

Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
Docket No. FHWA-2021-0022
Development of Guidance for Electric Vehicle Charging Infrastructure Deployment
January 23, 2022

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming (“we” or “our”) respectfully submit these joint comments in response to the notice and invitation for comment in this docket. This docket concerns the Federal Highway Administration’s (FHWA’s) implementation of the provisions of the recently enacted infrastructure law, the Infrastructure Investment and Jobs Act¹ concerning funding programs supporting the deployment of electric vehicle (EV) charging infrastructure. See 86 Federal Register 67782 (November 29, 2021).

The new infrastructure law includes a formula grant program and a discretionary grant program supporting the deployment of electric vehicle (EV) charging infrastructure. Acquisition of EV charging equipment, its installation, and certain operating costs can be supported by Federal funds under these programs.²

Each of our departments looks forward to making best efforts to successfully implement the formula program and use its respective EV charging apportioned funds, as well as consider applying for discretionary funds (which can be used for EV charging projects as well as for projects for infrastructure for certain other alternative fuels).

Our states, however, are very rural by national standards. We are concerned that the programs could be particularly hard to implement in rural states if USDOT and FHWA do not implement the provisions with flexibility, flexibility that is warranted to meet statutory recognition that the programs must reach rural states and areas.

Our comments address two significant issues regarding the ability of our states to implement these EV charging programs.

1. Deadlines for submitting plans to USDOT/FHWA for the use of apportioned formula funds for EV charging facilities should provide very substantial flexibility to States, including -- that the deadline be a date well out into the future, that States have the opportunity to receive extensions of filing deadlines and submit those plans contingent on certain circumstances, and that states be able to amend those plans. Such flexibility is particularly appropriate due to

¹ Public Law No. 117-58, 135 STAT 429 et seq., sometimes referred to as “IIJA” and sometimes as the bipartisan infrastructure law (BIL).

² The formula program is set forth in the law at Division J, Title VIII, under the heading Federal Highway Administration beginning at 135 STAT 1421. The discretionary grant program is set forth in section 11401 as an amendment to 23 USC 151. See 135 STAT 546 et seq.

- concern that states will not be able to locate sufficient, if any, EV charging equipment that complies with Buy America requirements. Further, the exercise of such flexibility must be without financial penalty such as loss of funds.
2. The formula program and part of the discretionary program allow funds to be used for EV charging projects only if located along a designated EV charging corridor. Our states do not have as much designated corridor mileage as we would like because current practice by FHWA, not required by statute or rule, requires locations for fast EV charging to be separated by no more than 50 miles for a route to meet corridor ready status. In our large area, low population states useful sites may be separated by more than 50 miles, making it problematic for our departments to designate such corridors. FHWA should immediately allow greater flexibility in corridor designation, at least in very rural states, so that we can more readily deploy program funds and provide increased access to EV charging. Taking such a step would not only have FHWA further the obvious goal of the statutory funding provisions – deployment of more EV chargers, but would be consistent with technology improvements since the 50-mile practice was developed. The Department of Energy (DOE) has reported this month that some EVs for model year 2022 have a maximum range of over 500 miles, not 50, and DOE reports that model year 2021 EVs have a median range of 234 miles, making the 50-mile practice arbitrary and counterproductive in a rural setting without traffic jams.

These important points are discussed in more detail below.

FHWA Must Be Flexible in Administering the Programs, Particularly Due to the Prospect That Qualifying Equipment Will Not be Available

In addition to this docket, USDOT and DOE opened a docket on EV Charging Equipment and Buy America Requirements. 86 Federal Register 67115 (November 24, 2021).

The Federal Register notice in that Buy America docket included the important information that the two “Agencies are not aware of any EV chargers currently able to meet applicable Buy America requirement[s] for steel and iron.” 86 Federal Register 67117.

We strongly support U.S. workers and businesses. However, if Buy America compliant EV chargers prove to be not available, or not available in sufficient quantities to achieve program implementation, FHWA must move quickly if there is to be a functioning EV charging formula program.

States cannot file plans with USDOT or FHWA for the use of those formula funds in given time frames if they (or their private sector contractors under the program) cannot procure in those time frames equipment which meets Buy America requirements (or procure such qualifying equipment in sufficient quantities). Further, if USDOT/FHWA addresses this issue through a Buy America waiver, that waiver must be sufficiently

flexible to enable a state to file plans with confidence that equipment allowed under the waiver will be available to implement the EV charging program within the plan time frames.

In that FY 2022 is already far along, we ask FHWA to act quickly to provide states a solution or solutions to this fundamental obstacle. A Buy America waiver seems to be required and must last until it is clear that Buy America compliant equipment is genuinely available.

