October 13, 2022

Mr. John Davies
Office of Planning, Environment, and Realty
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, D.C. 20590

RE: Docket Number FHWA-2021-0004-0001 National Performance Management Measures: Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure

Dear Mr. Davies:

On behalf of the Associated General Contractors of America (AGC), the leading association in the construction industry representing more than 27,000 firms, including America's leading general contractors, specialty-contracting firms, and suppliers, we appreciate the opportunity to comment on the Federal Highway Administration's (FHWA or the Agency) *Notice of Proposed Rulemaking (NPRM) on National Performance Management Measures: Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure.*

The Moving Ahead for Progress in the 21st Century Act (MAP-21) included a significant policy directive in the creation of national performance measures to improve decision-making and accountability of state departments of transportation (DOTs) and Metropolitan Planning Organizations (MPOs). AGC provides the following comments on the greenhouse gas (GHG) performance measure.

I. FHWA lacks the authority to establish a greenhouse gas performance measure

We agree that Congress identified national goals under 23 U.S.C. 150(b), one of which is environmental sustainability. However, we believe it is just as the name implies, a goal and not a license for the Administration to do whatever it wants under the broad category of environmental sustainability. It has not changed the mission of the Agency. The goal is first and foremost to enhance the performance of the transportation system. Congress established these goals and then created performance measures to achieve them. In fact, Congress clearly was concerned about environmental sustainability when it created a clearly defined performance measure for "on-road mobile source emissions," which includes ozone, carbon monoxide, and particulate matter as listed in 23 U.S.C. 149.

If Congress intended FHWA to include a performance measure on greenhouse gas emissions, it would have explicitly included it in 23 U.S.C. 150 (c)(5). Likewise, Congress debated and carefully selected performance measures that would achieve the goals described in 23 U.S.C. 150(b). To further cement that point, Congress included in 23 U.S.C. 150(c)(2)(C) that the Secretary shall "limit performance measures only to those described in this subsection."

AGC agrees with FHWA's 2017 interpretation[1] in which it states that "the statute does not explicitly address CO2 emissions or require FHWA to include a GHG measure among the national performance measures."

To this point, AGC was part of a coalition of associations that addressed in prior comments to the Administration the lack of authority for FHWA to administer any GHG measurement and management requirement and the regulatory overlap that could result.[2] AGC has highlighted the fact that any performance standards for GHG emissions would be duplicative of other requirements. DOT and the U.S. Environmental Protection Agency (EPA) are already addressing GHG emissions from motor vehicles. Likewise, projects that seek any significant increase in motor vehicle capacity will also likely be subject to review under the National Environmental Policy Act (NEPA). The White House Council on Environmental Quality is also looking to address GHGs through NEPA guidance and changes to the NEPA regulations, which the DOT will need to incorporate into its NEPA implementation rules.[3]

AGC maintains that any GHG performance measure would also divert and dilute resources away from highway and bridge conditions, performance, safety, and states' ability to meet federal National Ambient Air Quality Standards (NAAQS): all core missions specified by Congress. Integrating GHG performance management requirements into an already complex process of uniting air quality planning and critically important transportation infrastructure decisions will bog down highway planners. As NAAQS become more stringent, the likelihood of MPOs confronting "conformity lapses" will increase. Construction bans will thwart many efforts to reduce traffic congestion: a key strategy to controlling on-road GHG emissions. Construction bans will also prevent the construction industry from building out energy, broadband and other utility efficiency into existing and future infrastructure. *See* Section VI below.

II. Congress repeatedly debated authorizing U.S. DOT to create a greenhouse gas performance measure but repeatedly rejected it

The Infrastructure Investment and Jobs Act (IIJA) represents the most significant infusion of investment in our infrastructure since the enactment of the Interstate Highway System in the mid-1950's. The robust, stable funding level that IIJA includes will allow states to plan needed, long-term projects while giving construction companies the assurance to make needed investments in equipment and hiring and training new employees. The law also includes robust funding and policies to combat climate change – including the Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) Formula Program[4] and the Carbon Reduction Program.[5] **However, one policy not included is the authorization for U.S. DOT to establish a greenhouse gas performance measure.**

During the debate of the IIJA, Senator Cardin offered an amendment[6] to authorize the Department of Transportation to establish a greenhouse gas performance measure. As you know, this amendment was not included in the IIJA that was signed into law. Likewise, House Transportation and Infrastructure Committee Chairman Peter DeFazio included a provision that would have authorized a performance measure on greenhouse gas emissions in the INVEST in America Act in both 2020 [7]and 2021[8]. While both of these bills passed the House, they were ultimately not included in the IIJA that was signed into law.

