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January 13, 2014

U.S. Department of Transportation
Docket Management Facility, Room W12-140
1200 New Jersey Ave., S.E.
Washington, DC 20590-0001

Re: Congestion Mitigation and Air Quality Improvement Program Interim Guidance (Docket No. FHWA-2013-0023)

To the Federal Highway Administration:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the Interim Guidance for the Congestion Mitigation and Air Quality Improvement (CMAQ) Program, published by the Federal Highway Administration (FHWA) in the Federal Register on November 12, 2013. (78 Fed. Reg. 67442).

AASHTO is a nonprofit, nonpartisan association that represents highway and transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all transportation modes. AASHTO's primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

Background

In the Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress reauthorized the CMAQ program for two years and also amended certain provisions of the program. Principally in response to those amendments, FHWA has issued the Interim Program Guidance, which supersedes the 2008 Final Program Guidance. In addition to implementing the changes in MAP-21, the Interim Program Guidance also includes various changes to clarify provisions in the 2008 guidance.

General Comments

AASHTO welcomes the development of interim guidance to implement changes made to the CMAQ program and to clarify issues relating to interpretation of CMAQ program requirements. We agree that it is necessary to issue interim guidance that takes effect immediately.

AASHTO supports administration of the CMAQ program in a manner that maximizes flexibility for States, consistent with applicable statutory provisions. Greater flexibility facilitates the ability of States to make programming and other decisions based on local circumstances and inputs. It also facilitates prompt delivery of programs and projects for the benefit of the State and its people and businesses. Moreover,

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limiting regulatory and program reporting burdens enables States to focus scarce resources on the delivery of projects and programs, including those that advance the CMAQ program.

Our comments below address several specific issues that we believe should be clarified or revised in the final guidance.

1. Transferability of CMAQ Funds

MAP-21 broadened States' ability to transfer CMAQ funds to other federal-aid programs. Prior to MAP-21, there was a specific provision in 23 U.S.C. 126 that limited the amount of CMAQ funding that could be transferred. MAP-21 repealed that provision. As a result, CMAQ funds are now subject to the general transferability provisions in 23 U.S.C. 126. Those provisions allow up to 50% of apportioned funds to be transferred to any other program that receives an apportionment under 23 U.S.C. 104(b). Separately, MAP-21 also amended 23 U.S.C. 149(k) to create a new 25% set-aside for projects that reduce PM_{2.5} emissions.

The Interim Guidance seeks to reconcile these provisions as follows:

For CMAQ, **the apportioned funds eligible for transfer will not include the statutory PM_{2.5} priority set-aside**, which is discussed later in the guidance (Section V.C.). This interpretation gives meaning to both the statutory transfer language in Section 126 and to the PM_{2.5} priority established by Congress in 23 U.S.C. 149(k). This safeguarding of PM_{2.5} set-aside funds from transfer **does not affect the ability of a State to transfer up to 50 percent of its CMAQ funds** to another apportioned program.

(Interim Guidance, p. 4 (emphasis added)).

We are concerned that the opening sentence of the paragraph quoted above could be construed to mean that the transferable amount is 50% of the amount that remains after the PM_{2.5} set-aside has been excluded. The statute (23 U.S.C. 126) does not provide a basis for excluding the PM_{2.5} set-aside before calculating the transferable amount. As the last sentence in this paragraph seems to recognize, the statute allows a State to transfer up to 50% of its total CMAQ apportionment.

To avoid confusion, we recommend revising this paragraph to make clear that the State is allowed to transfer up to 50% of its total CMAQ funds to another program, pursuant to 23 U.S.C. 126, as long as the State also complies with the PM_{2.5} set-aside requirement (which, to the extent applicable to a State, would be funded from the remaining 50% of the State's CMAQ apportionment).

