



July 23, 2017

Docket Management Facility  
US Department of Transportation  
1200 New Jersey Ave SE, Room W12-140  
Washington, DC 20590-0001

Re: Transportation Infrastructure; Review of Policy, Guidance, and Regulation (Docket Number DOT-OST-2017-0057)

To the US Department of Transportation:

The Association of Metropolitan Planning Organizations (AMPO) welcomes the opportunity to submit comments to the US Department of Transportation (DOT) in response to its review of existing policy statements, guidance documents, and regulations to identify unnecessary obstacles to transportation infrastructure projects.

AMPO is a nonprofit membership organization established in 1994 to serve the needs and interests of MPOs nationwide. Federal highway and transit statutes require, as a condition for spending federal highway or transit funds in urbanized areas, the designation of the now 400+ MPOs, which have responsibility for planning, programming and coordination of federal highway and transit investments.

**ADMINISTRATIVE ACTION:**

**INFLATIONARY ESCALATION FOR FISCAL CONSTRAINT:** Allow flexibility in application described in FHWA guidance.

Implementation of year of expenditure revenue and cost estimates allows MPOs to more accurately express potential resource constraints over their plans and programs. This provides the opportunity for MPOs and their members to identify the impacts associated with slowly growing funding sources, cost escalation and decisions that defer or delay transportation investments. While FHWA and FTA guidance allows MPOs to utilize a base 4% annual rate, it is recognized that cost and revenue growth are driven by different factors such as material and commodity indexes for construction, while employment, population and other regional economic factors can drive revenue growth. As a result, inflation factors based on key revenue and cost drivers should be considered rather than a uniform inflation rate.

FHWA's Fiscal Constraint Question & Answer document appears to recognize the importance of this flexibility, given the many factors that contribute to estimating project costs: "In the absence of State and/or local data, FHWA and FTA would be comfortable if State DOTs and MPOs

utilize an annual inflation rate of four percent for project costs. Because circumstances may vary from State-to-State, from region to region, as well as between highway and transit projects, a State DOT or MPO may assume a lower or higher rate based on circumstances. Inflation assumptions should be documented in the financial plan.” See, [https://www.fhwa.dot.gov/planning/guidfinconstr\\_qa.cfm](https://www.fhwa.dot.gov/planning/guidfinconstr_qa.cfm) AMPO members have experienced much less flexibility with application of this standard than appears to be available. We urge USDOT to promote the flexibility described in the FHWA guidance.

**PLANNING AND PERFORMANCE MANAGEMENT:** Establish One Common Effective Date for Statewide and Nonmetropolitan Transportation Planning.

Along with State DOTs and public transportation providers, MPOs are required to develop specific written provisions for sharing information related to transportation performance data, as well as the selection/reporting of performance targets to track and attain certain critical outcomes for MPO regions according to three separate rulemakings, all with different effective dates. This requires excessive amounts of staff time and processing, as well as duplicative efforts while developing the written procedures. Because of the staggered rulemaking process for the three performance measures, state DOTs, MPOs and public transportation providers will be required to develop written procedures on three separate occasions for three very different data sets, targets, and reports even though they all will use very similar processes.

AMPO supports the establishment of one common effective date for the MAP-21 performance measure final rules. Coordinating the deadline for all three rules to apply two years after the last rule is finalized will allow MPOs to coordinate with its transportation partners more effectively by implementing one data sharing and target setting exercise (as opposed to three) to shape the written procedures for the remaining rules. Coordination on performance measures will be enhanced and streamlined if MPO responsibilities are triggered once all measures are final and in effect.

**MPO CERTIFICATION REVIEWS:** Apply consistent principles nationwide.

Federal regulations (23 C.F.R. Part 450 and 49 C.F.R. Part 613) require that the FHWA and FTA jointly certify that the transportation planning process in Transportation Management Areas (urbanized areas with populations over 200,000) complies with a lengthy list of requirements at least once every four years. See, e.g., 23 C.F.R. 450.336(b).

