



NATIONAL STONE, SAND  
& GRAVEL ASSOCIATION

October 13, 2022

Federal Highway Administration  
Docket Management Facility  
United States Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Re: Docket No. FHWA-2021-0004  
National Performance Management Measures; Assessing Performance of National Highway System,  
Greenhouse Gas Emissions Measure Notice of Proposed Rulemaking (NPRM)

The National Stone, Sand and Gravel Association appreciates the opportunity to provide this comment to the Federal Highway Administration (FHWA) and U.S. Department of Transportation (DOT) on Docket No. FHWA-2021-0004, Notice of Proposed Rulemaking (NPRM) regarding National Performance Management; Assessing Performance of National Highway System, Greenhouse Gas Emissions Measure.

Stone, sand, and gravel are essential resources for developing any type of infrastructure and are key to producing renewable energy sources and sustainable public works. From new electric vehicle charging stations, to natural gas and hydrogen production and transportation, our members stand ready to supply the needed construction materials for these projects that will be needed to reduce emissions across the transportation industry.

In producing these needed materials, NSSGA members run their operations effectively to maintain air and water quality and are always working to reduce energy use. Aggregates operations are very low contributors to greenhouse gas (GHGs) emissions in the U.S. NSSGA members use the GHG emissions calculator to track and work to reduce their energy use and emissions. Even so, the aggregates industry has undertaken many greenhouse gas mitigation efforts, such as investing heavily in fuel-efficient mobile equipment and improving operational efficiency.

As most of the emissions associated with aggregates come from the transportation of material, NSSGA supports policies that promote local sources of aggregates, which results in lower greenhouse gas emissions. Aggregates are an important tool in creating resilient infrastructure to combat climate change, with uses such as flood control and water treatment.

Aggregates facilities are heavily regulated before, during and after operation at the local, state, and federal level. NSSGA members support reasonable regulations based upon the law and sound science



that allow the timely extraction of materials vital for infrastructure projects, but object to those that are redundant, burdensome and do not provide environmental improvement.

The regulation FHWA proposes would amend 23 CFR Part 490 to add requirements for State DOTs and metropolitan planning organizations (MPOs) to establish declining carbon dioxide (CO<sub>2</sub>) targets and methods for the measurement and reporting of greenhouse gas (GHG) emissions associated with transportation under Title 23 of the U.S. Code. These proposed GHG measures would be codified among the National Highway Performance Program (NHPP) performance measures that FHWA established in 23 CFR part 490 through prior rulemakings.

Throughout the Notice of proposed rulemaking FHWA reiterates the benefits of the GHG data produced from the proposed amendments, and how and why “proposed GHG measure would help the United States confront the increasingly urgent climate crisis.” The NSSGA supports the reduction of global GHG emissions and strongly believes the establishment of authority to reduce GHG within Title 23 must occur through an act of Congress, not a rulemaking. It is only through an enactment that the authority claimed in the proposed rulemaking can be established. Just as importantly, Congressional legislative process provides critical benefits to the proposed authority, including bi-partisan political benefits, improved policy structure and program design.

The FHWA administration proposed amendments rely upon “reinterpreted” legal authority in 150 U.S.C. 23 and 119 U.S.C. 23. Section 119 U.S.C. 23 was originally established in Section 116 of Public Law 95-599, the “Surface Transportation Assistance Act of 1978” or, STAA, and entitled “Interstate System Resurfacing”. Over the following years Congress amended the program to update the program focus on contemporary issues and challenges facing an efficient and well-maintained interstate system. From its inception in 1978, Congress has apportioned funds for the program for use by states according to its eligibility criteria.

In 2012, Section 119 was amended by Section 1106 of Public Law 112-141, the “Moving Ahead for Progress in the 21<sup>st</sup> Century Act, or ‘MAP-21’” to add requirements for “performance standards”; these amendments FHWA now relies upon for its authority to promulgate the proposed GHG rule. In the Conference report to MAP-21, the Conferees provided the following explanation for the “performance standard” amendments to the program:

*The nation's surface transportation programs have not provided sufficient accountability for how tax dollars are being spent on transportation projects and would benefit from a greater focus on key national priorities. The conference report focuses the highway program on key outcomes, such as reducing fatalities, improving road and bridge conditions, reducing congestion, increasing system reliability, and improving freight movement and economic vitality.*

*Focus on the National Highway System*

*The conference report combines the old interstate maintenance program into a new program called the National Highway Performance Program to address both the interstate system as well as an extended National Highway System. It is these roads that are most critical to our economic vitality, and the conference report ensures the roads and bridges that make up this system will be better maintained.*

It is relevant to emphasize that the Section 119 National Highway Performance Program was a redesign of the Interstate Maintenance program; a program through which funds to maintain the Interstate system were historically apportioned to states. The added performance standards were and are focused on the highway program’s key outcomes and specifically listed in the conference report



cited above. Congress added performance standards focusing on the enumerated “key outcomes” to address the need to steward taxpayers’ dollars as effectively as possible towards effective and efficient transportation infrastructure in the midst of the inability of Congress to increase apportioned funding to states. The Interstate Maintenance program had previously contained no explicit measurement of how well states were obligating Sec. 119 apportioned funding towards the “highway program key outcomes” and efficient function and maintenance of the Interstate System.

