



April 12, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army for Civil Works
U. S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

Re: Docket No. EPA-HQ-OW-2018-0149, *Revised Definition of Waters of the United States*

Dear Administrator Wheeler and Assistant Secretary James,

The Association of Metropolitan Water Agencies (AMWA) appreciates the opportunity to comment on the Environmental Protection Agency’s (EPA) and the U.S. Army Corps of Engineers’ (USACE) joint rulemaking, *Revised Definition of Waters of the United States* (84 FR 4154). AMWA is an organization of the nation’s largest publicly owned drinking water utilities, and our members provide drinking water service to more than 156 million people. Fundamentally, any rulemaking to define the waters of the United States (WOTUS) under the Clean Water Act (CWA) must explicitly consider the implications for drinking water. AMWA is pleased to submit the following comments for consideration.

Source Water Protection

Protecting the source waters that public drinking water utilities rely on is of immense concern to AMWA’s members. Drinking water utilities’ top priority is protecting public health and the treatment of source waters is key to providing safe and reliable drinking water. Preventing contaminants from entering these source waters is paramount to providing safe drinking water in a cost-effective manner, recognizing that blocking pollutants from entering drinking water supply source water is a complex task involving a myriad of point and nonpoint sources.

It is essential that when finalizing this rule, EPA and USACE be cognizant of the rule’s impact on source waters, particularly those used for drinking water, and to finalize language that is protective of these vital resources. USGS estimates¹ that surface water sources provided 61 percent of the total water withdrawn for public supply use in 2015. These water sources are vulnerable to potential chemical and biological contamination. AMWA supports the protection, preservation and restoration of the nation’s surface water resources through comprehensive pollution control measures. It is most effective to control point source pollutants at the discrete conveyance, where they are highly concentrated, rather than remove them at the consumer’s expense after they have entered a water body or supply source. This approach helps ensure that those who pollute our natural resources are not allowed to pass the cost of cleanup onto others.

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Wetlands

AMWA supports the goal of streamlining the regulatory processes of applying for and gaining approval for projects that impact WOTUS. Policies and procedures should be in place that ensure public time and funds are expended efficiently to meet public water supply needs.

The new WOTUS proposal will exclude more wetlands than the 2015 Clean Water Rule due to both the exclusion of ephemeral features and the removal of the significant nexus criterion for inclusion under WOTUS. Wetlands are inseparably related to the supply of safe, high quality drinking water. Wetlands can be central to local and regional hydrologic cycles serving to filter sediment, remove pollutants, recharge aquifers, control flooding and reduce erosion. Water intake structures, reservoirs and other facilities must often, by their nature, be located in or utilize wetland areas. Such use is appropriate with proper mitigation since water supplies provide essential public benefits. AMWA encourages both EPA and the USACE to consider these points when determining which wetlands should be considered jurisdictional under the new rule.

The preamble to the new WOTUS proposal states that mitigation banking will likely be the most impacted sector. AMWA would like to highlight the association's support for the concept of "no net loss", a policy with a goal to balance the loss of wetland acreage due to economic development with wetland reclamation, mitigation, and restoration so that the acreage of wetlands in the country does not decrease, but instead remains the same or increases. Maintaining this goal is paramount due to the reasons described previously. AMWA encourages EPA and USACE to consider this concept moving forward with both the new rule and any guidance that may be developed.

Clear Exemptions for Water Infrastructure

Water utility capital projects that impact WOTUS should take reasonable and appropriate steps to avoid, minimize, and mitigate harm to rivers, streams, and wetlands. However, once water infrastructure is constructed, it should no longer be under the jurisdiction of WOTUS. AMWA is concerned that, under the rule as currently written, routine operation and maintenance of drinking water, wastewater, and stormwater conveyances, aqueducts, canals, impoundments, and treatment facilities could potentially be subject to regulation. Infrastructure components such as these are critical for transporting and storing water to be used for drinking water, processing wastewater, and managing stormwater.

Currently, the proposed rule excludes waste treatment systems, which have been excluded from the definition of WOTUS since 1979, though previous iterations have been without a formal definition of what constitutes a 'waste treatment system'. The proposal newly defines waste treatment systems as all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge). AMWA agrees with the continued exclusion of waste treatment systems from the definition of WOTUS and is supportive of this new definition. It should also be made clear that the exclusions include residual management systems associated with drinking water treatment.

