WRITTEN STATEMENT FOR THE RECORD

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ON BEHALF OF
THE NATIONAL ASSOCIATION OF COUNTIES
&
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POTENTIAL IMPACTS OF THE PROPOSED CHANGES TO THE CLEAN WATER ACT JURISDICTIONAL RULE

BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE'S
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

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Thank you Chairman Gibbs, Ranking Member Bishop and Members of the Subcommittee for the opportunity to testify on the April 21 proposed rule—*Definition of the Waters of the United States Under the Clean Water Act*—as proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps).

My name is Dusty Williams and today I represent both the National Association of Counties (NACo), and the National Association of Flood and Stormwater Management Agencies (NAFSMA), where I currently serve as President. I am also an active member of the California State Association of Counties (CSAC).

Both NACo and NAFSMA members play an important role in the management of water resources while ensuring public safety. While we share members, our groups offer unique perspectives, which is ideal for today's hearing. Both organizations actively partner with federal and state governments and understand the challenge of drafting regulations, since in our communities we are both the regulators and the regulated.

We are very concerned with the scope of the "waters of the U.S." definition proposal. While the proposed rule is intended to clarify issues raised in recent Supreme Court decisions on the Clean Water Act's (CWA) Section 404 permit program, its potential impact is significantly broader in scope. It extends federal jurisdiction well beyond the Section 404 permit program and could have far reaching impacts on many other CWA's programs.

About NACo

Founded in 1935, NACo is the only national organization that represents county governments in the United States. NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties. NACo promotes sound public policies, fosters county solutions and innovation, promotes intergovernmental and public-private collaboration and provides-value added services to save counties and taxpayers money.

The proposed rule is of particular interest to counties because they are responsible for building and maintaining 45 percent of public roads in 43 states, with Delaware, North Carolina, New Hampshire, Vermont and West Virginia not providing authority over roads to any counties. These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects. Many of these road systems are in very rural areas. Of the nation's 3,069 counties, 50 percent (1,542) serve counties with populations below 25,000 residents. So any additional cost burdens are challenging to these smaller governments, especially since more rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased federal and state regulations with the limited resources available to local governments poses significant implementation challenges.

Since many counties are tasked with dealing with a number of Clean Water Act (CWA) programs that impact roads and roadside ditches, flood control channels, stormwater culverts and pipes, water and water transfer rights, implementation of water quality and land use plans, green infrastructure, floodplain management, onsite water treatment and management systems, NACo has particular interest in this proposal. Changes in the

definition of “waters of the U.S.” will not only impact county operations, but will also increase costs and permitting time.

About NAFSMA

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. Our 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.

Overarching Concerns with the Proposed “Waters of the U.S.” Rule

On behalf of both NACo and NAFSMA, I am here to express strong concerns with the proposed rule and the process used for the rule’s development.

While the proposed rule aims to clarify confusion over the CWA’s Section 404 jurisdiction in the field stemming from several Supreme Court decisions, we believe that the proposed rule brings about more questions than answers. The proposed definition will significantly increase the number of public infrastructure ditches that fall under federal jurisdiction.

Additionally, the proposed definition also applies to all CWA programs, not just to the Section 404 permit program, and impacts nine different regulatory programs, including Section 402, which establishes the nation’s stormwater management program, and Section 401, which governs water quality certifications.

Key terms used by the “waters of the U.S.” definition—tributary, adjacent waters, riparian areas, flood plains, and the exemptions listed—also raise important questions. It is uncertain how they will be used to effectively implement the Section 404 permit program.

Agency Consultation with State and Local Partners Was Flawed

We appreciate that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed. However, our organizations are concerned by the process used to create this

proposal, and specifically whether impacted state and local groups were adequately consulted throughout the process.

Under “Executive Order 13132—Federalism,” federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of “waters of the U.S.” imposes only “indirect” costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations.

