NAIOP
COMMERCIAL REAL ESTATE DEVELOPMENT ASSOCIATION

April 5, 2019

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Emailed to OW-docket@epa.gov
Re: EPA-HQ-OW-2018-0149

Attention: Docket ID No. EPA-HQ-OW-2018-0149

Re: Definition of "Waters of the United States" under the Clean Water Act

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners, investors and related professionals in office, industrial, mixed-use and retail real estate, with 20,000 members and 48 chapters throughout the United States. On behalf of our membership, thank you for the opportunity to provide comments and recommendations on the Proposed Rule for Waters of the United States (WOTUS).

NAIOP appreciates the willingness of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) to solicit input from the regulated community to ensure that the Proposed Rule is properly vetted. The comments and recommendations presented here are aimed at providing further clarity and consistency to affected landowners, a stated goal of the EPA and Corps.

We agree that current regulations have proven subjective in many parts of the country, resulting in inconsistent determinations of WOTUS boundaries. However, we are concerned that certain aspects of the Proposed Rule do not fully achieve the EPA's and Corps's (Agencies) stated intent of clarifying the existing regulatory language. Further confusion would exacerbate the current dynamic, and lead to project approval delays, for example, among other negative consequences. The Proposed Rule also imposes regulation on certain waterbodies for which protection is not appropriate, and for a small subset of waters, removes regulation where protection is deserved.

This letter addresses the following four (4) overarching concepts as they pertain to the Proposed Rule:

1) The current process for determining which streams are regulated is far from predictable. Too often, consultants, attorneys, and other third-party professionals are needed to make such determinations, a costly and time-consuming endeavor. EPA itself has stated that its "…overarching principle in drafting this new proposal for water in the U.S. was that any landowner could stand on his or her property and

figure out for themselves based on the definition what is and is not federal waterway without having to hire an outside consultant or attorney"[1]. The Proposed Rule takes important steps towards achieving greater certainty; however, we contend that additional steps are necessary in order to achieve the desired results.

2) Too many ditches would still subject to federal regulation under the Proposed Rule.

3) Too many stormwater facilities and wastewater systems that protect our waterways would still be regulated under the Proposed Rule, which would make regular and necessary maintenance and improvement activities costly and time consuming.

4) Certain wetlands – those which reduce flooding and improve water quality, and therefore deserve protection – are proposed to not be regulated under the Proposed Rule.

We believe these issues are easily addressed, and that doing so will enable the new WOTUS rule to survive litigation, protect our waters, reduce costs and uncertainty, and generate economic growth.

It is vital that the EPA and Corps understand that the definition of WOTUS is ultimately a policy decision that incorporates economic realities in a scientific and legal framework. Determinations of WOTUS based on this definition must be, to the greatest extent possible, practicable and understandable.

We submit that a successful definition of WOTUS should reflect the following theme:

"Healthy federal, state and local economies and clean waters of the U.S. are integrally related; balanced economic development and protection of our waterways are not mutually exclusive."[2]

A. Overview

1. Preamble:

As evidenced by the following statements from a December 11, 2018, press release, the stated goals of the Proposed Rule are to achieve greater clarity and simplicity:

"Our proposal would replace the Obama EPA's 2015 definition with one that respects the limits of the Clean Water Act and provides states and landowners the certainty they need to manage their natural resources and grow local economies," said EPA Acting Administrator Andrew Wheeler. **"For the first time, we are clearly defining the difference between federally protected waterways and state protected waterways. Our simpler and clearer definition would help landowners understand whether a project on their property will require a federal permit or not, without spending thousands of dollars on engineering and legal professionals."**

[1] EPA Administrator Andrew Wheeler, quoted in Farm Journal's Ag-Pro. March 18, 2019: https://www.agprofessional.com/article/epas-wheeler-dedicated-clear-concise-wotus-rule

[2] Paraphrased from Article 2.5, Sec. 62.1-44.15:67 of the Chesapeake Bay Preservation Act

"EPA and the Army together propose this new definition that provides a clear and predictable approach to regulating 'waters of the United States.' We focused on developing an implementable definition that balances local and national interests under the Clean Water Act," said R.D. James, Assistant Secretary of the Army of Civil Works. **"I have heard from a wide range of stakeholders on Clean Water Act implementation challenges. This proposed definition provides a common-sense approach to managing our nation's waters."**

We believe that with minimal changes, the goal of providing greater simplicity and clarity in the federal regulatory framework is achievable. The changes proposed in this letter would do so in a manner that would more effectively protect the quality of our nation's waters, while also engendering economic expansion.

2. Problem:

   a. The reduction in the number of wetlands and other WOTUS from federal regulations, as currently proposed is significant, and would lead to more litigation, confusion, and delays for landowners' permits. Such an outcome would hurt our industry and the broader U.S. economy.

   b. Aspects of the Proposed Rule, such as the requirement to determine the precise point at which a stream changes from perennial to intermittent, or from intermittent to ephemeral, add needless complexity. If implemented, these requirements would subject landowners to costly consulting fees, litigation, and project delays.

   c. Determining which lakes, ponds, ditches, stormwater facilities, and wastewater systems are, or are not, regulated under Section 404 adds an additional layer of complexity to the regulatory framework.

