



# Association of Minnesota Counties

October 4, 2021

Damaris Christensen  
Oceans, Wetlands and Communities Division  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Stacey Jensen  
Office of the Assistant Secretary of the Army  
for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0104

RE: Docket ID No. EPA-HQ-OW-2021-0328

Dear Ms. Christensen and Ms. Jensen,

On behalf of the Association of Minnesota Counties (AMC), a voluntary association representing all 87 Minnesota counties, thank you for the opportunity to offer comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers (Army Corps) proposed rule on the "Intention to Revise the Definition of Waters of the United States," which aims to clarify which water bodies are federally regulated under the Clean Water Act (CWA). Specifically, the purpose of the proposed rule is to repeal the Navigable Waters Protection Rule and replace it with the pre-2015 "Waters of the United States" (WOTUS) regulations.

Minnesota counties are diligent in their work to provide for the health, well-being and safety of our citizens including through water protection and improvement efforts. As co-regulators in implementing and enforcing CWA programs, the county perspective must be incorporated in crafting reasonable and practicable WOTUS rules and regulations. As partners in protecting America's water resources, it is essential that local governments have a clear understanding of any changes to the definition of WOTUS, which will have significant impacts on all aspects of the CWA.

The state of Minnesota worked with Minnesota's counties, other local governments, and the public, to put in place a robust regulatory structure for water protection. Minnesota's water laws and rules were developed to complement federal regulations befitting our state water resources based on our unique geology and natural resources.

Minnesota, with the support of AMC, is currently working with the EPA and Army Corps to develop a plan for assumption of CWA section 404 permitting authority. With federal encouragement of 404 assumption, The Army Corps had revised the number and nature of assumable waters. As a result, Minnesota finally recognized a potential benefit for our citizens and water protection efforts. Another revision to WOTUS definitions raises concerns about the value of this work and jeopardizes the investments Minnesota has made toward 404 assumption.

Through the work of Congress and the courts we understand that “navigable waters” go beyond traditionally navigable-in-fact waters but there are limits to the CWA’s jurisdiction. However, under the pre-2015 rules, ditches were regulated under CWA Section 404, both for construction and maintenance activities. Should these rules be reimplemented, several challenges within the 404 program will significantly impact counties. Historically, an exemption existed for ditch maintenance; however, the Army Corps districts inconsistently applied it across the country.

Local governments own and manage a wide variety of public safety ditches—road, drainage, stormwater conveyances and others—to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a local government is responsible for maintaining the integrity of these ditches, even if the federal agencies do not approve federal permits promptly.

Counties urge the EPA and Army Corps to include local government public works general maintenance and repair projects in CWA Section 404 permitting exclusions.

Counties are still adjusting to the 2020 Navigable Waters Protection Rule, and the definitions therein. Returning to the pre-2015 regulations will take time for local governments to reimplement this definition of WOTUS. The definition was complex and required counties to hire consultants, adding to the project’s timeline and economic impact.

By the time we fully understand these changes, the second rulemaking on defining WOTUS will come out, and we will have to start this process again. AMC is concerned that this plan for consecutive rulemakings will exacerbate confusion over the definition of WOTUS and put water quality and public health decisions at risk.

AMC appreciates the opportunity to comment on the proposed revision of the regulations defining “Waters of the United States.” As partners in protecting America’s water resources, counties must clearly understand the vast impact WOTUS will have on our local communities. We look forward to working with the EPA and the Army Corps as the regulatory process moves forward.

Sincerely,

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

Rich Sve, Lake County Commissioner  
*President, Association of Minnesota Counties*