

March 8, 2024

The Honorable Shailen P. Bhatt  
Administrator  
Federal Highway Administration  
1200 New Jersey Avenue, SE  
Washington, DC 20590-0001

Subject: Notice of Proposed Rulemaking, National Performance Management Measures; Extenuating Circumstances, Highway Performance Monitoring System Data Field Names, Safety Performance Measure, Pavement Condition Measure, and Freight Performance Measure (Docket No. FHWA-2023-0014)

Dear Administrator Bhatt:

The American Association of State Highway and Transportation Officials (AASHTO) appreciates the opportunity to comment on the Federal Highway Administration (FHWA) Notice of Proposed Rulemaking (NPRM), published in the Federal Register on January 25, 2024, regarding National Performance Management Measures (89 Federal Register 4857, Docket No. FHWA-2023-0014).

AASHTO is a nonprofit, nonpartisan association representing the state transportation departments (state DOTs) in the 50 states, the District of Columbia, and Puerto Rico, with the mission to support state DOTs in connecting America with the transportation system of today and tomorrow. AASHTO and the state DOTs have a long history of successful partnership and collaboration with the US Department of Transportation (USDOT) and its modal administrations, and we look forward to continuing this important work together. Given the state DOTs' role as primary stewards of the federally-supported, state administered federal transportation program, AASHTO is pleased to provide the following input for consideration.

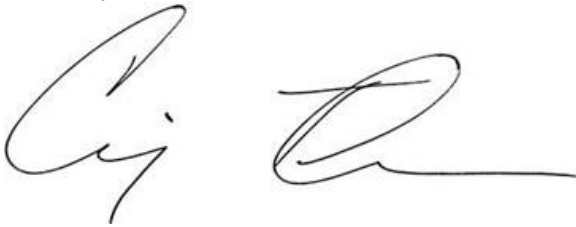
AASHTO and the state DOTs understand and appreciate that what we measure matters. State DOTs have served as stewards of the federal performance management framework that was enacted in 2012 in the Moving Ahead for Progress in the 21st Century (MAP-21) Act. Since initial implementation began in 2013, with the full effect of the federal law and subsequent iterations of regulations being in place since 2018, the state DOTs have delivered on the congressional intent of the performance management provisions which is to provide a consistent framework to measure the performance of the transportation system. Under state DOTs' leadership, the national performance management framework has been implemented in a manner that advances a safer and more efficient transportation system without imposing significant undue regulatory burdens on states.

While challenges remain given the scale and complexity of the performance management framework, AASHTO continues to place foremost priority on improving safety under my tenure as President. We are still experiencing a crisis in which too many users of our transportation system do not make it home safely, and it is crucial that we address this crisis using all means and methods at our disposal—including through performance management. Last November, the AASHTO Board of Directors unanimously passed a resolution to resolutely and firmly renew our commitment to connecting places and communities with a transportation system free of fatalities and serious injuries. We are currently deploying an AASHTO Safety Action Plan, and we will be holding another Safety Summit later this year to follow upon last year's highly successful gathering.

AASHTO also notes our disappointment that the comment period for this NPRM, which was originally only 30 days, was extended only by 15 days instead of 60 days as requested by AASHTO. A 45-day comment period for this highly complex and technical NPRM significantly hindered the opportunity for state DOTs to provide informed responses based on collection and synthesis of perspectives from multiple disciplines represented by AASHTO's committees and by different program and functional areas within individual state DOTs. The insufficient review period without a clear rationale has unfortunately led to a lack of inclusivity in this rulemaking process.

We appreciate the opportunity to provide input to FHWA on national performance management measures. If you have any questions, please contact Anna McLaughlin, Program Director for Transportation Program Management, at [amclaughlin@aaashto.org](mailto:amclaughlin@aaashto.org) or (202) 624-3625.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Thompson', written in a cursive style.

Craig Thompson  
President, American Association of State Highway Transportation Officials  
Secretary, Wisconsin Department of Transportation

Enclosure

## AASHTO Comments Regarding

### **Notice of Proposed Rulemaking, National Performance Management Measures; Extenuating Circumstances, Highway Performance Monitoring System Data Field Names, Safety Performance Measure, Pavement Condition Measure, and Freight Performance Measure (Docket No. FHWA-2023-0014)**

AASHTO comments are organized as follows:

- A. General Comments
- B. Specific National Performance Management Measure Responses – AASHTO response to the specific National Performance Management Measures in the NPRM.
- C. AASHTO Response to FHWA Requests – AASHTO response to the questions specifically asked by FHWA in the NPRM.

