

**TESTIMONY OF JEFFREY LONGSWORTH
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BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON WATER AND WILDLIFE
“INNOVATION AND THE UTILITIES OF THE FUTURE: HOW LOCAL WATER
TREATMENT FACILITIES ARE LEADING THE WAY TO BETTER MANAGE
WASTEWATER AND WATER SUPPLIES”
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Chairman Cardin, Ranking Member Boozman, and distinguished members of the Water and Wildlife Subcommittee of the Senate Committee on Environment and Public Works, thank you for the opportunity to testify today on “Innovation and the Utilities of the Future: How Local Water Treatment Facilities are Leading the Way to Better Manage Wastewater and Water Supplies.” I am a partner in the Barnes & Thornburg law firm, previously was appointed to the U.S. Environmental Protection Agency’s (EPA) Federal Advisory Committee on Urban Wet Weather Flows and Montgomery County’s (Maryland) Water Quality Advisory Committee, and have represented state, municipal, industrial, and construction stormwater clients for 25 years. I am testifying in my own capacity based on my expertise in this area.

Individual municipal separate storm sewer system (MS4) operators and utilities are developing many innovative strategies to address local water resource challenges. Flexibility to address unique local and regional issues and priorities is critical to MS4 operations and prioritizing use of limited financial resources to maximize the benefits of their investments to protect water resources. Conversely, EPA’s overly prescriptive and unjustified mandates and efforts to expand its Clean Water Act jurisdiction to drainage features within MS4s in contravention of the limitations set forth by Congress in the Act significantly hamper and threaten MS4 operators’ ability to efficiently protect local water resources.

Specifically, I will address the following critical issues:

- EPA’s national effort to mandate green infrastructure and regulate the flow of stormwater;
- EPA’s and the Army Corps of Engineers proposed waters of the U.S. rulemaking; and
- The collective impacts that these two federal initiatives have on MS4 operators, limiting their flexibility to address discharges from those MS4s as envisioned by the Clean Water Act.

I. GREEN INFRASTRUCTURE INVESTMENTS ARE UNIQUELY A LOCAL DETERMINATION

Green infrastructure projects have the potential to create significant benefits.¹ But the evidence shows that the decisions to implement appropriate green infrastructure projects are uniquely local in nature. EPA initiated a national rulemaking in 2009 to expand the stormwater permit program to force MS4 operators to impose stormwater retention and flow restrictions (as “green infrastructure”) on new or redeveloped sites,² but last year announced that it was “deferring” its national rulemaking.³ However, despite its announcement that it will not pursue a rulemaking to establish national green infrastructure standards, EPA is instead attempting to mandate the same type of stormwater flow and retention mandates on MS4 operators through a permit-by-permit type of approach that it deferred in its national rulemaking. Individual and proposed general permits issued by EPA (and its Regional Offices) in Washington, DC, Albuquerque, NM, New Hampshire, Massachusetts, and certain Department of Defense military bases all contain provisions related to mandatory stormwater retention and flow that significantly and unjustly impact local MS4 operators, as well as local economies that have to pay for such programs. More importantly, EPA’s approach bypasses its CWA and Administrative Procedures Act rulemaking obligations, resulting in litigation and unnecessary program uncertainty.

EPA should be prohibited from using the “adjudicatory process of permit issuance” to attempt to implement a regulatory approach outside its current regulatory authority. Congress clearly set forth the process for expanding the stormwater program through CWA Sections 402(p)(5)-(6). The Agency should not be allowed to short-circuit that process through a permit-by-permit approach.

A. EPA’s Authority Over MS4 Discharges Is Limited.

Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). CWA § 301(a) prohibits “the discharge of any pollutant” by any person, except as authorized by the Act. 33 U.S.C. § 1311(a). To regulate these discharges, CWA Sections 301 and 304 authorize EPA to establish “effluent limitations,” defined as restrictions placed upon pollutants that “are discharged from

¹ See EPA’s *Municipal Separate Storm Sewer Systems Permits: Post-Construction Performance Standards & Water Quality-Based Requirements – A Compendium of Permitting Approaches* (June 2014).

² Since at least 2009, EPA has believed that it must promulgate new rules and regulations to expand the existing stormwater program to establish its own post-construction stormwater performance standards. See 74 Fed. Reg. 68,617 (December 28, 2009); see also EPA’s rulemaking webpage at <http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm>; and EPA Semiannual Regulatory Agenda – Fall 2013 (RIN 2040-AF13) (<http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0784-0001> at 13).

³ See <http://water.epa.gov/polwaste/npdes/stormwater/Proposed-National-Rulemaking-to-Strengthen-the-Stormwater-Program.cfm> (“EPA is updating its stormwater strategy to focus now on pursuing a suite of immediate actions to help support communities in addressing their stormwater challenges and deferring action on rulemaking to reduce stormwater discharges from newly developed and redeveloped sites or other regulatory changes to its stormwater program.”)

point sources into navigable waters.” *Id.* §§ 1311, 1314(b), 1362(11) (emphasis added); *see also id.* § 1342(a)(1).

