November 14, 2014

Ms. Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

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

Dear Ms. Downing and Ms. Jensen:

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rule on *"Definition of "Waters of the United States" Under the Clean Water Act."* We thank the agencies for educating our members on the proposal and for extending the public comment period in order to give our members additional time to analyze the proposal. We thank the agencies in advance for continued opportunities to discuss these, and other, important issues.

The health, well-being and safety of our citizens and communities are top priorities for us. To that end, it is important that federal, state and local governments all work together to craft reasonable and practicable rules and regulations. As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact that a change to the definition of "waters of the U.S." will have on all aspects of the Clean Water Act (CWA). That is why several of our organizations and other state and local government partners asked for a transparent and straight-forward rulemaking process, inclusive of a federalism consultation process, rather than having changes of such a complex nature instituted though a guidance document alone.

As described below, we have a number of overarching concerns with the rulemaking process, as well as specific concerns regarding the proposed rule. In light of both, we have the following requests:

1. We strongly urge EPA and the Corps to modify the proposed rule by addressing our concerns and incorporating our suggestions to provide greater certainty and clarity for local governments; and
2. We ask that EPA and the Corps issue a revised proposed rule with an additional comment period, so that we can be certain these concerns are adequately addressed; or
3. Alternatively, if an additional comment period is not granted, we respectfully call for the withdrawal of this proposed rule and ask the agencies to resubmit a proposed rule at a later date that addresses our concerns.

Overarching Concerns with the Rulemaking Process

While we appreciate the willingness of EPA and the Corps to engage state and local government organizations in a voluntary consultation process prior to the proposed rule's publication, we remain concerned that the direct and indirect impacts of the proposed rule on state and local governments have not been thoroughly examined because three key opportunities that would have provided a greater understanding of these impacts were missed:

1. Additional analysis under the Regulatory Flexibility Act, which examines economic impacts on small entities, including cities and counties;
2. State and local government consultation under Executive Order 13132: Federalism, which allows state and local governments to weigh in on draft rules before they are developed or publicly proposed in order to address intergovernmental concerns; and
3. The agencies' economic analysis of the proposed rule, which did not thoroughly examine impacts beyond the CWA 404 permit program and relied on incomplete and inadequate data.

Additionally, we believe there needs to be an opportunity for intergovernmental state and local partners to thoroughly read the yet-to-be-released final connectivity report, synthesize the information, and incorporate those suggestions into their public comments on the proposed rule. These missed opportunities and our concerns regarding the connectivity report are discussed in greater detail below.

1. The **Regulatory Flexibility Act (RFA)** requires federal agencies that promulgate rules to consider the impact of their proposed rule on small entities, which under the definition includes cities, counties, school districts, and special districts of less than 50,000 people. RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, requires agencies to make available, at the time the proposed rule is published, an initial regulatory flexibility analysis on how the proposed rule impacts these small entities. The analysis must certify that the rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. The RFA process was not undertaken for this rule.

Based on analysis by our cities and counties, the proposed rule will have a significant impact on all local governments, but on small communities particularly. Most of our nation's cities and counties—more than 18,000 cities and 2,000 counties—have populations less than 50,000. The RFA SISNOSE analysis would be of significant value to these governments.

2. **Executive Order 13132: Federalism** requires federal agencies to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that a change in the definition of "waters of the U.S." imposes only indirect costs, the agencies state that the proposed rule does not trigger Federalism considerations. We wholeheartedly disagree with this conclusion and are convinced there will be both direct and indirect costs for implementation.

Additionally, while EPA initiated a Federalism consultation for its state and local partners in 2011, the process was prematurely shortened. In the 17 months between the initial Federalism consultation and the publication of the proposed rule, the agencies changed directions several times (regulation versus guidance). In those intervening 17 months between the consultation and the publication of the proposed rule, the agencies failed to continue substantial discussions, thereby not fulfilling the intent of Executive Order 13132.

3. The ***Economic Analysis of Proposed Revised Definition of Waters of the U.S.*** is flawed because it does not include a full analysis of the proposed rule's impact on all CWA programs beyond the 404 program (including the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, and Spill Prevention, Control and Countermeasure (SPCC) programs). Since a number of these CWA programs directly affect state and local governments, it is imperative the analysis provide a more comprehensive review of the actual costs and consequences of the proposed rule on these programs.

Moreover, we remain concerned that the data used in the analysis is insufficient. The economic analysis used 2009-2010 data of Section 404 permit applications as a basis for examining the impacts of the proposed rule on all CWA programs. It is insufficient to compare data from the Section 404 permit program and speculate to the potential impacts to other CWA programs. Additionally, 2009-2010 was at the height of the recession when development (and other types of projects) was at an all-time low. The poor sample period and limited data creates uncertainty in the analysis's conclusions.

