Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration (FHWA)
in Docket No. FHWA-2023-0014
National Performance Management Measures;
Extenuating Circumstances, Highway Performance Monitoring System Data Field Names,
Safety Performance Measure, Pavement Condition Measure, and Freight Performance Measure
Notice of Proposed Rulemaking; Request for Comments
March 7, 2024

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming ("we" or "our") respectfully submit these joint comments on the Notice of Proposed Rulemaking in this docket, published by the Federal Highway Administration (FHWA) at 89 Fed. Reg. 42401 (January 25, 2024) ("NPRM").[1]

Introduction and Overview

The proposed rule includes material that infringes on target setting authority that statute vests in States. Other provisions would increase the regulatory burden on States without suggestion by FHWA that there is information or data justifying the new requirement. We do not support the shift of FHWA safety performance measures from a five-year rolling average to a three-year average. Additionally, more flexibility should be accorded to States. We are concerned by a number of the questions raised at the end of the notice indicating FHWA's potential interest in a vast expansion of performance management regulation to cover the condition of non-NHS roads, even though such authority is beyond the performance management authority provided to FHWA by Congress. For such reasons, we do not support this proposal in its current form.

Also at the outset, we emphasize that safety has always been a top priority for our departments. Safety is considered in all phases of our Federal-aid projects and programs. We are committed to pursuing continuous improvement in safety performance, even as we have concerns over the proposed changes to FHWA's safety performance measures.

We turn now to our important recommendations to improve the proposal.

Recognize Emergencies Declared by Governors as Extenuating Circumstances

The proposed rule addresses a need to expand the kinds of extenuating circumstances that could cause a State to not make significant progress toward achieving performance targets or collecting data. FHWA properly proposes to amend current 23 CFR 490.109(e)(5) to expand the list of such circumstances to include Presidentially declared emergencies. But Governors also declare emergencies with respect to their States when they deem appropriate. Not every circumstance that has impact on highways and the ability of a State to collect required data regarding highways

[1] By subsequent notice, FHWA extended the deadline for comments in this docket to March 12, 2024. 89 Fed. Reg. 10018 (February 13, 2024).

is a disaster or emergency declared by the President. FHWA should expand the list of extenuating circumstances in 23 CFR 490.109(e)(5) that could be referenced by a State DOT as a basis for not having made significant progress toward meeting a target to include emergencies and disasters declared by the Governor of the State. Governors do not casually make such declarations and FHWA's proposed amendments to section 490.109(e)(5) should be expanded to enable a State to claim extenuating circumstances based on an emergency or disaster declaration by a Governor.

While declarations by Governors is a clear case, the rule revision should also accommodate other exigencies, if approved by FHWA.

The difficulty of working through extenuating circumstances also warrants a number of conforming changes to FHWA's rules. For example, current 490.109(e)(5)(i) requires a State to quantify the impact of extenuating circumstances such as (but not limited to) declared disasters on the State's ability to make substantial progress toward targets. This is not often going to be easy or feasible in the context of extenuating circumstances. This quantification requirement should be dropped. States facing such circumstances need real accommodation, not required tasks.

In addition, proposed 490.317(c)(2) should be amended to permit, even without FHWA approval, late submittal of information regarding extenuating circumstances. It should be no surprise that adverse conditions or events can slow down reporting. Injecting flexibility into proposed 490.317(c)(2) is a needed conforming change.

Further, proposed 490.211(h) concerns assessing progress toward meeting targets in the event of extenuating circumstances. That section should be modified to be consistent with the changes recommended here as to data submission in the event of extenuating circumstances such as, but not limited to, recognizing emergencies and disasters declared by Governors.

Target Setting Authority Under 23 USC 150 Is Reserved Solely to States; This Requires Modification of the Proposal

The FHWA performance measurement statute is clear that it is a "State" that sets targets for performance, not FHWA. 23 USC 150(d) provides –

> "…after the Secretary has promulgated the final rulemaking under subsection (c), **each State** shall set performance targets that reflect the measures identified …" (emphasis supplied).

