



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

(b)(5)

Decision

Matter of: U.S. Department of Transportation, Federal Highway Administration—
Application of the Impoundment Control Act to Memorandum
Suspending Approval of State Electric Vehicle Infrastructure
Deployment Plans

File: B-337137

Date: May 22, 2025

DIGEST

The National Electric Vehicle Infrastructure (NEVI) Formula Program is a formula grant program authorized by the 2021 Infrastructure Investment and Jobs Act (IIJA).¹ The NEVI Formula Program is funded by no-year appropriations, which become available in each of fiscal years (FYs) 2022 through 2026. As of February 5, 2025, all 50 states, Washington, D.C., and Puerto Rico had submitted required plans to the Secretary of the U.S. Department of Transportation (DOT) for FYs 2022 through 2025. On February 6, 2025, the Federal Highway Administration (FHWA) issued a memorandum, which announced the cancellation of all previously issued guidance for the NEVI Formula Program and the suspension of all state plans previously submitted under the program. The memorandum also directed that until new guidance is issued and new state plans are submitted and approved, no new obligations for the program could be incurred; however, expenditures pursuant to existing project agreements would continue.²

The recording statute, 31 U.S.C. § 1501, requires that an agency record an obligation when there is sufficient documentary evidence of the government's liability. Because obligations for the NEVI Formula Program arise by operation of law, the point of obligation for the program is when IIJA makes funds available for obligation for the program. We conclude that DOT violated the recording statute, in each of FYs 2022 through 2025, when it treated signed project agreements as the

¹ Pub. L. No. 117-58, div. J, title VIII, 135 Stat. 429, 1421 (Nov. 15, 2021).

² The memorandum did not identify the number of or amounts of existing obligations that would be reimbursed.

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point of obligation for the NEVI Formula Program, rather than at the time IJJA made appropriations available for the program.

In addition, FHWA's February 6, 2025 memorandum has resulted in DOT withholding appropriations for the NEVI Formula Program from expenditure, and this withholding is a deferral under the Impoundment Control Act (ICA).³ While some deferrals are permissible if reported under the ICA, another provision renders that a moot point here.

Under the ICA, a section referred to as the fourth disclaimer prohibits withholding from obligation or expenditure funds appropriated for programs where there is a mandate to spend therefor.⁴ We conclude that the NEVI Formula Program is covered by the fourth disclaimer. Therefore, DOT is not authorized to withhold these funds from expenditure and DOT must continue to carry out the statutory requirements of the program. While DOT cannot withhold these funds under the ICA, DOT could propose funds for rescission or otherwise propose legislation to make changes to the NEVI Formula Program for consideration by Congress.

The ICA was enacted to ensure that legislation passed by Congress and signed by the President is faithfully executed.⁵ It includes vesting the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances as expressly provided by the ICA.⁶ GAO's institutional role is to support the Congress, including in Congress's exercise of its constitutional power of

³ The purpose of reporting a deferral under the ICA is to notify Congress when the President wants to temporarily withhold obligation or expenditure of funds to provide for contingencies, to achieve savings made possible by or through changes in requirements or greater efficiency of operations, or as specifically provided by law, but not for policy reasons. See 2 U.S.C. § 684. Congress may enact legislation disapproving a deferral and requiring that the deferred funds be made available for obligation. In any event, any amount of budget authority deferred must be prudently obligated before the end of the period of availability.

⁴ See 2 U.S.C. § 681(4). The ICA has a section that sets out four disclaimers with respect to its application. The first three disclaimers provide that nothing in the ICA shall be construed as (1) asserting or conceding the constitutional powers or limitations of the Congress or the President; (2) ratifying or approving any impoundment except as pursuant to statutory authority; or (3) affecting the claims or defense of any party to litigation concerning any impoundment. See 2 U.S.C. §§ 681(1)–(3).

⁵ See S. Rep. No. 93-688, at 75 (1974) (explaining that the objective of ICA was to assure that "the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress").

⁶ Pub. L. No. 93-344, title X, 88 Stat. 297, 332–339 (July 12, 1974), 2 U.S.C. §§ 681–688.

the purse. This includes GAO's functions under the ICA, such as reviewing special messages and reporting impoundments the President has not reported. GAO's role is procedural—to help ensure compliance with the ICA and appropriations law—and is not to be interpreted as taking a position on the underlying policies entailed.

DECISION

Congress created the National Electric Vehicle Infrastructure (NEVI) Formula Program in the 2021 Infrastructure Investment and Jobs Act (IIJA), and appropriated no-year funds for the program, to become available in each of fiscal years (FYs) 2022 through 2026.⁷ IIJA requires that the Secretary of the U.S. Department of Transportation (DOT) allocate appropriations for the program pursuant to a statutory formula, and requires that states⁸ submit plans to DOT to receive funds.⁹ For each of FYs 2022 through 2025, DOT, through the Federal Highway Administration (FHWA), an operating administration within DOT, had allocated funds to the states pursuant to apportionments, and all plans were submitted and approved for each such FY.

