



National Association of Flood & Stormwater Management Agencies

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Date

Water Docket, Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

NAFSMA is a local and regional public agency driven organization based in the nation's capital, with a focus on effective flood and stormwater management in urban areas. The association's mission for more than 35 years has been to advocate public policy and encourage technologies in watershed management that focus on flood protection, stormwater and floodplain management.

Many of NAFSMA's members are partners on flood damage reduction and environmental restoration projects with the Corps and we recently signed a memorandum of agreement on green infrastructure with the U.S. Environmental Protection Agency (EPA).

NAFSMA members are on the front line, protecting their communities and regions from flood hazards that can result in loss of life and property. They are responsible for flood mitigation, stormwater and emergency management activities, as well as water quality protection.

NAFSMA appreciates the opportunity to review the proposed rule to define the Waters of the United States (WOTUS) under the Clean Water Act (CWA), circulated for public review on April 21, 2014. NAFSMA recognizes the proposed rule's goal to clarify the definition of WOTUS without expanding the federal jurisdiction. However, the document raises far more questions than it resolves and the broad language of the proposed rule will be interpreted to expand jurisdiction. Consequently, NAFSMA urges the EPA to revise the proposed rule with narrower definitions and explicit exemptions. NAFSMA offers the following comments for your consideration.

NPDES

The broad definitions in the proposed Rule, especially that of Tributary in conjunction with Adjacent, can lead to the conclusion that MS4s would be deemed Waters of the US. The distinction between MS4s and WOTUS is critical and begs the question of how CWA Sections 303 and 402 will be applied to historic MS4s deemed to be WOTUS. NAFSMA requests that the EPA clearly define what is an MS4 and what is WOTUS, and reaffirm that an MS4 cannot be WOTUS.

The proposed Rule is also silent on Low Impact Development (LID). Many LID features will fit the definitions outlined in the proposed Rule and NAFSMA requests that EPA explicitly exempt LID / Green Infrastructure features from WOTUS. The vague language in the proposed Rule could contradict the existing waste water treatment exemption and inadvertently recapture MS4s, including treatment BMPs, back under WOTUS. Commingling MS4s and WOTUS will

forcibly misapply costly compliance requirements intended for receiving water bodies to the vast water collection and conveyance network; and one of the many unanticipated consequences will be deterring the regulated community from implementing Green Infrastructure. NAFSMA acknowledges permit requirements for new construction activities, however the maintenance of LID, Green Infrastructure, and MS4 features should be explicitly exempt from WOTUS.

Scientific Advisory Board's peer review

The draft *Connectivity of Streams and Wetlands to Downstream Waters: A review and Synthesis of the Scientific Evidence* report (Connectivity Report) appears to be the basis for many conclusions in the proposed rule defining the scope of waters protected under the CWA, rulemaking. Since the Connectivity report is currently under review by EPA's Scientific Advisory Board (SAB), NAFSMA believes circulation of the proposed Rule for public comment at this time is premature. We request the EPA and US Army Corps of Engineers (USACE) to suspend the public comment period and re-release the proposed Rule after the SAB has finalized its peer review of the Connectivity report.

The draft Connectivity Report appears to be based on a review of scientific literature seeking to determine the nature of connectivity. The scientific question then becomes "how are things connected?" and the research results are predictably a documentation of theoretical connection—everything is connected. While valid for scientific research, the basis of the Connectivity report is inappropriate for the development of regulations. To be effective, an administrative process requires clear boundaries and limits in light of both the desired regulatory effects, federal law and the practical ability for a regulatory organization to implement any promulgated regulations. To support rule making for determining WOTUS, the central scientific question should have been, "where does the regulatory connection effectively stop?". Consequently, the Connectivity Report for the purposes of this rule making is flawed and its utility is questionable. Because the Connectivity Report is central to EPA's proposed Rule, we request EPA reassess the scientific literature with a focus on the limits of connectivity. We recognize this is a fundamental step and reassessment will likely impact the overall schedule of the proposed Rule. However, we believe the profound significance of WOTUS to Clean Water Act programs justifies the additional effort.

