February 7, 2022

U.S. Environmental Protection Agency
Water Docket, Environmental Protection Agency, Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460
Attention: Docket ID No. EPA–HQ–OW–2021–0602

Subject: Comments of the Water Environment Federation on the Proposed Rule "Revised Definition of 'Waters of the United States'"

Submitted via Federal eRulemaking Portal & E-mail to OW-docket@epa.gov

The Water Environment Federation (WEF) thanks the Department of the Army (DoA), Corps of Engineers (CoE), Department of Defense (DoD) and the Environmental Protection Agency (EPA) (hereinafter "the Agencies") for the opportunity to comment on the proposed rule "Revised Definition of the 'waters of the United States'" (hereafter "proposed rule") under the federal Clean Water Act (CWA). WEF supports science-based protection of our nation's wetlands, rivers and lakes and the continued improvement of their quality and welcomes a continued dialogue on some key areas of this proposed rule. WEF's comments reflect input from members associations and its members across the United States. In addition, WEF appreciates the stakeholders' outreach EPA conducted regarding this proposed rule. WEF supports EPA's intent in protecting our nations' waters and provides input in these comments on how the proposed rule may be clarified.

WEF is a not-for-profit association that has provided technical education and training for the world's water quality professionals since 1928. The Federation is an organization of 30,000 individual members and 75 affiliated Member Associations who support its mission to preserve and enhance the global water environment. WEF is supportive of regulations that are science based, achievable, and protective of human health and the environment.

WEF appreciates that the proposed rule explicitly specifies that the agencies propose no changes to the longstanding regulations that exclude waste treatment systems designed to meet the requirements of the CWA and prior converted cropland from the definition of ''waters of the United States.'' (86 FR 69378 (December 7, 2021). These regulations provide an essential component of the existing regulatory framework that ensures effective agency operations. The retention of the waste treatment exemption is one of the highest priorities for WEF and its Member Associations. However, WEF is concerned that the lack of an exclusion for Stormwater Control Measures, Stormwater Control Features, or other systems that capture storm water for the purpose of flood risk mitigation, water supply, or water quality improvement may pose challenges to the regulated community.

WEF delineates below certain areas of primary interest to its members and suggests clarifications which would help in clarifying them and otherwise help in the implementation of a final rule.

The Waste Treatment Exemption Should Specifically Include Water Recycling Facilities and Effluent Storage Ponds

In order to address the historic drought conditions currently plaguing the western states, water and wastewater utilities must rely on a full suite of flexible options to provide potable and recycled water supplies for a variety of ongoing uses. Thus, WEF opposes any direct or indirect regulatory impacts on water recycling, water storage, and other mechanisms that play a part in recycled water infrastructure and processes as a result of the proposed rule.

As noted above, we appreciate the explicit acknowledgement and codification of the waste treatment exemption in the proposed rule. However, we believe it is important that the proposed rule expressly states that the waste treatment exemption extends to recycled water facilities. States' water recycling projects often depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. If these features are considered waters of the U.S. and are excluded from the waste treatment exemption, they could theoretically no longer be used as an integral component of the waste treatment systems, forcing the closure of important recycled water projects critical to states's water supply. Moreover, a lack of clarity on this issue may stall or halt the development of recycled water projects at a time when recycling is needed the most to address climate resiliency priorities.

Because recycled water demand is variable with time of day and season, recycled water agencies maintain reservoirs or storage basins/ponds to store recycled water during periods of low usage in anticipation of peak demands. These features are an essential component of the recycled water process and integral to an agency's ability to continue reliably producing and supplying recycled water in many instances. The proposed rule should affirm that such reservoirs along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of "complete waste treatment system" found in existing federal regulations[1]. As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and treatment systems should include any facilities, including storage ponds and basins, related not only to traditional treatment facilities and processes, but also to the production of recycled water.

