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Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: Docket No. CEQ-2023-0003

Dear Docket Clerk:

The American Public Transportation Association (APTA) represents the \$79 billion public transportation industry that provides mobility for millions of Americans each year, directly employs 430,000 people, and supports millions of private-sector jobs. I am pleased to submit these comments to the Council on Environmental Quality (CEQ), Request for Information (RFI) on the National Environmental Policy Act (NEPA) Implementing Regulations Revisions Phase 2, published in the *Federal Register* July 31, 2023, at 88 FR 49924.

General Comments

APTA commends the CEQ for reaching out to the transit community and the wider public to seek guidance for how to revise CEQ's regulations for implementing the procedural provisions of the NEPA, including to implement the Fiscal Responsibility Act's (FRA) amendments to NEPA.

APTA appreciates the significance of the FRA amendments to NEPA and CEQ's proposed regulation revisions. APTA applauds CEQ's intent to provide for an effective environmental review process that promotes better decision-making; promote opportunities for fair public involvement; provide for an efficient process and regulatory certainty; and provide for sound decision making grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects.

APTA encourages CEQ to consider Congress' focus and intent on environmental and NEPA streamlining in development and approval of the FRA. Transit projects are considered to be societally and environmentally beneficial including air quality and GHG benefits, supportive of concentrated land uses, avoidance of the impacts associated with expansion of roads and highways and providing mobility benefits to communities of concern. Streamlining and reducing the burden of a lengthy NEPA process and documentation for transit projects that are beneficial and traditionally underfunded and fiscally constrained

is important to APTA and its membership.

APTA recognizes CEQ's intent with the revisions is to better align the provisions with CEQ's extensive experience implementing NEPA; CEQ's perspective on how NEPA can best inform agency decision-making; longstanding Federal agency experience and practice; NEPA's statutory text and purpose, including making decisions informed by science; and case law interpreting NEPA's requirements.

APTA's comments are structured to provide feedback on three main points of the intent as outlined by CEQ followed by APTA's responses to address the invitations to comment and set of questions noted by CEQ in the RFI.

CEQ's Regulatory Revisions Intent

1. Ensuring full and fair public involvement

APTA underscores the goal to encourage full and fair public involvement. The public benefits greatly when communities are engaged in project development. APTA strongly encourages a flexible approach that best meets the needs of its members while serving the public interest.

APTA encourages CEQ to consider the role that digital solutions can play in full and fair public involvement and include language that recognizes this and remains flexible to consider the pace at which digital approaches are advancing. During the COVID 19 pandemic, there was an immediate switch over to virtual public meetings for transit projects with, in most cases, an increase in attendance compared to in-person public meetings. Virtual involvement allows more individuals and more individuals with varying time constraints, abilities, and English proficiency (i.e., working mothers or fathers, shift workers, individuals with disability, etc.) to attend and provide input on the proposed project and NEPA documents.

APTA recognizes the value of Federal agencies having Chief Public Engagement Officers, as proposed in § 1507.2(a). Some of our larger members have individuals serving in this capacity for their respective agency. For smaller transit agencies, a requirement to install a public engagement officer at the local level would become a significant financial challenge.

As part of a robust notification, CEQ proposes "Posting of notification on- and off-site in the area where the action is to be located." § 1509.1(c) For small projects, this activity is easily accomplished. However, for large linear projects such as rail lines, this activity requires a substantial effort, especially when multiple notifications (for multiple meetings) are required. APTA believes that project sponsors should have flexibility, as they determine the best way to involve the public in its outreach efforts.

Encouragement of full and fair public involvement should not be understood as a legal cause of action under NEPA or the Administrative Procedures Act. Additional public engagement as a cause of action will defeat the CEQ's goal of environmental streamlining.

APTA believes that by encouraging a robust public involvement effort while maintaining substantial flexibility for its organizations, CEQ will ensure full and fair public involvement.

2. Providing for an efficient process and regulatory certainty and providing for sound decision making grounded in science

APTA strongly supports CEQ's goals of providing for an efficient process and regulatory certainty, as well as providing for sound decision making grounded in science. It is important to give weight to both sound decision-making and efficiency and certainty in the process. An overly lengthy and laborious process does not necessarily result in better decisions and can lead to delays in the implementation of transit projects that benefit our communities through improved mobility and reduced greenhouse gas emissions. We support revisions that encourage agencies to focus on the things that matter for decision-making, "right-size" the analysis, and coordinate with other processes to ensure the NEPA process is complementary and moves projects towards implementation efficiently.

3. Including consideration of relevant environmental, climate change, and environmental justice effects

APTA generally supports CEQ's revisions aimed at consideration of relevant environmental, climate change, and environmental justice effects. APTA notes that transit is a sustainable form of transportation, and while the implementation of transit capital projects could have discrete and temporary greenhouse gas (GHG) releases during construction, the overall lifecycle GHG benefits far outweigh the short-term impacts. Transit is an important part of the climate solution.

