Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
Docket No. FHWA-2022-0008, Notice of Proposed Rulemaking
National Electric Vehicle Infrastructure Formula Program
August 17, 2022

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming ("we" or "our") respectfully submit these comments in response to the Federal Highway Administration's (FHWA's) notice of proposed rulemaking to implement aspects of the recently enacted Infrastructure Investment and Jobs Act,[1] concerning funding programs supporting the deployment of electric vehicle (EV) charging infrastructure. See 87 Federal Register 37262 (June 22, 2022) ("NPRM").

The proposed rule would apply to funds used for EV charging projects that are made available under the legislation's EV charging formula program ("NEVI") and also to EV charging projects funded under other provisions of title 23, United States Code. See NPRM at note 1 and at proposed 23 CFR 680.100 and 680.102, 87 Federal Register at 37262, 37268, and 37276.[2]

Overview: The Proposed Rule Should be Modified to Promote Success of the NEVI Program by Reducing Regulatory Burdens

The NEVI program is a new program which, inherently, presents challenges for both the Federal Government (FHWA and USDOT, working with the Department of Energy) and state DOTs. Further, unlike typical FHWA funding programs, this new program concerns the purchase of a product by consumers – electricity for EVs – a function well suited to provision by the private sector.

As set forth more fully in these comments, our general view is that FHWA should revise the proposed rules to make them far more flexible and far less burdensome for states in order to facilitate prompt and successful implementation. This is particularly true because, under the NEVI implementation plans of many states, private sector entities (businesses or other) will own, operate, and/or maintain charging stations under agreements with the states. These private sector partners will be discouraged from participating in the program by regulatory burdens that are effectively passed through to them. Thus, keeping burdens and requirements down not only reduces burdens and costs for states; it is important in order to attract businesses as partners in implementing the program. So, minimizing requirements is important to the success of the

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[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. EV charging equipment is also an eligible investment under other provisions of title 23. See, e.g., 23 USC 133 and 149.

program, particularly in rural states where there may be relatively few transactions per EV charging station.

We also have comments on two issues relevant to the success of the NEVI program that are not addressed in the proposed rule.

First, there is continuing concern that, without a waiver or waivers from Buy America requirements, particularly for the near term, the NEVI program's chargers will not be available. Second, we continue to have concerns regarding the apparent requirement (not set forth in statute or rule, but only in guidance) that alternate fuel corridors for EV charging, to be considered "built out" and having corridor "ready" status, must have charging stations no more than 50 miles apart. Application of this 50-mile test can result in placement of stations in locations that the state does not consider optimal for development of an EV charging network. As noted below, there is recognition in Congress that this is problematic in rural states and areas.

Specific Comments on the Proposed Rule

We turn now to specific comments on the proposed rule.

Clarify proposed 23 CFR 680.106 to Ensure that, under this Federal rule, states have the flexibility to not regulate rates of return from operation of charging stations and instead rely on the marketplace

Under proposed 23 CFR 680.106(m) there are various restrictions as to "program income or revenue" from operating a charging station under the NEVI program, including language apparently limiting use of revenue to expenses plus "a reasonable return on investment … as determined by the State DOT." At least initially, and perhaps for some time in rural states, investments in EV charging may be risky and not profitable. The risk and non-profitability could continue for longer than funding for the NEVI program in many parts of low population density states such as ours.

Private sector partners are not looking for USDOT or state DOTs to impose new accounting requirements or financial restrictions, considerations that can be complex or at least multi-faceted. For example, is a state free to decide whether a "reasonable return" is an annual calculation or a long-term, multi-year concept? Consider that a positive return in a given year, even a substantial positive return, can much more readily be considered "reasonable" if the prior years were losses. We believe that the current text allows the state to defer to the marketplace, but clarity is recommended.

Accordingly, section 680.106(m) must be clear in the text that –

> "A state's ability to determine a reasonable rate of return includes the authority to not regulate the rate of return and any related financial matters."

Similarly, it should be made explicit in 680.106(m) or another appropriate point that --

> "This part [23 CFR part 680] does not require any state to provide any subsidy to ensure that a private party achieves a reasonable rate of return."

Avoiding complexity will help attract private sector partners to launch the NEVI program. The above recommended modifications would make clear that a state can decide that the marketplace, without regulation by the state, can decide what return is reasonable, especially given that EV charging stations are far from established as a profitable enterprise at this time.

