ASSOCIATION OF METROPOLITAN WATER AGENCIES

LEADERS IN WATER

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October 17, 2017

Via REGULATIONS.GOV

Docket Number COE-2017-0004
U.S. Army Corps of Engineers
ATTN: CECW-CO-N, Ms. Mary Coulombe
441 G Street NW
Washington, DC 20314-1000

Re: Docket COE-2017-0004 U.S. Army Corps of Engineers; Subgroup to the DoD Regulatory Reform Task Force, Review of Existing Rules

Dear Ms. Coloumbe:

The Association of Metropolitan Water Agencies is an organization representing CEOs and general managers of the largest publicly owned drinking water utilities in the United States. Many of AMWA's members have storage agreements with the U.S. Army Corps of Engineers (USACE), others interact with the USACE and EPA in CWA 404 permitting processes and still others look to better understand how the Corps operates and maintains its infrastructure, particularly as it pertains to water supply.

AMWA appreciates the opportunity to provide comments to USACE's Subgroup to the DoD Regulatory Reform Task Force as it reviews existing rules. Specifically, our comments address: **33 CFR part 209 (Administrative Procedure); 33 CFR Part 384 (Intergovernmental Review)** and **33 CFR part 328 (Definition of Waters of the United States).**

If there are any questions, please contact Erica Brown at 202-331-2820 or brown@amwa.net.

Sincerely,

Diane VanDe Hei, CEO

Attachments

AMWA Comments on Docket COE-2017-004; U.S. Army Corps of Engineers; Subgroup to the DoD Regulatory Reform Task Force, Review of Existing Rules

33 CFR Part 209 – Administrative Procedure and 33 CFR Part 384 – Intergovernmental Review

Much of the work of USACE that affects drinking water supply involves contracts and agreements with state and local partners as well as consideration of the interests of other stakeholders, such as recreational land users. Therefore, it is important for the Corps to support the spirit of administrative procedures law, particularly as it is related to rulemakings that affect those stakeholders. As a civilian governmental agency within a military governmental framework, implementing this law has traditionally brought unique challenges.

Similarly, fostering intergovernmental partnership "and a strengthened Federalism by relying on state processes and on state, area wide, regional and local coordination for review" is a key component of 33 CFR 384. In addition, the Corps is obligated to consider federalism implications (such as under E.O. 13132-Federalism) in rulemakings that affect states, such as the proposed rulemaking for Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal and Industrial Water Supply (Docket ID COE-2016-0016). This rulemaking has clear Federalism implications because of the fundamental relationship between the Corps and the states and the use of storage, which squarely fits within state responsibility for water allocations and water rights.

The reservoir rulemaking includes considerations for setting water storage pricing. The August 2017 Government Accountability Office report, *Army Corps of Engineers Better Data needed on Water Storage Pricing* (GAO-17-500) highlights inconsistencies across the Corps in how these storage agreements are priced. AMWA is pleased to know that the DoD concurs with the GAO's recommendations in this report, and recommends that the Corps include its findings and actions related to addressing these issues in the review and revision of the reservoir rule proposal.

AMWA is including comments submitted jointly with the American Water Works Association on the proposed reservoir rule, and also plans to submit additional comments to the Corps before the close of the comment period that specifically requests that the Corps initiate a Federal Advisory Committee Act stakeholder process to develop a proposed rule that better addresses the issues outlined in the Federalism E.O. as well as the Administrative Procedure Act, i.e., to provide for public participation and proactive engagement in the rulemaking process, something that was not initiated during the development of the reservoir rule proposal.

The culture of military command over the civilian nature and organization of the Corps of engineers bureaucratic structure compounds inefficiencies in the Corps process and likely contributes to a culture of closed doors rather than open ones, which is the spirit of 33 CFR 209 as well as the Federalism E.O.

For example, a three-year rotation of commanders and district engineers adds additional time to an already lengthy process of seeing a civil works permitting process or project to fruition, as new personnel need to be brought up to speed during a process that already spans many years. Therefore, it would behoove the Corps to increase the tenure of the District Engineer and or Commander from the

typical 3 years to 6 years. There may be other ways for the Corps to help ensure continuity in it's decision making processes, specifically in critical district-level decisions, such as promoting deputy commanders or assistant engineers who already have knowledge of the district and projects moving along the pipeline to commander, rather than frequently moving personnel around, and with it, institutional knowledge and the ability to make decisions.

