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The Honorable Pete Buttigieg
United States Department of Transportation,
1200 New Jersey Avenue SE,
Washington, D.C. 20590
Attention: Docket No. FHWA-2021-0004; RIN 2125-AF99

Electronically Submitted via <https://www.regulations.gov>.

Re: Request for Comments on the “National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure”

Dear Secretary Buttigieg,

The American Fuel & Petrochemical Manufacturers (AFPM)¹ submits these comments on the Federal Highway Administration’s (FHWA or the agency) notice of proposed rulemaking (NPRM) on the “National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure”² (Proposed Rule). Under the Proposed Rule, FHWA is proposing to amend its regulations on the national performance management measures to reduce carbon dioxide (CO₂) emission from mobile sources and tailpipe emissions. This Proposed Rule exceeds FHWA’s delegated authority, duplicates and encroaches on other agencies’ authorities, and fails to consider material issues such as costs, consumer choice, energy security, global competitiveness, and feasibility. For these reasons, AFPM strongly recommends that FHWA withdraw the Proposed Rule.

I. FHWA’s Proposed Rule Exceeds Its Statutory Authority

- a. FHWA unreasonably proposes to define National Highway System “performance” to mean “environmental performance.”

FHWA is tasked with establishing “performance measures and standards” for the Federal highway program.³ Congress did not define “performance.” FHWA asserts “performance,” under

¹ AFPM is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM members support more than three million quality jobs, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the U.S. AFPM members are also leaders in producing lower carbon fuels, such as renewable diesel and sustainable aviation fuel. The Proposed Rule is of interest to AFPM’s members as suppliers of both conventional and renewable fuels.

² 87 Fed. Reg. 42,401 (July 15, 2022) (hereinafter Proposed Rule).

³ 23 U.S.C. § 150(c)(1).

23 U.S.C. §150 (b)(6) and 23 U.S.C. § 119,⁴ includes “environmental performance” because one of the seven national goals of the performance management system is “environmental sustainability,”⁵ i.e., “enhance[ing] the performance of the transportation system while protecting and enhancing the natural environment.”

This statutory interpretation is unreasonable and unsupported. While statutory purposes are interpretive aids, “it is no more appropriate to consider one of a statute’s purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element.”⁶ Other provisions of the statute are expressly directed toward environmental protection⁷ and therefore fulfill this statutory purpose without requiring FHWA to unreasonably interpret highway performance to mean environmental performance. The other aspects of national highway performance that Congress expressly directed FHWA to address include pavement and bridge conditions. “[A] word is known by the company it keeps,”⁸ and bridge and pavement conditions are not of the same type of highway performance metric as environmental performance. Indeed, other agencies, such as the Environmental Protection Agency (EPA), are expressly tasked with the environmental performance of motor vehicles.⁹ Congress does not hide elephants in mouseholes,¹⁰ and Congress would not have provided the transformative authority to regulate vehicles through a provision concerning highway performance. This would raise a question of major political and economic significance—and one that alters the traditional federal-state balance—requiring a clear statement from Congress.¹¹ Congress did not provide a clear statement here. Thus, FHWA is attempting to create ambiguity by using the statutory purpose of environmental sustainability in interpreting performance, which is improper.¹² It has also failed to explain why environmental performance involves curbing the number of vehicles that use fossil fuel on the interstate and non-interstate NHS.

b. FHWA lacks the statutory authority to require CO₂ emission reduction targets as a performance management requirement.

FHWA lacks the authority to administer any GHG performance measure as a performance management requirement. Moreover, Congress expressly provided that the U.S. Department of Transportation (U.S.DOT) shall “limit performance measures only to those described in this subsection,”¹³ which does not refer to GHG performance measures. The only reference to “on-road mobile source emissions” is under the congestion mitigation and air quality program

⁴ See, Proposed Rule at 42408 and 42403.

⁵ 23 U.S.C. § 150(b)(6).

⁶ *King v. Burwell*, 576 U.S. 473, 512 (2015) (Scalia, J., dissenting).

⁷ See, e.g., 23 U.S.C. § 150(c)(5).

⁸ *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 373 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

⁹ See generally, 42 U.S.C. § 7521.

