Testimony of

Mr. Nick Ivanoff
President & CEO
Ammann & Whitney

On Behalf of the
American Road and Transportation Builders Association

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Hearing on the Responsibly and Professionally Invigorating Development Act of 2013

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Chairman Bachus and Ranking Member Cohen, thank you for holding this hearing on the Responsibly and Professionally Invigorating Development (RAPID) Act of 2013.
My name is Nick Ivanoff. I am currently president & CEO of Ammann & Whitney in New York, NY. I also serve as the first vice chairman of the American Road and Transportation Builders Association (ARTBA) and am appearing before you today in that capacity.

ARTBA, now in its 111th year of service, provides federal representation for more than 5,000 members from all sectors of the U.S. transportation construction industry. ARTBA's membership includes private firms and organizations, as well as public agencies that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than $380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA members must directly navigate the regulatory process to deliver transportation improvements. As such, they have first-hand knowledge about specific federal burdens that can and should be alleviated.

Significant progress was made on a bipartisan basis to streamline the permitting and approval process for transportation improvements in the past three reauthorizations of the federal surface transportation program: the Transportation Equity Act for the 21st Century (TEA-21) of 1998; the Safe, Accountable, Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005; and the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012. Each of these measures provides valuable insight about the successes and failures of legislative efforts to reduce delay in the delivery of needed transportation projects without sacrificing regulatory safeguards.

ARTBA recognizes that regulations play a vital role in protecting the public interest in the transportation review and approval process. They provide a sense of predictability and ensure a balance between meeting our nation's transportation needs and protecting vital natural resources. These goals, however, do not have to be in conflict. The most successful transportation streamlining provisions have been process oriented and essentially found a path for regulatory requirements to be fulfilled in a smarter and more efficient manner.

Today's hearing focuses on the RAPID Act, legislation which seeks to take some of the bipartisan mechanisms from TEA-21, SAFETEA-LU and MAP-21 surface transportation bills and expand their use to other areas of federal responsibility. As a champion of many of these project delivery reforms, ARTBA can state first-hand that these reforms have begun, and should continue, to reduce delays in the transportation project delivery review and approval process.

According to a report by the U.S. Government Accountability Office (GAO) prior to the enactment of MAP-21, as many as 200 major steps are involved in developing a transportation project, from the identification of the project need to the start of construction. The same report also shows it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally-funded highway project. This process involves dozens of overlapping state and federal laws, including: the National Environmental Policy Act (NEPA); state NEPA equivalents; wetland permits; endangered species implementation; and clean air conformity.

Both parties recognized that this is simply too long to make the public wait for transportation projects that improve mobility and safety. As such, finding meaningful ways to expedite this process has been a congressional priority for 15 years.

Reducing Project Delay

Reducing the amount of time it takes to build transportation improvements was first addressed in 1998 with the passage of TEA-21. Efforts to reduce delay in this legislation concentrated on establishing concurrent project reviews by different federal agencies. The concept was that multiple reviews done at the same time, as opposed to one after the other, would reduce the amount of overall time it took to get a project approved. While this improvement was a step in the right direction, it had limited impact, as concurrent reviews were discretionary, rather than

mandatory. Thus, it was up to the federal agencies involved in a project whether or not to take advantage of this new benefit.

In 2005, SAFETEA-LU sought to further reform the project delivery process by establishing a wider range of new ways to deliver transportation improvements. Specifically, SAFETEA-LU gave greater authority to the U.S. Department of Transportation (DOT) as "lead agency" during the delivery process, limited the window during which lawsuits could be filed against projects and reformed the process for determining impacts on historical sites and wildlife refuges.

SAFETEA-LU represented a far more expansive reforming of the project delivery process, by addressing the schedule for project reviews and also factors outside of the process itself which contribute to delay. SAFETEA-LU also went further than TEA-21 in that some of its reforms, such as the limitation on lawsuits, were mandatory, as opposed to optional.

The clear lesson between the 1998 and 2005 surface transportation bills was that simply giving federal agencies the ability to complete regulatory reviews in a more efficient manner in no way guarantees that authority would be utilized. As such, SAFETEA-LU took more aggressive steps to influence non-transportation agencies into making transportation project reviews a higher priority.

