



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 790

[Docket No. FHWA–2013-0018]

RIN 2125-AF63

Congestion Mitigation and Air Quality Improvement (CMAQ) Program

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Proposed rule; withdrawal.

SUMMARY: The FHWA withdraws its August 4, 2014, Notice of Proposed Rulemaking (NPRM), which proposed to establish a weighting factor of 5.0, to be used in determining the weighted population of fine particulate (PM_{2.5}) nonattainment areas.

The Moving Ahead for Progress in the 21st Century Act (MAP-21) language for the CMAQ Program funds that must be obligated for PM_{2.5} projects in PM_{2.5} nonattainment and maintenance areas (referred to in this document as a “set-aside”) instructs that the set-aside be calculated based on “weighted population” in PM_{2.5} nonattainment areas. Because the statute did not specify the values to be applied to determine the weighted population, FHWA had previously initiated a rulemaking to establish the weighting factor. After reviewing the record in this matter, FHWA withdraws the NPRM.

DATES: The NPRM “Congestion Mitigation and Air Quality Improvement (CMAQ) Program,” RIN 2125-2013-0018, published August 4, 2014 (79 FR 45146), is withdrawn as of [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Cecilia Ho, Office of Natural Environment, 202–366–9862, or Ms. Diane Mobley, Office of the Chief Counsel, 202–366–1366, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the 2014 NPRM, and all comments received may be viewed online through the Federal eRulemaking portal at <http://www.regulations.gov>. The Web site is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register’s home page at <https://www.federalregister.gov>.

BACKGROUND

The Intermodal Surface Transportation Efficiency Act of 1991 (Pub. L. 102-240, 105 Stat. 1914) established the CMAQ Program. The program provides funding to State and local governments for transportation projects and programs to help meet the requirements of the Clean Air Act (CAA) (42 U.S.C. 7401 *et seq.*). Funding is available to reduce congestion and improve air quality for areas that do not meet the National Ambient Air Quality Standards (NAAQS) for ozone, carbon monoxide (CO), or particulate matter (i.e., nonattainment areas), and for areas that were out of compliance but have now met the standards (i.e., maintenance areas). The program was reauthorized

under the Transportation Equity Act for the 21st Century (Pub. L. 105-178, 112 Stat. 107) in 1998, under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144) in 2005, under MAP-21 (Pub. L. 112-141, 126 Stat. 405) in 2012, and most recently under the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114-94, 129 Stat. 1312) in 2015.

Section 1113(b)(6) of MAP-21 amended 23 U.S.C. 149 by adding subsection (k)(1) requiring priority use of CMAQ funds in areas that are designated nonattainment or maintenance for the PM_{2.5} NAAQS.¹ Specifically, 23 U.S.C. 149(k)(1) states:

For any State that has a nonattainment or maintenance area for fine particulate matter, an amount equal to 25 percent of the funds apportioned to each State under section 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 such fine particulate matter emissions in such area, including diesel retrofits.

Although the statute requires that the PM_{2.5} set-aside must be calculated based on “weighted population,” it was not specific regarding what that weighting factor should be. Because the language did not specify values to be applied to determine the weighted population, FHWA must make that determination as the Agency implementing the CMAQ Program.

Since October 1, 2012, a State's CMAQ apportionment has been determined by multiplying a State's total amount for all apportioned programs under MAP-21 by the share of the State's total Fiscal Year (FY) 2009 apportionments for the CMAQ Program

¹The EPA has set both an annual and a 24-hour NAAQS for PM_{2.5} (40 CFR 50.7).

apportionment relative to the State's total apportionments under all programs for FY 2009, based on the statutory formula at the time.²

For the PM_{2.5} set-aside calculation, FHWA follows the prior statutory approach to weighted population formulas. To determine the 25 percent that States must set-aside for PM_{2.5} nonattainment and maintenance areas, FHWA must determine weighted populations for ozone, CO, and PM_{2.5} nonattainment and maintenance areas. The weighted population numbers provide a means to reflect the severity of the air quality problems among the populations of the areas in nonattainment and maintenance for ozone, CO, and PM_{2.5}. The FHWA is using the weighting factors in the most recent statutory apportionment formula from SAFETEA-LU for ozone and CO. However, since MAP-21 and prior legislation did not include a PM_{2.5} weighting factor in CMAQ apportionment formulas, FHWA continues to use the weighted population formula, which was used in prior statutes, to determine the PM_{2.5} set-aside under MAP-21.

The use of the previous weighted population formula for the PM_{2.5} set-aside calculation is based on the congressional description of the set-aside and requires two main mathematical steps, with multiple sub-steps. The PM_{2.5} set-aside calculation is based on the State's net CMAQ apportionment, which is the State's total CMAQ apportionment minus required set-asides for the Transportation Alternatives Program and State Planning & Research. The first main step is to determine the amount of the State's net CMAQ apportionment that is attributable to PM_{2.5} nonattainment and maintenance.

² 23 U.S.C. 104(b)(4).