Under CWA § 301, EPA must develop effluent limitations for “pollutants.” 33 U.S.C. § 1311. “[P]ollutant’ means dredged spoil, solid waste,... chemical wastes, biological materials,... heat,... rock, sand, cellar dirt and industrial... waste discharged into water.” 33 U.S.C. § 1362(6). The Supreme Court has held that the term “means” in a definition is restrictive; it excludes anything unstated. *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1978); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). Therefore, EPA cannot add to the list.

CWA § 402 provides an exception to CWA Section 301’s prohibition by allowing pollutant discharges to be authorized by a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342(a). Thus, the Clean Water Act, through the NPDES permit program, limits the discharge of pollutants into waters of the U.S. 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316(b)(1)(B).

The Clean Water Act and related Supreme Court decisions make clear that the permitting authority granted to EPA under Section 402 is limited solely to the discharge of “pollutants” from “point sources” into waters of the U.S. EPA now is attempting to expand its authority beyond the discharge of pollutants from an MS4 point source, and instead focus on other unregulated characteristics of stormwater (*i.e.*, its quantity, flow, or velocity), on the amount of impervious surface area for new or redeveloped properties that may drain into the MS4, or to expand its jurisdiction into drainage features contained in the MS4 by reclassifying them as “waters of the U.S.”

B. The CWA Clearly Limits EPA’s Authority to the Discharge of Pollutants.

EPA’s NPDES permitting authority over MS4s is limited to controlling the *discharge of pollutants from* the MS4 system to the maximum extent practicable (MEP). The limits of this authority does not stretch to encompass any agency role to independently regulate stormwater flow or volume absent pollutants, or to mandate that the MS4 establish new laws to achieve an end that EPA itself cannot independently achieve.

Congress’ mandate to EPA to focus on the discharge of pollutants is not unique to the MS4 program, but is inherent in the overarching NPDES permit program within which the MS4 provisions fit. CWA § 402(a) authorizes the “issu[ance of] permit[s] for the discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a). Section 402(p)(3)(B) then sets forth specific conditions applicable to discharges from MS4s. 33 U.S.C. § 1342(p)(3). The language Congress used in CWA § 402(p)(3)(B) is important because it only prohibits “non-stormwater” discharges *into* storm sewers while then directing EPA to develop “controls to reduce the discharge of pollutants” *from* MS4s “to the maximum extent practicable.” *Id.*

In addition, Congress did not require MS4 discharges to comply strictly with state water quality standards (33 U.S.C. § 1311(b)(1)(C)). In *Defenders of Wildlife v. Browner*, 191 F.3d

1159, 1165 (9th Cir. 1999), the Ninth Circuit Court of Appeals found that Congress did not mandate strict compliance with state water quality standards, but that Congress provided EPA with limited discretionary authority contained in 33 U.S.C. § 1342(p)(3)(B)(iii), to require such other provisions that the Administrator determines are appropriate “for the control of such pollutants.” *Id.* at 1166 (emphasis added). Hence, Congress delegated to EPA the authority to regulate pollutant discharges from MS4s through a combination of the MEP technology standard and limited discretionary authority to impose additional limitations on pollutants being discharged from the MS4.

Congress did not provide EPA with unbridled authority. Rather, the CWA “authorizes the EPA to regulate, through the NPDES permitting system, *only* the discharge of pollutants.” *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis added).” As the D.C. Circuit has explained, “[t]he statute is clear” and contains no language that “undercuts the plain meaning of the statutory text;” EPA may not “meddl[e] inside a facility” because it only has authority over the discharge of pollutants from a point source, and “Congress clearly intended to allow the permittee to choose its own control strategy.” *American Iron and Steel Institute v. EPA.*, 115 F.3d 979, 996 (D.C. Cir. 1997).

The definition of “*pollution*” underscores that Congress only provided EPA with authority over the discharge of pollutants. Congress defined “*pollution*” as “the man-made or man-induced alteration of the chemical physical, biological and radiological integrity of water.” 33 U.S.C. § 1362(19). The Supreme Court of Washington, in a case affirmed by the U.S. Supreme Court, succinctly provided that under CWA § 1362(19) “man-induced alteration of streamflow level is ‘*pollution*.’” *State of Washington, Dept. of Ecology v. PUD No. 1 of Jefferson County*, 121 Wash.2d 179, 187 (1993), *aff’d* 511 U.S. 700 (1994); *see also United States v. Tennessee Water Quality Control Board*, 717 F.2d 992, 998-99 (6th Cir. 1983) (“Although alterations in the properties of the water are ‘*pollution*’ . . . all alterations do not fit the narrower definition of ‘*pollutants*’ . . .”). Hence, EPA’s national efforts to restrict volume and flow to protect against down-stream erosion and “*pollution*” go beyond the Agency’s authority to control the discharge of pollutants through the NPDES permit program.

