Public Hearing of the House Transportation Committee

Hearing on Federal Economic Stimulus (Infrastructure) Impacts and Application

On Behalf of the
Transportation Construction Industries

Robert E. Latham, Executive Vice President
Associated Pennsylvania Constructors
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Thank you Chairman Markosek, Chairman Geist and members of the House Transportation Committee for inviting me today to discuss improved delivery of our critical infrastructure needs in the Commonwealth. My name is Robert Latham and I am the Executive Vice President of the Associated Pennsylvania Constructors (APC). I also serve as a spokesperson for the Transportation Construction Industries Coalition (TCI).

APC represents Pennsylvania's highway and bridge construction industry and has an 85-year history as Pennsylvania's leading trade association consisting of more than 400 members including contractors, consulting engineers, and material suppliers. Our members are mostly family owned, local businesses whose owners and employees live and work in Pennsylvania. We provide family-wage jobs in many areas of Pennsylvania where such jobs are scarce. It is estimated that directly and indirectly we employ nearly 50,000 Pennsylvanians.

2009 is a critical year for transportation programs. The first order of business, of course, will be to successfully implement the transportation component of President Barack Obama's economic recovery program to save and create American jobs. I assure you the private sector is poised and anxious to respond. This must not be "business as usual."

The short-term package, however, must be followed-up as soon as possible this year with robust, multi-year authorizations of the federal aviation and surface transportation programs that focus on longer-term strategic capital investments. Without that action, the American jobs that will be saved and created through the economic recovery package will again be in jeopardy due to the precarious position of the federal Highway Trust Fund, which some believe will fall short of the cash required to fund existing commitments as early as mid-year.

Given Congress's track record in not delivering timely federal transportation approval, we believe that Pennsylvania cannot wait on funding action at the state level. Without action to replenish lost Act 44 revenue caused by the delay in tolling I-80, a federal stimulus program could simply result in a one year spike in construction activity.

The U.S. House passed stimulus measure includes $550 billion worth of initiatives to promote economic activity and create or sustain jobs (the final bill will also include a series of tax cuts valued at $275 billion). The House Appropriations Committee began work on the proposal January 21 with House floor consideration planned for this week.

On February 10, the Senate passed the so-called compromise bill. Like the House bill, the Senate measure would provide $43 billion in additional transportation investment to help boost the economy and create jobs, including: $27 billion for highways; $8.4 billion for transit; $1.3 billion for the air transportation system, $1.1 billion for passenger rail, and

$5.5 billion for competitive surface transportation grants to state and local governments (traditionally highway, bridge, public transportation, and rail projects qualify).
Below is an analysis of the House package's transportation funding provisions and the requirements for utilization of the recovery package funds.

Total Highway Investment
The measure would provide $30 billion for highway and bridge construction activities. These funds would be additional to the anticipated $41.2 billion level of investment for the core federal highway program in FY 2009. Of the $30 billion, approximately $800 million is dedicated for specific activities. The remaining $29.2 billion is distributed to states based on their share of the existing federal highway apportionment formula. There is no state matching requirement. The bill, however, proposes to divide these funds within each state by giving state departments of transportation control over 55 percent (a little over $16 billion) of the resources and treating the remainder (roughly $13 billion) as Surface Transportation Program (STP) funds.

Allocation Between States and MPOs
While the 55 percent directly under the control of state DOTs is fairly straight forward, the STP component warrants further explanation. It should be noted STP funds are the most flexible of all the highway categories and can be used for virtually anything from highway capacity to public transportation. The program requires a 10 percent automatic set aside for the Transportation Enhancement Program. As such, $1.3 billion of the recovery package's highway funds will be used for enhancement activities (facilities and education for bicyclists and pedestrians, activities related to scenic or historic sites, landscaping and beautification, historic preservation, rehabilitation of historic transportation buildings, preservation of abandoned railway corridors, outdoor advertising control and inventory, archaeological activities, environmental mitigation, and transportation museums).

The remaining $11.8 billion in STP funds are required to be divided within the state between metropolitan planning organizations (62.5 percent or $7.4 billion) and state departments of transportation (37.5 percent or $4.4 billion). This is due to the STP requirements, not direction in the economic recovery package.

Use It or Lose It
The measure would require the highway funds to be apportioned to the states within seven days of the bill's enactment. Half of the funds ($15 billion) must have contracts awarded within 120 days or they are returned to the federal government for redistribution to other states. With respect to the suballocated 45 percent, MPOs must award contracts for 50 percent of their funds within 90 days. If that deadline is not met, the funds would have to be returned to the state and the state must award contracts within 30 days or the funds would be redistributed to another state.

