

Comments of the Transportation Departments of
Idaho, Montana, and Wyoming
to the
Federal Highway Administration
Docket No. FHWA-2013-0018
Congestion Mitigation and Air Quality Improvement Program
September 26, 2014

The transportation departments of Idaho, Montana, and Wyoming (“we” or “our”) respectfully submit these joint comments in response to the notice of proposed rulemaking (NPRM) published by the Federal Highway Administration (FHWA) at 79 Federal Register 45146 *et seq.* (August 4, 2014). In this docket FHWA has invited comment on a proposed rule regarding the administration of the Congestion Mitigation and Air Quality Improvement (CMAQ) Program in States that include within their boundaries areas that are in nonattainment or maintenance for fine particulate matter, PM – 2.5.

As explained below, the proposed rule would reduce State flexibility compared to what is permitted by statute, and we strongly recommend revisions to the proposed rule. This lack of flexibility stems in part from apparent lack of recognition that, in rural areas, fine particulate matter nonattainment is often unrelated to transportation sources of PM-2.5.

Under 23 USC 149(k) as amended by MAP-21,

an amount equal to 25 percent of the funds apportioned to each State under [23 USC 104(b)(4)] 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 shall be obligated to projects that reduce fine particulate matter emissions in such area ...

FHWA has referred to this provision as establishing a “set-aside” requirement and has undertaken the rulemaking in this docket to determine the “weighted population” variable in the above provision, stating that the statute does not provide clarity in calculating this aspect of the set-aside.

We recommend that, in administering the CMAQ program (as well as its other programs), FHWA maximize flexibility for States. Greater flexibility facilitates the ability of States to make programming decisions based on State needs and input and also facilitates prompt delivery of programs and projects for the benefit of the State and its people and businesses.

Each of the three departments is a member of the American Association of State Highway and Transportation Officials (AASHTO). We were actively involved in the development of the comments submitted by AASHTO in this docket, and we support those AASHTO comments, which would result in a more flexible CMAQ program.

However, two of the issues raised by the notice in this docket are of particular concern to us, and we take this opportunity to emphasize those points, even though they are also raised in the AASHTO submittal.

First, the proposed rule should be amended to provide for a zero weighting when transportation is an insignificant contributor to PM-2.5 nonattainment or maintenance status. The final rule also should provide for a reduced weighting (above zero and less than 1.2) when transportation is more than an insignificant contributor to PM-2.5 nonattainment or maintenance status but where PM-2.5 sources other than transportation are also more than insignificant contributors to PM-2.5 nonattainment or maintenance status. We do not propose a specific formula for this reduced weighting; we would defer to FHWA to set the reduced weighting, which could be done on a case by case basis. Importantly, AASHTO has taken the positions summarized in this paragraph, both as to the zero weighting and the reduced weighting.

There is much to commend this proposed change to the proposed rule. Consider that at page 11 of its November 12 Interim Program Guidance for the CMAQ program, FHWA explains project eligibility for CMAQ funds (other than so-called flexible funding). It is stated there that each CMAQ project “***must be a transportation project***” (bold and italic in original **by FHWA**). Thus, in an area in PM-2.5 nonattainment due to wood smoke from wood burning stoves or due to off-highway mining operations, the CMAQ program may not be used to fund the retrofit of rural homes with alternate heating systems; that is not a CMAQ project (nor are we suggesting that it should be should it be an eligible use of CMAQ funds).

What FHWA should not want to do is impose requirements that make aspects of the CMAQ program ineffective as to both pollution abatement and transportation improvement, such that in an area where transportation sources of PM-2.5 are insignificant for transportation conformity (e.g., reducing transportation sources of PM-2.5 could not achieve PM-2.5 attainment), the State would nonetheless have to expend CMAQ funds on projects that could not make a difference in the effort to reach attainment. In that case, the proposed rule would result in highly suboptimal transportation investment and insignificant impact on PM-2.5 levels. This is a different situation than occurs in efforts to address CO and ozone pollution through CMAQ investments in eligible projects such as transit or traffic signalization. There the programming is at least reasonably directed at the source of nonattainment. So, it is appropriate for FHWA to take a different approach in this docket as to PM-2.5 in cases where eligible projects can have little or no effect on the effort to achieve attainment.

Thus, the proposed rule should be revised so that, with respect to an area where transportation sources of PM-2.5 are insignificant for transportation conformity, the weighting is zero. Further, with respect to areas where transportation sources of PM-2.5 are more than insignificant, but where other sources of PM-2.5 are also more than insignificant, the weighting should at least be reduced, even if it would be more than zero.

There are areas in at least two of the three States filing these comments that are in nonattainment for PM 2.5 due to the extensive use of wood burning stoves for home heating, not due to transportation pollution. Some other areas within these and other States could potentially enter into nonattainment for PM 2.5 due to non-transportation pollution.

In short, we strongly support flexibility for States in the administration of FHWA programs, including the PM-2.5 aspects of the CMAQ program, especially when the potential cause of the inflexibility is not transportation related. In such cases it is particularly appropriate to keep restrictions on State flexibility to a minimum. We have outlined above proposed changes to achieve that flexibility.

Second, we also take this opportunity to emphasize that, like AASHTO, we strongly disagree with the proposed 5.0 weighting that the proposed rule would assign to PM-2.5 pollution, a weighting much higher than the weighting assigned to other types of nonattainment areas. There is no indication whatsoever that Congress ever contemplated such a high weighting for PM-2.5.

In conclusion, we ask that the proposed rule be revised in accordance with our recommendations. The transportation departments of Idaho, Montana, and Wyoming thank FHWA for its consideration of these comments.
