ARTBA American Road & Transportation Builders Association

TRANSPORTATION ★★★★★★★ MAKES AMERICA ★★★★ WORK!

June 1, 2012

The Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah Cummings, Ranking Member
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan, Chairman
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Dennis Kucinich, Ranking Member
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending
2157 Rayburn House Office Building
Washington, DC 20515

Dear Representatives:

Thank you for your May 16 letter requesting information on existing and proposed federal regulations that negatively impact job growth.

The American Road & Transportation Builders Association (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 with the U.S. Department of Transportation (DOT) and the U.S. Environmental Protection Agency (EPA).

PRIDE in Transportation Construction

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In an effort to assist the Committee on Oversight and Government Reform with its examination of regulations negatively impacting jobs and the economy, ARTBA would recommend focusing on the following areas:

- **DOT's Disadvantaged Business Enterprise (DBE) Program (49 CFR Part 26)**: The DBE program's impact is significant enough that ARTBA believes there are some overarching areas of concern to highlight as part of the current regulatory review process.

  First, the DBE program's rules often diverge from the transportation construction Industry's customary business practices, thus undermining efforts to provide the most efficient, cost-effective projects for the taxpayers. At the same time, however, these aspects of the DBE program have little or no demonstrable benefit for the disadvantaged businesses for whose benefit the program was created – and, many would argue, actually harm the competitiveness of emerging DBE firms. One example is when a prime contractor is also a major materials supplier in a given area. This is a fairly common situation in that many contractors are vertically integrated. Since local ordinances or other environmental regulations often limit the number of plants or quarries in a given region, it may be the case that the prime contractor is one of the few suppliers in a geographic area for those construction materials. Normally, a DBE subcontractor would not hesitate to purchase materials from the prime contractor if it made business sense and the price was right.

  Yet the DBE program, as currently implemented, does not allow the cost of those materials to be counted towards the project's DBE goal. Therefore, even if the prime contractor is offering a favorable price and sales terms, there is a strong incentive for the DBE subcontractor to turn away from what may be the most efficient option, which benefits the project's owner and the taxpayers, and instead purchase more expensive materials to help meet the DBE goal.

  DOT did address this issue in its most recent DBE rulemaking and indicated it did not intend to change this interpretation of the rule. So, again, this is an example of a significant divergence between the DBE program's implementation and the most efficient practices of the industry.

  An improved interpretation of the rule would permit construction materials obtained by DBEs to be counted for DBE credit regardless of their non-DBE source. In turn, this would allow DBE firms to operate in the marketplace in the same manner as non-DBE firms, removing a constraint from obtaining the best price and source in their purchasing. Expanding the market choices to include purchase of materials from a prime contractor or its affiliates simply bolsters competition, improves business practices and likely lowers project costs.

  With many states attempting to implement ambitious DBE program goals, lack of capacity becomes a major obstacle for prime contractors to surmount as they seek to build the best project possible while complying with a challenging array of regulations. These transportation builders are also most willing to help build capacity in the local DBE community in an appropriate manner. In fact, many ARTBA chapters offer

discounted memberships to emerging DBE firms, and hold regular events so prime contractors and DBEs can meet and explore future business relationships. However, the program is often implemented in a way to discourage the assistance of prime contractors. Obviously, sham DBEs and "fronts" are unacceptable, but there is often severe disincentive for the prime contractors to assist – appropriately – in encouraging the success of these fledgling businesses. We see this as undermining the core purpose of the DBE program and hope to correct this inconsistency. We would like to see DBE regulations and their implementation strike a balance that enables established industry professionals to provide appropriate assistance to emerging firms, hopefully helping them to achieve sustained success in their business.

- **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, so that their daily drive time is actually minimal. Generally, transportation construction industry commercial drivers do not operate in a manner that leads to concerns over fatigue that are 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 construction of these projects, 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.

  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 in order to allow the contractor to undertake an intense effort to replace or renovate it within a very short time frame – sometimes over a single weekend. 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 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 reiterates its desire 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 lead to an increase in deaths and injuries 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. A transportation construction industry exemption could be fashioned in a similar manner. 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. So 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.

