



**Continuing Oversight of Regulatory Impediments to Job Building:
Job Creators Still Buried by Red Tape**

**Testimony of
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Committee on Oversight and Government Reform**

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My name is Paul Yarossi. I am the president of HNTB Holdings, Ltd, a national planning and design firm that has helped create our nations infrastructure network for nearly 100 years. Chairman Issa and Ranking Member Cummings, thank you for holding today's hearing to examine regulatory impediments to job creation and for inviting the American Road and Transportation Builders Association (ARTBA), for which I currently serve as Chairman, to participate.

ARTBA, now in its 110th 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 \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs.

ARTBA members must directly navigate the federal regulatory process to deliver transportation improvements. As such, they have first-hand knowledge about specific regulatory burdens that can and should be alleviated. We have raised many of these issues directly with the U.S. Department of Transportation (DOT) and the U.S. Environmental Protection Agency (EPA).

ARTBA recognizes that regulations play a vital role 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 environmental resources. However, there are areas where regulations have become overbroad and hinder, rather than a help to achieving this balance.

According to a report by the U.S. Government Accountability Office (GAO), 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. This unacceptable delay in delivering transportation improvements was a major focus of the recently enacted surface transportation bill. However, there are further steps that can be taken to lighten the regulation load to improve project delivery times and reduce costs to the public and private sectors.

In an effort to assist the Committee on Oversight and Government Reform with its examination, ARTBA would recommend focusing on the following areas in an effort to restore a proper balance between regulation and job creation:

- **Hours of Service Rules for Commercial Motor Vehicle Operators:** (49 CFR Parts 385, 386, 390, and 395): Throughout various Federal Motor Carrier Safety Administration (FMCSA) comment periods (starting in 2000) addressing the hours of service rule for commercial motor vehicle operators, ARTBA has argued the revised rule should not apply to drivers in the transportation construction industry. In the most recent rulemaking, FMCSA proposed to revise these regulations again, but without contemplating an exemption for the transportation construction industry. In comments submitted to FMCSA and at the present time, ARTBA believes the rationale for this exemption remains strong and worthy of the agency's consideration. The effect would be increased efficiency in the construction of transportation improvement projects, while still preserving the safety of all involved.

Transportation construction industry drivers are not long-haul operators who consistently spend many consecutive hours on the road in a given day. They are short-haul drivers who typically travel less than 20 miles one way. Many of our drivers spend substantial amounts of time off the road during the work day, loading and unloading materials or equipment, which allows for short breaks. Others may be responsible for positioning a piece of mobile equipment at the beginning of the work day, but may not be back behind the wheel until day's end. As such, their daily drive time may be minimal. Generally, transportation construction industry commercial drivers do not operate in a manner that leads to concerns over fatigue, which is the focus of the hours of service rule. Further, we are unaware of any conclusive data to demonstrate that driver fatigue and ancillary health issues are a significant problem in our industry.

Moreover, transportation project owners, the driving public and commercial shippers are expecting more timeliness and efficiency in the delivery of needed transportation

improvements, as well as less disruption to traffic. Transportation construction firms will often work very long hours to complete these projects expeditiously, especially in regions of the country where seasonal weather is a factor. While windows of 10-11 hours of drive time and 13-16 hours of on-duty time may seem adequate, in fact they often disrupt the efficient deployment of professionals and resources on the construction job site, without a demonstrable increase in safety. Ultimately, this is an example of two areas of federal policy—hours of service as administered by FMCSA and accelerated transportation project delivery as promoted by other agencies at U.S. DOT—that are simply in direct conflict.

In recent years, the transportation construction industry and many public-sector transportation agencies have been eager partners in utilizing accelerated construction techniques to increase efficiency, maximize the safety of motorists and workers, and minimize the inconvenience to the traveling public. This often involves total closure of a bridge or stretch of highway so the contractor can undertake an intense effort to replace or renovate it within a very short time frame—sometimes over a single weekend. In recent years, we have seen numerous safe, swift, innovative and high-profile examples of these techniques, acclaimed by public agencies, elected officials, the media and the general public alike. Similarly, natural or man-made disasters may require contractors to be extremely resourceful under even more challenging time frames, in order for them to repair or replace critical infrastructure assets that have been damaged.

