NAIOP
COMMERCIAL REAL ESTATE DEVELOPMENT ASSOCIATION

November 14, 2014

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

Emailed to OW-docket@epa.gov
Re: EPA-HQ-OW-2011-0880

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Re: Definition of "Waters of the United States" under the Clean Water Act

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners, investors and related professionals in office, industrial, mixed-use and retail real estate, with 17,000 members and 48 chapters throughout the United States. On behalf of our membership, thank you for the opportunity to provide comments and recommendations on the proposed rule for Waters of the United States (WOTUS).

NAIOP appreciates the willingness of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) to reach out to regulated communities, and our industry in particular, to ensure that this proposed rule is properly vetted. We hope these comments and recommended changes are considered for the final rule and strengthen your stated goal of providing clarity to affected industries.

We agree that current regulations lead to inconsistent determinations of WOTUS boundaries and have proven subjective in many parts of the country. However, we are concerned that certain aspects of EPA and Corps (Agencies) intent of clarification is not fully achieved with the proposed language, and this could cause interpretations in the field that would lead to both additional inconsistent determinations and an expansion in the area/coverage of the definition of WOTUS beyond the original intent of Congress.

It is vital that the EPA and Corps understand that the determination of the definition of (WOTUS) is ultimately a policy decision that incorporates economic realities in a scientific framework. While science should play a leading role in helping shape this policy, the policy decision has to reflect legal precedents, economic impacts, property rights and historic practices.

We submit that a successful definition of WOTUS should reflect the following theme:

"Healthy federal, state and local economies and clean waters of the U.S. are integrally related; balanced economic development and protection of our waterways are not mutually exclusive." [1]

[1] Borrowed the concept from the first sentence of the Chesapeake Bay Preservation Act.

The rule must also demonstrate the fact that one size cannot fit all, and that the federal government must utilize a definition of WOTUS that allows states and tribes to expand protection of their waterways through either conditions issued under Section 401 of the Clean Water Act (CWA), or by adding state or tribal regulation of non-federally regulated waters by enacting separate legislative protections.

We agree with the scientific principal that all water is ultimately connected.[2] The reason that the definition of WOTUS is so contentious is because regulators and scientists have used that basic principal as a justification for protecting waters that do not significantly alter or affect traditionally navigable waterways.

What is needed is a WOTUS definition that is reflective of a balance of economic development and protection of our waterways.

Please accept, consider, and incorporate the following specific comments to the Proposed Rule:

1. §328.3(a)(7) and §328.3(c)(7). Case-Specific Increase in WOTUS Areas using Significant Nexus. We recommend that you delete these subsections because the concept of "significant nexus" cannot be precisely defined and thus leads to delays and confusion, is open to political alterations, and is likely to be used to expand the areal extents of WOTUS. Case by case decisions of what the government specifically regulates simply, by definition, eliminate the possibility of a predictable and consistent regulatory program. The last several decades of angst over the definition of WOTUS can be directly tied to this concept. It simply cannot be defined with a bright line test so that the regulated public knows if a federal permit is needed. None of the key operative phrases in this definition (significant – speculative – insubstantial – sufficiently close) are terms that a surveyor can mark a line on the ground or a reasonable person can describe. The program is problematic because people who want to follow the rules cannot determine consistently where on their land these rules apply.

   Of particular note is that the Proposed Rule does not mention which areas surrounding new WOTUS determinations will also be impacted with regards to mitigation requirements. Currently, the geographic scope of federal regulation of WOTUS often includes 25' to 50' (or more) upland riparian buffers by Corps permit regulations for streams and open waters (i.e., Nationwide Permit General Condition C.23.(f), Federal Register Vol. 77 No. 34, February 21, 2012, pg. 10285). This could result in a

[2] All water on planet earth in some manner is connected through the hydrologic cycle.