- **Buy America** (23 CFR 635.410 and 49 CFR 661): Federal Buy America regulations require a domestic manufacturing process for all steel or iron products that are permanently incorporated in federal-aid highway or transit construction projects. While ARTBA and its members support efforts to preserve American jobs in the steel industry, we are concerned about the current interpretation of these regulations in some states. In those cases, the cost, both in terms of time and resources, of meeting documentation and certification requirements far outstrip the value of many of these products, which literally include "nuts and bolts." This approach appears contrary to the transportation construction industry's collective efforts with federal and state agencies to build projects as efficiently, quickly and safely as possible. Thus, ARTBA advocates for reasonable interpretation of Buy America regulations by the Federal Highway Administration and Federal Transit Administration so projects can move forward in a cost-effective and timely manner.

- **EPA Proposed Guidance on Clean Water Act Jurisdiction**: There has been a good deal of discussion recently about clarifying the jurisdiction of the CWA with substantive perspectives on all sides. Any attempts to do so undertaken by the EPA should be done

through a formal rulemaking and not via agency guidance. Issuing guidance bypasses public participation requirements offered through the rulemaking process and would deny the regulated community an opportunity to participate in the discussion of where jurisdiction under the CWA begins and ends. Also, EPA should recognize the difference between clarifying jurisdiction and expanding it. The agency's focus should be on the former without accomplishing the latter.

- **EPA and the Army Corps of Engineers (Corps) Wetland Permitting Process**: ARTBA has repeatedly stated the involvement of multiple agencies (including EPA) in wetlands regulation only hinders the overall efforts of the Corps' permitting program. One of the principal problems that has plagued the 404 program is indecision and inaction, with no benefit for the environment. Congress, in the National Defense Authorization Act for Fiscal Year 2004 authorized only one agency, the Corps, to issue 404 permitting program regulations. This direction should be continued. Thus, it should be the sole responsibility of the Corps to take the lead and build a stronger, more predictable compensatory mitigation program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit applicants. ARTBA continues to believe the Corps should be the principal agency administering the 404 wetlands regulatory program and the EPA should remove itself from the permitting process save for instances where the Corps specifically requests EPA's assistance.

  Should the EPA not be removed from the permitting process, there are other suggestions which ARTBA believes could lead to improvements:

  1) Many ARTBA members are directly involved in tremendously successful mitigation efforts as part of the projects they construct. From a federal regulatory perspective, mitigation should be declared as the preferred, first-choice method of wetlands restoration and development. The permitting process should be altered to require mitigation banking, provided that it is advantageous to both the environment and project sponsors. Federal mitigation regulations should place a premium on flexibility and not be bogged down by requirements which offer no additional environmental protection and could lead to further delay of desperately needed transportation infrastructure projects .

  2) Classifying wetlands based on their ecological function and value would allow greater protection for the most valuable wetlands while also creating flexibility for projects which impact wetlands that are considered to have little or no value. Many states currently have wetlands-classification type programs—and these programs should continue to exist, but a federal classification system is needed to expand this practice nationwide. This classification system should also set clear ecological guidelines for determining if an area is not a wetland. Any federal wetlands classification system, however, should not preclude a state from developing their own wetlands classification methods. Further, there should also 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.

3) Currently, there is no set time limit for permitting decisions. When project planners apply for permits, they have no sense of when the process is going to be completed. Strict, enforceable timelines for permitting decisions should be set. An acceptable time span would be between 60 and 120 days to allow EPA and the Corps enough time to evaluate the permit without causing a substantial delay to the project—unless EPA, the Corps and the applicant agree on another timeline acceptable to both parties. If a decision is not made on a permit within the given timeframe, then the project should be allowed to proceed. Time limits will add a sense of predictability to the permitting process and allow project planners to more accurately plan out timelines for environmental review. Deadlines for environmental reviews are employed in a variety of federal transportation programs with success. Further, in instances where a permit is not approved, EPA and the Corps should provide a detailed list of requirements to the applicant which would result in approval upon resubmission.

4) Changes to the Nationwide Permit Program (NWP) have compromised its effectiveness by allowing far fewer projects to be able to qualify for nationwide permits. The acreage limit under which an activity would qualify for the NWP program, as opposed to requiring an individual permit has been reduced from three acres to one-half an acre. This forces many more applications for individual permits and increases the Corps' workload. Also, greater mandatory notification requirements serving no purpose and increasing delay have been added to NWP's for projects with minor impacts. The acreage limitations and notification requirements recently placed on the use of NWPs should be rescinded.

