ARTBA American Road & Transportation Builders Association

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

April 4, 2011

Improving Regulations Docket
United States Environmental Protection Agency
EPA Docket Center
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Docket No. EPA-HQ-OA-2011-0159, EPA's Plan for Retrospective Review Under Executive Order 13563, Program Area: Toxic Substances

On behalf of the 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer the following comments for consideration as part of the U.S. Environmental Protection Agency's (EPA's) plan for retrospective review under Executive Order 13563 noticed in the February 23 issue of the *Federal Register*. The following comments deal specifically with issues relating to toxic substances.

ARTBA's membership includes public agencies and private firms and organizations 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 undertake a variety of activities that are directly impacted by EPA's CWA regulations. ARTBA's private sector members rely heavily on contracts funded under these titles to plan, design, construct and provide supplies for transportation improvement projects. This document represents the collective view of our member companies and organizations.

ARTBA commends President Obama for initiating this review process by issuing a January 18 Executive Order noting that all regulatory efforts must "protect public welfare, safety and our environment while promoting economic growth, innovation competitiveness and job creation." Specifically, the President's Executive Order notes agencies must tailor regulations to "impose the least burden on society." With this in mind, EPA should be cognizant of the impact its regulations have on other federal initiatives, such as effective transportation improvements. Regulations do not operate in a vacuum. A regulation promulgated and enforced by one agency, such as the EPA in one policy arena, often affects the ability to comply with other regulations issued by other agencies in completely different policy arenas.

For example, while EPA operates primarily in the environmental realm, its regulations can impact ARTBA members' ability to construct transportation improvements which are necessary from a public health and safety perspective. These effects should be considered by EPA as nearly 34,000 people die on U.S. highways each year and many federally-funded highway

improvements are designed specifically to address this issue, but under many situations these interconnections are not recognized.

In the area of toxic substances regulation, ARTBA wishes to focus on two specific issues: coal ash and non-hazardous forms of asbestos. 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. Specific details on the beneficial use of coal ash in transportation improvements have been reported from a variety of states, including:

- Colorado, where the use of coal ash in 2008 reduced GHG emissions by 19,500 tons;
- Indiana, where the state department of transportation is able to use an average of 42 percent of the coal ash generated in the state on recycled construction material;
- North Carolina, where the use of coal-ash is saving $5 to $10 million annually on transportation projects;
- Texas, where the annual savings from coal ash is estimated at $16 million;
- And, perhaps most recognizably, in Minnesota, where coal-ash was used in the concrete for the new I-35 bridge replacement.

In more general terms, EPA properly acknowledges 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 acknowledges in many cases coal ash use leads to "better road performance." In terms of safety, EPA states 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, ARTBA urges EPA not to regulate 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, the Federal Highway Administration 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.

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In regards to asbestos, ARTBA is concerned about the type of analysis used by the EPA to define what is and is not the subject of regulation. While there is always a desire to improve protection in this area, such improvements must be done in a way that does not confuse harmful asbestos with safe minerals that have a wide variety of uses, including the production of the asphalt and concrete necessary to produce and maintain our nation's transportation infrastructure.

Specifically, ARTBA is concerned future regulation of asbestos, if not done properly, could fail to differentiate it from chemically similar, but structurally different, minerals known as "non-asbestiform rocks." Non-asbestiform rocks are aggregate materials essential to the creation of concrete and asphalt. These minerals have never been shown to trigger the health effects attributed to asbestos.

As such, classifying non-asbestform rock as asbestos would inappropriately open the transportation industry and existing transportation projects to significant asbestos-related lawsuits. The potential effects of such unwarranted litigation could undercut federal, state and local efforts to maintain and improve the nation's highway and bridge network. Further, road structures already completed in many parts of the country where non-asbestiform rock was used in construction could be classified as "contaminated" with asbestos until proven otherwise. Finally, there would be environmental effects as well, as the recycling of construction materials with non-asbestiform rock, which currently enables millions of tons of such materials to be reused annually, would likely be stopped for fear of potential legal exposure.

ARTBA urges the EPA to recognize the distinctions between asbestos and non-asbestiform rock when promulgating future regulations concerning asbestos. Explicitly separating these minerals will protect public safety and avoid another unnecessary impediment to meeting the nation's surface transportation needs.

ARTBA thanks the EPA for initiating this regulatory review and urges EPA to draw upon the President's Executive Order and ensure that regulations operate in the most effective, least burdensome manner to achieve their stated goals.

Sincerely,

T. Peter Ruane
President & C.E.O