National Capital Region Transportation Planning Board

777 North Capitol Street, N.E., Suite 300, Washington, D.C. 20002-4290 (202) 962-3310 Fax: (202) 962-3202 TDD: (202) 962-3213

Item #5

MEMORANDUM

January 17, 2007

TO: Transportation Planning Board

FROM: Ronald F. Kirby
Director, Department of
Transportation Planning

RE: Letters Sent/Received Since the December 20th TPB Meeting

The attached letters were sent/received since the December 20th TPB meeting. The letters will be reviewed under Agenda #5 of the January 17th TPB agenda.

Attachments

Metropolitan Washington Air Quality Committee

Suite 300, 777 North Capitol Street, N.E. Washington , D.C. 20002-4239 202-962-3358 Fax: 202-962-3203

January 12, 2007

Honorable Catherine Hudgins, Chair
National Capital Region Transportation Planning Board
777 North Capitol Street, NE
Washington, D.C. 20002

Dear Chair Hudgins:

This letter responds to a letter from TPB dated December 20, 2006 regarding mobile source measures proposed for inclusion in the SIP. In the letter, TPB asked for the opportunity to review and comment upon any local government or state transportation measures proposed for the new 8-hour ozone SIPs. The purpose of TPB's review would be to ensure a consistent analytical approach, and to prevent any possibility of double-counting emissions benefits among SIPs and air quality conformity assessment activities.

State and local government transportation measures were included in the 1-hour ozone SIPs and are being proposed for the 8-hour ozone SIPs. The proposals include the TCMs and vehicle-, fuel- and maintenance-based measures transmitted in a TPB letter dated November 7, 2006, as well as a number of mobile source measures advanced by local governments in the region. The remainder of this letter focuses on the measures advanced by local governments.

The Washington DC-MD-VA region's 1-hour ozone SIPs included a bundle of local voluntary measures, among them some mobile source measures (see Attachment 1). In developing the control strategy for the 8-hour ozone SIPs, local jurisdictions are building upon the efforts from the past SIP to include an updated local voluntary bundle. A list of the programs that were identified and are being considered for inclusion in the SIP is also found in Attachment 1. Local jurisdictions are proposing inclusion of low-emission vehicle purchases, diesel retrofits, use of low-VOC paints, purchase of wind energy, and a variety of episodic code orange and code red programs. In addition, LED traffic signal retrofits are being examined as a possible local voluntary measure.

In response to TPB's request, we will transmit proposed mobile measures to DTP staff for review. We appreciate your assistance in identifying inconsistencies in methodology or duplication of measures. The schedule for adopting the 8-hour ozone SIPs calls for a draft SIP to be approved by MWAQC for public comment in March. To this end, we accept your offer and ask that the Technical Committees of TPB and MWAQC collaborate closely to review and reach agreement on the handling of local mobile measures in the SIPs by mid-February.

We look forward to our continuing close technical and policy working relationship as we move towards completion of the draft SIPs to meet EPA's new 8-hour ozone standard.

Sincerely,

Nancy Floreen

Nancy Floreen, Chair
Metropolitan Washington Air Quality Committee

DRAFT (January 12, 2007)

Attachment 1. Summary of Potential Voluntary Measures Commitments (2002-2009)

Washington, DC-MD-VA Ozone Nonattainment Area

Jurisdiction	Commitments in 1-hour Ozone SIP	New Additional Commitments for 8-hour Ozone SIP (a)	2005 Emission Reduction Credited in 1-hour Ozone SIP (tpd)	Possible New 2009 Emission Reduction for 8-hour Ozone SIP (tpd)
Regional Wind Power Purchase Program (kWh/year)				
Montgomery County (b)	28,000,000	23,809,091		
Prince George's County		7,611,601		
Arlington County		2,340,000		
Fairfax County		5,800,000		
District of Columbia		16,500		
Total	28,000,000	39,577,192	0.05 NOx	0.07 NOx
Clean Energy Rewards Program (MWh/year)				
Montgomery County		31,900		
Total		31,900	No Credit	No Credit
Renewable Portfolio Standards (kWh/year)				
District of Columbia	-	-	-	-
Total	-	-	-	-
LED Traffic Signal Retrofits (# of intersections)				
VDOT	0	864		
MDOT	0	15		
District of Columbia	0	-		
Montgomery County	0	250		
Arlington County	0	271		
City of Alexandria	0	239		
City of Falls Church	0	818		
Total		-	0	-
Building Efficiency/Energy Performance Contracting (kWh/year savings)				
Fairfax County	0	6,630,675		
Arlington County	0	1,500,000		
City of Greenbelt	0	230,000		
Montgomery County	0	-		
City of Falls Church	0	-		
City of Alexandria	0	-		
Calvert County	0	-		
Total	0	8,360,675	No Credit	No Credit
Diesel Retrofits (# of vehicles)				
Fairfax County School Bus	1,329	Complete		
Fairfax County Class 8 Trucks	0	113		
Fairfax County Fire Equipment	0	50		
Fairfax County DOT (DPF)	148	95		
Fairfax County DOT (idling)		95		
Montgomery County	0	253		
Loudoun County	0	237		
Total			No Credit	-
Low-Emission Vehicle Purchases (# of vehicles)				
Arlington County	0	69		
Fairfax County	32	65		
Montgomery County	5	176		
Prince George's County	3	8		
M-NCPPC Prince George's	0	23		
Loudoun County	0	25		
District of Columbia	0	678		
City of Alexandria	0	55		
City of Greenbelt	0	7		
City of Falls Church	0	7		
Total	40	1113	No Credit	-
Low-VOC Paint (# of gallons per ozone season day)				
Prince George's County	5			
M-NCPPC Prince George's	15			
Fairfax County	40			
MDOT	502.5			
Arlington County		0.63		
City of Alexandria		1.75		
City of Greenbelt		0.20		
Calvert County		1.25		
Total	562.5	3.20	0.166 VOC	0.0009 VOC
Enhanced Enforcement (solvent machine replacement/idling)				
Montgomery County	0	18 units	0	0.003-0.09 VOC
Loudoun County		No Idling Policy		
TOTAL				
NOx			0.2 (a)	0.07
VOC			3.2 (a)	0.09

(a) Total for 1-hour ozone SIP includes several programs not proposed for expansion in the 8-hour ozone SIP. These measures include Reformulated Consumer Products, Auxiliary Power Units for Locomotives, Gas Can Replacements, and Remote Sensing programs.

(b) 24,000 MWh in FY07 and 19,000 MWh in FY08.

National Capital Region Transportation Planning Board

777 North Capitol Street, N.E., Suite 300, Washington, D.C. 20002-4290 (202) 962-3310 Fax: (202) 962-3202

December 20, 2006

The Honorable Phil Mendelson
Chairman
Metropolitan Washington Air Quality Committee
777 North Capitol Street, NE
Washington, DC 20002 – 4239

Dear Chairman Mendelson:

The TPB has been working cooperatively with MWAQC over the past year to meet all requirements for development and submission of 8-hour ozone State Implementation Plans (SIPs) to the Environmental Protection Agency (EPA) in Spring 2007. A recent product of these work efforts was my November 7, 2006 letter to you (Attachment A) transmitting draft mobile source budgets for 2008 and 2009, which were derived by subtracting from the mobile source inventories for each year the emissions benefits from SIP-committed Transportation Control Measures (TCMs) and vehicle technology based measures. Once these mobile source emissions budgets are established in the SIPs and approved by EPA, they will be used by the TPB in demonstrating conformity of the Constrained Long Range Plan (CLRP) and Transportation Improvement Program (TIP) for the region.

At its November 8, 2006 meeting the COG Board passed a resolution (Attachment B) encouraging its member governments to adopt additional measures to reduce air pollution and assist in addressing the 8-hour health standards. The resolution asks for commitment letters from agencies by December 31, 2006. In Table 1, attached to the resolution, a number of transportation measures are included as examples. Since the same or similar transportation measures may be advanced to either SIP or air quality conformity activities, there is a need for continuing coordination between MWAQC and the TPB to ensure consistent and appropriate treatment of such measures.

The purposes of this letter are: (1) to review the ways in which emissions benefits of transportation measures may be credited in the SIP and the air quality conformity process, and (2) to offer TPB's review and comment on any transportation measures that may be submitted through the COG Board resolution or other initiative.

Transportation Measures in the SIP

As noted in my letter of November 7, 2006, there are two distinct categories of transportation measures that may be included for emissions credit in the SIP:

1. TCM (Transportation Control Measure): a demand-based measure which is a legally enforceable commitment in a SIP.
2. Vehicle-Based Measure: a vehicle technology-, fuel-, or maintenance-based measure which is also a commitment in a SIP.

According to EPA's Conformity Rule, TCMs are demand-based measures "specifically identified and committed to in the applicable implementation plan – for the purpose of reducing emissions or concentrations of air pollutants from transportation sources." Regarding vehicle-based measures, EPA's conformity rule states that "vehicle technology-based, fuel-based and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs". Nevertheless, once such measures are advanced as SIP commitment measures, they too become legally enforceable.

TCMs have a special status in the transportation conformity process in that in order to make a conformity determination the TPB must find that the CLRP and / or TIP "provides for timely completion or implementation of all TCMs in the applicable implementation plan". An ineffective TCM included in the SIP could preclude the TPB from making a conformity determination even if all other SIP and conformity requirements are met. It is therefore recommended that demand-based measures should be "hard-wired" into the new SIP as TCMs only if it is absolutely certain that they will be implemented.

MWAQC is also planning to include in the SIP an aggregation of voluntary measures as a "voluntary bundle," for which emissions credit may or may not be taken. In this context, EPA staff has indicated that any transportation measure in a SIP with a quantified emissions benefit would represent an emissions credit and therefore also would be considered as a SIP commitment (either a TCM or a vehicle-based measure).

Transportation Measures in the Conformity Process

In demonstrating conformity of the CLRP and TIP to the mobile budgets in the SIP, the TPB estimates emissions for rate of progress, attainment, and future milestone years, taking credit for Transportation Emissions Reduction Measures (TERMs) included in the CLRP and TIP. These TERMs include the TCMs and vehicle based measures in the SIP, as well as a number of other measures such as telecommuting, transit improvements, ridesharing, guaranteed ride home, and additional vehicle-related measures such as bus replacements to which the TPB has made commitments over the past decade.

Review and Comment

As noted in the above discussions, demand-based and vehicle-based transportation measures are currently included in both the SIP and the air quality conformity process. Measures included in the SIP are incorporated into the mobile emissions budgets.

Additional measures not included in the SIP are used by the TPB in the conformity process. It is clear that vigilant bookkeeping is a necessity to keep track of these different categories of transportation measures. To this end, TPB offers to review and comment upon any transportation measures received through the COG Board resolution or other initiatives. We believe that this review will help to ensure a consistent analytical approach and to guard against any possibility of double-counting emissions benefits among SIP and air quality conformity assessment activities.

The TPB looks forward to continuing the close technical and policy working relationships with MWAQC as we move forward in meeting remaining requirements for SIP planning.

