

Comments of the Transportation Departments of  
Idaho, Montana, North Dakota, South Dakota, and Wyoming  
to the  
Federal Highway Administration  
in  
Docket No. FHWA-2013-0053  
National Performance Management Measures;  
Assessing Pavement Condition for the National Highway Performance Program and  
Bridge Condition for the National Highway Performance Program  
May 6, 2015

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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 80 Federal Register 325 *et seq.* (January 5, 2015). In this docket FHWA has invited comment on proposed revisions to 23 CFR 490, regarding certain performance measures of pavement and bridge condition and related matters.

At the outset, the transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming wish to emphasize their deep commitment to achieving the best possible pavement and bridge condition within available financial resources. So, while these comments support significant change to the rules proposed in this docket, we recommend changes so that the rule would include fewer requirements and States would be better able to exercise discretion in pursuit of the best possible pavement and bridge condition within available financial resources.

We also note at the outset that each of the five departments is a member of the American Association of State Highway and Transportation Officials (AASHTO). We were very actively involved in the development of the comments filed by AASHTO in this docket. We support the proposals for changes to proposed 23 CFR 490 that are included in AASHTO’s comments in this docket. In these comments we emphasize the importance of a number of the changes to the proposed rules set forth in AASHTO’s comments.

In this docket, FHWA has proposed several different types of requirements. First, MAP-21 called for USDOT to develop measures of condition for pavements and bridges on the NHS and to establish certain minimum levels of condition for them. A state that does not achieve those minimums is subjected to various requirements. In addition, under the proposed rule states are to set targets for condition for pavements and bridges on the NHS, using the measures that would be established by the proposed rule.

The Proposed Measures are Complex and do not Have Consensus Support, and the Proposed Minimum Condition Levels are not Realistic

As set forth in detail in AASHTO’s comments, the proposed measures are complex and do not have consensus support. In addition, some are not realistic.

More specifically, FHWA has proposed IRI as a pavement measure and also proposed additional pavement measures of cracking, rutting and faulting. AASHTO has agreed to the use of IRI, with important caveats, but noted that: there are various questions about the proposed cracking, rutting and faulting measures; there is no consensus support for their use; and those measures should not be retained in the final rule. We agree with AASHTO on these important points.

More specifically as to IRI, FHWA has properly recognized that IRI measures are almost inherently higher in urban areas and proposed that a pavement can be considered as in an acceptable minimum condition in an urban area with a higher rating (220 or less) than would be considered minimally acceptable outside an urban area (170 or less). However, like AASHTO, we consider urban IRI measures to be sufficiently unreliable that they should be excluded from the final rule.

Moreover, as AASHTO has noted, FHWA's proposed rule fails to recognize that pavement even in small urban areas has urban characteristics; those characteristics do not occur only in metropolitan areas of 1 million or more persons. Title 23 of the U.S. Code has long defined an urban area at the 5,000 population threshold. See 23 USC 101(a). As AASHTO has noted, FHWA should use that threshold for urban IRI as well. Without such a change, the proposed rule would be subjecting thousands of miles of NHS urban area pavements to having to meet a smoother minimum condition level (IRI 170 or less) developed for rural settings. So, the final rule should exclude IRI for urban areas as defined at 23 USC 101(a). Failing that, at a minimum the acceptable IRI level for national pavement minimums should be 220 or less for all urban areas of 5,000 or greater population, not just for those of one million or greater population.

Further, should FHWA retain in the final rule measures regarding cracking, rutting and faulting, those measures must be adjusted for purposes of national pavement minimums. Under the thresholds proposed in the NPRM, pavements are classified as "poor" for cracking, rutting or faulting even if in reasonable condition. We agree with AASHTO that, if those measures are retained at all (and they should not), the thresholds should be raised. For example, the proposed .15" threshold for faulting is too low and should be a higher number.

As to bridges, we strongly support AASHTO's recommendation that a structurally deficient bridge be defined as one with an NBI condition rating of 1, 2, or 3 for culvert, deck, superstructure or substructure. AASHTO has properly recommended that a bridge with an NBI condition rating of 4 not be defined as structurally deficient. As AASHTO has noted, the historical approach of classifying a bridge with a rating of 4 as structurally deficient evolved so that there would be more flexibility for states in the use of certain bridge program funds (more bridges would be eligible), not because a 4 was truly structurally deficient. Under the proposed rule, including a "4" as a structurally deficient bridge would reduce, or at least tend to reduce, state programming flexibility because the greater the number of structurally deficient NHS bridges, the larger the deck area associated with structurally deficient NHS bridges, which increases the prospect of FHWA review of state programming decisions.