- **<u>EPA Stormwater Regulations</u>**: Currently, many projects effectively use Best Management Practices (BMPs) to address stormwater concerns in a manner that effectively balances environmental protection without exacerbating already arduous delays. In discussing how to approach the regulation of stormwater runoff, ARTBA has expressed, and continues to express a strong preference for maximum flexibility, allowing states to continue the use of BMPs as opposed to more stringent "one size fits all" approached relying on predetermined numeric standards. While EPA's most recent stormwater regulations have decided to forego such numeric standards at present, they are still researching the possibility for future permitting requirements.

  BMPs allow the flexibility necessary for projects to be able to select stormwater control techniques best suited to a projects particular circumstances. Every transportation project faces unique challenges based on a number of factors, including where actual construction is taking place, the size of the project and climate issues such as rainfall amounts during the time construction is being performed. A numeric standard applied to all projects, however, would not be able to take such differences into account. Transportation projects in areas with heavy rainfall would be held to the same effluent

limitation standards as projects in dry, arid regions. Such a "one-size-fits-all" approach to stormwater permitting will constrain and delay transportation projects because it does not account for the individual circumstances of each project.

In one specific instance, an ARTBA member company had a project on a fairly large site (70 to 100 acres). It started out as a $4,000,000 project. During the project, there was an "El Niño" weather cycle bringing a great deal of rain every day. The project's customer could not afford to wait until all of the BMPs treated the water and needed the contractor to dry out the site as fast as possible so construction could continue. Since the contract granted weather days but the water needed to be processed faster, the contractor developed an Alternative Treatment System (ATS, which would be required on all projects to meet the EPA's numeric standards) using settlement ponds, flocking, filtering, pumping, handling, etc. The contractor agreed to do this work on an audited Time and Material basis. The final cost and change order resulted in over $1,000,000 in additional charges to the project.

The ARTBA contractor involved in this job noted that just about every job in that area had the same problem that summer but none of them had the ATS expense that this contractor incurred. In considering ATSs, ARTBA is concerned the implementation of numeric stormwater discharge standards will add substantial additional costs which could put many contractors out of business due to the high cost of purchasing ATS equipment necessary for compliance. Further, contractors who pay these additional costs are most assuredly going to pass them along resulting in all owners, particularly public ones, paying more for their projects. This is especially troublesome for transportation projects where needs vastly outweigh available resources.

Another problem with numeric stormwater standards is the lack of availability of treatment equipment necessary to meet the standards. According to ARTBA contractor members, it could take years until there is enough equipment to fully implement numeric discharge standards. Meanwhile, many projects will be in limbo while waiting for this equipment to become available. Currently, there are only a relatively small number of vendors who sell the necessary equipment. Implementing a numeric discharge standard would essentially place transportation planners as well as the states and localities overseeing transportation projects at the economic mercy of this small group of treatment equipment vendors, at least in the short term.

Also, there are liability issues arising from the imposition of a numeric standard. If a project temporarily violates the proposed numeric standard, it would open the door for litigation. EPA's proposed rule does not specify who would bear the brunt of any such litigation. Would the project planner be responsible, the contractor in charge of the job, or the sub-contractor (if there is one) assigned to deal with stormwater run-off? Ultimately, the proposed rule provides another avenue for project opponents to use litigation as a means to delay and disrupt transportation improvements. As soon as there is a violation of the numeric standard, a "rush to the courthouse door" would likely be triggered, potentially resulting in additional years of delay to affected projects.

Future stormwater measures affecting transportation projects should allow for the level of flexibility needed to make sure stormwater issues can be addressed in a manner suited to the individual nature of the project in question. Further, the issues of cost and liability need to be taken into account to ensure additional measures do not result in additional years of delay and unnecessary costs to affected projects.

- **EPA's Clean Air Act (CAA) Transportation Conformity Process**: The problem with the existing conformity process is caused by the fact that some have tried to turn these determinations into an exact science, when they are 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 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 CAA's 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 lapses 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.