CEQ Questions and Invitations for Comment

B. Proposed Revisions to Update Part 1500 – Purpose and Policy

1. Purpose (§ 1500.1) and Policy (§ 1500.2)

APTA supports the added purpose statement at § 1500.1(c) that emphasizes that "NEPA's purpose is not to generate paperwork—even excellent paperwork— but to foster excellent action." APTA also supports the added policy statements at § 1500.2(b) that federal agencies shall make the NEPA process more useful to decision-makers and the public through concise documents supported by evidence that agencies have conducted the necessary environmental analysis and at § 1500.2 (c) that federal agencies shall integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice. These are best practices that our members have found can reduce delays and add to regulatory certainty.

APTA encourages CEQ to consider the vast differences in scope and complexity across projects and allow NEPA to remain flexible to most accurately allow the complexity or lack thereof be reflected in the environmental documentation.

While it is true that the purpose of NEPA is not to produce documents, the development of concise and informative environmental documents is key to fostering excellent action. Focusing on the things that matter and keeping documents concise makes them much more useful to decision-makers and enables other agencies and the public to more effectively review and provide comments. For this reason, APTA supports the changes in § 1500.4, including the title change from "reducing paperwork" to "concise and informative environmental documents." Among the proposed changes, switching "important" and "unimportant" for

“significant” and “insignificant” helps clarify that documents should focus on the things that matter for decision-making for the action being considered.

C. Proposed Revisions to Update Part 1501 – NEPA and Agency Planning

APTA’s members have found that integrating considerations related to NEPA and other planning and environmental review procedures into planning at an early stage is helpful to encouraging an efficient and more certain process. Therefore, APTA supports the proposed changes to § 1501.1 because these statements encourage use of best practices for streamlining.

2. Determine the Appropriate Level of NEPA Review (§ 1501.3)

"Focusing on the things that matter" also means right sizing the analysis to avoid unnecessarily complex or lengthy studies when there are other means of assessing the likelihood of significant effects. Therefore, APTA supports the proposed added language to § 1501.3(c): "agencies may make use of any reliable data source and are not required to undertake new scientific or technical research unless it is essential to a reasoned choice among alternatives, and the overall costs and timeframe of obtaining it are not unreasonable."

In addition, the NPRM notes that the proposed added paragraph at § 1501.3(d)(v) is intended to “make clear that public controversy over an activity or effect is not a factor for determining significance.” APTA suggests adding this statement to the regulation to make clear that public controversy is not an extraordinary circumstance.

3. Categorical Exclusions (§ 1501.4)

Many of APTA members’ projects fall under the "documented categorical exclusion" rubric. APTA supports the additional clarifications regarding the requirement to conduct analysis where “extraordinary circumstances” exist (§ 1501.4(b)) to determine whether the categorical exclusion should still apply and appreciates the added definition of "extraordinary circumstance" at § 1508.1(m). This language helps to clarify when additional analysis is appropriate. However, APTA would appreciate additional clarification that additional analysis is not required in the absence of extraordinary circumstances – the additional analysis and documentation carry with it schedule and cost implications, and the practice of analyzing certain types of actions as a matter of course can result in unnecessary delays and costs.

CEQ is proposing to add a requirement that agencies document any additional analysis and make it publicly available. While APTA supports transparency in these matters, we suggest clarifying that documentation shall be published on the federal agencies website, and is not the responsibility of non-federal project sponsors as it can be challenging for agencies to consistently maintain archival materials on public websites particularly for actions at the scale of those identified as categorical exclusions.

6. Lead Agency; Cooperating Agencies (§§ 1501.7 and 1501.8)

APTA’s members have found that coordination among agencies with different NEPA procedures and/or disparate interests can add to the complexity and timeline of the NEPA process. Therefore, it is essential to have key agencies engaged in the process early and to have buy-in from them at key decision points. APTA supports removing "complex" to modify "environmental assessment" in § 1501.7(a) as whether or not it is complex, an EA can involve multiple federal agencies. APTA also supports the proposed

added language to § 1501.10(a) that "where applicable, the lead agency shall establish the schedule and make any necessary updates to the schedule in consultation with and seek the concurrence of joint lead, cooperating, and participating agencies, and in consultation with project sponsors or applicants." In addition, APTA support adding the qualification to issuing a joint Record of Decision (ROD) "except where inappropriate or inefficient" (§1501.7(g)) – while a joint decision document is typically the most efficient path, it is important to have an option when a joint document is not feasible.

