



## MEMORANDUM VIA FACSIMILE – 5 PAGES TOTAL

**To:** John Morrall, Office of Information and Regulatory Affairs      **Fax:** 202-395-6974

**From:** Michael F. Stark, Managing Director, Materials & Services Division  
Deputy Director, Contractors Division

**Date:** May 28, 2002

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The following **are formal** written comments from the **American** Road & Transportation Builders Association (ARTBA) in response to the Office of Management and Budget's "Draft Report to Congress **on the Costs** and **Benefits** of **Federal** Regulations." The comments **are** a total of four pages. **This** document **will** also be emailed to you at [jmorrall@omb.eop.gov](mailto:jmorrall@omb.eop.gov).

If you have **any questions**, please do not hesitate to contact me at **202-289-4434**, ext. 115 or [mstark@artba.org](mailto:mstark@artba.org). Thank you.



May 28, 2002

Mr. John Morrall  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
NEOB, Room 10235  
725 17<sup>th</sup> Street, NW  
Washington, D.C. 20503

Re: Draft Report to Congress on the **Costs** and Benefits of **Federal** Regulations

Dear Mr. Morrall:

On behalf of the 5,000 members of the American Road & Transportation Builders Association (ARTBA), I appreciate the opportunity to comment on the Office of Management and Budget's (OMB) Draft Report to Congress on the Costs and Benefits of Federal Regulations published in the March 28, 2002 *Federal Register*.

ARTBA is the only national association that exclusively represents the collective interests of all sectors of the U.S. transportation construction industry. ARTBA's members include contractors, materials suppliers, transport/trucking companies, planning & design firms, and traffic safety professionals. As such a broad coalition of firms, our members are impacted by countless federal regulations from numerous federal departments and agencies.

Although certainly not an all inclusive list of federal regulations that impact ARTBA's members, we would request that OMB consider evaluating the following regulations:

**Occupational Safety & Health Administration's (OSHA) Steel Erection Standard**

On January 18, 2001, OSHA issued a new regulation regarding safety standards for steel erection. ARTBA challenged the section of the rule that applied to the attachment of shear connectors and argued that this section could have a detrimental impact on worker safety, productivity and the cost of doing business. In a petition filed with OSHA on July 25, 2001, ARTBA requested that the agency exempt bridge contractors from provisions of the new standards that pertain to shear connectors. ARTBA argued that OSHA did not fully consider the implications of the shear connector provisions as they relate to transportation construction and that the transportation construction industry was not adequately represented during the rulemaking process.

In addition to petitioning OSHA, ARTBA also met with the agency and worked to involve the Federal Highway Administration (FHWA) and other stakeholders in the process. Although OSHA was within their jurisdiction to issue this rulemaking, the impact of the shear connector



regulation on other potential safety hazards such as injuries from falls and falling objects and the possible increase in costs and lost productivity to contractors that may occur as a result of the standard did not appear to be considered. Furthermore, since the regulation will require more work to be done on an elevated bridge project (often over operating roadways), the result will be more lane closures, more work done at night, and increased hazards to motorists and transportation construction workers. While ARTBA recognizes that OSHA does not have responsibility for the safety of the general public, it is important for the agency to understand that extending the construction time also increases the likelihood for an incident.

OSHA's steel erection standard became effective on January 18, 2002, and was enforceable as of March 18. Shortly after this date, OSHA released a compliance directive for the steel erection standard. The directive specifically addresses the concerns that ARTBA raised regarding the standard.

ARTBA believes that federal agencies should increase their level of communication with one another during the development of a proposed regulation. FHWA expressed their Views on the standard after the final regulation was published, and OSHA hopefully took those views into consideration as they developed their compliance directive. Any action OMB can take to facilitate increased communication between regulatory agencies during development of a regulation, before its implementation, and even after it becomes effective would improve the ability of all issues to be considered during the rulemaking process, even those that may be outside of a regulating agency's authority.

#### U.S. Army Corps of Engineers Migratory Bird Rule

The U.S. Supreme Court issued a decision (Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers) on January 9, 2001, that the Clean Water Act does not give the Army Corps of Engineers the power to regulate isolated intrastate waters that provide habitat for migratory birds. The Court found that the Corps' rule to regulate such wetland areas under its Section 404 wetlands permitting program exceeds the authority granted the Corps by the Clean Water Act. The Court did not reach the constitutional issue in the case, but did state that a simple statutory interpretation of the federal Clean Water Act restricted the Corps to only regulate "navigable waterways," which clearly does not include isolated wetlands.

The so-called "Migratory Bird Rule" had been relied upon to extend the jurisdiction of the Corps over isolated waters and wetlands, thus bringing many transportation construction projects under the regulatory jurisdiction of the Corps that otherwise would not occur. (Isolated waters are those waters, including wetlands, which are not connected by surface waters to interstate or navigable waters.) This rule essentially stated that the destruction of any body of water (even a very small pond that might only occasionally have water in it) has an impact on "interstate commerce" if that wetland might be used by migratory birds. As a result, the Corps required contractors/owners to obtain a 404 permit if such wetlands were impacted. The decision eliminates from Section 404 jurisdiction of isolated waters and wetlands such as prairie potholes, vernal pools, and small ponds and streams.