Further, any pollutants to be regulated must be “discharged” to a water of the U.S. The Supreme Court has affirmed the importance of the distinction between “*pollutants*” added to a waterbody versus “*pollution*” already contained therein. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court described the difference between the discharge (addition) of pollutants to a water body and the movement of pollutants within a waterbody. 568 U.S. ___ (2013)(Slip Opinion at 3)(further explaining the Court’s decision in *South Florida Water Management Dist. v. Miccosukee Tribe* 541 U.S. 95, 109-112 (2004)). Quoting the Second Circuit, the Court explained that “[i]f one takes a ladle of soup

from a pot, lifts it above the pot, and pours it back into the pot, one has not ‘added’ soup or anything else to the pot.” *Id.* (internal quotations omitted).⁴

Thus, when substances redistribute within a waterbody, that substance is not being “added” to the waterbody under the CWA. In light of the Court’s holding that the movement of pollutants within a waterbody does not constitute an “addition” or discharge, the EPA cannot now credibly take the position that it can regulate flow to prevent streambank erosion downstream or the impacts of sediment already contained in the streambanks.

In short, EPA “is powerless to impose conditions unrelated to the discharge itself.” *N.R.D.C. v. EPA.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA cannot regulate point sources themselves, only the discharge of pollutants); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 551 (8th Cir 2009) (“the Clean Water Act gives EPA jurisdiction to regulate... only *actual* discharges—not potential discharges, and certainly not point sources themselves.”)(emphasis in original).

C. Flow is Not a Pollutant.

In *Virginia Department of Transportation v. U.S. Environmental Protection Agency*, 2013 U.S. Dist. LEXIS 981 (E.D.Va. Jan. 3, 2013) (hereafter referred to as “*Accotink*,” the name of the creek at issue in that case), the federal district court held that the CWA did not confer authority to regulate stormwater flow because stormwater is not a “pollutant,” under that term’s statutory definition. *Id.* at 5. The court rejected EPA’s argument that stormwater flow could be regulated as “proxy” or “surrogate” to affect levels of pollutants already present within a waterbody, while acknowledging that it may be appropriate, in different circumstances, to impose stormwater flow restrictions as a means to regulate *specific pollutant levels demonstrated to be discharged into a waterway within the stormwater flow*. *Id.* at 5-6.

EPA has incorrectly attempted to limit the applicability of *Accotink* to the development of Total Maximum Daily Loads (TMDLs) under CWA §303(d). The *Accotink* court’s logic – based upon the Act’s explicit focus on controlling pollutant discharges into waters of the U.S. – applies with equal force in the context of the NPDES permitting program, because both the NPDES permit program and TMDL wasteload allocations that are incorporated into NPDES permits are expressly limited to the authority conferred by the CWA to regulate the “discharge of pollutants.” 33 U.S.C. §§ 1311(a), 1313(d), 1314, 1342(a).

Executive agencies may not sidestep specific legislative requirements in their zeal to achieve a statute’s overall objective.⁵ CWA §402(p)(3)(B)(iii) does not authorize EPA to

⁴ See also *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (upholding EPA’s interpretation of “addition” that required pollutants be introduced “from the outside world.”); but see *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731-32 (4th Cir. 2009) (explaining that under CWA section 401(a)(1), the word “discharge” does encompass water flowing into areas where dredging was to occur.)

⁵ See *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (“No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”); *Nat’l. Mining Assoc. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (“In a press release accompanying the adoption of the Tulloch Rule, the

eliminate or control stormwater flow or mandate the prevention of stormwater discharges, but rather requires the pollutants in the discharge to be reduced to the MEP standard. While EPA may argue that limiting stormwater flows helps it to achieve the goals of the CWA, it is still bound by the specific limitations in the Act that require it to focus on the discharge of pollutants from point sources to waters of the U.S.

D. EPA's Clean Water Act Authority Over Discharges Of Pollutants Applies To Point Sources Only.

Under the Clean Water Act, the term “discharge of a pollutant” means “the addition of any pollutant to navigable waters from any *point source*.” 33 U.S.C. § 1362(12) (emphasis added). EPA’s authority to control pollutant discharges does not encompass the ability to mandate land use decision-making. This is not to say that local authorities and MS4 operators could not develop a standard or regulation to, for instance, limit impervious surfaces or other stormwater flows into the MS4. But EPA is limited to regulating the discharge of pollutants from the MS4 and cannot force MS4s to do what EPA is not otherwise authorized to do, including imposing restrictions on local land use decisions.

On November 26, 2014, EPA released a guidance memorandum in which it asserts authority to mandate retention standards based on the amount of impervious surface at a site.⁶ However, EPA’s authority is necessarily limited to the discharges from a MS4’s storm sewer system (the point source) into navigable waters. Managing stormwater to restore the area to, for example, its “predevelopment hydrology” exceeds EPA’s Clean Water Act authority because it goes beyond the regulation of a point source to regulate activities on the land and stormwater “flow.” Moreover, EPA has failed to show any relationship between pre- or post-development stormwater flows or the relationship of those flows to any actual pollutant discharges.

