

January 17, 2012

U.S. Army Corps of Engineers
ATTN: CECW-CO-R (Ms. Amy S. Klein)
441 G Street, NW
Washington, DC 20314-1000

Re: Docket No. COE-2011-0028, USACE's Plan for Retrospective Review Under E.O. 13563

On behalf of the 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer the following comments for consideration as part of the U.S. Army Corps of Engineers' (Corps') plan for retrospective review under Executive Order 13563 noticed in the November 16, 2011, issue of the *Federal Register*. The following comments deal specifically with issues pertaining to the federal Clean Water Act (CWA), including wetlands permitting.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs.

ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA. In the nearly 40 years since the CWA's passage, ARTBA has actively worked to achieve the complementary goals of improving our nation's transportation infrastructure and protecting essential water resources. In doing so, we are proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure improvements on the natural environment. This document represents the collective view of our member companies and organizations.

ARTBA commends President Obama for initiating this review process by issuing a January 18, 2011, Executive Order noting that all regulatory efforts must "protect public welfare, safety and our environment while promoting economic growth, innovation competitiveness and job creation." Specifically, the President's Executive Order notes agencies must tailor regulations to "impose the least burden on society." With this in mind, the Corps should be cognizant of the impact its regulations have on other federal initiatives, such as effective transportation improvements. Regulations do not operate in a vacuum. A regulation promulgated and enforced by one agency, such as the Corps in one policy arena, often affects the ability to comply with other regulations and initiatives from other agencies in completely different policy arenas.

For example, while the Corps operates primarily in the environmental realm, its regulations can impact ARTBA members' ability to construct transportation improvements which are necessary from a public health and safety perspective. These effects should be considered by the Corps as nearly 33,000 people die on U.S. highways each year and many federally-aided highway improvements are designed specifically to address this issue, but under many situations these interconnections are not recognized.

With this in mind, ARTBA offers comments on the following areas of regulatory concern relevant to the Corps' review:

- **General Corps/U.S. Environmental Protection Agency (EPA) Jurisdiction:** ARTBA has repeatedly stated the involvement of multiple agencies in wetlands regulation only hinders the overall efforts of the Corps' permitting program. One of the principal problems plaguing the 404 program is indecision and inaction, with no benefit for the environment. Currently, both the Corps and EPA share responsibility for promulgating wetlands permitting regulations. However, Congress, in the National Defense Authorization Act for Fiscal Year 2004 authorized only one agency, the Corps, to issue permitting program regulations. Thus, it should be the sole responsibility of the Corps to take the lead and build a stronger, more predictable compensatory mitigation program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit applicants. ARTBA continues to believe the Corps should be the principal agency administering the wetlands regulatory program. All wetlands-related guidance should be amended to acknowledge the Corps' status as the sole intended decision-making agency in jurisdictional determinations.
- **Wetlands Classification and De-Minimis Impacts:** The permitting process is already plagued with delays and an additional process to determine jurisdiction would only extend the amount of overall time taken to determine jurisdiction. An alternative method of establishing clarity would be to develop a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands, while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Further, a "de minimis" threshold should be established for instances where impacts to wetlands do not have any ecological effect. This would give projects that do not disturb wetlands an opportunity to proceed without having to be delayed by the permitting process.
- **Time Limits for Permitting Decisions:** There is no set time limit for permitting decisions. When they apply for permits, project planners have no sense of when the process is going to be completed. Strict, enforceable timelines for permitting decisions should be set. An acceptable time span would be between 60 and 120 days to allow the Corps enough time to evaluate the permit without causing a substantial delay to the project—unless the Corps and the applicant agree on another timeline acceptable to both parties. If a decision is not made on a permit within the given timeframe, then the project should be allowed to proceed. Time limits will add a sense of predictability to the permitting process and allow project planners to more accurately plan out timelines for environmental review. Deadlines for environmental reviews are employed in a variety of federal transportation programs with success. Further, in instances where a permit is not

approved, the Corps should provide a detailed list of requirements to the applicant which, if addressed, would result in approval upon resubmission.

- **Nationwide Permit Program:** Changes to the Nationwide Permit Program (NWP) have compromised its effectiveness. The acreage limit under which an activity would qualify for the NWP program, as opposed to requiring an individual permit, has been reduced from three acres to one-half an acre. This forces many more applications for individual permits and increases the Corps' workload. Also, greater mandatory notification requirements have been added to NWP's for projects with minor impacts. These notification requirements serve no purpose and only increase delay as minor impacts should not trigger burdensome requirements meant for more significant impacts. The Corps should rescind acreage limitations and notification requirements placed on the use of NWPs. The effectiveness of the NWP program is compromised by the fact that far fewer projects can qualify for it under current acreage limits.
- **Limited Corps Resources:** Limited Corps resources contribute to permitting delays. Constraints on Corps staff have caused a backlog in permit applications. Since the Corps budget may not be expanded to sufficiently address this permit backlog, project sponsors should be able participate in solving this problem. The Corps should develop a mechanism to allow project sponsors to contribute staff or monetary resources to the Corps to allow the permitting process to proceed more quickly. A similar procedure exists for federal-aid highway and airport projects. There should also be an auditing component allowing the sponsor to ensure resources given to the Corps are used exclusively on their permit application. Finally, if a state has sufficient resources to process a permit, the Corps should be able to conserve its resources by delegating the permit processing to the state.

ARTBA thanks the Corps for initiating this regulatory review and urges the Corps to draw upon the President's Executive Order and ensure that regulations operate in the most effective, least burdensome manner to achieve their stated goals.

Sincerely,



T. Peter Ruane
President & C.E.O