

Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
Docket No. FHWA-2021-0011
Notice and Request for Information
Improving Road Safety for All Users on Federal-Aid Projects
March 18, 2023

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming (“we” or “our”) respectfully submit these comments in response to the notice and request for information (RFI) in this docket. 88 Federal Register 7510 (February 3, 2023).

We Are Committed to Pursuing Continuous Improvement in Safety Performance

At the outset, we emphasize that safety has always been a top priority for our departments. Safety is considered in the planning, design, construction, and operation and maintenance of our Federal-aid projects. We are committed to pursuing continuous improvement in safety performance for all road users.

FHWA Should Work to Improve Safety Through Sharing Information on Successful Approaches to Improving Safety, Not by Imposing New Regulations on Already Heavily Regulated State DOTs

As explained more fully below, FHWA’s efforts to improve road safety for all users on Federal-aid projects should focus on providing information to State Departments of Transportation (DOTs), and others as appropriate, to increase their awareness of – and therefore their ability to consider using – practices that FHWA considers to have a positive impact on road safety.

New Federal rules, including design or planning rules, should not be imposed on already heavily regulated State DOTs or Metropolitan Planning Organizations (MPOs) as the pathway to road safety improvement. Finding safety solutions for all road users involves consideration of specific facts, including facts regarding a particular location. One size does not fit all, and practices or potential requirements that may be acceptable in a given circumstance may not be helpful in others, such as in the many very rural locations in our States.

In this docket, FHWA seeks information by asking 27 questions. These are best suited to response by individual entities and this joint response does not include responses to the 27 individual questions. We do address in these comments, however, broad issues raised in FHWA’s notice and RFI in this docket.

Comprehensive Planning Requirements Are in Place and Overlap with the Complete Streets Concept

Specific questions 1-5 concern complete streets actions or policies. This question area overlaps significantly with planning. FHWA already requires (jointly with FTA) that State DOTs and MPOs prepare plans and State Transportation Improvement Programs (STIPs) and Transportation Improvement Programs (TIPs), respectively. They do this after meeting comprehensive consultation, cooperation, and coordination requirements detailed at 23 CFR 450, as well as other outreach steps that provide the public opportunities to comment on plans and STIPs and TIPs. Collectively, every

conceivable city, town or county, tribe, community, or other stakeholder has the opportunity to provide input at the planning stage and in the development of a STIP/TIP. Many also have specific rights to be consulted or cooperate or coordinate with a State DOT in the transportation planning and project selection process.

Further, there are also safety planning requirements pursuant to the highway safety improvement program (HSIP), 23 USC 148. Safety professionals and the public are able to raise virtually any concern, including any safety concern, as to any type of user of a highway, in the overall general and safety planning processes. States can address the concerns through projects and programs without any new requirements.

At this point any additional regulatory requirements would drive State action towards taking steps needed to comply with the new regulations, as opposed to towards a more intense focus on identifying and addressing substantive transportation and transportation safety problems. Further, States and the local jurisdictions represented in an MPO must meet their own planning rules as well as Federal requirements.

Today, collectively, plans and STIPs address all kinds of Federal-aid eligible projects, from lanes on the Interstate to sidewalks, bike paths, and bus turnouts.

We consider adding rules as likely to reduce our flexibility and ability to be nimble in responding to problems and issues. More prescription through rules will tend to reduce State flexibility to respond to various issues in making planning and programming (and project design) decisions and, due to the need to comply with detailed rules, slow down the process.

Section 11206 of Public Law No. 117-58, the Infrastructure Investment and Jobs Act (IIJA), sometimes referred to as the Bipartisan Infrastructure Law (BIL), includes a definition of “Complete Streets” applicable to funds referenced in that section. The definition lists many factors though, as noted, the planning processes certainly consider virtually any conceivable factor that the public or professional analysis could identify and can address and consider any factor identified in a complete streets definition.

We do not support FHWA or USDOT expanding the reach of a “complete streets” definition, through regulation or interpretation or to other provisions or decision points not required by section 11206, in delivering a State’s highway and transportation plan. Such definition could, over time and through regulatory modifications, or through FHWA administrative actions, become more detailed and prescriptive.

Among our concerns with the potential for overreaching rules, or “guidance” functionally indistinguishable from rules, is that they could lead to poor investment choices, at a time when Administrator Bhatt, in a recently released and widely praised policy memo, reaffirmed that the Federal highway program is a Federally assisted State program featuring State project selection.

