



## **A Review of the Technical, Scientific and Legal Basis of the WOTUS Rule**

### **Statement of the American Road and Transportation Builders Association**

#### **Submitted to the United States Senate Committee on Environment and Public Works**

**April 26, 2017**

On behalf of the American Road and Transportation Builders Association (ARTBA) and its more than 6,000 member firms and public agencies nationwide, the association would like to thank Chairman Barrasso and Ranking Member Carper for holding today's hearing on, "A Review of the Technical, Scientific and Legal Basis of the WOTUS Rule"

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Transportation construction is directly tied to the economic health and development of the United States. According to Federal Highway Administration data, every \$1 billion spent on highway and bridge improvements supports almost 28,000 jobs, many of which are in small businesses. Given these broad direct and indirect economic contributions, the impact on transportation development should be taken into account when analyzing new federal regulations.

ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the Clean Water Act (CWA). ARTBA actively works to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources.

## Overview

One of the main reasons for the success of the CWA is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

“It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources...”

This structure of shared responsibility allows states the essential flexibility they need to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, making necessary improvements to their transportation infrastructure. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres of wetlands were lost each year. Subsequent to the CWA's passage, from 1986-1997, the loss rate declined to 58,600 acres per year and between 1998-2004 overall wetland areas increased at a rate of 32,000 acres per year.<sup>1</sup>

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of “wetlands.”<sup>2</sup> This ambiguity is frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of “wetlands” that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA's jurisdiction. As an example of this, official ARTBA policy recommends defining a “wetland” as follows: “If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland.”

### **The Waters of the United States (WOTUS) Rule Runs Counter to Supreme Court Precedent.**

ARTBA has also been actively involved in CWA litigation concerning federal jurisdiction over the nation's waters and wetlands for the better part of the past two decades. Most

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<sup>1</sup> *Draft 2007 Report on the Environment: Science*, USEPA, May 2007, available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917>

<sup>2</sup> Many states define wetlands as well other types of water resources and prescribe regulatory regimes that are appropriate to each. The federal government tries a one-size fits all approach essentially requiring water resources viewed by states as not being wetlands to be regulated as if they were wetlands under federal law.

recently, the Supreme Court's decision in *Rapanos v. United States*<sup>3</sup> benefited the transportation project delivery process by setting limits on Corps' jurisdiction.

At issue in *Rapanos* were two separate wetlands cases which were consolidated for the Court's review. The Court was asked to decide whether the Clean Water Act allows Corps regulation of "isolated wetlands" that have no connection with "navigable waters." The Court was also asked to decide whether or not a tenuous connection between a wetland and "navigable water" is enough to allow regulation by the Corps, or if there is a minimal standard that should be applied. Once again, ARTBA explained the CWA's legislative scheme of state and federal shared responsibility to the Court:

"By federalizing any wet area, no matter how remote from navigable waters, [this Court would adopt] an unprecedentedly broad jurisdiction of the geographic scope of CWA jurisdiction. As this Court held in *SWANCC*, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources...In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA."<sup>4</sup>

The Court's split decision in *Rapanos* preserved the CWA's essential jurisdictional balance by preventing sweeping federal authority over isolated wetlands and man-made ditches or remote wetlands with finite connections to navigable waters. However, because the Court's decision was not issued by a majority of the justices, these issues are currently being examined by lower courts on a case-by-case basis. While ARTBA applauds the fact the decision prevented an expansion of already inefficient federal wetlands regulation, we also recognize the need for clarity in *Rapanos*' wake in order to preserve the necessary balance between federal and state jurisdictions that is essential to the continuation of the CWA's success.

In decisions such as *Rapanos* where four justices agree in both the plurality opinion (authored by Justice Scalia) and the dissenting opinion (authored by Justice Stevens) and one Justice (Justice Kennedy) writes a concurrence, the effects of the opinion should be taken from the areas where the plurality and the concurrence agree. The Supreme Court has spoken to this point specifically, stating:

"[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by the members who concurred in the judgments on the narrowest grounds.'"<sup>5</sup>

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<sup>3</sup> 547 U.S. 715 (2006).