The rule also should be clear that any requirements applied to a rate of return or other financial factor apply only to those years when a private entity is receiving federal funding passed through by the state under this program.

Related to this portion of the proposed rule's text, we disagree with the statement in the Preliminary Regulatory Impact Analysis (PRIA) for the proposed rule that section 680.106(m) imposes no costs. See table at page 11 of the PRIA. To the extent that rate of return regulation discourages private sector investment, with many states hoping for private partners to contribute the non-Federal match towards a charging station or stations, the overall NEVI program is less likely to succeed.

Our concern in this regard is not limited to subsection 680.106 (m).

<u>Proposed 680.106(a)(2)(vi)</u> would require transparency as to "any information describing how prices for EV charging are to be set under the proposed contract [apparently with a third party] in accordance with state law." This aspect of the proposed rule should be made explicit that this and other sections of the proposed rule "do not require rate regulation by the state, but (subject to state law, if applicable) allow reliance on the marketplace." Pricing, especially in rural areas, can be significantly influenced by the actual number of chargers, electricity rates, and when charging occurs. For locations with limited use, peak electric rates and usage during times of peak rates can significantly impact a charging station's costs. Such factors reinforce our concerns that this is a complex, moving target, not necessary to be a subject of regulation under the NEVI program. This is especially true as excessive requirements, or even the perception that the requirements are burdensome, will discourage desired private sector participation.

Further, as to this and other requirements, the rule should clearly provide that a state may make use of existing processes to achieve transparency and/or solicit input, such as utilizing an existing process of posting information and requests for input on the state DOT website.

In addition, we note our disagreement with the PRIA insofar as it concludes that it is "unclear" that the regulatory provisions of section 680.106(a)(2) impose no costs. See table at page 8 of the PRIA. Again, to the extent that unclear requirements for transparency as to how charging rates are set are perceived as infringing on a private sector charging station's ability to determine what customers are charged discourages private sector investment in NEVI charging stations, the overall NEVI program is less likely to succeed.

Provide Flexibility as to the Number of Chargers Per Station in Rural Areas

Proposed 23 CFR 680.106(b)(2) would require each charging station to have at least four high-speed charging ports. In rural areas and perhaps other areas, four ports will be more than required by anticipated demand. Thus, the rule forces scarce dollars to be invested where they are not needed as opposed to in other locations that the state considers as representing a better place for investment. The provision should be modified by specifying –

> "Provided, a state may specify that a station may have less than 4 chargers with DCFC ports provided that the station is located in county with a population of less than 50 persons per square mile of land area or upon approval by FHWA of a request made by the state with justification deemed adequate by FHWA."

This flexibility would help make the program more practical. For example, such flexibility could include splitting 4 DCFCs at one station into 2 at a station and 2 at a station across the street. Further, allowing NEVI funds to be used for installations of one or two DCFC chargers at a station in such cases can meet the needs of travelers while limiting financial risk to a private sector partner in areas where low demand is expected. Requiring deployment of 4 chargers at a station in very rural areas with expected low demand could mean no private sector investment for the station.

Providing this practical flexibility could have additional benefits. Potentially, these changes to "right size" stations could result in freeing up funds to improve charging infrastructure serving non-interstate routes in our states that connect travelers with national parks and monuments and other important tourist routes and destinations, thereby advancing our states' economies and serving the national interest.

Provide Additional Flexibility as to Customer Payment Methods

Under proposed 23 CFR 680.106(f) consumers at a charging station must be provided with certain specified payment options.

The final rule should be modified to clarify that additional payment methods must be allowed and that a state can require additional methods, including non-contactless payment options.

Clarify a State's Obligation to "Ensure" Operation and Maintenance of a Charging Station

Proposed 23 CFR 680.106(i) would require states to "ensure" that EVSE equipment is maintained in compliance with NEVI standards for a period of not less than "5 years from the date of installation." We would clarify this by adding language that "A state satisfies this provision as to a charging station by including in its agreement with the private sector partner language requiring the partner to maintain EVSE equipment in compliance with NEVI standards for a period of not less than 5 years from the date of installation."

In addition, the final rule and the preamble to the final rule should disavow language included in the proposed rule preamble at 87 Federal Register 37270 regarding whether there is a "useful

life" to equipment after the 5-year period. That terminology complicates and injects judgment into what should be a clear-cut test – "5 years."

