

**ARTBA  
ENVIRONMENTAL & REGULATORY  
UPDATE**

**94<sup>TH</sup> ANNUAL CAROLINAS AGC CONVENTION**

by

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# CONTINUING TO PROTECT THE INDUSTRY

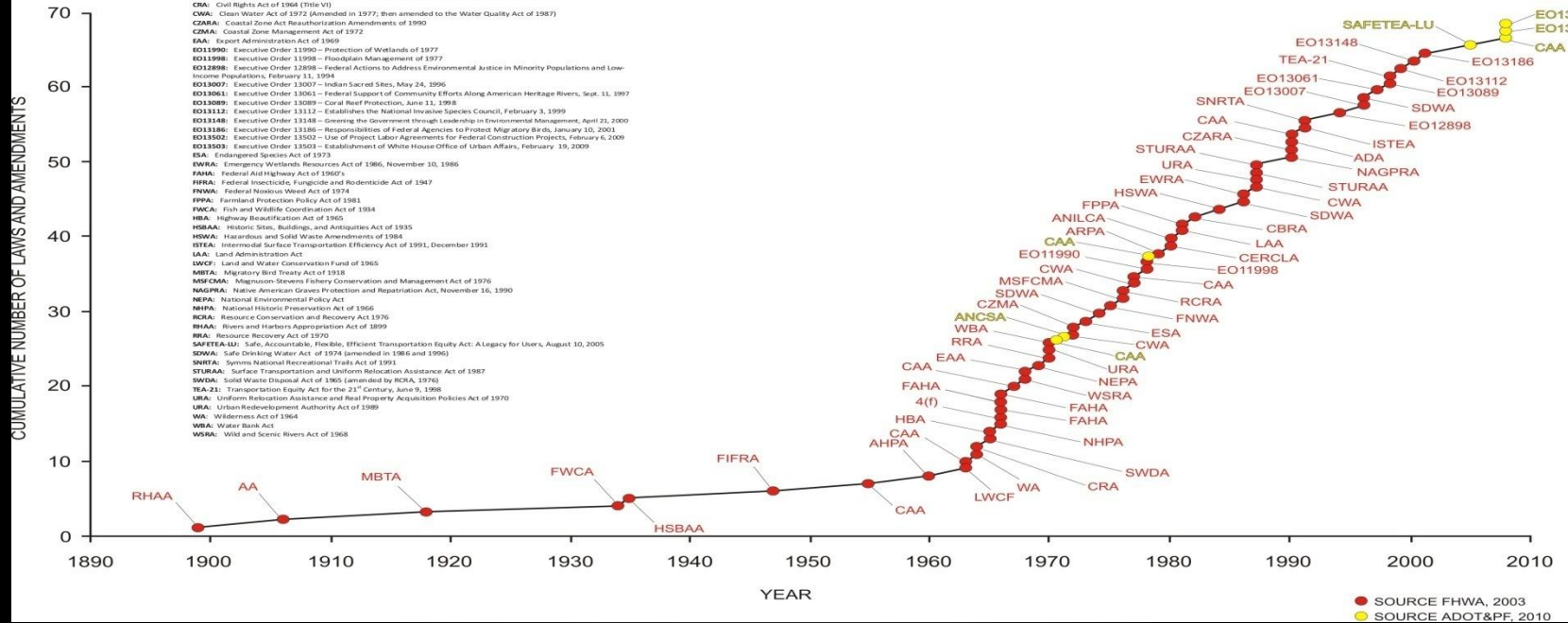
- ARTBA Activities:
  - 35 Regulatory filings in 2014
  - Testimony before Congress
  - Meet with officials from EPA, OSHA, SBA, DOT and OMB
  - Continuing to represent the industry in court

