

April 13, 2011

U.S. Small Business Administration
Office of the General Counsel
409 Third Street, SW
Washington, D.C. 20416

Re: Docket No. SBA-2011-0012, Reducing Regulatory Burden; Retrospective Review Under Executive Order 13653

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. Small Business Administration's (SBA's) plan for reducing regulatory burden and retrospective review under Executive Order 13563 noticed in the March 14 issue of the *Federal Register*.

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. Small businesses make up many of ARTBA's member firms, including those in the contracting, planning and design and materials and services arenas.

ARTBA members undertake a variety of activities that are directly impacted by a variety of regulations from federal agencies, including the U.S. Department of Transportation (DOT) and the U.S. Environmental Protection Agency (EPA). 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.

According to the latest economic census conducted by the U.S. Bureau of the Census, there are just over 11,000 business establishments that are involved in transportation construction. Most are small businesses. More than 90 percent have less than 100 employees, and the average is less than 40.

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, SBA should direct its attention towards the impact federal 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 in one policy arena, often affects the ability to comply with other regulations issued by other agencies in completely different policy arenas.



Generally, SBA should examine regulations with an eye towards streamlining the review and approval process for transportation improvements. Transportation infrastructure projects must navigate through a time-consuming and complex planning process. 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 and regulations.

This level of delay is unacceptable, and has a direct impact on the productivity of our nation's small businesses. Small businesses wishing to participate in transportation construction often find themselves besieged by permitting requirements and under the threat of litigation. While these projects are mired in red tape, small businesses dependent upon our nation's transportation infrastructure suffer unreasonable delays from denied and desperately needed system improvements.

While ARTBA realizes the responsibility for reforming the regulations highlighted in our statement lies primarily with the federal agencies from which they were promulgated, we wish to highlight them for SBA in order to demonstrate the obstacles they present for small businesses. If handled appropriately, improving the delivery of transportation projects would increase the efficiency of the transportation network, protect the environment, and ensure small businesses who depend on an efficient transportation network receive the full benefit of the user fee-financed transportation system.

Specific EPA regulations the SBA should examine include:

- **Transportation conformity** – The problem with the existing conformity process, which ensures county transportation plans conform with Clean Air Act (CAA) standards, 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. Also, project-level “hot-spot” conformity analyses provide 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. As a result, counties can be unnecessarily thrown out of compliance with the CAA, endangering federal transportation funds upon which small businesses rely to keep their employees working.
- **Setting 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 and, as with transportation conformity, result in the loss of federal funding for transportation improvement projects. In the future, decisions to alter NAAQS should

consider counties' progress to date as well as the cost of implementation including the loss of opportunities, including transportation improvements.

- **Clean Water Act Jurisdiction** – There has been a good deal of discussion recently about clarifying the jurisdiction of the Clean Water Act (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, any examination of CWA jurisdiction should recognize the difference between clarifying jurisdiction and expanding it. Unnecessary expansion of the CWA could result in increased permitting burdens for small businesses.
- **Clean Water Act Permitting** – Reforming the wetlands permitting program is an opportunity to reduce needless project delays. One method which could help here is the establishment of firm deadlines for permitting decisions. Another improvement would be a wetlands classification system, with the most sensitive wetlands receiving greater regulatory protections than those of lower ecological value. Second, regulations should prevent EPA from retroactively vetoing Clean Water Act permits unless a law has been broken. Retroactively vetoing permits upon which small businesses depend undermines the entire permitting process by placing permit holders in a “regulatory limbo” not knowing whether a permit valid today will be valid tomorrow.
- **Stormwater Regulations** – Stormwater regulations affect all small businesses involved in transportation development. 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.

In addition, ARTBA would ask SBA to examine the following regulations promulgated by DOT:

- **Disadvantaged Business Enterprise (DBE) Program** (49 CFR Part 26) – The DBE program's primary objective is ensuring greater participation by disadvantaged businesses in federal-aid procurement under the purview of DOT, particularly relating to the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration. These disadvantaged businesses are an important component of the small business community. However, with many states attempting to implement ambitious DBE program goals, lack of DBE 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 DBE 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. 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.

Unfortunately, the DBE program regulations 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, these aspects of the DBE program have little or no demonstrable benefit for the disadvantaged businesses for whose benefit the program was created, or can even work to the emerging business' detriment. Within the federal-aid highway program, one example is when a prime contractor is also a major materials supplier. 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. This can make the DBE subcontractor less competitive as a result.

- **Hours of Service Rule for Commercial Motor Vehicle Operators** (49 CFR Parts 385, 386, 390, and 395) – The hours of service rule, administered by the Federal Motor Carrier Safety Administration, puts limits on when and for long commercial motor vehicle operators may drive. The rule is intended to maximize safety on the roadways and is formulated in the context of fatigue and health risks relating to long haul truck drivers.

While the hours of service rule applies to drivers in the transportation construction industry, these 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.

At the same time, transportation project owners, the driving public and commercial shippers expect contractors to build projects in a timely and efficient manner, with minimal 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. More and more, the industry is also using innovative

techniques to replace a bridge or roadway by working intensively in a concentrated period of time, like over a single weekend. While windows of 10-11 hours of drive time and 13-16 hours of on-duty time may seem adequate in other cases, in fact those limitations can disrupt the efficient deployment of professionals and resources on the construction job site, without a demonstrable increase in safety.

For all of these reasons, ARTBA continues to advocate for a transportation construction industry exemption to the hours of service rule, such as that which other industries, like agriculture, currently enjoy. Because the transportation construction industry and its suppliers include many small businesses, the rule's effect on the competitiveness and efficiency of these businesses can be significant and is worthwhile for the SBA to examine.

Use of Proprietary Products in Highway Construction (23 CFR Part 635.411) - Federal regulations should provide maximum incentive for small and emerging businesses to innovate. However, this Federal Highway Administration (FHWA) rule imposes broad restrictions against the use of proprietary methods, materials, and equipment on federal-aid highway projects. For years, ARTBA has written about, and discussed with policy makers, the negative impacts of this regulation with respect to the development and timely deployment of innovations in highway construction. The time has come to act and revise the regulation to allow states the flexibility and authority to use cutting edge technologies that will improve the safety, durability, and performance of our road and bridge network.

ARTBA has joined with other national organizations, including the American Association of State Highway & Transportation Officials (AASHTO), in adopting policy statements and recommendations outlining shared concerns with this regulation and urging specific reforms. Those reforms would allow states to utilize proprietary products on federal-aid projects based on the documented analysis and professional judgment of qualified state transportation officials that the products will contribute to goals identified in the state's strategic highway safety plan and that no equally suitable alternative item exists. That remains ARTBA's recommendation, and we urge FHWA to modify the regulation accordingly.

We believe 23 CFR 635.411, as currently written and implemented, is a serious obstacle to innovation in the highway marketplace. Of particular interest to SBA is its effect on emerging businesses seeking to bring innovative solutions to that market. We appreciate this opportunity to reiterate ARTBA's support for reform of the regulation, as outlined above.

ARTBA thanks the SBA for initiating this regulatory review and urges SBA 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 without unnecessarily hindering the productivity of our nation's small businesses.

Sincerely,

A handwritten signature in black ink that reads "T. Peter Ruane". The signature is written in a cursive style with a large, stylized initial "T".

T. Peter Ruane
President & C.E.O