

# Congress of the United States

Washington, DC 20515

August 30, 2010

The Honorable Lisa Jackson  
Administrator  
U. S. Environmental Protection Agency  
Mailcode: 1101A  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

RE: PM-10 Nonattainment Area Plan for Maricopa County, Arizona

Dear Administrator Jackson:

We are writing to express our serious concerns with two recent decisions concerning Maricopa County's air quality plans that have been taken by the Environmental Protection Agency's (EPA's) Region IX Office.

Although Arizona state and local officials have attempted to work with EPA for many years on efforts to attain National Ambient Air Quality Standards (NAAQS) for coarse particulate matter (PM-10), we are concerned that EPA is presently pursuing a course of action that could result in a disruptive effect on Arizona's economy without ensuring a meaningful improvement in air quality. Instead of pursuing the present course of action, we ask that you review each matter and ensure that your agency employs a fair, collaborative and constructive process in resolving any outstanding issues. We believe this is the best course to help our state achieve the requirements of the Clean Air Act (CAA) while not imposing punitive and counterproductive measures.

First, we are concerned with EPA's pending actions concerning a proposed consent decree with respect to the Maricopa Association of Governments (MAG) Five Percent Plan for PM-10. This plan has been a success. It contains 53 new control measures for PM-10 emissions that are the best available control measures and as stringent as any in the country. Most importantly, except for certain natural conditions and events that temporarily caused elevated levels of PM-10, the PM-10 NAAQS has been met in the Maricopa County area. Clean data and compliant air quality has been achieved throughout 2010.

In a July 2, 2010 Federal Register Notice, EPA gave interested parties only 30 days to comment on whether the Agency should propose action on the MAG 2007 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area by September 3. Local and state agencies have, of course, weighed in on this matter, but EPA's overall timeframe in addressing this litigation is unacceptably short given the exceedingly technical nature of the information that is involved and the very large local and state interests that are at stake. After revealing this plan of action only this past July, EPA indicates in the Federal Register notice that it intends to propose action on the Five Percent Plan by September 3, 2010, and take final action by January 28, 2011.

Based on our understanding of EPA's intent in this matter, it appears that the agency will propose disapproval of the Five Percent Plan. According to MAG, this disapproval could initially result in a "conformity freeze" under which new transportation projects would be halted in the Phoenix area, and it could ultimately result in the imposition of CAA sanctions, including additional offset requirements for new construction and withholding of federal highway funds, putting literally billions of dollars in infrastructure investment at risk. Even prior to the imposition of any sanctions, we would be concerned that these actions could serve to chill private sector investment in the Phoenix area at a time when our country is attempting to emerge from a recession. Even the lowest level loss of transportation funding that has been threatened could cost at least 60,000 jobs, according to MAG estimates.

Second, we are concerned with regard to EPA Region IX's abrupt decision on May 21, 2010, to deny the State of Arizona's request regarding certain PM-10 "exceptional events" demonstrations. As you know, the CAA allows certain air quality data to be excluded from the consideration of an area's attainment status if the data was influenced by natural or certain human-caused events that are effectively out of an area's ability to control. Despite a lengthy albeit incomplete process in which Arizona and MAG submitted a considerable amount of technical data and analysis to EPA, the state's request to exclude four days worth of data at a single monitor was rejected by Region IX. At a meeting to discuss this disapproval, Region IX Administrator Jared Blumenfeld called the regulations under which he made his decision "flawed."

In this regard, we would note that the exceptional events rule has been consistently criticized by a wide range of interests since its adoption, including criticism by the state air quality managers in 15 western states most immediately affected by the rule. These states, through the Western States Air Resources Council, have requested action by the EPA Office of Air and Radiation since September 2009 to streamline implementation of the exceptional events rule and to make other changes in administration of the rule. To date, however, we are not aware of any action by EPA to effectively respond to this request or to work with states and localities that are most affected by conditions such as windblown dust and other particulate matter subject to transport.

