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MONITORING AND ANALYZING DEVELOPMENTS IN FEDERAL TRANSPORTATION AND PUBLIC WORKS POLICY

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Legislative Schedules

Week of September 7, 2009

House

Tuesday — meets at 2 p.m. — eleven measures under suspension of the rules.

Wednesday — meets at 10 a.m. — fifteen measures under suspension of the rules.

Thursday — H.R. 965, Chesapeake Bay Gateways.

Senate

The Senate convened at 10 a.m. today and is currently considering S. 1023, the Travel Promotion Act. Under a previous order, the Senate will vote on final passage of the bill by 4:30 p.m. today. The Senate will recess from 12:30 to 2:15 p.m. for the weekly party policy luncheons and from 3 to 4 pm for a 9.11 remembrance ceremony in Statuary Hall.

The House and Senate will meet in a joint session in the House chamber at 8 p.m. to hear President Obama's address on health care reform.

Inside This Issue

Congress Kicks Off Hectic September

Congress returned to Capitol Hill yesterday, and although the focus is on epic-scale legislation (health care, climate change), there are a number of things pertaining to transportation that Congress must do first — before September 30.

The month is a short one — legislators did not arrive back in DC until the first "bed check" vote of the month yesterday evening, and Jewish holidays on the 18th-19th and the 27th-28th subtract a couple of badly needed legislative days.

The House and Senate must agree on a duration of a short-term extension of federal surface transportation programs and pass a law by September 30, even as House Transportation and Infrastructure chairman Oberstar continues to push for committee action on his ambitious $450-billion, six-year bill.

The House and Senate must also agree on a duration of yet another short-term extension of spending authority from the Airport and Airway Trust Fund and pass a law by September 30.

The Appropriations Committees will most certainly need to fund many, if not most, federal agencies through a short-term continuing resolution by September 30 (and this legislation may wind up carrying the aviation extension as well, and there is a remote possibility it could also carry the highway extension if things go badly on that front).

And the Senate continues to make progress on the general appropriations bills and might (we emphasize *might*) take up the Transportation-HUD bill on the floor as early as tomorrow.

Beyond that, the ominous deficit and debt numbers from the August mid-session review will be debated on the Senate floor in October, as that chamber must pass an increase in the public debt ceiling next month, focusing attention on the debt and putting all other legislation under a spotlight for its effect on deficits and debt.

The History of Transportation Trust Funds, Pt. 1II

This is the third part of a large article describing the history and purpose of federal transportation trust funds. Part one examined the policy goals served by trust fund structure, gave a brief survey of trust fund accounts in the federal budget going back to the 1830s, and detailed how the original Eisenhower Administration plan for financing the Interstate highway system through the issuance of bonds, and the Democratic alternative for raising taxes to pay for Interstate construction in the absence of a trust fund structure, were both defeated in Congress in the summer of 1955. Part two followed and described the creation of the Highway Trust Fund in 1956, the creation and early history of the Airport and Airway Trust Fund, and the ultimately successful efforts to give mass transit its own dedicated revenue stream within the federal budget. Part three examines the creation of the Inland Waterway and Harbor Maintenance Trust Funds. Part four will examine the efforts in the 1980s and 1990s to take various transportation trust funds "off-budget."

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The History of Transportation Trust Funds, Pt. 1II—Continued

Recovering capital costs – the Inland Waterways Trust Fund. (*Note:* On his first day as a rookie reporter for the national desk of the *Washington Post* in January 1977, T.R. Reid was assigned to follow a bill from introduction through whatever its eventual fate at the end of the 95th Congress might be. His editor picked the bill that became the Inland Waterways Revenue Act of 1978, so not only did the bill receive unusual publicity throughout 1977-1978 from occasional front page stories in the *Post*, but Reid also turned his stories into a book about the enactment of the bill, entitled *Congressional Odyssey: The Saga of a Senate Bill.* Parts of this article draw heavily from that book, and any interested parties really should read the whole thing.)

America was originally settled by boat, and the growth of early settlement naturally clustered around natural harbors and inland rivers. Ensuring that access to harbors and navigability of waterways remained safe from natural disasters, decay and military assaults was a top priority for the British Empire and later for the colonial governments.

The principle that access to these waterways should be free to all goes very far back in American jurisprudence – all the way to the Treaty of Paris (1783) which brought peace with England and formally ended the American Revolution. Article 8 of the Treaty said that "The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." Four years later, the most important statute of 17th-century America, the Northwest Ordinance, codified and expanded on this principle, stating in Article 4 that "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."

"[F]orever free" – as Prince wrote, forever is "a mighty long time" – but in this instance, the principle of tax-free and toll-free navigability of inland waterways stayed in place for almost 200 years, which from a legislative point of view, is practically forever. Until Pete Domenici came along.

In 1977, Senator Pete Domenici (R-NM) was nearing the end of his first term in the Senate and was up for re-election in 1978. Reid recalls how Domenici was 100th in seniority as a freshman and was given an unasked-for assignment to the Public Works committee – and to add insult to injury, he was placed on the Water Resources subcommittee, which handled the "rivers and harbors" legislation (New Mexico is notable for its lack of both).[1]

The 1824 *Gibbons v. Ogden* decision from the U.S. Supreme Court (22 U.S. 1) gave the federal government complete authority to regulate interstate commerce on waterways (Daniel Webster was the victorious attorney arguing Gibbons' case). Less than three months after that decision was handed down, Congress enacted the act of May 24, 1824 (4 Stat. 32) authorizing the President to improve the navigation of the Ohio and Mississippi rivers and appropriating $75,000 towards that purpose. Congress quickly took to water with the same affinity as do ducks, and by the mid-twentieth century legislators were so in love with authorizing and appropriating funds for their own pet river and harbor projects carried out by the U.S. Army Corps of Engineers that the scene was as Allen Drury captured it in *Advise and Consent* (the best-ever novel written about Congress, by far) in 1959. Drury described a boisterous hearing of the Senate Appropriations subcommittee on Rivers and Harbors:

> Confronted by these determined and forceful gentlemen, the Corps of Engineers is not in the least dismayed. Serene in the knowledge that they are proprietors of the lobby which is, year in and year out, the most ruthless, the most effective and untouchable on Capitol Hill, its high-ranking officers are going through this annual charade with unperturbed suavity. In the comfortable Siamese-twin relationship which exists between the Corps and the Appropriations committees of the two houses, the Engineers know that when they reach to scratch their own backs they will also give solace to some solon, and that when Senator or Congressman in turn relieves his own itch he will in the process ease the Corps of Engineers. In close harmony and perfect accord they will spend the public monies together and both will be happy…not least the Engineers, for of course all these new funds and new projects will require new personnel to administer them, and so the always-swelling empire will continue its steady, inexorable growth. In the practical world of Washington the Corps and the Congress, it might be said, have each other firmly by a tender and important part of the anatomy; and in case either side should ever attempt to get out of line, a little squeeze is all that is necessary to restore a perfect understanding.[2]

As Domenici learned more about the issues before his subcommittee, he quickly discovered that while the barge industry got great benefit from the hundreds of millions of dollars appropriated by Congress every year to the Corps of Engineers to keep rivers and other inland waterways dredged and cleared, the barge industry paid nothing in the way of taxes or fees to pay for these capital improvement costs. While this may have made sense as a federal policy in the days when inland waterways were the only way to carry significant amounts of cargo, the barge industry was now competing directly with the railroad industry in many markets for transportation of bulk cargoes – and the railroads had to pay for all of their own capital costs. In addition, the inland Waterways network stops at the Missouri River – any shippers west of there but east of Oregon are solely dependent on

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The History of Transportation Trust Funds, Pt. II1—Continued

railroads to transport bulk cargo and thus gains no benefit from federal barge subsidies, making it somewhat of a regional issue.

