AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

May 14, 2012

U.S. Department of Transportation
1200 New Jersey Avenue, SE
Docket Operations, M-30
West Building Ground Floor
Room W12-140
Washington, DC 20590-0001

RE: Docket No. FTA–2011–0056

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Federal Transit Administration's (FTA) Notice of Proposed Rulemaking (NPRM) on Environmental Impact and Related Procedures, which was released for comment on March 15, 2012 at 77 FR 15310.

About APTA

APTA is a non-profit international trade association of 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

We commend FTA for the developing this NPRM that seeks to streamline the National Environmental Policy Act (NEPA) review process for federally funded projects. We strongly support the move towards a simplified, more comprehensible rule, and we believe the expanded CE list will reduce back-and-forth discussions between project sponsors and FTA, saving time and money. It will also make it easier for FTA and the industry to advance projects without significant environmental impact. We appreciate the FTA's commitment to complete the final rule during the current year.

APTA encourages the FTA to conduct outreach to its regional offices to ensure that regional offices understand the provisions outlined in the rule and the rule itself. We also urge the FTA to monitor implementation of the rule to ensure consistent implementation across regions. Many of the changes we propose below are intended to reduce the room for interpretation.

We request FTA consider the comments offered below when developing the final rule.

To facilitate FTA's review of our comments, we will address the proposed rule section by section. If we do not comment on a section, support or opposition should not be inferred by the fact that we do not comment.

Section by Section Comments

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

§771.111 Early coordination, public involvement, and project development

- We commend FTA for its move to formalize "early scoping". We believe this is the right direction for the industry, and should help advance the environmental review process.

§771.118 FTA Categorical Exclusions (CEs)

General Comments

- We urge the FTA to update the CE list on a regular basis, based on experience, and as new and novel projects arise that may be subject to categorical exclusion. As noted in the proposed rule, "when a patterns emerges of granting CE status for a particular type of action, the Administration will initiate rulemaking to add this type of action to the appropriate list of categorical exclusions." We suggest that this review occur at least every five years.

- Where a subsection lists types of projects that would be categorically excluded, we request that FTA add language to clarify that the list of projects is not intended to be an exhaustive list. For example, §771.118 (c)(1) would exclude projects "within the existing right-of-way, such as utility poles; underground wiring…." For clarification, we recommend that "such as" be replaced with "including but not limited to."

Subsection §771.118 (c)(1)

- We recommend that FTA add "replacement" to the list of activities that would be excluded. A replacement would have no more impacts than a new installation. This is an instance where the additional activity may help provide clarity to regional offices.

Subsection §771.118 (c)(3)

- Subsection (c)(3) contains: "Limited activities designed to mitigate environmental harm that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ…"
- Revision is suggested because the text is unclear as to what the limits are intended under this CE and because the rule will be most effective if opportunities for interpretation by FTA regional offices are minimized.
- We request that FTA remove the word "Limited" and revise the text so that it reads: "Activities that will maintain or reduce the environmental footprint of transit operations that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ…"
- We also suggest that "bridges" be added to list of rehabilitations that may be excluded if there are no adverse effects under the National Historic Preservation Act.

Subsection §771.118 (c)(5)

- Similar to the comment above under subsection (c)(3), we recommend deleting the word "discrete" in describing activities that may be excluded. "Discrete" could be interpreted differently by different reviewers.

Subsection §771.118 (c)(6)

- Subsection (c)(6) contains: "Acquisition or transfer of an interest in real property that is not within or adjacent to recognized environmentally sensitive areas (e.g., wetlands, non-urban parks, wildlife management areas) and does not result in a substantial change in the functional use of the property or in substantial displacements, such as scenic easements and historic sites for the purpose of preserving the site. This CE extends only to acquisitions that will not limit the evaluation of alternatives."
- The first sentence refers to "Acquisitions or transfers" while the second sentence seems to limit the CE acquisitions only. Revision is needed to clarify the intent of this subsection.
- We request FTA consider changing the last sentence to: "This CE extends only to acquisitions *or transfers* that will not limit the evaluation of alternatives."

Subsection §771.118 (c)(8)

- Subsection (c)(8) contains: "Maintenance and minimally intrusive rehabilitation and reconstruction of facilities that occupy substantially the same environmental footprint and do not result in a change in functional use, such as improvements to bridges, tunnels, storage yards, buildings, and terminals; and construction of platform extensions and passing track."
- We suggest removing the words "minimally intrusive," which would strengthen and broaden this CE.
- The text would then read: "Maintenance and reconstruction of facilities that occupy substantially the same environmental footprint…."
- For clarification, we also suggest replacing "environmental footprint" with "physical footprint."

Subsection §771.118 (c)(9)

- Subsection (c)(9): "Assembly or construction of facilities that is consistent with existing land use and zoning requirements (including floodplain regulations), is minimally intrusive, and requires no special permits, permissions, and uses a minimal amount of undisturbed land, such as buildings and associated structures; bus transfers, busways and streetcar lines within existing transportation right-of-way."
- We suggest removing the phrase "and requires no special permits, permissions" and adding the phrase "or uses previously undisturbed land", which would strengthen and broaden this CE.
- The text would then read: "…is minimally intrusive, and uses a minimal amount of undisturbed land or uses previously disturbed land, such as...."