Then, on February 6, 2025, FHWA issued a memorandum, which cancelled all previously issued guidance implementing the NEVI Formula Program and “immediately suspend[ed] the approval of all State Electric Vehicle Infrastructure Deployment plans for all fiscal years.”¹⁰ The memorandum also announced that no new obligations were to be incurred under the program until new guidance was issued, states submitted new plans, and the Secretary approved such plans.¹¹ However, according to DOT, expenditures would continue to be made under existing project agreements.¹²

⁷ Pub. L. No. 117-58, div. J, title VIII, 135 Stat. 429, 1421 (Nov. 15, 2021).

⁸ For purposes of the NEVI Formula Program, the term “state” also includes Washington, D.C. and Puerto Rico. See *id.*, 135 Stat. at. 1426; 23 U.S.C. § 101(a)(28).

⁹ Pub. L. No. 117-58, 135 Stat. at 1422.

¹⁰ FHWA, *Suspending Approval of State Electric Vehicle Infrastructure Deployment Plans* (Feb. 6, 2025) (FHWA Memorandum), available at <https://www.fhwa.dot.gov/environment/nevi/resources/state-plan-approval-suspension.pdf> (last visited May 8, 2025).

¹¹ *Id.*

¹² See *id.* The memorandum did not identify the number of or amounts of existing obligations that would be reimbursed.

Pursuant to our reporting responsibilities under the Impoundment Control Act (ICA), we are issuing this decision.¹³ As explained below, we conclude that DOT violated the recording statute, in each of FYs 2022 through 2025, when it treated signed project agreements as the point of obligation for the NEVI Formula Program, rather than the point at which IIJA made funds for the program available for obligation. In addition, DOT's withholding of funds from expenditure pursuant to FHWA's memorandum constitutes a deferral, as defined by the ICA. However, the ICA's fourth disclaimer prohibits withholding from obligation or expenditure funds appropriated for programs for which there is a mandate to spend therefor.¹⁴ Consequently, DOT is not authorized under the ICA to withhold these funds from expenditure and must continue to carry out the statutory requirements of the program. If DOT wishes to make changes to the obligation and expenditure of funds appropriated under the NEVI Formula Program, it must propose funds for rescission or otherwise propose legislation to make changes to the law for consideration by Congress.¹⁵

In accordance with our regular practice, we contacted DOT to seek factual information and their legal views.¹⁶ DOT responded to our letter on March 12, 2025.¹⁷ DOT also provided supplemental information in April in response to a request from our office.¹⁸

¹³ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, 88 Stat. 297, 336 (July 12, 1974), 2 U.S.C. § 686. Additionally, on March 31, 2025, the Ranking Members of the House and Senate Budget Committees sent a request to GAO to examine several directives, including Executive Order 14154, "Unleashing American Energy," which in part directed agencies to pause the disbursement of funds for the NEVI Formula Program. Letter from Ranking Member Merkley and Ranking Member Boyle, to Comptroller General (Mar. 31, 2025).

¹⁴ 2 U.S.C. § 681(4).

¹⁵ See B-307122, March 2, 2006; B-200685, July 30, 1981.

¹⁶ GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>; Letter from General Counsel, GAO, to Principal Deputy General Counsel, DOT (Feb. 25, 2025).

¹⁷ Letter from Acting General Counsel, DOT, to General Counsel, GAO (Mar. 12, 2025) (Response Letter).

¹⁸ Email from General Counsel, GAO, to Senior Counsel for Oversight, DOT, *Subject: USDOT Response (GAO Matter No. B-337137)* (Mar. 27, 2025); Email from Senior Counsel for Oversight, DOT, to General Counsel, GAO, *Subject: USDOT Response (GAO Matter No. B-337137)* (Apr. 1, 2025) (Supplemental Response).

BACKGROUND

National Electric Vehicle Infrastructure (NEVI) Formula Program

The NEVI Formula Program is a formula grant program authorized in IIJA to “provide funding to States to strategically deploy electric vehicle charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability.”¹⁹ Amounts appropriated for the program are to be used by states to acquire and install electric vehicle (EV) charging infrastructure, operate and maintain that infrastructure, and share data relating to EV infrastructure.²⁰

To carry out the NEVI Formula Program, Congress appropriated \$5,000,000,000 in IIJA to DOT, FHWA, \$1,000,000,000 of which is to become available in each of FYs 2022 through 2026 and remain available until expended.²¹ Of this amount, IIJA requires DOT to annually set aside 10 percent for grants to states or localities that require additional assistance to strategically deploy EV charging infrastructure,²² and up to 1.5 percent for FHWA operations and administration.²³ In addition, of the amount made available in FY 2022, IIJA required DOT to set aside not more than \$300,000,000 for the creation of a Joint Office of Energy and Transportation and for the Joint Office to carry out its specified duties, such as providing technical assistance and developing training and certification programs.²⁴ As a result, the total amount made available for the NEVI Formula Program for FY 2022 is \$615,000,000, and for each of FYs 2023 through 2026 is \$885,000,000.

