

Association for Commuter Transportation
Comments to Docket FHWA-2013-0023-0001
Congestion Mitigation Air Quality Program

The following comments are submitted on behalf of the Association for Commuter Transportation (ACT). ACT is an organization dedicated to providing commuters with options such as carpooling, vanpooling, transit, and telework. ACT members regularly use the Congestion Mitigation Air Quality program and the issues outlined below address areas of great concern to our members and we hope will be addressed in final guidance.

1. **Carpool/Vanpool Language Regarding Contracting – Need for Language to Reflect Market Practice** Existing guidance on CMAQ related to carpool/vanpool (Chapter 7(D)(10)) does not reflect what is going on in the field. The guidance states the following:

(Page 26) “Vanpool vehicle capital costs include purchasing or leasing vans for use in vanpools” – In a handful of cases CMAQ recipients purchase vehicles and run a program themselves. But in a majority of cases, a third-party operator is used. However, in this case, the capital is not leased rather it is contracted. Guidance should reflect this and include in its references: purchase, lease, or contracting. The lack of clarity on this has cause confusion and delay in the market, and in several cases, has led to stakeholders not advancing vanpool projects.

- ***Guidance be re-written to reference ‘contracting’: (Page 26-- Additions in red)***
“Vanpool vehicle capital costs include purchasing, **contracting** or leasing vans for use in vanpool.”
- ***CMAQ guidance should reference or duplicate FTA Circular 9030.1d (Urban Circular) Chapter 3 Section 6(o) regarding how to leverage private capital through the Capital Cost of Contracting policy. – The FTA circular language we reference is below***

2. **Operating expenses – outreach – Need for Clarity** – Page 12 of the guidance recognizes that operating assistance includes all costs of providing new transportation services including, but not limited to, labor, fuel, administrative costs, and maintenance.

Those costs are subject to a 5-year limit

Page 25 describes that operating assistance to manage new or expanded TDM measures may be funded per page 12.

However, page 25 goes on to state that marketing and outreach efforts to expand the use of TDM measures may be funded indefinitely, but only if broken out as distinct line-items.

Over the years, there has been a wide variance as to what FHWA considers outreach/marketing vs what it considers as labor, and subject to a limit.

On page 25, language should be added to clarify that marketing and outreach shall include labor directly tied to that marketing and outreach, so long as that marketing/outreach is able to illustrate a positive impact.

“The CMAQ funds may support capital expenses and, as discussed in Section VII.A.2, up to 5 years of operating assistance to administer and manage new or expanded TDM programs. Marketing and outreach efforts, , to expand use of TDM measures may be funded indefinitely, but only if they are broken out as distinct line items”. **This includes direct labor tied to outreach and marketing efforts”**

Then again at the bottom of page 25:

“Long-term public education and outreach can be effective in raising awareness that can lead to changes in travel behavior and ongoing emissions reductions; therefore, these activities may be funded indefinitely, **including labor and other operating costs directly tied to marketing and outreach.”**

- 3. Carpool/Vanpool – Private Sector Protections – Need for Strengthening** – ACT and many of its members are concerned about the lack of enforcement related to private sector protections. The simple matter is that in many cases, the intent of existing guidance and code is being ignored, and enforcement ranges from ambivalence to pure rejection. ACT understands that applying more guidance on an issue that already has the language necessary would be futile, we do believe that FHWA should, through this guidance, look to ensure existing guidance is followed. ACT requests additional guidance that would require States and MPOs to demonstrate direct outreach to the private sector.

(on page 26 – Additions in red): The CMAQ funds should not be used to buy or lease vans that would directly compete with or impede private sector initiatives. States and MPOs should consult with the private sector prior to using CMAQ funds to purchase vans, and if private firms ~~have definite~~ **can demonstrate existing service or can provide existence of a definitive action plan** to provide adequate vanpool service, CMAQ funds ~~should shall~~ not be used to supplant that service. **FHWA requires States and MPOs to demonstrate such outreach with private sector.**

- 4. Carpool/Vanpool – 100% Federal Match – Need for More Clarity** – As more agencies take a multimodal approach, TDM programs have gone beyond promoting carpool/vanpool programs alone. Many regional agencies also include support of other alternatives such as transit and bike/ped as a part of carpool/vanpool promotions.

Example: A regional planning body in the south covering 7 counties uses CMAQ funds to run a program that encourages carpool/vanpool, but the same program also supports ridership on a local transit system that is limited to the city limits. 95% of the work is carpool/vanpool promotion. The program operates under one grant. Provided that a vast majority of the work is to promote carpool/vanpool, should the entire grant be eligible for 100% Federal, are two grants required, or because there is some promotion of carpool/vanpool; Federal Share is 80/20.

