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Submitted via the Federal eRulemaking Portal:
<https://www.regulations.gov/>

RE: NACWA Comments on EPA and Army Corps' Revised Definition of "Waters of the United States" Proposed Rulemaking (Docket ID No. EPA-HQ-OW-2021-0602)

Dear Ms. Christensen and Ms. Jensen:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (USACE) proposed *Revised Definition of "Waters of the United States"* (EPA-HQ-OW-2021-0602) published in the Federal Register.¹

NACWA represents the interests of more than 340 public clean water utilities and stormwater agencies of all sizes across the country that everyday provide an essential service of managing billions of gallons of the nation's wastewater and stormwater in a manner that ensures the continued protection of public health and our environment.

Historically, NACWA has not taken a formal position on any particular WOTUS definition, policy, rule, or legal doctrine because most of our members discharge into clearly jurisdictional waters even under the

¹ 86 Fed. Reg. 69,372 (Dec. 7, 2021).

narrowest of interpretations. More recently, however, NACWA has provided substantial comments to EPA and USACE on the importance of maintaining certain key exclusions. Codifying these exclusions would add much-needed regulatory clarity for our members, which in turn would allow them to continue to operate efficiently and effectively manage the nation's wastewater and stormwater without being subjected to undue jurisdictional disputes.

As this Administration looks once again to redefine WOTUS, even as litigation continues over previous WOTUS iterations, NACWA urges EPA and USACE to continue recognizing the role certain WOTUS exclusions play in the operational viability of public wastewater and stormwater agencies of all sizes throughout the country by including those exclusions in any finalized revised definition.

While the agencies have traditionally not exerted jurisdiction over features such as stormwater control features, water recycling structures, and groundwater, the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule provided clean water utilities with regulatory certainty by codifying these exclusions. The agencies should maintain these regulatory exclusions so that the clean water community can continue to perform the public wastewater treatment, water reuse, and stormwater activities vital to human health and the nation's water quality.

EPA and USACE Should Clarify Certain Exclusions and Recodify Others

Waste Treatment Systems

The Agencies should finalize their proposed inclusion of the longstanding exclusion for waste treatment systems, but they should also adopt the additional clarifications to its scope codified in the Navigable Waters Protection Rule. These clarifications reflect the Agencies' longstanding application of the waste treatment system exclusion and are therefore consistent with the Agencies' stated intention now of maintaining the "familiar and longstanding framework" of WOTUS, albeit using more clear and transparent regulatory text.²

Specifically, the Navigable Waters Protection Rule clarified that "waste treatment systems" excluded from the definition of WOTUS include "all components [of a system] ...designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating such discharge)."³ Clarifying that all components of waste treatment systems are excluded from the definition of WOTUS is essential for clean water utilities to be able to use such systems to effectively treat wastewater and ensure that it meets all applicable National Pollutant Discharge Elimination System (NPDES) permitting requirements prior to discharge. Defining any portion of these systems as a WOTUS would

² *Id.* at 69,399.

³ 85 Fed. Reg. 22,341 (Apr. 21, 2020).

eliminate the entire system's use for wastewater treatment; this clarity is necessary to ensure the appropriate continued application of this longstanding exclusion to systems that are integral to protecting and improving water quality nationwide.

The Navigable Waters Protection Rule also eliminated ambiguous regulatory language concerning the need for waste treatment systems to be "designed to meet the requirements of the Clean Water Act." At times, these systems can utilize features that would otherwise be WOTUS which were in existence prior to the development of the waste treatment system. While it is true that obtaining Clean Water Act permits – particularly Clean Water Act Section 404 permits⁴ – may be necessary to appropriately integrate such features into a waste treatment system, it is equally true that it has long been the agencies' position that, once part of the system, those features are no longer WOTUS, even though they were not originally "designed" at all. The agencies should therefore consider eliminating this text from the proposed regulations, or at a minimum should clarify that a system is "designed to meet the requirements of the Clean Water Act" if the appropriate Clean Water Act permits were obtained in the creation of the system and for any discharges from the system into WOTUS.

Stormwater Control Features and Water Recycling Structures

NACWA has significant concerns over the omission of exclusions for stormwater control features, water recycling structures, and groundwater in the agencies' proposal. Previous exclusions for these features were paramount to ensuring these systems were not entangled in WOTUS jurisdictional disputes.

The public clean water community and their ratepayers should not have to shoulder unnecessary burdens over costly debates concerning whether stormwater control features or water recycling operations fall under the scope of WOTUS. These systems have been used for decades by the clean water community to advance the purposes of the Clean Water Act and the agencies should finalize a rule that supports their continued efficient and effective operation.

