



April 1, 2011

U.S. Department of Transportation
Docket Management Facility
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Docket No. DOT-OST-2011-0025

Dear Docket Clerk:

On behalf of the 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the U.S. Department of Transportation's (DOT) notice and request for comments on the Regulatory Review of Existing DOT Regulations, published February 16, 2011, at 76 FR 8940.

About APTA

APTA is a non-profit international trade association of 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

General Comments

DOT's review of its regulations on a cyclical basis is sound and reasonable. Regulations are reviewed at appropriate intervals that balance the competing interests of keeping those regulations current in light of evolving circumstances and providing reasonable certainty and stability to the regulated industries.

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We believe those reviews should, however, be expanded to encompass not only the regulations themselves but the administrative practices that accompany them. Accompanying policies, interpretations, and enforcement practices can easily render an otherwise reasonable regulation ineffective or burdensome. We have identified incidents of this nature in our later comments.

We believe the regulatory process in general could be greatly improved if DOT makes its data and assumptions related to the economic impacts of proposed regulations publicly available in every case. The costs of compliance are often the most contentious aspect of the rulemaking process, particularly where the Department's data and assumptions lead it to deem a proposed rule non-significant and the public transportation agencies and businesses affected by the proposal perceive it as a substantial unfunded mandate. Similarly, DOT should dissuade its operating administrations from discounting scientific evidence flowing from their own pre-Notice of Proposed Rulemaking (NPRM) fact finding efforts without subjecting that evidence to scientific review. Discounting scientific studies conducted to inform the regulatory process without scientific analysis contributes to a regulatory scheme that includes unnecessary costs and other barriers to productivity.

Although not an aspect of any one regulation, we believe DOT could substantially improve the overall performance of the transit program by coordinating and streamlining its multiple review processes. Project Management Oversight (PMO), Financial Management Oversight (FMO), triennial reviews, procurement system reviews, and various reviews of transit agencies' civil rights programs overlap extensively and in some cases, review the same aspects of a transit agency's program immediately before or after another review has examined the very same aspects of the program. Coordinating these reviews and sharing information among the various reviewers would eliminate redundancies, cut costs for the agencies and DOT alike, and avoid the considerable project delay that can accompany the reviews.

Withdraw the DOT "Disability Law Guidance" Pending Completion of an Appropriate Rulemaking Process

In September 2005, DOT issued several guidance documents concerning application of its Americans With Disabilities Act regulations, specifically pertaining to public transportation programs. Controversial from their initial posting, these guidance documents amounted to substantive changes to the regulations without appropriate notice and comment. DOT subsequently issued a NPRM incorporating these changes. Almost five years later, and with no final rule ever issued, DOT's operating administrations are actively enforcing the mandates in these guidance documents. FTA has now posted links to additional "guidance" created by an advocacy organization that builds on these ill-advised pronouncements. This has led to unreasonable expectations in the disability community, extensive costs to public transportation agencies, and has damaged the relationship between transit agencies and their riders with disabilities. DOT should immediately withdraw the September 2005 guidance pending completion of a proper regulatory process and should remove the links to the "Topic Guide Series on ADA Transportation" from the FTA web site.

Expand the Use of Categorical Exclusions

DOT's environmental regulation envisions expansion of the universe of projects eligible for Categorical Exclusion (CE) at 23 CFR 771.117(e) (directing that where a pattern emerges for granting CE status for a particular type of action, rulemaking should be initiated to move that type of action to the appropriate list of CEs). Many routine public transportation projects are subjected to delay and additional costs required to complete Environmental Assessments (EA) when experience dictates they be moved to the list of CEs requiring administration approval under 23 CFR 771.117(d). Other projects are subjected to the subsection (d) approval process when experience dictates they be migrated to the list of CEs not requiring administration approval at CFR 771.117(c).

Routine state-of-good-repair projects within existing transit property, such as rehabilitation of transit stations and replacement or repair of bridges and substations, are regularly granted CE status under subsection (d), but only after the additional costs and delay of preparing and submitting documentation for approval by one of DOT's operating administrations. Moving these projects to the list of projects in subsection (c) would save time and money, without significant risk to the environment, and would be completely consistent with the clear intent of subsection (e). Simply moving these projects from subsection (d) to subsection (c) promises to save six to nine months per project.

Additionally, projects of a recurring nature, such as initiation of bus rapid transit service, should be reviewed for inclusion under subsection (d) rather than subjecting these projects to the more costly and time consuming EA process. This would also be consistent with the intent of subsection (e) to allow the CE lists to evolve and grow as DOT gains experience with different types of projects that do not involve significant environmental impacts.

The unnecessary costs of environmental compliance – costs that do not result in improving or protecting the environment in any discernable way – have long been evident. Our colleagues at American Association of State Highway and Transportation Officials (AASHTO) reported delays tripled the average environmental review time for CEs from about eight months to about two years. Most pointedly, this report was published in October 2000 in *Environmental Process Streamlining: A Report on Delays Associated with States' Categorical Exclusion and Environmental Assessment Processes*. The amount of delay has not lessened since that report was published.