On a broader note, we are concerned that the terms "transferable" and "flexible" could be confused. The concepts are similar, but distinct. We recommend clarifying the distinction between these concepts. The explanation should cover the following points:

- **"Transferability"** is authorized by 23 U.S.C. 126. This statute allows a State to transfer up to 50% of its total CMAQ funding for use on any project eligible under a program that receives an apportionment under 23 U.S.C. 104(b) - that is, the National Highway Performance Program; the Surface Transportation Program; the Highway Safety Improvement Program; CMAQ; and Transportation Planning. Transferability is available on the same terms to all States, without

regard to air quality attainment status. There is no requirement to exclude PM_{2.5} set-aside funds when calculating the amount of funds that can be transferred under 23 U.S.C. 126.

- **“Flexibility”** is authorized by 23 U.S.C. 149(d). This provision allows the amount of CMAQ funds determined to be “flexible” to be used for any project that meets the eligibility criteria for the Surface Transportation Program or the CMAQ program. (Interim Guidance, pp. 7-8.) The amount of flexible funding available to a State is determined based on a formula defined in the statute.

2. Cost-Effectiveness Tables

MAP-21 added a new requirement for the U.S. DOT, in consultation with the U.S. Environmental Protection Agency, to “evaluate projects on a periodic basis and develop a table or other similar medium that illustrates the cost-effectiveness of a range of project types eligible for funding.” 23 U.S.C. 149(i)(2)(A). The statute requires States and MPOs to “consider the information in the table when selecting projects or developing performance plans” that are required under 23 U.S.C. 149(l).

At present, there are no such tables and no obligation for States or others to consider them. However, at such time as development of the tables commences, there should be a full opportunity for States and others to provide input and comment.

Very importantly, FHWA should make clear that States and MPOs are only required to “consider” the information in cost-effectiveness tables that are developed; they are not required to use the tables as the principal or definitive source of information on cost-effectiveness. In other words, as FHWA proceeds to carry out its statutory responsibility to develop such tables, it is very important to ensure that the tables are made available simply as a resource for States, as contemplated by the statute.

3. Cost-Effectiveness Analyses in Annual Reports

The CMAQ statute (23 U.S.C. 149) does not require annual reports. The “requirement” for annual reports emerged through guidance. The 2008 guidance states that “States should prepare annual reports detailing how CMAQ funds have been invested. CMAQ reporting is not only useful for the FHWA, the FTA, and the general public, but maintenance of a cumulative database of all CMAQ projects is required by SAFETEA-LU.” (2008 Guidance, p. 30).

The Interim Guidance continues to refer to a requirement for States to submit annual reports. (Interim Guidance, p. 33). It also includes new language encouraging annual reports to include cost-effectiveness analyses:

Based on MAP-21, States and other sponsors are expected to record cost-effectiveness analyses in their CMAQ annual reports to the extent they have been providing such information.

....

Given the emphasis MAP-21 places on cost-effectiveness and performance measurement, quantitative assessment should be provided whenever possible. In

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addition, to the extent this information has been provided historically, a cost-effectiveness assessment for each reported project should be projected as well.

(Interim Guidance, pp. 5, 34).

We appreciate the careful wording of these statements, but nonetheless we are concerned that the guidance could be interpreted in practice to require States to conduct cost-effectiveness analyses and report them annually - a requirement that does not appear anywhere in the statute.² We recommend that the final guidance state more clearly that the decision on whether to conduct cost-effectiveness analyses is within the discretion of the States.

4. Operating Assistance

MAP-21 amended the CMAQ statute to include 23 U.S.C. 149(m), which specifically allows CMAQ funds to be used for “operating costs under chapter 53 of title 49 or on a system that was previously eligible under this section.” This provision does not set a time limit on the use of CMAQ funding for operating assistance.

Despite this change in the statute, the Interim Guidance retains the provision - established in previous guidance, not in statute - that sets a time-limit on use of CMAQ funding for operating assistance. The 2008 guidance sets a three-year limit on the use of CMAQ funds for operating costs. (2008 Guidance, p. 13). The Interim Guidance provides some additional flexibility, but still retains the time limit: “the 3 years of operating assistance allowable under the CMAQ program may now be spread over a longer period, for a total of up to 5 sequential years of support.” (Interim Guidance, p. 12).

