will lock us into the discredited policies of the past and prevent us from moving toward the transportation system of the future...The Administration's business-as-usual approach, with multiple extensions passed before enactment of a new multi-year highway, highway safety, and transit authorization act, is unacceptable."

In the Senate, Secretary LaHood appeared to bow to the will of Congress on the issue of whether not an 18-month extension should contain any program reforms or should simply be a "clean" extension of current laws. In an exchange with EPW ranking member Jim Inhofe (R-OK), LaHood said that "I was in the same meeting you were, and it was pretty clear in that meeting that the folks around here are not keen on anything but a clean extension. I got the message and delivered it to the White House. You want a clean bill."

Perhaps the most interesting part of the hearing did not relate directly to LaHood but was an exchange between EPW chairman

Process for Collecting and Distributing Highway Account Receipts



Source: GAO

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Highway Trust Fund

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Barbara Boxer (D-CA) and infrastructure subcommittee ranking member George Voinovich (R-OH) in which it became clear that Voinovich was the only EPW member opposed to an 18-month extension and was also the only member willing to publicly advocate an immediate gas tax increase.

Also at the EPW hearing, a representative of the state DOTs (AASHTO) testified as to ways to meet the short-term Trust Fund shortfall by restoring the "integrity" of the Trust Fund — which, in this context, means having the general fund pay money into the Trust Fund to reimburse it for past ills, whether real or perceived.

(*Ed. Note:* Simply saying "let's pretend that never happened" does not restore Trust Fund "integrity" any more than verbalizing the same sentiment restores virginity.)

Option A would be a transfer from the general fund of $7.4 billion to pay back amounts appropriated from the Trust Fund for emergency relief highway spending from FY 1999-2005. Discussion of this topic inflames Congressional appropriators, who argue that (a.) the authorizing committees told them to appropriate the money when they wrote into the 1998 TEA21 law that they could appropriate "such sums as necessary" from the Trust Fund for ER, and (b.) because, they say, the authorizers have selfishly held the annual Trust Fund mandatory amount of the ER program to $100 million per year since 1978, even as costs continue to rise. Had the ER mandatory money been indexed to CPI inflation starting in 1978, the program would be at $328 million per year today, not $100 million.

Option B would be to pretend that TEA21 had not abolished interest payments on Trust Fund balances. Crediting the Trust Fund with imaginary interest earned on actual balances from 1999-2008

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GAO: SAFETEA-LU's Changes To RABA, Byrd Test Helped Cause Trust Fund Shortfall

Last week's testimony at the Ways and Means Committee from the U.S. Government Accountability Office emphasized certain points that TW has been emphasizing since late 2005 — that the seeds of the current Highway Trust Fund crisis were sown in actions taken by Congress relating to RABA and the Byrd Test — and that the consequences were easily foreseeable at the time. GAO testimony excerpt follows:

Improving existing mechanisms that are intended to help maintain Highway Account solvency could help DOT better monitor and manage the account balance, and improve the agency's ability to identify the potential for a funding shortfall. Although the Byrd Test was intended to help the federal government ensure there were sufficient funds in the Highway Account when states submitted their claims, under SAFETEA-LU, the test has no effect. First, SAFETEA-LU expanded the interval over which future estimated receipts are included in the calculation from 2 to 4 years, thereby increasing the amount of receipts that would be compared with unpaid commitments in the coming year. This modification made it less likely for the test to signal a decline in the Highway Account balance. According to a DOT analysis of the impact on the Highway Account had the test remained at 2 years rather than at 4, the account would have failed the Byrd Test annually from fiscal year 2005 through fiscal year 2008. In other words, the existing account balance each year plus the amount of receipts anticipated to be received over the next 2 years would have been insufficient to offset unpaid commitments in the next year. According to DOT officials, it would be nearly impossible for the Highway Account to fail the Byrd Test using a 4-year window under current levels of spending, but failing a 2-year Byrd Test provides one of the first tangible indicators that a shortfall is imminent.

