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August 13, 2014

Gregory G. Nadeau  
Acting Administrator, Federal Highway Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue S.E.  
Washington, DC 20590

Re: Docket No. FHWA-2013-0037

Dear Deputy Administrator Nadeau:

The American Association of State Highway and Transportation Officials (AASHTO) is pleased to provide comments on Federal Highway Administration's (FHWA) "Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning; Proposed Rule" (NPRM), published in the Federal Register on June 2, 2014. Representing all 50 states, the District of Columbia, and Puerto Rico, AASHTO serves as a liaison between state departments of transportation and the federal government.

AASHTO and the State DOTs are supportive of the MAP-21 performance provisions and believe that the performance management principles can be implemented along with transportation planning provisions in a manner that advances a safer and more efficient transportation system without imposing undue regulatory burdens on States. However, this is only the beginning of a long journey that we will complete together as partners. There are some recognized challenges ahead and AASHTO and the State DOTs will continue to engage with U.S. DOT to address these challenges and work together.

Performance management, the development of performance measures, and establishing performance targets are not new to the State Departments of Transportation (DOTs). For the last decade, many State DOTs have developed and implemented performance management systems to help them make effective investment decisions within resource limitations. An important aspect of this has been examining performance measures for a wide variety of areas from safety to asset condition to performance of the transportation system. State DOTs are concerned with all of these performance areas and must balance the funding of programs and projects across areas while at the same time meeting stakeholder expectations during a time of financial uncertainty.

AASHTO is generally supportive of the Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning; Proposed Rule. We appreciate that much of the proposed regulation is consistent with the language of MAP-21. FHWA and FTA are to be

commended for the substantial work reflected in this rulemaking, including the effort to coordinate this rule with many of the other performance management rulemakings currently under development. However, while we support many aspects of the proposed regulations, there are several areas in which State DOTs have concerns and we encourage FHWA and FTA to take action addressing those concerns in finalizing this regulation.

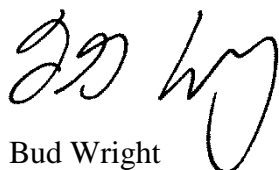
AASHTO comments are organized as follows in the attachment to this letter:

- **Principal Comments**—There are eight principal comments for which AASHTO provides an in-depth analysis and discussion.
- **Section-by-Section Comments**—AASHTO comments on each major section and sub-section of the NPRM.
- **AASHTO Response to FHWA Requests**—AASHTO responds to the nine questions specifically asked by FHWA in the NPRM.
- **Proposed Changes to Text**—Suggested changes to the NPRM text based upon AASHTO analysis.

These comments represent a substantial work effort among State departments of transportation to thoroughly review and comment on the Statewide and Nonmetropolitan Transportation Planning NPRM. AASHTO has in place a process to provide coordinated comments representing the different disciplines of the various standing committees on all of the performance management NPRMs being developed. This included a coordinated effort to gather input from the AASHTO Standing Committees on Planning, Environment, and Performance Management for this NPRM. These comments are but one set of more than ten that AASHTO expects to provide as USDOT issues proposals implementing performance-related provisions of MAP-21. Since this NPRM includes placeholder references for other NPRMs yet to be issued, AASHTO recommends that U.S. DOT provide an opportunity for States and others to offer any additional comments after all of the performance management NPRMs have been issued.

We appreciate the opportunity to provide these comments and look forward to working with FHWA in the implementation of final rules. If you would like to discuss the issues raised in this letter, please contact Matthew Hardy, AASHTO's Program Director for Planning and Policy at (202) 624-3625 or Shannon Eggleston, AASHTO's Program Director for the Environment at (202) 624-3649.

Sincerely,



Bud Wright  
Executive Director  
AASHTO



Mike Hancock  
President, AASHTO  
Secretary, Kentucky Transportation Cabinet

## **PRINCIPAL COMMENTS**

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### **1) WORKING TOGETHER TO STRENGTHEN A POSITIVE START IN IMPLEMENTING MAP-21**

AASHTO is supportive of the increased transparency and a performance-based approach to planning and programming codified in MAP-21. AASHTO is pleased that many of the provisions in this NPRM use language identical or nearly identical to the language in MAP-21 and that a number of additional provisions provide guidance without being overly prescriptive. This basic approach will enable each State to consider its own priorities and circumstances in its transportation planning.

AASHTO has some concerns, however, including that the comment deadline in this docket apparently will precede the issuance of proposed rules that would implement a number of MAP-21's performance measurement and management provisions. We believe it will be appropriate for FHWA and FTA to continue to take comments on proposed planning rules after the comment deadline in this docket to the extent such comments relate to not yet released proposals on performance measurement and management. In addition, while AASHTO is comfortable including succinct discussions of performance measures in the STIP and other traditional planning documents, it is important that implementation of this rule does not undermine the National Goal of reducing project delivery delays nor lead to increased transportation planning for the sake of regulatory compliance, documentation and report writing.

### **2) CONFIRM STATE DISCRETION IN TARGET SETTING AND REPORTING**

Target setting is a data-driven and multidisciplinary process that is practiced by all states. MAP-21 was clear in saying that each State shall set performance targets that use the measures developed by U.S. DOT. Furthermore, it is AASHTO's position that every state and municipality faces different constraints and opportunities affecting their transportation system. Available funding and sources are particularly important variables for States in planning and target setting, but there are other factors, including economic conditions, environmental conditions, population growth trends, legislative and gubernatorial mandates and priorities, and issues identified in the public involvement process. Consequently it is essential that States and MPOs have the flexibility to set targets, including targets that have performance holding steady or, in some situations, declining.

Regulations pertaining to performance reporting should focus on providing the public and interested parties clear, concise and easily available information on transportation system performance in the State as determined by the State. States should have flexibility in determining the need for consolidation of information regarding MAP-21 performance measures and the nature of the performance reporting. Options include but are not limited to stand-alone periodic performance reports, reporting within the context of the statewide plan, summary discussions with appropriate references in the STIP, etc. States are in the best position to know "what works" in the State regarding communications with the public, interested parties, and their partners.

AASHTO recommends the following as it relates to target setting and reporting requirements:

- **Avoid changes to the NPRM that would weaken the authority of States to set performance targets for the measures established in accord with 23 USC 150.** Allowing State DOT control over target setting, without approval from U.S. DOT, allows states and, where applicable, other target-setting entities to face the realities of their own situations. Furthermore, accountability will be maintained by U.S. DOT through an assessment of whether States are meeting or making significant progress towards meeting the targets.
- **Eliminate potential confusion regarding the basis for the authority to set performance targets and eliminate the related prospect of over-regulation.** Delete the following sentence in 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.” Paragraph 450.206(c)(2) provides elsewhere that States shall establish performance targets that reflect the measures identified in 23 USC 150(c) and 23 CFR part 490. Part 490 itself (when finalized) calls for States to establish targets relative to specified measures; this sentence implies that targets are set under both Part 490 and Part 450, which could lead to disputes over compliance with both rules for a single target. The sentence recommended for deletion also adds either new requirements or new ambiguity to the requirements of part 490, referring to an “appropriate target setting framework.” This raises the question of who (the State, USDOT, or another entity) determines whether a State’s target setting was performed within an undefined “framework” and whether the framework was “appropriate.” This is contrary to the statutory scheme, which reserves target setting authority to the States.

