



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 Minnesota Rural Counties and our 35 member counties, we appreciate the opportunity to submit 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.

For the record and for the reasons delineated below, MRC opposes the effort to revise the WOTUS definition.

The health, well-being and safety of our citizens and community are top priorities for our members. As co-regulators in implementing and enforcing many federal laws with our state, including CWA programs, MRC takes this responsibility seriously. To that end, federal, state and local governments must work together to craft reasonable and practicable rules and regulations. As partners in protecting America's water resources, it is essential that local governments and groups like MRC who represent them, have a clear understanding of the vast impact that a change to the definition of WOTUS will have on all aspects of the CWA.

Clean water is essential for public health, and state and local governments prioritize protecting local water resources. It is essential counties are involved as a significant partner in the CWA

rule development process. The CWA charges the federal government with regulating discharges of pollutants into the waters of the United States and quality standards for surface waters.

We ask specific consideration for the following concerns:

### **STATE & LOCAL AUTHORITY**

- Under a federal agreement for CWA enforcement, the EPA and the Army Corps share clean water responsibilities. The Army Corps is the lead on the CWA Section 404 Dredge and Fill permit program, and the EPA is the lead on other CWA programs. States have undertaken authority for EPA's Section 402 National Pollutant Discharge Elimination System (NPDES) permit program—EPA manages NPDES permits for Maryland, Massachusetts, New Hampshire and New Mexico. Additionally, states are responsible for setting water quality standards to protect their water resources.
- As the Land of 10,000 Lakes, and headwaters to the Mississippi River, Minnesota's culture, identity and much of its economy is tied directly to our bountiful water resources. From the establishment of the Wetland Conservation Act, which provided a blueprint for the nation on wetland preservation, to passage of the Clean Water Legacy Act, that since 2006, has constitutionally dedicated hundreds of millions of dollars in state sales tax revenues annually to keeping our waters clean (\$227,247,00 alone in FY 22-23), Minnesota is doing its part above and beyond federal requirements.

### **SUPREME COURT HISTORY**

- Section 502 of the CWA states, "the term 'navigable waters' means the waters of the United States, including the territorial seas." The phrase "navigable waters" was first used in 1899 in the Rivers and Harbors Act, which deals with interstate commerce—any ship involved in interstate commerce on a "navigable water" was required to have a license or permit for trading. At the time, navigable waters meant a lake, river or ocean.
- After linking navigable waters with waters of the United States, Congress limited the scope of the CWA to all pollutants discharged into a navigable water. In the realm of the CWA's Section 404 permit program, the courts have generally said that "navigable waters" go beyond traditionally navigable-in-fact waters but have also acknowledged there is a limit to the CWA's jurisdiction.
- In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, the Army Corps used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. In SWANCC, the Court ruled that the Army Corps exceeded its authority and infringed on states' water and land rights.
- In 2006, in *Rapanos v. United States*, the Army Corps was challenged over its intent to regulate isolated wetlands under the CWA Section 404 permit program. The Court ruled that the Army Corps exceeded its authority to regulate these isolated wetlands in a split decision. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites. Since neither

opinion was a majority opinion, it causes confusion over which waters are federally regulated under CWA.

### **STAFFING CONCERNS**

- 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 implementation timeline and economic impact. From changes in staff at the local, state and federal level to the varying interpretations that created the need to get clarifying guidelines in the past, local governments will experience additional delays and increased costs to do even the most basic maintenance tasks.
- This will affect small, rural counties the hardest as they lack the tax base to generate additional revenues to pay these added costs.

### **ECONOMIC IMPACTS**

- Our members fear that navigating the regulatory changes will create an environment where it will take time to understand the process and how implementation will be practiced fully. County engineers, staff, and consultants will simultaneously learn the changes, even when it is simply reversing to past guidelines and regulations. By the time we fully understand and grasp these changes, the second rulemaking on defining WOTUS will come out, and we will have to start this process again. Without clear guidance that includes reliable and accurate maps indicating federal jurisdiction claims that are vetted with state and local input, we fear the debate over the definition of WOTUS will continue and put water quality and public health at risk.
- Additionally, MRC is interested in learning more about the economic impacts of returning to the pre-2015 regulations. With more projects being subject to the permitting process, this will significantly slow down the construction of projects and increase costs. As Congress works to pass much-needed federal funding for infrastructure in the Infrastructure Investments and Jobs Act, by expanding the definition of WOTUS to the pre-2015 definition, we believe it will slow down the implementation of these much-needed investments.

### **COUNTY-OWNED INFRASTRUCTURE**

- 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 the exemption across the country.
- Local governments are responsible for public safety; they 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.
- Minnesota is in pursuit of 404 assumption through a process that has involved the EPA, as well as state policy makers.
- Counties urge the EPA and Army Corps to include local government public works general maintenance and repair projects in CWA Section 404 permitting exclusions.

**BENEFITS OF 2020 RULE**

- As the rulemaking process is initiated, we wanted to provide the following recommendations that MRC proposes for inclusion, based on elements of the Navigable Waters Protection Rule that considered the unique role of counties in its implementation.
- Our member counties have specifically appreciated exemption of certain ditches, stormwater features and recycling structures, ephemeral waters, groundwater, farm and roadside ditches, prior converted crop land, artificial lakes and ponds, water storage reservoirs and wastewater treatment systems and urge those exemptions be retained.

**CLOSING**

- MRC appreciates the opportunity to comment on the proposed revision of the regulations defining “waters of the United States,” and to express our opposition. 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 "MRC Chairman", written in a cursive style.

MRC Chairman and Pipestone County Commissioner