

**Comments of STAPPA and ALAPCO on
S. 1072, Senate Environment and Public Works Committee
Safe, Accountable, Flexible and Efficient Transportation Efficiency Act of 2003
(November 20, 2003 version, as posted on EPW web site [dated January 9, 2004])**

January 28, 2004

The following comments identify concerns with S. 1072, the transportation bill reported by the Senate Environment and Public Works Committee and, in some cases, recommend changes to address these concerns. Issues listed are in the order in which they appear in the bill and are not in priority order.

Section 1501 – Integration of Natural Resource Concerns into State and Metropolitan Transportation Planning (p. 756)

In Sections 1501(a)(1)(A)(i) and 1501(b)(1)(A)(i), on p. 756, line 17, and p. 757, line 19, respectively, we recommend the addition of “*air quality*” after “*water quality*.”

FHWA has suggested an editorial change on p. 756, lines 21-25, and pp. 757-758, lines 22 and 1-2, to replace “(*including minimizing adverse health effects from mobile source air pollution and promoting the linkage of the transportation and development goals of the metropolitan area*)” with “(*including reducing mobile source emissions within nonattainment and maintenance areas*).” We disagree with this proposed change and recommend that the language currently in the EPW bill be retained.

FHWA has also suggested an editorial change on p. 758, lines 9-10 and 12, to replace “*projects and strategies*” with “*factors*.” We disagree with this suggested change (and, further, believe it is substantive, rather than “editorial”). As currently written, the EPW bill (Section 1501(b) – Statewide Planning) requires that the state transportation planning process “*provide for consideration of projects and strategies*” that meet a series of specified factors and that “*after soliciting and considering any relevant public comments, the State shall determine which of the projects and strategies described in paragraph (1) are most appropriate for the State to consider.*” Changing “*projects and strategies*” to “*factors*” changes the meaning and impact of the provision and would make consideration of the specified factors discretionary.

Sec. 1511 – Transportation Project Development Process (p. 769)

This section of the EPW bill, which adds a new Section 326 to the law, is of significant concern to us. It appears that this language would allow U.S. DOT, as the lead agency, to determine which factors and documents are appropriate for consideration in determining the purpose and need for a project. As written, the new language would inappropriately allow the lead agency discretion to disregard “*environmental protection plans*,” which could include, among other things, SIP requirements for TCMs.

While we question the need for this new section, at a minimum, the language of Section 326(f)(7) on p. 784, lines 12-15, should be revised to ensure that consideration of and compliance with the listed factors is not discretionary. For example:

(7) 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.

Similar changes should be made throughout this section to ensure that the lead agency does not have the discretion to ignore requirements, provisions and priorities adopted by state and local environmental agencies.

Sec. 1611 – Addition of Particulate Matter Areas to CMAQ (p. 851)

STAPPA and ALAPCO support the expansion of areas eligible to receive CMAQ funding to include PM_{2.5} and 8-hour ozone nonattainment and maintenance areas. Areas eligible to receive funding should also include 1) areas nearing nonattainment, 2) areas whose transportation-related emissions have an impact on a nonattainment and 3) 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.

Sec. 1612 – Addition to CMAQ Eligible Projects (p. 853)

With respect to Section 149 of Title 23, USC, on CMAQ project eligibility and the selection of CMAQ projects, STAPPA and ALAPCO firmly believe that greater emphasis should be placed on projects that will result in direct, timely and sustained air quality benefits; criteria for substantiating such benefits should be established and data to support the quantification of such benefits should be required. Certain types of congestion mitigation projects (e.g., road and bridge construction and expansion, among others) may have the long-term effect of inducing growth in vehicle miles traveled and urban sprawl, and of creating new congestion corridors. CMAQ funding should be shifted away from such projects unless there is a demonstration that these projects will result in sustained air quality benefits. To qualify for CMAQ funds, a project should be required to demonstrate that a specified minimum air quality benefit threshold is met or exceeded, based on established criteria and supporting data; such a threshold should be determined with the concurrence of the appropriate state and/or local air quality agency.

