

Statement of the Transportation Departments of
Wyoming, Idaho, Montana, North Dakota, and South Dakota
before the
Committee on Environment and Public Works, United States Senate
presented by
William T. Panos,
Director, Wyoming Department of Transportation
regarding
Streamlining Regulatory Processes and Project Delivery
May 3, 2017

Chairman Barrasso, Ranking Member Carper, and Members of the Committee:

I am Bill Panos, Director and Chief Executive Officer of the Wyoming Department of Transportation. I appear today to present a statement on behalf of my own department and also for the transportation departments of Idaho, Montana, North Dakota, and South Dakota.

I commend the Committee for holding this hearing on streamlining regulatory processes and increasing the efficiency of project delivery.

As we meet today, the President has put improving the nation's infrastructure on the policy agenda, and there is wide interest in Congress in providing funding for infrastructure.

Yet, the level of funds available to invest is only part of the equation in the effort to deliver the best possible transportation program to the public. It is also important for the transportation program to deliver as much benefit as possible with each dollar.

That brings us to the question we will address today:

Can we reform Federal requirements so that State DOTs and others can put transportation dollars to work more effectively and efficiently – while protecting the environment and other public interests?

The answer is “yes.” We can and we should, in at least two ways.

First, I'll touch on opportunities for improvement in the project review and delivery process.

Second, I'll note other opportunities to reduce regulation. Unneeded regulation adversely impacts a State DOT's ability to deliver its program, as management effort is significantly redirected from executing projects and programs to achieving regulatory compliance.

Let me turn to specifics.

Expediting the Review Process for Projects Large and Small

Larger Projects. There has been some progress over time in improving the environmental review process for projects. Today, for projects for which an Environmental Impact Statement (EIS) is prepared, under 23 USC 139 the lead agency establishes a plan for review of projects including a schedule. Similarly, under 23 USC 139 and 168, Congress has established the concept of developing a single EIS for a project even if multiple agencies have a decision making role in the project.

A schedule proposed by the lead agency (usually USDOT), however, is subject to concurrence from every other agency that has a meaningful role in the project. This should be changed. Other agencies should be consulted on the schedule but not provided with concurrence authority. Today, with virtually every player at the table having control over the schedule, the dynamics simply push the schedule out. It's easy for agencies to obtain a longer time period for review by not concurring in the lead agency's schedule. Congress should assume that the lead agency will give fair consideration to the concerns of other agencies in setting a schedule, and will consider past timelines and other factors. That is a basis for letting the lead agency set the schedule.

Some may say we can't risk letting the lead agency set a schedule that another agency considers too prompt. I'd first respond that is a hypothetical problem. In addition, the other agency can be given a right to appeal to the Executive Office of the President. On such appeal the agencies are on equal footing. But, today, a non-lead agency is able to lengthen the schedule simply by not concurring in the lead agency's proposed schedule. Nobody is personally at fault. But the incentives in the system need to be changed in favor of promptness, as determined by the lead agency after consultation with the other agencies, combined with providing the other agencies the ability to appeal the schedule.

In addition, the highway program has important value to the economy, to economic growth, to jobs, and to the quality of life. It warrants efforts to improve the review process, as suggested here.

Let me add that the length of the review process can impact project selection by a State. If a project is not classified as a "categorical exclusion" (CATEX) project within the meaning of the National Environmental Policy Act (NEPA), it may be pushed back in project prioritization, in favor of projects that can be completed more promptly and less expensively. So, prompt but fair review schedules are important to advancing significant projects.

Further, a more definite schedule for completing the environmental review process does not resolve any substantive disputes that may arise between agencies. 23 USC 139 also includes dispute resolution provisions. The dispute resolution provisions may also need reform. But, at a minimum, empowering the lead agency to set schedules for environmental reviews should bring any disputes to light sooner.

Smaller Projects. Let me turn now to smaller projects. There has been considerable progress in the review process for smaller and routine projects.

To some extent the increase in the percentage of highway projects receiving CATEX treatment results from the increasing emphasis given to preservation-type projects within State DOT budgets. That has been the case in Wyoming where, in recent years, nearly all projects have been CATEX under NEPA.

Congress has also contributed to this favorable trend, having passed provisions designating additional types of projects as CATEX projects. A noteworthy example is the commendable legislation designating projects with a Federal contribution of less than \$5 million as CATEX, and the subsequent decision to index that amount to inflation (measured by the Consumer Price Index), a refinement that we advocated. These modifications have increased the ability of the Wyoming DOT and other State DOTs to use funds more promptly and efficiently.

We would welcome further additions to the classes of projects receiving CATEX treatment.

