



January 10, 2014

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

RE: Docket No. FTA-2013-0019

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(APTA), I write to provide comments on the Federal Transit Administration's (FTA) Notice of Availability (NOA) on Draft Guidance on the Application of United States Code to Corridor Preservation, published December 11, 2013 at 78 FR 75446.

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 as 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."

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General Comments:

Following are APTA's comments on the proposed guidance, which address two aspects: (a) the proposed limitation on when a recipient may pursue such acquisitions and (b) the appropriate level of NEPA review for such acquisitions.

I. FTA's position that once full-scale NEPA review of a project has begun, property acquisition under 49 USC 5323(q) would no longer be "appropriate" and FTA would therefore not authorize expedited acquisitions at that point appears unsupported.

A. In its discussion of Question 3, "What are some examples of ROW acquisitions that would not be allowed under this guidance?" FTA states in the second paragraph at the bottom of p. 5: ". . . once the NEPA review of a proposed project is initiated, corridor preservation would not be appropriate and FTA would not assist in any such acquisition."

B. FTA's proposed limitation on the timing of permissible acquisitions under 49 USC 5323(q) is inconsistent with the purpose of the statute. FTA's proposed requirement that project proponents seek authorization to assemble or preserve corridor prior to beginning NEPA review will force recipients to purchase property before they have completed sufficient due diligence to determine that the property should be acquired for the project.

C. In addition, allowing acquisitions to go forward once NEPA review has begun is entirely consistent with the practice that FTA has already established in connection with the more limited rail corridor acquisition provision that formerly appeared at 49 USC 5324(c).

D. There is no practical or legal justification for limiting the time within which to seek authorization to acquire property under 49 USC 5323(q). As the NEPA process confirms that property is appropriate to be acquired, recipients should be able to request authorization to preserve or assemble corridor so that development can occur as soon as practicable upon issuance of a CE or ROD. This will provide for the most efficient use of federal and local dollars, both for the acquisition of property and development of facilities, since it will minimize waiting times for FTA approvals, and, therefore, carrying costs.

E. FTA's proposed limitation to authorizing corridor preservation/assembly acquisitions only prior to the commencement of broader NEPA review defeats the purpose of the statute by denying recipients the flexibility afforded in the statute. Although the statute provides that "[t]he Secretary may establish restrictions on such an acquisition as the Secretary determines to be necessary and appropriate," this proposed restriction is neither. There does not appear to be any administrative burden involved with allowing corridor acquisition to occur once NEPA review has begun, particularly since no development on the property can occur until the NEPA process is complete.

II. Categorical Exclusions are the appropriate mechanism for reviewing proposed corridor preservation acquisitions.

A. In response to Question 8] FTA remarks that "In many cases, the ROW being acquired may harbor no environmentally sensitive resource. In these cases, with appropriate

documentation, FTA would consider whether a categorical exclusion (CE) is the appropriate level of NEPA review for the proposed corridor preservation project in accordance with FTA's NEPA regulation at 23 CFR part 771."

B. A CE for acquisition of property for corridor preservation or assembly should be FTA's default approach. No environmental impacts will accrue from the acquisition of property, and no development of such property can occur until separate NEPA review is complete.

C. The existing CE for acquisition of right-of-way at 23 CFR 771.118(d)(4) applies readily to acquisitions under 49 USC 5323(q). Following is the existing regulatory language, which meets the purpose of the revised statute as currently drafted:

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. Examples of such actions include but are not limited to:

(4) – Acquisition of right-of-way. No project development on the acquired right-of-way may proceed until the NEPA process for such project development, including the consideration of alternatives, has been completed.

Accordingly, whether or not a property contains an environmentally sensitive resource is not the issue, since a transfer of property would incur no impacts to such resources. FTA's CE regulations already provide for a more detailed level of review if unusual conditions exist (23 CFR 771.118(b)), so approaching corridor preservation in the context of a CE will be appropriate in the vast majority of circumstances, as the existing regulations already establish.

We appreciate the opportunity to assist FTA in this important endeavor. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarsch@apta.com.

Sincerely yours,



Michael P. Melaniphy
President & CEO