Second, even if the Highway Account had failed the Byrd Test, the resulting adjustment prescribed by the test—deferring the amount of contract authority apportioned to states—would not have curtailed future outlays from the account because the guaranteed funding levels (obligation limitations) for states in SAFETEA-LU are already lower than the apportioned contract authority. For example, DOT's analysis of the impact of a 2-year Byrd test on the Highway Account balance showed that the account would have failed the test in fiscal year 2005 because the amount of anticipated receipts fell short of anticipated outlays by $1.2 billion, indicating that $1.2 billion in apportioned contract authority to states should be deferred. However, because the amount of contract authority as of fiscal year 2005 exceeded the guaranteed funding level by more than $1.2 billion, adjusting contract authority would have not affected the amount that DOT was able to obligate and states eventually draw from the account.

In contrast, RABA is designed to affect obligation limitations and, if implemented as originally intended, could help align Highway Account spending with actual revenues. For example, in 2003, the RABA calculation called for a negative adjustment in obligation limitations of about $4.4 billion—from about $27 billion down to about $23 billion—but Congress waived the negative RABA adjustment for that year as part of a supplemental appropriations act. Congress chose instead to increase the obligation limit to $31.8 billion. We asked DOT to run a simulation to estimate the Highway Account balance from fiscal year 2003 through fiscal year 2008, assuming the calculated downward RABA adjustment in 2003 had not been waived. According to the simulation, the account balance at the end of fiscal year 2008 would have been about $6 billion if no other changes had been made. Under this scenario, the account balance would have been sufficient to reimburse states without the $8 billion infusion from the General Fund of the Treasury.

DOT officials told us that RABA could be an effective mechanism if obligation limitations were better aligned with outlays and receipts, but they said that the provision enacted in SAFETEA-LU requiring no negative adjustments in a fiscal year if the Highway Account balance is greater than $6 billion as of October 1 of that fiscal year should be examined because that particular amount may not provide a sufficient cushion to offset a possible shortfall. For example, a negative RABA adjustment of about $1 billion for fiscal year 2009—after the $8 billion was appropriated from the General Fund of the Treasury—was not implemented because the Highway Account balance was greater than $6 billion. According to DOT officials, the RABA adjustment could have helped delay or reduce the magnitude of a shortfall in fiscal year 2009.

Effective mechanisms to annually evaluate the solvency of the Highway Account and make appropriate adjustments are important to maintaining account solvency because DOT has no control over revenues and can manage outlays only indirectly through annual obligation limitations, which are determined months or years before states are reimbursed from the account. Without such mechanisms, the account balance runs the risk of dropping too low to withstand a sudden drop in revenues.

Highway Trust Fund

CONTINUED FROM PAGE NINE

would add $11.55 billion to the Highway Account and $5.22 billion to the Mass Transit Account. Or, the testimony said, you could also add imaginary interest from 1999-2008 to the non-existent $8 billion in balances written off by TEA21 but magically re-credited to the Highway Account last September, which would raise the totals to $17.64 billion for the Highway Account and $5.22 billion for the Mass Transit Account.

(*Ed. Note:* Since we're playing "let's pretend," why not just pretend that someone at DOT had the foresight to invest the full Highway Trust Fund balance in Microsoft stock at its IPO in 1986? In that case, the Trust Fund balance ought to be $4.2 trillion, and we could just transfer all that money from the general fund and build that desperately needed Duluth-to-Lyon transatlantic high speed rail tunnel.)

Option C would be to pretend that the 4.3 cent per gallon gas tax increase from the 1993 Clinton deficit reduction package had not been passed in the interest of deficit reduction and had instead been deposited into the Trust Fund from FY 1994-1997. This would total $17.8 billion for the Highway Account and $4.5 billion for the Mass Transit Account.

(*Ed. Note:* Sigh. Just read Bob Woodward's book *The Agenda*, the behind-the-scenes blow-by-blow of that 1993 legislation, for more information on why and how the 4.3 cpg tax increase took place.)