  Although not specifically mentioned in the proposed rule, ARTBA would also like to comment on the notion of project-specific, or "hot-spot" conformity analysis, which has surfaced in recent transportation conformity discussions. "Hot-spot" analysis ignores a fundamental truth—the building block for SIPs and conformity is at the county level. In urbanized areas, the key test is whether emissions from the long-range transportation plan or the TIP, *in their entirety*, stay within the emissions budget set in the SIP. In these cases, there is no project level conformity and appropriately so. The difference in emissions between build and no build alternatives is usually quite small. Therefore, the impact of any single project on those area-wide emissions totals is likely to be very slight, and could be positive or negative. Nevertheless, if these projects are part of a conforming long-range transportation plan and TIP, moving forward with them regardless of their air quality impact, would *not* compromise the legal commitment of the mobile sector to meet its SIP goals and achieve the attainment of air quality standards.

  ARTBA recommends the following changes to the transportation conformity process:

1) The air quality modeling process used in determining conformity levels needs to be reformed to utilize the most recent air quality data available, rather than prediction-based models. This would ensure conformity determinations are no longer based on assumptions and "modeling of future events," not often reflecting reality.

2) Emissions budgets must have a built in level of flexibility (preferably a 10 to 15 percent cushion) for counties. This will prevent the conformity process from degrading into a "race for the courthouse door" every time a local or regional government experiences a momentary up-tick in emissions levels.

3) "Hot-spot," or project-level, conformity should be repealed. This practice provides a false picture of air quality levels by focusing on temporary emissions caused by specific transportation construction projects. Finished projects, however, often lead to an overall decline in emissions levels for the county in question.

- **EPA National Ambient Air Quality Standards (NAAQS)**: Local officials need some sense of predictability in order to develop long-range transportation plans to achieve emissions reduction. Counties are focusing on addressing existing NAAQS and any further changes to the standards will undermine these efforts. If counties are to effectively comply with current NAAQS, additional requirements will only serve to hamper these efforts by opening the door to possible litigation and sanctions potentially resulting in the loss of federal funding for transportation improvement projects. In the future, EPA should consider counties' progress towards current NAAQS before setting new ones as well as consider the cost of implementing new standards including the loss of opportunities, including transportation improvements.

  When considering ozone NAAQS, and any possible changes, it is important to note the EPA's own reports have indicated an overall decline in ozone pollution. As EPA reported last year, between 1990 and 2008, gross domestic product increased 64 percent, vehicle miles traveled (VMT) increased 36 percent, energy consumption increased 19 percent, and U.S. population grew by 22 percent. During the same time period, total emissions of the six principal air pollutants dropped by 41 percent.[1] In addition, there has been a decline in the overall concentration level of criteria pollutants for ozone (1-Hour) of 25 percent in the past 20 years.[2] This progress has occurred both prior to and since the implementation of the existing ozone NAAQS. Furthermore, this continuing improvement indicates the current standard is working, and there is no need for any modification.

  Ground level ozone (as opposed to the ozone in the upper atmosphere or "ozone layer," which occurs naturally) is formed by the combination of the oxides of nitrogen (NOx) and volatile organic compounds (VOCs) in sunlight. NOx and VOCs are referred to as

[1] U.S. EPA, Our Nation's Air, Status and Trends through 2008 (February 2010).
[2] United States Environmental Protection Agency, National Trends in Ozone Levels, Ozone Air Quality 1980-2008, available at http://www.epa.gov/air/airtrends/ozone.html.

the "criteria pollutants" for ozone. As levels of NOx and VOCs decline, so will the amount of harmful ground level ozone. Since 1990, NOx levels have decreased by 36 percent and VOC levels have decreased by 35 percent[3]. This decline in pollution is being heavily driven by improvements in the transportation sector. Specifically, NOx emissions from motor vehicle emissions have gone down 41 percent since 1970, while VOC emissions from motor vehicles have declined by 73 percent. Clearly, the transportation community is playing a vital role in reducing ozone levels.