The FHWA performance measurement statute also clearly concerns "the Federal-aid highway program." See 23 USC 150(a). It is also clear that safety performance measures for the purposes of section 150 concern 23 USC "148," the safety program element of the Federal-aid highway program. See 23 USC 150(c)(4).

In Section 24102 of the Bipartisan Infrastructure Law (BIL), Pub. L. No. 117-58, Congress amended aspects of performance measurement and targeting for the purposes of programs of

safety grants to States authorized not under the Federal-aid highway program but under Chapter 4 of title 23. Section 24102 struck a reference in statute (23 USC 402) to States setting ‘‘annual performance targets’’ and inserted instead “performance targets that demonstrate constant or improved performance.” 135 STAT 789. This language constrains State flexibility in target setting.

It is clear that the target language of 23 USC 150(d) applies to performance measures for section 148 and that target language in 23 USC 402 applies to target language for measures pursuant to the NHTSA safety grant programs in Chapter 4 of title 23.

Accordingly, FHWA should delete proposed 23 CFR 490.209(a)(4), which would apply the section 402 target setting language standard to the section 148 program, contrary to the clear direction of Congress in 23 USC 150(d) that target setting under the Federal-aid highway program is for “each State” to decide.

Maintain the Current Five-Year Rolling Average Approach to FHWA Safety Performance Measurement. A related point is that FHWA is not bound by statute to follow the NHTSA approach of triennial safety targets; FHWA can and should allow States to continue the carefully developed five-year rolling average approach to HSIP performance measurement and targeting which FHWA developed after consultation with States.

In our low population States, annual fatality and serious injury rates can be impacted noticeably by changes in the number of fatalities in a year (whether up or down) that are relatively small compared to comparable numbers in many States. Hence, use of a five-year rolling average rather than a three-year average produces a more stable base of information for planning and targeting, an advantage that supports dropping the change proposed in this NPRM from the rolling five-year average safety performance measure.

As explained above, the performance measure language of 23 USC 150 applies to the “Federal-aid highway program” (see 23 USC 150(a) and (b)), and also to performance measures for section “148” (as a part of the Federal-aid program). In contrast, the performance measure language in 23 USC 402 applies to measures pursuant to the NHTSA safety grant programs in Chapter 4 of title 23. FHWA could choose to shift to the three-year average approach, but this notice does not present justification for the change on the merits. FHWA’s argument seems to be that there will be some simplicity if it will do as NHTSA does, which is hardly persuasive.

As to target setting, FHWA has noted that some FHWA safety performance measures for HSIP are identical to some performance measures administered by NHTSA under the safety grant programs of Chapter 4 of title 23. Specifically, NHTSA and FHWA have identified three performance measures that are identical for NHTSA and for FHWA: number of fatalities, number of serious injuries, and fatality rate. See the below link to a NHTSA statement identifying the three identical performance measures.[2]

https://www.nhtsa.gov/highway-safety-grants-program/state-performance-targets

[2] Link most recently reviewed on March 7, 2024.

In the NPRM, FHWA has proposed a rule that would implement its view that the same State target setting requirements should apply to the three identical measures in the entirely distinct NHTSA and FHWA safety programs. As noted earlier, we disagree and explained that result is not compelled by statute.

However, we consider it an especially egregious departure from 23 USC 150(d) that, in the proposed rule, FHWA has not restricted application of the NHTSA "constant or improved performance" targeting requirement to the three measures that are identical. Especially as to non-identical measures, the statutory command under 23 USC 150(d), that targets are set by "each State," must be followed.

Further, the proposed rule impinges on the ability of a State to take into account, in target setting for the State, any State specific circumstances. What if the State is experiencing significant population growth? Significant economic growth? Both?

