

BACKGROUND

- On December 7, 2023, the U.S. Department of Transportation and the Federal Highway Administration’s (collectively, “the Agencies”) published a new rule, *National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure*, 88 Fed. Reg. 85364 (Dec. 7, 2023) (“Emissions Rule”).
<https://www.federalregister.gov/documents/2023/12/07/2023-26019/national-performance-management-measures-assessing-performance-of-the-national-highway-system>
- The Emissions Rule requires KYTC and each Metropolitan Planning Organization in the Commonwealth to track greenhouse gas emissions, set declining targets for CO2 emissions that the Commonwealth must try to reach, monitor the emissions and to prepare reports to the FHWA.
- More specifically, the Emissions Rule requires KYTC and the Metropolitan Planning Organizations (MPOs) within the Commonwealth of Kentucky to “establish declining targets for reducing CO2 emissions generated by on-road mobile sources.” Targets for the first four-year period must be established and reported to FHWA by KYTC no later than February 1, 2024. (Because of the pending litigation in the United States District Court for the Western District of Kentucky, *Commonwealth of Kentucky, et. al. v. Federal Highway Administration, et. al.*, that deadline has been extended to March 29, 2024) MPOs in Kentucky are required by the Emissions Rule to set targets no later than 180 days after KYTC establishes its target.
- The Emissions Rule also requires KYTC and the MPOs within the Commonwealth to report biennially on their progress, which FHWA will use to determine whether Kentucky has made “significant progress toward the achievement of the 4-year target for the GHG measure.” FHWA will monitor performance, and KYTC must provide a detailed plan to achieve performance if the targets are not met.
- The State’s Initial GHG Report shall include the KYTC's 4-year target for the GHG measure, the basis for the target, a discussion of how the target relates to other longer-term performance expectations, and the metric for the reference year. *Id.* In addition to the Initial Report required by the Emissions Rule on or before

February 1, 2024, a Mid Performance Period Progress Report is required to be submitted on or before October 1, 2024. *Id.*

- Notably, FHWA claims that there is no penalty for failing to comply or failing to achieve actual reductions. Still it has referenced its general enforcement authority. (“Failure to comply with Federal requirements, ***including requirements to set performance targets***, may be subject to penalties under 23 CFR 1.36.”)
- On December 22, 2023, the Attorney General filed a lawsuit on behalf of the Commonwealth seeking to declare the Emissions Rule invalid because it is arbitrary and capricious under the Administrative Procedure Act, violates the Major Question Doctrine, Violates the Spending Clause, and violates the principles of federalism by infringing on the sovereignty of the States. *Commonwealth of Kentucky et. al. v. Federal Highway Administration, et. al., No. 5:23-cv-00162-BJB-LLK* (W.D. Ky. 2023). Twenty other states joined the lawsuit as plaintiffs. Texas has filed its own lawsuit in federal court in Texas.
- The parties have agreed that the Emissions Rule will not be enforced until March 29, 2024. Judge Beaton will hold a hearing on March 7, 2024.
- Prior to December 7, 2023, with the publication of the Emissions Rule, no federal regulation required KYTC to measure, monitor, or establish declining targets for mobile emissions of CO2.
- On February 9, 2024, the Commonwealth and the 20 other Plaintiff States filed a motion for summary judgment. Briefing will be complete by March 4, 2024 and the Court will issue a decision on the merits on or before March 29, 2024.

Additional Points

From 2021-24 State Transportation Improvement Plan:

- *The FAST Act requires that each State shall carry out a continuing, cooperative, and comprehensive statewide transportation planning process that provides for consideration and implementation of projects, strategies, and services that will support the economic vitality of the United States, the states, metropolitan areas, and nonmetropolitan areas, especially by enabling global competitiveness, productivity, and efficiency.*
- *In accordance with the FAST Act requirements, the KYTC mission is “to provide a safe, efficient, environmentally sound and fiscally responsible*

transportation system that delivers 21 economic opportunity and enhances the quality of life in Kentucky.2” Simply stated, the KYTC’s goal is to provide “safe and reliable roads, roads that lead to jobs,” and the 2020 Enacted Highway Plan and FY 2021-2024 STIP have been developed in support of that goal.

- *The KYTC considered technical data on the ability of candidate projects to improve safety, increase system reliability, and contribute toward enhancing regional economic attractiveness. Unfortunately, the needs of our highway system far outweigh available resources. The KYTC is working to improve the evaluation process for active and potential projects to ensure that every dollar spent is used to address the most critical and cost effective improvements. In doing so, the KYTC can concentrate available funds on those projects that truly result in safer roadway conditions, better pavements and bridges, and improved local economies.*

<https://transportation.ky.gov/Program-Management/Pages/2021-STIP-Book.aspx> At page 20-21.
