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Hon. Elaine Chao
U.S. Department of Transportation
Docket Operations Facility
M-30, West Building Ground Floor
Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590

Comments submitted electronically: <https://www.regulations.gov>

RE: Comments on Notice of Proposed Rulemaking for the 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 (Proposed Repeal of GHG Measure)

Docket No. FHWA-2017-0025; RIN 2125-AF76

Dear Secretary Chao:

The Attorney General of California, Xavier Becerra,¹ together with the Attorneys General of the States of Maryland, Oregon, Vermont, and Washington, and the Commonwealth of Massachusetts submits these comments opposing the Federal Highway Administration of the U.S. Department of Transportation's ("FHWA") proposed rulemaking to repeal a Greenhouse Gas Performance Measure that requires States to report and reduce carbon dioxide emissions generated by mobile sources on the national highway system, 82 Fed. Reg. 46,427 (October 5, 2017) ("Proposed Repeal"). The undersigned strongly oppose the Proposed Repeal and urge FHWA to reject this irresponsible proposal. Climate change is the most challenging environmental problem of our time, and demands decisive action from all levels of government.

¹ The California Attorney General submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. *See* Cal. Const. art. V, § 13; CAL. GOV'T CODE, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974).

The Greenhouse Gas Performance Measure (“GHG Measure”) is one part of the larger National Performance Measures Final Rule.² That Final Rule requires State departments of transportation (“SDOTs”), as a condition of receiving Federal transportation money, to monitor and establish performance measures in several categories, including environmental sustainability. With regards to GHG emissions, SDOTs must measure and track on-road GHG emissions, set locally-appropriate performance targets, and ensure consistency in data collection. SDOTs are required to set performance targets for the GHG Measure by February 20, 2018, 82 Fed. Reg. 5970, 6033 (Jan. 18, 2017), and report their progress every two years. *Id.* at 6037. FHWA will biennially assess whether each SDOT has made significant progress towards achieving its target. *Id.* at 5981, 6040. If a State fails to make significant progress, it must document the actions it will take to achieve the target in its next performance report. *Id.* at 6041.

Since the GHG Measure’s adoption in January, 2017, FHWA has made repeated and illegal efforts to block its implementation. Only the concerted efforts of a group of State Attorneys General and private parties have prevented the FHWA from delaying the GHG Measure through procedural subterfuge.³ The Proposed Repeal takes the effort to thwart this extremely important program to a whole new level. On October 5, 2017, FHWA published the Proposed Repeal in the Federal Register, seeking comments on whether the GHG Measure should be “repealed, retained, or revised.” 82 Fed. Reg. 46,427, 46,430 (Oct. 5, 2017). The Proposed Repeal also solicits additional evidence related to the GHG Measure’s implementation costs, its methodology, and its burdensomeness. *Id.* at 46,430-46,431.

² The full title is the “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.” 82 Fed. Reg. 5970 (Jan. 18, 2017). Establishing performance measures for the national highway system is required by the Moving Ahead for Progress in the 21st Century Act, Pub. L., 112-141 (“MAP-21”), and the Fixing America’s Surface Transportation Act, Pub. L., 114-94 (“FAST Act”).

³ The GHG Measure originally had an effective date of February 17, 2017. FHWA three times delayed the effective date of the Final Rule: first, to March 21, 2017, then to May 20, 2017; finally, it suspended it indefinitely. 82 Fed. Reg. 10,441 (Feb. 13, 2017); 82 Fed. Reg. 14,438 (Mar. 21, 2017); 82 Fed. Reg. 22,879 (May 19, 2017). The Attorney General of California, along with the California Air Resources Board (“CARB”) and the Attorneys General of Iowa, Maryland, Oregon, Vermont, Washington, the Commonwealth of Massachusetts, and the State of Minnesota by and through its department of transportation, filed suit against FHWA on September 20, 2017 (*People of the State of California et al. v. FHWA*, Case No. 4:17-cv-05439, *pending*) in the United States District Court for the Northern District of California challenging these delays as illegal for failure to comply with the Administrative Procedure Act (“APA”). On September 28, 2017, FHWA published a notice in the Federal Register putting the GHG Measure into immediate effect, pending consideration of a proposed repeal for which FHWA indicated it would follow APA procedures. 82 Fed. Reg. 45,179 (Sept. 28, 2017).

Our comments⁴ demonstrate that: 1) there is a continuing need for nationwide GHG performance measures to address the impact of GHG emissions on climate change; 2) repealing the GHG Measure is contrary to the facts and the law, and in particular, a violation of the APA; and 3) the FHWA has the legal authority to establish a national GHG performance measure. Accordingly, we strongly urge FHWA to retain the GHG Measure in its existing form, and take additional steps to reduce nationwide GHG emissions from the transportation sector.