Franklin D. Roosevelt first proposed a barge tax to help defray the Corps' expenses in 1938, and most Presidents since then had echoed the call, but Congress consistently ignored the issue, due in large part to the incredible degree of coziness between the authorizing and appropriating committees on Capitol Hill and the career Army staff of the Corps (which occasionally led some observers to conclude that the Corps really belonged to the legislative branch of government, not the executive branch).

Reid describes a series of Senate hearings in 1976 on replacement of a large lock and dam during which a bored Domenici decided to ask every witness their thoughts on a potential user fee system for barges, culminating with this scene:

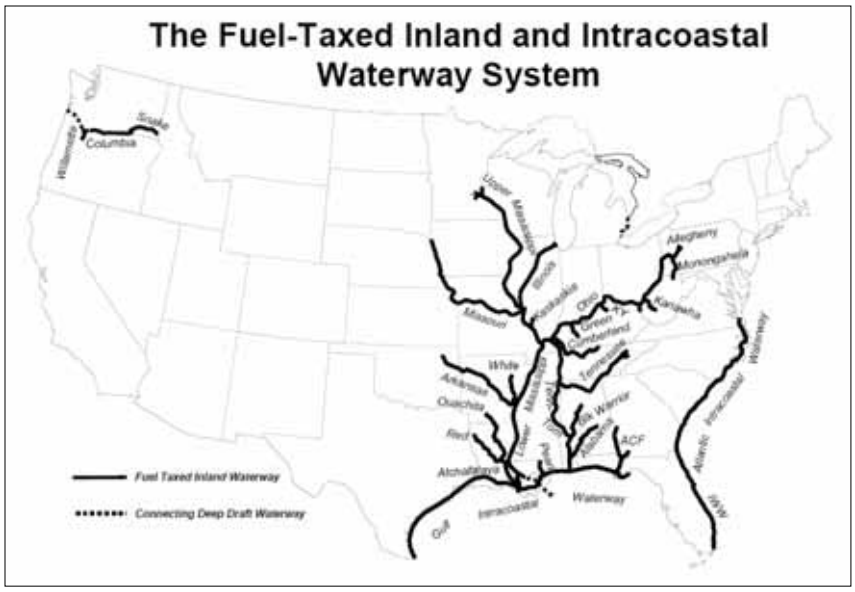
> On the last day of the hearings, a barge-line executive who had grown progressively angrier at Domenici's questions could contain himself no longer. "How come you're so interested?" the man shouted from his seat in the audience. "You don't have any waterways in New Mexico. What business is it of yours?"
>
> All of a sudden, Domenici's temper was fully ignited. "Jesus, that got me mad," Domenici recalled later. "In fact, it was that guy, shouting at me, that cemented it in my head, that I would take this on. I was just – I had a combination of violent anger and a burning desire to retort. So I said, 'Mister, you're going to find out what business it is of mine' and I got up and walked out."[3]

When the next Congress began, Domenici introduced legislation (S. 790, 95th Congress) that did several things in very clever ways. First of all, it authorized user fees to be levied on barges using the Corps-maintained inland Waterways network. However, the amount of the fees was not set. Instead, the goal was eventually to recover 100 percent of the Corps' annual operational costs for the Waterways system and 50 percent of the Corps' annual inland Waterways expenses – the total amount of the fees levied would be raised or lowered administratively each year based on half of the level of enacted appropriation, which would give the barge industry a large incentive to support restrained growth in Corps spending. To ensure that the industry could not ignore his proposal completely, S. 790 also included the top priority of the barge industry – a $400 million authorization for the Corps to replace the rapidly decaying Lock and Dam 26 on the Mississippi River at Alton, Illinois, without which one cannot pass from the Upper Mississippi to the Lower Mississippi.

And most cleverly of all, by structuring his bill as a true user fee and by leading the bill off with a spending authorization for the lock and dam, Domenici got the Senate Parliamentarian to refer the bill to his own Public Works Committee, not to the Commerce Committee (which has interstate transportation generally) and not to the Finance Committee (which oversees taxes).

The final distinction is crucial. Under the original Domenici bill, the Parliamentarian determined that the fees would not be taxes. Had they been classified as taxes, they would have (a.) gone to the Finance Committee and (b.) been forced to wait for a House-passed tax bill, since under the Origination Clause of the Constitution, "All bills for raising Revenue shall originate in the House of Representatives…"

In addition, there is an equally important distinction. Under the definitions used at in 1977 and today, taxes create budget receipts, "collections from the public that result from the exercise of the Government's sovereign or governmental powers" while true user fees are classified as offsetting collections which can be credited to individual appropriations accounts, and usually count as offsets to new budget authority, not as tax receipts.[4] The distinction: taxes are automatically deposited in the general fund, and the only way to correlate a new tax with a specific spending program is by the creation of a new trust fund account or other special fund. User fees can be credited against existing appropriations accounts. Accordingly, the original Domenici plan did not create any kind of new trust fund account to hold the proceeds of the user fees.



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The History of Transportation Trust Funds, Pt. I1—Continued

In order to get the leverage he needed to keep the barge industry and its allies from simply severing the Lock and Dam 26 authorization from the new user fee, Domenici needed lobbyists and leverage. The lobbyists came courtesy of the Western Railroads Association, who were actively supporting any kind of user fee that would, in their opinion, start to level the playing field between railroads and barges (though they were opposed to the repair of Lock and Dam 26). Reid tells of how the railroads not only lobbied overtly for the change, they also set up a shell association (the "Council for a Sound Waterways Policy") through which they funneled money to environmental organizations to help subsidize their lobbying activities in favor of the user fees.[5]

The leverage came from the White House. Domenici was one of the founding members of the Senate Budget Committee, and during their House counterpart panel's first Congress, the House Budget Committee was chaired by Rep. Brock Adams (D-WA), who was then selected to be President Carter's first Secretary of Transportation. Domenici and Adams had become friendly and stayed in touch, and Adams was sympathetic to Domenici's user fee goals. Adams lobbied the White House hard to support the Domenici proposal and before Public Works marked up the bill, Adams told the panel that the White House supported the linkage between user fees and replacement of Lock and Dam 23 (though Adams emphasized that the Administration preferred a fuel tax on diesel fuel used by barge tow boats). Then, after the bill was approved by committee but before it went to the floor, Adams finally got White House approval to issue a veto threat – Carter would veto the Lock and Dam 26 authorization if some sort of barge fee was not also included in the bill.

By the time S. 790 reached the Senate floor in June 1977, the veto threat had opened some eyes (though the Carter Administration had already alienated many in Congress to the point that Senators were not quite sure if the veto threat was serious), and when an amendment was offered to strike the user fees from the bill and instead require an 18-month study of the user fee concept, most observers were stunned to see the amendment fail, 44 yeas to 51 nays. The user fees stayed in the bill, which then passed by a 71 to 20 margin.

The next step was to attach the Domenici bill, and another Senate water project bill, as Senate amendments to a House-passed omnibus water project bill (the forerunner of today's Water Resources Development Acts), which the Senate did by unanimous consent. The Senate promptly requested a conference and appointed conferees. But the Ways and Means Committee stymied action in the House, since its chairman, Al Ullman (D-OR), determined that no matter what the Senate thought (and despite the fact that it was fairly clear that the Domenici fees would have passed muster under existing Supreme Court precedents related to the Origination Clause), Ullman felt that the Domenici proposal was a "bill for raising Revenue" and should be automatically and peremptorily rejected by the House for that reason alone.

