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1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327-7500

Facsimile
916.441.5507

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

RE: Proposed Rule on “Definition of “Waters of the United States Under the Clean Water Act,” Docket No. EPA-HQ-OW-2011-0880

To Whom it May Concern:

The California State Association of Counties (CSAC) appreciates this opportunity to offer comments on the Environmental Protection Agency (EPA) and Army Corps of Engineers’ (Corps) proposed rule defining “Waters of the United States” (WOUS) that was released on April 21, 2014. CSAC represents all 58 counties in California before the State Legislature, administrative agencies and the federal government. Our County Boards of Supervisors and County Public Works Departments are vital partners in the stewardship of our state’s water resources. They take this role very seriously and are committed to carrying out provisions of the Clean Water Act (CWA) to aid in better protection of our water systems.

While we understand the proposed rule is meant to clarify any confusion regarding the Clean Water Act (CWA), CSAC views the proposed rule change as adding confusion and potentially expanding the scope of the agencies’ authority. The following comments are based upon feedback that we received from the County Engineers Association of California (CEAC) and individual county officials from across the state.

General Comments:

- **Jurisdiction Expansion:** CSAC believes the proposed rule arguably sweeps into its scope not only lands that are wet and, in many cases, without bed and banks, but also associated lowlands and transitional zones between open waters and upland areas. New definitions including the new concept of “a single landscape unit” leave ambiguity about what portion of each watershed is beyond the reach of federal regulators under the CWA.
- **Uplands:** The proposed rule exempts ditches cut into uplands from CWA jurisdiction, but does not clearly state whether other features cut into uplands, including municipal and private storm drain systems, are similarly exempt. Also, the proposed rule does not contain a definition of the term “upland,” whereas it provides new definitions for several other key terms.

- **Connectivity Report:** Much of the newly proposed definitions find their base in the findings of the agencies’ connectivity report (CR). The conclusions from the CR seem to support findings of a “significant connection” in scenarios where connections are at most ephemeral. CSAC believes there are rational concerns that the CR will be used as a basis for a broad expansion of CWA authority.
- **Cost Benefit Analysis:** CSAC believes the Economic Analysis for the proposed rule is insufficient because it only accounts for federal agency costs, The Economic Analysis did not account for increased federal agency costs associated with the need to increase the agencies’ staffing levels to handle the increased workload resulting from the potential we see for expanding CWA authority. The Economic Analysis also did not account for the likelihood that the agencies’ staffs will not be increased to handle the increased workload, resulting in costs on counties associated with delays caused by permit processing. The analysis contends that the new definition of WOUS would have minimal costs to MS4 permittees and agriculture, but they did not take into account various costs and activities. CSAC believes at a minimum the Economic Analysis should be amended to account for the following additional costs at the state, regional and local levels due to the expanded definition of WOUS: increased federal, state and local agency staffing levels to process the increased number of permits; lost capacity and/or function of infrastructure due to delays caused by additional permit processing times and the likelihood of federal, state and local agencies being unable to get the funding needed to handle the increased permit load; increased permit compliance tasks, such as monitoring, assessment, program realignment, training and outreach, and BMPs reporting; and permitting costs, including compensatory mitigation.
- **County Liability:** Ultimately, a county is liable for maintaining the integrity of their ephemeral flow ditches, even if federal permits and the attendant state water quality certifications are not approved by the federal and state agencies in a timely manner. For example, in 2002, in *Arreola v Monterey* (99 Cal. App. 4th 722), the court held Monterey County (CA), among other local entities, liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the county argued that the regulatory permit process did not allow for timely approvals. In addition, based on recent federal court rulings regarding Corps’ actions and decisions, the expansion of the WOUS definition and the attendant potential for delays related to permit processing could increase the Corps’ liability exposure as well.

