NORTH STAR GROUP

Memorandum

Date: January 12, 2016

To: John Moosey, Borough Manager
Matanuska-Susitna Borough

From: Karl Ohls, Senior Policy Advisor-NSG/JFA

Re: FAST Act Analysis

The final version of HR 22, Fixing America's Surface Transportation Act (FAST Act), passed both the U.S. Senate and U.S. House on Dec. 3, 2015, and was signed into law by President Obama on Dec. 4.

The FAST Act establishes national policy for surface transportation project spending through 2020. Proponents say the law will give state, local and tribal governments an opportunity to plan ahead for major transportation projects and to know what level of funding will be available.

The FAST Act contains numerous policy changes for transportation funding. It continues the trend in Congress of minimizing the federal role and giving state and local governments more authority to make decisions about transportation priorities. It also attempts to streamline the environmental review and permitting process so that projects can be built with less delay.

The following is a summary of some of the most significant elements in the new law.

Federal-Aid Funding

Funding for the Federal-Aid Highway Program was authorized at $39.7 billion for FY2016, $40.5 billion for FY2017, $41.4 billion for FY2018, $42.3 billion for FY2019, and $43.3 billion for FY2020. Alaska's share of federal funding will be $483 million in the first year and will rise to $560 million in the fifth year, according to Sen. Dan Sullivan (R-AK).

Federal-Aid transparency is increased by requiring the Federal Highway Administration (FHWA) to provide project-level information to Congress and the public. This information permits monitoring of projects for cost overruns and assists Congress in understanding how states are using their Federal-Aid funds.

Federal Programs

New programs were established under Federal-Aid Highways to transfer money to the states to meet specific needs. Transportation funding over the next five years will be distributed through the Surface Transportation Block Grant Program, the National Highway Performance Program, the Highway Safety Improvement Program, the Congestion Mitigation & Air Quality Improvement Program, and the National Highway Freight Program.

Surface Transportation Block Grant Program:

- The program's purpose is to "provide flexible funding to address state and local transportation needs." It replaces the former Surface Transportation Program.
- One rationale for the program is that states and municipalities are best positioned "to respond to unique local circumstances and implement the most efficient solutions."
- The program is designed to "promote flexibility" that will "enhance state and local control over transportation decisions."
- Eligible projects include "highways, bridges, tunnels," transit capital projects, "infrastructure-based intelligent transportation systems," traffic monitoring and management, environmental measures, highway and transit safety infrastructure, recreational trails, surface transportation planning, bridge protection and safety, state support and oversight for public-private partnerships, and more.
- Funding for local governments increases from 50 percent to 55 percent over the life of the FAST Act.
- The Transportation Alternatives Program is rolled into the block grants, increasing state and local government flexibility.

A new non-formula program is the Nationally Significant Freight & Highway Projects (NSFHP) Program. The Congress created it to address the country's lack of a coordinated freight strategy or investment plan. The rules and goals are described in legislation, as follows:

- The purpose of this new competitive grant program is to provide financial assistance for projects of national or regional significance.
- Projects will be funded to improve "safety, efficiency, and reliability," increase U.S. global economic competitiveness, reduce highway congestion and bottlenecks, improve freight transportation connectivity, enhance highway infrastructure resiliency and help protect the environment.
- Eligible projects would involve highway freight, "freight intermodal or freight rail," or be within the boundaries of a "public or private freight rail."

- While $25 million was set as the minimum grant amount, the program also sets aside 10 percent of the funding for small projects requiring minimum $5 million grants.
- The transportation secretary is required to reserve at least 25 percent of the funding for rural area projects.

<u>Transportation Infrastructure Finance and Innovation Act (TIFIA):</u>

- TIFIA now has expanded eligibility. States will be allowed to use the National Highway Performance Program, Surface Transportation block grants, and NSFHP funds to pay the subsidy and administrative costs associated with providing TIFIA credit assistance.
- The TIFIA program was updated to enable it to be better used by rural areas and more accessible for small projects. This will be accomplished by using the leveraging ability of TIFIA to support state infrastructure banks and allowing USDOT to set-aside TIFIA funding in order to replace the fees typically collected from TIFIA borrowers to pay for independent financial analysis and outside counsel for rural projects.
- TIFIA was authorized for $275 million in FY2016, $275 million in FY2017, $285 million in FY2018, $300 million in FY2019, and $300 million in FY2020.