Accordingly, revise section 450.206(c)(2) to read as follows:

*“Each State shall select and establish performance targets in coordination with the relevant MPOs to ensure consistency to the maximum extent practicable. The targets shall address the performance areas described in 23 U.S.C. 150(c), and the measures established under 23 CFR part 490, where applicable, to use in tracking progress toward attainment of critical outcomes for the State. States shall establish performance targets that reflect the measures identified in 23 U.S.C. 150(c) not later than 1 year after the effective date of the DOT final rule on performance measures.”*

- **Eliminate redundant references to integration of goals, objectives, etc. into the statewide planning process, as proposed in both 450.206 and 450.208.** Accordingly, it is suggested that 450.206(c)(4) be deleted.
- **Modify 450.206(c)(5) by deleting “targets established under this paragraph” and substitute “the State’s targets”.** As discussed above with reference to 450.206(c)(2), the planning rules are not the basis for target setting authority. The rule should follow the statute and require a State to consider the performance measures established by USDOT and the applicable targets established by the State when developing plans and STIPs.

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

*“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.”*

- **Ensure State discretion in determining the appropriate means of performance reporting and linkages to other statewide planning documents.** Fragmented reporting across multiple planning documents could misinform the reader about the complex tradeoffs necessary in the decision making process to balance limited resources. More important to State DOTs than the writing of the performance report is communicating the performance to various audiences. AASHTO encourages FHWA to continue to work with the State DOTs in developing appropriate communication techniques for performance management that include performance reports as well as other web-based methods.
- **Affirm that States can consider public comments in setting targets.** Discussion of performance management sometimes focuses so much on data that the potential role of public comment and input is not mentioned. Without implying that the proposed rule as worded would preclude a State from considering public input in setting targets, the rule would be improved if it were made explicit that a State could consider public comment in setting targets. This could be done by adding a new paragraph 450.210(a)(3), to read as follows:

*“(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.”*

### **3) CLARIFY CHANGES TO THE PLANNING PROCESS**

MAP-21 continued the broad requirements for the scope of the statewide transportation planning process found in previous versions of 23 USC 135 while adding the important requirements regarding non-metropolitan issues and the use of a performance-based approach to transportation planning. Generally, the NPRM contains instances of added specificity not found in 23 USC 135. Some are cited as examples. AASHTO believes that the use of “examples” and “should” are subject to differing interpretations by States, MPOs and Division Offices. This could lead to unproductive, time consuming disagreements that can contribute to program implementation delays.

The NPRM appears to confuse, or in some cases treat as the same, the “statewide transportation planning process” and the “statewide plan.” MAP-21 continues to call for a “long-range statewide transportation plan...for all areas of the State, that provides for the development and implementation of the intermodal transportation system of the State” and contains requirements for coordination, consultation, and participation by the public and other parties. The only other specific requirements regarding the long-range statewide transportation plan relate directly to:

- a discussion of environmental mitigation issues;
- performances measures, targets and related performance report;

- measures to ensure the preservation and most efficient use of the existing transportation system; and
- publication of the plan.

As a result, MAP-21 leaves to the States to determine the content, whether to create a “policy” or “project” plan, whether to include a financial plan, how to treat other statewide planning activities, etc. MAP-21 does not require inclusion in the long-range statewide transportation plan of some of the information called for in the proposed rule.

AASHTO recommends the following as it relates to statewide transportation planning process and long-range statewide transportation plan requirements:

- **Delete the last sentence of proposed 450.206(c)(2).** There is no statutory directive to “coordinate” targets with Federal land management agencies. This provision undercuts a State's authority to set targets. The statute requires only that States “consider the concerns of ... Federal land management agencies that have jurisdiction over land within the boundaries of the State” when carrying out statewide transportation planning. See 23 USC 135(e).
- **Eliminate the examples of and references to “other transportation plans” or clarify that integration of the example plans is non-binding. Also make clear that it is a State that determines whether any “other” State plan or process is required to be integrated into the Federally-required planning process.** AASHTO is concerned that 450.208(g)(6) is too broad and will require State DOTs to consider and integrate into the planning process any other plan that U.S. DOT staff decides includes any aspect of a performance-based process, regardless of whether it is required as part of the federal transportation planning process or is, instead a document or plan developed at the discretion of the State. States should have the discretion to determine which “other plans and processes” should be so integrated into the transportation planning process beyond those federally required. AASHTO’s primary concern is that to require integration into planning of various other plans that the Federal statute does not specifically require to be integrated will: (1) add complexity to a planning process that is already too complicated; and (2) come to be interpreted as “requirements” by the public, interested parties or, more significantly, some Division Offices.

Moreover, if, as the current wording might suggest to some, any State plan or process could be determined by U.S. DOT staff 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 may be discouraged from undertaking any planning beyond that which is required by Federal law because additional planning it might undertake could well be transformed into a Federal planning requirement as to that State. AASHTO believes that proposed 450.208(g) should be revised to delete examples and track the intent of the statutory language, which we do not believe involved turning non-required State plans into Federal requirements. For the same reasons, references to other plans should be deleted from proposed 450.218(r).

Accordingly, it is suggested that 450.208(g) 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.XXX<sup>1</sup>; any plans developed pursuant to 23 USC and 49 USC Chapter 53<sup>2</sup> 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.”*

Further, it is suggested that section 450.218(r) 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.”*

- **Eliminate certain references to the content of the “statewide transportation plan”.** A State’s statewide transportation planning process must encompass numerous issues, required or otherwise. The State has, and should continue to have, the discretion to document its long-range statewide transportation plan to best serve its constituents, subject to federal and state laws. The proposed rule should be modified to eliminate content requirements for the long-range statewide transportation plan that go beyond the requirements in 23 USC 135. Accordingly, section 450.216(n) should be deleted.
- **Ensure a single effective date for meeting “the performance-based planning requirements.”** As written in the NPRM, 450.226(e) could be interpreted as basing STIP approvals/disapprovals on different effective dates for the various rules establishing performance measures. This could lead to extreme confusion on the part of State and review agency staff, potentially leading to project delays for no good purpose. The travelling public and taxpayers will be well-served by having one effective date for the entire set of rules establishing performance measures.

#### **4) CLARIFY AND EMPHASIZE KEY TERMS**

The final rule should provide additional clarity in key areas to reduce confusion, misinterpretations, and potential delays in key decisions during implementation of MAP-21 by State

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<sup>1</sup> This should refer to the three National-Level Performance Measure rules being developed by U.S. DOT that will be labeled as 23 CFR 490.

<sup>2</sup> This is referring to the forthcoming rules being developed by FTA for transit agencies related to the National Safety Plan, Agency Safety Plan, and Transit Asset Management Plan.

and Federal managers and staff. Through inclusion of a preamble, additional definitions, or other means, the following need elaboration for the purposes of consistent implementation:

- The difference between “shall” and “should”. Generally, AASHTO prefers “should” to “shall” and also prefers such language as “may, but is not required to...” compared to “shall” and urges the rule use “shall” only where required by the law.;
- Stronger emphasis on the role of Appendix A to reduce mis-interpretations in some States and/or Division Offices;
- Consistent usage, or definitional distinctions, of similar terms such as “transit operator” and “transit provider.”

