

Date: June 11, 2014

## **WATERS OF THE U.S. FACT SHEET**

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Army Corps) jointly released a proposed rule in April seeking to clarify which water bodies are subject to the Clean Water Act (CWA). NACWA had urged EPA to pursue any changes to CWA jurisdiction via a formal rulemaking process instead of via a guidance document, as was the past approach. NACWA has also long advocated for maintaining the waste treatment system exemption in any new jurisdictional rule, and this proposal does just that.

EPA and the Army Corps contend that the rule does not expand the reach of the CWA to include any new types of waters that have not historically been covered under the Act and is consistent with the Supreme Court's more narrow reading of CWA jurisdiction. The draft rule has many components, but below are the key elements from the perspective of the municipal clean water community that NACWA has identified, that will guide our comment development. Other national municipal organizations have expressed concerns about the potential of the rule to have a limiting effect on economic development.

We hope this information will also help inform those Member Agencies developing their own comments on the rule or who may be dealing with this issue with their own Boards or other local elected or appointed officials, while NACWA completes its official comments.

### **Key Elements for the Clean Water Community**

The draft rule:

- Maintains and clearly articulates an exemption for waste treatment systems designed to meet the requirements of the CWA.
- Exempts groundwater from federal jurisdictional reach.
- Does not change the regulatory status of water transfers.
- Excludes certain ditches that are located in upland areas with less than perennial flow from jurisdiction. Other ditches would be evaluated on a case-by-case basis for jurisdiction. However, the draft rule is not clear on what would qualify as an "upland" area. The draft rule's general treatment of ditches has caused significant confusion and is in need of clarification (see below).
- Exempts discharges incidental to stormwater runoff from lands that may be used for biosolids application under the agricultural stormwater discharge exemption.

### **Clarifications NACWA Will Seek**

- The final rule must clarify that municipal separate storm sewer systems (MS4s) are covered by the waste treatment system exemption and will not be jurisdictional under the CWA above any existing point of permitted discharge, including any ditches that are part of an MS4.

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- The draft rule is very confusing on its treatment of ditches, including which ditches will be specifically excluded from jurisdiction. Greater clarity on this point is needed, especially regarding how ditches could impact jurisdictional determinations for MS4s.
- EPA has verbally stated that the proposed rule is not intended to make green infrastructure (GI) installations jurisdictional, indicating that any GI installation or GI practice designed to meet CWA obligations or achieve water quality goals is not meant to be included. However, EPA and the Army Corps need to specifically clarify this in the final rule.
- The draft rule does not address the issue of recycled water projects, in particular those using wetlands to treat millions of gallons of water a day. EPA and the Army Corps must clarify the regulatory exemption of these recycled water projects.
- Differences in how states have implemented CWA jurisdiction in the past raise concerns about how the new rule will interface with existing state practice. This results in the perception that the rule is, contrary to EPA/Army Corps claims, expanding federal jurisdiction. EPA and the Army Corps will need to address this issue in the rule preamble.
- Concerns have been raised regarding a potential increase in federal enforcement over sanitary sewer overflows (SSOs) that previously would not be considered jurisdictional (for example, discharges into ditches that are not currently be considered a WOTUS). NACWA is exploring the implications of the rule on SSOs.

Comments for Docket ID No. EPA-HQ-OW-2011-0880 were originally due on July 21. However, interest groups filed requests for extension, to which EPA and the Army Corps responded with a 90-day extension, making the **new comment deadline October 20, 2014**. NACWA encourages its Member Agencies to evaluate the potential impacts of the rule for their utility and to help NACWA understand as many of the unique scenarios that may be of importance to association members and, as appropriate, include these in our national comment effort.

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