Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration
in
Docket No. FHWA-2013-0054
National Performance Management Measures;
Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program
August 16, 2016

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 81 Federal Register 23806 *et seq.* (April 22, 2016). In this docket FHWA has invited comment on proposed revisions and additions to 23 CFR 490 that would create new performance measurement and management regulatory requirements.

We are committed to achieving the best possible transportation system performance within available resources. Accordingly, these comments recommend reducing the requirements of the proposed rule so that States would be better able to exercise discretion in pursuit of the best possible system performance within available resources.

We particularly emphasize how the proposed rule must be changed so that rural areas would not be subject to regulations apparently inspired by the circumstances facing congested, large population metropolitan areas.

Modify the Proposed Rule to Eliminate Counterproductive Overregulation in Rural Settings

Our States are relatively rural, without a metropolitan area with a population of over one million. In contrast, in the NPRM, where FHWA describes the "Purpose of the Regulatory Action," the first purpose identified is "Congestion Reduction." See 81 Federal Register at 23807.

Our States do not experience anything remotely resembling what those in large metropolitan areas refer to as "congestion." To the extent that the proposed rule subjects us (and rural areas in other States) to requirements developed for the purpose of addressing congestion, the proposed rule will not solve any problem. In such instances, the proposed rule will impose direct data related costs as well as require management and staff time to address regulatory compliance. It will, therefore, detract from the ability of State DOT officials to address other important transportation issues and needs.

Accordingly, as to the scope of the proposed rule, we offer the following recommendations.

- We support that the proposed peak hour travel time measures would be limited to urbanized areas with a population of over one million. See proposed 490.503.
- The proposed NHS travel time reliability measure for the mainline non-Interstate NHS should be modified so that it would apply only in urbanized areas. Proposed 490.503(a)(1) and 490.507(a)(2) should be modified accordingly.
- We support that the proposed CMAQ traffic congestion measure (total excessive delay) would be limited to urbanized areas with a population of over one million in nonattainment or maintenance for criteria pollutants under the CMAQ program. See proposed 490.703.

- For consistency and ease of administration, the proposed CMAQ on-road mobile source emission measure should be modified so that it would apply only in the same areas to which the CMAQ traffic congestion measure (total excessive delay) applies -- in urbanized areas with a population of over one million in nonattainment or maintenance for criteria pollutants under the CMAQ program. This approach is also fully consistent with the decision of Congress to limit the requirement for preparation of a CMAQ performance plan to areas of over one million in population. See 23 USC 149(l). Proposed 490.803 should be modified accordingly.
- A proposed CO2 (GHG) measure and management requirements should not be adopted.

Also, these positions are not dependent on FHWA adopting in the final rule the exact measures and metrics proposed in the NPRM. Whether or not the measures or metrics are adjusted from those proposed in the NPRM, we would limit their applicability as set forth above.

We now elaborate on several of these points.

Limit the reach of the NHS travel time reliability measure for the mainline non-Interstate NHS so that it would apply only in urbanized areas.

As AASHTO has described in its comments, the proposed rule's call for States to use the National Performance Management Research Data Set (NPMRDS) effectively requires States to develop computerized applications and report on millions, in some cases hundreds of millions of data points, principally in order to identify areas where traffic is congested. This hefty addition to the already heavy workload of State DOTs is particularly not needed as to the non-Interstate NHS outside of urbanized areas – such areas are not congested.

Accordingly, the final rule should make this measure inapplicable to the non-Interstate NHS outside of urbanized areas or, alternatively, FHWA should allow compliance by means of a simple State certification that, in the view of the State, those segments are not subject to congestion except in unusual circumstances (a State should have flexibility under this approach to certify as to the non-Interstate, non-urbanized NHS as a whole or by segments). AASHTO's recommendations are to the same effect.

This approach would greatly reduce the reporting and cost burden associated with the proposed rule. Not making this modification, and requiring States to include the non-Interstate, non-urbanized NHS miles in the data reporting and targeting regime proposed in this docket, would be an error. It would be similar to the mistake made when the HSIP NPRM proposed that States be forced to collect extensive data on unpaved roads – a burdensome proposal that FHWA very commendably reduced to a *de minimis* requirement in the final HSIP rule. A similarly major reduction in regulation is warranted here as to non-urbanized, non-Interstate NHS highways. Those rural roads are not congested and have reliable travel times. A simple State certification that such roads are not congested except in unusual circumstances will more than suffice. FHWA should not be forcing States to collect, administer and report on huge amounts of data to confirm what is already known – that rural roads are not generally congested. Proposed 490.503(a)(1) and .507(a)(2) should be revised accordingly.