This process is called giving a bill a "blue slip" (the engrossed resolution of rejection is printed on blue paper), and the House is the final judge of whether or not it will accept or reject a bill based on what the collective membership perceives to be the Constitutional prerogatives of the lower chamber. In practice, it was practically unheard of for the House to fail to back up the Ways and Means chairman if he took to the floor to make a motion to give a Senate bill a blue slip. Reid reports that Speaker O'Neill did not want the bill to die, so he gave the concerned committees two weeks to come up with a new bill that passed Ullman's test for constitutionality.[6]

The barge lines and their allies in Congress decided that they could support a diesel fuel tax, as proposed by the Carter Administration, much more easily than user fees, since the level of a fuel tax would be set in law while the user fees might be subject to annual revision by the executive branch. Reid reports that the barge industry "originally suggested a tax of 1 cent per gallon, but when they brought up that figure in private meetings with Ullman and [Rep. Bizz] Johnson, the Pubilc Works chairman, both members said it was ridiculously low. The smallest tax Ullman thought he could propose without jeopardizing the lock and dam bill was 4 cents per gallon – the same as the federal fuel tax car and truck drivers pay. The barge lines decided to go along."[7]

At hearings before the Public Works panel in July 1977, the barge industry made that proposal. The Association of American Railroads said that 64 cents per gallon would be a more appropriate level. Adams testified that an eventual 42 cents per gallon would achieve the same financial returns as the user fees proposed by the Senate bill (100 percent of operating costs and 50 percent of capital costs).[8]

When Ways and Means considered the bill the following week, the panel accepted Ullman's suggestion to set the tax at 4 cents per gallon for the first two years and 6 cents per gallon thereafter – far below the level that would be raised by the Senate bill's user fees, and a level which would not be automatically increased if the appropriations for the Corps increased. Also, the House bill (H.R. 8309, 95th Congress) still deposited the receipts from the fuel tax in the general fund of the Treasury. But the fix was in, and Ullman's version passed the House by a vote of 331 to 70.

In the Senate, Reid reports, Finance Committee chairman Russell Long (D-LA) was eager to compromise with the House on a tax level of around 10 cents per gallon – which would cost the barge

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lines less than one-quarter what the original Domenici bill would have cost them. But the barge industry refused to compromise on any tax level that exceeded the House-passed level, which irritated Long and which led the pro-user-fee lobby to dig in their heels as well.[9] The languished in Senate limbo for the remainder of 1977 and the start of 1978 with Domenici and Long at a behind-the-scenes impasse: "For Domenici, linkage between the government's spending on waterways and the charge imposed on waterways users was an essential element of any user-charge bill. Long was reluctant to go along: a linkage requirement, he said, would violate his personal conviction that tax rates should be set by Congress, rather than by a formula in the hands of the executive branch."[10]

On May 1, 1978, Domenici made a public counter-offer – a new plan with two components: a diesel tax starting at 4 cents per gallon and eventually rising to 12 cents per gallon and a separate capital recovery user fee that would add to the fuel tax receipts until they combined to bring in a fixed percentage of Corps spending each year. Domenici also got a letter from Adams saying that the White House supported capital recovery in the final bill.[11]

But the wily Long responded with his own alternative – an amendment that kept the exact fuel tax from Domenici's revised plan but dropped the additional capital recovery user fee. A somewhat confused Senate defeated Domenici's plan by a vote of 43 yeas, 47 nays and then adopted Long's watered-down version by 88 to 2, with Long cleverly positing the final vote as a great victory for the freshman Domenici. Then President Carter issued a flat-out veto threat of the Senate-passed bill.

Carter's veto threats (against both the Senate-passed version of the bill and the House version's excessive water project authorizations) stalled the bill for the rest of May, June and July. Over the August recess, Reid reports, Domenici's staff began negotiating with Long's chief counsel over the central issue of capital recovery. Eventually, a compromise was reached: Domenici would settle for a 10 cent per gallon diesel tax, while Long agreed to deposit the receipts in a new Inland Waterways Trust Fund from which future Corps of Engineers appropriations "for making construction and rehabilitation expenditures for navigation on the inland and intracoastal waterways of the United States" could be made. Their logic went like this:

> The trust-fund idea was a kind of back-door approach to the goal that Domenici had been seeking all along – a limit on the government's waterways expenditures. Legally, it was no limit at all. [Long's staff] insisted that the legislation should contain specific language stating that the Waterways expenditures would not be limited to the amount in the trust fund; that is, Congress at any time could spend all the money in the trust fund and still appropriate more money from the Treasury for additional water projects. But [Domenici's staff] was guessing that, even with such language in the bill, the trust fund would serve, in practice, as a ceiling on waterways expenditures. "If somebody comes up with a big, expensive pork project some year," [Domenici's staffer] explained, "and there's not enough money in the trust fund to pay for it, I don't think Congress is going to cough up any money from general revenues. I think they're going to say that project has to wait until there's more bucks in the fund."[12]

By the time the principals and interest groups had signed off on the plan, it was October 6, with a target adjournment date of October 14 rapidly approaching. The compromise was a Senate plan, but since it contained a tax, its final legislative vehicle had to bear a House bill number. Long took from his hip pocket a small (41 lines of text) House-passed revenue bill, H.R. 8533 (95th Congress) to allow the Michigan Democratic Party to raise money through charity bingo games without paying federal income tax on the money. Long substituted his Waterways compromise bill for the text of the bingo bill and sent the bill back to the House by voice vote on October 10, and the House accepted the inland Waterways bill (which still bore the formal title given the bingo bill upon introduction, since the Senate forgot to amend the bill's title) under the suspension of the rules (two-thirds vote) procedure by a relatively narrow 287 to 123 vote (essentially, the bill passed by thirteen votes).[13]

(For another sterling example of Russell Long's using a tiny House-passed tax bill to pass a gigantic, unrelated bill in the 95th Congress, see the 60-page Powerplant and Industrial Fuel Use Act of 1978 (Public Law 95-620), the title of which is "An Act to amend the Tariff Schedules of the United States to provide for the duty-free entry of competition bobsleds and luges.")

As a final example of the Carter White House's continuing and colossal misreading of Congress, the President agreed to Vice President Mondale's decision to sign the bill into law at a Democratic-Farmer-Labor party rally in Minneapolis, despite the fact that all of the state's DFL legislators had voted against the bill on the grounds that it would increase shipping rates in the amply-served-by-inland-waterways Land of 10,000 Lakes and despite the fact that a schism within the DFL led to part of the crowd booing Carter when he shook hands with the leader of the other faction onstage. And the White House staff felt that Adams had put Carter in a bad spot by insisting on the veto threat, further detracting from Carter's popularity on Capitol Hill, so the White House refused to invite Adams, or anyone from DOT, to the signing ceremony (Adams and his staff took the FAA jet to Minneapolis and crashed the ceremony anyway, standing behind Carter as he signed the bill).[14] The bill became Public Law 95-502.

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The History of Transportation Trust Funds, Pt. II1—Continued

The law provided that the only restrictions on the use of the Trust Fund moneys was that the money had to be available "as provided by appropriations Acts, for making construction and rehabilitation expenditures for navigation on the inland and intracoastal waterways of the United States...No amount may be appropriated out of the Trust Fund unless the law authorizing the expenditure for which the amount is appropriated explicitly provides that the appropriation is to be made out of the Trust Fund."