This process involves an in-depth audit review by federal officials, and must be done in accordance with public participation requirements. MPOs welcome public input as a regular part of their procedures, but the federal recertification process has become burdensome and inconsistent. AMPO members report broad differences in the standards applied and paperwork required from state-to-state, and from FHWA Division Office to Division Office. Although we recognized that agency officials from each state play a role in the certification process, it is essential that FHWA and FTA apply consistent principles across the country. This would allow AMPO to better guide its members and to make this regulatory review as efficient as possible.

**FISCAL CONSTRAINT AND CONCLUSION OF NEPA PROCESS:** Develop process to conclude NEPA documents prior to project level conformity for projects with alternative funding mechanisms.

In agency guidance, FHWA has determined that it will not complete the NEPA process for any project unless the project is included in the MPO's fiscally constrained plan and 'at least one project phase' is included in the MPO's transportation improvement plan (TIP) and the State's transportation improvement plan (STIP). See, [https://www.fhwa.dot.gov/planning/tpr\\_and\\_nepa/tprandnepasupplement.cfm](https://www.fhwa.dot.gov/planning/tpr_and_nepa/tprandnepasupplement.cfm) Other regulations require projects located in air quality nonattainment and maintenance areas to conduct project level conformity analysis to show consistency with planning level regional conformity. FHWA can make the project-level air quality conformity determinations only if the project is included in the region's fiscally constrained plan and TIP. Project level conformity determinations are required prior to completion of the NEPA process, therefore requiring that projects be in the fiscally constrained plan and TIP prior to completion of the NEPA process.

The FHWA guidance attempted to clarify the regulations at 23 C.F.R. 771.133 that a Finding of No Significant Impact or a Final EIS must comply with all applicable environmental laws and other requirements. It was originally intended to promote efficiencies by focusing agency time and attention on only those projects that had a recognized funding source. As FHWA explained: "An effective transportation planning process requires the MPOs and the States to make the appropriate decisions that will benefit the transportation system and the region. A robust planning process that includes planning/corridor/subarea/feasibility studies, environmental analysis, and financial planning will help project sponsors, the MPOs, and the States to determine if completing all of the proposed Projects is achievable, given the anticipated revenues and the relative priorities of these Projects. The planning process, when appropriately used as a screening mechanism, ensures that only those "viable" Projects that meet funding and priority requirements will advance. These "viable Projects" will be limited in number and with the smaller number of Project commitments, the FHWA can better leverage its staff resources in reviewing and providing oversight of the NEPA process." [https://www.fhwa.dot.gov/planning/tpr\\_and\\_nepa/tprandnepasupplement.cfm](https://www.fhwa.dot.gov/planning/tpr_and_nepa/tprandnepasupplement.cfm)

As time has gone by, however, and as additional creative and alternative funding mechanisms for transportation infrastructure have become more common, this guidance has created an obstacle to project planning and delivery. For many projects, especially proposed Public-Private Partnership projects, the sources of funding may not be finally determined until NEPA is completed. The FHWA guidance cited above indicates that a final NEPA decision will not be approved without at least a general definition of the funding plan for the project. This requirement also discourages States from including a list of ready-to-go projects for which funding has not been identified. If and when funding becomes available, States and MPOs must go through a months-long process of completing NEPA, and amending the plan and TIP/STIP to include the projects.

AMPO supports a solution advocated by the American Association of State Highway and Transportation Officials (AASHTO) and other State DOTs to allow the NEPA process to conclude prior to project level air quality conformity being conducted and projects being included in the fiscally constrained planning documents. This approach does not change any substantive requirements related to fiscal constraint and project level conformity, it merely changes the timing of making these determinations.

## **LEGISLATIVE ACTION:**

### **REVISIONS TO SECTION 168 OF THE FAST-ACT, PLANNING AND ENVIRONMENTAL**

**LINKAGES:** Reduce or eliminate conditions to allow adoption of planning decisions in the NEPA process.

The regulatory concept of Planning and Environmental Linkages (“PEL”) permits planning decisions to be carried forward into a subsequent project-specific NEPA process without having to revisit these decisions. The FHWA and FTA have encouraged the use of PEL specifically because of the numerous positive outcomes related to project planning and development. Among other benefits, FHWA and FTA recognize that applying PEL effectively can result in: “improved sharing of information, elimination of duplicative efforts in planning and NEPA processes, improved communication and stronger relationships, early consultation and collaboration among stakeholders to identify potential impacts, accelerated project delivery, better environmental outcomes, timely permit decisions, and mutually beneficial outcomes.” See, <https://www.fhwa.dot.gov/hep/guidance/pel/pelfaq16nov.cfm#ftn11>