IIJA requires that the Secretary distribute appropriations for the NEVI Formula Program pursuant to a statutory formula.²⁵ In each of FYs 2022 through 2025,

¹⁹ Pub. L. No. 117-58, 135 Stat. at 1421.

²⁰ *Id.*, 135 Stat. at 1421–1422.

²¹ See *id.*, 135 Stat. at 1421. As explained further below, while most FHWA-administered grant programs are funded by contract authority, for which liquidating appropriations are provided in annual appropriations acts, the appropriation for NEVI is a general fund appropriation provided by IIJA.

²² *Id.*, 135 Stat. at 1425.

²³ *Id.*, 135 Stat. at 1420.

²⁴ *Id.*, 135 Stat. at 1425. This \$300,000,000 must be set aside from the amount made available for FY 2022 before DOT sets aside the 10 percent for grants to states or localities that require additional assistance for that FY. *Id.*

²⁵ *Id.*, 135 Stat. at 1422 (“[T]he Secretary shall distribute among the States the funds made available under this paragraph in this Act so that each State receives an amount equal to the proportion that the total base apportionment or allocation

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FHWA issued a notice of apportionment, which reflected the amounts owed to states.²⁶

IIJA also requires that each FY, each state submit a plan to the Secretary describing how the state intends to use the funds made available for that FY.²⁷ IIJA prescribes that the Secretary shall establish a deadline for states to submit plans, and that the plans shall, “in such form and such manner that the Secretary requires[,] . . . describ[e] how such State intends to use funds distributed to the State under this paragraph in this Act”²⁸ In addition, IIJA authorizes the Secretary to withhold or withdraw, as applicable, program funds made available to a state for a given FY if the state fails to submit a plan by the deadline the Secretary establishes, or if the Secretary determines that a state has not taken action to carry out its plan.²⁹ Prior

determined for the State under subsection (c) of section 104 or under section 165 of title 23, United States Code, bears to the total base apportionments or allocations for all States under subsection (c) of section 104 and section 165 of title 23, United States Code”). 23 U.S.C. § 104(c) provides the apportionment formula for states and D.C., while 23 U.S.C. § 165 provides the allocation formula for Puerto Rico.

²⁶ See FHWA, *Notice N-4510.863, Apportionment of Fiscal Year (FY) 2022 Highway Infrastructure Program Funds for the National Electric Vehicle Infrastructure Formula Program Pursuant to the Infrastructure Investment and Jobs Act* (Feb. 10, 2022) (FY 2022 Apportionment), available at <https://www.fhwa.dot.gov/legisregs/directives/notices/n4510863.cfm> (last visited May 8, 2025); FHWA, *Notice N-4510.873, Apportionment of Fiscal Year (FY) 2023 Highway Infrastructure Program Funds for the National Electric Vehicle Infrastructure Formula Program Pursuant to the Infrastructure Investment and Jobs Act* (Oct. 6, 2022) (FY 2023 Apportionment), available at <https://www.fhwa.dot.gov/legisregs/directives/notices/n4510873.cfm> (last visited May 8, 2025); FHWA, *Notice N-4510.883, Apportionment of Fiscal Year 2024 Highway Infrastructure Program Funds for the National Electric Vehicle Infrastructure Formula Program Pursuant to the Infrastructure Investment and Jobs Act* (Oct. 2, 2023) (FY 2024 Apportionment), available at <https://www.fhwa.dot.gov/legisregs/directives/notices/n4510883.cfm> (last visited May 8, 2025); and FHWA, *Notice N-4510.895, Apportionment of Fiscal Year 2025 Highway Infrastructure Program Funds for the National Electric Vehicle Infrastructure Formula Program Pursuant to the Infrastructure Investment and Jobs Act* (Oct. 1, 2024) (FY 2025 Apportionment), available at <https://www.fhwa.dot.gov/legisregs/directives/notices/n4510895.cfm> (last visited May 8, 2025). The apportionment for FY 2022 was certified on February 10, 2022, rather than at the beginning of the FY, because IIJA was not signed into law until November 15, 2021. See FY 2022 Apportionment.

²⁷ Pub. L. No. 117-58, 135 Stat. at 1422.

