

April 4, 2011

Improving Regulations Docket
United States Environmental Protection Agency
EPA Docket Center
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Docket No. EPA-HQ-OA-2011-0154, EPA's Plan for Retrospective Review Under Executive Order 13563, Program Area: Water

On behalf of the 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer the following comments for consideration as part of the U.S. Environmental Protection Agency's (EPA's) plan for retrospective review under Executive Order 13563 noticed in the February 23 issue of the *Federal Register*. The following comments deal specifically with issues relating to the Clean Water Act (CWA).

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs.

ARTBA members undertake a variety of activities that are directly impacted by EPA's CWA regulations. ARTBA's private sector members rely heavily on contracts funded under these titles to plan, design, construct and provide supplies for transportation improvement projects. This document represents the collective view of our member companies and organizations.

ARTBA commends President Obama for initiating this review process by issuing a January 18 Executive Order noting that all regulatory efforts must "protect public welfare, safety and our environment while promoting economic growth, innovation competitiveness and job creation." Specifically, the President's Executive Order notes agencies must tailor regulations to "impose the least burden on society." With this in mind, EPA should be cognizant of the impact its regulations have on other federal initiatives, such as effective transportation improvements. Regulations do not operate in a vacuum. A regulation promulgated and enforced by one agency, such as the EPA in one policy arena, often affects the ability to comply with other regulations issued by other agencies in completely different policy arenas.

For example, while EPA operates primarily in the environmental realm, its regulations can impact ARTBA members' ability to construct transportation improvements which are necessary from a public health and safety perspective. These effects should be considered by EPA as nearly 34,000 people die on U.S. highways each year and many federally-funded highway



improvements are designed specifically to address this issue, but under many situations these interconnections are not recognized.

There has been a good deal of discussion recently about clarifying the jurisdiction of the CWA with substantive perspectives on all sides. Any attempts to do so undertaken by the EPA should be done through a formal rulemaking and not via agency guidance. Issuing guidance bypasses public participation requirements offered through the rulemaking process and would deny the regulated community an opportunity to participate in the discussion of where jurisdiction under the CWA begins and ends. Also, EPA should recognize the difference between clarifying jurisdiction and expanding it. The agency's focus should be on the former without accomplishing the latter.

More specifically, the EPA should focus on regulations regarding wetlands permitting. ARTBA has repeatedly stated the involvement of multiple agencies (including EPA) in wetlands regulation only hinders the overall efforts of the Corps' permitting program. One of the principal problems that has plagued the 404 program is indecision and inaction, with no benefit for the environment. Congress, in the National Defense Authorization Act for Fiscal Year 2004 authorized 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 and the EPA should remove itself from the permitting process save for instances where the Corps specifically requests EPA's assistance.

Should the EPA decide not to remove itself from the permitting process, there are other suggestions which ARTBA believes could lead to improvements:

- Many ARTBA members are directly involved in tremendously successful mitigation efforts as part of the projects they construct. From a federal regulatory perspective, mitigation should be declared as the preferred, first-choice method of wetlands restoration and development. The permitting process should be altered to require mitigation banking, provided that it is advantageous to both the environment and project sponsors. Federal mitigation regulations should place a premium on flexibility and not be bogged down by requirements which offer no additional environmental protection and could lead to further delay of desperately needed transportation infrastructure projects .
- Classifying wetlands based on their ecological function and value would allow greater protection for the most valuable wetlands while also creating flexibility for projects which impact wetlands that are considered to have little or no value. Many states currently have wetlands-classification type programs—and these programs should continue to exist, but a federal classification system is needed to expand this practice nationwide. This classification system should also set clear ecological guidelines for determining if an area is not a wetland. Any federal wetlands classification system, however, should not preclude a state from developing their own wetlands classification methods. Further, there should also 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.

- Currently, there is no set time limit for permitting decisions. When project planners apply for permits, they have no sense of when the process is going to be completed. Strict, enforceable timelines for permitting decisions should be set. An acceptable time span would be between 60 and 120 days to allow EPA and the Corps enough time to evaluate the permit without causing a substantial delay to the project—unless EPA, the Corps and the applicant agree on another timeline acceptable to both parties. If a decision is not made on a permit within the given timeframe, then the project should be allowed to proceed. Time limits will add a sense of predictability to the permitting process and allow project planners to more accurately plan out timelines for environmental review. Deadlines for environmental reviews are employed in a variety of federal transportation programs with success. Further, in instances where a permit is not approved, EPA and the Corps should provide a detailed list of requirements to the applicant which would result in approval upon resubmission.
- Changes to the Nationwide Permit Program (NWP) have compromised its effectiveness by allowing far fewer projects to be able to qualify for nationwide permits. The acreage limit under which an activity would qualify for the NWP program, as opposed to requiring an individual permit has been reduced from three acres to one-half an acre. This forces many more applications for individual permits and increases the Corps' workload. Also, greater mandatory notification requirements serving no purpose and increasing delay have been added to NWP's for projects with minor impacts. The acreage limitations and notification requirements recently placed on the use of NWPs should be rescinded.