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[1] https://www.regulations.gov/document/FHWA-2017-0025-0267

[2] *See* https://www.regulations.gov/comment/FHWA-2013-0054-8202. AGC incorporates those comments by reference here.

[3] *Ibid*. *See also* AGC's additional comments submitted to the docket at https://www.regulations.gov/comment/FHWA-2013-0054-8067. AGC also incorporates these comments by reference here.

[4] https://www.fhwa.dot.gov/bipartisan-infrastructure-law/protect_fact_sheet.cfm

[5] https://www.fhwa.dot.gov/bipartisan-infrastructure-law/crp_fact_sheet.cfm

[6] https://www.congress.gov/117/crec/2021/08/03/167/138/CREC-2021-08-03-pt1-PgS5786-3.pdf

[7] https://www.congress.gov/bill/116th-congress/house-bill/7095/text

[8] https://www.congress.gov/bill/117th-congress/house-bill/3684

Likewise, during debate of the Inflation Reduction Act, Congress once again debated the inclusion of a performance measure on greenhouse gas emissions but ultimately did not include it in the final version that was signed into law. If Congress wanted FHWA to stand up a greenhouse performance measure, it would have directed them to do so when it recently passed bipartisan legislation or even in the partisan Inflation Reduction Act.

AGC disagrees with FHWA's loose interpretation of "performance" and their assertion that it has the statutory authority to move forward with this rulemaking, as further explained below.

III. A greenhouse gas performance measure will limit a state's options to connect people to jobs, healthcare, and education

The construction industry understands the need to combat climate change and is here to be part of the solution. However, in our efforts to combat climate change, we must continue to provide states the flexibility to meet their unique transportation needs. Continuing to invest in roads and bridges delivers positive results for American's primary method to travel. A greenhouse gas performance measure would limit states' options in how they choose to better connect disadvantaged communities and Tribes to jobs, healthcare facilities, and schools, or to better link businesses in those communities to their markets.

The greenhouse gas performance measure would be a one-size-fits-all mandate that would limit a state's ability to choose transportation projects that fit its unique needs. The transportation needs faced by Americans living in urban areas are not the same as those living in rural parts of the country. While forcing a state like New York to build a bike path instead of adding a new roadway lane might work in New York City –it is not realistic in a state like Alaska. States, as part of the transportation planning process, already take steps to combat climate change.

The COVID-19 pandemic, in particular, highlighted the necessity for continued investment in our nation's roads and bridges. At a time when many other methods of travel were unsafe, roads and bridges allowed Americans to access essential goods and services and medical facilities to be delivered critical supplies. As natural disasters become more common, forced evacuations of communities have been facilitated by roads and bridges. These disasters disproportionately affect people of color and low-income individuals who are more likely to live in areas vulnerable to climate change impacts.

IV. States and MPOs are already taking steps to reduce greenhouse gas emissions and improve air quality

Thanks to the IIJA, states will be able to plan needed, long-term projects, while giving construction companies the assurance to make needed investments in equipment and hiring and training new employees. The law also includes robust funding and policies to combat climate change – including the Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) Formula Program and the Carbon Reduction Program.[9] The Carbon Reduction Program, per the guidance, is dedicated funding for "projects designed to reduce transportation emissions, defined as carbon dioxide (CO2) emissions from on-road highway sources."

It is important that we continue to allow states to decide how to best address their transportation needs. Traffic congestion wasted 3.3 billion gallons of fuel in 2017—adding 8.8 billion hours to travel times in urban areas.[10] Research shows that the right mix of traffic congestion mitigation, speed management, and traffic smoothing measures would lower total carbon dioxide (CO2) emissions from vehicles by as much as

[9] https://www.fhwa.dot.gov/bipartisan-infrastructure-law/crp_fact_sheet.cfm

[10] Texas Transportation Institute, Texas A&M University, 2019 Urban Mobility Report, August 2019, available online at: https://static.tti.tamu.edu/tti.tamu.edu/documents/mobility-report-2019.pdf

30 percent.[11] According to FHWA's Conditions and Performance Report, investing in the right mix can increase the average speed by 9 percent in congested areas and reduce the average delay per VMT by 40 percent.[12] Further, autonomous vehicles, hybrids, and alternative fuel vehicles are already delivering emission reductions. The construction of new transportation projects helps relieve traffic congestion and air pollution as well as provides communities with multiple options for mobility.

