Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration (FHWA)
in Docket No. FHWA-2021-0004
National Performance Management Measures;
Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure
Notice of Proposed Rulemaking
October 9, 2022

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming ("we" or "our") respectfully submit these joint comments on the Notice of Proposed Rulemaking in this docket, published by the Federal Highway Administration (FHWA) at 87 Federal Register 42401 (July 15, 2022) ("NPRM").

Introduction and Overview.

We oppose the proposal and recommend that it be withdrawn. However, should FHWA proceed to adopt a rule in this docket, we offer important suggestions to improve it.

We also emphasize at the outset that these comments concern the specific rule proposed in this docket. These are not general comments on broad environmental issues. We are working towards a better environment and doing our part. However, we oppose this proposed rule.

The proposed rule would require State Departments of Transportation (DOTs) and Metropolitan Planning Organizations (MPOs) to establish targets for greenhouse gas (GHG) emissions from on-road mobile sources, specifically tailpipe CO2 emissions, on the National Highway System (NHS). Under the proposal, the targets not only would have to be declining targets (i.e., calling for reduced levels of tailpipe CO2 emissions from a reference year, using a metric defined by FHWA in the proposed rule), but "demonstrate reductions toward net-zero targets." The proposal in the NPRM would use as the reference year 2021, a year when economic and transportation activity was held down by the COVID virus, rather than this year or a later year. FHWA signals in the NPRM that penalties could be imposed on States that do not implement the rule per FHWA requirements.

Our key points include the following –

- FHWA lacks the authority to promulgate this rule, and that conclusion was reached by the previous Administration.
- Should FHWA in any event proceed to promulgate a performance measurement and management rule regarding GHG emissions, we would still oppose the rule unless amended to clearly establish that only States (and, to the extent applicable, MPOs) have the authority to set the emissions targets, whether declining, unchanged, or even increasing (such as due to economic growth). Further, if adopted, the rule should be revised to specify that no penalties may be imposed for not meeting a target.

- We strongly disagree with the proposed use of calendar 2021 as the reference or baseline year for measuring tailpipe CO_2 emissions and setting targets, as 2021 tailpipe CO_2 emissions levels were reduced due to the COVID pandemic.
- We also disagree generally with the approach of the rule as States, particularly very rural States such as ours, have little ability to influence tailpipe CO_2emissions for multiple reasons. Among them, some States have restrictions on the use of State highway funds, requiring them to be used exclusively for maintenance, construction and supervision of highways and bridges.
- In his September 14 appearance before the Senate Environment and Public Works Committee, the nominee for FHWA Administrator, Shailen Bhatt, indicated general recognition that sometimes one size does not fit all. The proposed rule would be greatly improved by exemptions for very rural States (which have few if any options for actions to reduce tailpipe CO_2 emissions) and for rural very low-income States (which are hard pressed to use scarce dollars on any but the State's highest priority transportation investments).

Before discussing those and other points, we note some background.

On January 18, 2017, FHWA published a final rule that, among other things, established a performance measure on the percentage change in CO_2 emissions from 2017 (as a reference year) generated by on-road mobile sources on the NHS, as well as related requirements that States establish and meet targets relative to that GHG measure. 82 Federal Register 5970. Early in the last Administration, FHWA published a proposed rule to repeal those GHG performance measurement and management requirements. 82 Federal Register 46427 (October 5, 2017). On May 31, 2018 the last Administration did adopt a rule that repealed the January 18, 2017 rule, and found that the 2017 rule was beyond FHWA's statutory authority[1] while also identifying policy concerns with the rule that it repealed. 83 Federal Register at 24920. The proposal in this docket would, in essence, reinstitute the problematic CO_2 performance measurement and management rule that the previous Administration repealed but make it more problematic by greatly undermining State authority to set targets -- by requiring States to set declining (toward net-zero) targets for on-road CO_2 emissions on the NHS.

The GHG Performance Management Requirement is Without Statutory Authority.