Significant Nexus Standard

Justice Kennedy, in his concurring opinion in the *Rapanos* Supreme Court case established the Significant Nexus standard that determines CWA jurisdiction. The Significant Nexus standard tested whether an area in question significantly affected the chemical, physical and biological integrity of downstream waters. However, throughout the proposed Rule's preamble and definition, EPA deviates from Justice Kennedy's key criteria and relies on conclusion from effects to "chemical, physical or biological integrity." The simple deviation from Supreme Court language greatly lowers the threshold for significant nexus and will expand the CWA jurisdiction. We request EPA remain consistent with Justice Kennedy's Significant Nexus standard and rely on effects to "chemical, physical and biological integrity" for conclusions of navigable waters.

Exemptions

The (b)(1) Waste Treatment Systems exemption does not clearly address stormwater treatment systems such as bioswales and constructed wetlands treatment systems. NAFSMA urges the federal agencies to clarify that such water quality treatment systems constructed to meet the requirements of the CWA are exempt. In addition, off-channel groundwater recharge basins, constructed adjacent to WOTUS should also be explicitly exempt.

The (b)(3) Ditches exemption is also unclear. Strict interpretation would not exempt ditches that eventually drain to jurisdictional water as is often the case. Even if the ditch meets the exemption criteria of being excavated in uplands, drains only uplands, and has less than perennial flow, the exemption seems to be unclear since ditches eventually flow into a jurisdictional water. Please clarify that upland ditches, excavated wholly in uplands, drains only uplands, and have less than perennial flow are exempt, even if they drain (eventually) to Traditional Navigable Waters. Furthermore, NAFSMA requests ditches that are wholly the result of human operations to also be exempt.

Many facilities meeting the ditches exemption criteria of wholly excavated in uplands and drain only uplands sometimes have more frequent flows from sources other than rainfall. In urban areas of the nation, nuisance flow (urban runoff) often flow in facilities that would otherwise be ephemeral. We request the Ditches exemption include ditches that may have less than perennial rainfall flows, but may have more frequent flows from non-rainfall sources such as urban runoff.

Paragraph (b)(5)(iii) exempts gullies and rills and non-wetlands swales, however, the preamble on page 22208 states that a "confined surface connection consist of permanent, intermittent or ephemeral flow paths, such as (but not limited to) swales, gullies, rills, and ditches." This narrative contradicts the proposed Rule exemption for gullies and rills and NAFSMA requests that EPA reaffirm the exemption by clarifying and correcting the contradiction.

Paragraph (b)(5)(vi) exempts groundwater and the CWA jurisdiction clearly does not cover groundwater. However, "shallow subsurface hydrologic connection" is used in the proposed Rule as a jurisdiction nexus. We believe this contradicts the exemption, and we request that the proposed Rule refrain from reliance on "shallow subsurface hydrologic connection."

CWA Section 404(f)(1)(b) and (f)(1)(c) provide limited exemptions for maintenance activities. However, past EPA and USACE interpretation of the exemptions and of Section 404(f)(2), the "recapture clause" (recapturing the activity back under CWA regulations) has limited the application and utility of the maintenance exemptions. We believe Congress intended for routine maintenance to be exempt as indicated by Section 404(f) and did not intend the recapture clause to be so expansively interpreted. Implementing guidelines have established an extremely low threshold for triggering the recapture clause: "(w)here the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration." The 404(f)(2) threshold may be applicable for construction of irrigation ditches, the threshold is rarely applicable to maintenance of drainage ditches. We strongly request the EPA to clarify the limits of the recapture clause on routine maintenance (not construction or modification) of drainage ditches as well as for canals.