33 CFR Part 328—Definition of Waters of the United States

AMWA has been engaged in the evolution of this rulemaking and revised rulemaking since EPA and the US Army Corps of Engineers first published notice on the topic in (year). As noted in comments submitted on September 11, 2017 and on November 14, 2014, AMWA recommends that any rulemaking to define waters of the United States (WOTUS) must ensure effective and efficient operations of drinking water infrastructure. A rule defining WOTUS should provide clear exclusions for regulatory oversight for routine operation and maintenance of drinking water, wastewater, and stormwater conveyances, aqueducts, canals, impoundments, and treatment facilities.

In cases that may fall outside of an exclusion for ongoing operations and maintenance activities for drinking water infrastructure, the Corps and EPA should be sure to clarify the applicability for water treatment situations and provide post-rule guidance where applicable. Any WOTUS rulemaking should also recognize the role of states in addressing water quantity management regarding water allocation and water rights, as required by CWA section 101(g).

33 CFR Part 230 – Procedures for Implementing NEPA

AMWA members are often applicants for or involved in projects that require NEPA reviews, such as those for water supply and delivery. The timeliness of the development of NEPA documents and the efficiency of NEPA reviews is important. Therefore, as
the White House takes steps to ensure that the federal "environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent", AMWA supports efforts of the Corps of engineers to work with other agencies, including relevant state agencies, to coordinate NEPA reviews and improve the efficiency and consistency of these reviews. AMWA supports the Administration's goal of completing federal environmental reviews and authorization decisions for water utility infrastructure projects within two years.

Finally, in light of potential impacts of climate change on our water resources, it's important that NEPA policies and guidelines facilitate adaptation approaches, including for projects developed to address future needs for resilience.

ASSOCIATION OF METROPOLITAN WATER AGENCIES

American Water Works Association

May 15, 2017

Re: Docket COE-2016-0016, Comments on the proposed rulemaking: Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal and Industrial Water Supply

Dear Mr. Fredericks:

The Association of Metropolitan Water Agencies (AMWA) is an organization representing CEOs and general managers of the largest publicly owned drinking water utilities in the United States and the American Water Works Association (AWWA) is an international, nonprofit, scientific and educational society dedicated to providing total water solutions assuring the effective management of water. Many members of both organizations have storage agreements with the U.S. Army Corps of Engineers, some are actively involved in basin reauthorization studies with the Corps for the purpose of reallocating portions of stored water for municipal use, and many more are interested in how the Corps intends to clarify policies regarding the use of its reservoirs. The terminology, definitions and change in applicability and procedures are very important to our members.

In light of the importance of this rulemaking to our members, AMWA and AWWA are pleased to submit these comments on the proposed rulemaking. While both organizations agree that additional clarifications related to the issues covered in this rulemaking are necessary, a final rulemaking should be delayed until additional consultations with states, utilities and other vested stakeholders can be undertaken. The issues at play in this rulemaking are complicated and nuanced to a degree that we believe a re-proposal is necessary to allow sufficient review of changes from the current proposal and assure critical issues are being properly addressed prior to finalization of the rule.

Our specific comments are provided as an attachment. If you have any questions, please contact Erica Brown (brown@amwa.net), AMWA's Chief Strategy and Sustainability Officer or Steve Via, AWWA (svia@awwa.org).

Sincerely,

Diane VanDe Hei
Chief Executive Officer
Association of Metropolitan Water Agencies

G. Tracy Mehan, III
Executive Director of Government Affairs
American Water Works Association

Comments from the Association of Metropolitan Water Agencies and American Water Works Association
May 15, 2017

Introduction

Many of AMWA's and AWWA's members have storage agreements with the U.S. Army Corps of Engineers, some are actively involved in basin reauthorization studies with the Corps for the purpose of reallocating portions of stored water for municipal use and many more are interested in how the Corps intends to clarify policies regarding the use of its reservoirs. Therefore terminology, definitions and change in applicability and procedures as related to the Corps' reservoir projects are very important to our members. Similarly, it is critical that the Corps' divisions and districts are working from the same understanding of how Section 6 of the Flood Control Act of 1944 and the Water Supply Act of 1958 should apply across the country to water supply projects and storage agreements.

