American Public Transportation Association

Commuter and Intercity Passenger Rail Legislative Subcommittee Agenda

October 9, 2022
9:30 a.m. - 10:30 a.m. PT

Sheraton Grand Seattle
Room: Jefferson (Union Tower, 4th Floor)

1. Welcome and Call to Order—Amy Scarton, Co-Chair

2. Southeastern Pennsylvania Transportation Authority (SEPTA) Commuter Rail and Infrastructure Priorities —Scott Sauer, Chief Operating Officer, SEPTA

3. Regulatory and Other Administrative Actions Update—Stacie Tiongson, Senior Director, APTA Government Affairs and Advocacy

    a. Federal Railroad Administration Reminder to APTA on IIJA Speed Limit Action Plan Requirements

    b. National Transportation Safety Board Recommendation to APTA on Dynamic Weather Alert Criteria in Railroad Operations

    c. Federal Railroad Administration Federal-State Partnership for Intercity Passenger Rail Program: Northeast Corridor Project Inventory

    d. Consolidated Rail Infrastructure and Safety Improvements Program

    e. FRA Train Crew Size Notice of Proposed Rulemaking

4. Legislative Update—Eric Bustos, Senior Legislative Representative, APTA Government Affairs and Advocacy

5. Open Discussion

6. Adjourn

ENCLOSED DOCUMENTS

- APTA Legislative Update (10.01.2022)
- Federal Railroad Administration Letter to APTA on IIJA Speed Limit Action Plan Requirements (09.30.2022)
- National Transportation Safety Board Letter to APTA on Dynamic Weather Alert Criteria in Railroad Operations (09.22.2022)
- APTA SUMMARY Federal Railroad Administration Federal-State Partnership for Intercity Passenger Rail Program (09.13.2022)
- APTA Comments FRA NPRM Train Crew Size (10.__.2022)
- FRA NPRM Train Crew Size (07.28.2022)
- FRA NPRM Training, Qualification, and Oversight for Safety-Related Railroad Employees (10.03.2022)

American Public Transportation Association

LEGISLATIVE UPDATE

APTA is focused on three major initiatives in fall 2022:

- aggressively advocating for public transportation investment in the Transportation, Housing and Urban Development, and Related Agencies Appropriations bill (THUD Appropriations bill);
- actively working to ensure successful implementation of the Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58), commonly referred to as the Bipartisan Infrastructure Law, and the Inflation Reduction Act (P.L. 117-169); and
- preparing a holistic outreach effort to every new and returning Representative and Senator in the new Congress, which begins in January 2023.

Aggressively Advocating for Public Transportation Investment in the THUD Appropriations Bill

In September 2022, Congress passed and President Biden signed the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023 into law (P.L. 117-___). The Act provides continued funding for the federal government, including public transportation programs, at Fiscal Year (FY) 2022 funding levels through December 16. After the midterm elections, Congress may develop an Omnibus Appropriations bill that includes the 12 separate appropriations bills.

With regard to the THUD Appropriations bill, APTA is aggressively advocating that Congress provide the highest possible funding for public transportation and that it complete action on a bipartisan, bicameral agreement this fall. In March 2022, Congress provided $20.5 billion for public transit in FY 2022**,** an increase of $7.6 billion (58 percent) from the FY 2021 enacted level. Congress also provided $16.6 billion for passenger and freight rail, an increase of $13.7 billion (475 percent) from the FY 2021 enacted level.

In July 2022, the House of Representatives passed its THUD Appropriations bill (H.R. 8294), and the Senate introduced its companion version of the bill (S. 4670). Both the House and Senate THUD Appropriations bills appropriate the overwhelming majority of public transit and passenger rail authorizations of the IIJA. However, the House THUD Appropriations bill provides significantly more public transit and passenger rail funding than the Senate bill.

The House THUD Appropriations bill, together with the IIJA's advance appropriations, provides **$21.7 billion** for public transit in FY 2023, which exceeds the IIJA authorization and is an increase of **$1.2 billion (6 percent)** from the FY 2022 enacted level. The House bill provides **$621 million** more for public transit than the Senate bill. The primary difference between the bills is funding for Capital Investment Grants (CIG). The House bill provides $3.0 billion for CIG, equal to the IIJA authorization, which is more than $500 million more than the Senate THUD appropriation.

The House THUD Appropriations bill, together with advance appropriations, provides **$17.1 billion** for passenger and freight rail in FY 2023, an increase of **$489 million (3 percent)** from the FY 2022 enacted level. The House bill provides **$164 million** more for passenger rail than the Senate bill. The House bill provides more funding for the Federal-State Partnership for Intercity Passenger Rail Grants and the Senate bill provides more funding for Amtrak Northeast Corridor grants. Both bills provide less than the $19.9 billion authorized for passenger and freight rail in the IIJA.

