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U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Docket No. EPA-HQ-OW-2021-0602; Revised Definition of "Waters of the United States."

Today I respectfully offer comments on the rule proposed by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) on Dec. 7, 2021, defining the scope of "Waters of the United States" (WOTUS).

Introduction

The proposed rule offered by the agencies repeals the 2020 Navigable Waters Protection Rule (NWPR) and reinstates Clean Water Act (CWA) jurisdictional regulations promulgated in 1986, with some updates to comply with Supreme Court decisions issued since that time.

It is disappointing that EPA and the Corps propose turning back the WOTUS clock by 36 years. While the NWPR dates back just two years, the agencies actually sought to rewrite the WOTUS rule in 2015 because it subjected stakeholders to case-specific jurisdictional analyses that were "time and resource intensive" and that "result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies.[1]" Simply put, if the 1986 approach did not work in 2015, it most likely will not work now.

ARTBA opposes the proposed rule. It will unnecessarily expand CWA jurisdiction, leading to many increases in costs and delays on critical transportation improvement projects, while offering no tangible environmental benefits in return. **The EPA and the Corps should withdraw the proposed rule and continue to implement the NWPR.**

The NWPR is the Proper Standard for CWA Jurisdiction

ARTBA strongly supported formulation of the NWPR, which struck an appropriate balance between protecting waters and wetlands and providing clarity and predictability to stakeholders and regulators. That new rule also respected the CWA's foundational policy of preserving the states' primary authority over land and water use, as well as incorporating relevant Supreme Court precedent. Over the decades, the definition of WOTUS had expanded well beyond the limits of federal agencies' statutory authority under the CWA and the Constitution, at the expense of state and local authority. ARTBA believes the NWPR rightly brought an end to persistent, unlawful efforts to expand federal power. It preserved the careful

[1] 80 Fed. Reg. at 37,056.

federal-state balance that Congress originally struck in the CWA and avoided the sorts of difficult constitutional questions raised by the prior definitions of WOTUS.

Because of the NWPR's clearer definitions, the rule is far easier to implement consistently "on the ground" compared to prior WOTUS rules. For example, because the NWPR largely bases jurisdictional determinations on observable surface connections, the regulated community can more easily ascertain whether they require CWA permits for their activities. The NWPR also explicitly excludes roadside ditches from the definition of WOTUS. As a result of these changes, parties to transportation projects are better able to avoid costs associated with the uncertainties in this regard, which persisted under prior definitions of WOTUS.

The Importance of Clean Water Act Jurisdiction to the Transportation Construction Industry

The federal wetlands permitting program directly shapes the work environment for ARTBA members as they plan and build transportation improvements under CWA jurisdiction. ARTBA believes improving the nation's transportation infrastructure and protecting essential water resources are complementary interests which can be reflected in implementation of the CWA.

Of all the CWA's provisions, the regulatory definition of "wetlands" is the most important for parties to a transportation project. Public agencies, planners, designers and contractors need transparent guidance in this regard, so they can fund, plan and schedule a project accurately. Overly-broad and ambiguous definitions of "wetlands" can delay construction of a project, which also carries cost implications. For example, the old version of WOTUS made it more likely that regulators could apply federal jurisdiction to a ditch ancillary to a project, with perhaps little or no advance notice. The resultant permitting process can cause unexpected project delays. Moreover, project opponents can weaponize this regulatory uncertainty to stop or delay transportation improvements – and the job opportunities they support – entirely.

For these reasons, ARTBA continues working with government agencies and coalition partners towards an improved definition of "wetlands," as expressed in the NWPR, that is easily recognizable to both landowners and transportation planners, while consistent with the original scope of the CWA's jurisdiction. Unfortunately, the proposed rule put forward by the EPA and Corps reverses the NWPR's progress in this regard.

Roadside Ditches Are Not "Waters of the United States"

As noted above, throughout the years of policy debate over federal Clean Water Act jurisdiction, ARTBA's primary concern has been roadside ditches. They are common to transportation improvement projects, primarily because they accommodate stormwater runoff and keep the roadway from flooding during rain events. If the owner and contractor on a project have a common understanding that ditches do not require federal permits, then they can build and maintain them without delay, using the best safety-related practices. Conversely, even the possibility of federal permitting for these ditches compels the parties to delay their

addition to a project – or perhaps hold up progress on the entire project – until completing this bureaucratic process. It also carries associated administrative and legal costs.