The industry is proud to be at the cutting edge of these emerging techniques. However, in these circumstances, the hours of service rule makes the job more difficult by limiting the availability of certain key personnel (none of whom are long-haul truck drivers) to discharge job duties relating to commercial motor vehicles. The rule may also disrupt the timely delivery of materials to the construction site. For these reasons, the rule may increase the project's cost (in terms of additional personnel required) without a requisite enhancement of safety for all concerned.

Therefore, ARTBA continues to push for an exemption relating to the drive-time and on-duty limits for transportation construction industry drivers. Any standard tailored for the transportation construction industry should be based on clear facts that establish the degree to which—if at all—fatigue for these drivers is a factor that could threaten safety on the nation's roadways.

It should be noted that other classes of industries are exempt from the general rule or enjoy certain exceptions, including agriculture and, as we were reminded over the recent holiday, members of the American Pyrotechnics Association involved in transporting explosives for Fourth of July fireworks shows. One would think that, as a national public policy goal, the improved efficiency in the delivery of transportation improvements would rank at least as high as the successful staging of holiday fireworks displays.

A transportation construction industry exemption could be fashioned in a similar manner to those affecting other specific industries, as described. Moreover, the existing rule includes a 24-hour restart provision (as opposed to 34 hours under the general rule) for commercial motor vehicle drivers of construction materials and equipment. Therefore,

the rule already contemplates a unique place for our industry and it would be possible to carefully craft a wider, viable exemption in a similar vein. Such an exemption would address drive time and on-duty limits for our sector while preserving safety.

- **EPA Proposed Guidance on Clean Water Act Jurisdiction:** One of the main reasons for the success of the federal Clean Water Act (CWA) over the past 35 years is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

“It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources...”¹

This structure of shared responsibility between federal and state governments allows states the essential flexibility they need to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, make necessary improvements to their transportation infrastructure. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres of wetlands were lost each year. Subsequent to the CWA's passage, from 1986-1997, the loss rate declined to 58,600 acres per year and between 1998-2004 overall wetland areas increased at a rate of 32,000 acres per year.²

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of “wetlands.”³ This ambiguity is frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of “wetlands” that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA's jurisdiction. As an example of this, ARTBA recommends defining a “wetland” as follows: “If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland.”

The EPA and Corps decision to issue draft guidance May 2, 2011 on this topic as opposed to a formal rulemaking runs contrary to the express aforementioned views of the U.S. Supreme Court. The guidance process shortcuts critical rulemaking requirements, such as: including a response to public comments; providing a rationale and factual basis for agency decision; and producing a final decision that can be judicially reviewed. Put simply, the matter of CWA jurisdiction is too important to be handled through the guidance process. It does not offer the

¹ CWA §101(b).

² *Draft 2007 Report on the Environment: Science*, USEPA, May 2007, available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917>

³ Many states define wetlands as well other types of water resources and prescribe regulatory regimes that are appropriate to each. The federal government tries a one-size fits all approach essentially requiring water resources viewed by states as not being wetlands to be regulated as if they were wetlands under federal law.

regulated community sufficient protection, nor will it solicit the information necessary to be able to properly inform agency decision making.

The guidance expands the universe of waters that will be considered “traditional navigable waters” by including for the first time ever, waters that support one-time recreational use. In addition, the guidance gives new and expanded regulatory status to “interstate waters,” equating them with traditional navigable waters. Further, the guidance makes it easier to find jurisdiction for adjacent wetlands, tributaries and other waters. All of this results in an unprecedented expansion of CWA jurisdiction that is wholly inappropriate for a guidance document. If this level of CWA expansion is truly what EPA and the Corps desire, it should be done through the regulatory process or, alternatively, the agencies should approach Congress and ask for their authority to be expanded.

ARTBA is particularly concerned with the treatment of ditches by the guidance. Roadside ditches are an essential part of any transportation project and contribute to the public health and safety of the nation by dispersing water from roadways. The current regulations say nothing about ditches, but the guidance regulates all roadside ditches that have a channel, have an ordinary high water mark, and can meet one of five characteristics.

In addition, the guidance creates a completely new concept of allowing for “aggregation” of the contributions of all similar waters “*within an entire watershed*,” making it far easier to establish a significant nexus between these small intrastate waters and newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional determination for an entire class of waters within an entire watershed. Such an interpretation of jurisdiction will literally leave no transportation project untouched from federal jurisdiction regardless of its location, as there is no area in the United States not linked to at least one watershed.

One method of establishing clarity would be to develop a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Also, there should be a “de minimis” level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A “de-minimis” standard for impacts would be particularly helpful for transportation projects and allow projects to avoid being delayed by minimal impacts to areas which are non-environmentally sensitive areas.

