

January 5, 2026

VIA ELECTRONIC SUBMISSION

Hon. Lee Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Hon. Adam Telle, Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
441 G St. NW
Washington, D.C. 20314

Re: Updated Definition of “Waters of the United States” (Docket No. EPA-HQ-OW-2025-0322).

Dear Administrator Zeldin and Assistant Secretary Telle:

On behalf of the American Road & Transportation Builders Association (ARTBA) and our more than 8,000 members in the transportation construction industry, we appreciate the Environmental Protection Agency (EPA) and the Army Corps of Engineers’ (Corps) efforts to update the definition of Waters of the United States (WOTUS) consistent with the Supreme Court’s decision in *Sackett v. EPA*.¹ ARTBA supports the proposal and believes it represents an important step toward restoring predictability and common sense to Clean Water Act permitting for transportation projects nationwide. We offer the following comments and recommendations to help strengthen the final rule and ensure consistent, durable implementation.

Background

ARTBA represents all components of the transportation construction industry, including contractors, materials suppliers, planning and design firms, public agencies, and equipment manufacturers. Our members build and maintain the nation’s roads, bridges, airports, ports, transit systems, and other critical infrastructure that support economic activity, public safety, and mobility. Moreover, they take great pride in practicing effective environmental stewardship while building these projects safely, efficiently and cost-effectively.

¹ *Sackett v. EPA*, 598 U.S. 651 (2023).

Transportation construction projects are subject to a range of federal, state, and local environmental requirements, including permitting under the Clean Water Act (CWA). While state departments of transportation typically serve as the lead permitting authorities for these projects, construction contractors are affected by jurisdictional determinations and, depending on the project delivery method, may be responsible for obtaining permits or ensuring compliance with permit conditions. In practice, contractors often bear day-to-day responsibility for compliance in the field and face direct exposure when jurisdictional questions arise mid-project. ARTBA members have long supported the CWA's goal of protecting the Nation's waters and routinely incorporate erosion controls, stormwater management systems, and other best practices into project design and construction to protect water quality.

Effective environmental protection, however, depends on regulatory clarity and predictability. For decades, ARTBA members have faced ongoing uncertainty driven by shifting and often conflicting definitions of WOTUS. Because WOTUS determinations dictate whether federal permitting applies, uncertainty at the outset of a project can delay construction, increase costs, and in some cases result in the loss of an entire construction season. These impacts are especially significant for transportation projects, which are already constrained by weather, funding cycles, right-of-way acquisition, and public safety needs. When combined with the substantial civil and criminal penalties associated with CWA violations, the consequences of unclear jurisdictional boundaries are real, immediate, and costly for permit holders. Clear, durable rules are therefore essential.

The Clean Water Act (CWA) was enacted in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.² In doing so, Congress limited federal authority to "waters of the United States," a term meant to capture navigable waters and other bodies with a clear connection to interstate commerce.³ Over time, however, the exact scope of WOTUS has been repeatedly litigated and redefined through regulation, resulting in decades of uncertainty for project sponsors and permit holders.⁴ Although several Supreme Court decisions have addressed the limits of federal jurisdiction,⁵ implementation has often varied across administrations, leaving project sponsors and contractors without consistent or predictable jurisdictional boundaries.

This proposed rule represents a meaningful – and welcome – break from that cycle. Rather than advancing another short-sighted interpretation, the proposal relies directly on the Supreme Court's decision in *Sackett*. Consistent with an amici brief submitted by ARTBA and several allied organizations, the Court clarified that CWA jurisdiction is limited to relatively permanent waters with a continuous

² Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101(a), 86 Stat. 816, 816 (codified as amended at 33 U.S.C. § 1251(a)).

³ 33 U.S.C. §§ 1251(a), 1362(7).

⁴ See, e.g., Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015); The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020); Revised Definition of "Waters of the United States," 88 Fed. Reg. 30,004 (May 12, 2023).

⁵ See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006); *Sackett v. EPA*, 598 U.S. 651 (2023).

surface connection to a traditional navigable water.⁶ Now, by grounding the definition of WOTUS in clear, objective criteria, the agencies have an opportunity to provide the regulatory stability and certainty that transportation construction projects depend on for effective planning, permitting, and delivery. ARTBA offers the following comments and recommendations to further strengthen the rule’s clarity, consistency, and durability in implementation.