Sincerely,

Michael Knapp
Chair, National Capital Region
Transportation Planning Board

Attachments (A - B)

cc: COG Board Members

National Capital Region Transportation Planning Board

777 North Capitol Street, N.E., Suite 300, Washington, D.C. 20002-4290 (202) 962-3310 Fax: (202) 962-3202

November 7, 2006

The Honorable Phil Mendelson
Chairman
Metropolitan Washington Air Quality Committee
777 North Capitol Street, NE
Washington, DC 20002 – 4239

Dear Chairman Mendelson:

The National Capital Region Transportation Planning Board (TPB) is pleased to transmit to the Metropolitan Washington Air Quality Committee (MWAQC) the attached table of mobile source emissions data prepared for use in the development of the 8-hour ozone state air quality implementation plan (SIP). Building upon the TPB's July 12, 2006 transmittal of mobile source emissions inventory results, this table incorporates estimates of emissions benefits of transportation measure commitments which are in the region's 'severe area 1-hour ozone SIP' to yield draft 2008 and 2009 mobile emissions budgets for volatile organic compounds (VOC) and nitrogen oxide (NOx) emissions.

These data are being formally transmitted by the TPB to MWAQC today because the 2008 and 2009 estimates of 'mobile emissions inventories less SIP-committed measures' represent the basis for establishing new motor vehicle emissions budgets in the SIP. These new emissions budgets will, in turn, be used by the TPB in future air quality conformity determinations. Reviewing the data in the table, the TPB's July 12, 2006 transmittal of the primary emissions inventory data provides the starting point for the forecast emissions levels. Emissions benefits for the transportation control measures (TCM)s and the Vehicle Technology measures in the table reflect estimates prepared by TPB staff as part of the air quality conformity assessment of the 2006 Constrained Long Range Plan (CLRP) and the FY2007 – 12 Transportation Improvement Program (TIP), which was adopted by the TPB on October 18, 2006. Subtraction of the SIP-committed measures from the base inventory levels yields the draft mobile budgets.

According to EPA's conformity regulations the motor vehicle emissions budget represents "… that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan…..allocated to highway and transit vehicle use and emissions." The regulations state further that EPA will not find a

submitted motor vehicle emissions budget to be adequate for transportation conformity purposes unless "The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance..." and "... is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision....". The TPB believes that the attached 2008 and 2009 motor vehicle emissions estimates, in conjunction with the emissions benefits from the SIP-committed measures, provide the basis for establishing motor vehicle emissions budgets that will comply with these EPA regulations.

The TPB looks forward to continuing the close technical and policy working relationships with MWAQC as we move forward in meeting remaining requirements for SIP planning.

Sincerely,

Michael Knapp
Chair, National Capital Region
Transportation Planning Board

Summary Table - Calculation Of Mobile Source Emissions Budgets For the 8-Hour Ozone SIP

	2008		2009	
	VOC	NOx	VOC	NOx
	Tons/day			
Mobile Source Inventory	70.98	160.30	66.68	146.53
TCMs	0.11	0.25	0.10	0.22
Vehicle Technology Based Measures	0.08	0.24	0.08	0.23
Net	70.79	159.81	66.50	146.08
Draft Mobile Source Budgets	**70.8**	**159.8**	**66.5**	**146.1**

Resolution R57-06
ADOOPTED November 8, 2006

METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS
777 North Capitol Street, NE
Washington, D.C. 20002

RESOLUTION TO ENCOURAGE ADOPTION OF MEASURES TO REDUCE AIR POLLUTION BY COG MEMBER GOVERNMENTS

WHEREAS, the Metropolitan Washington region does not meet the National Ambient Air Quality Standards (NAAQS) for ozone and fine particles; and

WHEREAS, the local jurisdictions in the Metropolitan Washington Council of Governments (COG) who participate with the states of Maryland, Virginia and the District on the Metropolitan Washington Air Quality Committee (MWAQC) are developing a regional plan to improve the air and meet federal health standards by reducing emissions that cause pollution; and

WHEREAS, the Washington, DC-MD-VA metropolitan region is classified as a moderate nonattainment area for the 8-hour ozone standard and is required to submit a revision to the region's state implementation plan (SIP) by June 15, 2007; and

WHEREAS, the states have committed to adopt and implement control measures beyond those explicitly required by the Clean Air Act to attain the eight-hour National Ambient Air Quality Standards; and

WHEREAS, MWAQC has investigated a broad range of measures for attainment, including short-term measures to attain the 8-hour ozone standard in 2009 and long-term approaches that go beyond traditional control measures; and

WHEREAS, MWAQC identified innovative approaches to reduce emissions through public policy initiatives such as purchase of wind power and environmental performance contracting; and

WHEREAS, the measures adopted by local jurisdictions have the potential to provide additional emission reductions necessary to meet the 8-hour ozone National Ambient Air Quality Standard, and to reduce eight-hour ozone levels which have been shown to produce detrimental human health effects.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS THAT:

1. COG encourages members to adopt programs to reduce harmful emissions causing air pollution such as purchasing wind energy, retrofitting diesel school and transit buses, purchasing low emissions vehicles, energy efficiency measures, and others listed in Table 1.

2. COG encourages members to submit letters committing to these programs to the appropriate state air agency by December 31, 2006, so the programs being adopted may be included in the regional air quality plan to be submitted to the states and EPA.

3. The Chair of the Board of Directors shall expeditiously transmit this resolution to the lead elected officials of all member jurisdictions.

Table 1

Measures That Reduce Harmful Air Emissions

For Consideration by COG Member Governments

- School Bus and Other Diesel Engine Retrofits
- Wind Energy Purchases
- Renewable Portfolio Standards
- LED Traffic Signal Retrofits
- Alternative Vehicle Purchases
- Low-VOC Paints
- Energy Performance Contracting (e.g., building efficiency, solar photovoltaics for schools)
- Airports Voluntary Emission Reduction Agreements
- U.S. Green Building Council's Guidelines for Energy and Design Standards (e.g., LEEDs, Green Building Codes) or other nationally recognized Green Building standards
- Tree Planting and Urban Heat Island Mitigation
- Enhanced Enforcement – Idling (e.g., trucks and buses)
- Cash for Clunkers Lawn and Garden Equipment Programs
- Best Practices in Production and Application of Traffic Markings, Asphalt, and Pesticides
- Environmental Performance Contracting (e.g., construction, landscaping)
- Additional transportation measures such as, but not limited to smart growth and transit-oriented development, expansion of the transit system to new locations; expanded Commuter Choice and telecommuting programs; and enhanced bicycle and pedestrian access to transit stations

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No: FTA–2006–25750]

Final Policy Statement on When High-Occupancy Vehicle (HOV) Lanes Converted to High-Occupancy/Toll (HOT) Lanes Shall Be Classified as Fixed Guideway Miles for FTA's Funding Formulas and When HOT Lanes Shall Not Be Classified as Fixed Guideway Miles for FTA's Funding Formulas

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Final policy statement.

SUMMARY: This notice supersedes the notice published in the **Federal Register** by FTA on December 27, 2006, at 71 FR 77862. This notice corrects certain typographical errors that appeared in the prior notice, makes non-substantive revisions to the prior notice and re-orders the sections of the prior notice.

This final policy statement describes the terms and conditions on which the Federal Transit Administration (FTA) will classify High-Occupancy Vehicle (HOV) lanes that are converted to High-Occupancy/Toll (HOT) lanes as ''fixed guideway miles'' for purposes of the transit funding formulas administered by FTA. This final policy statement also describes when FTA will not classify HOT lanes as fixed guideway miles for purposes of the transit funding formulas administered by FTA.

DATES: *Effective Date:* The effective date of this final policy statement is January 11, 2007.

ADDRESSES: *Availability of the Final Policy Statement and Comments:* Copies of this final policy statement and comments and material received from the public, as well as any documents indicated in this notice as being available in the docket, are part of docket number FTA–2006–25750. For access to the DOT docket, please go to *http://dms.dot.gov* at any time or to the Docket Management System facility, U.S. Department of Transportation, Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David B. Horner, Esq., Chief Counsel, Office of Chief Counsel, Federal Transit Administration, 400 Seventh Street, SW., Washington, DC 20590–0001, (202) 366–4040, *david.horner@dot.gov*; or Robert J. Tuccillo, Associate Administrator, Office of Budget & Policy, Federal Transit Administration, 400 Seventh Street, SW., Washington, DC 20590–0001, (202) 366–4050, *robert.tuccillo@dot.gov*. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: This document is organized in the following sections:

I. Background

On September 7, 2006, the Federal Transit Administration (FTA) published in the **Federal Register** (at 71 FR 52849), a proposed policy on (i) when High-Occupancy Vehicle (HOV) lanes converted to High-Occupancy/Toll (HOT) lanes shall be classified as ''fixed guideway miles'' for the purpose of FTA's funding formulas and (ii) when HOT lanes shall not be classified as fixed guideway miles for the purpose of FTA's funding formulas. The proposed policy reads as follows:

> FTA would classify HOT lanes as ''fixed guideway miles'' for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of the following conditions is satisfied: (i) The HOT lanes were previously HOV lanes reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 49 U.S.C. 5309; (ii) The HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d); and (iii) Program income from the HOT lane facility, including all toll revenue, is used solely for ''permissible uses.''

The proposed policy also addressed whether FTA should require certain transit and tolling policies with respect to HOT lanes classified as fixed guideway miles, and whether FTA should require the return of funds made available under Full Funding Grant Agreements for the construction of HOV lanes that have later been converted to HOT lanes.

II. Final Policy Statement on HOV-to-HOT Conversion

This final policy statement explains when FTA shall classify HOV lanes converted to HOT lanes as ''fixed guideway miles'' for the purpose of FTA's funding formulas and when FTA shall not classify HOT lanes as fixed guideway miles for the purpose of its funding formulas.

Overview

Since the early 1980s, transportation officials have sought to manage traffic congestion and increase vehicle occupancy by means of High-Occupancy Vehicle (HOV) lanes—highway lanes reserved for the exclusive use of car pools and transit vehicles. Today, there are over 130 freeway HOV facilities in metropolitan areas in the US,[1] of which approximately ten have received funding through FTA's Major Capital Investment program and approximately eighty are counted as fixed guideway miles for purposes of FTA's formula grant programs.[2] Since 1990, however, HOV mode share in thirty-six of the forty largest metropolitan areas has steadily declined,[3] while both excess capacity on HOV lanes and congestion on general purpose lanes have increased.[4]

An increasing number of metropolitan areas are considering new demand management strategies as alternatives to HOV lanes. One emerging alternative is the variably-priced High-Occupancy/Toll (HOT) lane. HOT lanes combine HOV and pricing strategies by allowing Single-Occupant Vehicles (SOVs) to access HOV lanes by paying a toll. The lanes are ''managed'' through pricing to maintain free flow conditions even during the height of rush hours.

HOT lanes provide multiple benefits to metropolitan areas that are experiencing severe and worsening congestion and significant transportation funding shortages. First, variably-priced HOT lanes expand mobility options in congested urban areas by providing an opportunity for reliable travel times for users prepared to pay a premium for this service. HOT lanes also improve the efficiency of HOV facilities by allowing toll-paying

[1] Office of Operations, Federal Highway Administration, U.S. Department of Transportation.

[2] National Transit Database.