Environmental Review

The Congress attempted to build more efficiency into the environmental review process for transportation projects. Some of the changes also apply to the federal government as a whole. The new process contains the following elements:

- All federal permits and project reviews shall now rely on a single environmental document—governed by National Environmental Policy Act (NEPA) rules and procedures—that is prepared by a lead agency.
- The congressional intent is to eliminate duplication in environmental reviews and approvals.
- The U.S. Department of Transportation (USDOT) is charged with developing "a coordinated and concurrent environmental review and permitting process" for NEPA-qualifying transportation projects.
- Early in the process, the department must determine project purpose and need, and a range of alternatives for analysis.
- All reviews and permitting decisions by the involved agencies must occur concurrently.
- The involved agencies shall jointly develop a "checklist" to help project sponsors "identify potential natural, cultural, and historic resources in the area" for proposed projects and provide information for the alternatives to be analyzed.
- The transportation secretary is required to facilitate "annual interagency collaboration sessions" for business plan coordination, workload planning, and workforce management. At the sessions, federal participants are to work with state and local transportation entities "to improve project planning, siting, and

application quality," and to consult and coordinate—early in the permitting process—with relevant stakeholders and federal, tribal, state, and local representatives.
- The transportation secretary and the department's inspector general are required to report to the Congress on the progress made in aligning federal environmental reviews.
- No later than 180 days after FAST Act enactment, the transportation secretary is required to examine ways to "modernize, simplify, and improve" NEPA implementation through new technology tools. The secretary is required to report to the Congress about this no later than one year after enactment.
- The U.S. Comptroller General is required to assess the progress in accelerating the delivery of Federal-aid Highway, highway safety construction projects, and public transportation capital projects no later than two years after enactment. In a long list of congressional instructions, the comptroller general is asked to evaluate "the extent to which the environmental review and permitting process remains a significant source of project delay," and to make recommendations about additional opportunities for streamlining.
- The transportation secretary is required to establish a pilot program for no more than five states to authorize them to conduct environmental reviews and issue approvals under state environmental laws instead of NEPA.

The FAST Act also establishes the Federal Permitting Improvement Steering Council, with the following requirements:
- The new steering council will be a multi-agency entity set up to oversee and coordinate the federal permitting process for covered projects, and thereby streamline the process for major energy and infrastructure projects.
- The council's executive director is appointed by the President, and chairs the council.
- The individual council members must be deputy secretaries or an equivalent position, and must be designated for the council by the secretaries of the departments of Agriculture, Army, Commerce, Interior, Homeland Security, Housing & Urban Development. Also directed to designate council members are the Administrator of the Environmental Protection Agency, and the chairmen of the Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and Advisory Council on Historic Preservation. The Chairman of the Council on Environmental Quality and the Director of the Office of Management and Budget are also directed to serve on the council.
- The council will meet at least annually with state, tribal and local government representatives.
- The executive director is required to establish in 180 days an inventory of covered projects that are pending environmental review or authorization. The projects must be subject to NEPA and require investments of more than $200 million.
- The projects could involve construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation,

aviation, ports and waterways, water resources projects, broadband, pipelines, manufacturing, or other sectors as determined by council majority vote.

- The executive director and the council have one year to develop recommended performance schedules for the covered projects that include intermediate and final completion dates for the environmental reviews and authorizations.
- The executive director is required to maintain a "Permitting Dashboard," which is an online database for tracking the status of federal environmental reviews and authorizations.
- The council shall issue recommendations annually for best practices for agencies to enhance early shareholder engagement, make timely decisions, improve coordination with federal and non-federal entities, increase transparency, reduce information collection requirements and administrative burdens, make available appropriate geographic information systems, and create and distribute training materials.
- All of the involved departments and agencies are required to have individuals who are designated to serve as the Chief Environmental Reporting and Permitting Officer. The CERPOs will be the in-house experts on environmental reviews. They will facilitate technical support, identify and resolve potential disputes, analyze agency procedures, and develop training programs for agency staff. They will also advise and make recommendations to their respective council members.
- The departments and agencies represented on the council were directed—after public notice, consultation, and public comments—to establish a fee structure for the federal government to be reimbursed up to 20 percent for reasonable costs incurred in conducting environmental reviews and authorizations for covered projects.
- The fees collected from project proponents would be deposited in the "Environmental Review Improvement Fund" in the U.S. Treasury. The fee program has a seven year sunset.

In addition to all of the administrative mechanisms for more efficient environmental reviews, the FAST Act also limits legal claims that challenge covered project approvals. The mechanisms to do this are:

- Claims seeking judicial review of any federal authorization are barred if they are filed more than two years after the final record of decision is published in the Federal Register.
- For actions pertaining to NEPA reviews, claims can only be filed by parties that submitted comments during the environmental process. Further, the comments must have been sufficiently detailed to put the lead agencies on notice about the issues under dispute. Parties still have access to judicial review if the lead agencies did not provide reasonable opportunities for comment.
- Whenever any action seeks temporary restraining orders or preliminary injunctions, the court is required to consider "the potential effects on public health, safety, and the environment, and the potential for significant negative

effects on jobs….” The legislation adds that the courts should not assume that these harms can be rectified.