The argument in favor of Option C appears to be that all taxes directly on highway users should be dedicated to the Highway Trust Fund in the interests of preserving the "user pays" principle in place since 1956.

Interestingly, last week House Highways and Transit Subcommittee chairman Peter DeFazio (D-OR) proposed a transaction tax on options on crude oil futures contracts and options. He said that a tax of 0.02% on futures contracts and of 0.05% on the option for a futures contract would raise $190 billion over six years, enough (when combined with current law tax revenues) to pay for the $450 billion T&I Committee bill.

However, the drawback of the DeFazio proposal is that it cannot be described as a user charge on highway users (it's a tax on financial trades on a base commodity that also goes to heat houses and make plastics). As such, it would place the Trust Fund in violation of section 401 of the Budget Act and lead to the end of contract authority.

USDOT LETTER TO STATES ON THE HIGHWAY TRUST FUND SHORTFALL

June 24, 2009

Dear State Highway Official:

I am writing to update you on the financial status of the Highway Account of the Highway Trust Fund (HTF). Over the past year, the balance in the Highway Account has continued its downward trend, with fuel tax and truck sales tax receipts lower than expected due to reduced highway travel and truck sales. As a result, the Federal Highway Administration (FHWA) is projecting that the Highway Account will experience a cash shortfall later this summer.

A cash shortfall will affect the ability of FHWA to reimburse State grantees. However, the shortfall will neither shut down the Federal-aid highway program nor alter States' abilities to continue to obligate Federal funds. In fact, the U.S. Department of Transportation (DOT) is required by law to continue to obligating funds during a cash shortage.

To reduce the impacts of the shortfall as much as possible, FHWA will begin to implement a series of cash management strategies to equitably address State repayment requests. Aside from the funds needed to keep the Federal-aid highway program and meet certain obligations of other Federal agencies funded through the Highway Account, available cash will be used to make payments to the States. However, as the Highway Account balance drops – possibly as soon as early August 2009 – it may be necessary for FHWA to make payments to the States on a weekly or biweekly basis, rather than daily, which is the current practice for many States. We will provide guidance to the States beforehand, although the precise date of this modified payment schedule is not yet known. In the event that the total amount of reimbursement requests exceeds available cash, each State submitting payment requests will receive an equitable share of the cash on hand.

I want to assure you that FHWA and DOT will do all we can to minimize the impact of the cash shortfall on the States. We are monitoring the cash status of HTF on a daily basis, and will continue to explore every possible technical procedure and policy tool available to managing the shortfall. At the same time, we are working closely with Congress to develop a solution to the shortfall. The Secretary has underscored the need to pass legislation this summer that will replenish the Trust Fund to avoid any disruption over the next 18 months.

Additional guidance will be forthcoming. In the meantime, if you have questions on the management of HTF please contact your Division Administrator.

Sincerely,

John D. Porcari

Deputy Secretary of Transportation

NEW AND NOTABLE ON THE INTERNET

Congressional Budget Office

CBO has just issued a profoundly depressing new report on the long-term federal budget outlook:
http://www.cbo.gov/ftpdocs/102xx/doc10297/06-25-LTBO.pdf

House Transportation and Infrastructure Committee

The letter signed by all T&I Democratic members to President Obama opposing a short-term highway extension is here:
http://transportation.house.gov/Media/file/Full%20Committee/Letter%20to%20the%20President_Extension.pdf

House Ways and Means Committee

All the prepared testimony from the June 25 Ways and Means hearing on highway and transit investment needs can be found here:
http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=685

Senate Environment and Public Works Committee

Prepared testimony and archived video of the June 25 EPW hearing on Highway Trust Fund insolvency is here:
http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=f57ebf20-802a-23ad-4084-77f7d7715f70