We therefore request that EPA respond to concerns of states and localities, within existing rules, regulations and ethical guidelines, in an effort to seek a reasonable solution to these issues. In order to allow this process to occur, we respectfully request that:

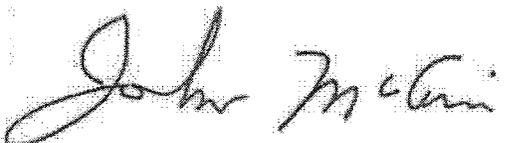
(1) EPA provide adequate time for an additional review of exceptional events requests by the State of Arizona. EPA should review and consider new data and information on these events and move to reconsider its May 21, 2010 determination with regard to the Maricopa County Nonattainment Area.

(2) EPA defer action with regard to its proposed consent decree so that there is adequate time for public comment and consideration. Under the accelerated timeframe that EPA revealed in its July 2, 2010 notice, EPA would propose and take final action on the consent decree in less than five months, allowing only 30 days for public comment. We seriously question whether such a truncated time period will allow sufficient opportunity for states, local areas, business and

private individuals who are not parties or intervenors to the litigation, but who may have a substantial stake in the outcome, to respond and assemble the necessary comments and information for EPA to review.

Thank you for your kind consideration and prompt attention to our concerns. Given the immediacy of this matter, we would ask that you respond in writing to this letter prior to the September 3, 2010 date of proposed action.

Sincerely,



Senator John McCain



Senator Jon Kyl



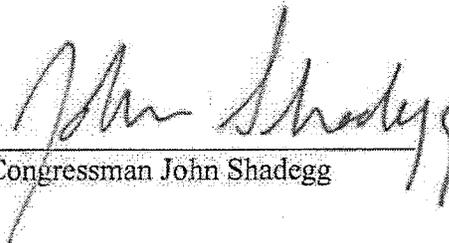
Congressman Harry Mitchell



Congressman Jeff Flake



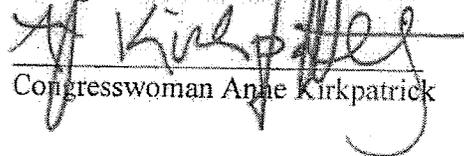
Congressman Ed Pastor



Congressman John Shadegg



Congresswoman Gabrielle Giffords



Congresswoman Anne Kirkpatrick



Congressman Trent Franks



**U.S. DEPARTMENT OF TRANSPORTATION**

FEDERAL HIGHWAY ADMINISTRATION

CALIFORNIA DIVISION

650 Capitol Mall, Suite 4-100

Sacramento, CA. 95814

November 17, 2008

IN REPLY REFER TO  
HDA-CA

Document #: S52247

Mr. Will Kempton, Director  
California Department of Transportation  
1120 N Street  
Sacramento, CA 95814

Attention: Federal Resources Office, M.S. #82  
For Rachel Falsetti, Transportation Programming

Dear Mr. Kempton:

**SUBJECT:** Revised Federal – Statewide Transportation Improvement Program (FSTIP)  
Amendment and Administrative Modification Procedures.

For the past few months, a subcommittee of the California Federal Programming Group (CFPG) consisting of representatives from the California Department of Transportation (Caltrans), the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and Metropolitan Planning Organizations (MPOs) throughout the State have collaborated on revisions to the current FSTIP/FTIP amendment and administrative modification procedures. These revisions were necessitated by the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU), which defined an administrative modification.

Attached are the revised procedures detailing what specific types of programming changes to the FSTIP/FTIPs may be made as administrative modifications, for which approval has been delegated to the State, and what changes must be submitted to FHWA and/or FTA for approval as amendments (per the July 15, 2004 MOU between FHWA – CA and FTA Region 9). These procedures are intended to clarify the parameters of an administrative modification.

In addition, as agreed to, to ensure that adequate financial capacity exists to make administrative modifications, Caltrans will document that financial capacity is available and included in the FSTIP. In processing administrative modifications, the financial capacity will be documented in each administrative modification and each MPO will adjust its financial plan at its next formal amendment to reflect the changes made by previous administrative modifications.

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If you have any questions regarding the attached procedures, please contact Ray Sukys, FTA, at 415-744-2803 ([Raymond.Sukys@dot.gov](mailto:Raymond.Sukys@dot.gov)) or Sue Kiser, FHWA, at 916-498-5009 ([Sue.Kiser@fhwa.dot.gov](mailto:Sue.Kiser@fhwa.dot.gov)).

