

**Congress of the United States**  
Washington, DC 20510

June 27, 2017

The Honorable Elaine L. Chao  
Secretary  
U.S. Department of Transportation  
1200 New Jersey Ave SE  
Washington, D.C. 20590

Dear Secretary Chao:

We write to request that you provide us with the rationale and authority the U.S. Department of Transportation (DOT) relied on in acting to delay indefinitely the effective date of the national performance measure on carbon pollution produced from tailpipe emissions on the National Highway System (NHS), otherwise known as the “GHG measure”. This action effectively changed a portion of the National Performance Measures final rule (Docket No. FHWA-2013-0054), without an opportunity for the public to comment on the change, while allowing the rest of the rule to take effect.

The creation of performance measures and standards to improve decision-making was a hallmark of “The Moving Ahead for Progress in the 21st Century Act” (Pub. L. 112–141), or MAP-21. Congress created national goals and directed DOT to establish performance measures to help states make progress toward improving outcomes for safety, reliability, and other performance-based outcomes. An explicit national goal established in MAP-21 is environmental sustainability in order to “enhance the performance of the transportation system while protecting and enhancing the natural environment.”

Accordingly, in the final rule, DOT required states to track on-road greenhouse gas (GHG) emissions. States were to set locally appropriate performance targets, and simply ensure consistency in the collection of emissions data. The final rule required these actions to enable decision-makers to understand and manage the challenges associated with climate change and transportation infrastructure. According to the U.S. Department of Energy, GHG emissions from the transportation sector recently surpassed those from electricity generation, making transportation the largest source of GHG emissions in the United States.<sup>[1]</sup> Removing the requirement for states to develop a mechanism intended merely to quantify levels of carbon pollution would be the regulatory equivalent of burying our heads in the sand.

The President’s decision to withdraw the United States from the landmark Paris Climate Accord leaves little room to wonder what the view of this Administration is on efforts to combat climate change and adapt to its effects. However, that view does not give the Department authority to change final regulations without meaningful public input. Moreover, the fact that the Department has singled out the GHG measure for indefinite delay without a convincing rationale causes concern that there may be a pre-decisional intent to revoke the measure permanently. Such action would be contrary to the requirements of the Administrative Procedures Act (APA).

In the Federal Register notice announcing the decision to delay the GHG measure indefinitely, the Department states: the “President’s appointees and designees need to delay the effective dates of

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<sup>[1]</sup> U.S. Department of Energy, Energy Information Agency (EIA), <http://www.eia.gov/totalenergy/data/monthly/>

these regulations to have adequate time to review new or pending regulations, and neither the notice and comment process nor delayed effective date could be implemented in time for this review.” The Administration has twice delayed the performance measure rulemaking for a total of four months – also without the opportunity for notice and comment - for the express purpose of such a review. The decision to target only the GHG measure and allow the rest of the rule to proceed clearly demonstrates cherry picking of a particular policy within the rule that this Administration finds objectionable.

The APA requires the opportunity for public notice and comment before the provisions of a final rule can be changed, unless it is “impracticable, unnecessary, or contrary to the public interest to do so.” The inclusion of a GHG measure in the final rule garnered strong public support, including supportive comments from over 91,000 citizens, over 100 businesses, numerous local officials, over 100 cities, and over 100 public interest, non-profit, and advocacy organizations. Congress weighed in as well, with 19 U.S. Senators and 48 Members of the U.S. House of Representatives expressing support. It is difficult to understand how delaying a portion of the rule that generated so many supportive comments in the development of the final rule can be “in the public interest”.

In addition, the indefinite delay has the effect of making changes to the final rule. Under the APA, the outcome of a rulemaking process must not be prejudged by the agency. Based on the final rule published in the Federal Register, it is difficult for us to understand how your Department justifies the waiver of the procedures required under the APA. So that we can better understand DOT’s plan going forward and its decision-making process, please provide written responses to the following questions no later than Monday, July 17, 2017:

- 1) By what date does DOT intend to reissue the GHG performance measure for notice and comment?
- 2) Given the MAP-21 goal of focusing the Federal-aid highway program on the enhancement of environmental sustainability, how does DOT intend to achieve this goal as it relates to GHG emissions?

Additionally, to gauge whether the DOT has already made the decision to take final action to withdraw the GHG measure, regardless of the record:

- 3) Please provide us with copies of all documents (including but not limited to emails, white papers, correspondence, memos, presentations, telephone logs and meeting minutes) pertaining to the decision to delay this measure.

Thank you for your prompt attention to this matter. If you have any questions or concerns, please have your staff contact Rebecca Higgins and Michal Freedhoff on the Senate EPW Committee, and Helena Zyblikewycz on the House T&I Committee.

Sincerely,



Tom Carper  
Ranking Member  
U.S. Senate Committee on Environment &  
Public Works



Peter DeFazio  
Ranking Member  
U.S. House Committee on Transportation &  
Infrastructure