Impervious surfaces are not “point sources” under the NPDES permit program. CWA Section 301 prohibits unauthorized point source discharges, but Congress left the “regulation of nonpoint source pollution to the states.” *Cordiano v. Metacon Gun Club, Inc.* 575 F.3d 199, 219 (2d Cir. 2009); *Defenders of Wildlife v. U.S. Env'tl. Prot. Agency*, 415 F.3d 1121, 1124 (10th Cir.

White House announced: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking." White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* (Aug. 24, 1993). While remarkable in its candor, the announcement contained a kernel of truth. If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress. Without such an amendment, the Act simply will not accommodate the Tulloch Rule.”)

⁶ See *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on LAs"* http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf (at Footnote 5) “For the purpose of this memorandum, and in the context of NPDES permits for stormwater discharges, ‘numeric’ effluent limitations refer to limitations with a quantifiable or measurable parameter related to a pollutant (or pollutants). Numeric WQBELs may include other types of numeric limits in addition to end-of-pipe limits. Numeric WQBELs may include, among others, limits on pollutant discharges by specifying parameters such as on-site stormwater retention volume or percentage or amount of effective impervious cover, as well as the more traditional pollutant concentration limits and pollutant loads in the discharge.” (emphasis added)

2005) (explaining that the CWA deals with nonpoint source pollution merely by “requir[ing] states to develop water quality standards for intrastate waters.”); *U.S. v. Plaza Health Labs, Inc.* 3 F.3d 643, 647 (2d Cir. 1993) (providing that the “control of pollutants from runoff is applied pursuant to section 209 and the authority resides in the State or other local agency.”) (quoting S. Rep. No. 92-414, 972 U.S.C.C.A.N. 3668, 3744). The CWA focuses on point sources rather than nonpoint sources because “differences in climate and geography make nationwide uniformity in controlling non-point source pollution virtually impossible. Also, the control of non-point source pollution often depends on land use controls, which are traditionally state or local in nature.” *Oregon Natural Desert Assoc. v. United States Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Poirier, *Non-point Source Pollution*, § 18.13); *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (recognizing that the “[r]egulation of land use . . . is a quintessential state and local power.”).

The CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Impervious surfaces such as roofs, parking lots, and roads are not point sources. Impervious surfaces do not channelize water. Instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which is not regulated under the stormwater permitting program.

If EPA now interprets “point source” to include impervious surfaces, it renders that term meaningless and clearly contradicts congressional intent to define the term and differentiate “point sources” from “non-point sources.” As noted by the Second Circuit Court of Appeals, “the phrase ‘discernible, confined, and discrete conveyance’ cannot be interpreted so broadly as to read the point source requirement out of the statute.” *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). Such a broad interpretation would be contrary to the text and structure of the CWA. The Act defines the term “point source,” and leaves all other flows of water to be considered “nonpoint sources,” the regulation of which is left to the states. *Id.* at 219-220. EPA's NPDES regulations define the extent to which surface runoff can in certain circumstances constitute point source pollution. The definition of “[d]ischarge of a pollutant” includes “additions of pollutants into waters of the United States from: surface runoff *which is collected or channeled by man.*” 40 CFR § 122.2 (emphasis added). By implication, surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and, consequentially, is not subject to the CWA permit requirement. *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (relying on “the familiar principle of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of the other”).

The Supreme Court has repeatedly rejected assertions of federal authority under the CWA that usurp the “quintessential state and local power” found in the “[r]egulation of land use.” *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) (Scalia, J. plurality) (citations omitted). *See also Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting

expansive reading of CWA jurisdiction because of “significant constitutional questions raised” by “impingement of the States’ traditional and primary power over land and water use”). These cases turned on the interpretation of the jurisdictional phrases “the waters of the United States” and “navigable waters,” and held that even by using those terms to broadly define the proper subject matter of federal jurisdiction under the CWA, Congress did not authorize federal regulators to supplant local land use decision-making. *Rapanos*, 547 U.S. at 738-39 (“We ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase ‘the waters of the United States’ hardly qualifies.” (citation omitted)); *Solid Waste Agency*, 531 U.S. at 174 (“We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation.”).