<sup>4</sup> *Rapanos v. United States*, 547 U.S. 715 (2006), Amicus Curiae Brief of the American Road and Transportation Builders Association, p. 25.

<sup>5</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977).

In *Rapanos*, the five justices who agreed in the final judgment of the case were Justices Scalia, Thomas, Alito, Roberts and Kennedy. Thus, in responding to the *Rapanos* decision, the focus should be on those areas where agreement can be found among these five justices.

The Scalia plurality and the Kennedy concurrence agree on several points which should guide any regulatory or legislative response to the *Rapanos* decision. Most importantly, both Scalia and Kennedy disagreed with the existing Corps theory of jurisdiction that a wetland with tenuous and questionable connections to navigable water can be subject to federal jurisdiction if one molecule of water flows between both points. This has been termed by some as the “migratory molecule” theory of jurisdiction. Justice Kennedy specifically rejects the idea of the “migratory molecule” by noting that a “central requirement” of the Clean Water Act is “the requirement that the word ‘navigable’ in ‘navigable waters’ be given some importance.”<sup>6</sup>

Justice Kennedy also explains the CWA’s establishment of certain basic recognizable limits to the Corps’ excluding man-made ditches and drains by refuting portions of Justice Stevens’ dissent:

“[t]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote and insubstantial, that eventually flow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far.”<sup>7</sup>

Further, Justice Kennedy notes such an over-expansive view of the Corps’ authority is incompatible with the CWA:

“Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact-water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.”<sup>8</sup>

This leads to a central point of *Rapanos* echoed by members of the plurality, dissent and Justice Kennedy—there needs to be some sort of regulatory response from the Corps reflecting these limits on its jurisdiction. In his concurrence, Justice Kennedy states:

“Absent more specific regulations, however, the Corps must establish a specific nexus on a case-by-case basis when it

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<sup>6</sup> *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, J. concurring).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, referring to the holding in *SWANCC*

seeks to regulate wetlands based on adjacency to navigable tributaries. Given the potential overbreadth of the Corps regulations, this showing is necessary to avoid unreasonable applications of the statute.”<sup>9</sup>

Chief Justice Roberts was more direct with his wording, noting a regulatory response from the Corps has been long overdue, and should have been promulgated after the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*<sup>10</sup> (*SWANCC*) decision first recognized the jurisdiction of the Corps needed to be limited:

“Rather than refining its view of its authority in light of [the Court’s] decision in *SWANCC*, and providing guidance meriting deference under [the Court’s] generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.”<sup>11</sup>

Finally, Justice Breyer’s dissent warns a refusal from the Corps to issue a regulatory response to *Rapanos* will only result in more litigation:

“If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today’s opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.”<sup>12</sup>

Thus, the lesson of the *Rapanos* decision is the need for a response recognizing the limits of Corps jurisdiction and clarifying existing wetlands regulations. It is essential for any administrative clarification of federal wetlands jurisdiction to preserve the federal-state partnership embodied in the CWA. As both *Rapanos* and *SWANCC* stressed, a scheme of shared jurisdiction is necessary to carry out the original intent of the CWA. States need to be allowed to maintain full control over intrastate water bodies in order to allow them the flexibility to balance their own environmental needs with unique infrastructure challenges. The WOTUS rule, as written, does not maintain this balance, but instead places all regulatory authority on the federal level, leaving states with none.

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<sup>9</sup> *Id.*

<sup>10</sup> *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001)

<sup>11</sup> *Id.* (Roberts, C.J., concurring).

<sup>12</sup> *Id.* (Breyer, J., dissenting).

### **Roadside Ditches Should Not Be Covered by the WOTUS Rule.**

ARTBA is particularly concerned with the treatment of roadside ditches under the WOTUS rule. Current federal regulations say nothing about ditches, but the WOTUS rule expands Environmental Protection Agency (EPA) and Corps jurisdiction to the point where virtually any ditch with standing water could be covered. Federal environmental regulation should be applied when a clear need is demonstrated and regulating all roadside ditches under the theory of interconnectedness fails to meet this threshold. A ditch's primary purpose is safety and they only have water present during and after rainfall. In contrast, traditional wetlands are not typically man-made nor do they fulfill a specific safety function. As such, roadside ditches are not, and should not be regulated as, traditional jurisdictional wetlands because the only time they contain water is when they are fulfilling their intended purpose.

