



**U.S. Environmental Protection Agency and U.S. Army Corps of Engineers  
Waters of the U.S. Listening Session  
February 28, 2024**

STATEMENT BY PRIANKA SHARMA ON BEHALF OF ARTBA

Good morning,

Thank you for this opportunity. I am Prianka Sharma, Vice President and Counsel for Regulatory Affairs at the American Road & Transportation Builders Association. I am speaking to you today on behalf of our more than 8,000 members of the transportation construction industry.

We represent public and private sector members involved in planning, designing, constructing, and maintaining our nation's roadways. Our members focus on vital repairs and infrastructure improvements to enhance our transportation infrastructure systems. Our members balance these goals with environmental stewardship principles.

Regulatory uncertainty stifles innovation. Permitting delays can result in missing an entire season of work in cold winter climates, causing setbacks and losses in these critical infrastructure projects. The government's significant investment in these essential projects through the Bipartisan Infrastructure Law must be accompanied by regulatory clarity. Our members need assurance that their activities won't lead to legal consequences.

We've recently learned about confidential interagency implementation and field documents being utilized without public disclosure. Federal agencies have a responsibility to transparency and professionalism. Especially when criminal penalties are at stake. Regardless of whether these are informal training documents, if they are being relied upon for implementation, they should be public. Not doing so is a violation of due process rights.

Furthermore, recently released jurisdictional determinations deviate from traditional standards on ditches and culverts, prioritizing what can only be characterized as significant nexus over permanence. These determinations seem to rely on outdated law, ignoring the Supreme Court's *Sackett* decision. Are these documents meant to govern future JDs? What standards are the agencies using, and how do they align with legal requirements?

Implementation of the conforming rule is murky at best. Bureaucratic reviews through "elevation" without any sort of public implementation standards undermine consistency, transparency, and accountability in federal policy. These cloudy procedures and lack of clear-cut coordination exacerbate an already burdensome process.

Since the *Sackett* decision, court rulings, particularly one from the 5th Circuit, have highlighted the importance of the agencies sticking to the WOTUS definition set forth in *Sackett*. Nonetheless, it appears

the agencies are more inclined to dredge up confusion than to offer clear implementation strategies to comply with the law.

I want to underscore that meaningful engagement in the regulatory process involves more than allowing for a three-minute statement. As demonstrated, this group has significant expertise, experience, and familiarity with this issue and with regulatory policy and procedure. Rather than excluding us from this process, it would be prudent for the agencies to allow us to be part of implementation.

Turning now to some of the technical matters at hand, roadside ditches are a major concern for the transportation construction industry, alongside wetlands and adjacent streams. Previous rules clarified that these ditches were exempt, but the 2023 final rule once again muddies the waters on this issue—as evidenced in the recent JDs.

- Delays in obtaining permits for ditches lead to unsafe conditions during significant rain events, affecting roadway flood management.
- Recent agency actions have cast doubt on the longstanding understanding that ditches don't require federal permits, causing uncertainty and project delays.
- Regulatory uncertainty surrounding JDs prompts businesses to postpone projects, awaiting compliance clarity from the Corps.
- EPA's response suggests seeking jurisdictional determinations for all situations, adding unnecessary burdens to businesses. When asked for guidance, EPA advised that “businesses should seek jurisdictional determinations for everything.”

This inefficient allocation of government resources undermines transparency and governance, punishing regulated entities preemptively, contrary to the law.

Regarding wetlands, a roadside ditch may be considered a wetland ONLY temporarily during heavy rain to ensure road safety. It is clear in these instances that they are not WOTUS. However, due to the absence of clear public guidance on what constitutes "relatively permanent," our members are forced to rely on Corps decisions, which recently have led to inconsistent opinions across regional offices and outdated criteria applied to these determinations. Man-made roadside ditches are not and should not be jurisdictional. If there is any doubt, EPA can rely on other protections including Section 402, and state level protections.

The bottom line is that those being regulated deserve to know how these decisions are being made. Critical transportation infrastructure projects that improve safety and reliability should not be delayed simply because permitting agencies refuse to engage in clear, transparent, and public implementation principles grounded in law and not ideology.

Thank you for your time, and we look forward to reading the interagency guidance and working with the agencies on these issues.