II. EPA’S AND THE ARMY CORP’S PROPOSED EXPANSION OF CWA JURISDICTION IMPACTS MS4 SYSTEMS

The existing definition of waters of the U.S. relies on the authority granted by Congress to protect waters that can be used in interstate commerce from becoming polluted. 42 Fed. Reg. 37122, 37127-28 (July 19, 1977).⁷ On April 21, 2014, the Department of Defense, Department of the Army, Corps of Engineers (Corps) and EPA (together “the agencies”) published a proposed rule in the Federal Register (79 Fed. Reg. 22,188) titled, *Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule* (“proposed rule” or “proposal”), which expands jurisdiction under the CWA into existing MS4 and other drainage features. In the proposed rule, the agencies have created an entirely new legal justification for federal jurisdiction. Instead of focusing on water pollution, the agencies have structured the proposed rule relying on the premise that the statute grants the agencies the authority to assert federal control over any water, located anywhere, if the agencies can find a “significant nexus” between that water and a navigable or interstate water or territorial sea.

Building on this premise, the agencies assert that the “significant nexus” that creates federal jurisdiction can be based on the movement of animals and insects from one water body to another or on the flow or retention of water, irrespective of the movement of pollutants and the potential for those pollutants to impact navigable waters. Relying on ecological studies that show, unsurprisingly, that land, water, animals, and plants are all linked, the agencies claim the authority, as a threshold matter, to assert federal control over all waters. After claiming this expanded jurisdiction, the agencies then recognize a few narrow exemptions.

There is no question whether the Constitution or the CWA authorizes federal jurisdiction over “navigable waters and territorial seas.”⁸ However, the proposed rule has created uncertainty regarding what is considered “navigable.” The preamble suggests that commercial navigation

⁷ The 1977 definition was reorganized in 1986. 51 Fed. Reg. 41206, 41216 (Nov. 13, 1986).

⁸ Territorial seas are navigable. 33 CFR § 328.4(a) (“The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles.”).

can be demonstrated by an experimental canoe trip taken solely to demonstrate navigability. 79 Fed. Reg. at 22,253. While the agencies cite *FPL Energy Marine Hydro L.L.C. v. FERC*, 287 F.3d 1151 (D.C. Cir. 1992), to support this position, such insignificant and speculative evidence does not meet the test set forth by the Supreme Court, which requires a traditional navigable water to be a “highway of commerce.” *The Daniel Ball*, 77 U.S. 557 (1870). According to the Supreme Court, use as a highway is the “gist of the federal test.” *Utah v. United States*, 403 U.S. 9 (1971). An experimental canoe trip fails that test. Under the Commerce Clause, Congress also can regulate those activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Again, a canoe trip fails that test.

The proposed rule also expands the agencies’ asserted jurisdiction over interstate water by expanding the concept of “water.” Under the proposed rule, “waters” can be dry, they can be erosion features on the land, they can be ponds or pools that are hydrologically isolated from any navigable water, and they can even be found in soil.

The proposed rule asserts jurisdiction over all “tributaries” of navigable or interstate water or territorial seas or impoundments thereof. Tributaries are jurisdictional under the current regulatory definition of waters of the U.S. 33 CFR § 328.3(a)(5). However, the term “tributaries” is not currently defined. The proposed rule expands jurisdiction over this category of water by proposing to define tributaries to include features on the land where an EPA or Corps employee believes he or she can discern a bed, bank, and ordinary high water mark (OHWM), even if these features disappear underground, as long as these features can be identified upstream of where they disappear.⁹ This proposed expansion of the definition of “tributary” has created tremendous uncertainty regarding the status of water conveyance and drainage systems.

Next, the proposed rule expands the concept of “adjacent wetlands” that are jurisdictional. The current regulations assert jurisdiction over wetlands that are adjacent to waters (other than waters that are themselves wetlands) that are considered jurisdictional waters of the U.S. 33 CFR § 328.3(a)(7). “Adjacent” is defined in current regulations as “bordering, contiguous, or neighboring.” The proposed rule expands this category in two ways. First, the proposed rule would assert jurisdiction over “*all waters*” (not defined), rather than wetlands only, that are “adjacent” to a navigable or interstate water or territorial sea or an impoundment or tributary thereof.¹⁰

⁹ “A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.” Proposed 33 CFR § 328.3(c)(5).

¹⁰ Current law clearly exercises federal jurisdiction over adjacent wetlands only, not other water. See *San Francisco Baykeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007) (holding that mere adjacency provides a basis for CWA coverage only when the relevant water body is a “wetland,” not adjacent ponds).

Second, the proposed rule expands the definition of “adjacent” by adding a definition of “neighboring” that includes all water located in (1) a “floodplain” (defined only as an area formed by sediment deposition from inland or coastal waters under “present climactic conditions” (not defined) and that is inundated during periods of “moderate to high flows” (not defined)), (2) a “riparian area” (defined as an area where surface or subsurface hydrology directly influences ecological processes and plant and animal community structure), (3) an area that has a shallow subsurface hydrologic connection (not defined), or (4) an area with a confined surface hydrologic connection (not defined – apparently less than a tributary but could be a non-jurisdictional feature such as a rill, gully or non-wetland swale) to such water.