But smaller projects, even those to be undertaken entirely within a highway's existing operational right-of-way, can still be delayed by other requirements, as State DOTs wait for permits or for jurisdictional determinations from other agencies as to whether there is even any issue for those other agencies to review. This is a distinct problem for smaller projects because the multi-agency coordination mechanisms of 23 USC 139 are not intended to address smaller or CATEX projects. A coordination process for smaller projects could complicate rather than streamline the review of such projects.

More particularly, consider when a State DOT has to wait for months for a determination that, for a project within an existing operational right-of-way, no 404 permits are needed. This is frustrating for a State, as it is frequently the case that there is no water in the project area except for any contained in man-made roadside ditches that drain a highway for safety purposes. We suggest that, for carefully circumscribed projects, such as those within the right-of-way and not for new travel lanes, some kind of time limit on other agencies to respond is appropriate. After that time period, the State should be free to proceed as to the requirement in question, for that specific case. Frankly, the resource agency would then be free to focus its time and energy on other matters.

Delegation of Review Authority is of Limited Value to Many Rural States. As to the project review process, let me acknowledge that one response to the (lack of) speed of the environmental review process has been to allow USDOT to delegate or assign certain review authorities to States. We think that can make sense, particularly for States with relatively high volumes of projects warranting environmental assessment (EA) or EIS level review. But our rural States have low volumes of such projects. State DOT responsibility for undertaking environmental review of complex projects under Federal law is an added layer of work, effort, stress, and cost for intermittent use. So, while we support other States in their efforts to obtain delegated authority, our focus is on expediting and simplifying the process itself, not on who undertakes it.

Concerns with Other Requirements

Let us turn now to concerns with other USDOT requirements or proposed requirements.

Don't Subject Rural States to Rules Inspired By the Problems of Heavily Populated States

One concern that we have is that rules sometimes are not merely burdensome, but maddeningly subject rural States to requirements intended to help address traffic congestion in America's largest metropolitan areas.

This over inclusive approach is one of the reasons we are pleased that the effective date of the performance management rules that were published in the Federal Register this January 18 have been delayed. Aspects of those rules were burdensome and complex. Hopefully, they will be withdrawn and different rules proposed.

Let me elaborate.

Our States are rural, without a high population metropolitan area. Yet, in the NPRM for the system performance and congestion management rule, where FHWA described the "Purpose of the Regulatory Action," the first purpose identified was "Congestion Reduction." See 81 Federal Register at 23807.

Our States do not experience anything remotely resembling the congestion in large metropolitan areas. To the extent that the rule in that docket published on January 18 would subject us (and rural areas in other States) to requirements intended to help address congestion, no problem is solved. Instead, the rule would impose direct data-related costs and require management and staff time to address regulatory compliance. It will, therefore, detract from the ability of State DOT officials to address safety and other important transportation issues and needs.

Under the rule as published in January, States must use FHWA's National Performance Management Research Data Set (NPMRDS) in a way that effectively requires States to develop computerized applications and report on millions of data points, principally to identify areas where traffic is congested. Adding such requirements to the already heavy workload of State DOTs is not appropriate with respect to rural States like Wyoming. Yet the proposal would require States, including very rural States, to report on traffic on all NHS routes. It would have us report to FHWA how many vehicles were on the road halfway between Cody and Casper at 10 o'clock on a Monday morning, for example. This information is not needed to combat congestion, and every dollar used to obtain the data and implement the rule would be unavailable for use elsewhere.

Accordingly, large portions of that final rule as published on January 18 should not apply to rural States, and even to rural areas in more populated States. Those rural roads are not congested and have reliable travel times. They are not generating significant emissions. For a rural State, a simple State certification that its roads are not significantly congested except in unusual circumstances (e.g., road blocked by a crash or landslide) will more than suffice. FHWA should not force States to collect, administer, or report on huge amounts of data to confirm what is already known – that roads in rural States are not generally congested and not generating significant emissions of any kind.

If any such requirements are imposed on a rural State, they would divert management and staff

time and focus, and other costs, to regulatory compliance and away from real work, including efforts to promptly deliver the best possible transportation program to the State. Accordingly, if further developments in the regulatory process do not free a State like Wyoming from such requirements, clarifying legislation should.

Burdensome regulations can impact heavily populated States and areas as well. Congress has correctly acted swiftly to nullify complicating changes in metropolitan planning rules that were published in December. The regulatory burdens facing rural States may differ but they, too, warrant prompt corrective action.

Subject Stewardship “Agreements” to Notice and Comment Rulemaking and Reduce the Burden They Impose on States

Another area of concern is the “Stewardship and Oversight” agreements between FHWA and State DOTs. These “agreements” initially were brief, but now routinely exceed 50 single-spaced pages per State.

