



**The Institute for Behavior and Health, Inc.  
Comments Regarding the National Highway Traffic Safety Administration  
2010-2015 Long Range Strategic Planning**

Docket No. NHTSA-2009-0171

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## **Introduction**

On November 5, 2009, the United States Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) published a notice and request for comment regarding the agency's 2010-2015 strategic planning. In the notice, NHTSA posed several questions that bear comment. This document constitutes the response of the Institute for Behavior and Health Inc. (IBH), and its associates.

Established in 1978, IBH is a 501(c)3 non-profit organization. Its mission is to identify and promote effective new strategies to reduce the demand for illegal drugs.

## **Background**

In 1980, a small group started a social movement that changed the way Americas viewed drunk driving when they founded Mothers Against Drunk Driving (MADD). Today, as the result of these brilliant and tireless efforts, the vast majority of Americans appreciate the dangers of alcohol impaired driving. MADD's name recognition rivals that of McDonald's. Federal and state legislatures have passed hundreds of laws to reduce drunk driving and spent billions on enforcement and public education. As a result, the number of people killed in alcohol related crashes has fallen approximately 40%. Unfortunately, public education on driving under the influence of illegal drugs, or drugged driving, has lagged considerably. Many people are unaware of this threat to highway safety, despite the increased occurrence of drugged driving, even as drunk driving has declined. Not surprisingly, today more people test positive for drugs (or their metabolites) than for alcohol.<sup>i</sup>

In 2005 the U.S. Department of Transportation Federal Highway Administration's Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy of Users (SAFETEA-LU) was enacted as Public Law 109-59.<sup>ii</sup> This important piece of legislation called for the Secretary

of Transportation to coordinate with other federal agencies to address the problem of drugged driving and conduct research on prevention, detection, and prosecution of drugged driving. In addition, the Secretary was required to submit a report on impaired driving to Congress and to develop a model statute for States relating to drugged driving.

In 2007, NHTSA contracted with the Pacific Institute of Research and Evaluation (PIRE) to conduct the National Roadside Survey (NRS) of alcohol and drug use. The survey was the fourth in a series, but the first to address drugs and driving. Researchers identified recent drug use by drivers by testing oral fluids (saliva) and blood. Over 16% of drivers tested positive for drugs. By way of comparison, only 2.2% of drivers had blood alcohol concentrations at or above the illegal 0.08 limit, down from 7.5% in 1973.<sup>iii</sup>

Since 1988, the 12 million commercial drivers in the United States have been subject to the *per se* standard for drugged driving, for which a positive test for any illegal drug use is a violation. This same standard has been adopted widely for underage alcohol consumption where any positive alcohol test result is a violation. This standard which is applied to commercial drivers, airline pilots, school bus drivers and others engaged in safety-sensitive activities should be adopted for all drivers. It is difficult to imagine any activity more related to public safety than driving a motor vehicle on the nation's roads and highways.

To quantify the national impact of drugged driving, standard drug testing protocols for illegal drug use are needed similar to those for alcohol for drivers involved in fatal crashes. While more data is needed, the few available studies demonstrate that drugged driving is a major highway safety threat. In Maryland, for example, researchers examined the prevalence of recent drug use among drivers involved in motor vehicle crashes who were admitted to the University of Maryland Shock Trauma Center during a 90 day period. They found that while 30.5% of the drivers tested positive for alcohol and 50.9% tested positive for other drugs.<sup>iv</sup> In Washington State, toxicologists examined blood and serum specimens from 370 fatally injured drivers from car crashes occurring between February 1, 2001 and January 31, 2002. They found that 42% of the drivers tested positive for alcohol and that 35% tested positive for other drugs.<sup>v</sup> While these studies showed a substantial overlap of drivers who tested positive for both illegal drugs and for alcohol, they also showed many drivers who tested positive for alcohol alone and for illegal drugs alone underlining the importance of testing all impaired drivers for both alcohol and illegal drugs.

There is no absolute right to drive.<sup>vi</sup> People who risk their own lives and the lives of others by driving under the influence of drugs should not be on our roadways. We are encouraged by recent progress by NHTSA and the White House Office of National Drug Control Policy (ONDCP), law enforcement and others to ameliorate the drugged driving problem. We urge NHTSA to partner with agencies such as the National Institute on Drug Abuse (NIDA), Substance Abuse and Mental Health Services Administration (SAMHSA), and National Institute on Alcohol Abuse and Alcoholism (NIAAA) to more aggressively address the issue. Reducing drugged driving will improve highway safety and reduce the demand for illegal drugs.

