




Memorandum

Subject: **INFORMATION: Policy on Using
Bipartisan Infrastructure Law
Resources to Build a Better America**

Date: December 16, 2021

From: Stephanie Pollack 
Deputy Administrator

In Reply Refer To:
HPL-1 and HCC-1

To: Associate Administrators
Chief Counsel
Chief Financial Officer
Directors of Field Services
Division Administrators

The recently enacted Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Pub. L. 117-58 (Nov. 15, 2021), will deliver generational investments in our roads and bridges, promote safety for all road users, help combat the climate crisis, and advance equitable access to transportation. The BIL also presents the Federal Highway Administration (FHWA) with a unique opportunity: to exercise our stewardship and oversight responsibilities and evolve the century-old relationship with State departments of transportation and other stakeholders in a way that takes advantage of the tools Congress has provided and prioritizes investments that align with the underlying policies evident throughout the BIL to help our states and communities Build a Better America.

This guidance is intended to serve as an overarching framework to prioritize the use of BIL resources on projects that will Build a Better America. The intent of the guidance also is to ensure that the funding and eligibilities provided by the BIL will be interpreted and implemented, to the extent allowable under statute, to encourage States and other funding recipients to invest in projects that upgrade the condition of streets, highways and bridges and make them safe for all users, while at the same time modernizing them so that the transportation network is accessible for all users, provides people with better choices across all modes, accommodates new and emerging technologies, is more sustainable and resilient to a changing climate, and is more equitable.

The BIL creates two kinds of new resources that FHWA's State, regional, Tribal and local stakeholders can use to Build a Better America:

- (1) changes to the eligibilities and policy requirements in FHWA's "legacy" apportioned programs such as National Highway Performance Program and the Surface Transportation Block Grant Program and its Transportation Alternatives set-aside; and
- (2) new programs (some formula, some discretionary grants and some a combination of the two) such as the Bridge Investment Program, National EV Charging Program, Carbon Reduction Program and PROTECT program.

FHWA will issue guidance and regulations, as appropriate, to fully implement these legislative changes and new programs and is actively soliciting stakeholder input on these matters through a just-opened [Federal Register docket](#).

Investments and projects that align with the BIL and will help Build a Better America include those that:

- improve the condition, resilience and safety of road and bridge assets consistent with asset management plans (including investing in preservation of those assets);
- promote and improve safety for all road users, particularly vulnerable users;
- make streets and other transportation facilities accessible to all users and compliant with the Americans with Disabilities Act;
- address environmental impacts ranging from stormwater runoff to greenhouse gas emissions;
- prioritize infrastructure that is less vulnerable and more resilient to a changing climate;
- future-proof our transportation infrastructure by accommodating new and emerging technologies like electric vehicle charging stations, renewable energy generation, and broadband deployment in transportation rights-of-way;
- reconnect communities and reflect the inclusion of disadvantaged and under-represented groups in the planning, project selection and design process; and
- direct Federal funds to their most efficient and effective use, consistent with these objectives.

Encouraging and Prioritizing Projects That Build a Better America

Under this Policy, FHWA will work with recipients of any Federal funds made available under title 23, United States Code to encourage and prioritize the repair, rehabilitation, reconstruction, replacement, and maintenance of existing transportation infrastructure, especially the incorporation of safety, accessibility, multimodal, and resilience features.¹ Projects to be prioritized include those that maximize the existing

¹ For purposes of this memorandum, FHWA recipients include Federal Land Management Agencies (FLMAs). In addition, Federal funds include both Federal-aid highway and Federal lands highway funds, as well as Transportation Infrastructure Finance and Innovation programs funds that are administered by the FHWA.

right-of-way for accommodation of non-motorized modes and transit options that increase safety, accessibility, and/or connectivity.

For FLMAs under the Federal lands program, FHWA will work with our Federal stakeholders to incorporate these policies into their programming policies and decisions, including asset management systems established under 23 U.S.C. 201(c)(5).