In the alternative, recycled water facilities and features (including storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling) should be expressly exempted as part of the specifically identified features that are not considered waters of the United States. within the proposed rule. In this case, recycled water facilities would be treated similar to artificial lakes, ponds, swimming pools, ornamental waters, and groundwater, which are specifically identified and expressly exempted. In either case, whether recycled water facilities are considered part of the waste treatment exemption or have their own specifically identified exemption, it is essential that the proposed rule not interfere with recycled water production and treatment by making those features jurisdictional.

The failure to include an explicit statement in the final rule would leave open the question of whether these features are considered "waters of the United States." Such a situation could lead to regulatory

[1] See 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, *including recycling or reuse,* of the treated wastewater and residues which result from the treatment process." (Emphasis added); *see also* 40 C.F.R. §35.2005(b)(49) [definition of "treatment works" includes "storage of treated wastewater in land treatment systems before land application" among other things].

disincentives to produce recycled water in western states, including California, compounding a water scarcity situation that is already dire. Pending and adopted federal and state legislation to address the impacts of our historic drought contain a number of approaches to encourage recycled water projects. Transforming components of the recycled water process (including integral systems such as storage ponds) into jurisdictional waters would undercut efforts to address the drought.

NPDES Implications of the Proposed "Waters of the United States" Rule

WEF and its members are concerned with the lack of clarity in the apparent intent for direct EPA NPDES permitting authority for non-point pollution sources. Since the definitions for "Waters of the United States" are being added to 40 CFR, Part 122 under the NPDES program, would the Proposed Rule conceivably provide EPA with direct NPDES permitting authority over certain qualifying non-point pollution sources for the first time? It is suggested that EPA clearly state its intent on this issue to avoid unnecessary confusion over the basis for program control, especially under the more difficult case-specific instances involving "Other Waters" and ephemeral areas.

The proposed definition of WOTUS includes intermittent and ephemeral streams as well as most wetlands. The CWA requires the states, territories, and tribes to adopt water quality standards (WQS). However, few if any WQS include intermittent and ephemeral streams and wetlands. WQS adopted for lakes, perennial streams, and coastal waters are difficult to apply to intermittent and ephemeral streams and wetlands. So, if the WOTUS definition is adopted, EPA must work with the states, tribes and territories to modify their WQS so they properly apply to intermittent and ephemeral streams and wetlands.

Spreading Grounds and Related Features of the Wastewater Treatment Process Should Be Expressly Exempted Under the Final Rule

As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the United States, and WEF wants to ensure that as part of these proposed amendments spreading grounds/basins, treatment ponds/lagoons, and constructed treatment wetlands used as part of the wastewater process are subject to the same exemption. Since these facilities are clearly part of the treatment process, providing additional treatment, residence and settling prior to discharge, these facilities should be expressly recognized in the rule as falling under the Waste Treatment Exception.

In addition, many WEF members utilize spreading grounds or basins in order to facilitate groundwater replenishment; a vital part of water management throughout certain states. Others utilize artificially created effluent storage ponds as part of their treatment process. Many agencies maintain reservoirs or storage basins/ponds to store recycled water. These artificially created features and spreading grounds have not previously been defined or regulated as "waters of the United States," and should remain separate. For this reason, the proposed rule should expressly include treatment ponds/lagoons, spreading grounds/basins, and constructed treatment wetlands within the scope of the Waste Treatment Exception, along with effluent storage reservoirs and recycled water storage facilities discussed previously.

"Tributary" is Defined Too Broadly and Will Likely be Construed to Include Certain Conveyances and Ditches

The proposed rule seeks to define what constitutes a "tributary" under the Clean Water Act. The proposed rule may drastically expand the number of waters potentially subject to federal jurisdiction.

Certain ditches under the agencies' longstanding approach to determining which waters are ''waters of the United States,'' are generally not considered ''waters of the United States.'' In some situations, ditches with wetland characteristics have been considered jurisdictional as adjacent wetlands. Where a ditch is jurisdictional, the agencies have historically taken the position that the ditch can be both a ''water of the United States'' and a point source and are proposing to reinstate this position.