Finally, the IIJA includes dedicated funding for electric vehicle charging infrastructure.[13] If FHWA is concerned about greenhouse gas emissions, it should focus its resources on providing technical assistance and helping states to obligate these funds and ensure that projects can break ground in a timely manner. Having electric vehicle charging infrastructure in place, particularly along the Interstates, will encourage more Americans to invest in electric vehicles.

V. FHWA needs to provide greater flexibility to states and MPOs to reduce greenhouse gas emissions

The proposed rule for a greenhouse gas performance measure does not take into account current levels of greenhouse gas emissions. The NPRM states that each state will get to set its declining target levels, however it does not consider that a state like California may have GHG emissions that are ten times or more than a state like Wyoming. In addition, California will have more realistic options in how to address GHG emissions like investing in bike lanes in San Francisco or investing in the purple line in Los Angeles. However, a state like Wyoming will have limited options that will actually be practical solutions.

FHWA should provide an exemption for states with low population density to avoid a one-size-fits-all approach. In doing so FHWA will still achieve its overall goal of reducing greenhouse gas emissions in a more targeted approach. Finally, in doing so FHWA will avoid the unintended consequences of steering funding away from important roadway projects that connect people to jobs, education, and healthcare.

VI. FHWA lacks authority to attach a GHG performance measure to penalties

As stated above, the proposed GHG performance measure would establish a new requirement for states and MPOs to set declining CO2 targets for – and track and report – on-road mobile source emissions on the National Highway System, relative to the calendar year 2021 (reference year). Under this proposal, states and metropolitan regions would be required to model their mobile GHG emissions when they update or amend their long-range plans and transportation improvement programs.

AGC is aware that some proponents of this rule are advocating for FHWA to require states to impose and enforce a plan for making reductions or suffer consequences for not achieving them. In effect, they are asking FHWA to implement the proposed rule in a way that would create a conformity analysis requirement for GHGs similar to what jurisdictions labeled as nonattainment or maintenance areas must produce for criteria pollutants under the Clean Air Act (CAA). This would require an act of Congress. FHWA does not have the authority to attach the proposed GHG performance measure to a combination of rewards and penalties.

Indeed, U.S. EPA has not established a scientifically determined national pollutant limit – National Ambient Air Quality Standard or NAAQS – for carbon dioxide and other greenhouse gases. EPA has set NAAQS for six pollutants called criteria air pollutants that can meaningfully be controlled by the localities where they

[11] Barth, M. and K. Boriboonsomsin, Traffic Congestion and Greenhouse Gas Emissions, University of California, 2009. http://www.uctc.net/

[12] https://www.fhwa.dot.gov/policy/24cpr/pdf/24cpr.pdf

[13] https://www.fhwa.dot.gov/bipartisan-infrastructure-law/evs.cfm

are emitted.[14] A national pollutant limit set through the NAAQS program triggers the state implementation planning process as well as transportation conformity under the Clean Air Act. Transportation conformity is required only in areas that currently do not (non-attainment areas) or formerly did not (maintenance areas) meet federal NAAQS standards. Many DOTs and MPOs have found that the conformity-based procedures developed to enforce provisions of the CAA are costly, time-consuming, and at best produce only marginal improvements in projected air quality.

What is more, AGC long expressed concerns with the two Clean Air Act provisions that can result in denial of federal highway funding to local areas: sanctions and the lapse of what is called "conformity." Under the Act, EPA will impose highway funding (or other) sanctions on areas that have not submitted or not implemented adequate plans to attain NAAQS. In addition, federal agencies may not provide financial support to transportation improvements in areas that have not attained NAAQS, unless the improvements conform with the State Implementation Plan for achieving air quality. Global warming cannot be stopped by U.S. action alone, which makes it illogical to impose fines or penalties against states if they are not able to meet their CO2 targets.

AGC strongly opposes any attempts by FHWA to reject applications to use highway contract authority for any project that would result in an increase in mobile GHG emissions or the withholding of federal highway funds in areas that are not able to demonstrate progress toward achieving a GHG mandate. If Congress seeks to strengthen the performance management regime established by MAP-21, as further described above, it would have included the authorization for U.S. DOT to do so.

Further, the United States Supreme Court decision in *West Virginia v. EPA* that denied EPA authorization to regulate stationary sources' GHG emissions **because Congressional authority was specifically not provided** may make it any such action subject to judicial challenge.

