

United States Senate

WASHINGTON, DC 20510

October 13, 2022

Ms. Stephanie Pollack
Deputy Administrator
Federal Highway Administration
Docket Management Facility
United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Docket No. FHWA-2021-0004

Dear Deputy Administrator Pollack,

We write to express our opposition to the Federal Highway Administration's (FHWA) Notice of Proposed Rulemaking (NPRM) on a National Performance Management Measure; Assessing Performance of the National Highway System, Greenhouse Gas (GHG) Emissions Measure, Docket No. FHWA-20210004 (hereinafter "proposal"). FHWA's proposal exceeds the agency's limited statutory authority provided by Congress. We are especially troubled by this attempted overreach given the Supreme Court's recent ruling in *West Virginia v. US Environmental Protection Agency*, 142 S. Ct. 2587 (2022), which made clear that agency actions implicating major questions require clear congressional authorization. The signatories of this letter, which include members of the Senate Committee on Environment and Public Works with oversight authority of FHWA, respectfully request FHWA withdraw the proposal.

Current law does not provide any authority to make this proposal. A regulatory action such as this one is particularly suspect when an agency suddenly discovers in statute an authority that "allow[s] it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." *Id.* at 2610. Congress debated incorporating a greenhouse gas emissions performance measure and associated targets into title 23 of the United States Code (U.S.C.) during the development of the recent five-year surface transportation reauthorization legislation. The House passed legislation that would have provided FHWA with such authority. *See* H.R. 3684 section 1403 (as engrossed in the House on July 1, 2021). The legislation that the Senate and House ultimately passed and President Biden signed into law in the Infrastructure Investment and Jobs Act (P.L. 117-58; IIA) did not. Nowhere in the IIA did Congress provide FHWA with any statutory authority to impose the performance measure or the requirement to set declining targets on state departments of transportation (DOTs) and metropolitan planning organizations (MPOs) contained in this proposal. FHWA cannot create of its own choosing the authority that Congress debated, considered, and rejected.

FHWA's attempt to create new authorities where Congress has not provided them would infringe on state DOTs' necessary flexibility to meet the surface transportation needs of their residents. FHWA's proposal is especially egregious because the agency seeks to "regulate a significant portion of the American economy" and potentially "require billions of dollars in spending" by

private persons or entities.” See *West Virginia*, 142 S. Ct. at 2621 (internal quotation omitted). If finalized, the proposal would commandeer state DOTs’ authority by forcing them to reduce vehicle emissions, likely necessitating shifts in vehicle fuel type usage and transportation modes without clear statutory authority. The proposal would also impose significant changes on the American economy and private spending as it would incentivize switching to electric vehicles, reducing vehicle miles traveled, and restructuring transportation networks.

FHWA attempts to justify the proposal based on a misguided and erroneous interpretation of section 150 and other sections in title 23, U.S.C. The 2012 surface transportation reauthorization law, the Moving Ahead for Progress in the 21st Century (MAP-21), Pub. L. 112-141, mandated a performance management approach for certain programs administered by the FHWA. Specifically, Congress established national goals and stipulated how those goals, the performance measures, and associated performance targets would be integrated into certain programs and federal transportation planning requirements. Section 150(b) sets forth the national goals of the federal-aid highway program, including “environmental sustainability,” which is defined as activities “to enhance the performance of the transportation system while protecting and enhancing the natural environment” (emphasis added). Section 150(c)(3) provides FHWA with authority to establish performance measures for conditions of pavement and bridges and performance of the Interstate System and National Highway System (NHS). The authority in 23 U.S.C. 150(c)(3) contains no reference to greenhouse gas emissions. Similarly, the National Highway Performance Program (NHPP) authorized in 23 U.S.C. 119, which FHWA tries to cite as providing authority for this proposal, does not include any discussion of environmental performance, let alone a reduction in greenhouse gas emissions.

FHWA wrongly asserts that section 150(c)(3) provides the agency with the regulatory authority necessary to pursue a GHG performance measure. The agency claims that because Congress did not define the term “performance” and because “environmental sustainability” is a national goal, FHWA has the authority to determine the nature and scope of “performance.” FHWA claims “performance” of the Interstate System and NHS under NHPP includes “environmental performance.” This interpretation of “performance” is contradicted by a plain text reading of 23 U.S.C. 150. “Performance” throughout section 150 was not intended to mean “environmental performance” which is evident by the environmental sustainability goal in section 150(b). The later part of the goal, would not be necessary if Congress intended “performance” to include “environmental performance.”