In addition to the missed opportunities, we are concerned about the timing of the yet-to-be-finalized *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report, which will serve as the scientific basis for the proposed rule. In mid-October, EPA's Science Advisory Board (SAB), which was tasked with reviewing the document, sent a letter with detailed recommendations on how to modify the report. The SAB raised important questions about the scope of connectivity in their recommendations, which will need to be addressed prior to finalizing the report. We recommend EPA and the Corps pause this rulemaking effort until after the connectivity report is finalized to allow the public an opportunity to comment on the proposed rule in relation to the final report.

In a November 8, 2013 letter from the U.S. Conference of Mayors, National League of Cities and National Association of Counties to the Office and Management and Budget Administrator, we highlight the various correspondences our associations have submitted since 2011 as part of the guidance and rulemaking consideration process. (See attached.) We share this with you to demonstrate that we have been consistent in our request for a federalism consultation, concerns regarding the cost-benefit analysis, and concerns about the process and scope of the rulemaking. With these comments, we renew those requests.

Requests:

- Conduct an analysis to examine if the proposed rule imposes a significant economic impact on a substantial number of small entities per the Regulatory Flexibility Act.
- Initiate a formal state and local government federalism consultation process per Executive Order 13132: Federalism to address local government concerns and issues of clarity and certainty.
- Perform a thorough economic analysis inclusive of an examination of impacts of the proposed rule on all CWA programs using deeper and more relevant data. We urge the agencies to interact with issue-specific national associations to collect these data sets.
- Reopen the comment period for the proposed rule once the connectivity report is finalized for a minimum of 60 days.

Specific Concerns Regarding the Proposed Rule

As currently drafted, there are many examples where the language of the proposed rule is ambiguous and would create more confusion, not less, for local governments and ultimately for agency field staff responsible for making jurisdictional determinations. Overall, this lack of clarity and uncertainty within the language opens the door unfairly to litigation and citizen suits against local governments. To avoid such scenarios, setting a clear definition and understanding of what constitutes a "waters of the U.S." is critical. We urge you to consider the following concerns and recommendations in any future proposed rule or final rule.

Key Definitions

Key terms used in the proposed rule such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" will be used to define what waters are jurisdictional under the proposed rule. However, since these terms are either broadly defined, or not defined at all, this will lead to further confusion over what waters fall under federal jurisdiction, not less as the proposed rule aims to accomplish. The lack of clarity will lead to unnecessary project delays, added costs to local governments and inconsistency across the country.

Request:

- Provide more specificity for proposed definitions such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," "neighboring," and other such words that could be subject to different interpretations.

Public Safety Ditches

While EPA and the Corps have publically stated the proposed rule will not increase jurisdiction over ditches, based on current regulatory practices and the vague definitions in the proposed rule, we remain concerned.

Under the current regulatory program, ditches are regulated under CWA Section 404, both for construction and maintenance activities. There are a number of challenges under the current program that would be worsened by the proposed rule. For example, across the country, public safety ditches, both wet and dry, are being regulated under Section 404. While an exemption exists for ditch maintenance, Corps districts inconsistently apply it nationally. In some areas, local governments

have a clear exemption, but in other areas, local governments must apply for a ditch maintenance exemption permit and provide surveys and data as part of the maintenance exemption request.

Beyond the inconsistency, many local governments have expressed concerns that the Section 404 permit process is time-consuming, cumbersome and expensive. Local governments are responsible for public safety; they own and manage a wide variety of public safety ditches—road, drainage, stormwater conveyances and others—that are used to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a local government is liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. In *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey, California liable for not maintaining a levee that failed due to overgrowth of vegetation.

The proposed rule does little to resolve the issues of uncertainty and inconsistency with the current exemption language or the amount of time, energy and money that is involved in obtaining a Section 404 permit or an exemption for a public safety ditch. The exemption for ditches in the proposed rule is so narrowly drawn that any city or county would be hard-pressed to claim the exemption. It is hard—if not impossible—to prove that a ditch is excavated wholly in uplands, drains only uplands and has less than perennial flow.

Request:

- Provide a specific exemption for public safety ditches from the "waters of the U.S." definition.

Stormwater Permits and MS4s

Under the NPDES program, all facilities which discharge pollutants from any point source into a "waters of the U.S." are required to obtain a permit, including local governments with Municipal Separate Storm Sewer Systems (MS4s). Some cities and counties own MS4 infrastructure that flow into a "waters of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. These waters, however, are not treated as jurisdictional waters since the nature of stormwater makes it impossible to regulate these features.

