

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

Legal Analysis of Model Legislation Mandating Consideration of Greenhouse Gas Reduction as Part of Metropolitan Transportation Planning
Prepared by Michael Dsida

This memorandum relates to implementing the second recommendation made in chapter 13 (“Transforming Transportation Demand”) of Legal Pathways to Deep Decarbonization in the United States (p. 335): “Congress should specifically add [greenhouse gas] emissions reduction to the list of planning factors...” that metropolitan planning organizations must consider in transportation planning.

A. Current law and what the draft bill would do

Under federal law, states must establish a metropolitan planning organization (MPO) for each urban area with a population of at least 50,000. 23 U.S.C. § 134(d); 49 U.S.C. § 5303(d).1 MPOs are subject to a variety of requirements, including the obligation to engage in a continuing, comprehensive, and cooperative transportation planning process for the urban area for which it has been established. 23 C.F.R. § 450.300.

Federal law also sets out factors to be considered as part of the transportation planning process. Each MPO’s planning process:

shall provide for consideration of projects that will:

- (A) support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
- (B) increase the safety of the transportation system for motorized and nonmotorized users;
- (C) increase the security of the transportation system for motorized and nonmotorized users;
- (D) increase the accessibility and mobility of people and for freight;
- (E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;
- (F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;
- (G) promote efficient system management and operation;
- (H) emphasize the preservation of the existing transportation system;
- (I) improve the resiliency and reliability of the transportation system and reduce or mitigate stormwater impacts of surface transportation; and
- (J) enhance travel and tourism.

23 U.S.C. § 134(h)(1). Federal law imposes nearly identical requirements on MPOs under 49 U.S.C. § 5303(h)(1).

Under subparagraph (E), MPOs *may* consider a project’s potential for reducing greenhouse gas emissions. There is no explicit requirement, however, in either 23 U.S.C. § 134(h)(1) or 49 U.S.C. § 5303(h)(1), that the planning process provide for consideration of projects that will reduce the amount of greenhouse gases produced by the metropolitan area’s transportation network.

The legislation accompanying this memorandum would establish such a requirement. Under the bill, the metropolitan planning process would be required to provide for consideration of projects and strategies that will reduce the amount of greenhouse gases produced by the transportation system. (The definition of “greenhouse gases” is substantially the same as the definition used in H.R. 763, the Energy Innovation and Carbon Dividend Act of 2019.)

B. Additional issues to consider

Prioritization – Current law does not prioritize any one factor (or set of factors) listed in 23 U.S.C. § 134(h)(1) over any others. The same is true of the factors listed in 49 U.S.C. § 5303(h)(1). However, such legislation could require MPOs to prioritize the reduction of greenhouse gases over other factors, and the accompanying legislation includes optional language a legislator may wish to consider should the legislator decide to prioritize greenhouse gas reductions.

Remedies for an MPO’s failure to meet the requirement – Under current law, courts have no authority to review an MPO’s failure to consider any of the factors listed in 23 U.S.C. § 134(h)(1) or 49 U.S.C. § 5303(h)(1). 23 U.S.C. § 134(h)(3) and 49 U.S.C. § 5303(h)(3). Such legislation, however, could allow courts to enforce the requirement that MPOs consider the reduction of greenhouse gases in transportation planning, and the accompanying legislation includes optional language a legislator may wish to consider should the legislator decide to include an enforcement requirement.

Planning outside of metropolitan areas – Federal law requires states to develop statewide transportation plans (which are to be developed in coordination with MPO planning). The factors that must be considered in the development of metropolitan transportation plans must also be considered in the development of statewide transportation plans. The accompanying legislation does not add the reduction of greenhouse gases as a factor to be considered in the development of statewide plans, but the bill could easily be revised to add it, as shown in the optional language.

Black carbon – The recommendation to which this memorandum and the accompanying legislation relate addresses greenhouse gases, but not black carbon – a type of airborne particulate matter that results from incomplete combustion of carbon-based fuels. The recommendation’s focus on greenhouse gases makes sense, given that greenhouse gases have a larger long-term impact on the climate than black carbon. But apart from carbon dioxide, black carbon may be the most significant “climate forcer.” As discussed in Chapter 13, “[r]eductions in

black carbon could offer significant and almost immediate climate mitigation benefits.”¹ Therefore, the accompanying legislation includes optional language a legislator may wish to consider should the legislator decide that federally-mandated transportation planning needs to consider black carbon impacts of transportation projects and strategies.²

Cross-references – There may be cross-references in other federal statutes and regulations to the statutory sections that are affected by the accompanying legislation. Additional research may be warranted to determine if that is the case.

¹ Legal Pathways to Deep Decarbonization in the United States, 848 (Michael B. Gerrard and John C. Dernbach eds., 2019).

² The definition used for “black carbon” in the accompanying legislation is drawn from the Environmental Protection Agency’s 2012 “Report to Congress on Black Carbon” at 20 (available at https://www.researchgate.net/publication/312088045_Report_to_Congress_on_Black_Carbon_March_2012/link/586ecb8608ae329d6214c6cb/download).