In addition, both House and Senate THUD Appropriations bills include important policy provisions. Both bills block the Rostenkowski Test to prevent a possible across-the-board cut of FY 2023 transit formula funds to each public transit agency. Both bills also prohibit the U.S. Department of Transportation (DOT) from impeding or hindering a project from advancing or approving a project seeking a CIG federal share of more than 40 percent. Finally, the Senate THUD Appropriations bill allows Consolidated Rail Infrastructure and Safety Improvements (CRISI) grants to be used for commuter railroad projects that implement or sustain positive train control systems. The House THUD Appropriations bill does not authorize commuter rail project eligibility for CRISI funds.

APTA is aggressively advocating that the FY 2023 THUD Appropriations bill fully fund the IIJA and provide additional resources for targeted investments. APTA also urges Congress to appropriate at least **$129 million** of emergency appropriations to the Federal Transit Administration's (FTA) Public Transportation Emergency Relief program (49 U.S.C. § 5324) to help public transit agencies offset the significant costs of providing emergency transportation services, rebuilding damaged infrastructure, and replacing vehicles destroyed from recent natural disasters, including floods, hurricanes, wildfires, and earthquakes. APTA continues to collect additional information from public transit agencies on unmet funding needs as a result of recent natural disasters.

Working to Ensure Successful Implementation of the Bipartisan Infrastructure Law and the Inflation Reduction Act

Bipartisan Infrastructure Law

On November 15, 2021, President Joseph Biden signed the IIJA into law. The IIJA provides $108.2 billion for public transit over five years (FY 2022 through FY 2026), an increase of $42.4 billion (64 percent) from current levels. These historic increases in public transit investment include $91.2 billion of guaranteed funding (i.e., contract authority and advance appropriations) and $17.0 billion of General Fund authorizations for CIG and other grants.

The legislation also provides $102.1 billion for passenger and freight rail over five years, an increase of $86.7 billion (561 percent) from current levels. These historic passenger rail investments include $66.0 billion of guaranteed funding (advance appropriations) and $36.1 billion of General Fund authorizations for Amtrak and other programs. In addition, the IIJA provides significant funding for multimodal investments (e.g., Rebuilding American Infrastructure with Sustainability and Equity (RAISE) and Mega grants) that include public transit and passenger rail as essential elements.

APTA is actively working with DOT on implementation of the Bipartisan Infrastructure Law. This year, APTA expects DOT to **advance $18.4 billion of FY 2022 competitive grants** that include public transit and passenger rail eligibility, including:

- ***Awards ($5.5 billion).*** To date, DOT and FTA have awarded $5.5 billion of competitive grants, including $2.3 billion for RAISE grants; $1.1 billion for Low and No Emission Bus grants; $547 million for Buses and Bus Facilities grants; and $1.5 billion for INFRA grants.

- ***Notices of Funding Opportunities (NOFOs) ($5.3 billion).*** DOT, FTA, and the Federal Railroad Administration (FRA) have issued numerous NOFOs for an additional $5.3 billion of competitive grants that include public transportation eligibility, including: $1.0 billion of Mega grants, $350 million of All Stations Accessibility Program grants, and $573 million for Railroad Crossing Elimination Grants.

- ***Upcoming NOFOs ($7.6 billion)***. This fall, we expect FRA and FTA to issue an additional $7.6 billion for competitive grants, including $7.3 billion for the Federal-State Partnership for Intercity Passenger Rail program and $300 million for the Rail Vehicle Replacement program.

In addition, DOT, FTA, FRA, and other agencies have issued Notices of Proposed Rulemaking, Guidance, Dear Colleague letters, and Requests for Information regarding IIJA implementation. APTA has actively engaged in this regulatory process and provided numerous Comments on IIJA implementation, including Comments on Buy America, CIG, Public Transportation Agency Safety Plan Safety Requirements, and Railroad Capital Projects.

To assist APTA members in tracking IIJA funding apportionments and competitive grant opportunities and policy actions, APTA has developed a **Smart Guide to the Bipartisan Infrastructure Law** on its website. The APTA Smart Guide includes funding and apportionment tables, section-by-section analyses, and DOT guidance, regulations, and NOFOs. Finally, the Smart Guide includes advocacy and media toolkits to help APTA members tell their Bipartisan Infrastructure Law success stories. APTA has also developed a **Regulatory Matrix** on its website to track all regulatory and other administrative action.

Inflation Reduction Act

On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 into law. The Act includes numerous important provisions that benefit public transportation, including alternative fuel tax credits and significant new investments in climate, zero-emission technology, equity, and environmental streamlining. The Inflation Reduction Act:

- Extends the excise tax credits for alternative fuels, biodiesel, and renewable diesel;
- Extends and substantially restructures the alternative fuel vehicle property credit;
- Establishes a new commercial clean vehicle tax credit; and
- Provides significant new investments in climate, zero-emission technology, equity, and environmental review, including $27 billion for a Greenhouse Gas Reduction Fund; $3.2 billion for Neighborhood Access and Equity Grants; and $2 billion for Low-Carbon Transportation Materials Grants.

