



**ASSOCIATION OF  
METROPOLITAN  
WATER AGENCIES**

**LEADERS IN WATER**

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May 13, 2022

Alison C. Cullen  
Chair  
Chartered Science Advisory Board  
U.S. Environmental Protection Agency

Via email

**Re: Chartered Science Advisory Board to review the scientific and technical basis of the proposed rule “Revised Definition of Waters of the United States.”**

Dear Dr. Cullen,

The Association of Metropolitan Water Agencies (AMWA) is pleased to provide public comment to the chartered Science Advisory Board (SAB) as it reviews the scientific and technical basis of the proposed rule “Revised Definition of Waters of the United States (WOTUS).” AMWA is an organization of the general managers and CEOs of large publicly owned drinking water utilities. Members serve communities of more than 100,000 people and work hard to provide safe, clean drinking water to the public. The association has previously submitted comments to EPA concerning WOTUS and have attached them here for consideration by SAB.

For the past several years, the association has consistently engaged with EPA and the Army Corps of Engineers regarding WOTUS as the agencies seek to develop a clear, implementable rule based on sound science. AMWA strongly supports a definition that works to protect drinking water sources to assist utilities in providing clean, safe drinking water to the public. Recent two-part rulemakings have caused confusion and regulatory uncertainty, so AMWA has urged EPA to accomplish its goals in one rulemaking instead of two. This will help create a durable and stable definition of WOTUS that is based on the best available science and works to protect source waters.

As SAB reviews the scientific and technical basis of the proposed WOTUS definition revisions, AMWA stresses the importance of increased transparency in the rulemaking and review processes. The association is pleased to provide the attached comment letter previously submitted to EPA via the WOTUS rulemaking docket. The comment letter highlights the need for regulatory stability, source water protection, and drinking water infrastructure exemptions.

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As SAB conducts its review, AMWA appreciates the consideration of these concerns as it evaluates the science and technical basis surrounding them. If you have any questions about these comments, please contact Brian Redder, AMWA's Manager of Regulatory and Scientific Affairs, at [Redder@amwa.net](mailto:Redder@amwa.net).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Michael Arceneaux', with a long horizontal flourish extending to the right.

Michael Arceneaux  
Acting Chief Executive Officer

Attachment

cc: Thomas Armitage, SAB Staff Office  
Thomas Brennan, SAB Staff Office  
Eric Burneson, OGWDW



## LEADERS IN WATER

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February 4, 2022

Damaris Christensen  
Environmental Protection Specialist  
Office of Water  
U.S. Environmental Protection Agency

Stacey Jensen  
Assistant for Environment, Tribal and  
Regulatory Affairs  
Office of the Assistant Secretary of the Army  
for Civil Works  
U. S. Army Corps of Engineers

Re: Docket ID No. EPA-HQ-OW-2021-0602, Revised Definition of Waters of the United States

Dear Damaris Christensen and Stacey Jensen,

The Association of Metropolitan Water Agencies (AMWA) is an organization representing the largest publicly owned drinking water utilities in the United States. AMWA appreciates the opportunity to comment on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) proposed rule for revising the definition of Waters of the United States (WOTUS). Fundamentally, any rulemaking to define WOTUS under the Clean Water Act (CWA) must explicitly consider the implications for drinking water sources. Protecting source waters from contamination reduces burdens associated with treatment for drinking water utilities and helps provide clean, safe drinking water to consumers. For the past several years, the association has consistently engaged with both agencies regarding WOTUS as we seek to develop a clear, implementable rule based on sound science.

It is paramount that the agencies provide continuity and predictability with a rule of this magnitude. A new definition for WOTUS will significantly impact the CWA 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 clear and consistent mandates govern the protection of the nation's drinking water sources. EPA and USACE must ensure that the rule is legally defensible and will endure to provide the public with regulatory stability.

AMWA strongly supports protecting our source waters to hold polluters accountable and ease burdens on drinking water utilities tasked with treating polluted waters. The association supports returning to pre-2015 definition of WOTUS with EPA's proposed modifications related to the court decisions of

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*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC) and *Rapanos v. United States*, 547 U.S. 715 (2006) (Rapanos), but urges EPA to rethink a second rulemaking process that will cast doubt on the durability and stability of the proposed WOTUS definition. With this in mind, AMWA is pleased to submit the following comments for consideration.

### *Regulatory Stability*

The definition of WOTUS has been increasingly uncertain over the past seven years. Recently, the U.S. District Court for the District of Arizona in *Pasqua Yaqui Tribe v. EPA* (Case No. 4:20-cv-00266) vacated the 2020 Navigable Waters Protection Rule (NWPR) that redefined WOTUS. The agencies are already returning to the pre-2015 definition, and AMWA supports codifying this change that will increase the durability and stability of the rulemaking. Specifically, by including the definition of the two methods provided by the *Rapanos* opinion— relative permanence and significant nexus, this will assist in identifying WOTUS by helping improve the legal defensibility of the rule and as a result, reduce the need of resources to uphold it.