Further, the EPA must consider reductions in ozone levels will occur as a direct result of existing regulations and those yet to take effect. Dramatic improvements in ozone levels will continue to come from implementation of regulations enacted in 2007 on sulfur levels in gasoline, as well as measures affecting heavy-duty diesel engines and highway vehicles. In fact, in 2006, regulations took effect requiring refiners to meet a 30-parts per million (ppm) average sulfur level for gasoline with a cap of 80-ppm. This fuel enables vehicles to use emissions controls which are projected to reduce tailpipe emissions of NOx by 77 percent from passenger cars and as much as 95 percent for pickup trucks, vans and sports utility vehicles. When fully implemented by 2030, these regulations are expected to have the effect of removing 164 million cars from our nation's roadways.[4]

In addition, EPA also will continue implementation of its rule to make heavy-duty trucks and buses run cleaner. Beginning with the 2007 model year, pollution from heavy-duty highway vehicles has been reduced by more than 90 percent[5], resulting in an additional reduction in NOx levels of 2.6 million tons per year. In addition, EPA also recently implemented its rule to regulate emissions from nonroad diesel engines by integrating engine and fuel controls as a system to gain the greatest emission reductions. Engine manufacturers are expected to produce engines with advanced emission-control technologies similar to those upcoming for highway trucks and buses. Exhaust emissions from these engines are estimated to decrease by more than 90 percent.[6] This is estimated to result in an additional reduction of 738 thousand tons of NOx per year.

Turning to the NAAQS for oxides of nitrogen (NOx), before deciding whether or not to tighten existing NOx regulations, EPA must take account of what has already been achieved as well as improvements which have been approved but not yet fully implemented, including the aforementioned regulatory efforts. When considering NOx standards, and any possible changes, it is important to note the EPA's own reports have indicated an overall decline in NOx pollution with significant additional decreases yet to be realized.

As EPA's own data reflects, between 1990 and 2008, gross domestic product increased 64 percent, vehicle miles traveled (VMT) increased 36 percent, energy consumption increased 19 percent, and U.S. population grew by 22 percent. During the same time

[3] Id.
[4] United States Federal Highway Administration, *Transportation Air Quality Selected Facts and Figures*, p. 36 (2006).
[5] EPA Heavy Duty Highway Diesel Program, information available at http://www.epa.gov/otaq/highway-diesel/index.htm.
[6] EPA Clean Air Nonroad Diesel Rule, information available at http://www.epa.gov/nonroad-diesel/2004fr/420f04032.htm.

period, total emissions of the six principal air pollutants dropped by 41 percent. Specifically, there has been a decline in NOx levels of 35 percent and furthermore, in 2008 the EPA classified the number of people living in counties where NOx levels were exceeded at "0" and concluded "all recorded concentrations were well below the level of the annual standard."[7] This continuing improvement indicates the current standard is working, and there is no need for any modification.

The transportation community is playing an essential role in contributing to the decline in NOx. Specifically, NOx emissions from motor vehicle emissions have, according to EPA data, declined nearly 4 million tons between 1990 and 2008. Today's average motor vehicle produces 80 to 90 percent less emissions than it did in 1967.[8] As better motor vehicle and fuel technologies develop, vehicle emissions will continue to go down with increased automobile usage.

Finally, EPA must also consider how it will determine the placement of additional NOx monitors. The monitors, which determine NOx compliance for counties, must be placed in areas where they can get a reading indicative of NOx 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 NOx emissions than one placed by a little used residential street.

Also, when taking readings from NOx monitors, it should be realized that the monitors cannot account for the aforementioned NOx reductions due to take place in the near future, such as reductions from newer, cleaner trucks and busses being placed on-line. Thus, even if there is a violation, the steps to remedy it are already underway.

- **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.

  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 cement in concrete. Further, EPA has noted using coal ash at this level results in annual greenhouse gas (GHG) 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.

[7] U.S. EPA, Our Nation's Air, Status and Trends through 2008 (February 2010).
[8] United States Department of Transportation, "Transportation Air Quality Selected Facts and Figures." (1999).

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, in terms of both specific and general benefits, coal ash is a significant benefit for both the production and maintenance of transportation improvements.

In order to preserve all of the benefits 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 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 invalidate 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 work.

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.

At a time when Congress is moving towards reauthorizing the nation's surface transportation program, ARTBA urges EPA to heed the results of our study. EPA should not be permitted to unnecessarily increase the cost of sorely needed transportation improvements which improve public health and safety by designating coal ash as a "hazardous substance."

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.

Sincerely,

T. Peter Ruane

T. Peter Ruane
President & C.E.O