A separate consideration of "useful life" would not be helpful, but a new and independent complicating and burdensome factor that should not be adopted, either in the rule or through the preamble to the final rule. But it should be disavowed in the notice of final rule, or someone could go back to the wording in the NPRM and seek to advance an interpretation that would stretch what is required.

Increase Flexibility of Workforce Provisions, Particularly in Rural States

Proposed 23 CFR 680.106(j) sets forth a number of requirements regarding workforce that are beyond the statutory requirement for "qualified technicians," including a requirement for "certified" workers meeting one of several listed credentials.

The need for greater flexibility within this provision will be particularly acute in rural areas with fewer training facilities or institutions to turn out a supply of "certified" workers. Accordingly, exceptions and/or alternate means of meeting the requirement for "qualified technicians," should be allowed.

Another approach would be to delay the effective date for this section, especially for rural areas, to allow time to develop a pool of certified technicians.

We suggest the following approach.

As an alternate means of compliance to the proposed text, the proposed rule should be modified by adding language to establish –

> "Alternate compliance. A state shall be in compliance with this subsection (j) if it requires each charging station operator to advise the state in writing how it will meet the statutory requirement of use of 'qualified technicians' and of its plans to increase workforce diversity."

Reduce the Burden of Reporting and Data Requirements

Proposed 23 CFR 680.112(b) would impose various specific data requirements and quarterly reporting requirements. The requirements should be reduced in extent and frequency. Annual reporting should suffice.

Further, the community engagement outcomes report required in 680.112(d) seems to be redundant of information provided in the annual report on deployment of NEVI funds. Further, this reporting should be clearly limited only to engagement on decisions considering whether or not to deploy a new charging station. More community engagement, as well as reporting on it, as to decisions already made, is not necessary and distracts states from other tasks.

Proposed 23 CFR 680.116(c) would impose significant data development and collection requirements as to the chargers and the services provided so that data can be made available to partners through mapping applications. We suspect the costs of these services are underestimated in the PRIA. We recommend that the requirements be cut back to those that are truly essential.

Increase Flexibility of Provisions Regarding Cybersecurity and Security

Proposed 23 CFR 680.106(h) should be more flexible and permit a state to accept the security and cybersecurity approaches of a private sector partner, even if that is not expressly stated as an option in the state's EV Infrastructure Deployment Plan. Today, nearly all operators of service stations have such plans. Rather than discouraging private sector investment by imposing on a private sector partner state plans that may require change to or even abandonment of its own security and cybersecurity arrangements, the state should be clearly allowed the flexibility to utilize existing plans of the relevant partner.

Charger to Charging Network Communication

Many rural areas have little or no internet service. Since the requirements in proposed 23 CFR 680.114 have to do with the charger, the wording of the provision should be modified so that the compliance obligation rests with the station operator.

The 80-20 Match Ratio for the NEVI Program Should be Applied at the Program Level, not to Individual Projects

To facilitate build out of EV charging facilities in rural and economically distressed areas, FHWA should allow a state to achieve the 20 percent non-Federal match on the program level. Under this approach some projects could match at less than 20% so long as others (perhaps in more densely populated or economically stronger areas) were over 20% and the overall NEVI program match for a year was 80-20.

Clarify that Administrative Costs are an Eligible Cost Under the NEVI Program

Administrative efforts by states in implementing the NEVI program have proven to be extensive and could be quite costly, including by consuming significant staff time.

So, we were pleased to see an FHWA NEVI Q&A document confirming the eligibility of these costs. See link:

https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/resources/nevi_program_faqs.pdf

Within the linked document FHWA says as to NEVI that "Administrative costs are an eligible expense; however, direct and indirect cost allocation must follow 2 CFR part 200."

We consider this conclusion to be consistent with statute. In the BIL, except as otherwise provided, NEVI program funds "shall be administered as if apportioned under chapter 1 of title

23, United States Code" 135 STAT 1425. Under general title 23 practice, administrative costs are an eligible expense.

However, Q&A documents sometimes are taken down from websites creating a risk of ambiguity where there was none. So, we would take the conclusion on this point set forth in the Q&A document and elevate it to the rule by adding to proposed 23 CFR 680, at an appropriate point, language such as –

"Administrative costs are an eligible expense under the NEVI program, including direct and indirect cost allocation; however, direct and indirect cost allocation must follow 2 CFR part 200."