7. Public and Governmental Engagement (§ 1501.9)

APTA encourages flexibility in how the goals of public engagement and governmental engagement are pursued. The proposal that agencies have a Chief Public Engagement Officer is laudable. APTA cautions that this function and regulation should not be used by fiat to require non-Federal agencies to adopt a similar office.

8. Deadlines and Schedule for the NEPA Process (§ 1501.10)

APTA applauds CEQ's goal of streamlining the environmental review process and the concept of time limits. APTA concurs with CEQ's proposed update paragraph (b) for consistency with section 107(h) of NEPA. Paragraph (b)(1) would require agencies to complete an EA within one year and paragraph (b)(2) would require EIS completion in two years unless the lead agency extends the deadline in consultation with any applicant or project sponsor and sets a new deadline.

To meet this goal, APTA supports more funding and focus on workforce development and staffing of the federal agencies that oversee NEPA for transit projects, since understaffed agencies could have a difficult time addressing NEPA reviews and management due to the unprecedented funding in the Infrastructure Investment and Jobs Act.

APTA believes that the ability to meet the time limits outlined some consideration should be given on how to address interagency reviews and approvals in a timely manner at the Federal and State Level. An example of time limit challenges for APTA members is delays due to the interaction of NEPA reviews with other regulatory requirements, such as National Historic Preservation Act Section 106 reviews and/or Department of Transportation Act Section 4(f) analyses. Both the Section 106 review and the Section 4(f) analysis (which is often based on the Section 106 review) will often generate additional mitigation requirements that become part of the NEPA decision document. However, these reviews involve outside agencies (typically State and Tribal Historic Preservation Officers) that are not bound by the same review timeframes. Often, these review processes extend the environmental review process, but are beyond the control of the Federal agency.

The inclusion of time limits can have significant challenges in transportation projects because transit agency authorities vary widely. As an example, project sponsors often do not have the authority to acquire project-required land by condemnation (Federally owned land or railroad rights-of-way, for example). Arrangements to acquire or operate in such lands are typically discussed through negotiation, which happens in parallel with the NEPA analysis. If these lands are ignored (as unobtainable) to meet the regulatory time limit, the sponsor effectively reduces its range of reasonable alternatives. If access to these lands is negotiated before the project starts, then the NEPA analysis is vulnerable to criticism or legal action based on project prejudice.

9. Programmatic Environmental Document and Tiering (§ 1501.11)

While APTA agrees that reviewing actions at a programmatic level for broad Federal actions can generally good practice, the definition of broad actions includes “larger or multi-phase projects” and “regional actions” which APTA proposes is too vague and does not consider the nuances of transit projects.

For example, often rail projects could have multiple phases, but the federal action is often federal funding from the Federal Transit Administration Capital Investment Grant program (CIG). When transit agencies seek CIG funding it is for a discrete project that can often be a phase 1 or initial segment of an envisioned, yet speculative larger rail alignment. No federal funding, i.e., action, has been identified for this future vision and therefore it is often not appropriate to add the schedule and cost impact or burden of developing a programmatic environmental document prior to development of a project specific environmental document. Transit capital projects and their extensions or future phases do not have surety of funding like other sectors. Also of note, considering the nature of transit funding and timing a reevaluation would be required for the programmatic document after 5 years, which would further burden transit agencies that have developed a wholistic vision.

Additionally, many transit projects are regional in nature, so APTA proposes to strike “regional actions” from the list unless clarified.

D. Proposed Updates to Part 1502 – Environmental Impact Statements

CEQ particularly invites comment on whether it should codify any or all of its 2023 GHG guidance, and, if so, which provisions of part 1502 or other provisions of the regulations CEQ should amend.

APTA is supportive of and understands the urgency of addressing climate change and its effects. Transit is an important part of the climate solution due to the reduction in vehicle miles traveled and resulting lifecycle GHG benefits that transit improvements offered. To be consistent in CEQ’s intent to encourage agencies to prepare concise NEPA documents coupled with transits typical overall reductions in GHG emissions, transit improvement GHG and climate change analysis should be kept concise and limited in scope. Additionally, it is important to note that capturing all the induced GHG reductions from changes in travel patterns and land use due to transit investments is not easily recognized or quantified. Consideration should be given to exemption or reduction of climate change analysis for projects that are considered part of the climate solution (i.e., transit projects that reduce VMT, EV deployment, etc.).