[3] *Journey to Work Trends in the United States and its Major Metropolitan Areas 1960–2000*, Publication No. FHWA–EP–03–058 Prepared for: U.S. Department of Transportation, Federal Highway Administration, Office of Planning, Prepared by: Nancy McGuckin, Consultant, Nanda Srinivasan, Cambridge Systematics, Inc.

[4] Office of Operations, Federal Highway Administration, U.S. Department of Transportation. Demand for highway travel by Americans continues to grow as population increases, particularly in metropolitan areas. Construction of new highway capacity to accommodate this growth in travel has not kept pace. Between 1980 and 1999, route miles of highways increased 1.5 percent while vehicle miles of travel increased seventy-six percent. The Texas Transportation Institute estimates that, in 2000, the seventy-five largest metropolitan areas experienced 3.6 billion vehicle-hours of delay, resulting in 5.7 billion gallons in wasted fuel and $67.5 billion in lost productivity. And traffic volumes are projected to continue to grow. The volume of freight movement alone is forecast to nearly double by 2020. Congestion is largely thought of as a big city problem, but delays are becoming increasingly common in small cities and some rural areas as well.

SOVs to utilize excess lane capacity on HOVs. In addition, HOT lanes generate new revenue which can be used to pay for transportation improvements, including enhanced transit service.

In August of 2005, recognizing the advantages of HOT lanes, the U.S. Congress enacted Section 112 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), codified at 23 U.S.C. 166, to authorize States to permit use of HOV lanes by SOVs, so long as the performance of the HOV lanes is continuously monitored and continues to meet specified performance standards. The U.S. Department of Transportation (Department) has strongly endorsed the conversion of HOV lanes to variably-priced HOT lanes, most recently in its *Initiative to Reduce Congestion on the Nation's Transportation Network.* It is the Department's policy to encourage jurisdictions to consider ''HOV-to-HOT'' conversion as a means of congestion relief and possible revenue enhancement.

The ability of HOT lanes to introduce additional traffic to existing HOV facilities, while using pricing and other management techniques to control the number of additional motorists, maintain high service levels and provide new revenue, make HOT lanes an effective means of reducing congestion and improving mobility. For this reason, and given the new authority enacted by Congress to promote ''HOV-to-HOT'' conversions, many States, transportation agencies and metropolitan areas are seriously considering applying variable pricing to both new and existing roadways. For example, the current long-range transportation plan for the Washington, DC, metropolitan area includes four new HOT lanes along fifteen miles of the Capital Beltway in Virginia, and six new variably-priced lanes along eighteen miles on the Inter-County Connector in Montgomery and Prince George's Counties in Maryland.[5] Virginia is also exploring the possibility of converting existing HOV lanes along the I–95/395 corridor into HOT lanes.[6] Maryland is considering express toll lanes along I–495, I–95 and I–270, as well as along other facilities.[7] Similarly, in San Francisco, the Metropolitan Transportation Commission's Transportation 2030 Plan advocates development of a HOT network that would convert that region's existing HOV lanes to HOT lanes;[8] Houston's 2025 Regional Transportation Plan includes plans to implement peak period pricing within the managed HOT lanes of the major freeway corridors in the region;[9] and the Miami-Dade, Florida 2030 Transportation Plan includes conversion of existing HOV lanes to reversible HOV/HOT lanes to provide additional capacity to I–95 in Miami-Dade County.[10] Other jurisdictions are exploring the potential for HOT lanes with grants provided by the Department's Value Pricing Pilot Program.[11] These include the Port Authority of New York/New Jersey; San Antonio, Texas; Seattle, Washington; Atlanta, Georgia; and Portland, Oregon.[12]

While an increasing number of metropolitan planning organizations and State departments of transportation are studying the HOT lane concept as a strategy to improve mobility, six HOT lane facilities currently operate in the United States: State Route 91 (SR 91) Express Lanes in Orange County, California; the I–15 FasTrak in San Diego, California; the Katy Freeway QuickRide and the Northwest Freeway (US 290) in Harris County, Texas; I–394 in Minneapolis and St. Paul, Minnesota; and I–25 in Denver, Colorado.

Prior FTA Policy

Since 2002, FTA's policy has been to continue to classify the lanes of an HOV facility converted to HOT lanes as fixed guideway miles for funding formula purposes on the condition that the facility meets two requirements: (i) The HOT facility manages SOV use so that it does not impede the free-flow and high speed of transit and high-occupancy vehicles and (ii) toll revenues collected on the facility will be used for mass transit purposes.[13] FTA has considered requiring as an additional condition for eligibility that the lowest toll payable by SOVs on a HOT facility be not less than the fare charged for transit services on the HOT facility.

Final FTA Policy

(a) *Purpose of Final Policy.* This final policy statement will help ensure that Federal transit funding for congested urban areas is not decreased when existing HOV facilities are converted to variably-priced HOT lanes in an effort by localities to reduce congestion, improve air quality, and maximize throughput using excess HOV lane capacity. The policy will also promote a uniform approach by the Department's operating agencies concerning HOV-to-HOT conversions. In particular, FTA's policy will be coordinated with the statutes enacted by the U.S. Congress under Section 112 of SAFETEA–LU applicable to the Federal Highway Administration that are intended to simplify conversion of HOV lanes to HOT lanes. The policy will also support the Department's objective of encouraging HOV-to-HOT conversions.

(b) *Final Policy.* FTA shall classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of the following conditions is satisfied:

(i) *The HOT lanes were previously*[14] *HOV lanes reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49*

[5] Letter to U.S. Department of Transportation, August 28, 2006, from National Capital Region Transportation Planning Board.

[6] *Id.*

[7] *Id.*

[8] A Vision for the Future Transportation 2030, February 2005, Chapter 1, Page 6.

[9] 2025 Regional Transportation Plan Houston-Galveston Area, June 2005, Page 31.

[10] Miami-Dade Transportation Plan (to the Year 2030) December 2004, FINAL DRAFT, Page 24.

[11] Federal Highway Administration, U.S. Department of Transportation. The Department's Value Pricing Pilot Program (VPPP), initially authorized by the Intermodal Surface Transportation Efficiency Act as the Congestion Pricing Pilot Program and continued as the VPPP under SAFETEA–LU, encourages implementation and evaluation of value pricing pilot projects, offering flexibility to encompass a variety of innovative applications including areawide pricing, pricing of multiple or single facilities or corridors, single lane pricing, and implementation of other market-based strategies.

[12] Federal Highway Administration, U.S. Department of Transportation.

[13] In a Letter to U.S. Representative Randall Cunningham, dated June 10, 2002, concerning the I–15 FasTrak facility in San Diego, FTA stated: ''* * * FTA will recognize, for formula allocation purposes, exclusive fixed guideway transit facilities that permit toll-paying SOVs on an incidental basis (often called high occupancy/toll (HOT) lanes) under the following conditions: the facility must be able to control SOV use so that it does not impede the free flow and high speed of transit and HOV vehicles, and the toll revenues collected must be used for mass transit purposes.''

[14] With respect to whether HOT lanes were previously HOV lanes reported in the National Transit Database (''NTD'') as ''fixed guideway miles,'' HOV facilities classified as ''fixed guideway miles'' in the NTD *on or before* date of the publication of this final policy statement shall satisfy this requirement. With respect to HOV lanes that have *not* been classified as ''fixed guideway miles'' in the NTD on or before the date of publication of this final policy statement, such HOV lanes may not be converted to HOT lanes and maintain their classification as ''fixed guideway miles'' unless: (i) The HOV lanes have reported to the NTD as ''fixed guideway miles'' for three years prior to their conversion to HOT lanes, (ii) users of public transportation have accounted for *at least* 50% of the passenger miles traveled on the HOV lanes in their last twelve months of service (or once the HOV lanes are converted to HOT lanes, users of public transportation are reasonably expected to account for at least 50% of the passenger miles traveled on the HOT lanes in their first twelve months of service), or (iii) in his or her discretion, the Administrator so approves.

U.S.C. 5307(b) and 49 U.S.C. 5309(a)(E).[15] Facilities that were not eligible HOV lanes prior to being converted to HOT lanes will remain ineligible for inclusion as fixed guideway miles in FTA's funding formulas. Therefore, neither non-HOV facilities converted directly to HOT facilities nor facilities constructed as HOT lanes will be eligible for classification as fixed guideway miles.[16]

(ii) The HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d). 23 U.S.C. 166(d) provides operational performance standards for an HOV facility converted to a HOT facility. It also requires that the performance of the facility be continuously monitored and that it continue to meet specified performance standards. Due to original project commitments, HOV facilities constructed using capital funds available under 49 U.S.C. 5309(d) or (e) may be required, when converted to HOT lanes, to achieve a higher performance standard than required under 23 U.S.C. 166(d). Standards for operational performance and determining degradation of operational performance for facilities constructed with funds from FTA's New Starts program shall be determined by FTA on a case-by-case basis. FTA will require real-time monitoring of traffic flows to ensure on-going compliance with operational performance standards.

(iii) *Program income from the HOT lane facility, including all toll revenue, is used solely for ''permissible uses.''* ''Permissible uses'' means any of the following uses with respect to any HOT lane facility, whether operated by a public or private entity: (a) Debt service, (b) a reasonable return on investment of any private financing, (c) the costs necessary for the proper operation and maintenance of such facility,[17] and (d) if the operating entity annually certifies that the facility is being adequately operated and maintained (including that the permissible uses described in (a), (b) and (c) above, if applicable, are being duly paid), any other purpose relating to a project carried out under Title 49 U.S.C. 5301 *et seq.* In cases where the HOT lane facility has received (or receives) funding from FTA and another Federal agency, such that use of the facility's program income is governed by more than one Federal program, FTA's restrictions concerning permissible use shall not apply to more than transit's available share [18] of the facility's program income. FTA shall not require recipients to assign priority in payment to any permissible use.

(c) *Transit Fares and Tolls on HOT Lane Facilities.* FTA shall not condition the classification of HOT lanes converted from HOV lanes as fixed guideway miles, or condition any approval or waiver under a Full Funding Grant Agreement, on a grantee's adopting transit fare policies or a tolling authority's adopting of tolling policies concerning, respectively, the price of transit services on the HOT lane facility and the tolls payable by SOVs. Instead, FTA shall permit grantees and tolling authorities to develop their own fare structures for transit services and tolls, respectively, on HOT lane facilities. Transit fares shall remain subject to 49 U.S.C. 332 (Nondiscrimination) and 49 U.S.C. 5307 (Urbanized area formula grants), however.

(d) *No Return of Funds under Full Funding Grant Agreements.* In the event that an HOV facility is converted to a HOT facility and the HOV facility has received funds through FTA's New Starts program, FTA shall not require the grantee to return such funds so long as the facility complies with the conditions set forth in this final policy statement and the original grant agreement or Full Funding Grant Agreement, as applicable.

III. Response to Comments Received

Thirty-four parties submitted comments in response to FTA's proposed policy, published in the **Federal Register** on September 7, 2006, at 71 FR 52849 (the proposed policy). This section responds to those comments by topic in the following order: (a) Policy Statement Generally; (b) HOT Lanes Were Previously HOV Lanes Reported in the National Transit Database as ''Fixed Guideway Miles''; (c) Monitoring and Performance Standards; (d) Program Income and Toll Revenues; (e) Transit Fares and Tolls; (f) Return of Funds under Full Funding Grant Agreements; and (g) Miscellaneous Comments.