If a final rule does not reinstate the exclusions for these systems, which were codified in the Clean Water Rule and Navigable Waters Protection Rule but reflected the agencies' longstanding practices in the pre-2015 regime, public clean water and stormwater management agencies could be inappropriately subjected to lengthy jurisdictional determinations and litigation that diverts public funds away from critical human health and environmental projects that benefit local communities.

⁴ If wastewater treatment systems result in the point source discharge of pollutants to WOTUS, which many do, an NPDES permit must also be obtained for that discharge. Application of the exclusion to the treatment system does not obviate Clean Water Act requirements for discharges from that system into WOTUS.

In the preamble of the proposed rule, EPA and USACE state that these exclusions were not in place before the promulgation of the 2015 Clean Water Rule, and therefore inclusion is not consistent with the goal of “return[ing] to the familiar and longstanding framework” offered by the 1986 regulations. EPA and USACE note, however, their “expect[ation] to implement the proposed rule consistent with longstanding agency practices,” in which they have “generally not asserted jurisdiction” over features such as stormwater control features, water recycling structures, and groundwater.

Preamble statements do not carry the legal enforceability of regulatory language or the corresponding certainty it provides. Accordingly, NACWA urges the agencies to reinstate the express exclusions for stormwater control features, and water recycling structures found in the 2015 and 2020 rules. The environmental benefits these features provide underscores how critical it is for the agencies to support their use by expressly excluding them from any WOTUS definition.

Green infrastructure projects are designed and operated specifically to mimic natural hydrological processes and manage large volumes of water that fall over land. In an important acknowledgement, Congress recognized the value of green infrastructure in the Clean Water Act for the first time in 2019.⁵ These projects bolster a community’s ability to be more “naturally” resilient and achieve environmentally and economically responsible benefits and outcomes.

Should EPA and USACE adopt a WOTUS definition that leaves green infrastructure projects vulnerable to the imposition of potentially significant permitting hurdles and case-by-case jurisdictional determinations, it will be detrimental to the advancement of resilient stormwater management practices nationwide. The Clean Water Act already requires communities to maintain their green infrastructure in a manner that protects and improves water quality; any additional permitting requirements brought about by an unclear WOTUS definition could substantially impede a community’s ability to operate their current systems or consider constructing this vital type of infrastructure in the future.

Much like green infrastructure, water recycling systems have been used for decades throughout the country, and communities continue to embrace these effective systems as a method to manage ever-increasing water resource challenges. Whether used as a technology to augment local water supplies, prevent land subsidence, mitigate saltwater intrusion, or improve overall water sustainability, these projects are costly and require significant advanced planning. The agencies should not subject local communities to additional and unnecessary regulatory costs by

⁵ See 33 U.S.C. § 1362(27) (2019) defining green infrastructure as “the range of measures that use plant or soil systems, permeable pavement or other permeable surfaces or substrates, stormwater harvest and reuse, or landscaping to store, infiltrate, or evapotranspire stormwater and reduce flows to sewer systems or to surface waters.”

failing to codify exclusions for these advanced systems simply because they were not expressly mentioned in regulations written nearly four decades ago.

Further, EPA and states have demonstrated their clear support, and even helped finance through loans or grant funding opportunities, diverse stormwater management and control techniques and water recycling/reuse initiatives to help improve downstream water quality and/or water availability for local communities. NACWA urges EPA and USACE to reinstate the exclusions for these features so that communities can continue their planning efforts with confidence that their investments in project construction and maintenance will not be undermined by ambiguous regulatory text.

Groundwater

EPA and the USACE must also retain the critical exclusion for groundwater. While this proposed rulemaking makes no changes to longstanding agency interpretation, it is important for EPA and the USACE to continue to expressly recognize that groundwater is not a jurisdictional WOTUS and has never been considered a jurisdictional WOTUS.

Our members have relied and continue to rely on the regulatory certainty offered by both the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule exclusions for groundwater as well as the continued confidence in longstanding agency practice to pursue advanced water resource planning and capital infrastructure projects. NACWA urges EPA and USACE to reinstate a clear exclusion for groundwater.

Conclusion

NACWA appreciates the opportunity to provide comments on the *Revised Definition of "Waters of the United States."* NACWA and its members recommend EPA and USACE adopt a rule that retains the key exclusions found in both the Clean Water Rule and the Navigable Waters Protection Rule in order to reduce the uncertainty that has led to decades of debate over WOTUS while allowing the clean water community to efficiently, responsibly, and cost-effectively manage the clean water infrastructure needed to meet local water resource challenges and treatment needs.

If you have any questions or comments, please contact Emily Rimmel by phone at 202/533-1839 or email at erimmel@nacwa.org.

Sincerely,



NACWA Comment on EPA-HQ-OW-2021-0602
February 7, 2022
Page 6 of 6

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