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STATE AND TERRITORIAL
AIR POLLUTION PROGRAM
ADMINISTRATORS

ASSOCIATION OF
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Comparison of Air Quality Provisions of
S. 1072, the *Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2004* (February 26, 2004)
and
H.R. 3550, the *Transportation Equity Act: A Legacy for Users* (April 2, 2004)

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Earlier this year, the U.S. Senate and the U.S. House of Representatives passed comprehensive transportation legislation, including authorization, for six years, of funds for federal transportation programs. Both bills – S. 1072, the *Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2004*, and H.R. 3550, the *Transportation Equity Act: A Legacy for Users* – include provisions that will amend the Clean Air Act as well as transportation law. In particular, the bills substantially change current law and/or requirements for transportation conformity, the Congestion Mitigation and Air Quality Improvement (CMAQ) program and other programs with air quality impacts.

Below is a comparison of key air-related provisions of the Senate and House bills. For each issue noted, STAPPA and ALAPCO have identified their preference between the two bills.

Transportation Conformity

Over the past decade or so since it has been implemented under the Clean Air Act (CAA), transportation conformity has proven to be a key tool for ensuring that our transportation choices contribute to – rather than undermine – progress toward achievement of healthful air quality. Further, as our nation prepares to implement new, health-based National Ambient Air Quality Standards (NAAQS) for 8-hour ozone and fine particulate matter ($PM_{2.5}$), the critical need to continue implementing conformity as it is currently structured is clear.

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Both the Senate and House bills contain provisions that would severely weaken transportation conformity. Though the conformity provisions of the two bills differ, both would substantially reduce the transportation sector's accountability for the pollution it creates, threatening the failure of state and local air pollution clean-up plans and unfairly forcing states and localities to respond by placing a greater pollution clean-up burden on other sectors of the economy. Because transportation emissions account for half of all ozone precursors and a large portion of $PM_{2.5}$ in most metropolitan areas, reducing the accountability of the transportation sector will seriously jeopardize the ability of states and localities to achieve and sustain clean air and public health goals. Given these significant adverse impacts, STAPPA and ALAPCO would strongly prefer that the final transportation bill that emerges from Congress not include any changes to the transportation conformity program and, instead, preserve the conformity program requirements and schedules currently in place. For this reason, the associations generally prefer the House bill, which shows greater restraint in relaxing the conformity program.

Conformity Horizon for Transportation Plans

Senate – S. 1072, sec. 1615(b)(4) (pp. 272-273), reduces from 20 years the planning horizon over which conformity must be demonstrated by defining a transportation plan as limited to the longer of 1) the first 10 years of the transportation plan adopted pursuant to 23 USC §134(g), 2) the latest date for which the State Implementation Plan (SIP) establishes an emissions budget or 3) the year after the completion date of a regionally significant project that requires approval before the "subsequent conformity determination."

House – H.R. 3550, sec. 1824(c) (pp. 374-376), continues to require that conformity be demonstrated through the last year of the transportation plan (i.e., for 20 years) except in areas where the metropolitan planning organization (MPO) and air pollution control agency agree to reduce the horizon. In such cases, the bill does not shorten the planning horizon by defining the term of the transportation plan, but instead requires a conformity determination for the "period ending" in the later of 1) the tenth year of the transportation plan, 2) the attainment date or 3) the year following completion of a project that will be programmed in the Transportation Improvement Program (TIP) or receive approval before the subsequent conformity determination. The requirement that the conformity determination must address the period prior to the horizon date requires a showing that the area will conform during the period in addition to a projection of conformity for the latest horizon date. H.R. 3550 also requires an emissions analysis for the years of the transportation plan that extend beyond the horizon date used for the conformity demonstration. S. 1072 does not include a counterpart provision.

STAPPA/ALAPCO Recommendation – STAPPA and ALAPCO's strong preference is that the existing 20-year conformity horizon be retained; neither bill provides for this. Of the two bills, we believe the House bill – which allows for a shorter horizon only with the agreement of the air pollution control agency, and requires an emissions analysis for the additional years in the transportation plan beyond the 10-year horizon date – is preferable.

