



October 3, 2021

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

Ms. 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 members of the Tennessee Municipal League (TML), we welcome the opportunity to submit comments in response to the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) regarding the proposed “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).

TML represents the 345 incorporated municipalities in Tennessee and is a voluntary, cooperative organization established by the cities and towns of the state for mutual assistance and improvement. Our members own and operate public safety facilities and infrastructure and are directly impacted by federal laws and regulations. As co-regulators in implementing and enforcing many of these laws and policies, including CWA programs, we are in the somewhat unique position of viewing water regulation from two perspectives — as enforcers of local water quality objectives and also as regulated dischargers.

Since the definition of “waters of the United States” (WOTUS) applies to all CWA programs beyond CWA Section 404, a revised definition will have far-reaching impacts on a number of state and local responsibilities including: National Pollutant Discharge Elimination System (NPDES) stormwater permits; setting water quality standards, including imposing pollution limits through the Total Maximum Daily Load (TMDL) programs, and ensuring the state water quality certification process.

Specifically, the purpose of the proposed rule is to repeal the Navigable Waters Protection Rule (NWPR) and replace it with the pre-2015 WOTUS regulatory regime. The EPA and USACE stated that they “intend to propose restoring the longstanding Clean Water Act regulations that were in place for decades prior to 2015,” and further “intend to propose a second rule that builds on that regulatory foundation.” TML offers the following for consideration:

### **Provide Regulatory Certainty in the WOTUS definition**

The health, well-being, and safety of our citizens and communities are top priorities for local elected officials. We need certainty in regulatory guidance to allow for the effective and sustainable planning and investment of our finite public resources. Federal, state, and local governments must combine efforts to craft reasonable and practicable rules and regulations, including clear and concise definitions. As partners in protecting America's water resources, it is essential that local governments clearly understand the vast impact that a change to the definition of WOTUS will have on all aspects of the CWA.

The federal agencies should provide states and local governments with a clear understanding of the difference between a federally protected waterway and a state-protected waterway. The agencies should respect the role of states in managing their land and water resources and allow more flexibility in determining how best to manage those resources.

Furthermore, local governments urge our federal partners to create a "one-stop-shop" permitting process for WOTUS to streamline the current multi-agency permitting process. Each project should have a lead agency, either the Army Corps or EPA, depending on the project. The designated lead agency should have the authority on said project to provide guidance and approvals to state and local governments. Furthermore, this approach should be administered uniformly so that all federal entities, including federal power marketing entities such as the Tennessee Valley Authority are acting in one accord. The "one-stop-shop" sole point of authority for the user is critical to reducing unnecessary administrative burden and interagency conflict, as well as promoting the conservation of desired areas.

Again, the lead agency should be responsible for coordinating all reviews, analysis, opinions, statements, permits, or other federal approvals required under federal law.

### **Economic Impacts**

As Congress is working to pass essential federal funding for infrastructure through the Infrastructure Investments and Jobs Act, expanding the definition of WOTUS to the pre-2015 definition could slow down the implementation of these vital investments. More projects being subject to the permitting process will significantly slow down the construction of these projects and increase costs.

As co-regulators, local governments need to understand their complete responsibilities and additional costs under the rule and the CWA. Water bodies defined as WOTUS are subject to all CWA regulations, including Section 402 National Pollutant Discharge Elimination System (NPDES), total maximum daily load and other water quality standards programs. For this proposed rule and the forthcoming proposed rules on WOTUS, we ask the agencies to conduct a comprehensive analysis of the actual costs and impacts of a WOTUS definition change on all of these programs beyond the Section 404 permit

program. If necessary, EPA should consider revising existing policies on these programs to address any unintended consequences.

Additionally, we fear that navigating the regulatory changes will create an environment in which it will take time to understand the process of fully implementing the changes. Municipal engineers, staff, and consultants will simultaneously learn the changes, even when it is simply reversing to past guidelines and regulations. We are concerned that by the time we fully understand and grasp these changes, the second rulemaking on defining WOTUS will be issued; and we will have to start the 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.

### **Municipal-owned Infrastructure**

The WOTUS definition directly impacts cities and towns as owners and operators of local infrastructure. Municipalities own and operate public safety water conveyances, stormwater municipal separate storm water sewer systems (MS4), and emergency management response and readiness. The definition of WOTUS determines whether or not a city may need to apply for a federal permit to maintain or to build new infrastructure projects. In addition, cities and towns 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.

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 programs will significantly impact cities and towns in Tennessee. Historically, an exemption existed for ditch maintenance; however, the USACE districts have inconsistently applied the exemption across the nation.

In addition, we urge the EPA and USACE to include local government public works general maintenance and repair projects in CWA Section 404 permitting exclusions, especially in emergency circumstances.

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**Closing**

TML appreciates the opportunity to comment on the proposed revision of the regulations defining waters of the U.S. As partners in protecting the nation's water resources, municipalities must clearly understand the significant impact that the WOTUS definition will have on our local communities.

Local governments need regulatory certainty and the appropriate time to implement pre-2015 regulations. Additionally, we are interested in further examining the economic impacts of changing the WOTUS definition and how the agencies will move forward interpreting relevant and related U.S. Supreme Court cases, which have caused confusion and grassroots frustration with the interpretation of Clean Water Act rules.

The definition of WOTUS plays a crucial role in the determination of which waters fall under the federal government's jurisdiction. Any body of water defined as WOTUS requires a permit for dredging, dirt fill, or discharges. Therefore, it is important that federal, state, and local governments work together to craft reasonable and practicable rules and regulations. This can only be accomplished through collaboration with state and local officials at the state level as opposed to rulemaking, or national and regional decision making. There is a pathway forward to achieve the goals of protecting our nation's waters, wetlands, critical habitat areas as well as turning back the rapid advancement of climate change. Regular collaboration and cooperation with state and local governments is that pathway.

We thank you for your consideration of our input. Please feel free to contact our offices if you have any questions.

Sincerely,

A handwritten signature in black ink, reading "Anthony C. Haynes". The signature is fluid and cursive, with a long horizontal stroke at the end.

Anthony Haynes  
Executive Director