(a) *Policy Statement Generally.* The purpose of the proposed policy was to ensure that Federal transit funding for congested urban areas would not be decreased if HOV facilities were converted to variably-priced HOT lanes. The proposed policy also sought to achieve a uniform approach among the operating agencies of the Department concerning HOV-to-HOT conversions, and supported the Department's policy of encouraging HOV-to-HOT conversions. Eight commenters agreed generally with FTA's proposed policy. Six parties submitted general comments. Four commenters asked FTA to defer its final policy determination until the impacts become more apparent. One commenter articulated four policy principles that discuss ways to integrate transit into toll roads and HOT lanes.[19] Another commenter stated that one of FTA's top priorities in developing the policy should be to foster an increase in alternative transportation ridership—whether that alternative is carpool, vanpool, transit, or other shared-mode—and suggested four ways the policy

[15] FTA apportions amounts made available for fixed guideway modernization under 49 U.S.C. 5309 pursuant to fixed guideway factors detailed at 49 U.S.C. 5337. One of these fixed guideway factors, located at 49 U.S.C. 5337(a)(5)(B), apportions a percentage of the available fixed guideway modernization funds to 'fixed guideway systems placed in revenue service at least seven years before the fiscal year in which amounts are made available.' For purposes of 49 U.S.C. 5337(a)(5)(B), (i) no HOV facility that has been in revenue service at least seven years shall forfeit its eligibility for fixed guideway modernization funds because it is converted to a HOT lane facility in accordance with this final policy statement; and (ii) no HOV facility that has been in revenue service for *less than* seven years shall forfeit the years it has accrued under 49 U.S.C. 5337(a)(5)(B) because it is converted to a HOT lane facility and for so long as the HOT lane facility maintains its ''fixed guideway'' classification in accordance with this final policy statement, it shall continue to accrue years thereunder.

[16] FTA recognizes one exception to this statement—bus-only shoulders. Accordingly, FTA shall classify HOT lane facilities converted from bus-only shoulders as fixed guideway miles, so long as such HOT lanes satisfy the conditions set forth in sections II(b)(ii) and (iii) of this final policy statement and were bus-only shoulders previously reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 5309.

[17] The costs necessary for the proper operation and maintenance of a HOT lane facility may include reconstruction, rehabilitation, and the costs associated with operating transit service on the facility.

[18] *Transit's allocable share* of the facility's program income shall be an amount equal to the facility's total program income, for any period, multiplied by a ratio, (a) The numerator of which shall be the cumulative amount of funds contributed to the facility through a program established by transit law, and (b) the denominator of which shall be the cumulative amount of all Federal, State and local capital funds contributed to the facility, in each case at the time transit's allocable share is calculated. For purposes of 49 CFR part 18.25, (i) amounts other than transit's allocable share shall not constitute program income and (ii) any expenditure of transit's allocable share that is not deducted from outlays made under transit law shall be deemed an ''alternative'' under 49 U.S.C. 18.25(g) and deemed by FTA a term of the grant agreement.

[19] The commenter's suggested policy principles are as follows: (1) Metropolitan areas and states should have greater latitude to use roadway tolling; (2) Tolling should be a supplement to and not a substitution for existing transportation funding; (3) Local sponsors should have the discretion to fund public transportation with toll revenues; and (4) Tolling should be permitted as a long-term strategy.

statement could better support this end.[20]

FTA Response: The commenters that asked FTA to defer its final policy determination until the impacts are more apparent seemed to misunderstand the scope of FTA's proposed policy. FTA's HOV-to-HOT policy will not result in all HOT lane facilities being classified as fixed guideway miles for purposes of FTA's funding formulas. Rather, only those HOT lane facilities converted from HOV lanes that have been previously classified as fixed guideway miles shall qualify for continued classification as such, subject to the conditions set forth in the final policy statement in section II of this notice.

In response to the four policy principles summarized at footnote (19), FTA reminds the commenter that, without this final policy statement, transit formula funding for congested urban areas would decrease if existing HOV facilities were converted to variably-priced HOT lanes. For this reason, FTA believes that this policy statement: (1) Gives states greater latitude to use tolling without negatively impacting available transit resources; (2) enhances existing transportation funding through the collection of toll revenues; (3) grants project sponsors discretion to use toll revenues for any ''permissible use'' (as defined in section II of this notice); and (4) encourages variably-priced HOT lanes as a long-term strategy, consistent with the policy of the Department.

In response to the commenter that stated FTA should consider fostering an increase in alternative transportation ridership as one of its top priorities in developing this guidance, FTA reemphasizes its primary purpose in drafting this guidance—to ensure that Federal transit funding for congested urban areas is not decreased when exiting HOV facilities are converted to HOT lanes. FTA responds to the commenter's four suggestions summarized at footnote (20) in turn. With respect to the first suggestion, the final policy statement supports HOV usage, but recognizes that many HOV facilities are underutilized; the ability of HOT lanes to introduce additional traffic to existing HOV facilities, while using pricing and other demand management techniques to control the number of additional motorists, maintain high service levels and provide new revenue, make HOT lanes an effective means of reducing congestion and improving mobility. With respect to the second and third suggestions, FTA will rely on the management, operation, monitoring and enforcement provisions of 23 U.S.C. 166(d). With respect to the fourth suggestion, the final policy statement does not modify language at 23 U.S.C. 166(c)(3).

Accordingly, FTA has adopted as final the general provisions of its proposed policy.

(b) *HOT Lanes Were Previously HOV Lanes Reported in the National Transit Database as Fixed Guideway Miles.* In its notice describing the proposed policy, FTA requested comments on its proposal to classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of three conditions is satisfied. The first condition is that the HOT lanes were previously HOV lanes reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 49 U.S.C. 5309. FTA received thirty-five comments on this condition, with some parties offering multiple comments. Eight commenters favored FTA's proposed policy. Eighteen commenters asked FTA to expand its policy to classify *all* HOT lanes as fixed guideway miles for purposes of the funding formulas administered by FTA, regardless of whether the HOT lane facility was newly constructed or was previously an HOV facility. Seven commenters asked FTA not to fund HOT lane facilities at a level that would dilute the pool of transit funding available for existing fixed guideway facilities. Two commenters proposed that FTA require converted HOV lanes to have operated as HOV lanes for seven years prior to their conversion to HOT lanes before FTA would classify them as fixed guideway miles.

FTA Response: FTA recognizes that *all* HOT lanes provide similar benefits to metropolitan areas that are experiencing severe and worsening congestion, regardless of whether the facility is newly constructed or converted from HOV or general purpose lanes. However, the purpose of the final policy statement is to ensure that Federal transit funding for congested urban areas is not decreased when existing HOV facilities are converted to variably-priced HOT lanes in an effort by localities to reduce congestion, improve air quality, or maximize throughput using excess HOV lane capacity and to promote a uniform approach by the Department's operating agencies concerning HOV-to-HOT conversions. If FTA were to classify all HOT lanes as fixed guideway miles without a commensurate increase in overall funding levels, it could negatively impact the ability of many transit operators to finance needed capital maintenance on existing infrastructure. For this reason, FTA has limited the scope of the final policy statement to classifying as fixed guideway miles only those HOT lane facilities that are converted from HOV lanes which had *previously* been classified as fixed guideway miles. In this way, FTA will ensure that Federal transit funding for congested urban areas is not decreased when existing HOV facilities are converted to variably-priced HOT lanes. FTA believes it appropriate to leave for the U.S. Congress, and not to determine on an administrative basis, the question of whether and on what terms facilities newly constructed as HOT lanes or general purpose lanes converted directly to HOT lanes would be classified as fixed guideway miles given the substantial reallocation of formula funds among transit authorities that might result over time if such facilities were also classified as fixed guideway miles.

FTA has included the following footnote (15) in section II (b)(i) of this notice in response to the recommendation that FTA require HOV lanes to have operated as HOV lanes for seven years before they may be converted to HOT lanes and remain classified as fixed guideway miles:

> FTA apportions amounts made available for fixed guideway modernization under 49 U.S.C. 5309 pursuant to fixed guideway factors detailed at 49 U.S.C. 5337. One of these fixed guideway factors, located at 49 U.S.C. 5337(a)(5)(B), apportions a percentage of the available fixed guideway modernization funds to 'fixed guideway systems placed in revenue service at least seven years before the fiscal year in which amounts are made available.' For purposes of 49 U.S.C. 5337(a)(5)(B), (i) no HOV facility that has been in revenue service *at least* seven years shall forfeit its eligibility for fixed guideway modernization funds because it is converted to a HOT lane facility in accordance with this final policy statement; and (ii) no HOV facility that has been in revenue service for *less than* seven years shall forfeit the years it has accrued thereunder because it is converted to a HOT lane facility, and for so long as the HOT lane facility maintains its fixed guideway classification in accordance with this policy

[20] The commenter's four suggestions on how FTA's policy statement could foster alternative transportation ridership are as follows: (1) The policy statement should support transportation demand management and HOV usage; (2) Greater emphasis on enforcement should be considered; (3) FTA should tie fixed guideway qualification to integrity of the lane; and (4) FTA should emphasize language at 23 U.S.C. 166(c)(3), which section requests that States, in the use of toll revenues, give priority consideration to projects for developing alternatives to single occupancy vehicle travel and projects for improving highway safety.

statement, it shall continue to accrue years thereunder.

Accordingly, FTA will not require that converted HOV lanes operate as HOV lanes for seven years before they may be converted to HOT lanes and remain classified as fixed guideway miles in accordance with this final policy statement.

(c) *Monitoring and Performance Standards.* In its notice describing the proposed policy, FTA requested comments on its proposal to classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of three conditions is satisfied. The second condition is that the HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d). FTA received twenty comments on this topic. Four commenters favored FTA's proposed position. Seven commenters proposed that FTA require a minimum level of transit service on a HOT lane facility before its lanes could be classified as fixed guideway miles for purposes of the funding formulas administered by FTA. Five commenters requested that FTA adopt more exacting performance standards. One commenter requested that FTA state explicitly that local agencies may increase HOV occupancy levels as necessary to ensure free flow conditions needed for transit bus service. Another commenter asked FTA to amend its policy to state that single occupant vehicles may be permitted on HOT lanes that are classified as fixed guideway miles, provided that the lanes satisfy the conditions set forth in FTA's final policy statement. One commenter requested that FTA acknowledge that compliance with State law governing performance standards for HOT lanes suffices in terms of meeting the condition that the HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d). One commenter asked FTA to require a study on degradation of transit service before an HOV facility may convert to a HOT lane facility and be classified as fixed guideway miles for purposes of funding formulas administered by FTA.