Transition to New Air Quality Standards

Senate – S. 1072, sec. 1616 (pp. 276-278), amends CAA requirements and EPA regulations that govern the methods for determining conformity before an emissions budget is available to implement a new NAAQS. These changes would allow an 8-hour ozone nonattainment area that currently has a 1-hour ozone budget to stop conforming to that budget and, instead, authorize EPA to establish "other" tests to determine conformity.

House – H.R. 3550 has no counterpart provisions.

STAPPA/ALAPCO Recommendation – In November 2003, EPA proposed a change to its transportation conformity regulations to create an option similar to that in the Senate bill, to allow areas not to comply with emissions budgets in approved SIPs during the multi-year hiatus before new emissions budgets are adopted to implement the 8-hour ozone NAAQS. STAPPA and ALAPCO opposed this proposed regulatory change in December 22, 2003 comments to EPA, explaining that removal of existing budgets will allow much higher emissions during the interim period prior to the development of new ozone SIPs, and that substantial deterioration in air quality will occur during that period. STAPPA and ALAPCO continue to hold this view and, therefore, believe the House bill is preferable. If, however, the Senate provision is used as the basis for the conference bill, it should be revised to maintain the use of currently approved emissions budgets by allowing EPA to prescribe an alternative conformity test only if the state has not already adopted an emissions budget for ozone. For example, at the beginning of sec. 1616(3)(A)(ii) (p. 277), add "*if no such budget, as described in 3(A)(i) above, has been found adequate or has been approved*,".

Frequency of Transportation Plan and TIP Conformity Determinations

Senate – S. 1072, sec. 1615(a) (pp. 268-269), reduces the frequency of conformity determinations for the TIP and Regional Transportation Plan (RTP) in nonattainment and maintenance areas from at least every three years (under current law) to every four years, unless the MPO elects to redetermine conformity more frequently or a conformity "trigger" is pulled. The Senate bill also reduces the frequency of updates to the TIP – from every two years to every four years, unless the MPO elects to update more frequently – and the RTP – from every three years to every four years in nonattainment and maintenance areas and to every five years in attainment areas that have never been designated nonattainment, unless the MPO elects to update more frequently; the TIP and the RTP are not required to be updated on the same schedule.

House – H.R. 3550, sec. 1824(b) (pp. 373-374), reduces the frequency of conformity determinations for the TIP and RTP in nonattainment and maintenance areas from at least every three years (under current law) to every four years, unless the MPO elects to redetermine conformity more frequently or a conformity "trigger" is pulled. Under secs. 5213(g) (p. 831) and 5213(h) (p. 836), the bill also reduces the frequency of updates to the TIP and RTP to every four years in all cases, unless the MPO elects to update more frequently.

STAPPA/ALAPCO Recommendation – STAPPA and ALAPCO have suggested synchronizing conformity determinations on and updates to the TIP and RTP, to occur at least every three years; both bills, however, go further in reducing frequency. Of the two bills, we believe the House bill is preferable.

Triggers for Conformity Determinations

Senate – S. 1072, sec. 1615(b) (pp. 270-272), revises the "triggers" for redetermining conformity to allow for less frequent conformity determinations. The current trigger of SIP submittal is replaced under subparagraph (2)(E)(i) with EPA's adequacy determination of a submitted budget, which typically comes four to five months after SIP submittal. Under subparagraph (2)(E)(ii), the current trigger of SIP approval if a SIP adds, deletes or changes TCMs, is replaced with SIP approval if the budget has not yet been used for a conformity determination. The bill also extends the grace period after which MPOs must conduct a triggered conformity redetermination for the TIP and RTP from not later than 18 months after a trigger to not later than two years after.

House – H.R. 3550 contains counterpart provisions in sec. 1824(a) (pp. 372-373), except that the second trigger is based on EPA approval or promulgation of a SIP that establishes a motor vehicle emissions budget (MVEB) where none previously existed or that "significantly varies" from a budget that had taken effect as a result of an adequacy determination or a prior SIP approval.