Limit the reach of the CMAQ on-road mobile source emission measure so that it would apply only in the same areas to which the CMAQ traffic congestion measure (total excessive delay) applies -- in urbanized areas with a population of over one million in nonattainment or maintenance for criteria pollutants under the CMAQ program.

The CMAQ on-road mobile source emission measure should be modified so that it would apply only in the same areas to which the CMAQ traffic congestion measure (total excessive delay) applies -- in

urbanized areas with a population of over one million in nonattainment or maintenance for criteria pollutants under the CMAQ program. AASHTO's recommendations are to the same effect.

This approach would be consistent with statutory planning requirements, where the requirement to prepare a CMAQ performance plan is **expressly limited to MPOs serving areas of over one million in population**. See 49 USC 149(l). Moreover, the authorization of Federal performance management requirements for on road mobile source emissions in 23 USC 150(c) is described as "for the purpose of carrying out section 149." See 23 USC 150(c)(5). Within 23 USC 149 **Congress specifically limited CMAQ performance plan requirements to the areas of over one million in population, amending earlier versions that would have extended the requirements to additional areas.**[1] Further, outside of large population metropolitan areas, non-attainment is far less likely to result from "on-road" emissions than from dust or combinations of emissions with geographic features (e.g., valleys) that cannot be changed.

The Potential CO2 (GHG) performance management requirement is without statutory authority and, though not yet specific, is likely unduly burdensome

While a CO2 (GHG) performance management requirement is not included in the text of the proposed rule, the preamble to the proposed rule states that FHWA is considering inserting such a requirement into the final rule. The NPRM also asks a number of questions as to how such a requirement should be worded. See 81 Federal Register at 23830-31. There are numerous reasons why the potential GHG performance management requirement should not be adopted.

The Proposal to Promulgate a CO2 (GHG) performance management requirement Is Without Authority

First, there is no statutory authority for such a proposal.

AASHTO recommends in its comments that FHWA "not establish additional national-level [performance] measures beyond those explicitly required by Federal statute." AASHTO also has noted the general point that 23 USC 150(c)(2) states that USDOT shall "limit performance measures only to those described in this subsection." AASHTO has also observed that "The statutorily described list is specific and explicit."

We recommend that FHWA apply those general points to this docket. Specifically, there is no description of a possible GHG measure in 23 USC 150(c). While the NPRM does not set forth a theory of statutory basis for FHWA's apparent claim of statutory authority, we note for discussion purposes 23 USC 150(c)(5), which reads as follows (emphasis added):

[1] When MAP-21 was first introduced in the 112th Congress as S. 1813, it called for all States to prepare CMAQ performance plans. In S. 1813 as introduced, the planning section included material requiring all States to prepare CMAQ performance plans in accord with 23 USC 149(k) (which became 149(l) in the final legislation). See page 309, line 16 of S. 1813 as introduced. During markup of the legislation by the Environment and Public Works Committee, the requirement that States prepare performance plans in accord with section 149(k) of title 23 was dropped. Similarly, in S. 1813 as introduced, by means of a reference to 23 USC 149(k), all MPOs were required to prepare CMAQ performance plans. See page 273, lines 8 and 22 of S. 1813 as introduced. That requirement was modified during committee markup by inserting the phrase "where applicable", thereby limiting the requirement to prepare CMAQ performance plans to those MPOs serving areas with a population of over one million and also representing a nonattainment or maintenance area.

"(5) Congestion mitigation and air quality program. -- For the purpose of carrying out section 149, the Secretary shall establish measures for States to use to assess-

(A) traffic congestion; and

(B) on-road mobile source emissions."

Perhaps FHWA considered this to be its (unstated) basis for a possible GHG performance management rule. However, 23 USC 150(c)(5) is not concerned with all emissions or even all on-road emissions. It is concerned with "carrying out section 149" of title 23 U.S. Code. 23 USC 149 is concerned with mitigating pollution from specifically listed sources: CO, ozone, NOX, PM-10, and PM 2.5. GHG (CO2) is not listed in 23 USC 149. Nor does the wording of 23 USC 149 authorize the Executive Branch to add pollutants to that statutory list.