While SAFETEA-LU's environmental streamlining provisions were a significant step forward from those enacted in TEA-21, the transportation project delivery process remained at an unacceptable pace. As such, MAP-21 has taken project delivery reform even further, with more tools for reducing delay. In addition to building upon the concept of "lead agency" begun in SAFETEA-LU, MAP-21 also includes specific deadlines for permitting decisions as well as a scheduling mechanism to ensure environmental impact statements (EISs) do not take longer than four years. As with SAFETEA-LU, however, it is important to note that many of the reforms made in MAP-21 are discretionary. ARTBA will be closely watching the degree to which states and federal agencies utilize this enhanced authority over the coming years.

Greater Strength for "Lead Agencies"

One of the primary areas the RAPID Act seeks to replicate from SAFETEA-LU and MAP-21 is the granting of increased authority to "lead agencies."

SAFETEA-LU established DOT as the "lead agency" for the environmental review of transportation projects, including "purpose and need" and "range of alternatives" determinations. MAP-21 expanded upon this authority by allowing DOT, as the lead agency for all transportation projects, to name a single modal administration as the lead agency in the case of multi-modal projects. The secretary of transportation also may, within 30 days of the closing of the comment period for a draft EIS, convene a meeting of the lead agency, participating agencies and project sponsor to set a schedule for meeting project deadlines. This new authority allows DOT to be the focal point of the review process as opposed to a peer on equal footing with non-transportation agencies.

The opportunities to reduce the delay caused by inter-agency conflict provided by SAFETEA-LU and MAP-21 in the area of lead agency are significant. However, these reforms will only be

effective to the degree that DOT chooses to take advantage of them. In other words, it is not mandatory that DOT take advantage of any of the benefits of "lead agency" status.

Even as an optional tool, though, "lead agency" status is an important mechanism for improving the project delivery process. By allowing other federal agencies to avail themselves of "lead agency" authority, the RAPID Act would help create a process to reduce delay in project delivery by giving agencies of primary jurisdiction for a project more control over the process itself.

Deadlines on Agency Decisions and Limitations on Filing of Lawsuits

The RAPID Act also seeks to improve project delivery by limiting the time during which lawsuits may be filed against projects. This concept was part of both SAFETEA-LU and MAP-21. SAFETEA-LU set a deadline of 180 days after the issuance of a federal decision on a project for the filing of a lawsuit. MAP-21 shortened this deadline to 150 days. Establishing a firm deadline for lawsuits ensures that any possible litigation is dealt with at the beginning of the delivery process. By addressing conflicts at the start of the delivery process, planners then are able to set schedules without fear of litigation after the deadlines have passed. Further, the deadline allows conflicts to be heard and resolved sooner, rather than later. By extending this provision to non-transportation projects, the RAPID Act takes similar steps to improve project delivery, ensuring that claims worthy of litigation are heard swiftly while at the same time preventing project opponents from using litigation as a tool to endlessly hold-up necessary development.

The RAPID Act also seeks to establish specific deadlines for environmental review documents, including a two-year deadline for EISs and a one-year deadline for environmental assessments (EAs). This would go further than MAP-21. Under MAP-21, project sponsors may request the secretary of transportation to set an expedited schedule for projects undergoing an EIS for more than two years. This schedule would ensure the project's EIS would be completed within two additional years. The RAPID Act's mandatory deadline could provide a greater sense of certainty during the delivery process, as it would be the same for every project.

However, MAP-21 does establish new deadlines not included in the RAPID Act for permitting decisions from federal agencies. If these deadlines are not met, the agencies suffer financial penalties. Thus, for these permitting decisions, MAP-21 has a financial incentive for compliance that the RAPID Act does not. It should be noted, however, that this provision of MAP-21 has not yet been put into effect and it remains to be seen how it will work in practice.

Simplification of the EIS Process and Reduction of Duplicative Work

The RAPID Act also shares MAP-21's goal of reducing the amount of duplicative work in the review and approval process. The RAPID Act would allow for state-level environmental review documents to be used during the federal approval process to avoid duplication of work. MAP-21 similarly allows for the option of using materials in the transportation planning process during NEPA review. Both provisions attempt to reduce delay by allowing, where appropriate, the use of material already created instead of "reinventing the wheel." MAP-21 also encourages the use

of programmatic agreements, spelling out requirements in the beginning of the review and approval process, rather than over a longer period of time. By outlining requirements early in the process, programmatic agreements provide a chance to give transportation planners increased certainty throughout the overall review process.