In the statutory provision authorizing performance measurement and management, 23 USC 150, paragraph 23 USC 150(c)(2) states that USDOT shall "limit performance measures only to those described in this subsection." (Emphasis supplied).

There is no express mention of a GHG or CO_2 performance measure in 23 USC 150(c). Nor is there other language in the subsection that "describes" a GHG measure.

[1] FHWA wrote in 2018: "… there is no explicit reference to a GHG measure in 23 U.S.C. 150(c). Thus, adoption of a GHG measure rested entirely on FHWA's discretion to interpret 23 U.S.C. 150(c). As discussed in the legal authority section in Section IV.B.1, FHWA has concluded, upon reconsideration, that the better reading of the statute does not encompass the GHG measure." 83 Federal Register at 24932.

There is, however, express direction to USDOT by Congress to establish measures to "assess … on-road mobile source emissions" in 23 USC 150(c)(5) "for the purpose of carrying out [23 USC] section 149." 23 USC 149 authorizes the Congestion Mitigation and Air Quality (CMAQ) program, an element of the Federal highway program. The CMAQ program concerns actions with respect to a specific list of pollutants that does not include GHG (CO2). So, while Congress acted in paragraph 150(c)(5) to require establishment of performance measures for some on-road mobile emissions, that section is not a basis of authority for a GHG performance measurement and management requirement.

In any event, under both the pending NPRM and the rule developed two Administrations ago (and subsequently repealed), FHWA advises that the basis for the tailpipe CO2 emissions performance measurement and management requirement was not 23 USC 150(c)(5), but 23 USC 150(c)(3). See NPRM at 87 Federal Register 42407 and 82 Federal Register at 46431 (2017).

There is nothing in 23 USC 150(c)(3), either, that could fairly be considered to have "described" a GHG performance measurement and management system for GHG (CO2). The words "greenhouse gas," "GHG," "CO2," "carbon dioxide," and "emissions" do not appear in the provision. Nor is there a sentence or phrase in paragraph (c)(3) describing a GHG performance measure or regulation.

23 USC 150(c)(3), claimed as the statutory basis for the proposed rule, concerns establishing certain listed standards "for the purpose of carrying out section 119 [of title 23]." Similarly, the words "greenhouse gas," "GHG," "CO2," "carbon dioxide," and "emissions" do not appear in 23 USC 119. To the extent that FHWA's interpretation is that a GHG measure is authorized by the very general reference in paragraph (c)(3) to measures for the "performance" of the Interstate System and the rest of the NHS, the interpretation is far removed from either a description specifically listing GHG as a topic for performance measurement and management or a less specific statement that would "describe" GHG as a permissible subject of a performance measure.

FHWA then tries to overcome the lack of a description in "subsection" 150(c), by referring to general national goals for the highway program set forth in 23 USC 150(b). But while Congress made clear in statute that authorization for a performance measure requires that the measure be "described in this subsection" (referring to subsection (c)), subsection (b), relied on by FHWA to supply the description that does not appear in subsection (c), in any event does not contain any reference to GHG or CO2 measures. So, FHWA notes that "environmental sustainability" is a goal in subsection (b) and, from that, concludes that means that the reference to "performance" in subsection (c)(3) meets the test of a tailpipe CO2 emissions reduction measure being described in subsection 150(c). Under such an approach 23 USC 150(c)(3) would appear to be a source of vast authority for regulation, whether of CO2 emissions or other factors not described in its text. This is contrary to the clear directive in 23 USC 150(c)(2) that USDOT shall "limit performance measures only to those described in this subsection." (Emphasis supplied).

And interpretations of subsection (b) are readily available that do not obliterate the requirement that a performance measure be described in subsection (c). Implementing paragraph (c)(5), for example, to assess on road mobile sources for the purposes of the CMAQ program, is consistent

with the "environmental sustainability" goal of subsection (b). The goals subsection is not a directive to rewrite subsection (c).

