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SouthernEnvironment.org

September 8, 2006

Mr. Amigo R. Wade
Division of Legislative Services
General Assembly Building
910 Capitol Street
Richmond, Virginia 23219

BY ELECTRONIC AND U.S. MAIL

Re: Comments on Draft Revisions to PPTA Implementation Guidelines

The Southern Environmental Law Center would like to provide the following comments on the draft recommended revisions to the guidelines implementing the Public-Private Transportation Act of 1995. The Coalition for Smarter Growth and the Virginia League of Conservation Voters also support these comments.

SELC works throughout Virginia to promote transportation and land use decisions that protect our natural resources and quality of life, and we applaud the effort to improve the guidelines implementing the PPTA. These guidelines are increasingly important with the dramatic rise in the use of the PPTA in recent years. Overall, we believe that the draft recommended revisions are a step in the right direction, and reflect the provisions of Chapter 936 of the 2006 Session and Chapter 1 of the 2006 Special Session. We also support most of the proposed changes in addition to the provisions of these two statutes. However, a number of serious issues remain. In general, although we recognize the need for certain proprietary and public agency information to be kept confidential at certain times, we favor full public disclosure of information pertaining to PPTA proposals as soon as possible since these proposals can have enormous impacts upon the public. We also believe that greater public input and participation is essential to an effective and respected PPTA process, yet the public role in the PPTA process remains limited despite the added requirements in recent legislation. Moreover, additional changes to the Guidelines and the PPTA are needed to address a number of important issues.

I. Changes to the Guidelines Implementing Recent Legislation

Most of the recommended changes to the guidelines are geared to the provisions of the new legislation focusing on the release of information pertaining to PPTA proposals.

The provisions of Chapter 936 of the 2006 Session revamp Virginia Code §2.2-3705.6 (11) pertaining to the release of information submitted by proposers, and add §§56-573.1:1 and 56-575.17 to address the posting of conceptual proposals, public comment, and public access to information concerning these proposals. We believe that, for the most part, these provisions and the recommended guideline changes spurred by these provisions strike an acceptable balance

between private proprietary interests and the public interest in these proposals, and they clarify the opportunities for public input. We suggest a few modifications to these provisions:

- The second sentence of the first paragraph of Section 4.4 of the guidelines (beginning on p. 4, line 28) seems slightly circular with the proposed amendments. We recommend either ending the sentence after the word “provisions” on line 29 or adding “, and are responsible for taking the steps necessary” after the word “provisions.”
- The timeline for posting conceptual proposals (beginning on p. 17, line 4 of the draft) is consistent with the statute. However, information should be posted and “pushed out” to interested parties sooner than 10 working days, and we recommend amending the guidelines to call for more rapid posting.
- We recommend that the second sentence of the section on posting conceptual proposals be strengthened by changing the word “may” to “shall” in line 6 to underscore the desirability of posting by additional means to maximize notice.
- Public comments should be accepted when proposals are posted.
- §56-573.1:1 B states: “The public comment period required by this subsection may include a public hearing in the sole discretion of the responsible public entity.” The draft changes to Section 5.1.6 of the guidelines require the presentation to the Oversight Board to be at a meeting open to the public but do not mention the option of a public hearing. This option should not only be mentioned, but a public hearing should be required, at least for projects where the total costs will exceed \$50 million.

The provisions of Chapter 1 of the 2006 Special Session focus upon the release to the public of materials prepared by or for the public entity. We understand the need to protect the public interest during bargaining but are concerned that these provisions unduly circumscribe public access to important information concerning a proposal. There are two main concerns. The first concern is with the scope of materials covered. The new legislation amends Virginia Code §2.2-3705.6 (11) to add certain materials prepared “prepared by or for the responsible public entity for the evaluation and negotiation of proposals” under certain conditions.

- The materials covered by this exemption should be narrowed – almost any materials arguably could “adversely affect” an entity’s “financial interest or bargaining position” to some extent.
- In addition, although the recommendations track the statute, this portion of the statute should be changed to protect the interests of the public entity alone (and not the private entity) since disclosures affecting private interests are addressed elsewhere.