# WHAT WE'RE UP AGAINST...

## Federal Environmental Requirements Affecting Transportation

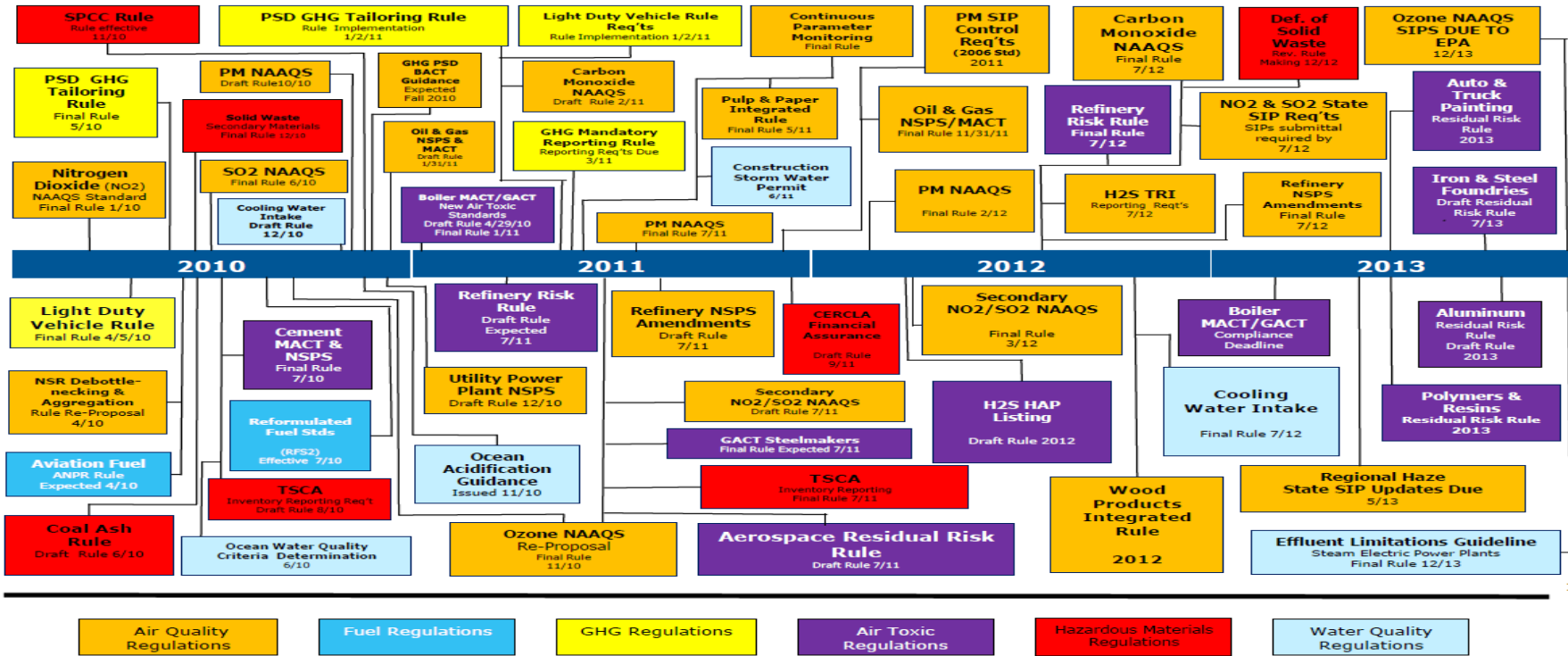
### Acronym – Description

- 4(f): Section 4(f) of the Department of Transportation Act of 1966
- AA: American Antiquities Act of 1906
- ADA: Americans with Disabilities Act of 1990 (also ADA Amendments Act of 2008)
- AHPA: Archaeological and Historic Preservation Act of 1974 (Expansion of Reservoir Salvage Act of 1960)
- ANCSA: Alaska Native Claims Settlement Act, 1971
- ANILCA: Alaska National Interest Lands Conservation Act, 1980
- ARPA: Archaeological Resources Protection Act of 1979
- CAA: Air Pollution Control Act of 1955 (later replaced by Clean Air Act of 1963, amended in 1970, 1977, 1990; Endangerment Finding regarding greenhouse gases, 2009)
- CBRA: Coastal Barrier Resources Act of 1982
- CERCLA: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)
- CRA: Civil Rights Act of 1964 (Title VI)
- CWA: Clean Water Act of 1972 (amended in 1977, then amended to the Water Quality Act of 1987)
- CZARA: Coastal Zone Act Reauthorization Amendments of 1990
- CZMA: Coastal Zone Management Act of 1972
- EAA: Export Administration Act of 1969
- EO11990: Executive Order 11990 – Protection of Wetlands of 1977
- EO11998: Executive Order 11998 – Floodplain Management of 1977
- EO12898: Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994
- EO13007: Executive Order 13007 – Indian Sacred Sites, May 24, 1996
- EO13061: Executive Order 13061 – Federal Support of Community Efforts Along American Heritage Rivers, Sept. 11, 1994
- EO13089: Executive Order 13089 – Coral Reef Protection, June 11, 1998
- EO13112: Executive Order 13112 – Establishes the National Invasive Species Council, February 3, 1999
- EO13148: Executive Order 13148 – Opening the Government through Leadership in Environmental Management, April 21, 2000
- EO13186: Executive Order 13186 – Responsibilities of Federal Agencies to Protect Migratory Birds, January 10, 2001
- EO13502: Executive Order 13502 – Use of Project Labor Agreements for Federal Construction Projects, February 6, 2009
- EO13503: Executive Order 13503 – Establishment of White House Office of Urban Affairs, February 19, 2009
- ESA: Endangered Species Act of 1973
- EWRA: Emergency Wetlands Resources Act of 1986, November 10, 1986
- FAHA: Federal Aid Highway Act of 1966
- FIFRA: Federal Insecticide, Fungicide and Rodenticide Act of 1947
- FNWA: Federal Noxious Weed Act of 1974
- FPPA: Farmland Protection Policy Act of 1981
- FWCA: Fish and Wildlife Coordination Act of 1954
- HBA: Highway Beautification Act of 1965
- HSBAA: Historic Sites, Buildings, and Antiquities Act of 1935
- HWMA: Hazardous and Solid Waste Amendments of 1984
- ISTEA: Intermodal Surface Transportation Efficiency Act of 1991, December 1991
- IAA: Land Administration Act
- LWCF: Land and Water Conservation Fund of 1965
- MBTA: Migratory Bird Treaty Act of 1918
- MSFCMA: Magnuson-Stevens Fishery Conservation and Management Act of 1976
- NAGPRA: Native American Graves Protection and Repatriation Act, November 16, 1990
- NEPA: National Environmental Policy Act
- NHPA: National Historic Preservation Act of 1966
- RCRA: Resource Conservation and Recovery Act 1976
- RHAA: Rivers and Harbors Appropriation Act of 1899
- RRA: Resource Recovery Act of 1970
- SAFETEA-LU: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, August 10, 2005
- SDWA: Safe Drinking Water Act of 1974 (amended in 1986 and 1996)
- SNRTA: System National Recreational Trails Act of 1991
- STURAA: Surface Transportation and Uniform Relocation Assistance Act of 1987
- SWDCA: Solid Waste Disposal Act of 1960 (amended by RCRA, 1976)
- TEA-21: Transportation Equity Act for the 21<sup>st</sup> Century, June 9, 1998
- URA: Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970
- URA: Urban Redevelopment Authority Act of 1989
- WA: Wilderness Act of 1964
- WBA: Water Bank Act
- WSRA: Wild and Scenic Rivers Act of 1968



