Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
in
Docket No. FHWA-2013-0052
Asset Management Plan
May 27, 2015

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 published by the Federal Highway Administration (FHWA) at 80 Federal Register 9231 *et seq.* (February 20, 2015). In this docket FHWA has invited comment on proposed 23 CFR 515, regarding Federal requirements for a State asset management plan respecting certain assets on the National Highway System (NHS).

At the outset, the transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming wish to emphasize their deep commitment to the best possible management of their NHS and other assets. In these comments we do recommend changes so that the rule would include fewer Federal requirements than proposed. Implementing these recommended changes would advance asset management, as States would be able to spend less time and fewer resources on regulatory compliance, and be better able to pursue the best possible management of their assets within available financial resources.

We also note at the outset that each of the five departments is a member of the American Association of State Highway and Transportation Officials (AASHTO). We were very actively involved in the development of the comments filed by AASHTO in this docket. We support the proposals for changes to proposed 23 CFR 515 that are included in AASHTO's comments in this docket. In this filing we emphasize our support for the AASHTO recommendations, and we highlight our concerns with several aspects of the proposed rule.

Reduce Required Asset Plan Length and Financial Plan Length to Four Years, Consistent with the STIP

The Federal highway program has and continues to face considerable uncertainty. MAP-21 provided two years of program authorizations (for FFYs 2013 and 2014) and, immediately before and since MAP-21, the program has been authorized only for short extension periods. As we submit this filing, the Federal highway program is authorized for a mere two months. This is hardly an environment conducive to new ten-year planning requirements that are not required by statute.

Earlier, in passing ISTEA, TEA-21, and SAFETEA-LU, multi-year authorization bills, Congress set forth basic planning rules, including that the State Transportation Improvement Program (STIP) covers four years. Yet now, at a time of reduced certainty for Federal transportation assistance programs to States, FHWA has, on its own, proposed a ten year time frame for both the asset management plan and the related financial plan. A ten year time frame exceeds the length of a hoped for multi-year authorization bill, exceeds the duration of a two term Presidency or Governorship, and would require detailed projections for time frames beyond what is required by statute. While the statutorily required planning process does call for a State to develop a long range plan (20 years), the long range plan is not required to include the details or financial elements called for by the proposed rule in this docket. Moreover, State long range plans can be, and in many cases are, "policy plans," which are not project specific.

States are vitally interested in making and implementing good decisions to improve transportation and do consider assets and issues from a perspective longer than the term of the STIP as well as from shorter perspectives. However, investing considerable time and money in preparing ten year asset plans and ten year financial plans respecting those assets to meet the very particular and detailed requirements of a Federal rule does not represent a priority effort in support of transportation improvement at this time of financial scarcity and uncertainty for the Federal highway program.

FHWA certainly should allow a State to submit an asset management plan or related financial plan for covered NHS assets that extends beyond four years; but it should not require such plans to cover a longer term than the STIP.

We support AASHTO's recommendation that the required asset plan term and financial plan term be four years, consistent with the STIP, while allowing a State option to include additional years in those plans.

Similarly, we do not agree with references in the proposed rule requiring States to have procedures for identifying "long term" budget needs for covered assets. Nor are we supportive of any other reference in the proposed rule to "long term," as its use tends to escalate the burden of any requirement. We would prefer the deletion of all references to "long term" from the rule. If there is a need for a reference to a time frame, the rule should allow a State to limit the time frame to a period no longer than the State's STIP (while allowing the State, at its option, to choose a longer time frame).

Ensure the Prerogative of State DOTs to Select Projects and Set Targets

The final rule should include language that expressly states that nothing in part 515 "authorizes the disapproval of project selection by a State or the disapproval of a target set by a State." AASHTO has explained at pages 4-5 of its comments that language in the proposed rule indicates that FHWA may have failed to recognize the line between asset management rule authority and project selection authority. While asset management work provides important information that a State can use in selecting projects, asset management is far from the only input into project selection. Further, as AASHTO has also recommended, there should be no requirement that an asset management plan contain references to individual projects.

In addition, MAP-21 clearly provides that, while USDOT has the authority to establish certain performance measures, and national minimum condition levels for certain NHS assets, individual States are to set their own targets for results, using the measures established by USDOT.