Specifically, they had defined ''tributary'' as a water "physically characterized by the presence of a bed and banks and ordinary high water mark…which contributes flow, either directly or through another water…" to a water of the U.S. Even wetlands, lakes, and ponds without an ordinary high water mark (OHWM) or bed and banks would be considered tributaries if they contribute flow, either directly or through another water to a water of the U.S. Perhaps most significantly, under the proposed rule, a tributary, including wetlands, can be a natural, man- altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not otherwise explicitly excluded.

This overly broad definition of tributary could potentially increase the number of man- made conveyances, ditches and conveyance facilities, including those utilized by wastewater entities, under federal jurisdiction, and the lack of certainty surrounding the rule's definition of a tributary could lead to regulation of previously unregulated waters. This broad classification of "tributaries" would be considered jurisdictional regardless of perennial, intermittent or ephemeral flow. Even dry washes could be considered jurisdictional under the proposed rule. This is significant for a variety of reasons.

One example of the potential impacts of defining what constitutes a "tributary" too broadly is the potential discharge from sanitary sewer systems to dry creeks/sloughs/washes when no pollutants ever actually reach water. It is entirely unclear whether this constitutes a discharge of pollutants to a water of the U.S. Under the broad definition of tributary in the proposed rule, it is possible that spills to dry creeks, sloughs, or washes would be considered a "discharge" even if there are no real or potential impacts to surface waters of any kind. Similarly, there are circumstances where sewer spills occur in a street that drains to a roadside ditch or local creek bed that has no flow and is unconnected to a water of the U.S. The responsible party may fully remediate the spill and address all real and potential water quality impacts before the spill ever reaches a water source. It is difficult to understand how this kind of circumstance could be envisioned as a discharge to "waters of the United States" when there is no actual water in a dry creek or ditch nor an adverse impact to the environment.

The proposed rule provides exceptions for ditches that are generally created in uplands and drain uplands, but it does not define upland. It gives specific exceptions but does not speak to the limits of those exceptions in terms of ditch length. For instance, roadside ditches often have characteristics of both perennial tributaries and of dry upland wet weather ditches along their sometimes very long lengths. The proposed rule promotes protection of water quality and addresses ditches, but it does not mention green infrastructure. Ditches that treat runoff are elements of green infrastructure. WEF's position is that by not being clear on this issue, it may be inadvertently impacting the future adoption of green infrastructure activities as they relate to ditches.

Finally, there is the issue of the cost of bringing these ditches into compliance. In its economic analysis, EPA calculated a net positive impact nationwide of around $200 million, but that analysis used a very narrow assumption of "new" waters included in the rule. In contrast, for example, studies[2] by the Florida Stormwater Association (FSA) show that the cost of bringing ditches up to current water quality standards typically runs about $1 million per mile. More comprehensive studies found that the rule would cost between $200 million and more than $1 billion per county in areas examined.[3]

Stormwater and Wet Weather Related Issues

Wet Weather Frequency, Duration, and Water Quality-Based Risk Factors. EPA has long struggled with evaluating water quality impacts and risk factors associated with short-term wet weather conditions, and to date this regulatory area has not been adequately resolved. However, the Proposed Rule cites various nexus situations that would very much depend on such short-term wet weather conditions. Therefore, WEF recommends that EPA stipulate the basic technical and administrative approaches that are intended to be used at the source in order to define frequency, duration, and water quality-based risk factors that are directly associated with wet weather events that reportedly transport pollutants of concern to downstream designated beneficial use areas. In other words, how does EPA intend to establish applicable, defensible water quality standards and monitoring requirements at the claimed pollutant sources, such as ephemeral stream areas under short-term wet weather conveyance conditions?