FTA Response: FTA disagrees that it should require a more exacting performance standard, including a minimum level of transit service. FTA recognizes that a more exacting standard would be necessary if *all* HOT lane facilities were eligible for classification as fixed guideway miles, for under this scenario rural or suburban HOT lane facilities with little or no transit service could receive a significant portion of the Federal transit funds needed by the Nation's largest transit providers to maintain their current infrastructure. For this reason, FTA has limited the benefits of the final policy to HOV lanes that have previously been classified as fixed guideway miles. Such designation as a fixed guideway mile indicates that a facility has a minimum level of transit service. FTA believes that compliance with the performance standards codified at 23 U.S.C. 166(d) is sufficient to ensure free flow traffic conditions and to avoid degradation of transit service on these facilities when converted from HOV lanes to HOT lane facilities. Moreover, HOV facilities constructed using capital funds available under 49 U.S.C. 5309(d) or (e) could be required, when an HOV facility converts to a HOT lane facility, to achieve a higher performance standard than required under 23 U.S.C. 166(d). In all circumstances, FTA shall require real-time monitoring of traffic flows to ensure on-going compliance with 23 U.S.C. 166(d).

FTA does not agree that compliance with State law governing HOT lane performance standards will satisfy FTA's requirements in all circumstances. Rather, FTA shall require all HOT lane facilities to comply with the statutory requirements of 23 U.S.C. 166 to be classified as fixed guideway miles for purposes of FTA's funding formulas. It may be the case that the laws of certain states require a higher level of performance than the Federal standard articulated here. In these instances, the lesser Federal standard should present no obstacle to HOT conversion.

With respect to the request that FTA require a study on the degradation of transit service before an HOV facility may convert to a HOT facility, FTA (i) believes that compliance with the free flow traffic requirements of 23 U.S.C. 166 is sufficient to avoid the degradation of transit service on these facilities and accordingly (ii) will not require that project sponsors incur the additional expense of a formal study on the degradation of transit service.

(d) *Program Income and Toll Revenues.* In its notice describing the proposed policy, FTA requested comments on its proposal to classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of three conditions is satisfied. The third condition is that program income from the HOT lane facility, including all toll revenue, is used solely for ''permissible uses.'' FTA received twenty-five comments on this condition. Five commenters favored FTA's proposed policy. Seven commenters requested that FTA expressly state in its final policy that grantees may use toll revenues for transit operating costs. Four commenters stated that FTA funds should not be used for the maintenance and/or construction of HOT lane facilities. Four commenters asked FTA to require that all Federal transit funds generated by HOT lane facilities because of their classification as fixed guideway miles be directed to the ''designated recipient'' for Federal transit funding. Three commenters stated that FTA should not permit the operators of HOT lane facilities to finance a HOT lane facility's operating losses with Federal funds generated by the facility's classification as fixed guideway miles. One commenter asked FTA not to limit the use of HOT lane toll revenues to transit. Another commenter asked FTA to require that priority of payment be provided for in the project implementation documents.

FTA Response: Based on the recommendation of several commenters that FTA expressly state that grantees may use toll revenues for transit operating costs, and pursuant to 49 CFR part 18.25, which states that FTA ''grantees may retain program income for allowable capital or operating expenses,'' FTA has added transit operating costs to its description of ''permissible uses'' at section II(b)(iii) of this notice.

FTA disagrees with the comment that its grantees should not use Federal transit funds for the maintenance and/or construction of HOT lane facilities. The commenter did not indicate whether it referred to the use of grant funds or program income. While FTA recognizes both HOV and HOT lanes as permissible incidental uses of FTA-funded assets, FTA grant funds shall not be used to construct a HOT lane facility beyond what is allowed by 49 U.S.C. 5302(a)(4), as implemented by FTA's regulations, as amended from time to time.[21] Any facility that converts from an HOV to a HOT facility, and retains its classification as a fixed guideway by satisfying the conditions of this policy statement, may use program income in accordance with this final policy

[21] 49 U.S.C. 5302(a)(4) defines ''fixed guideway'' as ''a public transportation facility (A) using and occupying a separate right-of-way or rail for the exclusive use of public transportation and other high occupancy vehicles; or (B) using a fixed catenary system and a right-of-way usable by other forms of transportation.''

statement, the Department's regulation at 49 CFR part 18.25, and other applicable statutes, regulations and requirements. Similarly, FTA disagrees with the comment that it should limit the use of HOT lane toll revenues to transit. In many cases, a HOT lane facility may have received (or receives) funding from FTA and another Federal agency, such that use of the facility's program income is governed by more than one Federal program. In these instances, FTA's restrictions concerning permissible use shall not apply to more than transit's allocable share of the facility's program income, as described in section II of this notice. FTA will not require recipients to assign priority in payment to any permissible use.

Federal transit law requires FTA to disburse certain funds to the designated recipient. The designated recipient for FTA formula funds shall not be changed because the grantee converted an HOV facility to a HOT facility, in accordance with the final policy statement. FTA shall not prevent such designated recipients from using the funds for eligible activities in accordance with the process for programming transit funds described at 23 CFR part 450.324(l) of the joint FTA–FHWA planning regulations.

(e) *Transit Fares and Tolls.* In its notice describing the proposed policy, FTA requested comments on transit fares and tolls on HOT lane facilities. FTA stated that it would not condition the receipt of Federal transit funds by a qualifying HOT lane facility on the tolling authority's adoption of policies concerning the price of transit services on the HOT lane facility or the tolls payable by single occupant vehicles. FTA would allow grantees and tolling authorities to develop their own fare structures for transit services and tolls on HOT lane facilities. FTA received sixteen comments on this topic. Without further comment, five commenters agreed with FTA's proposed policy not to regulate toll prices. Ten commenters stated that transit vehicles should be exempt from tolls charged on Federally-funded HOT lane facilities for its lanes to be classified as fixed guideway miles for purposes of the funding formulas administered by FTA. One commenter asked FTA to require that transit fares and tolls remain competitive.

FTA Response: Federal transit law prohibits FTA from regulating the ''rates, fares, tolls, rentals, or other charges prescribed by any provider of public transportation.'' 49 U.S.C. 5334(b)(1). Accordingly, FTA shall not condition the receipt of Federal transit funds by a qualifying HOT lane facility on the tolling authority's adoption of policies concerning the price of transit services on the HOT lane facility or the tolls payable by single occupant vehicles. FTA will allow grantees and tolling authorities to develop their own fare structures for transit services and tolls, respectively, on HOT lane facilities. Transit fares shall remain subject to 49 U.S.C. 5332 (Nondiscrimination) and 49 U.S.C. 5307 (Urbanized area formula grants), however.

(f) *Return of Funds under Full Funding Grant Agreements.* In its notice describing the proposed policy, FTA requested comments on its proposal that, in the event that an HOV facility is converted to a HOT facility and the HOV facility has received funds through FTA's New Starts program, FTA would not require the grantee to return such funds, so long as the facility complied with the conditions set forth in the proposed policy. FTA received one comment on this topic. The commenter expressed concern that, when the grantee is not also the tolling authority, the tolling authority may make business decisions contrary to the interest of the grantee/transit provider, thus forcing the grantee/transit provider to repay New Starts funding to FTA.

FTA Response: It appears that the commenter misunderstood the scope of FTA's proposed policy, which states that ''in the event that an HOV facility is converted to a HOT facility and the HOV facility has received funds through FTA's New Starts program, FTA would *not* require the grantee to return such funds so long as the facility complied with the conditions set forth in this guidance.'' If a grantee wishes to convert an existing HOV facility to a HOT lane facility and maintain the classification of its facility as a fixed guideway for purposes of FTA's funding formulas, it must comply with the conditions set forth in the final policy statement. To the extent that the facility is subject to a Full Funding Grant Agreement, the grantee is obligated to abide by the requirements thereof, just as it is bound to any other contractual or legal obligation.

(g) *Miscellaneous Comments.* FTA received seven miscellaneous comments in response to its proposed policy. One commenter asked FTA to address a circumstance in which a previously eligible HOV lane (or a portion of an HOV lane) is temporarily or permanently taken out of service in order to be reconstructed and expanded into an improved HOT lane facility in the same corridor. A second commenter requested that FTA indicate whether it would classify as fixed guideway miles bus-only shoulders converted to HOT lanes when the bus-only shoulders are currently classified as fixed guideway miles. Another commenter asked FTA to clarify its policy with respect to variable-priced express lanes. Two commenters asked FTA to require coordination between privately operated HOT lane facilities and public transportation agencies. One commenter asked FTA to connect this policy with transit supportive land use. And another commenter argued that FTA's policy should not affect New Starts project eligibility criteria.

FTA Response: FTA recognizes that it may be necessary to temporarily remove an HOV lane from service in order to convert it into a HOT lane facility. Such a HOT lane facility will not lose its classification as a fixed guideway so long as it satisfies the conditions set forth in the final policy statement.

FTA agrees with the proposal that it classify as fixed guideway miles bus-only shoulders converted to HOT lanes as long as the bus-only shoulders are currently classified as fixed guideway miles and satisfy the conditions of this final policy statement. Accordingly, FTA has included the following language at footnote (16) in section II(b)(i) of this notice:

> FTA shall classify HOT lane facilities converted from bus-only shoulders as fixed guideway miles, so long as such HOT lanes satisfy conditions (ii) and (iii) of this final policy statement and were bus-only shoulders previously reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 5309.

The commenter that asked FTA to consider variably-priced express lanes did not provide enough information for FTA to determine whether such facility could satisfy the conditions set forth in the proposed policy. FTA responds by reiterating its statement at section II(b)(i) of this notice, that with the exception of bus-only shoulders, ''neither non-HOV facilities nor facilities constructed as HOT lanes would be eligible for classification as fixed guideway miles.''

The comment requesting that FTA require coordination between privately operated HOT lane facilities and public transportation is beyond the scope of this notice. FTA's Planning and Assistance Standards are located at 49 CFR part 613.

Similarly, the comments requesting that FTA connect this policy with transit supportive land use and that this policy not affect FTA's New Starts project eligibility criteria are beyond the scope of this notice, which is limited to the classification of HOT lane facilities

as fixed guideway miles for purposes of FTA's funding formulas.

Issued on January 8, 2007.

James S. Simpson,

Administrator.

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 06–17]

Office of Thrift Supervision

[Docket No. 2006–55]

FEDERAL RESERVE SYSTEM

[Docket No. OP–1254]

FEDERAL DEPOSIT INSURANCE CORPORATION

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55043; File No. S7–08–06]

Interagency Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities

AGENCIES: Office of the Comptroller of the Currency, Treasury (''OCC''); Office of Thrift Supervision, Treasury (''OTS''); Board of Governors of the Federal Reserve System (''Board''); Federal Deposit Insurance Corporation (''FDIC''); and Securities and Exchange Commission (''SEC'') (collectively, the ''Agencies'').

ACTION: Notice of final interagency statement.