Evidence of Intensifying Climate Change Demonstrates the Need for the GHG Measure

Since GHG Measure was initially adopted on January 18, 2017, evidence of the impacts of climate change continue to occur at a rapid pace that cannot be ignored, underscoring the need to strengthen, not eliminate, current efforts to combat climate change. The U.S. Global Change Research Program's recently-released Fourth National Climate Assessment concludes that "[m]any lines of evidence demonstrate that it is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century."⁵ The report goes on, consistent with the vast body of climate science, to describe the dire effects of climate change occurring in the United States, including increased temperatures, ocean acidification, fire, flood, drought, weather variability, and economic destabilization.

The recent devastating hurricane season underscores the urgent need for more action at all levels of government to address climate change. The latest scientific analyses suggest that Hurricanes Harvey, Irma, and Maria were more severe than they otherwise would have been, due to warmer ocean temperatures caused by anthropogenic greenhouse gas emissions.⁶ This was the first time two Category 4 hurricanes hit the United States in one season. Harvey and Irma have claimed at least 120 lives and caused an estimated \$245 billion of damage. Maria has claimed at least 45 lives and caused an estimated \$85 billion of damage. Our government must not ignore

⁴ Comments submitted separately by the California Department of Transportation and CARB support FHWA's earlier conclusions that the best available evidence shows the GHG Measure is not duplicative or burdensome, and that the benefits of retaining and implementing the GHG Measure are likely to outweigh its costs.

⁵ U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)], Chapter 1, Key Finding 3 (2017).

⁶ There is broad agreement in the scientific literature that human factors (greenhouse gases) have had a measurable impact on the observed oceanic and atmospheric variability in the North Atlantic, and that this has contributed to the observed increase in hurricane activity since the 1970s. Several studies have projected increases of precipitation rates within hurricanes over ocean regions, Thomas R. Knutson et al., *Tropical cyclones and climate change*, 3 *Nature Geoscience* 157, 157-163 (2010), particularly for the Atlantic basin, Thomas R. Knutson et al., *Dynamic Downscaling Projections of Twenty-First-Century Atlantic Hurricane Activity: CMIP3 and CMIP5 Model-Based Scenarios*, 26 *Journal of Climate* 6591, 6591-6617 (2013).

these impacts. Regulatory policies untethered from science and real world facts and circumstances are practically and legally untenable.

FHWA’s Repeal of the Measure Would be Arbitrary and Capricious Under the Administrative Procedure Act

Transportation emissions, including mobile sources, represent 26% of the nation’s greenhouse gas emissions.⁷ In its prior rulemaking establishing the GHG Measure, FHWA recognized that “[t]he transportation sector is the largest source of GHG emissions in the United States,” 82 Fed. Reg. 5970, 5997 (Jan. 18, 2017), and that “[s]ignificantly greater reductions in transportation GHG emissions are needed” to help address climate change. *Id.* FHWA acknowledged that the need to confront climate change was doubly important for the transportation sector, since “the transportation system both contributes to climate change and suffers from the impacts of climate change (e.g., flooding, sea level rise).” 82 Fed. Reg. 5970, 5993 (Jan. 18, 2017).

Before deciding to adopt the GHG Measure, FHWA carefully weighed the decision, and explained its reasoning. It noted that adopting the Measure “will incorporate an important environmental aspect of system performance into the set of national performance measures, be responsive to public comments, improve transparency and support the national transportation goal of environmental sustainability.” *Id.* at 5993. In rejecting comments about lack of specificity in the Measure, FWHA referenced “the substantial body of research and guidance that FHWA and others have developed on ways to incorporate GHGs into performance-based transportation planning and programs.” *Id.*

Ten months later, FWHA promulgated the Proposed Repeal, seeking to reverse its decision. It cannot, however, meet the heavy burden of justifying this reversal. Where an agency changes course by repealing an existing rule, the starting point for judicial review is the “arbitrary and capricious” standard of review. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). For repeal of rules, an “agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change.” *Id.* at 42. The Supreme Court has clarified that an agency need not show that a new rule is better than the rule it replaced, but must demonstrate that “there are good reasons” for the replacement. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Further, an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *Id.* An abrupt change of course, like rescinding the GHG Measure, is only legally valid if there are strong justifications. *Id.* Moreover, an agency cannot suspend a validly promulgated rule without first “pursu[ing] available alternatives that might

⁷ *See U.S. Greenhouse Gas Inventory Report: 1990-2014*, available at <https://19january2017snapshot.epa.gov/ghgemissions/us-greenhouse-gas-inventory-report-1990-2014.html> (last visited November 5, 2017).

have corrected the deficiencies in the program which the agency relied upon to justify the suspension.” *Public Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984).