The proposed change from “adjacent wetlands” to “adjacent waters” and broad expansion of the concept of “adjacent” have caused tremendous uncertainty regarding the status of wetlands, ponds, water storage systems, and water conveyances that lie in a floodplain or riparian area or that have a groundwater connection, however distant, or where water can move overland to a navigable water.

Current regulations also assert jurisdiction over “other waters” if the use, degradation, or destruction of those “other waters” could affect interstate or foreign commerce, with specific examples of water bodies that may be included in this category. 33 CFR § 328.3(a)(3). The proposed rule expands this narrow category to all “other waters” (not defined) that alone or in combination with other similarly situated waters have a significant nexus to a navigable or interstate water or territorial sea. “Significant nexus” is defined as a nexus that is more than speculative or insubstantial. Once the “significant nexus” is established for single water, or a category of waters that are similarly situated, all are *per se* jurisdictional.

Under the proposed rule, a significant nexus can be based on the movement of biota, so any water could be considered jurisdictional if used by a bird, insect, amphibian, or mammal. And, if any single water is jurisdictional then all waters in the same category (pond, wetland, swale, *etc.*) also are jurisdictional. Thus, any water located anywhere could be considered jurisdictional. This is an expansion of federal jurisdiction that has caused enormous uncertainty.

The proposed rule includes exemptions from the existing regulations and exemptions that are based on clarifications of the scope of federal jurisdiction in those prior rulemaking preambles. But these exemptions are related to *different* underlying rules and are not always directly applicable to the proposed rule, making those exemptions and how they apply to the proposed expanded jurisdiction equally confusing. For example, “ditches” have generally been excluded from CWA jurisdiction, but under the proposed rule, ditches will be considered tributaries and therefore waters of the U.S. unless they meet the terms of an exemption.

Under the proposed rule a ditch is exempt *only if* (1) it is excavated (not a natural feature such as an erosion feature) wholly in uplands and drains only uplands (uplands is not defined) and it has less than perennial flow (meaning that during normal years it does not hold water all 12 months of the year) or (2) the ditch does not contribute flow (it is not clear if this means surface flow only or if groundwater is included) to a water of the U.S., directly or indirectly. The

agencies wrongly claim that with these exclusions for certain ditches, they have narrowed the definition of waters of the U.S.¹¹ In fact, the proposed rule constitutes the first time that the regulatory definition has expressly included ditches – by including all ditches that are not exempt. This so-called “ditch exemption” has created significant uncertainty about the status of ditches because, under the structure of the proposed rule, all ditches that are not excluded are waters of the U.S.

Many facilities regulated by the CWA stormwater permit program rely upon various exemptions to ensure that existing treatment ponds, drainage areas, or other “water” features are not the regulated point of discharge into a water of the U.S. For example, current regulations include exemptions for waste treatment systems, including impoundments “designed to meet the requirements of the Clean Water Act.” While the words of the wastewater treatment exemption are not being changed, the agencies are proposing to add a comma before the “designed to” clause, thus applying that clause to all waste treatment systems, not just impoundments. This change would create significant uncertainty about the scope of the long-standing waste treatment system exemption. The agencies must be clear that facilities with fully compliance stormwater treatment systems today do not have parts of those systems deemed waters of the U.S. as a result of any final rule resulting from this proposal.

Municipal Separate Storm Sewer Systems (or MS4s) play important roles in collecting and treating stormwater discharges from industrial and commercial operations. In addition, some large manufacturing plants have drainage systems that may mirror or are included in larger MS4 systems. The status of these drainage systems under the agencies proposed rule is critical, yet unclear.

In the comprehensive and exhaustive proposed rule, nowhere do the agencies mention MS4s – much less the elaborate CWA regime that governs and regulates these systems across the United States. Municipal pollutant discharges from MS4s are one of three categories of stormwater permits authorized by CWA Section 402(p).¹² For over 20 years, EPA has implemented Congress’s plan for a “phased” approach to regulate municipal runoff based on the

¹¹ In a blog posted on EPA’s website, former Acting Assistant Administrator for Water, Nancy Stoner, says: “For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, that drain only dry lands, and don’t flow all year, are not “waters of the U.S.” This includes many roadside ditches, and many ditches collecting runoff or drainage from crop fields. Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.” <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/>. This statement does not accurately describe the history of the regulation of ditches or the scope of the proposed rule.