Additional language added on page 26 under carpooling and vanpooling –

In accordance with 23 U.S.C. 120(c)(1), carpooling and vanpooling activities may be supported with up to 100 percent Federal funding, under certain limitations. **If a grant is primarily used to support carpool/vanpool (greater 75% of the grant) then it should be eligible for 100% Federal share. If support of transit is a primary part (>25%) of a program, a separate grant should be considered at an 80/20 basis.**

5. **Ridesharing – Federal Match** – Section 1113 (a)(7) of MAP-21 specifically makes eligible ridesharing projects in CMAQ; as such, ACT believes that no part of a rideshare project should be subject to a 3-year limit on operations so long as the project continues to show air quality improvements

Given that ridesharing is specifically codified as an eligible expense, it should not be subject to limitations and thus, we would recommend that all aspects of rideshare (carpool/vanpool) projects are not subject to any limitations on operating expenses so long as air quality improvements can be demonstrated.

6. **Annual Reports** – ACT agrees with the comments on pages 33/34 of the guidance related to annual reports and believes that such reports will provide transparency to the public and stakeholders as to which projects were selected and what the benefits of those projects are. We believe that paragraph 6 related to annual reports should not be optional, rather required. Furthermore, congestion relief provided should specifically be something that is reported. Additionally, we have some concern related to the treatment of telework and flexible-work schedule programs and how their benefits are assessed. (See section 8 of our comments)
7. **Performance Plan** – ACT would like to see more required out of the performance plan and hopes that this section will be revised following the establishment of performance metrics are required by MAP-21.
8. **Telework/Flexible Work Schedule** -- We believe confusion exists related to employer-sponsored flexible work programs. Such employer-sponsored programs can help mitigate congestion and improve air quality even when they do not have a significant impact on SOV travel. However, the guidance seems to take an inconsistent position concerning the categorization of flexible work schedule programs. As a result of this

inconsistency, many states may be hesitant to engage in employer sponsored flexible work schedule programs, or may apply SOV reduction requirements that are usually reserved for telecommuting programs.

The guidance lists “employer-sponsored programs to permit flexible work schedules” as a transportation control measure (TCM) (pp. 21-22) and states that most” of the TCM’s on the list are eligible for CMAQ funding. In addition, the guidance lists telecommuting as a form of travel demand management (TDM) and states that telecommuting is eligible if it is “explicitly aimed at reducing SOV travel and associated emissions” (pp. 24-25) .

Notwithstanding its categorization of flexible work schedule programs as a TCM, rather than a TDM measure, the guidance also explains that “States should prepare annual reports detailing how CMAQ funds have been invested” and that reports should include a “list of projects funded under CMAQ, in seven main project categories” (pp. 33-34). One of the categories is “Demand Management.” This category specifically includes “flexible work schedule programs.” (It does not include telecommuting.)

The discussion in the guidance concerning the reports raises the question of whether flexible work schedule programs are TCM’s, TDM’s, or both. If a flexible work schedule program is considered a “demand management” activity - if the phrase "flexible work schedule program" is either intended to include telecommuting or to include programs that should be treated like telecommuting - arguably, flexible work schedule programs might be subject to the SOV performance measure.

However, if flexible work schedule programs and telecommuting are considered distinct activities - if flexible work schedules are considered TCM’s rather than TDM’s and the phrase “flexible work schedule programs” in the report section was used inadvertently to refer to telework programs - then perhaps the SOV performance measure applies only to telework programs and not to flexible work schedule programs.

In light of the inconsistent treatment of “flexible work schedule programs” in the guidance, we consider the following to be necessary:

- Clarification that telecommuting and employer-sponsored programs to permit flexible work schedules are distinct and eligible activities;
- Clarification that if employer-sponsored programs to permit flexible work schedules can demonstrate congestion mitigation and air quality improvement, they are eligible even when they do not have a significant impact on SOV travel; and,
- Identification of both telecommuting and employer-sponsored programs to permit flexible work schedules as projects to be included in annual reporting (p. 34).

If you have any questions about these comments, please contact ACT’s government affairs specialist, Jason Pavluchuk at 202-285-6414.

APPENDIX I

The language below comes from the FTA Urban Circular *9030.1d (Urban Circular)* and should serve as an example of how language could be written in CMAQ guidance. This would eliminate several issues mentioned above:

Capital Cost of Contracting. Some FTA recipients turn to an outside source to obtain public transportation service, maintenance service, or vehicles that the recipient will use in public transportation service. When a recipient enters a contract for such service, FTA will provide assistance for the capital consumed in the course of the contract. In the case of a contractor's providing vehicles for public transportation service, the capital consumed is equivalent to the depreciation of the vehicles in use in the public transportation service during the contract period. In the case of a maintenance contract, the capital consumed may be, for example, depreciation of the maintenance garage, or depreciation of the machine that lifts the vehicle. Capital consumed may also include a proportionate share of the interest the contractor might pay out as the contractor purchases and makes available to the recipient these capital assets. FTA refers to the concept of assisting with capital consumed as the "capital cost of contracting."