The remaining 50 percent of funds must be under contract by August 1, 2010, or face redistribution. The MPOs' remaining funds must be under contract by July 1, 2010, or be returned to the state department of transportation. The state would then have to award contracts for these returned funds by August 1, 2010 or the resources would be redistributed to another state.

Time Tables for Contract Bidding Under Stimulus
(NOTE: Use tightest time assumptions for the first half of the funds. Assume award date will be 14 days after bid date)

Stimulus Enactment	Feb 12
Funds Apportionment	Feb 19
First Bid Date (3 wks. Pa Law) for either DOT or MPO Funds	March 5
Last Bid Date MPO Funds	April 23
90 day Award Limit MPO Funds	May 6
Last Bid Date DOT Funds	May 21
120 day Award Limit DOT Funds	June 5

Assume Pennsylvania's share of the stimulus package to be
4.5% x $29.2 billion = $1.314 billion

First 50 %:
55% DOT control - $1.314 x.5 x.55 = $363 million
45 % STP (MPO) control - $1.314 x.5 x.45 = $296 million

Assuming MPO portion is bid by PennDOT and all used for Highway/Bridge projects:

March 5 to April 23 Total MPO Stimulus Bids of $296m in 7 weeks or,
$42.3 million per week

March 5 to May 21 Total PennDOT Stimulus Bids of $363m DOT in 11 weeks or,
$33 million per week

(During the first 7 weeks, total bids = $75/m/week)

These bids are all in addition to the normal program bid load. This is a very aggressive rate, especially since most projects will be smaller in size and therefore larger in number. This, of course, begs the question, can the industry ensure timely utilization of these funds in an efficient manner? We are happy to say we can and will deliver.

1. Steps to ensure timely utilization of stimulus funds

PennDOT Far More Organized Than Most States
The industry has been in contact with other states and national organizations throughout the last six to eight weeks regarding the stimulus package. What we have learned is that PennDOT's level of activity in addressing the stimulus is almost unprecedented, nationally. The Department has been aggressively meeting with MPO's, industry, and other stakeholders to ensure that Pennsylvania is on go from day one. Meeting we have held with Pennsylvania's Congressional Delegation has verified this activity.

Also, PennDOT Deputy Secretary Rick Hogg has convened two high level meetings with contractors to brief us on their progress in identifying ready-to-go projects.

2. Modifications to internal review process to ensure project delivery

Several sessions between industry and the Department have been held in the past month to address this issue. In fact, as we sit before you today, I am happy to report that a committee of contractors and PennDOT officials, at this very moment, are across the street discussing this very topic. Some of the modifications to process we have recommended for consideration by the Department include:

How to Accelerate Award to Notice to Proceed Timeframe

1. Produce a dated bid schedule – as it will be necessary to have weekly lettings to bid the required projects in a short period, and because there is a limit to the number of projects most contractors are able to bid on a specific date, it will be helpful for the Department to publish a dated letting schedule stimulus projects.

2. Simplify pre-startup boilerplate to reduce start-up delays:
   a. Mandatory communication and utility connections for project trailers.
   b. Implement current processes for payment guarantee for expedited material purchases.

How to Accelerate Project Completion

1. Committed reduction of 21 day turnaround time for approval of submittals. Should be no more than 5 days for minor submittals.
2. Mark submittals as "Approved as Noted" rather than "Revise and Resubmit"
3. Assign a District Design/Build coordinator where appropriate.
4. Address the problem of utility relocation delays.

3. Other Suggestions for Improvements to Streamline Construction Activities and Reduce Costs of Construction

Pay Contractors on a Timely Basis

PennDOT Projects - In December 2008, an order was issued by the Budget Secretary to slow payments from 30 to 45 days. This was on existing contracts in which the contractor bid figuring on timely 30 day payment periods. In general, PennDOT pays monthly Estimates (nee invoices) within the 30 day timeframe. However, the ability to decelerate payments by administrative order warrants consideration that the Department be brought under the Prompt Payment Act.

Municipal Projects – Often, PennDOT administers contracts for municipalities under a Municipal Services Agreement. Payment timeframes on these projects are habitually abysmal. The reason for slow payment of Contractors on "municipal" projects is that the projects are bid under a "Hardship Template" which allows municipalities to wait for reimbursement from PennDOT for the value of each pay estimate (invoice) before payment is made. Part of the extra time results from the fact that payments from the Federal Highway Administration to PennDOT on average take ten to seventeen days from billing to payment.

