NACWA
A Clear Commitment to America's Waters

November 13, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
Submitted via: owdocket@epa.gov

Re: Docket ID EPA-HQ-OW- 2011-0880

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the proposed *Definition of "Waters of the United States" Under the Clean Water Act* issued on April 21, 2014 by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE), regarding identification of waters protected by the Clean Water Act (CWA) (79 Fed. Reg, 22188). NACWA represents the interests of nearly 300 public wastewater treatment and stormwater agencies nationwide. While NACWA has some questions and concerns with the proposal as outlined in these comments, the Association commends EPA and USACE for pursuing the changes to CWA jurisdiction via a formal rulemaking process that allows for robust public input.

The proposed rule has implications for wastewater and stormwater collection and treatment systems, as well as for public health and water quality. NACWA encouraged individual member agencies to submit comments on the draft rule that consider their particular situations and we urge the Agencies to give their full attention to their individual comments. NACWA's comments below acknowledge major overarching implications of the rule for the nation's clean water utilities. NACWA appreciates the longstanding commitment EPA has made to maintaining the manmade waste treatment exemption which has helped address the majority of NACWA member concerns. As these comments lay out, a few concerns remain and the exemption could largely be used to clarify those as well. Overall, NACWA believes the draft rule addresses several key concerns, but can be improved in important areas and would benefit from additional clarity.

NACWA is broadly supportive of efforts to strengthen the water quality protection afforded by the CWA when done as part of a holistic watershed approach, and believes the proposed rule takes some important steps in this direction. The scope of waters protected under the CWA has been the subject of much litigation and

and confusion. The uncertainty surrounding CWA jurisdiction preceding and following the 2006 Supreme Court decision in *Rapanos v. United States* has had broad implications and the potential to affect NACWA members. NACWA public agency members already hold permits under the National Pollutant Discharge Elimination System (NPDES) or state equivalent and discharge to jurisdictional waters, but additional predictability and clarity regarding other CWA programs, such as stormwater management, is needed. EPA and USACE's continued efforts to apply science to categorize which water bodies are, may be, or are not "waters of the United States" (WOTUS) within the scope of the CWA can help to provide this additional predictability and clarity if properly structured.

Preservation and Clarification of Waste Treatment Exemption Critical

The draft rule preserves and clearly articulates a regulatory exemption for waste treatment systems, which is absolutely necessary. NACWA's longstanding position supports an interpretation of CWA jurisdiction that maintains a clear articulation of the waste treatment exemption and we applaud the Agencies for maintaining the critical, existing exemption. Title 40, Section 122.2 of the U.S Code of Federal Regulations explicitly excludes manmade "waste treatment systems" from the definition of "waters of the United States." This enables the proper functioning of publicly owned treatment works (POTWs). However, communities use a variety of approaches, ranging from green infrastructure (constructed wetlands, swales, etc.) and various components of municipal separate storm sewer systems (MS4s), to manage wet weather, which are not included in the exemption. NACWA does not suggest that the definition of POTW be expanded; however, explicit exemptions for these systems designed to meet CWA requirements need to be included in any final rule. In addition to waste treatment systems, the proposed rule exempts "treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" in 40 CFR 230.3(t)(1). Inserting language into this provision to expand it to cover a broader array of wet weather management practices including those discussed above, would be a viable solution.

Stormwater Exemptions Must be Explicit

Earlier this month, EPA's Local Government Advisory Committee (LGAC) provided the Agencies with recommendations on how the proposed rule intersects with the important issues facing local officials. One of the LGAC's main recommendations is that "manmade conveyance components of MS4s be exempt from Waters of the United States. This includes manmade green infrastructure, roads, pipes, manmade gutters, manmade ditches, manmade drains, and manmade ponds." NACWA endorses and fully agrees with the LGAC's recommendation for an exemption of manmade components of MS4s. Manmade wetlands in uplands constructed as part of an MS4 should also be included in the suggested exemption. This exemption would clarify that the rule is not intended to make MS4 collection systems jurisdictional under the CWA above the existing point of permitted discharge. This has been a point of significant concern for the municipal community, and the Agencies must clarify that MS4 collection systems are not jurisdictional in the final rule.

