

August 19, 2016

U.S. Department of Transportation
Docket Operations, M-30
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590

RE: Docket No. FHWA-2013-0054: National Performance Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program

On behalf of the more than 6,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer comments on the Federal Highway Administration's (FHWA) proposed rulemaking regarding National Performance Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System and Congestion Mitigation and Air Quality (CMAQ) Improvement Program.

ARTBA's membership includes private and public sector members that are integral to the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

The FHWA has developed its proposed rulemaking pursuant to 23 U.S.C. 150 (c) as required by the 2012 Moving Ahead for Progress in the 21st Century (MAP-21) surface transportation reauthorization law. The relevant portions of 23 U.S.C. 150 (c), pertaining to freight movement and the CMAQ program state:

(c) Establishment of Performance Measures.—

- (1) In general.—Not later than 18 months after the date of enactment of the MAP-21, the Secretary, in consultation with State departments of transportation, metropolitan planning organizations, and other stakeholders, shall promulgate a rulemaking that establishes performance measures and standards.
- (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.

(6) National freight movement.—The Secretary shall establish measures for States to use to assess freight movement on the Interstate System.

ARTBA commends the FHWA for its continued implementation of both MAP-21 and the 2015 “Fixing America’s Surface Transportation” (FAST) Act surface transportation reauthorization law. We recognize the unique position the agency is in having to implement overlapping surface transportation program reauthorizations. However, it is essential that FHWA and the U.S. Department of Transportation (DOT) as a whole continue to press forward and fully implement both MAP-21 and the FAST Act as expeditiously and strictly as possible.

In order to maximize U.S. DOT’s resources in implementing MAP-21, the agency should confine its efforts only to those goals specifically enumerated in the law. To do otherwise would be to stray outside of the authority Congress granted U.S DOT when it enacted MAP-21 as well as drain administrative resources which could be used to further full implementation of the measure.

Soon after the passage of MAP-21, ARTBA convened a “Trans 2020 Task Force” of industry experts and authored a series of papers outlining recommendations for MAP-21’s implementation. On the subject of performance measures, ARTBA stated in its August 28, 2013 submission to the U.S. DOT:

“Focus on the goals enumerated in the law. The authors of MAP-21 had the opportunity to include a host of external goals such as livability, reduction of transportation-related greenhouse gas emissions, reduction of reliance on foreign oil, adaptation to the effects of climate change, public health, housing, land-use patterns and air quality in the planning and performance process. Instead, Section 1203 of MAP-21 listed only one goal—environmental sustainability—that is not directly related to physical conditions and operational performance of the National Highway System. The same is true for the metropolitan and statewide planning processes laid out in Sections 1201-1202.

“Accordingly, the U.S. Department of Transportation (DOT) should focus on implementing the goals and standards as spelled out in MAP-21. While there may be stakeholders and perspectives that did not achieve their full objectives in the legislative process, we urge you to resist any recommendations to re-open the delicate compromise achieved in MAP-21 through over interpretation of the measure’s performance process. The simple fact is that few interest groups, including ARTBA, are entirely satisfied with every aspect of major legislation. That reality should in no way tarnish MAP-21’s meaningful policy reforms. Further, the common ground found during the legislative process is one of the main reasons MAP-21 was among the few significant pieces of legislation to secure broad bipartisan support during the 112th Congress.”

Unfortunately, FHWA has chosen to ignore ARTBA’s warning in this proposed rule by injecting a new policy objective that is outside the scope of MAP-21. On page 23830 of the April 22 *Federal Register*, the FHWA seeks comment on: “whether and how to establish a CO₂ emissions measure in the final rule.”

The inclusion of greenhouse gas (GHG) reduction in the proposed rule exceeds both the authority of the FHWA and the intent of MAP-21. Nowhere in MAP-21 is the FHWA (or U.S. DOT) instructed to establish any sort of a GHG measurement system. Congress had a chance to include GHG related measures in MAP-21 when it was deliberated in both the House and Senate and chose not to do so. In addition, the Office of Management and Budget released a February 9, 2012, Statement of Administration Policy during MAP-21 negotiations which did not identify GHG analysis as an administration priority or urge Congress to include such a priority.

Further, it should be noted that any sort of a GHG measurement program cannot be justified under the auspices of the CMAQ program. As stated in both 23 U.S.C. 149 (b) and FHWA's CMAQ question and answer website (available here:

<http://www.fhwa.dot.gov/fastact/factsheets/cmaqfs.cfm>), the CMAQ program only applies to areas not meeting federal Clean Air Act standards for ozone, carbon monoxide and particulate matter. As such, the CMAQ program does not convey any sort of authority to regulate or measure GHGs.

