An Examination of the Federal Permitting Process

Statement of the
American Road & Transportation Builders Association

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On behalf of the American Road & Transportation Builders Association (ARTBA) and its more than 7,500 member firms and public agencies nationwide, the association would like to thank Subcommittee Chairman Farenthold and Ranking Member Plaskett for holding today's hearing on "An Examination of the Federal Permitting Process."

ARTBA, now in its 118th year of service, provides federal representation for its 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. Because of the nature of their businesses, ARTBA members undertake a variety of activities that are directly impacted by the federal permitting process. This process includes navigating statutes such as the National Environmental Policy Act (NEPA), Clean Water Act (CWA), Clean Air Act (CAA) and Endangered Species Act (ESA).

ARTBA recognizes that regulations play a vital role in protecting the public interest in the transportation project 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 have essentially found a path for regulatory requirements to be fulfilled in a smarter and more efficient manner.

However, in recent years the rulemaking process has morphed from something intended to protect the public interest into a tool to achieve diverse policy and political objectives, many of which are largely unrelated to improving our transportation infrastructure.

Furthermore, this process has been routinely unaccountable to affected interests, while often dismissing or undervaluing the project cost increases, delays and compromises in safety which can result. Even more disturbingly, some regulatory initiatives advanced by the previous administration diverted from Congress's clear intentions in certain policy areas, infusing the administration's political priorities where they were not warranted.

According to a report by the U.S. Government Accountability Office prior to the enactment of the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012, as many as 200 major steps were 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: NEPA; state NEPA equivalents; wetland permits; endangered species implementation; and clean air conformity.

Further, project delays carry severe financial consequences. According to a 2016 report by the Texas A&M Transportation Institute, project delay is estimated to cost $87,000 per month for small projects (e.g., reconstruction), $420,000 per month for medium-sized projects (e.g., widening) and $1.3 million per month for large projects[1]. Both political parties recognized that the current system was simply too long and too expensive a way to deliver 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.

Significant progress was made on a bipartisan basis to streamline the permitting and approval process for transportation improvements in the past four 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; MAP-21 in 2012; and, most recently, the "Fixing America's Surface Transportation (FAST) Act of 2015. 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.

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

[1] "Assessing the Costs Attributed to Project Delay During Project Pre-Construction Stages," Texas A&M Transportation Institute, March 2016, available at: https://static.tti.tamu.edu/tti.tamu.edu/documents/0-6806-FY15-WR3.pdf.

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 project 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, both MAP-21 and the FAST Act 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 and the FAST Act 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 and the FAST Act were discretionary. The more state and federal agencies choose to use these reforms, the greater the impact will be.

Expansion of the Use of Categorical Exclusions

One of the most significant changes to existing law in both MAP-21and the FAST Act was an expansion of the use of categorical exclusions (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 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, 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 enables 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. 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 cost $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.

Additionally, the current system for processing CEs should be examined in order to reduce unnecessary delay. Under Section 1315 of the FAST Act, the Federal Highway Administration (FHWA), on behalf of the Secretary of Transportation, developed a programmatic agreement template for CEs as required by the legislation. The FAST Act specifically states the template was to be developed for CEs listed in section 771.117(c) of title 23, Code of Federal Regulations. ARTBA believes the intent of this requirement was to provide a single, uniform process for processing CEs on the "c list", which now include three previous "d list" CEs and associated constraints. Previously, there were no constraints associated with the use of "c list"

CEs except for "unusual circumstance". It should be noted that FHWA already has a 1989 programmatic model for the "d-list" CEs.[2]

As stated in 23 CFR 771.117(c), "c-list" CEs normally do not require any further NEPA approvals by the FHWA while "d-list" CEs require additional documentation to be sent to a federal agency as outlined by FHWA's 1989 programmatic model for "d-list" CEs . The purpose of the programmatic agreement template under the FAST Act was to ensure that with the addition of the three previously listed "d-list" CEs and associated constraints to the "c-list" that a template be developed to provide guidance on how to properly document "c-list" CEs which now includes the three CEs with constraints in an efficient manner.

FHWA did not develop a template for the "c-list" CEs as required by the FAST Act, but one for both the "c-list & d-list" CEs. While there is not a specific issue with a template that covers both the "c-list and d-list" CEs, there is an issue with the template placing historical "d-list" constraints on the use of "c-list" CEs and constraints which are not required under Federal Regulations. The FHWA developed template is more restrictive and burdensome than the Federal Regulation for those projects with "c-list" CEs and requires more case by case review by FHWA than what the Federal Regulations require. This was not the intent of the FAST Act language, nor the intent of programmatic agreements.