This quickly proved problematic, as after the 1978 law was enacted, there came to be a complete breakdown between the White House and Congress over the authorization of water projects (under both Carter and Reagan). As such, no authorization bills for such projects were signed into law after the Trust Fund was created until the landmark Water Resources Development Act of 1986, after which the annual appropriations paragraph for the Corps' General Construction account began to include, after the dollar amount of the appropriation, the codicil "...of which such sums as are necessary pursuant to Public Law 99-662 [WRDA 1986] shall be derived from the Inland Waterways Trust Fund…"[15] The proviso in last year's Corps appropriation is identical.

The tax levels feeding the Trust Fund were set in the 1978 Act at 4 cents per gallon in FY 1981, 6 cents per gallon in FY 1982 and 1983, 8 cents per gallon in FY 1984 and 1985, and 10 cents per gallon thereafter. This was amended by WRDA 1986 to increase the tax gradually to 20 cents per gallon between 1990 and 1994, and the tax has stayed at the 20 cents per gallon level for fifteen years. WRDA 1986 also wrote into law something close to what Domenici originally wanted – section 102 of that law authorized that one-half of the costs of construction of each inland Waterways project authorized by the law would be paid from the Trust Fund, with the other half coming from the general fund. (Operations and maintenance, however, would remain dependent on the general fund.)

From its inception, the Inland Waterways Trust Fund differed from the Highway Trust Fund and the Airport and Airway Trust Fund in one crucial way – there was not originally, nor is there now, any authorization to provide multi-year contract authority from the Trust Fund, which would at least partly bypass the annual appropriations process. Instead, all amounts credited to the fund are completely subject to the annual discretionary appropriations process Congress uses to determine the Corps of Engineers' budget. But Congress typically does not set the amount to be drawn from the Trust Fund in the appropriations bill – instead, they simply say "such sums as necessary" knowing that the existing statute in the tax code prevents more than 50 percent of the cost of any project from coming out of the Trust Fund.

In recent years, as the table below shows, the expenditures out of the Trust Fund have exceeded the new revenues, drawing down the balances. The acting civilian head of the Corps of Engineers said earlier this year that "The amount provided in the FY 2010 Budget for construction and rehabilitation of projects on the inland Waterways system, $85 million, has been constrained to ensure that necessary funding will be available in the IWTF under current law"[16] ($85 million is, on average, the amount that the existing 20 cent per gallon diesel tax brings in each year to the Trust Fund).

The Obama Administration, like the Bush Administration before it, has proposed to replace the diesel tax with a system of lock user fees much more like the original Domenici proposal. The recent Mid-Session Review of the budget predicted that the Administration's plan, if enacted soon, would bring in an extra $75 million in FY 2010 and an extra $100 million in FY 2011. In its annual report to Congress, issued in May

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CASH FLOW AND BALANCES OF THE INLAND WATERWAY TRUST FUND, FY 1994 - FY 2009

(Dollars in millions. FY 1994-2008 are actual, FY 2009 is the projection from the FY 2010 Budget.)

Fiscal Year	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Start-of-FY Balance	193	214	238	275	300	327	345	364	404	392	383	350	323	237	138	29
Tax Revenues	88	103	108	96	91	104	101	113	95	90	91	91	81	91	88	84
Interest	8	16	14	18	15	14	20	22	17	3	(7)	19	17	15	5	1
Total Receipts	97	119	122	114	106	118	121	135	112	93	84	110	98	106	93	85
Transfers Out	76	55	59	89	79	88	102	110	104	102	117	137	184	205	202	103
End-of-FY Balance	214	278	301	300	327	357	364	389	412	383	350	323	237	138	29	11
E-O-FY Balance As % Of Transfers	*283%*	*505%*	*510%*	*337%*	*414%*	*406%*	*357%*	*354%*	*396%*	*375%*	*299%*	*236%*	*129%*	*67%*	*14%*	*11%*

Source: *Appendix to the Budget of the United States Government* for various years.

Note: yes, there are a few discrepancies between one year's end of year balances and the following year's beginning of year balances. We took each year's numbers from the prior year "actual" totals in the Budget Appendix. However, agencies fill out forms each year for printing in the Appendix and write the numbers out all over again, and no one at OMB bothers to check or reconcile "actual" numbers since the year is already over (this happens in highways a lot as well - millions of dollars in prior years vanish or appear because someone at the agency filled out the form wrong or something was reclassified, but no one ever explains). We simply print what is in the Appendix as "actual" totals for each year.

The History of Transportation Trust Funds, Pt. III—Continued

2008, the Inland Waterways Users Board (an advisory committee set up by statute to recommend and prioritize inland waterways projects for Trust Fund spending) included a letter the Board members wrote to the then-head of the Corps saying that "The carriers and the shippers who make up the inland waterways transportation industry have fully and efficiently paid more than $1.6 billion in users taxes since its inception more than 20 years ago. Unfortunately, the Corps of Engineers has not spent those taxes and the matching general treasury funds with the same level of efficiency. It is therefore, at the very least, premature for the Administration to seek additional taxes from the industry until such time as we have corrected the inefficient spending and contracting practices of the Corps."[17] The private industry association of barge and tow operators, the American Waterways Operators, also voiced strong opposition to the proposal.

Nevertheless, on July 22 of this year, the Obama Administration transmitted its proposal to Congress. The draft legislation, called the "Lock Usage Fee Act of 2009," would keep the Inland Waterways Trust Fund but would phase out the diesel tax, cutting it from 20 to 10 cents per gallon in calendar years 2012 and 2013 and repealing the tax entirely effective on January 1, 2014. In its place would be a fees per barge per use of an individual lock, based on the length of the main lock chamber. If the lock is less than 600 feet long, the fee would be $27 in calendar years 2010 and 2011 and $54 in calendar years 2012 and 2013. If the lock is 600 feet or longer, the fees would be $45 in 2010 and 2011 and $90 in 2012 and 2013.

Starting in January 2014, the fees would be adjusted based on how much money the fees were depositing in the Trust Fund. According to section 2(b) of the draft bill, "If the balance of receipts in the Inland Waterways Trust Fund at the end of fiscal year 2013 or any subsequent fiscal year is less than $50,000,000, or is less than $75,000,000 and has declined from the level of such balance at the end of the preceding fiscal year, then the lock usage fee shall increase for the following calendar year" by $10 per use for long locks and $6 per use for short locks. If the balance is $100 million or more and has gone up from the prior fiscal year, the fees in the next calendar year would be reduced by the same amount.[18]

The draft bill also gives the Secretary of the Army the power to "increase the amount of the lock usage fee for any lock in order to reduce congestion during periods of expected high usage" and amends the 1978 Act to expand the listed number of inland waterways that are subject to the fuel taxes and future lock usage fees.

The future of the lock usage fee proposal, and of the Inland Waterways Trust Fund itself, is now in the hands of Congress.

Sharing the costs – The Harbor Maintenance Trust Fund. As noted earlier, after the passage of the Inland Waterways Act of 1978, the stage was set for a perennial series of water project authorization laws, followed by annual appropriations bills, from which the costs of inland waterway projects (but not other Corps water projects) would be shared with the direct beneficiaries. It didn't turn out that way, as the authorization process immediately broke down. The Water Resources Development Act of 1979 passed the House but never made it out of committee in the Senate. Neither chamber bothered to attempt a bill during the first two years of the Reagan Administration due to White House opposition and the prevailing mood. The Water Resources Development Act of 1983 passed the House and was reported from committee in the Senate but never brought up on the Senate floor before the Congress ended in 1984.