APTA is actively working with DOT, the U.S. Department of the Treasury, and other agencies on implementation of the Inflation Reduction Act. In particular, APTA is focused on implementation of the new commercial clean vehicle tax credit and the new grant programs. Section 13403 of the Act creates a new tax credit (up to $40,000) for commercial clean vehicles (e.g., zero-emission buses). Commercial clean vehicles include battery electric and fuel cell vehicles. This 10-year tax credit takes effect in 2023. The section requires the Secretary of the Treasury to issue regulations or guidance as necessary to implement the provision. APTA is actively working to ensure that public transit agencies may benefit from this provision and receive a direct payment in lieu of a tax credit.

APTA is also working with agencies on implementation of several new programs created by the Inflation Reduction Act. For example, APTA wants to ensure public transportation eligibility under the new $27 billion Greenhouse Gas Reduction Fund. This Fund will provide capital for both a national and state "green banks" to provide financial support for zero-emission technologies and projects that reduce or avoid greenhouse gas emissions. The Fund provides $20 billion for a national green bank and $7 billion to finance state and local green banks. Under the program, EPA will make competitive grants, loans, other financial assistance, and technical assistance available to states and local governments to enable communities, particularly low-income and disadvantaged communities, to reduce or avoid greenhouse gas emissions and deploy or benefit from zero-emission technologies.

Preparing a Holistic Outreach Effort to the New Congress

Finally, APTA is preparing a holistic outreach effort to every new and returning Representative and Senator in the 118th Congress, which begins in January 2023. At the beginning of the new Congress, APTA will undertake a comprehensive outreach effort that includes:

- Sending each Member of Congress, totaling 541 offices, a personalized packet that contains background information about the public transportation industry; a copy of their Congressional District or State Transit Industry Footprint; and APTA's legislative priorities.

- Meeting with each new Representative and Senator to ensure that they understand our industry and APTA's priorities for the 118th Congress.

- Urging all APTA members to contact their new and returning Members of Congress to introduce themselves, outline the role that public transportation plays in your community and the nation's economy, and educate them on the need to honor the IIJA and provide increased investment in public transportation.

In addition, APTA continues to redouble our outreach efforts to build greater support for public transportation among Republican Members of Congress. In 2022, we are specifically focusing on 32 Republican Members of Congress (18 Representatives and 14 Senators), who are more likely to support public transportation or hold critically important leadership and committee positions. APTA will continue this targeted outreach in the 118th Congress. We will also continue efforts to expand APTA's grassroots advocacy tools, such as APTA's Advocacy Engagement Tool.

U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

Mr. Ian Jefferies
President and CEO
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Mr. Paul P. Skoutelas
President and CEO
American Public Transportation Association
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Mr. Chuck Baker
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American Short Line and Regional Railroad Association
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Ms. KellyAnne Gallagher
Executive Director
Commuter Rail Coalition
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September 30, 2022

Re: Infrastructure Investment and Jobs Act – Speed Limit Action Plans

Dear Messrs. Jefferies, Skoutelas, and Baker and Ms. Gallagher:

On November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58) was signed into law. Section 22415 of the IIJA updates Section 11406 of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114-94), Speed Limit Action Plans, codified at 49 U.S.C. § 20169. This letter is intended to remind the industry of its obligation to, not later than November 15, 2022, and annually thereafter, review and update as necessary its Speed Limit Action Plans in accordance with 49 U.S.C. § 20169, to ensure the effectiveness of actions taken to enable warning and enforcement of the maximum authorized speed for passenger trains.

The FAST Act was passed in the wake of two catastrophic accidents that occurred on December 1, 2013 (Metro-North Commuter Railroad, Spuyten Duyvil, New York, NY) and May 12, 2015

(Amtrak Train 188, Philadelphia, PA). Each accident involved over-speed derailments of passenger trains in curves where the maximum authorized speed dropped dramatically from the tangent section of track to the curved section. On December 18, 2017, Amtrak Train 501 derailed near DuPont, WA, also from over-speeding through a curve.

The FAST Act required each railroad providing intercity and commuter rail passenger service to survey its entire system and identify each main track location where there is a speed reduction of more than 20 miles per hour (mph) from the approach speed to a curve, bridge, or tunnel and the maximum authorized operating speed. The FAST Act also required a railroad carrier, not later than 120 days after the date the survey is complete, to submit an action plan for approval that describes the appropriate actions to enable warning and enforcement of the maximum authorized speed, contains milestones and target dates for implementing each appropriate action, and ensures compliance with the maximum authorized speed at each of the identified locations.

The IIJA updated the FAST Act requirements to mandate periodic reviews and updates to each railroad carrier's Speed Limit Action Plan annually and 90 days prior to implementing any significant operational or territorial operating change; and preparation of a Speed Limit Action Plan, including the required survey, by railroad carriers providing intercity rail passenger transportation or commuter rail passenger transportation that were not subject to the FAST Act requirements.