²⁸ *Id.*

²⁹ *Id.*

to making a determination that a state has not taken action to carry out its plan, IIJA requires that the Secretary provide notice, consult with the state, and identify actions that can be taken to rectify any concerns.³⁰ The Secretary must give a state at least 90 days to take action to address these concerns.³¹ In addition, DOT must notify the state not less than 60 days in advance of withholding or withdrawing any funds pursuant to this provision, during which time the state may appeal the decision.³²

DOT's Implementation of the NEVI Formula Program

DOT announced the submission of all state plans for FYs 2022 and 2023 on September 27, 2022, and the submission of all FY 2024 plans in November 2023.³³

According to DOT, once a state has submitted a plan and all legal requirements have been met, the state enters into a project agreement with FHWA pursuant to 23 U.S.C. § 106.³⁴ When the project agreement is signed, DOT records an obligation.³⁵ This is consistent with how DOT records obligations for federal-aid highway formula programs authorized under chapter 1 of Title 23, United States Code.³⁶ DOT reported that as of February 6, 2025, it had obligated \$526,608,042.75 of the \$3,270,000,000 that is currently available for obligation for the NEVI Formula Program.³⁷

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See Department of Energy, *National Electric Vehicle Infrastructure (NEVI) Formula Program*, available at <https://afdc.energy.gov/laws/12744> (last visited May 8, 2025). DOT has not formally announced the submission of FY 2025 state plans, but the EV States Clearinghouse, which collects data on NEVI Formula Program implementation, indicates that all states submitted FY 2025 plans. See EV States Clearinghouse, *National Electric Vehicle Infrastructure (NEVI) Awards Dashboard*, available at <https://evstates.org/awards-dashboard/#FAQ> (last visited May 8, 2025).

³⁴ Supplemental Response.

³⁵ *Id.*

³⁶ See 23 U.S.C. § 106.

³⁷ FHWA, *National Electric Vehicle Infrastructure (NEVI) Formula Program Status of Funds as of February 6, 2025* (Apr. 17, 2025), available at <https://www.fhwa.dot.gov/environment/nevi/> (last visited May 1, 2025).

Recent Actions Regarding the NEVI Formula Program

On January 20, 2025, the President signed an executive order entitled, "Unleashing American Energy."³⁸ Section 7(a) of the Executive Order directs all agencies to "immediately pause the disbursement of funds appropriated through the Inflation Reduction Act of 2022 (Public Law 117-169) or the Infrastructure Investment and Jobs Act (Public Law 117-58)," including "funds for electric vehicle charging stations made available through the National Electric Vehicle Infrastructure Formula Program"³⁹

On February 6, 2025, FHWA issued a memorandum stating that its "new leadership . . . has decided to review the policies underlying the implementation of the NEVI Formula Program."⁴⁰ As a result, FHWA announced that it was rescinding all previously issued NEVI Formula Program guidance and "immediately suspending the approval of all State Electric Vehicle Infrastructure Deployment plans for all fiscal years."⁴¹ The memorandum also announced that no new obligations were to be incurred under the program until new guidance was issued and new state plans were approved, and that FHWA hoped to have new guidance available for public comment by Spring 2025.⁴² According to DOT, the memorandum would not disrupt reimbursement of obligations incurred prior to February 6, 2025.⁴³

DISCUSSION

At issue here is whether DOT violated appropriations law requirements under the recording statute and whether it complied with the requirements of the ICA. We begin with consideration of the requirements of the recording statute when DOT treated signed project agreements as the point of obligation for the NEVI Formula Program. For the reasons explained below, we conclude DOT violated the recording statute and should have recorded a liability equal to the amounts made available for the program for each of FYs 2022 through 2025, when IIJA made appropriations for such FYs available for obligation. Also at issue is whether DOT's withholding of NEVI Formula Program funds violates the ICA. We conclude that DOT's withholding of funds pursuant to FHWA's February 6 memorandum constitutes a deferral, as defined by the ICA. As explained below, because the ICA's fourth disclaimer does not permit the withholding from obligation or expenditure funds for programs for

³⁸ Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 29, 2025).

³⁹ *Id.* at 8357.

⁴⁰ FHWA Memorandum, at 1.

⁴¹ *Id.*

⁴² *Id.* As of May 5, 2025, no new guidance implementing the NEVI Formula Program has been issued.

⁴³ *Id.*

which there is a mandate to spend, DOT's withholding of NEVI Formula Program funds violates the ICA.

The Recording Statute and Obligations for the NEVI Formula Program

An obligation arises when an agency incurs a legal liability for payment, or a legal duty that could mature into a legal liability for payment by virtue of actions beyond the control of the agency.⁴⁴ The recording statute requires that an agency record an obligation when supported by documentary evidence of a grant or subsidy payable from appropriations that is "required to be paid in specific amounts fixed by law or under formulas prescribed by law."⁴⁵ We have determined that this provision applies when a statute requires the government to provide federal assistance and prescribes a formula to calculate the payments.⁴⁶

For example, in B-316915, we addressed the point of obligation for funds appropriated to the Election Assistance Commission (EAC) to carry out the Help America Vote Act of 2002 (HAVA).⁴⁷ Title III of HAVA required EAC to make payments, known as "requirements payments," to each state in accordance with a statutory formula, so long as the state first certified that it met statutory preconditions outlined in the Act.⁴⁸ In the decision, we analyzed whether the requirements payments were an amount "required to be paid" under the meaning of 31 U.S.C. § 1501(a)(5)(A) and should be recorded as such, even though HAVA required that each state certify it met the preconditions prior to receiving the payments.