USDOT should more clearly follow that approach, such as by making clear in the rule text that States have the authority to set targets that would reflect declining condition. In the face of great needs and limited financial resources, a declining condition target could represent an aggressive target, and FHWA must recognize that.

Do Not Overregulate State Asset Management of Non-NHS Assets

The final rule should not preclude or discourage a State from implementing an asset management system for non-NHS assets of the State's own design. So long as a State meets the requirements in the final rule in this docket for NHS assets that the rule requires a State to address in the asset management plan that it submits to FHWA for review, a State should have freedom to pursue asset management initiatives of its own design for other assets, such as non-NHS roads and bridges.

The proposed rule, however, includes provisions such as proposed 23 CFR 515.009(c), which states that: "If the State DOT decides to include other such assets on the NHS in its asset management plan, or to include assets on other public roads, the State DOT shall evaluate and manage those assets consistent with the provisions of this part." Those other "provisions" are quite burdensome and would appear to effectively require a State to set targets and undertake performance gap analyses respecting assets not required to be addressed in a Federal asset management plan.

As explained below, we have at least two concerns with such provisions.

First, at a minimum, in the final rule in this docket FHWA must make clear that in 515.009(c) and similar provisions in the proposed rule, it is referring to what a State must do if it includes more than the minimum covered assets in the asset management plan that it submits to FHWA for review. The State must always be free to develop asset management initiatives for assets not covered by the FHWA rule and must be free to address them any way that it wants for its own purposes. That should be made clear in the final rule.

One way would be to revise the definition of "asset management plan" to make clear that, as used in the rule, it refers to the plan that the State "submits to FHWA for review under this part" (emphasis added).

We recognize that FHWA has authority to regulate the form of the Federally required asset management plan for certain NHS assets. So, FHWA could, in regulating the form of the asset management plan document that a State submits to FHWA, choose to require that a State exclude non-required assets unless they are treated a certain way. However, we think it is unwise for FHWA to elevate form over substance and require by rule that if a State has met requirements for assets that must be included in an asset management plan under part 515, that the State cannot include material in the submission to FHWA that concerns additional assets, even if those additional assets are not addressed in the same way as the assets required to be included in an asset management plan under part 515.

Because States likely would rather have only one asset management plan document, FHWA's approach to plan form has the effect of increasing costs to States for their efforts to address additional assets. This FHWA approach effectively says to a State that it cannot undertake asset management for assets that are not required to be addressed in the Federal rule, <u>and include the State's treatment of them in the asset management plan that it submits to FHWA for review,</u> unless the State addresses them in the very specific (and burdensome) way FHWA has required as to assets that must be addressed in the Federal rule.

So, the rule as proposed would have the effect of driving a State to prepare one asset management document for FHWA that includes only the bare minimum required by rule and, to the extent that State does other asset management work, discuss that other work only in a separate document that is not submitted to FHWA for review under this rule. Such an approach is not required by statute, is needlessly burdensome, and should be dropped in the final rule.

Second, we certainly hope that FHWA does not mean by 515.009(c) and similar provisions that a State must follow FHWA format for asset management of assets that are not required to be in the asset management plan of part 515, even if the State does not submit that information to FHWA for review as its asset management plan within the meaning of this rule. Simply, we do not see statutory authority or sound policy bases for FHWA to regulate the form and content of any State asset management plan that the State develops for its own purposes and that is not submitted to FHWA for review under part 515.

In any event, proposed 515.009(c) and similar provisions should be deleted when FHWA issues the final rule in this docket.

<u>Do Not Require Performance Gap Analyses Except With Reference to State Targets</u>

A significant concern with the proposed rule is its frequent use of undefined terms such as "desired level of condition" and "desired state of good repair." Moreover, the way such terms are used, we are concerned, as is AASHTO, that the rule could require a State to undertake time consuming and potentially costly analyses as to what would be necessary for assets to achieve those undefined levels of condition.

