



Stakeholder Perspectives on the Impacts of the Biden Administration's
Waters of the United States (WOTUS) Rule

Statement of the
American Road and Transportation Builders
Association

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Committee on
Transportation and Infrastructure
Subcommittee on
Water Resources and Environment

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The American Road & Transportation Builders Association (ARTBA) thanks Chairman Rouzer and Ranking Member Napolitano for holding today's hearing, "Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule." The rule marks the third time in the past seven years the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) have redefined the federal jurisdiction of the Clean Water Act (CWA).

ARTBA's principal concern with this series of rule changes has been roadside ditches, which our members commonly deploy to ensure safety and environmental compliance on transportation construction projects. Overreaching or uncertainty in their jurisdiction can trigger federal permitting requirements, potentially delaying or even interrupting these projects (while also likely increasing their costs).

Under the 2015 WOTUS rule, virtually any ditch with standing water could fall under EPA and Corps jurisdiction. In 2020, the Corps and EPA explicitly exempted roadside ditches from the federal regulation. Unfortunately, the latest WOTUS rule reverts to the previous approach, a combination of needless overregulation and onerous case-by-case determinations of jurisdiction.

Consequently, ARTBA supports the joint resolution introduced by Chairman Graves and Subcommittee Chairman Rouzer that would rescind the recent WOTUS rule and restore clarity to the federal permitting process for transportation construction projects.

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. This includes the case of *Sackett v. EPA*, which the U.S. Supreme Court agreed to hear

in 2022. The Court will determine whether CWA jurisdiction should be based on “significant nexus” or a “continuous surface water connection.” Nonetheless, with this critical decision pending, the EPA and Corps have continued proceeding with the new WOTUS rule. Doing so prior to the disposition of *Sackett*, these agencies risk moving forward with a rule that may require an almost immediate rewrite. Therefore, it makes sense for them to suspend implementation of their new rule until the Court reaches its decision.

At the same time, the Infrastructure Investment and Jobs Act (IIJA) features an historic federal investment in our nation’s infrastructure, which should yield associated economic benefits across all communities. Public agencies and the transportation construction industry are working diligently to maximize these results through safe, efficient and timely project delivery. Regulatory overreach – such as the latest WOTUS revision – poses the greatest threat to these efforts.

Through a key IIJA provision, the codification of One Federal Decision, the law seeks to complete the review and approval process for projects within two years¹. Unfortunately, with its expanded jurisdiction determinations and permitting requirements, the EPA and Corps’ latest WOTUS rule will put this two-year objective out of reach for many such projects. Do the EPA and Corps want their bureaucratic obstinance to interfere with achieving this objective, as well as delaying or diminishing the IIJA’s economic benefits?

For all these reasons, it is inopportune for the EPA and Corps to proceed with their third WOTUS revision in seven years. The agencies should instead definitively exempt roadside ditches from federal jurisdiction, or, at the very least, suspend implementation of their latest rule until the Supreme Court issues its decision in *Sackett*.

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

¹ IIJA, Sec. 11301. According to the White House Council on Environmental Quality, it currently takes an average of five to seven years for a transportation project to complete the environmental review and approval processes.