



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

State Departments of Transportation/Metropolitan Planning Organizations: Federal Highway Administration Proposed Rule Requiring Measurement/Reporting CO₂ Emissions of Vehicles Traveling on the Federal Highway System

07/11/2022

The Federal Highway Administration ("FHWA") announced a notice of proposed rulemaking ("NPRM") that would:

- Amend FHWA regulations governing national performance measures to require state departments of transportation ("State DOTs") and metropolitan planning organizations ("MPO") to establish declining carbon dioxide ("CO₂") targets
- Establish a method for the measurement and reporting of greenhouse gas ("GHG") emissions associated with transportation under Title 23 of the United States Code

FHWA states the rule would not mandate the level of the targets.

The NPRM would be applicable to State DOTs and MPOs that have national highway system mileage within their state geographic boundaries and metropolitan planning area boundaries. They would be tasked to establish declining CO₂ emission targets for emissions generated by on-road mobile sources relative to a reference year established as calendar year 2021. A biennial report addressing progress in meeting the established targets would be required. The proposed measure would be codified among the National Highway Performance Program performance measures that are found in 23 CFR Part 490.

FHWA's rationale for the NPRM is to assist the United States in addressing what it describes as the climate crisis. Transportation is cited as a significant contributor to climate change and the CO₂ produced by the combustion of fossil fuels is cited as contributing to future warming. Further, the NPRM is stated to align with previously issued Biden Administration Executive Orders and a United States target of achieving a 50-52% reduction from 2005 levels of economy-wide net GHG pollution in 2030.

FHWA cites as its legal authority to establish the proposed GHG measures 23 U.S.C. 150. It states that the agency is:

. . . directed under 23 U.S.C. 150(c)(A)(ii) to establish measures for States to use to assess the performance of the Interstate System and non-Interstate NHS. Although the statute does not define performance, 23 U.S.C. 150(b)(6) identifies environmental sustainability as a national goal of the Federal-aid highway program. To address this national goal, FHWA has determined that the performance of the Interstate System and the NHS under 23 U.S.C. 150(c)(3)(A)(ii)(IV)-(V) includes environmental performance.

The Energy Marketers of America in its July 8th newsletter notes that the trade association will file comments opposing the implementation of the NPRM. Further, it states that the United States Supreme Court decision in *West Virginia v. EPA* that denied the United States Environmental Protection Agency authorization to regulate stationary sources' GHG emissions because Congressional authority was specifically not provided may make it subject to judicial challenge.

A copy of the NPRM can be downloaded [here](#).