# EPA HAS KEPT US BUSY!

## EPA Rulemaking Timeline



# 2013 IN REGULATIONS

- 175,496 pages in the Federal Register
- 3,659 Final Rules
- \$1.863 trillion in total regulatory costs
- EPA out of top five
- Introduced to “Marty the Magician”

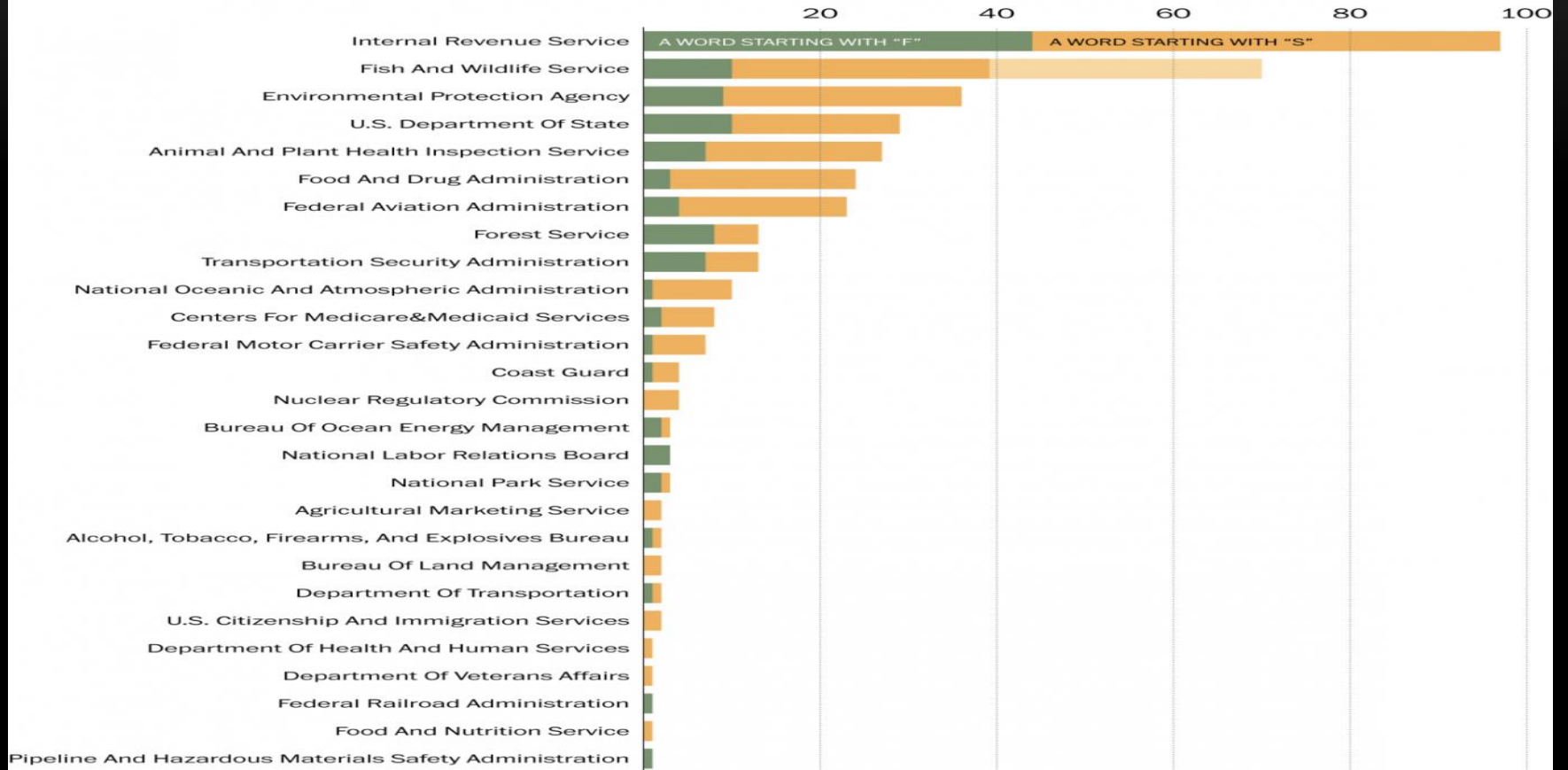
# PEOPLE AGREE WITH ARTBA – LESS DELAY!

- Bipartisan support in Congress
- February 2014 poll shows a majority of Americans agree reviews of infrastructure projects can be shortened without harming the environment.
  - 52% of Democrats
  - 72% of Republicans
  - 59% of Independents

# HOW FOLKS REALLY FEEL ABOUT REGULATION

## The government agencies that are sworn at the most

Appearances of two common swear words in comments submitted on proposed regulations.



