



AMERICAN PUBLIC WORKS ASSOCIATION

Your Comprehensive
Public Works Resource

www.apwa.net

1200 Main Street, Suite 1400
Kansas City, MO 64105-2100
816-472-6100 800-848-APWA
fax 816-472-1610

25 Massachusetts Avenue, NW
Suite 500A
Washington, DC 20001
202-408-9541

September 17, 2021

Damaris Christensen
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, D.C. 20310

RE: Notice of Public Meetings Regarding “Waters of the United States” and Request for Recommendations – Docket No. EPA-HQ-OW-2021-0328

Dear Mr. Christensen and Ms. Jensen:

The American Public Works Association (APWA) appreciates the opportunity to submit pre-proposal comments on the U.S. Environmental Protection Agencies’ (EPA) and U.S. Army Corps of Engineers’ (USACE) plans to repeal the Navigable Waters Protection Rule (NWPR) and establish a new rule defining “Waters of the United States” (WOTUS) under the Clean Water Act (CWA).

Protecting the nation’s surface water and groundwater is essential to public health and the quality of life our citizens enjoy. APWA’s over 30,000 members play a critical role in providing clean and safe water to their communities which are large and small, urban and rural. Chief among their responsibilities are the planning, design, construction, operation, and maintenance of the following: water supply systems, wastewater treatment systems, stormwater management programs, and drainage and flood control infrastructure, among numerous other public assets. Our members include public works professionals from cities, counties, and special districts, as well as their private sector partners. Our members take their responsibilities under the CWA seriously, and are committed to a partnership with federal, state, regional, and local partners in assuring a sustainable future.

APWA and its members are pleased by the EPA and USACE’s efforts to solicit feedback from impacted stakeholders as the process for promulgating a new WOTUS definition begins. APWA’s *117th Congress Water Resiliency Policy Priorities* highlight the importance of streamlining federal regulations and ensuring rules are firmly grounded in the latest science. Integrating these principles into new WOTUS regulations will help strengthen the partnership between public works agencies, states, and the federal government and reach our common goal of clean, affordable water for all.

As background, APWA previously issued comments on September 26, 2017 when the NWPR was initially proposed. Our association asked for both the EPA and USACE to revise the 2015 WOTUS rule in order to provide consistent

PRESIDENT
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implementation across the nation, specifically regarding the definition of the “significant nexus” terminology used by Justice Anthony Kennedy in his Rapanos opinion.

As finalized on April 21, 2020, the NWPR did address some of APWA’s concerns regarding jurisdiction over ditches and municipal separate storm sewer systems. However, in three key areas, the final rule continues to create serious concerns for public works professionals and programs: 1) Permitting uncertainty; 2) Assumptions regarding cooperative federalism; and 3) Additional costs for water providers and water customers. With respect to the new WOTUS rule, APWA urges EPA and USACE to maintain aspects of the NWPR that clarified the aforementioned jurisdictional issues while taking steps to address these key concerns.

Permitting Uncertainty

The new WOTUS rule should address permitting uncertainty issues by clearly defining any metrics that will be used to determine regulated waters. Additionally, we believe EPA and USACE should consider past precedent for protection of intermittent/perennial streams and wetlands to ensure waters with impacts on our nation’s drinking water supply are appropriately regulated.

Under NWPR the regulatory definition of WOTUS applies to intermittent or perennial streams that contribute flow to navigable waters in a “typical year,” which means over a rolling 30-year average. This new definition undid federal CWA protections for streams that flow after rainfall or snowmelt. It also removed protections for wetlands without surface water connections to larger waterways.

This was a departure from previous administrations which protected wetlands with either surface or shallow subsurface connections to navigable waters. Previous administrations also protected some wetlands that were not directly connected by water to larger waterways. Under the Obama Administration, ephemeral streams were protected if they had an identifiable bed, bank, and high-water mark. Under the Bush Administration, streams with “significant hydrological or ecological connections” to navigable water were protected.

The NWPR did little to provide clarity regarding permitting. For example, the rule offers no metrics for what a “typical year” would be in terms of intermittent or perennial streams. There is no clarity on whether such a metric would include the number of days or months a stream must flow, or volume of water it must carry, or other data points. Furthermore, the rule fails to clearly define the differences between ephemeral, intermittent, and seasonal streams. As a result, decisions on jurisdiction were left up to USACE field personnel.

