Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
in
Docket No. FHWA-2023-0045
Highway Safety Improvement Program
April 14, 2024

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming ("we" or "our") respectfully submit these comments in response to the notice published by the Federal Highway Administration (FHWA) at 89 Fed. Reg. 13000 *et seq.* (Feb. 21, 2024) ("NPRM"). In this docket FHWA has invited comment on proposed modifications to the rule governing the Highway Safety Improvement Program (HSIP), 23 CFR 924.

Introduction and Overview

At the outset, the transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming emphasize their deep commitment to improving transportation safety and to reducing fatalities and serious injuries. Safety is a top priority consideration for us in all aspects of our programs, not only in implementing HSIP, a safety specific program.

As set forth below, we recommend changes to a number of sections in the proposed rule to reduce regulatory complexity, duplicative requirements, burdens and uncertainty. We seek to operate effectively and efficiently under the HSIP in delivering safety projects and programs. However, proposed new regulatory requirements, combined with new requirements that certain State actions must be approved by FHWA, will not improve safety but, to the extent they burden States and slow down safety project delivery, will delay State investments to improve safety.

FHWA should update its HSIP rule in light of recent legislation. Most of the proposed changes included in proposed 23 CFR 924, however, are elective changes proposed by FHWA that would increase the workload of States. We consider it important that FHWA make the adjustments and clarifications to the proposed rule that we recommend, as we would reduce burdens on States without diminishing safety. Further, to the extent reducing regulatory burdens and complexity would enable prompter action by States in implementing safety programs and delivering safety projects, States would be able to deliver more safety investment with each safety dollar.

We turn now to specific comments, presented in order of appearance of issues in the proposed rule.

Comments on Definitions, Proposed 924.3

Modify definition of highway safety improvement project

Amendment. Strike: "and for all road users" and substitute: ", implemented considering all road users,".

Discussion: Not all projects are "for" all road users. Lane widening on an Interstate is almost certainly not for cyclists, for example. Further, FHWA itself explained that "all road users need to be considered in the implementation of highway safety improvement projects." See NPRM at 13002 (emphasis supplied). With our proposed amendment, the rule would more closely reflect what FHWA seeks to capture in the definition, as set forth in FHWA's own words in the NPRM at 13002.

Clarify definition of MIRE Fundamental data elements (and closely related provisions)

Discussion: The highway safety improvement program statute defines "Model Inventory of Roadway Elements" ("MIRE") as those roadway and traffic data elements that are "critical" to safety "management, analysis and decisionmaking." 23 USC 148(a)(5).

FHWA appears to have done a good job specifying MIRE critical elements in tables 1, 2, and 3 of proposed 924.17. Specifically, FHWA has provided in 924.17 that a longer list of data elements must be collected for non-local paved roads (Table 1) than for local paved roads (Table 2) and that for unpaved roads the number of data elements to be collected is, correctly, much lower still.
We do not object to the data elements listed as required to be collected as described in those three tables. Those appear to us to be clear and intended by FHWA to be the "critical" elements, the "MIRE Fundamental data elements" required to be collected. We do not see any of the footnotes to the three tables in 924.17 as changing the clear meaning of the items listed in the three tables, particularly including that the information required to be provided as to unpaved roads is limited to the 5 items listed in Table 3.

We do have concern, however, with other, unclear wording in proposed 23 CFR 924, outside of 924.17 and its tables, pertaining to the MIRE data to be collected and the meaning of "MIRE Fundamental data elements." For example, we think FHWA should be eager to make clear to States that the rule does not require any broader collection of MIRE data than is described in those three tables in section 924.17.

Specifically, aspects of FHWA's definition of "MIRE Fundamental data elements" in 924.3 are vague and leave a well-intentioned State at risk of stumbling into non-compliance and endless discussions with the FHWA Division Office – for example, as to the operational meaning of FHWA's reference to the "minimum subset" of MIRE data "used to support a data-driven safety program." FHWA must stand behind its own work defining MIRE critical elements set forth in the tables in 924.17. It must not adopt into the final HSIP rule loose language that effectively says that FHWA can make up more requirements as it goes along as opposed to set them forth in a rule. Otherwise, States may well be burdened with requests for MIRE data that are not set forth in the proposed rule as required data.