One of the major tenets of Federal transportation planning is that a State or MPO develop fiscally constrained planning documents. Basically, this means that States are to develop transportation plans or STIPs for which there are expected to be sufficient resources to support implementation. Limiting performance gap analyses to the gap between current condition and targets set by the State is consistent with that approach. Since there are consequences for a State if it does not achieve its targets (or at least make substantial progress towards them), a State is unlikely to set a target that is financially unrealistic. Undertaking analyses as to the cost of closing gaps between current conditions and "desired" conditions, or even to a "state of good repair," is not a fiscally constrained exercise. States almost certainly have higher priority uses for their scarce time and fiscal resources than to undertake such fiscally unconstrained analyses; they should not be required. See AASHTO's comments, including regarding proposed 515.007.

Additional Comments

FHWA's Benefit–Cost Analysis is not a Sound Foundation for the Proposed Rule. As noted in AASHTO's comments, FHWA's view that the proposed rule has a positive benefit cost analysis appears to be based on a view that States undertake little or no asset management already, an incorrect assumption. States already undertake significant asset management work, and the burdens of the proposed rule significantly exceed FHWA's estimates. Accordingly, FHWA should significantly reduce the requirements and burdens that the proposed rule would impose on States.

Keep the Evaluation of Emergency Induced Damage Simple and Limited to the NHS. We strongly agree with the concerns AASHTO has noted with proposed 23 CFR 515.019, regarding an evaluation of facilities that have required repair or reconstruction due to emergency events. The provision should be limited to evaluation regarding NHS assets, require only a summary discussion document, and limit the past events to be considered to those that took place during a time frame less than 40 years before the evaluation.

We are also concerned that the inclusion of this emergency related data provision in the asset management rule, if not drafted carefully, could have unforeseen burdensome impacts. As discussed at pages 3-4 above, we and AASHTO strongly recommend that the final rule remove provisions that would require a State that includes non-NHS assets in an asset management plan that it submits to FHWA for review must submit for non-NHS assets included in the submitted plan the same detailed data and analyses that are required for NHS assets. Yet, in section 515.019 as proposed, unlike the rest of proposed part 515, FHWA would not limit the data required to be submitted to NHS assets.

So, while we strongly recommend that the requirements of 23 CFR 515.019 be limited to NHS routes, if FHWA should nonetheless insist on including non-NHS routes within the scope of that section, it should at least be clear that inclusion of any data on a non-NHS route in a State submission pursuant to 515.019, regarding past emergencies, does not trigger an obligation to submit detailed asset management data for such route as if such route were on the NHS.

The Proposed Rule Includes Numerous Vague and Expansive Terms that Would Make the Rule More Costly and Unworkable.

In the final rule FHWA should not include vague adjectives and terms that have the potential to be interpreted as establishing expansive requirements. As AASHTO has explained, the rule includes undefined references to a "fiscally responsible manner," requirements for "long term" assessments and budget needs compilations, requirements for utilization of "minimum practicable cost," references to a "state of good repair," and perhaps other vague terms. It is unclear what will be required to act in a "fiscally responsible manner," and the term and related requirement can be deleted. Similarly, there is always at least an argument that a cost could be reduced, making the "minimum practicable cost" requirement a subjective judgment by FHWA and a potentially significant burden for States even as they work hard to keep costs down.

State DOTs are already under financial scrutiny from their Governors and legislatures and are trying to do as much as possible with scarce resources. Vague terms and related requirements are unnecessary and, if they cannot be dropped entirely, they need to be cut back and defined in a way that will respect State judgments in managing their programs.

Requirements for Data on “Relative Unit Cost” and by “Work Type” are Excessive. The proposal to require States to submit “unit cost” data, and to do so by “work type,” is not reasonable in the context of an asset management effort that should be focused on a bigger picture. These terms as defined also have the effect of extending data compilation burdens on States to maintenance work, even though maintenance work is not even generally Federal-aid eligible. These data requirements and the related terms should be dropped from the rule (see pages 15-16 of AASHTO comments).

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming strongly support modifications to the proposed rule as recommended by AASHTO. We have taken the opportunity of this filing to emphasize a number of the particular concerns addressed by AASHTO and make clear our view that the requirements set forth in the proposed rule should be considerably reduced. Making the AASHTO recommended changes to the proposed rule would reduce regulatory burdens and better enable a State to focus on efforts to achieve the best possible condition of NHS pavements and bridges within available financial resources. We thank FHWA for its consideration and urge adoption of a final rule in this docket in accord with these comments.

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