Sincerely,



Leslie Rogers  
Regional Administrator  
Federal Transit Administration, Region IX



For  
Gene K. Fong  
Division Administrator  
Federal Highway Administration, CA Div.

Enclosure

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## Procedures for Federal – Statewide Transportation Improvement Program (FSTIP) Amendments and Administrative Modifications

The following procedures are applicable for processing amendments and administrative modifications to the Federal – Statewide Transportation Improvement Program (FSTIP). In accordance with the provisions of 23 CFR 450, Federal Transportation Improvement Programs (FTIP) developed by Metropolitan Planning Organizations (MPOs) are incorporated into the FSTIP and, as such, these procedures are also applicable to FTIPs.

In accordance with 23 CFR 450.216(c), projects in the recognized four-year period of the FSTIP may be delivered in any of the FSTIP program years subject to the project selection requirements of 23 CFR 450.222. Such modifications do not require approval, provided expedited project selection procedures have been adopted in accordance with 23 CFR 450.332 and the required interagency consultation or coordination is accomplished and documented. These changes should be accounted for through subsequent amendments or modifications to the FSTIP/FTIPs. Changes to illustrative projects or others that have been included for informational purposes only do not require administrative modifications or amendments.

### 1. Definitions:

- A. Administrative modifications are minor changes to the FSTIP/FTIP that do not require a conformity determination, a demonstration of fiscal constraint or a public review and comment period. Administrative modifications can be processed in accordance with these procedures provided that they:
- i. Revise a project description without changing the project scope or conflicting with the environmental document;
  - ii. Revise the funding amount listed for projects or project phases. Additional funding is limited to the lesser of 25 percent of the total project cost or \$5 million, and programming capacity has to be available in the FSTIP/FTIP prior to programming the modification, and documented in the support materials;
  - iii. Cost decreases have no cap, however, the request to reduce the cost must originate from the project sponsor and include an explanation for the decrease;
  - iv. Change sources of funds;
  - v. Change a project lead agency;
  - vi. Program federal funds for Advance Construction conversion;
  - vii. Change program year of funds with the 4-year FTIP/FSTIP, provided Expedited Project Selection Procedures are in place;
  - viii. Split or combine individually listed projects, provided cost, schedule and scope remain unchanged;
  - ix. Change required information for grouped or lump sum project listings; or,
  - x. Add or delete projects from grouped or lump sum project listings provided the funding amounts stay within the funding change guidelines above (see Section ii).
  - xi. Administrative modifications are allowed for the re-programming of projects for which CMAQ funds were transferred to FTA in the prior FTIP and the FTA had not approved the grant yet. The project can be programmed in the current FTIP via administrative modification as long as there is no change in the original scope or cost, and the project needs to be programmed with "FTA 5307 (CMAQ Transfer Funds)" in the FTIP.

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- xii. Administrative modifications may be used for programming FTA projects from the previous FTIP. The project can be programmed into the current FTIP via administrative modification as long as there is no change in the original scope or cost. Prior year funding must be differentiated from the current year funding by including narrative in the project description (or in "CTIPS MPO Comments" section) stated the year, amount and nature of the prior year funds.
- xiii. Make minor changes to the FTA funded grouped project listings. Minor changes include changing the number of transit vehicles purchased by 20% or less and changes to the fuel type of transit vehicles. MPO needs to take the change through its interagency consultation procedures to confirm that the change in scope is minor.

B) Amendments or Formal Amendments are all other modifications to FSTIP/TIP that are not Administrative Actions.

## 2. Procedures:

### A. Administrative Modifications

Each MPO-approved administrative modification will be forwarded to Caltrans Division of Transportation Programming for approval on behalf of the Governor. If the MPO Board has delegated approval of administrative modifications to the MPO Executive Director, the MPO will need to provide copies of the delegation to Caltrans, FHWA, and FTA.

