

# United States Senate

WASHINGTON, DC 20510

February 18, 2022

The Honorable Pete Buttigieg  
Secretary  
U.S. Department of Transportation  
1200 New Jersey Ave. SE  
Washington, D.C. 20590

Dear Secretary Buttigieg:

We write to you today as members of the bipartisan group that helped craft the bipartisan Infrastructure Investment and Jobs Act (IIJA, P.L. 117-58). Signed into law on November 15, 2021, this legislation is the largest long-term investment in our infrastructure and economy in our Nation's history. As members that represent small rural towns, large cities, and everything in between, we are proud that this bill addresses the unique needs of every State in the country, and we look forward to working with you to ensure that all Americans benefit from this monumental legislation. It is important to maintain the careful bipartisan balance that was struck in our negotiations, and we seek to clarify recent policy issued by the Federal Highway Administration (FHWA).

One of the key pillars in the bipartisan IIJA is the maintenance and construction of the roads and bridges that help connect our great country. The \$1.2 trillion law reauthorizes surface transportation programs for five years and invests \$350 billion in highway programs, including \$110 billion in additional funding to support our roads and bridges. We want to thank you and your staff for working diligently to implement the IIJA. Given the number of new programs and the significant increases in discretionary grant funding, it is a herculean task. In seeking to implement the law that we authored, FHWA recently issued a memorandum entitled "Policy on Bipartisan Infrastructure Law Resources to Build a Better America," providing guidance to FHWA staff "to serve as an overarching framework to prioritize the use of [infrastructure] resources on projects." This guidance, although well intentioned, has generated a considerable amount of confusion over its intent, purpose, and authority, and additional clarity is warranted.

In particular, language in FHWA's memorandum appears to prioritize projects that modernize and increase the operational efficiency of existing roads and highways over projects that expand capacity. A "Fix It First" requirement was ultimately not what the bipartisan group of negotiators chose to emphasize in the IIJA, instead acknowledging that such a one-size-fits-all approach does not accurately reflect the diverse needs of states across the country. We can and should ensure maintenance and safety while improving capacity, but rural and urban areas vary greatly in the sorts of projects and investments they choose to prioritize. They also vary in their ownership of public roads – a point that the guidance omits. According to FHWA's own data, some states own the bulk of the roads in their states – as high as 88.5% – while others own only a very small percentage of public roads – as low as 6%.

The FHWA memorandum also appears to discourage states from moving forward with capacity-building projects by directing staff to encourage stakeholders to consider project timelines and eligibility for Categorical Exclusions, such as bike paths, pedestrian lanes, and maintenance projects, over highway capacity expansion projects. The guidance misses an opportunity to highlight the One Federal Decision policy codified within the

law, which streamlines the National Environmental Policy Act (NEPA) process by introducing specific, two-year timelines for federal decisions, requiring coordination among permitting agencies, and expanding on the types of projects eligible for categorical exclusions. This was done to cut down on unnecessary red tape and help projects be completed more quickly while still protecting citizens and communities across the country.

We are also concerned that FHWA plans to incorporate this policy into “all notice of funding opportunities (NOFOs) for its allocated discretionary grant programs.” As FHWA itself notes in its memorandum, “States and other Federal-aid recipients ultimately select projects consistent with” existing federal law, but this is not necessarily true for discretionary grant programs under the jurisdiction of FHWA and other agencies within the U.S. Department of Transportation (DOT). The IJA made clear that funding should be distributed equitably to all communities across the country, codifying set-asides for rural areas across the law to ensure that these communities are not left behind. However, should FHWA seek to implement its guidance with respect to future discretionary grant programs, this could disadvantage states that do not conform to the criteria set forth in the guidance or rural areas that have different priorities and needs, running counter to Congressional intent. Similarly, as FHWA develops guidance for the new programs created through the IJA, such as the Carbon Reduction Program, it is vital that FHWA considers the unique needs and circumstances of applicants from across the country and offers appropriate flexibility for all applicants. We would urge FHWA to ensure the equitable distribution of funds to both urban and rural areas – as the law makes clear – and to consider how to accommodate rural areas in particular, so that these communities are able to advance projects that address program goals in effective and reasonable ways and are not left further behind.

For these reasons, we seek to clarify the policies FHWA included within the December memorandum and place them within the appropriate context. Specifically, we ask that you answer the following questions:

- Will states retain their traditional flexibility to select projects and make decisions about how to spend federal funds provided through the bipartisan Infrastructure Investment and Jobs Act? Will FHWA follow current Federal law and Congressional intent regarding the Federal-aid Highway Program?
- Will FHWA follow Congressional intent and not prioritize certain types of projects or regions when making decisions regarding future discretionary awards? Will FHWA consider the unique transportation needs of rural and urban areas?
- Will how States use their formula dollars impact their success in applying for future discretionary dollars?
- Is FHWA implementing the One Federal Decision provisions as passed by Congress?

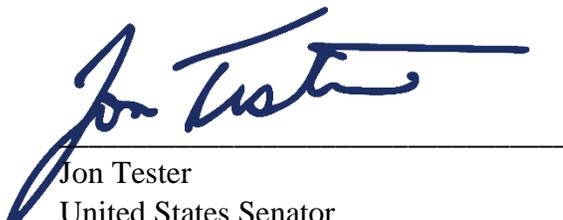
As members of the bipartisan group that helped author this historic legislation, we are proud that it will provide a lasting investment in our communities, and we appreciate your leadership on this critically important process. We welcome the chance to continue to work with you and your team to advance these critical programs and ensure the faithful implementation of the various provisions of the IJA, and would appreciate additional clarity on the FHWA internal policy memorandum to ensure IJA is implemented as Congress intended. Thank you for your attention to this important matter.

Sincerely,



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Joe Manchin III  
United States Senator



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Jon Tester  
United States Senator

*Jeanne Shaheen*

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Jeanne Shaheen  
United States Senator