



February 7, 2022

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Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

RE: Docket ID No. EPA-HQ-OW-2021-0602

Dear Ms. Christensen and Ms. Jensen,

On behalf of the National Association of Counties (NACo), the National Association of County Engineers (NACE), and the 3,069 counties we represent, we respectfully submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Army Corps) proposed rule, titled "Revised Definition of "Waters of the United States" (WOTUS). This proposed rule aims to define the scope of federally protected waters under the Clean Water Act (CWA).

Our citizens' and communities' health, well-being, and safety are top priorities for county leaders across the country. Counties recognize that the availability of an adequate supply of clean water is vital to our nation. Water quality degradation can impose human health risks through contaminated drinking water supplies, diseased fish, and unsafe or polluted water bodies used for recreation. Degraded water quality can lead to the loss of valuable wildlife habitat. We have a duty as local elected officials to avoid these outcomes on behalf of the Americans we represent.

Counties serve as co-regulators with the federal government and ultimately implement federal laws, including CWA programs. Additionally, counties own public safety facilities and infrastructure directly impacted by federal laws and regulations. As such, we recognize the critical role the federal government plays in developing and implementing new regulations.

In addition to the recommendations below, please consider [comments submitted](#) by NACo, the National League of Cities and the U.S. Conference of Mayors on the WOTUS rulemaking. Furthermore, please consider all [previous comments](#) submitted by NACo on the definition of WOTUS. We hope our comments on this proposal will help inform the new WOTUS definition.

County-owned infrastructure impacted by WOTUS

As outlined in our October 4, 2021, [letter](#) to the EPA and Army Corps, WOTUS will have far-reaching impacts on counties.

As intergovernmental partners, owners and operators of local infrastructure, co-regulators and stewards of the environment, counties are deeply invested in protecting our nation's waters and the existing WOTUS definition. Counties own and operate the following infrastructure that a change to the WOTUS definition would potentially impact: public safety water conveyances including road ditches and other drainage ditches, municipal separate stormwater sewer systems (MS4), green infrastructure construction and maintenance projects, public ditches serving agricultural lands, water reuse and infrastructure and emergency management readiness.

Our primary concern with changing the WOTUS regulatory definition is that counties may need to apply for a federal permit to maintain or build new infrastructure projects that serve and protect our local communities. Such infrastructure includes the following, **all of which should be expressly excluded** from the possibility of being regulated as WOTUS:

- **Human-made public safety water and stormwater conveyances:** roads and roadsides ditches, flood control channels, drainage conveyances, and culverts not associated with naturally occurring water bodies.
- **Municipal Stormwater Sewer Systems (MS4s):** constructed stormwater ponds, channels, ditches, and pipes in the MS4 system.
- **Green infrastructure stormwater control features:** including human-made impoundments and other systems such as bioswales, vegetative buffers, constructed wetlands, vegetated infiltration features, and rain gardens owned and operated by local governments and private entities. Several federal funding sources are available to counties and other entities to construct more green infrastructure to improve water quality and infrastructure resiliency. It is important to guard against a change in the WOTUS definition that works against these efforts.
- **Drinking-Water Facilities and infrastructure:** reservoirs, dams, ponds, canals serving drinking water facilities.
- **Water Reuse Infrastructure:** including facilities built to generate water supply, like ponds, recharge basins, canals, and ditches serving water reuse facilities.

Additionally, ditches are regulated under CWA Section 404 for construction and maintenance activities. An exemption has historically existed for ditch maintenance; however, Army Corps districts applied the exemption inconsistently across the country. We urge the Army Corps to enforce the exemption under the 404-program equally.

Counties are responsible for public safety; they own and manage many public safety ditches to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a county government is responsible for maintaining the integrity of these ditches, even if the federal agencies do not approve federal permits promptly. Failure to maintain ditches can result in flooding that leads to property damage and loss of crops.