The ongoing lack of new authorizations also had an effect on annual appropriations for water projects. One scholar added it up and found that "Federal outlays for water projects dropped by almost 80 percent, from $6 billion per year in 1968 to $1.3 billion in fiscal 1984, and from 1977 to 1983 more Corps civil works projects were canceled than were authorized…"[19]

In a nutshell, both Carter and Reagan wanted the non-federal beneficiaries of more types of Corps water projects to contribute a share of the costs. A 1983 Congressional Budget Office study summed up the existing law for Corps project cost-sharing at that time:

> Under current policy, nonfederal cash contributions are not required for commercial navigation projects (ports, harbors, and waterways); structural flood control projects (reservoirs, levees, flood walls, and the like); hydroelectric power projects; water supply components of multipurpose reservoirs; or joint costs of fish and wildlife enhancement, recreation, or water quality features of multipurpose projects. Up-front cash contributions are required from nonfederal sponsors to cover 25 percent of separable fish and wildlife costs (for example, fish hatcheries) and 50 percent of separable recreation costs (such as boating or swimming facilities). For Corps projects, nonfederal sponsors are required to provide necessary land easements and rights-of-way. On average, they have accounted for 14 percent of urban flood control capital costs, 5 percent of rural flood control capital costs, 14 percent of port development costs, and 5 percent of inland waterway project capital costs. Nonfederal participants must repay within 50 years the capital costs of providing water supply storage and hydroelectric power.

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> The Corps pays all operation and maintenance (O&M) costs for navigation projects, major flood control reservoirs, and joint costs of multipurpose reservoirs. Nonfederal sponsors pay O&M for all other types of projects – local flood control, drainage, hydropower, water supply, irrigation, and separable cost of multipurpose reservoirs.[20]

What was the point of cost sharing? "Advocates of these new cost-sharing rules promised that the allocation of federal funds to Corps projects would result in more efficient use of tax dollars because water projects would have to meet the test of the market. They reasoned that if a local project sponsor was neither capable nor willing to share the costs of a project, it was not worth building and that only truly good projects would receive local financial backing and be constructed. Advocates also argued that the legislation would spread a limited construction budget across a greater number of projects."[21]

Reagan promoted his cost-sharing ideas through his budget requests. The Senate at the time was controlled by Reagan's Republican party, and its leaders were forced to take Reagan's budget requests much more seriously than were their Democratic House counterparts. In January 1983, Reagan's fiscal 1984 budget request assumed legislation raising over $400 million per year in new Corps user fees in three areas: deep draft port dredging projects, recreational facilities operated by the Corps, and additional charges on inland waterways users. The budget also assumed additional cost sharing by local sponsors for flood control projects.

But by the following year, the FY 1985 budget request had been downsized so it only recommended $200 million in annual user fee receipts, and only for deep draft port dredging. The ill-fated 1983-1984 WRDA bill made some progress in this regard. The Senate bill (S. 1739, 98th Congress) required a local cost share of 50 percent of local flood control projects. And for harbor improvements, the Corps was given the responsibility for keeping the harbor dredged to a depth of 45 feet, with the local entity responsible for 50 percent of the cost of keeping it dredged below that level. The House companion bill (H.R. 3678, 98th Congress) required a non-federal cost share of 25 percent for flood control projects. The bill also established a Port Infrastructure Development and Improvement Trust Fund account in the Treasury, but since the bill did not go to the Ways and Means Committee, it had no provision to raise new revenues for the Trust Fund.

Up until this point, the Appropriations Committees had stayed within the rules and, by and large, refused to appropriate funds for Corps water projects unless authorized by law. But the eight-year lapse since the last omnibus WRDA bill (which was enacted in 1976) and the fact that 1984 was an election year was too much to bear, and as the Congress was preparing to wrap up its business by passing a continuing resolution appropriating funds to keep the government going so that legislators could go home and campaign for re-election, problems arose. The House Rules Committee issued a rule (H. Res. 586, 98th Congress) that would have prevented any amendments adding water projects from being added to the "CR" (because of its must-pass-or-the-government-shuts-down nature and because of a loophole in House rules allowing some nongermane amendments to be offered to CRs under regular order, a CR is a very popular "Christmas tree" on which to hang amendments).

But the House, starved for new water projects six weeks before the elections, voted down the rule by a vote of 168 to 225 on September 20. Because of the pending weekend, it took five more days before Rules was able to report (and the House pass) a revised rule allowing amendments, at which Rep. Bob Roe (D-NJ) from the Public Works Committee offered an amendment containing the text of the House WRDA bill to the CR, which passed (336 to 64). But this delay meant the Senate had to wait an additional week until it could start debating the CR, which kept Congress in session longer and led to legislators in both chambers missing a week of campaigning.

The House-Senate conference committee on the CR dropped the WRDA legislation from the final version of the bill after the White House indicated they would not accept the new project authorizations without additional cost-sharing language.[22]

When the 99th Congress convened the following year, there was additional impetus to work through the logjam. Both the House and Senate committees of jurisdiction started working on omnibus WRDA bills again. But before the committees could report those bills, it was time for the annual spring supplemental appropriations bill to make its way through the House. The bill came to the floor containing a $150 million appropriation for water projects, half of which were not authorized by law. The appropriators asked the Rules Committee to protect the provision from a point of order against unauthorized appropriations, but the Public Works Committee's leadership told Rules they would object to the waiver unless the supplemental bill carried the entire draft House WRDA bill, which the appropriators refused to do.

So the rule did not protect the $150 million in projects – the point of order was indeed made and that whole appropriations paragraph was stripped from the bill. Appropriations chairman Jamie Whitten (D-MS) then offered an amendment reinstating the entire $150 million for all of the projects (not just the money for the authorized projects,

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as some had expected him to do). Another member then offered an amendment to Whitten's amendment lowering the dollar amount by $99 million to prevent funding of the unauthorized projects. This amendment passed by one vote (203 to 202), killing the projects.[23]

When the bill (H.R. 2577, 99th Congress) got to the Senate, Republican leaders were determined to find middle ground in order to fund some of the water projects. Though the supplemental appropriations bill was reported out of committee under a veto threat, once it got to the floor, an agreement was reached between the White House and Senate Republicans on cost-sharing conditions that would allow project funding to move forward (subject to the cost controls later being written into law in the forthcoming WRDA authorization) and the deal was outlined in a Senate floor colloquy in the *Congressional Record* on June 21, 1985. However, the House was not a part of these negotiations and did not feel bound by the deal.

The House Public Works and Transportation Committee reported its WRDA bill (H.R. 6, 99th Congress) on August 1. The House bill included cost sharing for port construction, on a sliding scale with the non-federal share being ten percent for the shallowest ports up to fifty percent for the deepest ports, similar to the levels agreed to by Reagan and the GOP Senators. On the revenue side, the House bill did incorporate the 0.04 percent tax on the value of cargo imported and exported through ports in order to help raise money to pay for the federal share, as per the Senate agreement. But the House bill did not increase the federal cost share of inland waterways projects or increase the excise tax on barge diesel fuel, as Reagan and the Senate wanted. The House committee report said that "a high level of cost recovery would have serious adverse economic impacts, not only on the inland waterways transportation industry, but on many major commodities such as agriculture, coal, steel and steel products, and sand and gravel."[24]

The Public Works bill also included a Port Infrastructure Development and Improvement Trust Fund into which the new taxes were to be deposited. However, neither the tax increase nor the Trust Fund creation was actually within the jurisdiction of the Public Works Committee. The Ways and Means Committee reported its (substantially identical) version of these provisions on September 23, 1985, and the bill eventually made it to the floor and passed the House on November 13 by the wide margin of 358 to 60.