Similarly, at proposed section 924.9(a)(1)(ii), the proposed rule states that roadway data shall include: (A) the MIRE Fundamental Data Elements in section 924.17 and "(B) any additional elements necessary to support a systemwide safety risk assessment." The open-ended language of subparagraph (B) does not appear to rule out additional MIRE elements. Section 924.9(a)(1)(ii)(B) should be revised and scaled back. At worst, this vague phrase reserves to FHWA authority to pronounce yet unrevealed data as "necessary." Further, it would be "necessary' for a new report, a "systemwide safety risk assessment," that is not required by statute and which, for additional reasons, we oppose and would delete from this proposed rule. So, instead, of adopting that clause (B), if, after experience, FHWA is able to pinpoint some type of roadway data that it would want to require beyond that in the three tables in 924.17, it can publish another NPRM and take comments on that specific proposal. At this point use of roadway data beyond that called for by the tables in section 924.17 should be up to the State.

Accordingly, we recommend the following amendments to the NPRM regarding the meaning of MIRE Fundamental data elements.

Revise the Definition of MIRE Fundamental data elements to read as follows:

"MIRE Fundamental data elements means the data elements set forth: in Table 1, section 924.17, for non-local paved roads; in Table 2, section 924.17, for local paved roads; and Table 3, section 924.17, for unpaved roads."

Revise the first sentence of proposed section 924.17 to read as follows:

"MIRE fundamental data elements shall be collected on all public roads and are defined as the elements listed in Tables 1, 2, and 3 of this section …."

Revise proposed section 924.9(a)(1)(ii)(B) to read as follows:

"(B) any additional data as determined by the State."

Clarify definition of Safe System Approach

In clause (3) of the definition, strike "Keeps" and substitute "Aims to result in".

This technical change reflects that the impact of crashes on the human body is not a static situation that one "keeps". "Aims" is the word used by FHWA in Clause (1) and thus is suggested here.

Delete Definition of systemwide safety risk assessment

We propose deleting the proposed new burdensome systemwide safety risk assessment requirement as it is duplicative of other requirements. Thus, we would also delete the definition. We explain below why this new requirement, which is not required by statute, should be deleted. See comments on section 924.9.

Comments on Policy, Section 924.5

Amendment. Revise the second sentence in proposed 924.5(b) to read as follows:

"A State shall consider which projects maximize opportunities to advance highway safety, including which highway safety improvement projects the State considers to have the greatest potential to reduce the State's roadway fatalities and serious injuries, and shall focus the State's HSIP funds on such projects, though not to the exclusion of other projects."

Discussion. FHWA acknowledges that under the statute (23 USC 148(c)(2)(B)(v)) a State is to "consider" which projects maximize opportunities to advance safety, while also adopting goals that "focus" resources on areas of greatest need. See 23 USC 148(c)(2)(C) and discussion in NPRM at 13004. "Focus" is widely understood as not an exclusive focus, but as "emphasis."[1]

[1] https://www.merriam-webster.com/dictionary

Yet, as drafted, proposed 924.5(b) leaves out the flexibility inherent in the statute's use of the words "consider" and "focus." Instead, the second sentence in 924.5(b) makes an absolutist statement that HSIP funds "shall be used to maximize opportunities to advance highway safety…." The proposed revision, we submit, better reflects both the statute and FHWA's intent of a focus on projects that a State considers to have the greatest potential to reduce the State's roadway fatalities and serious injuries while, consistent with proposed 924.9(a)(3)(vi) and (vii) and 924.9(a)(4)(i), allowing for consideration of all road users and consideration of investment in, for example, projects that serve underserved areas and projects in areas that would benefit underserved communities.[2] The wording in the second sentence in 924.5(b) as proposed by FHWA is so absolutist as to raise the specter of stripping States of project selection authority, contrary to 23 USC 145(a).[3]

For such reasons, 924.5(b) should be revised as recommended, which would delete absolutist language that is contrary to statute while retaining the same general concept of emphasizing projects that are perceived as maximizing safety benefit. It would avoid arguments as to whether a project could ever be funded under HSIP if there was a question whether that investment was, compared to other possible HSIP investments, a "maximum" benefit safety project. It would also make 924.5(b) consistent with proposed 924.9(a)(3)(vi) and (vii) and 924.9(a)(4)(i).