We appreciate the additional flexibility in the Interim Guidance, but we urge FHWA to reconsider the underlying issue of whether an across-the-board time-limit - of any duration - is allowable under the statute.

- First, as noted above, the CMAQ statute now specifically designates operating assistance for public transit (i.e., “operating costs under chapter 53 of title 49”) as an eligible expense. The statute does not impose any time limitation on such eligibility. When Congress has spoken this clearly, the law should be implemented as written: operating assistance that falls within this provision (23 U.S.C. 149(m)) should be treated as an eligible expense, without any limit on duration.
- The other eligibility provisions in the statute (outside 23 U.S.C. 149(m)) define various activities that are eligible for CMAQ funding, without placing any time limitation on eligibility. It is inconsistent with the statute for FHWA to seek to impose through guidance an eligibility restriction that does not exist in the statute itself. Further, such restriction will limit State flexibility to pursue what the State considers to be the most effective uses of CMAQ funds.

² The only reporting required under the statute is that performance plans “shall be updated biennially” and must include “a separate report that assesses the progress of the program of projects under the previous plan” in achieving the goals in that plan. 23 U.S.C. 149(1)(2). The statute does not require the performance plans to include a cost-effectiveness analysis.

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For these reasons, we believe the statute itself does not support adoption of an across-the-board time limit on the use of CMAQ funds for operating assistance.

Moreover, there are strong policy considerations that favor implementing the CMAQ statute without any time limit on eligibility. The statute encourages States to direct CMAQ funds to the most cost-effective means of improving air quality and reducing congestion. Removing the time-limit enables States to focus their CMAQ funds on the most cost-effective strategies, rather than forcing States to remove CMAQ funds from a highly cost-effective strategy simply because an arbitrary time limit has been reached.

In short, we urge FHWA to remove the time limit on CMAQ funding in the final guidance, and allow CMAQ funding to be used for any activity that satisfies the eligibility requirements as defined in the statute.

5. PM_{2.5} Set-Aside - "Targeting" vs. "Reducing"

MAP-21 amended the CMAQ statute to include 23 U.S.C. 149(k), which requires a 25% set-aside of certain funds for projects that reduce PM_{2.5} emissions in areas designated as nonattainment or maintenance for PM_{2.5}. The 25% amount is not necessarily 25% of the total CMAQ apportionment; it is 25% of the CMAQ funding that was apportioned to the State "based all or in part on the weighted population of such area in fine particulate matter nonattainment."

The Interim Guidance correctly acknowledges and makes this important distinction, but interprets aspects of its implementation more restrictively than is justified by the statute.

The Interim Guidance states that the 25% "must be used for projects **targeting** PM_{2.5} reductions in those nonattainment and maintenance areas." (Interim Guidance, p. 7, emphasis added). The word "targeting" implies that, in order to be counted towards the 25% set-aside requirement, a project must be primarily directed toward reducing PM_{2.5} emissions. The statute simply requires that the 25% amount be obligated to "projects **that reduce** such fine particulate matter emissions in such area, including diesel retrofits." The Interim Guidance should make clear that if a project "reduces" PM_{2.5} emissions, the project counts toward the 25% requirement.

6. PM_{2.5} Set-Aside - Weighting

MAP-21 adopts a new approach to apportioning CMAQ funding: rather than apportioning funds based on a formula of weighted populations in ozone and CO nonattainment and maintenance areas, MAP-21 apportions funds based on the ratio of (1) the State's fiscal-year 2009 CMAQ funding to (2) the State's total apportioned Federal-aid for that year. In other words, if CMAQ funding was 5% of the State's total federal-aid apportionment in 2009, then the State's CMAQ funding in 2013 and 2014 will be 5% of whatever total amount is apportioned to the State in those years. This approach has the effect of locking in each State's share of the CMAQ funding based on CMAQ's share of the State's total apportionments in 2009.