By way of this letter, FRA reminds the industry of several key requirements under 49 U.S.C. § 20169:

1. No later than November 15, 2022, and annually thereafter, review and update their Speed Limit Action Plan in accordance with 49 U.S.C. § 20169, to ensure the effectiveness of actions taken to enable warning and enforcement of the maximum authorized speed for passenger trains.

2. No later than 90 days prior to implementing any significant operational or territorial operating change, including initiating a new service or route, and after consultation with any applicable host railroad, submit for FRA approval a revised action plan. The revised plan must consider any modified or new locations where there is a reduction of more than 20 mph from the approach speed to a curve, bridge, or tunnel and the maximum authorized operating speed for trains at the curve, bridge, or tunnel, resulting from the operational or territorial operating change.

3. If a railroad carrier providing passenger service did not exist on December 4, 2015, the railroad carrier must have completed a survey by February 15, 2022, and submitted for FRA approval its action plan within 120 days of completion of the survey.

4. FRA must review and approve, approve with conditions, or disapprove each submitted action plan within 90 days of its submission. Speed Limit Action Plans are to be submitted to FRA-SpeedLimitActionPlans@dot.gov.

Under 49 U.S.C. § 20169(f), a railroad carrier may be exempt from the requirements on each segment of track for which operations are governed by positive train control (PTC).[1] The industry successfully completed the implementation of PTC in 2020, and a majority of regularly provided intercity and commuter rail passenger services operate over mainline track that has an installed and operational PTC system that prevents over-speed derailments. FRA reminds the industry that at locations with an approved mainline track exception (MTEA),[2] operators must adhere to the requirements of 49 U.S.C. § 20169, including appropriate actions to enable warning and enforcement of the maximum authorized speed for passenger trains at each location identified in a Speed Limit Action Plan that are within the MTEA limits.

FRA, as part of our ongoing regulatory oversight and enforcement, plan to perform audits to confirm compliance with the IIJA.

FRA appreciates your leadership in conveying this message to your member railroads. If you or your member railroads should have any questions regarding this letter or the requirements of 49 U.S.C. § 20169, please contact Ms. Carolyn Hayward-Williams, Director, Office of Railroad Systems and Technology, at (202) 493-6036 or c.hayward-williams@dot.gov.

Sincerely,

Karl Alexy
Associate Administrator for Railroad Safety
Chief Safety Officer

cc: Jeremy Ferguson, President, SMART-Transportation Division, jferguson@smart-union.org
Dennis Pierce, President, BLET, pierce@ble-t.org
Michael S. Baldwin, President, BRS, msb@brs.org
Alex Beckmann, Legislative Representative, TTD, alexb@ttd.org

[1] 49 U.S.C. § 20169(f), Alternative Safety Measures. The Secretary may exempt from the requirements under this section each segment of track for which operations are governed by a positive train control system certified under section 20157, or any other safety technology or practice that would achieve an equivalent or greater level of safety in reducing derailment risk.

[2] 49 CFR § 236.1019, Main line track exceptions, details the limited type of exceptions to the rule that trackage over which scheduled intercity and commuter passenger service is provided requiring installation of a PTC system.

National Transportation Safety Board

Office of the Chair

Washington, DC 20594

September 22, 2022

Mr. Paul P. Skoutelas
President and Chief Executive Officer
American Public Transportation Association
1300 I St., NW
Washington, DC 20005

Dear Mr. Skoutelas:

The National Transportation Safety Board (NTSB) is an independent federal agency charged by Congress with investigating every civil aviation accident in the United States and significant accidents in other modes of transportation—railroad, highway, marine, and pipeline. We determine the probable cause of the accidents and issue safety recommendations aimed at preventing future accidents. In addition, we carry out special studies concerning transportation safety and coordinate the resources of the federal government and other organizations to assist victims and their family members affected by major transportation disasters.

We are providing the following information to urge the American Public Transportation Association to act on the safety recommendation in this letter because we believe your organization can help reduce the risk of future accidents. For more information about the NTSB and our recommendation process, please see the attached one-page summary.

This letter also includes information about our August 18, 2022, report *CSX Transportation Derailment with Hazardous Materials Release and Fire, Draffin, Kentucky, February 13, 2020* (RIR-22/13). The details of this accident investigation and the resulting safety recommendations may be found in the attached report, which can also be accessed at http://www.ntsb.gov.

As a result of this investigation, we identified the following safety issues:

- High-risk placement of US Department of Transportation-111 tank cars.
- Impact of weather conditions on railroad operations.

Accordingly, the NTSB makes the following safety recommendation to the American Public Transportation Association. Additional information regarding this recommendation can be found in the noted section of the report.

Inform your members of the circumstances of this derailment and encourage them to revise as necessary their criteria for train operations to provide dynamic weather alerts that take into account current, persistent, and past weather conditions to improve location-based adverse weather alerts. (R-22-10) (See section 2.4.)

You may use the enclosed sample article, "The Importance of Dynamic Weather Alert Criteria in Railroad Operations," to address this recommendation.

You may revise this sample article as needed to match any length or style guidelines of your newsletter or website. We ask that, after you publish this sample article, you send us a copy of the newsletter containing the article, or link to the website where you have posted it.

