

Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota and Wyoming
to the
National Highway Traffic Safety Administration
in
Docket No. NHTSA-2022-0036
Uniform Procedures for State Highway Safety Grant Programs;
Notice of Proposed Rulemaking and Request for Comments
October 25, 2022

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming (“we” or “our”) respectfully take this opportunity to comment on the Notice of Proposed Rulemaking published by the National Highway Traffic Safety Administration (NHTSA) at 87 Federal Register 56756 *et seq.* (September 15, 2022) (“NPRM”).¹

The recently enacted Infrastructure Investment and Jobs Act, Public Law No. 117-58, often referred to as the Bipartisan Infrastructure Law (BIL), includes provisions modifying programs of grants to States for highway safety programs that are administered by NHTSA. In the NPRM, NHTSA has proposed revisions to its rules governing those safety grant programs to achieve consistency with the BIL and for other purposes. To facilitate a smooth transition to the revised rules, NHTSA has proposed that the changes take effect with FY 2024 and that current rules govern the program through FY 2023.

At the outset, the transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming emphasize their unwavering commitment to working to improve transportation safety and reduce fatal and other crashes. Improving highway safety throughout our States is a vitally important consideration for us in all aspects of our programs, not only in NHTSA-administered safety specific programs.

Our States are members of the Governors Highway Safety Association (GHSA). GHSA has emphasized that NHTSA implementation of the BIL should not impose on States requirements not supported by statute. We appreciate those and similar GHSA efforts and comments that would provide States with increased flexibility to direct funds and take other actions to address the highway safety issues in their respective States, without excessive administrative requirements.

We set forth below both thematic comments, that NHTSA should take into account with respect to all provisions of the proposed rule, as well as some specific comments. Some of the thematic comments closely track points we made in May 2022, in response to NHTSA’s Advance Notice of Proposed Rulemaking (ANPRM) in this docket – but they are still applicable.

¹ These comments are also supported by the South Dakota Department of Public Safety.

Comments of Broad Applicability to the Proposed Rule

Limit Administrative Requirements to Enhance Highway Safety

A successful State program implementing the NHTSA State safety grant programs will have senior management focused on identifying the most important opportunities to improve highway safety in the State and determining how to maximize those opportunities through project or program investments or other action.

Dollars, including personnel time and costs, dedicated to administration or application forms are dollars not available for investment in actual projects and programs that provide safety benefits. So, we see the addition of administrative requirements to requirements clearly called for by statute as not just adding direct costs, but as also imposing opportunity costs, steering the time and effort of State staff away from more direct efforts to improve safety. Accordingly, we respectfully ask NHTSA, as it works to finalize the proposed rule in this docket, to review provisions closely and make a strong effort to eliminate burdensome requirements. This is especially true for minimum apportionment States that have limited staff and other resources to implement the considerable proposed additional administrative requirements.

NHTSA Should Interpret and Administer Provisions to Provide States with Increased Flexibility to Address Highway Safety Issues in Their Respective States

In addition to not imposing requirements not specifically called for by statute, NHTSA can increase State effectiveness in enhancing highway safety by interpreting and implementing statutory provisions so as to increase State flexibility.

Don't Assume Additional Performance Measures Would Have Positive Impact

We believe that any additional performance measures by NHTSA for the highway safety grant programs must be able to cross over an extremely high bar. Currently, we would oppose new performance measures. Importantly, the current set of measures has been sufficient to enable NHTSA to gather data on key safety issues. Further, a State is free to supplement Federal performance measures with performance measures of its own choosing.

Thus, we appreciate that NHTSA advised in the NPRM that it does not plan to impose new performance measures on its safety grant programs before the submission date for the 2027 triennial HSP submission deadline. We are concerned, however, that NHTSA also advised that it intends to begin to explore developing an "update" to current performance measures to be effectuated for 2027 triennial plans. See NPRM at 56769.

As noted at the outset, what is important is to minimize administrative burdens so that State safety program leaders can focus more fully on delivering effective solutions to safety problems and help reduce fatalities, injuries and property damage from crashes. An "update" of performance measures could well involve different, additional measures, or modifying current performance measures by dividing them into two or more measures, or something else new or different.