#### **A. GENERAL COMMENTS**

##### **Lack of Legislative Authority to Redefine Target-setting**

AASHTO expresses concern regarding FHWA’s justification for establishment authority pertaining to “constant or improved performance from the baseline safety performance.” While AASHTO and the state DOTs are generally supportive of the performance management provisions included in MAP-21, FAST Act, and IIJA as implemented to date and believe that with the continued effective implementation of federal performance management regulations we will see a more effective federal transportation program to complement ongoing state efforts to achieve a safer and more efficient transportation system, we disagree with FHWA’s assertion in the NPRM.

AASHTO disagrees with FHWA’s assertion in the NPRM which states:

*The FHWA proposes to remove § 490.209(a)(4) and replace it with a new requirement for State DOTs to establish performance targets that “demonstrate constant or improved performance from the baseline safety performance.” This proposed requirement addresses the recent increase in fatalities by requiring performance targets to offer realistic expectations toward achieving the long-term goal of zero roadway fatalities, which is consistent with DOT’s NRSS. This requirement also aligns with NHTSA’s requirement under section 24102 of the BIL (23 U.S.C. 402(k)(4)(A)(ii)) that performance targets submitted as part of the triennial HSP demonstrate constant or improved performance. Although BIL did not make a similar amendment to the performance management requirements in 23 U.S.C. 148, there is no indication that Congress was attempting to undermine or change FHWA’s and NHTSA’s regulations that require identical performance targets for the three common measures. Likewise, there is nothing in Title 23 that prohibits FHWA from adopting the same “constant or improved performance” standard required by section 24102. Given the national crisis of fatalities on our roadways, FHWA believes it is good public policy to have the same requirement for its Safety Performance Management Program.*

During the U.S. Senate’s consideration of what eventually became the IIJA in August 2021, it rejected an effort to change safety target-setting in 23 USC Section 150 to require a “target that represents an improvement over baseline conditions.”

Target-setting is a significantly data-driven and multidisciplinary process that is practiced by all states. The performance management provision in the 23 USC 150 is clear that “each state shall set performance targets” that use the measures developed under MAP-21. Furthermore, it remains AASHTO’s position

that every state and political subdivision faces different constraints and opportunities affecting their transportation system. Available funding is a particularly important variable for states in planning and target-setting, but there are other factors, including economic conditions, environmental conditions, population growth trends, legislative and gubernatorial mandates and priorities, coordination with local jurisdictions and their priorities, and issues identified in the public involvement process.

Consequently, it is essential that states continue to retain the legislatively-provided flexibility to set targets, including targets that have performance holding steady or, in some situations, declining. This flexibility is critical to state DOTs in order to balance the breadth of performance measures they must address. In addition, the proposed change to target-setting under 23 USC Section 150 will set a precedent to potentially add similar requirements to other performance measures (e.g., pavement condition, bridge condition, travel time reliability) to set improving targets.

We recognize that the current conflict in safety target-setting between FHWA and the National Highway Traffic Safety Administration (NHTSA) is not ideal, but we believe this issue can only be addressed through congressional action rather than through executive rulemaking.

We strongly reemphasize this comment pertains strictly to target-setting in the context of the federally-established performance management process, and it does not pertain in any way to advancement of safety outcomes. AASHTO and state DOTs' highest priority remains improving safety. AASHTO's Board of Directors in November 2023 adopted a policy resolution that stated that the Association "resolutely and firmly renews our commitment to connecting places and communities with a transportation system free of fatalities and serious injuries" and initiated development of the multidisciplinary AASHTO Safety Action Plan to guide state DOTs' collective action.

### **Expected Schedule for Implementation**

As noted above, AASHTO and its member states express disappointment at the lack of sufficient time provided by FHWA to respond to this highly technical NPRM. The allotted timeframe does not allow states to adequately consider the ramifications of the changes prior to developing their targets or enough time to inform their partners of the changes. Coordination and approval of targets, especially if identical targets to those in the Highway Safety Plan are required, takes time as multiple agencies and stakeholders are involved.

