



Testimony of

**David S. Zachry
President & CEO
Zachry Corporation**

**On Behalf of the
American Road and Transportation Builders
Association**

**Submitted to the
United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Transportation and Public Assets**

**Hearing on Moving Ahead for Progress in the 21st Century
(MAP-21) Program Consolidation**

December 8, 2015

Chairman Mica and Ranking Member Duckworth, thank you for holding this hearing on Moving Ahead for Progress in the 21st Century (MAP-21) Program Consolidation. My name is David Zachry. I am currently President & CEO of the Zachry Corporation in San Antonio, Texas. I also serve as Chairman of the American Road and Transportation Builders Association (ARTBA) and am appearing before you today in that capacity.

ARTBA, now in its 113th year of service, provides federal representation for more than 6,000 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 \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA members must directly navigate the regulatory process to deliver transportation improvements. As such, they have first-hand knowledge about specific federal burdens that can and should be alleviated.

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. Each of these measures provides valuable insight about the successes and failures of legislative efforts to reduce delay in the delivery of needed transportation projects without sacrificing regulatory safeguards.

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.

Today's hearing focuses on the implementation of the latest round of project delivery reforms under MAP-21. As a champion of many of these project delivery reforms, ARTBA can state first-hand that these reforms have begun, and should continue, to reduce delays in the transportation project delivery process.

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.

Both political parties recognized that this is simply too long to make the public wait for transportation projects that improve mobility and safety. As such, finding meaningful ways to expedite this process has been a congressional priority for more than 15 years.

Reducing Project Delay

Reducing the amount of time it takes to build transportation improvements was first addressed in 1998 with the passage of TEA-21. Efforts to reduce delay in this legislation concentrated on establishing concurrent project reviews by different federal agencies. The concept was that multiple reviews done at the same time, as opposed to one after the other, would reduce the amount of overall time it took to get a project approved. While this improvement was a step in the right direction, it had limited impact, as concurrent reviews were discretionary, rather than mandatory. Thus, it was up to the federal agencies involved in a project whether or not to take advantage of this new benefit.

In 2005, SAFETEA-LU sought to further reform the project delivery process by establishing a wider range of new ways to deliver transportation improvements. Specifically, SAFETEA-LU gave greater authority to the U.S. Department of Transportation (U.S. DOT) as “lead agency” during the delivery process, limited the window during which lawsuits could be filed against projects, and reformed the process for determining impacts on historical sites and wildlife refuges.

SAFETEA-LU represented a far more expansive reforming of the project delivery process, by addressing the schedule for project reviews and also factors outside of the process itself which contribute to delay. SAFETEA-LU also went further than TEA-21 in that some of its reforms, such as the limitation on lawsuits, were mandatory, as opposed to optional.

The clear lesson between the 1998 and 2005 surface transportation bills was that simply giving federal agencies the ability to complete regulatory reviews in a more efficient manner in no way guarantees that authority would be utilized. As such, SAFETEA-LU took more aggressive steps to influence non-transportation agencies into making transportation project reviews a higher priority.

While SAFETEA-LU’s environmental streamlining provisions were a significant step forward from those enacted in TEA-21, the transportation project delivery process remained at an unacceptable pace. As such, MAP-21 took project delivery reform even further, with more tools for reducing delay. In addition to building upon the concept of “lead agency” begun in SAFETEA-LU, MAP-21 also included specific deadlines for permitting decisions as well as a scheduling mechanism to ensure environmental impact statements (EISs) do not take longer than four years. As with SAFETEA-LU, however, it is important to note that many of the reforms made in MAP-21 were discretionary. The more state and federal agencies choose to use MAP-21’s reforms, the greater the impact will be.

Expansion of the Use of Categorical Exclusions (CEs)

One of the most significant changes to existing law in MAP-21 was an expansion of the use of CEs during the environmental review process. A CE is used when projects create minimal impacts on the environment. The difference between a CE and an EA or EIS is multiple years added on to the amount of time it takes to complete a project review. Under MAP-21, many sorts of routine projects were 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 enabled local governments to have more certainty as to when a CE can be used and also allows routine projects to be undertaken without burdensome, unnecessary levels of review.

MAP-21 also called for the development of CE guidelines for projects being constructed in response to an emergency or natural disaster. To qualify for CE status, such a project must be of the same mode/type and in the same right-of-way as the facility it is replacing and started within two years after the emergency/natural disaster. It should be noted that MAP-21 also offers states additional flexibility in emergency situations by allowing the issuance of special permits to

overweight vehicles delivering relief supplies and allows states to use any federal highway program apportionments other than those dedicated for local governments to replace transportation facilities damaged by a national emergency.

