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VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Office of the Administrator
Mail Code 1101A
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

RE: Revised Definition of “Waters of the United States”; Conforming (Docket No. COE-2023-0001).

Dear Administrator Regan and Assistant Secretary Connor:

On behalf of the American Road & Transportation Builders Association (ARTBA) and our more than 8,000 members, we respectfully submit this feedback on the agency’s final Waters of the United States (WOTUS) rule issued on September 8, 2023.

While ARTBA appreciates the agencies’ expeditious issuance of this final rule in response to the Supreme Court’s ruling in *Sackett v. EPA*, it does not in fact fully align with the revised regulatory parameters under the Court’s holding, nor does it provide necessary certainty to regulated entities.

To date there has been no public guidance on how the agencies plan to implement the 2023 Final Rule coupled with this latest “conforming” rule. In its *Sackett* decision, the Supreme Court reiterated that the agencies must issue definitive guidance so that regulated entities can better understand what is and is not considered a WOTUS. Given that Clean Water Act violations are subject to criminal penalties, it is imperative that the agencies heed the Court’s admonition.

Immediately after the Court’s decision in *Sackett*, the agencies announced a pause on the issuance of approved jurisdictional determinations under the Clean Water Act. This action stalled necessary environmental permitting reviews, negatively affecting the progress of transportation infrastructure projects among many others.



While the agencies have resumed this process, they are doing so under the dreaded “case-by-case basis.” The reality is that regulated entities cannot efficiently undergo a review process with the Corps for every potential permit. Corps offices do not have the resources to handle these increased volumes of reviews, likely resulting in significant delays for the projects in question. Furthermore, the amended WOTUS rule has only exacerbated uncertainty and the potential for these tests to be inconsistently applied depending on which regional office is conducting the review.

These developments come in the context of historic federal-aid funding from the Infrastructure Investment & Jobs Act (IIJA). According to ARTBA’s ongoing analysis of related data,¹ the IIJA supported over 29,000 new highway and bridge formula projects in FY2022, and over 24,000 in FY2023 through July 31. The legacy of this landmark legislation should be equally significant progress in safety, economic growth, and quality of life. Instead, as currently conceived, the WOTUS implementation process could set records for paperwork and bureaucratic delays.

We therefore request that the agencies swiftly address the shortcomings in the conforming rule. Such issues to be resolved include but are not limited to:

- (1) Offering clear guidance on how regional staff will interpret “relatively permanent” and “continuous surface connection.”
- (2) Appropriately and adequately communicating with and educating regulated entities on any new guidance being implemented by field offices.
- (3) Implementing clear and consistent directives.

Thank you for your prompt attention to this matter. Should you require additional information or have questions please contact Prianka Sharma, Vice President and Counsel for Regulatory Affairs by email at psharma@artba.org.

Sincerely,

Prianka Sharma

Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs
American Road & Transportation Builders Association

¹ See e.g., <https://www.artba.org/economics/highway-dashboard-iija/>.