The Senate version of the bill (S. 1567, 99th Congress) was proceeding along similar lines, a month behind. The Public Works Committee reported its part of the bill on August 1 and the Finance Committee reported the revenue provisions on January 8, 1986. The Senate bill included all of the agreed-on cost-sharing provisions, the 0.04 percent tax on cargo value at ports, and the GOP's doubling of the barge diesel tax for inland waterways after a long phase-in (coupled with an increase in the non-federal cost share of inland waterways projects to 50 percent). The Senate bill also changed the name of the port trust fund account to the Harbor Maintenance Trust Fund. There was one key distinction between the House and Senate trust fund provisions (aside from the name) – the Senate bill mimicked the Inland Waterways Trust Fund by capping, in the tax code, the amount that could be appropriated from the Trust Fund at 40 percent of the operation and maintenance costs of port projects. Under the House bill, the Trust Fund could be used to pay for 100 percent of O&M.

The Senate amended its bill, incorporated it into H.R. 6, and passed its amended version of H.R. 6 by March 26, 1986 and went to conference with the House. But conference dragged on, it became clear that Reagan had all the leverage and that getting a bill with popular water projects enacted before the elections depended on the House caving in to Reagan's cost-sharing demands. It was not until the waning pre-election days of the 99th Congress that agreement was reached (after a false start on October 9, a conference report was not filed until October 17, just three weeks before the November 8 elections.

The landmark 1986 WRDA bill became Public Law 99-662 on November 17, 1986. It kept the 0.04 percent tax on cargo value at ports, the Harbor Maintenance Trust Fund, the doubling of the Inland Waterways Trust Fund diesel tax, and most of the cost-sharing measures from the Senate bill. At the time, it was estimated that the cargo tax at ports would raise almost $200 million in 1998 and almost a billion dollars over a five-year period.[25]

But outside pressures soon forced a misalignment between the Harbor Maintenance Tax level and the expected expenditures. When originally enacted, the tax level was 0.04 percent (four cents per $100 of cargo value). But during the 1990 budget summit and its aftermath, Congress passed (and President Bush signed) the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508), containing hundreds of billions of dollars in tax increases and spending reductions designed to lower the federal deficit. Among those provisions was a section that more than tripled the HMT to 0.125 percent (12.5 cents per $100 of cargo value). The tax remains at that level today.

The ad valorem (on value) method of taxation was originally selected primarily because it is easy and cheap to administer – bills of lading containing the dollar value of cargo are already submitted as part of the import/export proc-

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ess. But taxing based on the dollar value of the product diminishes the relationship between the level of taxation and the value of the benefit provided by the government in exchange for the tax payment.

Picture two identical freighters. One is full of a heavy bulk cargo, like, for example, some kind of mineral ore. The other is full of containers of MP3 players from China (each player safely encased in its own protective packaging to avoid breakage, of course). The freighter full of mineral ore will be much heavier, and as a result, will sit lower in the water and require more clearance from the floor of the port. These are the costs that the HMT is supposed to recoup – the costs of dredging deep draft ports for the vessels with the deepest draft. But the way the Harbor Maintenance Tax is constructed, the freighter full of MP3 players would pay far more in taxes than would the freighter full of mineral ore because the total dollar value of a shipload of electronics is much greater than that of a shipload of mineral ore – even though the freighter with the MP3 players has a more shallow draft and therefore is using less of the Corps' services. From this perspective (the "benefit taxation" model), the HMT as currently structured makes little sense and bears almost no resemblance to a true "user fee."

And the distinction between a tax and a user fee is not just academic. The Constitution flatly forbids any tax or duty on exports going from the U.S. to a foreign country, but the courts have ruled that the prohibition "does not rule out a 'user fee,' provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government-supplied services, facilities, or benefits."[26] In March 1998, the U.S. Supreme Court unanimously held that the HMT was indeed a tax, not a user fee, and struck down its application to exports. In the opinion (*U.S. v. United States Shoe Corp*., 523 U.S. 360), the Court determined that the HMT "is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter…the extent and manner of port use depends on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for example, harbor dredging…we must hold that the HMT violates the Export Clause as applied to exports. This does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities."[27]

The government immediately stopped collecting the HMT on exports, and Congress amended the statute in 2005 to clarify that it did not apply to exports. But this cancelation of part of the HMT did not stop the continuing rise in tax collections, as the table below makes clear. Why? In large part, because the United States runs a huge trade deficit, with imports from China through deep draft ports rising particularly quickly. If the U.S. ran a trade surplus, the Court's striking down of the export portion of the HMT would have had more of an impact. Also, a 2008 GAO report quoted Corps officials as also saying that the rapid increase in HMT receipts "was driven by the ad valorem nature of the fee – receipts grow with both volume and value of shipments. Annual harbor maintenance project expenditures, which are subject to annual appropriation, grow more slowly – from $660 million in 2001 to $910 million in 2007 (38 percent)."[28]

The most recent budget document projects that the HMTF surplus at the end of September 2009 will be about $5 billion, and GAO quotes Corps representatives as saying that the surplus balance could reach $8 billion by the end of 2011.[29] What should Congress do? Amend the underlying statute to spend more money from the Trust Fund (either through increasing the total dollar amount of harbor improvements or through increasing the HTMF's share of the total project cost), or lower the tax to a level that more closely tracks approximate HMTF expenditures? GAO laid out the pros and cons:

> As with similar situations, deciding whether and how to link HMF collections with expenditures is complicated. On the one hand, aligning collections and expenditures can promote economic efficiency and enhance stakeholder support for the fee. On the other hand, increased spending on harbors or reduced fee collections would increase the federal deficit, unless spending in other areas was decreased or other collections or revenues were

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CASH FLOW AND BALANCES OF THE HARBOR MAINTENANCE TRUST FUND, FY 1994 - FY 2009

(Dollars in millions. FY 1994-2008 are actual, FY 2009 is the projection from the FY 2010 Budget.)

FY	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
BOY Balance	302	451	621	865	1,106	1,246	1,556	1,621	1,777	1,850	2,001	2,299	2,695	3,234	3,751	4,559
Tax Revenues	622	671	698	736	622	553	678	722	653	758	870	1,048	1,207	1,262	1,467	1,089
Interest	24	30	41	54	29	54	89	94	77	(21)	76	54	130	165	127	133
Total Receipts	646	701	739	790	651	607	767	816	730	737	946	1,102	1,337	1,427	1,594	1,222
Transfers Out	497	531	495	549	511	117	702	660	653	586	648	706	798	910	786	808
EOY Balance	451	621	865	1,106	1,246	1,736	1,621	1,777	1,854	2,001	2,299	2,695	3,234	3,751	4,559	4,973
E-O-FY Balance As % Of Transfers	*91%*	*117%*	*175%*	*201%*	*244%*	*1484%*	*231%*	*269%*	*284%*	*341%*	*355%*	*382%*	*405%*	*412%*	*580%*	*615%*

Source: *Appendix to the Budget of the United States Government* for various years.

