Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
in
Docket No. FHWA-2013-0019
Highway Safety Improvement Program
May 23, 2014

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 79 Federal Register 17464 *et seq.* (March 28, 2014). In this docket FHWA has invited comment on proposed modifications to rules governing the Highway Safety Improvement Program (HSIP), 23 CFR 924. In proposing rules changes, FHWA has noted that the Congress recently modified the HSIP statutory provision, 23 USC 148, as part of 2012's MAP-21 legislation.

While FHWA should update its HSIP rules in light of MAP-21, we consider it important that FHWA modify problematic aspects of the rules that have been proposed in this docket. The adjustments we seek would reduce burdens on States without diminishing safety.

At the outset, the transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming wish to emphasize their deep commitment to improving transportation safety and to reducing fatal and other crashes. Safety is an important consideration for us in all aspects of our programs, not only in safety specific programs. So, in pursuing modifications to the proposed rules, we are seeking to improve how States are able to operate effectively and efficiently under the HSIP in pursuit of safety.

We also note that each of the five departments is a member of the American Association of State Highway and Transportation Officials (AASHTO). We were actively involved in the development of the comments filed by AASHTO in this docket and note our broad agreement with those AASHTO comments. However, we take this opportunity to emphasize the importance of modifying the proposed rule in several areas.

Our principal concerns are:

- to remove from the rule apparent requirements for analyses of projects that are potentially complex and burdensome, not called for by MAP-21, and that could impinge on State project selection authority; and

- to ease the proposed data collection requirements, which would be unduly burdensome.

Remove Language That Would Burden States with New Requirements and Restrict State Project Selection Authority

In 23 USC 148 Congress has outlined key concepts for States to consider in implementing the HSIP program. Notably, States are to:

"**consider** which projects maximize opportunities for safety (23 USC 148(c)(2)(B)(v)) (emphasis supplied); and

adopt "**goals**" that "focus resources on areas of greatest need." (23 USC 148(c)(2)(C)(ii)) (emphasis supplied).

The proposed rules would take these broad program level goals and considerations and apparently turn them into project level or other specific requirements that would be burdensome and impinge on State project selection authority. Such proposals should be revised or deleted, as described below.

Revise Proposed 23 CFR 924.5(b)

Proposed 23 CFR 924.5(b) states that "HSIP funds shall be used for highway safety improvement projects that maximize opportunities to advance safety and have the greatest potential to reduce the State's fatality and serious injuries." This provision goes far beyond the statute's call for a State to "**consider** which projects maximize opportunities for safety (23 USC 148(c)(2)(B)(v)) (emphasis supplied). It simply says that HSIP funds "**shall**" be used for the projects that maximize safety (emphasis supplied). As this would be a Federal rule, FHWA may well interpret and apply it not as something that a State must consider – the statutory charge – but as something that must be achieved. This could lead, in practice, to States having to develop, subject to FHWA approval, a rank ordering of HSIP projects based on some determination as to how projects maximize safety (and provide greatest potential to reduce fatalities and serious injuries). This could impose a potentially large project development and review burden on States in a quest to form a view as to whether one candidate project for HSIP funding does more to "maximize" safety (and provide greatest potential to reduce fatalities and serious injuries) than another, or another, and so on. It also would seem to strip States of significant programming discretion and even of the ability to be responsive to the concerns identified by stakeholders in the development of the state's safety plans unless they fit into some particular calculation.

The difference between having to consider a goal and saying that projects shall achieve it is vast, and the proposed rule would misapply the statute and burden States, potentially greatly. Accordingly, it is important that proposed 23 CFR 924.5(b) be revised to bring it into accord with the statute by referring to a State having to "**consider**" certain things, not by saying that HSIP funds "shall" achieve certain goals or objectives. AASHTO's suggested rewording has the merit of referring to the considerations and goals stated in the statute (quoted above).

Thus, proposed 23 CFR 924.5(b) should be revised to read: "HSIP funds shall be used for highway safety improvement projects consistent with the SHSP, provided that the State shall have considered which projects maximize opportunities to advance safety and considered which areas are in greatest need for safety improvement investment."