In light of the importance of this rulemaking to our members, AMWA and AWWA are pleased to submit these comments. While AMWA agrees that additional clarifications related to the issues covered in this rulemaking are necessary, a final rulemaking should be delayed until additional consultations with states, utilities and other vested stakeholders can be undertaken. The issues at play in this rulemaking are complicated and nuanced to a degree that we believe a re-proposal is necessary to allow sufficient review of changes from the current proposal and assure critical issues are being properly addressed prior to finalization of the rule.

The Role of States Versus The Corps in Determining Allocations

At the heart of the reservoir rules, and, thus, the Corps proposal, is one overriding issue of relevance to the water utilities with storage contracts– i.e., the role and legal rights of states in allocating water flows and how those state responsibilities fit into the Corps' mission to provide water storage in its projects. By definition, the Corps provides ***storage space*** in its reservoirs.[1] It is the states that have jurisdiction over the ***allocation of water*** within the bounds of established water allocation agreements/contracts. As written, the Corps proposal does not maintain a clear distinction between these two responsibilities.

From a water utility perspective, once it has acquired storage space within a reservoir project, it should be able to utilize that space in the most efficient way possible to maximize its water yield

[1] It is recognized that all arguments regarding the use of storage space need to respect the Corps' operational obligations of the reservoirs (e.g., observing rule curves, etc.). In addition, in some instances, existing contracts between the Corps and a water utility may provide a right to a specified amount of water or other benefits. Existing contract rights and benefits should be acknowledged in the rulemaking and should not be abridged or negated directly or indirectly by a new rule.

in accordance with its state-issued water contracts and/or permits. In most respects, water utilities approach the operation of their storage – essentially a defined empty space – within the conceptual framework of a mass balance equation. Because the Corps is only providing storage space, it should only be concerned with how much water an authorized user has in the reservoir at any single point in time. Water availability should be based on a storage owner's net water used over any contractually designated time frame.

This concept is particularly important as it pertains to return flows and made inflows. If return flows or made inflows are credited to a water utility in accordance with state-assigned water allocations, the Corps should respect that allocation. Return flows or other made inflows - defined as inflows into a Corps reservoir that have been allocated by a state to an owner of storage in the reservoir - should be fully credited to the storage account holder responsible for such flows, provided that the flows can be reliably measured.

Both practically and conceptually, the Corps definition of water storage needs to be simplified to allow the maximum flexibility for states to manage their legal right for allocating water. As written, the Corps proposal suggests changes or modifications to rule language that would intrude on states' rights for water allocation.

One example of this is a medium-sized wholesale water and wastewater utility that owns a state water right for its indirect reuse water. If the Corps does not recognize the state's right to allocate the reuse water to the utility, the utility must purchase additional reallocated storage from the Corps or seek additional resources elsewhere to serve its customers. At current raw water rates, the utility would spend up to $3 million per year under current conditions. Future water needs could require the utility to purchase up to $10 million per year at current raw water rates.

Federalism

Because of the fundamental relationship between the Corps and states, and the use of storage in Corps projects within state allocations of water rights, there are clearly Federalism implications for almost every aspect of the proposed rule. It is unclear how the Corps came to a contrary conclusion in its assertion that Executive Order (EO) 13132 (Federalism) does not apply to this rulemaking. AMWA and AWWA strongly believe that this conclusion was incorrect, and that the robust outreach and consultation with states and local officials required under the Federalism EO is absolutely necessary prior to moving forward with this rule in any respect. Ideally, the results from such consultations should be shared widely with all stakeholders and incorporated into a re-proposal of the rule.

Throughout the proposal, much of the language refers to Corps decisions that would impact state, local, and tribal governments, but there is little information on how these levels of government or actual affected users (e.g., a water utility) would be engaged aside from through responding to public notices issued by the Corps. Therefore, in the spirit of reconsidering the proposal of this rule under EO 13132, as recommended elsewhere in our comments, the processes for making Corps decisions under this rule must include more proactive engagement of all stakeholders, including state, local and tribal government entities, and the requirements and mechanisms for such interactions need to be better reflected throughout this rulemaking.

