Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration and Federal Transit Administration
in
Docket No. FHWA-2013-0037
Statewide and Nonmetropolitan Transportation Planning;
Metropolitan Transportation Planning; Proposed Rule
August 13, 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) and the Federal Transit Administration (FTA) (sometimes herein jointly referred to as USDOT) at 79 Federal Register 31783 *et seq.* (June 2, 2014). In this docket USDOT has invited comment on proposed revisions to 23 CFR 450, regarding federally required transportation planning processes for States and metropolitan planning organizations. The principal purpose of the proposed rule is to modify current planning rules for consistency with new statutory provisions regarding performance-based planning.

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 wording changes to proposed 23 CFR 450 recommended by AASHTO in its comments in this docket. This filing underscores our support for a number of AASHTO's recommendations and in many instances our reasoning in support of the specific recommended changes tracks or is similar to AASHTO's.

Do Not Impose New Planning Rules Not Required by Statute, Particularly Now

MAP-21 has added to the regulatory burden imposed on States as part of the Federal highway and transit programs, notably by requiring: the development of Federal performance measures; State performance targets based on those measures; and a performance-based planning process. It is hoped that implementation of this federally required performance-based planning process will prove beneficial -- but there is no question that implementation of the new statutory provisions regarding performance management will require a great deal of work by States.

Accordingly, it is particularly appropriate that FHWA and FTA implement MAP-21's planning and performance management provisions in a way that does not add to requirements mandated by statute. The planning and project delivery process is already complex. States already, in their own ways, undertake performance measurement and management. So, now is not a time to complicate an already complex planning process with requirements not directed by statute. The Federal interest is best served by ensuring that, to the extent permitted by statute, States are able to limit the time and cost of regulatory compliance and focus efforts and funds on promptly delivering highway and transit projects to the public -- which in turn will help boost the economy, create jobs, improve safety, and improve personal mobility.

To help achieve those and other benefits of transportation investment, we offer the following recommendations to improve the proposed rule. Key points and recommendations for specific wording changes to the proposed rule are underlined.

PRINCIPAL COMMENTS

Ensure that the Rules Are Consistent with MAP-21 by Reinforcing that States, not the Federal Government, Set Performance Targets.

MAP-21 provided that States (and in some cases MPOs and transit agencies), not the Federal government, set targets for performance using the measures developed by USDOT. Congress was correct to reserve this authority to States, as the various States face different transportation, budgetary, economic, environmental, and other circumstances as they set targets – whether for improved performance or, in the face of resource challenges, avoiding major declines in performance, or to achieve other levels of performance. Accordingly, we support several changes to the proposed rule so that the final rule would more clearly reflect that States, not the Federal government, set targets.

Delete the following sentence in proposed 450.206(c)(2): "Each State shall select and establish targets under this paragraph in accordance with the appropriate target setting framework established at 23 CFR part 490."

As AASHTO noted, other material in proposed 450.206(c)(2) provides that required State established performance targets are to be set using the measures identified in 23 USC 150(c) and 23 CFR part 490. However, this sentence that we would delete from proposed 450.206(c)(2) suggests that targets are set "under" both Part 490 and Part 450. This formulation could result in a dispute over a State performance target being treated as a compliance issue under Part 450 as well as under Part 490.

We also share the concern noted by AASHTO with the directive in that sentence that State target setting would be subject to an "appropriate target setting framework." As we have noted, target setting is not a Federal prerogative, yet this language does not specify that the State sets the targets. We are concerned that this sentence may indicate that USDOT could be creating a regulatory platform authorizing it to take actions to define a "framework" for State target setting and what makes a framework "appropriate." This would be inconsistent with the statute, which vests target setting authority in the States.

For essentially the same reasons, proposed 450.206(c)(5) should be revised by deleting "targets established under this paragraph" and substituting "the State's targets". The planning rules are not a basis for target setting authority, and Congress was clear that target setting is a State prerogative.

Accordingly, revise section 450.206(c)(5) to read as follows:

(5) A State shall consider the performance measures and the State's targets established under 23 CFR Part 490 when developing policies, programs, and investment priorities reflected in the long-range statewide transportation plan and statewide transportation improvement program.

Be clear that States can consider public comments in setting targets.

As AASHTO explained, consideration of performance management can be so focused on data that the role of public and stakeholder input in target setting often is not referenced. Though we see nothing in the proposed rule that would prevent a State from taking into account public comments in setting targets, we recommend that the rule expressly recognize that, in setting targets, a State may consider public comment.

Accordingly, we recommend adding the following new paragraph 450.210(a)(3) to Part 450:

(3) With respect to the setting of targets, nothing in this part precludes a State from considering comments made as part of the State's public involvement process.

Do Not Include in the Final Rule Certain Proposed Provisions Not Required By Statute.

MAP-21 maintained State flexibility as to the content of the long-range state transportation plan and STIP, including whether to adopt a "policy" or "project" long-range state transportation plan. To help maintain such flexibility, we would modify several aspects of the proposed rule.