Furthermore, in the interest of consistency, AMWA requests that this exclusion be extended to drinking water infrastructure. With few exceptions, current and past practice under the CWA has been to exclude these day to day activities from jurisdiction under WOTUS. AMWA does not believe that it was Congress' intent, nor that of EPA or USACE, to regulate these water infrastructure components as WOTUS under the CWA. AMWA stresses the importance that this historic regulatory standard not be altered and for these exemptions to be made explicit within the final rulemaking.

Water infrastructure encompasses a broad range of structures, facilities, and activities, including, but not limited to: green infrastructure (e.g., infiltration trenches, swales, artificial wetlands, etc.); ground-water recharge basins and percolation ponds; constructed wetlands; ground-water wells; water recycling facilities; and stormwater retention basins. Any water infrastructure exclusion included in the final rule should clearly encompass the full breadth of water utility operations in order to prevent confusion as to what components of water infrastructure are included. The final rule should also clarify that the release of drinking water or wastewater to dry land, such as through a sanitary sewer overflow, does not constitute a discharge to a jurisdictional water body.

Public drinking water utilities are especially protective of the water quality within their systems and excluding water supply and delivery facilities and infrastructure will not result in a degradation of water quality. By adding this express exclusion, EPA and USACE will further their goals of increasing clarity over which waters are regulated and will simplify the issue of jurisdiction for these facilities. This exclusion will also ensure that public drinking water systems will not see an increase in costs for permitting and compliance.

Finally, EPA and USACE should ensure that the new rule makes explicitly clear that transfers of water from one water body to another solely for the purposes of water supply and without intervening municipal, industrial, or agricultural use are excluded from jurisdiction under WOTUS, as is already addressed within the National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule. These transfers are an essential element of water resource management for local utilities and it is necessary to make this exclusion apparent within the final rule so that EPA, USACE, and the public may avoid confusion with the implementation of the new rule in regards to water transfers.

Regulatory Constraints for States

According to an EPA news releaseⁱⁱ, the agency believes that this proposed definition “appropriately identifies waters that should be subject to regulation under the Clean Water Act while respecting the role of states and tribes in managing their own land and water resources.” The press release goes on to say that states “have existing regulations that apply to waters within their borders, whether or not they are considered ‘waters of the United States,’” and that the proposal gives states more flexibility in determining how best to manage their own lands and water resources.

AMWA encourages EPA and USACE to consider a reportⁱⁱⁱ released by the Environmental Law Institute which looked at limitations contained in state laws which either restrict or eliminate the authority of state

regulators to protect aquatic resources that are no longer covered under the federal definition. According to the report, 36 states have some type of legal restriction that could prevent them from regulating waters that are no longer considered federal waters under a new WOTUS rule.

Due to these considerations and restraints, AMWA asks that EPA and USACE further investigate and consider how these state laws might impact or impede the authorities of the states to protect their own waters. AMWA also asks EPA and USACE to consider providing delayed implementation for the new WOTUS rule. A delay will allow states time to determine how this new definition impacts their water resources and to develop plans for how they may want to address any deficiencies within their state laws.

Cost Benefit Analysis

AMWA is concerned with the cost benefit analysis^{iv} provided by EPA and USACE within the docket and believes that more work should be done to better estimate the true impact of this new rule to public drinking water systems. According to the document, the proposed rule could have a wide range of impacts including water quality degradation that may adversely affect the costs of drinking water treatment and reservoir maintenance. However, the only true analysis that the report attempts to provide for drinking water is within the case studies using the Soil and Water Assessment Tool (SWAT) to determine the change in daily suspended sediment concentrations. Results from the different SWAT analyses for each case study show a likely increase in daily suspended sediment concentrations. With this data in mind, the report references studies that show “increased sediment loadings, and increased pollutants bound to these sediments, are likely to increase operation costs to the affected” public water system. However, given what the report considers “small predicted changes in sediment loadings,” maxes of between 0.02 and 0.45 percent, the report did not attempt to estimate the potential change in drinking water treatment costs.

AMWA believes the current analysis is lacking in sufficient detail and consideration for the needs and limitations of drinking water utilities. The association encourages both EPA and USACE to perform a more rigorous analysis using sound scientific assessments in order to better estimate the impact of this new rule on treatment costs for drinking water.