- It has been discussed that this undocumented CE seems very broad in terms of the types of projects that could be classified under the definition. However, if these actions remain in this category, adding "fixed guideways" in place of "streetcar lines" and replacing "bus transfers" with "bus transfer stations or intermodal centers" would not change the breadth of the coverage of the CE definition because all of the other parts of (c)(9) would still need to be met by the action in order to qualify as an undocumented CE. The change is suggested so that the action is not described as mode-specific but rather by the general category of action and characteristics that meet the general definition in §771.118 (a) and (c) (9).

- We suggest replacing "streetcar lines" with "fixed guideways", replacing "bus transfers" with "bus transfer stations and intermodal centers" and adding the words "operating" within" so that it reads: "bus transfer stations and intermodal centers, busways, and fixed guideways operating within existing transportation right-of-way". Adding "operating within" limits the actions that could be covered by the more general term "fixed guideways."

Subsection §771.118 (c)(10)

- Subsection (c)(10): "Development activities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities, such as police facilities, daycare facilities, public service facilities, and amenities."
- The term "Development activities" is vague and could be understood to mean anything from construction to signage to public relations to advertising.
- We suggest the word "Construction" in place of "Development activities." The text would then read "*Construction* activities for transit and non-transit purposes…"

Subsection §771.118 (d)

- General Comment: It is understood that, consistent with past practice, FTA is proposing to continue to allow the categorical exclusion of other actions with documentation with a mechanism proposed for subsection §771.118(d), which mirrors the existing 23 CFR 771.117 (d). However, because there is now a specific list of proposed undocumented FTA CEs noted in §771.118 (c), we suggest the following revisions to the proposed rule to provide more

clarity and distinction between undocumented and documented FTA CEs. These revisions are suggested so that the text in the proposed rule would more clearly indicate that FTA would consider **all** actions **not noted** under (c) if the applicant produces documentation showing compliance with the broader definition of a CE noted in the proposed rule and also in Council on Environmental Quality (CEQ) regulations.

Subsection §771.118 (d)

- Subsection §771.118 (d): "Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after FTA approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result."
- All actions noted under 118 (d) as documented CEs were included in the April 23, 2009 revised rule and it is understood that these were not amended as part of the proposed rule.
- We suggest that all actions with the exception of (1) be moved under (c) as undocumented CEs. We suggest deleting (1) as an example of an action so that an applicant has a clear opportunity to submit documentation that demonstrates that a proposed action not included in (c) but that meets the criteria of a CE could be considered a documented CE. We suggest that Section 771.118 (d) be revised to remove all "examples" (1-4) and end with the sentence "The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result." It is suggested that FTA footnote the CEs referencing hardship and protective acquisition of property [should they be placed under 23 CFR 771.118 (c)], that the applicant would need to provide information to FTA that substantiates a request for hardship or protective acquisition; however this information would be necessary for FTA to approve the right-of-way purchase during project development and prior to NEPA clearance and is not specifically part of the NEPA documentation.

§771.119 (k) Environmental assessments and §771.123 (d) Draft environmental impact Statements (EIS)

- §771.119 (k): "For FTA actions: If the applicant selects a contractor to prepare the EA, the contractor's final scope of work for the preparation of the EA will not be determined until the informal scoping process is completed, and the scope of study has been approved by FTA in consultation with the applicant."
- §771.123 (d): "For FTA actions, the contractor's final scope of work for the preparation of the EIS will not be determined until scoping has been completed, and the scope of study has been approved by FTA in consultation with the applicant."
- FTA's desire to eliminate unnecessarily expansive efforts by consultants is laudable and is consistent with ongoing efforts at transit agencies throughout the industry. However, the proposed requirement to approve scopes of study would have the unintended consequence of delaying project implementation. . This could occur, for example, if an FTA regional office has other work priorities, inadequate staff, or staff inexperience or lack of authority to approve such changes.

- In the case of EIS's, delays would also result when the sponsor intends to have the same consultant do project scoping and also write the EIS. Under the provisions in 771.119(k), the sponsor would need to conduct two procurements, one for project scoping and a second to write the EIS, adding several months onto the environmental process.
- In addition, transit agencies frequently issue requests for proposals where one task is to develop a scope of work for an EIS or an EA. Sponsors would lose the ability to have the consultant develop the scope if FTA had to approve the scope prior to contract award.
- Finally, we trust FTA recognizes that many properties have environmental requirements in addition to NEPA requirements that will impact the breadth of the scope.
- We suggest that sections 771.119(k) and 771.123(d) be removed from the rule and the discussion on the need for the applicant to carefully scope the project and be adaptable to changes in the overall process after formal NEPA scoping is included in published guidance following the final rule. One way to better manage consultant efforts nationally is to develop standard statements of work (SOWs) for EAs and EISs. This measure would provide significant support toward achieving FTA's goal.

We appreciate the opportunity to assist FTA in this important endeavor, and thank you for listening to industry comments and concerns when developing the subject NPRM. We trust that you will take our comments into account when writing the final rule. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarusch@apta.com.

Sincerely yours,

Michael P. Melaniphy
President & CEO