



SCWA Legislative & Regulatory Update

December 11, 2023



FHWA Releases Final Greenhouse Gas Performance Measurement Rule

On November 22, the Federal Highway Administration (FHWA) released its long-awaited final rule on Greenhouse Gas Performance Measurement on the National Highway System.

The rule imposes measurement, targeting and reporting requirements on states with the objective of reducing greenhouse gas (GHG) emissions from the transportation sector (specifically, CO₂ tailpipe emissions).

Many small business organizations were encouraging the FHWA to withdraw the rule as they did not have authority to propose the rule for multiple reasons, including statutory wording and that authorization for such a rule was debated by Congress during consideration of the Infrastructure Investment and Jobs Act and not passed.

The final rule made several changes from the proposal, notably by removing the requirement for a state to set a declining emissions target that would meet the Biden Administration's Net Zero goals.

While the elimination of the need to meet the Biden Administration's Net Zero goals will give states some flexibility in meeting the requirements of this rule, the rule as structured will still require states to set targets to achieve a decline in tailpipe CO₂ emissions.

This is especially problematic for states that are growing in population and increasing economic output. Furthermore, states which do not have a strong electric vehicle market also will have difficulty meeting the reduction goals of this rule.

However, it is somewhat positive that the FHWA chose to change the baseline year for measuring reductions in GHG emission levels from 2021 to 2022.

As stressed in many comments, 2021 was not a realistic or fair baseline as it was still in the middle of the pandemic and economic activity was down significantly compared to future post pandemic years. So, a 2021 baseline would require states to work towards reductions from a low level of CO₂ emissions; 2022 as the baseline year is an improvement.

Despite these changes small business owners remain opposed to this rule as we believe it penalizes and/or discourages investments in highways and adding badly needed capacity to our Interstate System. Though the FHWA released its rule last week, the rule has not yet been officially published in the Federal Register.

Once it is published it is anticipated there will be potential legal challenges to whether the agency had the authority to propose this rule without congressional authorization.

We believe that the Supreme Court's decision in *West Virginia v. EPA* requires federal agencies to have clear congressional authorization to introduce rules on Major Questions which we believe this rule does.

Additionally, we expect both the House and Senate will use the Congressional Review Act (CRA) to rescind this rule by the FHWA.

While Congress may pass a CRA on this rule it will undoubtedly be vetoed by President Biden and there will not be enough votes to override his veto.

[Click here view the final rule.](#)



OT Rule Release Targeted for April

The Biden administration just released the [Fall 2023 Regulatory Agenda](#).

We wanted to flag for you that the [FLSA Overtime final rule](#) is now targeted for April 2024.

We will continue to monitor and report on any developments.



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