For the reasons set forth above, the proposed rule should be revised to continue use of the rolling five-year average safety performance measure and must be revised to delete proposed 23 CFR 490.209(a)(4). Failing that, 490.209(a)(4) must be revised to be limited to the three items in common as between the HSIP performance measures and the NHTSA safety grant program performance measures.

Further, if 490.209(a)(4) is not completely deleted, the authority statement for the rule (at the outset of Part 490) must be revised to add a reference to 23 USC 402, as none of the other cited authorities even arguably authorize FHWA to violate the clear statutory command that "each State" sets the performance targets. 23 USC 150(d). We strongly disagree with any assertion by FHWA that the other cited statutes provide authority to require a constant or improved target.

Potential Transition Issues

While we disagree with FHWA's proposed change of safety performance targets from annual targets based on a five-year rolling average to triennial targets based on a three-year average, if such a change is made in the final rule, FHWA does properly recognize that such a shift would raise transition issues. See 89 Fed. Reg. at 4859. Of the transition options raised by FHWA in the event there is a change in the measure, we would strongly prefer the last one, described in the last paragraph, middle column 89 Fed. Reg. 4859. This option would not require identical performance targets between NHTSA and FHWA programs for calendar years 2025 and 2026, delaying the shift to the three-year approach.[3]

We would prefer an even longer transition, providing time for FHWA to reconsider its decision to shift to the triennial approach.

Under current rules, where the safety targets are revised annually, 490.209(a)(6) requires FHWA approval to change a target. Again, while we disagree with the proposed change of safety performance targets from annual targets based on a five-year rolling average to triennial targets

[3] That FHWA sees such an approach as a viable option confirms our analysis that FHWA is not required to adopt the NHTSA three-year average measure.

based on a three-year average, if such a change is made in the final rule, FHWA should revise proposed 490.209(a)(5) to allow a State to modify its target at least once without FHWA approval within the three-year period. Circumstances change; a State should not be precluded from making an adjustment to a target within a multi-year period.

The Proposed Three-year Averages Do Not Appear to be Weighted, Making Them Less Accurate Than They Could Be

While we have stated above our disagreement with the proposed shift from the five-year rolling average approach of the current rule to the NHTSA triennial approach, we note a technical concern with proposed section 490.207(b). Under that section, for any measure of a "rate," for example, the three-year average is calculated by adding the rate for each of the three most recent years and dividing by 3. However, this always treats each year as if equal in activity, while in practice they will not often be equal. For example, one of the three years may have more VMT (by a more than de minimis amount) than the other two, so that the results for that year for rate of fatalities, for example, should receive greater weight than the other two years, not equal weight. If the final rule should, unfortunately, not follow our advice to not change the measure from today's five-year rolling average approach, section 490.207(b) should be adjusted to achieve more accurate results.

Incorporation by Reference of HPMS is Unclear; Changes to HPMS Must be Subject to Notice and Comment

We do not disagree with the concept that FHWA's Highway Performance Monitoring System (HPMS) Field Manual is incorporated by reference. See proposed 490.111(c)(2). However, FHWA should be clearer than it is in the NPRM that the version being incorporated is the latest version that has been finalized after going through public notice and comment. FHWA must also be clear that a State using a version of the HPMS Field Manual that is in effect has done valid work that does not need to be redone other than according to regular measurement schedule upon publication of a new version of the Field Manual that was properly subjected to notice and comment.

The FHWA discusses its update of the HPMS Field Manual in the NPRM at 4860-61 but does not specify that the update being incorporated by reference was subject to notice and comment.

The proposed change set forth at 490.111(c)(2) should be modified to specify that incorporation is "provided, that the version incorporated is the latest published version that was finalized after notice and comment on proposed changes from the prior version." The HPMS and its Field Manual are so integral to the performance measurement regime that it is essential to limit incorporation to when the version being incorporated was subject to notice and comment. Otherwise, FHWA will have essentially modified the rule without notice and comment.