Moreover, it is truly hard to imagine how FHWA could claim that a GHG measure is "described" in 23 USC 150. Likely since it is such a straightforward word, courts are rarely asked to construe it – but they have in at least a few recent instances.

At least two Federal courts found that "the definition of 'describe' is 'to represent or give an account of in words.'" See Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Kirk, 354 F. Supp. 2d 196, 202 (D. CT 2005), citing Merriam-Webster's Collegiate Dictionary (10th ed. 1993); and Synopsys, Inc. v. Ricoh Co., Ltd, 2005 WL 6217, 6219 (N.D. CA 2005), citing Merriam-Webster's Ninth New Collegiate Dictionary. See also In re Shirel, 251 B. R. 157, 162-63 (U.S. Bankruptcy Court, W.D. OK 2000): "'describe" means 'to set forth in words, written or spoken, by reference to qualities, recognizable features, or characteristic marks, to give a detailed or graphic account of'" (citing The Oxford English Dictionary Vol. IV, 511-12 (2d ed. 1988).

Here, there is no reference to a GHG measure. As noted, the only reference to a measure of "emissions" is "for the purpose of carrying out [23 USC] section149." As also noted, 23 USC 149 concerns a limited list of emissions that does not include GHG (CO2). There is no setting forth or representing or giving an account of "in words" of a GHG performance management requirement.

Thus, a GHG (CO2) measure is **not** "described" in 23 USC 150 subsection (c), either in paragraph (5) or elsewhere, which is a prerequisite for a performance measure under section 150.[2] Congress' use of the term "described" cannot be treated as surplusage or as without meaning.

Further, Congress provided that FHWA shall "limit performance measures only to those described in this subsection." 23 USC 150(c)(2)(C) (emphasis added). The words "limit" and "only" do not encourage an expansive reading of the authority provided to promulgate performance management rules. To the contrary, their use warrants a narrow reading of such authority.

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[2] In addition, in its recent notice issuing "Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning; Final Rule," FHWA and FTA stated (81 Federal Register at 34077, May 27, 2016):

> "…environmental performance measures are not included in the list of performance measures that MAP–21 requires FHWA and FTA to establish. Title 23 U.S.C. 150(c)(2)(C) precludes FHWA from establishing any national performance measures outside those areas identified in 23 U.S.C. 150."

Again, 23 U.S.C. 150(c)(2)(C) specifically precludes measures other than those "described" in 23 USC 150(c) -- a narrower concept than "areas identified in" section 150. Congress' use of the term "described" cannot be treated as surplusage or as without meaning -- and there is no description of a GHG measure in the provision.

Accordingly, there is no statutory authority to proceed with a GHG performance management rule, including as discussed in the NPRM at 81 Federal Register 23830-31.

Even if there is Authority for such a requirement, it should not be exercised

If, somehow, it is concluded that there is authority for FHWA to impose a CO2 performance management requirement as part of the highway program, that does not mean that it should. In particular, USDOT already addressed the issue of GHG emissions from motor vehicles in its regulations increasing required fuel economy from various vehicles.

Further, most highway program projects advanced by State DOTs are in the nature of system preservation (resurfacing, etc.). Such projects do not add capacity or induce any demand; nor does a decision to not undertake resurfacing result in any meaningful shift of mobility to transit or walking from passenger cars. Moreover, failure to preserve pavement may well increase GHG emissions as rough pavement tends to reduce travel speeds (increasing emissions).

Moreover, with respect to the relatively few projects that would provide increased motor vehicle capacity, the significant ones are generally subject to EA or EIS analysis pursuant to NEPA.

Thus, it is speculative and not demonstrated that States have the ability to effect meaningful change in GHG emissions through stewardship of the highway program. The proposal effectively looks for GHG reductions from a largely preservation-oriented the highway program, where they are not available to be had.