SUMMARY: The Agencies are adopting an Interagency Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities (''Final Statement''). The Final Statement pertains to national banks, state banks, bank holding companies (other than foreign banks), federal and state savings associations, savings and loan holding companies, U.S. branches and agencies of foreign banks, and SEC-registered broker-dealers and investment advisers (collectively, ''financial institutions'' or ''institutions'') engaged in complex structured finance transactions (''CSFTs''). In May 2004, the Agencies issued and requested comment on a proposed interagency statement (''Initial Proposed Statement''). After reviewing the comments received on the Initial Proposed Statement, the Agencies in May 2006 issued and requested comment on a revised proposed interagency statement (''Revised Proposed Statement''). The modifications to the Revised Proposed Statement, among other things, made the statement more principles-based and focused on the identification, review and approval process for those CSFTs that may pose heightened levels of legal or reputational risk to the relevant institution (referred to as ''elevated risk CSFTs''). After carefully reviewing the comments on the Revised Proposed Statement, the Agencies have adopted the Final Statement with minor modifications designed to clarify, but not alter, the principles set forth in the Revised Proposed Statement. The Final Statement describes some of the internal controls and risk management procedures that may help financial institutions identify, manage, and address the heightened reputational and legal risks that may arise from elevated risk CSFTs. As discussed further below, the Final Statement will not affect or apply to the vast majority of financial institutions, including most small institutions, nor does it create any private rights of action.

EFFECTIVE DATE: The Final Statement is effective January 11, 2007.

FOR FURTHER INFORMATION CONTACT:

OCC: Kathryn E. Dick, Deputy Comptroller, Credit and Market Risk, (202) 874–4660; Grace E. Dailey, Deputy Comptroller, Large Bank Supervision, (202) 874–4610; or Ellen Broadman, Director, Securities and Corporate Practices Division, (202) 874–5210, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

OTS: Fred J. Phillips-Patrick, Director, Credit Policy, (202) 906–7295, and Deborah S. Merkle, Project Manager, Credit Policy, (202) 906–5688, Examinations and Supervision Policy; or David A. Permut, Senior Attorney, Business Transactions Division, (202) 906–7505, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Board: Sabeth I. Siddique, Assistant Director, (202) 452–3861, or Virginia Gibbs, Senior Supervisory Financial Analyst, (202) 452–2521, Division of Banking Supervision and Regulation; or Kieran J. Fallon, Assistant General Counsel, (202) 452–5270, or Anne B. Zorc, Senior Attorney, (202) 452–3876, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TTD) only, call (202) 263–4869.

FDIC: Jason C. Cave, Associate Director, (202) 898–3548; Division of Supervision and Consumer Protection; or Mark G. Flanigan, Counsel, Supervision and Legislation Branch, Legal Division, (202) 898–7426, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SEC: Mary Ann Gadziala, Associate Director, Office of Compliance Inspections and Examinations, (202) 551–6207; Catherine McGuire, Chief Counsel, Linda Stamp Sundberg, Senior Special Counsel (Banking and Derivatives), or Randall W. Roy, Branch Chief, Division of Market Regulation, (202) 551–5550, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

Financial markets have grown rapidly over the past decade, and innovations in financial instruments have facilitated the structuring of cash flows and allocation of risk among creditors, borrowers, and investors in more efficient ways. Financial derivatives for market and credit risk, asset-backed securities with customized cash flow features, specialized financial conduits that manage pools of assets, and other types of structured finance transactions serve important purposes, such as diversifying risk, allocating cash flows and reducing cost of capital. As a result, structured finance transactions, including the more complex variations of these transactions, now are an essential part of U.S. and international capital markets.

When a financial institution participates in a CSFT, it bears the usual market, credit, and operational risks associated with the transaction. In some circumstances, a financial institution also may face heightened legal or reputational risks due to its involvement in a CSFT. For example, a financial institution involved in a CSFT may face heightened legal or reputational risk if the customer's regulatory, tax or accounting treatment for the CSFT, or disclosures concerning the CSFT in its public filings or financial statements, do not comply with applicable laws, regulations or accounting principles.[1]

In some cases, certain CSFTs appear to have been used in illegal schemes

[1] For a memorandum on the potential liability of a financial institution for securities laws violations arising from participation in a CSFT, see Letter from Annette L. Nazareth, Director, Division of Market Regulation, Securities and Exchange Commission, to Richard Spillenkothen and Douglas W. Roeder, dated December 4, 2003 (available at *http://www.federalreserve.gov/boarddocs/srletters/2004/* and *http://www.occ.treas.gov).*

National Capital Region Transportation Planning Board

777 North Capitol Street, N.E., Suite 300, Washington, D.C. 20002-4290 (202) 962-3310 Fax: (202) 962-3202 TDD: (202) 962-3213

October 10, 2006

Comments to Docket Number: FTA-2006-25750

The Federal Transit Administration (FTA) has requested comments on a notice published in the Federal Register on September 7, 2006 concerning the eligibility of High-Occupancy Toll (HOT) lanes for inclusion in the transit funding formulas administered by FTA. In this September 7, 2006 notice, FTA states that "neither non-HOV facilities converted directly to HOT facilities nor facilities constructed as HOT lanes would be eligible for classification as "fixed guideway miles."

The National Capital Regional Transportation Planning Board (TPB), the metropolitan planning organization (MPO) for the Washington region, requests that FTA broaden this proposed policy to include all variably-priced lanes that provide for unimpeded transit service as "fixed guideway" miles in the transit funding formulas administered by the Federal Transit Administration (FTA). This will ensure that federal transit funding for congested urban areas is not decreased in a situation where existing High-Occupancy Vehicle (HOV) facilities are converted to variably-priced lanes, and also that federal transit funding is increased in situations where new variably-priced facilities that provide for unimpeded transit are implemented.

The metropolitan Washington region continues to face significant transportation funding shortages and severe congestion. Variably-priced lanes can provide an alternative source of funding as well as an effective long-term congestion management tool. For these reasons, TPB member jurisdictions are seriously considering applying variable pricing to both new and existing roadways. The region's current long-range transportation plan includes four new HOT lanes along 15 miles of the Capital Beltway in Virginia, and six new variably priced lanes along 18 miles on the Inter-County Connector in Montgomery and Prince George's Counties in Maryland. Virginia is also exploring the possibility of converting existing HOV lanes along the I-95/395 corridor into HOT lanes. Maryland is considering express toll lanes along I-495, I-95 and I-270, as well as along other facilities.

In this region, existing exclusive HOV lanes which can be used by transit, carpool and vanpool vehicles have been classified by FTA as "fixed guideway" miles because they provide for unimpeded transit service. It is only logical that all variably-priced lanes which provide for unimpeded transit service should be classified as "fixed guideway" miles and be included in the federal transit funding formulas.

Therefore, we urge you to adopt an explicit policy stating that all variably-priced lanes which provide for unimpeded transit service may be included as "fixed guideway" miles in the federal transit funding formula. Thank you for considering the TPB's views on this matter.

Maryland Department of Transportation
The Secretary's Office

419481

Robert L. Ehrlich, Jr.
Governor
Michael S. Steele
Lt. Governor
Robert L. Flanagan
Secretary
James F. Ports, Jr.
Deputy Secretary

October 6, 2006

Docket Management System
U.S. Department of Transportation
Nassif Building
Room PL-401
400 Seventh Street, SW
Washington, DC 20590-001

RE: Federal Transit Administration
Docket Number: FTA-2006-25750 - 30
Policy on When High-Occupancy Vehicle (HOV) lanes Converted to High-Occupancy/Toll (HOT) Lanes Shall Be Classified as Fixed Guideway Miles for Federal Transit Administration's (FTA) Funding Formulas and When HOT Lanes Shall Not Be Classified as Fixed Guideway Miles for FTA's Funding Formulas

Dear Sir or Madam:

The Maryland Department of Transportation (MDOT) has a Statewide Vision for Express Toll Lanes (ETLs) throughout the State of Maryland (see attached), which would provide extensive benefits to transit vehicles, who would ride for free or at a discounted rate, as well as to single-occupant vehicles willing to pay a user fee for a relatively congestion-free trip whenever they need it most. Rates would vary, of course, based on demand, either by time of day or actual traffic conditions, to ensure that the Express Toll Lanes maintain an adequate level of service.

The MDOT is currently in the middle of several studies to evaluate and implement these variably priced ETLs along several key corridors in central Maryland, including I-270, I-495 (the Capital Beltway), northern sections of I-95 and a section of US 301, as well as projects moving forward in both design and construction, such as the Inter-County Connector and I-95 north of Baltimore (I-895 to MD 43). Most of these ETLs are in newly constructed lanes. Conversion of HOV lanes are only under consideration on I-270 and US 50, which are only a small portion of the entire Vision for the State. These new lanes create infrastructure for regional express bus service in the busiest commuting routes around the State, with a reliable, relatively free-flowing travel time for time-sensitive transit trips. In addition to providing the infrastructure and opportunity for reliable transit solutions through a regionally integrated bus system optimizing efficiency and maximizing flexibility of schedules, these ETLs allow the State to build this sustainable capacity much sooner than otherwise feasible through a new revenue source.

My telephone number is 410-865-1000
Toll Free Number 1-888-713-1414 TTY User Call Via MD Relay
7201 Corporate Center Drive, Hanover, Maryland 21076

However, we support the FTA proposed rule making to allow converted HOV lanes that currently count towards "fixed guideway" lane miles in the transit funding formula administered by the FTA. The State of Maryland believes it is **critical** that **new variably priced ETLs miles also count toward** "fixed guideway" lane miles in the transit funding formula administered by the FTA. In a 2002 policy letter from the FTA regarding the I-15 FasTrak facility in San Diego, California, the FTA clearly recognizes that both existing HOV lanes converted to variably priced lanes and new variably priced lanes can provide for unimpeded transit service, as required for inclusion as "fixed guideway" lane miles in the federal transit funding formula.

The State of Maryland supports our Metropolitan Planning Organization (MPO) for the Washington region, the National Capital Regional Transportation Planning Board (TPB) and their October 19, 2005 and August 28, 2006 letters to the FTA on this issue and offers the following policy statement adopted by this group from a document entitled "Goals for a Regional System of Variably-Priced Lanes" (adopted April, 2005):

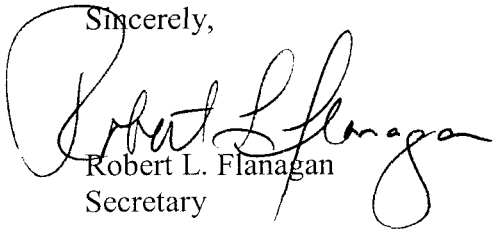
> *"Toll revenues from variably priced lane projects may finance construction, service debt, and pay for operation and maintenance of the priced lanes. Should toll lanes operate at a revenue surplus, consideration should be given to enhancing transit service."*

The MDOT offers this statement in objection to the FTA's condition that toll revenues on variably priced facilities must be used for mass transit purposes. This represents a serious limitation for the MDOT, as well as for our Maryland Transportation Authority (MdTA), the entity in Maryland that owns, operates and maintains our current toll facilities. Their bonds and statutes have restrictions for the use of toll revenue monies that would be required to pay for debt service for the entire system of toll facilities prior to any other use.

Again, the MDOT supports this proposed policy; however, it is only logical that **all** variably priced ETLs that provide for unimpeded transit service, regardless of how the toll revenues are used, should be classified as "fixed guideway" lane miles and be included in the federal transit funding formula. Therefore, the MDOT urges you to adopt an explicit policy stating that all variably priced lanes that provide for unimpeded transit service may be included as "fixed guideway" lane miles in the federal transit funding formula.