Delete Unclear Proposal for New "Certification" Requirement in Section 490.319(c)(1)

Currently, individuals engaged in manual data collection (related to certain FHWA performance measurement) are subject to a "certification" requirement.

The NPRM proposes to amend 23 CFR 490.319(c)(1) to require that individuals working in data collection (related to certain FHWA performance measurement), other than individuals doing manual data collection, also be subject to "certification."

FHWA explains that "every State already has [a] process for training operators and other persons working in data collection even though there has not been a requirement to do so." 89 Fed. Reg. at 4864. In other words, there is no problem to solve, yet the proposal would amend the rule to add a "certification" requirement for such persons. While we do not suggest that FHWA intends a complex requirement, a future FHWA could have a stricter view of "certification" than FHWA appears to suggest at 89 Fed. Reg. at 4864, where the short discussion indicates that all States already meet what FHWA currently considers to be a "certification" requirement for the workers that FHWA would newly subject to a "certification" requirement. Nonetheless, we recommend that FHWA not attempt to "fix" a non-problem by adding a certification requirement. Depending how "certification" is interpreted by FHWA in the future, the addition of that certification requirement could reduce a State's ability to hire qualified essential workers, even as today the transportation industry is in broad agreement that there is a shortage of individuals in the transportation workforce.

Technical Issues, Pavement Condition

Proposed definition of "Cracking Percent" for Continuous Reinforced Concrete Pavement (CRCP). The NPRM would revise this definition. See proposed revision of 490.305 at 89 Fed. Reg. 4870. There does not appear to be any discussion or explanation of this proposed change in the Federal Register notice. Yet, by apparently establishing a different definition of cracking percent for CRCP, as opposed to other pavements, States may have to review their software and other data gathering approaches as to cracking percent to account for a definitional change for one type of pavement. Since FHWA proposed this change without explanation, making it more difficult for States to comment on the merits of the proposal, we recommend that FHWA drop this proposal, or make it optional for States, until such time as a further Federal Register notice provides information on the proposal sufficient to enable careful review and comment.

Wording of Data Requirements Revision in Proposed 490.309(a) Appears to be Inconsistent with the HPMS Field Manual. We have no quibble with the first sentence of the proposed wording revision of this subsection, which refers to data items "collected and reported following the HPMS Field Manual." See proposed 490.309(a) at 89 Fed. Reg. 4870. However, the second sentence of the proposed subsection states that "State DOTs shall report four condition metrics for each pavement section: IRI, rutting, faulting, and Cracking_Percent." Id. Our understanding is that HPMS rejects rutting on rigid pavement and faulting on flexible pavement. Accordingly, we would revise the second sentence in the subsection, such as by striking the period at the end and substituting "only to the extent collected and reported under the HPMS Field Manual."

FHWA's Additional Requests for Comments

In addition to seeking comment on specific proposed rules, FHWA also seeks comment on other issues without making a specific proposal. See 89 Fed. Reg. 4865. With respect to those issues, we note that receiving comment on concepts, without making a proposal, does not provide FHWA with a legally sufficient foundation to promulgate a final rule on those topics in this docket. A further notice of proposed rulemaking would be required. We don't suggest that FHWA is planning to take rulemaking action on those topics at this time, but wanted to be clear that, in any event, a further NPRM would be required.

We do have comments on some of these additional issues raised by FHWA and we turn to them now.

FHWA Questions Regarding Possible New Performance Measures Fail to Acknowledge Important Statutory Limitations on FHWA's Authority

FHWA asks questions about possible new and additional performance measures, including for pavement and bridge condition off the National Highway System and for highway safety performance measures that differ from those set forth in statute.

In reply we particularly note that, under the FHWA performance measure statute, 23 USC 150, FHWA's authority to impose performance measurement requirements and related targeting requirements, is narrow. Under 23 USC 150(c)(2)(C), the "Secretary" (of Transportation, and by delegation, the FHWA) "shall … limit performance measures only to those described in this subsection."