Our second main concern with Chapter 1 and the recommended guidelines changes pertaining to this legislation is the how long materials will be exempted from disclosure. §56-573.1:1 D and the proposed changes to Section 4.4 of the guidelines tie disclosure to when “an interim agreement or a comprehensive agreement has been entered into *and the process of bargaining of other interim agreements related to the qualifying transportation facility or the process of bargaining of all phases or aspects of the comprehensive agreement is complete*”.

- The italicized language added to the statute and recommended to be added to the guidelines should be narrowed, and the guidelines should clarify this language. Particularly in cases involving multi-phase improvements, there could be numerous other agreements related to the facility (including wholly unrelated proposals involving the same facility) that extend the time for disclosure for years, well beyond the time period needed to protect the public entity’s legitimate interests.

II. Additional Changes

In addition to the recommended revisions pertaining to disclosure issues based on recently passed legislation, the draft proposes some additional changes to the guidelines, particularly to the Checklist for Selection and Evaluation Criteria contained in Appendix D. The majority of these changes are not controversial and improve the guidelines.

- We do, however, think that the language on Public Support should be broadened and include public opposition as well.

A host of other changes are needed to the guidelines and to the statute, set forth in more detail in the comments submitted by the Southern Environmental Law Center on guideline revisions last September (attached) and to address issues raised in a recent comprehensive study of the PPTA.¹ Among other things:

- Proposals should be consistent with transportation planning rather than end-running it, and the guidelines should be amended to help insure that proposals do not sidestep the normal transportation planning process, by at least requiring that any PPTA proposal seeking state and/or federal funds be part of the Six Year Transportation Plan or the transportation plans of the relevant Metropolitan Planning Organization before an Independent Review Panel (IRP) is appointed to review a proposal.
- The role of the Oversight Board needs to be strengthened.
- The relationship between PPTA and NEPA needs to be clarified. Among other things, the guidelines should say that no proposal shall proceed beyond the initial quality control review phase until the NEPA process is complete. At the very least, a comprehensive agreement should not be negotiated or entered into before the NEPA process has concluded.
- The guidelines are almost devoid of any reference to or consideration of the land use impacts of proposals, slighting the critical link between land use and transportation.
- The public participation provisions of the guidelines need to be improved. Among other things, the public should be given an opportunity to weigh in before the Board makes its decision in order to give it an opportunity to respond to the IRP decision and/or written explanation of decision. And the public should have an opportunity to weigh in on any proposed comprehensive agreement before it is executed.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Trip Pollard', with a stylized flourish at the end.

Trip Pollard
Land and Community Project Leader

¹ Jim Regimbal, Fiscal Analytics, “An Analysis of the Evolution of the Public-Private Transportation Act of 1995,” which is available at www.southernenvironment.org.



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September 19, 2005

Innovative Project Delivery Division
Draft PPTA Guideline Comments
Virginia Department of Transportation
1401 East Broad Street
Richmond, Virginia 23219

BY ELECTRONIC AND U.S. MAIL

Re: Comments on Draft PPTA Guidelines

The Southern Environmental Law Center would like to provide the following comments on the draft Public-Private Transportation Act of 1995 Implementation Guidelines.

SELCO works throughout Virginia to promote transportation and land use decisions that protect our natural resources and quality of life, and we applaud the effort to improve the guidelines implementing the PPTA. These guidelines are increasingly important with the dramatic rise in the use of the PPTA in the past few years and the creation of the Transportation Partnership Opportunity Fund earlier this year. Overall, we believe that the draft guidelines are a step in the right direction, and better reflect the more open process that has been used more recently. However, a number of serious issues remain. Some of these issues can be addressed by changes we suggest below to improve the guidelines further. We recognize that other needed changes are beyond the scope of these guidelines and will require action by the General Assembly, including the need to formalize more of the process by including it in the PPTA statute, rather than relying on guidelines and interpretations that can easily be altered.

I. Consistency with Transportation Needs, Goals, and Planning Processes

The PPTA was designed to leverage public sector transportation expenditures by attracting private sector investment and to bring private sector innovations and efficiency to building needed transportation projects. Yet experience with the PPTA, explored in a recent comprehensive study,¹ indicates that it has gone beyond this original intent and is now driving transportation policymaking and accelerating projects of questionable merit.