DEFINITIONS

Tributary: CSAC agrees that this definition should consider bed, bank, and ordinary high-water mark. However, the frequency and amount of flows, infiltration, evaporation, and transpiration should also be considered before determining that a feature is a tributary. The current definition would not properly account for the dry weather conditions in southeastern California. For example, because desert rainfall events are so infrequent in these areas (Palm Springs 5 inches/year, Blythe 4 inches/year), the existing bed and banks may have been

formed during very infrequent events. CSAC believes that defining these features as a jurisdictional tributary is not a proper exercise of the agencies' authority.

The CR states that all tributaries, including perennial, intermittent and ephemeral streams are connected to downstream rivers via channels and associated *alluvial deposits*. Alluvial deposits should not be used as a basis for connectivity because groundwater is not regulated by the CWA.

Riparian area: While CSAC acknowledges that riparian areas are not jurisdictional in and of themselves, there are concerns the current definition is too broad. It is possible that an isolated water could be determined to be "connected" to a traditional WOUS by a very large riparian area, thus becoming jurisdictional. Specifically, the language "...influence the exchange of energy and materials between those ecosystems" combined with the broad conclusions from the CR raise real concerns of isolated waters becoming jurisdictional via a large riparian area. CSAC proposes the definition should: not include sub-surface hydrology as a basis for connectivity, require a *substantial* influence as opposed to simply an influence, and should have some limiting language in regards to its possible size.

Neighboring: The term neighboring (for purposes of *adjacent*) includes waters within the riparian area or waters with a shallow subsurface hydrologic connection to a jurisdictional water. The current definition containing the language "shallow subsurface hydrologic connection" is concerning for two reasons. First, hydrologic connection in the context of the broad conclusions of the CR raises concerns that even the slightest of connections will be used to define features as neighboring. Second, subsurface hydrologic connection appears to encroach upon groundwater regulation and runs contrary to the agencies stated intention of this proposed rule. CSAC proposes the definition require a "substantial" surface hydrologic connection.

Floodplain: The current definition does not have any limiting language in regards to how large floodplains can be. According to FEMA, any piece of land can be flooded. Further, CSAC would like clarification in regards to the time frame of "present climatic conditions" as well as the formula for deciding if a feature is experiencing a period of "moderate to high water flows". CSAC believes the metrics of 2-year or 5-year flow frequencies used by the Corps in the past are appropriate. Floodplain is an inappropriate and expansive criterion for determining the extent of the Clean Water Act. Floodplain should not be used for the proposed rule.

Similarly situated: This definition contains subjective terms like "performing similar functions" and "single landscape unit" that when coupled with the broad findings of the CR, could lead to isolated waters being deemed jurisdictional. This would exacerbate the already cumbersome and costly CWA 404 permit process because it would take the agencies even longer to document the hydrologic and ecological characteristics of the WOUS and others "similarly situated". Providing some sort of narrowing mechanism into the definition of "single landscape unit" would alleviate concerns of expansive CWA jurisdiction.

In the region: The agencies have interpreted “in the region” to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry. The proposed rule recognizes that the watersheds may get very large in arid areas of the West and can be resource intensive to demarcate watershed. The agencies offer an unfamiliar National Hydrography Data set (NHD) mapping tool as a method to demarcate catchments surrounding the water. Marking all the relevant waters in the region appears to be a daunting task. The agencies should provide a better description of the method for the public to evaluate; marking in effect all the waters in a region will be very burdensome.

SUPREME COURT PRECEDENT AND SIGNIFICANT NEXUS

It is unclear if the current rule accurately reflects the narrower of the two holdings in *Rapanos v United States*, 547 U.S. 715 (2006). A four-vote plurality of the court held that “Navigable waters” regulated under the CWA are limited to “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features,’” such as streams, oceans, river and lakes. Wetlands with a “continuous surface connection” to such bodies of water, so that “there is no clear demarcation between them,” are “adjacent to” such water bodies and also are covered. Justice Kennedy concurred in the judgment of the plurality, but on different grounds, relying on the “significant nexus” test and the significant ecological functions wetlands adjacent to tributaries can serve.

