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Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Ave SE
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Re: Docket No. FHWA-2021-0004 – National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure

The American Road & Transportation Builders Association (ARTBA) respectfully offers the following comments opposing the rule proposed by the Federal Highway Administration (FHWA) July 15 that would establish a greenhouse gas (GHG) measurement system for the transportation sector.

Introduction

The proposed rule would direct state departments of transportation and metropolitan planning organizations to establish GHG emissions targets as well as a method for measuring these emissions from the transportation sector. While FHWA would not mandate the exact emissions targets, the agency would require them to decline over time. FHWA asserts these mandates should fall under the National Highway Performance Program (NHPP) performance measures, which Congress established through the 2012 "Moving Ahead for American Progress in the 21st Century" (MAP-21) surface transportation reauthorization law.

FHWA proposed a similar GHG measurement system in 2016 and adopted it in 2017. The following year, the agency repealed the rule, noting it was based on a "strained reading" of MAP-21 and the rule "did not fully consider the limitations imposed by the statute."[1] Then, as now, ARTBA agrees that imposition of a GHG measurement tool for transportation emissions is beyond the scope of FHWA's authority.

The NHPP Does Not Authorize FHWA's Proposed Rule

As in 2016, FHWA now claims statutory authority to impose a GHG measurement program under 23 U.S.C. 150 (c), which authorizes the U.S. Department of Transportation (U.S. DOT) to establish performance measures for both the Interstate Highway System (IHS) and non-Interstate National Highway System (NHS). However, through multiple surface transportation reauthorizations, Congress has chosen not to reference greenhouse gas emissions in that section of the law.

[1] 83 Fed. Reg. 24923 (May 31, 2018).

In fact, Congress has clearly enumerated the purpose and parameters for these performance measures, as follows:

> [F]or the purpose of carrying out [the National Highway Performance Program], the Secretary [of Transportation] shall establish-
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> (i) minimum standards for States to use in developing and operating bridge and pavement management systems;
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> (ii) measures for States to use to assess-
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> (I) the condition of pavements on the Interstate system;
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> (II) the condition of pavements on the National Highway System (excluding the Interstate);
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> (III) the condition of bridges on the National Highway System;
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> (IV) the performance of the Interstate System; and
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> (V) the performance of the National Highway System (excluding the Interstate System);
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> (iii) minimum levels for the condition of pavement on the Interstate System, only for the purposes of carrying out section 119(f)(1); and
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> (iv) the data elements that are necessary to collect and maintain standardized data to carry out a performance-based approach.[2]

Moreover, Congress has clearly stated the secretary "**shall… limit performance measures only to those described in this subsection**."[3] [emphasis added]

Faced with these clear congressional instructions (and limitations), FHWA has chosen to deploy an opportunistic reading of the statute in support of its proposed rule. The agency cites 23 U.S.C. 150 (b), which lists "environmental sustainability" as one of several goals for the federal-aid highway program generally. According to Congress, this objective is "[t]o enhance the performance of the transportation system while protecting and enhancing the natural environment." Note that Congress does not mention GHG emissions or measurements relating to climate change anywhere in this subsection.

[2] 23 U.S.C. 150(c)(3)
[3] 23 U.S.C. 150(c)(2)(C)

Moreover, Congress has deployed emissions-related measurements elsewhere in the law, making their absence from the enumerated NHPP performance measures even more dispositive. In the Congestion, Mitigation and Air Quality (CMAQ) program[4], Congress established parameters to assess traffic congestion and on-road mobile source emissions. The specific emissions covered by this section include nitrogen oxide, volatile organic compounds, carbon monoxide and particulate matter, but not GHGs.

In short, Congress 1.) omitted GHG emissions from a clear list of permissible performance measures, 2.) specified that U.S. DOT was only to establish performance measures from its enumerated list, and 3.) addressed aspects of emissions in another section of the law, through the CMAQ program. Collectively, these statutory realities betray FHWA's claim of authorization for its current proposal.

Congress Chose NOT to Include a GHG Monitoring Rule in the Infrastructure Investment & Jobs Act

The Infrastructure Investment & Jobs Act (IIJA) is the first surface transportation reauthorization law to include a stand-alone climate title. It features new programs to reduce GHG emissions, including authorizing a nationwide network of electric vehicle charging stations, as well as establishing a Carbon Reduction Program. However, as with its predecessors, the IIJA does not include a GHG reporting mandate.