➤ **EPA National Ambient Air Quality Standards (NAAQS):**

The stated goal of the U.S. EPA’s National Ambient Air Quality Standards (NAAQS) is in part to improve public health. This is a commendable objective and one shared by ARTBA. EPA, however, must be cognizant of the impact more stringent NAAQS would have on other federal initiatives. Nearly 32,000 people die on U.S. highways each year and many federally-funded highway improvements are designed specifically to address safety issues. Imposing stricter NAAQS that threaten future highway improvements could be counterproductive to improving public health. As such, EPA’s recent recommendation to tighten PM standards ignores one public health threat and favors another.

When considering the NAAQS, and any possible changes, it is important to note the EPA's own reports have consistently indicated an overall decline in emissions over the past 30 years. Any tightening of the NAAQS by the EPA would greatly increase the stringency of regulation at a time when existing standards are already resulting in noticeable progress. According to the EPA's own data, since 1980, gross domestic product increased by 127 percent, vehicle miles travelled increased by 96 percent, population increased by 36 percent and energy consumption increased by 19 percent. Indeed, since 1980, the overall amount of aggregate emissions, has decreased by 67 percent⁴. This continuing improvement indicates the current regulations are having their desired effect.

Today's average motor vehicle produces 80 to 90 percent less emissions than it did in 1967.⁵ Clearly, the transportation sector is playing a major role in reducing emissions and is continuing to take steps, independent of the NAAQS, to build on this success by further reducing all forms of air pollution. As better motor vehicle and fuel technologies develop, vehicle emissions will continue to decrease, even as automobile usage increases.

Illustrating this point, major automobile manufacturers announced in 2005 a new generation of vehicles that will be 99 percent cleaner than vehicles produced 30 years ago. This reduction in emissions comes from a four-part strategy that includes cleaning up the fuel as it goes into the vehicle, burning the fuel more precisely in the engine, removing undesirable emissions with a catalyst, and monitoring all of these systems to ensure minimal emission levels. As these and other new technologies are integrated into both on and off road vehicles, emissions levels in all areas should continue to decline.

Moreover, counties need some sense of predictability in order to develop long-range transportation plans to most effectively achieve emissions reduction. Adding new layers of requirements on top of existing standards that have not been fully implemented complicates these efforts. Specifically, existing projects deemed to be in compliance with the Clean Air Act (CAA) when first undertaken could be thrown out of compliance once new standards are approved, exposing these projects to costly, time-consuming litigation.

To fully understand the effects of increasing the NAAQS on the transportation sector and the problems counties face when the standards are tightened, the transportation conformity process as a whole also needs to be examined. The problem with the existing conformity process is caused by the fact that some have tried to turn conformity into an exact science, when it is not. Rather, conformity findings are based on assumptions and "modeling of future events," not often reflecting reality. Very few conformity lapses occur because a region has a major clean air problem. They occur because one of the parties involved cannot meet a particular deadline. Thus, the conformity process has become a top-heavy bureaucratic exercise that puts more emphasis on "crossing the t's

⁴ U.S. EPA, Comparison of Growth Areas and Emissions, 1980-2010, available at: <http://www.epa.gov/airtrends/aqtrends.html#comparison>. The six principal or "criteria" air pollutants referred to by the EPA are nitrogen dioxide, ozone, sulfur dioxide, particulate matter, carbon monoxide and lead.

⁵ United States Department of Transportation, "Transportation Air Quality Selected Facts and Figures." (1999).

and dotting the i's" than on engaging the public in true transportation planning that is good for the environment and the mobility of a region's population.

The problems with the conformity process are amplified by transportation plans and the State Implementation Plans (SIPs) with which they are intended to conform often being out of sync with one another. Largely, this is due to transportation plans having very long planning horizons requiring frequent updates, while most air quality plans have very short planning horizons and are updated infrequently. As a result, many of the planning assumptions used for conformity determinations of transportation plans and programs are not consistent with the assumptions used in the air quality planning process to establish emissions budgets and determine appropriate control measures.

In other words, because transportation plans must use the most recent air quality data, a perceived increase in emissions and possible conformity lapse can occur simply because the numbers of models relied on in the transportation plan differ from those in the air quality plan—not because an area's air quality has changed. The more EPA changes the NAAQS, the greater the conformity problems become. Changes in the NAAQS, on a completely different timeline than conformity schedules, can set off a chain reaction forcing counties to re-examine deadlines that had been set years prior and result in significant additional regulatory requirements. These types of complications need to be weighed against the potential gains of increasing air quality standards.