FHWA should be directed to re-examine the FAST Act developed model programmatic agreement for CEs and remedy the language to fit the intent of the FAST Act and its underlying regulations.

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 expanded 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. More recently, Ohio applied for the delegation program in 2015 and has just had its first federal audit while both Florida and Utah submitted applications last year.

The Committee needs only to look to California and Texas—the two states which have the longest running NEPA delegation programs—to see what continued use of the delegation program can achieve. Specifically, an Oct. 30, 2015, fact sheet published by the California Department of Transportation demonstrates the following significant reductions in delay preparing environmental review documents:

- Draft EAs have seen a median time savings of 10.7 months;

[2] https://www.environment.fhwa.dot.gov/projdev/docuceda.asp

- 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[3]!

Similarly, TxDOT credited NEPA delegation with increased time savings, a more organized internal project delivery program and greater predictability.[4] Further, the Ohio Department of Transportation (ODOT) estimates the time saved by NEPA delegation will lead to a cost savings of $45 million once the Ohio program is fully established[5].

Put succinctly, NEPA delegation works. As FHWA stated on Dec. 22, 2016, "The NEPA Assignment Program reduces duplication, saves time and resources, and avoids compromising our high standards for protecting the human and natural environment. Empowering states in this way saves time and money, making it good government AND good business."[6]

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 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 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 U.S. 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

[3] Available at http://www.dot.ca.gov/hq/env/nepa/pdf/nepa_assignment_fact_sheet_q33_oct2015_rev.pdf.
[4] See Dec. 8, 2015 testimony of Carlos Swonke, Director of Environmental Affairs, Texas Department of Transportation before the House Committee on Oversight and Government Reform Subcommittee on Transportation and Public Assets, available at: https://oversight.house.gov/wp-content/uploads/2015/12/12-8-2015-Transportation-Subcommittee-Hearing-on-MAP21-Swonke-TX-DOT-Testimony.pdf.
[5] Available at https://www.dot.state.oh.us/NEPA-Assignment/Pages/NEPA_Assignment_History.aspx.
[6] Available at https://www.transportation.gov/fastlane/fhwa%E2%80%99s-%E2%80%98every-day-counts%E2%80%99-initiative-empowering-states.

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 basic problem is that the development of a transportation project involves multiple agencies besides DOT evaluating the impacts of the project as required by NEPA. While it would seem that the NEPA process would establish a uniform set of regulations and submittal documents nationwide, this has not been the case. For example, the United States Environmental Protection Agency (EPA), Army Corps of Engineers (Corps), Fish and Wildlife Service (FWS) and their companion state agencies each require an independent review and approval process, forcing separate reviews of separate regulations, and unique determinations of key benchmark issues—such as the purpose and needs of a project—and requiring planners to answer multiple requests for additional information. Also, each of these agencies issues approvals according to independent schedules.

The opportunities to reduce the delay caused by inter-agency conflict provided by SAFETEA-LU, MAP-21 and the FAST Act 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.

Additional 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 established 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.

The Administration's Proposed Permitting Reforms Will Improve the Review Process

ARTBA was pleased to see the Trump administration's focus on improving the permitting process in its February infrastructure plan. Specifically, we would like to highlight the following suggestions made by the administration aimed at reducing delay in the project review and approval process:

"One Federal Decision:" Currently, the EIS process for a new highway project is a multi-year endeavor. A major cause is the length of the EIS itself, which can literally span multiple volumes totaling thousands of pages under the current NEPA regulations.

There is no set time limit for NEPA decisions. When they begin a NEPA review, project planners have no sense of when the process is going to be completed. Strict, enforceable timelines for NEPA decisions would add predictability to the NEPA process and allow project planners to more accurately plan schedules for environmental review.

The administration's plan addresses this issue by building on President Trump's August 2017 executive order on reforming the permitting process by improving upon the expedited EIS schedule introduced in MAP-21. Specifically, it sets a two-year time limit for environmental reviews where the lead agency on any project would have 21 months to complete an environmental review and then additional permitting requirements from other agencies would have to be completed three months thereafter. Further, the plan also places one agency (the lead agency) in charge of all permitting decisions, eliminating the possibility of multiple agency schedules and priorities conflicting with one another.

However, ARTBA recognizes that a uniform deadline may not work for every project. In setting NEPA schedules, discussions involving the lead agency and project sponsor should take place in order to determine a realistic time frame for the project and allow for project-specific flexibility.