Thank you for your consideration. If you have any questions or comments, do not hesitate to contact me at 410-865-1001, toll-free at 800-713-1414 or by email at rflanagan@mdot.state.md.us.

Sincerely,



Robert L. Flanagan
Secretary

Attachments
cc: Ms. Lisa L. Dickerson, Administrator, Maryland Transit Administration
Ms. Trent M. Kittleman, Executive Secretary, MdTA
Mr. Neil J. Pedersen, Administrator, State Highway Administration

October 10, 2006

Docket Management System
U.S. Department of Transportation
400 Seventh Street, S.W.
Nassif Building
Room PL-401
Washington, D.C. 20590-0001

Re: Comments to Docket No. FTA-2006-25750

Dear Sir/Madam:

The Washington Metropolitan Area Transit Authority (WMATA) is the largest mass transit provider in the Washington, D.C. metropolitan area and the second largest subway and fifth largest bus system nationally. On average, we provide 720,000 rail trips, 439,000 bus trips, and 4,400 paratransit trips every weekday. WMATA is pleased to provide the following comments on the policy statement on classification of HOV lanes converted to HOT lanes as fixed guideway miles published on September 7, 2006 (at 71 Fed. Reg. 52849) by the Federal Transit Administration (FTA).

Designation of HOV lanes converted to HOT lanes as fixed guideway miles

WMATA supports the use of HOV and HOT lanes as another "tool" in the transportation "toolbox" by which localities can move people and reduce growing congestion. However, as the major public transportation provider of the national capital area, WMATA has a number of concerns with the proposed policy for HOV to HOT conversion and the designation of those miles as fixed guideway miles for FTA funding formulas.

As the Washington, DC area continues to grow, so does WMATA's ridership and costs. At the same time, WMATA's proportional share of the fixed guideway modernization program is declining, despite the modest growth in the program. This decline in program dollars is a function of an increasing number of fixed guideway miles (primarily rail transit) becoming eligible for these funds, as rail systems mature. Consequently, WMATA is opposed to

Washington Metropolitan Area Transit Authority

600 Fifth Street, NW
Washington, D.C. 20001
202/962-1234

By Metrorail:
Judiciary Square-Red Line
Gallery Place-Chinatown
Red, Green and Yellow Lines

A District of Columbia, Maryland and Virginia Transit Partnership

the addition of new HOV/HOT miles that would further reduce funds available for critical rail capital maintenance and rehabilitation needs.

Despite the fact that there are many HOV/HOT proposals in the Washington region, as other regions across the country add HOV/HOT miles and projects into the FTA funding formulas, WMATA is extremely concerned that its proportional share of fixed guideway modernization funding will decline. Funding for fixed guideway modernization program is not growing at a large enough rate to offset the dilution of the program by HOV/HOT miles from across the country being added to the formulas. Therefore, WMATA recommends that in addition to the requirement that they be reported in the National Transit Database, HOV lanes must have been operated as HOV lanes for seven years (similar to the requirement for rail projects) prior to conversion to HOT lanes and prior to qualification as eligible miles for FTA funding under 49 U.S.C. §5307(b).

Although HOV and HOT lanes are another "tool" in the transportation "toolbox," FTA needs to keep in mind that not all lane miles are equal. A transit lane mile (assuming 8-car trains, at 2.5 minute headways) carries approximately 18,000 - 20,000 people/hour. By contrast, an HOV-3 lane mile carries approximately 6,000 people/hour. At a time when transit capital dollars are so desperately needed, WMATA believes this proposed policy is a slippery slope whereby transit program dollars would increasingly be used for highway projects--with little or no protection for transit properties of existing FTA formula funds and no promise of funding growth.

Therefore, WMATA urges FTA to ensure that all federal funds generated from the fixed guideway miles of HOV lanes converted to HOT lanes be directed to the designated recipients for funding eligible public transit capital expenditures.

FTA policies regarding HOV lanes converted to HOT lanes

WMATA agrees with other commenters that prior to the conversion to HOT, a study should be done to ensure that the conversion will not degrade traffic flow or transit service on the facility. In addition, there should be continuous monitoring of HOT facilities to ensure free flow of traffic and no degradation of transit service.

WMATA feels strongly that HOV to HOT conversion should require the provision of transit service on the facility and that transit vehicles should not be subject to HOV/HOT tolls.

FTA's policy should include a provision that program income from the HOT lane facility, including all toll revenues, should be used solely to provide capital and operating funds to support the operation of transit service and not to finance operating losses of the HOT lanes. If toll revenues are insufficient to cover these expenses, public transit operators should not be penalized by diverting transit funds to finance HOT lanes.

Overall comment on September 7 FTA policy statement

For the reasons enumerated above, WMATA suggests that FTA defer a final policy decision on this issue. WMATA agrees with other commenters that FTA should first study likely trends and forecast the impacts of the various policy options available, then publish both the methodology used and the likely results of various courses of action that are available to FTA. Finalizing a policy before such steps are taken will likely result in a number of unintended consequences on transit agencies that already face increasing costs and declining federal funding dollars.

WMATA appreciates the opportunity to provide comments on this proposed policy, which could greatly affect transit authorities across the country.

Sincerely,

Deborah S. Lipman

Deborah S. Lipman
Director
Office of Policy and Intergovernmental Relations

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE, 257 Park Avenue South, New York, NY 10010, SIERRA CLUB, Inc., 85 Second Street, 2nd Floor, San Francisco, CA 94105, Plaintiffs, v. UNITED STATES DEPARTMENT OF TRANSPORTATION, 400 Seventh Street, S.W., Washington, DC 20590, MARY PETERS, in her official capacity as Secretary of Transportation, 400 Seventh Street, S.W., Washington, DC 20590, FEDERAL HIGHWAY ADMINISTRATION, 400 Seventh Street, S.W., Washington, DC 20590, J. RICHARD CAPKA, in his official capacity as Federal Highway Administrator, 400 Seventh Street S.W., Washington, DC 20590, METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, 777 North Capitol Street, N.E., Suite 300, Washington, DC 20002, JAY FISETTE, in his official capacity as Board Chair of the Metropolitan Washington Council of Governments, 777 North Capitol Street, N.E., Washington, DC 20002, NATIONAL CAPITAL REGION TRANSPORTATION PLANNING BOARD, 777 North Capitol Street, N.E., Suite 300, Washington, DC 20002, MICHAEL KNAPP, in his official capacity as Chairperson of the National Capital Region Transportation Planning Board, 777 North Capitol Street, N.E., Suite 300,	Civil Action No.

Washington, DC 20002,)
)
Defendants.)
)
_____)

COMPLAINT

NATURE OF ACTION

1. Plaintiffs Environmental Defense and Sierra Club bring this action to enforce the federally mandated duties of Defendants United States Department of Transportation ("USDOT"), Federal Highway Administration ("FHWA"), Metropolitan Washington Council of Governments ("MWCOG"), National Capital Region Transportation Planning Board ("TPB"), and their respective officials, to make a decision regarding a the Intercounty Connector ("ICC") in the best overall public interest after considering how the ICC meets the national and local objectives for transportation projects, the environmental impacts of the ICC, and alternatives and mitigation measures which minimize those impacts while meeting national and local transportation objectives.

2. The proposed ICC would be an eighteen mile, six lane highway which, if constructed, would bring 125,000 vehicles per day into quiet residential neighborhoods and scenic parks and in close proximity to five schools where children, already attending school in an area deemed by the Environmental Protection Agency ("EPA") to have emissions levels of particulate matter with an aerodynamic diameter equal to or less than 2.5 microns in size ("PM2.5") in excess of levels deemed safe for human health, will be exposed to dangerous levels of toxic and particulate matter air pollution that cause asthma, other respiratory diseases, cancer, cardiovascular disease and other

diseases that contribute to increased emergency and urgent care, long-term hospitalization, increased medical costs, lost work and school days, and early death.

3. In addition to the severe human health effects caused by the airborne pollution resulting from the ICC project, the proposed ICC would destroy private property, wetlands, and other natural areas home to endangered species. In exchange for these devastating health impacts, significant environmental destruction, and costs in excess of 2.4 billion dollars, the ICC would, at best, reduce travel time by a meager six minutes between central Montgomery County and BWI Airport, and will increase travel time in other areas.

4. Plaintiffs bring this action to enforce Defendants' mandatory duties to ensure transportation project decisions are made in the best overall public interest. Plaintiffs challenge Defendants' approval of the ICC as well as the substantive findings made by USDOT, acting through the FHWA, and the Maryland Department of Transportation, through the Maryland State Highway Administration, (collectively, "lead agencies"), in the Record of Decision ("ROD"), the final agency action approving the ICC project. Defendants used deficient and inaccurate analyses of direct, indirect, and cumulative impacts from the selected alternative, combined with an overly narrow project purpose to freeze out project alternatives and mitigation measures proposed by the Plaintiffs. Defendants ignored alternatives in the record that would better meet national transportation planning objectives to minimize transportation-related fuel consumption and air pollution, foster economic growth and development, and increase the mobility of all area residents, including those without vehicles. Defendants also ignored alternatives in the record that would better meet

regional transportation planning objectives to reduce vehicle miles traveled and reliance on single occupant vehicles. The Defendants' analysis of health, environmental, and land-use consequences is inadequate because the lead agencies omitted significant and adverse impacts in their assessment of significant costs and benefits of the project, and relied on an unrealistic characterization of the project's success in meeting regional and national statutory objectives. The lead agencies' consistent underestimation of costs, overestimation of benefits, and failure to disclose the human health and environmental impacts evince a pattern of agency neglect for statutory duties to protect the human environment while constructing federally-funded transportation projects.

5. Plaintiffs allege that, by issuing the ROD and approving the ICC, the lead agencies, the MWCOG and their respective officials violated the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), 23 U.S.C. § 134, the Federal-Aid Highways Act ("FAHA"), 23 U.S.C. § 109, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70f, and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-06.

6. Plaintiffs seek a declaration that Defendants' approval of the ICC and the FY2005-2010 and FY2006-2011 Metropolitan Transportation Improvement Programs ("Metropolitan TIPs") and 2004 and 2005 Constrained Long-Range Plans ("CLR Plans"), which included the ICC, violated federal highway laws, NEPA, and the APA. Plaintiffs ask the Court to set aside the Metropolitan TIPs and CLR Plans because they included the ICC without properly analyzing the ICC project's impact upon the Metropolitan TIP's or CLR Plans' ability to meet national or local

transportation objectives, in violation of federal law. Plaintiffs also ask the Court to set aside the lead agencies' approval of the ICC because the lead agencies did not make a determination that the ICC would be in the best overall public interest after considering the required statutory factors as compared to alternatives in the record. To the extent the lead agencies made a determination pursuant to 23 U.S.C. § 109(h), they did not identify the costs of mitigating the adverse impacts of the ICC project or explain the factors they considered or weighed in reaching such a determination. Plaintiffs further ask the Court to set aside the lead agencies' approval of the ICC because they conducted an inadequate analysis of environmental impacts and alternatives and because their approval is arbitrary and capricious and not otherwise in accordance with law.