¹⁰ See, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

¹¹ See generally, *West Virginia v. EPA*, 597 U.S. ___ (2022); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

¹² Cf. *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012) (“In any event, even the most formidable argument concerning the statute’s purposes could not overcome the clarity we find in the statute’s text.”).

¹³ 23 U.S.C. § 150 (c)(2)(C).

(CMAQ), where— “for the purposes of carrying out Section 149, the Secretary shall establish measures for States to use to assess- (A) traffic congestion; and (B) on-road mobile sources emissions.”¹⁴

Furthermore, 23 U.S.C. § 149 is only concerned with mitigating pollution from specifically listed sources (criteria pollutants), including carbon monoxide (CO), ozone, nitrogen oxides (NO_x), particulate matter (PM)-10 and PM 2.5—it does not list CO₂ emissions. This section further emphasizes that CMAQ funding is only for areas in nonattainment with the National Ambient Air Quality Standards (NAAQS) for the criteria pollutants. No language of the statute authorizes FHWA to mitigate CO₂ emissions from all tailpipe and mobile source emissions from all state departments of transportation (State DOTs) and Municipal Planning Organizations (MPOs) with inter-state and non-interstate highway systems, regardless of their attainment status. There is also no reason to think FHWA—even assuming its erroneous statutory interpretation of 23 U.S.C 119 and 150 to “enhance the performance of the transportation system while protecting and enhancing the natural environment” were correct—has authority to establish performance standards that go beyond EPA standards and existing CMAQ programs that are focused on ensuring states can achieve the NAAQS. This is particularly relevant, since new internal combustion vehicles (ICEVs) emit increasingly low levels of nitrous oxides (NO_x), volatile organic compounds (VOCs) and particulate matter (PM). In fact, EPA notes that, “[n]ew passenger vehicles are 98-99% cleaner for most tailpipe pollutants compared to the 1960s.”¹⁵

- c. FHWA’s claimed authority comes solely from executive orders and the Administration’s pledges to the United Nations.

FHWA further claims that its authority to promulgate the Proposed Rule comes from the Administration’s 2030 target of reducing CO₂ emissions between 50 percent to 52 percent below 2005 levels, and 2050 net-zero emissions targets under Executive Order (E.O.) 13990¹⁶ and E.O. 14008¹⁷, and the Administration’s pledges at the 2021 Leaders Summit on Climate.¹⁸ However, these executive orders and the administration’s pledges to the United Nations during the 2021 Summit cannot give the agency the statutory authority—that it lacks—to establish GHG performance requirements for federal highways. In fact, neither does the Carbon Reduction Program under the Infrastructure Investment and Jobs Act of 2021, which is cited only once in footnote 44 of the Proposed Rule.¹⁹ This program simply provides funding to states to invest in specific projects that the U.S. DOT claims will reduce GHG emissions. Moreover, the Carbon Reduction Program mandates the U.S. DOT to provide funding to states for projects to reduce transportation CO₂ emissions and for states to develop strategies to implement these U.S. DOT listed projects. However, the Carbon Reduction Program does not in any way give the FHWA the authority to impose requirements for the total reduction in CO₂ emissions or VMTs on the

¹⁴ 23 U.S.C. § 150 (c)(5).

¹⁵ See, <https://www.epa.gov/transportation-air-pollution-and-climate-change/history-reducing-air-pollution-transportation> (accessed on October 4, 2022).

¹⁶ Under [E.O. 13990](#), “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (2021)”, the Administration’s net zero targets include an economy-wide approach by 2050.

¹⁷ [E.O. 14008](#), “Tackling the Climate Crisis at Home and Abroad 2021”.

¹⁸ [Leaders Summit on Climate - United States Department of State](#).

¹⁹ See, Proposed Rule at 42418.

interstate or non-interstate highway system. The strategies under the Program are limited to the types of projects listed within the amount of appropriated funds given to each state.

II. FHWA’s Wavering as to Whether It Has the Authority to Require State DOT and MPOs to Set CO₂ Emission Targets is Arbitrary.