Among other things, we would delete examples of and references to "other transportation plans" that the proposed rule says a State shall integrate into its transportation planning process. Also, the final rule should make clear that it is the State that determines whether any "other" State plan or process is integrated into the federally required planning process.

More specifically, like AASHTO, we are concerned that 450.208(g)(6) is too broadly worded and may require State DOTs to integrate into the federally required planning process any other plan that USDOT considers to be part of a performance-based process, even if that plan or process was developed at the discretion of the State. A State should determine which, if any, "other plans and processes," beyond those required by Federal law, are to be integrated into the Federal transportation planning process as applied to that State.

Further, like AASHTO, we are concerned that if any State transportation plan or process could be determined by USDOT to be a plan "required as part of a performance-based program" and, therefore, required to be integrated into the Federal planning process, then a State will be discouraged from undertaking any transportation planning beyond that which is required by Federal law.

Accordingly, 450.208(g) should be revised to read as follows:

A State shall integrate into the statewide planning process, directly or by reference: the goals, objectives, performance measures, and targets described in 23 CFR 490; any plans

> developed pursuant to 23 USC and 49 USC Chapter 53 by providers of public transportation in urbanized areas not represented by a metropolitan planning organization; and goals, objectives, performance measures and targets in other State transportation plans and transportation processes that the State determines are required as part of a performance-based program and that the State voluntarily chooses to integrate into this planning process.

For essentially the same reasons, 450.218(r) should be revised to read as follows:

> A statewide transportation improvement program shall include, to the maximum extent practicable, a discussion of the anticipated effect of the statewide transportation improvement program toward achieving the State's federally-required performance targets, linking investment priorities to those performance targets. This discussion does not require a State to include additional information on individual projects or to link individual projects with specific performance measures.

In addition, and also for essentially the same reasons, 450.206(c)(4) and 450.216(n) should be deleted.

Portions of the proposed rule relating to the STIP also create a risk of excessive regulation, and should be revised.

Proposed 450.226(e) states that "FHWA/FTA will only approve an updated or amended STIP that is based on a statewide transportation planning process that meets the performance-based planning requirements in this part and in such a rule." Here, "such a rule" refers to "each rule establishing performance measures" under 23 USC 150(c) or certain other statutes. We share AASHTO's concern that, under this formulation, a disagreement between USDOT and a State that relates to a rule establishing a performance measure could become a threat to the validity of a State's long-range statewide transportation plan, STIP, or planning process.

That uncertainty is exacerbated by the broad reference to the State's planning processes having to meet the "performance-based planning requirements in this part." This formulation poses a risk that even approval of routine STIP amendments could be delayed for an exhaustive review by the USDOT to consider whether the State's planning process complies with Part 450 and Part 490. That is not a practical approach to the planning process, particularly at a time when USDOT is developing major changes in requirements regarding performance-based planning. Nor is it consistent with efforts to streamline project delivery.

Accordingly, section 450.226(e) should be revised to read as follows:

> Two years from the effective date of each rule establishing performance measures under 23 U.S.C. 150(c), 49 U.S.C. 5326, or 49 U.S.C. 5329, FHWA/ FTA will only approve an updated or amended STIP that is based on a statewide transportation planning process that substantially meets the requirements in this part and is consistent with such a rule.

And, for the same reasons, we would revise section 450.226(f) to read as follows:

> Prior to 2 years from the effective date of each rule establishing performance measures under 23 U.S.C. 150(c), 49 U.S.C. 5326, or 49 U.S.C. 5329, a State may adopt a long-range statewide transportation plan that it has developed using the SAFETEA–LU requirements or the performance-based provisions and requirements of this part and in such a rule. Two years on or after the effective date of each rule establishing performance measures under 23 U.S.C. 150(c), 49 U.S.C. 5326, or 49 U.S.C. 5329, a State may only adopt a long-range statewide transportation plan that is substantially in accord with the requirements of this part and is consistent with such a rule.

In addition, the rule should be clearer that States have discretion regarding the form and content of the required "discussion of the anticipated effect of the statewide transportation improvement program toward achieving the performance targets." The final rule should make clear that a State can meet this requirement by presenting a program level "discussion."
We also would delete the requirement for the STIP to be "informed" by the financial plan and state asset management plan for the NHS. AASHTO noted a number of difficulties with this aspect of the proposed rule. The parameters of this proposed requirement are unclear. The requirement also seems to overlap with the proposed requirement that the "discussion" to be included in the STIP (proposed 450.218(r)) must be consistent with the asset management plans, as well as overlap with requirements that a project can be included in a STIP only if there is a reasonable anticipation of full funding. Those other requirements regarding finances and asset management are more than sufficient; an additional, unclear requirement should not be added.

Accordingly, the final rule should delete section 450.218(o) and revise section 450.218(r) to read as follows:

> A statewide transportation improvement program shall include, to the maximum extent practicable, a discussion of the anticipated effect of the statewide transportation improvement program toward achieving the State's federally-required performance targets, linking investment priorities to those performance targets. This discussion does not require a State to include additional information on individual projects or to link individual projects with specific performance measures.