County-level weighted populations are calculated by taking the population in each of the State's counties with a nonattainment or maintenance area and multiplying by the weighting factors for each pollutant for which the county is in nonattainment or maintenance status. The State's total weighted population for all three criteria pollutants (ozone, CO, and PM_{2.5}) is determined by combining the weighted populations of all counties in nonattainment or maintenance for any of the pollutants. The State's PM_{2.5} weighted population is determined by combining the weighted populations of all counties in nonattainment or maintenance for PM_{2.5}. The State's PM_{2.5} weighted population is divided by the State's total weighted population to determine the percentage of the State's total weighted population attributable all or in part to PM_{2.5}. The net CMAQ apportionment amount then is multiplied by the PM_{2.5} percentage to determine the amount of the net CMAQ apportionment amount attributable to PM_{2.5} pollutants. The second main step is to multiply the resulting number by 25 percent to arrive at the PM_{2.5} set-aside under 23 U.S.C. 149(k)(1). States are to spend that set-aside only on PM_{2.5} projects, as chosen by the States, in the nonattainment or maintenance areas for PM_{2.5}. This is not meant to be a limit on the amount of funds to be spent; areas may spend additional CMAQ funds above the 25 percent set-aside on PM_{2.5} projects.

To calculate the weighted population of an area under 23 U.S.C. 149(k)(1), FHWA uses updated populations based on the most recent data available from the U.S. Census Bureau for each county, or part of a county, that is designated nonattainment or maintenance for ozone, CO, or PM_{2.5}. The U.S. Census Bureau provides annual estimates of county populations, and FHWA historically has used this jurisdictional level

to determine CMAQ apportionments. Updated populations are then given a relative value—a weighting—that corresponds to the nonattainment designation and severity of the criteria pollutant classification of the area, as established under the CAA.

Beginning in 2013, FHWA implemented the MAP-21 changes by an administrative determination to use a weighting factor of 1.2 for PM_{2.5} areas. The justification for this determination was outlined in the August 2014 NPRM.

The FHWA issued a NPRM on August 4, 2014, proposing to set a weighting factor of 5.0 for PM_{2.5} areas. The FHWA solicited comments on this weighting factor and specifically requested comments on whether setting the weighting factor at 5.0 may present any implementation concerns for States or local transportation agencies, and if so, how FHWA could address those concerns. The FHWA received 28³ sets of comments on the NPRM.

NPRM Comments Generally

One State DOT commented that a weighting factor of 5.0 does not fully consider the U.S. Environmental Protection Agency (EPA) analysis for the 2012 PM_{2.5} NAAQS. The EPA's analysis predicted that the implementation of Federal controls will ensure more than 90 percent of areas will attain the PM_{2.5} NAAQS by the year 2020. The EPA expects that fewer than 10 counties, out of the more than 3,000 counties in the U.S., will need to consider any local actions to reduce fine particle pollution in order to meet the 2012 PM_{2.5} NAAQS by 2020. The rest of the country can rely on air quality

³ The docket shows receipt of 31 comments; however, 3 sets were duplicates.

improvements from Federal rules already on the books to meet this new standard. It is not clear to the commenter that a proposed weighting factor of 5.0 sufficiently considered this EPA information and the associated reduction in potentially harmful health impacts.

One metropolitan planning organization (MPO) commented that setting the weighting factor at 5.0 could inhibit the region's ability to meet existing reduction commitments for ground-level ozone and place a fast-growing region at a disadvantage for dealing with increased congestion. A weighting factor of 5.0 does not take into account resources available at the State and local level. The commenter is concerned that increasing the PM_{2.5} weighting factor from the interim value of 1.2 to 5.0 will significantly reduce the flexibility of a State or region to develop air quality projects that best meet the needs of the affected local population.

One State DOT disagreed with FHWA's characterization of the impact of moving from a weighting factor of 1.2 to a weighting factor of 5.0 as producing a "modest difference." The commenter pointed out that the amount of the set-aside shown in an example set forth in the NPRM⁴ increases by more than 15 percent. If the weighting factor were to be increased from the current 1.2 to the proposed 5.0, the amount required to be set-aside for the 7 counties in Michigan would increase from \$11.5 million to \$15.6 million, an increase of more than \$4.1 million per year, or roughly 36 percent. Every dollar and the strings attached to each dollar, matter greatly to the State.

The comments submitted by a transportation association and supported by 10 State DOTs and other transportation organizations recommended that the final rule provide the specific weightings to be used for each possible combination of

nonattainment and maintenance areas. They commented that the following combinations were not addressed in the proposed rule, and should be added to the final rule: (1) Ozone nonattainment and maintenance areas that are also designated as PM_{2.5} maintenance areas; (2) CO nonattainment or maintenance areas that are also designated as PM_{2.5} nonattainment areas; (3) CO nonattainment or maintenance areas that are also designated as PM_{2.5} maintenance areas; (4) Ozone nonattainment and maintenance areas that are also designated as CO nonattainment or maintenance areas and are designated as PM_{2.5} nonattainment areas; and (5) Ozone nonattainment and maintenance areas that are also designated as CO nonattainment or maintenance areas and are designated as PM_{2.5} maintenance areas. These combinations should be addressed specifically in the final rule even if the weighting for one or more of the individual pollutants (e.g., CO) is 1.0. The benefit of specifying the weighting factor for each possible combination is that it ensures clarity and certainty in implementation of the rule.