Only three months after the emergency/natural disaster CE was promulgated by the U.S. Department of Transportation (U.S. DOT), it was put to use in May 2013 when a truck hit the I-5 Skagit River Bridge in Mount Vernon, Washington. Application of the CE allowed repairs to the bridge to begin swiftly, and correctly recognized that in times of emergency, the focus should be on responding as promptly and effectively as possible. Specifically, in this instance repairs began within 24 hours after the accident and the bridge was re-opened to traffic in just 27 days and fully repaired within 115 days.

MAP-21 also created a CE for projects within an existing right-of-way. This is a logical application of the CE process, as an environmental review would have already had to be completed in order for the right-of-way to be obtained. Thus, requiring a second environmental review for a project within that right of way is duplicative and adds no additional environmental protection. The Texas Department of Transportation (TXDOT) noted a Houston widening project undertaken prior to MAP-21 involving a widening of a four-lane road. Although no additional right-of-way was required, an EA was deemed necessary. The EA took three years and costed \$100,000. Under MAP-21, that same project would qualify for a CE and be completed in a fraction of the time and cost.

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. Allowing certain types of projects to be classified as CEs is a very effective way of reducing delay in the review and approval process, ensuring that projects with minimal environmental impacts are not put through a needlessly long regulatory process.

Delegation of Environmental Review Responsibilities

Under SAFETEA-LU, a pilot program was established allowing five states (California, Alaska, Ohio, Texas and Oklahoma) to assume the role of the federal government during the NEPA process. MAP-21 expands the opportunity to participate in the program to all states. States choosing to take part would conduct their own environmental reviews, potentially saving time as a result of not having to go through multiple federal agencies.

Of the five states allowed to participate in the delegation pilot program under SAFETEA-LU, only California chose to do so and was approved in 2006. Under MAP-21, Texas was approved to participate in December of 2014. Also, Ohio recently applied to participate in the delegation program in May of 2015, and both Utah and Florida have indicated interest in applying for the program in the near future.

According to an October 30 fact sheet published by the California Department of Transportation, there have been significant reductions in delay preparing environmental review documents. Specifically, when compared to documents prepared prior to the delegation program:

- Draft EAs have seen a median time savings of 10.7 months;
- Final EAs and Findings of No Significant Impact (FONSI) have seen a median time savings of 11.5 months;
- Draft EISs have seen a median time savings of 22.9 months, and;
- Final EISs have seen a median time savings of 130.8 months—nearly 11 years!

While the Texas delegation program has not been in place as long as California's, TXDOT has estimated an average time savings of 25 percent. The Ohio Department of Transportation estimates similar time savings once Ohio's delegation program is established, as well as an estimated cost savings of \$45 million.

Additionally, MAP-21 allows states to also assume control of just the CE process as opposed to full environmental reviews. TXDOT has experienced a significant reduction in the time it takes to review CEs through this partial delegation program. Prior to assuming responsibility for CE review, the process took about one year. Under the program, the average time is now less than 45 days. Further, the documentation requirements have been reduced. CEs which used to span more than 100 pages are now two-page checklists. Utah has also assumed control of the CE process under MAP-21 and is now completing CEs in as little as six days for routine projects. Finally, Alaska has also assumed responsibility for CEs and is experiencing favorable results from the program.

While the reason for non-participation thus far by the other states has varied, potential liability and litigation costs were an overriding issue, as the state would also be assuming federal responsibilities for litigation over any project where delegation was used. Still, ARTBA believes delegation of environmental review responsibilities to states could be an important tool to save resources and speed project delivery without sacrificing regulatory safeguards.

Greater Strength for “Lead Agencies”

SAFETEA-LU established 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.

Even as an optional tool, though, “lead agency” status is an important mechanism for improving the project delivery process.

Construction Manager/General Contractor Contracting

MAP-21 also included a provision allowing the use of a “two-phased” contract – more commonly known as construction manager/general contractor (CM/GC) – on federal-aid highway projects. Under such an arrangement, a contracting agency retains a construction firm to serve as an advisor on constructability and other design issues during the first phase, then that firm has the first opportunity to agree on a price and build the project during the second phase. While the Federal Highway Administration (FHWA) had approved such projects on an experimental basis in the past, MAP-21 essentially mainstreamed the CM/GC contracting method so that the FHWA need not give special approval. In fact, as part of its Every Day Counts Program, the FHWA has been actively promoting the use of CM/GC by state DOTs in recent years.

While ARTBA, FHWA and state departments of transportation have conducted an ongoing dialogue about CM/GC-related issues, our association does not have an official policy on the topic, nor are we in a position to endorse its use. We believe that is best left to the individual state departments of transportation in close consultation with the contracting community. It should be noted that ARTBA's contractor member-firms embrace innovation and are always eager to advance the efficiency of transportation improvement projects, whether in terms of cost, time or safety. However, while ARTBA's membership includes firms, agencies and individuals representing all sectors of transportation construction, relatively few of them have first-hand familiarity with the use of CM/GC on highway projects. Accordingly, ARTBA has undertaken a member education effort on this method in recent years.

