AMERICAN
PUBLIC
TRANSPORTATION
ASSOCIATION

April 29, 2013

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. FHWA-2013-0007

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 Highway Administration (FHWA) and Federal Transit Administration's (FTA) joint Notice of Proposed Rulemaking (NPRM) on Environmental Impact and Related Procedures, which was released for comment on February 28, 2013, at 78 FR 13609.

About APTA

APTA is a non-profit international trade association of more than 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.

APTA speaks for its members. Its Board of Directors reiterated that fact on March 9, 2013, when it adopted the following statement: "While APTA encourages its members to provide specific examples or impacts in support of the association's positions, APTA crafts its comments to represent those of all APTA members. The association goes to great lengths to ensure its regulatory comments represent the consensus views of our members. Every APTA member has the opportunity to review drafts, participate in discussions, and assist in crafting those consensus comments. In short, we speak with a single voice and, when the rare instance occurs that we cannot reach consensus, we do not speak at all. APTA's comments are those of our more than 1,500 members. This consensus-based method of crafting regulatory comments is a factor underlying APTA's selection of one of Washington's most trusted brands in a broad survey conducted by the National Journal and we encourage all federal agencies to recognize the representative nature of the association's regulatory comments."

General Comments

APTA reiterates its support for FTA's efforts to streamline the National Environmental Policy Act (NEPA) review process for federally funded projects. We believe expansion of the categorical exclusion (CE) list will save time and costs for project sponsors and FTA without compromising protection of the environment.

APTA believes the proposed changes will be beneficial overall and offers the comments below to maximize that benefit. We also reiterate our suggestion that the final rule be accompanied by a strong outreach program to ensure all involved in the process understand the changes and implementation is consistent throughout the country.

Section-by-Section Comments

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

§771.118 FTA categorical exclusions

Subsections §771.117 (c)(22) and §771.118 (c)(12)

- In §1316(a) of MAP-21, Congress directed the Secretary to "designate any project . . . within an existing operational right-of-way as an action categorically excluded from the requirements relating to environmental assessments or environmental impact statements under section 1508.4 of title 40, Code of Federal Regulations, and section 771.117(c) of title 23, Code of Federal Regulations." Congress also defined in §1316(b) the term "operational right-of-way," as used in §1316, as:

  > "all real property interests acquired for the construction, operation, or mitigation of a project (as defined in section 101(a) of title 23, United States Code), including the locations of the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway."

- The regulatory language adopted by the Secretary designating projects "within an existing operational right-of-way" must be consistent with the definition mandated by Congress. The joint draft of proposed §§771,117(c)(22) and 771.118(c)(12) prepared by FTA and FHWA, however, fails this test. The proposed regulation modifies the definition of "operational right-of-way" in a manner that reduces the "operational right-of-way" specified by the statute to a more limited area; thereby potentially excluding projects that otherwise would meet the statutory term.

- The statutory definition does not require the project to be within a right-of-way that has been "disturbed for an existing transportation facility" or been "regularly maintained for transportation purposes." Instead, the test is whether the project is "within" a real property interest "acquired for the construction, operation, or mitigation of a project." We suggest reverting to the previous statutory definition, as it is broader in scope.

- For instance, undisturbed and unmaintained land along a right-of-way in current use may well have been obtained to keep the public away in order to make operations in the right-of-way safer.

Under the MAP-21 definition, projects in such areas should qualify for a CE but will not under the draft regulation. Similarly, projects on land that were acquired for construction but are not part of the right-of-way qualify for a CE. The CE should apply to a transportation project that is on land acquired to mitigate a project, which also may not be right-of-way. The proposed regulatory language needs to be changed to reflect this statutory intent.

- The limitations proposed – limiting the CE to portions of the right-of-way that have been "disturbed" and those that are "regularly maintained" – are unnecessary. Rail operations occur in right-of-ways that include land that has been left in its natural state but from which the public is excluded, and such land is not maintained regularly but only when something on the property may interfere with operations. Projects conducted there, often just feet from the right-of-way, are unlikely to have any greater impact than projects, for instance, between tracks. Instead, the definition specified by statute should be utilized, and the last sentence of proposed regulation – "It does not include portions of the existing right-of-way that are not currently being used or not regularly maintained for transportation purposes" – should be struck.

Subsections §771.117 (c)(23) and §771.118 (c)(13)

- As noted in the proposed rule, "any project that receives less than $5,000,000 of federal funds or with a total estimated cost of not more than $30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost" would be categorically excluded from review.

- We recognize that this language derives from Sec. 1317 of MAP-21; however this two prong approach is confusing and could cause back-and-forth delay while project sponsors attempt to determine which approach fits their project. MAP-21 has proposed the federal contribution below which review is not required at $5 million in the first prong and $4.5 million (15 percent of $30 million) in the second prong.

- These two proposals are functionally similar. For simplicity in the review process, we suggest that "any project that receives less than $5,000,000 of federal funds" be categorically excluded from review.

We appreciate the opportunity to assist the Administration in solving these important issues and would be happy to provide any additional information necessary to complete this process. 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,

Michael P. Melaniphy
President & CEO

MPM/jpl/rk