ARTBA is also concerned by EPA's proposal to place air quality monitors in "near roadway" locations. The monitors, which determine CAA compliance for counties, must be placed in areas where they can get a reading indicative of emissions levels for the area as a whole. Emissions are naturally going to be higher in some areas of a county and lower in others. For example, a monitor placed by the side of a well-travelled highway is most likely going to get a higher reading for emissions than one placed by a little used residential street. Also, when taking readings from air quality monitors, it should be realized the monitors cannot account for the aforementioned emissions reductions due to take place in the near future, such as reductions from newer, cleaner trucks and busses coming on-line. Thus, even if there is a violation, the steps to remedy may already be underway.

A major key to further emissions reductions is to deal directly with traffic congestion. Additional emissions reductions from the transportation sector will be achieved by relieving congestion through greater production of transportation improvements across all modal sectors. Vehicles operating at highway speeds unimpeded by congestion are far more efficient—and therefore generally emit far less—than vehicles caught in stop-and-go traffic. Thus, the worse traffic congestion becomes, the worse the emissions from on-road vehicles will be.

The simple fact is that if America is to meet its mobility and environmental challenges during this century, we must invest in a host of transportation solutions, including new capacity for both highways and mass transit systems. And not create a false choice between needed investments in both areas.

Unfortunately, traffic congestion has grown drastically during the past quarter-century, as vehicle travel has greatly outpaced new highway capacity, which has only increased six percent in the last 30 years. Failure to alleviate congested areas already produces specific bottlenecks that cause 50 percent of total congestion on the nation's freeways. In 2004, a study of the nation's most severely congested highways highlighted the reality that significant reductions in emissions require a reduction in vehicle time traveled, not vehicle miles traveled. The study concluded that modest improvements to traffic flow at 233 bottlenecks would reduce carbon dioxide emissions by as much as 77 percent and conserve more than 40 billion gallons of fuel over a 20-year period.⁶ These fuel savings translate directly into lower emissions.

While the proponents of a modal conflict will argue the solution to this national dilemma is to get people out of their cars, there is no evidence that this approach is either achievable or even desired by the American public. The preferred alternative should be to advance all modes of transportation improvement. In a nation as large as ours, different areas will require different transportation strategies.

Certainly new roadway capacity is not a viable solution in some communities, but for others it is appropriate. Given the nation's vast transportation challenges, federal policy should not constrain potential solutions available to communities. To do so would have serious economic consequences. For example, the truck traffic statistics cited earlier do not represent discretionary decisions—the fact of the matter is that for certain products, locations and time schedules, frequent shipments by truck are the only feasible alternative.

The implementation of ever-tightening standards will hamper the nation's abilities to both preserve and improve its transportation infrastructure. In the future, when NAAQS are examined, retention of the current standards should always be presented as a viable option. This would enable the nation to continue to make progress towards cleaner air while at the same time continue to pursue desperately needed transportation improvements vital to our economy, public health and safety.

- **EPA Potential Regulation of Coal Ash:** ARTBA members routinely use coal ash to produce concrete, an essential material in transportation improvement projects. Non-hazardous forms of asbestos are also commonly used in roads and other transportation projects. Therefore, the June 21, 2010 proposed rule regarding the disposal of coal ash and its potential classification as a hazardous material are alarming to the transportation construction industry.

The transportation sector's use of coal ash is truly an environmental success story. According to EPA's own data, coal ash accounts for between 15 and 30 percent of the

⁶ Unclogging America's Arteries, Effective Relief for Highway, Cambridge Systematics, Inc., (February 2004) available at: <http://trpc.org/regionalplanning/transportation/projects/Documents/Smart%20Corridors/americanuseralliancestudy.pdf>.

cement in concrete. Further, EPA has noted using coal ash at this level results in annual greenhouse gas reductions in concrete production of between 12.5 and 25 million tons and an annual reduction in oil consumption of between 26.8 and 53.6 million barrels. Also, EPA has stated coal ash “generally makes concrete stronger and more durable,” which “reduc[es] the need for future cement manufacturing and corresponding avoided emissions and energy use.”

In 2008 alone, more than 12.5 million tons of coal ash was used in the production of concrete. Perhaps the most recognizable use is in Minnesota, where coal-ash was used in the concrete for the new I-35 bridge replacement.