Encouraging concise NEPA documents: The EIS is meant as a resource for affected members of the community to gain information about the proposed project. Current EISs are impossible for many lawyers to understand and completely inaccessible to community members without any prior training in the fields of law or environmental consulting. One factor behind lengthy EISs is the fear of litigation on the part of project developers. In an effort to anticipate issues which could be used to delay a project through litigation, project developers have reportedly attempted to "bulletproof" their EISs. This results in a document which attempts to address every possible issue or scenario to arise in connection with a proposed project no matter the relevance or how likely it is to be a factor in environmental decision making. The end product of this process is an EIS which is completely unwieldy and does not serve its intended purpose.

ARTBA is encouraged by the administration's directive to the Council on Environmental Quality (CEQ) requiring it to revise NEPA regulations in an effort to "reduce the time and costs associated with the NEPA process" and "increase efficiency, predictability and transparency in environmental reviews."[7]

[7] Legislative Outline for Rebuilding Infrastructure in America, The White House, p. 36 (2018).

To achieve this goal, ARTBA recommends CEQ set a page limit threshold on the length of EISs that would help them better serve the communities for which they are intended to be written. It would also force the authors of EISs to write in clear and more concise terms. Finally, it would reduce the delay associated with new transportation construction projects by dramatically cutting down the time needed to complete the final document.

Integrating NEPA with transportation planning: Another reform ARTBA supports in the administration's plan is integration of NEPA with the transportation planning process. ARTBA has recommended increased integration of NEPA in both legislative and regulatory settings repeatedly and the issue is also one ARTBA has recommended be part of the next reauthorization legislation for the federal surface transportation program.

For transportation projects, an extensive amount of information is gathered during the planning process, which often occurs prior to the actual triggering of NEPA requirements. Allowing information gathered during the planning process, to the extent it is still current and relevant, to satisfy NEPA requirements would limit duplicative reviews and reduce the amount of delay in the NEPA process. If current information is already available as the result of compliance with transportation planning requirements, that information should satisfy NEPA regulations as well. This would increase efficiency and maintain environmental protection. Duplicative reviews serve no redeeming purpose as part of the NEPA process, and should be eliminated wherever possible. It should also be noted that this concept has already achieved bipartisan consensus in Congress as part of the FAST Act.

The plan would eliminate the need for concurrence by cooperating agencies when deciding to use a planning document for NEPA. This sensible reform would eliminate the need for the lead agency to seek out multiple cooperating agencies to review a document which has already been reviewed during the planning process.

Clean Water Act Reforms: In addition to addressing NEPA, ARTBA is pleased that the administration has also included reforms to other statutes which impacts the permitting process. Specifically, the plan includes a number of beneficial reforms to the Clean Water Act (CWA).

One of the biggest factors creating the confusion in federal wetlands permitting is the involvement of multiple agencies—specifically the Corps and the EPA—in the jurisdictional determination process. ARTBA has repeatedly stated that the involvement of multiple agencies hinders the overall efforts of the wetlands permitting program. One of the principal problems plaguing the wetlands permitting program is indecision and inaction, with no benefit for the environment. Justice Breyer reiterated this in his *Rapanos v. United States* dissent, stating "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [federal wetlands jurisdiction]."[8]

Congress reiterated this point in the National Defense Authorization Act for Fiscal Year 2004 by authorizing 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, not the EPA, to take the lead and build a stronger, more predictable permitting program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit

[8] *Rapanos v. United States*, 547 U.S. 715 (2006).

applicants. ARTBA continues to believe the Corps should be the principal agency administering the 404 wetlands regulatory program as its staff has the technical expertise and practical knowledge to ensure fair implementation of federal wetlands policy and is pleased to see this recognized in the administration's proposal. Similarly, ARTBA agrees with the administration's removal of EPA authority to review NEPA documents already completed by other federal agencies. When one agency can make a determination or conduct a review, involving multiple agencies provides no additional benefits and only leads to needless delay by creating conflicting schedules and competing interests.

ARTBA also agrees with the administration regarding the revocation of EPA's ability to veto CWA permits. Ideally, permits should provide a sense of certainty for both the regulating authority (in this case the Corps and EPA) and the project sponsor. Conditions are outlined in the permit, which, if met, allow the project in question to move forward and the environment to be protected. From the viewpoint of the project sponsor, the main benefit of a permit is predictability. The project sponsor knows that as long as the terms of the permit are met, project construction can commence without fear of time-consuming litigation.