Green infrastructure (GI) practices are manmade and engineered components of wet weather management systems and thus should be included in the MS4 exemption. GI installations designed to meet CWA obligations or achieve water quality compliance should not be jurisdictional waters. Many stormwater utilities use permanent and temporary, iterative best management practices (BMPs) such as diversions, sedimentation basins, and constructed GI to comply with MS4 permits and the rule should reflect the range of facilities that are used to convey, capture, treat and infiltrate stormwater. To avoid any interpretation of these structures as WOTUS, they should be clearly exempted from the jurisdictional definition. EPA itself has vigorously promoted GI as a "cost-effective and resilient approach to our water infrastructure needs that provides many community benefits" but any indication that GI could be classified as a WOTUS would significantly disincentivize its continued nationwide adoption. Though EPA has verbally stated that the proposed rule is not intended to make GI installations jurisdictional, the final rule must explicitly indicate that manmade GGI and BMPs designed to meet CWA obligations or achieve water quality goals are not jurisdictional.

Use of Groundwater to Establish Connection Needs Additional Explanation

NACWA is also pleased that the draft rule includes an explicit exemption for groundwater in line with previous Association comments. Consistent CWA application dictates the preservation of the traditional groundwater exemption and ensures that groundwater appropriately remains outside the CWA's scope. NACWA members in arid regions of the country, in particular, appreciate that groundwater, including groundwater drained through subsurface drainage systems, is not jurisdictional. However, the proposal frequently references groundwater to establish a jurisdictional connection between ditches, tributaries and "adjacent waters", meaning water management features that may interface with groundwater have the potential to be deemed WOTUS. This leaves many clean water utilities uncertain of the regulatory status of certain facilities such as treatment control BMPs, infiltration basins, or storage ponds that may have a hydrologic connection to groundwater. The Agencies must clearly delineate what factors would be evaluated to establish hydrologic groundwater connections for purposes of determining jurisdiction.

Water Reuse Exemption Needed

The draft rule does not sufficiently address the issue of recycled water and reuse projects, in particular those using constructed treatment wetlands to treat millions of gallons of water a day. Under the draft rule these treatment wetlands could be declared WOTUS, potentially stifling development of or shutting down innovative recycled water projects. Lawmakers and the public alike are recognizing the integral role water reuse will play in regions facing severe drought, as demonstrated by California's recently passed ballot measure *Water Quality, Supply and Infrastructure Act of 2014*, which provides more than $7 billion for water infrastructure projects including investments in reuse. Clarifying the exemption of these projects designed to reuse treated effluent will ensure that jurisdictional questions will not impede their development and help to provide a sustainable water supply where it is most critical. There are multiple ways to clarify a regulatory exemption of these recycled water projects, which is currently unclear. Manmade features, like treatment wetlands, which are components of the water reuse process, could be easily included as a component of the waste treatment exemption with additional language. A separate exclusion specifically for water reuse and recycling elements would also work.

Clarity Needed on Ditches, Maintenance, Water Transfers, Biosolids

In Section 3 of the proposed rule, EPA and USACE address tributaries including roadside and agricultural ditches. The current regulations do not define "ditches" as a category of jurisdictional water and EPA's 2008 *Rapanos* Guidelines generally excluded them. Other municipal organizations have raised myriad concerns with the Agencies on the topic of ditch jurisdiction. However, NACWA's main concerns center around how ditch jurisdiction will impact MS4 systems and the potential implications on sewer overflows into dry ditch systems. Under the draft rule, ditches are excluded if they are built in uplands, drain uplands and have less than perennial flow. But in many areas, coastal areas especially, ditches that are built in and drain uplands may have significant groundwater inputs and associated flows. This leads to the possibility that many ditches will be deemed jurisdictional. This is a concern as most sewer construction occurs in easements along roadways in ditches. Making these ditches jurisdictional would create additional permitting requirements and could add significant costs, unnecessary administrative requirements and delays to clean water utility projects. Greater clarity on this point is needed, especially regarding how ditches could impact jurisdictional determinations for MS4s, as noted above.