MAP-21 also simplifies the EIS process, by allowing a lead agency to simply list the corrections between a draft EIS and a final EIS—as opposed to producing an entirely new document. Also, lead agencies, to the maximum extent possible, are directed to combine final EISs and records of decision into a single document. By preventing the needless production of multiple additional documents, MAP-21 significantly reduces the amount of time involved in EISs. Both of these provisions should be considered for inclusion in the RAPID Act.

Delegation of Environmental Review Responsibilities

Under SAFETEA-LU, a pilot program was established allowing five states (Calif., Alaska, Ohio, Texas and Oklahoma) to assume the role of the federal government during the NEPA process. MAP-21 expands the opportunity to participate in the program to all states. States choosing to take part would conduct their own environmental reviews, potentially saving time as a result of not having to go through multiple federal agencies.

Of the five states allowed to participate in the delegation pilot program under SAFETEA-LU, only California chose to do so. While the reason for non-participation thus far by the other states has varied, potential liability and litigation costs were an overriding issue, as the state would also be assuming federal responsibilities for litigation over any project where delegation was used. Still, ARTBA believes delegation of environmental review responsibilities to states could be an important tool to save resources and speed project delivery without sacrificing regulatory safeguards. As such, the subcommittee should explore how delegating federal authority for project reviews to states could be incorporated into the RAPID Act.

Expansion of the Use of Categorical Exclusions (CEs)

Although not addressed by the RAPID Act, one of the most significant changes to existing law in MAP-21 is an expansion of the use of CEs during the environmental review process. A CE is used when projects create minimal impacts on the environment. The difference between a CE and an EA or EIS is multiple years added on to the amount of time it takes to complete a project review. Under MAP-21, many sorts of routine projects are now automatically classified as CEs, these include rehabilitation and repair projects, projects within an existing right-of-way, projects with minimal federal resources and projects undertaken as a result of an emergency situation. Expanding the use of CEs to these additional areas should enable local governments to have more certainty as to when a CE can be used and also allow routine projects to be undertaken without burdensome, unnecessary levels of review.

MAP-21 also calls for the development of CE guidelines for projects being constructed in response to an emergency or natural disaster. To qualify for CE status, such a project must be of the same mode/type and in the same right-of-way as the facility it is replacing and started within two years after the emergency/natural disaster. It should be noted that MAP-21 also offers states additional flexibility in emergency situations by allowing the issuance of special permits to

overweight vehicles delivering relief supplies and allows states to use any federal highway program apportionments other than those dedicated for local governments to replace transportation facilities damaged by a national emergency.

NEPA was never meant to be a statute enabling delay, but rather a vehicle to promote balance. While the centerpiece of such a balancing is the environmental impacts of a project, other factors must be considered as well, such as the economic, safety, and mobility needs of the affected area and how a project or any identified alternative will affect those needs. Allowing certain types of projects to be classified as CEs is a very effective way of reducing delay in the review and approval process, ensuring that projects with minimal environmental impacts are not put through a needlessly long regulatory process. ARTBA suggests the members of the subcommittee examine a greater use of CEs as an additional way to further the goals of the RAPID Act.

Conclusion

The transportation sector has made significant strides in the area of project delivery. Beginning with TEA-21 and continuing through both SAFETEA-LU and MAP-21, members of both parties have worked together to ensure our nation's infrastructure continues to improve at a pace matching the growth of our country. While MAP-21 represents an unprecedented and comprehensive approach to reforming the transportation project delivery process, that does not mean ARTBA will stop looking for further reforms to ensure transportation improvements are advanced as efficiently as possible. The first step in this effort must be to ensure MAP-21 project delivery reforms are implemented in a timely manner that is consistent with the letter and spirit of the new law.

Reforming the environmental review process for transportation projects has been a 15-year evolution that has provided important lessons about what works and what does not work in this area. We commend the authors of the RAPID Act for attempting to use these lessons as a guide for how similar reforms should be structured in other federal areas of responsibility.

Chairman Bachus, Representative Cohen, thank you for allowing me to appear before you today to discuss ARTBA's long history of promoting common sense reforms in the transportation project delivery process. We stand ready to assist the subcommittee as it works to bring comparable reforms to other federal agencies.

I would be happy to answer any questions from you or other members of the subcommittee.