Increase Flexibility in Projects Eligible for Categorical Exclusions

DOT should allow projects to proceed beyond the 30 percent design stage prior to issuance of environmental findings. Limiting projects to 30 percent design completion before issuance of environmental findings delays projects and makes them more expensive, without benefit to the environment. For routine projects unlikely to have significant environmental impacts, the 30 percent barrier delays work rather than allowing work to continue concurrently with the environmental review. For complex projects, the kind of information necessary for informed decision making is often not reasonably available until the design has evolved beyond 30 percent, forcing project sponsors to create data when it is uneconomical to do so.

Requiring completion of environmental findings prior to award of design-build contracts for projects eligible for CE also adds costs and time to those projects. Design-build projects are often not sufficiently developed (prior to contract award) to allow for meaningful consultation with outside environmental regulators such as State Historic Preservation Offices and the Army Corps of Engineers. Forcing agencies to carry the design process further prior to contract award decreases the benefits of design-build contracting, since that project delivery method is premised on bringing the ultimate builder into the design process as early as possible to avoid claims and disputes.

While neither of these limitations is incorporated into Part 771 *per se*, they are among the interpretations and implementation practices noted above that render the regulation unnecessarily burdensome. We believe practices under 23 CFR 771.113 should be updated to specifically allow the design process to continue during the course of environmental review and to allow issuance of design-build contracts in advance of environmental findings. Design processes and contracting do not increase the risk to the environment and the savings available more than offset any risk of an adverse environmental finding rendering the work moot.

Streamline Other Aspects of the Environmental Review Process

DOT should allow a single modal administration's finding under the National Environmental Policy Act (NEPA) to cover all modes without adoption by other administrations. Requiring adoption delays implementation, increases costs, and amounts to redundant work for project sponsors and DOT.

DOT should allow grantees to pursue separate environmental findings where multiple projects are planned spanning a number of years. In some cases, aggregating the environmental work of projects with a long horizon with more current projects is impractical. Even where the grantee possesses sufficient information to do so, the information – and the decisions made based on the information – are likely to be out-of-date before the project is even started.

Extending the “shelf life” for environmental documents would significantly reduce costs and schedule delays. Specifically, the shelf life for EAs and CEs should be extended to match the corresponding period applicable to Environmental Impact Statements (EIS) – ten years. Additionally, the period between draft and final EISs should be extended from the current three years to seven years. Conditions, particularly in urban areas, are unlikely to change in any significant way in these extended periods and where no such changes have been observed, extending the “shelf life” of these documents could be accomplished without threat to the environment.

As with the comments above on increasing flexibility in the use of categorical exclusions, none of these practices is incorporated into Part 771 *per se*. Each should be addressed through an update of practices under Part 771. In the alternative, 23 CFR 771.107 should be amended to note that an “action” may be a single project in a more extensive program, the seven year “shelf life” of EAs and EISs should be added to 23 CFR 771.129, and 23 CFR 771.133 should specifically note that one DOT operating administration's approval of environmental documentation is binding upon all DOT administrations and activities.

23 CFR Part 771 should be updated to include concrete timelines for DOT review of environmental documents. Failure to complete environmental reviews in a timely manner directly impacts project schedules and budgets. Project sponsors shoulder these burdens without regard to how reasonable or unreasonable the delay may be. Establishing concrete timelines will provide a degree of certainty for project sponsors and, subject to fiscal law limitations, a basis on which DOT's operating administrations can assume the financial burdens imposed by their failure to conduct timely reviews.

Allow Congestion Mitigation Projects to Proceed in the Event of a Conformity Lapse

Transit projects assist communities in meeting air quality standards. These projects should be added to the list of projects that may proceed in spite of a conformity lapse at 23 CFR 450.322. Specifically, the regulation should allow transit vehicle procurement, station improvements, and other projects that expand transit capacity and are otherwise qualified for a CE under the expanded lists discussed above to proceed without regard to any conformity lapse under the Clean Air Act.

Harmonize Environmental Review Under the "4(f) Process" and the National Historic Preservation Act

The "4(f) process" is the common reference to environmental review under 49 USC 303. The process protects, *inter alia*, historical properties and archaeological resources. In these two aspects, the 4(f) process is redundant with section 106 of the National Historic Preservation Act (NHPA), as well as a host of state and local statutes. These overlapping statutes lead to duplication of efforts and increased costs without affording additional protection to the properties and resources they are designed to protect. This is most evident in projects that include rehabilitation of historic stations or other transit infrastructure.

To ease this burden without compromising environmental protection, DOT should revise 23 CFR Part 771 to affirmatively accept any finding under NHPA section 106 as satisfying the requirements of the 4(f) process as the latter relates to historical properties and archaeological resources.

Streamline Capital Investment Projects

Although specifically authorized in 49 CFR Part 18, deferred local shares are not applied within the New Starts program. Deferring the local share allows projects to proceed with lower costs, fully leveraging the federal investment. We believe 49 CFR 611.11 should be amended to specifically authorize project sponsors to defer the local share of New Starts project costs.

