



OHIO DEPARTMENT OF TRANSPORTATION

John R. Kasich, Governor

Jerry Wray, Director

1980 W. Broad Street, Columbus, OH 43223

614-466-7170

transportation.ohio.gov

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Craig Butler, Director
Ohio EPA
P.O. Box 1049
Columbus, Ohio 43216-1049

RE: Proposed Redefinition of Waters of the United States

Director Butler,

At Ohio EPA's request, the Ohio Department of Transportation (ODOT) is providing our initial comments on the potential impacts to our program in the event that the United States Environmental Protection Agency (USEPA) redefines waters of the U.S. (WOTUS) in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006), where WOTUS would only include "relatively permanent" waters and wetlands with a "continuous surface connection". It is our understanding that this response will be provided to the USEPA, in conjunction with other Ohio Agency responses, to address a USEPA mandate to begin to understand how changing the definition of WOTUS would impact the States.

The Scalia opinion indicates that Clean Water Act jurisdiction includes "...relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters." ODOT understands that this opinion could be narrowly (and more aggressively) interpreted as:

Relatively Permanent = only perennial streams and permanent lakes and waterbodies

Continuous Surface Connection = only wetlands that directly touch a jurisdictional water (aka a perennial surface water connection)

Should the definition of the WOTUS be interpreted to only include perennial streams and permanent lakes and waterbodies, ODOT anticipates an estimated 75% reduction in the Clean Water Act regulatory actions required per year to deliver our transportation program. We estimate that a proposed definition of WOTUS in accordance with the Scalia opinion would reduce the amount (area, length, limits) of surface water resources subject to federal jurisdiction thereby reducing the time and cost of delivering transportation projects that impact those resources. Time and cost savings would be realized through a reduction in the requirements for agency coordination, permit application preparation and processing, project design and engineering costs associated with avoiding and minimizing impacts to these resources, and mitigation costs.

Due to Ohio's isolated wetland rule, all wetlands no longer under federal jurisdiction would continue to be regulated and protected by state statute. Since all isolated wetland impacts require a permit

application and mitigation, ODOT's creation and submission of State isolated wetland permit applications and associated mitigation would likely increase along with the associated costs.

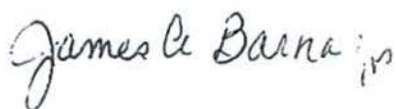
In the absence of federal jurisdiction over intermittent and ephemeral waters, it is likely that the State of Ohio would adopt a permitting process to regulate and protect these resources. While it is uncertain what this permitting process would entail, the development of a new state permitting process would present its own positive and negative consequences. With limited federal jurisdiction on surface waters, ODOT would prefer a new waters of the state permitting process that is streamlined, fast, simple, and produces environmental quality improvements, and not be a reproduction of the current time-consuming and inefficient federal process.

In the absence of a state permitting program being created to regulate impacts to waters no longer considered under federal jurisdiction, long term implications of reduced water quality regulations could include the overall degradation and lowering of water quality in the State of Ohio. This could lead to several issues including increasing the number of listed or endangered aquatic species that would be regulated and managed in ODOT project delivery (with an associated increase in project delivery timelines and costs). Poor water quality would equal reduced quality of life in Ohio which could lead to reduced economic activity, lowered tax revenues, and could reduce funding for transportation projects.

Despite the controversy of the 2015 WOTUS rule, the rule was based on the science of how ephemeral and intermittent stream quality impacts the quality of downstream resources. This science appears to be valid and well supported. A reduction in the quality of headwaters has been shown to reduce the quality of the downstream resources. Reducing protections of headwater streams would most likely lead to increases in water treatment costs, lowered fish health and diversity, fewer number of waters that meet state standards for water quality, and increased harmful algae bloom severity and prevalence. All of these items combined would increase costs for ODOT to create surface water mitigation when it would remain necessary.

ODOT appreciates the opportunity to submit comments on this important topic which will have implications throughout Ohio and our Nation. Should there be a need to directly contact us regarding our specific comments, please feel free to contact Matthew Perlik, Assistant Environmental Administrator at (614)466-1937.

Respectfully,



James A. Barna, P.E.,
Chief Engineer & Assistant Director
Transportation Policy

TMH:MKP:MWR