The maintenance of existing roads and highways in a state of good repair is an important tool to ensure the effective use of Federal funding while also improving transportation safety, reducing surface transportation-related greenhouse gas emissions, delivering equitable transportation options and access, and accommodating new and emerging technologies by upgrading the nation's existing infrastructure. Proper maintenance is also an affirmative responsibility of the States as required by 23 U.S.C 116. This Building a Better America Policy will help achieve these important goals. Additionally, this Policy is consistent with the Bipartisan Infrastructure Law and recently issued Presidential Executive Orders (EOs), including, EO 14008, Tackling the Climate Crisis at Home and Abroad (86 FR 7619); EO 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (86 FR 7009); and EO 14030 Climate Related Financial Risk (86 FR 27907).

Prioritizing Investment in All Federal-Aid and Federal Lands Eligible Transportation Assets

FHWA staff shall emphasize to our planning and project selection and project delivery stakeholders that the resources made available under the BIL can and should be applied to modernize all eligible streets, highways, and bridges – not just those owned and operated by State departments of transportation.

Many projects funded with Federal-aid highway funds are either on the Interstate System (which constitutes just under 50,000 system miles and accounts for 25% of VMT) or the broader National Highway System (which constitutes approximately 222,000 system miles and accounts for 55% of VMT). However, there are over 1 million miles of streets and highways, which account for 85% of Vehicle Miles Travelled, that are Federal-aid highways and may benefit from BIL investments. Nationally, arterials and collectors are in poorer condition compared to the interstate highway system. BIL also expands the universe of eligible roadways for certain types of investments. For example, up to 15% of National Highway Performance Program funds may be spent on projects on Federal-aid highways (and bridges) off the National Highway System for projects that add protective features related to mitigating risk of recurring damage or the cost of future repairs from extreme weather events, flooding, or other natural disasters.

For bridges, there are over 620,000 bridges on the National Bridge Inventory (NBI), which includes all of the nation's bridges located on public roads, including Interstate highways, U.S. highways, State and county roads, as well as publicly-accessible bridges on Federal and tribal lands. All of these bridges are eligible for investments under the restored bridge formula program.

FHWA staff should encourage metropolitan planning organizations, State transportation departments, FLMAs, and other decisionmakers to direct new and expanded investments based on asset condition and need for modernization, as well as the potential for an investment or project to achieve Building a Better America objectives – rather than focusing exclusively or primarily on assets owned by States. Asset owners of all Federal-aid highways, Federal Lands highways and streets and all NBI bridges should be involved in decisions about which projects are selected for investment.

NEPA Review

FHWA staff shall emphasize to our planning and project selection and project delivery stakeholders that one advantage of focusing investment on Building a Better America projects is that they can be delivered faster because, in many cases, such projects may require only a Categorical Exclusion under FHWA's NEPA environmental review regulations, 23 CFR Part 771. For example, construction of bicycle and pedestrian lanes, paths, and facilities normally meet the FHWA and CEQ criteria for categorical exclusions and, absent unusual circumstances, do not require any further NEPA approvals by the FHWA. 23 CFR 771.117(c)(3). Similarly, street and highway modernization projects involving resurfacing, restoration, rehabilitation, or reconstruction; highway safety or traffic operations improvement projects; bridge rehabilitation and reconstruction projects; and construction of grade separation to replace existing at-grade railroad crossings will generally qualify for Categorical Exclusions. 23 CFR 771.117(c)(3)

By contrast, other types of projects necessarily require more scrutiny under NEPA. For example, highway capacity expansion projects that involve “acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements” may *not* be processed as categorical exclusions. Categorical exclusions are also not available if the proposed project would:

- induce significant impacts to planned growth or land use for the area;
- have a significant impact on any natural, cultural, recreational, historic or other resource; or
- have significant impacts to travel patterns.

23 CFR 771.117(a).

FHWA staff shall encourage metropolitan planning organizations, State transportation departments, FLMAs and other decisionmakers to consider the timeline for delivering projects and eligibility for Categorical Exclusions under NEPA as they are programming funding made available under the Bipartisan Infrastructure Law.