As to highway and bridge condition, section 150(c)(3) is for the purpose of carrying out 23 USC 119, which concerns the NHS. The authorization for freight movement measures is tied to the "Interstate System." See section 150(c)(6). Measures for the condition of non-NHS roads and bridges are not mentioned in the subsection, much less "described." Similarly, section 150(c)(4) directs the Secretary to establish certain specifically listed safety measures, not others.

Further, even if there were authority for additional FHWA performance measures, we, and we are confident, others, consider that the number and extent of requirements imposed on States by FHWA should be reduced, not expanded.

States always have been concerned with the condition of non-NHS routes and make best efforts to improve those road and bridge assets within budgetary confines. Accordingly, we do not support establishment of new Federal performance management requirements regarding the condition of non-NHS roads and bridges.

Moreover, such expansion of Federal authority could be very burdensome. In Idaho, for example, expanding the reach of Federal performance measurements on road condition to all public roads would extend Idaho's data collection obligation from today's less than 3,000 centerline miles to approximately 55,000 centerline miles. Further, in all States not only is most public road mileage not NHS mileage, in our five rural States as well as in a number of other

States, a great deal of the public road mileage is not even paved, making data gathering challenging, time consuming and costly.

While it may be possible that FHWA is considering making a legislative proposal to Congress to expand its authority to impose performance measurement and management requirements, the wording in the Federal Register notice in this docket suggests that FHWA may be considering regulatory action. We respectfully suggest that FHWA not focus on exploring possible performance measures that are beyond its authority, but instead develop and offer to States and others webinars and other information on asset management and pavement and bridge condition, so that States can consider the information while taking actions to preserve and improve the highway and bridge system.

Approaches to Data Collection on Road Condition When the Right Lane is not Accessible

FHWA also requested comment on how it should address the inevitable instances when data cannot be collected with respect to a segment of pavement. FHWA explains in the notice that, to minimize the amount of missing pavement data reported to HPMS, current regulations direct States to collect condition information from another lane when the rightmost lane is closed due to construction, closure, excessive congestion, or other events impacting access.

We suggest that for inaccessible pavement segments that have been let to be constructed, resurfaced, reconstructed, etc., the data should be excused from collection as follows. First, we would eliminate the need to try and collect the data prior to the construction activity. This would not be inappropriate or misleading. It would be misleading to report the pavement segment as in poor condition when the lane(s) are closed or about to be closed and construction to put the segment in good or excellent condition is so imminent. This approach would apply whether the project takes one construction season or more than one.

Such a protocol should also eliminate the need to collect the data immediately after the construction project is complete. If the project passed inspection, the relevant segment should be presumed to be in good or excellent condition for at least the first-year post-construction.

These protocols, particularly including as to pre-construction of the let project(s), could be classed as missing data or as under construction and save States a great deal of time and effort without impairing data quality. Data for these segments should simply be allowed to be ignored or excluded from performance reporting and not considered to be in "poor" condition.

An attractive alternative would be to not consider such segments as part of the required miles for which data is to be collected. The miles under construction (including miles that have been let to be constructed, reconstructed, resurfaced or otherwise improved) would be "exempt" from collection and not considered part of the condition calculation. Excellent, good, fair and poor condition for the applicable roads in the State would be measured based on the condition of the roads not excluded from data collection. Again, this would more accurately reflect the condition of roads in the State than to declare that inaccessible data means the segment is in "poor" condition – it is about to be in good or excellent condition. And, importantly, State workloads as to performance measurement would be reduced, enabling States to turn to other, worthy tasks.

Should FHWA not accept either of these time-saving meritorious approaches that more accurately reflect conditions, a further alternative would be to allow a State the option of resubmitting the results of the most recent measurement of the segment.

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming thank FHWA for its consideration and recommend that any further action on the issues addressed in these comments be in accord with these comments.

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