Unfortunately, the sense of fairness and predictability in the CWA permitting system has been jeopardized through the use of EPA's veto authority. The EPA in January 2011 retroactively vetoed a 404 permit issued to the Mingo Logan Coal Company for a coal mine in West Virginia. Mingo Logan had lawfully obtained the permit in 2007 and had been operating in compliance with all permit requirements for over three years. Despite the fact that Mingo Logan had not violated the terms of the permit, EPA decided to change the permit conditions more than three years after it was issued. This action rendered Mingo Logan's operations out of compliance.

While the EPA's decision was directed at a single mining operation, its impacts have been felt throughout the regulated community in all sectors of the economy. Indeed, multiple industry associations, including ARTBA, challenged EPA's actions in court. While a favorable decision was obtained in federal district court, EPA's decision was ultimately upheld at the appellate level and the Supreme Court declined to review the case. As things stand currently, project sponsors now face the potential uncertainty of losing a valid wetlands permit, through no fault of their own, simply because the EPA changes its mind.

For the transportation construction community, EPA's permit revocation is particularly unsettling. Major transportation projects, such as new roads, bridges or transit systems, can take years, if not more than a decade, to complete. In order for these projects to move forward, planners need to know that permits received at the beginning of a multi-year construction process will be valid throughout the entire time the project is being built. Further, planners also need to know that the specific conditions and mandates in a particular permit are not going to change after the permit is issued.

Certainty in the permitting process is also integral to financing transportation projects. With public-private partnerships being eyed more frequently as a means of project delivery, private investors considering financing transportation projects have become very concerned with properly analyzing risks in project delivery. In order for parties to invest in transportation improvements, they need a level of certainty. The prospect of validly issued permits being rescinded is precisely the type of scenario that could increase the perceived risk of a project to

potential investors and make the project less appealing, or increase the entities required rate of return.

Reforming the transportation conformity process: ARTBA is also pleased the administration's plan includes an examination of the transportation conformity process. As with the CWA, transportation and other CAA regulations play a role in the permitting process and should be examined as a part of any effort at reform.

Transportation conformity refers to the efforts of counties to conform to CAA standards, and is arguably one of the most confusing aspects of the statute. Currently, conformity findings are based on assumptions and "modeling of future events," which often do not constitute an exact science nor reflect reality. In fact, very few conformity lapses occur because a region has a major clean air problem, but rather because one of the parties involved cannot meet a particular administrative 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 truly engaging the public in transportation planning that improves the mobility of a region's population while protecting the environment.

One consistent shortcoming with the conformity process relates to the differing structure and duration of state transportation plans and the State Implementation Plans (SIPs) with which they are intended to conform. 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 to determine the conformity 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 demonstrably changed.

Additionally, according to FHWA guidance, "transportation conformity regulations specify that an air quality conformity determination can only be made on a fiscally constrained metropolitan transportation plan."[9] In practical terms, this means an area trying to achieve CAA standards can only do so through projects where the funding has already been fully committed. This type of restriction actually discourages long-range planning by forcing counties to forego long-term solutions in favor of stop-gap measures because they may not have enough dedicated funding.

Congress and the administration should thoroughly re-examine the transportation conformity program and re-assess its usefulness as a regulatory effort. As it exists now, conformity's main purpose is to generate a series of conflicting deadlines with no regulatory value, serving only as a vehicle for project opponents to start a "race to the courthouse" once a deadline or standard is not met. ARTBA supports the administration's proposal requiring metropolitan planning organizations to meet only the most recent set of standards as opposed to unnecessarily spending resources on older standards when new ones have already been proposed. ARTBA also

[9] "Financial Planning and Fiscal Constraint for Transportation Plans and Programs Questions & Answers," available at: https://www.fhwa.dot.gov/planning/guidfinconstr_qa.cfm.

recommends lengthening the time frame between CAA standard designations to allow sufficient time for them to work before re-evaluating their effectiveness.

Still More Work to Do

Unfortunately, a number of the MAP-21 and FAST Act 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 and prior to the passage of the FAST Act in December 2015, 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 delayed or canceled projects valued at $1.9 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 were often reluctant to proceed with such projects. Furthermore, these types of projects are also the costliest of transportation improvements and federal highway investment has barely kept pace with inflation over the past decade. With the FAST Act's 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 project delivery reforms in practice. Still, the long-term stability of the Highway Trust Fund and chronic underinvestment need to be resolved to provide states full confidence to undertake large-scale new transportation improvements.

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 federal permitting 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. ARTBA looks forward to continuing to work with the Committee on these efforts.