There are numerous potential consequences to the jurisdiction of ditches, and one in particular that concerns a number of clean water utilities is a potential increase in federal enforcement over sewer overflows that previously would not be considered jurisdictional. While there are numerous policy implications surrounding sanitary sewer overflows (SSOs), this is an illustrative example of the nuanced ramifications of considering dry ditches as WOTUS. The specific scenario troubling wastewater utilities concerns SSOs of a small volume that might occur occasionally in a wastewater collection system and not reach jurisdictional waterways. Collection system pipes often lie parallel to dry ditch systems used for things like highway maintenance or as part of an MS4 system. Right now in many states those dry ditches are not considered jurisdictional, so in the event of a small SSO into a ditch, where it is cleaned up before any contact with flowing water, there are no mandatory reporting requirements for the utility. But should those ditches be deemed jurisdictional, then the dry ditch SSO scenario above could potentially constitute a permit violation as a discharge to WOTUS and trigger a slew of reporting requirements under an NPDES permit. The increase in potential enforcement and related legal implications for these very minor SSO events are unnecessary burdens on the clean water community's already overtaxed resources.

EPA and USACE also have the opportunity to clarify the applicability of the CWA to water transfers in this rulemaking. Transferring water from one basin to another is a tool used by clean water utilities; it is often an essential element of water resource management and warrants close attention as to the jurisdiction of the CWA. In defining WOTUS, EPA and the USACE should be clear that jurisdiction does not extend to waters transferred from one water body to another without intervening municipal, industrial, or agricultural use, for purposes of water utility operations and maintenance.

Also, the final definition of WOTUS will have a direct impact on wastewater utilities and other entities engaged in construction, maintenance, repair, and expansion of water infrastructure. The rule should incorporate generally accepted practices to assure protection of WOTUS, while minimizing regulatory burden and allowing routine operation and maintenance of wastewater and stormwater conveyances. For wastewater utilities, the ability to engage in timely construction and other maintenance and improvement projects has significant implications for infrastructure function, public health, local economies, and community quality of life. It is critical that jurisdictional changes not delay wastewater system maintenance, repair, and construction activities.

Many NACWA members produce biosolids, and some are responsible for the land application of those biosolids on agricultural lands. Our understanding is that any discharges incidental to stormwater runoff from lands that may be used for biosolids application would be covered under the agricultural stormwater discharge exemption – NACWA requests further clarification of this exemption in the final rule.

Rule Must Affirm the Lead Role States Play in Implementing the CWA

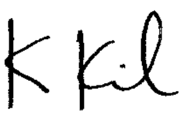
NACWA members have expressed unease that the WOTUS rulemaking may impinge on the states' water quality management authority as delegated under the CWA. Differences in how states have implemented CWA jurisdiction in the past raise legitimate concerns about how the new rule will interface with existing state practice. The resulting perception is that the rule is, contrary to the Agencies' claims, expanding federal jurisdiction. When finalizing the rule, EPA and the USACE should include clarifying language in the rule preamble reaffirming the authority provided to the states by the CWA.

Conclusion

NACWA encourages EPA and the USACE to take the above comments into consideration as they refine the proposed rule. Providing clear exclusions from CWA regulatory oversight and removing ambiguity as suggested in these comments will reduce confusion and gain further support for the proposal from the municipal clean water community – a critical partner in protecting our nation's waters. The final rule must not unnecessarily burden the operation of the nation's public wastewater and stormwater utilities while also encouraging innovative practices that will contribute to water quality improvement far into the future.

The Association appreciates the opportunity to provide these comments and looks forward to continued engagement with EPA during the rulemaking process. If you would like to discuss any of these comments further, please do not hesitate to contact Brenna Mannion at bmannion@nacwa.org or 202/533-1839.

Sincerely,



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