On July 2, 2018, the agency repealed the 2017 GHG measure and determined that it lacked the legal authority to set such a measure, that the costs outweighed the lack of demonstrated benefits, and that it duplicated other CO₂ emissions reduction initiatives.²⁰ In its Proposed Rule, FHWA is again reconsidering its legal authority, the potential costs, and the duplication of information, and has proposed adopting a GHG performance measure. FHWA claims that adopting this GHG measure is necessary “[i]n light of the Agency’s policy emphasis on using its available authorities to confront worsening climate change.”²¹ FHWA further argues that the transportation sector data released by the EPA and the Department of Energy (DOE) “lag FHWA’s publication of fuel use by up to a year.”²² However, these arguments do not justify an entirely new program under the FHWA. The Proposed Rule continues to duplicate EPA and DOT’s existing programs.²³ States and federal DOTs and the U.S. Energy Information Administration (EIA)²⁴ already have detailed data on VMTs for each type of vehicle and accurate estimates of associated emissions. In fact, the Energy Policy Act of 1992²⁵ required EIA to expand its data gathering and analysis in several areas, including energy consumption, alternative fuels and alternatively-fueled vehicles, GHG emissions, fossil fuel transportation rates and distribution patterns. As a result, states, the public, and agencies including U.S. DOT, have access to a myriad of cross-sections of state energy and emissions data, including those on transportation energy-related carbon dioxide emissions.²⁶

Further, even though the regulatory impact assessment (RIA) uses a break-even analysis and only estimates costs for a 10-year period (2021-2031) to include “\$11 million discounted at 7 percent and \$12.9 million discounted at 3 percent,” the Proposed Rule would lead to significant economic consequences for states and municipalities. These state and local bodies will find it close to impossible to meet these targets due to differing state and local vehicular miles traveled (VMTs) and CO₂ emissions. These differences include states like California, Florida, Ohio, and Texas²⁷ with daily inflows of out-of-state traffic on their highway systems, states with larger

²⁰ See, Proposed Rule at 42405.

²¹ *Id.*

²² *Id.* at 42412.

²³ EPA and DOT’s Corporate Average Economy Standards (CAFE Standards) are one example of this.

²⁴ See, [National Household Travel Survey \(ornl.gov\)](https://www.ornl.gov/) (accessed on October 4, 2022).

²⁵ P.L. 102-486, 42 USC 13385.

²⁶ U.S. Energy Information Administration. “Energy-Related CO₂ Emission Data Tables”, <https://www.eia.gov/environment/emissions/state/>

²⁷ See, <https://www.transportation.gov/briefing-room/new-fhwa-report-reveals-states-busiest-highways> (accessed on October 4, 2022).

heavy-duty truck travel such as Arkansas, West Virginia, Tennessee, and Utah²⁸, as well as states with international border access like Texas, Michigan, Arizona, and Washington.²⁹

This arbitrary back and forth on whether the agency has the authority to require CO₂ emission targets based on non-binding national targets of the Administration, causes uncertainty and unduly burdens State DOTs and MPOs.

III. The Proposed Rule Positions Certain States and Their Policies As “Winners or Losers” Based on Their Priorities Regarding Zero Emission Vehicle (ZEV) Mandates and Low-Carbon Fuel Standards (LCFS).

Congress did not authorize FHWA to encourage the adoption of vehicle technologies as a GHG mitigation measure. That specific authority is more closely related to EPA’s programs that regulate vehicle emissions. AFPM strongly recommends that FHWA should focus their existing statutory authorities and efforts on congestion reduction instead of encouraging state DOTs and MPOs to set policies that reduce the volume ICEVs on the NHS and to pick specific policy and technology “winners and losers.” These efforts could include further investments in road expansions, higher capacity expressways, and overpasses. These measures are warranted based on the higher population migrations from metropolitan areas to rural areas³⁰ and increasing demand for efficient and cost-effective modes of transportation. Moreover, low-income households that depend on low-cost ICEV transportation benefit significantly from these types of investments. After all, Congress declared that the primary purpose of the DOT and, in turn, FHWA, is to develop policies that provide “fast, safe, efficient, and convenient transportation at the lowest cost.”³¹