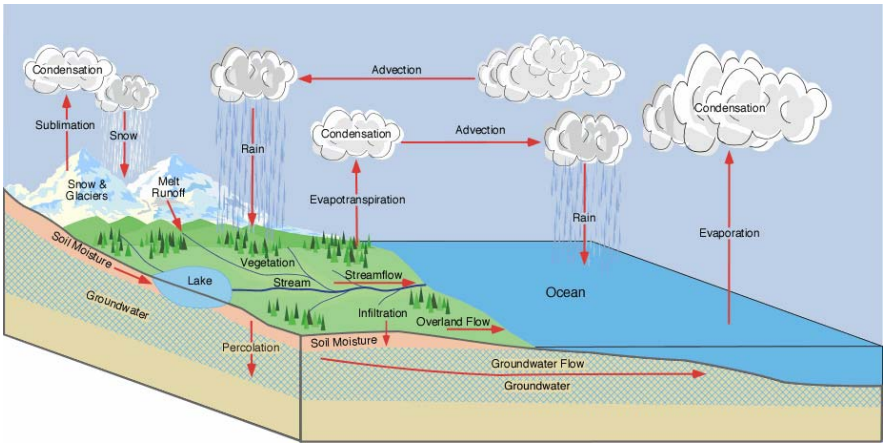


Figure 1: Hydrologic Cycle. (Source: PhysicalGeography.net, As included in Hubbart, J. (2011). Hydrologic cycle. Retrieved from http://www.eoearth.org/view/article/51cbee0d7896bb431f695c5e)

significant increase in the area of land regulated by the federal government by an order of magnitude much greater than the physical area of WOTUS – e.g., a 5-foot wide ephemeral stream would have at least a 25-foot buffer (or more) on each side, or 50-feet, 10 times the size of the stream. We anticipate streams as small as 1-3 feet wide will be determined jurisdictional by the Corps. If the current buffer requirement is needed for these types of waters, the economic impact would be significant.

2. §328.3(b)(3). Excavated Ditches.
   The current proposal for excavated ditches is a clear expansion of WOTUS jurisdiction. It is also unworkable in practice without many challenges because:

   a. Over time, some ditches may erode and intercept the groundwater table and become perennial, or an erosional head cut may move upstream or sediment disposition could occur – both changing the location of perenniality.

   b. Some ditches, in order to effectively achieve their desired purpose, must intercept the groundwater to provide gravity flow, and thus would be regulated.

   c. The EPA and Corps, unlike some states, have not developed a protocol to identify visually perennial water bodies in a consistent and repeatable manner at all times of the year. While there is a definition (just like wetlands), there is no manual as to how to identify features that meet said definition – unlike wetlands (whose manual and related documents have been developed and is widely understood).

   The following change is recommended: delete *"and have less than perennial flow"* and replace it with *"and were not constructed to relocate a stream defined as a WOTUS in §328.3(a)."*

3. §328.3(b)(4). Contributing Ditches.
   This section, as written, creates confusion[3] – as it recaptures (as jurisdictional WOTUS) certain ditches excluded in §328.3(b)(3).

   It is also problematic since it means that any ditch that connects to a stream or waterbody becomes a WOTUS. Since most ditches (to achieve their purpose of drainage) must connect to such areas to allow water to flow via gravity, the proposed language expands the extents of the current WOTUS definition – contrary to the stated clarification purpose of the proposed rule.

   Therefore, we request that you delete §328.3(b)(4) in its entirety.

4. §328.3(b)(5)(ii). Artificial Ponds.
   There is much concern in the regulated community that stormwater facilities currently exempt from regulations as a WOTUS could become regulated by the proposed rule[4], and that the adjective "exclusively" is extremely limiting. Therefore, to codify statements from the Agencies to the contrary, please revise this section to read as follows:

   (*ii) Artificial lakes or ponds created by excavating and/or diking dry land and used for such purposes as stock watering, irrigation, settling basins, rice growing, or wet or dry stormwater facilities, stormwater Best Management Practice (BMPs), flood control facilities, Low Impact Development (LID) facilities or other systems designed to control and treat stormwater runoff.*

[3] Q&A #19 provided by EPA at http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf did not address this issue. It said that when a ditch is constructed through a wetland or stream and connects to a navigable water it will be regulated as it is currently. It does not address when such ditches are constructed in uplands and connects to a water.
[4] This concern clearly generated EPA Q&A #22. However, it only addresses rain gardens – and not other stormwater facilities.

