



## LEADERS IN WATER

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October 1, 2021

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Office of Water  
U.S. Environmental Protection Agency

Stacey Jensen  
Office of the Assistant Secretary of the Army  
(Civil Works)  
U. S. Army Corps of Engineers

Via: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) and [usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil)

Re: Federalism Consultation Comment Period for Revising the Definition of “Waters of the United States” (WOTUS)

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’s (EPA) and the U.S. Army Corps of Engineers’ (USACE) joint Federalism Consultation 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. 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 nation’s drinking water sources. EPA and USACE must ensure that the rule is legally defensible and will endure so as to provide the public with regulatory stability.

AMWA supports streamlining the regulatory processes of applying for and gaining approval for projects that impact WOTUS. Policies and procedures should ensure that public time and funds are expended efficiently to meet public water supply needs. However, simplifying the regulatory process should not come at the cost of compromising the quality of the nation’s source waters. With this in mind, AMWA encourages both EPA and USACE to weigh this balance carefully when determining which waters should be considered jurisdictional under any WOTUS rule. AMWA is pleased to submit the following comments for consideration.

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### *Source Water Protection*

Protecting the source waters that drinking water utilities rely on 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 WOTUS rule, EPA and USACE be mindful 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 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 most effective to control pollutants at the source, where they are highly concentrated, rather than remove them at the consumer's expense after entering 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 public drinking water utilities and their customers.

Wetlands have been of particular interest throughout multiple WOTUS iterations. These water bodies are inseparably related to the supply of safe, high-quality drinking water. Wetlands can be central to 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 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 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 benefits that wetlands bring. AMWA encourages EPA and USACE to consider this concept moving forward with a new rule and any guidance that may be developed.

### *Clear Exemptions for Water Infrastructure*

Water utility capital projects should take reasonable and appropriate steps to avoid, minimize, and mitigate harm to rivers, streams, and wetlands. However, with few exceptions, 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. AMWA stresses the importance that this historic regulatory standard not be altered and for these exemptions to be made explicit within any WOTUS rulemaking.

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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>

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 degrade water quality. By adding this express exclusion, EPA and USACE will further increase clarity over which waters are regulated and simplify 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 which by proxy avoids increasing costs to the consumer.

Specifically, routine operation and maintenance of drinking water, wastewater, and stormwater conveyances, aqueducts, canals, impoundments, and treatment facilities should not be subject to regulation under a WOTUS rule. 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. Infrastructure components such as these are critical for transporting and storing water for drinking water, processing wastewater, and managing stormwater.

Any water infrastructure exclusion included in a WOTUS rule should clearly encompass the full breadth of water utility operations and infrastructure to prevent confusion about what components are included. Any WOTUS 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.

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 with the implementation of a new rule regarding water transfers. This practice is already in place within the National Pollutant Discharge Elimination System Water Transfers Rule and should be continued within any WOTUS rule.

### *Regulatory Constraints for States*

AMWA encourages EPA and USACE to consider a 2013 report released by the Environmental Law Institute, which looked at limitations contained in state laws that either restrict or eliminate the authority of state regulators to protect aquatic resources that are no longer covered under the federal definition<sup>2</sup>. According to the report, 36 states have some type of legal restriction preventing them from regulating waters that are no longer considered federal under a WOTUS rule. AMWA encourages EPA and USACE to fully consider these limitations and consider how these state laws might impact or impede the states' authorities to protect their waters under a new WOTUS rule.

### *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

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<sup>2</sup> Environmental Law Institute. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. May 2013. <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

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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 WOTUS rule.

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. Therefore, we continue to expect any final rule to provide explicit 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 any final rule and ensure that the final rule is legally defensible and will endure. A clear, final rule, consistent with historic practice, 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 appreciates the opportunity to comment. If you have any questions, please contact Stephanie Hayes Schlea ([schlea@amwa.net](mailto:schlea@amwa.net)), AMWA's Director of Regulatory and Scientific Affairs.

Sincerely,

A handwritten signature in blue ink that reads "Diane VanDe Hei".

Diane VanDe Hei  
Chief Executive Officer

cc: Radhika Fox, Assistant Administrator for Water  
Jennifer McLain, Acting Director, Office of Ground Water and Drinking Water