



Testimony of

**Mr. Nick Ivanoff
President & CEO
Ammann & Whitney**

**On Behalf of the
American Road & Transportation Builders
Association**

**Submitted to the
United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment**

**Hearing on “EPA’s Expanded Interpretation of Its
Permit Veto Authority Under the Clean Water Act.”**

July 15, 2014

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“EPA’s Expanded Interpretation of Its Permit Veto Authority Under the Clean Water Act”

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Subcommittee Chairman Gibbs and Ranking Member Bishop, thank you for holding this hearing on “EPA’s Expanded Interpretation of Its Permit Veto Authority Under the Clean Water Act (CWA).” My name is Nick Ivanoff. I am president & CEO of Ammann & Whitney in New York, NY—we provide design and construction services to public and private sector clients around the world. I also serve as the senior vice chairman of the American Road and Transportation Builders Association (ARTBA) and am appearing before you today in that capacity.

ARTBA, now in its 112th year of service, provides federal representation for more than 6,000 members from all sectors of the U.S. transportation construction industry. ARTBA’s membership includes private firms and organizations, as well as public agencies that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA members must navigate the regulatory process to deliver transportation improvements. Specifically, ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA. ARTBA actively works to combine the complementary interests of improving our nation’s transportation infrastructure with protecting essential water resources and vital habitats. Further, ARTBA supports the protection of environmentally-sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements.

Part of the environmental review and approval process for transportation construction projects includes section 404 of the CWA which authorizes the issuance of permits for “the discharge of dredged or fill material into the navigable waters [of the United States].” The permitting responsibility for CWA section 404 is shared between the United States Army Corps of Engineers (Corps) and the EPA. Annually, roughly 60,000 section 404 permits are issued.¹

¹ Economic Incentive Effects of EPA’s After-the Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal, Professor David Sunding, University of California at Berkeley and the Brattle Group (May 30, 2011).

Transportation improvements must obtain section 404 permits when they impact wetland areas during construction.

Ideally, permits should provide a sense of certainty for both the regulating authority (in this case the Corps and EPA) and the project sponsor. Conditions are outlined in the permit, which, if met, allow the project in question to move forward and the environment to be protected. From the viewpoint of the project sponsor, the main benefit of a permit is predictability. The project sponsor knows that as long as the terms of the permit are met, project construction can commence without fear of time-consuming litigation.

Unfortunately, the sense of fairness and predictability in the CWA permitting system has recently been placed in jeopardy. The EPA in January of 2011 retroactively vetoed a 404 permit issued to the Mingo Logan Coal Company for a coal mine in West Virginia. Mingo Logan had lawfully obtained the permit in 2007 and had been operating in compliance with all permit requirements for over three years. Despite the fact that Mingo Logan had not violated the terms of the permit EPA decided to change the permit conditions more than three years after it was issued, rendering Mingo Logan's operations out of compliance.

While the EPA's decision was directed at a single mining operation, its impacts have been felt throughout the regulated community in all sectors of the economy. Indeed, multiple industry associations, including ARTBA, challenged EPA's actions in court. While a favorable decision was obtained in federal district court, EPA's decision was ultimately upheld at the appellate level and the Supreme Court declined to review the case. As things stand currently, project sponsors now face the potential uncertainty of losing a valid wetlands permit, through no fault of their own, simply because the EPA changes its mind.

For the transportation construction community, EPA's permit revocation is particularly unsettling. According to Federal Highway Administration data, every \$1 billion spent on highway and bridge improvements supports almost 28,000 jobs. Given these broad direct and indirect economic contributions, potential impacts on transportation development should be taken into account when analyzing EPA's actions.

Major transportation projects, such as new roads, bridges or transit systems, can take years, if not more than a decade, to complete. In order for these projects to move forward, planners need to know that permits received at the beginning of a multi-year construction process will be valid throughout the entire time the project is being built. Further, planners also need to know that the specific conditions and mandates in a particular permit are not going to change after the permit is issued.

Certainty in the permitting process is also integral to financing transportation projects. With public-private partnerships being eyed more frequently as a means of project delivery, private investors considering financing transportation projects have become very concerned with properly analyzing risks in project delivery. In order for parties to invest in transportation improvements, they need a level of certainty. The prospect of validly issued permits being rescinded is precisely the type of scenario that could increase the perceived risk of a project to potential investors and make the project less appealing or increase the entities required rate of return.

EPA's permit veto decision is made even more troubling by the agency's recent attempts to expand its overall jurisdiction under the CWA. Currently, EPA is taking comments on a proposed rule which would alter the definition of "waters of the U.S." ARTBA recently provided a written statement to this committee detailing our concerns with EPA's proposed rule. In regards to this hearing, if EPA's proposed rule is implemented, the universe of water bodies requiring federal permits will expand. This will be a "one-two" punch for transportation improvements as the permitting burden will increase and even if those permits are obtained, the length of their validity will always be in doubt.

It should also be noted there has been recent bipartisan progress in the area of streamlining the project review and approval process for transportation projects. Members of both parties agree that transportation improvements can and should be built more quickly without sacrificing necessary environmental protections. The current surface transportation reauthorization law, the "Moving Ahead for Progress in the 21st Century" (MAP-21) Act contained significant reforms to the project delivery process aimed at reducing delay. Recently, the Obama Administration released the "Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency, and Rebuilding of Infrastructure and Communities throughout America" (GROW AMERICA) reauthorization proposal which continues MAP-21's efforts at improving project delivery.

Absent legislative action to prohibit EPA's actions, the progress of MAP-21 and the potential progress of the project delivery reforms in GROW AMERICA could be jeopardized. Any reduction in delay gained from improvements to the project delivery process would be negated by the increased uncertainty in the regulatory process for wetlands.

Instead of increasing uncertainty in the regulatory process, ARTBA has urged EPA on multiple occasions to establish clarity in CWA regulation by developing 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, as it could reduce needless paperwork, delay and regulatory requirements where a project's impacts do not rise to the level of having a significant effect on the environment.

ARTBA is pleased this committee has recently introduced bipartisan legislation, H.R. 4854, the "Regulatory Certainty Act of 2014," which would curb EPA's ability to retroactively veto valid CWA permits. ARTBA supports this legislation in the interest of regulatory fairness and sees it as a means of restoring certainty to the transportation construction community who obtain such permits in order to deliver sorely needed transportation improvements. A permit is akin to a promise, and once a permit is issued, both the regulator and the regulated entity should be expected to hold up their ends of the bargain.

Subcommittee Chairman Gibbs and Ranking Member Bishop, thank you for allowing me to appear before you today. ARTBA looks forward to continuing to work with the committee in

order to continue to protect, sustain and improve our nation's infrastructure while maintaining the integrity of the CWA.

I would be happy to answer any questions from you or other members of the subcommittee.