AASHTO recommends the following as it relates to Clarify and Emphasize Key Terms:

- **Define or clearly explain the difference between “shall” vs “should”.** “Shall” means that something is required. “Should” conveys a recommendation or encouragement, which may or may not be a “best practice” but is not a requirement. Subpart B of the NPRM contains the word “should” 11 times. It is important that all parties understand the difference between “shall” and “should” to avoid confusion, potential disapprovals or delays, and unnecessary resources and time resolving differences of opinion. AASHTO recognizes that two of the 11 uses of “should” in Part B of the NPRM mirror their use in 23 USC 135(f)(7) and 23 USC 135(f)(8) regarding the statewide transportation plan, an indication that states should be afforded discretion in whether and, if so, how to address the issues referenced by “should.”
- **Clarify that Appendix A is non-binding guidance.** Some states have experienced a gradual shift in U.S. DOT interpretation of parts of Appendix A from “guidance” to “requirements.” Appendix A does state that “It is intended to be non-binding and should not be construed as a rule of general applicability.” In practice, however, this statement is not always followed. AASHTO requests that Appendix A be revised to state more strongly that it does not have the force of law or rule in interpreting the actions of States and MPOs in the transportation planning process.

## **5) CLARIFY THE RELATIONSHIP OF PERFORMANCE MANAGEMENT TO THE STIP**

23 USC 135(g) requires a State Transportation Improvement Program that contains an annual listing of projects for a period of 4 years, along with requirements for consistency with similar listings in metropolitan transportation improvement programs. MAP-21 added a further requirement that the STIP “shall include, to the maximum extent practicable, a discussion of the anticipated effect of the statewide transportation improvement program toward achieving the performance targets established in the statewide transportation plan”. AASHTO believes that use of the word “discussion” and the phrase “to the maximum extent practicable” are a clear indication that Congress intended that States have significant discretion in how the STIP should include a narrative “discussion” in a listing of project details for projects planned for implementation over the 4-year period. Options for the discussion may include a summary of the anticipated effect of the entire program (as a whole, not with respect to individual projects) toward achieving the performance targets identified by the State in the statewide transportation plan and/or a reference to a more detailed report on progress in achieving performance targets.



AASHTO recommends the following modifications to clarify the relationship of the STIP and performance management and to avert overregulation.

- **Modify Proposed 450.226(e) and (f) so they are more specific and do not overreach.** AASHTO considers the language in these two sections that we would strike to be too general and as creating a risk of undue regulation through the planning rule. The NPRM 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.” The context is that “such a rule” refers to “each rule establishing performance measures” under 23 USC 150(c) or certain other statutes. It will be a disservice to the travelling public and taxpayers to risk delays of needed transportation projects for disapprovals based upon such general, non-specific language. Such general language is open to extreme interpretations that could result in project delays, which would be contrary to the National Goal of Reduced Project Delivery Delays. Clear expectations for the basis of this determination should be established as soon as possible, as this is one of the most critical decision points in the transportation planning and project delivery process. As worded, the slightest disagreement between a State and U.S. DOT over a measure or target (as reflected in “such a rule”) could jeopardize the adequacy of the entire plan or STIP or planning process. This potential outcome is compounded by the unclear reference to the “performance-based planning requirements in this part.”

Accordingly, revise section 450.226(e) 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, 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.”*

- **Continue to emphasize that the function of the STIP is to provide an annual listing of projects for a period of 4 years to inform the public, partners and review agencies.**

USDOT and the States have enormous investments in processes and tools to provide sufficient detailed information on projects planned for implementation over the next four years. Overly burdening the STIP with added narratives that are best addressed in other planning documents will not be productive; nor is it the best way to provide information on achieving performance targets.

- **Clarify that States have discretion regarding “a discussion of the anticipated effect of the statewide transportation improvement program [not projects] toward achieving the performance targets”.** States should be able to determine the best approach to a “discussion” of the anticipated effect of the statewide transportation improvement program toward achieving performance targets. This may include references to such documents as performance reports that are more user-friendly than bulky, detailed reports documenting thousands of planned projects. The final rule should include a statement that the “discussion” should be at the program level, not at the individual project level.
- **Eliminate the requirement for the STIP to be “informed” by the financial plan and investment strategies from the state asset management plan for the NHS.** AASHTO is concerned that use of the term “informed,” which is not defined, may result in inconsistent and potentially burdensome new requirements as it is interpreted and applied by different FHWA division offices around the country. This is also largely redundant with the requirement that the “discussion” required in the STIP (proposed 450.218 (r)) be consistent with the asset management plans, as well as requirements that projects only be included in a STIP if full funding can reasonably be anticipated. In addition, as noted in the Principal Comment 3, Clarify Changes to the Planning Process (where similar language is proposed for statewide transportation plans), this goes well beyond the requirements found in 23 USC 135.

Accordingly, 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.”*

## **6) ENSURE FLEXIBILITY IN METROPOLITAN PLANNING AGREEMENTS AND METROPOLITAN PLANNING ORGANIZATIONS**

Section 450.314 proposes to significantly expand the elements required to be addressed in metropolitan planning agreements. While AASHTO recognizes the importance of ensuring all planning agencies are working from the same script, it’s equally important that agencies retain the flexibility to adapt to the changes brought about by operating in a performance-oriented environment. In many states metropolitan planning agreements are not easily or quickly updated, and the update process often involves extensive legal and executive review. The list of elements included in this proposed rule appears overly prescriptive and beyond what is necessary for such

agreements, and can more easily be addressed (and more quickly changed if necessary) in less formal documents such as MPO operating procedures. In addition, the section proposes to require that planning agreement “should” be periodically reviewed and updated as appropriate. Agreements are generally already revised as necessary when changes are made to regulations and when dictated by other circumstances. AASHTO is concerned that subsection (b) could be construed to create a new obligation to review agreements even when that review is unnecessary.

The preamble of the NPRM also discusses the makeup of MPOs that serve TMAs. AASHTO recognizes the importance of ensuring that MPOs are constituted in ways that ensure they are well equipped to tackle the challenges associated with the transportation planning responsibilities required of them. Since many MPOs are organized and operate under state law, and their makeup may be a carefully negotiated issue, any regulations that go beyond the specific requirements in law will restrict the ability of state and local policymakers to establish a governance structure that best suits their respective circumstances. AASHTO recommends that the regulations stick closely to the language of 23 USC 134 in order to ensure that MPOs have maximum flexibility in determining how they are constituted and how they operate. Any additional regulations on MPO structure or governance will likely have unintended consequences.