The origins of this legal term of art suggests a common sense plain meaning of “significant” that may not be consistent with the science-driven nexus approach adopted by the agencies. Further, the agencies’ proposed rule’s definition of what is significant is anything that is not speculative or insubstantial. CSAC believes this is too low a bar and does not accurately reflect the meaning of significant.

The agencies seem to draw significant support from the Kennedy concurrence as opposed to the four vote plurality. Despite adopting the significant nexus test from the concurrence, the proposed rule does not accurately mirror the language. Justice Kennedy cited the significant nexus as “significantly affects the chemical, physical, *and* biological integrity...” whereas the proposed rule uses “or” in place of “and”. The rule should accurately reflect the language of *Rapanos*.

CSAC also has concerns with the broad language of the proposed rule in regards to the ad hoc inquiry of “other waters”. Specifically, “other water evaluated either individually, or as a group of water where they are determined to be similarly situated in the region...depending on the functions they perform and their spatial management within the region or watershed.” The expansive findings of the CR combined with the language “similarly situated in the region” leaves open the possibility that separate water features will be clumped into the subjective label of “similarly situated” and become jurisdictional. CSAC feels this language should be narrowed in order to clarify the extent of the agency’s jurisdiction.

CONNECTIVITY REPORT

While CSAC admires the agencies' comprehensive scientific study, the conclusions could be problematic due to the broad implications on the agencies' jurisdictional reach. The following excerpts from the main conclusions of the CR are addressed in turn:

“The scientific literature demonstrates that streams, individually and cumulatively, exert a strong influence on the character and functioning of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”

This finding suggests that all tributary streams, regardless of how frequent the stream is, are categorically connected to downstream rivers in every scenario. The CR also seems to purport the connection is not only real and appreciable, but always “significant”.

“Wetlands and open waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open waters in riparian areas and floodplains) are chemically, physically, and biologically connected with rivers via the export of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter.”

In the same vein as the above comment, this CR conclusion is very broad and could be used to assert jurisdiction wherever the agencies find any “bidirectional hydrologic exchange,” even if such a connection is not significant.

Based on the flaws in the CR on the determining connectivity, identified above, the rule making process should be suspended until the EPA Scientific Advisory Board's peer review of the document is completed. Furthermore, the reliance of the CR for rule making expands the federal jurisdiction, which is in contradiction to the EPA's assertion that the proposed rule does not expand jurisdiction.

Definitions implicated by CR findings:

- **Neighboring:** “...or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.”
- **Riparian area:** “...influence the exchange of energy and materials between those ecosystems.” This factor gives potentially unlimited scope for inclusion into WOUS jurisdiction, given the connectivity findings. While the riparian area may not be jurisdictional in and of itself, it can be used to link a WOUS to an isolated water, making the isolated water jurisdictional.
- **Significant Nexus:** “...significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a) (1) through (3)...” The passage goes

on to state that in order for an effect to be significant, it must be more than speculative or insubstantial. The wording from the connectivity report saying there is a “strong influence on the character and functioning of downstream waters” makes it seem as though the “significant” effect is not a high bar to attain. Many waters could become jurisdictional given the broadness of the connectivity report.

EXCLUSIONS

Ditches:

The rule should clarify that for a ditch to be exempt, it must only meet one or the other of the exemptions, not both. The rule contains two exemptions for ditches:

- a) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- b) Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.

The second exemption for ditches (“b” above) should be further expanded to state that:

Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment. If the ditch does contribute flow, but was constructed for the purpose of transporting surface runoff and was not previously a Waters of the US, then it also qualifies for this exemption.

The agencies should also add language to the exemption specifying that the term “perennial flow” will mean: containing water at all times except during extreme drought. These clarifications are essential to ensuring that counties, the public and local regulators are on the same page with interpreting the exemptions and maintaining public infrastructure in a way that prioritizes safety. As an example, counties and other local jurisdictions maintain thousands of miles of roadways, many with ditches and conveyance features found on either side of roadways. These entities also maintain bench drains in hillside fill areas that connect to storm drains or whose flows make their way to storm drains. There is concern that the expanded definition would obstruct the management and maintenance of these features.