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> increased. Moreover, our prior work shows that providing guaranteed funding levels to any one activity in the budget protects that activity from competition with other areas for scarce resources and limits Congressional discretion to make trade-offs in spending priorities. Regardless of the approach taken, a reduction in fee receipts or an increase in appropriations—absent offsetting changes elsewhere—will increase the federal deficit. Given the fiscal pressures imposed by the nation's large and growing structural deficits, decisions about changing the HMF should consider its continued relevance and relative priority within the context of reexamining the base of all major federal spending and tax programs.[30]

Given the latest news from the budget estimators, the deficit argument may prove paramount, especially when one considers that the reason HMT receipts exceed expenses so greatly is because the tax was tripled in 1990 for reasons only relating to the deficit.

- by Jeff Davis

Endnotes

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25 132 *Cong. Record* p. 33084, October 17, 1986.

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27 *U.S. Shoe*, 523 U.S. 360, 369-370.

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Duration of Highway Extension Must Be Settled Soon

Reimbursements to states for their ongoing highway and transit expenditures will stop on October 1, and no new funding authorizations will be extended for the next fiscal year, unless Congress enacts some sort of extension of spending from the Highway Trust Fund for surface transportation programs by September 30.

It is widely agreed that even though the House has approved an 800-page draft bill in subcommittee, since that bill has no dollar amounts and is not paid for, and since the Senate is nowhere close to releasing a draft bill, it is impossible to get a comprehensive bill enacted in the next three weeks (or even three months).

The question then becomes, how long should the next extension last? The White House and Senate leaders are backing an eighteen month extension lasting until March 31, 2011. But opponents point out several problems with this approach, the most compelling of which is that an eighteen month extension would almost certainly stretch beyond that, as it is hard to see how a new Congress, with newly appointed committees and altered membership sworn in in January 2011 could possibly draft, debate, amend and reconcile a bill that large by March 31. So, they say, eighteen months really means two years or more.

House Transportation and Infrastructure chairman James Oberstar (D-MN) is desperate to get his draft bill voted on and passed by the House before September 30 and has so far avoided any discussion of an extension (and if his staff have been working on extension options at all, they have been very discreet about it). Some House sources believe Oberstar would oppose any extension longer than three months.

However, writing an extension for the various surface transportation programs is a complicated business — the initial TEA21 extension back in 2005 (the first of twelve such — see table below at left) was 55 pages long, and once a duration is decided, it takes several days of round-the-clock staff work to get a bill drafted and vetted.

In addition, leaders hope to include a provision in the extension repealing the $8.7 billion rescission of contract authority scheduled to take effect on September 30, which will either require a controversial budget offset (a tax increase or spending cut) or a waiver of the House's PAYGO budget rule (which would be volatile).

Bonds Now, Taxes Later? Oberstar Explores Funding Options

House Transportation and Infrastructure chairman James Oberstar (D-MN) spent the August recess reaching out to transportation stakeholder groups to explore options for raising the $60+ billion in additional revenues needed to pay for his ambitious surface transportation bill, in the hopes of developing a plan he can recommend to the Ways and Means Committee.

An idea that Oberstar is said to be strongly considering was hinted at in his testimony before Ways and Means prior to the recess — issuing at least $50 billion in bonds immediately to pay for highway and transit spending. In the same law, Congress would authorize significant increases in the taxes on gasoline and diesel fuel (perhaps as much as ten cents per gallon for gas and fifteen cents per gallon for diesel) — but those tax increases would not take effect for several years (either a date certain two or three years in the future, or after some economic growth targets have been met).

There is no word yet on how the Ways and Means members would react to such a plan, but two problems spring to mind.

First, there is no guarantee that Congress would allow the tax to take effect. Imagine if, two or three years from now, the tax is poised to take effect, but because of geopolitical and economic factors, gasoline prices have risen to $5.00 per gallon. Or $6.00. There would be tremendous political pressure on Congress to delay or eliminate the implementation of the gas tax increase, which could put pro-repeal forces well over the 60-vote margin in the Senate needed to waive the Budget Act and eliminate the tax hike.

Second, in the short term, the tens of billions of dollars raised by the debt issue would add directly to the federal deficit up front, at a time when deficit -consciousness in Congress and with the public at large is increasing. And adding tens of billions of dollars to a skyrocketing national debt will not sit well with many legislators — particularly when a controversial vote to raise the debt ceiling is pending in the Senate next month.

SHORT-TERM EXTENSIONS OF THE 1998 TEA21 LAW

	Congr.	Bill Number	Time Period Covered	Duration	Passed House	Passed Senate	Signed Into Law	Public Law #
1	108th	HR 3087	10/1/2003 - 2/29/2004	5 months	9/24/2003	9/26/2003	9/30/2003	108-88
2	108th	HR 3850	3/1/2004 - 4/30/2004	2 months	2/26/2004	2/27/2004	2/29/2004	108-202
3	108th	HR 4219	5/1/2004 - 6/30/2004	2 months	4/28/2004	4/29/2004	4/30/2004	108-224
4	108th	HR 4635	7/1/2004 - 7/31/2004	1 month	6/23/2004	6/23/2004	6/30/2004	108-263
5	108th	HR 4916	8/1/2004 - 9/30/2004*	2 months	7/22/2004	7/22/2004	7/30/2004	108-280
6	108th	HR 5183	10/1/2004 - 5/31/2005	8 months	9/30/2004	9/30/2004	9/30/2004	108-310
7	109th	HR 2566	6/1/2005 - 6/30/2005	1 month	5/25/2005	5/26/2005	5/31/2005	109-14
8	109th	HR 3104	7/1/2005 - 7/19/2005	3 weeks	6/30/2005	6/30/2005	7/1/1005	109-20
9	109th	HR 3332	7/20/2005 - 7/21/2005	2 days	7/19/2005	7/19/2005	7/20/2005	109-35
10	109th	HR 3377	7/22/2005 - 7/27/2005	6 days	7/21/2005	7/21/2005	7/22/2005	109-37
11	109th	HR 3543	7/28/2005 - 7/30/2005	3 days	7/27/2005	7/27/2005	7/28/2005	109-40
12	109th	HR 3512	8/1/2005 - 8/14/2005	2 weeks	7/29/2005	7/29/2005	7/30/2005	109-42

**P.L. 108-280 extended expenditure authority for Trust Fund outlays through October 1 but only extended contract and obligation authority through midnight on September 24, so obligations and CA lapsed for the last few days of September 2004.*

House-Senate Talks on DOT Appropriations Are Already Ongoing

Last week, the staffs of the House and Senate Transportation-Housing Appropriations Subcommittees began meeting to "pre-conference" the differences between their differing versions of the appropriations bill for those agencies for fiscal year 2010.

The House has passed the bill (H.R. 3288), and the Senate Appropriations Committee has reported a different version. But the Senate has not yet passed the bill (the House has passed all twelve of the general 2010 appropriations bills, the Senate only four. Normally, the House and Senate only go to conference on a bill when either (a.) both chambers have passed different versions of a bill, or (b.) the leaders in both chambers have agreed that no further floor action is likely and so the conference negotiations take place on the substance of the bill but get stuck on another legislative vehicle.

In this case, there is still a chance that the Senate could consider H.R. 3288 on the floor — and this could happen as early as tomorrow, although nothing is certain — the staff have been trying to work through the low-level differences that are unlikely to be amended much on the Senate floor while saving the higher-level disputes until they see what changes, if any, the Senate makes and then getting the chairmen and ranking minority members more personally involved in the process.

One pivotal matter is out of the hands of the subcommittee — the final overall size of the bill (both in new budget commitments and in terms of 2010 Treasury outlays from both new and prior commitments). The House and Senate bills are $1.12 billion apart on new budget authority and almost $700 million apart on outlays. The final numbers must be decided by the chairmen of the full House and Senate Appropriations Committees.