Another area ARTBA would like to offer suggestions in is stormwater regulation. Currently, many projects effectively use Best Management Practices (BMPs) to address stormwater concerns in a manner that effectively balances environmental protection without exacerbating already arduous delays. In discussing how to approach the regulation of stormwater runoff, ARTBA has expressed, and continues to express a strong preference for maximum flexibility, allowing states to continue the use of BMPs as opposed to more stringent “one size fits all” approached relying on predetermined numeric standards.

BMPs allow the flexibility necessary for projects to be able to select stormwater control techniques best suited to a projects particular circumstances. Every transportation project faces unique challenges based on a number of factors, including where actual construction is taking place, the size of the project and climate issues such as rainfall amounts during the time construction is being performed. A numeric standard applied to all projects, however, would not be able to take such differences into account. Transportation projects in areas with heavy rainfall would be held to the same effluent limitation standards as projects in dry, arid regions. Such a “one-size-fits-all” approach to stormwater permitting will constrain and delay transportation projects because it does not account for the individual circumstances of each project.

In one specific instance, an ARTBA member company had a project on a fairly large site (70 to 100 acres). It started out as a \$4,000,000 project. During the project, there was an “El Niño”

weather cycle bringing a great deal of rain every day. The project's customer could not afford to wait until all of the BMPs treated the water and needed the contractor to dry out the site as fast as possible so construction could continue. Since the contract granted weather days but the water needed to be processed faster, the contractor developed an Alternative Treatment System (ATS, which would be required on all projects to meet the EPA's numeric standards) using settlement ponds, flocking, filtering, pumping, handling, etc. The contractor agreed to do this work on an audited Time and Material basis. The final cost and change order resulted in over \$1,000,000 in additional charges to the project.

The ARTBA contractor involved in this job noted that just about every job in that area had the same problem that summer but none of them had the ATS expense that this contractor incurred. In considering ATSS, ARTBA is concerned the implementation of numeric stormwater discharge standards will add substantial additional costs which could put many contractors out of business due to the high cost of purchasing ATS equipment necessary for compliance. Further, contractors who pay these additional costs are most assuredly going to pass them along resulting in all owners, particularly public ones, paying more for their projects. This is especially troublesome for transportation projects where needs vastly outweigh available resources.

Another problem with numeric stormwater standards is the lack of availability of treatment equipment necessary to meet the standards. According to ARTBA contractor members, it could take years until there is enough equipment to fully implement numeric discharge standards. Meanwhile, many projects will be in limbo while waiting for this equipment to become available. Currently, there are only a relatively small number of vendors who sell the necessary equipment. Implementing a numeric discharge standard would essentially place transportation planners as well as the states and localities overseeing transportation projects at the economic mercy of this small group of treatment equipment vendors, at least in the short term.

Also, there are liability issues arising from the imposition of a numeric standard. If a project temporarily violates the proposed numeric standard, it would open the door for litigation. EPA's proposed rule does not specify who would bear the brunt of any such litigation. Would the project planner be responsible, the contractor in charge of the job, or the sub-contractor (if there is one) assigned to deal with stormwater run-off? Ultimately, the proposed rule provides another avenue for project opponents to use litigation as a means to delay and disrupt transportation improvements. As soon as there is a violation of the numeric standard, a "rush to the courthouse door" would likely be triggered, potentially resulting in additional years of delay to affected projects.

Future stormwater measures affecting transportation projects should allow for the level of flexibility needed to make sure stormwater issues can be addressed in a manner suited to the individual nature of the project in question. Further, the issues of cost and liability need to be taken into account to ensure additional measures do not result in additional years of delay and unnecessary costs to affected projects.

ARTBA thanks the EPA for initiating this regulatory review and urges EPA to draw upon the President's Executive Order and ensure that regulations operate in the most effective, least burdensome manner to achieve their stated goals.

Sincerely,

A handwritten signature in black ink that reads "T. Peter Ruane". The signature is written in a cursive style with a large, stylized initial "T".

T. Peter Ruane
President & C.E.O