3. Solution – Strike a Balance:

   a. Exempt all existing ditches from regulation, unless they convey water from and to a stream that is regulated as WOTUS [modify 32.8.3 (a) (3)].

   b. Exempt all stormwater control features and wastewater recycling structures, regardless of where they were constructed [modify 388.3 (b) (9) and (10)].

   c. Only regulate streams (features that exhibit an Ordinary High Water Mark (OHWM)) if their drainage area (d.a.) exceeds 1 percent of one square mile[3], or 6.4 acres, with an allowance that Corps Districts/Engineers may increase this d.a. to reflect local conditions [modify 328.3 (a) (2), (3) and (4)].

[3] In our opinion, the 1 percent threshold marks a de-minimis point (for example, see Virginia's Flood Protection limits of analysis in 9VAC25- 870-66 C.3.). Drainage areas less than 1 percent of one square mile do not represent a significant nexus to floodplains that must be mapped by FEMA (though we acknowledge that FEMA sometimes maps smaller drainage areas), and thus have a federal nexus:

FEMA POLICY Standards for Flood Risk Analysis and Mapping (FEMA Policy #FP 204-078-1 (Rev 6) Approved November 22, 2016, reestablishes the following standard as policy:

110	4/1/2003	Existing standard. Already implemented.	Project Planning	Program Standard	Flooding sources with contributing drainage area less than 1 square mile and/or with an average flood depth of less than one foot shall not be included in the Flood Risk Project scope of work, unless they have been analyzed on the effective FIRM or a justified need is identified during Discovery.

d. Regulate all wetlands which are isolated, adjacent to, or connected to a stream, as these wetlands improve water quality and reduce flooding, regardless of location. Furthermore, modify the definition of "adjacent" in order to not limit which wetlands are excluded [modify 320.3 (a), (b) and (c) (1)].

The changes proposed above represent a compromise which would strike a balance between the need to both strengthen our economy and protect our waters. These recommendations would also provide the regulated community with certainty and predictability, ensuring landowners are able to determine which waters and wetlands are federally regulated in a timely and cost-efficient manner.

B. Additional Suggestions

Clarifying which waters are regulated by the Federal Government is simply **step one in creating a predictable WOTUS regulatory program**. Additional actions are needed to ensure clarity and consistency, such as:

1) Regulators and consultants need to be trained, tested, and certified in order to validate their knowledge of WOTUS boundaries. The last time a certification program of this type was implemented (for wetlands only), the pass rate for those seeking certification was just 38 percent (FR Vol. 60. No 49, March 14, 1995). Given the myriad changes in the definition of WOTUS since then, the pass rate today would likely be substantially lower.

2) Establish a time limit of 60 days, within which Approved (not preliminary) Jurisdictional Determinations (JD) must be approved. This would ensure landowners have a jurisdictional decision they can rely upon, versus one that the Federal Government can change for any reason.

3) Establish that the Applicant alone, rather than the Agencies, has the right to define the **purpose and need of his/her project**. This would ensure that the property rights of American citizens and landowners are preserved.

4) Establish an In-Lieu Fee (ILF) rate by 8-digit Hydrologic Unit Code (HUC) (i.e. portion of a river watershed) in each Corps District as a guaranteed mitigation option, at a price level that encourages mitigation banking, NGO ILF's and Permittee Responsible Mitigation (PRM). This would ensure that an Applicant has the option to immediately pay a higher fee in exchange for saving time, if other options are not immediately available.

5) Establish an "application checklist" with clear and definable timeframes for each stage of the application process. These would include timeframes for completeness review (15 days), application review (60 days), and comment responses (15 days). If these deadlines go unmet, the project should be deemed approved.

6) Eliminate Clean Water Act Section 404 permits from any requirements imposed by the federal Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA). At the very least, clear and definable timelines for these actions are needed in order to avoid a seemingly endless pursuit of consensus.

C. Comments on Additional Requested Topics:

1. Which streams should be regulated

   a. The Proposed Rule excludes ephemeral streams from regulation; it also asks if intermittent streams should be excluded. Both are problematic:

      i. In much of the country, intermittent streams often exceed the lengths of perennial streams and directly convey water to perennial streams and/or navigable waters. Removing said streams from federal regulation would allow for extreme impacts to the remaining waters.

      ii. There is no accepted national methodology of determining the precise difference between ephemeral, intermittent, and perennial streams. While some exist on a regional or local basis, they are not suitable for use by a typical layperson, nor are they reliable on a consistent basis.

      iii. Members of NAIOP, and others in the real estate community, have faced numerous lawsuits and challenges in jurisdictions that do regulate such features. Some districts, such as the Corps's Norfolk District, will not currently make such stream flow decisions due to said challenges. And in situations in which a determination is not easily made, it can take years of observation until a "normal" year occurs (at best, only 40 percent of years could qualify if only annual precipitation is considered, and not seasonality). In these instances, even the definition of "normal" itself is fraught with technical dispute, leading to even more confusion and costly delays.

   b. The definitions of "ephemeral," "intermittent," and "perennial" flow should be adjusted. These definitions should explicitly state that surface water flowing does not include hyporheic flow between pools or within the stream bed. Surface water flow must be visually above the invert of the stream bed through the entirety of the stream reach being described by a particular flow regime (i.e., ephemeral, intermittent, or perennial). The lack of a clear definition with regards to flow has long been a source of confusion for NAIOP members, causing numerous delays and regulatory compliance challenges.

