NACWA
A Clear Commitment to America's Waters

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*

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

National Association of
Clean Water Agencies
1816 Jefferson Place, NW
Washington DC 20036-2505

p 202.833.2672 f 202.833.4657
www.nacwa.org · info@nacwa.org

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*, 9th 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* or 202/833-9106 with any questions or to discuss further.

Sincerely,

Chris Hornback
Chief Technical Officer

cc: Andrew Hanson, EPA