Further, by encouraging the use of public transportation and ZEVs the Proposed Rule fails to acknowledge consumer choice and the lack of ubiquitous public transportation infrastructure in numerous states like Kansas, Montana, Oklahoma, Indiana, Florida, and Texas.^{32,33} According to a 2019 U.S. Census Bureau study,³⁴ a majority of public transportation commuters live in one of the nation’s seven largest metropolitan areas.³⁵ This leaves the rest of the nation, especially rural smaller metropolitan areas, behind on achieving the proposed CO₂ reduction targets. Further, these targets place certain MPOs and States ahead of others based on pre-existing infrastructure investments. This particularly puts states in the South at a disadvantage with public

²⁸ See, <https://www.greencarcongress.com/2021/03/20210316-sivak.html> (accessed on October 4, 2022).

²⁹ See, <https://data.bts.gov/Research-and-Statistics/Border-Crossing-Entry-Data/keg4-3bc2/data> (accessed on October 4, 2022).

³⁰ See, <https://dailyonder.com/rural-population-bounces-back-in-2021/2022/03/28/> (accessed October 12, 2022).

³¹ Public Law 89-670, “Department of Transportation Act”, <https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg931.pdf>.

³² See, <https://www.usatoday.com/story/travel/experience/america/fifty-states/2018/12/04/americas-largest-cities-with-no-public-transportation/38628503/> (assessed on October 4, 2022).

³³ See, <https://www.motorbiscuit.com/public-transportation-is-the-worst-in-these-10-cities/> (accessed on October 12, 2022).

³⁴ Burrows, Michael, Charlynn Burd, and Brian McKenzie, “Commuting by Public Transportation in the United States: 2019” American Community Survey Reports, ACS-48, U.S. Census Bureau, Washington, DC, 2021, at 6.

³⁵ *Id.*, including, the New York Metropolitan area; Chicago, IL; San Francisco, CA; Washington D.C.; Boston, MA; Boston, MA; Los Angeles, CA; and Philadelphia, PA.

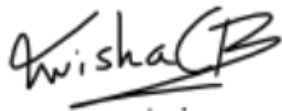
transportation use at 3.5 percent within metropolitan areas and only 0.3 percent outside of metropolitan areas.³⁶ Even where heavily subsidized public transportation is available, ridership is declining due to customer choice and safety concerns. DOT's own data shows that public transit ridership was declining consistently since 2014, and then dropped dramatically in 2020 due to the COVID-19 pandemic and has yet to recover.³⁷ It is increasingly clear that the public disfavors public transit compared to higher-valued alternatives, such as ICEVs.

Establishing this GHG performance metric is clearly intended to distribute future federal and state highway funding through a process that disproportionately rewards those states that have adopted or agreed to adopt ZEV mandates, LCFS programs, and other transportation electrification initiatives, and further disadvantages states with proportionally higher truck traffic as well as those with the nation's busiest highways such as Florida, Virginia, and Texas.³⁸ If finalized, the Proposed Rule would also establish standards that disadvantage states with lower average incomes, older average vehicles, or heavier manufacturing that requires consistent heavy-duty truck and freight transport. The Proposed Rule would also establish standards that potentially threaten the balance of imports and exports, supply chains, and, in turn, national security. These issues of central relevance to the Proposed Rule are not adequately analyzed or explained, depriving interested parties from providing informed comment.

IV. Conclusion

AFPM supports FHWA's mission and urges the Agency to operate within the confines of its authority. However, because the FHWA lacks authority to require such CO₂ emissions reductions targets from State DOTs and MPOs, and because of the broad implications this Proposed Rule will have on consumer choice and equitable mobility, AFPM recommends that FHWA withdraw this proposed rulemaking. We appreciate the considerations of these comments. If you wish to discuss these issues further, please contact me at 202-844-5475 or tbalasubramanian@afpm.org.

Sincerely,



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American Fuel & Petrochemical Manufacturers

³⁶*Id.* at 3, 4.

³⁷ U.S. DOT, Federal Transit Administration, <https://www.transit.dot.gov/ntd/annual-national-transit-summaries-and-trends>.

³⁸ See, <https://www.transportation.gov/briefing-room/new-fhwa-report-reveals-states-busiest-highways> (accessed on October 4, 2022).