2. Develop a mapping system which conveys the presence or absence of WOTUS, and which could be relied upon by stakeholders

   a. Issue Approved JDs upon receipt of WOTUS survey data in a specified format to incorporate into a publicly viewable GIS system, a process already being undertaken at the local level. Doing so would also reduce the common problem of Corps staff issuing overlapping or conflicting JDs.

   b. An Approved JD is currently valid for five (5) years from the date of issuance. Extending this lifespan beyond the five-year period would provide landowners with a greater degree of certainty, by minimizing the frequency with which such subjective determinations must be made – particularly on larger projects where development approvals, market conditions, and financing availability often extend projects out for multiple decades.

3. Simplify the process for making in-the-field determinations

   a. Exempt all ditches subject to federal regulation, unless they relocate or channelize a regulated stream.

   b. Exempt all systems that were built to improve water quality and/or reduce peak flow rates of runoff from federal regulation, regardless of whether or not they were built in uplands. These systems are improving water quality, and upgrades to or maintenance of them is beneficial for the environment.

   c. Utilize a drainage area, which can be easily measured by topographic maps in an objective manner (if needed, more precise topographic mapping can be performed). This practice is far superior to using partially subjective visual systems or multivariate scoring systems to determine which streams are regulated, or attempting to make site-specific determinations of ephemeral, intermittent, or perennial flow regimes.

      The practice of using a drainage area to determine the regulatory status of wetlands and streams is well established. For example, since 1982, the Virginia Marine Resource Commission (VMRC), which regulates the subaqueous lands under navigable waters, "…assumes that all perennial streams with a drainage basin of greater than five (5) square miles, or a mean annual flow greater than five (5) cubic feet per second, are navigable-in-fact until evidence is presented proving non-navigability."[4]

      This definition matches the Corps's definition of "Headwaters," per 33CFR § 330.2 (d):

      > **Headwaters** – means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second (cfs). The district engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, district engineers may establish the headwaters as that point on the stream where a flow of 5 cfs is equaled or exceeded 50% of the time.

      For example, for at least three decades, the Norfolk District has used this headwater definition to relate 5 cfs to 5 square miles of drainage area (using the average statewide stream runoff), in order to determine which streams are "headwaters" for regulatory purposes (i.e. those which qualify for certain permits).

      Similarly, there are maps available (https://pubs.er.usgs.gov/publication/wro844274) which can be used to estimate average streamflow and headwater limits for streams in U.S. Army Corps of Engineers, Mobile District, Alabama, and adjacent states.

[4] Subaqueous Guidelines, Virginia Marine Resources Commission: http://www.mrc.virginia.gov/regulations/subaqueous_guidelines.shtm

The current federal definition of WOTUS, enacted in 2015 – and which is currently applicable in 22 states nationwide – represented a significant overreach of federal authority. As such, it has been mired in legal disputes for years, and has caused confusion and costly delays for landowners. NAIOP applauds the Agencies for their efforts to improve upon the 2015 rule, and create a predictable, cost-effective, and efficient regulatory framework.

However, we remain concerned that the proposed regulations, as currently written, will continue to create confusion for the regulated community, specifically with regards to determinations of which waters are considered a WOTUS. This uncertainty will likely lead to further litigation, as well as slower permit processing, project delays, and other negative consequences, in direct conflict with the stated purpose of the Proposed Rule.

In summary, we suggest the following changes to the Proposed Rule:

1) Exempt all existing ditches unless used to move a stream.

2) Exempt all existing stormwater and wastewater facilities.

3) Regulate only significant streams (those with a drainage area greater than 1 percent of the standard one square mile minimum FEMA floodplain), unless a District Engineer finds that local conditions warrant a larger drainage area exclusion.

4) Regulate all areas exhibiting wetland characteristics, to protect water quality and reduce flooding.

The Agencies have a unique opportunity to craft a WOTUS rule that withstands the test of time, kick starts delayed projects, streamlines the permitting and approval process, provides much-needed clarity to landowners, and generates economic growth, all while protecting the environment in a responsible manner.

We appreciate the opportunity to comment on the Proposed Rule, and hope that you will consider our changes and incorporate them into the Final Rule. If I or my office can be of further assistance, please contact Alex Ford, director of federal affairs, at 703-904-7100 or ford@naiop.org.

Sincerely,

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