The Department has analyzed the additional steps (and time) necessary for payment to occur and determined that, under the best circumstances, contractor payment on municipal projects with Federal funding cannot be made in less than 62 days. The value of municipal projects subject to this payment process is $100 to $150 million per year. Municipalities also are not subject to the Pennsylvania prompt pay act. The chronically slow payment of contractors on municipal projects could result in additional cost to the Department if contractors are including the cost of slow payment in their bid prices.

Delays Caused by Railroads Operations/Directions

PennDOT Districts hold meetings at the highest level with railroads. Agreements reached include: Reporting procedure, weekly coordination meetings, change in procedures for getting track time, coordination at the managerial level for better communication, better cooperation from management. APC has asked that contractors get better information in bidding and contract documents. In 2005, APC requested the development of statewide policy in this matter.

Excessive Negotiations and Liability Caused by Railroad Right-of Entry Clauses

PennDOT and the construction industry have been attempting to negotiate reasonable right-of-entry (ROEA) clauses with railroads for some time. Typically, railroads require the contractor to indemnify the railroad for even intentional acts by the railroad. Insurance is not available for such clauses.

For example, some ROEA requires the contractor to be responsible for any and all costs, expenses and legal fees incurred by the railroad. This could be for anything. The typical ROEA allows the railroad to require any additional insurance it wants. According to the agreement, the railroad could require the insurance to be renewed indefinitely – "until all of the company's obligations have been fulfilled" (contractor's obligations are required to survive the expiration of the agreement).

These clauses add needless and tremendous cost to a contractor's bid and others expose the contractor to extreme risks that are uninsurable. The taxpayer bears the ultimate costs for delays and protection demanded by railroads.

4. Existing legal barriers and impacts of resource agencies impeding delivery of projects to ensure investment in infrastructure can be met

<u>Proposed Listing by PaFBC of New Mussel Species as Threatened and Endangered Species - Impact on Available Sources of PennDOT Grade Aggregates</u>

In October 2008, the Pa Fish and Boat Commission (PaFBC) announced a Proposed Rulemaking to add five additional freshwater mussels to the state's Threatened and Endangered Species (T&E) list. The PaFBC intends to finalize the rulemaking on Friday January 30th

This represents an immediate and drastic negative impact on the available supply of sand and gravel (construction aggregates), used primarily in concrete and asphalt. The Allegheny and Ohio Rivers are two of the major sources of PennDOT grade aggregates in Western Pennsylvania.

In 2007, 2.3 million tons of river-based aggregate was produced, of which over of 95%, or 2.1 million tons, was used for PennDOT projects. The 2.1 million tons represents approximately 20% of the total aggregates used annually by PennDOT. If river-based sources were further restricted, due to the presence of additional threatened and endangered mussels, the availability of high quality aggregates would be impacted. Current land-based production in Western Pennsylvania is not sufficient to replace these river-based sources should they be further reduced or eliminated. This specifically impacts PennDOT's western Districts 10, 11 and 12, and would force them to seek sources outside their region. On average, it is expected that 90 to 100 miles would be added to the current distance that aggregate would need to be transported, increasing the unit cost by 30%. This 30% increase is based on current fuel prices, and would be higher if fuel prices were to increase.

Should river-based aggregate be curtailed, PennDOT estimates an increase in project costs of over five-million dollars annually, based on current material usage, which could easily grow with increased material demand (due to the stimulus package) and higher fuel prices.

This current source of PennDOT grade aggregate could be eliminated, due to the proposed rulemaking by PaFBC. It is not in the best interest of the Commonwealth for vital aggregate and construction industries to be placed at risk, particularly during an economic recession.

Create Interagency Committee to Coordinate Resource Agencies

To avoid disruptions and unnecessary cost escalation from resource agency actions, our recommendation is that a gubernatorial Executive Order be issued quickly, tasking all agencies to assign the top Deputy Secretary of each agency to implement their agency's response and cut "red tape." I further respectfully suggest that an inter-agency committee chaired by the Secretary of Transportation be established to permanently oversee transportation initiatives related to the stimulus. This committee should make periodic reports to the General Assembly.

Increase the use of Recycled Asphalt Pavement (RAP) by Contractors

Twenty-nine states turn back the total tonnage of Recycled Asphalt Pavement (RAP) to the contract and then mandate a high percentage of RAP for use in paving projects. There is savings available for the use of RAP, not to mention the positive impact on the environment. All but one of PennDOT's Districts turn back some RAP to contractors. In 2008, the Department retained 30% of RAP produced or 461,000 tons of the product for use in future paving projects.

