AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

January 10, 2017

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

RE: FTA–2016–0239

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 Department of Transportation's (DOT) Update to U.S. Department of Transportation's National Environmental Policy Act (NEPA) Implementing Procedures, published on December 20, 2016 at 81 FR 92966.

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.

General Comments

APTA is pleased to see this update, as it not only clarifies NEPA best practices that practitioners have informally developed and followed, but stating these practices for emerging professionals in environmental reviews to better understand. We would like to thank the DOT for updating the order and clarifying these practices. APTA, however, would like to ensure that DOT has completed its due diligence to create consistency between this update and with 23 CFR §771, as any inconsistencies can result in litigation. Acknowledging that Section 4 does cover the Implementation of the Order in general in terms of the intent of the procedures, we have identified the following possible inconsistencies and areas of concern that our members would like addressed in the final update:

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- As stated in 5(a) of the order (page 8) regarding the timing of general provisions, “Prior to making a final decision, [FTA and other USDOT agencies] must not take any action that would have an adverse environmental impact or that may limit the choice of reasonable alternatives.” This sentence restates long-standing DOT NEPA policy but fails to acknowledge the exception which Congress adopted in MAP-21, §1302(b): "A State may carry out, at the expense of the State, acquisitions of interests in real property for a project before completion of the review process required for the project under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) without affecting subsequent approvals required for the project by the State or any Federal agency."

- 10(b) contains a new list of the extraordinary circumstances which preclude a NEPA Categorical Exclusion (“CE”), and which FTA and other USDOT agencies must consider when approving a proposed CE. Two of them are “Adverse effects on… (b) Properties protected under Section 106 of the National Historic Preservation Act” and “(c) Properties protected under Section 4(f).” This is broader than the FTA/FHWA NEPA regulations which provide that such circumstances include a “significant impact on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act.” There are cases holding that an “adverse effect” for 4(f) or historic purposes does not necessarily rise to the level of a significant impact under NEPA.

- 11(f) states that FTA and other DOT agencies “must involve environmental agencies, applicants, and the public, to the extent practicable, in the preparation of an EA.” “Must” (even when limited by “to the extent practicable”) is mandatory. However, this is inconsistent with both 11(j), “At its discretion, [an agency] may prepare a draft EA for public comment” (with a similar discretionary statement in 25(d)) and FTA/FHWA NEPA regulations which provide: “an EA need not be circulated for comment but the document must be made available for public inspection at the applicant’s office and the appropriate Administration field offices…”

- 11(h)1 states that “the EA must objectively evaluate each alternative at comparable levels of detail, and where appropriate, best estimates of cost must be reasonable, comparable, and developed using consistent methodologies.” 13(d)2 say the same for an EIS: “To ensure that the decision maker may evaluate the comparative merits of each alternative, the EIS must evaluate and discuss each alternative or reasonable range of alternatives at comparable levels of detail (unless otherwise provided by law), and where appropriate, best estimates of cost must be reasonable, comparable, and developed using consistent methodologies.” Comparable levels of detail are not necessarily required for each alternative.

- Any update referencing Section 106 regulations.

- Section 30 requires OAs to develop implementing procedures for this order. For FTA, any procedures must go through notice and comment pursuant to 49 U.S.C. 5334(k).

We appreciate the opportunity to assist FTA in this important endeavor. For additional information, please contact Linda Ford, APTA's chief counsel, at (202) 496-4808 or lford@apta.com.

Sincerely yours,

Richard A. White
Acting President & CEO

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