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**Adam Krantz**

November 27, 2017

**Damaris Christensen**  
Office of Water  
U.S. Environmental Protection Agency (EPA)  
1200 Pennsylvania Avenue, NW (4504-T)  
Washington, DC 20460  
Via *regulations.gov*

**RE: Definition of "Waters of the United States" – Docket ID No. EPA-HQ-OW-2017-0480**

Dear Ms. Christensen,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide early input into the U.S. Environmental Protection Agency's (EPA or Agency) and Army Corps of Engineers' (Corps) effort to redefine "Waters of the United States" (WOTUS). NACWA provided a comment letter earlier this year (attached) that focused on the importance of preserving the exclusions – including those added by the June 29, 2015, Clean Water Rule – that allow its public wastewater treatment and stormwater utility members to do their jobs in protecting the nation's water quality. The comments below stress several of the same points from the Association's earlier comment letter and provide some additional perspective on the importance of this issue to its members.

These comments are only the Association's initial thoughts on the new proposed WOTUS definition that EPA is currently developing (the Step 2 Rule). NACWA will provide additional input and comments once it sees the proposed rule.

With a few exceptions, NACWA's members are discharging to waters that are clearly jurisdictional. There are instances where NACWA members discharge to dry beds or channels that would otherwise not be jurisdictional, or that may become non-jurisdictional in the Step 2 Rule. However, given the role these waterbodies play in the overall water environment – in some cases creating ecosystems where none existed before – they are generally treated by the states

as jurisdictional under the Clean Water Act (CWA). In other instances, NACWA members have eliminated their CWA permitted discharges altogether. While there are other potential impacts, as discussed below, for NACWA members as a result of changes to the WOTUS definition, the Association anticipates that most of its members will see no change in their CWA discharge permit requirements.

### Key Exclusions Must be Maintained

While existing discharge permits may not be directly impacted, as NACWA has noted in its previous comments, certain exclusions EPA and the Corps have crafted in the context of WOTUS are essential to the proper functioning of the nation's wastewater treatment and stormwater management systems. Specifically, the existing waste treatment exclusion must be maintained and further clarified. Some of the needed clarifications were made in the 2015 Clean Water Rule, including the addition of specific exclusions for stormwater control features and water recycling structures. These must be maintained in the Step 2 rule.

NACWA's letter from June of this year goes into additional detail on the need for clarity in the exclusions, including discussions of the following issues:

- The current language of the waste treatment exclusion includes the phrase "designed to meet the requirements of the Clean Water Act." The word 'designed' has very specific meaning in an engineering context and it could unnecessarily narrow the exclusion. This phrase should be modified or deleted altogether
- The qualifying phrase "created in dry land" included as a part of both the stormwater control and wastewater recycling exclusions in the 2015 Clean Water Rule is extraneous, creates confusion and should be deleted.

How treatment wetlands are handled in the wastewater treatment, stormwater and water recycling contexts should be further clarified to ensure these systems are excluded and can be appropriately maintained to ensure their proper functioning. The rule should specifically exclude "constructed wetlands" that are used for wastewater treatment, stormwater management or water recycling.

### Seasonal and Ephemeral Streams Need Protection

Seasonal and ephemeral streams can provide important ecosystem functions that help to maintain overall water quality and watershed health. A degrading of these water systems, which could result from a loss of federal jurisdiction, may mean more cost for municipalities working to meet federal and state stormwater requirements. Should EPA and the Corps choose to narrow the definition of WOTUS as it relates to perennial or seasonal waters, it is essential that EPA and the Corps work with the states to ensure these waters are adequately protected under state authority to maintain this important function. In addition, as weather patterns continue to change, the reality of what is seasonal or perennial will also change. We must maintain sufficiently flexibility and resiliency in these water systems to ensure the watershed can adapt to these changes.

## EPA and the Corps Must Consider Utility-Specific Issues

As EPA and the Corps work on the Step 2 rule, it is important to remember that there are many utility-specific concerns as it relates to federal jurisdiction. NACWA cannot voice all of the various issues, but in general, EPA and the Corps should remember that there are regional differences, including the unique water features in the arid west, that influence how jurisdiction is determined. For example, stormwater control and conveyance structures in Arizona or New Mexico may not look like or operate like a stormwater structure in the Northeast. The Step 2 Rule should be sufficiently flexible to address regional differences.

## EPA and the Corps Must Maintain Exclusion for Groundwater, Clarify That Groundwater is Not a Point Source

On the issue of groundwater, EPA and the Corps must maintain and further clarify the exclusion for groundwater from CWA jurisdiction. As laid out in our June letter, CWA statutory and legislative history do not support regulating groundwater as a point source, as suggested in the preamble to the 2015 Clean Water Rule. The conduit theory, where the migration of pollutants to jurisdictional waters via groundwater is viewed as a point source discharge into waters of the U.S., eliminates the distinction between point and nonpoint sources. The Agency should clearly exclude groundwater from the definition of WOTUS and clarify that groundwater cannot function as a point source or provide a hydraulic connection to a jurisdictional waterbody for purposes of establishing CWA jurisdiction.

