



January 31, 2017

The Honorable Elaine Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Ave., SE
Washington, D.C. 20590

Dear Secretary Chao:

Congratulations on your confirmation as Secretary of Transportation. As you begin your term, the Associated General Contractors of America (AGC) is optimistic that you will focus the Department of Transportation (US DOT) in ways that will help President Trump accomplish his objectives of revitalizing the Nation's infrastructure, spurring economic growth and creating new jobs.

AGC, representing 26,000 construction industry businesses in all fifty states, stands ready to assist you in this effort. A top priority for AGC is to fix the Highway Trust Fund so that it can continue to support the long-term economic strength of the nation. AGC also supports the President's focus on significantly reducing regulatory requirements that increase inefficiencies and costs in government programs.

AGC believes that there are opportunities for US DOT to reduce the regulatory burden and would like to offer its recommendations. I would like an opportunity to meet with you soon to discuss how AGC can work with you in support of the President's agenda.

Stop Unnecessary Regulatory Impediments

There are a host of regulations generated by the US DOT that impact the implementation of the transportation infrastructure programs. Some of these rules have been longstanding and some were put in place by the Obama administration. US DOT should look to eliminate these regulations that undermine efforts to invest in transportation infrastructure projects and increase their costs. AGC suggests the following:

Local Hire Requirements: US DOT established a pilot program to overturn a long-standing policy that prohibited states from imposing local hire mandates on Federal-aid contracts in the highway program and at the same time issued a Notice of Proposed Rulemaking to make this change permanent. While US DOT has not yet moved forward with the rulemaking, the pilot program, originally established for one year, was extended an additional year. In a last-minute action, the Obama administration extended the pilot program for an additional five years.

Local hire requirements restrict competition and violate the U.S. Supreme Court's landmark ruling in [*United Building & Construction Trades Council of Camden Cnty. v. Mayor & Council of the City of Camden \(Camden\)*](#), which held that in-state hiring preferences discriminate against non-residents and therefore violate the Privileges and Immunities Clause of the Constitution. The net effect of local hire requirements is that contractors could be forced to hire unneeded workers or unskilled workers and

potentially lay off current employees. Meeting these mandates can create safety concerns not only for the new hires, but current employees as well. In addition, these mandates unnecessarily increase project costs.

While the construction industry is facing a workforce shortage and is undertaking efforts to recruit, train and retain the construction workforce of the future, local hire mandates impede rather than help this effort. AGC urges US DOT to abandon the pilot program and to continue ongoing efforts to work with the industry in meeting workforce needs in a way that provides individuals with long term--rather than fleeting--career opportunities. As such, the pilot program should be eliminated and the NPRM withdrawn.

Green House Gas Measures: In meeting a Congressional directive in MAP-21 to develop metrics to determine the effectiveness of Federal investment in the performance of freight movement, congestion relief and the air quality program, FHWA inappropriately expanded its statutory scope and adopted a last minute regulation requiring the measurement of greenhouse gas (GHG) emissions. The regulation goes beyond MAP-21 requirements and uses the rulemaking to further the Obama administration's climate agenda. Not only did MAP-21 specify what performance standards were to be adopted, it also specifically did not include GHG emissions and furthermore told US DOT to not go beyond the performance measurements articulated in the law.

FHWA's regulation imposes new federal mandates that require states and Metropolitan Planning Organizations (MPOs) to evaluate GHG emissions as a factor in transportation planning. GHG measurement and management requirements pose significant obstacles to the transportation planning process, adversely impact national air quality, and duplicate other federal agency regulations and initiatives currently underway. Integrating GHG performance management requirements into an already complex process of uniting air quality planning and critically important transportation infrastructure decisions will significantly slow down the highway planning process. This regulation should be rescinded.

Guidelines for NEPA Reviews: Also in the waning days of the Obama administration, US DOT issued a new order for "Procedures for Considering Environmental Impacts" detailing steps for the various Operating Administrations (OA) in US DOT to follow when National Environmental Policy Act (NEPA) review is necessary. The NEPA review process has a significant impact on the timely delivery of vitally needed transportation infrastructure projects. Protecting the primary objective of NEPA while making the review process work more efficiently and cost effectively was a primary concern of Congress when it enacted the three most recent transportation authorization statutes: SAFETEA-LU, MAP-21, and the FAST Act. US DOT's proposed NEPA Order undermines these legislative initiatives by adding an unnecessary layer of review and coordination requirements on top of those already developed by each of the OAs.

This is a major rule making that will have significant impact on the environmental review process for transportation projects. Because US DOT only provided a 21-day review period, this rule did not receive proper vetting when proposed. The procedures add new requirements for consideration of factors that have never before been part of the environmental review process. In addition, the proposed Order undermines the use of categorical exclusions which allow for expedited environmental reviews of certain projects, again, in complete defiance of congressional intent.

One of President Trump's first actions in office was to sign an Executive Order to expedite procedures and deadlines for completion of environmental reviews and approvals for significant infrastructure projects. AGC suggests that rescinding this last-minute Order from the US DOT on NEPA review is in keeping with the president's intent to speed the environmental review process.

Disadvantaged Business Enterprise (DBE) Program: The US DOT Disadvantaged Business Enterprise (DBE) program has been operating since 1982 and applies to the highway, transit and aviation programs administered by US DOT. With the DBE program now more than 30 years old, it is appropriate at this juncture to examine the program's results and determine what have been its successes and what have been its shortfalls.