Assumptions Regarding Cooperative Federalism

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Due to laws at the state level regarding clean water regulations, the NWPR essentially prohibits many states from regulating waterways. Thirty-six states currently have laws that prohibit their state-level environmental agencies from instituting regulations that are more stringent than federal standards. Such laws effectively exempt any waters not included in the NWPR from state regulation.

Arizona is one state which has enacted such a law. In arid western states like Arizona, which face significant water supply issues, all water is drinking water. The NWPR has added significant cost to treating these unprotected waters, since as much as 94% of the states' waters lost federal protection and were exempted from state regulation under state law.

In addition to specific laws passed by state legislatures to prohibit state environmental protection agencies from regulating non-jurisdictional waters, there is an element of whether states have the means, or the will, to institute such regulation. State budgets across the nation are tight and asking state agencies to take over CWA jurisdiction is beyond the means of most if not all states.

In a new WOTUS rule, APWA supports provisions that would allow the federal government to resume an appropriate role in CWA enforcement. By expanding the definition of WOTUS, EPA and USACE can ensure cost-effective regulation of waters that are currently prohibited from state regulation or beyond the means of state governments to regulate.

Additional Costs for Water Providers and Water Customers

The EPA estimates 50% of the country's rivers and streams are impaired, including roughly 25% of rivers that serve as drinking water sources. While NWPR deals with CWA jurisdiction, the effects of the rule have a significant impact on drinking water and Safe Drinking Water Act (SDWA) compliance. As mentioned previously, especially in the arid western states, all water is drinking water. The NWPR has exposed more waterways to impairment by removing CWA protections and therefore allowing increased industrial discharges in those waters. This risks contamination of drinking water, especially in communities with limited access to water. Ultimately, the result is agencies and water providers have needed to do further treatment on those waters to make them safe for drinking. With additional treatment comes greater costs, which are passed on to the customers, thereby exacerbating the water affordability issue that afflicts communities across our country. Public works agencies recognize there are necessary treatment costs to protect public health and our nation's environment. A new WOTUS rule that protects waterways that impact our nation's drinking water systems will allow public works agencies to effectively balance these environmental concerns with the need to provide clean, affordable water to our communities.

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Public works encompasses many of the things that make our communities livable. Providing drinking water and treating wastewater and stormwater are essential services that public works delivers. While specific data is not yet available, it is likely the NWPR has increased costs for local agencies and water providers to deliver those services. Given their already limited budgets, those bodies are frequently faced with choices between raising rates and potentially pricing members of the community out of those services or risking noncompliance by trying to stretch already thin budgets for water and wastewater treatment. Raising rates can also result in communities losing residents and ratepayers, as those residents may choose to move to a jurisdiction with lower rates. A new WOTUS rule should help to reduce impairment of waterways, thereby reducing costs for providers and ratepayers.

Jurisdictional Clarity

APWA was pleased to see some jurisdictional issues addressed in the NWPR. In our 2017 comments, APWA requested clarity regarding two specific areas: 1) expanded jurisdiction over ditches; and 2) the need to assure that any proposed rule be clear that municipal separate storm sewer systems (MS4s) and other stormwater management programs are excluded from regulation as “Waters of the United States.” Elements of the NWPR do assist in addressing these issues. First, the rule provides a specific definition under which a ditch would be classified as jurisdictional. Additionally, the rule complements that definition with additional language to provide precision. Finally, the rule states specifically that “stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off” will not be classified as jurisdictional. Once EPA and USACE complete their repeal of NWPR, APWA supports inclusion of the provisions specified above in a new WOTUS rule. This will help ensure continued regulatory certainty for public works agencies.

As the regulatory process continues, APWA’s stance is that EPA and the USACE can benefit our environment, our public health, and our nation’s public works professionals by drafting a WOTUS rule that clarifies the “significant nexus” language used by Justice Kennedy and addresses the problems that we have highlighted. APWA looks forward to continuing to provide input as more details on the new proposed rule are provided.

On behalf of public works professionals nationally, we thank you for the opportunity to comment and urge you to give serious consideration to the above comments. We are committed to working with EPA and USACE on our common goal of clean water. If you have any questions, please contact Michael Altman in our Washington, D.C. office at maltman@apwa.net or at 202-218-6727.

Sincerely,

PRESIDENT
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CHIEF EXECUTIVE OFFICER
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