It is this distinction that creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule and opens the door to citizen suits. Water conveyances including but not limited to MS4s that are purposed for and servicing public use are essentially a series of open ditches, channels and pipes designed to funnel or to treat stormwater runoff before it enters into a "waters of U.S." However, under the proposed rule, these systems could meet the definition of a "tributary," and thus be jurisdictional as a "waters of the U.S." The language in the proposed rule must be clarified because a water conveyance cannot both treat water and prevent untreated water from entering the system.

Additionally, waterbodies that are considered a "waters of the U.S." are subject to state water quality standards and total maximum daily loads, which are inappropriate for this purpose. Applying water quality standards and total maximum daily loads to stormwater systems would mean that not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. This, again, creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule.

Request:

- Provide a specific exemption for water conveyances including but not limited to MS4s that are purposed for and servicing public use from the "waters of the U.S." definition.

Waste Treatment Exemption

The proposed rule provides that "waste treatment systems, including treatment ponds or lagoons, *designed to meet the requirements of the Clean Water Act*" (emphasis added) are not "waters of the U.S." In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from the CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may inadvertently fall under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins. Therefore, we ask the agencies to specifically include green infrastructure techniques and water delivery and reuse facilities under this exemption.

A. Green Infrastructure

With the encouragement of EPA, local governments across the country are utilizing green infrastructure techniques as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. These more beneficial and aesthetically pleasing features, which include existing stormwater treatment systems and low impact development stormwater treatment systems, are not explicitly exempt under the proposed rule. Therefore, these sites could be inadvertently impacted and require Section 404 permits for green infrastructure construction projects if they are determined to be 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. Moreover, if these features are defined as "waters of the U.S.," they would be subject to all other sections of the CWA, including monitoring, attainment of water quality standards, controlling and permitting all discharges in these features, which would be costly and problematic for local governments.

Because of the multiple benefits of green infrastructure and the incentives that EPA and other federal agencies provide for local governments to adopt and construct green infrastructure techniques, it is ill-conceived to hamper local efforts by subjecting them to 404 permits or the other requirements that would come with being considered a "waters of the U.S."

B. Water Delivery and Reuse Facilities

Across the country, and particularly in the arid west, water supply systems depend on open canals to convey water. Under the proposed rule, these canals would be considered "tributaries." Water reuse facilities include ditches, canals and basins, and are often adjacent to jurisdictional waters. These features would also be "waters of the U.S." and as such subject to regulation and management that would not only be unnecessarily costly, but

discourage water reuse entirely. Together, these facilities serve essential purposes in the process of waste treatment and should be exempt under the proposed rule.

Requests:

- Clarify the waste treatment exemption by stating that green infrastructure practices and water delivery and reuse facilities meet the requirements of the exemption.
- Expand the waste treatment exemption to include systems that are designed to meet *any* water quality requirements, not just the requirements of the CWA.
- Provide a specific exemption for green infrastructure and water delivery and reuse facilities from the "waters of the U.S." definition.

NPDES Pesticide Permit Program

Local governments use pesticides and herbicides in public safety infrastructure to control weeds, prevent breeding of mosquitos and other pests, and limit the spread of invasive species. While the permit has general requirements, more stringent monitoring and paperwork requirements are triggered if more than 6,400 acres are impacted in a calendar year. For local governments who have huge swathes of land, the acreage limit can be quickly triggered. The acreage limit also becomes problematic as more waterbodies are designated as a "waters of the U.S."

Additional Considerations

Finally, we would like to offer two additional considerations that would help to resolve any outstanding confusion or disagreement over the breath of the proposed rule and assist local governments in meeting our mutual goals of protecting water resources and ensuring public safety.

Appeals Process

Many of the definitions in the proposed rule are incredibly broad and may lead to further confusion and lawsuits. To lessen confusion, we recommend the agencies implement a transparent and understandable appeals procedure for entities to challenge agency jurisdictional determinations without having to go to court.

Request:

- Institute a straight-forward and transparent process for entities to appeal agency jurisdictional determinations.

Emergency Exemptions

In the past several years, local governments who have experienced natural or man-made disasters have expressed difficulty obtaining emergency clean-up waivers for ditches and other conveyances. This, in turn, endangers public health and safety and jeopardizes habitats. We urge the EPA and the Corps to revisit that policy, especially as more waters are classified as "waters of the U.S." under the proposed rule.

Request:

- Set clear national guidance for quick approval of emergency exemptions.

