ASSOCIATION OF METROPOLITAN WATER AGENCIES

LEADERS IN WATER

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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.

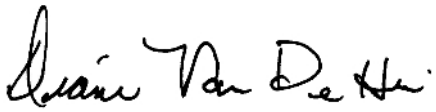
The CWA plays a critical role in protecting the nation's surface waters, which serve as the primary drinking water supply for millions of people across the country. Water suppliers need strong protections against pollution and contamination events that can pose severe health risks to drinking water consumers. 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
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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
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