Comments on Program Structure, Section 924.7

Delete Proposed New Approval Requirement in 924.7(c)

Under the proposed rule, FHWA would newly claim for itself authority to "approve" State processes for the planning, implementation, and evaluation of "HSIP components described" in proposed 924.7(a). Those components include 924.7(a)(3), a "program of highway safety improvement projects." The ability to approve and thereby control a process has a heavy and sometimes decisive role in the relevant decision. Thus, the proposed change could, in practice, enable FHWA to infringe on State project selection authority, contrary to 23 USC 145(a).

Further, FHWA casually states in the NPRM at 13004 that this proposed approval authority over HSIP processes is similar to current (and proposed) section 924.9(a)(3)(iii)'s requiring FHWA approval of processes for the State's Strategic Highway Safety Plan (SHSP). But it is not. Of great relevance to the presence – or absence – of FHWA's authority to approve a State's action is statutory text. The statute specifically authorizes FHWA approval of the SHSP. See 23 USC 148(d). The SHSP is a component of the larger HSIP, per 924.7(a). The statute does not provide for approval of the HSIP.

Accordingly, the following amendment should be made to the third sentence of proposed 924.7(c), to delete the proposed new approval role for FHWA and return the provision to its current wording.

Amendment

Strike "These documented processes shall be developed by the State and approved by the FHWA Division Administrator …"; and substitute: "These documented processes shall be developed by the State in cooperation with the FHWA Division Administrator …."

[2] See also FHWA's interest in such flexibility as set forth at proposed 924.9(a)(3)(vi).

[3] "The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed." 23 USC 145(a).

Comments on Planning, Section 924.9

Delete Proposed New Systemwide Safety Risk Assessment Requirement as Redundant and Burdensome Given Other Important Planning Requirements

We would delete the proposed new "systemwide safety risk assessment" requirement as redundant and burdensome. Accordingly, we would make conforming changes, including deleting the proposed definition of a "systemwide safety risk assessment."

More specifically, proposed Section 924.9(a)(4) would add a requirement for conducting a "systemwide safety risk assessment" that is basically duplicative of other requirements and thus should not be adopted. The proposed rule would continue the current requirement that a State analyze safety data to develop a program that has the greatest potential to reduce fatalities and injuries. That is functionally indistinguishable from assessing risk before selecting projects. See 924.9(a)(4)(i). Similarly, under the proposed rule, the process for updating the Strategic Highway Safety Plan (SHSP) shall:

> "(vi) Analyze and make effective use of safety data to address safety problems and opportunities on all public roads and for all road users, including in underserved communities; [and]
> "(vii) Identify key emphasis areas and strategies that are consistent with a Safe System Approach, have the greatest potential to reduce highway fatalities and serious injuries on all public roads, and focus resources on areas of greatest need …"

Again, the net result is functionally indistinguishable from assessing risk systemwide before selecting projects.

Further, as discussed above, the "policy" portion of the proposed rule, section 924.5(a) directs that –

(a) Each State shall plan, implement, evaluate, and report on an annual basis an HSIP that advances a Safe System Approach and has the purpose to significantly reduce fatalities and serious injuries resulting from crashes on all public roads and for all road users, in support of the long-term goal to eliminate such fatalities and serious injuries.

Further, section 924.5(b), both as proposed by FHWA and we correctly would revise it (see above) would require a State to use funds for highway safety projects consistent with the State's SHSP. As explained immediately above, the SHSP process already requires analysis that is in effect risk assessment. Further, both as FHWA proposes it and as we would revise it, the State is assessing risk by considering which projects have the greatest potential to reduce the State's roadway fatalities and serious injuries.

We also call to FHWA's attention 23 USC 148(h)(4), which bars the use of reports and information compiled pursuant to section 148 (the HSIP section) in litigation. Yet a "risk" report could stand as a beacon to potential litigants against States, resulting in their increasing efforts to develop data to be used against States even if the risk report itself could not be used in legal proceedings.

We note, however, that were the proposed definition to be adopted, it would be problematic and add some burdensome features.

Moreover, the definition would call for a State to "classify all sections of the roadway network" into one of no fewer than three safety categories. This is potentially contradictory to the clear language in 924.17, which limits to a very few data points the required MIRE data for unpaved roads. Should FHWA choose to include this definition in a final rule in this docket, it should be revised to be clear that FHWA is not engaged in a back-door revision of section 924.17's definition of MIRE data for unpaved roads by requiring classification of such roads.

