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*Submitted via electronic mail to: CWAwotus@epa.gov and
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Re: NACWA Comments to EPA and USACE's Federalism Consultation for Recommendations for Revising the Definition of "Waters of the United States (WOTUS)

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers' (Corps) intent to revise the Clean Water Act's (CWA) definition of Waters of the United States (WOTUS). NACWA represents the interests of more than 330 publicly-owned clean water and stormwater agencies across the country that everyday provide an essential service managing billions of gallons of the nation's wastewater and stormwater to ensure the continued protection of public health and the environment.

NACWA has generally not taken a position on any particular WOTUS definition, policy, rule, or legal doctrine because most of our members discharge into clearly jurisdictional WOTUS even under the narrowest interpretations. NACWA did, however, provide both EPA and the Corps comments during the Obama Administration on the 2015 Clean Water Rule, and again during the Trump Administration in June 2017 when the 2015 Clean Water Rule was being rescinded.

In 2019, NACWA again submitted comments to EPA and the Corps on the proposed Navigable Waters Protection Rule once the Step-Two process had matured and new WOTUS definition language was available. NACWA's comments on this iteration of WOTUS were largely focused on the exclusions, as EPA and the Corps maintained the vital jurisdiction exemptions necessary for public clean water utilities and stormwater agencies to provide service to their communities without having to navigate jurisdictional WOTUS quagmires or duplicative permitting without any meaningful water quality benefit.

As the WOTUS pendulum swings again, it is critical that regulated entities have the certainty that WOTUS will not be redefined at each change in political administration. EPA and the Corps this time vow a "durable" definition that will stand the test of time as well as "support public health, environmental protection, agricultural activity, and economic growth," and NACWA hopes that this is the case.

NACWA continues our ask that EPA and the Corps preserve the exclusions for waste treatment systems, stormwater control features, wastewater recycling structures, and groundwater because not only have these exclusions been codified by the two most recent Administrations' WOTUS rulemakings—the 2015 Clean Water Rule and 2019 Navigable Waters Protection Rule—but they have also been considered longstanding agency practice for years, if not decades. These exclusions provide greater certainty that public wastewater treatment systems and stormwater agencies can continue to properly operate and function and not be entangled in the nuances of WOTUS disputes.

EPA and USACE Must Maintain Existing and Added Exclusions

Waste Treatment Systems

EPA and the Corps must maintain the existing waste treatment systems exclusion. These systems have been excluded from WOTUS jurisdiction since 1979, with slight modifications to the exclusion in the 2015 Clean Water Rule and further clarification in the Navigable Waters Protection Rule. Failure to *exclude all* portions of a waste treatment system could cause the clean water community to not be able to use those systems for their intended purpose, which is nearly always to ensure that downstream discharges adhere to the requirements of CWA Section 402. As such, failure to exclude all components of a waste treatment system from the WOTUS definition would undermine—not advance—the purposes of the CWA.

NACWA supported EPA and the Corps' retention of the exclusion for waste treatment systems in the Navigable Waters Protection Rule, including the updated definition: "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." This improved the then-2015 Clean Water Rule exclusion that included a superfluous modifying phrase of "designed to meet the requirements of the Clean Water Act." NACWA maintains its position that *all components* of a waste treatment system be excluded from the definition of WOTUS.

Municipal clean water agencies are required to obtain National Pollutant Discharge Elimination Program (NPDES) permits under the CWA prior to discharging treated effluent into a WOTUS. Maintaining the waste treatment system exclusion in which *all components* of the system are excluded from WOTUS, provides the municipal clean water community the certainty to continue managing the nation's wastewater and stormwater, knowing that specific treatment processes will not be burdened by future jurisdictional disputes.

Stormwater Control Features

EPA and the Corps must maintain the exclusion for municipal stormwater control features, especially for green infrastructure control features. While the Navigable Waters Protection Rule added clarifying language that certain stormwater control features (e.g., "upland") were excluded from a jurisdictional WOTUS, it built upon the stormwater control exclusions already in place in the 2015 Clean Water Rule that NACWA supported.

NACWA has advocated in prior comments that stormwater control features be excluded regardless of whether these features were constructed in an upland area as this could be unnecessarily restrictive and lead to greater confusion about longstanding agency practice of excluding a broad array of stormwater management techniques.

EPA and the Corps have never considered traditional gray infrastructure as WOTUS. As such, NACWA urges EPA and the Corps as they consider a more "durable" WOTUS definition to avoid competing modifiers or language that relates to *where* these stormwater control features are

constructed, as this may deter beneficial green infrastructure methods for municipalities managing stormwater by adding regulatory burdens. Further, the CWA already regulates these stormwater discharges and further regulating the features provides no additional water quality benefit.

Wastewater Recycling Structures

EPA and the Corps must maintain the exclusion for wastewater recycling structures that was added for the first time in the 2015 Clean Water Rule. The Navigable Waters Protection Rule also included this exclusion that reflects over thirty years of longstanding agency practice recognizing the vital role wastewater recycling systems play across the country to augment local water supplies, prevent land subsidence, mitigate saltwater intrusion, and improve overall water sustainability. As more communities embrace wastewater recycling and water reuse initiatives, NACWA urges EPA and the Corps to recognize this exclusion moving forward.

Groundwater

To the extent EPA and the Corps address groundwater in any WOTUS context, NACWA encourages the agencies to continue the longstanding exclusion for groundwater. NACWA has expressed concern that the 2015 Clean Water Rule and Navigable Waters Protection Rule—while both excluded groundwater as a WOTUS—included language that added greater uncertainty and confusion that groundwater and other geographic features that are otherwise excluded from the definition of WOTUS may function as “point sources” under CWA § 502(14), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA § 402). EPA and the Corps should not conflate two distinct statutory questions—is a water a WOTUS and is a discharge a “point source discharge” subject to NPDES requirements—as doing so would cause unnecessary additional confusion in an area already ripe with uncertainty.

EPA and the Corps have never considered groundwater a jurisdictional WOTUS. Further, clear Congressional intent and the U.S. Supreme Court’s reasoning in its recent *County of Maui v. Hawaii Wildlife Fund* decision show why groundwater is not a WOTUS. Any future WOTUS definition EPA and the Corps draft must recognize this fact.

Conclusion

NACWA appreciates the opportunity to provide initial thoughts to EPA and the Corps on a revised definition of WOTUS and encourages the agencies to sustain these key exclusions that will allow public clean water utilities to effectively meet their environmental obligations in managing the nation’s wastewater and stormwater. We appreciate your consideration of these comments, and if questions arise, please contact me at 202/533-1839 or eremmel@nacwa.org.

Sincerely,



Emily Remmel
Director, Regulatory Affairs

cc: Andrew Hansen, USEPA
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