

July 29, 2011

Environmental Protection Agency
Water Docket
Mail Code: 2822T
1200 Pennsylvania Avenue
Washington, D.C. 20460
Attn: Docket No. EPA-HQ-OW-2011-0409

Re: EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act

On behalf of the American Road and Transportation Builders Association (ARTBA) and its 5,000 member firms and public agencies nationwide, I respectfully offer comments on the Environmental Protection Agency's (EPA's) and Army Corps of Engineers' (Corps') Guidance regarding identification of waters protected by the Clean Water Act (CWA) published in the May 2, 2011 *Federal Register*.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA. In the 35 years since the CWA's passage ARTBA has actively worked to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources. In doing so, we are proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure projects on the environment.

One of the main reasons for the success of the CWA over the past 35 years is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

"It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."

This structure of shared responsibility between federal and state governments allows states the essential flexibility they need to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, making necessary improvements to their transportation infrastructure. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres



of wetlands were lost each year. Subsequent to the CWA's passage, from 1986-1997, the loss rate declined to 58,600 acres per year and between 1998-2004 overall wetland areas increased at a rate of 32,000 acres per year.¹

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of "wetlands."² This ambiguity is frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of "wetlands" that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA's jurisdiction. As an example of this, official ARTBA policy recommends defining a "wetland" as follows: "If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland."

ARTBA has been also actively involved in CWA litigation concerning federal jurisdiction over the nation's waters and wetlands for the better part of the past two decades. Most recently, the Supreme Court's decision in *Rapanos v. United States*³ benefited the transportation project delivery process by setting limits on Corps' jurisdiction.

At issue in *Rapanos* were two separate wetlands cases which were consolidated for the Court's review. The Court was asked to decide whether the Clean Water Act allows Corps regulation of "isolated wetlands" that have no connection with "navigable waters." The Court was also asked to decide whether or not 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. Once again, ARTBA explained the CWA's legislative scheme of state and federal shared responsibility to the Court:

"By federalizing any wet area, no matter how remote from navigable waters, [this Court would adopt] an unprecedentedly broad jurisdiction of the geographic scope of CWA jurisdiction. As this Court held in *SWANCC*, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources...In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA."⁴

The Court's split decision in *Rapanos* preserved the CWA's essential jurisdictional balance by preventing sweeping federal authority over isolated wetlands and man-made ditches or remote wetlands with finite connections to navigable waters. However, because the Court's decision was not issued by a majority of the justices, these issues are currently being examined by lower courts on

¹ Draft 2007 Report on the Environment: Science, USEPA, May 2007, available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917>

² Many states define wetlands as well other types of water resources and prescribe regulatory regimes that are appropriate to each. The federal government tries a one-size fits all approach essentially requiring water resources viewed by states as not being wetlands to be regulated as if they were wetlands under federal law.

³ 547 U.S. 715 (2006).

⁴ *Rapanos v. United States*, 547 U.S. 715 (2006), Amicus Curiae Brief of the American Road and Transportation Builders Association, p. 25.

a case-by-case basis. While ARTBA applauds the fact the decision prevented an expansion of already inefficient federal wetlands regulation, we also recognize the need for clarity in *Rapanos*' wake in order to preserve the necessary balance between federal and state jurisdictions that is essential to the continuation of the CWA's success.

In decisions such as *Rapanos* where four justices agree in both the plurality opinion (authored by Justice Scalia) and the dissenting opinion (authored by Justice Stevens) and one Justice (Justice Kennedy) writes a concurrence, the effects of the opinion should be taken from the areas where the plurality and the concurrence agree. The Supreme Court has spoken to this point specifically, stating:

“[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by the members who concurred in the judgments on the narrowest grounds.’”⁵

In *Rapanos*, the five justices who agreed in the final judgment of the case were Justices Scalia, Thomas, Alito, Roberts and Kennedy. Thus, in responding to the *Rapanos* decision, the focus should be on those areas where agreement can be found among these five justices.

The Scalia plurality and the Kennedy concurrence agree on several points which should guide any regulatory or legislative response to the *Rapanos* decision. Most importantly, both Scalia and Kennedy disagreed with the existing Corps theory of jurisdiction that a wetland with tenuous and questionable connections to navigable water can be subject to federal jurisdiction if one molecule of water flows between both points. This has been termed by some as the “migratory molecule” theory of jurisdiction. Justice Kennedy specifically rejects the idea of the “migratory molecule” by noting that a “central requirement” of the Clean Water Act is “the requirement that the word ‘navigable’ in ‘navigable waters’ be given some importance.”⁶

Justice Kennedy also explains the CWA's establishment of certain basic recognizable limits to the Corps' excluding man-made ditches and drains by refuting portions of Justice Stevens' dissent:

“[t]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote and insubstantial, that eventually flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.”⁷

Further, Justice Kennedy notes such an over-expansive view of the Corps' authority is incompatible with the CWA:

“Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact-water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the

⁵ *Marks v. United States*, 430 U.S. 188, 193 (1977).

⁶ *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, J. concurring).