Despite this change to apportionment, for purposes of determining eligible use of certain apportioned funds, the PM_{2.5} set-aside includes language that refers to a population-weighted formula, as was the case in the pre-MAP-21 apportionment approach to CMAQ. The set-aside is defined as an amount equal

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to 25 percent of the funds “apportioned to each State ... for a nonattainment or maintenance area that are based all or in part on the weighted population of such area in fine particulate matter nonattainment.” 23 U.S.C. 149(k). This provision requires a determination to be made regarding the percentage of the total CMAQ apportionment that is based on the population in PM_{2.5} nonattainment areas.

The Interim Guidance states that FHWA intends to address this issue by “proposing a weighting factor for PM_{2.5} through a rulemaking and public comment process.” The Interim Guidance states that “[i]f this process leads to a final rule, FHWA plans on using the PM_{2.5} weighting factor developed during that rulemaking for set-aside determinations made after the effective date of the final rule.” (Interim Guidance, p. 7). We agree that a rulemaking is an appropriate way to fill in this gap in the statute - i.e., to define the weighting to be used for PM_{2.5} areas for purposes of determining what funds are subject to use restriction.

Also, we note that FHWA has issued “supplementary tables” for Fiscal Year 2013 to define the PM_{2.5} set-aside amount on an interim basis in advance of the rulemaking.³ We request that FHWA disclose the formulas used in making these interim determinations for FY 2013 and, if applicable, for FY 2014. It is important to disclose the formula used in making interim determinations because - given the length of the rulemaking process - it is possible that a final rule will not be issued until after FY 2014 apportionments are made.

7. PM2.5 Set-Aside - Classification of Projects

The Interim Guidance states that FHWA has established accounting codes to track the spending for the PM_{2.5} set-aside. We acknowledge the necessity of developing a system for tracking expenditures on projects that count toward the 25% requirement for projects that reduce PM_{2.5} emissions. But we note that many projects reduce multiple pollutants and are located in areas designated as nonattainment for both PM_{2.5} and other pollutants, such as ozone.

For example, a CNG bus may be purchased with CMAQ funding to replace a diesel bus. This project would reduce emissions of PM_{2.5} and other pollutants, including CO, VOC, NO_x, and PM₁₀. If the project is in a PM_{2.5} nonattainment area, it should be and presumably would be classified as a project that reduces PM_{2.5} emissions. If that occurs, it is unclear how - if at all - the accounting system would track the project’s benefits for other pollutants, such as CO and ozone. We recommend that the final guidance clarify the accounting treatment for projects that reduce PM_{2.5} emissions and also reduce emissions of other pollutants for which a region is in non-attainment or maintenance status by making clear that such a project counts towards meeting any applicable PM_{2.5} set-aside as well as count towards efforts to reduce other pollutants.

8. Programmatic Eligibility

Overall, we strongly support the additional flexibility provided in the Interim Guidance and MAP-21 for State DOTs and MPOs in the form of an optional programmatic assessment of the program of CMAQ projects or subset of projects. As the optional assessment would fulfill the requirement for CMAQ for an emission reduction demonstration, it may significantly streamline the project development process.

³ FHWA, Revised Fiscal Year 2013 Supplementary Tables - Apportionments Pursuant to MAP-21, Code No. N 4510.766 (July 23, 2013), at http://www.fhwa.dot.gov/legsregs/directives/notices/n4510766/n4510766_t13.cfm.

To support the implementation of programmatic eligibility as a streamlining provision, we encourage FHWA to work with state DOTs and MPOs to develop options for modeling that they could modify and apply at their discretion (based on their needs and resources) to demonstrate emission reductions for purposes of programmatic eligibility. This process could take the form of a series of workshops, with the final deliverable of a standard report and associated webinar/ PowerPoint presentation on the subject. This collaborative effort would benefit streamlining as it may help encourage state DOTs and MPOs to take advantage of this provision, and not be deterred by a need to undertake the development of new modeling approaches on their own.

Also to support the implementation of programmatic eligibility as a streamlining provision, FHWA should clarify whether the modeling must be project-specific or whether a State would have the option of modeling for generic project types, at least for relatively minor projects. The latter approach may provide significant additional benefits in terms of streamlining as, for example, all intersection projects could be covered by a generic intersection category (or categories that would cover various typical configurations) rather than conducting project-specific modeling.

