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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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August 17, 2016

Gregory G. Nadeau, Administrator  
Federal Highway Administration  
United States Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

RE: Docket ID. FHWA-2013-0054

Dear Administrator Nadeau,

We write to you today to express our concerns regarding the Federal Highway Administration's (FHWA) Proposed Rule: 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 (Docket ID FHWA-2013-0054), published in the Federal Register on April 22, 2016 (NPRM).

In 2012, Congress enacted bipartisan highway program legislation, Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21; P.L. 112-141). This legislation includes section 1203 (codified at 23 U.S.C. 150), entitled National Goals and Performance Management Measures. In order to improve the management of the Federal-aid highway program, subsection (c) of this carefully crafted section identifies specific performance measures and gives the FHWA the authority to promulgate regulations to implement those measures only. In fact, in an abundance of caution, Congress carefully prescribed the scope of FHWA's rulemaking authority by specifying that the rulemaking "limit performance measures only to those described in this subsection." 23 U.S.C. 150(c). The performance measures described in subsection (c) are standards for bridge and pavement management systems, measures to assess the condition of pavement and bridges, measures to assess the performance of highways, measures to assess highway safety including serious injuries and fatalities, measures to assess implementation of the congestion mitigation and air quality (CMAQ) program under 23 U.S.C. 149, by assessing traffic congestion and on-road mobile source emissions, and measures to assess freight movement.

The performance measures specified in section 150(c) are extremely important to improving the management of the highway program and will take significant resources to assess and address. However, rather than implementing the law passed by Congress, in the NPRM FHWA is proposing to divert attention and resources away from highway and bridge conditions, performance, safety, and attainment of national ambient air quality standards by proposing to

adopt a greenhouse gas (GHG) performance measure. The NPRM requests comment on whether and how to establish GHG (CO<sub>2</sub>) emissions measure in the final rule.

FHWA has no authority to establish a GHG measure. FHWA's authority to establish performance measures is limited to those specifically listed in 23 U.S.C 150(c). No GHG measure is listed. Furthermore, a GHG measure is not related to any of the listed measures. The only performance measure related to air quality is directly tied to the implementation of the CMAQ program and the CMAQ program is limited to programs or projects to help achieve or maintain ozone, carbon monoxide, or particulate matter national ambient air quality standards. GHGs are not listed in section 149 and, just as FHWA has no authority to expand the performance measures listed under 23 U.S.C. 150(c), FHWA has no authority to expand the scope of the CMAQ program under 23 U.S.C. 149.

In fact, FHWA has already conceded that it lacks the authority to implement its GHG proposal. The Federal Register notice fails to set forth any basis for statutory authority for FHWA to establish a GHG performance measure. Further, in the recently released final rule for Statewide and Nonmetropolitan Transportation Planning, FHWA and the Federal Transit Administration (FTA) affirmed that Congress did not give the agencies omnibus authority to establish environmental performance measures. In response to a comment suggesting that FHWA and FTA adopt such performance measures, the agencies stated: "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." 81 Fed. Reg. 34,050, 34,077 (May 27, 2016).

Given this admission, we are surprised and concerned that FHWA would consider adopting a GHG performance measure. If adopted in a final rule, challenges to this measure will distract FHWA from implementing the measures specified by Congress and will divert scarce state and local resources away from managing the safety of our highways and bridges and the other program areas listed by Congress to pursue this Administration's unlawful and extremist climate agenda.


In order to effectively improve the performance of our Federal-aid highway program and provide a means to the most efficient investment of Federal transportation funds, FHWA must implement section 1203 of MAP-21, as enacted by Congress and forego inclusion of an unauthorized GHG performance measure.

Sincerely,



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James M. Inhofe  
Chairman  
Environment and Public Works



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Jeff Sessions  
United States Senator

*Shelley Moore Capito*

Shelley Moore Capito  
United States Senator

*John Barrasso*

John Barrasso  
United States Senator

*Deb Fischer*

Deb Fischer  
United States Senator

*John Boozman*

John Boozman  
United States Senator