¹ This issue and other shortcomings of the PPTA are discussed more fully in a study by Jim Regimbal of Fiscal Analytics, "An Analysis of the Evolution of the Public-Private Transportation Act of 1995," which is available at www.southernenvironment.org.

The draft guidelines contain several provisions that may help to address these problems, yet more is needed. First, the PPTA Goals and Principles section of the draft guidelines does a fairly good job of articulating the rationale for the PPTA and its process. Among other things, it includes the statement that proposals “must support the overall transportation goals and priorities of the Commonwealth” (p. 3). This is a necessary objective and requirement, yet it sets too low a threshold. We recommend that it be amended to require proposals to “promote” rather to merely “support” transportation goals and priorities.

Proposals also should be consistent with transportation planning rather than end-running it. The guidelines suggest that proposals must “address the needs identified in the appropriate local, regional, state transportation plan” (part of the quality control criteria on page 15), and that proposals “address the needs of the city, county and regional transportation plans” (part of the proposal evaluation and selection criteria, page 23). It is unclear what it means to “address the needs” identified in the appropriate plan. We suggest amending these provisions to make them more specific and to help insure that proposals do not sidestep the normal transportation planning process, by at least requiring that any PPTA proposal seeking state and/or federal funds be part of the Six Year Transportation Plan or the transportation plans of the relevant Metropolitan Planning Organization before an Independent Review Panel (IRP) is appointed to review a proposal.

The proposed guidelines give the Oversight Board a greater role in the PPTA process. This is definitely a step in the right direction, since, for example, the Commonwealth Transportation Board (in those situations in which it is the Oversight Board) is generally responsible for the location, decision-making, and financing of transportation projects in Virginia. However, the role of the Oversight Board needs to be strengthened further. Two or more members of the Oversight Board should be on the Independent Review Panel and the Board should confirm the appointments to the Panel. Also, the Board’s role largely ends after Phase Three of the process outlined in the draft guidelines, although there is a provision that there be a presentation of “the major business points” of any comprehensive agreement before it is signed (page 18). This provision should be strengthened by requiring the Board to approve the comprehensive agreement after it is negotiated by the agency administrator.

Finally, the PPTA guidelines should state more clearly the relationship between the PPTA and transportation allocation formulas. Currently, there is a single reference at the top of page 7 calling upon the Oversight Board to support future allocations within the limits of “pertinent distribution formulas for State appropriations” if public funds are proposed to be used. Although it is appropriate to recognize the realities of current funding limitations, the PPTA is likely to promote bad investments if it follows a bad allocation formula, and it seems likely that multimodal PPTAs will rarely be proposed or approved. We recognize that the PPTA Implementing Guidelines are not the place to alter current allocation formulas; however, the role of the formulas and the allocation of both state and federal funding should be specified.

II. Consistency with NEPA Alternatives Process

As the recent study of the PPTA found, the Act “has moved from a process of determining the best financing and build alternatives for a consensus-driven project (e.g. Route

28 Interchanges), to a process advancing one alternative into the transportation decision-making process before a recommended transportation solution has been achieved through NEPA or some other process (e.g. I-81 Widening).”² The ongoing experience with the proposed widening of I-81 highlights this problem, where a consortium that proposed to build a particular project has been selected as the vendor to build a project, and negotiations to develop a comprehensive agreement have been underway for over a year, yet—at least in theory and under federal law—alternatives are currently being examined under NEPA and there has been no decision made regarding what project is needed. This puts the cart before the horse and undermines the NEPA alternative process, potentially prejudicing the outcome of the process and undermining public confidence in the process.

The Goals and Policies section of the draft guidelines does state that “Proposals must be in compliance with or specify how it [sic] will satisfy all applicable state and/or federal laws and regulations,” including NEPA. (p. 3). The draft guidelines should go further and say that no proposal shall proceed beyond the initial quality control phase until the NEPA process is complete. At the very least, a comprehensive agreement should not be negotiated or entered into before the NEPA process has concluded. These provisions should be changed or deleted, and similar provisions should be included in the Proposal Evaluation and Selection Criteria section of the guidelines. This is, in fact, a problem throughout the draft, where the Goals and Policies are often not reflected in the Proposal Evaluation and Selection Criteria.³

Similarly, the provisions regarding the ability of the Department to proceed directly to sealed bids or negotiation in Phase Four should be altered. The second bullet says the Department can take such a short cut when “planning, engineering, and environmental review processes are sufficiently advanced to warrant and enable an objective procurement of selection” (p. 17), which could undercut NEPA. Even worse, the short cut to competitive sealed bidding or negotiation is permitted if any of the three conditions stated occur, so there need not even be a finding that environmental review is sufficiently advanced. These provisions should be changed.