AASHTO recommends the following as it relates to Metropolitan Planning Agreements:

- **Remove the language added throughout the subsection that requires additional elements to be addressed in metropolitan planning agreements.**

Accordingly, revise section 450.314(a) to read as follows:

*“The MPO, the State(s), and the providers of public transportation shall cooperatively determine their mutual responsibilities in carrying out the metropolitan transportation planning process. These responsibilities shall be clearly identified in written agreements among the MPO, the State(s), and the providers of public transportation serving the MPA. To the extent possible, a single agreement between all responsible parties should be developed. The written agreement(s) shall include specific provisions for cooperatively developing and sharing information related to the development the metropolitan transportation plan (see § 450.324) and the TIP (see § 450.326), and development of the annual listing of obligated projects (see § 450.334). The written agreements may also include provisions for cooperatively developing and sharing information related to transportation systems performance data, the selection of performance targets, the reporting of performance targets, the reporting of system performance to be used in tracking progress toward attainment of critical outcomes for the region of the MPO (see § 450.306(d)), and the collection of data for the asset management plans for the NHS.”*

- **Delete subsection 450.314(b) to eliminate any possibility that this could be interpreted to require regular updates to existing planning agreements.**

## 7) KEEP PROPOSED APPROACH TO VOLUNTARY PROGRAMMATIC MITIGATION PLANS, WITH MODIFICATIONS

AASHTO is generally supportive of the new sections on programmatic mitigation plans in the statewide and metropolitan planning sections of the proposed regulations (Sections 450.214 and 450.320). More specifically, we support inclusion of the following provisions in the proposed rule as they clarify the nature of and the process for developing programmatic mitigation plans:

- The State (in statewide planning) and MPO (in metropolitan planning) is responsible for determining the scope of the programmatic mitigation plan: 450.214(a) and 450.320(a) and whether to adopt one at all (450.214(b) and (d)).
- The plans may address existing conditions and mitigation for “natural and human” environmental resources: 450.214(a)(2) and 450.320(a)(2).
- If a programmatic mitigation plan is developed, it may be considered by other agencies in carrying out their responsibilities under both NEPA “and any other environmental laws and regulations.”: 450.214(d) and 450.320(d).

One concern with the proposed language is that the mandatory language in Sections 450.214(b) and 450.320(b), which says “If a State [or MPO] chooses to develop a programmatic mitigation plan then it shall be developed as part of the statewide [or metropolitan] transportation planning process, requiring the State [or MPO] to consider the following process prior to adopting a programmatic mitigation plan ...” This language is more restrictive than the text of the statute. The statute allows a programmatic mitigation plan to be developed through the statewide or metropolitan planning process, but it does not prohibit such plans from being developed outside the statewide or metropolitan planning process. See 23 USC 169(a). The proposed regulations are more restrictive because they would make the statewide and metropolitan planning process the only means through which a State or MPO could develop a programmatic mitigation plan.

AASHTO recommends the following as it relates to Programmatic Mitigation Plan requirements:

- **Preserve the flexibility provided in the statute for States and MPOs to develop programmatic mitigation plans.** It should be a voluntary decision for States and MPOs whether to develop these plans at all and, for those that choose to develop them, they should be allowed to develop programmatic mitigation plans within or outside the statewide and metropolitan planning processes.

Accordingly, revise section 450.214(b) and 450.320(b) to read as follows:

*“If a State [or MPO] chooses to develop a programmatic mitigation plan then it may be developed as part of the statewide [or metropolitan] transportation planning process...”*

- **Clarify that the contents of the programmatic mitigation plans are not limited to the listed items.** States and MPOs should have the flexibility to include additional information and considerations into their programmatic mitigation plans.

- **Expand the inventory of environmental resource banks for impacted resource categories to include stormwater banks.**
- **Clarify and expand “resources” under the Programmatic Mitigation Plan section.** Recommend separating “threatened or endangered species” and “critical habitat” (see below). The NPRM refers to “threatened and endangered species critical habitat.” We recommend changing this to “threatened and endangered species, and critical habitat.” These are separate issues with the USFWS and are dealt with separately under consultation. Plus, different resource agencies have different designations for critical habitat under their programs. In addition, we recommend adding archeological resources to the list of resources.

Accordingly, revise section 450.214(a)(2) as follows:

*“2. Contents. The programmatic mitigation plan may include, but not be limited to:*

*ii) An identification of economic, social, and natural and human environmental resources within the geographic area that may be impacted and considered for mitigation. Examples of these resources include wetlands, streams, rivers, stormwater, parklands, cultural resources, historic resources, farmlands, archeological resources, threatened or endangered species, and critical habitat. This may include the identification of areas of high conservation concern or value, and thus worthy of avoidance;*

*(iii) An inventory of existing or planned environmental resource banks for the impacted resource categories such as wetland, stream, stormwater, habitat, species, and an inventory of federally, State, or locally approved in-lieu-of-fee programs;”*

- **Preserve existing authorities to develop programmatic mitigation plans.** States and MPOs should have the flexibility to pursue developing programmatic mitigation plans under existing authorities.

Accordingly, revise section 450.214(e) as follows:

*“Nothing in this section limits the use of programmatic approaches for reviews under NEPA or the development of programmatic mitigation plans under existing authorities.”*

## **8) PARTNER WITH STATES AND MPOs TO IMPLEMENT “LINKING NEPA AND PLANNING”**

MAP-21 provides statutory authority in 23 USC 168 to expedite environmental reviews by allowing the NEPA process to adopt analyses and decisions made by States and MPOs during the transportation planning process. Prior to MAP-21, this authority existed only in the transportation planning regulations (23 CFR Part 450). MAP-21 provides, for the first time, explicit statutory authority for this practice. It also includes a savings clause, which preserves the States’ ability to link planning and NEPA under the existing procedures in 23 CFR Part 450.

Although State DOTs welcome the statutory authority, the MAP-21 process establishes a much more complex and cumbersome process – it requires the fulfillment of 10 separate conditions, plus concurrence in the fulfillment of those conditions by all participating agencies with “relevant expertise.” The complexity and cumbersome nature of the new process may deter States from undertaking this effort under the MAP-21 framework. As such, we support retention of the current Appendix A to Part 450, which is what has been proposed in the NPRM.

AASHTO understands that the MAP-21 provision providing authority for the NEPA process to adopt analysis and decisions made during the transportation planning process will be implemented in a separate proposed rulemaking. This separate proposed rulemaking will add new subsections under 23 CFR 450.224 and 23 CFR 450.338. Once the new proposed rule has been issued, AASHTO will be reviewing it. However, we want to stress the importance of preserving the States’ ability to use the existing procedures in 23 CFR Part 450 for the NEPA process to adopt analysis and decisions made during the transportation planning process. In addition, AASHTO strongly encourage U.S. DOT to provide ample time between issuing the two proposed rulemakings such that States can provide comprehensive comments. Furthermore, if U.S. DOT is unable to provide overlap between the two rules, we believe it will be appropriate for FHWA and FTA to continue to take comments on both proposed planning rules after the comment deadline has passed for this rulemaking.

## SECTION-BY-SECTION COMMENTS

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### SUBPART A—TRANSPORTATION PLANNING AND PROGRAMMING DEFINITIONS

#### ***450.104 DEFINITIONS***

*General*—AASHTO suggests that U.S. DOT provide a discussion on the difference between the definitions of terms such as “shall” and “should”. Generally, AASHTO prefers “should” to “shall” and, compared to “shall”, more strongly prefers language such as “may, but is not required to...” to clearly indicate that a State has discretion whether to take an action. AASHTO urges that the rule use “shall” only where required by the law. Please see discussion under Principal Comment 4: Clarify and Emphasize Key Terms.

*Conformity*—Conformity only applies in certain nonattainment or maintenance areas. SIP requirements apply to attainment, nonattainment and maintenance areas. Using the term “any” area under a SIP could lead to confusion. AASHTO suggests replacing the phrase “in any area” with “in a nonattainment or maintenance area”.