We concluded that the requirements payments were "required to be paid" within the meaning of 31 U.S.C. § 1501(a)(5)(A) and were obligated by operation of law.⁴⁹ We explained that even though there was a possibility that a state may not comply with the prerequisites for the payments, noncompliance was an action within the state's control, rather than the government's.⁵⁰ As a result, "[t]he preconditions d[id] not render uncertain the entitlement."⁵¹ Therefore, EAC was required to record the full amount of its liability for the program when funds became available for obligation.

⁴⁴ B-333150, Apr. 8, 2024; B-300480, Apr. 9, 2003; *see also* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 70 (defining obligation).

⁴⁵ 31 U.S.C. § 1501(a)(5)(A).

⁴⁶ *See* B-336036, Feb. 12, 2025; B-316915, Sept. 25, 2008.

⁴⁷ B-316915, Sept. 25, 2008.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

The NEVI Formula Program operates similarly to the EAC program. For example, IIJA requires the Secretary to “distribute” funds made available under the Act for the NEVI Formula Program in accordance with a statutory formula.⁵² Additionally, while IIJA requires that states submit plans for the program to DOT, there is no statutory requirement that the Secretary approve them. We note that, according to DOT, because IIJA requires that state plans must be “in such form and such manner that the Secretary requires,”⁵³ it is their view that plans must be approved by the Secretary.⁵⁴ We disagree. While IIJA clearly authorizes the Secretary to dictate the information included in the plan and the deadline for submission, it is silent as to whether the Secretary has discretion to reject timely state submissions. IIJA does not include a discretionary approval provision, which has been included in statutes authorizing other programs.⁵⁵

In fact, a state’s compliance with the submission of a state plan for the NEVI Formula Program is within that state’s control, rather than DOT’s. Therefore, DOT’s legal liability to distribute the funds to states pursuant to the statutory formula arises when funds for the program become available for obligation each fiscal year. Consistent with other programs we have considered, it is at that point that a legal duty could mature into a legal liability by virtue of actions wholly under the states’ control.⁵⁶

⁵² Pub. L. No. 117-58, 135 Stat. at 1422.

⁵³ *Id.*

⁵⁴ Response Letter, at 2; see also FHWA, *INFORMATION: National Electric Vehicle Infrastructure Formula Program Guidance (Updated)* (June 11, 2024), at 1 (previously issued NEVI Formula Program guidance stating the same approval requirement).

⁵⁵ For example, in order for states to receive funding under the Highway Safety Improvement Program, the state must have a State Strategic Highway Safety Plan in place that it reevaluates regularly, among other requirements. See 23 U.S.C. §§ 148(c)(1)(A), 148(c)(1)(C). In addition to laying out the required elements of a State Strategic Highway Safety Plan, section 148 also provides specific requirements for approval of the plans by the Secretary. 23 U.S.C. § 148(d)(2). Section 148 imposes a penalty on states that do not have a plan submitted and approved, stating that such states “shall not be eligible to receive any additional limitation pursuant to the redistribution of the limitation on obligations for Federal-aid highway and highway safety construction programs that occurs after August 1 for each succeeding fiscal year until the fiscal year during which the plan is approved.” 23 U.S.C. § 148(d)(3).

⁵⁶ See B-333150, Apr. 8, 2024; B-300480, Apr. 9, 2003; see also B-212145, Sept. 27, 1983 (concluding that obligations for a formula grant program should be

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We note that the Secretary's authority in IIJA to withhold or withdraw, as appropriate, funds from a state if it does not submit a plan or does not take action to carry out its plan during a given FY,⁵⁷ also supports this conclusion. The terms "withhold" and "withdraw" present some ambiguity with respect to the Secretary's authority. To help provide clarity, we give words used in a statute their plain meaning.⁵⁸ To withhold is defined as: "To refrain from giving, granting, or allowing."⁵⁹ Similarly, to withdraw is defined as: "To take back or away."⁶⁰ Were DOT in control of its liability for the program until state plans were approved, there would be no need to provide the Secretary with the authority to take back funds from states that fail to submit plans altogether. The inclusion of this provision supports the conclusion that states' entitlement to the funds for each FY precedes submission of their plan for such FY. If DOT wants to make changes to the Secretary's authority, it must seek legislative authority to amend the IIJA.

DOT therefore violated the recording statute when it failed to record its obligation for the NEVI Formula Program at the time appropriations for FYs 2022 through 2025 became available. The recording statute requires an agency to record the full amount of its obligation against funds available at the time it incurs the obligation.⁶¹ Therefore, DOT should have recorded the full amount appropriated for the NEVI Formula Program for each of FYs 2022 through 2025 when the funds became available, which would amount to \$615,000,000 for FY 2022 and \$885,000,000 for each of FYs 2023, 2024, and 2025.⁶² DOT should adjust its accounts for FYs 2022 through 2025 to properly recognize these liabilities.

DOT's Position on Incurring Obligations for the NEVI Formula Program

According to DOT, it records obligations for the NEVI Formula Program when project agreements are signed.⁶³ This is consistent with how DOT records obligations for

recorded when appropriated funds are made available for the program, "even though the specific recipients and the exact amounts payable for each are not yet known").