Continuity and Predictability

Continuity and predictability are crucial with a rule of this magnitude. A new definition for WOTUS will significantly impact the Clean Water Act and, by association, the Safe Drinking Water Act. This rule will be a pillar for determining regulatory and enforcement actions and it is essential that the nation’s drinking water sources be governed by clear and consistent mandates. Regardless of what approach is taken, and the content of the final rule, EPA and USACE must ensure that the rule is legally defensible and will endure so as to provide the public with regulatory stability.

Nationwide Permits

To address situations where utility activity falls outside of these exclusions and impacts jurisdictional waters, AMWA also recommends that EPA and USACE consider updating the nationwide permits (NWP). NWP help to ensure that water utilities engaged in construction, maintenance, repair, expansion, and diversification projects are able to follow generally accepted practices and guidelines for assuring the protection of WOTUS, while minimizing regulatory burden and avoiding project delays. It is critical for water utilities to maintain the ability to perform basic maintenance construction for infrastructure function, system integrity, public health, fire protection, economic vitality, and the local community's quality of life in a reasonable, consistent, and predictable timeframe. The USACE and EPA should continue to structure NWP so as to not delay these critical water system maintenance, repair, and construction activities.

AMWA understands that EPA and USACE are mandated under the CWA to update the NWP every five years and that the last update occurred in 2017. However, with a change of this magnitude it would be in the public's best interest for both EPA and USACE to review the NWP in light of these changes and to make any necessary clarifying edits outside of the normal five-year cycle. By updating these permits EPA and USACE will ensure continuous regulatory certainty and clarity and will reduce regulatory burden on drinking water utilities while maintaining critical environmental and public health protection. By ensuring projects with minimal environmental impacts are able to qualify for these general permits, state and federal regulators will be able to focus their limited resources on those projects which will have the greatest impact and therefore need the greatest oversight.

Climate Change and Adaptability

AMWA appreciates definition in the proposed rule of a "typical year", which incorporates a 30-year rolling period for determining the normal range of precipitation for a particular geographic area. By using a rolling period within the definition, EPA and USACE will be able to include changes and variation in weather patterns that result from a changing climate. AMWA members support policies that bring attention to, and enable action on, climate change and adaptation issues to allow utilities to better prepare for the future.

AMWA does request that EPA and USACE give more clarification as to the reasoning behind selecting a 30-year rolling period as opposed to a different window of time. AMWA also requests that EPA and USACE better define what constitutes a flood or drought and is therefore removed from the data considered in order to determine a typical year.

Conclusion

In conclusion, 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

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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.

AMWA continues to support efforts to clarify the definition of WOTUS and its applicability under the CWA. However, the recommendations mentioned above are essential to ensure the most effective and efficient operations of critical drinking water infrastructure. We continue to expect any final rule 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. AMWA also expects EPA and USACE to take additional steps to assure sound implementation of the final rule, as well as ensuring that the final rule is legally defensible and will endure. 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 appreciates the opportunity to comment. If you have any questions, please contact Stephanie Hayes Schlea (schlea@amwa.net), AMWA's Manager of Regulatory and Scientific Affairs.

Sincerely,



Diane VanDe Hei
Chief Executive Officer

cc: David Ross, Assistant Administrator for Water
Jennifer McLain, Acting Director, Office of Ground Water and Drinking Water
Michael McDavit, Oceans, Wetlands, and Communities Division
Jennifer A. Moyer, Regulatory Community of Practice

ⁱ Dieter, C.A., Maupin, M.A., Caldwell, R.R., Harris, M.A., Ivahnenko, T.I., Lovelace, J.K., Barber, N.L., and Linsey, K.S., 2018, Estimated use of water in the United States in 2015: U.S. Geological Survey Circular 1441. Retrieved from <https://pubs.usgs.gov/circ/1441/circ1441.pdf>

ⁱⁱ Environmental Protection Agency, Headquarters Office of Water. (2018, December 11). EPA and Army Propose New "Waters of the United States" Definition. Retrieved from <https://www.epa.gov/newsreleases/epa-and-army-propose-new-waters-united-states-definition>.

ⁱⁱⁱ Environmental Law Institute. (2013). State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. Retrieved from <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

^{iv} Environmental Protection Agency and Department of the Army. (2018, December 14). Economic Analysis for the Proposed Revised Definition of "Waters of the United States".