APTA is supportive of the inclusion of a general discussion of potential risk reduction, resiliency, or adaptation measures in the proposed action and alternatives due to a changing climate, APTA recognizes that transit agencies and their infrastructure are vulnerable to climate risks, such as wildfire risk, extreme heat and other extreme weather events, drought, and flood risk. However, APTA recommends that CEQ not require this for approval of a NEPA decision document and strike “any” from “any risk reduction...” Transit agencies vary significantly in agency size, geographic area, and climate risks, so a more flexible and generalized approach to inclusion in NEPA if at all is prudent. Most transit agencies that are facing or will face significant risks due to climate change are addressing resiliency across all their assets in more comprehensive planning not just for a single project, like the CEQ requirement would require. Again, transit agencies are fiscally constrained, and this provision could require additional planning and analysis for a single proposed project versus a more comprehensive system wide approach.

5. Page Limits (§ 1502.7)

APTA suggests more clarity be provided regarding the content to be included within the page limits, and the definition of a page. APTA suggests retaining the existing language in § 1502.7 that indicates which materials in an environmental impact statement should be counted toward the page limits to avoid the impression that everything between the covers of the document should be counted. APTA fully supports including the clarification that citation and appendices do not count toward the page limit but suggests also including a cross-reference to the definition of a page at § 1508.1(z) for further clarity.

E. Proposed Updates to Part 1503 – Commenting on Environmental Impact Statements

1. Inviting Comments and Requesting Information and Analyses (§ 1503.1)

APTA concurs with the deletion of this section.

2. Specificity of Comments and Information (§ 1503.3)

APTA supports the proposed modifications and recommends that CEQ invite all comments, without restriction or guidance.

3. Response to Comments (§ 1503.4)

APTA supports the proposed modifications.

H. Proposed Updates to Part 1506 – Other Requirements of NEPA

1. Innovative Approaches to NEPA Reviews (§ 1506.12)

APTA applauds the CEQ for including consideration of innovative approaches that agencies can use to comply with NEPA using procedures modified from the requirements of the regulations to address extreme environmental challenges, which could include, for instance, sea level rise or increased wildfire risk, or bolstering the resilience of infrastructure to increased disaster risk from the effects of climate change; water scarcity; degraded water or air quality; species loss; disproportionate and adverse effects on communities with environmental justice concerns; imminent or reasonably foreseeable loss of historic, cultural, or Tribal resources; and impaired ecosystem health.

J. Proposed Revisions to Part 1508 – Definitions

6. Environmental Justice (§ 1508.1(k))

APTA is supportive of the new definition for “environmental justice” (§ 1508.1(k)) in recognition of the fair treatment of all communities including communities with environmental justice concerns, which often include communities of color, low-income communities, indigenous communities, and Tribal communities. APTA does however suggest that more clarity and precision be provided in the law on what specifically defines an “environmental justice community” to guide agencies and practitioners and avoid undue delays or legal challenges. Currently, “environmental justice communities” are identified using US Census Block Group data, which is quantifiable. APTA encourages CEQ to include more clear direction on the data sources for use in defining “environmental justice communities.”

8. Extraordinary Circumstances (§ 1508.1(m))

APTA is supportive of adding a definition for “extraordinary circumstances” (§ 1508.1(m)) to help clarify when an agency should analyze whether a normally categorically excluded action may have a significant environmental effect. APTA is hopeful that this will reduce the level of analysis that is sometimes required for transit projects where the additional analysis can add unnecessary time and expense to implementation.

11. Joint Lead Agency (§ 1508.1(q))

APTA supports the added definition for “joint lead agency” (§ 1508.1(q)). Given the nature of transit projects, our transit agencies are often in a “joint lead” role with FTA or FRA.

13. Major Federal Action (§ 1508.1(u))

APTA agrees with the proposed “minimal Federal funding” exclusion in § 1508.1(u)(2)(i)(A). Agencies currently evaluate the provision of minimal Federal funding based on specific factual contexts. APTA believes additional procedures, including thresholds for the amount or proportion of Federal funding necessary for an agency action to constitute major Federal action, would increase clarity and predictability while ensuring that Federal agencies do not overlook effects to vital components of the human environment, including the health of children and vulnerable populations, drinking water, communities with environmental justice concerns, and similar considerations.

16. Page (§ 1508.1(z))

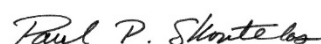
APTA supports adding the clarification that citations do not count towards the page limit.

20. Significant Effects (§ 1508.1(kk))

In response to CEQ’s question in the NPRM, APTA prefers the approach taken in §1501.3(d)(2)(i) over §1508.1(kk) regarding the inclusion of the word “adverse” in the definition. Projects can provide significant beneficial effects which can get lost if the definition only applies to adverse effects. It is sufficient for §1501.3(d)(2)(i) to state that only significant *adverse* effects require preparation of an environmental impact statement.

We appreciate the opportunity to comment and look forward to further collaboration with CEQ in this important endeavor. For additional information, please contact Linda Ford, APTA General Counsel, at (202) 496-4808, or lford@apta.com.

Sincerely yours,



Paul P. Skoutelas
President and CEO