Authorizations

The Corps rule proposes that approvals of state reallocations or surplus water determinations require sign-off by the Assistant Secretary of the Army (ASA). Given the historical record on moving many Corps projects through such approvals (i.e., it is already a very cumbersome, slow process), we believe this would be an excessively burdensome requirement, having the potential to cause further extensive delays in implementing much needed changes. Instead of creating a system that requires higher-level approvals, the revised rule should encourage streamlining of such processes wherever possible. Many of the decisions involved in reallocations and surplus water determinations are dependent on local conditions and technical in nature; therefore, responsibility for review and approval of these requests best resides with Corps District leadership familiar with projects and impacts for all parties involved.

As an example, Public Law 110-114 Sec. 5019 (Nov 8, 2007) provides the authority for the Secretary of the Army to enter into agreement with the Interstate Commission on the Potomac River (ICPRB) basin to provide temporary water supply at Corps facilities in the Potomac River Basin during specific drought periods. In this case, while this authorization provided requirements for the duration and applicability of any agreement, the proposed rule should be modified to provide the authority to allow the Corps District office, in this case the Baltimore District, to enter into agreement and/or reallocate non-contractually obligated water storage directly with the ICPRB Co-Op section. The Baltimore District office is responsible for developing and implementing the operating rules of the Corps Reservoir and, consequently, has direct knowledge of the rationale used to make Reservoir releases. A decision made at the District level provides a more efficient mechanism to accomplish surplus water declarations and/or reallocations of water storage that can be more effectively used by the local community.

Reassessing Existing Uses

The proposal describes reassessment of current uses when easements expire or within five years of the effective date of the final rule, whichever is earlier. If municipal and industrial water supply allocations require the approval of the Assistant Secretary of the Army, this concept raises several logistical challenges, i.e.:

1. If the review leads to a change in status, what timeframe will be afforded existing municipal and industrial users to transition to alternative sources or re-position outfalls in response to the assessment?
2. What, if any, other statutes would be triggered by this review?
3. What data gathering would be necessary?
4. What decision criteria would be used?
5. What is the status of existing uses during the review process?
6. What conditions apply to users during the review period?
7. How much time would the review process require?

Reassessments are lengthy and complicated processes, and the rule changes need to do a much more thorough job of accounting for such contingencies for the rule to result in greater clarity and efficiencies.

Surplus Water Definition and Costs

In regard to the definition of surplus water, we do not believe the definition should include natural flows, but rather only stored water in excess of established contractual storage agreements should be counted under the definition. And when making decisions related to surplus water, the Corps should not be making judgments about "beneficial uses" (i.e., choosing one use over another). The Corps should be solely concerned with whether the water storage is needed for an authorized purpose. Thus, we agree with the Corps that the term "more beneficially used" in the definition in the Corps guidance should be removed, since this suggests that the Corps is making an assessment of which uses are "more beneficial" than another. Water storage volume under existing contractual storage agreement must not be considered "surplus water" under any condition. If the water is not needed for an authorized use in the basin, then it should be considered surplus water and available for someone with a contract in that basin to take.

The rule as stated also includes a caveat that surplus water may include water where the "authorized purpose for which such water was originally intended have not fully developed". Water utilities acquire storage facilities based on very long-term projections, and 50 to 100-year needs are frequently considered in planning. So, if a utility is only 30 or 50 years into their plan, and is using only a portion of its contracted storage, that doesn't necessarily mean the intended use has not fully developed. Utilities should not be put in a position of defending long-term plans to maintain their contracted storage volume.

Furthermore, we agree with the Corps proposal that the annual charge for surplus water should "reflect only the full separable costs, if any, to the Government associated with the surplus water withdrawals." Reimbursement for indirect and forgone revenue, such as hydropower revenue, or other proposals strictly intended to enhance revenue should not be included in any surplus water pricing structure. With regard to the pricing of surplus water, the Corps should not be in the business of generating excess revenue.

Pricing of Water Storage Agreements

In general, greater clarity is needed in the costs to be included in water supply storage agreements. As a guideline, the Corps should focus its pricing strategy on simply recouping costs – not generating excess revenue/profit. All rule components related to pricing should be subject to further, targeted outreach focused on gaining first-hand feedback from the financial officers and accounting professionals tasked with addressing these issues within the entities effected by the rule.