The NTSB is vitally interested in this recommendation because it is designed to prevent accidents and save lives. We would appreciate a response within 90 days of the date of this letter, detailing the actions you have taken or intend to take to implement these recommendations. When replying, please refer to the safety recommendations by number (Safety Recommendation R-22-10). We encourage you to submit your response to ExecutiveSecretariat@ntsb.gov. If your reply, including attachments, exceeds 20 megabytes, please e-mail us at the same address for instructions on how to send larger documents. Please do not submit both an electronic copy and a hard copy of the same response.

All communications regarding safety recommendations are stored by the NTSB and viewable by the public. Please do not send privileged or confidential communications in response to this/these recommendation(s). Responses marked as confidential or privileged (or similar designations) will be considered nonresponsive. In the likely event that your company uses auto-generated and/or preformatted confidentiality statements on letterhead or outgoing e-mails, please include a statement in your letter indicating that the information can be publicly released. If you have concerns about this protocol, please contact us at ExecutiveSecretariat@ntsb.gov.

Sincerely,

Jennifer Homendy
Chair

National Transportation Safety Board

The Importance of Dynamic Weather Alert Criteria in Railroad Operations

Many railroads contract with weather service providers for weather alerts used to alert railroad dispatchers of hazardous weather conditions. As part of their service, the weather service provider collaborates with the railroad to develop static criteria for determining when a weather alert is warranted. The National Transportation Safety Board (NTSB) recently issued a report about a derailment in Draffin, Kentucky caused by heavy rainfall where the weather alert criteria did not account for the risks due to excessive rainfall before the accident.

On February 13, 2020, a high hazard flammable train carrying denatured ethanol derailed on a CSX Transportation railroad track that runs between a hillside and the Russell Fork River near Draffin, Kentucky. In the 2 weeks before the derailment, the area received more than 300 percent of its normal amount of rainfall, and in the week before the derailment between 500 and 750 percent of normal precipitation fell. This excessive rainfall led to a mudslide that covered the track with mud and debris immediately before the derailment. At the time of the derailment, there were no weather alert criteria for long-term weather events, such as accumulating precipitation over a period of days, weeks, or months.

The NTSB‘s investigation found that the weather alert criteria used by most Class I railroads and some major short line railroads used static criteria, meaning they only considered the current weather and near-term forecast; they did not consider unusual weather conditions in the days preceding the alert. For example, CSX’s static criterion for a flash flood alert was at least 3 inches of rain over a period of 3 hours or less. The criterion did not consider the effects of accumulated rainfall during the previous 2 weeks. Other industries have used dynamic criteria that consider varied and changing initial conditions for weather alerts. Dynamic criteria account for unusual increases in precipitation or other changes in weather and climate and the alerting criteria levels may change depending on the environment and how preceding weather events have affected it. For example, dynamic weather alert criteria may take into account ground saturation from previous rainfalls when determining the effect that 3 inches of rain falling in an hour would have on a particular geographic area.

The NTSB determined that the derailment occurred because of a mudslide that obstructed the track following excessive rain accumulation over several weeks before the accident. Furthermore, the NTSB found that the system providing weather alerts to the railroad did not consider the above-normal rainfall accumulated over several weeks, and elevated temperatures (leading to rainfall instead of snow) in the month before the derailment.

This was not an isolated incident. In the past 40 years, the NTSB has investigated five other derailments where adverse weather conditions, particularly rainfall, affected the railroads’ infrastructure and created unsafe operating conditions. These accidents are discussed in the report associated with the Draffin derailment, *CSX Transportation Derailment with Hazardous Materials Release and Fire, Draffin, Kentucky, February 13, 2020.* (NTSB/RIR-22/13) and can be found on the NTSB’s investigation web page.

AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
FACT SHEET

THE FEDERAL-STATE PARTNERSHIP FOR INTERCITY PASSENGER RAIL PROGRAM INFRASTRUCTURE INVESTMENT AND JOBS ACT

September 13, 2022

On November 15, 2021, President Joseph Biden signed the Infrastructure Investment and Jobs Act (IIJA) into law, which amends 49 U.S.C. § 24911 (Federal-State Partnership for State of Good Repair), creating the "Federal-State Partnership for Intercity Passenger Rail Grants" program.