Definitions

We appreciate the EPA's effort to provide new definitions in the proposed Rule but we are concerned that the definitions are not clear and in aggregate, are excessively expansive. As an example, per (a)(5), all Tributaries would be WOTUS; then (a)(6) establishes area adjacent to Tributaries as WOTUS; then, (c)(1) Adjacent includes Neighboring, which is subsequently defined to include (c)(3) Riparian Area and (c)(4) Floodplain. By multiple convoluted definitions, a tributary has become categorically vast. Consequently, WOTUS encompasses noncontiguous areas in the floodplain and riparian areas neighboring a tributary, which could be (but may not have to be) a bed and bank with an Ordinary High Water Mark, but does not have to be flowing. Under these definitions, the entire watershed could be categorically determined to be WOTUS which is inconsistent with EPA's stated intent. Furthermore, since definition (c)(2) Tributary specifies that shallow subsurface hydrologic connections can be jurisdictional nexus, WOTUS could extend beyond the surface water watershed boundaries.

We believe the intertwined definitions in aggregate will lead to strict field interpretations and result in expansive WOTUS determination beyond what EPA intended. Please refine the definitions to establish limits more clearly.

Adjacency is particularly troublesome in the rulemaking as it is no longer the traditional definition of bordering or contiguous. Adjacency is now defined as a region (neighboring, floodplain, riparian area). The concept of adjacency is used throughout the proposed Rule and we recommend that Adjacency be reverted back to its traditional definition of bordering and Neighboring be defined separately so that the two concepts can be used independently in the proposed Rule.

Floodplain definition is particularly vague as the phrase "periods of moderate to high water flows" is completely undefined. NAFSMA urges the EPA to specifically define Floodplain as the inundation area from a two-year storm.

Typically, a two-year storm fills the low flow area and over time has the most geomorphic influence in shaping a floodway and is a reasonable and specific approach to defining Floodplain in conjunction with the Neighboring definition.

Economic Analysis

The economic analysis of the proposed Rule only considered additional costs from increased CWA Section 404 permitting. Since the proposed Rule has global application across all CWA section, the economic analysis ignored additional costs from costly programs such as CWA Sections 303, 402, 401, and is therefore flawed. The economic analysis evaluated the expansion of previously determined CWA Section 404 jurisdiction. It did not, however, consider new areas of jurisdiction that were not previously jurisdictional. As a result the economic analysis underestimates the true costs of the proposed Rule.

Appendix A - Supplemental Cost Analysis Information, Exhibit 31. The high and low unit cost for stream mitigation is predominantly \$170 and \$243, respectively, for 39 of the 50 states, including for California a state with high real estate costs. The prevalence of the \$170 and \$243 unit cost for stream mitigation is suspect, and skews the national average unit costs down to \$177 and \$265, respectively. The unit costs are not accurately represented and we respectfully request reevaluation.

Appendix A - Supplemental Cost Analysis Information, Exhibit 32 (labor rates) appears unrealistically low. As an example, Local Government mean hourly wages for Environmental Engineer, \$35.89; Lawyer, \$43.77; Economist, \$27.38. This is unrealistically low and results in underestimating the true costs of complying with the CWA provisions. We request EPA revise the economic analysis to include effects to all sections of the CWA and to use realistic unit labor costs.

Conclusion

Fundamentally, NAFSMA believes the proposed rule to be expansive and unclear. Although the EPA's goal of the rulemaking is to clarify the jurisdiction of the Clean Water Act and not to expand jurisdiction, the proposed rule raises far more questions than it answers. In addition, the open ended language in the proposed rule will lead to an expansion of federal jurisdiction, which contradicts the stated purpose of rulemaking.

Because we want to work to ensure that we have a clean, safe supply of water for generations to come and keep our public as safe as possible from flooding, we look forward to working with the federal and state governments to clearly define goals and work together to protect our nation's water resources. For additional information on these comments, please contact NAFSMA Executive Director Susan Gilson at 202-289-8625 or sgilson@nafsma.org.