⁵⁷ Pub. L. No. 117-58, 135 Stat. at 1422.

⁵⁸ See, e.g., B-336106, Dec. 2, 2024.

⁵⁹ Merriam-Webster, *Withhold*, available at <https://www.merriam-webster.com/dictionary/withhold> (last visited May 1, 2025).

⁶⁰ Merriam-Webster, *Withdraw*, available at <https://www.merriam-webster.com/dictionary/withdraw> (last visited May 1, 2025).

⁶¹ See B-327242, Feb. 4, 2016.

⁶² DOT has not yet incurred an obligation for FY 2026 because the funds are not yet available for obligation.

⁶³ Supplemental Response.

federal-aid highway formula programs,⁶⁴ and we note that IIJA states that the NEVI Formula Program funds “shall be administered as if apportioned under chapter 1 of Title 23, United States Code.”⁶⁵

However, we disagree that this proviso dictates the point of obligation for the NEVI Formula program. First, as explained above, IIJA requires the Secretary to “distribute” funds made available under the Act in accordance with a statutory formula, and does not provide express authority to the Secretary, or DOT, to control when funds are obligated to states. Therefore, liability for the program arises when IIJA makes funds for the program available for obligation each fiscal year. Additionally, IIJA creates a process specific to the NEVI Formula Program through which the Secretary may “withhold or withdraw” funds made available for a FY from a state that has either failed to submit a plan or that the Secretary finds has not taken actions to carry out its plan.⁶⁶ This process presupposes that DOT’s liability for the program precedes submission of the state plans, which are a necessary precursor to the project agreements. Finally, according to DOT, this proviso is often used to apply the contract authority in 23 U.S.C. § 118 to a particular program. However, the NEVI Formula Program is funded by a general fund appropriation, and DOT does not rely on contract authority to incur liabilities for the program.

Impoundment Control Act

Having addressed when DOT must record obligations for the NEVI Formula Program, we now consider whether DOT has violated the ICA by delaying expenditures for the program.⁶⁷ We conclude that it has.

It is important to understand the constitutional and historical underpinnings of the ICA with respect to the critical role of Congress in exercising its constitutional powers. The Constitution specifically vests Congress with the power of the purse, providing that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁶⁸ The Constitution also vests all legislative powers in Congress and sets forth the procedures of bicameralism and presentment, through which the President may accept or veto a bill passed by both houses of Congress,

⁶⁴ See 23 U.S.C. § 106.

⁶⁵ Pub. L. No. 117-58, 135 Stat. at 1425.

⁶⁶ *Id.*, 135 Stat. at 1422.

⁶⁷ In this decision, we focus our analysis on DOT’s delay of expenditures for the NEVI Formula Program. As explained below, the ICA applies to both obligations and expenditures. However, given that NEVI Formula Program funds for FYs 2022 through 2025 are already obligated by law, delay of obligations is not at issue here.

⁶⁸ U.S. Const. art. I, § 9, cl. 7.

and Congress may subsequently override a presidential veto.⁶⁹ The President is not vested with the power to ignore or amend any such duly enacted law.⁷⁰ Instead, the President must “faithfully execute[]” the law as Congress enacts it.⁷¹

An appropriations act is a law like any other; therefore, unless Congress has enacted a law providing otherwise, the President must take care to ensure that appropriations are prudently obligated during their period of availability.⁷² In fact, Congress was concerned about the failure to prudently obligate according to its congressional prerogatives when it enacted and later amended the ICA.⁷³

The Constitution grants the President no unilateral authority to withhold funds from obligation.⁷⁴ Instead, Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances as expressly provided in the ICA.⁷⁵ The ICA separates impoundments into two exclusive categories—deferrals and rescissions. The President may temporarily withhold funds from obligation—but not beyond the end of the fiscal year in which the President transmits the special message—by proposing a “deferral.”⁷⁶ The President may also seek the permanent cancellation of funds for fiscal policy or other reasons, including the termination of programs for which Congress has provided budget authority, by proposing a “rescission.”⁷⁷

In either case, the ICA requires that the President transmit a special message to Congress that includes the amount of budget authority proposed for deferral or rescission and the reason for the proposal.⁷⁸ These special messages must provide

⁶⁹ *Id.*, art. I, § 7, cl. 2, 3.

⁷⁰ See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (the Constitution does not authorize the President “to enact, to amend, or to repeal statutes”).

⁷¹ See U.S. Const., art. II, § 3.

⁷² See B-331564, Jan. 16, 2020; B-329092, Dec. 12, 2017 (the ICA operates on the premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold).

⁷³ See generally, H.R. Rep. No. 100-313, at 66–67 (1987); see also S. Rep. No. 93-688, at 75 (1974) (explaining that the objective was to assure that “the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress”).

⁷⁴ See B-135564, July 26, 1973.

⁷⁵ See 2 U.S.C. §§ 681–688.

⁷⁶ 2 U.S.C. § 684.