Research and Innovation

The FAST Act incorporates the "Transportation for Tomorrow Act of 2015." To fulfill the innovation goal, funding is authorized for the Highway Research and Development Program in the amount of $125 million per year for fiscal years 2016 through 2020, and for the Technology and Innovation Deployment Program in the amounts of $67 million for FY2016, and $67.5 million for each fiscal year 2017 through 2020.

The secretary is required to establish an Advanced Transportation and Congestion Management Technologies Deployment Initiative, which will provide grants to develop model deployment sites for the installation of advanced transportation technologies.

The FAST Act establishes the National Surface Transportation and Innovative Finance Bureau, and lists its responsibilities:

- The bureau will act as a one-stop shop for state and local governments to "provide assistance and communicate best practices and financing and funding opportunities to eligible entities" for the department's infrastructure finance programs, the Nationally Significant Freight & Highway Projects Program, and the Railroad Rehabilitation and Improvement Financing Program.
- The bureau is directed to promote innovative financing best practices, reduce uncertainty and delays with environmental reviews and permitting, and reduce project delivery costs and risks to taxpayers.
- The secretary has the authority to consolidate or eliminate different offices within USDOT. These targeted improvements should be based on previous congressionally initiated reforms, oversight, and USDOT pilot projects.

Rail Projects

The FAST Act includes the Train, Railroad, and Infrastructure Network Act, which contains the following provisions:

- The process for approving rail projects is streamlined by applying existing statutory provisions to rail projects. To the greatest extent feasible, the secretary is directed to use for rail the expedited environmental review procedures already used for highways and transit.
- The secretary is directed to identify additional categorical exclusions for transportation projects and to propose new and existing exclusions for rail.

The Railroad Rehabilitation Improvement and Financing (RRIF) program is authorized to provide loans and loan guarantees to railroad projects, ranging from short-line railroad equipment to passenger rail facilities. To advance its ability to advance major infrastructure, the following changes were made:

- According to the Congress, while RRIF provides attractive low-interest, long-term financing, it has not been extensively used, and its inflexible terms and limited consideration of project-finance style lending features limit its utility to large-scale infrastructure projects.
- The FAST Act includes the Railroad Infrastructure Financing Improvement Act (RIFIA), which includes several provisions designed to unlock RRIF. It streamlines USDOT's approval processes—mirroring successful TIFIA features—to make RRIF a more flexible lender, and to make partnerships easier to develop by allowing RRIF loans to be combined with other types of financing, including private financing.
- USDOT is required to pay back the credit risk premium, with interest, to a borrower that has repaid its RRIF loan, regardless of whether the loan is or was included in a cohort. The intent of this provision is for the pay back to occur as soon as feasible, but not later than three months after the date of enactment. Language is also included to modify RRIF's general authority to provide direct loans to include at least one of the eligible applicants in a joint venture.

Financing

The Congress found the revenue to fund the FAST Act and replenish the Highway Trust Fund (HTF) for five years. The main source is an extension of existing taxes on diesel, gasoline, kerosene and special motor fuel, heavy vehicle tires, heavy vehicle use, and retail sales of heavy trucks and trailers through Sept. 30, 2022. The bill's financing section includes the following provisions:

- Transfers from the U.S. Treasury general fund to HTF are authorized in the amounts of $51.9 billion for the Highway Account and $18.1 billion to the Mass Transit Account.
- HTF is also funded with motor vehicle safety violation civil penalties, and with transfers of $100 million per year for three years from the Leaking Underground Storage Tank Trust Fund.
- HTF expenditure authority is extended through Sept. 30, 2020.
- Motor fuels tax rates are set at 18.3 cents per gallon of gasoline, 24.3 cents per gallon of diesel fuel and kerosene, and 18.3 or 24.3 cents per gallon of alternate fuels.
- The appropriations are also offset by miscellaneous new tax provisions, including unpaid taxes enforcement through passport denial or revocation. New fees are also charged for certain customs services. New revenues are raised from drawing down and selling the Strategic Petroleum Reserve.
- The secretary is directed to provide grants to states that they can use to develop and demonstrate "user-based alternative revenue mechanism that utilize a user fee structure to maintain the long-term solvency of the Highway Trust Fund."

Please contact us at NSG if we can provide additional information about the FAST Act and its contents.