STAPPA/ALAPCO Recommendation – STAPPA and ALAPCO have advocated for retention of the existing triggers and the 18-month grace period; both bills deviate from this. The difference between the two bills, with respect to the second trigger, is that the Senate bill would allow the two-year grace period clock to restart before the conformity determination is conducted, while the House bill would only restart the two-year clock if the budget in the approved SIP differs from the prior budget. Of the two bills, we believe the House bill is preferable.

Conformity Lapse Grace Period

House – H.R. 3550, sec. 1824(e) (pp. 378-379), enacts a 12-month grace period following a conformity failure, during which an area can amend its transportation plan, if necessary, to modify the project list or add TCMs sufficient to achieve emissions levels required by the MVEB in the applicable SIP.

Senate – S. 1072 has no counterpart provisions.

STAPPA/ALAPCO Recommendation – The House addition of a 12-month grace period to delay the effect of a conformity lapse after a transportation plan or program is found to be inconsistent with the air quality plan would inappropriately allow transportation projects to move forward even after it is determined that the transportation plan or program is at odds with the air quality plan. STAPPA and ALAPCO, therefore, prefer the Senate bill.

Limiting Conformity to Regionally Significant Projects

Senate – S. 1072, sec. 1615(b) (pp. 273-275), defines the term "transportation project" as used in CAA §176(c)(2)(C) to mean only a "regionally significant project" or a change to a project that makes it regionally significant. The CAA prohibits DOT from funding or approving any "transportation project" unless it comes from a conforming RTP and TIP. The new definition of "transportation project" changes the applicability of the conformity provisions of CAA §176(c)(2)C) from all projects in a conforming plan or TIP to only those that are regionally significant or that make a significant revision to an existing project.

Therefore, non-regionally significant projects could be approved, accepted or funded during a conformity lapse when the plan or TIP does not conform.

S. 1072 also amends every use of the term "project" by adding "transportation" to bring it under the new definition of "transportation project" as regionally significant. This language narrows the scope of CAA §176(c)(3)(B)(ii), regarding carbon monoxide, to exempt from conformity those projects that create a CO hotspot if they are not regionally significant.

House – H.R. 3550 has no counterpart provisions.

STAPPA/ALAPCO Recommendation – STAPPA and ALAPCO prefer the House bill because the Senate bill would allow large numbers of projects to evade conformity review, thereby allowing projects to be funded even if they would contribute to a conformity lapse.

Conformity of Projects Listed in the TIP

Senate – S. 1072, sec. 3006 (pp. 598-599), reenacts the transportation planning provisions of 23 USC §5303 (g)(4)(D)(iii) by requiring that projects listed in the TIP conform under the CAA if they are located in an area designated nonattainment for ozone or carbon monoxide. However, under this language, projects in PM_{10} or $PM_{2.5}$ nonattainment areas that do not conform under the CAA may be still included in the TIP project list and, therefore, funded.

House – H.R. 3550 contains a counterpart provision in sec. 6001 (p. 857).

STAPPA/ALAPCO Recommendation – This provision, which is limited to ozone and carbon monoxide, appears to create a conflict with CAA §176(c), which requires that conformity apply to any area designated nonattainment for ozone, carbon monoxide or PM, and to ozone, carbon monoxide or PM areas that are now designated attainment but which were previously nonattainment. This provision should be deleted. If the provision is retained, however, it should be 1) amended to also include all nonattainment areas for any particulate matter standard and 2) expanded to include all former nonattainment areas redesignated to attainment, so as to avoid a repeal by implication of the scope of conformity in CAA §176(c).

Congestion Mitigation and Air Quality Improvement Program

STAPPA and ALAPCO strongly support the CMAQ program, which provides a discrete source of funding explicitly set aside for transportation projects that meet air quality objectives and for projects that result in sustainable air quality improvement. The CMAQ program appropriately reinforces the interrelationship between the transportation and air quality planning processes by specifically recognizing and seeking to ameliorate the transportation sector's impact on air quality. Since 1991, when the program was established, it has been demonstrated that CMAQ can play a significant role in helping states and localities address transportation-related air quality problems.