Ultimately, roadside ditches are not "waters of the United States." Under previous interpretations of the CWA, virtually any ditch with standing water could fall under EPA and Corps jurisdiction. While federal environmental regulation should be applied when those agencies demonstrate a clear need, regulating all roadside ditches fails to meet this threshold. The primary purpose of ditches is to help ensure safety by capturing and dispersing water which would otherwise flood roadways, 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 NWPR clarified the jurisdictional confusion surrounding roadside ditches by definitively excluding them from WOTUS classification. However, by reverting to the regulatory regime of 1986, the current proposal resurrects the same uncertainty which triggered multiple Supreme Court cases, as well as repeated regulatory and legislative attempts to clarify the issue of CWA jurisdiction as a whole.

Additionally, the proposed rule reverses one of the NWPR's central improvements to the regulatory process. Under the NWPR, when there is confusion over the status of any land feature, including a roadside ditch, the burden is on the federal agencies to show that federal jurisdiction existed. The current proposal upends this approach by requiring the regulated community to show the feature in question is not jurisdictional.

Such a requirement runs counter to good regulatory policy. The onus should be on the relevant federal agency to show compelling need for the rule's application, not on the regulated community to demonstrate otherwise.

It should also be noted that ARTBA is not suggesting that these ditches remain "unregulated." The preferred approach is for state and local transportation, environmental and natural resource agencies to handle that aspect of a project, since they are already overseeing other components of it. This also contemplates the CWA's original division of labor among the various levels of government.

This Rulemaking Should be Paused until the Supreme Court Decides *Sackett v. EPA*

Because of the CWA's importance to planning and building projects, ARTBA has participated in litigation concerning federal jurisdiction over the nation's waters and wetlands for nearly two decades. Recently, the U.S. Supreme Court agreed to hear the case of *Sackett v. EPA*. The

central question concerns the proper method for determining CWA jurisdiction under the Court's 2006 decision in *Rapanos v. United States*.[2]

At issue in *Rapanos* were two separate wetlands cases consolidated for the Court's review. The Court was asked to decide whether the CWA allows Corps regulation of "isolated wetlands" that have no connection with "navigable waters." The Court was also asked to decide whether 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.

The *Rapanos* Court reached a somewhat uncommon "4-1-4" decision which resulted in the "significant nexus" test for determining CWA jurisdiction. However, the term "significant nexus" has not been clearly defined since the *Rapanos* decision, resulting in confusion for those seeking to comply with the statute. Now, in *Sackett*, the Court is poised to decide whether this method should continue to be used, or abandoned in favor of the *Rapanos* plurality, which states "only those wetlands that have a continuous surface water connection to regulated waters may themselves be regulated."

The difference between basing federal jurisdiction on "significant nexus" as opposed to a "continuous surface water connection" is vast. The former is an ambiguous, undefined standard requiring a case-by-case approach, while the latter provides a brighter line upon which to decide the CWA's reach. In expressing its preference in *Sackett*, the Court will direct the federal agencies to take one of two very different regulatory routes.

Therefore, it makes sense for the EPA and Corps to pause their rulemaking efforts until the Court reaches its decision. By proceeding now, the agencies risk promulgating a rule that will require an almost immediate rewrite, along with expenditure of additional resources to do so, and continued lack of clarity in the meantime.

Reversing NWPR Will Dilute Benefits of Record Infrastructure Investment

In enacting the Infrastructure Investment and Jobs Act (IIJA), President Biden and Congress committed to an historic investment in our nation's infrastructure, intending to drive associated economic benefits across all communities. Public agencies and the transportation construction industry will be working diligently to maximize delivery of these benefits in a timely fashion, with an emphasis on "timely."

Through a key provision, the codification of One Federal Decision, the IIJA seeks to complete the project review and approval process within two years[3]. Unfortunately, the EPA and Corps' proposed rule puts this two-year time frame out of reach for many such projects.

[2] 547 U.S. 715 (2006).
[3] IIJA, Sec. 11301

Specifically, as described above, the proposed rule will trigger additional CWA permitting requirements due to its expansion in jurisdiction, with associated time and costs. On the public agency side, an increase in individual permit applications could overwhelm staff, thus further exacerbating the delays in permitting. This is an unfortunate case of conflicting policy objectives, although largely avoidable by leaving the NWPR in place. ARTBA assumes that no federal agency would want its bureaucratic obstinance to be cited as a reason the IIJA did not fulfill its promise.

Conclusion

With IIJA implementation ramping up, it is an inopportune for the EPA and the Corps to roll back CWA regulation 36 years. The agencies should maintain the regulatory clarity in the NWPR, or, at the very least, pause these efforts until the Supreme Court issues its decision in *Sackett*.

In a final note, as a founding member of the Waters Advocacy Coalition (WAC), ARTBA incorporates and supports their comments to this docket by reference.

ARTBA looks forward to continued work with the EPA and Corps towards the goal of a clear and consistent CWA regulatory system. Thank you for considering the viewpoint of the transportation construction industry on this important policy matter.

Sincerely,

Dave Bauer
President & CEO