Further, the reference to "sections" of the network, if construed so that even very short portions of roads are "sections" of the network, also could unduly burden States by requiring detailed, step by step data in what is part of a "planning" section, not a project implementation section. In any such planning effort, States should be able to address "classes" of roads, not individual "sections" of individual roads. And the "three" classes of roads concept injected into the definition is inherently arbitrary, as evidenced by FHWA pointing out a private group that uses five classes. The FHWA should stay silent on the point and it would be up to a State – outside of the context of a hopefully deleted risk assessment requirement and definition – to decide whether and if so how to include any type of classification into its analysis of how to maximize the benefit of use of HSIP funds.

So, we strongly recommend deleting all references to the proposed systemwide safety risk assessment:

> Amend the opening phrase of 924.9(a)(4) to read as follows:
>
> "(4) A process for analyzing safety data to:";
>
> Amend 924.3 to delete the definition of "systemwide safety risk assessment";
>
> Amend proposed section 924.9(a)(1)(ii)(B) by striking "to support a systemwide safety risk assessment"; and
>
> Make any additional conforming changes.[4]

Disaggregation of Data by Demographic Variables, Proposed Section 924.9(a)(1)(i)(B)

Proposed 924.9(a)(1)(i)(B) would require safety data to be broken out "by demographic variables to support the inclusion of underserved communities." We are concerned that this provision could be implemented in a burdensome way and, if it is not deleted, it should be modified.

The provisions in this proposed rule regarding underserved communities and equity are not referenced in statute and thus are not required by statute. They are entirely a creation of Federal agency policy.

In general, we consider that States (and others) are already subject to a huge number of regulatory requirements. The agency priority should be to reduce and streamline such requirements in pursuit of more cost efficient and prompt delivery of the highway safety improvement program – to get more out of each highway safety improvement program dollar, after considering how to maximize safety benefits.

[4] However, if such a provision and definition were to be retained, it should be made less burdensome.

Nonetheless, we perceive that FHWA is committed to these non-statutory requirements, so we direct comments here to ensuring that they would be workable requirements if adopted as part of the final rule in this docket.

For at least some of the variables identified in the definition of underserved communities, data is scarce. State DOTs do not have much if any data on the highway safety experience of people based on their sexual orientation or annual income, for example. We do not know whether FHWA intends for officials gathering data for crash reports, for example, to ask highly personal questions of those involved in the crash. We hope not, as difficult legal questions could arise that could potentially paralyze efforts to deliver safety improvements through the HSIP program.

For such reasons, if FHWA goes down this path, it must modify the language of this section to be clear that the disaggregation requirement proposed in this section will be satisfied by reasonable efforts, considering available data, including proxies. The final rule must not be amenable to being construed as requiring States to dedicate scarce safety dollars to the development of data regarding "underserved communities" when there is need to invest in safety projects.

For example, a method that is sometimes used today in determining whether crashes are occurring in areas with a vulnerable population utilizes the CDC's Social Vulnerability Index (SVI), which is evaluated by Census tract. A plot of crashes can be overlaid with the SVI layer for the relevant census tract. Such efforts, when a State chooses to undertake them, are "beyond the call" and highly commendable; they should be allowed at State option.

Moreover, clarifying that reasonable efforts are to be considered satisfactory appears to be consistent with proposed 924.9(a)(3)(vi), which refers to a State analyzing and making "effective use of safety data to address safety problems and opportunities ... including in underserved communities." That phrasing appears to refer to existing data; there is no suggestion that additional data must be developed.

Accordingly, proposed 924.9(a)(1)(i)(B) should be amended such as follows:

Amendment. In proposed 924.9(a)(1)(i)(B), strike: "Be disaggregated by demographic variables …."; and substitute "Be disaggregated by demographic variables to the extent feasible through reasonable efforts, considering data that exists and is available, and proxies for data at State option …".

SHSP Strategies

We note that proposed 924.9(a)(3)(viii) would add "equity" to a list of highway safety elements for a State to include in its HSIP planning process when determining SHSP strategies. "Equity" is not defined, but the discussion in the NPRM at 13004 indicates that addressing safety issues with respect to underserved communities would reflect consideration of "equity."[5]

[5] The definition of "underserved communities" includes as a required element that a population, to be underserved, "has been systematically denied" the full opportunity to participate in economic, social and civic life. Perhaps FHWA will just assume that any named group has been "systematically denied" – but the phrase could make it more difficult for a State to determine whether a population qualifies as an "underserved community."