5. Missouri "Safe & Sound Bridge Improvement Program" - APC Observations

Facts from Missouri Program:

1. Procurement began September 2008

2. Includes 802 Total Structures:
    a. 248 Rehabilitations by modified design-bid-build, goal of 100 under construction by early 2009 (assumed by individual contractors)
    b. 554 Replacements by design-build
        i. Typical Replacement 147 ft. long, 24 ft. wide, 60 years old ADT less than 1900 vehicles per day

3. Selecting Single Design-Build Team for 554 Replacements using a "Two-Phase" RFP Process
    a. 10/27/2008 issued Request for Qualifications, followed by:
    b. Statements of qualification, short listing, technical proposals and team selection
    c. Selection by Best Value Method: 30% Technical, 70% Price, plus Pass/Fail Items May/2009 anticipated Contract Award
        i. Includes schedule damages and incentives

ii. $10,000,000 upfront payment from contractor
iii. Contractor Risk: Inflation, Geotechnical (foundation), Design
iv. MoDOT Risk: Hydraulic, Environmental

4. Complete Construction by October 31, 2014. This schedule would likely result in completion of approximately 111 bridges each year from 2010 to 2014.

Application to Pennsylvania's Accelerated Bridge Program (ABP)

1. The "Two-Step" (RFP – Best Value) selection process is currently the subject of a lawsuit in Pennsylvania. It has been challenged as violating the current Procurement Code which specifies that contracting for construction be done by the low bid method.

2. As of January 1, 2009, Pennsylvania has awarded 145 "Accelerated Bridge Program" projects which are a mixture of conventional designed bids and design-builds.

3. PennDOT's goal is to have awarded 411 ABP projects with a mixture of conventional bids and design-builds (Design Build awards based on low bid). PennDOT's plans to award an additional 700 (approx.) ABP projects by June 30 2011, with probable completion of its program by the end of the 2012 construction season.

Therefore, Pennsylvania's "Accelerated Bridge Program" will likely result in completion of approximately 275 bridges each year from 2009 thru 2012.

The value of the single design-build contract for Missouri's 554 replacements will approximate $600,000,000. Only a very few of the largest national contractors are financially capable of taking on a risk of this magnitude, especially considering the large number of structures. There are relatively few national contractors who could even participate in a joint venture of up to three contractors for a contract of this size. If Pennsylvania's remaining ABP bridges, say 850, were included in a single Design-Build contract, the price would approach one billion dollars. The issues would not just be in value of the contract, but the number and diversity of the projects in question.

PennDOT, of necessity, is organized into 11 Engineering Districts to administer its operations, including design and construction. It is difficult to imagine the problems that would result for a single Design Builder to interact with 11 different District entities. Eliminating Districts would create construction administration problems. APC believes it would be unwieldy, for example, to administer contracts in Butler from Harrisburg.

The cost for a single design-build contractor to undertake Pennsylvania's ABP would no doubt be increased by a many factors:

- Cost to assemble and maintain an expensive top management staff, as well as geographical sub-offices due to the size of the state.
- Uncertainty cost to deal with multiple Engineering Districts with unique design, construction, and operation preferences.
- Uncertainty cost of predicting availability and wage cost of field (craft) labor over a four or more year contract period, and throughout diverse area of a very large state. Some areas work mostly under union contracts, while others do not.
- Alternately, and more likely, administrative cost plus markup applied to costs to subcontract individual projects to local / regional contractors, and whose prices must also, of necessity, include administrative cost and profit.
- Difficulty and risk to estimate a firm price for 850 structures, probably without benefit of borings, in a short (proposal preparation) period, especially if geotechnical risk is included.
- Management of engineering effort requires that a single, large organization be assigned the entire project, or that the work be assigned to numerous small organizations. The former would experience significant learning curve difficulty to produce designs consistent with PennDOT's expectations, while the latter would be a large management challenge to coordinate the efforts of many firms, albeit firms familiar with PennDOT design requirements.

6. How is the Commonwealth positioned to deal with the next step in an economic recovery based upon infrastructure investment?

Our opinion is that we the Commonwealth at this time is not well positioned. Even before our current fiscal crisis, the 2006 Transportation Funding and Reform Commission estimated the shortfall in highway funding for Pennsylvania at $960 million per year. That sum included only the resources needed to maintain and repair the existing infrastructure; it did not accommodate expanded highway or transit capacity, and it did not include the funding required to maintain local (i.e., non-state or federal) roads.