Our associations believe, however, that this important program should be strengthened in several ways: 1) by requiring the concurrence of state and local air quality agencies for CMAQ project evaluation and selection; 2) by expanding the areas eligible to receive CMAQ funding; 3) by placing greater emphasis on projects that will result in direct, timely and sustained air quality benefits; and 4) by substantially increasing the federal commitment of

resources to the CMAQ program, to reflect the true and very significant impact of transportation-related emissions on air quality.

Role of Air Quality Agencies in the Evaluation and Selection of CMAQ Projects

Senate – S. 1072, sec. 1613 (p. 266), requires the U.S. DOT Secretary to "encourage States and metropolitan planning organizations to consult with State and local air quality agencies in nonattainment and maintenance areas on the estimated emission reductions from proposed congestion mitigation and air quality improvement programs and projects."

House – H.R. 3550 has no counterpart provisions.

STAPPA/ALAPCO Recommendation – STAPPA and ALAPCO have advocated strongly that state and local air pollution control agencies be given a "concurrence" role in the evaluation and selection of CMAQ projects; neither bill provides for this. Of the two bills, we believe the Senate bill – which, at least, encourages consultation on estimated emission reductions – is preferable.

Addition of Areas Eligible for CMAQ Funding

Senate – S. 1072, sec. 1611 (pp. 261-263), expands areas eligible to receive CMAQ funding to include $PM_{2.5}$ (in addition to ozone and carbon monoxide) nonattainment and maintenance areas. By continuing to refer generally to "ozone" nonattainment and maintenance areas, the bill also allows 8-hour ozone nonattainment and maintenance areas to be eligible for CMAQ funding.

House – H.R. 3550 has no counterpart provisions.

STAPPA/ALAPCO Recommendation – STAPPA and ALAPCO believe that areas eligible to receive CMAQ funding should be expanded to include not only 8-hour ozone and $PM_{2.5}$ nonattainment and maintenance areas, but PM_{10} nonattainment and maintenance areas as well. The associations further believe that CMAQ eligibility should be extended to areas nearing nonattainment; areas whose transportation-related emissions have an impact on a nonattainment area; and areas that experience other air quality problems as a result of transportation-related emissions, including, but not limited to, hazardous air pollutants from mobile sources. Neither bill provides for expansion to this extent. Of the two bills, we believe the Senate bill – which expands eligibility for CMAQ funding to $PM_{2.5}$ and 8-hour ozone nonattainment and maintenance areas – is preferable. We urge that the language be revised to also ensure the eligibility of PM_{10} nonattainment and maintenance areas.

Expansion of Projects Eligible for CMAQ Funding to Include Transportation Systems Management and Operations

Senate – S. 1072, sec. 1701 (pp. 293-300), expands the scope of projects eligible for CMAQ funding to include those that "improve transportation systems management and operations" without any showing that such projects will improve air quality. The broad definition of "transportation systems management and operations" includes, among others, such projects and activities as traffic detection and surveillance, work zone management, electronic toll collection, roadway weather management and traveler information services, all of which are unrelated to improving air quality.

House – H.R. 3550 contains counterpart provisions in sec. 1202 (pp. 118-119).

STAPPA/ALAPCO Recommendation – The provisions included in both bills would inappropriately open the limited funds available for CMAQ to projects unrelated to air quality. STAPPA and ALAPCO urge that they be deleted.

Authorization of CMAQ Funds

Senate – S. 1072, sec. 1101, authorizes $13,435,344,394 over six years (2004-2009) for the CMAQ program.

House – H.R. 3550, sec. 1101, authorizes $9,388,989,000 over six years (2004-2009) for the CMAQ program.