In June 2013, US DOT's Office of Inspector General (OIG) issued a report highly critical of DOT's administration of the DBE Program. The report pointed out that DOT has limited success in achieving its program objective to develop DBEs to succeed in the marketplace because recipients place more emphasis on getting firms certified as DBEs rather than assisting them to identify opportunities and to market themselves for DBE work on federally funded projects.

MAP-21 pointed the highway program in a new direction by requiring state DOTs to set metrics for a variety of performance factors and to annually measure success at meeting those metrics. The DBE program should also be performance-based. Currently the only metric used is the achievement of an annual utilization goal. The annual goal metric needs to be reconsidered and additional metrics should be established and reported for both the DOT and for DBEs participating in the program. AGC believes now is the time to take a comprehensive look at this program's achievements and costs and determine how it should be refocused.

Work Zone Safety: The safety of the construction workforce is the top priority for AGC and for our member companies. Unfortunately, statistics show that 23 percent of all worker fatalities in highway construction work zones are due to workers on foot being struck during a third party work zone space intrusion. Crash statistics from New York DOT indicate that the use of positive protection strategies in that state led to a 20 percent reduction in fatal work zone crashes. Because construction employers cannot control the behavior of third parties, they must instead devise strategies to protect their workers from these behaviors. Worker and motorist safety should be the factors that determine what protection measures are used during construction. However, sometimes cost becomes an overriding factor.

MAP-21 directed the FHWA to draft regulations to remedy this situation. FHWA was directed to require states, at a minimum, to use positive protective measures to separate workers from motorized traffic under the following circumstances: where conditions offer workers no means of escape (e.g., tunnels and bridges); in stationary work zones lasting two weeks or more and when the project design speed is 45 mph or greater; and, when the nature of the work requires workers to be less than one lane-width from the edge of an open travel lane. The provision allows states to choose alternative safety protection measures other than positive protection if an engineering study determines that positive barrier did not offer the best protection for motorists and workers in these circumstances.

Inexplicably, FHWA has not responded to this requirement in MAP-21, putting highway construction workers at risk. In the FAST Act, Congress once again directed FHWA to move forward with regulations

implementing this MAP-21 provision. To date nothing has been forthcoming from US DOT. AGC urges you to move forward with this rule making.

Hours of Service: The FAST Act increased from 50 miles to 75 miles an allowance for construction industry truck drivers to reset their on-duty time clocks after a 24-hour rest period. The agreed upon distance was a compromise that did not fully address the construction industry's unique nature. The allowance for construction industry drivers should be extended to 150 miles.

Congress provided this allowance in recognition that construction industry drivers operate under unique circumstances including: seasonal limits on when work can be done, materials that must be put in place within tight time limits or be lost forever, drivers spending much of their time not actually driving but waiting to pick up or deliver materials, and drivers being under constant supervision as they return continuously to the job site or the source of the materials. In addition, construction industry drivers generally drive only in good weather conditions. No studies have concluded that there is a safety deficiency specific to construction workers driving under the current rules. The construction industry's operation under the provision has never been found to not be in the public interest nor to be unsafe. An increase in the allowance will benefit the Nation by allowing the delivery of vitally needed infrastructure in a safe, timely, and cost effective manner.

Fix the Highway Trust Fund

AGC is enthusiastic about the President's focus on improving our Nation's infrastructure. While we have not seen details of the initiative, we hope it will include provisions to ensure long-term, sustainable infrastructure investment by providing the revenue needed to sustain the Highway Trust Fund into the future. The Federal-aid highway system has been, and remains, the crown jewel of the US transportation system. It is vital to US economic competitiveness. While the 2015 FAST Act greatly improved the effectiveness and efficiency of highway and transit programs, it did not provide for the long-run solvency of the Highway Trust Fund. Failure to address trust fund solvency prior to the expiration of the FAST Act in 2020 will potentially cause major disruptions. It will require either short-term stopgap funding measures or finding a \$110 billion offset to pass a long-term bill that will, at best, maintain current funding levels that do not meet our transportation infrastructure needs. Absent long-term stability for the Highway Trust Fund, many projects critical to the efficient movement of people and goods have the real potential to be backlogged or never built. Further, mounting deferred maintenance could cause current infrastructure to fall into an even greater state of disrepair. These investments will not only support construction and transportation jobs, but the general industry jobs that will result from the resulting economic growth.

Conclusion

Congratulations again on your confirmation. On behalf of the 26,000 construction companies AGC represents, we are look forward to working with you on improving the Nation's transportation infrastructure system and advancing the initiatives herein discussed.

In addition, we would like to share with you AGC’s comprehensive legislative and regulatory plans. The documents—“[An Agenda to Rebuild Our Infrastructure & Our Craft Workforce](#)”¹ and “[Make Federal Agencies Responsible Again](#)”²—detail the wide array of initiatives AGC will seek to work with you and the new administration.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen E. Sandherr". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Stephen E. Sandherr
Chief Executive Officer

¹https://www.agc.org/sites/default/files/Files/Programs%20%26%20Industry%20Relations/An_Agenda_to_Rebuild_Our_Infrastructure.pdf

²http://newsmanager.commpartners.com/agcleg/downloads/2_Make%20Federal%20Agencies%20Responsible%20Again.pdf