*Consideration*—The NPRM casually notes that the longstanding definition of “consideration” would be “updated” by adding the word “consequences” as an item to take into account in the consideration process. See 79 Federal Register 31790. Given that the MAP-21 legislation and the proposed rule already would add very considerable new work load to States to implement a performance based approach to planning, now is not the time for USDOT to even consider, much less propose, adding a complication to every consideration that States must undertake under the already complex and multi-faceted planning process. Moreover, as the current definition has been in place for an extended period, it is fair to believe that the Congress did not contemplate that USDOT would be revisiting it at the same time that it works to implement the truly new provisions in MAP-21. This proposed change should not be adopted.

*Long-range statewide transportation plan*—The NPRM defines the term “long-range statewide transportation plan.” However, many references in Subpart B (450.206(c)(5) and 450.216(f)) refer to the “statewide transportation plan”; AASHTO believes those references are intended to refer to the “long-range statewide transportation plan.” U.S. DOT should use the term “long-range statewide transportation plan” consistently throughout the rule to ensure consistency and clarity.

*NHS Asset Management Plan*—This term should be defined per 23 U.S.C. 119(e) and then used consistently throughout the rule.

### SUBPART B—STATEWIDE AND NONMETROPOLITAN TRANSPORTATION PLANNING AND PROGRAMMING

#### ***450.206 SCOPE***

(c)(2) There is no statutory directive to coordinate targets with Federal land management agencies. The statute is specific in calling for coordination with MPOs 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. That other provision is appropriate and sufficient. Moreover, given U.S. DOT’s view of the high degree of interaction represented by a “coordination” requirement, this provision would undercut a State’s authority to set targets. Accordingly, the last sentence of this subsection should be deleted.

(c)(3). Strike “areas” and substitute “urbanized areas” in order to specify that certain coordination and other requirements apply only with respect to urbanized areas. This point is also applicable to (c)(4) as proposed, but AASHTO would delete that paragraph entirely for other reasons.

(c)(4) and (c)(5). See discussion under Principal Comment 2: Confirm State Discretion in Target Setting and Reporting.

#### ***450.208 COORDINATION OF PLANNING PROCESS ACTIVITIES***

(e) The proposed language requiring a State DOT to apply asset management principles consistent with the NHS Asset Management Plan is unclear and confusing and does not appear to add any real value in terms of carrying out the statewide transportation planning process. The statewide transportation planning process is much broader and comprehensive than an asset management plan. Second, the requirement that States **must** apply the asset management principles to the statewide planning process may have a number of unintended consequences.

AASHTO recommends either deleting this subsection or modifying the language to read as follows:

*“450.208(e) 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.”*

(g) This subsection appears to closely mirror Section 450.206(c)(4). However, it should be modified to track the statutory ability of a State to integrate material into planning “directly or by reference.” See the comments set forth above in AASHTO’s discussion on Section 450.206(c) under Principal Comment 2: Confirm State Discretion in Target Setting and Reporting.

#### ***450.210 INTERESTED PARTIES, PUBLIC INVOLVEMENT AND CONSULTATION***

(d) AASHTO supports the proposed language concerning the discretionary nature of RTPOs. This aspect of the proposed rule correctly confirms that it is a matter of State discretion whether RTPOs are established. However, clarification may be needed to specifically state that establishment of an RTPO needs to include the agreement of local units of government.

#### ***450.212 TRANSPORTATION PLANNING STUDIES AND PROJECT DEVELOPMENT***

AASHTO intends to comment on the future rulemaking or guidance document that implements the planning-NEPA linkage provisions in Section 1310 of MAP-21.



#### **450.214 DEVELOPMENT OF PROGRAMMATIC MITIGATION PLANS**

AASHTO believes it is critical that U.S. DOT preserve the flexibility provided in the statute for States and MPOs to develop programmatic mitigation plans. States and MPOs should be allowed to develop programmatic mitigation plans within or outside the statewide and metropolitan planning processes. Please see discussion under Principal Comment 7: Keep Proposed Approach to Voluntary Programmatic Mitigation Plans, with Modifications.

#### **450.216 DEVELOPMENT AND CONTENT OF LONG RANGE STATEWIDE TRANSPORTATION PLAN**

(k) AASHTO believes that the consultation is only with “applicable” Federal, State, local and regional agencies and applicable tribes. More specifically, a State’s transportation officials should not have to consult on mitigation issues in the southern part of the State with local officials from a distant northern part of the State. The current wording is open ended as to the extent of agencies to be consulted. It should be revised to read as follows:

*“450.216(k) A long-range statewide transportation plan shall include a discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the long-range statewide transportation plan. The discussion may focus on policies, programs, or strategies, rather than at the project level. The State shall develop the discussion in consultation with applicable Federal, State, regional, local and Tribal land management, wildlife, and regulatory agencies. The State may establish reasonable timeframes for performing this consultation.”*

#### **450.218 DEVELOPMENT AND CONTENT OF STIP**

(l) Revenue estimation and cost estimation are two different processes and are unrelated to one another. Cost estimation (year of expenditure dollars) involves calculating an inflation factor. Revenue estimation involves predicting what the federal government and other entities will provide for surface transportation in a given year, and is unrelated to inflation. AASHTO recommends that revenue and cost estimation be separated per the following:

*“450.218(l) 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.”*

(o) AASHTO is concerned that use of the term “informed”, which is not defined, may result in inconsistent and potentially burdensome new requirements as it is interpreted and applied by different FHWA division offices around the country. This is also largely redundant with the requirement that the “discussion” required in the STIP (proposed 450.218(r)) be consistent with the asset management plans, as well as requirements that projects only be included in a STIP if full funding can reasonably be anticipated. Please see discussion under Principal Comment 5: “Clarify the Relationship of Performance Management to the STIP,” above. Furthermore, the rule should acknowledge that funding sources other than federal funds may have a role in meeting performance targets.

#### **450.220 SELF-CERTIFICATION, FEDERAL FINDINGS, AND FEDERAL APPROVALS**

AASHTO has no comments on this section.

#### **450.222 PROJECT SELECTION FROM THE STIP**

(c) AASHTO recommends deleting the words “with responsibility for transportation” from the end of the subsection. Reference to nonmetropolitan officials is used elsewhere in the section, and it is clear from the definition that “nonmetropolitan officials” refers to those with responsibility for transportation. The following revision is recommended:

*“450.222(c) In nonmetropolitan areas, with the exclusion of specific projects as described in this section, the State shall select projects from the approved STIP in cooperation with the affected nonmetropolitan local officials, or if applicable, through RTPOs described in § 450.210(e). The State shall select transportation projects undertaken on the NHS, under the Bridge and Interstate Maintenance programs in title 23 U.S.C. and under sections 5310 and 5311 of title 49 U.S.C. Chapter 53 from the approved STIP in consultation with the affected nonmetropolitan local officials.”*

#### **450.224 APPLICABILITY OF NEPA TO STATEWIDE TRANSPORTATION PLANS AND PROGRAMS**

Please see discussion under Principal Comment 8: Partner with States and MPOs to Implement “Linking NEPA and Planning”.