⁷⁷ 2 U.S.C. § 683.

⁷⁸ 2 U.S.C. §§ 683–684.

detailed and specific reasoning to justify the withholding, as set out in the ICA.⁷⁹ The burden to justify a withholding of budget authority rests with the executive branch.

GAO's institutional role is to support the Congress, including in Congress's exercise of its constitutional power of the purse. This includes GAO's functions under the ICA, such as reviewing special messages⁸⁰ and reporting impoundments the President has not reported.⁸¹

While the ICA does not circumscribe when funds can be proposed for rescission, it only permits deferral of budget authority in a limited range of circumstances: to provide for contingencies; to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or as specifically provided by law.⁸² As ICA's fourth disclaimer makes clear, the ICA does not permit the President to withhold from obligation or expenditure budget authority that is required by law to be spent.⁸³

Application of the ICA to the NEVI Formula Program

In this case, the Administration has not sent a special message under the ICA related to the NEVI Formula Program. DOT asserts that the "temporary delay in the ability to obligate new NEVI Formula Program funds resulting from the issuance of new program guidance does not constitute a withholding that falls within the scope of [the ICA]" because the delay is programmatic.⁸⁴ According to DOT, the agency needs to issue new guidance for state plans and states need to resubmit the plans for approval "to address the underutilization of [NEVI Formula Program] funding and implement the program at the funding level Congress intended."⁸⁵ In DOT's view, both actions it plans to take—issuing new guidance and requiring new state plans

⁷⁹ See 2 U.S.C. §§ 683–684; B-237297.4, Feb. 20, 1990 (vague or general assertions are insufficient to justify the withholding of budget authority).

⁸⁰ 2 U.S.C. § 685.

⁸¹ 2 U.S.C. § 686.

⁸² 2 U.S.C. § 684(b).

⁸³ 2 U.S.C. § 681(4). Section 681 sets out four disclaimers with respect to the application of the ICA. The first three disclaimers, none of which are relevant here, provide that nothing in the ICA shall be construed as (1) asserting or conceding the constitutional powers or limitations of the Congress or the President; (2) ratifying or approving any impoundment except as pursuant to statutory authority; or (3) affecting the claims or defense of any party to litigation concerning any impoundment. See 2 U.S.C. §§ 681(1)–(3).

⁸⁴ Response Letter, at 2.

⁸⁵ *Id.*, at 3.

which must be approved by the Secretary—are within the statutory authority provided by Congress to the Secretary to administer the NEVI Formula Program.⁸⁶ We disagree.

An impoundment occurs when an agency refuses to spend budget authority.⁸⁷ By its plain terms, the ICA extends to both obligations and expenditures.⁸⁸ However, we have said that not all delays in obligation or expenditure of budget authority constitute impoundments under the ICA. For example, when an agency is taking reasonable and necessary steps to implement a program or activity, but the obligation or expenditure of funds is unavoidably delayed, such action constitutes a programmatic delay and is not an impoundment, as defined by the ICA.⁸⁹

We have previously concluded that programmatic delays include delays in the obligation or expenditure of budget authority that result from agency compliance with statutory requirements.⁹⁰ The delay at issue here is different. The delay did not result from DOT's attempt to comply with the statutory requirements for the program, but rather from DOT imposing requirements on the program that are not contemplated by IIJA. For example, IIJA requires states to submit plans to DOT, but does not provide authority for the Secretary to approve or disapprove such plans. All states submitted their plans for FYs 2022 through 2025 in satisfaction of their statutory requirement. Nonetheless, on February 6, 2025, DOT asserted that it was disapproving all state plans that had previously been submitted, which resulted in much of the NEVI Formula Program funds becoming unavailable for expenditure until FHWA issues new guidance and states develop and submit new plans.

We note again that this conclusion is supported by the Secretary's authority in IIJA to withhold or withdraw, as appropriate, funds from a state if it does not submit a plan or does not take action to carry out its plan during a given FY.⁹¹ IIJA provides DOT with the ability to oversee the program to ensure states are implementing the program "at the funding level Congress intended."⁹² Therefore, DOT's withholding of these funds from expenditure through the imposition of new requirements on the

⁸⁶ *Id.*

⁸⁷ See B-217722, Mar. 18, 1985.

⁸⁸ 2 U.S.C. § 682(1); see also B-200685, Dec. 23, 1980 (explaining that even where funds had been obligated for an interagency agreement between the Department of Energy and the Defense Fuel Supply Center to procure petroleum for the Strategic Petroleum Reserve (SPR), if the administration took action that would amount to an impoundment with respect to SPR expenditures, it would violate the ICA).

⁸⁹ B-331564.1, Feb. 10, 2022.

⁹⁰ See B-333110, June 15, 2021.

⁹¹ See Pub. L. No. 117-58, 135 Stat. at 1422.

⁹² Response Letter, at 3.

states is outside of the parameters set by IIJA for withholding or withdrawing funds, and cannot be a programmatic delay.