FHWA also asserts that President Biden’s Executive Orders 13990 and 14008 provide justification for the proposal and direct state DOTs and MPOs to set targets that align with those orders. Those orders can provide no further authority for FHWA to enact this proposal absent statutory authority. To tie performance measures and corresponding targets to executive orders creates long-term uncertainty for state DOTs and MPOs. Policy that is mandated in such a manner shifts with each change in administration, further demonstrating the pitfalls of attempting to enact policy absent specific congressional authorization.

Even if FHWA had authority to issue this proposal, the proposal would still be unreasonable in its execution. The proposal diverges from the construct of other performance measures established in 23 U.S.C. 150(c) by requiring state DOTs and MPOs to set declining (emphasis added) targets for greenhouse gas emissions. This requirement restricts the ability for state DOTs

and MPOs to set targets using a data-driven approach. Further hindering compliance, the proposal directs greenhouse gas emission targets to be set by October 1, 2022, before the comment period is even closed. The changes state DOTs and MPOs would need to make to achieve declining greenhouse gas emissions targets for each Transportation Performance Management four-year reporting period would take years of planning and execution.

FHWA has selected 2021 as the reference year to calculate the performance measure, making it even more difficult for state DOTs and MPOs to achieve a declining target. While we understand that 2021 was the most recent year for which data will be complete and available, the nation was still recovering from the COVID-19 pandemic at that time, which significantly impacted roadway travel. During the nationwide lockdown in 2020, there was a historic drop in light duty travel that totaled almost 355 billion vehicle miles, a reduction of over 12 percent from 2019, according to FHWA. While total vehicle miles traveled (VMT) rose in 2021 to almost pre-pandemic levels, VMT was still lower than 2019 levels and lower than what was predicted pre-pandemic. If those models stand true, and VMT gradually adjusts to predicted levels, the 2021 reference year would disadvantage all state DOTs' and MPOs' ability to achieve declining targets.

The proposal also lacks a rural state exemption, taking a one-size-fits-all approach to addressing greenhouse emissions. When Congress debated providing FHWA with the authority for a greenhouse gas performance measure, an exemption for states with certain population densities was considered. FHWA's proposal disadvantages rural states and places an unreasonable burden on them by failing to recognize the unique situation of those states. For example, one theoretical way to reduce greenhouse gas emissions in urban areas is to increase usage of alternative transportation options, such as public transit and biking. However, in rural areas, modal shifts are often not feasible and do not improve connectivity and safety in the way they might in a large urban area.

In sum, FHWA does not have the statutory authority to proceed with this proposal. The agency's actions demonstrate a complete disregard for the law and an overreach of its authority provided by Congress. Again, we request that you withdraw this proposal immediately and instead focus staff time and resources on the implementation of the IIJA as enacted by Congress.


Sincerely,




Shelley Moore Capito
Ranking Member
Environment and Public Works Committee




Kevin Cramer
United States Senator


John Barrasso, M.D.
United States Senator


Mike Braun
United States Senator


Susan M. Collins
United States Senator


Mike Crapo
United States Senator



Steve Daines
United States Senator


Deb Fischer
United States Senator


John Hoeven
United States Senator


John Boozman
United States Senator



Richard Burr
United States Senator


John Cornyn
United States Senator


Ted Cruz
United States Senator

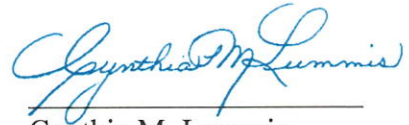

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United States Senator


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United States Senator


James M. Inhofe
United States Senator



James Lankford
United States Senator



Cynthia M. Lummis
United States Senator



Roger Marshall, M.D.
United States Senator



Lisa Murkowski
United States Senator



Rob Portman
United States Senator



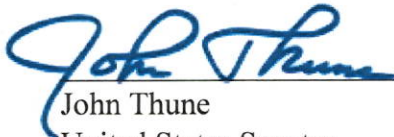
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United States Senator



Richard Shelby
United States Senator



Dan Sullivan
United States Senator



John Thune
United States Senator



Thom Tillis
United States Senator



Roger F. Wicker
United States Senator