The IIJA broadens the grant program's focus from funding rail projects related to reducing the state-of-good-repair backlog to include: improving performance, or expanding or establishing new intercity passenger rail service, including privately operated intercity passenger rail service if an eligible applicant is involved.[1] Eligible applicants include: a state, group of states, interstate compact, public agency or public chartered authority; political subdivision; Amtrak; federally recognized Indian Tribe or a combination of such entities.[2]

Eligible projects, including acquisition of real property interests, are defined as a project to:

- replace, rehabilitate, or repair infrastructure, equipment, or a facility used for providing intercity passenger rail service to bring such assets into a state of good repair;
- improve intercity passenger rail service performance, including reduced trip times, increased train frequencies, higher operating speeds, improved reliability, expanded capacity, reduced congestion, electrification, and other improvements, as determined by the Secretary; and
- expand or establish new intercity passenger rail service.[3]

The Secretary is required to consider the following selection criteria in awarding funding:

For projects located on the Northeast Corridor:

- make selections consistent with the Northeast Corridor Project Inventory (NEC Project Inventory), unless when necessary to address materially changed infrastructure or service conditions, changes in project sponsor capabilities or commitments, or other significant changes since the completion of the most recently issued Project Inventory; and
- for projects that benefit intercity and commuter rail services, only make such selections when Amtrak and the public authorities providing commuter rail passenger transportation at the eligible project location are in compliance with § 24905(c)(2) (cost allocation); and

[1] 49 U.S.C. § 24911(b).
[2] 49 U.S.C. § 24911(a).
[3] In addition, a group of related projects described above as well as the planning, environmental studies, and final design for a project or group of projects is eligible to receive grants. § 24911(c).

identify funding for the intercity passenger rail share, the commuter rail share, and the local share of the eligible project before the commencement of the project.[4]

For projects not located on the Northeast Corridor:

- give preference to eligible projects for which Amtrak is not the sole applicant; that improve the financial performance, reliability, service frequency, or address the state of good repair of an Amtrak route; and that are identified in, and consistent with, a corridor inventory prepared under the Corridor Identification and Development Program pursuant to § 25101;
- take into account the cost-benefit analysis of the proposed project, including anticipated private and public benefits relative to the costs of the proposed project;
- the degree to which the proposed project's business plan considers potential private-sector participation in the financing, construction, or operation of the proposed project;
- the applicant's past performance in developing and delivering similar projects, and previous financial contributions;
- whether the applicant has, or will have the legal, financial, and technical capacity to carry out the project; satisfactory continuing access to the equipment or facilities; and the capability and willingness to maintain the equipment or facilities;
- if applicable, the consistency of the project with planning guidance and documents set forth by the Secretary or otherwise required by law; and
- whether the proposed project serves historically unconnected or under-connected communities; and any other relevant factors, as determined by the Secretary.[5]

In addition, the law sets aside not less than 45 percent of the amounts appropriated for projects not located along the Northeast Corridor, of which not less than 20 percent shall be for projects that benefit (in whole or in part) a long-distance route.

The law also sets aside not less than 45 percent of the amounts appropriated for projects listed on the NEC Project Inventory. The Secretary is required to, not later than one year after the date of enactment, and every two years thereafter, create a predictable project pipeline that will assist Amtrak, States, and the public with long-term capital planning by publishing the NEC Project Inventory.

Revised § 24911 permits the Secretary to provide funding to a project over multiple years through a phased funding agreement and letter of intent if the project is highly rated and federal assistance for the project is more than $80 million. The phased funding agreements may include a commitment, contingent on amounts to be specified in law in advance, to obligate an additional amount from future available budget authority. Last, an applicant who does not carry out a project for reasons within the control of the applicant shall repay all federal grant funds awarded for the project.[6]

[4] 49 U.S.C. § 24911(d)(1).
[5] 49 U.S.C. § 24911(d)(2).
[6] A National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) analysis that results in the selection of a no build alternative is not considered within the applicant's control.

The Northeast Corridor Project Inventory

On June 24, 2022, the Federal Railroad Administration (FRA) published a Notice of Proposed Approach to the Northeast Corridor Project Inventory and the Federal-State Partnership for Intercity Passenger Rail Program for Northeast Corridor Projects (NEC Project Inventory Proposed Approach) at 87 *Federal Register* 37905.

In the notice, FRA sets forth its proposed approach as to how it will develop the NEC Project Inventory in accordance with § 24911(e). The FRA states that the NEC Project Inventory will:

- Include NEC Projects in all Lifecycle Stages[7] and identify project sponsors for each project. Each project FRA finds eligible for funding under the Partnership Program will receive an individual entry on the NEC Project Inventory;
- Specify the order of funding for the identified NEC Projects over a two-year period starting from the publication of the NEC Project Inventory;
- Rely on NEC Commission Planning Documents when developing the Project Inventory; and
- Identify the amount of federal funding, if any, that a projects sponsor has received or has requested a federal agency consider including as part of a federal funding recommendation, for all or a portion of Total Project Costs from non-Partnership Program funding.[8]

Importantly, FRA specifies in the notice that it will prioritize projects in the NEC Project Inventory as follows:[9]

- **Major Backlog Projects** in the following order based on Lifecycle Stage: (1) Project Planning Stage; (2) Project Development Stage; (3) Final Design Stage; and (4) Construction Stage;

- **Defined Capital Renewal Projects** in the following order based on Lifecycle Stage: (1) Project Planning Stage; (2) Project Development Stage; (3) Final Design Stage; and (4) Construction Stage; and then

- **Improvement and Stations Projects** in the following order based on Lifecycle Stage: (1) Construction Stage; (2) Final Design Stage; (3) Project Development Stage; and (4) Project Planning Stage.

