

January 10, 2017

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Ave. SE
West Building
Ground Floor
Room W12-140
Washington, DC 20590-0001

Re: Docket No. DOT-OST-2016-0239; Updates to U.S. Department of Transportation's NEPA Implementing Procedures.

On behalf of the 6,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer comments on the recent proposed updates to the U.S. Department of Transportation's (U.S. DOT) National Environmental Policy Act (NEPA) implementing procedures.

ARTBA's membership includes private and public sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA members undertake a variety of activities that are subject to the environmental review and approval process in the normal course of their business operations. ARTBA's public sector members adopt, approve, or fund transportation plans, programs, or projects. ARTBA's private sector members plan, design, construct and provide supplies for these federal transportation improvement projects. This document represents the collective views of our 6,000 member companies and organizations.

Significant progress was made on a bipartisan basis to streamline the permitting and approval process for transportation improvements in the past three reauthorizations of the federal surface transportation program: the Transportation Equity Act for the 21st Century (TEA-21) of 1998; the Safe, Accountable, Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005; and the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012. ARTBA urges the U.S. DOT to continue this progress through the continued implementation NEPA reforms in a manner consistent with the bipartisan goal of reducing unnecessary delay in transportation construction projects.

ARTBA recognizes that regulations play a vital role in protecting the public interest in the transportation review and approval process. They provide a sense of predictability and ensure a balance between meeting our nation's transportation needs and protecting vital natural resources.



These goals, however, do not have to be in conflict. The most successful transportation streamlining provisions have been process oriented and essentially found a path for regulatory requirements to be fulfilled in a smarter and more efficient manner.

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

The U.S. DOT NEPA Implementation Order deals with a number of reforms to the environmental review and approval process for transportation projects. ARTBA would direct the U.S. DOT's attention to the following areas:

- **Expansion of the Use of Categorical Exclusions (CE)**: A CE is used when projects create minimal impacts on the environment. The difference between a CE and an environmental assessment (EA) or environmental impact statement (EIS) is multiple years added on to the amount of time it takes to complete a project review. Under MAP-21 and the FAST Act many sorts of routine projects have been automatically classified as CEs, these include rehabilitation and repair projects, projects within an existing right-of-way, projects with minimal federal resources and projects undertaken as a result of an emergency situation. Expanding the use of CEs to these additional areas has enabled local governments to have more certainty as to when a CE can be used and also allowed routine projects to be undertaken without burdensome, unnecessary levels of review.

The U.S. DOT should continue to aggressively use CEs as a means of reviewing routine transportation improvement projects. ARTBA is concerned that U.S. DOT's NEPA Implementation Order expands the list of 'extraordinary circumstances' which could prevent a CE from being used to review a project. This runs counter to the intent of both MAP-21 and the FAST Act. Both pieces of legislation sought to expand, not restrict, the use of CEs. Even if the U.S. DOT chooses not to utilize the expanded list of 'extraordinary circumstances' to exempt a project from qualifying for a CE, the list opens up the possibility of time-consuming litigation by project opponents who could challenge CE status for no other reason than to cause delay.

- **Continuation of the U.S. DOT as Lead Agency on Transportation Projects**: SAFETEA-LU established the U.S. DOT as the "lead agency" for the environmental review of transportation projects, including "purpose and need" and "range of alternatives" determinations. MAP-21 expanded upon this authority by allowing DOT, as the lead agency for all transportation projects, to name a single modal administration as the lead agency in the case of multi-modal projects. The secretary of transportation also may, within 30 days of the closing of the comment period for a draft EIS, convene a meeting of the lead agency, participating agencies and project sponsor to set a schedule for meeting project deadlines. This new authority allowed the U.S. DOT to be the focal

point of the review process, as opposed to a peer on equal footing with non-transportation agencies.

The opportunities to reduce the delay caused by inter-agency conflict provided by SAFETEA-LU and MAP-21 in the area of lead agency are significant. However, these reforms are only effective to the degree that the U.S. DOT chooses to take advantage of them. In other words, it is not mandatory that the agency take advantage of any of the benefits of “lead agency” status. ARTBA urges the U.S. DOT to frequently utilize “lead agency” in a manner that allows the agency’s expertise in transportation projects to reduce the delay frequently caused by inter-agency scheduling conflicts and obligations.

- **Agency Overreach Beyond the Scope of NEPA, MAP-21 and the FAST Act:** Soon after the passage of MAP-21, ARTBA convened a “Trans 2020 Task Force” of industry experts and authored a series of papers outlining recommendations for MAP-21’s implementation. On the subject of performance measures, ARTBA stated in its August 28, 2013 submission to the U.S. DOT:

“Focus on the goals enumerated in the law. The authors of MAP-21 had the opportunity to include a host of external goals such as livability, reduction of transportation-related greenhouse gas emissions, reduction of reliance on foreign oil, adaptation to the effects of climate change, public health, housing, land-use patterns and air quality in the planning and performance process.”

“Accordingly, the U.S. Department of Transportation (DOT) should focus on implementing the goals and standards as spelled out in MAP-21. While there may be stakeholders and perspectives that did not achieve their full objectives in the legislative process, we urge you to resist any recommendations to re-open the delicate compromise achieved in MAP-21 through over interpretation of the measure’s performance process. The simple fact is that few interest groups, including ARTBA, are entirely satisfied with every aspect of major legislation. That reality should in no way tarnish MAP-21’s meaningful policy reforms. Further, the common ground found during the legislative process is one of the main reasons MAP-21 was among the few significant pieces of legislation to secure broad bipartisan support during the 112th Congress.”

Unfortunately, sections of the U.S. DOT’s NEPA Implementation Order appear to ignore ARTBA’s warning in this proposed rule by injecting new policy objectives that are outside the scope of MAP-21, the FAST Act and NEPA itself. Specifically, the NEPA Implementation Order directs modal agencies to “preserve the natural countryside” and “consider historical divides created by previous transportation decisions” and “preserve, restore and enhance environmental quality to the maximum extent practicable.” None of these requirements have any relation to the NEPA reforms of MAP-21 and the FAST Act nor do they fall under the authority of NEPA itself. U.S. DOT’s NEPA Implementation order should adhere to the boundaries of NEPA itself and the reforms introduced in MAP-21 and the FAST Act. In order to accomplish this, ARTBA urges the U.S. DOT to remove the phrases cited above.

- **Insufficient Public Comment Period:** ARTBA feels the 21-day comment period for this rule was not sufficient to achieve necessary involvement with the regulated community. The NEPA Implementation Order is a 40-page document that governs how U.S. DOT will review and approve transportation projects under NEPA and will impact all parties who work to construct transportation improvements. Documents of far less complexity routinely receive at least a 30 to 45 day comment period.

NEPA was never meant to be a statute enabling delay, but rather a vehicle to promote balance. While the centerpiece of such a balancing is the environmental impacts of a project, other factors must be considered as well, such as the economic, safety, and mobility needs of the affected area and how a project or any identified alternative will affect those needs. U.S. DOT should strive to implement NEPA in a manner consistent with the bipartisan goal of reducing unnecessary delay in the transportation project review and approval process. The proposed NEPA Implementation Order should be amended in order to ensure U.S. DOT accomplishes this goal.

Sincerely,



T. Peter Ruane
President & C.E.O