For example, costs included for annual joint O&M in Corps storage agreements with water utilities varies widely, with little consistency in what's included in those costs. For capital costs

related to buying into projects, depreciation of assets needs to be considered in the pricing structure. These, and all other costs, need to be assessed using well-defined, standard accounting practices. Furthermore, invoices need to show sufficient detail to allow auditing under accepted general accounting rules.

One rationale for the rulemaking is also greater consistency and equity in the cost structure of using Corps facilities. It is not clear from the proposal that charges would be more equitably distributed. In the proposal, the Missouri River system is identified as a natural flowing "mainstem reservoir," to which the proposed pricing policy would not apply until June 2024. What about other similar systems like the Ohio River? Water utility withdrawals do not necessarily rely on storage in these systems; however, the proposed rule would result in new and inconsistent charges to authorize withdrawals from some rivers (i.e., the Missouri) but not others

Conclusion

AMWA and AWWA appreciate the general listening sessions the Corps has held to explain the current proposal. However, there was no substantive dialog and outreach to stakeholders prior to the proposal as required under the Federalism EO 13132. Therefore, given the absence of stakeholder outreach prior to proposal of the Corps rule, AMWA and AWWA strongly believe that additional robust consultations with all stakeholders are needed on the substance of the proposal. In addition, an official consultation with states and local government officials under the auspices of the Federalism EO 13132 is required and must be completed prior to moving forward with any aspect of this rulemaking.

Following the additional consultations, we believe the required changes to the proposal as written will be substantial enough to warrant a re-proposal of the rule to assure that the final product is workable for all interested stakeholders. This rulemaking makes changes to rules on the books since the 1940s and 1950s that have been subject to a broad range of interpretation and implementation across the country. How this rule is implemented in practice varies across Corps districts and divisions and the purpose of the rule is to clarify policy questions and interpretations that have arisen over time across the country by facilitating a more standard interpretation of the rule. In this context, the extra engagement and time to get all the details right is essential.

ASSOCIATION OF METROPOLITAN WATER AGENCIES

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September 11, 2017

Environmental Protection Agency
Department of the Army, Corps of Engineers
RE: Definition of "Waters of the United States" - Recodification of Pre-Existing Rules; (Docket ID No. EPA-HQ-OW-2017-0203)

The Association of Metropolitan Water Agencies (AMWA) is an organization representing CEOs and general managers of the largest publicly owned drinking water utilities in the United States. We appreciate the opportunity to submit additional comments on the joint rulemaking between the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to define "Waters of the United States" (WOTUS) and thus more clearly delineate which waters are subject to federal jurisdiction under the Clean Water Act (CWA).

Fundamentally, any rulemaking to define WOTUS under the CWA must explicitly consider the implications to drinking water. In November 2014, AMWA submitted joint comments with other water sector associations (copy attached) with our thoughts on the WOTUS rulemaking as it existed at that time. Though the rulemaking process continues to evolve, the core issues with respect to drinking water infrastructure and operations remain the same. Thus, we continue to support those comments and wish to stress again that the impacts of this rulemaking on drinking water supplies must be explicitly taken into consideration as part of the current regulatory discussions.

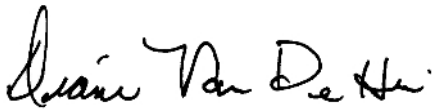
The CWA plays a critical role in protecting the nation's surface waters, which serve as the primary drinking water supply for millions of people across the country. Water suppliers need strong protections against pollution and contamination events that can pose severe health risks to drinking water consumers. At the same time, CWA provisions should not interfere with the provision of the nation's drinking water and water utility operations. The balance between protecting water sources and allowing the efficient building, expansion and operation of water infrastructure are key requirements for a final, implementable CWA.

We continue to support efforts to clarify the definition of WOTUS and its applicability under the CWA. However, the recommendations made in our November 2014 submission are essential to

ensure the most effective and efficient operations of critical drinking water infrastructure. We continue to expect any final regulation to provide clear exclusions from CWA regulatory oversight for routine operation and maintenance of drinking water, wastewater, and stormwater conveyances, aqueducts, canals, impoundments, and treatment facilities; remove ambiguity by providing practical definitions for key terms used in the rulemaking; and take additional steps outlined in the joint comment letter to assure sound implementation of the final rule. A clear final rule, consistent with historic practice, can effectively protect the environment, provide important protections to the nation's drinking water supply, and assure the sound function of public water infrastructure.