The FRA's de-prioritization of improvement and station projects has caused concern among agencies with projects that are ready to go and can spend down federal funding quickly. For instance, the New York Metropolitan Transportation Authority and the Associated General Contractors of New York State submitted comments to FRA expressing their concerns about the

[7] FRA defines Life Cycle Stage as consecutive stages of a project as applicable to include project planning, project development, final design and construction stages. *Id.* at 37906.
[8] *Id.* at 37907. FRA will then allocate available Program Partnership funding based on the remaining amount necessary to complete the project or project Lifecycle Stage(s). *Id.*
[9] *Id.* at 37907-37908.

de-prioritization of these important projects, arguing that the FRA's proposal to deprioritize station and improvement projects is not supported by statute, and would prevent priority NEC projects from being funded under the Partnership Program. They argue that FRA should prioritize Partnership Program funding based on readiness (i.e., whether funds for selected projects can be obligated and drawn down quickly).[10] The FRA's proposed approach to prioritizing projects for the Partnership Program may have ramifications for other FRA capital grant funding programs.

Program Administration

FRA proposes to publish the NEC Project Inventory no later than November 15, 2022, and not less often than every other year thereafter. FRA makes clear that projects and allocations in the NEC Inventory are not funding commitments and project sponsors must apply for grants and be selected for funding. FRA intends to publish a Notice of Funding Opportunity (NOFO) following the publication of the NEC Project Inventory. Funds available will include FY 2022 Appropriations for the program of $100 million and advanced appropriations of $7.2 billion included in the IIJA, as well as any additional funding that may be available.[11]

Project Selections

FRA will review and evaluate applications received in response to the NOFO for consistency with the NEC Project Inventory, eligibility, and completeness. In addition, FRA will take into account the following factors when evaluating applications:

- Proposed amount and commitment of non-Federal match and/or other Federal funds; and
- Factors indicating project readiness for funding, such as Lifecycle Stage; environmental risk; technical capacity; financial completeness; and
- Consistency with DOT Strategic Goals, such as safety, economic strength and global competitiveness, equity, climate and sustainability, transformation of the system to serve current and future challenges, and organizational excellence.[12]

The federal share of the total cost for a project shall not exceed 80 percent. FRA notes that the NOFO will state FRA's willingness to fund projects up to the 80 percent maximum federal share, with sponsors responsible for 20 percent non-federal share for Partnership Program grants.[13]

Letters of Intent and Phased Funding Agreements

The IIJA authorizes FRA to issue **Letters of Intent** (LOIs), authorized at 49 U.S.C. 24911(g)(1), to obligate amounts to projects from future budget authority. LOIs are contingent commitments and not binding obligations of the federal government. LOIs demonstrate FRA's intent to provide future Final Design and Construction Lifecycle Stage funding for Major Capital Projects assuming successful completion of Project Planning and Project Development Lifecycles for the

[10] *See* FRA Docket No. FRA-2022-0049 at Regulations.gov
[11] *Id.* at 37909.
[12] *Id.* at 37910.
[13] *Id.*

project. FRA states that it anticipates issuing LOIs primarily to projects currently in, or beginning, the Project Development Lifecycle Stage.[14]

A **Phased Funding Agreement** (PFA) is an agreement associated with the obligation of an initial grant award under the Partnership Program. FRA may enter into a PFA with a Project Sponsor if: (1) the project is highly rated, based on the evaluations and ratings described in the Partnership Program NOFO and as conducted by FRA, and (2) the federal assistance to be provided for the project under the Partnership Program is more than $80 million.[15]

FRA notes that it may consider additional factors in determining whether a PFA is the appropriate funding approach for a project. It anticipates limiting the use of PFAs to projects that are currently in, or beginning, the Final Design and/or the Construction Lifecycle Stages. FRA expects to issue PFAs for Major Backlog projects ready for Final Design and/or the Construction Lifecycle Stages *to reflect the higher priority placed on these projects by FRA* (emphasis added). PFAs are contingent commitments and are not financial obligations of the federal government. However, unlike LOIs, PFAs are agreements relating to the obligation of future funds and FRA commits to provide funding as specified in the PFA for the duration of the project, as long as the grantee continues to meet the terms of the PFA and Congress appropriates sufficient Partnership Program funding for such purpose.[16]

Shared Benefit Projects

FRA notes in its Proposed Approach that NEC Projects that solely benefit commuter rail passenger transportation are not eligible to receive Partnership Program funding and will not be included in the NEC Project Inventory. However, such projects may be located on shared corridors with commuter rail passenger transportation and may benefit both intercity and commuter services (i.e., Shared Benefit projects).[17]

Shared Benefit Projects are eligible for Partnership Program funding. In evaluating applications for such projects, FRA will consider if the proposed project would be a reasonable investment in intercity passenger rail transportation separate from consideration of the proposed project's benefits to commuter railroad passenger transportation.