The proposed rule properly recognizes that it is a matter of discretion for a State whether to establish RTPOs. The voluntary nature of RTPOs must be maintained in the final rule.

The proposed rule properly recognizes that it is a matter of discretion for a State whether to undertake programmatic mitigation plans. The voluntary nature of programmatic mitigation planning must be maintained in the final rule.

Do Not Provide for "Coordination" with Federal Land Management Agencies when the Statute Calls for "Consideration."

The last sentence of proposed 450.206(c)(2) would newly require States to "coordinate" targets with Federal land management agencies. The statute is specific in calling for State coordination with MPOs for this purpose but does not mention coordination with Federal land management

agencies. Proposed 450.208(a)(3) properly reflects that 23 USC 135(e)(2) calls for a State, in carrying out planning, to "consider" the concerns of Federal land management agencies. Proposed 450.208(a)(3) represents the correct approach. Accordingly, the last sentence of paragraph 450.206(c)(2) should be deleted.

ADDITIONAL COMMENTS

Do Not Modify the Current Definition of "Consideration." In 450.104 the proposed rule would modify the longstanding definition of "consideration" by adding "consequences" as an item for States to take into account in the consideration process. The NPRM provides no justification for this increase in a regulatory requirement, mentioning in an off-hand manner that the definition would be "updated." See 79 Federal Register 31790. In MAP-21 Congress made a number of changes to the transportation planning statute, but did not change current practice regarding "consideration." Yet, this proposed change would add to the workload of States as to every "consideration." The proposed change to the definition of consideration should not be adopted.

In proposed 450.206(c)(3), strike "areas" and substitute "urbanized areas." This would specify that certain coordination and other requirements apply only with respect to "urbanized" areas. This modification should also be made to 450.206(c)(4) as proposed if it is retained, but we agree with AASHTO that 450.206(c)(4) should be deleted entirely (for additional reasons).

Delete or modify proposed 450.208(e), regarding Coordination of Planning Process Activities. It is unclear what is intended by proposed language that would require a State DOT to apply to the "planning process" asset management principles consistent with the NHS Asset Management Plan. This is another instance of the proposed rule turning a single requirement (as to asset management) into a double requirement (asset management and planning). Again, the resulting concern for a State is that a disagreement with USDOT over an asset management detail could result in a determination of a non-compliant planning process – calling into question a State's ability to advance projects, obtain STIP amendments, etc. Also, Congress did call for an NHS Asset Management Plan but did not apply that provision to all topics within the scope of the planning process, such as other Federal aid roads and bridges. We are concerned that this provision may be an effort to expand the scope of the asset management plan provision beyond the NHS. So, for a number of reasons, proposed 450.208(e) appears to suggest potentially significant non-statutory increases in regulation. The proposed provision should be deleted.

Accordingly, proposed 450.208(e) either should be deleted or, failing that, modified to read as follows:

> In carrying out the statewide transportation planning process, States may apply asset management principles and techniques in establishing planning goals, defining STIP priorities, and assessing transportation investment decisions, including transportation system safety, operations, preservation, and maintenance.

AASHTO is also correct in calling for the final rule to clarify that the consultation required by 450.216(k) (regarding potential environmental mitigation activities) extends only to "applicable" Federal, State, local, and regional agencies and applicable tribes. A State's transportation

officials should not have to consult on mitigation issues in one part of the State with unaffected officials or tribes from another part of the State.

The third sentence of proposed 450.216(k) should be revised to read as follows:

> The State shall develop the discussion in consultation with applicable Federal, State, regional, local and Tribal land management, wildlife, and regulatory agencies.

450.218(l), Financial Plan

A STIP "may" include a financial plan. It is not mandatory. Yet, 450.218(l) of the proposed rule would discourage such plans by including detail as to what a voluntary financial plan must look like. For example, revenue estimation and cost estimation are different processes, but would be treated similarly under the proposed 450.218(l).

Accordingly, proposed 450.218(l) should be revised to read as follows:

> The STIP may include a financial plan that demonstrates how the approved STIP can be implemented, indicates resources from public and private sources that are reasonably expected to be available to carry out the STIP, and recommends any additional financing strategies for needed projects and programs. In addition, for illustrative purposes, the financial plan may include additional projects that would be included in the adopted STIP if reasonable additional resources beyond those identified in the financial plan were to become available. The State is not required to select any project from the illustrative list for implementation, and projects on the illustrative list cannot be advanced to implementation without an action by the FHWA and the FTA on the STIP. Cost estimates supporting the STIP must use an inflation rate reflecting "year of expenditure dollars." Revenue projections must be based on best estimates of future funding availability, developed cooperatively by the State, MPOs, and public transit agencies.

450, Appendix A

The final rule should make clear that Appendix A is non-binding guidance.

CONCLUSION

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming strongly support modifications to the proposed rule that would limit regulation and better enable States to focus their financial and personnel resources on the prompt delivery of projects that serve the public. We thank FHWA and FTA for their consideration and urge that the final rule in this docket be modified in accord with our recommendations.

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