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Ken Kirk

July 29, 2011

Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
Submitted via: owdocket@epa.gov

Re: Docket ID EPA-HQ-OW-2011-0409

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the proposed joint agency guidance issued on April 27, 2011 by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE), regarding identification of waters protected by the Clean Water Act (CWA). NACWA represents the interests of nearly 300 public wastewater treatment and stormwater agencies nationwide. The proposed guidance has national implications for wastewater and stormwater collection or treatment systems, as well as for public health and water quality. Overall, NACWA believes the draft guidance addresses several key concerns of NACWA's members but would benefit from some additional clarity.

NACWA is broadly supportive of efforts to strengthen the water quality protection afforded by the CWA when done as part of a holistic watershed approach, and believes the proposed guidance takes some important steps in this direction. However, the issue of CWA jurisdiction deserves the full attention of the rulemaking process and the formal notice and comment procedures that go with it. Should EPA proceed to finalize the draft guidance, it is critical that, like the draft, the final document preserve the existing regulatory exemption for waste treatment systems, and include explicit exemptions for municipal stormwater collection systems and groundwater from CWA coverage.

The scope of waters protected under the CWA has been the subject of much litigation and confusion. The uncertainty surrounding CWA jurisdiction preceding and following the 2006 Supreme Court decision in *Rapanos v. United States* has broad implications and the potential to affect NACWA members. Most NACWA members already hold permits under the National Pollutant Discharge Elimination System (NPDES), but additional predictability and clarity regarding CWA programs is needed for activities such as expansion or alteration of facilities. NACWA thus appreciates EPA and USACE's continued efforts at clarifying which waters are, may be, and are not "waters of the United States" within the scope of the CWA.

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Preservation and Clarification of Waste Treatment Exemption Critical

Alongside the proposed changes and clarifications, NACWA urges the Agencies to ensure they preserve the critical, existing exemptions for waste treatment systems and groundwater. Title 40, Section 122.2 of the U.S Code of Federal Regulations explicitly excludes manmade "waste treatment systems" from the definition of "waters of the United States." Consistent CWA application also dictates the preservation of the traditional groundwater exemption. NACWA was pleased that the 2011 draft guidance included the waste treatment exemption, and requests that the final guidance explicitly maintain this exemption and more explicitly include an exemption for groundwater.

The waste treatment exemption is critical in enabling the proper functioning of publicly owned treatment works (POTWs). Manmade holding pools and lagoons are often a key component of the wastewater treatment process. NACWA's longstanding position supports a broad interpretation of CWA jurisdiction that maintains a clear articulation of the waste treatment exemption and ensures that groundwater appropriately remains outside the CWA's scope.

NACWA also requests that EPA include a more explicit statement in any final guidance or rule that municipal separate storm sewer systems (MS4s) are included as part of the waste treatment exemption and that the guidance is *not* intended to make MS4 collection systems jurisdictional under the CWA above the existing point of permitted discharge. This has been a point of significant concern for the municipal community, and clarifying in the final guidance that MS4 collection systems are not jurisdictional is critical.

Clarity Needed on Applicability to Ditches, Water Reuse Projects

NACWA has concerns with the draft guidance's potential impacts on specific projects in the arid west. Section 4 of the draft guidance addresses tributaries including roadside and agricultural ditches. The current regulations do not define "ditches" as a category of jurisdictional water and the 2008 Rapanos Guidelines generally excluded them. However, under the draft guidance, ditches have a series of associated requirements that indicate many ditches will be deemed jurisdictional. This is a concern as most pipeline construction occurs in easements along roadways in ditches. Making ditches jurisdictional would create additional permitting requirements and could add significant costs, unnecessary administrative requirements and delays to clean water utility projects.

Also, the draft guidance does not address the issue of recycled water projects, in particular those using wetlands to treat millions of gallons of water a day. The regulatory exemption of these recycled water projects is unclear. Under the draft guidance these treatment wetlands could be declared waters of the U.S., potentially shutting down innovative recycled water projects.

The Association appreciates the opportunity to provide these comments and looks forward to continued engagement with you during the forthcoming rulemaking process. If you would like to discuss any of these comments further, please do not hesitate to contact Nathan Gardner-Andrews, NACWA's General Counsel, at ngardner-andrews@nacwa.org or 202/833-3692.

Sincerely,



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