SOURCE: REGULATIONS.GOV

# SLOW PROGRESS

- Bipartisan pressure on DOT to move faster
- Six years of policy in 18 months
- Full implementation seen as essential to next bill
- Not enough time or projects to measure results



# WHAT HAS BEEN COMPLETED

- New CEs
  - Used in I-5 Bridge replacement
- Guidance for permit deadlines, fines, simplifying EIS
- Delegation for CA & TX
- Minimum standards for pavement & bridges proposed

# PROJECT DELIVERY & REAUTHORIZATION

- Both Administration & Senate proposals continue MAP-21's progress
- Nothing undone – A victory in and of itself
- Common themes – Simplifying historic preservation requirements, reducing alternatives analysis

# 2014 STORMWATER VICTORY!

- Patience Pays Off!
- Started efforts in 2007
- Multiple ARTBA members directly involved, speaking to EPA detailing costs
- More than \$1 million per project
- One size DOES NOT fit all!

# 2014 COAL ASH VICTORY!

- EPA will not regulate coal ash as a “hazardous substance”
- ARTBA lead at the national level on this issue
- ARTBA study highlighted possible \$104 billion price tag over the next 20 years
- Federal regulations for coal ash storage will increase
- Eye still on legislation to make EPA’s decision permanent

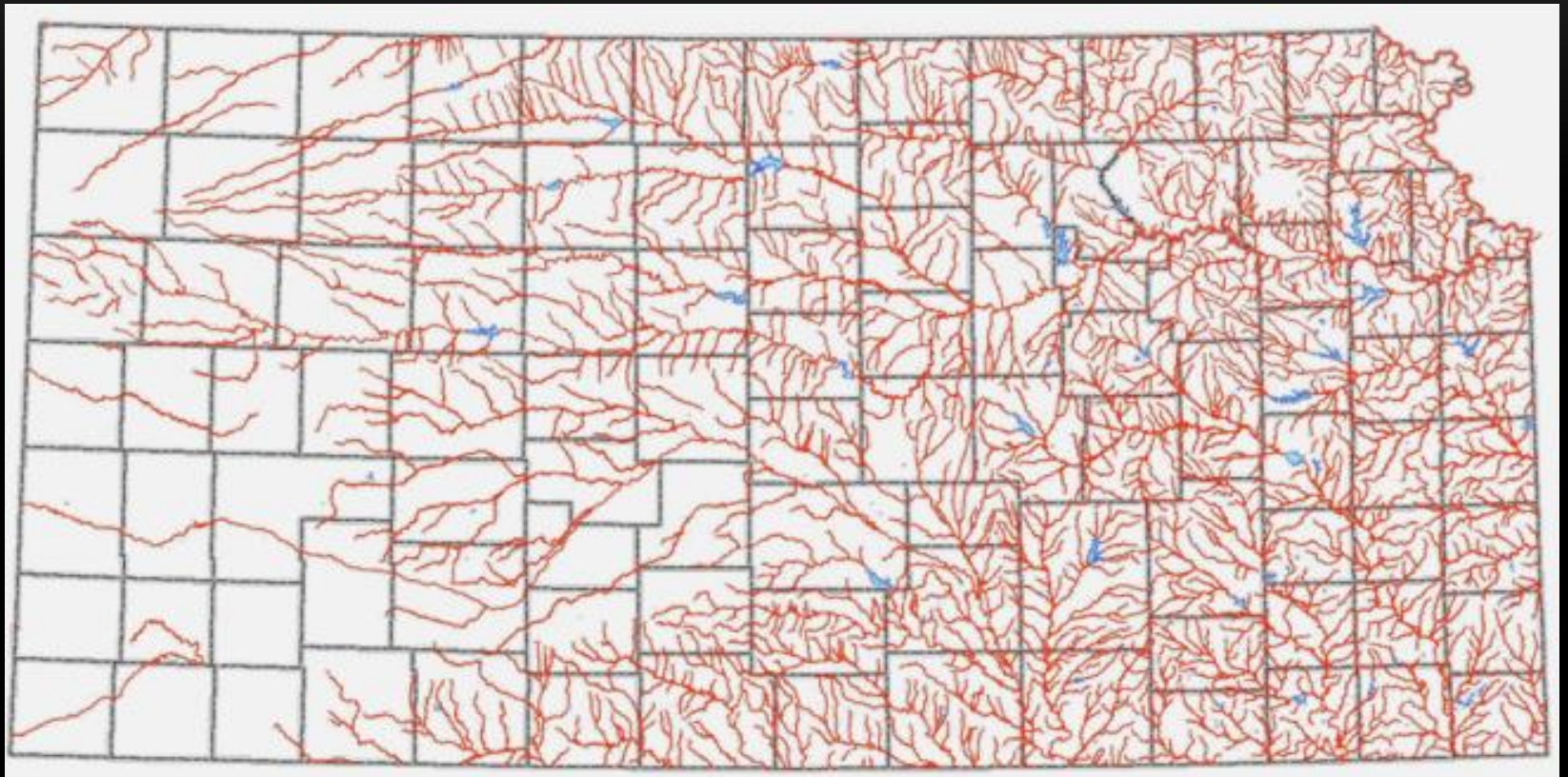
# WATERS OF THE UNITED STATES

- Started as legislation in 2005
- Bipartisan objection
- Did not even make it out of T&I
- EPA is doing what congress would not
- Not “SWANCC-y” at all