An agency's failure to prudently and expeditiously discharge its liabilities in accordance with law constitutes an impoundment. For example, in B-207186, May 5, 1982, we considered what actions the Department of Housing and Urban Development (HUD) was required to take to avoid an unlawful impoundment of funds appropriated for the Solar Energy and Energy Conservation Bank, when previous actions by the President and the Office of Management and Budget (OMB) to defer funds meant the bank was not operational.⁹³ We concluded that to comply with the ICA, HUD was required to "prudent[ly] and expeditious[ly] discharge" the preparatory steps required to make the bank operational, such as appointing bank officers and issuing regulations, and following completion of these steps, to provide financial assistance required by provisions of the Energy Security Act.⁹⁴

Obligations for the NEVI Formula Program arise by operation of law, and unless the Secretary invokes the authority in IIJA to withhold or withdraw funds therefor, such funds are directed by IIJA to the states. To date, the Secretary has not invoked such authority, and instead, has taken steps that prevent funds being expended for the program. Therefore, DOT's actions to delay the expenditure of funds for the NEVI Formula Program constitute an impoundment.

Application of the Fourth Disclaimer to the NEVI Formula Program

While the ICA only permits deferral in a limited range of circumstances, we need not determine whether this delay fits within any of those circumstances. This is because the ICA expressly precludes withholding from obligation or expenditure funds for programs for which there is a mandate to spend. Therefore, NEVI Formula Program funds cannot be deferred under the ICA.

ICA's fourth disclaimer states that nothing in the ICA shall be construed as "superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."⁹⁵ We have explained that the consideration for whether something is covered by the ICA's fourth disclaimer is "whether the relevant statutory scheme constitute[s] a mandate to spend the full amounts available or confer[s] spending discretion."⁹⁶ For example, in B-205053, Feb. 5, 1982, we concluded that OMB could not use the ICA to withhold funds appropriated for a

(b)(5)

⁹³ B-207186, May 5, 1982.

⁹⁴ *Id.*

⁹⁵ 2 U.S.C. § 681(4).

⁹⁶ B-205053, Mar. 10, 1982.

formula grant program authorized by the Library Services and Construction Act (LSCA) because such action was prohibited by the ICA's fourth disclaimer.⁹⁷

We reached this conclusion by examining several factors: LSCA required that funds be allotted to states by a specific formula in the Act; states had to submit plans for approval before receiving the funds; states were entitled to notice and opportunity for a hearing before a plan was approved; states were entitled to judicial review of any final agency action disapproving the plan; and LSCA specifically mandated the Commissioner of Education pay amounts to states.⁹⁸

Four of the factors outlined in B-205053, Mar. 10, 1982, apply to the NEVI Formula Program. For example, IIJA prescribes a formula by which NEVI Formula Program funds are to be allocated, requires that the Secretary give notice before they withdraw or withhold funds, prescribes an opportunity for states or territories to appeal the decision, and uses language mandating the allocation of funds to states or territories.⁹⁹ Because IIJA constitutes a mandate to provide amounts appropriated for the NEVI Formula Program to the states, the amounts currently available for the program are subject to the ICA's fourth disclaimer and may not be withheld from expenditure under the ICA.

CONCLUSION

GAO's institutional role is to support the Congress, including in Congress's exercise of its constitutional power of the purse. This includes GAO's functions under the ICA, such as reviewing special messages and reporting impoundments the President has not reported. Our analysis and conclusions regarding the NEVI Formula Program help ensure compliance with the ICA and appropriations law; we do not take a position on the policy goals of the program and this is not to be interpreted as taking a position on the underlying policies entailed. Changes to these policies and priorities can be addressed through the legislative process with Congress and the Administration.

DOT violated the recording statute when it failed to record obligations for the NEVI Formula Program for FYs 2022 through 2025, when IIJA made appropriations for such FYs available for obligation. In addition, DOT's withholding of funds from

⁹⁷ B-205053, Feb. 5, 1982.

⁹⁸ See B-205053, Mar. 10, 1982.

⁹⁹ While the NEVI Formula Program also differs from the LSCA program discussed in B-205053, Mar. 10, 1982, such as by not requiring the Secretary to approve NEVI Formula Program state plans, this distinction does not affect our conclusion. Rather, it further emphasizes that even if NEVI Formula Program state plans were required to be approved by the Secretary, the program would still be covered by the ICA's fourth disclaimer.

expenditure pursuant to FHWA's memorandum constituted a deferral, as defined by the ICA, and not a programmatic delay, and because the ICA's fourth disclaimer applies to the NEVI Formula Program, DOT is not authorized under the ICA to withhold these funds from expenditure. If DOT wishes to make changes to the obligation and expenditure of funds appropriated under the NEVI Formula Program, it must propose funds for rescission or otherwise propose legislation to make changes to the law for consideration by Congress.

A handwritten signature in black ink, reading "Edda Emmanuelli Perez". The signature is written in a cursive, flowing style.

Edda Emmanuelli Perez
General Counsel