ARTBA’s Comments on the Proposal

I. Roadside ditches are not WOTUS and should remain clearly excluded.

Roadside ditches and transportation drainage features are essential components of transportation construction projects. They are engineered to collect, convey, detain, and dissipate stormwater, thereby preventing roadway flooding, reducing erosion, and protecting the traveling public. Constructed as part of a managed drainage system, these features typically contain water only during or following precipitation events or seasonal runoff. The agencies are therefore correct to exclude them from the definition of WOTUS, as they function as safety and drainage infrastructure, not natural waters.⁷

Excluding roadside ditches from CWA jurisdiction does not leave these features unregulated. Transportation drainage systems remain subject to extensive state and local stormwater, erosion control, and water quality requirements. Preserving a clear federal exclusion allows those initiatives to function as intended, while avoiding duplicative permitting that can delay safety-critical work.

The proposed rule defines a “ditch” as a constructed or excavated channel used to convey water.⁸ It further states that non-navigable ditches constructed entirely in dry land are not WOTUS, even where those ditches convey relatively permanent flow or connect to downstream jurisdictional waters.⁹ Importantly, it codifies that transportation-related ditches do not become classified as WOTUS simply because they convey water, connect to downstream waters, or carry flow during wet seasons.

To further strengthen the final rule, ARTBA encourages the agencies to reinforce that the ditch exclusion turns on the constructed and functional nature of the feature, not on the mere presence of water or downstream connectivity. Clear confirmation of this principle in the final rule and accompanying guidance will promote consistent application across Corps districts and reduce unnecessary permitting disputes.

The proposed rule also incorporates a segment-by-segment evaluation approach in certain contexts.¹⁰ This approach would mean that specific segments of a ditch may be considered jurisdictional, while others may not, based on their individual characteristics rather than their location within a broader

⁶ *Supra* note 1.

⁷ See *Updated Definition of “Waters of the United States”*, 90 Fed. Reg. 52,498, 52,516–17 (Nov. 20, 2025) (proposing exclusion of non-navigable ditches constructed entirely in dry land).

⁸ See 90 Fed. Reg. at 52,516 (proposed definition of “ditch”).

⁹ *Id.* at 52,516-17.

¹⁰ See *id.* at Fed. Reg. at 52,517–18.

drainage system. To support predictable implementation, the agencies should provide guidance explaining how this approach applies to ditches and drainage networks related to transportation projects, including confirmation that excluded ditch segments may not be converted into jurisdictional waters solely because of aggregation or conveyance.

ARTBA supports the ditch exclusion as proposed by the agencies but further recommends that the final rule and associated guidance clearly affirm its application to roadside and transportation-related drainage features. Doing so will strengthen the rule’s durability in judicial review.

II. The definition of a tributary must not inadvertently include roadside ditches.

ARTBA supports the agencies’ effort to narrow the definition of “tributary” to relatively permanent waters having a clear, continuous connection to a downstream navigable water.¹¹ Focusing jurisdiction on waters that flow year-round or predictably during the wet season is an important step toward restoring clarity and aligning the rule with *Sackett*.

At the same time, it is critical that the tributary definition not be applied in a way that unintentionally captures roadside ditches and other engineered conveyances that are part of transportation infrastructure. Transportation drainage systems often move water downslope, pass through culverts or pipes, and connect to downstream waters. That alone should not make them tributaries. A ditch, swale, or drainage channel should not be deemed regulated simply because it conveys water to another location. Put simply, moving water downhill does not turn a man-made drainage feature into a regulated stream.

ARTBA agrees with the proposed rule’s recognition that intermittent or short-lived flow (non-relatively permanent) breaks jurisdiction upstream.¹² Where water flows only in response to rainfall or for short, unpredictable periods, jurisdiction should stop. This provides an important and commonsense boundary that prevents jurisdiction from creeping upstream through dry or episodic features that are designed to manage stormwater, not function as natural streams.

Because the proposed rule relies on wet-season flow and relatively permanent hydrology,¹³ ARTBA encourages the agencies to provide clear implementation guidance on how these determinations will be made in practice. ARTBA members need clarity on how these determinations will be applied consistently across Corps districts. Without this guidance, project participants can face uncertainty that directly affects their planning.

Providing these guardrails will also help ensure that the tributary definition functions as intended, supports predictable permitting outcomes, and avoids unnecessary delays to transportation projects that are essential to public safety and mobility.

¹¹ See *id.* at 52,508–10.

¹² See *id.* at 52,509–10.

¹³ See *id.* at 52,510–12.

III. Meaningful guidance can enhance predictability.

ARTBA supports the proposed rule's use of the "wet season" concept to help determine whether a water feature has relatively permanent flow.¹⁴ This approach looks at whether water shows up in the same place year after year during normal wet conditions, rather than treating short-lived runoff from individual storms as jurisdictional. A predictable, science-based framework for making these determinations is critical to implementing the rule consistently and in a manner that reflects real-world hydrology.