Further, a general rule in aid of statutory construction is that "the specific governs the general." See Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992). Within 23 USC 150(c), paragraph (5) is the provision concerned with "on-road mobile source emissions" and congestion. Rather than respect that Congress had specifically addressed performance measures for emissions in paragraph (c)(5), the NPRM concludes that a very general reference to "performance" plus language not in subsection 150(c) is sufficient to justify measures regarding emissions (GHG) that are beyond the scope of paragraph (c)(5). The more logical approach, consistent with statutory construction rules, would be to conclude that, within subsection 150(c), Congress expressly stated how to address emissions in paragraph 150(c)(5) and that, particularly given the absence of any other "description" in subsection 150(c) of emissions regulation, the rest of subsection 150(c) -- including paragraph (c)(3) -- did not provide other authority to regulate emissions, including CO2 emissions.

In addition, importantly, an interpretation that results in regulatory power in USDOT to expand the set of performance measures is contrary to, not merely in addition to, other words that Congress included in 23 USC 150(c). As noted, in subsection 150(c) Congress stated that FHWA shall "limit performance measures only to those described in this subsection." 23 USC 150(c)(2)(C) (emphasis added).

Those are four words of limitation in one sentence! And they must be given weight. The words "limit" and "only" do not allow, much less encourage an expansive reading of the authority provided to promulgate performance management rules. They direct a limited, narrow reading of measures authorized by subsection 150(c). Nor does any word or phrase in subsection 150(c) "describe" a GHG performance measure. FHWA went looking in subsection (b) for a description while Congress specified the text of subsection (c) as the frame of reference, not the full statute or any other subsection.

Congress' reference to the subject of performance measures being "described" in subsection 150(c) cannot be treated as surplusage or as without meaning. In short, a GHG (CO2) measure is **not** "described" in 23 USC 150 subsection (c), either in paragraph (3) or elsewhere, which is a prerequisite for a performance measure under section 150.

The legislative history of 23 USC 150 supports the conclusion that the proposed rule is not authorized. The section was enacted as part of "MAP-21," Pub. L. No. 112-141 (2012). The Conference Report for MAP-21 described 23 USC 150, which has not been substantively modified since enactment, as follows:

> "Performance measures
>
> "The nation's surface transportation programs have not provided sufficient accountability for how tax dollars are being spent on transportation projects and would benefit from a greater focus on key national priorities. The conference report focuses the highway program on key outcomes, such as reducing fatalities, improving road and bridge

> conditions, reducing congestion, increasing system reliability, and improving freight movement and economic vitality."

H. Conf. Rep. No. 112-557, to accompany H.R. 4378, at 598 (2012).

While the conference report does say that the listed "key outcomes" from the performance measures program are "such as," it is conspicuous that there is no suggestion whatsoever of a GHG performance measure with targets to reduce CO2 emissions. Conference report language has always been viewed as critically important legislative history and the conference report language describing the performance measures the Congress authorized is fully consistent with the lack of authorization for a GHG performance measure. Simply, the Conference Report on what became MAP-21 was the opportunity for the Congress to explain what measures were "described" in subsection 150(c) and nothing resembling a GHG or CO2 performance measure was described.

For at least all of the above reasons, FHWA should not adopt the proposed rule. It is beyond the agency's authority as it does not meet the essential statutory test of setting forth a performance measure "described" in 23 USC 150(c).

Even if one were to believe there is arguably authority for the proposed rule, the Supreme Court recently reaffirmed that there must be "clear" authority for promulgation of a rule on a "major question." The proposal to regulate States to reduce GHG emissions would represent a major change in a major program, the highway program, without clear authority; so, there is not authority for the proposed rule.

In West Virginia v. EPA, 597 U.S. ___ (2022), 142 S. Ct. 2587, the Court recently applied the "major questions doctrine" to its review of a rule promulgated by the U. S. Environmental Protection Agency (EPA). The Court explained that an agency must point to "clear congressional authorization"[2] for the authority it claims in cases where the "breadth" of the authority claimed and the "economic and political significance" of the asserted authority provide "reason to hesitate before concluding that Congress meant to confer such authority." Id. (slip opinion) at 17 (quotation marks and citations omitted).