AMWA looks forward to continued engagement on this rulemaking as it proceeds. Please feel free to contact either myself, vandehei@amwa.net, or our Manager of Regulatory Affairs, Stephanie Hayes Schlea, at schlea@amwa.net if you have any questions.

Sincerely,



Diane VanDe Hei
Chief Executive Officer
Association of Metropolitan Water Agencies

Attachment

ASSOCIATION OF METROPOLITAN WATER AGENCIES

American Water Works Association

Association of California Water Agencies
Since 1910
Leadership • Advocacy • Information • Service

NAWC
National Association of Water Companies

November 14, 2014

Water Docket, EPA Docket Center
EPA West, Room 3334
1301 Constitution Avenue NW.
Washington, DC.

RE: Proposed Rule - Definition of "Waters of the United States" Under the Clean Water Act (Docket ID No. EPA–HQ–OW–2011–0880)

The undersigned organizations represent the full spectrum of drinking water and wastewater service providers from both public and private sectors. Our organizations' members include both publicly owned and investor-owned utilities serving communities throughout the United States. We appreciate the opportunity to comment on the joint rulemaking between the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to define "Waters of the United States" (WOTUS), and thus more clearly delineate which waters are subject to federal jurisdiction under the Clean Water Act (CWA). A wide cross-section of stakeholders recommended pursuing a rulemaking prior to development of guidance. We believe a rulemaking is the appropriate administrative process for clarifying CWA jurisdiction. And, we strongly support the agencies' desire to provide greater clarity and predictability for jurisdictional determinations.

The CWA, along with other environmental laws, is critical to protecting our nation's aquatic resources, including its drinking water sources. Thus, we continue to support EPA's work with other federal agencies using the CWA and other existing authorities to protect the chemical, physical, and biological, integrity of the nation's waters. While we encourage the federal government to protect drinking water supplies, the undersigned organizations urge EPA and the Corps regulators to adhere to the spirit of CWA policy-making, which historically has balanced policy objectives with pragmatic solutions. Thus, in finalizing the

definition of WOTUS, we encourage the EPA and Corps to consider the implications of this rulemaking on drinking water supplies, balancing the broad interests of the CWA in protecting the nation's surface waters, while not unduly interfering with the provision of the nation's drinking water and water utility operations.

Future water utility capital projects that are constructed in WOTUS should take reasonable and appropriate steps to avoid, minimize, mitigate harm to waters and wetlands. However as a practical matter, water infrastructure once constructed should not be managed under the WOTUS legal construct. We are concerned that under the broad terms, definitions, and concepts used in the proposal, routine operation and maintenance of drinking water, wastewater, and stormwater conveyances, aqueducts, canals, impoundments, and treatment facilities could potentially be subject to jurisdiction. We do not believe that it was Congress' intent, nor that of the agencies to have such an effect, and firmly believe that this rulemaking should not alter the historic regulatory paradigm for managing water infrastructure.

Infrastructure used to transport and store water are critical components of the systems used to provide drinking water, process wastewater, and manage storm water. With limited exceptions, current and past practice under the CWA has been not to treat water system infrastructure as subject to WOTUS restrictions when carrying out normal operational and maintenance activities. In particular, water supply and treatment operations and maintenance activities conducted by a water utility within or associated with water supply conveyances, storage, and treatment facilities should be specifically exempted from WOTUS restrictions.

Similarly, the final rule should retain the current exclusion (33 CFR 328.3(a) and 40 CFR 122.2) for "waste treatment systems" and it should be clear that that the exclusions include residual management systems associated with drinking water treatment. The current rulemaking also presents an opportunity to clarify that release of drinking water or wastewater to dry land, such as through a sanitary sewer overflow (SSO), do not constitute a discharge to a jurisdictional water body.

Water infrastructure facilities encompass a broad range of structures and activities, ranging from green infrastructure (e.g., infiltration trenches, swales, artificial wetlands, etc.) to ground-water recharge basins and percolation ponds, constructed wetlands, and ground-water wells, water recycling facilities, and stormwater retention basins. The final rule exclusion for water infrastructure should clearly and explicitly encompass the full breadth of water utility operations.