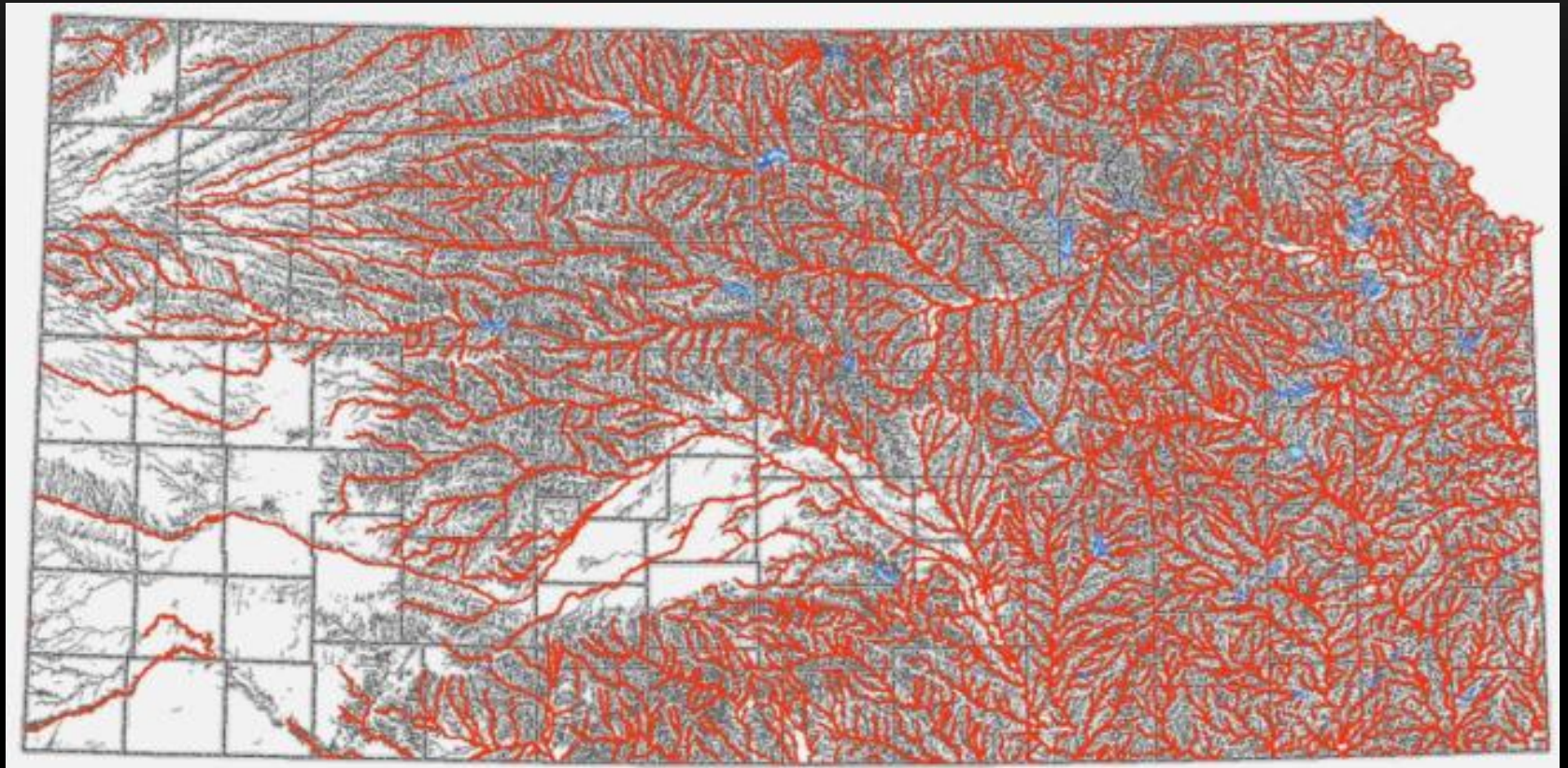
# WHAT WILL EPA'S RULE DO?

- Expands federal jurisdiction to roadside ditches – for simply being ditches!
- Lead to delays, increased litigation for transportation improvements
- ARTBA, industry allies offered detailed comments
- Legislative solutions also being pursued
- EPA promises final rule by April 2015; ultimately, there may be litigation

# CLEAN WATER ACT NOW IN KANSAS



# PROPOSED RULE ADDS 134,000 MILES!





**WHAT WILL BE REGULATED?**  
**ARIZONA – CARRIED WATER 5 TIMES IN 182 RAIN EVENTS**



# ROADSIDE DITCH IN MARYLAND



# PARK DITCH IN PINELLAS COUNTY, FLA. - \$31,351,460 COST!



# OZONE

- EPA proposed new standard Wednesday, November 26<sup>th</sup>.
- 65 – 70 ppm, taking comments on 60 ppm as well.
- Cost anywhere from \$90 (EPA) to \$270 (NAM) Billion annually!
- Lower end would be most expensive regulation of all time!
- Federal highway funds would be put at risk