The Clinton Administration quickly issued an executive order attempting to circumvent the Court's ruling in the case and the Corps has declared that it is essentially enforcing the rule

despite the Court's decision. ARTBA continues to be concerned that the *Corps* and the Environmental Protection Agency (EPA), which have **not** yet responded to the Court's decision, may **seek** to limit its application. We **are** continuing to **work** to ensure that the **Court's** decision is enforced **and** would request that the OMB also monitor **how** this decision **is** interpreted by the *Corps* and the **EPA**.

### **U.S. Army Corps of Engineer's Nationwide Permit**

Since 1997, the *Corps* has proposed at least four rounds of changes to its Nationwide Permit (NWP) program. **ARTBA** has challenged each of the proposals by **providing** formal comments to the *Corps*, **written letters** to Congress and the Administration, and participating actively in both the Coalition on **Permitting Efficiency** and National **Wetlands** Coalition.

On **March** 9, 2000, the *Corps* mandated a dramatic reduction in the NWP program. This latest round, if successful, would severely erode the ability of the construction **industry** to utilize general permits for activities in wetland **areas** and would dramatically reduce the availability of the NWPs to the **construction** community. Some of **the most adverse** issues include **lowering** the threshold for the size **of** wetlands regulated **by** the *Corps* and reducing the number of nationwide permits available, **substantially lengthening** the permitting process. Already, numerous transportation construction projects nationwide have **been** put on hold or canceled because the *Corps* has not been able to issue permits in a **timely** fashion. While ARTBA succeeded through the regulatory process to remove some other adverse concerns from the **new rules**, several **other major issues** still remain. **ARTBA** has worked **with** its partners to **pass** legislation that will **require** the *Corps* to reevaluate its changes to the **rule**. **ARTBA** has also joined with another national trade **association** to challenge the new rules in court.

Most recently, ARTBA presented testimony at a September 26, 2001, public hearing held by the *Corps* on proposed changes to its nationwide **genera1** permit program. The *Corps* is proposing to reissue all of its NWPs this year. **Because** of the nature of the transportation construction industry, **ARTBA** members frequently are required to obtain wetland permits from the *Corps*.

**While ARTBA** generally supports the changes to the NWP program proposed in the August 9, 2001 *Federal Register*, we are disappointed that the *Corps* did not take the opportunity, in modifying and reissuing **all NWPs**, to correct more **of** the problems the agency **created** with earlier changes to the program. The changes made to the NWP **program** at the end of the Clinton Administration have resulted in a large burden **on** the transportation construction **industry** in the **form** of significant increases in the expense **and** effort that are required to comply **with** the changes. In addition, these recent changes have resulted **in a large increase** in delays associated with obtaining individual **permits** for project-related activities.

In fact, the *Corps'* own data **show** that the number of acres of wetlands created **under** the **mitigation** requirements of the nationwide permit program far exceed **the number of acres** permitted **under** the program. ARTBA has urged the *Corps* to **do** more to carry out the policies embodied in Section 101(f) of the Clean Water **Act** to minimize paperwork, seek the best **uses** of manpower **and funds**, and to prevent needless delays at all levels of **government**. **Any** oversight that the OMB can provide regarding **this issue would** be of great assistance to the transportation construction **industry**.

**Truck Driver Hours-of-Service Proposed Regulation**

The proposed truck driver hours-of-service rule published in the May 2, 2000 *Federal Register* by the Federal Motor Carrier Safety Administration (FMCSA) remains pending, due in part to the 53,000 mostly adverse comments the agency received. OMB and OIRA are well aware of this proposed rule, as it was considered a "high priority review" candidate last year and was a topic of discussion between OIRA and the U.S. Department of Transportation (DOT).

In the semiannual Regulatory Agenda published in the May 13, 2002 *Federal Register*, FMCSA states that, as a result of their review of the hours-of-service docket, the agency was "proceeding to develop a final rule" and it was scheduled for "final action" in March 2003. ARTBA is opposed to the current proposed rule and we would encourage the OMB to ensure that the FMCSA review all comments in the docket and that they issue a supplemental Notice of Proposed Rulemaking, as opposed to a final rule.

ARTBA is encouraged by many of the initiatives that OMB outlined in their draft report. Efforts to reduce the regulatory burden to business (especially small business), increase the dialogue between OMB and federal agencies, highlight the importance of cost/benefit analysis based on accurate data and sound science, and greater involvement of the public and stakeholders into the regulatory process will vastly improve the implementation of effective federal regulations for all involved.

Sincerely,



T. Peter Ruane  
President & CEO