## **Recommendations**

The traffic safety community and legislators can and should do more to address drugged driving, a pervasive, dangerous, and under-recognized, threat. A coordinated national policy in reducing highway deaths from drug impaired driving should include the following components:

### ***Public Education***

NHTSA and its partners have done an outstanding job educating the public about the dangers of drunk driving. During the past few of years, NHTSA has engaged in an increasing number of drugged driving efforts. We urge NHTSA to expand them further and address drugged driving in the same manner and at the same level that it addresses drunk driving. Lessons can be learned from the successes in other countries using frank and compelling dramatizations of the consequences of impaired driving including drugged driving.

### ***Enforcement***

The Drug Evaluation and Classification (DEC) Program trains officers to determine whether someone is impaired by a drug or drugs and, if so, to determine what category of drug(s). These officers commonly are referred to as Drug Recognition Experts (DRE). NHTSA, in partnership with the International Association of Chiefs of Police (IACP), has funded the development and expansion of the program. To date, over 6,000 officers and 1,000 instructors in 46 states have been trained.<sup>vii</sup> While studies demonstrate that DREs can be exceptionally accurate,<sup>viii</sup> NHTSA and its law enforcement partners have found it impossible to expand this program to the scale of drugged driving. For this reason, they have developed programs designed to help all officers better screen drivers for potential drug use and to widely use drug testing as they now use alcohol testing. Together, these programs are working. We encourage NHTSA to study their efficacy and to identify ways to improve them, make them more efficient, and take them to scale.

### ***Drug Testing***

There are two major problems in drug testing related to highway safety that NHTSA should address as drug testing is increased.

First, in virtually every jurisdiction in the country, Driving Under the Influence (DUI) offenders are not tested for drugs if they provide a breath or blood alcohol level at or above the illegal limit because of limited resources. This makes DUI the only crime in the country where law enforcement officials have made a conscious and systematic decision to stop their investigations before collecting all relevant evidence. The practice makes drugged driving cases more difficult to prosecute and prevents justice officials from identifying offenders who need drug treatment. While we are sympathetic to budgetary constraints, this is unacceptable because of the threat to highway safety posed by drugged driving. At the very least, NHTSA should partner with law enforcement to pilot drug testing all DUI arrestees whose breath alcohol levels do not adequately explain the observed impairment.

Second, many toxicology laboratories do not perform to the standards our communities deserve. They are understaffed, undertrained, and under-resourced. Many laboratories can only test for a limited subset of commonly abused drugs and many technicians are unqualified to testify about the impact that drug use has on driving. We urge NHTSA to help remedy these issues by promoting accreditation for laboratories, professional certification for testifying scientists, and national standards and methods for drug testing.

### ***Prosecution***

Today DUI cases are exceptionally difficult to prosecute. The law is quite complex and prosecutors must handle many different types of scientific evidence. In fact, most states' DUI laws and regulations are 10 or more times longer than their homicide laws. Prosecutors and judges are critical to the effort to reduce both drunk and drugged driving. If offenders can "beat" the charges, the arrests serve little value and, arguably, become "anti-deterrents" that teach offenders that there are no real consequences for their actions.

Recognizing this, NHTSA has partnered with the National Association of Prosecutor Coordinators (NAPC) and National District Attorneys Association (NDAA) to develop the national Traffic Safety Resource Prosecutor (TSRP) Program and the National Traffic Law Center (NTLC). NHTSA also has partnered with the National Judicial College (NJC) and American Bar Association (ABA) to promote judicial training. These programs have been extremely effective; prosecutors and judges are far better educated than ever before. Nonetheless, many are underserved. We urge NHTSA to expand these programs so that these cases are handled properly.

### ***Courtroom Testimony***

A recent U.S. Supreme Court decision, *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), has placed a significant burden on prosecutors' ability to accommodate their large DUI caseloads, effectively use their limited resources, and respond to last minute defense tactics. Additional demands for testimony have placed heavy burdens on forensic laboratories, further limiting the resources available for performing testing. Current technologies for video/remote testimony should be made easier to use for providing expert testimony remotely, while accommodating a DUI defendants legitimate right to confrontation.

### ***Laws***

Seventeen states have addressed the drugged driving problem through the development of "zero tolerance" or *per se* drugged driving laws patterned on the *per se* alcohol laws. These laws prohibit people from driving with specified drugs or types of drugs "on-board" regardless of whether or not they are impaired and simplify prosecution. With three exceptions, none of these laws requires the prosecution to prove any particular drug level. However, law enforcement officers cannot compel blood or urine samples unless they have probable cause to believe the person was impaired. Most of the laws only apply to illegal drugs; none apply to drivers who take medications in accordance with a proper prescription.

The idea of using a *per se* standard for drugged driving is not revolutionary. The U.S. has employed the standard since 1988 for 12 million commercial drivers. It sends a clear no-use message that illegal drug use and driving is unacceptable. We encourage NHTSA to examine these provisions and to develop a national model statute that could be adopted and adapted at the state level, just as NHTSA did for alcohol. Such a model statute would fulfill the provision outlined in SAFETEA-LU.