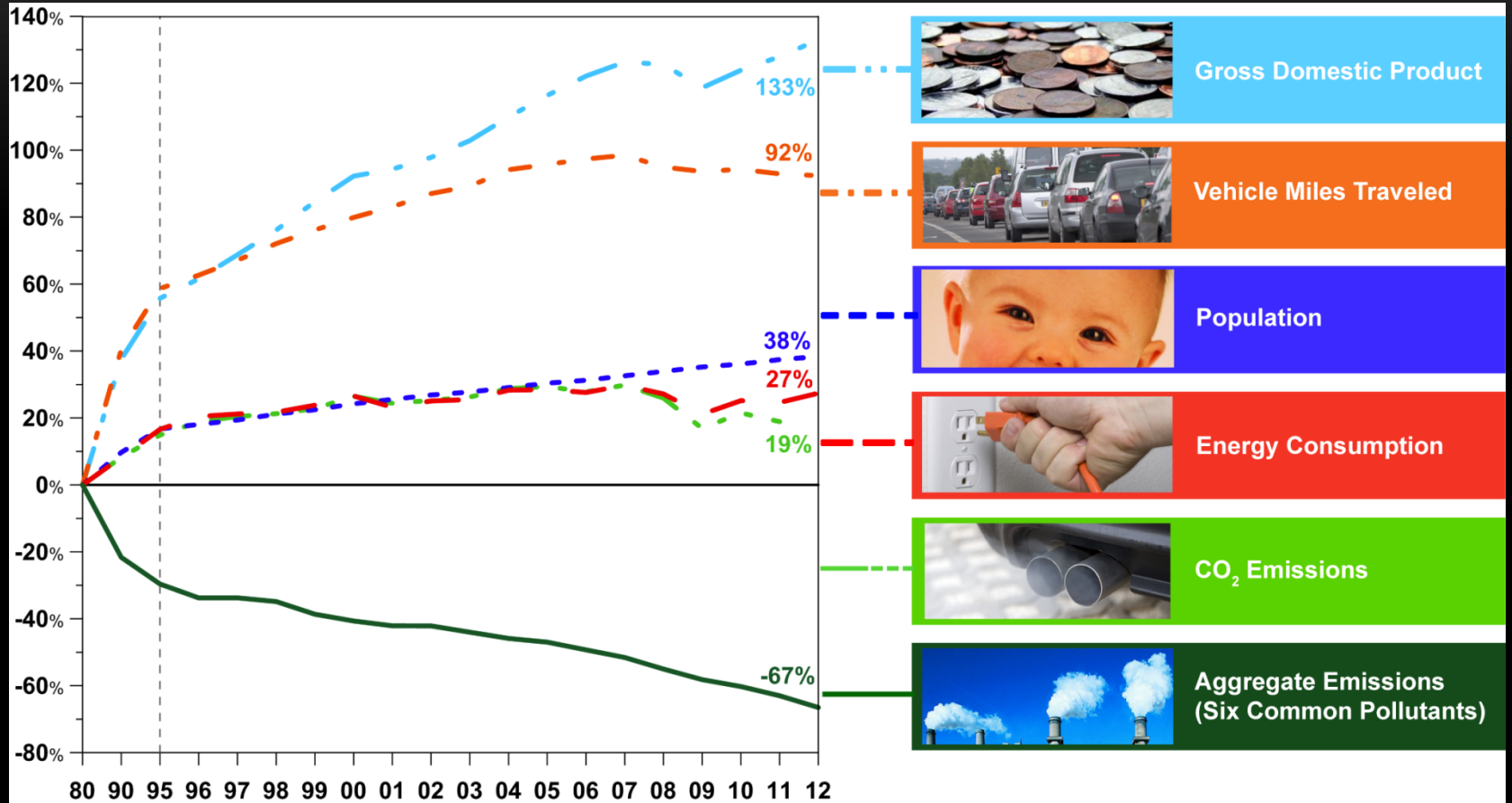
# OZONE

- EPA is required to REVIEW standard every five years.
- EPA is NOT required to impose a STRICTER standard.
- Current standard is working.
- Still being implemented in many areas.
- Moving the goalposts.
- Regulations do not operate in a vacuum.