This focus on the performance of the states’ investment of Federal-aid Highway apportioned funds towards achieving the key outcomes listed in the conference report is reinforced in the amendment itself establishing the purpose of the program:

“119(a) Establishment. --The Secretary shall establish and implement a national highway performance program under this section.

“(b) Purposes. --The purposes of the national highway performance program shall be--

- “(1) to provide support for the condition and performance of the National Highway System;
- “(2) to provide support for the construction of new facilities on the National Highway System; and
- “(3) to ensure that investments of Federal-aid funds in highway construction are directed to support progress toward the achievement of performance targets established in an asset management plan of a State for the National Highway System.

The FHWA GHG notice incorrectly states the intent and meaning of the “performance standards” and of the concept of “performance” to include broad authority does not present on the face of Section 119 or in the historical record of Congressional action on Section 119.

The MAP-21 enactment also included a redesign of Section 150. Reflecting the same need to improve accountability for the performance of obligated funds by states in the efficiency of the transportation system, the Section 150 “Declaration of Policy” stated:

“Sec. 150. National goals and performance management measures

“(a) Declaration of Policy. --Performance management will transform the Federal-aid highway program and provide a means to the most efficient investment of Federal transportation funds by refocusing on national transportation goals, increasing the accountability and transparency of the Federal-aid highway program, and improving project decision making through performance-based planning and programming.

The “performance Management measures” were intended, and are, the regime through which the Section 119 “performance program” and the other apportioned programs would achieve the Section 150 declared national policy goals. As the FHWA Notice observes, Section 150 (b) states:

Sec. 150 (b) National Goals. --It is in the interest of the United States to focus the Federal-aid highway program on the following national goals:

- “(1) Safety. --To achieve a significant reduction in traffic fatalities and serious injuries on all public roads.



- ``(2) Infrastructure condition. --To maintain the highway infrastructure asset system in a state of good repair.
- ``(3) Congestion reduction. --To achieve a significant reduction in congestion on the National Highway System.
- ``(4) System reliability. --To improve the efficiency of the surface transportation system.
- ``(5) Freight movement and economic vitality. --To improve the national freight network, strengthen the ability of rural communities to access national and international trade markets, and support regional economic development.
- ``(6) Environmental sustainability.--To enhance the performance of the transportation system while protecting and enhancing the natural environment.
- ``(7) Reduced project delivery delays.--To reduce project costs, promote jobs and the economy, and expedite the movement of people and goods by accelerating project completion through eliminating delays in the project development and delivery process, including reducing regulatory burdens and improving agencies' work practices.

The “National goals” of Section include “Environmental sustainability”, which is defined in Section 150(b)(6) to be the enhancement of “performance of the transportation system while protecting and enhancing the natural environment”. The policy goal here is to continue investments that enhance the performance of the transportation system while avoiding damage to the environment from the transportation investments. The design of transportation performance investments should enhance their associated environment, not degrade it. The FHWA Notice incorrectly cites this provision, as well as 23 U.S.C. 150(c)(A)(ii), that it provides legal authority to establish the proposed GHG measure. The GHG measure is entirely unrelated to the policy goals established in Section 150(b), and in no way serves the performance management goals Section 150.

In the “Infrastructure Investment and Jobs Act”, Public Law 117-58, Congress amended Section 119 to add the following:

Section 119 (b)(4) to provide support for activities to increase the resiliency of the National Highway System to mitigate the cost of damages from sea level rise, extreme weather events, flooding, wildfires, or other natural disasters."

and

Section 119(k) Protective Features.--

``(1) In general.--A State may use not more than 15 percent of the funds apportioned to the State under section 104(b)(1) for each fiscal year for 1 or more protective features on a Federal-aid highway or bridge not on the National Highway System, if the protective feature is designed to mitigate the risk of recurring damage or the cost of future repairs from extreme weather events, flooding, or other natural disasters.

- ``(2) Protective features described.--A protective feature referred to in paragraph (1) includes--
- ``(A) raising roadway grades;
  - ``(B) relocating roadways in a base floodplain to higher ground above projected flood elevation levels or away from slide prone areas;
  - ``(C) stabilizing slide areas;
  - ``(D) stabilizing slopes;
  - ``(E) lengthening or raising bridges to increase waterway openings;
  - ``(F) increasing the size or number of drainage structures;
  - ``(G) replacing culverts with bridges or upsizing culverts;



“(H) installing seismic retrofits on bridges;  
“(I) adding scour protection at bridges, installing riprap, or adding other scour, stream stability, coastal, or other hydraulic countermeasures, including spur dikes; and  
“(J) the use of natural infrastructure to mitigate the risk of recurring damage or the cost of future repair from extreme weather events, flooding, or other natural disasters.  
“(3) Savings provision.--Nothing in this subsection limits the ability of a State to carry out a project otherwise eligible under subsection (d) using funds apportioned under section 104(b)(1).”.