Applying these rules, in *Humane Soc. of U.S. v. Locke*, the court vacated a National Marine Fisheries Service determination that contradicted earlier factual findings by the agency. 626 F.3d 1040, 1051 (9th Cir. 2010). The Court noted that “[d]ivergent factual findings . . . raise questions as to whether the agency is fulfilling its statutory mandates impartially and competently.” *Id.* at 1049. The Ninth Circuit also overturned an exemption to a Department of Agriculture (“DOA”) roadless rule because the agency failed to justify a conclusion that contradicted factual findings it made on the same topic two years earlier. *Organized Village of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956 (9th Cir. 2015). The court emphasized that the DOA had reached opposite conclusions “[o]n precisely the same record,” and that such an “unexplained inconsistency” was arbitrary and capricious. *Id.* at 966-67. The court went on to note that “even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.” *Id.* at 968.

In this case, FHWA produced a strong scientific record to justify the GHG Measure. For instance, in 2009, FHWA initiated a research project to investigate GHG measures that would align with performance-based planning and programming, as well as demonstrating how SDOTs could go about implementing such measures. 82 Fed. Reg. 5970, 5997 (Jan. 18, 2017). A number of FHWA stakeholders served on the expert panel that provided input into the development of the resulting research report – *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning* (“FHWA Report”).⁸ Relying on the FHWA Report and other available evidence, the FHWA concluded that “[s]ignificantly greater reductions in transportation GHG emissions are needed” to help address climate change, *id.* at 5997, and that transportation infrastructure itself is at risk if FHWA fails to tackle climate change. “Continued emissions of GHGs, that adversely affect the atmosphere, lead to climate change effects, and threats to the transportation system posed by climate change impacts (e.g., damaged or flooded facilities).” *Id.* at 5993.

Moreover, in its original rulemaking adopting the GHG Measure, FHWA stated that complying with its statutory mandate under the FAST Act and MAP-21 required it to establish performance measures that address GHG emissions on the national highway system.⁹ 82 Fed. Reg. 5970, 5993 (Jan. 18, 2017). FHWA stated, “[t]he FHWA agrees that as sound policy, the set of national performance measures must cover multiple key aspects of performance [including

⁸See

http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_planning/ghgplanning.pdf (last visited Nov. 5, 2017).

⁹ MAP-21 requires FHWA to promulgate performance measures in the area of environmental sustainability. 23 U.S.C. § 150(a); see 82 Fed. Reg. 5970, 5972 (Jan. 18, 2017). “Environmental sustainability” is defined as “enhanc[ing] the performance of the transportation system while protecting and enhancing the natural environment.” 23 U.S.C. § 150(b)(6).

GHG emissions], otherwise decision-making may not properly take into account important aspects of performance.” 82 Fed. Reg. 5970, 5996 (Jan. 18, 2017). It is unclear how FHWA can now jettison the GHG Measure, when it previously determined that the GHG Measure was necessary to comply with Congressional intent as embodied in MAP-21. *See Organized Village of Kake*, 795 F.3d at 966-67.

Ignoring its own science, the FHWA now references “policy changes” around climate change, the desire to reduce regulations generally, and the potentially burdensome nature of compliance with the GHG Measure as reasons for considering a repeal. 82 Fed. Reg. 46,427, 46,430 (Oct. 5, 2017). In this case, there is no “reasoned analysis” or “detailed justification” to support the complete about-face that the Proposed Repeal represents. The transportation sector remains the largest contributor to GHG emissions, and the adverse effects of anthropogenic climate change are harming our environment in the ways predicted and demonstrated by robust scientific modeling and real-world observations.

To the extent that the FHWA solicits “new information” about the burdensomeness of compliance with the GHG Measure, or its lack of precision, the same concerns were discussed and rejected by the agency in its earlier rulemaking on the GHG Measure. *See* 82 Fed. Reg. 5970 (Jan. 18, 2017). “To allay some of the burden concerns raised by those arguing against a GHG emissions measure . . . FHWA has chosen a measure that relies on existing data and is straightforward to calculate.” 82 Fed. Reg. 5970, 5997 (Jan. 18, 2017). Thus, the FHWA has already considered whether the GHG Measure was unduly burdensome, and concluded it was not. Further, the new evidence submitted by SDOTs that have undertaken the steps required by the GHG Measure indicates that compliance with the GHG Measure *takes under a day’s worth of time*. *See* Minnesota Department of Transportation Comment Letter submitted on the Proposed Repeal, at 1 (reporting it took *two hours* to complete a mock version of the GHG Measure’s reporting requirements). Thus, it is virtually certain that FHWA will be unable to meet its burden of showing a strong justification for overturning factual findings made by the very same agency less than one year ago.

