Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
in
Docket No. FHWA-2013-0020
National Performance Management Measures; Highway Safety Improvement Program
June 19, 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 13845 *et seq.* (March 11, 2014). In this docket FHWA has invited comment on proposed new 23 CFR 490, which would establish measures for use by State DOTs in carrying out the Highway Safety Improvement Program (HSIP). Congress called for such rules in new 23 USC 150 (see section 1203 of MAP-21), specifically as to highway fatalities and serious injuries, both in terms of absolute numbers and per vehicle mile traveled. As explained below, we consider it important that FHWA modify several aspects of the rules that have been proposed in this docket.

First, we would change one provision in order to achieve consistency with the provisions of MAP-21 that reserved to States the authority to set performance targets for the HSIP program. The proposed rules would undercut that State authority.

Second, we support additional changes to the proposed rules that would increase flexibility 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, efficiently, and with flexibility under Federal law 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. We support the proposals for wording changes to proposed 23 CFR 490 that are included in AASHTO's comments in this docket. We take this opportunity to emphasize, below, the merits of a number of those proposed changes to the proposed rules.

<u>Modify Proposed 23 CFR 490.209(a)(1) to Better Ensure State Authority to Set Targets</u>

MAP-21 clearly provides that, while USDOT has the authority to establish certain performance measures, individual States are to set their own targets for results, utilizing the measures

established by USDOT. However, proposed 23 CFR 490.209(a)(1), if implemented as worded, would have the effect of subjecting State established targets to USDOT approval/disapproval. Accordingly, the provision should be revised.

More specifically, 23 USC 150(d)(1) provides that "each State shall set performance targets that reflect the measures identified in paragraphs (3), (4), (5), and (6) of subsection (c)." (Emphasis supplied). HSIP measures are set forth in 23 USC 150(c)(4). So, it is clear that the statutory provisions regarding performance measurement for the HSIP program call for each State to set its own performance targets.

In the NPRM, however, FHWA proposes that the State's HSIP targets "shall be identical to the targets established by the State Highway Safety Office for common performance measures reported in the State's Highway Safety Plan, subject to the requirements of 23 USC 402(k)(4), and as coordinated through the State Strategic highway safety plan."

Under 23 USC 402(k)(4), a State's plan (regarding the highway safety grant programs of chapter 4 of title 23) is not in effect unless approved by USDOT (NHTSA). See 23 USC 402(k)(5). As a result, proposed 23 CFR 490.209(a)(1) has the effect of subjecting the HSIP targets to USDOT approval even though that is not permitted under 23 USC 150(d)(1).

Other provisions enacted as part of MAP-21 reinforce that USDOT is not to have approval authority over the targets at issue in this rule. Section 135(d)(2)(B)(i)(I) states that "Each State shall establish performance targets…" (emphasis added). Section 135(d)(2)(B)(i)(II) refers to "Selection of performance targets by a State…" (emphasis added).

In addition, the structure of a report that USDOT must provide to Congress evaluating the performance-based planning process reinforces that only the State decides the performance targets. In that report provision USDOT is to take into account whether a "State developed appropriate performance targets." 23 USC 135(h)(1)(A). Clearly, even in a case where USDOT might consider the State's targets to be other than appropriate, Congress does not look to USDOT to disapprove or revise the target; USDOT is provided the opportunity to advise Congress whether, in USDOT's opinion, the State determined targets were "appropriate."

Further, in the FHWA's highway safety statute, the law addresses the case where a State has not met its targets or made significant progress towards meeting them. The statute refers to the targets as the "performance targets of the State established under section 150(d)." See 23 USC 148(i). There is no reference to performance targets under 23 USC 402, which is a separate provision.

Lastly, there is the vast difference in the wording of the performance target provision for the program under 23 USC 402 and the wording of the performance target provisions for the HSIP program. The wording of 23 USC 402(k) clearly allows USDOT to revise a State's targets for the purposes of the 402 program. Congress knows how to provide USDOT with authority to revise State targets when it wants to, and it did not so authorize USDOT for the purposes of the HSIP program.

Accordingly, the proposed rule must be modified to ensure State authority in target setting, in accord with 23 USC 150 and the other provisions discussed.