While some State-specific material is included in a State’s stewardship and oversight agreement with FHWA, most text in these documents consists of standardized clauses. And the number of clauses periodically expands – far beyond the subject matter of 23 USC 106(c), the provision that gave rise to these agreements. Under 23 USC 106(c) a State is able to “assume the responsibilities of the Secretary under this title for design, plans, specifications, estimates, contract awards, and inspections with respect to the projects.”

Yet, as the American Association of State Highway and Transportation Officials (AASHTO) has noted, the stewardship and oversight agreements require advance notice of or approval of changes in many kinds of State DOT policies and practices. This includes those for which the State supposedly assumed the responsibilities of the Secretary, such as for: the State’s standard specifications; pavement design policy; value engineering policy; quality assurance programs; and other matters. Statute does not require such advance notice or approval of such State decisions. As noted, the statute actually calls for the State to assume the Secretary’s responsibility in many of these areas. But, in practice, the “assumption” is subject to periodic approvals as to many matters. This is not what most people think of as an assumption of a responsibility. Nor is it straightforward oversight of how a State exercises assumed responsibility. Yet, States have no real choice other than to accept those terms. We’re not saying that the individual provisions in these “agreements” are crushingly burdensome, but they are burdensome and not specifically required by statute.

The Federal highway program is a “federally assisted State program.” See 23 USC 145. We are not saying that there should be no strings attached to Federal assistance, or that States are not subject to FHWA oversight to ensure compliance with Federal highway statutes. But creation of obligations to obtain approvals for actions is not mere oversight. It is below the radar regulation. To the extent that such requirements in these agreements are really needed, they should be established by rule that survives the rigors and scrutiny of the rulemaking process. Otherwise, States should have more flexibility, subject to FHWA oversight.

Further, State DOTs are public sector entities, serving the public interest, and subject to public review within the State. We suggest that USDOT/FHWA be more trusting of State DOTs and reduce the burdens it imposes on them.

We suggest that USDOT be required to minimize the number of standard clauses in a stewardship agreement, and publish a revised draft agreement for notice and comment. That notice should be required to include justification for any proposed requirements for advance notification or approval of State policies not specifically called for by statute, or for any other requirements not specified by statute. The provisions that survive the comment process and that are adopted in final rule would supersede the current agreements, with allowance made for any appropriate State-specific adjustments that are mutually agreed.

Waiver Authority Should Be Built into USDOT Rules

USDOT sometimes adopts significant and complex rules that do not include provision for waivers, such as for good cause shown. There are narrow waiver provisions scattered throughout titles 23 and 49 of the U.S. Code, but no general waiver provision for what happens when highway program rules encounter, for example, unusual or unforeseen circumstances. We suggest that a waiver provision be added to title 23 as to highway program regulatory requirements developed by USDOT (i.e., requirements beyond any mere repetition of statutory provisions in the rules). This is different than a waiver from statutory requirements. Such a provision for waivers from regulatory requirements would enable FHWA to grant extensions or other relief to States and MPOs from its own rules. It could also facilitate innovation and development of streamlined or simplified processes as alternates to provisions in rules. Further, we suggest that any denial of a waiver request be accompanied by a written explanation of the reasons for the agency action.

Planning and Flexibility Issues

For a project to be subject to the environmental review process, it must first emerge from the planning process. That is a very complex process that needs no more requirements. This does not mean that new planning approaches should not be tried, but any additions to current planning requirements should be voluntary, not mandatory.

Similarly, it is important that any legislation maintain or increase flexibility available to States under the current highway program. This is not just a question of maintaining current flexibility across programs but, in some cases, a matter of improving flexibility within programs. For example, more flexibility to designate additional mileage as urban or rural connectors would enhance flexibility in the use of freight program funds.

If new legislation provides additional funding for highway and other infrastructure, the success of that initiative can be better assured if States have flexibility in putting the funds to work.

The prospect of additional funds is also a compelling reason for streamlining and regulatory reduction. One wants to move the additional projects associated with the additional funding through the system responsibly, but promptly.

Help Improve USDOT's Performance

To assist the Congress and the public in understanding USDOT's stewardship of its program activities, Congress could require some new reporting by USDOT. We recognize that USDOT already submits a number of important reports on such topics as the condition and performance of highway and transit systems and highway fatalities, but some others could be useful.

They could include annual reports such as the following:

For all projects under Chapter 1 of title 23 for which a Record of Decision was issued for an EIS, the average amount of time between issuance of the ROD and publication in the Federal Register of the notice of intent to prepare an EIS. USDOT also could be invited to set a target for that average time period for future years.