Additionally, FHWA proposes the new triennial cycle for Highway Safety Improvement Plan (HSIP) safety performance targets begin with reporting in August 2024 representing safety performance for calendar years 2025 through 2027. If FHWA moves forward and makes August 2024 the effective date for the rule, state DOTs will have little to no time to effectively review and integrate the changes. In addition, states should not be required to retroactively integrate three-year targets into HSPs since it would create confusion and added effort. States request that the effective date be delayed to accommodate proper coordination and implementation of targets. If FHWA proceeds with requiring alignment of NHTSA and FHWA safety targets, AASHTO does not support the August 2024 effective date and would prefer the second proposed option outlined in the NPRM to "waive the requirement for identical performance targets between NHTSA and FHWA programs for CY 2025 and CY 2026 and have the state DOTs continue to submit annual safety performance targets based on 5-year averages (as per the current regulation) in their HSIP Annual Reports until NHTSA's next triennial cycle (2027-2029)." It seems highly infeasible for any phase-in to occur during the calendar year 2024. AASHTO recommends phasing these changes in at a later date, if the proposed target alignment is confirmed.

### **Extenuating Circumstances**

AASHTO and its members support the inclusion of extenuating circumstances in the rulemaking, but also believe that the definitions of extenuating circumstances should be expanded and clarified to include additional circumstances. These include state or locally declared emergencies and other catastrophic infrastructure failures not associated with a natural or man-made disasters, such as an extended bridge closure that result in significant long term traffic disruptions.

### **Highway Performance Monitoring System Data Field Names**

AASHTO has no concerns with FHWA's proposed approach to updating the HPMS data field names.

## **B. SPECIFIC NATIONAL PERFORMANCE MANAGEMENT MEASURES**

### **Safety Performance Measure**

AASHTO and the state DOTs strongly support efforts to reduce traffic fatalities on our nation's roadways. AASHTO's 2021-2026 Strategic Plan focuses on the goal of safety, mobility, and access for everyone; AASHTO and its member states are in the process of developing a Safety Action Plan to further the focus on safety and AASHTO supports federal efforts in this critical area, such as the National Roadway Safety Strategy. However, there are a number of important concerns with the particular proposed approach to measuring safety targets outlined in the NPRM.

*NHTSA and proposed FHWA regulations are not coordinated appropriately.* Aligning safety targets with NHTSA is not required by law. Furthermore, NHTSA does not invoke any sort of penalty to a state highway safety office for not meeting its targets whereas FHWA requires the submission of an HSIP Implementation Plan if a state fails to meet or make significant progress towards meeting its targets. It is important to recognize that Congress has imposed both a financial penalty and a consequence if a state DOT has not made significant progress toward meeting the safety performance targets established under section 23 U.S.C. 150(d) in implementing the HSIP requirements. Congress did not impose a similar penalty upon the state highway safety office for implementing the HSP. As AASHTO expressed in its comments during the related NHTSA rulemaking for 23 CFR Part 1300, the requirement to have identical targets combined with the requirement that HSP targets either show improvement or constant performance, further limits state DOTs' ability to implement effective safety performance management. These requirements detract from a state's ability to deliver safety projects and programs as they address penalties resulting from failing to meet targets that can be perfunctory due to their non-data-driven nature. The NPRM's proposed reiteration of these requirements and loss of state flexibility in target-setting of the three common targets to match up with NHTSA's rules and frequency creates additional administrative burden for states, does not add value, and is not an effective way to accomplish the intended result of tangibly improving safety outcomes.

Consistency across the separate entities' targets can appear desirable, but this shift distances states and metropolitan planning organizations (MPOs) from setting targets based on actual data. The longer-range timeframe for the Implementation Plans will also pose serious challenges as there may be less fidelity to real-world project schedules/timelines, creating a need for more amendments and adjustments. Furthermore, there are additional inconsistencies that linger between the two systems. These include:

- Still acceptable to use five-year averages in NHTSA reporting;
- HSP targets can be adjusted annually between triennial plans;
- Reporting deadlines will be earlier (June), posing a challenge for states to have crash, Highway Performance Monitoring System, and other data available in time for target setting.

AASHTO additionally recommends removing the requirement for states to develop an HSIP Implementation Plan should they not meet or make significant progress towards meeting their targets each

year. This onerous requirement is particularly punitive for small rural states with limited staff that are already spending 100 percent of their annual HSIP fund allocation on its intended and eligible purpose and further degrades these organizations' ability to effectively deploy safety solutions to their high-risk facilities.

#### ***Changes from Five-Year Rolling Average to Three-Year Average***

AASHTO recommends that FHWA maintain the usage of five-year rolling averages rather than the proposed implementation of three-year averages. FHWA indicates that reducing the number of years of data required is expected to be a minimal burden to states; however, the shift to a three-year average has several other consequences.