Under the proposed rule, FHWA would be able to influence the selection of projects by States that rely on formula funds that Congress requires FHWA to distribute to the States. This would be a major change from today's norm, where formula funds are distributed to States, with States selecting projects to execute with those funds pursuant to parameters set forth by Congress. If the proposed rule were adopted, a State would be faced with pressure to select projects based on whether they would help the State achieve a "declining target" for CO2 emissions – or face potential penalties.[3]

[2] Id. (slip opinion) at 19 (quotations and citations omitted).

[3] While the proposed rule itself does not propose penalty authority or levels, both the NPRM and the Economic Assessment for the proposed rule volunteer that FHWA has penalty authority elsewhere that could be applied. See NPRM at n.39, 87 Federal Register 42415, and the Economic Assessment at 9.

In the FHWA's draft "Summary Report – Economic Assessment for Greenhouse Gas Performance Measure," June 2022 ("Economic Assessment," available in the docket for the NPRM), FHWA states "it is not possible to conclude with any degree of certainty whether and how the [proposed] GHG measure might cause State DOTs and MPOs to make transportation investment and operations decisions that they otherwise would not have made." Id. at 6.

Later on, the Economic Assessment acknowledges that "the rule may result in some offsetting loss of benefits from investment projects that would no longer be pursued, if funds are shifted towards other projects as a result of the rule." Id. at 29.

We are concerned that FHWA's Economic Assessment understates the consequences and the considerable pressure that a State could face under the proposed rule. In particular, all States strive to achieve economic growth and, historically, that is associated with an increase in vehicle miles traveled, which tends to generate increased CO2 emissions. To achieve a reduction in CO2 emissions during hoped-for long periods of substantial economic growth will be challenging at best, particularly in States where electric vehicle deployment may be slow.

Further, in rural States per person vehicle miles traveled (VMT) are generally higher than average, we suggest due to absence of congestion. Relatively dispersed populations in rural States have to travel longer distances to and from destinations for basic needs such as shopping and health services. Also contributing to high VMT per person in rural States are the long distances agricultural products and natural resources travel from rural points of origin on their way to national and world markets.

FHWA provides in the proposed rule that a State must meet a "declining" target for CO2 tailpipe emissions (measured against the baseline for that State under the particular way that FHWA would calculate CO2 emissions under the proposed rule). The proposed rule goes even further, specifying that the declining target must "demonstrate reductions toward net-zero targets." Proposed 23 CFR 490.105€ (10), NPRM at 42419-20. Thus, it appears foreseeable that FHWA could, under this proposed rule, pressure States that fail to hit aggressive targets for tailpipe CO2 emissions reduction to adjust the mix of projects selected for action with the State's limited Federal formula funds – or face penalties, perhaps including non-approval of projects selected by the State that otherwise would be approved.

We also believe FHWA has significantly underestimated the costs of implementing this major rulemaking in terms of time and resources and opportunity costs associated with implementation of the rule. States may well be discouraged from making investments that they prefer in order to pursue projects to achieve "declining" tailpipe CO2 emissions. The benefits of such other projects are important – such as safety, connectivity and efficiency – and the proposed rule appears likely to discourage or delay at least some other projects and their benefits.[4]

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[4] See pages 8-10, infra, for additional discussion of reasons why the proposed rule would have a major impact on the ability of States to function under the Federal highway program. Those reasons apply not only to the appropriateness of invoking the major questions doctrine, but the inappropriateness of the proposed rule's unprecedented limitations on the authority of States to set targets with respect to a performance measure and the overall inappropriateness of applying the rule to rural States. See also discussion at page 6, infra, where the Economic Assessment for the NPRM recognizes that the impact on project selection by States would result in the loss of benefits from projects that are delayed or canceled due to the proposed rule.