# **COST TO THE CAROLINAS**

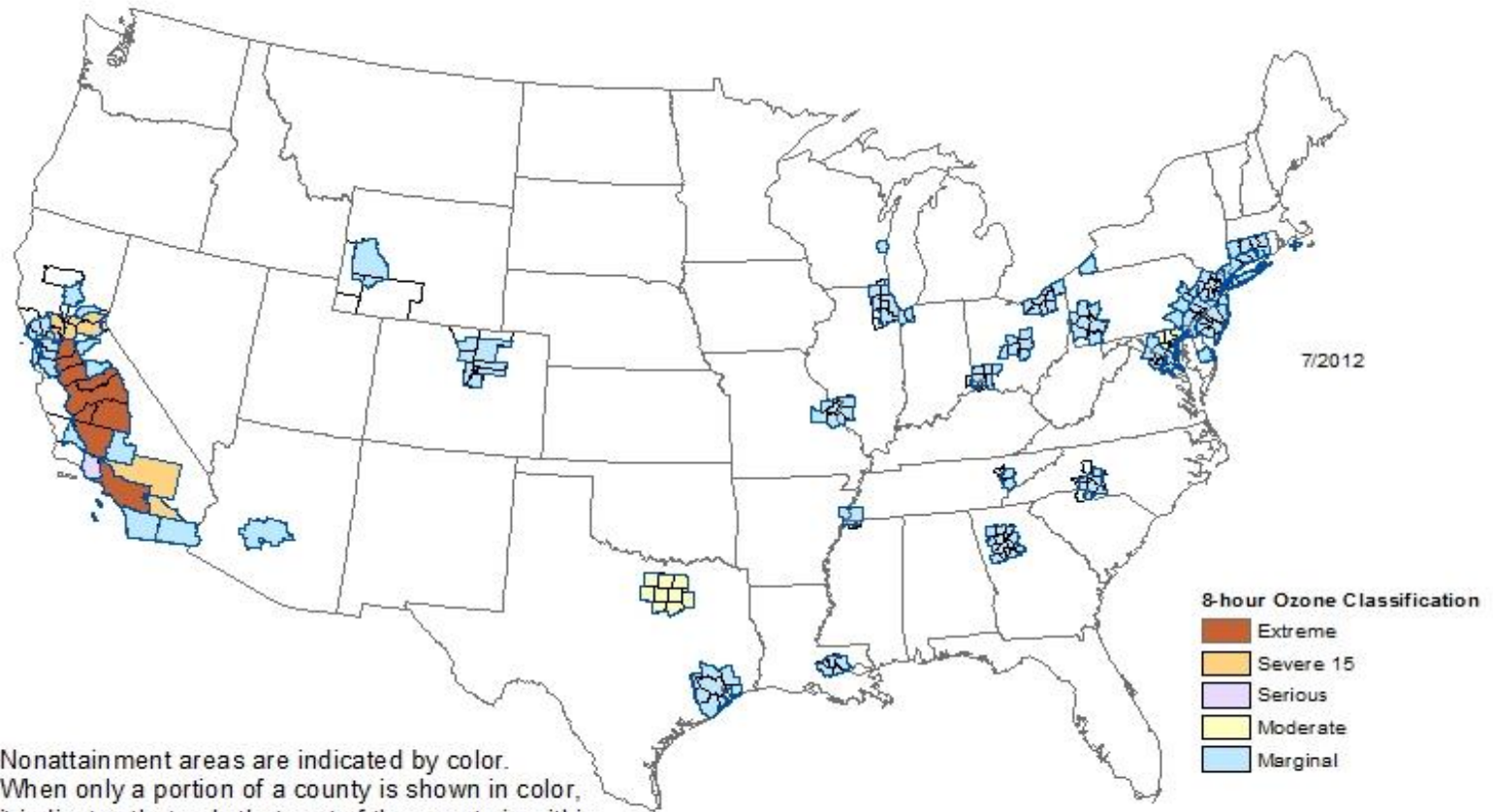
- **\$191 Billion** Gross State Product Loss from 2017 to 2040
- **164,405** Lost Jobs or Job Equivalents per Year
- **\$1,010** Drop in Average Household Consumption per Year
- **\$16 billion** increase in costs for residents to own/operate vehicles statewide from 2017 to 2040
- Shutdown of 34% of the Carolinas' coal-fired generation capacity