Conclusion

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we thank you for the opportunity to comment on the proposed rule. Changing the CWA definition of "waters of the U.S." will have far-reaching impacts on our various constituencies.

As local governments and associated agencies, we are charged with protecting the environment and protecting public safety. We play a strong role in CWA implementation and are key partners in its enactment; clean and safe drinking water is essential for our survival. We take these responsibilities seriously.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact the proposed "waters of the U.S." rule will have on our local communities. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Clarence E. Anthony
Executive Director
National League of Cities

Matthew D. Chase
Executive Director
National Association of Counties

Joanna L. Turner
Executive Director
National Association of
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Brian Roberts
Executive Director
National Association of County
Engineers

Peter B. King
Executive Director
American Public Works
Association

Susan Gilson
Executive Director
National Association of Flood and
Stormwater Management Agencies

November 8, 2013

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street N.W.
Washington D.C. 20503

RE: EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule and Connectivity Report (Docket ID No. EPA-HQ-OA-2013-0582)

Dear Administrator Shelanski:

On behalf of the nation's mayors, cities and counties, we are writing regarding the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rulemaking to change the Clean Water Act definition of "Waters of the U.S." and the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which EPA indicated will serve as a basis for the rulemaking. We appreciate that EPA and the Corps are moving forward with a rule under the Administrative Procedures Act, as our organizations previously requested, however, we have concerns about the process and the scope of the rulemaking.

Background

In May 2011, EPA and the Corps released Draft Guidance on Identifying Waters Protected by the Clean Water Act (Draft Guidance) to help determine whether a waterway, water body or wetland would be jurisdictional under the Clean Water Act (CWA).

In July 2011, our organizations submitted comments on the Draft Guidance, requesting that EPA and the Corps move forward with a rulemaking process that features an open and transparent means of proposing and establishing regulations and ensures that state, local, and private entity concerns are fully considered and properly addressed. Additionally, our joint comments raised concerns with the fact that the Draft Guidance failed to consider the effects of the proposed changes on all CWA programs beyond the 404 permit program, such as Total Maximum Daily Load (TMDL) and water quality standards programs and the National Pollutant Discharge Elimination System (NPDES) permit program.

In response to these comments, EPA indicated that it would not move forward with the Draft Guidance, but rather a rulemaking pertaining to the "Waters of the U.S." definition. In November 2011, EPA and the Corps initiated a formal federalism consultation process with state and local government organizations. Our organizations submitted comments on the federalism consultation briefing in December 2011. In early 2012, however, EPA changed course, putting the rulemaking on hold and sent a final guidance document to the Office of Management and Budget (OMB) for interagency review. Our organizations submitted a letter to OMB in March 2012 repeating our concerns with the agencies moving forward with a guidance document.

Most recently, in September 2013, EPA and the Corps changed course again and withdrew the Draft Guidance and sent a draft "Waters of the U.S" rule to OMB for review. At the same time, the agencies released a draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Concerns

While we acknowledge the federalism consultation process that EPA and the Corps began in 2011, in light of the time that has passed and the most recent developments in the process toward clarifying the jurisdiction of the CWA, we request that EPA and the Corps hold a briefing for state and local governments groups on the differences between the Draft Guidance and the propose rule that was sent to OMB in September. Additionally, if EPA and the Corps have since completed a full cost analysis of the proposed rule on all CWA programs beyond the 404 permit program, as our organizations requested, we ask for a briefing on these findings.

In addition to our aforementioned concerns, we have a new concern 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 basis to claim federal jurisdiction over certain water bodies. By releasing the draft report for public comment at the same time as a proposed rule was sent to OMB for review, we believe EPA and the Corps have missed the opportunity to review any comments or concerns that may be raised on the draft science report actually inform the development of the proposed rule. We ask that OMB remand the proposed rule back to EPA and the Corps and that the agencies refrain from developing a proposed rule until after the agencies have thoroughly reviewed comments on the draft science report.

While you consider our requests for additional briefings on this important rulemaking process and material, we also respectfully request additional time to review the draft science report. We believe that 44 days allotted for review is insufficient given the report's technical nature and potential ramifications on other policy matters.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast affect that a change to the definition of "Waters of the U.S." will have on all aspects of the CWA. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

Tom Cochran	Clarence E. Anthony	Matt Chase
CEO and Executive Director	Executive Director	Executive Director
The U.S. Conference of Mayors	National League of Cities	National Association of Counties

cc: Gina McCarthy, Administrator, U.S. Environmental Protection Agency
Lt. General Thomas P. Bostick, Commanding General and Chief of Engineers, Army Corps of Engineers