Such changes would add administrative burdens for States in the safety grant programs. A decision to add a new performance measure, including by modifying or “updating” one, triggers many steps: planning as part of the triennial plan is to take performance measures into account; implementation steps for the annual plan, including apparently the development of countermeasures; and public engagement. So, any new performance measure would trigger ongoing administrative and program implementation work on many fronts.

We don’t see why NHTSA would assume that additional and/or different measures and all the resulting related work for the States would improve highway safety more than the alternative of allowing the safety professionals in each State to work equally hard on implementing current measures and requirements and developing State performance measures that they consider appropriate.

For such reasons, we do not assume that an “update” of performance measures is an answer to improved highway safety. But we do have confidence that any such update likely means a more complex NHTSA safety grant program, with State managers having less time to undertake genuine strategic thinking and focused implementation efforts as they pick up additional administrative burdens. NHTSA’s discussion at 87 Federal Register 56769 of the NPRM makes clear that NHTSA has decided it will consider performance measure updates, but we urge NHTSA not to go into such review believing in advance that the route to safety improvement is more performance measures and the associated increase in program complexity. Already, in administering highway safety programs, States are being asked to achieve with respect to performance measures over which they have little or no control.

More Specific Comments

Scope of Public Engagement Requirements Must Not Extend to Day-to-Day Management

We agree that it is important for States in the safety grant programs to engage with the public, especially in developing the triennial plan.

But the wording of the proposed rule goes far beyond requiring public engagement in the development of the triennial plan.

NHTSA explains in the NPRM that public engagement under the proposal includes “public participation and engagement activities throughout the three years covered by the triennial HSP” See NPRM at 56764 and at proposed 23 CFR 1300.11(b)(2)(iii), NPRM at 56798. There is no limit in that statement. This seems to imply involvement in management decisions implementing the three-year plan and in the annual application relating to projects. As worded it could be construed as reaching minor reprogramming, for example. That would be counterproductive regulatory overreach.

Accordingly, we would delete proposed 23 CFR 1300.11(b)(2)(iii) as overbroad, or at least revise it by adding words of limitation. The final rule should be clear that the public engagement

requirements apply only to the triennial plan and, if NHTSA insists on broader reach, the public engagement requirement should be limited to the triennial plan and the annual application.

Congress Deleted Maintenance of Effort Requirements from NHTSA's Safety Grant Programs; NHTSA Must Continue to Follow Through and Delete any such Requirements from its Rules and Guidance

A very positive aspect of the BIL was revision of 23 USC 405(a) to delete the requirement that, as part of a grant application, a State makes a certification that it is maintaining at least past expenditure levels on safety programs. This required keeping track of past expenditures. More importantly, to some extent, this discouraged a State from making any one-time safety investments (because of the implication that any one-time increase could not be for one time but would have to be maintained). It also, to some extent, hindered the ability of a State to shift funds to new or increasingly important State highway safety priorities because of concern that it had to maintain prior expenditure levels in programs.

Accordingly, revised rules (or guidance) implementing the NHTSA State safety grant programs for FY 2024 and later years should delete references to maintenance of effort requirements. NHTSA has correctly proposed to do this in the NPRM and should follow through with this approach in the final rule in this docket. See NPRM at 56777.

Continue Provision for Transfer of Unused Section 405 Funds to Section 402

As we also commented in response to the ANPRM, we consider it positive that current rules reflect the provision in the FAST Act under which certain funds not awarded by NHTSA under other programs (basically, section 405 programs) are transferred to the section 402 program for distribution to the States using the formula applicable to section 402 funds. See 23 CFR 1300.20(e)(3). This approach was continued in the BIL and NHTSA is correct to propose to continue this approach in the proposed rule. See NPRM at 56777. On this point NHTSA should follow through and include this aspect of the proposed rule in the text of the final rule.

Conclusion

In closing, we emphasize again our strong commitment to safety. NHTSA should strive to limit administrative, process and paperwork requirements for States to those clearly called for by statute. This approach, and more flexible, less prescriptive interpretations of provisions, would increase a State's ability to address highway safety problems of greatest importance within that State. It also would free up resources for investment in safety projects and programs, thereby further enhancing safety.

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming thank NHTSA for its consideration and urge that further actions regarding the subject matter of this docket be in accord with our recommendations.