General Purpose Capacity Expansion Projects

This Policy prioritizes projects that move more people and freight by modernizing and increasing the operational efficiency of existing roads and highways over projects that expand the general purpose capacity of roads and highways. Consistent with this

Policy, FHWA will implement policies and undertake actions to encourage—and where permitted by law, require—recipients of Federal highway funding to select projects that improve the condition and safety of existing transportation infrastructure within the right-of-way before advancing projects that add new general purpose travel lanes serving single occupancy vehicles.

Application of this Policy does not prohibit the construction of new general purpose capacity on highways or bridges, but in most cases Federal-aid highway and Federal Lands funding resources made available through the BIL should be used to repair and maintain existing transportation infrastructure before making new investments in highway expansions for additional general purpose capacity. State transportation departments should also be mindful of their ability to transfer resources to support transit projects that may be more consistent with these priorities.

Specifically, FHWA staff shall encourage metropolitan planning organizations, State transportation departments, FLMAs and other decisionmakers and recipients of Federal-aid highway and Federal Lands funding to consider the following factors before advancing projects that result in new capacity for single occupancy vehicles:

- progress in achieving a state of good repair consistent with the State's asset management plan under 23 U.S.C 119(e);
- how the project will support the achievement of the State's performance targets under 23 U.S.C 150 (including any new performance targets established by FHWA); and
- whether the project is more cost-effective than both operational improvements to the facility or corridor and transit projects eligible under chapter 53 of title 49.

Additional Planned Actions

In pursuit of these important policy objectives, FHWA will adopt guidance and implement new requirements, to the extent permitted by statute, to advance this Policy on *Using Bipartisan Infrastructure Law Resources to Build a Better America*. These actions will include:

- incorporating the principles advanced in this Policy into all guidance documents issued for “legacy” apportioned programs for which the BIL includes changes in eligibility or other requirements;
- incorporating the principles advanced in this Policy into all guidance and regulatory documents issued for new programs created by the BIL and administered by FHWA;
- incorporating the principles advanced in this Policy into all notice of funding opportunities (NOFOs) for its allocated discretionary grant programs;
- working with the Federal Transit Administration to review and, if appropriate, propose changes to guidance or regulations governing the federally required transportation planning processes in metropolitan areas, as set forth in 49 U.S.C.

5303 and 23 U.S.C. 134, and in rural areas and on a statewide basis set forth in 49 U.S.C. 5304 and 23 U.S.C. 135;

- reviewing and, if appropriate, proposing changes to guidance or regulations governing Transportation Asset Management Plans;
- reviewing and, if appropriate, proposing changes to guidance or regulations governing relevant aspects of the NEPA process for FHWA projects;
- reviewing and, if appropriate, proposing changes to guidance or regulations governing relevant aspects of Title VI as it applies to FHWA projects; and
- improving and promoting the use of travel demand modeling to provide for more accurate forecasting of how proposed projects (including, but not limited, to projects proposing the addition of general-purpose capacity) affect travel demand and air emissions including emissions of greenhouse gases.

Conclusions

Although States and other Federal-aid recipients ultimately select projects consistent with 23 U.S.C. 145, and FLMAs consistent with 23 U.S.C. 201, this Policy will inform that decision-making. Once implemented, this Policy will help improve safety and accessibility for all road users, reduce the environmental impact of highway and bridge projects, including curtailing transportation greenhouse gas emissions that contribute to climate change, better accommodate new and emerging transportation technologies, reduce relocations and otherwise ensure that transportation agencies do not expand roadways in inequitable ways that disproportionately impact disadvantaged communities, and support the efficient and effective use of Federal funds.

Working together, we can make investments and deliver projects that upgrade the condition of streets, highways, and bridges and make them safe for all users, while at the same time modernizing them so that the transportation network is accessible for all users, provides people with better choices across all modes, is more sustainable and resilient to a changing climate, and is more equitable. FHWA is committed to increasing our level of coordination with metropolitan planning organizations, State departments of transportation and other stakeholders and decisionmakers including local and tribal governments that have not traditionally had access to needed Federal funds to ensure these goals are fully realized.