One way to achieve this could be to strike "shall be identical" in proposed 23 CFR 490.209(a)(1) and substitute "are encouraged but not required to be identical". This change would not preclude USDOT from requiring the same measures as to fatalities and serious injuries for the programs under 23 USC 148 and 23 USC 402. But it would respect the different approaches to target setting taken by the Congress with respect to the two provisions, 23 USC 148 and 23 USC 402.

Additional Recommendations for Reasonable Flexibility

Clarify 23 CFR 490.209(a)(6) regarding modification of targets. In addition, proposed 23 CFR 490.209(a)(6) should be clarified so that the restriction precluding a State from modifying an HSIP target "unless approved by FHWA" once the target is submitted in the State's HSIP annual report applies only for a given year. The overall approach of the proposed rule contemplates annual target setting. See 23 CFR 490.209(a). So, we are hopeful that the proposed restriction on modification of targets was intended to apply only with respect to a given year. However, to avoid any risk of inflexible implementation of the rule, proposed 23 CFR 490.209(a)(6) should be clarified, such as by striking "Unless approved by FHWA, State DOTs shall not change their target once it is submitted …" and substituting "Unless approved by FHWA, a State DOT shall not change one or more of its targets under this part for a given year once it is submitted and the HSIP annual report due date has passed …". With this change, the rule would be clearer that a State does not need FHWA approval to change one of its targets under this part in a subsequent year. The proposed change also would allow a State to modify its target for a given year if it had submitted it before the HSIP annual report deadline and subsequently, but before the HSIP annual report due date, determined to change the target. Without this technical change, the structure of the rule could discourage States from filing until the deadline.

Modify 23 CFR 490.211(b) to provide increased flexibility to find that a State has made significant progress towards its targets.

We do support that proposed 23 CFR 490.211(b)(3) would treat achievement or significant progress towards achievement of 50% of the State's safety targets as significant progress for purposes of averting requirements under 23 USC 148(i).

However, within that framework, the rule should be more flexible as to the options available to FHWA to determine that a State that has not achieved a target has made significant progress towards achieving it.

More specifically, AASHTO has pointed out that, under the proposed rule, a State could experience a year over year decrease in fatalities or serious injuries or a year over year decrease in its five year rolling average of a measure and still be considered not to have made significant progress. FHWA should not tie its own hands by rule and preclude the possibility of finding "significant progress" in such instances. The rule should include additional language to establish this point (see below). We emphasize that this must stand independent of the relatively complex

process set forth in proposed 490.211(b)(2). This is a straightforward approach that is consistent with advancing safety and, for example, would cover a situation where a State has set a target that would reduce serious injuries and there is a reduction in serious injuries, but not as great a reduction as called for by the target. The rule must allow for that to be considered significant progress regardless of the complex analysis under (b)(2).

The rule also should allow for determinations that a State DOT has made significant progress towards achieving performance targets if circumstances allow FHWA to consider that a failure to achieve targets or significant progress towards achieving targets was impacted by extraordinary circumstances, such as naturally occurring hazards, that could make it challenging, if not impossible, to achieve performance targets or significant progress towards achieving performance targets.

Accordingly, so that FHWA has the needed and appropriate flexibility to determine that a State that has not achieved its targets has made significant progress towards achieving them, two new paragraphs should be added to proposed 23 CFR 490.211(b), as follows:

"(4) The FHWA may also determine that a State has made significant progress towards achieving performance targets within the meaning of this section if either of the following conditions is met:

(A) the State saw a decrease in the 5-year rolling average from the previous year.
(B) the State saw a decrease in yearly number of fatalities or serious injuries from the previous year.

"(5) The FHWA may also determine that a State has made significant progress towards achieving performance targets upon finding that the State likely would have achieved targets or achieved significant progress towards achieving targets within the meaning of this section but for extraordinary circumstances, including but not limited to naturally occurring hazards such as extreme weather events, forest fires, and earthquakes."

With these two new paragraphs, a conforming change should be made to 490.211(b)(3) by striking "paragraph (b)(2)" and substituting "paragraph (b)(2), (b)(4), or (b)(5)."

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming strongly support modifications to the proposed rule that would affirm State prerogatives bestowed by Congress and make the program more flexible. These changes can be achieved without diminishing highway safety. We 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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