



November 6, 2013

U.S. Environmental Protection Agency
Office of Environmental Information (OEI) Docket
Mail Code: 28221T
Docket ID No. EPA-HQ-OA-2013-0582
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Comments on the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Docket ID No. EPA-HQ-OA-2013-0582

Dear Sir or Madam:

On behalf of the National Association of Counties (NACo), we are submitting comments to the Science Advisory Board (SAB) Panel reviewing U.S. Environmental Protection Agency's (EPA) connectivity report. NACo is the only national organization that represents all 3,069 county governments in the United States.

Counties are tasked with the heavy responsibility of protecting the health, welfare, and safety of their citizens, as well as maintaining and improving their quality of life. This includes protection of valuable water resources. Whether or not a waterbody (or its conveyances) is considered jurisdictional will have an impact on local governments.

It is our understanding that the connectivity report will be used as the scientific basis for revising the "waters of the U.S." definition within the Clean Water Act (CWA). This proposed regulation is currently undergoing interagency review at the Office of Management and Budget (OMB).

Since the proposed rule will rely heavily on this document, we wanted to raise several issues of importance, because we feel some important questions are not being asked. Nor does the report currently guide federal regulatory agencies and the regulated community in understanding jurisdictional certainty.

We request the comment period be extended 90 days due to the technical nature of the report. The connectivity report notice was published in the Federal Register on September 24 with comments due November 6. This is not enough time for different parts of the country to analyze specific impacts of the report on local regions - this is relevant since the report's studies do not take into account regional differences. A number of our counties have conveyed that the comment period was not sufficient to thoroughly analyze the report's implications on regional conditions, such as watersheds, flood zones, topography, hydrology, geology and climate. Furthermore, there could be a wide range of these types of differences within one state or region. Since the shutdown closed a number of federal agency websites relevant to this research, NACo believes an extension of the comments is warranted.



NACo understands that the SAB panel has not been provided a copy of the proposed rule. NACo believes the SAB panel should be provided a copy of the rule to ensure that definitions and key terms in the draft regulation and the report are consistent. Otherwise, the SAB panel is set up for failure.

The report concludes that “streams,” whether alone or aggregated and regardless of size or flow, impact downstream waters. While Congress defined “navigable waters” in CWA section 502(7) to mean “the waters of the United States, including the territorial seas,” the Courts have generally assumed that “navigable waters of the U.S.” go beyond traditional navigable-in-fact waters. However, the Courts also acknowledge that there is a limit to federal jurisdiction. If the report assumes that all “streams” are interconnected, and thus, impact downstream water, those conveyances are likely to be regulated. This report, as drafted, goes well beyond the Courts dictates, essentially making all water (and their tributaries) within a watershed jurisdictional. NACo urges the panel to look at the limits of connectivity.

Since the report only focuses on the presence of connections, we request the SAB panel expand the scope of the questions studied to look at the impacts various types of connections have on downstream waters, in order to determine the limits of connectivity. Are all flows of equal importance and impact to downstream waters? NACo asks that the panel consider specific metrics to discover the stream flow impact on downstream waters and how significance will be measured. For example, a stream containing a permanent water flow may have a different ecological impact on downstream waters than a stream that flows intermittently or one that flows once a decade. It is important that these types of scientific studies be thoroughly documented.

We are also concerned that the report focuses on natural channels, rather than a broader spectrum of conveyances, which will likely be considered “connected” in the proposed regulation at OMB. We would like to see the scientific documentation on different types of conveyances, including ditches, since ditches have a different function than headwater streams. NACo is concerned that road-side, flood-control and other types of similar conveyances may be impacted, which would be significant for counties. While a ditch exemption technically exists, in practice, it is difficult to obtain. This leads counties to go through the Section 404 permit process for maintenance on ditches; the Section 404 process is very cumbersome and time-consuming, which lead to delays on important public safety infrastructure projects.

NACo is concerned about the broad definitions used in the report. For example, the definition of “stream” is general, which opens the door for other types of ditch conveyances, regardless of existing exemptions. Existing exemptions are so narrowly crafted that it is difficult to utilize them.