The five-year rolling average provides a more consistent and revealing picture of safety trends. Year to year, crash trends can fluctuate, and these fluctuations in particular affect safety performance assessments with lower numbers of fatalities. In some circumstances, national events like the COVID-19 pandemic introduce significant volatility in crash trends due to a myriad of factors. Those temporary spikes are weighted more heavily in three-year averages than five-year rolling averages. Given the volatility of crash data, the use of three-year averages is likely to result in greater fluctuation in the data and increases the likelihood that states will face penalties for not meeting targets. These penalties reduce the flexibility to obligate HSIP funding on the most effective highway safety improvement projects. Furthermore, safety practitioners understand the volatility of safety data and leverage evaluations like rolling averages to create more meaningful trend data to more effectively plan and manage safety programs. The public and elected officials may not readily understand the difference between an average and a rolling average. If states are required to move to the three-year average, the resulting performance data will likely trigger scrutiny of safety programs or spending when spikes in crashes occur, displacing resources away from proven actions. Lastly, there is no evidence provided in the docket that explains why a three-year average target is a better methodology, nor are there any descriptions of why there are deficiencies in the current five-year rolling average target setting process.

If implemented, the three-year average proposal requires further clarification from FHWA. The use of a rolling average supports data-driven trend analysis. Clarification is required as to whether a three-year average implies the usage of three single-year data points or that a single data point will be set at the end of three years. The definition should be modified for clarity at the least if pursued.

Current regulation allows state highway safety offices to establish targets using annual or rolling averages. Requiring state DOTs to use their three-year average will also require highway safety offices to also use the three-year average. This similarly limits the ability of highway safety offices to plan and implement effective programs.

#### ***Change from Annual to Triennial Target Setting***

While triennial target-setting appears to be less work than annual target setting, these targets still will not sync with the Strategic Highway Safety Plans and the associated five-year cycle. The NPRM is unclear as to whether the three-year target-setting cycle results in the HSIP continuing to be an annual report or whether it will move to a three-year publishing cycle. AASHTO and its member states support moving all target-setting, reporting, and plan submission to a five-year cycle for HSIP and HSP.

While state highway safety offices are able to update their targets on an annual basis, the proposed rule would prohibit state DOTs from doing the same. This effectively will prohibit highway safety offices from updating their shared targets annually as needed. In addition, since FHWA proposes to assess a state with missing data as not meeting a target, the state will be assessed as not meeting the target for each of the three years.

Other targets in the National Performance Management Program can be updated annually. AASHTO objects to the possibility of carrying the proposed limitation on updating safety targets into other performance measures.

### **Pavement Condition Measure**

As outlined above, AASHTO supports the inclusion of extenuating circumstances as a consideration for pavement condition reporting. AASHTO acknowledges that the pavement performance measures as they exist are imperfect compared with the way states evaluate pavement structure health and select projects. With additional time to respond to the NPRM, AASHTO would be able to share substantive comments on the impact of the proposed pavement condition measure changes. AASHTO looks forward to continuing to work with FHWA in identifying and refining pavement condition measures in the future.

### **Freight Performance Measure**

AASHTO supports the proposal to update Section 490.107 to align with section 21104(c) of the Infrastructure Investment and Jobs Act (IIJA), amending the State Freight Plan cycle to four years from five years. AASHTO acknowledges FHWA's clarification regarding expectations around the truck freight bottleneck list.

## **C. AASHTO RESPONSE TO FHWA REQUESTS**

The following are responses to individual questions posed within the NPRM.

*(1) The MAP-21 legislation required FHWA to develop a uniform method for States to measure and report pavement conditions indicating investment needs and mobility on the Interstate and non-Interstate NHS. This methodology is contained in § 490.313 and uses the HPMS for reporting pavement conditions. After experiencing the first 5 years of collecting and reporting this information, FHWA invites comments on the effectiveness of the methodology for the intended purposes and suggestions to improve the required measurement and reporting.*

The current methodology is not effective for decision-making and communicating actual pavement performance. The existing methods lack the granularity needed to determine right treatments at the right time to manage pavement performance. For this reason, many state DOTs still maintain their own pavement indices to plan and program projects. Furthermore, the methods often overestimate or underestimate actual pavement performance, which can confuse the public. Overall, few DOTs use the federal performance measure approach to manage pavement performance, which is incongruous with the target-setting and significant progress determinations. There seems to be a disconnect between decision-making on the pavement performance and the actual performance measures. AASHTO would be amenable to continue this conversation with FHWA and state DOTs to identify potential suggestions for improvement.