#### **450.226 PHASE-IN OF NEW REQUIREMENTS**

AASHTO believes that it is critical that all of the new performance management requirements, whether they are related to the national-level performance measures, performance-based planning process or asset management plan requirements, have a single effective date. While this NPRM has a two year phase-in requirement, it is critical that the planning requirements be coordinated with the implementation of other performance management requirements such that States are not having to establish targets for different time periods for different measures and incorporating targets for some measures into the statewide planning process but not others. One single effective date will enable State DOTs and MPOs to work together and ensure the necessary data and analysis techniques are available. Please see Principal Comment 3: Clarify Changes to the Planning Process. Furthermore, AASHTO is concerned that a two year phase-in timeframe may not be enough time and U.S. DOT should consider either extending this date or allowing flexibility as implementation begins.

## **SUBPART C—METROPOLITAN TRANSPORTATION PLANNING AND PROGRAMMING**

### ***450.306 SCOPE***

AASHTO has no comments on this section.

### ***450.308 FUNDING FOR TRANSPORTATION PLANNING AND UNIFIED PLANNING WORK PROGRAMS***

AASHTO has no comments on this section.

### ***450.310 METROPOLITAN PLANNING ORGANIZATION DESIGNATION AND REDESIGNATION***

Please see discussion under Principal Comment 6: Ensure Flexibility in Metropolitan Planning Agreements and Metropolitan Planning Organizations.

### ***450.312 METROPOLITAN AREA BOUNDARIES***

AASHTO has no comments on this section.

### ***450.314 METROPOLITAN PLANNING AGREEMENTS***

Section 450.314 proposes to significantly expand the elements required to be addressed in metropolitan planning agreements. While AASHTO recognizes the importance of ensuring all planning agencies are working from the same script, it's equally important that agencies retain the flexibility to adapt to the changes brought about by operating in a performance-oriented environment. Please see Principal Comment 6: Ensure Flexibility in Metropolitan Planning Agreements and Metropolitan Planning Organizations.

### ***450.316 INTERESTED PARTIES, PUBLIC INVOLVEMENT AND CONSULTATION***

AASHTO has no comments on this section.

### ***450.318 TRANSPORTATION PLANNING STUDIES AND PROJECT DEVELOPMENT***

AASHTO intends to comment on the future rulemaking or guidance document that implements the planning-NEPA linkage provisions in Section 1310 of MAP-21.

### ***450.320 DEVELOPMENT OF PROGRAMMATIC MITIGATION PLANS***

AASHTO believes it is critical that U.S. DOT preserve the flexibility provided in the statute for States and MPOs to develop programmatic mitigation plans. States and MPOs should be allowed to develop programmatic mitigation plans within or outside the statewide and metropolitan planning processes. Please see discussion under Principal Comment 7: Keep Proposed Approach to Voluntary Programmatic Mitigation Plans, with Modifications.

### ***450.322 CONGESTION MANAGEMENT PROCESS IN TRANSPORTATION MANAGEMENT AREAS***

AASHTO has no comments on this section.

### ***450.324 DEVELOPMENT AND CONTENT OF METROPOLITAN TRANSPORTATION PLAN***

(f)(11)(iv) Please see discussion on revenue estimation versus cost estimation under the above section on 450.218 Development and Content of STIP.

***450.326 DEVELOPMENT AND CONTENT OF TIP***

(j) Please see discussion on revenue estimation versus cost estimation under the above section on 450.218 Development and Content of STIP.

***450.328 TIP REVISIONS AND RELATIONSHIP TO THE STIP***

AASHTO has no comments on this section.

***450.330 TIP ACTION BY THE FHWA AND FTA***

AASHTO has no comments on this section.

***450.332 PROJECT SELECTION FROM THE TIP***

AASHTO has no comments on this section.

***450.334 ANNUAL LISTING OF OBLIGATED PROJECTS***

AASHTO has no comments on this section.

***450.336 SELF-CERTIFICATIONS AND FEDERAL CERTIFICATIONS***

AASHTO has no comments on this section.

***450.338 APPLICABILITY OF NEPA TO METROPOLITAN TRANSPORTATION PLANS AND PROGRAMS***

Please see discussion under Principal Comment 8: Partner with States and MPOs to Implement “Linking NEPA and Planning”.

***450.340 PHASE-IN OF NEW REQUIREMENTS***

Please see AASHTO comments under 450.226: Phase-In of New Requirements.

**APPENDIX A TO PART 450—LINKING TRANSPORTATION PLANNING AND NEPA PROCESSES**

U.S. DOT needs to clarify that Appendix A is non-binding guidance. Please see additional comments above under Principal Comment 4: Clarify and Emphasize Key Terms.

## AASHTO RESPONSE TO FHWA REQUESTS

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1. *FHWA and FTA seek comment on the following questions related to target setting:*
  - a) *What obstacles do States, MPO and transit providers foresee to the coordination among them that is necessary in order to establish targets?*
  - b) *What mechanisms currently exist or could be created to facilitate coordination?*
  - c) *What role should FHWA and FTA play in assisting States, MPOs and transit providers in complying with these new target-setting requirements?*
  - d) *What mechanisms exist or could be created to share data effectively amongst States, MPOs and transit providers?*
  - e) *For those States, MPOs and transit providers that already utilize some type of performance management framework, are there best practices that they can share?*

AASHTO has provided extensive comments to the U.S. DOT concerning the topic of target setting. In fact, target setting is one of the most unknown areas of the MAP-21 performance management provisions and we must proceed with implementation in a careful manner in order to mitigate as many unintended consequences as possible.

AASHTO also provided the following comments previously to U.S. DOT that provide input to many of the questions asked by FHWA and FTA:

- AASHTO comments on the *National Performance Management Measures; Highway Safety Improvement Program; Proposed Rule*, submitted on June 9, 2014.
- AASHTO *SCOPM Task Force Findings on MAP-21 Performance Measure Target-Setting*, submitted to U.S. DOT on March 22, 2013.

Furthermore, during the AASHTO SCOP/SCOPM Joint Technical Meeting that took place in June 2014, an all-day peer exchange was held that brought together State DOTs and MPOs to discuss these target setting issues. Results of this peer exchange should be completed by September 2014. AASHTO would encourage U.S. DOT to use these results to inform answers to these questions and to develop further capacity building programs and events to support State DOTs, MPOs and transit agencies in target setting.

Regarding the specific questions at hand, AASHTO recognizes that MAP-21 calls for State DOTs and MPOs to set targets within their respective boundaries. AASHTO generally finds the proposed language in 23 CFR Part 490, *National Performance Management Measures; Highway Safety Improvement Program; Proposed Rule*, gives enough flexibility to the State DOTs and MPOs in establishing targets between the two that are either the same or complementary. There is flexibility included in the rulemaking that allows MPO's to adopt the state DOT targets, if so desired by the MPO. This is important since no State DOT will be exactly the same in working with their MPO partners to develop and establish performance targets. Thus, AASHTO encourages U.S. DOT to provide similar target setting methods in follow-on rules related to asset condition and system performance.

2. *The FHWA and FTA seek public comment on how regional planning coordination can be further improved in situations where multiple MPOs serve one or several adjacent urbanized areas.*

AASHTO suggests that U.S. DOT work with State DOTs and MPOs once the rules have been finalized to develop resource documents and best practice guides to support regional planning coordination as it relates to performance management implementation.

3. *The FHWA and FTA seek public comment on additional mechanisms that could be created to improve regional coordination in situations where there may be multiple MPOs serving a common urbanized area or adjacent urbanized areas.*

AASHTO suggests that U.S. DOT work with State DOTs and MPOs once the rules have been finalized to develop resource documents and best practice guides to support regional planning coordination as it relates to performance management implementation.