In more general terms, EPA properly acknowledged the use of coal ash “an important function in road building, replacing material that would otherwise need to be replaced such as aggregate or clay.” EPA also acknowledged in many cases coal ash use leads to “better road performance.” In terms of safety, EPA has stated coal ash is used to “replace fine aggregate that would otherwise need to be used to prevent skidding.” Thus, with respect to both specific and general benefits, coal ash is a significant asset for both the production and maintenance of transportation improvements.

In order to preserve all of the attributes recycled coal ash has provided to the transportation sector and the environment, EPA should be prohibited from regulating coal ash as a “hazardous waste.” On at least four separate occasions in 1988, 1993, 1999 and 2000 EPA has found coal ash did not warrant regulation as a “hazardous waste.” There has been no new scientific information since the last time this issue was broached to warrant reaching a different conclusion now.

Every element of the transportation construction process, from the suppliers of concrete to the contractors who handle construction materials would be affected by the stigma of a “hazardous waste” label for coal ash. Specifically, because of the increased expense of handling a “hazardous waste,” the producers of coal ash would be resistant to continue providing it to concrete manufacturers.

Another potentially unintended consequence of categorizing coal ash as a “hazardous substance” would be the invalidation of already existing guidance on coal ash use. Specifically, EPA, FHWA and the U.S. Department of Energy collaborated with the regulated community in 2005 to craft guidance on the appropriate use of coal ash in highway construction. This guidance has contributed to all of the aforementioned benefits from coal ash use. A reclassification of coal ash as a “hazardous substance” will undercut this guidance, as it was not designed to address “hazardous substances,” and leave the regulated community without any direction in coal ash use.

As further evidence of the importance of coal ash to the nation’s transportation infrastructure, ARTBA released a study late last year entitled “The Economic Impacts of Prohibiting Coal Fly Ash Use in Transportation Infrastructure Construction.” The study concludes the cost to build roads, runways and bridges would increase by an estimated \$104.6 billion over the next 20 years if coal fly ash is no longer available as a transportation construction building material.

This breaks down to a \$5.23 billion annual direct cost, including a \$2.5 billion increase in the price of materials and an additional \$2.73 billion in pavement and bridge repair work due to the shorter pavement and service life of other portland cement blends. To put this \$5.23 billion figure in perspective, it is almost \$2 billion per year more than the federal government currently invests in the Airport Improvement Program and about 13 percent of the federal government's annual total annual aid to the states for highway and bridge improvements.

The ARTBA study also explores how states would have to forego the potential additional benefits and savings of as much as \$65.4 billion over 20 years derived from using fly ash in new, high performance concrete pavements.

The ARTBA study's analysis utilized bid tab data from 48 states and Washington, D.C., collected and organized by Oman Systems, Inc., in Nashville, Tenn. The same data are used by the Federal Highway Administration (FHWA) to calculate the National Highway Construction Cost Index. It also used transportation construction market data from the U.S. Census Bureau, FHWA's National Bridge Inventory and Highway Performance Monitoring System and conducted extensive surveys and personal interviews with state transportation department officials and fly ash supply company executives to determine state market shares and penetrations.

EPA should not be permitted to unnecessarily increase the cost of sorely needed transportation improvements by designating coal ash as a "hazardous substance."

It should be noted that the Committee's examination of regulatory burdens is particularly well-timed as it coincides with the recent completion of the long-overdue reauthorization of the federal surface transportation program. Members of both parties have termed the new law as a "jobs bill." Allowing this much needed legislation to be followed by continued implementation of overly burdensome federal regulations is at best two steps forward and one step back. Providing resources and important policy reforms to help states advance critical transportation improvements while making it more difficult for transportation projects to move forward actually undermines the goal behind the surface transportation bill.

It is ironic that members of both chambers and parties have made streamlining the environmental review and approval process for transportation projects a priority of the transportation bill yet few talk about how excessive regulatory burdens can disrupt the very process they are trying to make more effective. Essentially, while any streamlining reforms in the reauthorization bill could save years during the project delivery process, each of the regulations highlighted today could severely restrict the opportunities states have to take advantage of these reforms.

ARTBA thanks the Committee on Oversight and Government Reform for initiating this examination of regulatory issues negatively impacting jobs and the economy. We stand ready to assist the Committee in continuing to ensure federal regulations operate in the most effective, least burdensome manner to achieve their stated goals.