Further, the Administration has addressed the issue of climate change impact in yet another regulatory action that is not limited to transportation but which includes it. On August 1, 2016 the Council on Environmental Quality (CEQ) issued "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Reviews" (available on CEQ website).[3] On page 3 of the guidance, CEQ notes that NEPA review can take the form of categorical exclusions (CEs), environmental assessments (EAs) and environmental impact statements (EISs) and then states the new guidance is intended to help Federal agencies with respect to analysis of "potential GHG emissions and climate change in an EA or EIS." As FHWA knows, at the present time the vast majority of NEPA reviews of FHWA supported highway projects fall into the CE category. So, we submit that it is significant that, after exhaustive review and issuing multiple drafts of this guidance before issuing the August 1 final guidance, CEQ chose to address projects for which an EA or EIS is prepared. While the discussion of possible GHG measurement and management requirements set forth in the NPRM at 81 Federal Register 23830-31 is not highly specific, it does indicate, at least to us, that FHWA is considering program wide GHG measurement and management requirements. That would have wider reach than CEQs focus on EAS and EISs. Whatever one's views on the merits of that CEQ final guidance, it is now in effect. So, any new GHG-related requirement that FHWA would impose in this docket would be a more far-reaching requirement on top of the CEQ guidance. Such additional regulation is unwarranted.

So, one can be supportive of taking action to combat climate change and still oppose this proposal. Simply, the proposal is highly unlikely to result in reduced GHG emissions, but it apparently will subject States to new, expensive and burdensome regulation at a time when the public wants a streamlined transportation program delivered with maximum efficiency. The proposal is a "lose-lose;" little or no environmental benefit and burdens on the provision of transportation programs and projects at a time

[3] CEQ has noted the availability of this guidance by Federal Register notice, 81 Federal Register 51866 (August 5, 2016). In that notice it is stated that this guidance is effective as of August 5, 2016.

when the public wants more for each transportation dollar. And, as noted, USDOT has already acted twice to address climate change in this area. It has taken action on fuel economy. And it will implement the CEQ guidance, which will require consideration of GHG for projects requiring EA or EIS NEPA review.

If FHWA insists on establishing performance measurement and management requirements for GHG (CO2), it should first issue a second, more specific NPRM on this matter so that the public could know what is proposed and provide specific comments; failing that, any rule in this area promulgated by FHWA should be as simple as possible and minimize the administrative burden on States by requiring FHWA to undertake the measurement work.

If, notwithstanding the lack of statutory authority for such a requirement, and notwithstanding the difficulty in seeing benefit from the imposition of such a requirement, FHWA were to choose to impose such a requirement, it should first issue a second, more specific NPRM on GHG and performance management. Only when presented with a specific proposal could we and other interested parties have a clear chance to consider the proposal and then point out costs, benefits and burdens and offer other comments.

If, notwithstanding the lack of statutory authority for such a requirement, and notwithstanding the difficulty in seeing benefit from the imposition of such a requirement, FHWA were to choose to impose such a requirement without first going through a second notice with opportunity to comment, FHWA at least should proceed in a way that minimizes the burden on States and MPOs.

For example, FHWA has data estimating State by State VMT, enabling estimates of CO2 emissions from road (tailpipe sources) that could be supplied to a State by FHWA in usable form. Upstream and downstream emissions analyses, which FHWA indicated it could consider requiring, are highly speculative and complex. Such analyses certainly should not be required of States and MPOs.

Moreover, very few, if any, projects are major enough to be expected to have a discernible impact on net[4] statewide VMT and, under the CEQ final guidance those undoubtedly would be reviewed as to GHG because they undoubtedly would be subject to EA or EIS review. So, going further, and applying a requirement on a statewide, programmatic basis for essentially a preservation program, would be a highly burdensome approach that could not be expected to provide additional much less commensurate benefit.

In short, if a GHG measurement and management requirement is to be imposed, FHWA should provide 100 percent of the baseline data to the States and MPOs if the data to be required is other than data already in the possession of the States. Moreover, any such requirement should be limited to megaprojects. This approach (while still not authorized by law due to the clear limits on FHWA authority under 23 USC 150(c)) would at least limit the burden imposed on States and recognize that stewardship of what is largely a pavement preservation program is not a constructive opportunity to address GHG issues.

Additional Comments

The above comments concern the reach of proposed requirements: where they will apply and whether there should be a requirement at all as to certain matters. The balance of these comments concern several issues as to how requirements should work, to the extent they apply to a road or area under the final rule.

[4] Any increase in VMT should be calculated on a "net" basis, recognizing that most if not all of the users of a transportation facility after it is improved by a project were already using the State's system, and likely that very facility before it was improved.

As to this group of issues, AASHTO has addressed the complexity of the proposed rule's data requirements, possible solutions, issues with definitions and other issues regarding the proposed requirements that are the subject of this docket. However, we take this opportunity to emphasize several points.

