



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington DC 20515

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Katherine W. Dedrick
Staff Director

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March 7, 2022

The Honorable Pete Buttigieg
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Secretary Buttigieg:

We write to ask that you promptly rescind guidance issued by the Federal Highway Administration (FHWA) on December 16, 2021, that impermissibly contradicts and seeks to replace important sections of the *Infrastructure Investment and Jobs Act* (IIJA), Pub. L. No. 117-58.¹ Specifically, FHWA's guidance improperly promotes the Administration's policy preference that was both considered and rejected during development of the IIJA in Congress. This policy, now being pushed through agency guidance, is intended to delay or deter critical road and highway expansion projects in clear defiance of the law and Congressional intent.² This blatant misapplication of the *IIJA* represents a clear and frustrating example of the FHWA undermining the law while attempting to prioritize guidance without public accountability.³

As you know, statutes such as the *IIJA*, represent the strongest controlling authority to agencies when taking actions, creating policy, and serving the public good.⁴ Agency guidance ranks behind both statutes and regulations for agency direction and authority.⁵ Unlike statutes,

¹ Memorandum from Stephanie Pollack, Deputy Administrator, FHWA to Associate Administrators, et. al., (Dec. 16, 2021), available at https://www.fhwa.dot.gov/bipartisan-infrastructure-law/docs/building_a_better_america-policy_framework.pdf [hereinafter Pollack, FHWA Guidance].

² *Id.*

³ The Editorial Board, *Highway Funding Bait-and-Switch*, WALL ST. J., (Jan. 30, 2022), available at https://www.wsj.com/articles/highway-funding-bait-and-switch-agencies-bipartisan-infrastructure-new-capacity-cars-public-transportation-11643576500?mod=Searchresults_pos1&page=1 [hereinafter Wall St. J. E. Bd.].

⁴ U.S. GOV'T ACCOUNTABILITY OFF., *Guidance Documents from Federal Agencies*, available at <https://www.gao.gov/assets/670/669721.pdf>; see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 827, 842-843 (1984), denoting that once Congress has explicitly spoken on an issue agencies cannot utilize regulations to amend statutes.

⁵ *Id.*; see also *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) "do not have the force and effect of law.").

agency guidance is not legally binding and is generally meant to clarify statutes and “inform the public about complex policy implementation topics.”⁶ While this type of guidance may prove helpful in clarifying and informing the public, it may also be improperly weaponized to wrongly interpret statutory obligations without adequate – or any – accountability.⁷

The *IIJA* includes an important section meant to streamline the authorization and permitting process required to “site, construct or reconstruct” highway projects that include roadway expansions.⁸ This section, called “One Federal Decision,” is specifically and clearly intended to increase the efficiency of the environmental review process for qualifying projects, like new roadways, so such projects advance with minimal bureaucratic delays and red tape.⁹ Notably, One Federal Decision directs the FHWA to develop a two-year limit for the environmental review process for all major highway projects with no designation of priority.¹⁰ In short, it will allow roads to get built faster and help communities grow.

Unfortunately, FHWA voluntarily chose to draft the guidance at issue, which it “intended to serve as an overarching framework to prioritize the use of [IIJA] resources on projects.”¹¹ Specifically, FHWA’s guidance encourages the investment of *IIJA* funds in projects and policies that align with the Administration’s priorities, including climate change, transportation equity, and modes of transportation other than motor vehicles.¹² Of concern, the guidance creates new conditions by directing FHWA to undertake actions and policies to disfavor the use of Federal highway money for new or expanded highways and roadways.¹³ The guidance dictates that FHWA take action to encourage or require “recipients of Federal highway funding to select projects that improve the condition and safety of existing transportation infrastructure within the right-of-way before advancing projects that add new general purpose travel lanes serving single occupancy vehicles.”¹⁴ The guidance explicitly discriminates against support for projects that benefit motor vehicles by mandating that “[p]rojects to be prioritized include those that maximize the existing right-of-way for accommodation of **non-motorized modes**” (emphasis added).¹⁵

The purpose of FHWA’s guidance appears not to inform the public or clarify the statute, but to create altogether new standards and polices for federal funding that conflicts with the language and clear Congressional intent of the *IIJA*. FHWA’s improper attempt to preempt law with agency guidance is not only clear to us, but also caught the public’s attention as an improper “bait-and-switch” that runs counter to the *IIJA* and One Federal Decision.¹⁶ In sum, this guidance wrongly seeks to ban what most areas need most - more capacity.

⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-368, SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES 1 (2015), available at <https://www.gao.gov/assets/gao-15-368.pdf>.

⁷ KATE R. BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS (Apr. 19, 2021), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10591>.

⁸ *Infrastructure Investment and Jobs Act*, Pub. L. No. 117-58, § 11301 (Nov. 15, 2021).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pollack, FHWA Guidance, *supra* note 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Wall St. J. E. Bd., *supra* note 3.

We respectfully ask that the December 16, 2021, FHWA guidance memorandum be rescinded in its entirety.

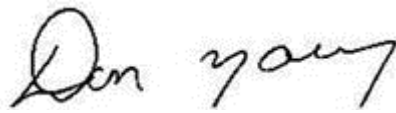
Sincerely,



Rodney Davis
Ranking Member
Subcommittee on Highways and Transit



Sam Graves
Ranking Member
Committee on Transportation and
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Don Young
Member of Congress



Eric A. "Rick" Crawford
Member of Congress



Bob Gibbs
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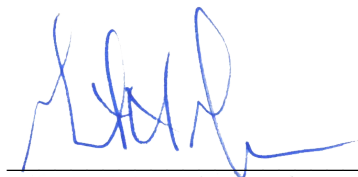
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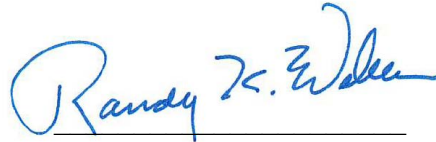
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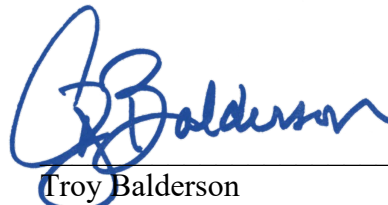
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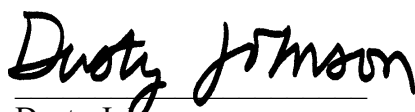
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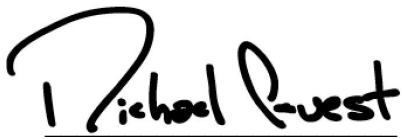
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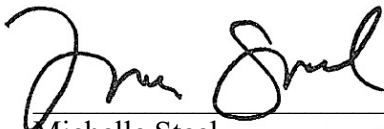
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