Provide Flexibility to Address Emergency Conditions

Proposed 23 CFR 680 should be amended to include a provision waiving requirements in emergencies, with the state determining emergency status. For example, this could include allowing a worker to service an EV charger even if there are worker training or certification requirements not met by the individual providing the emergency assistance. As it is hard to fully anticipate emergencies, the wording of such an exclusion should be broad.

Build Into the Rule Itself Flexibility Features, Including FHWA Authority to Waive Requirements in Part 680 not Expressly Required by Statute and to Delay the Effective Date of Provisions

Not all circumstances or contingencies can be anticipated and FHWA can and should build flexibility into the regulatory scheme so that it can waive requirements not expressly required by statute when that would serve the public interest based on a written request from a state. Likely, waivers granted would be narrow and perhaps only for a short period of time. But waiver authority, as a public interest safety valve, should be built into this new and complex rule.

Further, to the extent that it would not be considered a subject for waiver, such a rule should also expressly authorize phase-ins or extensions of effective dates for rules.

Additional Concerns Regarding EV Charging Programs

We take the opportunity of this docket to call to the attention of FHWA that are additional issues regarding the EV charging funding programs that are not addressed by the proposed rule, notably: (1) application of Buy America requirements; and (2) apparent mileage requirements for the maximum distance between charging stations on built out designated corridors and for the distance between corridors and highway off ramps.

Buy America Waivers -- FHWA Must Be Flexible in Administering EV Charging Programs, Particularly Due to the Prospect That Qualifying Equipment Will Not be Available, Especially in the Near Term

Last fall, 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 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. We also hope that some progress has been made since last November in identifying (and or manufacturing) EV Chargers that meet Buy America Requirements. However, if Buy America compliant EV chargers prove to be not available, or not available in sufficient quantities to achieve program implementation, or not available in sufficient quantities in some regions of the country, waivers must be provided if there is to be a functioning EV charging formula program with procured and installed chargers.

FHWA Should Allow States More Flexibility in Locating EV Charging Stations, Specifically by Allowing States to include in Corridor "Ready" Corridors EV Charging Stations that are More than 50 Miles from the Next Station Along the Corridor and Stations that are More than One Mile from the Corridor Highway

FHWA guidance has effectively precluded, or at least made difficult, designation, as corridor "ready" for EV charging, corridors with a gap of more than 50 miles between charging stations. There are rural areas, particularly including in states such as ours, 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. Flexibility to adjust charging station locations to such realities is needed and must be provided.

Also, guidance now calls for charging stations to be within one mile of the highway that is the reference point for the corridor (e.g., within one mile of an Interstate System Highway's exit ramp). Flexibility must also be provided to allow charging stations to be located more than one mile from an Interstate exit. This could be appropriate for any number of reasons, including location of a business district or cost of electric grid connections.

Greater flexibility also would be consistent with technology improvements since the 50-mile practice was first developed, not long after enactment of 2012's MAP-21 law. The Department of Energy (DOE) has reported 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 imposition of the 50-mile test in rural settings questionable.[3]

[3] 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."

We also note that the Committee report of the House Appropriations Committee on the FY 2023 transportation-housing appropriations bill stated that the Executive Branch should consider exceptions to the 50-mile test, “especially” in rural areas:

> When implementing funding from the national electric vehicle infrastructure formula program, administration officials in the Joint Office of Energy and Transportation should consider the capacity of electricity distribution at proposed charging locations and the inclusion of one or more charging station locations where the distance between two adjacent stations is greater than 50 miles, especially in areas with a population density of 50 or fewer persons per square mile of land area based on the most recent decennial census and within such states only outside the geographic boundaries of a metropolitan planning area for a metropolitan planning organization serving a population of greater than 200,000.

H. Rep. No. 117-402 (for H.R. 8294) at 46.

So, even if not addressed in this rulemaking, we urge FHWA to take action promptly – on the application of Buy America requirements to EV charging stations and on the location of stations along corridors – in accord with our recommendations.

<u>Conclusion</u>

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming thank FHWA for its consideration and strongly recommend that further action regarding FHWA EV charging programs be in accord with our comments.

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