This request for an exclusion, which is consistent with historical practice, speaks directly to the rulemaking goal of a clear definition of WOTUS and consistent implementation of the CWA. For situations that fall outside of any exclusions for ongoing operations and maintenance activities, further efforts also need to be made to eliminate the ambiguity introduced by a number of important terms in the proposed definition. Terms like "adjacent", "tributary" and "wetland" must be clearly defined to ensure that they are not construed as applying to water utility infrastructure, including facilities and practices such as those listed above.

In addition to clarifying the definitions of "adjacent," "tributary," and "wetland," EPA must provide clear definitions of all key words and phrases in the rule, including: "neighboring," "bordering," "aggregation," "in the region," and "similarly situated." It is also confusing when the proposed rule creates terms that are used differently in other regulatory contexts and/or are ill-defined in describing WOTUS. An example is use of the words "floodplain" and "riparian area" to define adjacency.

For the rulemaking to achieve its goal of increased clarity, the final rule language should communicate both where WOTUS starts and where WOTUS ends. In explaining the agencies' intent, the EPA's and Corps' subject-matter experts refer to current guidance and preamble language. However, guidance and preamble do not have the force of law, and existing guidance will likely be replaced after the rule is finalized in favor of interpretation of the revised rule language as it is written. Consequently, in addition to the definitions listed above, the final rule language should provide a clear basis for:

1. Distinguishing between a tributary and water infrastructure such as stormwater ditches and swales.
2. Defining when water is sufficiently physically remote as to be no longer "adjacent."

Contemporaneously with publication of the final rule, the EPA and Corps should issue guidance incorporating photographs to illustrate definitions and thereby provide clarity for regulatory staff, regulated entities, and the public. Such guidance can also provide additional clarity to the regulatory text by conveying generally understood conventions for delineating WOTUS. Such conventions can speed and provide nationwide consistency in implementation.

For situations that fall outside of any exclusions, we also recommend that, when this rulemaking is finalized, the Corps and EPA re-visit the eligibility criteria for nationwide permits. The final definition of WOTUS will have a direct impact on whether the current triggers are sufficient to ensure that (1) Corps and EPA staff resources remain focused on site-specific projects that have significant potential impacts and (2) water utilities and other

entities engaged in construction, maintenance, repair, expansion, and diversification projects incorporate generally accepted practices to assure protection of WOTUS, while minimizing regulatory burden and avoiding associated project delays. For water utilities, the ability to engage in timely construction and other maintenance and improvement projects has significant implications for infrastructure function, system integrity, public health, fire protection, local economies, and the local community's quality of life. It is critical that the Corps and EPA structure nationwide permits so as to not delay water system maintenance, repair, and construction activities.

The transfer of water for purposes of water supply is an essential element of water resource management and that management warrants close attention and clarity as to the jurisdiction of the CWA. In defining WOTUS, EPA and the Corps should be clear that waters transferred from one water body to another without intervening municipal, industrial, or agricultural use should not be subject to WOTUS restrictions for purposes of water utility operations and maintenance.

The WOTUS rulemaking also raises questions regarding federal recognition of state water quantity management. Again in keeping with the rule's purpose of clarifying historic practice in the context of recent court rulings, when finalizing the rule, EPA and the Corps must explicitly defer authority over water quantity to states, as required by CWA section 101(g). The rule language must give full force and effect to and not diminish or detract from States' authority over water allocation and water rights administration.

In summary, we support attempting to clarify the definition of WOTUS. However, unless changes are made to the current proposal, the paradigm under which water utilities operate their infrastructure will change. In finalizing the proposed rule we expect EPA to provide clear exclusions from CWA regulatory oversight for routine operation and maintenance of drinking water, wastewater, and stormwater conveyances, aqueducts, canals, impoundments, and treatment facilities; remove ambiguity by providing practical definitions for key terms used in the rulemaking; and take additional steps described above to assure sound implementation of the final rule. A clear final rule, consistent with historic practice, can effectively protect the environment, provide important protections to the nation's drinking water supply, and assure the sound function of public water infrastructure.

If you have any questions regarding these comments please contact any of the undersigned individuals.

Sincerely,

Diane VanDe Hei
Executive Director
Association of Metropolitan Water Agencies

Michael Deane
Executive Director
National Association of Water Companies

Timothy H. Quinn
Executive Director
Association of California Water Agencies

Thomas W. Curtis
Deputy Executive Director
American Water Works Association