In the context of its transportation planning responsibilities, for example, an MPO might consider and then create a plan with community input that establishes a transportation corridor, or even makes modal recommendations for future infrastructure investments. FHWA and FTA regulations at 23 C.F.R. 450, Appendix A recognize the substantial efficiencies promoted by not having to repeat lengthy analyses and/or decision-making on certain fundamental planning issues.

Congress attempted to incorporate the benefits of PEL into statute in both MAP-21 and the FAST Act. However, the most recent statutory language in Section 168 of the FAST Act contains ten stringent conditions that must be met prior to carrying a planning decisions forward into NEPA, including resource agency concurrence. These additional requirements are in many ways inconsistent with the DOT’s PEL regulations. Most important, they have been an impediment to using the excellent work from MPOs to streamline NEPA reviews.

AMPO strongly supports the amendment of 23 U.S.C. Section 168 to ensure that the statutory authority provided to adopt planning decisions in the NEPA process includes all of the flexibility previously provided in the agency’s planning regulations.

### **AIR QUALITY CONFORMITY: NATIONAL AMBIENT AIR QUALITY STANDARD (NAAQS):**

Require transportation agencies to conform to only the most recent NAAQS for pollutants of concern.

The Clean Air Act conformity process requires MPOs to apply time-consuming and technical analyses to comply with statutory requirements. To conduct transportation conformity, MPOs must conduct complicated analysis and build vs. no build scenario evaluations to predict future emissions. The timing and sequence of these analyses often overlaps with other planning requirements. As a result, MPOs struggle with confusing mandates, with the result of the conformity activities often becoming the subject of litigation.

To elaborate on this challenge, consider that after a new NAAQS is established, nonattainment areas are designated. One year after this designation, transportation conformity applies. State Implementation Plans (SIPs) however, are not due for three years after nonattainment areas are designated. The SIPs establish the pollutant budgets and determine the percentages attributable to various contributors (including transportation). Due to the timing requirement related to transportation conformity, conformity must occur two years before the SIP is developed and budgets and contributors are established.

On top of these timing issues, consider that currently, there are three NAAQS for particulate matter—1997, 2006 and 2012 and three standards for ozone—1997 and 2008 and 2015. Each successive standard tightens air quality requirements. MPOs that are in nonattainment must document how they plan to achieve cleaner air for all applicable existing standards.

The challenge presented to AMPO members concerns these successive standards and competing planning deadlines, and how MPO conformity plans must adhere to both. Given these differing dates, and the fact that planning processes around the country do not necessarily coincide with the implementation dates for these enhanced standards, there has been substantial confusion over which standards should apply. This confusion has been amplified by appellate court rulings that have specifically called out implementation challenges as a result of this phenomenon. See e.g., Natural Resources Defense Council v. McCarthy, (D.C. Cir. December 23, 2014).

AMPO supports a legislative fix to 42 U.S.C. 7506 that would (1) require transportation agencies to conform to only the most recent NAAQS for pollutants of concern in any given planning area, and (2) require that initial transportation conformity does not apply until six months after EPA approves the SIP motor vehicle emissions budgets. If transportation conformity were not required until after a SIP is developed, MPO's could use the actual SIP budgets rather than conducting complicated and sometimes unnecessary analysis.

We appreciate the opportunity to provide comments on legislative and administrative actions. AMPO looks forward to working with the Trump Administration and USDOT on these matters. Should you have any questions, please contact me at 202-624-3684 or [dhardy@ampo.org](mailto:dhardy@ampo.org)

Sincerely,

A handwritten signature in black ink, appearing to read "DeLania Hardy". The signature is fluid and cursive, with the first name being more prominent.

DeLania Hardy, Executive Director

Association of Metropolitan Planning Organizations