9. Improvements to Transit Stations

The Interim Guidance, Section F.6, appears to retain the limit on the use of CMAQ funds for station improvement projects to those that “increase transit service capacity” and are projected to cause “an expected increase in transit ridership that is more than minimal.” (Interim Guidance, p. 23)

We recommend modifying the guidance to allow CMAQ funding for significant capital improvements to transit stations that reduce vehicle dwell time and that can retain existing and attract new riders to transit systems. For example, station improvement projects often include widening or adding new stairs, reconfiguring fare control areas, removing obstructions, rehabilitating or replacing platforms, improving accessibility, replacing or rehabilitating platforms, installing elevators to comply with the ADA, new lighting and signage. These station improvements, when they occur at locations where trains are already scheduled to maximum throughput capacity, have the effect of reducing congestion and maintaining and improving system performance, all results that are consistent with the intent of CMAQ. We recommend clarifying that these types of facility improvements are eligible for CMAQ funding.

10. Bicycle and Pedestrian Facilities and Programs

The Interim Guidance limits the eligibility of bicycle and pedestrian improvements that are implemented as stand-alone projects - e.g., “Constructing bicycle and pedestrian facilities (paths, bike racks, support facilities, etc.) that are not exclusively recreational and reduce vehicle trips.” (Interim Guidance, p. 24).

We recommend clarifying that CMAQ funds can be used together with other FHWA funding programs to implement projects that include bicycle and pedestrian improvements as well as other road improvements. For example, if a State proposes to construct a new bike lane as part of a road widening project, the State should be allowed to use CMAQ funds for the portion of the project that involves the bike lane, and Surface Transportation Program funds for the road widening elements of the project. This approach would be far more practical, efficient and cost effective approach than undertaking each element as a separate project -- one with only STP funding and one with only CMAQ funding.

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11. Use of MOBILE6 vs. MOVES Air Quality Model

The Interim Guidance states that “Emissions estimates may be derived from EPA’s MOVES model, CARB’s EMFAC model, and AP-42, among others.” (Interim Guidance, p. 34). The same section of the guidance also states that “Benefits should be reported the first time a project is entered into the system, and only then to avoid double counting of benefits.” (Interim Guidance, p. 35).

Many projects that are currently receiving CMAQ funds were initially adopted based on air quality modeling using the MOBILE6 model (the predecessor of MOVES). We recommend clarifying that it is not necessary to update the emissions estimates for these projects using the MOVES model; in other words, it should state clearly that, if a project’s emissions over a multi-year period have been calculated using MOBILE6, the annual reports can continue to use those MOBILE6 projections, even if “new” projects are modeled using the MOVES model.

12. Performance Plans

The Interim Guidance acknowledges that, under the MAP-21 amendments to the CMAQ program, metropolitan areas with a population of one million or more will be required to develop “performance plans” specifically for the CMAQ program. It points out that a rulemaking will be completed in 2014 to determine performance measures and the process for setting performance targets. (Interim Guidance, pp. 35-36).

We recommend clarifying that the Performance Plan requirements do not take effect in the CMAQ program until the effective date of final regulations issued by FHWA establishing performance measures related to the CMAQ program and defining the procedures for States and MPOs to use in setting their performance targets.

In addition, we strongly encourage FHWA to:

- streamline these new performance plan requirements to the extent feasible, in keeping with the goals outlined in FHWA’s Every Day Counts initiative;
- clarify that the performance plan requirements do not apply to former nonattainment or maintenance areas where the standard has been revoked, even if funds continue to be allocated there on a discretionary basis by the state.

We appreciate the opportunity to comment on this interim guidance and thank FHWA for its consideration. If you have any questions regarding these comments, please contact Jennifer Brickett, Program Manager for Environment, at (202) 624-8815, or Matt Hardy, Program Director for Planning and Policy, at (202) 624-3625.

Sincerely,



Bud Wright
Executive Director