VII. Regulatory Impact Analysis

In the preamble to the proposed rule, FHWA estimates the costs at $11.0 million, discounted at 7 percent, and $12.9 million, discounted at 3 percent over 10 years.[15] "The Office of Management and Budget (OMB) has determined that the proposed rule would be a significant regulatory action within the meaning of E.O. 12866 because it *may raise novel legal or policy issues* arising out of the President's priorities." (Emphasis added.) However, FHWA maintains that the proposed rule would not be economically significant for purposes of E.O. 12866: "The proposed rule would not have an annual effect on the economy of $100 million or more." FHWA further asserts that "the proposed rule would not adversely affect in a material way the economy, any sector of the economy, productivity, competition, or jobs."[16] AGC disagrees.

The draft regulatory impact analysis (RIA) assesses only the administrative effort associated with the proposal (establish targets, track emissions, and report progress) and ignores the indirect costs and societal impacts resulting from the measures a state could take in implementing the proposal. This is especially true when the proposal would force a "shift from single occupant vehicles" and aims to "reduc[e] the growth in future on-road travel activity." These societal and economic costs could include increases in commuter time and congestion, as well as delays in permitting. In fact, it would appear the Agency would rather get out of the transportation business altogether: "This proposed rule provides for no increase in funds for transportation projects."[17] The Agency goes on to express that project delays are a benefit if those delays

[14] The Clean Air Act's NAAQS regime and Section 115 is not suited to control GHGs that are dispersed throughout the global atmosphere. It would be impossible to implement such a standard.
[15] *See* 87 *Fed. Reg.* 42404,
[16] *See* 87 *Fed. Reg.* 42418.
[17] *See* 87 *Fed. Reg.* 42411.

result in the reallocation of resources.[18] AGC reminds the agency that delaying projects runs counter to multiple goals set out in 23 U.S.C. 150(b) such as safety, congestion reduction, system reliability, and reduced project delivery delays.

The agency struggles to capture the benefits of the rule. In the preamble to the proposal, the agency recalls their prior position, that: "The May 2018 repeal final rule determined that 'the measure imposes unnecessary regulatory burdens on State DOTs and MPOs with no predictable benefits,' and stated that 'FHWA does not believe the speculative and uncertain benefits are a sufficient reason to retain the GHG measure, especially given the very definite costs associated with the measure.' 83 FR 24924–25."[19] However, the agency now backs away from that finding and promises that there will be "substantial benefits" from the proposed rule that are "neither speculative nor uncertain," yet it remains unable to quantify those benefits.[20]

The agency chose to engage in a break-even analysis instead of monetizing the benefits using the social cost of carbon, but it still relies on the Interagency Working Group (IWG) social cost of carbon (SC-CO2) to show a benefit. To calculate the number of tons of CO2 emissions that would need to be avoided for the rule to break even, FHWA divided the total cost of the proposed rule by the annual IWG SC-CO2 for 5, 3, and 2.5 percent, as well as 3 percent 95th percentile, and discounting them back to 2020.[21] The agency relies on that analysis to assert that the amount of emissions reductions necessary to break even would amount to less than 1 percent of the transportation sector's emissions.[22] As indicated in extensive comments to the Office of Management and Budget, AGC has serious concerns with using the IWG's SC-CO2 for three main reasons (among others):[23]

- The IWG did not use a transparent process.
- The IWG has yet to address the National Academy of Sciences' recommendations.
- The 2021 IWG update was issued without any notice or public comment opportunity.

Thank you for the opportunity to comment on this important issue. AGC encourages FHWA to focus its attention and resources towards implementing the IIJA as negotiated and passed by Congress. The IIJA demonstrates to our existing and future workforce that there is sustainable work in the years to come. We look forward to the continued partnership between AGC and FHWA as you work to implement this historic legislation.

Sincerely,

James V. Christianson
Vice President, Government Relations

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[18] "While FHWA expects that any re-allocation of resources would increase overall benefits, FHWA acknowledges that the benefits resulting from specific projects would be delayed if the re-allocation would result in delays of these projects. The FHWA expects, however, that the net benefits resulting from any re-allocation would be higher than the net benefits without the re-allocation." See *Summary Report – Economic Assessment for GHG Performance Measure – Draft*, RIN 2125-AF99, p. 31 (June 2022).

[19] *See* 87 *Fed. Reg.* 42410.

[20] *Ibid.*

[21] *See* RIA, p. 31.

[22] *See* 87 *Fed. Reg.* 42417.

[23] These points are discussed in detail in a coalition letter that AGC participated in that is available online from https://www.agc.org/news/2021/06/24/agc-responds-bidens-administrations-reformulating-social-cost-greenhouse-gases.