### ***Sentencing***

Many drugged drivers have serious substance use disorders and do not respond to traditional sanctions. We urge NHTSA to expand its support of DUI courts, Hawaii's Opportunity Probation with Enforcement (HOPE),<sup>ix</sup> South Dakota's 24/7 Sobriety Project,<sup>x</sup> and similar programs that require offender abstinence, hold them accountable for violations, and address underlying issues. Programs that include intensive random testing linked to swift and certain but brief incarceration have shown impressive results in reducing both recidivism and incarceration. They deserve a national trial in multiple sites with a central evaluation to establish their potential for substantially improving the management of DUI offenders.

Justice officials should be encouraged to screen all DUI offenders for alcohol, drug and mental health issues and provide them with the treatment and counseling they need to overcome their disorders and addictions. They also should be educated regarding the adverse effects of drugs on driving.

### ***Research***

NHTSA should develop collaborative efforts with NIDA, SAMSHA and NIAAA to support research to develop better tools for roadside drug testing, especially evaluating the value of oral fluid/saliva testing. New medications should be evaluated in on-road driving and laboratory studies to enable better prescribing patterns by doctors and pharmacists, and more informative warnings to the public regarding the effects of drugs on driving – licit and illicit. Finally, innovation in high technology systems in vehicles to detect driver impairment and provide collision avoidance needs to be further investigated.

Every driver involved in a crash resulting in serious bodily injury or death should be tested for alcohol and drugs. This would enable a better assessment of the scope of the problem and provide the data to develop strategic initiatives to remedy the problem.

### ***Future Vehicle-Based Technology***

We join the many advocates in supporting the development of vehicle-based technology to prevent people from driving with blood alcohol concentrations (BAC) above the illegal limit and

are encouraged by the progress. This technology, while still a decade or so away, has great potential and will benefit from additional research funding.<sup>1</sup>

We are skeptical however, that technology can be created during the next 10 to 20 years that accurately and reliably prevents people under the influence of drugs from driving for three reasons. First, it is virtually impossible to create a testing process that can identify the ever-increasing number of drugs that cause impairment. Second, many drugs impair people at such low blood levels that they are very difficult to detect. Third, alternative behavioral and physiological testing methods are not sensitive or specific enough to protect the public or avoid mistakes at the level demanded for universal application. Thus, while we are supportive of NHTSA's efforts in this area, we recommend that NHTSA focus on currently available and viable solutions until significant advancements in technology are proven to be effective in practice.

## **Conclusion**

Together, just as they have done with alcohol – dramatically – new efforts to reduce drugged driving will save thousands of lives. They will make our city streets, county roads and interstate highways significantly safer for the sober and the impaired driver alike. The nation's success in reducing drunk driving provides an encouraging precedent for similar efforts to curb drugged driving. The nations of Western Europe as well as Australia provide encouraging models for future American efforts. Rather than viewing drunk driving prevention as competitive with drugged driving prevention, we believe that combining efforts to deal with impairment caused by both alcohol and illegal drugs will substantially improve efforts to curtail drunk driving and will significantly improve the nation's highway safety.

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<sup>1</sup> We are concerned however, that BAC-based technology cannot fully address the drunk driving problem since many people are impaired at levels below the illegal limit. Moreover, such technologies do not remedy the public health issues revolving around addiction. Also, we are concerned that people will disable the devices. Regardless, it will be decades before this technology is available fleet-wide and we appreciate that NHTSA continues to work on more near-term solutions in addition to developing future technology.

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**Robert L. DuPont, M.D.**

Dr. DuPont served as the first Director of the National Institute on Drug Abuse (1973-1978) and as the second White House Drug Chief (1973-1978). From 1968 to 1970 he was Director of Community services for the District of Columbia Department of Corrections, heading parole and half-way house services. From 1970 to 1973, he served as administrator of the District of Columbia Narcotics Treatment Administration (NTA), the city-wide drug abuse treatment program that was the model for the federal government's massive commitment to drug abuse treatment in the early 1970s. Following this distinguished public career, in 1978 Dr. DuPont became the founding president of the Institute for Behavior and Health, Inc. (IBH). Dr. DuPont has written for publication more than 200 professional articles and fifteen books and monographs on a variety of health-related subjects.

**Barry K. Logan, Ph.D.**

Dr. Logan is a forensic toxicologist specializing in the study and investigation of alcohol, drugs and their effects on drivers and their role in crash involvement. He has authored more than 80 peer reviewed articles in forensic toxicology, conducts training in alcohol and drug impairment, and testifies as an expert witness. Dr. Logan served as State Toxicologist for the State of Washington for 18 years, and is currently Director of Forensic Services at NMS Labs in Willow Grove, PA. He is also Executive Director of the Center for Studies of Law in Action at Indiana University, where he manages the Borkenstein School on alcohol, drugs and human performance.

