

Comments of
American Highway Users Alliance,
American Coke and Coal Chemicals Institute, American Council of Engineering Companies,
American Forest and Paper Association, American Fuel & Petrochemical Manufacturers,
American Motorcyclist Association, American Moving and Storage Association,
American Petroleum Institute, American Road and Transportation Builders Association,
American Trucking Associations, American Wood Council,
Asphalt Emulsion Manufacturers Association,
Asphalt Recycling & Reclaiming Association, Associated Equipment Distributors,
Associated General Contractors of America, Auto Care Association,
Foundation for Pavement Preservation,
Industrial Minerals Association – North America, International Liquid Terminals Association,
International Slurry Surfacing Association, Motor and Equipment Manufacturers Association,
Motorcycle Riders Foundation, National Asphalt Pavement Association,
National Association of Manufacturers, National Automobile Dealers Association,
National Electrical Contractors Association, National Ready Mixed Concrete Association,
National Stone Sand and Gravel Association, NATSO,
Owner-Operator Independent Drivers Association, Precast/Prestressed Concrete Institute,
Recreation Vehicle Industry Association,
Service Station Dealers of America and Allied Trades, The Fertilizer Institute,
The National Grange, Tire Industry Association, Truck Trailer Manufacturers Association,
and U.S. Chamber of Commerce
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
November 6, 2017

The 38 associations listed above (“we” or “our”) are pleased to submit these joint comments in strong support of the proposed repeal of requirements for carbon dioxide (CO₂)-based greenhouse gas (GHG) performance measurement and management, published by the U.S. Department of Transportation (USDOT), Federal Highway Administration (FHWA), at 82 Federal Register 46427 *et seq.* (October 5, 2017). We urge that the proposed repeal be finalized as promptly as possible after the close of the comment period in this docket and oppose any further extension of the comment period.

At the outset, we emphasize that, collectively, the coalition of associations submitting these comments represent companies and organizations comprising a very significant portion of the entire U.S. economy, collectively with millions of employees and users of our nation’s highways. Our opposition to the FHWA GHG performance measure rule should not be

construed to suggest a particular position shared by all of our organizations on the larger issue of climate change.

On January 18, 2017, FHWA published a final rule that 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 states in support of repeal of those requirements 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 that individually and together those reasons are more than sufficient bases to repeal the GHG performance measurement and management requirements. Additionally, we argue the rule burdens States in more ways than the recordkeeping and administrative costs noted by FHWA in its October 5 notice, that GHG tailpipe emissions are already subject to regulation by USDOT and EPA, and that FHWA lacks legal authority to impose the rule.

Below we expand upon these additional reasons to repeal this regulation and ask that FHWA acknowledge these reasons in the docket upon final repeal of the requirements.

First, the rule forces States to expend resources monitoring regulatory compliance and distracts from management efforts to promptly deliver highway projects and programs. These delays are costly and counteract the important USDOT priority of improving the pace of project delivery.

Second, under other statutes, USDOT and EPA are already addressing fuel economy standards for new vehicles. So, there is already an established statutory mechanism for fuel economy requirements under which USDOT addresses, directly or indirectly, GHG emissions.

Finally, and most critically, the GHG performance management requirement is without statutory authority. The statutory provision authorizing performance measurement and management, 23 USC 150, paragraph (c)(2) is clear 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 words or phrases in the subsection that “describe” 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.” But 23 USC 149, the Congestion Mitigation and Air Quality (CMAQ) program, relates only to the limited list of emissions monitored under the National Ambient Air Quality Standards (NAAQS); GHG emissions are not measured under NAAQS. Nor does 23 USC 149 authorize USDOT/FHWA to take administrative action to add CO₂ GHG to the list of emissions addressed by 23 USC 149. So, paragraph (c)(5) is not a basis of authority for the GHG performance measurement and management requirement. In any event, in the October 5 NPRM, FHWA advises that the basis used by the prior Administration 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. As “describe” is a straightforward word, courts rarely have cause to construe it – but they have in some 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. CT. 2005), citing Merriam-Webster’s Collegiate Dictionary (10th ed. 2002); and, Synopsys, Inc. v. Ricoh Co., Ltd, 2005 WL 6217119 (N.D. CA. 2005) (citing Merriam-Webster’s Ninth New Collegiate Dictionary 1987).

There is nothing in paragraph (c)(3) that sets forth “in words” a GHG performance measurement and management requirement. The words “greenhouse gas,” “GHG,” and “emissions” do not appear in paragraph (c)(3). 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 23 USC 150(c).

An interpretation in support of expansive regulatory power is not only inconsistent with the plain words of 23 USC 150(c), but inconsistent with an important rule in aid of statutory construction, 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 prior Administration determined 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.

Moreover, an expansive interpretation of USDOT’s authority to promulgate performance measurement and management rules also would be contrary to Congress’ directive in 23 USC 150(c)(2)(C) that USDOT/FHWA shall “limit performance measures only to those described in this subsection.” (emphasis added). The words “limit” and “only” support a narrow reading of authority to impose performance measurement rules. In short, GHG performance measures for CO₂ are **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’ use of the term “described” cannot be treated as surplusage; it must be given real meaning.

In short, we agree with FHWA that a GHG performance rule is not “required,” but we further submit that it is not “permitted.”

Summary

In this docket, FHWA has commendably concluded that it should not impose CO₂ GHG performance measurement and management requirements and proposed repeal of those requirements. As FHWA has explained in the NPRM, the current rule would impose costly burdens upon States – one suitable reason to repeal the GHG performance measurement and management rule.

In addition, the current rule would take effect at a time when there is a need for enhanced highway and infrastructure investment. Yet the rule would divert the attention of State DOT management from maximum effort to efficiently deliver highway projects and programs to regulatory compliance.

Moreover, under other statutes, USDOT and EPA address fuel economy standards for new vehicles. So, there is already an established statutory mechanism for fuel economy requirements under which USDOT addresses, directly or indirectly, GHG emissions.

Finally, as argued extensively above, FHWA lacks the authority to impose the rule in the first place.

Conclusion

Our 38 associations strongly support 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 additional reasons that further support repeal. We ask that the proposed repeal be adopted as a final rule very shortly after the close of the comment period on this docket, urge that the additional reasons discussed in these comments be reflected in FHWA’s notice issuing the final rule, and oppose extension of the comment period. We thank FHWA for its consideration of our views on this important matter.