In addition, since Congress authorized the Interstate Highway System in 1956, the Federal highway program has given considerable emphasis to major arterial roads. Those are the Interstate System highways and other highways on the National Highway System that tie the country together and enable long distance movement of people and freight. The proposed rule would have a State focus its tailpipe CO_2 emissions reduction efforts on Interstate System and NHS roads, the roads that carry the overwhelming majority of through interstate traffic, even though transferring highway funds to transit projects will not reduce through interstate traffic, but at most only some local traffic that uses NHS routes.

Moreover, rural States are at a disadvantage under the proposed rule in pursuing targeted reductions of CO_2 emissions due to the absence of congestion. The calculations under the proposed rule for estimating CO_2 emissions is purely a function of relationship of NHS to non-NHS VMT and fuel consumption (to which an emissions factor is applied). In densely populated States where there is congestion, there may well be opportunities to reduce CO_2 emissions through transit investment. However, absent congestion, the opportunity in rural States to reduce VMT or fuel consumption is extremely limited.

Further, and importantly with respect to the principles of West Virginia v. EPA, authorization for a GHG performance measure was debated and not included in 2021's Infrastructure Investment and Jobs Act (IIJA), H.R. 3684, enacted as Pub. L. No. 117-58, or in 2022's budget reconciliation legislation, known as the Inflation Reduction Act, H.R. 5376, enacted as Pub. L. No. 117-169. The House of Representatives passed H.R. 3684 on July 1, 2021. Express authority for GHG performance measures and targets was set forth in section 1403, but not agreed to by the Senate and not included in the law.[5] Additionally, the House passed budget reconciliation legislation, H.R. 5376, on November 19, 2021; section 110002 of that bill included express authority for GHG performance measures and targets. Again, such authority was not agreed to by the Senate and not included in the law.

Instead, Congress addressed greenhouse gas in other ways, enacting in IIJA new programs with funding, for example, a carbon reduction program ($6.4 billion over 5 years) and investments in charging stations for electric vehicles (over 5 years $5 billion in formula funds and $2.5 billion in discretionary funds). Yet, FHWA claims authority from the 2012 legislation (MAP-21) that created the FHWA performance management program, and that legislation does not include any of the specific language that proponents of a GHG performance measurement and management system so recently sought to enact.

This is extraordinarily similar to the fact pattern before the Court in West Virginia v. EPA. There, the Court noted that Congress had considered and rejected the type of system of power plant regulation that EPA nonetheless promulgated and was before the Court. See West Virginia v. EPA, slip opinion at 27-30. The Court concluded that the Congressional rejection of the regulatory scheme that EPA proceeded to promulgate was an indication that EPA must point to "clear congressional authorization to regulate in that manner." Id. at 28 (quotation marks and citations omitted).

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[5] In addition, at least one amendment was filed during Senate floor consideration of the bill that would have established a GHG performance measure, but it did not receive floor action. S. Amendment 2465, Sen. Cardin, Cong. Rec., August 3, 2021 (daily ed. at 5786).

We set forth above numerous reasons why the proposed rule is not authorized. Those same reasons also contribute to a conclusion, if needed, that the proposed rule is not grounded in "clear" authorization.

Further, as noted above (page 2, infra) the prior Administration closely considered the question of whether FHWA has authority for the proposed GHG performance measure rule and concluded that it does not. For the purposes of the major questions doctrine, the prior Administration's view that there is not authority for the proposed rule is a very strong indication that there is not the requisite "clear" statutory authority for such a major change in policy for the highway program.

Accordingly, in addition to other reasons advanced herein, FHWA should not adopt the proposed rule because it is not authorized under the major questions doctrine.

Should FHWA adopt a rule in this docket, it should first modify the proposed rule in important ways.

If FHWA nonetheless decides to impose tailpipe CO2 emissions performance measurement and management requirements, that does not mean that it should do so as it proposes, as discussed below.

Target Setting Must be Reserved Solely to States, particularly as it is Challenging at Best for a State to Directly Impact Tailpipe CO2 Emissions.