Due to past litigation, the inherent problem with EPA guidance and many of the State water quality standards to date is that there has been no ability to establish upper bounds in stormwater flow and resultant stream flows for the evaluation of pollutants of concern within any water quality-based NPDES permitting activities. Quite the opposite – NPDES wastewater point-source discharge permits are primarily based on applying water quality standards under extreme low flow dry weather conditions for acute and chronic toxicity periods of exposure; that is, during times where transport of pollutants of concern from ephemeral source areas would not logically occur. Therefore, if the ultimate intent of the Proposed Rule under the various "Waters of the United States" classifications is to include and manage short-term stormwater flow condition events, then EPA must also logically address the corresponding frequency, duration, and risk factors under such short-term conditions to be applied to pollutant source ephemeral areas and appropriate "Other Waters" areas under the Proposed Rule. It is not sufficient to simply cite cases of technical evidence for "connectivity" involving various physical, chemical, and biological factors without mentioning the underlying causative statistical stormwater flow boundary conditions for each of those cases.

As a related matter, such "connectivity" link to water quality standards will be very important in extending the Proposed Rule to the existing TMDL Program where downstream water quality shows impairment. In addition, the Proposed Rule mentions that certain means of stormwater conveyance may potentially be considered point sources"; whereas such point sources may have been previously considered to represent non-point sources. This would imply that certain previous TMDL determinations, involving both point source waste load allocations and non-point source load allocations, may have to be re-examined and re-issued as a result of the Proposed Rule. Therefore, it is suggested that "connectivity" factors need to separately distinguish short-term wet weather impacts from long-term impacts (eg. bio-accumulative impacts) and must describe how established water quality standards are to be addressed in a meaningful, defensible manner at

[2] "*Proposed Regulations Waters of the United States: Assessment of Impacts,*" July 25, 2014.

[3] *"Estimated Fiscal Impacts on Selected Municipal Separate Storm Sewer System Permittees"*, Study by the Florida H2O Coalition, August 29, 2014.

the pollutant source.

Finally, on a related "connectivity" issue - WEF would like to note that, as written, and in conjunction with the Connectivity Report, EPA and the USCOE appear to advocate deep consideration be given to biological/chemical/physical (BCP) connections. WEF members have experienced occasions where the focus seemed to be only on the hydrologic connectivity. For instance, during wet weather, gullies, ditches, and ephemeral streams will deposit large woody debris (LWD) and food sources for the downstream aquatic populations life cycles. This may make those waters jurisdictional through the unmentioned BCP connections. WEF's concern is that a disproportional focus may be given by regulators to BCP with a resulting disproportionate finding of jurisdiction. WEF asks that EPA clarifies when and how these BCPs will be applied.

Impacts on MS4 Communities: The proposed rule will impact MS4 communities as it relates to the issue of waste treatment system exclusions in the context of stormwater management. Currently, exclusions listed in 40 CFR 122.3 specifically target discharges associated with pest control, nonpoint sources and agricultural activities, sewage and industrial wastes, water transfer activities, and even sewage discharged from vessels.

Not included here are stormwater management and treatment systems. The proposed rule plainly states that it "does not change regulatory exclusions for waste treatment systems." However, EPA and the Corps do not intend for traditional stormwater practices, such as detention ponds, or green infrastructure practices, such as bioretention facilities and permeable pavements, to be considered jurisdictional Waters of the United States, but the lack of language explicitly outlining the exclusion of these systems leaves the rule open for interpretation as to whether stormwater controls are considered jurisdictional. WEF asks that EPA specifically exempts these so to avoid their inclusion.

To clarify that waters associated with stormwater infrastructure are not considered Waters of the United States, WEF suggests that specific terms, such as "stormwater control measures" or "best management practices," be integrated into the regulations and clearly exempted.

After review of the revised definitions and the analysis and reasoning for the revised definitions, the lack of an exclusion for Stormwater Control Measures, Stormwater Control Features, or other systems that capture storm water for the purpose of flood risk mitigation, water supply, or water quality improvement may pose challenges to the regulated community. To simplify the discussions, WEF recommends that the Agencies define Stormwater Control Measures, Stormwater Control Features, etc. as man-made features that collect storm water prior to the storm water flowing into waters of the U.S. as defined under other sections of the definition. WEF recommend that they be abbreviated to "SCFs).