Risk assessment, although not dictated by any regulatory provision, often serves as an impediment to efficient project management by unnecessarily delaying projects. DOT should amend its practices under 49 CFR 611 to specifically allow for locally developed risk assessment tools that account for local conditions more effectively than those developed by FTA and to specifically allow for relaxed requirements where project sponsors employ independent contractors to assess risk in their major capital projects.

The term “project” itself has been expanded through practice and should be limited to the statutory definition found in 49 USC 5302(a)(1). FTA regional offices have, in some cases, taken an overly expansive view of what is included in a project and thus subject to federal rules and oversight. As a result, FTA grantees have been required to subject locally funded, unrelated work (e.g., replacing light rail catenary wire) to federally-assisted projects (e.g., rehabilitation of light rail vehicles) based on tenuous links (e.g., both are aspects of an existing light rail system). This both slows and adds expense to locally funded projects with no offsetting benefit.

Allow for More Effective Spare Ratios for Transit Vehicles

Spare ratios are an aspect of the Public Transportation Management System (PTMS) described in 23 CFR 500, Subpart A and in FTA guidance. The current ratios, established some 40 years ago, do not adequately account for modern multi-modal, multi-faceted, transportation operations incorporating advanced technologies and responding to unprecedented demands. An FTA-funded study under the Transit Cooperative Research Program (TCRP) resulted in a number of recommendations, including allowing the smallest transit systems (fewer than 50 buses) to set their own spare ratios; those operating up to 250 buses to carry spare ratios of up to 25 percent without further justification and greater amounts if warranted; and those operating more than 250 buses to carry spare ratios of 25 percent without further justification, greater amounts if warranted, and to remove small and advanced technology vehicles from their spare ratio calculations. We urge DOT, through FTA, to amend the spare ratios as recommended by the TCRP study and explained in greater detail in separate correspondence submitted to FTA in support of a petition to update FTA Circular 5010.1C.

Exclude Transportation to Open Events from the Definition of Charter Service

The current definition of charter service in 49 CFR 604.3 effectively bars public transportation agencies from supporting large community events that are open to the public and draw substantial patronage from throughout those communities. The definition of charter service should be amended to exclude transportation provided to the general public for events or functions that occur on an irregular basis or for a limited duration, regardless of whether the service is paid for in whole or in part by a third party or whether a premium fare is charged, so long as the service is available and open to the general public attending public events or functions and the recipient of federal funds determines the routes and schedules of the service provided.

Create a Charter Service Exception for Historic or Other Unique Vehicles

Many public transportation agencies operate historic or other vehicles not readily available from private providers. These vehicles are highly desirable for service in wedding parties, family reunions, and other similar events. The current charter service regulation allows no distinction between these aesthetic vehicles and other buses. As a result of the rule, there is no effective way for those public transportation agencies to make the vehicles available for charter service either directly or by subcontract to a private provider. The end result is an unfilled need. Customers who desire these vehicles and cannot obtain them do not hire alternative buses – they rely on automobiles. 49 CFR Part 604 should be amended to acknowledge the qualities that distinguish vehicles of this nature and create

an exception that would allow transit agencies to provide these services in the absence of similar vehicles available from private sources at reasonable prices.

Quasi-Regulatory Issues

A number of practices within the Department, while not reduced to regulations or interpretations of regulations, have an equivalent effect. These quasi-regulatory actions are presented as policies, guidance, or practices. Like regulations, some of these practices increase the costs and complexity of federally-assisted projects without concomitant benefits. We have detailed some examples and recommended changes below.

Congestion Mitigation Air Quality Improvement Program Improvements

The CMAQ program is operated under program guidance issued by FHWA and jointly administered by FHWA and FTA. While there is no statutory time limit on using CMAQ funding for a project, DOT's operating administrations have administratively limited funding to a maximum of three years. DOT should allow operating subsidy and transportation travel demand projects to continue to qualify for CMAQ after three years as long as they continue to demonstrate net air quality benefits to air quality non-attainment areas.

Additionally, CMAQ funding is routinely refused in situations where net air quality benefits are difficult to quantify although intuitively obvious. We believe DOT should deem projects that increase transit capacity to benefit air quality without additional analysis.

Grant Process Improvements

We urge DOT to better align the funding practices of FTA and FHWA. Currently, FHWA recipients request and receive authority to proceed that allows them to immediately draw federal funds for their projects. FTA grantees, even those with pre-award authority to incur reimbursable costs, must wait for FTA grant approval before obtaining reimbursement. This delay, often six months or more, results in financial hardship on public transportation agencies forced to finance all project costs in advance of grant approval. DOT should reform the FTA grant practice to allow FTA grantees to undertake and be reimbursed for routine activities under a similar 'authority to proceed' in advance of grant approval. The grant approval and triennial review processes provide adequate assurance to DOT that applicable federal requirements are observed.

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We appreciate the opportunity to assist DOT in this important endeavor. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarsch@apta.com.

Sincerely yours,

A handwritten signature in black ink, appearing to read "William Millar". The signature is fluid and cursive, with a prominent initial "W" and a long, sweeping tail.

William Millar
President

WM/jpl