In addition, we believe that CMAQ project funding beyond three years should be allowed and decided on a case-by-case basis, contingent on a demonstration of need and continuing air quality benefit. Such extended project funding should, however, be phased out over time.

Sec. 1613 – Improved Interagency Consultation (p. 854)

STAPPA and ALAPCO strongly urge that state and local air quality agencies be provided a concurrence role in the selection of CMAQ projects. However, if such a concurrence role is not granted, at a minimum, consultation with air agencies on CMAQ project

evaluation and selection should be required. This section (pp. 854-855, lines 22-25 and 1-2) should be revised as follows:

(g) *Interagency Consultation – The Secretary shall ~~encourage~~ require 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 evaluation and selection of proposed~~ congestion mitigation and air quality improvement programs and projects.*

Further, to the extent that the MPO's final action is not consistent with the recommendations of the air agency, the MPO should be required to formally document why different action was taken and what the difference in air quality impact will be.

Sec. 1615 – Synchronized Planning and Conformity Timelines, Requirements, and Horizon (p. 856)

STAPPA and ALAPCO oppose the provisions of the EPW bill reducing the planning horizon for the RTP from 20 years to 10 and reducing the frequency of conformity determinations on the TIP and RTP from no less than every two and three years, respectively, to four years. However, if these provisions are to be retained in the bill, we recommend the following clarifications:

pp. 856-857, paragraph (a), *Metropolitan Planning*

- Not only does this paragraph (p. 856, line 16) reduce the frequency of updates to the RTP in nonattainment and maintenance areas from “*at least triennially*” (23 CFR Sec. 450.322(A)) to “every four years,” it arguably denies MPOs discretion to update the RTP more frequently than every four years. As amended, the provision of Section 134(g)(1) would read “*Each metropolitan planning organization shall prepare, and update every four years in areas in [nonattainment and maintenance areas], a long-range transportation plan for its metropolitan area in accordance with the requirements of this subsection.*” The same is true for updates to the RTP in attainment areas (p. 856, line 23), which currently are required “*at least every 5 years,*” but under the EPW bill would be required “*every 5 years,*” again denying the opportunity for more frequent updates. Therefore, we recommend inserting “*at least*” before “*every 4 years*” on p. 856, line 16 and before “*every five years*” on p. 856, line 23.
- The language of paragraph (a) on pp. 856-857 is inconsistent with that on p. 859, lines 9-18, which identifies exceptions to the “every 4 years,” thus allowing more frequent RTP updates. We recommend that these exceptions, amended per our recommendations below, be specified in paragraph (a) on pp. 856-857 as well.
 - Subparagraph (I) on p. 859, lines 11-14, should be amended as follows:

(I) the metropolitan planning organization elects to ~~update~~ add a project or change the timing of a project in a transportation plan or program more frequently;
- In addition, if the life of the TIP is extended from 2 years to 4 years, then projects in the 4-year TIP should be subject to the same financial constraint requirements

currently applicable to projects in the first 2 years of the TIP. This will safeguard against “phantom” projects and ensure that projects claiming air quality credits are funded and built on schedule.

pp. 857-863, paragraph (b), *Synchronized Conformity Determination*

- pp. 858-859, lines 1-25 and 1-3, *Transportation Plans and Programs* – This section creates additional delays in conducting requirements.
 - Subparagraph 2(E) 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 2 years after. The 6 additional months delays the conformity redetermination.
 - Subparagraphs (i) and (ii) of subparagraph 2(E) (p. 858, lines 16-25) change the triggers for conformity redeterminations to further delay conformity redeterminations. The current trigger of SIP submittal is replaced under subparagraph (i) with EPA’s adequacy determination of a submitted budget, which typically comes 4-5 months after SIP submittal. Under (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, which allows the 2-year grace period clock to restart before the conformity determination is conducted. The changes represented in subparagraph 2(E), taken together, could allow up to 52-53 months before a new budget is used for conformity, which is even more than the 4 years allowed under the EPW-revised frequency requirement of every 4 years. Further, if the language of paragraph (a) on page 856 is not revised to “at least every 4 years,” as we recommend above, the EPW bill could allow up to 8 years to pass without requiring use of a new budget for conformity.
- pp. 860-861, lines 8-24 and 1-13, (7) *Conformity Horizon for Transportation Plans*
 - p. 860, lines 18-20 – the language of (ii) is unclear. Delete the text of (ii) and replace it with the text on lines 1-13 of p. 861, under (B) *Exception*, as follows:

(ii) The latest year in the implementation plan applicable to the area that contains a motor vehicle emission budget. In a case in which an area has a revision to an implementation plan under section 175A(b) and the Administrator has found the motor vehicle emissions budgets from that revision to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2003), or has approved the revision, the transportation plan shall be considered to be a transportation plan or portion of a transportation plan that extends through the last year of the implementation plan required under section 175A(b).
 - Page 860, lines 22-24 – the language of (iii) is subject to the construction that a project could be approved before a conformity determination. Revise (iii) as follows:

(iii) The year after the completion date of a regionally significant project, if the project ~~requires approval before the subsequent conformity determination would not be completed during the timeframes of (i) or (ii) above.~~

- Delete lines 1-13 on page 861.
- Further, if the horizon is to be reduced to 10 years, in addition to the clarifying changes recommended above, it is important that provisions be added to require actual compliance with the SIP during the 10-year period. As currently drafted, the EPW language, combined with EPA's existing conformity rule, would allow an area to engage in repeated predictions of compliance 10 years into the future, but never reach a year in which it actually has to comply.
- p. 863, lines 12-17, *(C) Transportation Project* – This section changes the applicability of Clean Air Act Section 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, projects that do not meet these new criteria could be approved, accepted or funded even if they are not from a conforming plan or TIP.
- p. 863, lines 18-20 – This language narrows the scope of Clean Air Act Section 176(c)(3)(B)(ii), regarding carbon monoxide, to except from conformity those projects that create a CO hotspot if they are not regionally significant.

Sec. 1616 – Transition to New Air Quality Standards (p. 863)

This section amends Clean Air Act requirements regarding the methods of determining conformity before a budget is available.

- These changes would allow an 8-hour ozone nonattainment area that currently has a 1-hour ozone budget to discontinue use of that budget and, instead, use other tests established by EPA to determine conformity. STAPPA and ALAPCO commented extensively to EPA last month on a related regulatory proposal. Our associations' December 22, 2003 comments, in which we explain our objections to such discontinued use of the 1-hour budget, are attached. With respect to the EPW bill, we recommend the following:
 - Delete lines 12-13 of p.864.
 - On line 23 of p. 864, add the following at the beginning of subparagraph (ii):
“if no such budget , as described in 3(A)(i) above, has been found adequate or has been approved,”.
- On pp. 865-866, lines 22-25 and 1-10, regarding the criteria for conformity determination tests to be established by EPA, the provisions of subparagraph (bb) should be expanded to include PM_{2.5} emissions, as well as carbon monoxide emissions, since the impact area of a highway is similar for CO and PM_{2.5}. Therefore, we recommend the following:

- On line 22 of p. 865 and on line 1 of p. 866, insert “or PM_{2.5}” after “carbon monoxide,” to

Sec. 1617 – Reduced Barriers to Air Quality Improvements (p. 866)

This section establishes a procedure for TCM substitution in the SIP. STAPPA and ALAPCO agree that a TCM substitution policy should be established. We believe that this can be done administratively and need not be addressed in legislation. However, if a legislative approach is desired, the one established in the EPW bill is problematic because it neither ensures timely emission reductions nor clearly specifies who has the final authority for TCM substitution decisions; more specifically, it does not clearly delegate this authority to the air agency, as it should..