Earlier this year, the FHWA published a Notice of Proposed Rulemaking as it works to implement the MAP-21 CM/GC provision. ARTBA submitted detailed comments based on the input of our members who do have experience with CM/GC on highway projects. Issues we raised in the comments included transparency and objectivity of the selection process, proper risk allocation, timeliness of decision-making by the public agency, maximizing open competition in the procurement process and recognizing the uniqueness of the heavy-highway construction sector in formulating this new rule.

ARTBA and our members look forward to continued dialogue with the FHWA, state departments of transportation and other groups on the use of CM/GC. We will also be working with our members and chapters to make sure they have the information and material necessary to discuss the issue with their state and local transportation agencies should there be interest in employing CM/GC in their respective markets.

Additional MAP-21 Project Delivery Reforms

MAP-21 also improved project delivery by limiting the time during which lawsuits may be filed against projects. This concept was also part of SAFETEA-LU. SAFETEA-LU set a deadline of 180 days after the issuance of a federal decision on a project for the filing of a lawsuit. MAP-21 shortened this deadline to 150 days. Establishing a firm deadline for lawsuits ensures that any possible litigation is dealt with at the beginning of the delivery process. By addressing conflicts

early, planners then are able to set schedules without fear of litigation after the deadlines have passed. Further, the deadline allows conflicts to be heard and resolved sooner, rather than later.

Under MAP-21, project sponsors were allowed to request the Secretary of Transportation to set an expedited schedule for projects undergoing an EIS for more than two years. This schedule would ensure the project's EIS would be completed within two additional years. MAP-21 also establishes new deadlines for permitting decisions from federal agencies. If these deadlines are not met, the agencies suffer financial penalties. It should be noted, however, that these provisions of MAP-21 have not yet been utilized and it remains to be seen how they would work in practice.

Still More Work to Do

Additionally, many of MAP-21's reforms still need to be implemented through the regulatory process. MAP-21 is somewhat unique in that it provided 22-months of funding, but contained enough new policy in the project delivery arena to warrant multiple years of new regulations. Thus, MAP-21 will continue to be implemented even after, hopefully, the recent enactment of the "Fixing America's Surface Transportation" (FAST) Act.

In some cases, the U.S. DOT has missed deadlines established by MAP-21. An example of this can be found in Section 1503 of the law. Under this section, U.S. DOT is required to make available to the public, via website, annual federal transportation expenditure data on a state by state basis. This tool has the potential to provide a real, tangible connection to taxpayers explaining exactly how the money they send to the federal government is spent on projects in their states and neighborhoods. MAP-21 required U.S. DOT to annually update committees in the House and Senate on these efforts. However, more than a year after the expiration of MAP-21's funding, these efforts have yet to be started.

Unfortunately, a number of the MAP-21's project reforms mentioned do not have many examples upon which to evaluate their success. A major reason for this is the uncertainty over long-term federal funding. Federal funds, on average, support 52 percent of annual state department of transportation capital outlays for highway and bridge projects. Uncertainty surrounding the short and long-term fiscal condition of the Highway Trust Fund continues to have a significant effect on state transportation planning.

Following the expiration of MAP-21 at the end of September 2014, Congress put in place a series of short-term program extensions and temporary Highway Trust Fund revenue patches to keep highway and public transportation funds flowing to the states. This period of uncertainty led DOT officials in 35 states to publicly declare their state programs would be impacted by a shutdown of the federal surface transportation funds. In fact, eight states have delayed or canceled projects valued at \$1.90 billion.

The types of projects which require an EIS (and sometimes even an EA) are complex, multi-year projects. Without the assurance of long-term federal funding, states are often reluctant to proceed with such projects. The recent enactment of a five year surface transportation reauthorization bill is a positive sign that this uncertainty may soon be coming to an end. With an assurance that federal investment will be provided through FY 2020, states will hopefully

undertake more long-term transportation construction projects and we will have a better opportunity to witness more of MAP-21's reforms in practice.

Conclusion

The transportation sector has made significant strides in the area of project delivery. Beginning with TEA-21 and continuing through to the FAST Act, members of both parties have worked together to ensure our nation's infrastructure continues to improve at a pace matching the growth of our country. Continuing to streamline the project review and approval process for our nation's infrastructure is essential in assuring the public the government is making every dollar spent of transportation go as far as possible without sacrificing necessary regulatory safeguards.

Subcommittee Chairman Mica, Representative Duckworth, thank you for allowing me to appear before you today to discuss ARTBA's long history of promoting common sense reforms in the transportation project delivery process. We stand ready to assist the subcommittee as it continues to work towards the goal of reforming the project review and approval process for the transportation improvements our nation desperately requires.

I would be happy to answer any questions from you or other members of the subcommittee.