The performance measurement statute is clear that it is a "State" that sets targets for performance, not FHWA. 23 USC 150(d) provides –

> "…after the Secretary has promulgated the final rulemaking under subsection (c), **each State** shall set performance targets that reflect the measures identified …" (emphasis supplied).

Under the proposed rule, however, FHWA specifies that the targets must be "declining targets for reducing tailpipe CO2 emissions on the NHS, that demonstrate reductions toward net zero targets." Proposed 23 CFR 490.105(e)(10). 87 Federal Register 42419-20.

This proposal effectively leaves a State (or, as applicable, an MPO) with very little choice in setting targets; FHWA is really setting the targets.

FHWA's rulemaking approach stands in contrast to performance measurement and target setting under a program of grants to States administered by a different USDOT agency, the National Highway Traffic Safety Administration. In Section 24102 of the IIJA, Congress amended aspects of performance measurement and targeting for the purposes of NHTSA programs of grants to States, effective with fiscal year 2024.

Section 24102 struck a reference in statute to States setting ‘‘annual performance targets’’ and inserted instead ‘‘performance targets that demonstrate constant or improved performance’’. 135 STAT 789.

So, when Congress wanted to require States to set targets for constant or improved performance, and not allow targets for declining performance, it knew how to do so. It did not do that for FHWA performance measurement under 23 USC 150. Yet, FHWA asserts in this NPRM authority to require declining CO2 emissions (improved GHG performance) and further greatly narrow the State's discretion by specifying that the State's targets must demonstrate progress towards "net zero." This is contrary to the straightforward statutory language that "each State shall set performance targets."

The top-down approach to target setting proposed in the NPRM also greatly impinges on the ability of a State to take into account, in target setting for the State, any State specific circumstances. What if the State is experiencing significant population growth? Significant economic growth? Both? What if, as is the case for many States, there are State constitutional restrictions on the use of highway revenues for non-highway purposes, limiting the prospects of using highway funding for a transit investment?

In addition, in States like ours, residents drive longer than average distances for basic goods and services, often in challenging weather. Cold weather and high elevation adversely impact the effectiveness of at least some electric vehicles (EVs). In our States, cold weather and high elevation may discourage purchases of electric vehicles (EVs). State target setting could take that into account. These and other factors can receive at most marginal weight under the proposed rule because FHWA has dictated the general nature of the target that must be set.

Moreover, the NPRM does not appear to recognize the potential dislocation to State transportation programs from the rule. Today, most highway projects advanced by State DOTs are in the nature of system preservation (resurfacing, etc.). Such projects do not add capacity or induce any demand; nor does a decision to not undertake resurfacing result in any meaningful shift of mobility to transit or walking from passenger cars. Moreover, failure to preserve pavement may well increase GHG emissions as rough pavement tends to reduce travel speeds (increasing per trip emissions). For such reasons, it is speculative and not demonstrated that States have the ability to effect meaningful change in GHG emissions through stewardship of the highway program. The GHG rule effectively looks for GHG reductions from a largely preservation-oriented highway program, where they are not available to be had. So, the rule would place pressure on a State to change the mix of projects, for speculative if any benefit.

We also note that, under another statutory regime, USDOT, through NHTSA, addresses the fuel economy of various vehicles. Vehicles (excluding EVs) and fleets of them regulated by NHTSA do produce direct CO2 emissions when operating, while States and others that own and operate the roads are not emitters in their capacity as owners or operators. Further, the three main components of the proposed GHG emissions performance metric are fuel sales, fuel efficiency factors, and vehicle miles traveled. State DOTs are generally non-regulatory agencies and have limited ability to change those variables.

As a result, a requirement to reduce CO2 emissions, imposed on States, would place pressure on States to adjust project selection. That will represent a major change in the nature of the program of Federal assistance to States for highways, where State authority and flexibility to prioritize projects has been a bedrock principle.