⁷ *Id.*

integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than the isolated ponds held to fall beyond the Act's scope in *SWANCC*.”⁸

This leads to a central point of *Rapanos* echoed by members of the plurality, dissent and Justice Kennedy—there needs to be some sort of regulatory response from the Corps reflecting these limits on its jurisdiction. In his concurrence, Justice Kennedy states:

“Absent more specific regulations, however, the Corps must establish a specific nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to navigable tributaries. Given the potential overbreadth of the Corps regulations, this showing is necessary to avoid unreasonable applications of the statute.”⁹

Chief Justice Roberts was more direct with his wording, noting a regulatory response from the Corps has been long overdue, and should have been promulgated after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*¹⁰ (*SWANCC*) decision first recognized the jurisdiction of the Corps needed to be limited:

“Rather than refining its view of its authority in light of [the Court's] decision in *SWANCC*, and providing guidance meriting deference under [the Court's] generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.”¹¹

Finally, Justice Breyer's dissent warns a refusal from the Corps to issue a regulatory response to *Rapanos* will only result in more litigation:

“If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.”¹²

Thus, the one thing that is clear from the *Rapanos* decision is the need for a response recognizing the limits of Corps jurisdiction and clarifying existing wetlands regulations. It is essential for any administrative clarification of federal wetlands jurisdiction to preserve the federal-state partnership

⁸ *Id.*, referring to the holding in *SWANCC*

⁹ *Id.*

¹⁰ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001)

¹¹ *Id.* (Roberts, C.J., concurring).

¹² *Id.* (Breyer, J., dissenting).

embodied in the CWA. As both *Rapanos* and *SWANCC* stressed, a scheme of shared jurisdiction is necessary to carry out the original intent of the CWA. States need to be allowed to maintain full control over intrastate water bodies in order to allow them the flexibility to balance their own environmental needs with unique infrastructure challenges.

The EPA and Corps decision to issue guidance on this topic as opposed to a formal rulemaking runs contrary to the express aforementioned views of the Supreme Court. The guidance process shortcuts critical rulemaking requirements, such as: including a response to public comments; providing a rationale and factual basis for agency decision; and producing a final decision that can be judicially reviewed. Put simply, the matter of CWA jurisdiction is too important to be handled through the guidance process. It does not offer the regulated community sufficient protection, nor will it solicit the information necessary to be able to properly inform agency decision making.

The guidance expands the universe of waters that will be considered “traditional navigable waters” by including for the first time ever, waters that support one-time recreational use. In addition, the guidance gives new and expanded regulatory status to “interstate waters,” equating them with traditional navigable waters. Further, the guidance makes it easier to find jurisdiction for adjacent wetlands, tributaries and other waters. All of this results in an unprecedented expansion of CWA jurisdiction which is wholly inappropriate for a guidance document. If this level of CWA expansion is truly what EPA and the Corps desire, it should be done through the regulatory process or, alternatively, the agencies should approach Congress and ask for their authority to be expanded.

ARTBA is particularly concerned with the treatment of ditches by the guidance. Roadside ditches are an essential part of any transportation project and contribute to the public health and safety of the nation by dispersing water from roadways. The current regulations say nothing about ditches, but the guidance regulates all roadside ditches that have a channel, have an ordinary high water mark, and can meet one of five characteristics. Roadside ditches are not, and should not be regulated as, traditional jurisdictional wetlands since they are an essential part of any transportation improvement project and contribute to the public health and safety of the nation by dispersing water from roadways.

In addition, the guidance creates a completely new concept of allowing for “aggregation” of the contributions of all similar waters “*within an entire watershed*,” making it far easier to establish a significant nexus between these small intrastate waters and newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional determination for an entire class of waters within an entire watershed. Such an interpretation of jurisdiction will literally leave no transportation project untouched from federal jurisdiction regardless of its location, as there is no area in the United States not linked to at least one watershed.

One method of establishing clarity would be to develop a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Also, there should be a “de minimis” level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A “de-minimis” standard for impacts would be particularly helpful for transportation projects and allow projects to avoid being delayed by minimal impacts to areas which are non-environmentally sensitive areas.

Furthermore the guidance does not recognize one of the biggest factors creating the confusion in defining Corps’ jurisdiction—multiple agencies being involved in the jurisdictional determination

process. ARTBA has repeatedly stated the involvement of multiple agencies in wetlands regulation only hinders the overall efforts of the Corps' permitting program. One of the principal problems plaguing the 404 program is indecision and inaction, with no benefit for the environment. Justice Breyer reiterated this in his aforementioned *Rapanos* dissent, stating "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [federal wetlands jurisdiction]." ¹³

Congress reiterated this point in the National Defense Authorization Act for Fiscal Year 2004 by authorizing only one agency, the Corps, to issue 404 permitting program regulations. This direction should be continued. Thus, it should be the sole responsibility of the Corps to take the lead and build a stronger, more predictable compensatory mitigation program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit applicants. ARTBA continues to believe the Corps should be the principal agency administering the 404 wetlands regulatory program. The *Rapanos* guidance should be amended to acknowledge the Corps' status as the sole intended decision-making agency in jurisdictional determinations and the EPA should be removed from the permitting process entirely. ¹⁴

Finally, ARTBA is an active member of the Waters Advocacy Coalition (WAC) and supports, as well as incorporates by reference, the comments of WAC submitted to this docket.

ARTBA looks forward to continuing its long tradition of working with the Corps in order to build upon the success and address the future challenges of the CWA and its essential scheme of shared federal and state jurisdiction.

Sincerely,



T. Peter Ruane
President & C.E.O

¹³ *Rapanos v. United States*, 547 U.S. 715 (2006).

¹⁴ It would also be helpful if the power of the EPA under CWA §404(c) could not be triggered by EPA's non-concurrence in a jurisdictional determination made by the Corps.