Congress certainly considered this possibility during the legislative process that culminated in the IIJA. Earlier in 2021, the House of Representatives passed the INVEST in America Act, which included a GHG measurement program.[5] The IIJA, which originated as the Senate's version of the reauthorization bill, became law when passed by that chamber and the House, then signed by President Biden. As noted, it does not include mandated measurement of GHG in its extensive climate title. Its omission is a clear-cut expression of congressional intent.

The two reauthorization measures referenced in these comments, MAP-21 and the IIJA, as well as the "Fixing America's Surface Transportation" (FAST) Act of 2015, became law with significant support from both Republicans and Democrats. They were authentic examples of bipartisan consensus. As shown above, those agreements included affirmative decisions not to impose GHG performance measures. In the case of the current law, congressional Republicans have repeatedly expressed public concern over attempts to impose policy objectives outside the contours of the carefully-negotiated legislation. The proposed GHG mandate would fall under this description and only serve as a distraction – and point of contention with some in Congress – when all parties should be focused on delivering needed transportation infrastructure improvements to every state and community.

[4] 23 U.S.C. (c)(5)

[5] See https://transportation.house.gov/report/topic/facing-climate-change.

Additionally, FHWA cites two of President Biden's executive orders (EOs) as providing authority for its proposed rule: EO 13990, "Protecting the Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" and EO 14008, "Tackling the Climate Crisis at Home and Abroad." However, both EOs note that they shall not be "construed to impair or otherwise affect the authority granted by law to an executive department or agency or the head thereof." Thus, an EO cannot bestow FHWA the authority that Congress has denied.

The Supreme Court's *West Virginia v. EPA* Decision Undercuts FHWA's Proposal

The *West Virginia v. EPA*[6] decision, issued June 30, dealt with the U.S. Environmental Protection Agency's (EPA) ability to regulate GHG emissions from coal fired power plants. EPA directed these power plants to switch entirely from coal fired generation to cleaner methods of energy production, such as natural gas. The Court held EPA's rules had exceeded the agency's statutory authority.

The Court expressed concern with EPA's use of regulatory methods reserved for other federal agencies, namely the Department of Energy or Federal Energy Regulatory Commission. Congress, in the Court's view, did not give EPA authority to force a switch in how energy is produced. Rather, it only allowed the agency to require that generators utilize the best technology available to ensure emissions are as clean as possible. Put a different way, EPA only has the power to regulate how emissions are produced as opposed to what type of emissions are produced.

The decision directs agencies, including FHWA, not to stray beyond their congressional authority when promulgating regulations. Specifically, the Court stated in *West Virginia* that agencies "have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line."[7] Additionally, the Court also stated "the agency instead must point to clear congressional authorization for the power it claims."[8] As evidenced by ample statutory references above, FHWA's editorial proposal violates the bipartisan intent and directives of the IIJA and commits the same flaw as the EPA's GHG plan the Court nullified.

Additional Concerns with FHWA's Proposal

FHWA also relies on the Social Cost of Carbon (SCC) to quantify the benefits of its proposal. The SCC, which a group of 13 federal agencies including U.S. DOT developed in 2010, is "an estimate of the monetized damages associated with an incremental increase in carbon in any given year." ARTBA has repeatedly raised concerns about the SCC as an analytical tool, specifically over the methods used in calculating the SCC and whether it has undergone an adequate notice and comment process in prior agency rulemakings. While FHWA may disagree with these

[6] Available at https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.
[7] Id. at p. 19.
[8] Id.

concerns, it is important that such issues be fully resolved before using the SCC as justification for this proposed rule, as with any other guidance or regulation.

FHWA also sets unrealistic – or impossible – deadlines in its proposal, with states being required to establish GHG targets prior to Oct. 1. Given that the comment period does not close until Oct. 13, and comments will need to be considered before a final rule is issued, this deadline would need to be extended.

Conclusion

Congress has never authorized FHWA to mandate GHG performance measures as proposed. At the same time, the IIJA provides a once-in-a-generation investment in our nation's transportation infrastructure system. This landmark legislation also offers meaningful steps forward on both climate change and project delivery. Instead of attempting to impose a divisive policy priority with no statutory basis, FHWA should focus on achieving the IIJA's full promise.

Thank you for considering these views.

Sincerely,

David Bauer

David C. Bauer
President & CEO