III. Consistency with Environmental Protection and Land Use Planning

The seventh Project Characteristic listed in the Proposal Evaluation and Selection Criteria section is entitled “Meets/Exceeds Environmental Standards” (p. 21). This definitely should be one of the evaluation and selection criteria, but it needs to be strengthened. For one thing, the language under this heading is geared solely to meeting environmental standards; it should be broadened to call for projects to exceed minimum standards of environmental protection. In addition to asking if the project meets appropriate environmental standards, this provision should be amended to also ask if a proposal mitigates adverse environmental impacts. The section should also be broadened to ask if the proposal adequately addresses and takes steps to avoid adverse impacts on communities and on historic resources. Similarly, a statement should be added to the Goals and Principles section that states that proposals should indicate the steps that will be taken to minimize any adverse impacts on communities, environmental quality, or historic resources.

² Regimbal Report, p. 27.

³ The Goals and Policies also need to be better reflected in the draft guidelines for the Transportation Partnership Opportunity Fund; particularly in the Evaluation Criteria on page 4.

Further, the guidelines are almost devoid of any reference to or consideration of the land use impacts of proposals, slighting the critical link between land use and transportation. A provision should be added to the Project Characteristics section, for example, that the proposal should explain steps taken to address adverse land use impacts of the project, such as access management controls. In addition, the Proposal Evaluation and Selection Criteria section on Project Compatibility begins with a focus of whether the project is compatible with “appropriate transportation and land use plans” (p. 23). None of the five bullets that follow, however, mention land use. Among other things, a criterion should be added that the project be consistent with local comprehensive plans.

IV. Promoting Multimodal and Intermodal Projects

The Goals and Principles section includes a statement that “Proposals must reflect the Commonwealth's policy of multimodal and intermodal solutions to transportation problems.” (p. 3). We strongly support this statement; however, the remainder of the draft guidelines contains only an occasional passing reference such as in the Project Compatibility subsection of the Proposal Evaluation and Selection Criteria section, which asks in part if the project “improve connections among the transportation modes” and if it addresses the needs of the Multimodal Long Range Plans. (p. 23). More emphasis should be placed on multimodal and intermodal solutions throughout the draft.

V. Financial Role of Applicant and Risk to Taxpayer

As the recent analysis of the PPTA concluded, the Act for the most part has failed to achieve its primary purpose of spurring the investment of private risk capital in transportation projects. Most of the “private” contribution to public-private projects under the Act has been in the form of tolls paid by the public rather than private risk capital. The guidelines do contain some provisions that could help address this problem, such as the statement that proposals “must include specific actions that share cost and/or risk between the parties beyond those commonly obtained through the competitive negotiation process” (p. 2). This statement is followed by seven enumerated items that should be included in proposals, such as direct capital investment. (pp. 2-3). However, this language is only in the Goals and Principles section. These requirements should be repeated or shifted to other parts of the guidelines, such as the Proposal Evaluation and Selection Criteria, and should be given priority among the criteria.

Requiring applicants to have a greater stake in the proposal will also help to address the problem of optimism bias, since projections of toll-road traffic and revenue levels have consistently exceeded reality.⁴ Forecasts have been more accurate when conducted by those with some credit risk. In addition to requiring a larger stake in the proposal, the guidelines should require a proposer to pay for an independent verification of traffic and cost estimates.

The Goals and Principles section also states that proposals “must fully disclose all public sector financial commitments” and “identify the development of user fees or any long-term public sector commitments” (3). This provision may help reduce—or at least better identify—

⁴ Regimbal Report, p. 33.

some of the taxpayer subsidies that have characterized most PPTA projects thus far. A further positive provision is the requirement that proposers include a financial plan with enough detail to show “the full extent of the public sector financing and concession commitments” (p. 12). This provision should be clarified and expanded, though, to require sufficient information to show the full extent of tolls or other costs the public will have to bear. The financing provisions on page 22 should similarly be expanded to focus more on the level and length of tolls that could be imposed on the public, as well as the proposed rate of return to the project proponent.

