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***Re: Federalism Consultation - Revising the Definition of “Waters of the United States”***

The Association of State Drinking Water Administrators (ASDWA) appreciates the EPA and Army (the agencies) Intergovernmental Associations Federalism Consultation with ASDWA and other associations to provide recommendations on the revision of the definition of, “Waters of the United States (WOTUS),” and the associated comment period extension to October 4, 2021. ASDWA is the national, nonpartisan, non-profit association representing the collective interests of the drinking water program administrators in the 50 states, five territories, the District of Columbia, and the Navajo Nation. ASDWA’s members implement the Safe Drinking Water Act (SDWA) every day to ensure the protection of public health. These comments do not necessarily represent the specific views and concerns of individual states or consensus from all states. We encourage the agencies to consider individual state comments, in addition to ASDWA’s, to gain further perspective.

**Work with States as Co-Regulators**

ASDWA recommends that the agencies work closely with states, as co-regulators, to revise the definition of WOTUS and develop any new regulations. States have extensive experience to share on challenges with political, legal, scientific, and practical implementation of WOTUS regulations both before and after the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule. Early, meaningful, and continued state involvement in the regulatory development and implementation processes is needed to create a clear WOTUS definition based on sound science, along with the detailed guidance to ensure durable and consistent rule implementation. State involvement is essential to create buy-in and eliminate the continuous recurrence of litigation and future changes to the WOTUS definition based on shifting political leadership.

The recent Federalism Consultation and public meetings were a helpful start to the process the agencies are undertaking on WOTUS, but more engagement is needed to ensure that the resulting rulemakings achieve the goals originally envisioned by the 1972 Clean Water Act (CWA). The definition of WOTUS must be flexible enough to adjust for the complexity of site-specific circumstances and landscapes across the country, and not too prescriptive to undermine the varying frameworks of state laws and rules aimed at providing additional protections for surface water, groundwater, and drinking water sources. Reverting to, and building from, the CWA regulations that were in place prior to 2015 for these

rulemakings will therefore necessitate action by some states to make substantial statutory and regulatory changes.

### **Look Broadly Across Programs Using a Holistic Lifecycle Approach**

The efforts of the agencies to revise the definition of WOTUS and undertake two new rulemakings provides a great opportunity to look more broadly across EPA and Corps of Engineers' programs and consider opportunities to address environmental and public health impacts from contaminants of concern using a holistic lifecycle approach. Preventing contaminants from impacting surface water and groundwater, including those that serve as sources of drinking water, is more effective and less expensive than having to remove them once contamination has occurred. ASDWA emphasizes that EPA should work across programs to address sources of contamination and ensure that contaminants are not transferred from one media to another.

### **Consider the Role of Groundwater**

The agencies must include considerations for groundwater in these rulemakings, and in subsequent implementation, guidance, and coordination across programs. Though some states have authority and programs under federal and state laws to adequately protect surface waters from discharges to groundwater, other states do not. While ASDWA understands that groundwater is not a jurisdictional water under the CWA, the agencies must use linked CWA-SDWA and holistic lifecycle approaches to ensure that groundwater discharges do not create CWA water quality impairments and conversely, actions taken to achieve CWA goals do not inadvertently contribute to groundwater contamination, particularly for groundwater sources of drinking water.

### **Use the Clean Water Act to Protect Drinking Water Sources**

A holistic approach is essential to ensure that connections between the CWA and SDWA, surface water and groundwater quality and quantity, and across media are considered in EPA's effort to revise the WOTUS definition, undertake new rulemakings and implementation actions, and coordinate across programs. The SDWA uses a "multiple-barrier approach" that includes source water protection, treatment, and distribution system integrity to ensure safe drinking water. This multi-barrier approach relies on effective implementation of rules, guidance, and funding for the CWA, the SDWA and Underground Injection Control (UIC) Program, as well as individual state laws to protect both surface water and groundwater sources of drinking water from potential point and nonpoint sources of pollution. This approach is not intended to leave the burden of responsibility on the public water systems (PWSs) to remove contaminants from the environment, it is to ensure that these barriers will minimize human exposure.

ASDWA worked with the Association of Clean Water Administrators (ACWA), the Ground Water Protection Council (GWPC) and our state members, along with EPA Headquarters and Regions as part of an extensive effort to develop the [2014 CWA-SDWA Toolkit](#) entitled, "Opportunities to Protect Drinking Water Sources and Advance Watershed Goals through the Clean Water Act: A Toolkit for State, Interstate, Tribal and Federal Water Program Managers." This document highlights how CWA provisions and tools including Water Quality Standards; Monitoring, Assessment, and Impaired Waters Listings; Total Maximum Daily Loads (TMDLs); the National Pollutant Discharge Elimination System (NPDES); and Nonpoint Source and 319 programs, can be used to mitigate impacts to drinking water sources. The

opportunities identified in the toolkit are ripe for action now, as well as for future implementation of new WOTUS rulemakings.

### **Consider State Costs and Implementation Timeline**

ASDWA recommends that the agencies consider and ensure funding for state administrative costs and direct implementation costs and timelines, including significant costs and timelines for revisiting and revising current statutes and regulations for these new WOTUS rulemakings, and additional state statutes and rules to add protections beyond WOTUS. For this reason, ASDWA also requests that the agencies consider delayed implementation of these WOTUS rulemakings to allow states additional time to update their respective legislative and administrative processes.

### **Consider Regional Approaches**

ASDWA recommends that the agencies work with states to consider regional approaches for WOTUS that strike a balance and find a middle ground for states in different geographic areas of the country, with different legal frameworks, knowledge, and expertise to address site specific conditions based on state priorities, and across state boundaries. Regional approaches would be most helpful to address issues with interstate waters; issues related to ephemeral and intermittent streams and agricultural permits in the western US that are impacted by climate and drought; and with groundwater “discharges of pollutants” via direct hydrologic connection to surface water that are impacted by geology such as in karst areas.

### **Develop Detailed Implementation Guidance**

ASDWA recommends that the agencies work with states to develop all necessary implementation guidance associated with these rulemakings in a timely manner. The guidance should provide additional clarity and specific information on the agencies’ process for changing the WOTUS definition, how the definition will change, how specific changes will be made, and how those changes will affect the locations of permits and what is required to be included in the permits. This should include maps and a graphical interface to display information for states and regions to help address site-specific conditions and regional approaches, and examples to show changes from where permits are currently required versus where they will be required.

In closing, ASDWA emphasizes that in addition to working directly with states as co-regulators, the agencies must directly engage with water and wastewater systems and other important stakeholders to ensure that these rulemakings and the subsequent guidance and implementation is clear, with detailed information that addresses the questions, challenges, and site-specific needs of all affected stakeholders across the nation. The agencies must also provide adequate and appropriate funding for implementation and ensure continued and future coordination across agencies and programs to prevent the transfer of contaminants from one media to another using linked CWA-SDWA and holistic lifecycle approaches. This holistic approach is essential for sustaining safe drinking water supplies, and for protecting public health, the economy, and the environment.

If you have any questions regarding these comments, please contact me ([aroberson@asdwa.org](mailto:aroberson@asdwa.org)) or Deirdre White ([dwhite@asdwa.org](mailto:dwhite@asdwa.org)).

Sincerely,



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Executive Director

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