*(2) To minimize the amount of missing pavement data reported to HPMS, the current regulations direct States to collect condition information from another lane when the right most lane is closed due to construction, closure, excessive congestion, or other events impacting access. Some States have indicated difficulties collecting condition information in areas under construction due to bridge replacements, detours, or other circumstances. The FHWA invites comments on how to best collect and report the required information in these challenging situations.*

The current methods unfairly categorize performance in the instance of construction, detours, or lane closures. Many states commented that the current system unfairly penalizes performance when there is construction, detours, or lane closures. This data is missing because of activities undertaken to improve pavement performance. The most common suggestion was to exclude areas where construction is

occurring from the reporting. Construction, lane closures, or detours are temporary conditions and should be viewed as an extenuating circumstance. Instead of being counted toward the Missing, Invalid, and Unresolved (MIU) data calculation, states should be allowed to exclude the data, use a previous year's data, or use data from an adjacent lane if available. Otherwise, performance in these circumstances will continue to be misrepresented by the current method.

*(3) For the purpose of carrying out [23 U.S.C. 148](#), the Secretary is required to establish measures for States to use to assess (A) serious injuries and fatalities per vehicle mile traveled; and (B) the number of serious injuries and fatalities ([23 U.S.C. 150\(c\)\(4\)](#)). The FHWA is seeking comments on possible alternative safety performance measures that could be used to assess safety performance related to the HSIP. These performance measures should be directly related to the State's HSIP and help provide quantifiable evidence toward progress of safety performance. These performance measures may evaluate the outputs (quantitative and indicate the level of activity or effort) or outcomes (provide an indication of effectiveness) resulting in the implementation of the HSIP. The FHWA also seeks comment on whether FHWA should maintain the existing safety performance measures, replace the existing safety performance measures with alternative safety performance measures, or use some combination of both to assess future safety performance.*

AASHTO considers the five existing national performance measures for safety to be sufficient in demonstrating the comprehensive and coordinated level of effort needed across all of the safe system elements to reach safety goals and to provide a picture of trends. However, there are numerous factors contributing to crashes that are outside the control and responsibility of state DOTs and highway safety offices—and assessment of states' safety performance and determination of penalties under current law should consider process measures that demonstrate the efficiency and quality of the effort state DOTs dedicate to reaching safety goals.

*(4) The existing TPM measures for pavement and bridge condition in [23 U.S.C. 150\(c\)\(3\)](#) are limited to the Interstate and NHS. However, there is also considerable need on the non-NHS system for infrastructure improvements. For example, approximately 90 percent of the bridges in poor condition in the 2022 National Bridge Inventory dataset are non-NHS bridges. Would State DOTs and MPOs benefit from the creation of national performance measures for the non-NHS system? For non-NHS bridges, condition data is already collected and reported annually to FHWA and can be used to set targets and report on performance. For non-NHS pavement performance, FHWA collects condition data on a sample of these roadways in each State. What would be reasonable measures, target setting timelines, data collection methods, reporting frequency, and reporting methods for any non-NHS measures? If such national performance measures are created, what would be needed to collect, report, and analyze non-NHS data and implement such a program?*

AASHTO and its member states maintains the position that no new additional federal performance measures, associated performance management requirements, or other new complexities should be established, including the expansion of federal reporting metrics to include non-NHS assets. USDOT and FHWA should continue to focus on the National Highway System due to its importance to the nation. States already have their own approaches to data on non-NHS routes and bridges and should have the flexibility to address the needs and allocate appropriate resources without the creation of a new National Performance Measure for such assets. States cannot reasonably support the mandated collection, reporting, and analysis of a national non-NHS pavement performance program in the proposed manner. This would require immense coordination with the asset owners across counties, cities, and towns. Additionally, non-NHS condition is impacted by a myriad of factors, many of which are entirely outside state DOT control and jurisdiction. Several states currently measure and report on conditions of non-NHS highways and bridges through other statewide regulations and initiatives. Each state is different, and the flexibility is important.



Furthermore, absent Congressional action, there is no authority under 23 USC 150 for FHWA to establish condition performance measures for systems other than the Interstate System and non-Interstate NHS. We recommend FHWA to continue its focus on enhancing the ease of use of data that is already collected and reported to FHWA, especially by improving the ability of MPOs and other non-state entities to easily access and utilize that data, particularly pavement data.