4. *FHWA and FTA seek comment on the following questions related to Section 450.310: MPO Designation and Redesignation related to public transportation representation on MPO boards:*
  - a) *Should the regulations clarify who appropriate “officials” may be?*
  - b) *Can staff members or other alternates be substituted for the “officials” identified in paragraph (d)(1)?*
  - c) *Can an official in paragraph (d)(1) serve in multiple capacities on the MPO board, e.g., can a local elected official or State official serve as a representative of a major mode of transportation?*
  - d) *Should the regulations provide more specificity on how each of the officials identified in paragraph (d)(1) should be represented on the MPO?*
  - e) *Should the regulations include more information about MPO structure and governance?*

The preamble of the NPRM discusses the makeup of MPOs that serve TMAs. AASHTO recognizes the importance of ensuring that MPOs are constituted in ways that ensure they are well equipped to tackle the challenges associated with the transportation planning responsibilities required of them. Since many MPOs are organized and operate under state law, and their makeup may be a carefully negotiated issue, any regulations that go beyond the specific requirements in law will restrict the ability of state and local policymakers to establish a governance structure that best suits their unique needs. AASHTO recommends that the regulations stick closely to the provisions in 23 USC 134 in order to ensure that MPOs have maximum flexibility in determining how they are constituted and how they operate. Any additional regulations on MPO structure or governance will likely have unintended adverse consequences.

5. *FHWA and FTA Seek Public Comments on the Information Collection Associated with these Proposed Rules Related to the Baseline Burden Analysis:*
  - a) *Whether the proposed collection is necessary for the DOT’s performance*
  - b) *The accuracy of the estimated burdens*
  - c) *Ways for DOT to enhance the quality, usefulness, and clarity of the collected information*

- d) *Ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information.*

AASHTO submitted a comment letter regarding burden associated with complying with the proposed rule. Please see *AASHTO Response to Notice of Request for Revision of a Currently Approved Information Collection* submitted to U.S. DOT on January 29, 2014. In that letter, AASHTO commented that the Estimated Annual Burden of 8017 hours documented in the Notice is too low. This estimate is equal to approximately three full time employees. In Michigan, they estimated that 8,000 person hours were used in one year on the long-range plan update let alone updating other documents and plans. In states such as Florida, one of their MPOs provided an estimate of 15,608 hours for their area, nearly double the estimate provided in the Notice. Moreover, the estimate did not include required interagency consultation and involvement of federally specified stakeholder groups—each of which takes considerable time.

Given there are wide variations in labor wage rates and overhead rates among state DOTs and MPOs AASHTO would encourage the cost burden analysis to be state and MPO specific. States that have a large percentage of roadways and transit facilities will require greater resources to carry out this effort. In New Jersey, the addition of over 600 formerly county and local lane miles to their National Highway Network is one example of the additional cost burden that NJDOT is faced with utilizing additional resources for data collection on. Given the additional cost expected we encourage FHWA/FTA to do a state specific analysis and provide additional funds to states and MPOs to carry out the requirements proposed in this NPRM.

## PROPOSED CHANGES TO TEXT

Section	Changes Recommended by AASHTO
450.104 Consideration	Consideration means that one or more parties takes into account the opinions, action, <del>consequences</del> , and relevant information....
450.104 Conformity	Conformity means a Clean Air Act (42 U.S.C. 7506(c)) requirement that ensures that Federal funding and approval are given to transportation plans, programs and projects that are consistent with the air quality goals established by a State Implementation Plan (SIP). Conformity, to the purpose of the SIP, means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS or any required interim emission reductions or other milestones in <del>any a nonattainment or maintenance</del> area. The transportation conformity regulations (40 CFR part 93, subpart A) sets forth policy, criteria, and procedures for demonstrating and assuring conformity of transportation activities.
450.206(c)(2)	Each State shall select and establish performance targets in coordination with the relevant MPOs to ensure consistency to the maximum extent practicable. The targets shall address the performance areas described in 23 U.S.C. 150(c), and the measures established under 23 CFR part 490, where applicable, to use in tracking progress toward attainment of critical outcomes for the State. States shall establish performance targets that reflect the measures identified in 23 U.S.C. 150(c) not later than 1 year after the effective date of the DOT final rule on performance measures. <del>Each State shall select and establish targets under this paragraph in accordance with the appropriate target setting framework established at 23 CFR part 490. Each State should select and establish performance targets in coordination with affected Federal Lands Management agencies, as appropriate.</del>
450.206(c)(3)	In <u>urbanized</u> areas not represented by an MPO, the selection of public transportation performance targets by a State shall be coordinated to the maximum extent practicable with providers of public transportation to ensure consistency with the performance targets that public transportation providers establish ....



Section	Changes Recommended by AASHTO
450.206(c)(4)	<del>(4) A State shall integrate into the statewide transportation planning process, directly or by reference, the goals, objectives, performance measures, and targets described in this section, in other State transportation plans and transportation processes, as well as any plans developed pursuant to chapter 53 of title 49 by providers of public transportation in areas not represented by an MPO required as part of a performance-based program. Examples of such plans and processes include the HSIP, SHSP, the National Highway System (NHS) Asset Management Plan, the State Freight Plan (if the State has one), the Transit Asset Management Plan, and the Public Transportation Agency Safety Plan.</del>
450.206(c)(5)	A State shall consider the performance measures and <u>the State's</u> targets <del>established under this paragraph</del> when developing policies, programs, and investment priorities reflected in the <u>long-range</u> statewide transportation plan and statewide transportation improvement program.
450.208(e)	<p><i>Delete this subsection or revise it to read as follows:</i></p> <p>In carrying out the statewide transportation planning process, States <u>may</u> apply asset management principles and techniques <del>consistent with the NHS Asset Management Plan and the Transit Asset Management Plan, and Public Transportation Agency Safety Plan</del> in establishing planning goals, defining STIP priorities, and assessing transportation investment decisions, including transportation system safety, operations, preservation, and maintenance.</p>

Section	Changes Recommended by AASHTO
450.208(g)	<p data-bbox="415 232 1094 264"><i>Delete current section and replace with the following</i></p> <p data-bbox="415 305 1822 375"><del>(g) A State shall integrate the goals, objectives, performance measures, and targets from the following into the statewide transportation planning process:</del></p> <p data-bbox="415 415 1934 485"><del>(1) NHS Asset Management Plan, as defined in 23 U.S.C. 119(e), and Transit Asset Management Plan, as discussed in 49 U.S.C. 5326;</del></p> <p data-bbox="415 488 1535 521"><del>(2) Applicable portions of the HSIP, including the SHSP, as specified in 23 U.S.C. 148;</del></p> <p data-bbox="415 524 1283 557"><del>(3) Public Transportation Agency Safety Plan in 49 U.S.C. 5329(b);</del></p> <p data-bbox="415 560 451 592"><del>15</del></p> <p data-bbox="415 596 1654 628"><del>(4) Other safety and security planning and review processes, plans, and programs, as appropriate;</del></p> <p data-bbox="415 631 1268 664"><del>(5) The State Freight Plan, if the State chooses to develop one; and</del></p> <p data-bbox="415 667 1875 699"><del>(6) Other State transportation plans and transportation processes required as part of a performance-based program.</del></p> <p data-bbox="415 740 1913 959"><u>(g) 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.XXX<sup>3</sup>; any plans developed pursuant to 23 USC and 49 USC Chapter 53<sup>4</sup> 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.</u></p>

<sup>3</sup> This should refer to the three National-Level Performance Measure rules being developed by U.S. DOT that will be labeled as 23 CFR 490.