Many transportation projects are planned and delivered over several years, often under tight funding and construction windows. Uncertainty over wet season determinations can affect project planning, right-of-way acquisition, scheduling, and cost estimates long before construction begins.

ARTBA encourages the agencies to clearly identify which tools and datasets will be used to determine the wet season and relatively permanent flow, and which tools take priority where multiple sources are available. Without a clear hierarchy, there is a risk that different Corps districts will rely on disparate data sources, leading to inconsistent outcomes for similar projects in different regions.

In addition, guidance should clarify how wet season determinations account for regional variation, seasonal timing, and predictable lag between precipitation and surface flow. Many transportation-related safety features such as roadside ditches and drainage conveyances exhibit flow patterns that are consistent year after year, yet do not align neatly with calendar months. Clear, practical guidance will help ensure that these predictable conditions are evaluated consistently and fairly.

Finally, where direct observations or site-specific data are unavailable, ARTBA supports a transparent, weight-of-the-evidence approach that relies on appropriate and reliable information. Providing examples or case illustrations of how the agencies will apply these tools would further support consistent implementation and reduce unnecessary disputes.

IV. Stormwater control features are not WOTUS and should be excluded.

ARTBA supports clear and predictable treatment of engineered stormwater control features under the CWA and believes additional clarification is warranted for these features in the final rule. Transportation-related stormwater control features are engineered systems. They are designed to manage stormwater generated by roadway and construction activities to reduce flooding, limit erosion, and improve downstream water quality as part of transportation projects. Common examples include detention basins, treatment ponds, infiltration systems, and other engineered features designed to temporarily hold and treat runoff. Unlike roadside ditches, which are built to move water efficiently away from the roadway, stormwater control features are designed to manage and improve runoff before it reaches downstream waters. Some ARTBA members are responsible for the construction of these features within the scope of a transportation infrastructure project.

¹⁴ See *id.* at 52,510–12.

These stormwater control measures are constructed specifically to meet state and local stormwater requirements, and are routinely regulated through established permitting programs, including CWA Section 402.¹⁵ They are not natural water bodies and are not intended to function as streams, rivers, or other jurisdictional waters.

Consistent with longstanding regulatory practice, ARTBA encourages the agencies to expressly reaffirm that constructed stormwater control features associated with transportation projects are not WOTUS. Providing this clarification would promote regulatory continuity, support consistent implementation, and avoid confusion regarding features that exist solely to meet stormwater management and environmental protection requirements.

V. The responsibility to determine whether a water feature is a WOTUS rests with the government.

ARTBA supports a regulatory framework that provides regulated entities with clear notice regarding when CWA requirements apply. An essential component of that clarity is confirming that the burden of establishing CWA jurisdiction rests with the federal agencies asserting it.

Throughout the proposed rule and preamble, the agencies appropriately acknowledge that jurisdictional determinations require affirmative findings based on defined criteria, including relatively permanent flow, determinations of whether a ditch is jurisdictional, and qualifying connections to downstream waters.¹⁶ To strengthen the rule's durability and ensure consistent implementation, ARTBA encourages the agencies to codify this principle explicitly in the regulatory text.

Clearly allocating this burden of proof is particularly important for transportation construction projects. Contractors may not have been provided full, historical information on longstanding features such as tributaries, or hydrologic conditions. Absent an unequivocal directive otherwise, project sponsors and contractors may be placed in the untenable position of disproving jurisdiction, leading to delay, increased costs, and inconsistent outcomes across Corps districts.

EPA and the Corps should bear the burden of demonstrating that a feature meets the definition of WOTUS. Codifying this practice would promote uniform application of the rule, reduce unnecessary disputes, and align implementation with fundamental principles of administrative law.

Conclusion

ARTBA supports the proposed rule as a long-overdue improvement that brings clarity and common sense back to CWA permitting. By anchoring the definition of WOTUS to an unambiguous Supreme Court ruling on this matter, EPA and the Corps can help facilitate safe and timely construction of transportation projects, while ensuring better compliance with the CWA. ARTBA's recommendations are offered to strengthen the rule's durability, ensure consistent implementation, and avoid unnecessary permitting of

¹⁵ 33 U.S.C. § 1342.

¹⁶ See 90 Fed. Reg. at 52,508–12, 52,516–18.

engineered roadside ditches and other drainage features. We appreciate the agencies' leadership and look forward to continued engagement as the rule is finalized.

Should you have any questions or require additional information, please do not hesitate to contact Prianka Sharma, Vice President and Counsel for Regulatory Affairs, at psharma@artba.org.

Sincerely,

Prianka Sharma

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