For example, our 5 States are large land area States, with many miles between most population centers, even small population centers. Yet most walking and biking trips are relatively short. Complete streets goals for downtown Washington, D.C. do not apply well to a stretch of a two-lane rural highway 20 (or more) miles from the nearest town of 5,000 or more people. Requirements or pressure to invest in sidewalks and bike lanes on such roads will not lead to highest and best use of funds, from a safety perspective or otherwise. Even in less clear-cut fact patterns, FHWA should not adopt rules or

take other actions to steer State (or local) project choices. Hence, our strong view that adding Federal rules is not the right path to addressing the issues of road safety for all users.

Since a State DOT has the flexibility to address these issues already, FHWA deference to the States is the appropriate course, without further regulatory action. What FHWA should do is take steps to provide State DOTs and MPOs information on projects and actions from around the nation that FHWA considers successful, whether through conferences, a website, or other means.

Do Not Impinge on State Flexibility with Additional Federal Highway Design Requirements

For basically the same reasons as stated above with respect to planning and project selection, we oppose new design standards and prefer State flexibility in advancing road safety for all users.

Questions 6-12 in the RFI ask about the potential for changes to FHWA design rules. In addition to current Federal design rules, States have their own design requirements (focused on roads classified below the NHS). Further, even when not required by statute or rule, States will consider, for example, AASHTO design guides, their own policies relating to complete streets or context sensitive design (even if those policies do not go by those labels), and other important guides or information in deciding which projects to build and how to design them. So, design guides that address various situations and needs already exist and are already consulted as appropriate.

In short, the always highly important issues of improving safety are addressed through many planning and public comment and input processes, through professional design work, and, in the end, are significantly project specific. Accordingly, we strongly recommend that, in the effort FHWA is making through this docket, after collecting information, it should not develop new rules but, instead, undertake an information sharing effort. This could include regularly posting on a website practices that FHWA considers positive (sometimes called “best” practices, though we think that implies too strongly that something is definitely “best” even as context will always matter in choosing an approach).

Data and Liability Protection Considerations

There are references to data in the Federal Register notice in this docket. Data can help a State reach decisions, through its project selection process, including project selection to help address a safety concern for one or more types of users. Useful data can also include data assessing the safety impact of earlier projects.

In FHWA’s Highway Safety Improvement Program (HSIP), 23 USC 148, paragraph 148(h)(4) establishes, among other things, the principle that a State can protect from disclosure certain data developed as to a location “relating to” the HSIP program of section 148.¹ A State may carefully study an area, such as a stretch of road or an intersection, and learn something about its apparent crash rate, and consider a possible project based on that data. If the crash data is not protected from disclosure, the State may be discouraged from developing it in the first place due to liability concerns. We see the prospect of similar fact patterns as States develop plans to enhance safety for all users even when HSIP

¹ 148(h)(4). “Discovery and admission into evidence of certain reports, surveys, and information. -- Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for any purpose relating to this section, shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location identified or addressed in the reports, surveys, schedules, lists, or other data.”

funds are not expected to be used for a contemplated project investment to address safety, perhaps because HSIP funds are oversubscribed.

In short, any enhanced effort to improve safety for all users will inevitably involve data collection; so, it should be combined with protection for States from having to disclose data. The data protection afforded under 23 USC 148(h)(4) should apply even when the funding source is not literally apportionments in support of the program at 23 USC 148. FHWA should take care to achieve the equivalent of section 148(h)(4) data protection to the greatest extent possible, such as by finding that complete streets projects and other types of projects discussed in its February 3 Federal Register notice are projects “relating to” the section 148 (HSIP) safety program for non-disclosure purposes. Without such protection, any safety initiative by a State or MPO, or by FHWA, seems unlikely to be as successful as it could be.

Summary and Conclusion

We are strongly committed to highway safety for all users. As explained above, FHWA’s efforts to improve road safety for all users on Federal-aid projects should focus on providing information to State DOTs (and others as appropriate) to increase their awareness of – and therefore their ability to consider using – practices that FHWA considers to have a positive impact on road safety.

New Federal rules, including design or planning rules, should not be imposed on already heavily regulated State DOTs (or MPOs) as the pathway to road safety improvement, as safety solutions for all road users involve consideration of specific facts, including facts regarding a particular location.

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