Initial Federal Performance Management Requirements Should be Limited and Not Complex

Federal transportation performance measurement and management is a new endeavor and it represents a new and major management challenge for States. So that this effort gets off to a smooth start, FHWA should begin by implementing statutory requirements in a limited manner. Put another way, FHWA should proverbially stick its toe in the water as to performance management requirements before it jumps in at the deep end of the pool.

Issues Regarding the NPMRDS data

AASHTO has addressed in detail many issues regarding the use of the NPMRDS data, which would be needed for compliance with the proposed rule and which FHWA is providing to States in raw form. We encourage FHWA's favorable consideration of AASHTO's proposals regarding the NPMRDS and alternative data.

We emphasize two points. FHWA should be required to improve the presentation of NPMRDS data to the States, so that there is no "assembly required" of the data by the States.

With respect to the many aspects of the proposed rule that contemplate FHWA providing NPMRDS data to the States, the rule should further specify that, in any year for which FHWA does not provide that or equivalent data to a State in usable format with "no assembly required," the State is excused from compliance with the applicable requirement.

Further limits on scope of the on road mobile source emissions requirements

As set forth in proposed 490.803, subpart H of part 490 appears to concern the relationship between expenditures from apportionments for the CMAQ program and certain emissions reduction. It and any other applicable portion of 490 Subpart H should be modified to limit its application only to the use of non-flexible CMAQ funds.

In 23 USC 149 Congress clearly provided a number of States (formerly known as CMAQ minimum apportionment States) with the ability to spend at least some CMAQ apportionments on projects eligible under the STP program. The CMAQ performance measure requirement, 23 USC 150(c)(5), is "for the purpose of carrying out section 149." So, to better reflect the terms of section 149, the rule should not require data reporting as to flexible CMAQ funds, as part of an effort to measure emissions reduction. The proposal comes across as suggesting that States should not choose to use the flexibility provided by Congress and, instead, dedicate flexible CMAQ funds to projects as if the funds were not flexible. However, FHWA cannot undo in this rule or elsewhere flexibility in the use of CMAQ funds provided to States by Congress. Accordingly, 23 CFR 490 Subpart H should be modified to limit its application only to the use of non-flexible CMAQ funds.

This change should be made **in addition** to the change recommended above, that would limit the application of subpart H to urbanized areas with a population of over one million in nonattainment or maintenance for criteria pollutants under the CMAQ program.

Ensure Flexible State Authority to Set Targets

MAP-21 clearly provides that, while FHWA has the authority to establish certain performance measures, individual States are to set their own targets for results, utilizing the measures established by FHWA. However, aspects of the proposed rule appear to claim that USDOT can place restrictions on State authority to set targets, such as when they can be revised. FHWA also must be explicit in the text of the performance management rules that States have the authority to set targets that would reflect declining condition or performance. In the face of great needs and limited financial resources, a declining target could represent an aggressive target.

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). So, it is clear that the statutory provisions regarding performance measurement for NHS pavements and bridges call for each State to set its own performance targets.

Other provisions enacted as part of MAP-21 reinforce that USDOT is not to have approval authority over or restrict the ability of States to set targets. 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 FHWA is to take into account whether a "State developed appropriate performance targets." 23 USC 135(h)(1)(A). Clearly, even in a case where FHWA might consider the State's targets to be other than appropriate, Congress does not look to FHWA to disapprove or revise the target or restrict what a State sets; FHWA is provided only with the opportunity to advise Congress whether, in FHWA's opinion, the State determined targets were "appropriate."

As to State flexibility in setting targets, we note that in webinars on the NPRM, FHWA staff has stated that declining targets are permissible. This is a helpful clarification should a State find itself in a position with massive needs and insufficient resources to reduce those needs. The proposed rule should be modified so that the text of the rule itself would confirm that declining targets are permissible.

Waiver Authority Should Be Built into 23 CFR 490

AASHTO correctly asks that the final rule include provision for waivers for good cause shown. The performance management requirements are going to be significant and new. There will be unforeseen fact patterns. A safety valve built into the rule will enable FHWA to grant extensions or other relief to States and MPOs to the extent warranted.

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming strongly support modifications to the proposed rule as outlined in these comments. Making those changes to the proposed rule would reduce regulatory burdens and better enable a State to focus on efforts to achieve the best possible performance of its transportation system within available financial resources.

We thank FHWA for its consideration and urge that the final rule in this docket be modified in accord with these comments.

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