## Clear Federal Jurisdiction is Critical for Source Water Protection, Equity in CWA Regulation

Thirty to forty percent of NACWA's members provide both water and wastewater services and the Association fully supports the comments previous submitted by the Association of Metropolitan Water Agencies (AMWA) and the American Water Works Association (AWWA) on how drinking water structures and conveyances must be excluded from WOTUS. Man-made structures, like canals, that may look and behave like a natural water system, are often part of a water distribution system and should not be jurisdictional to ensure drinking water utilities can continue to manage their water resources.

At the same time, any significant narrowing of the WOTUS definition – which might limit federal protection for key headwater streams, seasonal waterbodies and certain wetlands, for example – could threaten the quality of the source water for many drinking water systems. NACWA encourages EPA and the Corps to consult with drinking water utilities closely during the Step 2 rulemaking to ensure any changes do not negatively impact their source waters and with the states to ensure state protections are in place where needed.

Finally, a narrowing of CWA jurisdiction also has the potential to leave key upstream sources of pollutants out of the CWA and its programs, including total maximum daily loads (TMDLs). This could mean that downstream point sources, like NACWA's public utility members, may be required to do more than their fair share to achieve the necessary pollutant reductions, meaning more cost for ratepayers. The current CWA regime already disproportionately impacts point source dischargers, and EPA must be careful not to exacerbate this existing imbalance.

November 27, 2017

Page 4

Thank you for your consideration of these comments. Please contact me at [chornback@nacwa.org](mailto:chornback@nacwa.org) or 202/833-9106 with any questions or to discuss further.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Hornback", with a stylized flourish at the end.

Chris Hornback  
Chief Technical Officer

**ATTACHMENT** – NACWA’s June 19, 2017 Letter to EPA on WOTUS

**EXECUTIVE COMMITTEE**

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**Adel H. Hagekhalil**

Assistant Director  
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**CHIEF EXECUTIVE OFFICER**

**Adam Krantz**

June 19, 2017

Donna Downing  
Office of Water  
U.S. Environmental Protection Agency (EPA)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Via Electronic Mail: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov)

Dear Ms. Downing,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide input into the U.S. Environmental Protection Agency's (EPA or Agency) and Army Corps of Engineers' (Corps) effort to define "Waters of the United States" (WOTUS). NACWA has not previously taken a position on a particular WOTUS definition, policy, rule or legal doctrine, instead focusing its attention on preserving the critical exclusions that allow its public wastewater treatment and stormwater utility members to do their jobs in protecting the nation's water quality. Our comments below stress the importance of maintaining the existing exclusions that have been in place, either in regulation or in practice, for years and in some cases decades. While this administration is proceeding to rescind the Clean Water Rule, finalized on June 29, 2015, several exemptions added to the regulations in that rule are critical and should be retained.

It is important to note that these comments are only submitted to provide input in response to EPA's call for how a new rule defining WOTUS might be developed. These comments provide NACWA's initial thoughts on the matter. NACWA will be engaging in a robust process with its members over the coming months to develop a more detailed position on WOTUS issues, and will provide more specific comments in the future in response to any WOTUS rule proposal.

### Important Watershed Considerations

The majority of wastewater utility discharges are into free-flowing waters that are clearly WOTUS, and therefore our members have generally not been involved in jurisdictional disputes. However, NACWA's members support an equal playing field for all dischargers, ensuring that each does its part in controlling pollutants to help meet water quality standards. Any significant

narrowing of the WOTUS jurisdiction could increase the burden for downstream dischargers, like NACWA's members, where unregulated, upstream discharges to tributaries deemed no longer jurisdictional under the federal Clean Water Act (CWA) contribute to the pollution load of the receiving water. EPA and the Corps must consider these potential impacts on downstream dischargers.

In addition, more than a third of NACWA's members also have responsibility for providing safe drinking water to their communities. Even though most of the work to protect the source water for these systems will be done at the state and local level, strong federal protection is essential to providing safe and sustainable drinking water supplies into the future. Any significant narrowing of the WOTUS jurisdiction could threaten this protection and NACWA encourages EPA and the Corps to consult with clean water utilities and drinking water utilities during the rulemaking on the importance of protecting source water supplies.

### Existing Exclusions Must Be Retained and Clarified

Any new definition for WOTUS must maintain and further clarify the existing waste treatment exclusion that has been in place since 1979 and that was only slightly modified by the June 29, 2015, final Clean Water Rule. This exclusion enables the proper functioning of public wastewater treatment systems and is an essential component of any future definition rule.