**Stephen K. Talpins**

Mr. Talpins is the Co-Founder, Chairman of the Board and Chief Executive Officer of the National Partnership on Alcohol Misuse and Crime (NPAMC), an inclusive non-profit public-private partnership incorporated in Washington, DC. He is also is the Vice President of Industry Relations for Alcohol Monitoring Systems, Incorporated (AMS). Mr. Talpins previously served as National Director of Public Policy for Mothers Against Drunk Driving (MADD), Director of the National District Attorneys Association – American Prosecutors Research Institute's National Traffic Law Center (NTLC), a National Highway and Traffic Safety Administration (NHTSA) and National Association of Prosecutor Coordinators (NAPC) Prosecutor Fellow and as an Assistant State Attorney with the Miami-Dade County (Florida) State Attorney's Office.

## J. Michael Walsh, Ph.D.

Dr. Walsh is an internationally known expert in substance abuse issues having served more than 28 years in Federal service in senior research and policy positions. Dr. Walsh served as the Executive Director of the President's Drug Advisory Council and Associate Director of the Office of National Drug Control Policy. Prior to his White House appointment he directed Applied Research at the National Institute on Drug Abuse directing national research including drug effects on performance/driving, drug policy and drug testing. Dr. Walsh led the task force that developed the U.S. Federal Drug Testing Guidelines; established the National Laboratory Certification Program, coordinated with the Dept. of Transportation on the modal Drug and Alcohol programs, and was responsible for coordinating the development of all Federal Agency drug policies and programs.

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<sup>i</sup> R. Compton and A. Berning, "Results of the 2007 National Roadside Survey of Alcohol and Drug Use by Drivers," Traffic Safety Facts Research Note (National Highway Traffic Safety Administration July 2009), <http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811175.pdf>.

<sup>ii</sup> United States Department of Transportation Federal Highway Administration. (n.d.). Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. Retrieved December 30, 2009 from <http://www.fhwa.dot.gov/safetealu/legis.htm>

<sup>iii</sup> See R. Compton and A. Berning, "Results of the 2007 National Roadside Survey of Alcohol and Drug Use by Drivers," *supra*.

<sup>iv</sup> Walsh, J., Flegel, R., Atkins, R., Cangianelli, L., Cooper, C., Welsh, C. and Kerns, T., "Drug and alcohol use among drivers admitted to a Level-1 trauma center," 37 Accident Analysis and Prevention 894-901 (2005)

<sup>v</sup> Schwilke, E., Sampaio dos Santos, I., and Logan, B., "Combined Drug and Alcohol use in Fatally Injured Drivers in Washington State" (Washington State Toxicology Laboratory, Forensic Laboratory Services Bureau, Washington State Patrol, 2203 Airport Way S., Seattle WA 98134)(2003)

<sup>vi</sup> See e.g. Bourdeau, J., et al, "Motor Vehicles," 60 C.J.S. Motor Vehicles § 257; Duncan v. Cone, 2000 U.S. App. LEXIS 33221 (6<sup>th</sup> Cir. 2000); Smelser v. Troutdale, 2000 U.S. App. LEXIS 16134 (9<sup>th</sup> Cir. 2000); Roberts v. State, 2000 U.S. App. LEXIS 22753; 2000 Colo. J. C.A.R. 5225 (10<sup>th</sup> Cir. 2000); John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369 (U.S.D.C. N. D. Ga. 2001); McFarland v. Mackey, 1988 U.S. Dist. LEXIS 15638 (U.S.D.C. Mass. 1988); Flatt v. Miller, 1996 U.S. Dist. LEXIS 1883 (W. D. Mich. 1996); League of United Latin Am. Citizens v. Bredeesen, 2004 U.S. Dist. LEXIS 26507 (M. D. Tn. 2004); Wells v. Malloy, 402 F. Supp. 856 (DC Vt. 1975).

<sup>vii</sup> See R. Compton and A. Berning, "Results of the 2007 National Roadside Survey of Alcohol and Drug Use by Drivers," *supra*.

<sup>viii</sup> See e.g. S. Talpins and C. Hayes, The Drug Evaluation and Classification Program at 8-9 (National District Attorneys Association 2004).

<sup>ix</sup> Hawken, A., & Kleiman, M. (2009). Managing drug involved probationers with swift and certain sanctions: Evaluating Hawaii's HOPE (Award Number 2007-IJ-CX-0033). Washington, DC: National Institute of Justice, Office of Justice Programs, U.S. Department of Justice.

<sup>x</sup> Long, L. (2009). The 24/7 Sobriety Project. *The Public Lawyer*, 17(2), 2-5.