The MPO will provide copies of administrative modifications submitted to Caltrans for approval to FHWA and/or FTA for informational purposes. In addition, the MPO will demonstrate in a subsequent amendment that the net financial change from each administrative modification has been accounted for. Once approved by Caltrans, on behalf of the Governor, the administrative modification will be incorporated into the FSTIP and no Federal action will be required. Caltrans will notify the MPO, FHWA and FTA of the approved administrative modification.

### B. Amendments

Amendments to the FSTIP must be developed in accordance with the provisions of 23 CFR 450.326 and/or 23 CFR 450.216, and approved by the FHWA and/or FTA in accordance with 23 CFR 450.218, 23 CFR 450.328 and the July 15, 2004 MOU between FHWA - CA and FTA Region 9. Each MPO-approved amendment will be forwarded to Caltrans Division of Transportation Programming for approval on behalf of the Governor. To expedite processing, the MPO will also forward a copy of the submitted amendment to FHWA and FTA at the same time the amendment is sent to Caltrans. Once approved by Caltrans on behalf of the Governor, Caltrans will forward the amendment to FHWA and/or FTA for Federal approval. Once approved by FHWA and/or FTA, the amendment will be incorporated into the FSTIP. The FHWA and/or FTA approval letter will be addressed to Caltrans, with copies sent to the MPO.

## 3. Dispute Resolution

If a question arises on the interpretation of what constitutes an administrative modification or amendment, Caltrans, the MPO, FHWA and FTA will consult with each other to resolve the question. If after consultation, the parties disagree regarding what constitutes an administrative modification or amendment, the final decision rests with the FTA for transit projects and FHWA for highway projects.

### **§ 93.126 Exempt projects.**

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in table 2 of this section are exempt from the requirement to determine conformity. Such projects may proceed toward implementation even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in table 2 of this section is not exempt if the MPO in consultation with other agencies (see §93.105(c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation. Table 2 follows:

**Table 2—Exempt Projects**

#### ***Safety***

- Railroad/highway crossing.
- Projects that correct, improve, or eliminate a hazardous location or feature.
- Safer non-Federal-aid system roads.
- Shoulder improvements.
- Increasing sight distance.
- Highway Safety Improvement Program implementation.
- Traffic control devices and operating assistance other than signalization projects.
- Railroad/highway crossing warning devices.
- Guardrails, median barriers, crash cushions.
- Pavement resurfacing and/or rehabilitation.
- Pavement marking.
- Emergency relief (23 U.S.C. 125).
- Fencing.
- Skid treatments.
- Safety roadside rest areas.
- Adding medians.
- Truck climbing lanes outside the urbanized area.
- Lighting improvements.
- Widening narrow pavements or reconstructing bridges (no additional travel lanes).
- Emergency truck pullovers.

#### ***Mass Transit***

- Operating assistance to transit agencies.
- Purchase of support vehicles.
- Rehabilitation of transit vehicles<sup>1</sup>.
- Purchase of office, shop, and operating equipment for existing facilities.
- Purchase of operating equipment for vehicles (e.g., radios, fareboxes, lifts, etc.).
- Construction or renovation of power, signal, and communications systems.
- Construction of small passenger shelters and information kiosks.
- Reconstruction or renovation of transit buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures).
- Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way.
- Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet<sup>1</sup>.

- Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR part 771.

#### *Air Quality*

- Continuation of ride-sharing and van-pooling promotion activities at current levels.
- Bicycle and pedestrian facilities.

#### *Other*

Specific activities which do not involve or lead directly to construction, such as:

- Planning and technical studies.
- Grants for training and research programs.
- Planning activities conducted pursuant to titles 23 and 49 U.S.C.
- Federal-aid systems revisions.
- Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.
- Noise attenuation.
- Emergency or hardship advance land acquisitions (23 CFR 710.503).
- Acquisition of scenic easements.
- Plantings, landscaping, etc.
- Sign removal.
- Directional and informational signs.
- Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).
- Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.

Note: <sup>1</sup> In PM<sub>10</sub> and PM<sub>2.5</sub> nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40081, July 1, 2004; 71 FR 12510, Mar. 10, 2006; 73 FR 4441, Jan. 24, 2008]