The unacceptable length of the environmental review and approval process for federal-aid highway projects has been routinely documented and acknowledged by both Republican and Democrat administrations. Adding more layers of review—for unproven benefits—will only lengthen this process. Further, requiring wetland permits for ditch construction and maintenance would force project sponsors and the private sector to incur new administrative and legal costs which would lead to increased project costs. The potential delays and increased costs that would result from the WOTUS rule would divert resources from timely ditch maintenance activities and potentially threaten the role ditches play in promoting roadway safety.

In addition, the WOTUS rule creates a completely new concept of allowing for “aggregation” of the contributions of all similar waters “*within an entire watershed.*” This concept results in a blanket jurisdictional determination—meaning the EPA and Corps could regulate the complete watershed. Such a broadening of jurisdiction would literally leave no transportation project untouched regardless of its location, as there is no area in the United States not linked to at least one watershed. While there are certainly instances where a permit is appropriate for the impacts of transportation construction, these situations should be evaluated on a case-by-case basis where specific environmental benefits can be evaluated.

### **EPA's WOTUS Rule Could Jeopardize Progress on Project Streamlining.**

It should also be noted that there has been recent bipartisan progress in the area of streamlining the project review and approval process for transportation projects. Members of both parties agree that transportation improvements can be built more quickly without sacrificing necessary environmental protections. The current surface transportation reauthorization law, the “Fixing America’s Surface Transportation (FAST) Act as well as its predecessor, the “Moving Ahead for Progress in the 21<sup>st</sup> Century” (MAP-21) Act both contained significant reforms to the project delivery process aimed at reducing delay.

Under the WOTUS rule, the progress of the project delivery reforms in both MAP-21 and the FAST Act would be jeopardized. Any reduction in delay gained from improvements to the project delivery process would likely be negated by the increased permitting requirements and opportunities for litigation caused by the WOTUS rule’s expansion of federal jurisdiction.

### **Alternative Solutions are Available.**

One 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. Also, there should be a “de minimis” level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A “de-minimis” standard for impacts would be particularly helpful for transportation projects and allow projects to avoid being delayed by minimal impacts to areas which are non-environmentally sensitive areas.

Furthermore the WOTUS rule does not recognize one of the biggest factors creating the confusion in defining federal jurisdiction—multiple agencies being involved in the jurisdictional determination process. ARTBA has repeatedly stated the involvement of multiple agencies in wetlands regulation hinders the overall efforts of the federal permitting program. One of the principal problems plaguing the 404 program is indecision and inaction, with no benefit for the environment. Justice Breyer reiterated this in his aforementioned *Rapanos* dissent, stating “If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [federal wetlands jurisdiction].”<sup>13</sup>

Congress reiterated this point in the National Defense Authorization Act for Fiscal Year 2004 by authorizing only one agency, the Corps, to issue 404 permitting program regulations. This direction should be continued. Thus, it should be the sole responsibility of the Corps, not the EPA, to take the lead and build a stronger, more predictable permitting 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 404 wetlands regulatory program as its staff has the technical expertise and practical knowledge to ensure fair implementation of federal wetlands policy. The WOTUS rule should acknowledge the Corps’ status as the sole intended decision-making agency in jurisdictional determinations and the EPA should be removed from the permitting process entirely.

### **Conclusion.**

The committee should also note that there have been multiple legislative attempts in recent years to expand the jurisdiction of the CWA to include all “waters of the United States.” Each of these efforts met with broad bipartisan opposition and none have resulted in new law or even a successful committee mark-up. It is clear that a consensus among policymakers and affected stakeholders has not yet been reached regarding appropriate federal wetlands jurisdiction. Congress should direct the EPA to take note of these developments and instead of seeking to “connect” all waters, work with the regulated community to identify those specific types of water bodies which are currently not being covered and craft more appropriate, targeted measures to protect them.

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<sup>13</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

ARTBA looks forward to continuing to work with the committee in order to continue to protect, sustain and improve our nation's infrastructure while addressing the future challenges of the CWA.