However, the agencies’ cost-benefits analysis—*Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2013)—tells a different story. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed. Since states, local governments and their agencies implement and enforce CWA programs, the “waters of the U.S.” definitional change has a “substantial direct effect” on these entities. The economic analysis agrees, stating that CWA programs “may subsequently impose direct or indirect costs as a result of implementation.” We regret that local and regional governments were not actively engaged in substantial policy discussions on options prior to the rule’s publication; such discussions could have lessened the confusion surrounding the proposed rule.

In addition to the aforementioned issues, we are also concerned with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed “waters of the U.S.” rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature, and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule.

Because of the complexity of the proposed rule, we are further concerned that it only allows 90 days for review and comment. In order to fully understand what the rule does (and does not do), we recommend that the agencies adopt a multi-step consideration process. The Administration should, at the very least, reopen the comment period for 90 days after EPA’s Connectivity report is released and updates are made to the proposed rule based on the final report.

The agencies should also consider extending the current comment period by an additional 90 days in order to give all stakeholders adequate time to assess unintended consequences, since counties and public agencies will need ample time to study the proposal and assess its impacts within their own jurisdictions. As partners in implementing and enforcing the Clean Water Act, we should be given the opportunity to fully consider and comment on rules that will have a significant impact on capital costs, operations and mandates on the people we serve.

As previously mentioned, while the agencies have performed cost-benefit analysis of the definitional changes on CWA programs, they have acknowledged that the data used and the assumptions made to craft the analysis may

be flawed. On page two, the report states, "The economic analysis is necessarily based on readily available information and the resulting cost and benefit estimates are incomplete… Readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis."

Additionally, the methodologies used to determine economic costs and benefits to the proposed rule are misleading. In its economic cost analysis for the proposed rule, the agencies indicated that an additional 2.7 percent water features will be considered jurisdictional under the Section 404 program. However, the data used to compute costs for Section 404 comes from submitted Section 404 permit applications for FY2009-2010. The economic analysis dismisses the fact that, under the proposal, additional waters, currently not jurisdictional (and thus, with no permit submissions), will become jurisdictional. This reasoning is flawed and does not give a true accounting of potential costs or benefits.

We are also particularly concerned that the impacts of intermittent streams, biological connectivity and adjacency requirements have not been correctly assessed with regard to how significantly they impact the jurisdictional reach of the CWA, nor the impact of the rule on other CWA programs such as 402(p). Further, while we are asked to provide alternatives, we are only given an inadequate 90 days to develop such alternative methodologies.

The agencies should consider suspending the current public comment period and re-releasing the proposal, with the updated economic analysis (based on the comments received), after the science-based connectivity report is issued. This approach would be welcomed by local governments and their flood and stormwater management agencies.

Impacts on Section 404 Program

Both NACo and NAFSMA believe that the proposed rule will increase the number of publicly maintained stormwater management facilities and roadside ditches that would require CWA Section 404 permits, even for routine maintenance. This is critical because the federal jurisdictional process is not well understood. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely complex, time-consuming and expensive, leaving local governments and public agencies charged with public safety vulnerable to citizen suits.

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Over the years, numerous local governments and public agencies have expressed concerns that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for local governments and public agencies.

Determining whether a project is jurisdictional can be very difficult, and if a project is deemed jurisdictional, it is then subjected to a multitude of regulatory requirements under CWA. Other federal laws are triggered, such as environmental impact statements, National Environmental Policy Act (NEPA) and impacts on the Endangered Species Act (ESA). These involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process, which can take years.

These delays are extremely significant to local agencies responsible for maintaining public infrastructure, such as roadside ditches, flood control channels and stormwater systems designed to protect public safety by funneling water away from low-lying roads, properties and businesses to prevent accidents and flooding. Expanding the number of ditches that are regulated will increase necessary public infrastructure projects' budgets and timelines. The cost of operations and maintenance for public infrastructure, such as existing flood damage reduction systems, will also be increased and will take more time to accomplish than it should for an existing facility— potentially putting public safety at risk and increasing flood damage. We continue to recommend strongly that maintenance activities of existing storm water management facilities and roadside ditches, such as channels and detention basins, be exempt from repetitive Section 404 permitting.

