

Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
in
Docket No. FHWA-2017-0025
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:
Notice of Proposed Rulemaking to Repeal the Greenhouse Gas Measure
October 30, 2017

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming (“we” or “our”) respectfully submit these joint comments in support of the Federal Highway Administration’s (FHWA’s) proposed repeal of requirements for CO₂-based greenhouse gas (GHG) performance measurement and management, published at 82 Federal Register 46427 *et seq.* (October 5, 2017). Further, we support finalizing the repeal as soon as possible after the close of the comment period.

More specifically, on January 18, 2017, FHWA published a final rule that, among other things, established a performance measure on the percent change in CO₂ emissions from 2017 (as a reference year) generated by on-road mobile sources on the National Highway System (NHS), as well as related requirements on States to establish and meet targets relative to this GHG measure. See 82 Federal Register 5970. In the notice of proposed rulemaking (NPRM) in this docket FHWA proposes to repeal those GHG performance measurement and management requirements. FHWA explains that the performance measurement statute (23 USC 150) “does not explicitly require a GHG [performance] measure,” that the requirement is “burdensome,” and that it is “potentially duplicative of existing efforts in some States.” See 82 Federal Register 46430.

We agree with those reasons and agree that individually and collectively they provide ample bases for repeal of the GHG performance measurement and management requirements. We also note at the outset that these comments concern the specific change in FHWA rules proposed in this docket and are not general comments on environmental issues.

In addition, we emphasize that we and others in the public and business sectors are eager to see an enhanced focus by FHWA and USDOT on delivery of highway projects and programs. The rule that FHWA has proposed to repeal in this docket would require managers at State DOTs to dedicate additional resources and effort to regulatory compliance, inevitably eroding the focus on project and program delivery. Thus, repeal of the rule would enable increased attention to project and program delivery – while leaving individual States free to formulate and implement their own GHG performance measurement and management activities.

Below we offer additional reasons to repeal the GHG performance measurement and management requirements.

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.”

There is no mention of a GHG measure in 23 USC 150(c) and no other language in the subsection that “describes” a GHG measure. Likely since “describe” is such a straightforward word, courts are rarely asked to construe it – but they have in at least a few recent instances.

At least three Federal courts found that the definition of “describe” is “to represent or give an account of in words.” Disability Rights New York v. Wise, 171 F. Supp. 3d 54, 58 N.D.N.Y. 2016) (citing Merriam-Webster’s Collegiate Dictionary (10th ed. 1997); Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Kirk, 354 F. Supp. 2d 196, 202 (D. Conn. 2005), citing Merriam-Webster’s Collegiate Dictionary (10th ed. 2002); and Synopsys, Inc. v. Ricoh Co., Ltd., 2005 WL 6217119 (N.D. Cal. 2005) (citing Merriam-Webster’s Ninth New Collegiate Dictionary 1987).

In 23 USC 150(c) there is no express reference to a GHG measure. There is a reference to a measure of on-road mobile source “emissions” in 150(c)(5) “for the purpose of carrying out [23 USC] section 149.” 23 USC 149, the Congestion Mitigation and Air Quality (CMAQ) program, concerns actions with respect to a limited list of emissions that does not include GHG (CO₂). So, paragraph (c)(5) is not a basis of authority for the GHG performance measurement and management requirement.

And, in any event, in the October 5 NPRM FHWA advises that the basis for the GHG performance measurement and management requirement was not 23 USC 150(c)(5) (based on 23 USC 149), but 23 USC 150(c)(3). See 82 Federal Register at 46431.

There is nothing in 23 USC 150(c)(3), either, that could fairly be considered to have “described” a CO₂-based GHG measure. To use the court formulations noted above, there is nothing in that paragraph (c)(3) that sets forth or gives an account “in words” of a GHG performance measurement and management requirement. The words “greenhouse gas,” “GHG,” and “emissions” do not appear in the provision. Further, 23 USC 150(c)(3) concerns establishing certain listed standards “for the purpose of carrying out section 119 [of title 23].” Similarly, the words “greenhouse gas,” “GHG,” and “emissions” do not appear in 23 USC 119. To the extent that the 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 proves too much. Under such an approach 23 USC 150(c)(3) would appear to be a source of vast authority for regulation, whether of emissions or other factors not referenced in its text.

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 emissions and congestion. Rather than respect that Congress had specifically addressed performance measures for emissions in that provision, the GHG rule

published on January 18 apparently is based on a determination that a very general reference to performance of the system 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 practice, would be to conclude that Congress expressly stated how to address emissions in paragraph 150(c)(5) and that the rest of subsection 150(c) did not provide other authority to regulate emissions.

In addition, an interpretation that results in expansive regulatory power in USDOT is contrary to other words that Congress included in 23 USC 150(c). There, it is stated that USDOT/FHWA shall “limit performance measures only to those described in this subsection.” 23 USC 150(c)(2)(C) (emphasis added). The words “limit” and “only” do not encourage an expansive reading of the authority provided to promulgate performance management rules. To the contrary, their use warrants a narrow reading of such authority. 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. Congress’ reference to the subject of performance measures being “described” in subsection 150(c) cannot be treated as surplusage or as without meaning.

Accordingly, while we agree with FHWA that a GHG performance rule is not “required,” it is not even permitted.

Even if there is authority for such a requirement, it should not be exercised

If it is nonetheless concluded that FHWA has authority to impose CO₂ GHG performance measurement and management requirements, that does not mean that it should. In this docket, FHWA has very commendably concluded that it should not, and has proposed repeal of those requirements.

In the NPRM FHWA has properly noted that the rule imposes costly burdens upon States – a good and sufficient reason to repeal the GHG performance measurement and management rule.

FHWA also noted that States can develop their own performance measures in this area. So, a Federal requirement represents an additional burden in such States (and a new burden in others).

However, 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 emissions). Thus, 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.

Rural States may face particular challenges and program distortions under the rule. 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 FHWA as to how States might influence GHG emissions. See 82 Federal Register at 5997. A significant number 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. But these and similar actions are not well suited to rural settings, where residents drive relatively long distances, often in heavy duty vehicles.

Further, under other statutory regimes USDOT addresses the issue of the fuel economy of various vehicles. In short, there is already a statutory mechanism for fuel economy issues under which USDOT addresses, directly or indirectly, GHG emissions.

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming support prompt adoption, as a final rule, of the proposed rule to repeal the GHG performance measurement and management requirements. We agree with the reasons for repeal advanced by FHWA and have offered above additional reasons that support repeal, including that the rule may be particularly problematic in a rural State setting. Finally, prompt action to finalize the repeal of these GHG requirements is appropriate, to help ensure that States do not incur the burdens of implementing these requirements before they are repealed.

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming thank FHWA for its consideration of these comments.
