

Comments of

American Highway Users Alliance
American Council of Engineering Companies
American Fuel & Petrochemicals Manufacturers
American Motorcyclist Association
American Moving and Storage Association
American Petroleum Institute
American Road and Transportation Builders
Association
American Trucking Associations
Associated Equipment Distributors
Associated General Contractors of America
Auto Care Association

Foundation for Pavement Preservation
Motor and Equipment Manufacturers Association
National Association of Manufacturers
National Automobile Dealers Association
The National Grange
National Ready Mixed Concrete Association
National Stone Sand and Gravel Association
Owner-Operator Independent Drivers Association
Service Station Dealers of America and Allied Trades
Tire Industry Association
Truck Trailer Manufacturers Association
U.S. Chamber of Commerce

to the
Federal Highway Administration
in
Docket No. FHWA-2013-0054
National Performance Management Measures;
Assessing Performance of the National Highway System, Freight Movement on the Interstate
System, and Congestion Mitigation and Air Quality Improvement Program
August 19, 2016

Our 23 associations respectfully submit these comments in response to the notice published by the Federal Highway Administration (FHWA) at 81 Federal Register 23806 *et seq.* (April 22, 2016). In this docket, FHWA has invited comment on proposed revisions and additions to 23 CFR 490, which would create new performance measurement and management regulatory requirements.

These comments focus on the potential for performance measurement and management requirements regarding greenhouse gases (GHGs). As explained below, USDOT/FHWA does not have authority to impose such requirements. Therefore, we strongly recommend that the final rule in this (or any other docket) not establish such requirements.

More specifically, while a CO₂ (GHG) performance management requirement is not included in the text of the proposed rule, the preamble to the proposed rule states that FHWA is considering inserting such a requirement into the final rule. The NPRM then asks a number of questions as to how such a requirement should be worded. See 81 Federal Register at 23830-31.

The Proposal to Promulgate a CO₂ (GHG) Performance Management Requirement Is Without Authority

FHWA lacks the authority to administer any GHG measurement and management requirement. 23 USC 150 is the statutory source of authority for performance management requirements. There, Congress provided that USDOT shall “limit performance measures only to those described in this subsection.” 23 USC 150(c)(2)(C) (emphasis added).

There is no description of a possible GHG measure in 23 USC 150(c). While the NPRM does not set forth a theory of statutory basis for FHWA’s apparent claim of statutory authority, we note for discussion purposes 23 USC 150(c)(5), which reads as follows (emphasis added):

“(5) Congestion mitigation and air quality program. -- For the purpose of carrying out section 149, the Secretary shall establish measures for States to use to assess-

- (A) traffic congestion; and
- (B) on-road mobile source emissions.”

Perhaps FHWA considered this to be its (unstated) basis for a possible GHG performance management rule. However, 23 USC 150(c)(5) is not concerned with all emissions or even all on-road emissions. It is concerned with “carrying out section 149” of title 23 U.S. Code. 23 USC 149 is concerned with mitigating pollution from specifically listed sources: CO, ozone, NOX, PM-10, and PM 2.5. GHG (CO₂) is not listed in 23 USC 149. Nor does the wording of 23 USC 149 authorize the Executive Branch to add pollutants to the list.¹

Moreover, it is truly hard to imagine how USDOT/FHWA could claim that a GHG measure is “described” in 23 USC 150.

There is no reference within 23 USC 150(c) to a GHG measure or even to a phrase that provides some authority to USDOT to designate additional matters that could be subject to measure. As noted, the only reference to “emissions” is for the purpose of carrying out 23 USC 149. Also, 23 USC 149 concerns a list of emissions that does not include GHG (CO₂).

Simply, it is neither appropriate nor justified to find that a GHG (CO₂) measure is “described” in 23 USC 150 subsection (c), a prerequisite for a performance measure under section 150.

¹ In its Federal Register notice issuing the final rule for Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning; Final Rule, FHWA and FTA stated (81 Federal Register at 34077):

“...environmental performance measures are not included in the list of performance measures that MAP-21 requires FHWA and FTA to establish. Title 23 U.S.C. 150(c)(2)(C) precludes FHWA from establishing any national performance measures outside those areas identified in 23 U.S.C. 150.”

Again, 23 U.S.C. 150(c)(2)(C) specifically precludes measures other than those “described” in 23 USC 150(c) – a narrower concept than “areas identified in” section 150 -- and there is no description of a GHG measure in the provision.

Further, Congress provided that USDOT shall “limit performance measures only to those described in this subsection.” 23 USC 150(c)(2)(C) (emphasis added). The words “limit” and “only” are not words that encourage an expansive reading of the authority provided to promulgate performance management rules. To the contrary, their use warrants a narrow reading of such authority.

Accordingly, there is no statutory authority to proceed with a GHG performance management rule, including as discussed in the NPRM at 81 Federal Register at 23830-31.

Even if Authority is Claimed for a CO₂ Requirement, It Should not be Exercised

While we have explained that FHWA lacks authority to impose a CO₂ performance management requirement as part of the highway program, even if FHWA should claim such authority, it should not exercise it.

USDOT/NHTSA already addresses the issue of GHG emissions from motor vehicles in its regulations increasing required fuel economy from on-highway vehicles.

Further, most highway programs are in the nature of system preservation (resurfacing, etc.). Failure to preserve pavement may well increase GHG emissions. As pavement gets rougher – and arguably less safe – travel speeds tend to be erratic, which can lead to increased emissions.

As to the distinct minority of projects that would provide increased motor vehicle capacity, the significant ones are generally subject to review under the National Environmental Policy Act (NEPA) through an environmental assessment (EA) or an environmental impact statement (EIS). Effective August 5, 2016, the Council on Environmental Quality (CEQ) issued final guidance to federal agencies, including USDOT, on considering GHG emissions and climate change in NEPA reviews. Specifically, CEQ issued the guidance “to provide for greater clarity and more consistency in how agencies address climate change in the environmental impact assessment process.”² According to CEQ, this guidance “is intended to help Federal agencies ensure their analysis of potential GHG emissions and effects of climate change in an EA or EIS is commensurate with the extent of the effects of the proposed action.”³ Given this recent CEQ action directed at NEPA reviews, now is certainly not the time for FHWA to promulgate an additional rule on the same topic. Such potentially overlapping regulatory initiatives can be confusing, duplicative, contrary and particularly burdensome.

In short, there are practical problems with the proposal. Some of our organizations may agree to support efforts to address mobile source emissions, including GHGs, but we still oppose this proposal. Our view is that the proposal would not result in significantly reduced GHG emissions, but would subject highway planners and engineers to new and burdensome regulations that slow projects at a time when the public wants to get the greatest possible benefit out of each transportation dollar.

² “Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Reviews” at 2 (available on CEQ website).

³ *Id.* at 3.

Any CO₂ (GHG) Performance Management Requirement Should Be Subject to a Separate Notice and Comment Period

Finally, notwithstanding the lack of authority, and even though it would be unwise and substantially duplicative of other regulations to proceed, if FHWA chooses to proceed to impose GHG performance measurement and management requirements, it should not do so in this docket. It should first issue a separate notice and opportunity to comment on a specific proposal. Only if we and others are provided the opportunity to review and comment on a specific approach to such regulation would FHWA be truly informed as to the pros and cons of specific requirements and their relative burdens.

Our organizations thank FHWA for its consideration of our comments and urge the agency to not include any requirement in its final rule related to CO₂ or other greenhouse gases as part of the new performance measurement and management regulatory requirements.