<sup>4</sup> This is referring to the forthcoming rules being developed by FTA for transit agencies related to the National Safety Plan, Agency Safety Plan, and Transit Asset Management Plan.

Section	Changes Recommended by AASHTO
450.210(a)	<p><i>Add the following new provision:</i></p> <p><u>(a) In carrying out the statewide transportation planning process, including development of the long-range statewide transportation plan and the STIP, the State shall develop and use a documented public involvement process that provides opportunities for public review and comment at key decision points.</u></p> <p>(1) The State's public involvement process at a minimum shall . . .</p> <p>(2) The State shall provide for public comment . . .</p> <p><u>(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.</u></p>
450.214(a)(2)	<p>(2) Contents. The programmatic mitigation plan may include, <u>but not be limited to:</u></p> <p>(i) An assessment of the existing condition of natural and human environmental resources within the area covered by the plan, including an assessment of historic and recent trends and/or any potential threats to those resources;</p> <p>(ii) An identification of economic, social, and natural and human environmental resources within the geographic area that may be impacted and considered for mitigation. Examples of these resources include wetlands, streams, rivers, stormwater, parklands, cultural resources, historic resources, farmlands, <u>archeological resources</u>, <del>and</del> threatened or endangered species, <u>and</u> critical habitat. This may include the identification of areas of high conservation concern or value, and thus worthy of avoidance;</p> <p>(iii) An inventory of existing or planned environmental resource banks for the impacted resource categories such as wetland, stream, <u>stormwater</u>, habitat, species, and an inventory of federally, State, or locally approved in-lieu-of-fee programs;</p> <p>(iv) An assessment of potential opportunities . . .</p>
450.214(b)	<p>If a State chooses to develop a programmatic mitigation plan then it <del>shall</del> <u>may</u> be developed as part of the statewide transportation planning process,...</p>
450.214(e)	<p>Nothing in this section limits the use of programmatic approaches for reviews under NEPA <u>or the development of programmatic mitigation plans under existing authorities.</u></p>
450.216(d)	<p>The <del>long-range</del> statewide transportation <del>plan</del> <u>planning process, directly or by reference</u>, should integrate the priorities, goals, countermeasures, strategies, or projects contained in the HSIP, including the SHSP, required under 23 U.S.C. 148, the Public Transportation Agency Safety Plan required under 49 U.S.C. 5329(d), or an Interim Agency Safety Plan in accordance with 49 CFR part 659, as in effect until completion of the Public Transportation Agency Safety Plan.</p>

Section	Changes Recommended by AASHTO
450.216(k)	A long-range statewide transportation plan shall include a discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the long-range statewide transportation plan. The discussion may focus on policies, programs, or strategies, rather than at the project level. The State shall develop the discussion in consultation with <u>applicable</u> Federal, State, regional, local and Tribal land management, wildlife, and regulatory agencies. The State may establish reasonable timeframes for performing this consultation.
450.216(n)	<del>The long-range statewide transportation plan should be informed by the financial plan and investment strategies from the State asset management plan for the NHS (as defined in 23 U.S.C. 119(e)) and investment priorities of the public transit asset management plan(s) (as discussed in 49 U.S.C. 5326).</del>
450.218(l)	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. <del>Revenue and cost estimates for the STIP must use an inflation rate to reflect “45 expenditure dollars,” based on reasonable financial principles and information, developed cooperatively by the State, MPOs, and public transportation operators. 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.</del>
450.218(o)	<i>Delete this subsection.</i>  <del>The STIP should be informed by the financial plan and the investment strategies from the State asset management plan for the NHS (as defined in 23 U.S.C. 119(e)) and by the public transit asset management plan(s) (as discussed in 49 U.S.C. 5326).</del>

Section	Changes Recommended by AASHTO
450.218(r)	(r) A STIP shall include, to the maximum extent practicable, a discussion of the anticipated effect of the STIP toward achieving the <u>State's Federally-required</u> performance targets <del>identified by the State in the statewide transportation plan or other state performance based plan(s)</del> , linking investment priorities to those performance targets. This discussion <del>does not require a state to include additional information on individual projects or to link individual projects with specific performance measures. should be consistent with the strategies to achieve targets presented in the statewide transportation plan and other performance management plans such as the highway and transit asset management plans, the SHSP, the public transportation agency safety plan, the Congestion Mitigation and Air Quality Improvement Program (CMAQ) performance plan, and if one exists, the State freight plan.</del>
450.222(c)	In nonmetropolitan areas, with the exclusion of specific projects as described in this section, the State shall select projects from the approved STIP in cooperation with the affected nonmetropolitan local officials, or if applicable, through RTPOs described in § 450.210(e). The State shall select transportation projects undertaken on the NHS, under the Bridge and Interstate Maintenance programs in title 23 U.S.C. and under sections 5310 and 5311 of title 49 U.S.C. Chapter 53 from the approved STIP in consultation with the affected nonmetropolitan local officials <del>with responsibility for transportation.</del>
450.226(e)	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 <del>meets the performance based planning requirements in this part and in such a rule substantially meets the requirements in this part and is consistent with such a rule.</del>
450.226(f)	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 <del>it has developed according to the performance based provisions and requirements of this part and in such a rule is</del> <u>substantially in accord with the requirements of this part and is consistent with such a rule.</u>

Section	Changes Recommended by AASHTO
450.314(a)	<p>The MPO, the State(s), and the providers of public transportation shall cooperatively determine their mutual responsibilities in carrying out the metropolitan transportation planning process. These responsibilities shall be clearly identified in written agreements among the MPO, the State(s), and the providers of public transportation serving the MPA. To the extent possible, a single agreement between all responsible parties should be developed. The written agreement(s) shall include specific provisions for cooperatively developing and sharing information related to <del>transportation systems performance data, the selection of performance targets, the reporting of performance targets, the reporting of system performance to be used in tracking progress toward attainment of critical outcomes for the region of the MPO (see § 450.306(d)), the collection of data for the asset management plans for the NHS,</del> the development of <del>financial plans that support</del> the metropolitan transportation plan (see § 450.324) and the <del>metropolitan</del> TIP (see § 450.326), and development of the annual listing of obligated projects (see § 450.334). <u>The written agreements may also include provisions for cooperatively developing and sharing information related to transportation systems performance data, the selection of performance targets, the reporting of performance targets, the reporting of system performance to be used in tracking progress toward attainment of critical outcomes for the region of the MPO (see § 450.306(d)), and the collection of data for the asset management plans for the NHS.</u></p>
450.314(b)	<p><i>Delete this subsection.</i></p> <p><del>The MPO, the State(s), and the providers of public transportation should periodically review and update the agreement, as appropriate, to reflect effective changes.</del></p>
450.320(b)	<p>If an MPO chooses to develop a programmatic mitigation plan then it <del>shall</del> <u>may</u> be developed as part of the metropolitan transportation planning process,...</p>