For the reasons set forth above, if a rule is promulgated in this docket, proposed 23 CFR 490.105(e)(10) must be revised to delete both the specification that targets must be "declining" and the specification that targets must "demonstrate reductions toward net-zero targets." The revision must not include any other specification as to what the target must do. Instead, the final rule must expressly establish that "only" the State (or if applicable, an MPO) sets targets and must also expressly allow a "State" the authority to set targets for the measure, in this case tailpipe CO2 emissions on the NHS, "whether constant, declining, or increasing."

States Face Great Difficulty in Efforts to Impact CO2 Emissions Levels; That Difficulty is Particularly Acute for Certain Rural States, Which Should be Exempted from the Requirements of the Proposed Rule.

Rural States may face particular challenges and program distortions under the rule as it is hard for States to influence the factors that form the proposed measurement metric, such as level of VMT, or fleet fuel economy. A review of the January 18, 2017, Federal Register notice that promulgated the GHG measurement and management rule as a final rule offers ideas from that time period by FHWA as to how States might influence a decrease in GHG emissions. See 82 Federal Register at 5997. Many of those ideas -- congestion pricing, road pricing, ramp metering, increased coordination with transit and non-motorized improvements, paying fees to scrap low mileage heavy duty vehicles – may be options for heavily populated metropolitan areas. The current NPRM notes the possibility that transit investment could help reduce CO2. NPRM at 42410. But these and similar actions are not well suited to rural settings, where residents drive relatively long distances, often in heavy duty vehicles required for business or agriculture and able to maneuver effectively in inclement weather and through altitude changes. Further, low population densities greatly limit, if not eliminate good transit options for investment. Further, Congress, in the IIJA already greatly increased transit program funding levels.

In any event the transit example noted in the NPRM is really geared to denser populations. FHWA states:

> For instance, the construction of a new grade-separated transit facility has the potential to reduce travel on neighboring roadways, which in turn would reduce congestion, improve safety, and reduce criteria pollutant emissions in addition to reducing on-road GHG emissions. NPRM at 42410.

A "grade-separated transit facility" is a high-volume transit facility, not a bus operating on a route in mixed traffic with passenger cars. So, as was the case in the Federal Register notice of January 18, 2017, references to transit in a Federal Register notice concerning a tailpipe CO2 emissions performance measure do not speak to an option likely to be available in the setting of a rural State.

Accordingly, if FHWA should proceed to adopt a final rule in this docket, that final rule should

> Be expressly inapplicable to very rural States, we would define them as having a population per square mile of land area of 30 or fewer, and other States with population density below the national average that are also among the five lowest per capita income States. These States may not be as rural but, with low per capita income, are especially pressed to focus their highway and transportation funds on the highest priority transportation projects.

Should a rule be promulgated, such limited (but highly meritorious) exemptions would still include within the rule the vast majority of States and an even higher proportion of the population.

No Penalties.

As noted above at note 4, FHWA has stated that it could use other rules as a basis for imposing penalties on States that do not meet the declining targets largely dictated by FHWA. Imposition of penalties would be, to our knowledge, contrary to practice under the performance management program. To date, when a State does not meet a target that it has set (for a measure adopted by FHWA), the result is consultation with FHWA and new target setting and efforts to meet the new target. Let us be clear, while not a penalty, such "consultation" gives FHWA an opportunity to press States, including to adjust the State's program of projects in pursuit of reduced CO2 emissions. The voluntary mention by FHWA of the possibility of penalties injects much more pressure for States into any such consultations. Further, penalties are particularly inappropriate as applied to this proposed rule because, as explained above, States have little opportunity to take actions that can impact the measurements.

Accordingly, if the proposed rule is to be finalized at all, a new section should be added to part 490 to specify that that "no penalty may be imposed for failure to meet a target [under the tailpipe GHG/CO2 emissions performance measure]."

The Proposed Use of Calendar Year 2021 as the Reference Year for Measurement under the Proposed Rule Should be Changed to 2022 or an Even Later Year.