The same transportation association with the supporting State DOTs also expressed their opposition to the proposed 5.0 weighting. They believed that the reasoning presented for selecting the weighting factor of 5.0 is inadequately supported in the proposed rulemaking. They commented that increasing the PM_{2.5} weighting factor from 1.2 to 5.0 will significantly reduce the flexibility of a State or region to develop air quality projects that best meet the needs of the affected local population. They recommended retaining the existing weighting of 1.2 for the following reasons: (1) The earlier Senate version of MAP-21 included a 1.2 weighting factor for an apportionment formula for areas designated nonattainment or maintenance for PM_{2.5}; (2) The weighting

factors used prior to MAP-21 (to determine CMAQ apportionments) ranged from 1.0 for CO to 1.4 for the highest ozone classification—as the NPRM notes, a weighting factor of 1.2 is in the midpoint value of that range, and a reasonable inference is that Congress intended for FHWA to adopt a weighting factor within the range of those already in use; and (3) The factor only establishes a minimum investment level for PM_{2.5} projects. A State can invest additional funding in such projects if it determines this is the best use of its CMAQ funding. They do not believe there is sufficient support for concluding that PM_{2.5} should be assigned a weighting factor that is twice as great as the other two pollutants combined. Such a factor has no basis in the legislation nor does the scientific information cited in the NPRM provide a compelling basis for assigning such a weighting. They further commented that even if FHWA concluded that the highest existing factor should be doubled, there is an error in the logic proposed in this NPRM. The highest possible weighting factor should be 1.2 multiplied by 1.4, or 1.68 for an area that is nonattainment or maintenance for CO and is also extreme nonattainment for ozone. Thus, if the intent is to double the highest possible weighting factor under current law and policy, the weighting factor should be no higher than 3.36.

In the event that a weighting factor of 1.2 is not retained for PM_{2.5} nonattainment areas, the commenters recommended adopting a weighting factor no higher than the current highest weighting factor of 1.4 for “extreme” ozone nonattainment areas. This approach would ensure that the weighting for PM_{2.5} nonattainment areas is within the range contemplated by Congress when it enacted MAP-21 while also reflecting the heightened severity of PM_{2.5} health effects.

Five commenters (two State DOTs and three MPOs) support FHWA setting the $PM_{2.5}$ weighting factor at 5.0. These commenters cited the serious health impacts associated with $PM_{2.5}$ emissions. They agreed that setting the weighting factor at 5.0 for $PM_{2.5}$ set-aside calculations was intended to improve and benefit overall public health by targeting $PM_{2.5}$ emissions. The commenters also agreed that it is reasonable to set a weighting factor for $PM_{2.5}$ that is higher than the weighting factor for ozone and CO given the potential health impacts.

One commenter suggests that an even higher weighting factor (higher than 5.0) for $PM_{2.5}$ nonattainment areas could be supported if cost effectiveness of CMAQ projects were taken into account. For example, the Carl Moyer Program administered by the California Air Resources Board has, for many years, taken the health impacts and toxicity of $PM_{2.5}$ into account in its cost effectiveness formula that is used to determine which projects are funded. They urged FHWA to consider the rationale for a higher weighting of $PM_{2.5}$ emission reductions relative to nitrogen oxide, volatile organic compounds, and CO, as well.

One MPO commented that a wide variety of projects eligible under the CMAQ Program reduce $PM_{2.5}$ as well as other criteria pollutants. The flexibility that FHWA has provided to select projects that demonstrate criteria pollutant emissions for CMAQ funding is beneficial and appreciated. This commenter requests that FHWA continue this flexibility with respect to the types of projects that reduce $PM_{2.5}$ and are counted toward the obligation targets for such projects. This allows each region to effectively target

investment opportunities specific to its unique strategies to meet air quality as well as other planning objectives.

FHWA Decision to Withdraw the NPRM

Based on the current record, including comments received in response to the NPRM indicating that the 1.2 weighting factor was sufficient and provided States necessary flexibilities, FHWA has decided to withdraw the August 2014 NPRM and, accordingly, cancels the plans to develop a final rule. If FHWA determines changes to the weighting factor currently in use are necessary and advisable in the future, a new rulemaking would be initiated that will incorporate any appropriate recommendations from the comments received through this rulemaking. The FHWA will continue to use the weighting factor in use since 2013. The NPRM proposing to establish a weighting factor to be used in determining the weighted population of PM_{2.5} nonattainment areas are withdrawn.

Issued on: April 10, 2018.

Brandy L. Hendrickson
Acting Administrator
Federal Highway Administration

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