This achieves the stated purpose of the proposed rule and eliminates the current ambiguities.

5. §328.3(b)(1) MS4s.
The proposed definitions of tributary could be construed to include municipal separate storm sewer systems (MS4s) and their components. The Agencies' overly broad definition of "tributary" may improperly treat MS4s as WOTUS and clarification is needed to proclaim that MS4s are excluded from jurisdictional coverage. EPA and the Corps propose that any waterbody that meets the definition of a tributary is "by rule" a WOTUS. Pursuant to the Proposed Rule, a "tributary" is a waterbody that has a bed, bank and ordinary high water mark (OHWM), and contributes flow to waters that are used in interstate commerce, territorial seas, interstate waters, and their impoundments ("(1)-(4) waters").

   Under this proposed definition, MS4s and their system components could be deemed jurisdictional WOTUS. MS4 systems often include ditches and other manmade structures that have a bed, bank and OHWM. Moreover, as they are designed to convey and treat stormwater, MS4s will contribute flow (directly or indirectly) to the categories of so-called (1)-(4) waters. These common MS4 components are already subject to National Pollutant Discharge Elimination System (NPDES) permit requirements and could be confusingly and unnecessarily layered with more federal regulation as a WOTUS.

   EPA and the Corps should thus clarify for its field offices, state and local governments, and the regulated community that MS4s and their component conveyances are not considered WOTUS under the proposed rule.

   The following change is recommended:

   "(b) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

   "(1) Waste treatment systems, including treatment ponds, lagoons, **or Clean Water Act regulated municipal separate storm sewer systems and the component conveyances within such systems."**

6. §328.3(b)(5)(vii). Arid Ephemeral Streams.
It is unclear whether EPA intends to regulate ephemeral streams such as arroyos as "tributaries"[5]. If arroyos are considered tributaries, this would be a dramatic increase in regulatory jurisdiction and a burden on landowners, especially in the arid West. These arid ephemeral streams typically carry stormwater only during seasonal, and in some cases rare, rain events. The truth is that water flows downhill and water in the arid West has been carving the landscape for centuries.

   We think the more reasonable and justifiable approach is, as a matter of policy, not to regulate arid ephemeral streams. However, exceptions to this policy would make sense. EPA might determine that a particular ephemeral stream should be opted in because (a) it has been proven to flow, at X rate (i.e., that is more than de minimus), into a regulated water, for Y number of hours (e.g., 240), for Z number of years (e.g., 5 consecutive), based on historic flow, or (b) the Corps has made a case-by-case determination under the significant nexus criteria.

[5] EPA's Q&A #6 did not answer this concern.

Given the lack of justification for treating ephemeral streams differently than gullies and rills, which function similarly in conveying water in response to rainfall events, we recommend that you replace:

"(vii) Gullies and rills and non-wetland swales" with:
(vii) Gullies, rills, non-wetland swales and arid ephemeral streams such as arroyos.

7. §328.3(b)(5)(v). Water-filled Depressions.
Routinely federal regulators, despite guidance in the preamble of the 1986 Final Rule, attempt to exert jurisdiction over features such as sediment traps, sediment basins, vegetated swales, and stormwater ponds (created for and during construction activities) when projects are delayed due to economic conditions (loss of funding, foreclosures, etc.). While higher level managers usually intercede, the delays and angst could be eliminated by providing more specific and clear language.

Therefore, we recommend that you replace: *"Water-filled depressions created incidental to construction activity;"* with the following subsection:

(v) Depressions that become water filled periodically or permanently with or without hydrophytic vegetation or hydric soils created incidental to construction or quarrying activity whether actively in use or abandoned.

