



**National Association of Flood & Stormwater  
Management Agencies**

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June 19, 2017

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**Subject: EPA Definition of “Waters of the U.S.”**

**Comments in Response to E.O. No. 13132 Federalism Consultation**

The National Association of Flood and Stormwater Management Agencies (NAFSMA) is an organization of public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. The association’s mission for 39 years has been to advocate for 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 U.S. Army Corps of Engineers (USACE) and we have signed a memorandum of agreement on green infrastructure with the U.S. Environmental Protection Agency (EPA) and currently have a partnership memorandum of understanding with the U.S. Army Corps of Engineers.

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 activities, and water quality protection.

NAFSMA appreciates the opportunity to provide input on the development of a revised Waters of the U.S. rule through the Executive Order No. 13132 Federalism Consultation process. Our comments are below.

**Connectivity report**

The EPA’s January, 2015 report titled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (Connectivity Report) was the basis for the June 29, 2015 Waters of the U.S. Final Rule. The Connectivity Report appeared to research the question of how streams are connected, concluding that almost everything is connected. Assessing the effective limits of connectivity may have been more useful in developing regulations. If the EPA initiates a new review of scientific literature to support a new rule consistent with Justice Scalia’s opinion, NAFSMA recommends the study focus on the practical limit of the criterion in question.

### **Clarification that MS4 is not WOTUS**

The Rapanos case focused on Clean Water Act §404, discharge of dredged or fill material, however, the definition of Waters of the U.S. applies globally throughout the Clean Water Act. NAFSMA requests special attention on how a new Waters of the U.S. definition might affect Clean Water Act §303, §401, and §402. NAFSMA requests the new rule explicitly clarify that Municipal Separate Storm Sewer Systems (MS4) are not Waters of the U.S.

In addition, depending on the definition of Waters of the U.S., jurisdiction may be inaccurately exerted on constructed stormwater management and groundwater recharge facilities. NAFSMA requests the new rule explicitly exempt: green infrastructure; low impact development (LID); constructed natural (wetlands) treatment systems; bioswales; off-channel groundwater recharge basins, percolation ponds, and spreading grounds; and stormwater capture and management facilities.

### **Clarification of channel maintenance exemption**

The Clean Water Act §404(f)(1)(b) and §(404)(f)(1)(c) provide limited exemptions for maintenance activities. However, past EPA and USACE interpretations of §404(f)(2), the so-called “recapture clause” (recapturing the exempted activity back under Clean Water Act regulations) has limited the application and utility of the maintenance exemptions. NAFSMA believes Congress intended to exempt routine maintenance activities and did not intend the §404(f)(2) clause to be so expansively interpreted. NAFSMA requests the EPA to affirm the maintenance exemptions for flood channels, drainage ditches, and canals; and also clarify the limits of the recapture clause.

We appreciate this opportunity to provide comments on the Waters of the U.S. Rule. NAFSMA is deeply committed to this important policy issue and has provided comments on the Waters of the U.S. draft rules as well as supporting technical documents; and we look forward to providing U.S. EPA and the U.S. Army Corps of Engineers with the stormwater and flood management agency perspectives as you move to a formal comment review and comment period later this year.

In the meantime, please feel free to contact NAFSMA Executive Director Susan Gilson with any questions at [sgilson@nafsma.org](mailto:sgilson@nafsma.org) or 202-289-8625.