Public Safety: A new exemption for maintenance of safety features should be included. For example, ditches, MS4 systems and water conveyance features provide a means of transporting surface runoff and keeping the roadway safe for motorists, bicyclists and adjacent pedestrians. The channels, including road ditches, which are constructed as part of development to transport surface runoff, should be considered in relation to life and safety, ensuring that stormwater drains appropriately off roadways and other developed areas. Ongoing maintenance and operations to keep these features clean and safe should not be hindered by administrative burdens and lengthy permitting processes. Ditches that are

maintained as part of an MS4 system and permitted under Section 402 of the CWA should be exempt.

Waste Treatment Systems: The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any* water quality requirements, not just the requirements of the CWA. This exemption should also apply to individual state or local water quality regulatory requirements (for example, the Porter-Cologne Act in California). CFR Part 328.3 (7) states that *waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States*. CEAC strongly urges the agencies to strengthen and expand this vaguely written exemption, or otherwise explicitly exempt all water quality treatment facilities. Current federal regulations (see “a” and “b” below) appear to only vaguely exempt “waste treatment systems” (which presumably apply to permanent BMPs such as: detention basins, retention basins, bioswales, etc.) that are designed to meet the requirements of only the CWA:

- a. Nationwide Permit (NWP) 43 has language that states: “Note that stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States, and maintenance of these waste treatment systems generally does not require a section 404 permit.”
- b. Then 33 CFR 328.3(a)(8) states the following: “Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.”

As an example, NWPs are renewed every five years and their continued existence or continuation of their conditions are not guaranteed. The rule should therefore be clarified to exempt maintenance of these facilities. CSAC believes such exemptions are consistent with the agencies’ past approach of not inhibiting, and in fact encouraging state and local entities’ efforts to further protect the environment.

Water Quality Treatment Features: Any constructed feature built for the purpose of water quality treatment or runoff control as required by any agency should be exempt from regulation under the CWA. It is important that counties are able to construct and maintain or cause to be constructed and maintained these features in a manner that is consistent with the overall goal and public good of stormwater management without subjecting themselves and property owners to federal regulation that can delay or interfere with the features’ public safety or water supply protection functions . Hindrances and delays regarding this function, and discouragement to build treatment features, that will result from federal permit processes and compensatory mitigation requirements will, ironically, conflict with the goals of the CWA.

As examples:

- Permanent settling basins that are constructed on a site to decant sediment-laden runoff from the site itself or properties above it prior to running off the property or into a storm drain.

- Green Infrastructure projects, such as bioswales and artificial wetlands, which are intended to impose or restore natural hydrological features and promote multiple benefits, have been embraced by many counties and municipalities. The Los Angeles County Flood Control District, for example, has constructed an artificial wetland next to a concrete flood control channel and an artificial “natural stream” adjoining an existing concrete channel. Additionally, in many areas, such as Los Angeles County, counties and municipalities are combining their efforts in designing facilities to treat and infiltrate stormwater and urban runoff in facilities that provide other community benefits. Such facilities are artificially created and will be subject to sediment accumulation that will need to be removed; vegetation taking root in the sediment will also need to be removed and replaced. These actions are needed to maintain the facilities’ water quality function. To encourage the development of such projects, which create water features where none existed before, Green Infrastructure projects should not be designated as WOUS.
- Bioswales are constructed to serve a filtering function. Such facilities are artificially created and will be subject to sediment accumulation that will need to be removed, along with vegetation taking root in the sediment, in order to maintain their water quality function.

Artificial Groundwater Recharge Basins: Under the current proposal, off-channel groundwater recharge basins that are located adjacent to a WOUS may be considered jurisdictional via the agencies’ “adjacent waters” language. In keeping with the spirit of the agencies stated intent not to regulate groundwater, language should be added that exempts these types of basins.