Act 44 of 2007 increases tolls on the Pennsylvania Turnpike and borrows against that future toll revenue; part of Act 44, the tolling of Interstate 80 was denied by the Federal Highways Administration. The proposed private lease operation of the Turnpike has failed. This will make it extremely difficult to fund our transportation needs beyond the one time borrowing of $350 million for bridge repair approved by the Governor and the Legislature in 2008.

In 2008, The Motor License Fund has experienced a significant decline in revenue as higher gasoline prices and an uncertain economy have kept drivers off the road. In Fiscal Year 2007-08, gasoline tax receipts were off by about $88 million compared with projections.

For the first four months of FY 2008-09, gas-tax revenue was off by 8.2 percent, a trend that would create a shortfall of nearly $238 million if it were to hold through June 2009. Looking ahead to FY 2010-11, Highway revenue from Act 44 will decrease by $200 million per year beginning in FY 2010-11, a result of the rejection of the I-80 tolling plan by the Federal Highway Administration.

The fact that the highway system is under funded could lead to additional catastrophic failures, such as the Birmingham Bridge in Pittsburgh, the I-95 bridge in Philadelphia and the collapse of the bridge onto I-70 near Washington, Pa. in 2005. At the very least, needed roadway repair and capacity projects are on hold while PennDOT is forced to expend the vast majority of its resources on fixing bridges.

Comprehensive, not piecemeal approach needed. Previous measures have not done the job because they tend to pit geographic regions and motorist classifications against one another *and still do not solve the problem.*

Second, we must stop thinking merely in terms of cost and start thinking in terms of investment. We must answer the question: "What kind of transportation system do we want in 10 years, and how to we get there?"

Third, we need to make a distinction between general taxation and user taxes and fees. User taxes and fees, whether based on tolling, fuel consumption, or the miles someone drives, more accurately assess the cost for the use of our highway assets. They also give the motoring public some measure of individual control over how much they pay.

Specifically:

- Toll *all* of Pennsylvania's interstate highways. The current toll schedule for the Turnpike, plus the proposed toll schedule for I-80 that was rejected, would have raised $270 million per year by 2013. Tolling all 1758 miles of our interstate highways would either raise more money, or moderate the required tolling levels, or both, and it would not place a disproportionate burden on any single geographic region. We should begin working immediately with our congressional delegation to lift the federal restrictions on tolling.
- Raise the cap on the Oil Company Franchise Tax. The current cap of $1.25 should be raised to $1.75, with 3 percent annual increases. This would raise $500 million per year, with growth to accommodate inflation.
- At the same time, the declining gas-tax revenue in recent months illustrate why we should begin looking at a miles-driven user tax and convert from the consumption-based gasoline tax. A miles-driven approach is more fair and equitable given our national energy policy, which emphasizes conservation and alternate fuels. We should begin planning now for replacing the current 12-cent-per-gallon gas tax with a miles-driven fee.

- Increase registration, title, licensing and inspection fees to raise an additional $100 million, and dedicate that to local roads.
- Cap State Police funding from the Motor License Fund and begin shifting the responsibility back toward the General Fund. Three-quarters of the State Police budget now comes from the fund that was created to pay for highway projects.
- Enact enabling legislation for P3 projects, including for unsolicited proposals. Regardless of whether the Turnpike lease idea comes back, we believe the greatest opportunities for P3s are in building new capacity.

Will it be accepted?
TCI's 2008 public opinion research revealed that 56 percent of Pennsylvania voters would be willing to pay at least an additional $8 per month in order to solve this problem.

More recently, the co-chairs of Building America's Future announced the results of a national poll that examines American views on infrastructure, priorities and willingness to pay for it. Conducted by Luntz, Maslansky Strategic Research, the poll shows widespread and bipartisan support for infrastructure investment with accountability measures.

Key findings included:

A near unanimous 94% of Americans are concerned about our nation's infrastructure.

- 81% of Americans are prepared to pay 1% more in taxes to rebuild America's infrastructure.
- Accountability is their single highest priority (61%) in rebuilding America's infrastructure.
- Regarding infrastructure spending, Americans care most that projects are on time and on budget (31%), and that they can see exactly where the money is being spent (24%).

Again, thank you Chairman Markosek, Chairman Geist and members of the Transportation Committee for inviting me today to improved delivery of our critical infrastructure needs in the Commonwealth.

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