These amendments to Section 119 were enacted roughly a year ago and reinforce the intent to preserve the performance of the National Highway System from damage, loss of service, loss of capacity and degradation flowing from insufficient state investments designed to mitigate environmental impacts on transportation infrastructure. The FHWA Notice attempts to “reinterpret” this authority as intended to protect the environment from the use of transportation infrastructure.

The FHWA Notice’s effort to imbue Sections 119 and 150 with the legal authority for the FHWA to regulate GHG fails to provide or address the lack of authority States have in regulating vehicle emissions under Title 23. The Clean Air Act, (CAA), 42 U.S.C. §7401 et seq. is the Congressional enactment containing the authority to regulate air emissions from mobile and stationary sources. Under the CAA, the Environmental Protection Agency (EPA), not the FHWA, has the authority to establish National Ambient Air Quality Standards (NAAQS) to protect the public's health and welfare and to regulate emissions of hazardous air pollutants.

The FHWA Notice states that:

“DOT considers the proposed GHG performance management measure essential not only to improve transportation sector GHG performance and work toward achieving net-zero emissions economy-wide by 2050, but also to demonstrate Federal leadership in the assessment and disclosure of climate pollution from the transportation sector. Measuring and reporting complete, consistent, and timely information on GHG emissions from on-road mobile source emissions is necessary so that all levels of government and the public can monitor changes in GHG emissions over time and make more informed choices about the role of transportation investments and other strategies in achieving GHG reduction targets.”

The NSSGA supports the consideration in Congress of GHG measurements that are complete, consistent, and timely to enable Congress to make informed legislative choices directing transportation investments towards achievement of GHG reductions. As of today, Congress has not provided to FHWA the authority to direct states’ Departments of Transportation to measure and reduce GHGs. The FHWA Notice instead places reliance upon the “need” to close gaps in the GHG reporting already produced state-by-state by the EPA and the Department of Energy. The NSSGA doesn’t disagree with the FHWA’s expressed concern that the current data is not disaggregated to reflect the sources of the emissions, but that concern does not give rise to new authority to FHWA to address the concern, particularly where the EPA and DOE do have the authority to measure GHGs emission levels.

The lack of FHWA authority to regulate GHGs was previously recognized by FHWA itself when on July 2, 2018, it repealed its “PM3” or Performance Management” rulemaking (83 FR 24920) identifying the three main reasons for the repeal included in the FHWA Notice:



FHWA identified three main reasons for the repeal: (1) reconsideration of the underlying legal authority; (2) the cost of the GHG measure in relation to the lack of demonstrated benefits; and (3) potential duplication of information produced by the GHG measure and information produced by other initiatives related to measuring CO<sub>2</sub> emissions.

That FHWA now proposes to reconsider it prior reconsideration to discover it in fact has the authority to promulgate the proposed GHG rule stretches credibility. This stretch occurs in the wake of the Supreme Court ruling in *West Virginia vs. EPA*. The *West Virginia* analysis is applicable to the question of whether FHWA has been granted by Congress the authority to implement the proposed rule and its GHG regime because of the sweeping, national consequences of the proposed rule on the use of the nation's transportation infrastructure. On the face of the authorities cited by FHWA no grant of authority is found. Like the EPA's authority for the Clean Power rule at issue in *West Virginia*, the FHWA has similarly discovered extraordinary authority to require states' Departments of Transportation to measure and reduce GHGs. Also found in FHWA's rationale and the *West Virginia* holding, is that "discovery allowed it to adopt a regulatory program that Congress had conspicuously declined to enact itself." (See *West Virginia vs. EPA*).

As the current law authorities cited by FHWA do not provide it the authority to promulgate the proposed rule, FHWA could proceed under its current authority to advance the results of the National Cooperative Highway Research Program (NCHRP) study "Estimating the Effects of Pavement Condition on Vehicle Operating Costs", that showed that an IRI decrease (improvement in pavement smoothness) by 1 m/km (63.4 in./mi) will result in a 3% decrease in the fuel consumption for passenger cars. Considerable research shows that roadways have direct impact on CO<sub>2</sub> emission; and roadway pavements that are smooth result in lower CO<sub>2</sub> levels (assuming all other variables are equal). FHWA can and should work to maintain higher surface quality for NHS roadways to lower the GHGs.

The NSSGA supports the Congressional legislative process of hearings, introduced legislation, mark-ups and floor consideration and conference for the provision of legal authority and encourage FHWA to retract this proposed rule and seek the needed authority from Congress for any future proposal to regulate GHGs under Title 23.