Partly due to the Buy America issue, but also because the fiscal year is already well along, and because the program is new and FHWA has not yet released guidance or rules for its administration, and also because States may wish to have additional corridors designated as locations for facilities funded under the legislation, FHWA must provide flexibility to States. For example –

The deadline for submitting plans for the formula EV program for the first program year, as well as for beyond FY 2022 should not be premature.

FHWA should also allow States to amend plans after they are filed and to file plans that are expressly contingent on the availability of equipment that is allowed to be deployed.

Particularly at this time, do not require the filing of 5 years' worth of plans but require only the first year to be addressed in an initial filing, allowing out years to be addressed in later filings.

Put another way, given the noted challenges, FHWA must not require States to promptly submit a plan for use of 5 years' worth of these funds. To be clear -- we want to put EV charging funds to use – but that is looming as a potentially impossible task near term and FHWA must be proactive to be sure States are not required to achieve the impossible in this aspect of the infrastructure bill.

We offer the above comments and ideas to assist FHWA as well as our departments in making a success of the program, and look forward to seeing a genuinely constructive and flexible response by FHWA to this challenge of program administration.

FHWA should ensure that there are eligible locations for rural States to deploy EV charging, particularly by allowing the designation of corridors, in low population density states and low population density areas in states generally, where EV charging stations would be more than 50 miles apart.

As mentioned at the outset, funds under the formula program and portions of the discretionary program can be directed to EV charging facilities only on designated corridors. Yet, FHWA practice has precluded designation (as corridor ready) of corridors with a gap of more than 50 miles between charging stations, a mileage limitation that is a severe obstacle in rural areas where there can be more than 50 miles between realistic

charging station locations – whether due to electrical grid limitations in rural areas, more than 50 miles between towns of size, or other reasons.

Further, improvements in EV technology and range per full charge have made the 50-mile restriction increasingly arbitrary and provide FHWA an easy opportunity to allow greater range between charging stations on designated corridor ready EV charging corridors.

A January 10, 2022 release from the Department of Energy’s Office of Energy Efficiency and Renewable Energy (“Transportation Analysis Fact of the Week #1220”) advises that for model year 2021 one EV model has a range of 405 miles and that of all EV models available for sale in the U.S. for that model year the median range is 234 miles. That same DOE office’s January 17 release (“Transportation Analysis Fact of the Week #1221”) states that “there are already EV models offered for the 2022 model year achieving a maximum range of more than 500 miles.”

The 50 miles practice is not required by statute or rule in the Code of Federal Regulations. It is a practice that FHWA can change right away, including in the guidance issued for these programs!

We also are confident that disagreement with the 50-mile restriction is shared by many, particularly across the west and in other rural states and areas.

Moreover the 50-mile practice was not developed in contemplation of Federal grant programs. But now Congress has enacted and funded these programs and wants to see the programs working. This is another major consideration that requires a change in the current restrictive 50-mile practice.

Moreover, Congress has expressly stated in the new legislation that, specifically as to some of the funds, the Secretary –

shall give priority to projects that expand access to electric vehicle charging infrastructure ... within ... rural areas. 23 USC 151(f)(8)(F).

The same consideration applies to the formula program, where, in developing guidance for that program, DOT and DOE are to consider the “need for electric vehicle charging infrastructure in rural corridors and underserved or disadvantaged communities.”

Further, the new infrastructure law includes section 25010, Rural Opportunities to Use Transportation for Economic Success Initiative. Among the section’s provisions are directives to the new ROUTES Council, which includes the Secretary, Deputy Secretary and FHWA Administrator to –

Ensure that the unique transportation needs and attributes of rural areas and Indian Tribes are fully addressed during the development and implementation of programs, policies, and activities of the Department; and

Provide rural areas and Indian Tribes with proactive outreach — to improve access to discretionary funding and financing programs.

So, to the extent that eligibility to apply for or expend EV charging program funds requires or is facilitated by location on a site that is on a designated corridor, it seems clear that the new statute has sent a signal to USDOT to facilitate, not stand in the way of designating rural corridors, even those with EV charging stations more than 50 miles apart.

We submit that it is past time for FHWA to be more flexible in EV corridor designations, at least for purposes of the EV charging grant programs in rural states. Rather than a 50-mile distance, FHWA can provide that it will accept a greater distance as specified by the state, or perhaps more straightforwardly specify a limit of as much as 100 miles in states with a population density of 50 or fewer persons per square mile of land area. But some such change is needed promptly so that there will be a clear opportunity for rural states to have places where EV charging facilities can be acquired, installed, and operated with Federal program funds, particularly including along a designated corridor. That would better enable USDOT to meet the statutory references to investing in EV charging facilities in rural settings.

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming thank FHWA for its consideration and strongly recommend that further action regarding the subject matter of this docket be in accord with our comments and taken very promptly.