VI. Non-Compete Clauses

An issue that needs to be addressed in the guidelines is that PPTA toll road proposers have often sought non-compete clauses limiting improvements to other roads or to other transportation modes in a region so that drivers cannot avoid paying a toll by taking an alternative route. The ability of the state to improve its transportation infrastructure must not be compromised. The guidelines should strictly limit the use of non-compete clauses in any PPTA agreement.

VII. Limiting Ex Parte Communication

The final bullet of the Goals and Principles section limits contact by a proposer with the Executive Branch, “including advocacy efforts, to individuals or entities designated in these guidelines and/or any solicitation documents.” (p. 3). We strongly support this provision, which will help improve the integrity of the PPTA process. In addition, we believe similar statements outlining this limitation need to be added to the Proposal Evaluation and Selection Criteria.

VIII. Public Participation and Availability of Information

Public input and participation is essential to an effective and respected PPTA process. A number of changes are needed to improve the public participation provisions of the guidelines:

- Although the Goals and Principles section calls for a “structured opportunity for public participation” (p. 3), it is unclear what this means, and this should be clarified to more clearly state at least a minimum level of public participation that will be required.
- The IRP is to consider any comments from localities or the general public (pp. 6, 16, 17). We support this provision, but it should be clarified to state a minimum time period for public comment.
- It is unclear when public input is to be considered. At one point, the guidelines say that public input is to be considered “upon receipt of proposal” (p. 6) and at another they say the IRP must consider public input “prior to its final recommendations” (p. 17). The latter provision makes more sense; we recommend revising the language on page 6 to be consistent with that on page 17.
- Provisions dealing with IRP consideration of comments from localities (pp. 6, 16) should be expanded to include regional entities (MPOs, Transit Districts, etc.) that may be affected by the proposed project.
- The alternatives for soliciting public input should be increased by amending the guidelines to mandate a traditional public hearing before the IRP makes its decision, at least for projects where the total cost will exceed \$50 million.

- The draft guidelines also state that proposers “may be required to give one or more oral presentation(s) of their proposal to the Independent Review Panel, the Oversight Board and/or the public.” (p. 12). This provision should be changed to state that there “shall” be at least one such presentation, so there is an opportunity for the public to hear the proposal at some point.
- There is no opportunity for public input other than at the IRP stage. This is inadequate. The public should be given an opportunity to weigh in before the Board makes its decision in order to give it an opportunity to respond to the IRP decision and/or written explanation of decision. And the public should have an opportunity to weigh in on any proposed comprehensive agreement before it is executed.

The Goals and Principles also call for transparency and accountability, and say that they “therefore should contain confidential information only when release would clearly and adversely affect the financial interest of the public or the private entity, or the bargaining position of either entity, as determined by the Department in its sole discretion.” (p. 3). This should be rephrased so it is clearer; it seems like these standards govern when a proposal should contain confidential information rather than when information in a proposal should be kept confidential. In addition, the standard for keeping information confidential is too broad and the phrase “or the bargaining position of either entity” should be deleted.⁵

In addition, if a proposer has concerns about proprietary information, a four step process is established in the draft guidelines to permit a determination of confidentiality prior to submission of the proposal. The second step of this process should be changed, though, to state that if there is an oral presentation it is recorded so that a record exists somewhere.

Finally, the second bullet provision on the application of FOIA to the PPTA process on page 13 contains an overly-broad definition of procurement records. Trade secrets are defined in the Virginia Code, balance sheets and financial statements are widely understood, and these materials should remain confidential; however, it is unclear what constitutes “proprietary, commercial” information and these terms should be deleted.

Thank you for your consideration of these comments. We believe that these changes will further improve the PPTA Implementation Guidelines, and we urge you to adopt them. Please contact us if you would like to discuss any of these matters.

Sincerely,

Trip Pollard
Land and Community Project Leader

cc: Mr. Pierce Homer, Secretary of Transportation
Mr. Gregory A. Whirley, Acting Commissioner, Department of Transportation
Ms. Karen J. Rae, Director, Department of Rail and Public Transportation

⁵ A similar standard on page 9 should be narrowed as well.