It is axiomatic that a rule intended to spur States to reduce CO2 tailpipe emissions must have a reference year against which future emissions levels will be measured, to see if there is a reduction or other change. The proposed rule would use calendar 2021 as the reference year as, per FHWA, it is the most recent year for which FHWA will have data. See NPRM at 42415.

2021, however, was a year when economic and transportation activity was held down by the COVID virus and response to it, even though we now approach the end of 2022, a year expected to reflect an increase in VMT compared to 2021. Thus, from the outset, the proposed rule would make it even more difficult for States to achieve a declining target.

In contrast, this was not an issue under the rule promulgated on January 18, 2017, two Administrations ago. That rule set 2017, not an earlier year, as the baseline year. 82 Federal Register 5970. In that proposal, FHWA, consciously or not, recognized the inappropriateness of using, as a reference year, a year with lower emissions than the then current year.

In short, if there is a final rule in this docket, the reference year should not be 2021 or any other year that represents an unusually low level of VMT (and therefore of tailpipe CO2 emissions) but 2022 or an even later year.

No Retroactive Requirements.

The NPRM is clear that the comment deadline on the proposal is October 13, 2022. Yet the proposed revisions to 23 CFR 490.105 and 490.107 would establish an October 1, 2022 "reporting date" for information as to the proposed GHG rule, including targets. NPRM at 42412 and 42419. This proposed retroactive provision is perhaps inadvertent and clearly untenable.

If there is to be a final rule in this docket, the reporting dates for the new requirements should begin at least two years later than currently proposed, i.e., no earlier than October 1, 2024, to allow States to begin to implement the new provision before reporting on it.

Limit Definition of GHG to What is at Issue, CO2.

As the operative provision in the proposed rule is a measurement and targets for tailpipe CO2 emissions, we were surprised that the definition of "greenhouse gas (GHG)" at proposed 23 CFR 490.505 is broader than that. The definition also includes methane, nitrous oxides and unspecified hydrofluorocarbons. The definition further includes the statement that "97 percent of the on-road GHG emissions are CO2." NPRM at 42421 and 42415.

We do not discern (so far) that the proposed rule's inclusion of emissions other than CO2 in the definition of GHG establishes regulatory requirements as to those other emissions, but don't dismiss the possibility that FHWA may see authority as a result of including those additional gases in the definition, something that it has not explained in the NPRM. The point is that inclusion in the definition of these other emissions is unnecessary to effectuate a proposal to limit tailpipe CO2 emissions, which FHWA says represents 97 percent of the tailpipe GHG emissions. This overbroad definition seemingly opens the door to more regulation without even a rulemaking, as FHWA conceivably could issue guidance or an interpretation purporting to apply operative requirements with respect to these other than CO2 emissions – as they would already be in the rule as part of the term "GHG."

The reference to 97 percent is a reason why, if one were to support a GHG performance measurement and management rule, which we do not, it would focus on CO2. It is not a reason to include the sources of the other 3 percent in the definition. It is, to the contrary, a reason to exclude those other gases from the definition. If FHWA should later consider that it wants to regulate with respect to those other emissions, it can begin a new rulemaking and address issues as to its authority and reasons for the proposal at that time.

Accordingly, if there is to be a final rule in this docket, the definition of "greenhouse gas (GHG)" should be revised to refer solely to tailpipe CO2 emissions.

Conclusion.

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming oppose the proposed rule to establish GHG performance measurement and management requirements. We do not believe there is authority for FHWA to promulgate such a rule. We also have explained above policy objections to such a rule, which will be especially problematic for rural States.

If, notwithstanding our objections, the rule is to be promulgated, revisions should be made, particularly to restore the exclusive State role in setting targets, and to exempt from coverage under the rule very rural States and certain States that are rural and have very low per capita income from coverage. Additional changes that we have recommended, such as changing the inappropriate proposed 2021 reference year for measurement, are also highly meritorious and should be incorporated if the rule is to be finalized.

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming thank FHWA for its consideration and recommend that any further action on the issues addressed in these comments be in accord with these comments.

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