FHWA PROPOSES BOLD TRANSPORTATION PERFORMANCE MEASURES TO REDUCE CARBON EMISSIONS

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Perhaps only by coincidence, on April 22—"Earth Day"—the Federal Highway Administration ("FHWA") published a Notice of Proposed Rulemaking ("NPRM") that, for the first time, would set performance measures for greenhouse gas ("GHG") emissions. The NPRM is the latest of a series of rulemakings to establish performance measures for state departments of transportation ("State DOTs") and Metropolitan Planning Organizations ("MPOs") as mandated by the recently enacted Moving Ahead for Progress in the 21st Century Act ("MAP-21") and the Fixing America's Surface Transportation Act.[1] The proposal could fundamentally transform federal funding priorities for transportation projects.

Buried in the text is a first-of-its-kind, climate-related performance measure for tracking GHG emissions from transportation projects to measure and mitigate the climate-related impacts of on-road sources and possibly construction equipment and upstream sources such as power plants. If adopted, it could elevate the importance of reducing carbon emissions in transportation planning and significantly influence which transportation projects receive funding. The NPRM also proposes performance measures for traffic congestion, freight movement, and transportation-system performance.

The K&L Gates Transportation Policy team is prepared to work with interested stakeholders to address how these performance measures are developed and implemented at the federal, state, and local levels to prioritize transportation project planning and funding to serve local communities and the national economy.

PROPOSED NATIONAL PERFORMANCE MEASURES

The proposal would establish performance measures for reducing traffic congestion, strengthening freight movement, and curbing criteria pollutants (e.g., ozone) and GHG emissions to improve the performance of the Interstate System and the non-Interstate National Highway System ("NHS"). These measures are aimed at ensuring that federal funding for transportation programs is used effectively and would provide a framework for improved project planning and investment decision-making processes that account for system reliability, economic vitality, and environmental sustainability.

The timelines for implementing the rule are aggressive. Within one year after the effective date of FHWA's rule, State DOTs would be required to establish 2-year and 4-year targets for applicable transportation networks or projects and report these targets to the FHWA. MPOs also must establish corresponding targets for their Metropolitan Planning Area.

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State DOTs and MPOs would also be required to report to FHWA the condition, performance, and progress of transportation projects in performance reports beginning January 1, 2018, except for the on-road mobile source emissions measure, which is expected to begin October 1, 2017. The FHWA would assess each State DOT's progress toward achieving performance biennially and use the data "to better communicate a national performance story and more reliably assess the impacts of Federal funding investments."[2]

GHG EMISSIONS

MAP-21 required the establishment of performance standards for on-road mobile source emissions of criteria pollutants to carry out the Congestion Mitigation and Air Quality ("CMAQ") program. The FHWA is proposing to expand that requirement to include GHG emissions.

The FHWA is proposing the GHG emissions performance measure because mobile sources account for over 80 percent of U.S. transportation sector GHGs and achieving U.S. climate goals will likely require significant GHG reductions from on-road transportation sources. As proposed, State DOTs would be required to track GHG emissions from on-road mobile sources and possibly construction equipment and emissions generated upstream from power plants and petroleum refineries needed to provide electricity and fuel for vehicles.

Specifically, the FHWA is considering how GHG emissions data could be used to inform transportation planning decisions to reduce long-term emissions. According to the NPRM, the FHWA believes that GHG emissions would be best measured as the total annual tons of CO2 from all on-road mobile sources. The agency is seeking public comment on the cost, feasibility, and effectiveness of a potential GHG-emissions measure, including whether such a measure should:

- address all on-road mobile sources or only a particular vehicle type;
- be limited to emissions coming from the tailpipe or include emissions generated upstream in the life cycle of vehicle operations (e.g., emissions from the extraction/refining of petroleum products and the emissions from power plants to provide power for electric vehicles); and
- include non-road sources, such as construction and maintenance activities associated with Title 23 projects.

The FHWA's press release on the NPRM characterizes the proposed rule as "a down payment on the administration's 21st Century Clean Transportation Plan, a budget proposal to reduce traffic and carbon intensity of the transportation sector."[3] If adopted, it could have a profound effect on transportation planning and, ultimately, which projects are funded.

CONCLUSION

Because the Administration has indicated its goal to finalize the NPRM this year, State DOTs, MPOs, and other interested stakeholders should engage in the rulemaking process. Interested stakeholders should consider filing comments in response to this proposal prior to the August 20, 2016 deadline. The K&L Gates Transportation Policy team can help clients work through this process, as well as with federal, state, and local agencies to promote their interests in transportation project planning and funding issues.

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[1] Fed. Highway Admin., U.S. Dep't of Transp., *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*, 81 Fed. Reg. 23806 (Apr. 22, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-04-22/pdf/2016-08014.pdf. The FHWA is required to promulgate rules in 12 performance areas. Since 2014, the FHWA has already issued proposed rulemakings that establish performance measures for (a) serious injuries per vehicle miles traveled ("VMT"), (b) fatalities per VMT, (c) number of serious injuries, (d) number of fatalities, (e) pavement condition on the Interstate System, (f) pavement condition on the non-Interstate NHS, and (g) bridge condition on the NHS. This latest NPRM is a continuation of these efforts to increase efficiency and accountability. The final rule for safety performance measures was published on March 15, 2016, and the final rule for the pavement and bridge performance measures is expected in October of this year. Fed. Highway Admin., *National Performance Management Measures NPRM Overview Presentation 6* (Apr. 21, 2016), *available at* https://www.fhwa.dot.gov/tpm/rule/prespmoverview200416.pdf.

[2] *FHWA Publishes NPRM to Propose National Performance Management Measures to Assess Performance of the National Highway System, Freight Movement on the Interstate System, and the Congestion Mitigation and Air Quality Improvement Program*, Fed. Highway Admin. http://www.fhwa.dot.gov/tpm/rule/pm3_nprm.cfm.

[3] Press Release, FHWA Proposes New Performance Measures to Reduce Congestion on the Nation's Highways, Apr. 18, 2016, available at https://www.fhwa.dot.gov/pressroom/fhwa1623.cfm.

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