Additionally, the Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties and flood and stormwater management agencies in a precarious position—especially those who are balancing small budgets against public health and environmental protection

At a time when local governments throughout the nation are only starting to experience the beginnings of economic recovery, proposing far reaching changes to CWA's "waters of the U.S." definition seems to be a very precarious endeavor and one which should be weighed carefully and given adequate time for review.

Impact on Public Infrastructure Ditches

The EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, our members indicate that the definitional language is far from clear.

The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S."

That said, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system—roadside, flood or stormwater— is interconnected and can run for hundreds, if not thousands of miles. Our ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to "waters of the U.S."

To assist in visualizing some of these concerns, I would like to focus on the Romoland area of Riverside County. The District recently had a jurisdictional determination completed for a large flood hazard mitigation project that would address this approximately 17 square mile watershed that ultimately serves as a tributary to the 500 plus square mile San Jacinto River watershed.

Today, the project area is deemed non-jurisdictional by the Corps because the ephemeral drainage features that exist within the watershed are isolated from the San Jacinto River (Exhibit A). However, based on the definitions in the proposed rule, coupled with the exception hidden in the ditch exclusion of the proposed rule, upland ditches and other ephemeral, isolated drainage features could be deemed jurisdictional waters of the U.S. (Exhibit B). This analysis also does not consider the impacts of the significant nexus test for "other waters" that would effectively require the entire project area to be evaluated for potential physical, chemical or biological connections to the San Jacinto River. This is just one of many examples of the potential cumulative jurisdictional expansions of the definitional changes that are being raised by our members. We have countless examples like this from across the country.

Stormwater and Green Infrastructure Impacts

Since stormwater management activities are not explicitly exempt under the proposed rule, concerns have been raised that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S." Some counties and cities own municipal separate storm sewer systems (MS4) infrastructure, which is defined under (40 CFR 122.26(b)(8)) as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains," owned by a state, tribal, local or other public body, which discharge into "waters of the U.S." While MS4s are currently regulated under the CWA's Section 402(p), there is concern that stormwater conveyances or systems of conveyances could be deemed a "water of the U.S" under the proposed regulation. This would potentially change the locations of outfalls for MS4s, and therefore the point of regulation, as defined in the CWA's Section 402. This could mean that MS4 Section 402 permit holders would have to regulate, not only at the point of discharge into a "water of the U.S.," but also when a pollutant initially enters the stormwater conveyance system.

This is a significant potential impact for states, counties and other MS4 permittees that own MS4 infrastructure, because these newly jurisdictional facilities would trigger requirements for the state to expend resources to designate beneficial uses pursuant to CWA Section 131.10 requirements. Further, counties and other MS4

permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.

Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, etc. Our members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. In stakeholder meetings, EPA has suggested that local governments need to include in their comments whether an exemption is needed, and if so, under what circumstances, along with the reasoning behind the request. We are working to develop those recommendations. However, an exemption is clearly needed.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies. It is also unclear how the proposed definitional changes may impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems.

Conclusion

Mr. Chairman and Members of the Committee, the bottom line is that the proposed rule contains many terms that are not adequately defined. Our associations believe that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this

proposal. This is problematic because our members are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches, even if federal permits are not issued by the federal agencies in a timely manner. Furthermore, the unknown impacts on other CWA programs are equally problematic. Many of these waters are presently under current practices; however, the degree and cost of regulation will increase dramatically if these features are redefined as "waters of the U.S."

Because we want to work with you to ensure that we have a clean, safe supply of water for generations to come and that we can keep our public as safe as possible from flooding, we are proud to partner with the federal and state governments, as the founding fathers intended, to protect our nation's water resources. We look forward to working with the federal government to clearly define goals and to work together to accomplish these shared goals.

For additional information on this testimony, please contact Julie Ufner at NACo (202-942-4269) or JUfner@naco.org or Susan Gilson at NAFSMA (202-289-8625) or sgilson@nafsma.org.