In short, for such reasons, we support AASHTO's recommendations to simplify and revise proposed pavement and bridge measures and minimum national condition levels (see pages 3-6 of AASHTO comments). Even as proposed to be revised by AASHTO, the new requirements

would represent a major management and investment effort by states. Federal performance measurement and management is a new endeavor. FHWA should begin with a handful of (albeit important) requirements before considering additional steps. AASHTO's recommendations appropriately ask FHWA to take such an approach.

### Ensure State Authority to Set Targets

MAP-21 clearly provides that, while USDOT has the authority to establish certain performance measures, and the national minimum condition levels, otherwise individual States are to set their own targets for results, utilizing the measures established by USDOT. 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. USDOT also must be clear in the rule that states have the authority to set targets that would reflect declining condition. In the face of great needs and limited financial resources, a declining condition target could represent an aggressive target.

In addition to the reasoning and recommendations set forth by AASHTO on state targeting authority (see pages 6-7 of AASHTO comments), we note the following in further support of state targeting authority.

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). Pavement and bridge performance measures are called for in 23 USC 150(c)(3). 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 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 or restrict what a state sets; USDOT is provided only with the opportunity to advise Congress whether, in USDOT's opinion, the State determined targets were “appropriate.”

### Scale Back Various Proposed Ancillary Requirements

The heart of the proposed rule is determining the measures to be used and the national minimum condition levels. However, much of the rule would establish various ancillary requirements, such as for data collection, which concern actual implementation of the measures and requirements. The final rule should significantly scale back or modify a number of those requirements.

AASHTO has properly noted that the proposed rule would require States to collect more data, more often, in increased detail, and submit it earlier in the year than currently called for under HPMS. Such costly requirements are particularly challenging at this time, when citizens are pressing for States to maximize the extent to which scarce funds are invested in projects and programs. While broadly supporting all of AASHTO's comments regarding the need to simplify and reduce the data collection requirements of the proposed rule, we note as of particular concern several burdens that should be deleted or modified before the final rule is adopted.

For example, the final rule should not rate pavement as "poor" if data is missing. In some cases the state may not have control over the relevant NHS segment (there could be local, tribal, or even Federal control). In other cases the segment may be undergoing renovation. Missing data should not count in determining overall pavement condition; nor should it count in determining whether a state has made significant progress towards achieving targets.

Some sampling of pavement segments should be allowed. Also, some data should not have to be collected annually. In addition, there is no need to require data to be collected with respect to segments of one-tenth of a mile. A state should be allowed to utilize somewhat longer segment lengths for data collection purposes; a number of states use one-quarter mile segments, for example. FHWA has offered no compelling justification for insisting on segments as small as one-tenth of a mile.

There should be longer phase-in periods for the implementation of the rule, and the reporting periods can be lengthened. Pavements and bridges are assets with long lives; reporting periods should be lengthened.

Data to be used in implementation of the rule are to be collected using the HPMS and NBIS systems. Yet, under current law, FHWA can change what is involved in collecting data pursuant to those systems without any process constraints. As AASHTO has recommended, now that the data to be collected under those systems have regulatory consequences, any changes to those systems by FHWA should result from cooperation with states and also must be subject to notice and comment by the states and other interested parties.

Finally, while we support the use of quality data, the data quality provisions in the proposed rule are vague and troublesome and should be scrapped; FHWA should rely on the states to use quality data. More specifically, proposed 490.319(c) would require a State to have an FHWA-approved data quality management program. The proposal lists some areas that must be addressed within such a program, but no standards or criteria are identified. In short, as to data quality, the proposed rule really does not say more than that FHWA will decide whether it will accept what a State is doing. That is too vague to be adopted.

As AASHTO has recommended, if there must be a data quality provision at all, it should require that a state certify that it has a data quality management program and require the state to provide a description of it to FHWA for information, not for approval. See AASHTO's comments on this issue at pages 23-24.

In addition, it is important that nothing in the final rule should preclude a state from implementing a performance management system or systems for non-NHS assets, whether bridges or pavements or both. So long as a state meets the requirements in the final rule in this docket for NHS assets, a state should have freedom to pursue performance management initiatives of its own design for other assets, such as non-NHS bridges.

These and other concerns over the specifics of how the proposed rule would work, and how it should be modified are set forth by AASHTO at pages 7-32 of the AASHTO comments filed in this docket.

### Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming strongly support modifications to the proposed rule as recommended by AASHTO and briefly 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 condition of NHS pavements and bridges 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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