Railway-Highway Crossing Data

Amend proposed 924.9(a)(1)(iii) to read as follows:

"Railway-highway crossing data shall include all fields as required in 49 CFR 234.403."

Discussion: 49 CFR 234.403 requires

The proposed HSIP rule would require **all** fields in the DOT National Highway-Rail Crossing Inventory to be completed which is in contradiction to current 49 CFR 234.403. In 49 CFR 234.403 the inventory form as to such crossings is to be completed in accordance with the Inventory Guide. That guide identifies fields required, optional or conditionally required to be completed in the DOT National Highway-Rail Crossing Inventory, which are less than all fields in that Inventory.

To avert an increase in regulatory burden as to railway-highway crossing data, the FHWA should not increase the data compilation burden in this area.

Comments on Implementation, Section 924.11

Clarify MIRE Data Reference

Proposed 924.11(b) should be clarified in two ways. First, this section, pertaining to State collection of a "complete" collection of MIRE fundamental data elements, should be explicit that, for purposes of this rule, a complete collection is defined by table 1, 2, and 3 in section 924.17. Accordingly, in proposed 924.11(b) we would --

Strike: "a complete collection of the MIRE fundamental data elements on all public roads …"; and Substitute: a complete collection of the MIRE fundamental data elements on all public roads as defined by data elements in tables 1, 2, and 3 in section 924.17."

Second, there could be circumstances where a State might not be able to complete its collection of MIRE fundamental data elements by the end of FY 2026, as required in this provision. For example, there could be cases where the road in question is under the jurisdiction of a Federal agency, such as the National Park Service or Bureau of Land Management, or a Tribal government, or a local government, and the data might therefor be very difficult for a State to access and collect.

To provide some flexibility in such cases, we would designate the text of 924.11(b) as (b)(1) and add a (b)(2), such as the following:

"(2) Notwithstanding paragraph (1), a State that does not have a complete collection of the MIRE fundamental data elements on all public roads as defined by data elements in tables 1, 2, and 3 in section 924.17, by September 30, 2026, shall be deemed in compliance if the State certifies to the Division Administrator that the less than complete collection status is due to less than complete collection with respect to roads under the jurisdiction of a Federal agency, a Tribe, or a local agency, and the State submits to the Division Administrator a plan to gather the missing information in 2 years or less. "

Comments on Evaluation, Section 924.13

Proposed new 924.13(a)(1) would require a State to have –

> (1) A process to establish and track quantifiable measures to evaluate the effectiveness of data improvement activities to improve accuracy, completeness, timeliness, uniformity, accessibility, and integration for MIRE fundamental data elements.

This is not the evaluation of actual safety data, but of processes to improve data in a number of listed ways. Then, this information on efforts to improve data becomes required data. This would be series of new, specific requirements for data not being collected today.

We believe that the main data issue is cost-efficient collection of data of the kind that is used in decisions on where and how a State invests HSIP funds. Data collection, and the perfection of it, is not an end in itself. The new requirements proposed in 924.13(a)(1) go too far towards dedicating time, effort, and costs to data collection as an end in itself.

Proposed new 924.13(a)(1) should not be adopted

Comments on Reporting, Section 924.15

Following up on our just mentioned disagreement with proposed new 924.13(a)(1), proposed 924.15(a)(1)(iii)) would add a reporting requirement to the same effect. And we similarly disagree with it as too focused on data as an end in itself. Accordingly, proposed 924.15(a)(1)(iii)) should be deleted.

We would not object, however, to a more general reporting requirement that a State report "any noteworthy efforts to maintain or improve the quality of data used in decisions by a State implementing the HSIP program."

Continue to Allow Assessments of Safety Projects by Groupings or Classes of Similar Projects

We disagree with the proposed revision of 924.15(a)(1)(ii). The proposal would deny States the opportunity they have under the present rule to describe the effectiveness of highway safety improvement projects by grouping similar projects in a presentation. To deny States that opportunity is not logical. The provision should allow such grouped assessments "when and as appropriate" and also allow such grouped assessments as to "countermeasures." We suggest the revision of the rule include "when" appropriate because sometimes there can be a passage of a year or multiple years from execution of a project before results are clear enough to be assessed.

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming thank FHWA for its consideration and urge that the final rule in this docket be modified in accord with our recommendations.

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