Under the proposed rule, the ditch provisions are still very complicated. Similar to the pre-2015 regulations, counties will have to work with the EPA and Army Corps to complete a case-specific analysis

of the ditch's jurisdictional status. The EPA and Army Corps would then determine if a ditch met the definition of a tributary or satisfies the significant nexus and relatively permeant tests to be federally regulated.

As the agencies finalize their definition of WOTUS, counties urge our federal partners to include public works general maintenance and repair projects in CWA Section 404 permitting exclusions. Requiring a case analysis will only further delay these crucial county projects and increase costs.

Watershed and Wetlands Management

As the EPA and Army Corps continue their work on the proposed definition, NACo offers the following suggestions on watershed and wetlands management:

- Managing watersheds, wetland areas, and coastal watersheds to address public health and safety, environmental protection, and restoration issues within hydrologically defined geographic areas.
- Counties must be involved in all aspects of planning and management. Local governments make critical front-line land-use decisions balancing these important considerations with achieving sustainable economies.
- Expand federal funding and increase flexibility for planning and implementation of watershed management at the local level and the restoration of wetlands, repair of habitat, coordination of stormwater management programs with comprehensive watershed management efforts, and establishment of native vegetation on lands vital to water quality.
- Flexible and voluntary water quality trading policies control and reduce watershed nonpoint pollution. Costly controls should not be required when there are readily available controls that are appropriate and less costly.
- When feasible, discourage residential, commercial, or industrial development in floodplains and wetlands. Counties recognize these areas are of significant natural productivity, hydrological utility and environmental diversity and provide natural flood mitigation, improved water quality, recharged aquifers, and flow stabilization of streams and rivers. Flood risk analysis and consideration of the environmental impacts should be performed for development activities, including flood mitigation measures, in these high-risk, sensitive areas.

Wetlands Permitting and Navigable Waters

Counties support no net loss of wetlands and encourage a management approach that first avoids the destruction of wetlands, then minimizes wetland loss, and mitigates any loss as the final alternative. This policy goal is intended to prevent adverse impacts on watershed flood storage capacity and water quality impacts. Counties support additional federal funding and technical assistance to implement this national policy goal.

NACo calls on the EPA and Army Corps to clarify that local streets, gutters, and human-made ditches are excluded from the definition of "waters of the United States." Further, counties urge our federal partners to recognize that the flow volume of stormwater from development and regulation of impervious surfaces are local land use issues and are not subject to federal regulation.

During this regulatory process, counties urge the federal government to improve the CWA §404 permit process by the Army Corps to remove routine maintenance of human-made public flood protection

facilities, infrastructure and public works general maintenance and repair projects from the §404 permit process.

Local Governments Support a Clear and Implementable Rule

Enforcing the pre-2015 regulatory framework gives local governments regulatory certainty. In 28 states, water quality laws have not significantly changed since 2015. Although this proposed rule includes a slight change from the pre-2015 regulatory framework, local governments will work with our federal partners to help implement a final rule. The foundational waters consisting of traditional navigable waters, interstate waters and territorial seas are familiar to local governments. Adjacent wetlands, tributaries and impoundments of these foundational waters are also familiar to local governments.

The proposed rule defines the term "relatively permanent standard" to mean waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters to be deemed federal jurisdiction. The agencies borrow this language from Justice Scalia's opinion in *Rapanos v United States*. This standard is one that counties are familiar with and can quickly determine independently.

Recommendations on How to Improve the Proposed Rule

Counties recognize that the proposed definition is not simply returning to the pre-2015 framework. There are fundamental differences that we are significantly concerned with as local governments.

The EPA and Army Corps have acknowledged that a case-by-case analysis will likely occur for any water that isn't clearly a foundational water body by reinstating the relatively permanent standard and significant nexus standard. **Local governments recommend streamlining this process by clarifying which waters are jurisdictional**, without the need to hire consultants and expend limited resources to determine whether a water falls within federal jurisdiction. Under the Navigable Waters Protection Rule, it was clear which waters were regulated by the federal government or given to the states. As a co-regulator and regulated entity, counties seek that level of clarity in this definition.

