Institute *for* Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

November 6, 2017

VIA ELECTRONIC SUBMISSION

Attn: United States Department of Transportation

Re: Docket ID No.: FHWA–2017–0025; RIN 2125–AF76

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] submits the following comments on the Federal Highway Administration's ("FHWA") proposal to repeal the greenhouse gas (GHG) measure, 82 Fed. Reg. 46,427 (Oct. 5, 2017).

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comment:

FHWA Has Not Explained Why the GHG Measure's Benefits No Longer Justify Its Costs

FHWA established the GHG measure as part of a series of rulemakings intended to ensure the most efficient investment of Federal transportation funds.[2] Of the 18 performance measures established by these rulemakings,[3] FHWA has singled out the GHG measure for repeal.[4]

FHWA originally found that the benefits of the GHG measure outweighed its costs.[5] Specifically, the agency determined that the GHG measure would result in $13.9 million in compliance costs and that, assuming each ton of carbon dioxide emissions results in $44 in climate damage, the GHG measure would need to reduce 312,302 tons of CO_2 emissions over

[1] This document does not purport to present New York University School of Law's views, if any.
[2] 82 Fed. Reg. 46427, 46,428 (Oct. 5, 2017).
[3] 82 Fed. Reg. 5970, 5973 (Jan. 18, 2017).
[4] *See* 82 Fed. Reg. 22,879, 22,879 (May 19, 2017) (suspending the GHG measure while allowing all other measures to take effect).
[5] 82 Fed. Reg. at 5976.

ten years (or 31,230 tons of CO_2 emissions per year) to justify its costs.[6] FHWA then expressly concluded that the GHG measure's benefits would "surpass this threshold" and therefore outweigh its costs.[7] To put that 31,230 annual CO_2 reduction threshold in context, FHWA noted that it represented a less than 0.01 percent decrease in the average annual amount of CO_2 emissions from the transportation sector.[8] To be even more precise, these reductions represent a 0.0018 percent reduction in average annual CO_2 emissions from the transportation sector.[9]

In order to repeal the GHG measure, FHWA must (1) "examine the relevant data" and (2) "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[10] In addition, FHWA must provide "a reasoned explanation" for changing course and disregarding factual findings that underlay the GHG measure.[11] FHWA has not satisfied this standard.

First, FHWA has not examined "the relevant data" regarding the costs that repeal will impose in the form of forgone benefits from the GHG measure.[12] FHWA's regulatory impact analysis for this notice of proposed rulemaking ("Repeal RIA") fails to provide any discussion of the GHG measure's benefits.[13] The Repeal RIA acknowledges that, as a whole, the package of seven performance measures that included the GHG measure will lead to greater consistency in data collection, improved planning, better assessment of performance, greater transparency and accountability, and, ultimately, progress with respect to stated national goals.[14] But the agency has not explicitly addressed the benefits of the GHG measure

[6] 82 Fed. Reg. at 6026.
[7] *Id.* at 5976.
[8] *Id.* at 6026.
[9] *Id.* at 6026 & fn 77. FHWA used 2014 as a reference and explained that the transportation sector accounted for 1.74 billion tons of CO_2 emissions that year. Thus, 31,230 tons divided by 1.74 billion tons is 0.0018 percent. *Id.*
[10] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).
[11] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[12] *See State Farm*, 463 U.S. at 43.
[13] *See* Summary Report Economic Assessment: Green House Gas Performance Measure at 26-27 [hereinafter Repeal RIA].
[14] *Id.* at 26.

specifically—benefits that will be forgone if this proposed repeal is finalized. Ignoring these forgone benefits is arbitrary and capricious.[15]

Second, FHWA has not explained its basis for disregarding the factual findings underlying the GHG measure.[16] FHWA has not explained whether or why it no longer believes that the GHG measure will lead to at least a 31,230 ton (or 0.0018 percent) reduction in average annual CO_2 emissions from the transportation sector. Nor has FHWA explained whether or why it no longer believes that those reductions would be worth $13.9 million over ten years.

FHWA states that "if the potential benefits described in this section were to not materialize . . . then the net benefits of this rulemaking would equal the total cost savings from repealing the GHG measure as presented . . . above."[17] Of course, *if* a rule has no benefits in the first place, repeal will result only in cost savings. But here, FHWA previously found that the GHG measure *would* provide benefits and so it should explain why forgoing those benefits is justified before any repeal.[18]

FHWA also offers the conclusory assertion that "FHWA believes that the cost savings from this rulemaking would exceed the foregone benefits."[19] But FHWA originally found that the GHG measure would yield more than $13.9 million in benefits from reduced carbon dioxide emissions and thus that its benefits would surpass the compliance costs of the measure.[20] FHWA has provided no explanation for disregarding its prior analysis.[21]

If FHWA does provide an analysis of the forgone benefits, FHWA should continue to rely on the global social cost of carbon estimates to calculate the cost of carbon dioxide emissions. The agency's use of that estimate was reasonable and consistent with the best available

[15] *California v. Bureau of Land Management*, No. 17-03804, 2017 WL 4416409, at *11 (N.D. Cal. Oct. 4, 2017) ("Defendants' failure to consider the benefits of compliance with the provisions that were postponed, as evidenced by the face of the Postponement Notice, rendered their action arbitrary and capricious and in violation of the APA.").
[16] *Fox*, 556 U.S. at 515.
[17] Repeal RIA at 27.
[18] 82 Fed. Reg. at 5976.
[19] 82 Fed. Reg. at 46,431.
[20] 82 Fed. Reg. at 5976.
[21] *Fox*, 556 U.S. at 515.

science.[22] And scores of economists and climate policy experts continue to endorse the estimates as the best available estimates of the cost of carbon dioxide emissions.[23]

Respectfully,

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[22] *See Zero Zone, Inc. v. Dep't of Energy*, 832 F.3d 654, 679 (7th Cir. 2016) (holding that estimates of the social cost of carbon used to date by agencies were reasonable).

[23] *See, e.g.*, Richard Revesz et al., *Best Cost Estimate of Greenhouse Gases*, 357 Science 655 (2017); Michael Greenstone et al., *Developing a Social Cost of Carbon for U.S. Regulatory Analysis: A Methodology and Interpretation*, 7 Rev. Envtl. Econ. & Pol'y 23, 42 (2013); Richard L. Revesz et al., *Global Warming: Improve Economic Models of Climate Change*, 508 Nature 173 (2014) (co-authored with Nobel Laureate Kenneth Arrow, among others).