Finally, if FHWA identifies problems with the GHG Measure, its emphasis should be to correct any perceived deficiencies, not to repeal the Measure. FHWA must consider alternative solutions to address alleged problems with the GHG Measure, such as issuing guidance or making adjustments necessary to clarify certain provisions, rather than merely repealing the GHG Measure. *See Public Citizen v. Steed*, 733 F.2d at 103.

FHWA has the Legal Authority to Enact the GHG Measure

To the extent that stakeholders seek to resurrect legal arguments previously rejected by the FHWA, these arguments remain invalid.¹⁰ There is no doubt that FHWA has clear authority,

¹⁰ We note, and appreciate, that the FHWA has not retreated from its understanding of its legal authority.

and even an explicit duty, to establish the GHG Measure. Under 23 U.S.C. § 150(c)(3), States are to adopt “performance measures” that they can use to assess performance of the Interstate and non-Interstate National Highway System for the purpose of carrying out 23 U.S.C. § 150(c)(3)(A)(ii)(IV)–(V).

Moreover, Section 150(c)(3) does not impose limitations on the types of highway system performance to be measured in rules promulgated under 23 U.S.C. § 150(c)(3)(A)(ii)(IV)–(V), provided they relate to the areas of concern identified in 23 U.S.C. § 150(c)(3) – (6). 82 Fed. Reg. 5970, 5994-5995 (Jan. 18, 2017). Consistent with its long-standing practice, FHWA interprets “performance measures” in those provisions to include measures addressing environmental performance. 82 Fed. Reg. 5970, 5995 (Jan. 18, 2017). This interpretation is validated by the many Title 23 provisions that make the environment an important part of the Federal-aid Highway Program,¹¹ as well as by the many FHWA actions demonstrating that environmental protection outcomes, specifically promoting sustainability and avoiding the impacts of climate change, are important aspects of national highway system performance.¹² Reducing GHG emissions in the transportation sector is vital to accomplishing these environmental goals.

¹¹ 82 Fed. Reg. 5970, 5995 (Jan. 18, 2017). This includes the national goal of environmental sustainability in 23 U.S.C. § 150(b)(6), the transportation planning provisions in 23 U.S.C. §§ 134–135, the environmental provisions in 23 U.S.C. § 109(c), (g), (h), (i), and (j), and the statement of policy in 23 U.S.C. § 101(b)(3)(G) (Congressional declaration that “transportation should play a significant role in promoting economic growth, improving the environment, and sustaining the quality of life”); *accord, e.g.*, 42 U.S.C. §§ 4321 *et seq.* (requiring consideration of the environment under NEPA when developing and implementing infrastructure projects). *See* 82 Fed. Reg. 5970, 5995 & n.27 (Jan. 18, 2017).

¹² *See* 82 Fed. Reg. 5970, 5994-5995 (Jan. 18, 2017). Examples include the following: (1) the FHWA 2013 Conditions and Performance Report, which discussed the need to address climate change as part of promoting sustainability, *see* <https://www.fhwa.dot.gov/policy/2013cpr/> (last visited Nov. 5, 2017); (2) FHWA’s July 2013 guidance, *Handbook for Estimating Transportation Greenhouse Gases for Integration into the Planning Process*, *see* http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_handbook/ghghandbook.pdf (last visited Nov. 5, 2017); (3) FHWA’s December 2013 guidance, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*, *see* http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_planning/ghgplanning.pdf (last visited Nov. 5, 2017); and (4) FHWA Order 5520, *Transportation System Preparedness and Resilience to Climate Change and Extreme Weather Effects* (Dec. 15, 2014), *see* <http://www.fhwa.dot.gov/legsregs/directives/orders/5520.cfm> (last visited Nov. 5, 2017), which states climate change and extreme weather events are a significant and increasing risk to the safety, reliability, effectiveness, and sustainability of transportation infrastructure and operations.

Conclusion

FHWA's proposal to repeal the GHG Measure is devoid of legal justification, and violates the fundamental requirements of the APA. Indeed, a repeal would be arbitrary and capricious in light of the record before the FWHA, as well as FHWA's own prior statements related to the need for the GHG Measure. We strongly urge the FHWA to reject the Proposed Repeal, and retain the GHG Measure in its current form.

Sincerely,

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