A list of all regulatory requirements imposed on States or local governments or the public pursuant to the Federal highway program, whether in the Code of Federal Regulations or otherwise, removed or reduced, and the estimated value of those reductions.

A list of all regulatory requirements newly imposed on States or local governments or the public pursuant to the Federal highway program, whether in the Code of Federal Regulations or otherwise, and the estimated additional costs of such new requirements.

A list of any categorical exclusions added to or deleted from 23 CFR 771.117.

This is not a long or complicated list, but the point is that, of all the data and reports and decisions generated by USDOT regarding the highway program, some of them should be concerned with reductions in burdens imposed on State DOTs and others. We think it would be useful for that perspective to receive increased attention and reporting by USDOT.

Additional Streamlining and Regulatory Reforms

In our statement today we have recommended action on several ideas for streamlining and reduced regulation while protecting the environment and other public interests. But there are other ideas for streamlining and regulatory reform that do not conflict with ours. Other States have ideas. The private sector has ideas. Trade associations, including the association to which we belong (AASHTO), have continued to work on areas for regulatory reform and streamlining. So, there are additional ideas for reform for the Committee to consider.

A Few Words on Infrastructure Investment

Before closing, let us add a few comments on infrastructure investment. We have made some of these points in previous testimony, but they deserve further mention.

Significant Federal Transportation Investment in Rural States Benefits the Nation.

The entire nation, including residents of major metropolitan areas, is well served by Federal investment that improves surface transportation infrastructure in and across rural States like ours. Among other benefits, Federal-aid highways in our rural States enable:

- truck movements between the West Coast and the large cities of the Midwest and East, benefitting people and commerce in the big metropolitan areas at both ends of the journey;
- agricultural, energy, and natural resource products, which largely originate in rural areas, to move to national and world markets;
- tourists to visit scenic wonders like Yellowstone National Park and Mount Rushmore; and
- movement of military personnel and equipment.

Rural States face funding challenges.

Yet, our States face significant transportation infrastructure funding challenges. We can't provide all these benefits to the nation and ensure a sufficiently connected national system without Federal investment. We –

- are geographically large;
- often include vast tracts of Federal lands (that cannot be taxed or developed);
- have extensive highway networks; and
- have low population densities.

This means that we have very few people to support each lane mile of Federal-aid highway – and preserving and maintaining this aging, nationally connected system is expensive. Yet, citizens from our States contribute to this effort significantly. Nationally, the per capita contribution to the Highway Account of the Highway Trust fund is approximately \$111.45. The per capita contribution to the Highway Account attributable to rural States is much higher. In Wyoming it is much, much higher – \$319.87.

Public Private Partnerships (P3s) and other approaches to infrastructure investment that depend on a positive revenue stream from a project are not a surface transportation infrastructure solution for rural States. The relatively low traffic volumes on projects in rural States are not suitable for tolls, even if one wanted to impose them. Put another way, projects in rural areas are unlikely to generate revenues that will attract investors for bonds or other instruments to finance those projects – even if the revenues are supplemented by tax credits for investors. So, an infrastructure initiative comprised of funding that supports P3s would not be enough to make a difference in surface transportation infrastructure in rural States. Other funding approaches must be part of any national infrastructure initiative for rural States to be able to participate substantially in the initiative, particularly as to surface transportation infrastructure.

Using the current predominantly formula-based FAST Act approach to distribution would ensure that both rural and urban States participate in the initiative. It also would help push the benefits of any new infrastructure initiative out to the public promptly.

AASHTO made similar points in its April 5 statement before the House Transportation and Infrastructure Committee presented by the CEO of the Oklahoma DOT (page 9):

Based on the Federal surface transportation program’s long track record of efficiency and flexibility, we recommend that any increase in federal funds should flow through the existing FAST Act formula-based program structure rather than through untested new approaches that will require more time and oversight. Any effort that does not rely on the existing federal surface transportation program, such as an approach that chooses only certain projects based on a priority list, would leave most of the country behind no matter the size of such a list. In addition, I believe this type of a top-down approach from Washington will not only undermine the state and local prerogatives honored in the FAST Act, but also impede timely and successful delivery of the new infrastructure package.

Conclusion

In conclusion, we have offered today various ideas for streamlining regulatory processes while continuing to protect public interests. We hope that Congress will take favorable action on those proposals.

That concludes our statement. I’ll be pleased to respond to questions at the appropriate time, though, to the extent the responses go beyond the positions we have addressed in the written statement, I am able to respond only for my own department.

We (the transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming) thank the Committee for its consideration of our views and suggestions and for the opportunity to present testimony today.