Delete Rate of Return Language in Proposed 23 CFR 924.9(a)(3)(vii)

Proposed 23 CFR 924.9(a)(3)(vii) similarly would take a broad statutory statement – that States adopt goals that "focus resources on areas of greatest need" (23 USC 148(c)(2)(C)(ii)) – and turn it into something far more specific than a goal – as well as burdensome to States.

As set forth in the proposed rule, a State would have to "Identify key emphasis areas and strategies that significantly reduce highway fatalities and serious injuries, focus resources on areas of greatest need, and possess the greatest potential for a high **rate of return** on safety investments." (Emphasis supplied).

This language seems to call for very detailed analysis even at the plan (SHSP) level. How can one have an opinion on whether an approach would have a high "rate of return" without specific cost and benefit information? We are concerned that such a rule would lead to additional rules or "guidance" or ad hoc decisions by FHWA personnel reviewing a SHSP, or even projects, with regard to rates of return on investment. This would be far more complex than anything called for by the statutory provisions. The rate of return concept should be deleted from the proposed rule.

Like AASHTO, we support a revision of this provision to read as follows:

> "Identify key emphasis areas and strategies that significantly reduce highway fatalities and serious injuries, focus resources on areas of greatest need as determined by the State DOT."

Ease the Data Collection Burden of the Proposed Rule,
Particularly Including as to Unpaved and Low Volume Roads

The HSIP program provides eligibility for States to fund projects on any public road in order to address safety issues. However, the broad desire of States, the Congress, and FHWA to be able to address highway safety issues where they arise, even if on roads not ordinarily eligible under the Federal-aid highway program, does not constitute sufficient justification for rules that would require expenditure of considerable funds on data collection, particularly data regarding dirt and gravel roads and other low volume rural roads. Scarce funds would be better directed to actual safety projects.

AASHTO's comments properly note the astoundingly high cost of the data collections that would be required by this proposed rule; AASHTO estimates over $2 billion dollars in data collection costs to states over a multi-year period under the rule as proposed. We are hopeful that FHWA's much lower estimate of the data collection burden was inadvertent and that, upon considering AASHTO's information, it will be highly amenable to reducing the burden.

Moreover, we note that the definition of "Model Inventory of Roadway Elements" (MIRE) in 23 USC 148(a)(5) refers to data elements "critical to safety management, analysis and decisionmaking." (Emphasis supplied). By the terms of the definition not all data elements for

all roads are to be required – only "critical" ones.

As FHWA well knows, there are over 4 million miles of public roads in this country and slightly over one-third are gravel or dirt or otherwise unpaved. It is hard to imagine that data elements related to these unpaved roads are "critical" to overall safety management. FHWA should simply exclude them from the MIRE requirements. If, later, evidence comes to light that suggests that it truly would be "critical" to require States to spend scarce funds on gathering data regarding traffic on unpaved roads, FHWA can issue another proposed rule for comment at that time. FHWA should modify its proposed rule in this docket so that the new data collection requirements do not apply with respect to dirt, gravel, and otherwise unpaved roads.

In addition, even as to paved roads, data regarding those with low traffic volumes is similarly not "critical" to overall safety management and also should be either excluded from the data collection requirements or subjected to less comprehensive requirements, including an option for a State to address low volume routes via sampling. FHWA has recognized that sampling is appropriate in other contexts, notably as to the Highway Performance Monitoring System (HPMS).

AASHTO has made these points as to unpaved and low volume routes and, properly, has also raised concern over the proposed application to States of data collection requirements for roads on tribal or Federal lands. Responsibility to collect that data should not fall on States.

AASHTO is also correct to call for an extended time period to collect data – even after the collection obligation would be reduced in response to comments such as ours and AASHTO's.

Moreover, we urge this not only to alleviate a burden on our and other State transportation departments. FHWA would help enhance safety by seriously curtailing the costly (in time and money) data collection burden it has proposed in this docket, because that would enable States to direct more funds to safety and other valuable projects.

In short, the proposed rule would overburden states by requiring data that is not "critical" to safety management, even though the statute refers to data elements that are "critical." We strongly urge major reduction to the data collection obligations included in the proposed rules.

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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