It is unclear what EPA hopes to achieve with a second rulemaking when the purpose of this proposed rule is to create a more lasting definition of WOTUS. While AMWA recognizes that the pre-2015 WOTUS definition is imperfect, the uncertainty and ambiguity associated with a second rulemaking so quickly after Rule 1 may cause significant confusion for regulators and regulated entities and require resources that could be better used elsewhere. Therefore, AMWA urges EPA to finalize the best legally defensible and durable definition based on sound science and stakeholder input with only one rulemaking, and refrain from a supplementary rulemaking process. A single rulemaking would properly balance interests of numerous and diverse stakeholders and thereby avoid the confusion that may arise from changing the definition again in short succession. If EPA determines to go forward with a second rulemaking, the agency should include a thorough explanation of specific goals it hopes to achieve when it issues a final Rule 1.

### *Source Water Protection*

Protecting the source waters that drinking water utilities rely on for supply is a foremost concern for AMWA's members. Drinking water utilities' top priority is protecting public health, and a utility's ability to treat source waters is key to providing safe and reliable drinking water. It is essential that when developing a revised WOTUS rule, EPA and USACE are mindful of the rule's impact on source waters, particularly those used for drinking water, and as a result, finalize language that is protective of these vital resources.

USGS estimates that surface water sources provided 61 percent of the total water withdrawn for public supply use in 2015<sup>1</sup>. 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 generally most effective to control pollutants at their source, where they are highly concentrated, rather than remove them at the consumer's expense after entering a water body or supply source. This proactive approach helps ensure

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<sup>1</sup> 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>

that those who pollute our natural resources are not allowed to pass the cost of cleanup onto public drinking water utilities and their customers.

Wetlands have been of particular interest throughout multiple WOTUS iterations, as they are inseparably related to the supply of safe, high-quality drinking water. Wetlands provide essential functions in local and regional hydrologic cycles that 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 health, safety, and economic benefits.

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 mitigation. Maintaining this goal is paramount due to the water quality and habitat benefits that wetlands bring to the environment, including protecting source water. AMWA encourages EPA and USACE to consider the "no net loss" concept moving forward with this rule and commit to protecting wetlands.

#### *Clear Exemptions for Water Infrastructure*

Any water infrastructure exclusion in a WOTUS rule should clearly encompass the full breadth of water utility operations and infrastructure to prevent confusion about what – if any – components are included under the rule. Specifically, routine operation and maintenance of drinking water, aqueducts, canals, impoundments, and treatment facilities should not be subject to regulation under a WOTUS rule. While there are explicit exclusions for waste treatment systems included in the proposal, a final rule must include these exclusions for drinking water systems as well. Current and past practice under the CWA has excluded water infrastructure components from jurisdiction under WOTUS once they are constructed. AMWA does not believe that it was Congress' intent, nor that of EPA or USACE, to regulate these components as WOTUS under the CWA.

EPA and USACE should also 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. These transfers are an essential element of water resource management for local utilities. Therefore, it is necessary to make this exclusion apparent within any WOTUS rule so that EPA, USACE, and the public may avoid confusion as this practice is already in place within the National Pollutant Discharge Elimination System Water Transfers Rule. These exclusions will not compromise water quality but will ensure that public drinking water systems will not see an increase in costs for permitting and compliance which by proxy avoids increasing costs to the consumer.

#### *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 Americans. 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 required under the SDWA. The balance between protecting water sources and allowing the efficient building, expansion, and operation of water infrastructure are key requirements for a final, implementable WOTUS rule.

AMWA continues to support efforts to clarify the definition of WOTUS and its applicability under the CWA. However, these recommendations discussed in our comments are essential to ensure the most effective and efficient operations of critical drinking water infrastructure. Therefore, we continue to expect any final rule to provide explicit exclusions from CWA regulatory oversight for routine operation and maintenance of drinking water infrastructure, including aqueducts, canals, impoundments, and treatment facilities. AMWA urges EPA and USACE to take these additional steps to assure sound implementation of any final rule by ensuring that it is legally defensible and durable. A clear, final WOTUS rule, can effectively protect the environment, provide essential protections to the nation's drinking water supply, and assure the proper function of public water infrastructure.

AMWA sincerely appreciates the opportunity to comment. If you have any questions, please contact Brian Redder ([Redder@amwa.net](mailto:Redder@amwa.net)), AMWA's Manager of Regulatory and Scientific Affairs.

Sincerely,



Diane VanDe Hei  
Chief Executive Officer

Cc: Michael Regan, Administrator, Environmental Protection Agency  
Radhika Fox, Assistant Administrator for Water, Office of Water  
Jennifer McLain, Director, Office of Ground Water and Surface Water  
Andrew Sawyers, Director, Office of Wastewater Management  
Michael Connor, Assistant Secretary of the Army for Civil Works  
Jaime Pinkham, Principal Deputy Assistant Secretary of the Army for Civil Works