The current exclusion includes the modifying phrase "designed to meet the requirements of the Clean Water Act." A proposed ministerial change to the exclusion in the April 21, 2014, proposed Clean Water Rule included an additional comma that substantively changed the meaning of the exclusion. While EPA and the Corps did not finalize this change, it underscores the need to clarify the existing language. The intent of the phrase "designed to meet the requirements of the Clean Water Act" is unclear. It could refer to the original engineering design of the unit or it could simply mean that the unit is intended or operated to meet the requirements of the CWA. The distinction, however, is irrelevant. The key to whether a lagoon or treatment pond is excluded is where it was originally created, as outlined by the second half of the exclusion. The phrase "designed to meet the requirements of the Clean Water Act" is superfluous, adds unnecessary confusion and should be deleted.

Waste treatment systems often take on the characteristics of a jurisdictional wetland, supporting hydric soils and wetland vegetation. Despite the fact that they are still artificially constructed treatment systems whose maintenance is necessary for their function, certain Corps districts have required CWA permits in the past for this essential maintenance. Section 404 permits should not be triggered simply because these treatment units have been colonized by water-loving vegetation, and EPA and the Corps should address this issue in its upcoming definition rule.

### *Stormwater Control Features*

EPA and the Corps must maintain and clarify the new exclusion from the definition of WOTUS, included in the 2015 rule, for stormwater control features constructed to convey, treat, or store stormwater. The 2015 Clean Water Rule added this new exclusion – which reflects longstanding agency practice – that will lead to more certainty over the status of green infrastructure/low impact design stormwater features regarding permitting and maintenance, as well as many other stormwater control features. A clear exemption for stormwater features will also help with consistency among Corps districts as many now require Section 404 permits to clean out stormwater features that have been colonized with wetland plants. Since routine clean out of stormwater features is necessary for their proper functioning, it is counter-productive to require a permit for their maintenance.

EPA and the Corps should remove the qualifying phrase “that are created in dry land” included at the end of the stormwater exclusion. While the addition of the term is intended to mean “anything that is not a jurisdictional water or wetland,” it introduces uncertainty and raises questions about whether the presence of a waterbody in the past could impact the current jurisdictional status of a stormwater feature (i.e., convert a non-jurisdictional stormwater feature into a WOTUS). While in the past some stormwater features were built by damming or confining streams or other waters, this practice is now illegal. The phrase is therefore superfluous and should be omitted to avoid confusion.

#### *Wastewater Recycling Structures*

EPA and the Corps must maintain and clarify the new exclusion for wastewater recycling structures. This exclusion – which reflects longstanding agency practice – was added to the regulations by the 2015 Clean Water Rule and must be maintained in any new WOTUS definition. Such structures were not contemplated when the 1986/88 exemptions were put in place, but are now widely used as part of water systems to improve long-term water sustainability. The qualifying phrase “in dry land,” included in the wastewater recycling structure exclusion, is unnecessary and should be removed as it could cause confusion for some treatment systems.

#### *Groundwater*

EPA and the Corps must maintain and further clarify the new exclusion for groundwater, included for the first time in rule language in the Clean Water Rule. NACWA has concerns with the assertion made in the final Clean Water Rule (page 37101 of the June 29, 2015 final rule) that groundwater and other geographic features that are otherwise excluded from the definition of WOTUS “may function as ‘point sources’ under CWA section 502(14), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).”

Rather than clarifying how groundwater should be addressed, this language creates greater regulatory uncertainty. It combines two distinct tests – the CWA jurisdiction “hydrologic connection” test and the “point source” test as defined by CWA section 502(14). Based on this language and their own interpretations of *Rapanos*, courts have created a novel “conduit” theory where “migration” of pollutants into navigable waters via groundwater acting as a conduit is effectively a discharge of pollutants from a point source into navigable waters in violation of the CWA unless a permit is obtained. The conduit theory eliminates the distinction between point and nonpoint sources and exponentially expands the universe of discharges subject to the Section 402 permitting program regardless of *how* those discharges enter navigable waters.

CWA statutory and legislative history do not support regulating groundwater as a point source. Furthermore, EPA has subsequently backed away from its assertion that groundwater can function as a point source. In May 2016, the US Department of Justice filed an amicus brief on behalf of EPA in a Ninth Circuit appeal of a decision advancing the theory. In the brief, the Agency stated that groundwater is not a point source, is not a WOTUS and the court’s application of the significant nexus test is erroneous. (*see* United States Amicus Curiae Brief, *Hawaii Wildlife Fund v. County of Maui*, 9<sup>th</sup> Cir., Case No. 15-17447). Considering the foregoing, NACWA recommends that the new definition rule clearly exclude groundwater and omit language about groundwater functioning as a point source.

Thank you for your consideration of these comments. Please contact me at [chornback@nacwa.org](mailto:chornback@nacwa.org) or 202/833-9106 with any questions or to discuss further.

June 19, 2017

Page 4 of 4

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Hornback". The signature is fluid and cursive, with the first name "Chris" being more prominent than the last name "Hornback".

Chris Hornback  
Chief Technical Officer

cc: Andrew Hanson, EPA