PARTIES

PLAINTIFFS AND STANDING

7. Plaintiff Sierra Club ("Club") is a non- profit environmental and conservation organization incorporated under the laws of the state of California. The Club is dedicated to promoting the responsible use of the earth's ecosystems and resources and protecting and restoring the quality of the natural and human environment to ensure a clean and healthful environment for all people. The Club seeks to protect the interests of its members in the promotion of energy conservation, reduction of greenhouse gas emissions, and preservation of existing transportation systems. The Club also seeks to increase the efficiency of transportation systems and the mobility of its members while minimizing air pollution and transportation-related fuel consumption, as well as the adverse economic, social, safety, and environmental

effects of transportation projects. The Club has over 750,000 members, approximately 17,000 of whom reside in Maryland, and approximately 3,100 of whom reside in the District of Columbia ("D.C."). The Club is authorized to bring this action on the behalf of itself and its members who will be injured by the project.

8. Plaintiff Environmental Defense ("ED") is a non-profit environmental and conservation organization incorporated under the laws of New York. ED is dedicated to protecting the environment for all people, including future generations. ED seeks to ensure that there exists clean air, clean water, healthy food, and flourishing ecosystems for this and future generations. ED seeks to protect the interests of its members in the promotion of energy conservation, reduction of global warming, and improved transportation systems. ED also seeks to increase the efficiency of transportation systems and the mobility of its members while minimizing air pollution and transportation-related fuel consumption, as well as the adverse economic, social, safety, and environmental effects of transportation projects. ED has 290,306 members nationally, 7,594 of whom reside in Maryland and 1,101 of whom reside in D.C. ED is authorized to bring this action on behalf of itself and its members who will be injured by the project.

9. The Club and ED, as well as their members, have long advocated responsible and well planned growth in the Maryland and D.C. metropolitan area. In their long standing tradition of active participation in the transportation planning process, Plaintiffs have commented on various aspects of the transportation project in question, including the draft environmental impact study ("DEIS"), final

environmental impact study ("FEIS"), the 2006-2011 Metropolitan TIP, the National Capital Region 2005 CLR Plan, and the Project-Level Conformity Determination.

10. The organizational purposes of the Club and ED include educating the public on the environmental effects and impacts of government actions. Defendants' failure to adequately study the environmental impacts of the ICC project in the Metropolitan TIP, CLR Plan, FEIS, ROD, and the project-level conformity determination has harmed the ability of the Club and ED to disseminate information to their members and the general public regarding the environmental impacts of the ICC project. Defendants' failure has further resulted in a drain on the Club's and ED's resources as Plaintiffs have been required to develop evidence that should have been developed by Defendants regarding the environmental effects of the ICC project to properly inform the public of the project's environmental impacts.

11. The Club and ED seek to promote efficient and environmentally protective transportation systems and prevent ill-conceived transportation plans, programs, and projects which will harm the public interest and increase the level of motor vehicle emissions. Defendants' failure to study reasonable alternatives to and consider for adoption mitigation measures for the ICC project harms Plaintiffs' ability to promote sound transportation plans, programs, and projects which minimize environmental harm and promote smart growth. Defendants' failure has drained the Club's and ED's resources as Plaintiffs have expended their resources to study and analyze transportation alternatives to and mitigation measures for the ICC to promote the continued consideration of such alternatives by the lead agencies.

12. The D.C. and Maryland members of the Club and ED, who need not participate in this suit or in the relief sought, are also injured by the ICC project. A number of Plaintiffs' members live in close proximity to the ICC project right-of way and frequently travel to the ICC right-of-way and surrounding areas to enjoy the aesthetic beauty of the area, including parks and wetlands, recreate, take their children to school, shop, and work and will be harmed by the increased air pollution they will breathe resulting from the construction of the ICC project and the increased vehicular pollution resulting from the ICC project.

13. Those members of the Club and ED who reside, work or recreate near the project and who travel to or through the project area will be further injured by the increased noise, litter, traffic, pollution, and health risks resulting from the ICC project, as their ability to use the area, including parks and wetlands, for recreational purposes and aesthetic enjoyment will be diminished.

14. Those members of the Club and ED who reside, work or recreate near the ICC project and travel to or through the project area will be further injured by the increase in secondary traffic resulting from the project, which will increase local delays and disrupt their mobility.

15. As an example of some of the injuries suffered by members of the Club and ED, Beth Gatti, a member of the Club, is an asthmatic recovering from a kidney transplant. She also has a son who is asthmatic. Ms. Gatti and her son live in close proximity to the ICC right-of-way. She and her son, as asthmatics, are particularly susceptible to the negative health effects of particulate matter and other motor vehicle pollution and will

be injured by the increased air pollution resulting from the vehicular traffic along the ICC corridor.

16. The D.C. and Maryland members of the Club and ED will be injured by the lead agencies' overly narrow purpose and need statement because it precluded consideration of transportation alternatives which would have reduced air pollution and fuel consumption and increased their mobility, thereby resulting in less injury to them.

17. The D.C. and Maryland members of the Club and ED will be further injured by the approval of the ICC project as the project will cause the National Capital Region to fall into nonattainment of the PM2.5 National Ambient Air Quality Standards ("NAAQS") and/or delay timely attainment of the NAAQS as the area affected by emissions from the project will experience levels of PM2.5 pollution above those deemed safe for human health.

18. The ICC project will injure Plaintiffs' members by affecting the ability of the National Capital Region to meet the PM2.5 NAAQS which will limit the ability of the National Capital Region to obtain federal funds for improvements to the existing transportation system.

19. Defendants' failure to adequately study and analyze the environmental effects of the ICC project, failure to consider less harmful alternatives or develop mitigation measures to eliminate or minimize adverse effects, failure to choose the alternative that is in the best overall public interest, and failure to properly administer the statutory requirements are the causes of the injuries of Plaintiffs and their members.

20. Vacating the decision approving the ICC project until the statutory requirements are properly administered and an adequate study of the environmental impacts, alternatives, and mitigation measures can be conducted, will redress the Plaintiffs' and their members' injuries because it will ensure the project's impacts are adequately considered and evaluated and enable the lead agencies to determine, based upon consideration of the full impacts and minimal benefits of the project, that the project is not in the best overall interest of the public.

21. Vacating the Metropolitan TIPs and CLR Plans, or striking from such CLR Plans and Metropolitan TIPs the ICC project, until a project-level conformity determination for the ICC project is made will redress Plaintiffs' and their members' injuries because the ICC project cannot proceed until its impact upon the transportation plans and programs and their cumulative air pollution impacts are considered. This would reduce the amount of pollution to which the Plaintiffs' members would be exposed.

22. Unless the relief sought herein is granted, the substantial health, financial, aesthetic, recreational, and environmental interests of the Plaintiffs and their members will continue to be adversely affected and injured by the Defendants' actions and omissions.

DEFENDANTS

23. Defendant USDOT, the executive department of the federal government responsible for oversight of the transportation planning process pursuant to the Department of Transportation Act, 49 U.S.C. § 303(c), is responsible for making the determination of whether a project is in the best overall public interest pursuant to 23 U.S.C. § 109(h), determining the conformity of a project pursuant to 42 U.S.C. § 7506(c), and

implementing the requirements of NEPA with respect to highway projects, 23 U.S.C. § 139. The headquarters of USDOT are in D.C.

24. Defendant Mary E. Peters is the Secretary of Transportation for USDOT. Secretary Peters is responsible for the administration, operations, and activities of USDOT, including oversight of the FHWA. In her official capacity, Secretary Peters resides in D.C. Defendants USDOT and Secretary Peters are referred to collectively in this complaint as USDOT.

25. FHWA is the agency within USDOT primarily responsible for highway planning and funding as well as the approval of access permits for highway projects that connect to existing interstate highways. FHWA is the lead federal agency responsible for approving the ICC project. The headquarters of FHWA are in D.C.

26. Defendant J. Richard Capka is the Administrator of FHWA. Administrator Capka is responsible for the administration, operations, and activities of FHWA and its various divisions. In his official capacity, Administrator Capka resides in D.C. He is being sued in his official capacity only. Defendants FHWA and Administrator Capka are referred to collectively in this complaint as FHWA. Defendants USDOT and FHWA are referred to collectively in this complaint as the federal defendants.

27. Defendant, the MWCOG is a regional organization of Washington area local governments. It, through the TPB, determined that the Metropolitan TIPs and CLR Plans, which included the ICC project, conformed with the Maryland state implementation plan and federal conformity regulations. The headquarters of MWCOG are located in D.C.

28. Defendant Jay Fisette is Board Chair of the MWCOG. Chairperson Fisette is responsible for the administration, operations, and activities of MWCOG, including the TPB. In his official capacity, Chairperson Fisette resides in D.C. He is being sued in his official capacity only. Defendants MWCOG and Chairperson Fisette are referred to collectively in this complaint as MWCOG.

29. Defendant TPB, an organization within MWCOG, is the federally designated Metropolitan Planning Organization ("MPO") for the National Capital Planning Region, which includes D.C. and portions of Maryland and Virginia. TPB prepares highway and transportation plans and programs that the federal government must approve in order for federal-aid transportation funds to flow to the National Capital Region. TPB prepared and approved the Metropolitan TIPs and CLR Plans, which included the ICC project. The headquarters of TPB are located in D.C.

30. Defendant Michael Knapp is Chairperson of the TPB. Chairperson Knapp is responsible for the administration, operations, and activities of TPB. In his official capacity, Chairperson Knapp resides in D.C. He is sued in his official capacity only. Defendants TPB and Chairperson Knapp are referred to collectively in this complaint as TPB. Defendants MWCOG and TPB are referred to collectively in this complaint as the MPO.

JURISDICTION

31. This court has federal question jurisdiction, 28 U.S.C. § 1331, over Plaintiffs' claims against the federal defendants and MPO arising under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, Federal-Aid Highways Act, 23 U.S.C. § 109, SAFETEA-LU, 23 U.S.C. § 134, National Environmental Policy Act, 42 U.S.C. §§ 4321-70f, the

Clean Air Act, 42 U.S.C. § 7604, and the Freedom of Information Act, U.S.C. § 552(a)(4)(B).

PART I: CAUSES OF ACTION RELATING TO DEFENDANTS' FAILURE TO ADHERE TO FEDERAL TRANSPORTATION LAWS, THE NATIONAL ENVIRONMENTAL POLICY ACT, AND THE ADMINISTRATIVE PROCEDURE ACT.

FACTUAL BACKGROUND

32. In 1983, FHWA attempted to construct an "Intercounty Connector" road between upper Montgomery County and I-95 in Prince George's County.

33. In 1990, the United States Department of the Interior commented on the ICC, stating that "[i]f locations for a four-lane, divided, limited-access highway were considered *de novo*, using today's standards without reference to past planning decisions, it is unlikely that the ICC Master Plan alignment would be a location of choice. Consequently, we see no valid reason why the . . . loss of scarce natural resources and other environmental amenities should be accepted in light of today's environmental criteria."

34. The ICC project would be the nation's third largest construction project and would be located within the National Capital Region, an area currently designated in nonattainment of the standards for PM2.5 pollution under 40 C.F.R. § 81.309.

35. The FHWA and Maryland State Highway Administration issued a DEIS regarding the ICC project, which is substantially similar to the ICC project approved by the lead agencies, in 1997.