¹² 42 U.S.C. § 1342(p)(2). The other categories are discharges associated with “industrial activity” (including land disturbing construction activities), and certain other discharges that, as EPA determines on a case-by-case basis, contribute to a water quality violation or other significantly pollutants to waters of the U.S.. See *EDC*, 344 F.3d at 841-842.

size of the population served by an MS4.¹³ NPDES permits must be obtained for all stormwater discharges from “large” and “medium” MS4s under so-called “Phase 1” rules,¹⁴ and from regulated “small” MS4s under Phase 2 rules.¹⁵

The CWA’s overriding regulatory objective is to prohibit pollutant discharges without a permit – such as a permit issued under the NPDES program.¹⁶ Stormwater that conveys pollutants¹⁷ from a “point source”¹⁸ into waters of the U.S. are a type of “discharge”¹⁹ that triggers NPDES permitting requirements. Regulations define MS4s as “a conveyance or *system of conveyances* ... designed or used for collecting or conveying storm water.”²⁰ The component “conveyances” within a larger MS4 “system” collect and channel runoff through “roads with

¹³ See 33 U.S.C. § 1342(p)(2)-(4), (6) (two-phase approach for stormwater regulation). MS4s can be “large,” “medium,” or “small.” Large MS4s serve a population of 250,000 or more (40 CFR § 122.26(b)(4)), while medium MS4s serve a population of 100,000 or more but less than 250,000. (*Id.* § 122.26(b)(7)). Large and medium MS4s have been subject to NPDES regulation since 1990 under the so-called “Phase 1” rules, see 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 CFR pts. 122-124). Small MS4s (defined *id.* § 122.26(b)(16) have been regulated since 1999 under the “Phase 2” rules, see 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 CFR pts. 9, 122, 123, and 124). The phased approach for the NPDES stormwater permit program, including MS4 discharge permits, is discussed at *EDC*, 344 F. 3d at 841-842.

¹⁴ See, *e.g.*, 40 CFR §§ 122.26(a)(3), (4).

¹⁵ See, *e.g.*, *id.* § 122.26(a)(5).

¹⁶ 33 U.S.C. §§ 1311(a), 1342(a); see *Env’t Def. Ctr. v. EPA*, 344 F. 3d 832, 841 (9th Cir. 2003) (“*EDC*”) (the CWA “prohibits the discharge of pollutants from a ‘point source’ into the waters of the United States without a permit issued under the terms of the National Pollutant Discharge Elimination System”).

¹⁷ While Congress exempted most discharges “composed entirely of stormwater” (*i.e.*, not mixed with wastewater or other regulated discharges) (33 U.S.C. § 402(p)(1), it specifically identified certain MS4 and industrial stormwater pollutant sources for permitting to control *pollutants discharged in stormwater from those point sources*. See related discussion in Section I above.

¹⁸ “The term ‘point source’ means any discernible, defined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well ... [or] container ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14); 40 CFR § 122.2.

¹⁹ The CWA defines “discharge of a pollutant” as “any addition of any pollutant *to* navigable waters *from* any point source ...” 33 U.S.C. § 1362(12) (emphasis supplied). Thus, in the “discharge” definition, Congress distinguished between “navigable waters” (defined to mean waters of the U.S. at 33 U.S.C. § 1362(7)) on the one hand, and “point sources” on the other hand. EPA regulations likewise specify that “discharge of a pollutant” includes “additions of pollutants into [waters of the U.S.] from ... discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works ...” 40 CFR § 122.2. Thus, “point sources” (like MS4s) serve the function to convey and carry pollutants, and are features from which pollutants are discharged into waters of the U.S. . But “point sources” are *not* themselves waters of the U.S.. Congress did not give the Agencies broad authority over “point sources” as conveyances *per se* -- but only conferred limited federal permitting authority over the *activity* of a “discharge” when a “point source” *adds* a pollutant to waters of the U.S.. See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109-110 (2004) (emphasizing that CWA permits are required for “any addition” of pollutants to waters of the U.S., not the movement of pollutants within the same waterbody).

²⁰ 40 CFR § 122.26(b)(8) (emphasis supplied).

drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains.”²¹ The MS4 definition closely tracks the separate definition of “point source”²² – thus confirming that “[s]torm sewers are established point sources subject to NPDES permitting requirements” within section 402’s regime.²³ All of the municipally owned or operated pipes, curbs, gutters, ditches, drains and other conveyances that comprise an MS4 system collect and carry stormwater to an “outfall” – specifically designated by EPA’s regulations as a “point source” because it is “the point where a municipal separate storm sewer discharges to [waters of the U.S.]”²⁴

EPA’s pronouncements in developing NPDES regulations have long distinguished between MS4s as “point sources” on the one hand, and the “waters of the United States” on the other hand. In the 1990 preamble to the Phase 1 regulations, EPA stated that stormwater runoff *into* municipal sewers (including MS4-controlled ditches, roads, storm drains, etc.) is *not* a discharge of a pollutant into a waters of the U.S..

In the context of the Phase 1 regulations, a municipality commented to EPA “that neither the term ‘point source’ nor ‘discharge’ should be used in conjunction with industrial releases into urban storm sewer systems because that gives the impression that such systems are navigable waters.”²⁵ EPA responded that it, “[A]lways addresses such discharges as ‘discharges *through* municipal separate storm sewers’ as opposed to ‘discharges *to* waters of the United States.”²⁶ In addition, implementing regulations require MS4 permit applicants to identify and list “water bodies” that receive discharges from municipal storm systems – further making plain that EPA does not consider MS4s as jurisdictional water bodies under the CWA.²⁷

But, as stated above, the overly broad proposed definition of “tributary” may improperly treat MS4s not as conveyance systems but as jurisdictional waters. Pursuant to the proposed rule, a “tributary” is a waterbody that has a bed, bank and ordinary high water mark (OHWM),

²¹ *Id.*

²² See *supra* note 15.