FRA anticipates a substantial number of Shared Benefit projects will be included in the NEC Project Inventory since a majority of the NEC territory has shared operation, and thus resulting benefits, between intercity and commuter services. For Shared Benefit Projects, FRA will only make such selections when Amtrak and the public authorities providing commuter rail transportation at the eligible project location: (1) are in compliance with 49 U.S.C. 24905(c)(2); (2) have identified funding for the intercity passenger rail share, the commuter rail share, and the local share of the eligible project before the commencement of the project in applications

[14] *Id.*
[15] 49 U.S.C. 24911(g)(2).
[16] For a project with a PFA, FRA may provide grant funding in phases consistent with the terms of the PFA and within the established maximum amount of federal financial assistance for the project. The NEC Project Inventory will not identify projects for LOIs or PFAs, as those determinations will be made based on applications during project selection.
[17] *Id.* at 37907, 37910.

responsive to the NOFO; and (3) have demonstrated a fair allocation of financial responsibility between intercity and commuter rail transportation.

AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

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October __, 2022

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

Re: Docket No. FRA-2021-0032
RIN: 2130-AC88

Dear Docket Clerk:

The American Public Transportation Association (APTA) represents an $80 billion industry that directly employs 450,000 people and supports millions of private-sector jobs. We are pleased to offer comments regarding the Notice of Proposed Rulemaking (NPRM) on Train Crew Size Safety Requirements published on July 28, 2022 in the *Federal Register* at 87 FR 45564.

Risk Assessment Methodology

The risk assessment methodology proposed in 49 CFR 218.135, including the risk matrix and the probability/severity definitions, may be viewed as precedent in future regulatory proceedings unrelated to train crew size. In general, APTA supports risk-based approaches that allow railroads to identify, mitigate, and manage safety in a manner that reflects the scale and specifics of individual operations. Although FRA notes that it believes this rule does not conflict with other regulations, APTA sees the introduction of a separate, but similar, risk assessment process as unnecessary for railroads that already follow an established methodology under 49 CFR Part 270. APTA believes the concern raised by FRA regarding a railroad deciding "not to implement mitigations" could still be addressed by an appropriate review and approval process, so long as a railroad is able to work within the framework of its existing Part 270 processes. This would provide consistency and avoid potential confusion regarding the process by which the railroad manages operational risks.

Specifically, the proposed matrix and definitions, particularly severity definition components linked to 49 CFR 225 as applied to commuter railroads, could have the potential to create scale compression such that a minor event would be classified as catastrophic. The difference between the proposed matrix/definitions and widely accepted risk assessment standards such as MIL-STD-882E is notable. In MIL-STD-882E, a risk standard established by the Department of Defense and referenced in 49 CFR238, a formal risk assessment matrix is outlined to reduce or eliminate risks posed by hazards. In this widely used model, only 25 percent of the safety risk matrix would be considered "red" meaning a "high" risk. In the proposed matrix in 49 CFR 218.135, 50 percent of the matrix would be classified as "unacceptable." It should be noted that MIL-STD-882E does not state what risk level is acceptable versus unacceptable. Such a determination would need to be made on a case-by-case basis, as noted by FRA, in its recognition that "every railroad operation is unique, and that the technical resources and capabilities of railroads vary."

Additionally, having a parallel, but different assessment could cause confusion, dimmish the utility of any assessments of similar risks performed under Part 270 programs, and raise security concerns by providing direct access to hazards in conflict with the legal protections provided by FRA under its risk reduction programs. To avoid these potential issues, APTA suggests the railroad's 49 CFR 270 or 49 CFR 271 programs be adopted in the final rule as an acceptable alternative methodology, with an appropriate review and approval process that allows the legal protections afforded by Part 270 to be maintained.

Definition of "Train Crew"

The Federal Railroad Administration (FRA) defines "train crew" in section 218.5 as one or more railroad employees who are: "assigned to a controlling locomotive; called to perform service subject to the Federal hours-of-service requirements; involved with the movement of the equipment they are called to operate; reporting and working together as a unit that remains in close contact, if more than employee; and subject to the railroad operating rules and program of operational tests and inspections required in 49 CFR 217.9 and 217.11".

Currently, Utah Transit Authority and Regional Transportation District in Denver, both employ two team members on each train, who are both trained and qualified under the railroad's Passenger Train Emergency Preparedness program under 49 CFR Part 239. One team member is a dual certified Engineer/Conductor and is responsible for the safe operation of the train. The second team member does not meet the hours-of-service requirement as proposed in the NPRM as a "train crew" member, despite acting in this capacity. FRA notes that it is choosing not to define the duties of the two required crewmembers in the proposed rule, but in tying the definition to § 218.5, it is unclear for legacy operations who operate with more than one person on a train where they might otherwise fall short of the intent of the rule, as defined by § 218.121(a).

APTA appreciates the opportunity to comment on this request for comments. If there are any questions regarding this letter, please contact APTA's General Counsel, Linda Ford at lford@apta.com.

Sincerely,

Paul P. Skoutelas
APTA President and CEO