- pp. 866-869 – This language specifically does not provide the state or local air agency with the lead role, or even a concurrence role, in determining whether a TCM should be substituted and, if so, what the substitute measure(s) should be. Instead, it 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.
- p. 867, lines 14-21 – Subparagraph (II), regarding the timing of a TCM substitution, might be appropriate for areas in which the standard has already been attained and for areas prior to their attainment deadline, but where attainment has not been demonstrated upon the attainment deadline, any substitution should be for emissions that are sufficient to provide for attainment, which will require more than just equivalent emissions.
- Moreover, subparagraph (B) on lines 21-24 of p. 868 (*Adoption*) could inappropriately force a state to change its SIP even if it is adequate for attainment; federal law cannot order such a change. To make this provision constitutional, we recommend the following change to subparagraph (B) on p. 868, lines 21-24:
(B) ADOPTION – After carrying out subparagraph (A), a State ~~shall~~ may adopt the substitute or additional transportation control measure in the applicable implementation plan.
- Given the lack of a control over this TCM substitution process by the air agency, it appears that subparagraph (C) on p. 869, lines 1-7, *No Requirement for Express Permission*, could override state law on who has control over the SIP.
- p. 869, lines 8-16, (*D) No Requirement for New Conformity Determination* – For a transportation plan to conform, it must show that it fully implements all TCMs in the SIP. However, this language eliminates the conformity determination, thereby eliminating the mechanism for enforcing TCMs under the Clean Air Act. Therefore, as part of the TCM substitution policy, the MPO should be required to make a determination that the funds needed to implement the substitute TCM are in the TIP. We recommend that the following addition to subparagraph (D):

(D) NO REQUIREMENT FOR NEW CONFORMITY DETERMINATION – The substitution or addition of a transportation control measure in accordance with this paragraph shall not require –

(i) a new conformity determination for the transportation plan; or

(ii) a revision of the implementation plan

if the MPO finds that adequate funding is included in the TIP to ensure timely implementation of the substitution or additional TCM.

- p. 869, lines 17-21, subparagraph (E) should be revised as follows (see also our recommended changes to subparagraph (B), above):

(E) CONTINUATION OF A CONTROL MEASURE BEING REPLACED – A control measure that is being replaced by a substitute control measure under this paragraph shall remain in effect until the substitute control measure is ~~approved~~ adopted by the State pursuant to subparagraph (B).

Sec. 1701 – Transportation Systems Management and Operations (p. 880)

Section (b) of this section (pp. 881-882, lines 22-24 and 1-2), to expand the scope of projects eligible for CMAQ funding to include those that “improve transportation systems management and operations,” is of concern to us. The broad definition of “transportation systems management and operations” (pp. 882-885 and definition #39 on pp. 669-670) 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 and eligible for funding under other sections of the bill. STAPPA and ALAPCO believe that a greater emphasis should be placed on CMAQ projects that will result in direct, timely and sustained air quality benefits. The provisions of this section, however, are completely counter to this principle and would open the limited funds available for CMAQ to projects unrelated to air quality. Such an expansion is clearly inconsistent with the goals and purposes of the CMAQ program and will undermine this important program.

PM_{2.5} Designations and Regional Haze SIP Submissions (omitted provision)

The Administration’s version of SAFETEA contained a provision, Section 1616, that harmonized PM_{2.5} designations and submittal of PM_{2.5} and regional haze SIPs. STAPPA and ALAPCO support including these provisions, with a modification, in the EPW bill.

- The modification to the Administration’s SAFETEA bill that we support is in Section 1616(c)(2), which would have modified Section 6102(c) of TEA-21 to require state governors to submit PM_{2.5} designations by September 30, 2003. Given that this deadline has already passed, and that EPA instructed states to submit these designation recommendations by February 15, 2004, STAPPA and ALAPCO support requiring state governors to submit PM_{2.5} designations by February 15, 2004.

- We support inclusion in the EPW bill of other related provisions of the Administration's SAFETEA bill, as written:
 - It is important to set one deadline for states to submit SIP revisions to meet the regional haze requirements, and we believe 3 years after the date PM_{2.5} designations are promulgated by the Administrator is a reasonable timeframe.
 - We support preserving the agreements and recommendations set forth in the Grand Canyon Visibility Transport Commission Report dated June 1996 that provide different procedures with respect to regional haze SIP submissions for the states of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah and Wyoming.
 - We support the requirement that EPA promulgate the PM_{2.5} designations by December 31, 2004.