“Waters of the U.S.” Rewrite Will Provide Clean Water and Clear Rules

On April 21, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) officially published their revisions to the 2015 “Waters of the United States” (WOTUS) rule. The new “Navigable Waters Protection Rule” (NWPR) takes effect June 22. It will help restore clarity to federal wetlands regulations and reduce delays to important transportation improvements.

This is a major, positive step forward in a process that has extended through the courts, Congress and federal agencies for over 15 years. ARTBA has taken aggressive action from the beginning, including testifying at hearings, submitting comments, signing on to amicus briefs, participating in media events and lobbying Congress. Many of these activities have been coordinated with a wide-ranging coalition of groups concerned about potential regulatory overreach.

**Background**

At issue is how the EPA and Corps define bodies of water that are subject to federal authority under the Clean Water Act. The most recent chapter of this saga began in 2015, when the Obama Administration released its version of the WOTUS rule. ARTBA helped lead the opposition to that proposal, including through litigation, which resulted in two federal courts declaring it invalid. The Trump Administration announced its repeal of the WOTUS rule in 2017, then undertook a comprehensive rulemaking effort to replace it with the NWPR it just announced.

Among other mandates, the Obama Administration rule would have subjected roadside ditches to unnecessary federal oversight, leading to delays and increased costs for many transportation improvement projects because of the need for additional permits. ARTBA continually stressed that ditches adjacent to roadways serve the necessary safety function of collecting water during and after rain events, and therefore should not be regulated the same as traditional wetlands, which are typically not man-made nor fulfill a specific safety function.

In response to ARTBA’s concerns, the new NWPR rule exempts “many farm and roadside ditches” from federal jurisdiction. The only exceptions are those ditches which are already traditional navigable waters (such as the Erie Canal) or tributaries. Additionally, a ditch cannot be created in an existing, protected wetland and will become jurisdictional if it takes on the characteristics of a wetland (by developing a high water mark or certain types of plant life).

Perhaps most importantly, though, if there is any question as to whether a ditch (or any other water body) is jurisdictional, the burden is on the federal government to show the Clean Water Act applies. This is a vast improvement over the 2015 rule, where any ambiguity resulted in a presumption of federal jurisdiction unless proof to the contrary was shown.
Details on the Navigable Waters Protection Rule

The new NWPR divides federally-protected “waters of the United States” into four categories:

➢ **Territorial seas and traditional navigable waters** — large waterbodies including seas, rivers and lakes (examples include the Mississippi River, Great Lakes, Chesapeake Bay and Erie Canal);

➢ **Tributaries** — perennial and intermittent rivers and streams that contribute surface flow to traditional navigable waters in a typical year. Tributaries must be perennial or intermittent, as opposed to only flowing after a single precipitation event (such as College Creek, which flows into the James River near Williamsburg, Va.);

➢ **Lakes, ponds, and impoundments of jurisdictional waters** — these water bodies are jurisdictional where they contribute surface water flow to as traditional navigable water or territorial sea (such as Lake Pepin in Minn. or Lake Travis in Tex.) or they are flooded by a water of the United States in a typical year (such as certain oxbow lakes along the Mississippi River); and

➢ **Adjacent wetlands** — wetlands that physically touch other jurisdictional waters (such as Horicon Marsh along the Rock River in Wis.) or are separated from a water of the United States only by a natural berm, bank or dune are included, as are wetlands inundated by flooding from a water of the United States. Also included are wetlands physically separated by structures such as artificial dikes, barriers or roads provided there is a direct hydrological connection over the structure in a typical year.

Additionally, NWPR enumerates bodies of water which are not considered waters of the United States. In addition to most roadside ditches, perhaps the most important of these categories is groundwater. This is consistent with ARTBA’s long-standing position. We have repeatedly emphasized to EPA and the Corps that any attempt to federally regulate groundwater would “leave no transportation project untouched regardless of its location, as there is no area in the United States not linked to at least one source of groundwater.”

What Happens Next

Opponents of the NWPR have already announced their intention to challenge the rule in court. ARTBA is part of a legal coalition which successfully challenged the 2015 WOTUS rule, and which continues to defend the Trump Administration’s efforts to repeal it. ARTBA and our allies will be similarly defending the new NWPR in the federal courts. Eventually, we expect the NWPR litigation to reach the U.S. Supreme Court.

The law firm of Mayer Brown LLP is representing ARTBA and our coalition allies in the current litigation. ARTBA’s advocacy on WOTUS issues through the years has been made possible by our “Transportation Makes America Work!” program, which is funded exclusively by ARTBA members and chapters.

Additional Information

This document describes highlights of the NWPR. To access the entire rule as well as supporting EPA and Corps fact sheets, go to: [https://www.epa.gov/nwpr/navigable-waters-protection-rule-step-two-revise](https://www.epa.gov/nwpr/navigable-waters-protection-rule-step-two-revise).

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