SCFs range from filter socks to concrete retention systems to constructed wetlands and include a broad set of alternatives. Many SCFs have free water surfaces perennially and, because of that, support habitat. Yet, they are constructed for the purpose of collecting storm water, either to detain it for flood risk reduction, treat it through natural processes for water quality improvement, store the water for future use, or some combination of those. Most of these SCFs are constructed outside jurisdictional waters in areas where water had not been found to have pooled, channeled, or been naturally retained historically.

While the proposed waters of the U.S. definition provides an exclusion for waste treatment systems, storm water is not defined as a waste. While storm water may, at times, pick up and carry waste that has been deposited on land across which the storm water flows, USEPA's contained in policy (63 FR November 30 1998) is applied to listed hazardous waste only and not waste in general. Under rare circumstances would

storm water wash over listed hazardous waste or would listed hazardous waste discharge into an SCF. If such were to occur, the collected water would certainly be a hazardous waste subject to all hazardous waste management regulations. Thus, storm water is not a waste and SCFs do not treat waste. Given that stormwater is not a waste, the regulated community may find themselves having SCFs that would not be considered a waste treatment system and would not fall under the waste treatment system exclusion. Based on the type of SCF, some may then be considered waters of the U.S.

The SCF would then be subject to water quality criteria for the water inside the SCF, which by definition, because it is treating storm water, would be expected to be above some water quality criteria at some locations in the system. WEF proposes a scenario where a member of the regulated community having discharge limits on the water that enters an SCF constructed to treat storm water, where they would need to construct a stormwater collection and treatment system for the storm water that they are sending to an existing stormwater collection and treatment system because that existing system is a constructed wetland, pond, retention basin, bioretention system, etc.

Economically this would chill communities' investments in SCFs that utilize natural processes, such as constructed wetlands or other green stormwater infrastructure due to their sudden unaffordability. It is important to note that SCFs that utilize natural processes provide multiple benefits to communities beyond improved water quality in the waters of the U.S. to which they ultimately discharge. They provide habitat, outdoor recreation, improved air quality, carbon sequestration, and cooling of urban heat islands, to name a few. When sited in historically disadvantaged communities, they provide improved quality of life that revitalizes communities, and supports a virtuous cycle of economic improvement.

Here is one example: The South Los Angeles Wetlands Park in South Central Los Angeles. Constructed in 2014, this park converted a subsurface storm drain and 9 acres of parking lot into a wetland pond, park, and trails. (https://la.curbed.com/2018/1/26/16930354/lacma-south-los-angeles-expansion-wetlands) The wetlands treat stormwater, the park provides outdoor recreation, and the Los Angeles County Museum of Art struck a deal with the City to open an extension museum at the Park. South Central Los Angeles has been historically underserved and disadvantaged and this SCF has been helping to change that. Should this become waters of the U.S., the City will likely need to capture and treat the water before it enters the constructed wetlands, which will prove very costly and prevent the City from constructing other green stormwater infrastructure they have planned to meet their watershed management planning goals of eliminating impairments in the waters of the U.S. to which their Municipal Separate Storm Sewer System (MS4) flows. The regulated community under their MS4 National Pollutant Discharge Elimination System (NPDES) permits is being encouraged to invest in green stormwater infrastructure SCFs to improve the water quality in downstream waters of the U.S., and the approach proposed here by the Agencies would cause a chilling effect in these investments.

This would help to codify that infrastructure used to treat, manage, infiltrate, or retain urban stormwater runoff is covered under the waste system treatment exclusions. The rule also should further define the systems to which the exemption applies and could include man-made structures and devices as well as treatment measures used to improve water quality, reduce stormwater volume, control flow rate and flooding, convey stormwater, or any combination of these purposes.