Only the costs attributable to the privately owned assets are eligible under this policy. With one exception, items purchased with Federal, State, or local government assistance are not eligible. The exception is a public transportation vehicle privately owned in which the recipient has invested FTA funds from the Over-the-Road Bus Accessibility Program to finance incremental capital costs of complying with ADA. Capital consumed for service or maintenance in the provision of service outside the public transportation portion of the contract, such as for charter or school bus service, is not an eligible cost.

In addition, FTA provides assistance for preventive maintenance, which is defined as all maintenance. In some instances, the recipient contracts with outside sources for both maintenance and public transportation service, and the contractor provides both maintenance and vehicles. In such cases, both FTA's capital cost of contracting and preventive maintenance standards will apply.

To avoid imposing burdensome accounting rules with regard to contracts for bus, paratransit, and demand-responsive related services, FTA will allow the recipient to consider a percentage of leased service or contracted maintenance capital costs without further justification and will provide assistance for 80 percent of the resultant amount. EXHIBIT IV-1, below, shows the percentages and the corresponding type of contract service for bus, paratransit, and demand-responsive related services. The percentages are calculations using data from the NTD. Presented by type of contract, the calculations represent industry averages in counting capital-eligible activities as a share of total cost. The percentages apply whether the service is local, express, shuttle, paratransit, or demand-responsive service.

**PERCENT OF CONTRACT ALLOWED FOR CAPITAL ASSISTANCE
WITHOUT FURTHER JUSTIFICATION***

Contract Services	Percent of Contract Eligible for Federal Share
Type of Contract	
1. Service Contract (contractor provides maintenance and transit service; recipient provides vehicles)	40 percent
2. Service Contract (contractor provides transit service only; recipient provides vehicles and maintenance)	0 percent
3. Vehicle Maintenance Contract (contractor provides maintenance; recipient provides vehicles and transit service)	100 percent
4. Vehicle Lease Contract (contractor provides vehicles; recipient provides maintenance and transit service)	100 percent
5. Maintenance/Lease Contract (contractor provides vehicles and maintenance; recipient provides transit service)	100 percent
6. Turnkey Contract (contractor provides vehicles, maintenance, and transit service)	50 percent
7. Vehicle/Service Contract (contractor provides vehicles and transit service; recipient provides maintenance)	10 percent

Some of the calculations above in EXHIBIT IV-1 are based on the assumption that the contractor (or someone other than the recipient) provides the assets. For example, if a contractor provides maintenance, FTA assumes in the calculations that the contractor does so in a facility provided by the contractor. For another example, in a contractor-operated vanpool program that qualifies under a Turnkey Contract (see type 6), a vanpool driver may provide the service rather than a contractor employee, but since the recipient does not provide the service, these costs are treated as part of the contract.

A recipient may request FTA participation at a higher percentage of the contract than FTA shows in Exhibit III-1, but must provide substantiation of the actual costs in order to do so. A recipient applying for assistance with costs that contain any of the capital costs of contracting permutations listed in EXHIBIT III-1 may list costs for the contracted service in the capital cost of contracting budget category, or the recipient may use both that category and another appropriate category such as preventive maintenance or leasing, so long as the total of the costs do not exceed the amount of the contract.

In the case where the grantee owns the facilities (constructed with FTA funds) from which the contractor operates, the vehicles (purchased with FTA funds) are maintained by the contractor, and the service contractor is responsible for maintenance of the facility and vehicles within the

scope of the service contract, the grantee will need to calculate the proportion of the contract that actually represents allowable capital costs. These include (1) all vehicle maintenance costs, and (2) all costs to maintain the grantee's facilities, since such costs are eligible as Preventive Maintenance. In this case, since the facility is already owned by the grantee, depreciation of the facility cannot be included as an eligible cost, since to do so would be double counting because FTA and grantee funds have already been used to cover the capital costs of the maintenance facility itself. Since the facility is owned by the grantee, while Capital Cost of Contracting does apply, the eligible amount will have to be determined based on the contract. The amount of the contract costs attributed to the vehicle maintenance and facility maintenance is eligible for Federal capital funds at 80 percent as an eligible Preventive Maintenance expense.

Costs of a contract which remain after application of Capital Cost of Contracting are operating expenses and may, depending on the size of the urbanized area, recipient, or purpose of the service, be eligible for Federal operating assistance. For example, in an urbanized area with a population of under 200,000, 50 percent of a turnkey contract (type 6) would be eligible for Federal capital assistance at a matching ratio of 80 percent Federal. The remaining 50 percent of the costs of the contract, less any fares received, would be eligible for Federal operating assistance at a matching ratio of 50 percent Federal. The same costs of a contract may not be double counted and receive both capital and operating assistance. Thus, if a maintenance/lease contract (type 5) is treated as a capital expense under Capital Cost of Contracting, none of these expenses would be reimbursable as an operating expense.