For example, starting almost 100 years ago, counties in southern California have constructed artificial basins for the purpose of replenishing local area aquifers. Today, the counties in southern California are home to over 20 million people, and the population is expected to increase. Groundwater serves a significant portion of the water supply for the inhabitants of these counties. In many communities, groundwater actually makes up the majority of their water supply. Counties in southern California are under pressure from the federal and State governments to lessen their dependence on water imported from the Sacramento/San Joaquin Delta and the Colorado River for the sake of environmental concerns at these source areas. The State of California declared a drought emergency in early 2014 that is still in effect; there are projections that drought conditions may continue for a very long period of time, even decades. It is therefore vital that groundwater recharge in these counties is not only maintained but enhanced.

An exemption for these groundwater recharge basins is consistent with exemptions the agencies have already given for artificial stock ponds and waters “created for purely aesthetic reasons.” The recharge basins were artificially created. Although the basins may be located adjacent to a river or channel that is designated a WOUS, the basins have no significant hydrologic connection to a WOUS; the waters entering the basins go down into groundwater aquifers, which are not WOUS.

CSAC strongly believes subjecting artificial groundwater recharge basins to federal permits will result in reducing groundwater recharge at a time when it is vital to increase recharge. Permit processes will result in delays in maintenance necessary to maintain the basins' operability and water storage and percolation capacity. The costs associated with groundwater recharge will significantly increase due to: increased staff time for permit acquisition; increased monitoring and reporting; the imposition of compensatory mitigation; and increased amount of work to remove accumulations in the basins that increased while waiting for the permits to be processed. Similar impacts can be expected for any project, including "drought buster" projects being sought by the State of California, to enhance operations, storage or percolation at existing groundwater recharge basins or create new basins. In addition to adversely impacting the water supply of millions of people and conflicting with the State's goal to alleviate the impact of prolonged droughts, the imposition of federal permits will, ironically, result in increased demand for imported water that will conflict with federal goals to reduce dependence on imported water.

IMPACT ON MS4

The proposed rule does not discuss the interrelationship of WOUS and municipal separate storm sewer systems (MS4). The interconnected nature of storm drain systems regulated under MS4 permits and the broad nature of the definitions in the proposed rule could lead to legal uncertainty, regulatory confusion and conflicts in regulations. It is especially important for the agencies to provide clear guidance on where an MS4 ends and WOUS begins for counties in the Southwest, where engineered drainage systems have mostly replaced the natural drainage patterns in urbanized watersheds.

The current definition of "tributary" (79 Fed. Reg. at 22263) states "a water that otherwise qualifies as a tributary...does not lose its status if, *for any length*, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams)...so long as a bed and bank with an ordinary high water mark can be identified upstream of the break." Los Angeles County, for example, contains many storm drains with upstream man-made open channels with a bed, bank, and high water mark. The proposed rule would render a number of open channels per se jurisdictional under this broad definition of tributary and subject local agencies to further regulation. In addition, due to the proximity of WOUS channels, it is possible that MS4 channels could be considered "adjacent" waters and therefore jurisdictional.

The ramifications of these plausible scenarios are: subjecting local agencies to the CWA 404/401 permit process, high costs for repairing or upgrading such infrastructure when it is already covered by the MS4 permit process, and potential liability to citizen suits. It should be noted the EPA has previously determined that storm drains cannot be WOUS. The agencies should therefore include language that exempts MS4 from CWA regulation even if it otherwise qualifies as a "tributary" under the proposed rule. The exemption language should explicitly exempt: stormwater conveyances, bioswales, green projects, and infiltration basins used to comply with an MS4 permit as these facilities are necessary to comply with the CWA.

CONCLUSION

CSAC believes that the proposed definition of WOUS deviates from the Supreme Court's Rapanos Ruling and conflicts with the EPA's stated assertion that the rulemaking will not expand jurisdiction. We further assert that without the recommended exemptions and clarifications stated above, the public's costs for maintaining vital infrastructure will be significantly increased, while their health, safety and water supply are significantly adversely impacted.

Thank you again for the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Karen Keene". The signature is written in a cursive, flowing style.

Karen Keene
CSAC Deputy Director of Federal Affairs