But within the bill, the big issue is how to handle the President's proposal for $2 billion for a National Infrastructure Bank — the House did not fund the Bank but stuck the $2 billion in the high-speed rail account, where it could then be transferred to a Bank next year if still unspent and if authorization legislation is enacted by that time. The Senate dispensed with the FY 2010 prospects for a Bank altogether and split its extra money between discretionary surface transportation grants within the Office of the Secretary, extra highway funding (expecially for the TIFIA credit program) and extra funding for subway and light rail construction.

The full committee chairmen hope to get as many appropriations bills as possible enacted into law individually before the end of the year.

FAA Extension Also Needed By September 30

In addition to the extension of federal surface transportation programs discussed on the previous page, the programs funded by the Airport and Airway Trust Fund require extension as well lest funding for those programs be shut off as of October 1.

The next extension will be the seventh such law enacted since the last multi-year aviation authorization law (VISION 100) expired at the end of fiscal year 2007.

Unlike surface transportation programs, most budget authority for aviation programs is discretionary and is provided by the Appropriations Committees in their annual bills and can take place whether or not an authorization bill is in place. But funding for the Airport Improvement Program must still be provided in authorization laws, and the permission to spend money out of the Airport and Airway Trust Fund itself is also set to expire and must be extended.

Also, the taxes on aviation that support the Trust Fund are set to expire and must be renewed.

But these differences mean that an aviation extension is a brief and uncomplicated piece of legislation — it can be as little as a page or two. This means that an aviation extension can be added on to a continuing appropriations resolution with little difficulty — indeed, the first of the extensions of the VISION 100 law shown in the table below was carried on a "CR."

Democratic leaders in the Senate appear to be looking at a three-month extension to give them time to attempt to get the Senate FAA authorization bill (S. 1451) to the Senate floor (the House bill, H.R. 915, has already passed that chamber). However, airport interests traditionally say that at least six months worth of contract authority must be provided for the AIP program up front or it becomes difficult for the FAA to process grants.

The Obama Administration, which has had little input into the pending FAA bills, has not yet weighed in publicly on an extension timeline.

SHORT-TERM EXTENSIONS OF AVIATION FUNDING PROGRAMS

	Congr.	Bill Number	Time Period Covered	Duration	Passed House	Passed Senate	Signed Into Law	Public Law #
1	110th	HJRes 52	10/1/2007 - 12/25/2007	3 months	9/26/2007	9/27/2007	9/29/2007	110-92
2	110th	HR 2764	12/25/2007 - 2/29/2008	2 months	6/22/2007	9/6/2007	12/26/2007	110-161
3	110th	HR 5270	3/1/2008 - 6/30/2008	4 months	2/12/2008	2/13/2008	2/28/2008	110-190
4	110th	HR 6327	7/1/2008 - 9/30/2008	3 months	6/24/2008	6/26/2008	6/30/2008	110-253
5	110th	HR 6984	10/1/2008 - 3/31/2009	6 months	9/22/2008	9/23/2008	9/30/2008	110-330
6	111th	HR 1512	4/1/2009 - 9/30/2009	6 months	3/18/2009	3/18/2009	3/30/2009	111-12

NEW AND NOTABLE ON THE INTERNET

Congressional Budget Office

On August 21, CBO issued its final scoring of the $7 billion Highway Trust Fund bailout passed by Congress in July. That report is here:

http://www.cbo.gov/ftpdocs/105xx/doc10520/hr3357.pdf

Federal Highway Administration

To reiterate, FHWA has released its guidance on how it intends to implement the September 30, 2009 rescission of $8.708 billion in highway contract authority, and it is complicated. The notice is here (state-by-state tables are linked at the bottom):

http://www.fhwa.dot.gov/legsregs/directives/notices/n4510711.htm

Federal Transit Administration

On September 2, FTA issued a new New Starts/Small Starts rating system policy document in the Federal Register, which can be found online here:

http://edocket.access.gpo.gov/2009/pdf/E9-21173.pdf

U.S. Government Accountability Office

A new GAO report was issued over the recess entitled *Public Transportation: Better Data Needed to Assess Length of New Starts Process, and Options Exist to Expedite Project Development*. It is available online here:

http://www.gao.gov/new.items/d09784.pdf

A new GAO report was issued today entitled *Metropolitan Planning Organizations: Options Exist to Enhance Transportation Planning Capacity and Federal Oversight*. It is available online here:

http://www.gao.gov/cgi-bin/getrpt?GAO-09-868

STATUS OF PENDING TRANSPORTATION-RELATED NOMINATIONS

Agency	Nominee	Position	Senate Committee	Latest Action
Department of Transportation	Chris Bertram	Assistant Secretary for Budget and Programs	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Department of Transportation	Susan Kurland	Assistant Secretary for Aviation and Int'l Affairs	Commerce, Science and Transportation	Nomination confirmed 8/7/09
DOT-Federal Motor Carrier Safety Admin.	Anne Ferro	Administrator	Commerce, Science and Transportation	Nomination transmitted 7/16/09
DOT-National Highway Traffic Safety Admin.	Charles Hurley	Administrator	Commerce, Science and Transportation	Nomination reportedly will be withdrawn
National Transport. Safety Board	Christopher Hart	Member for a term expiring 12/31/2012	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Surface Transportation Board	Daniel Elliott	Chairman	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Department of the Army	Jo-Ellen Darcy	Assistant Secretary for Civil Works	Armed Services *and* Enviro. & Public Works	Nomination confirmed 8/7/09

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Please send comments or corrections to: Mail@transportationweekly.com

THIS WEEK IN COMMITTEE

Thursday, September 10, 2009 — House Oversight and Government Reform — full committee business meeting to mark up pending legislation including H.R. 1881, Transportation Security Workforce Enhancement Act — *10:00 a.m., 2154 Rayburn.*

House Transportation and Infrastructure — full committee hearing on hazardous materials safety and PHMSA's role therein — *10:00 a.m., 2167 Rayburn.*

NEXT WEEK IN COMMITTEE

Tuesday, September 15, 2009 — House Transportation and Infrastructure — Subcommittee on Aviation — subcommittee hearing on management of the Hudson River Airspace Corridor — 10:00 a.m., 2167 Rayburn.

STATUS OF MAJOR TRANSPORTATION BILLS — 111th CONGRESS

BILL	HOUSE ACTION	SENATE ACTION	RESOLUTION
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	H.R. 3288 passed House 7/23/09 by a vote of 256-168	H.R. 3288 reported 8/5/09 S. Rept. 111-69	
FY 2010 Energy and Water Appropriations	H.R. 3183 passed House 7/17/09 by a vote of 320-97	H.R. 3183 passed Senate 7/29/09 by a vote of 85-9	
FY 2010 Homeland Security Appropriations	H.R. 2892 passed House 6/24/09 by a vote of 389-37	H.R. 2892 passed Senate amended 7/9/09 by a vote of 84-6	
Federal Aviation Admin. Reauthorization Bill	H.R. 915 passed House 5/22/09 by a vote of 277-136	S. 1451 ordered reported 7/21/09 by Senate Commerce Committee	
Surface Transportation Reauthorization Bill	Subcommittee marked up draft bill on 6/24/09		
Short-Term Extension of Surface Transportation Laws		S. 1498 reported 7/22/09 S. Rept. 111-59	
Water Resources Development Act			
FY 2010 Coast Guard Authorization		S. 1194 ordered reported 7/8/09 by Senate Commerce Committee	
Transportation Security Admin. Reauthorization	H.R. 2200 passed House 6/4/09 by a vote of 397-25		