# EPA SAYS THINGS ARE GETTING BETTER!



# Current Ozone Nonattainment Areas

## 8-Hour Ozone Nonattainment Areas (2008 Standard)

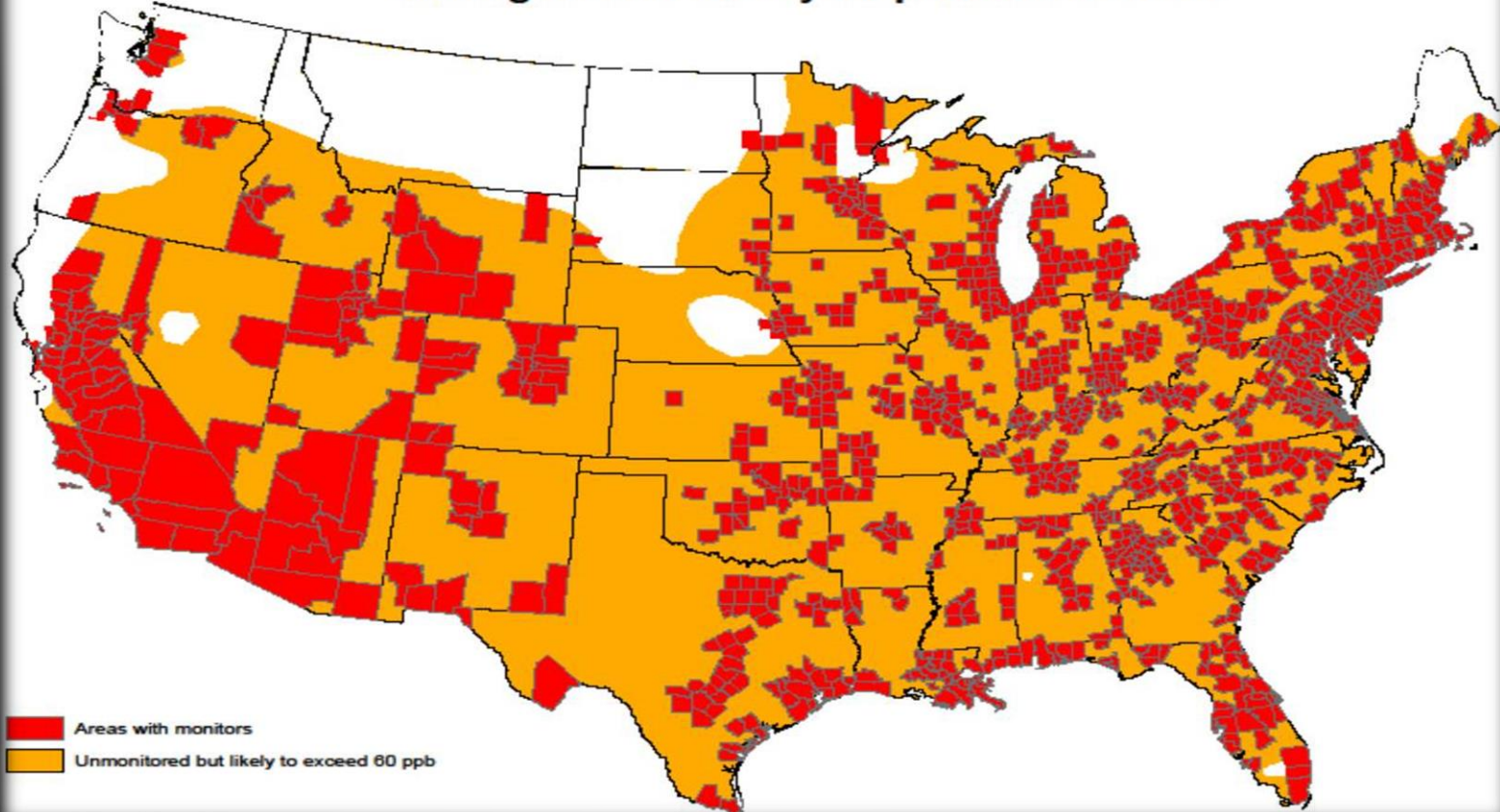


Nonattainment areas are indicated by color. When only a portion of a county is shown in color, it indicates that only that part of the county is within a nonattainment area boundary.



# Nonattainment At 60 PPB

NAAQS Ozone 8-hr Design Values  
4th Highest for the 3-year period 2010-2012



Source: URS, June 4, 2013

# OZONE – WHAT'S NEXT?

- 90 day public comment period
- Public hearings in January 2015
- Possible legislative remedies (ARTBA & TXDOT meeting with legislators)
- Likely judicial action
- We have won on ozone before!

# ENDANGERED SPECIES ACT

- CBD/WildEarth Guardians Settlement
  - Many lawsuits vs. FWS demanding species listing
  - Resolved in comprehensive settlement of suits
  - Listing decisions for 757 species by 2018
- Nationwide impacts
  - At least 3 species / state
  - 50+ in some states (e.g., FL – 115, TN – 103, VA – 75, KY – 55, NV – 54, CA – 52)
  - 81 new species listed in FY2013 – just the beginning!

# DBE RULE CHANGES

- 25 month process
- ARTBA submitted 2 sets of comments, conducted contractor survey
- Concerns focused on cost, compliance issues
- ARTBA's comments cited numerous times in final rule changes
- Value in having our positions heard
- ARTBA is working on a comprehensive review, offering webinars
- Industry leader on this issue

# DBE RULE CHANGES

- If it chooses, a state or local department of transportation will be able to allow prime contractors to submit DBE information and good faith effort documentation up to a maximum of seven (7) days after bid. The permissible window will be shortened to five (5) days in 2017.
- U.S. DOT's original proposal would have required all prime contractors to submit this material with their bids, or at most one day afterward. ARTBA strongly opposed this provision and obviously prefers the 5/7-day limit to the original version.

# DBE RULE CHANGES

- State and local agencies may continue to use bidders, prequalification or plan holders lists as part of the goal-setting process, although U.S. DOT will require additional market data to be considered.
- The original proposal explored the possibility of prohibiting any of these lists from being used for goal-setting. ARTBA argued this would have been contrary to the DBE program's stated policy of enabling state and local agencies to adapt the program to their respective markets.

# DBE RULE CHANGES

- State and local agencies will need to determine “on a contract-by-contract basis” if a particular DBE subcontractor is acting as a regular-dealer or a transaction expediter.
- Initially, DOT had discussed abolishing the regular-dealer designation entirely. ARTBA opposed this possible change as misunderstanding the important role regular-dealers continue to play on many projects.

# OSHA ISSUES

- ARTBA testified before OSHA on crystalline silica.
  - Stressed cost, accuracy of OSHA data, implementation issues
- ARTBA commented on OSHA recordkeeping proposal
  - House Committee on Small Business invited ARTBA to participate in a Roundtable
- OSHA confined spaces rule at OMB
  - ARTBA commented in 2008, citing liability and classification concerns



# THE PERRY MASON OF TRANSPORTATION!

- 20<sup>th</sup> Anniversary last year!
- Seeks out cases of national importance
- Ensures transportation construction has a seat at the table
- Over \$50 Billion in transportation projects allowed to move forward

# WHY WE NEED TO LITIGATE

- “Facts and reason are much less important than the amount of noise you can make... Officials who support [highway projects] should be mercilessly abused, shamed, ridiculed and otherwise made to suffer pain... The objective should be to cleave a division through the community so painful that people will remember it for decades afterward.”
  - Jay Kardan, Conservation Chairman, Sierra Club, Virginia Chapter

# WELL FUNDED ADVERSARIES

- Earthjustice – Net assets of more than \$32 Million
  - 55 attorneys,
  - 18 litigation/research assistants
  - 1 scientist on staff.
- Environmental Defense Fund – Net assets of more than \$132 million
- Both of these organizations employ the majority of their resources to fund anti-growth litigation often aimed at transportation projects.

# ELIZABETH RIVER CROSSINGS

- VA Supreme Court victory October 31, 2013
- Lower court in VA halted P3 project
- Held tolls were unconstitutional
- In VA, the decision saved:
  - \$10 billion in construction
  - More than \$7.5 billion in economic activity
  - 26,000 jobs (at least 14,000 long-term)
- Could have endangered other states P3 legislation and projects

# DBE LITIGATION

- Federal appeal of “Dunnet Bay” decision
- Goals:
  - Uphold “good faith efforts”
  - Clarify distinction between “targets” and “quotas”
  - Protect bidding process
  - Protect right to challenge mis-application of DBE guidelines
- Case came from state chapter involvement
- No decision expected until early 2015

# QUESTIONS, COMMENTS OR ADDITIONAL INFORMATION

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