Beyond our concerns about FHWA proposing a GHG analysis that is outside its statutory mandate, ARTBA also has serious concerns with the specifics of the recommendation. First and foremost, it is extremely difficult to discern what exactly FHWA is proposing to measure. The proposal presents a wide array of possibilities, including on-road and/or off-road vehicles, tailpipe emissions and/or "upstream" emissions "from the extraction/refining of petroleum products and the emissions from power plants to provide power for electric vehicles," emission measurements based on changes in "population, economic activity, or other factors," and measurements based on "gasoline and diesel fuel sales, system use (vehicle miles travelled) or other surrogates." Simply put, the FHWA's proposal does not define what exactly it will measure and how it will measure it. It is unfair to ask the regulated community to provide specific comments on such an abstract proposal.

The vagueness of the proposal presents a variety of dangers to the regulated community. One of the bipartisan goals of MAP-21 is to expedite project delivery. FHWA's proposed GHG measurement system, however, runs counter to this goal. The proposal's lack of specifics would enable project opponents to suggest GHG measurements which would essentially preclude new transportation improvements from being built. For example, many project opponents believe in the theory of "induced demand," which essentially states that any new road capacity will "create" new motor vehicles to occupy it. In fact, the opposite is true, congestion already exists on our nation's roadways and reducing it through the addition of new transportation improvements must be a centerpiece in any strategy attempting to reduce emissions.

Additionally, any proposed measurement could attempt to hold transportation projects responsible for emissions associated with development occurring after the project is completed. Put another way, would a new road be held accountable for emissions coming from houses and/or businesses built along the road after it is complete. Again, such a measurement would be heavily speculative at best. Further, would transportation improvements be given credit for the amount of congestion reduction and resulting air quality improvements they provided? Any accurate emissions measurement system should allow for credits as well as penalties.

Establishment of a GHG emissions measurement system by DOT is redundant. On August 1, the President's Council on Environmental Quality issued guidance directing federal agencies, including the U.S. DOT to consider GHG emissions and climate change during the National Environmental Policy Act (NEPA) project review and approval process. While ARTBA has voiced concerns that CEQ's guidance will undo bipartisan progress made in the area of reducing project delay in both MAP-21 and the FAST Act, the fact remains that CEQ is already proceeding down the regulatory path DOT seeks to travel.

On a separate note, ARTBA also suggests FHWA focus on measuring congestion along the nation's freight network. Again, in 2013, ARTBA's Trans 2020 Task Force noted: "Under MAP-21, a clear federal responsibility is established for assuring that freight moves safely and efficiently by improving highway freight corridors and removing bottlenecks that impede the efficient flow of freight over the nation's highways." In the area of proposed performance measures for freight movement, the task force recommended:

"The freight performance measures required by MAP-21 provide an opportunity to strengthen the effectiveness of the National Freight Strategic Plan. While there are certainly externalities related to all types of transportation, the intent of MAP-21's freight provisions is to assure the nation's freight network is a foundation for economic growth. The freight performance measures should focus on empirical data explicitly related to the efficiency of goods movement, such as current and future congestion levels at identifiable freight choke points. The goal of the process should be achieving certain outcomes and the metrics utilized must be related to those specific objectives.

"In addition to measuring the right indicators of performance, the process must also be transparent to ensure system users have access to the best information available about the nation's freight network. Full disclosure of this management process can also serve to help demonstrate to the American people the value of federal transportation infrastructure investments. Unfortunately, the lack of information about how federal funds are utilized and the resulting benefits make it difficult to show policy makers and the general public why these programs deserve their support. A fully transparent freight management process would help rectify this situation."

As in 2013, ARTBA asks that FHWA focus on transparency as they develop performance management measures for freight movement.

While the Obama Administration has adopted a clear policy of proposing regulations to circumvent gridlock in Congress, that narrative cannot be applied to the GHG proposal. The simple fact is that both MAP-21 and the FAST Act were approved with broad bipartisan majorities in the House and Senate. Furthermore, there is no record of the Administration asking Congress to include GHG measurements in either law's performance management process. As such, it is hard to see this proposal as anything other than a maneuver to achieve a policy objective the Administration failed to initiate during the MAP-21 and FAST Act deliberations.

In conclusion, rather than attempting to force an Administration priority into a carefully balanced and meaningful compromise between congressional Republicans and Democrats, ARTBA urges FHWA to withdraw the portions of the proposed rule dealing with establishing a GHG

measurement system. Further, if such authority is given to DOT, a separate proposal should be released only after extensive participation by the regulated community.

Sincerely,

A handwritten signature in black ink that reads "T. Peter Ruane". The signature is written in a cursive style with a large, stylized initial "T".

T. Peter Ruane
President & C.E.O