However, counties strongly urge the EPA and Army Corps to strengthen the rule and streamline the process by making public and private stormwater control features and other county-owned facilities, particularly those related to drinking water, wastewater, and stormwater control features, explicitly excluded under the proposed rule, as included both the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule.

Counties appreciate the exclusions listed in the proposed definition. We strongly value the exclusions for agriculture - artificially irrigated areas; artificial lakes or ponds used for agriculture; artificial reflecting or swimming pools; water-filled depressions filled in upland; swales or erosional features caused by infrequent or short-duration rainfall.

The 2015 Clean Water Rule's preamble states: "Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and regulators, and makes rule implementation clear and practical." These explicit exclusions are needed so that owner/operators and local stormwater and drinking water system managers can do their essential operations and maintenance work efficiently and effectively.

Even slight modifications to the pre-2015 regulatory framework will take time and resources for county engineers to learn and implement. Therefore, we urge the agencies to provide technical assistance and funding to local governments to help officials and employees both understand and implement this proposed definition. Alternatively, the EPA and Army Corps can create one map that clearly shows all waters that would be considered jurisdictional WOTUS under the new proposed rule. Currently, the EPA and Army Corps recommend that counties check and monitor eight different mapping resources, plus any additional resources that their respective state offers, to determine whether water is federally regulated.

Key Difference Between Pre-2015 Regulatory Framework and the Proposed Definition

Significant Nexus Standard

The proposed rule reintroduces the "significant nexus standard" and promotes a case-by-case analysis to determine federal jurisdiction. Local governments strongly believe that this will delay projects and increase costs exponentially. Furthermore, we firmly believe that the language used in the proposed rule, instead of Justice Kennedy's opinion in *Rapanos*, instantly expands federal jurisdiction in a significant way by phrasing it as "chemical, physical, **or** biological connections" to downstream foundational waters. Justice Kennedy's opinion required it to significantly affect downstream foundational waters' "chemical, physical, **and** biological integrity." In [St. John's Law Review](#), Kenneth Adams and Alan Kaye outline that "and" conveys conjunction, requiring joint consideration for items linked by "and." Adams and Kaye state that "or" introduces alternatives. Using these definitions, the EPA and Army Corps are significantly expanding federal jurisdiction by simply changing "and" to "or" in the proposed rule, thereby only requiring one of water's chemical, physical or biological integrity to be impacted, instead of all three. **We strongly urge our federal partners to revert to the pre-2015 regulatory framework by using the exact text from Supreme Court decisions to define WOTUS under the CWA.**

A strong intergovernmental partnership is needed to ensure a reasonable and practical definition of WOTUS

As partners in protecting America's water resources and stewards of the environment, counties must be heavily involved in the rulemaking process of the WOTUS rule. Federal, state and local governments must work together as partners to craft a reasonable and practicable definition of WOTUS. While we commend the agencies on their outreach efforts over the last several months, we urge additional consultation with county leaders from across the country, who are able to provide unique insight on the impacts of the proposed WOTUS definition.

Due to the responsibilities and the complicated nature of determining federal jurisdiction under WOTUS, county leaders have consistently asked for a transparent and straightforward rulemaking process, including Federalism consultations under Executive Order 13132 - Federalism.

Conclusion

On behalf of the nation's counties, we thank you for engaging with NACo, NACE and county leaders. We look forward to working with you as you continue to develop a new "Waters of the U.S." definitional rule, which will have far-reaching impacts on counties.

If you have any questions, please do not hesitate to contact NACo Associate Legislative Director Adam Pugh at apugh@naco.org or 202.942.4269.

Sincerely,



Matthew Chase
Executive Director
National Association of Counties



Kevan Stone
Executive Director
National Association of County Engineers