February 7, 2022

Ms. Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
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-2021-0602 Regarding the Revised Definition of "Waters of the United States" Submitted via Email to https://www.regulations.gov/ ; CWAwotus@epa.gov ; and usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil.

Dear Ms. Christensen and Ms. Jensen:

The National Association of Towns and Townships (NATaT), on behalf of the more than 10,000 communities we represent, appreciates the opportunity to submit our comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), also referred to as "the agencies", on the proposed first rulemaking to restore the longstanding pre-2015 regulations in place prior to the *Navigable Waters Protection Rule*, amended to be consistent with relevant Supreme Court decisions. These comments also reflect our general views and concerns on revising the definition of "waters of the United States" (WOTUS) under the federal Clean Water Act (CWA). NATaT representatives participated in the Federalism outreach sessions in August 2021 in Washington DC and have concerns with the proposed action to develop a revised definition of WOTUS.

NATaT represents a large group of towns and townships that are regularly impacted by CWA regulation of business and residential development projects, wastewater treatment facilities, and other important activities that maintain the economic health and provide for future growth of our small rural communities. As such, the scope of jurisdiction under the CWA is of fundamental importance not only to our membership, but also to the Nation.

Proposed Federal Actions

On December 7, 2021, the agencies announced a proposed rulemaking process to interpret "waters of the United States" to mean the waters defined by the longstanding 1986 regulations, with amendments to certain parts of those rules to reflect the agencies' interpretation of the statutory limits on the scope of the "waters of the United States" and informed by Supreme Court case law. The agencies also anticipate developing a second rulemaking informed by states, tribes, and stakeholder feedback that further refines and builds upon that regulatory foundation. A second E.O. 13132 (Federalism) stakeholder consultation will be initiated as the agencies move closer to working on that second rule. The agencies most recently revised these regulations in 2020 with the *Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22,250 (April 21, 2020), which amended the regulations found at 33 CFR Part 328 and 40 CFR Part 120.

On January 20, 2021, President Biden signed Executive Order 13990; Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (published January 25, 2021, signed January 20, 2021). Executive Order 13990 directed federal agencies to review rules including the *Navigable Waters Protection Rule*, issued during the prior four years that are, or may be, inconsistent with the policy stated in the order. Consistent with this Executive Order, the agencies have completed their review of the *Navigable Waters Protection Rule* and have proposed a rulemaking to revise the definition of "waters of the United States," as referenced above.

Overview of NATaT Concerns

NATaT over the past two decades has engaged in administrative efforts aimed at "clarifying" the application and interpretation of the CWA. These efforts included guidance developed by the George W. Bush Administration following the U.S. Supreme Court's *SWANCC* and *Rapanos-Carabell* decisions, and the development of the Obama Administration's *Clean Water Rule* (2015 Rule). During this time, our organization consistently advocated for clearly written regulations that state what categories meet the definition of WOTUS subject to CWA Section 404 jurisdiction and, just as importantly, what does not.

Our initial concerns are with the proposed foundational rule restoring the pre-2015 regulations and guidance and how the agencies plan to amend those regulations to reflect the relevant Supreme Court decisions, effectively codifying the Supreme Court's holding in *Rapanos*. For example, the proposed regulations incorporate the "significant nexus" and "relatively permanent" tests to help determine the CWA's jurisdiction and may further expand CWA's jurisdiction over wetlands. The EPA and Corps are also currently seeking comments on numerous contentious topics within the proposed regulations, such as whether the final rule should define the terms "intermittently," "ephemerally," or "periodically" as used in the "relatively permanent" test, as well as the phrase "significantly affect" as used in the "Significant Nexus" test.

NATaT recommends that the agencies limit the scope of the proposed rulemaking to only restoring pre-2015 regulations and guidance and not modify these longstanding, familiar regulations and guidance to reflect the agencies' further interpretation of the Supreme Court decisions in this rulemaking. NATaT understands that the agencies plan yet another rulemaking soon to promulgate a more "durable definition" of WOTUS. That rulemaking is where the agencies should interpret the Supreme Court's relevant decisions. NATaT believe the agencies should at that time use the entire docket of case law from Supreme Court cases such as *Rapanos*, *SWANCC*, and *Riverside Bayview* in developing their "durable definition" of WOTUS under the CWA.

Regardless of when the agencies apply their interpretation of the relevant Supreme Court decisions in a rulemaking on defining WOTUS, NATaT continues to be concerned about any possible expansion of the CWA that could bring isolated wetlands or other waters not connected to navigable waters under federal jurisdiction – states should continue to be in the lead in protecting these state waters. NATaT believes that expanded federal CWA jurisdiction would negatively impact the functions of towns and townships in many ways.

While we appreciate that the proposed rule's preamble recognizes that most ditches are not jurisdictional WOTUS, we recommend the proposed rule that, beyond the exemptions provided by the CWA, the construction, operation, maintenance, repair, and rehabilitation of man-made ditches and canals, roadside ditches, and other similar features is not subject to CWA as jurisdictional "waters of the United States". NATaT recommends that wastewater and stormwater treatment infrastructure, such as man-made ponds, constructed wetlands, water reuse and recycling facilities, and groundwater recharge infrastructure should all be excluded from a WOTUS definition. If not excluded, overregulation of these types of projects under the CWA would discourage their use.

NATaT also recommends that the agencies' recent guidance memo, *Joint Memorandum to the Field Between the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act* (July 24, 2020)[1], is frequently used to perform such work on implementing CWA Section 404(f) exemptions for construction and maintenance of ditches and maintenance of drains and should remain in place regardless of any future rule defining WOTUS. The exemptions under Section 404(f) in the CWA provide significant assurances that rural agriculture, an important open space and economic component of our small town and township members, can continue to function without the need for a CWA permit to work on agricultural ditches and drains important to their operations. Section 404(f) specifically exempts from CWA permitting requirements discharges of dredged or fill material into "waters of the U.S." associated with the construction and maintenance of irrigation ditches and maintenance of

[1] EPA, *Ditch Exemptions Memo* (July 24, 2020), click here.

drainage ditches, and as such, the July 2020 guidance memo is critical to ensuring these activities remain exempt under the CWA.

Conclusion

In conclusion, NATaT members believe the agencies should simply revert to the pre-2015 regulations and guidance that has been longstanding and is familiar to the regulated community. NATaT believes the proposed rule should not include additional interpretations of the Supreme Court's decisions in *SWANCC*, *Rapanos*, and other relevant CWA cases in administering the pre-2015 regulations and guidance. NATaT also recommends that the current guidance on implementing the CWA 404(f) exemptions should remain in place. Finally, NATaT recommends the agencies conclude in any future rulemaking providing a more "durable definition" of WOTUS that man-made canals, drains, roadside ditches, wastewater and stormwater treatment, water reuse, groundwater recharge, and other similar infrastructure features be not categorized as WOTUS under the CWA.

We believe we represent our membership of 10,000 towns and townships across the country by saying that we stand ready to work with the EPA, the Corps, and our local, regional, and state governments in protecting water quality on a common sense, practical and collaborative basis for our future and the future of our nation's water resources.

Thank you for this opportunity to comment.

Sincerely,

NATaT President