8. §328.3(c)(2). Neighboring.
Neither one of the following phrases: (i) *"riparian area"* and the phrase (ii) *"or waters with a shallow subsurface hydrologic connection or confirmed surface connection to such a jurisdictional water"* can be defined by a precisely located line on the ground (i.e., how many inches deep is "shallow") – thus the result will be confusion, uncertainty, inconsistency and delay.

Therefore, we recommend that you replace this subsection with the following changes:
Neighboring. The term *neighboring*, for the purposes of the term "adjacent" in this section, includes waters located within 100 feet of a water identified in paragraphs (a)(1) through (5) of this definition, or within the floodplain of a water identified in paragraphs (a)(1) through (5) of this definition.
This language, coupled with our suggested change to the floodplain definition, would provide certainty and clarity to all involved in the program.

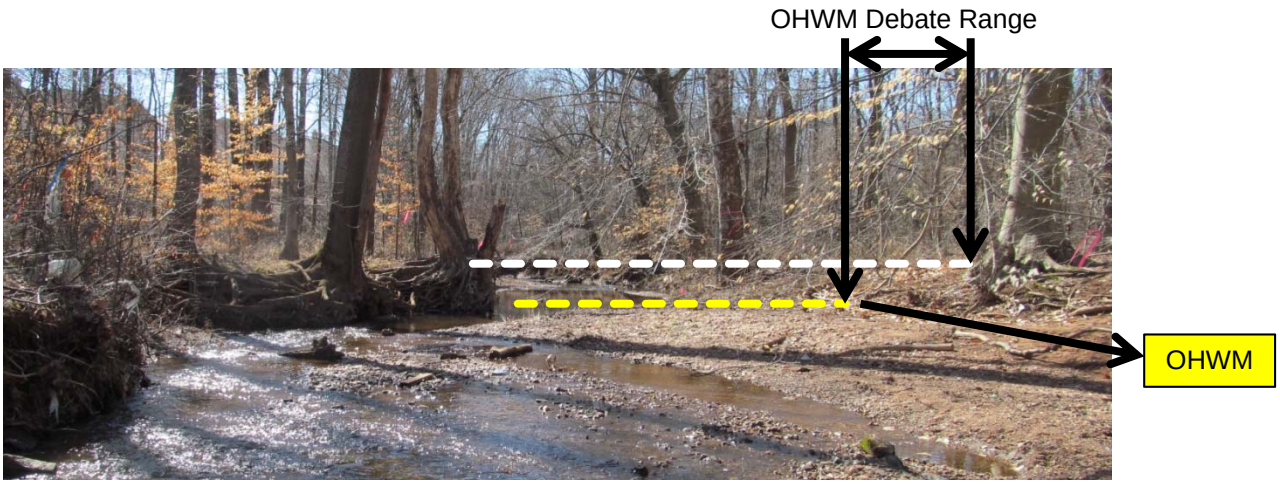
9. §328.3(c)(4). Floodplain.
The amorphous definition of floodplain in the Proposed Rule does not provide the public a "bright line" that is publically available and definable on the ground. We recommend that you delete this definition and replace with:

Any land area susceptible to being inundated by water from any natural source that is subject to a one percent or greater chance of flooding in any given year as depicted on the most recent Federal Emergency Management Agency Flood Insurance Rate Map, i.e., the 100-year floodplain, or if an area not currently mapped by FEMA meets both of the following conditions:

1. *The flooding source has a contributing drainage area of at least one square mile, or*
2. *The resulting inundation with a one percent or greater chance of flooding in any given year from a natural source of water is at least one foot deep and 25 feet wide.*

10. §328.3(c)(5). Tributary.
    This definition utilizes the term "Ordinary High Water Mark" (OHWM). This phrase is inconsistently interpreted in the field. The lack of a manual instructing regulators and the regulated public as to what is an OHWM is the cause of most debates over whether or not a defined channel is a gulley, rill, non-wetland swale, or an ephemeral stream.

    For example, below is a picture of an "easy" OHWM determination. Some regulators would say the OHW elevation is the yellow line; others would pick the white line (it is the lower, yellow line – the OHWM is where that plane intersects the edge of the bank).