²³ *EDC*, 344 F.3d. at 841 (citing *NRDC v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977)).

²⁴ 40 CFR § 122.26(b)(9). A “major” MS4 outfall discharges from a single pipe with an inside diameter of 36 inches or more; or an inside diameter of 12 inches in the case where an MS4 receives stormwater from lands zoned for construction and other types of industrial activity. *Id.* § 122.26(b)(7).

²⁵ *Id.*

²⁶ *Id.* (emphasis supplied). Indeed, the CWA’s “discharge” definition drives home the point that Congress did not intend MS4s and other permitted “point sources” to be waters of the U.S. See *supra* notes 15-16. For purposes of these comments, the CORE Associations maintain that permitted MS4s are categorically not waters of the U.S. We do not address here whether, or under what circumstances, other “point sources” can ever be considered waters of the U.S.

²⁷ 40 CFR § 122.26(d)(1)(iv).

and contributes flow to waters that are used in interstate commerce, territorial seas, interstate waters, and their impoundments. The agencies further explain that ponds and wetlands are “tributaries” as long as they also contribute flow. In addition, “tributaries” can be manmade; their flow may be ephemeral, intermittent, or perennial; and they may be broken by features such as pipes, culverts and dams.²⁸

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 traditionally jurisdictional waters. Under the proposed tributary definition, these common MS4 components – owned and controlled by municipalities, and already subject to NPDES permit requirements – could be confusingly and unnecessarily layered with more federal regulation as a jurisdictional water. Certainly, Congress never envisioned a circumstance where a “water of the U.S.” could be located *within* a “point source.”

Further, CWA Section 303 requires States to adopt and submit to EPA water quality standards (WQSs) which “consist of a designated use or uses for the waters of the United States”²⁹ If MS4s were waters of the U.S., then state-developed and EPA-approved WQSs would need to designate “uses” for storm sewer systems. However, “in no case shall a State adopt waste transport . . . as a designated use for any water of the United States.”³⁰ Yet one of the very purposes of an MS4 and the ditches, drains and gutters within these systems is, in fact, to transport waste. It would be impossible to designate a WQS for an MS4 for any other reason *but* to convey and treat stormwater – in plain violation of EPA’s regulations for water quality standards.³¹

Moreover, if an MS4 were somehow deemed a water of the U.S., then the MS4’s NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water. Of course, Congress required permits for discharges from point sources into waters of the U.S. – not for discharges from a water of the U.S. to a water of the U.S.³² To avoid

²⁸ See, e.g., *id.* at 22,202, col. 3 (“[T]ributaries that have been channelized in concrete or otherwise have been human altered, may still meet the definition of tributaries under the agencies’ proposed regulation so long as they still contribute flow to an (a)(1) through (a)(4) water. The agencies’ proposed definition of tributary provides a non-exclusive list of the types of waters, natural, man-altered, and man-made, that may be tributaries: . . . [P]onds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of the proposed rule.”)

²⁹ 33 U.S.C. § 1313; 40 CFR § 131.3(i).

³⁰ 40 CFR § 131.10(a).

³¹ In the context of industrial discharges into MS4s, EPA has explained that the discharger’s obligation to satisfy WQSs is “at the boundary of a State established mixing zone . . . located in the receiving waters of the United States.” 55 Fed. Reg. at 48,037. That is, the industrial discharger’s obligation to satisfy WQSs does not pertain to such standards for the very storm sewer system itself.

³² Moving pollutants within the same waterbody is not a “discharge” because no pollutants are added, and hence do not trigger CWA permitting obligations. See, e.g., *LA Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 733 (2013); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. (2004) (both cases quoting *Catskill Mountains Chapter of Trout Unlmt., Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).

such an untenable result within the Act's structure and the agencies' own regulations, they should thus clarify that MS4s are not waters of the U.S. Without such clarification, MS4s could be forced to break up their MS4 permit programs into smaller pieces so that each permit is limited to each discharge into a water of the U.S., further confusing and adding complexity when the agencies' intent was the opposite.

III. CONCLUSION

Green infrastructure investments are local decisions based on local needs and conditions. EPA's efforts to develop a national program to mandate stormwater flow and retention standards was recently deferred, but the Agency continues to pursue such an agenda on a permit-by-permit basis without the benefit of a national notice-and-comment rulemaking. Combined with the recent waters of the U.S. proposed rulemaking, the demands on MS4 operators could have significant and unnecessary financial and programmatic impacts. EPA can provide valuable guidance, but the ultimate decisions regarding green infrastructure investments should be left to MS4 operators.