Likewise, the broad floodplain definitions used under the bidirectional section are of concern. The document does not state where a floodplain would end. Would existing data sets be used, such as those used by the Federal Emergency Management Agency (FEMA), which are not always exact elevations? Or would other data be allowed, such as state and/or local government data? NACo urges the panel to disclose relevant scientific studies about these new classifications and definitions.

NACo is also concerned over the impact the report will have on other CWA programs beyond Section 404. If the report is being used as the basis for the proposed regulation, there is only one definition of “waters of the U.S.” within the CWA, and that definition must be applied consistently for all CWA programs that use the term “waters of the U.S.” CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs, may be impacted. If the report leads with the assumption that all connections are of equal importance, it is likely these programs may also be impacted. NACo encourages the panel to include scientific basis studies, including specific impacts.

County Responsibilities in CWA

Under the CWA, states, counties and cities, share a wide range of regulator and regulated responsibilities ranging from NPDES, TMDL’s, Section 404, water quality standards, etc. It is in the arena of ditches that NACo members will be most immediately impacted. Counties own and maintain road-side ditches, flood control and stormwater channels, culverts, etc. These conveyances are an integral part of public safety.

In conversations with the Army Corps of Engineers (Corps) and EPA, the agencies have stressed continuation of their current exemption of maintenance of ditches. However, while an exemption exists on paper, in practice, a number of our counties are required to obtain 404 maintenance permits to cut down vegetation and/or clean out debris of man-made ditches. Delays in the process and associated financial requirements cause financial hardship on our counties.

Numerous NACo members have voiced concern regarding officials at local Corps offices deciding to regulate man-made ditches as jurisdictional waters under the CWA. Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Whether or not a ditch is regulated under Section 404 has significant financial implications for counties.

If more waters fall under federal jurisdiction, it is reasonable to assume counties will be submitting more Section 404 permits. Based on our counties’ experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur *after* federal jurisdiction is claimed.

Once jurisdictional, the project is then subjected to a multitude of regulatory requirements required under CWA. It triggers application of other federal laws like environmental impact statements, 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 with counties. A number of our California counties have told us this process takes easily three to five years or more, with costs in the millions for one project.

Over the past several years, a number of our counties have been required to obtain special maintenance permits to clean out roadside and flood control ditches. These permits often come with tight special conditions that dictate when and how the county is permitted to clean out relevant ditch(es). For example, one county had a maintenance permit for an earthen stormwater ditch. They are only permitted to clear grass and debris from the ditch six months out of the year due to ESA impacts. This, in turn, has led to multiple floodings of private property and upset citizens.

Another county tells us that it took them three years to obtain a Section 404 permit for a flood protection ditch project. The special conditions attached to the Section 404 permit required clearing 13 acres of vegetation (cost: \$700,000) and 20 acres of mitigation (cost: \$2.8 million). NACo has a multitude of these examples.

Additionally, Section 404 Corps processing delays have led to legal problems for counties. In *Arreola v Monterey*, 99 Cal. App. 4th 722 (2002), the Fourth District Court of Appeals held the County of Monterey liable for not maintaining a levee that failed due to overgrowth of vegetation, even as the county argued that the permit process did not allow for timely approvals. Broadening the scope of what waters are connected will increase third party litigation suits.

If more conveyances are considered significant, and thus, connected, it is reasonable to assume that more waters are jurisdictional. This will mean the process will become even more cumbersome, especially if the process is not streamlined nor accompanied by a Corps staff increase.

It is imperative that 404 permits be processed in a timely manner by the Corps. Delays in the permitting process have resulted in flooding of constituent and business properties, placing our counties in a difficult position in choosing between public safety and environmental protection.

We thank the SAB for their consideration. If you have any questions, please feel free to contact my staff Julie Ufner (Jufner@naco.org/ 202.942.4269).

Sincerely,



Matthew D. Chase
Executive Director
National Association of Counties