Fully-constructed Stormwater Control Measures. The term fully-constructed stormwater control measures (SCMs) means man-made structures, devices, measures, or Best Management Practices (BMPs) that are constructed by the purpose of water quality treatment, stormwater runoff volume reduction, stormwater runoff rate control, flood control, or any combination of these purposes. Fully-constructed SCMs include constructed

stormwater ponds, constructed stormwater wetlands, rain gardens, bioswales, green roofs, infiltration devices and structures, Low Impact Development structures and other stormwater control and conveyance structures, devices, and features. SCMs that have been built at the approximate location of similar types of natural waters (such as stormwater ponds constructed at the location of natural lakes or wetlands, ditches constructed at the location of natural streams or creeks, or stormwater channels constructed at the location of natural rivers) shall not be considered to be fully-constructed SCMs. These sites require maintenance to maintain performance. Natural lakes, ponds, and wetlands with stormwater conveyance pipes discharging to them and constructed outlets shall not be considered to be fully-constructed SCMs.

The 2015 Clean Water Rule included a provision excluding stormwater control features (SCFs) from consideration as Waters of the United States:

(2) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

The Navigable Waters Protection Rule (NWPR) included very similar text:

(b) Non-jurisdictional waters. The following are not "waters of the United States":
(10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;"

The term “Stormwater Control Measures” is used in the 2009 National Research Council report “Urban Stormwater Management in the U.S.” and would present a simple exclusion language to a now unclear provision. WEF finds that the use of the term “fully-constructed SCMs” is narrow enough to allow a reasonable application of what otherwise could be a broad term. We also intend for this to be narrow and by listing examples, achieve such narrow objective.

WEF offers an example of why the language above is needed: An upscale condominium was constructed in an upland with heavy soils. A requirement for a restricted flow rate was imposed on the stormwater discharge from the development. The engineer designed a typical rectangular stormwater wet-detention basin with a controlled outlet to meet the requirement. The developer rejected the design as “visually unacceptable”. The subsequent design had a stormwater wet-detention basin with the same outlet control structure, but the basin had a curvilinear shape and benched sideslopes to encourage emergent vegetation and wildlife. The result was a “very attractive” amenity. After construction the condominium association took over control of development, and added a fishing pier, a paddleboat livery, and a swimming beach. Does the stormwater detention basin fall under the exemption, or is it a WOTUS?

The Waste Treatment Exemption Should Specifically Include Land Applications and Landfill Sites for Biosolids

The wastewater treatment process generates biosolids which is commonly applied to lands such as farmlands, drought stricken areas, fire damaged areas, green belts, recreational areas, and landfills. Under the broad criteria of this proposed rule, land application sites for biosolids can be subject to regulation. Such sites are already subject to regulation under 40 CFR 503, which addresses the standards for the beneficial use or disposal of sewage sludge. To mitigate conflicting regulation, the existing rule 40 CFR 503 should govern and therefore the waste treatment exemption should be broadened to include lands subject to 40 CFR 503 regulation.

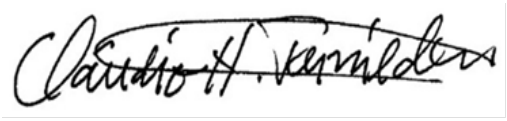
Conclusion

WEF requests that the explicit exclusions in this rule be affirmed and extended to other highly regulated activities such as MS4s, along with "green infrastructure" practices; water reuse, recycling, and reclamation operations; and commercial, industrial and manufacturing water treatment systems. In the case of MS4s, any new proposal for exclusion and solicitation of public comment should extend to their conveyances that channel and discharge stormwater runoff as well as "green infrastructure" approaches which attempt to infiltrate, reuse, retain and evaporate stormwater flows.

WEF, again thanks EPA, the DoD, the DoA and the CoE for the opportunity to comment in this important rulemaking and invites the Agencies to maintain a continuous dialogues on the issues identified here and to explore together opportunities to address them.

Again, thank you for the opportunity to comment on this rulemaking and should you have any questions or comments, please contact me at (703) 684-2416, or at cternieden@wef.org.

Sincerely,



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