STATUS OF PENDING TRANSPORTATION-RELATED NOMINATIONS

Agency	Nominee	Position	Senate Committee	Latest Action
Department of Transportation	Polly Trottenberg	Assistant Secretary for Transportation Policy	Commerce, Science and Transportation	Nomination transmitted 6/8/09
DOT-Federal Highway Administration	Victor Mendez	Administrator	Environment and Public Works	Nomination placed on the calendar 6/10/09
DOT-Federal Motor Carrier Safety Admin.	Anne Ferro	Administrator	Commerce, Science and Transportation	Nomination announced 6/4/09
DOT-National Highway Traffic Safety Admin.	Charles Hurley	Administrator	Commerce, Science and Transportation	Nomination reportedly will be withdrawn
Federal Maritime Commission	Richard Lidinsky, Jr.	Commissioner	Commerce, Science and Transportation	Nomination transmitted 6/18/09
National Transport. Safety Board	Deborah Hersman	Chairman	Commerce, Science and Transportation	Nomination transmitted 6/18/09
National Transport. Safety Board	Christopher Hart	Member for a term expiring 12/31/2012	Commerce, Science and Transportation	Nomination transmitted 6/25/09
Department of the Army	Jo-Ellen Darcy	Assistant Secretary for Civil Works	Armed Services *and* Enviro. & Public Works	Nomination placed on the calendar 6/16/09

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THIS WEEK IN COMMITTEE

The House and Senate are in recess this week for the Fourth of July and no committee meetings are scheduled.

NEXT WEEK IN COMMITTEE

Tuesday, July 7, 2009 - House Appropriations — full committee markup of draft FY 2010 appropriations for energy and water development — *time TBA, 2359 Rayburn.*

Senate Commerce, Science and Transportation — Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard — subcommittee hearing on Coast Guard oversight — *10:00 a.m., SR-253 Russell.*

Wednesday, July 8, 2009 - House Transportation and Infrastructure — Subcommittee on Economic Development, Public Buildings, and Emergency Management — subcommittee hearing on the GSA's Capital Investment and Leasing Program — *2:00 p.m., 2167 Rayburn.*

Thursday, July 9, 2009 - House Transportation and Infrastructure — Subcommittee on Coast Guard and Maritime Transportation — subcommittee hearing on the National Maritime Center and Mariner Credentials — *10:00 a.m., 2167 Rayburn.*

STATUS OF MAJOR TRANSPORTATION BILLS — 111th CONGRESS

BILL	HOUSE ACTION	SENATE ACTION	RESOLUTION
FY 2009 Omnibus Appropriations Act	H.R. 1105 passed House 2/25/09 by a vote of 245-178	H.R. 1105 passed Senate 3/10/09 by voice vote	Public Law 111-8 3/11/09
Economic Stimulus Appropriations & Tax Cuts	H.R. 1 conference report passed House 2/13/09 by 246-183-1	H.R. 1 conference report passed Senate 2/13/09 by a vote of 60-38	Public Law 111-5 2/17/09
FY 2010 Congressional budget resolution	H. Con. Res. 85 passed House 4/2/09 by vote of 233-196	S. Con. Res. 13 passed Senate 4/2/09 by vote of 55-43	Conference report (H. Rept. 111-89) agreed to 4/29/09
FY 2010 Transportation-HUD Appropriations	Subcommittee markup scheduled for 7/15/09		
FY 2010 Energy and Water Appropriations	Subcommittee marked up draft bill on 6/25/09		
FY 2010 Homeland Security Appropriations	H.R. 2892 passed House 6/24/09 by a vote of 389-37	S. 1298 reported 6/18/09 S. Rept. 111-31	
Federal Aviation Admin. Reauthorization Bill	H.R. 915 passed House 5/22/09 by a vote of 277-136	Draft bill may be introduced in the Senate next week	
Surface Transportation Reauthorization Bill	Subcommittee marked up draft bill on 6/24/09		
Water Resources Development Act			
FY 2010 Coast Guard Authorization			
Transportation Security Admin. Reauthorization	H.R. 2200 passed House 6/4/09 by a vote of 397-25		