STAPPA/ALAPCO Recommendation – Funding for CMAQ in FYs 1998 through 2003 was $8,122,572,000. STAPPA and ALAPCO believe the historic allocation of CMAQ funds is inadequate to address transportation-related air quality problems that exist now and that will exist in the future. The associations have advocated that overall funding of the CMAQ program should be increased significantly to reflect the expanding scope and magnitude of transportation-related emissions and their impact on air quality, and to accommodate new $PM_{2.5}$ and 8-hour ozone nonattainment areas. Of the two bills, we believe the Senate bill – which provides a greater increase in CMAQ funding – is preferable.

Other Issues

TCM Substitution

Senate – S. 1072, sec. 1617 (pp. 278-282), establishes a procedure for adding or substituting TCMs in the SIP. Although the bill allows for the addition or replacement of TCMs, provided the substituted measures achieve equivalent or greater emission reductions and are implemented on a schedule consistent with that for TCMs in the SIP, the bill specifically does not provide any agency with the lead role, and does not provide the air pollution control agency with even a concurrence role in determining whether a TCM should be substituted and, if so, what the substitute measure(s) should be. Instead, the Senate bill merely provides air agencies with a general role in a "collaborative process" and a concurrence role only with respect to determining the equivalency of the substitute or additional measure(s). In addition, Subparagraph (B), regarding adoption of substitute or additional TCMs, could force a state to change its SIP even if it is adequate for attainment. Subparagraph (D) eliminates the conformity mechanism in current law for ensuring that TCMs are funded and implemented.

House – H.R. 3550, sec. 1824(d) (pp. 376-378), also includes provisions for TCM substitutions, but expressly states that the state "may" (versus "shall") approve the changes to its SIP and requires the MPO to determine that funding is available in the TIP to ensure implementation of the new TCMs.

STAPPA/ALAPCO Recommendation – Although STAPPA and ALAPCO support the concept of TCM substitution, the associations do not believe legislative action is necessary or appropriate. However, of the two bills, we believe the House bill – which corrects many of the deficiencies of the Senate bill – is preferable.

Integration of Natural Resource Concerns into State and Metropolitan Transportation Planning

Senate – S. 1072, secs. 1501(a)(1)(A)(ii) and 1501(b)(1)(A)(ii) (pp. 152-153), adds "minimizing adverse health effects from mobile source air pollution" to the list of planning factors for MPO and state long-range transportation plans that MPOs are not required to consider (because judicial review is barred even if the factors are not considered at all). In addition, the bill adds a new paragraph (f)(2) to §§134 and 135, allowing the MPO or state to "determine which of the factors described in paragraph (1) are most appropriate for the metropolitan area to consider." This provides more explicit authority for planning agencies to disregard any factors they determine are not "appropriate."

House – H.R. 3550 has no counterpart provisions.

STAPPA/ALAPCO Recommendation – The Senate provisions are highly problematic because 1) MPOs and states are granted discretion not to consider the adverse health effects of mobile source air pollution and 2) if the health effects of air pollution are considered to encompass the emissions regulated under conformity, then the bar against judicial review could be held to bar judicial review of MPO or state conformity determinations. STAPPA and ALAPCO, therefore, prefer the House bill.

Transportation Project Development Process

Senate – S. 1072, sec. 1511 (pp. 180-184), adds a new §326 to 23 USC. Paragraphs (f)(7) and (g)(6) allow U.S. DOT, as the lead agency, to determine whether air quality, water quality, species and habitat protection, transportation and land use plans are appropriate for consideration in determining the purpose and need for a project. As written, the new language inappropriately allows the lead agency discretion to disregard "environmental protection plans," which could include, among other things, SIP requirements for TCMs.

House – H.R. 3550 has no counterpart provisions.

STAPPA/ALAPCO Recommendation – STAPPA and ALAPCO prefer the House bill. If, however, the Senate provisions are used as the basis for the conference bill, they should be revised – in both (f)(7) and (g)(6) – to ensure that consideration of and compliance with applicable environmental, land use and other plans adopted to protect community resources are not discretionary. For example, the language of (f)(7) and (g)(6) should be amended to read *FACTORS TO CONSIDER – The lead agency will ensure that the following factors and documents are considered and complied with in determining the purpose of and need for a project.*