    It is critical for the Agencies to refine the field location protocols of OHWM so that it is clear as to the extents of such regulatory authority because the lack of specificity on this term for decades simply continues to build angst amongst the regulated public.

    We have learned that the Corps has unveiled guidance aimed at clarifying OHWM. We recommend that these documents need to be developed for the U.S. before implementing a new regulation relying on a loosely defined term.

11. §328.3(a)(4) and (5). Impoundments and Tributaries.

    We recommend that you reverse the order of these subsections and correct the numbering accordingly. The order proposed is simply illogical. Currently these subsections read as:

    (4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;

    (5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

    Revising it as proposed below would not eliminate any jurisdictional WOTUS based upon any scenario we can envision and would eliminate the "circular argument." We recommend that it be changed as follows:

    (4) All tributaries of waters identified in paragraphs (a)(1) through (3) of this section;

    (5) All impoundments of waters identified in paragraphs (a)(1) through (4) of this section;

12. §328.3(c). Definition of Upland Ditches and Uplands.
    There is confusion as to what is meant by the term "upland ditches."[6] To eliminate this confusion, we suggest the following definitions be added in §328.3(c): Uplands. The term *uplands* means those land area that are not below a waterbody (i.e., subaqueous) and not a wetlands.

    Upland Ditches. The term *uplands ditches* means ditches that are excavated wholly in uplands and were not constructed to relocate a stream defined as a WOTUS in §328.3(a).

How to Protect Additional Waters

The primary reason why significant portions of the public are so concerned with the extent of the definition of WOTUS is due to the financial burdens and the requirements of dealing with the current CWA permitting program.

The Corps and EPA should refocused their efforts on developing a successful and simplified permit process by determining:

- What is regulated (areas and activities).
- What is required (of applicants).
- Timeliness requirements (for agency responses).

NAIOP's proposed changes will clarify and clearly communicate what is regulated in terms of area. The proposed rule is lacking in any attempt to define or articulate the activities in such areas that the federal government proposes to regulate. While this was attempted for agricultural activities, we suggest that a stakeholder group be formed to spell out what activities shall not be allowed in WOTUS without a CWA permit.

An effective permit program needs to include a specific list and description of what is required for an application to be complete. States that have done so have dramatically reduced the time that staff and applicants expend on "getting in the door" with a complete application suitable for a timely review.

Timeliness requirements are critical for effective and efficient CWA permit review. A timeframe for completeness review must be established (e.g., 15 days). The regulators must either ask for more information consistent with the program requirements or accept the application. Then, depending on the type of permit, an outside timeframe for issuance must be mandated for all permits.

Conclusion

We believe that a better approach for the federal government is to refocus on protecting areas that, without doubt, need federal protection and regulate the WOTUS in an effective, consistent and fair manner, allowing states and tribes to determine if more extensive regulatory protections over certain landscape features and/or activities are warranted.

There are workable solutions across our great nation. For example, in 2000 the regulated community in Virginia worked with the environmental community to regulate isolated wetlands and prevent the draining of wetlands via "Tulloch ditching." They traded increased regulatory definitions and protections for "Waters of the Commonwealth – including many isolated wetlands" in exchange for timeliness and certainty in the permit process.

[6] EPA's Q&A #20 addressed part of this issue. Including these terms as definitions will end any confusion.

All sectors also agreed on a policy that not all isolated wetlands need such protection – and thus defined isolated wetlands of minimal ecological value (IWOMEV), which are not regulated. This could serve as a model for the Agencies to follow.

We appreciate the opportunity to comment on the Proposed Rule. We remain concerned that the new regulations, as currently written, will continue to create confusion to the regulated community for what is considered a WOTUS. We also contend that these regulations will result in a significant increase in the extent of WOTUS, both in geographical areas and in WOTUS determinations, contrary to the stated purpose of the Agencies.

For these reasons, we hope that you will consider our changes and incorporate them into the Final Rule. If I, or my office, can be of further assistance, please contact John Bryant, senior director of federal affairs, at 703-904-7100 or bryant@naiop.org.

Sincerely,

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President and CEO

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