



October 4, 2021

Ms. Damaris Christensen
Oceans, Wetlands and Communities
Division
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. 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-2021-0328

Dear Ms. Christensen and Ms. Jensen,

On behalf of the National Association of Counties (NACo) 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 on the "Intention to Revise the Definition of Waters of the United States (WOTUS)." This regulatory effort seeks to clarify which water bodies are federally regulated under the Clean Water Act (CWA). Specifically, the purpose of the proposed rule is to repeal the Navigable Waters Protection Rule (NWPR) and replace it with the pre-2015 WOTUS regulatory regime.

The health, well-being and safety of our citizens and communities are top priorities for county leaders across the country. Counties serve as co-regulators with the federal government and are ultimately responsible for implementing new and existing 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 the development and implementation of new regulations. We commend the EPA and Army Corps' intergovernmental and policy staff for ongoing, substantive engagement with local stakeholders on this rulemaking process. We hope our comments on this proposal help inform the new WOTUS definition. In addition to the comments below, we hope that you take into consideration [comments submitted](#) by NACo, the National League of Cities and U.S. Conference of Mayors on the WOTUS rulemaking.

Counties strongly believe that changing the WOTUS definition will have far reaching impacts on our communities and residents. After consultation with county leaders, America's counties provide the following recommendations as you consider changes to the definition of WOTUS.

County-owned infrastructure impacted by WOTUS

As intergovernmental partners, owners and operators of local infrastructure, and co-regulators and stewards of the environment, counties deeply care about both protecting our nation's waters and the WOTUS definition. Counties own and operate public safety water conveyances, municipal separate stormwater sewer systems (MS4), green infrastructure construction and maintenance projects, water reuse and infrastructure and emergency management readiness.

Our main concern with changing the 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, including:

- Public safety water conveyances: roads and roadside ditches, flood control channels, drainage conveyances, culverts, etc.
- Municipal Separate Stormwater Sewer Systems (MS4): comprised of channels, ditches and pipes
- Green infrastructure construction and maintenance projects: includes but is not limited to low-impact development projects (LID), bioswales, vegetative buffers, constructed wetlands, stormwater detention ponds, etc.
- Drinking water facilities and infrastructure: reservoirs, dams, ponds, canals, large water transport systems (Central Arizona Project, California Aqueduct, Colorado River Aqueduct, etc.)
- Water reuse and infrastructure: includes facilities built to generate additional water supply, their ponds, recharge basins, canals and ditches.

With specific regard to ditches, ditches were regulated under CWA Section 404 for construction and maintenance activities. With these rules being reimplemented, counties will be significantly impacted due to several challenges within Section 404 will significantly impact counties. Historically, an exemption existed for ditch maintenance; however, Army Corps districts inconsistently applied it 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 a wide variety of public safety ditches – road, drainage, stormwater conveyances and others – 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.

As the agencies begin drafting their definition of WOTUS, counties urge our federal partners to include public works general maintenance and repair projects in CWA Section 404 permitting exclusions.

Counties request regulatory certainty

County leaders are focused on providing services and maintaining public infrastructure that is essential to protecting public health, the environment and water quality. The health, well-being and safety of our residents and communities are top priorities for county leaders. However, to fulfill these responsibilities, counties need regulatory certainty to allow for the effective and sustainable planning and investment of finite public resources. Specifically related to protecting water resources, it is essential that counties clearly understand the vast impact that a change to the definition of WOTUS will have on all aspects of the CWA.

For example, counties urge that this two-step rulemaking process create a clear, understandable and implementable definition of WOTUS under the CWA. Specifically, this definition should provide counties with a clear understanding of the difference between a federally protected waterway and a state-protected waterway. The agencies should also respect the role of states in managing their land and water resources and give more flexibility in determining how best to manage those resources.

Furthermore, counties urge our federal partners to create a “one-stop-shop” permitting process for WOTUS to streamline the current multi-agency permitting process. Each project should have a lead agency – either the Army Corps or EPA. Designating a lead agency will prevent counties from being bounced between federal agencies to determine who makes the final jurisdictional determination. This lead agency would coordinate all reviews, analyses, opinions, statements, permits, or other federal approvals required under federal law.

While the agencies each have websites showing approved jurisdictional determinations throughout the country, we urge our federal partners to take this a step further. For both rules on WOTUS, the agencies should consider including an online and searchable map that shows all waters that would be considered a jurisdictional WOTUS under the pre-2015 regulatory regime and under any new proposed rule.

Counties need time to effectively implement the pre-2015 regulatory regime

Returning to the pre-2015 regulatory regime on WOTUS means returning to guidance agencies developed in 2003 and 2007 following U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States*, *Rapanos v. United States* and *Carabell v. United States*. However, it was these guidance documents and the competing and differing interpretations of the U.S. Supreme Court decisions that led the Obama Administration to [state](#) in May 2015 when it crafted the Clean Water Rule that “court decisions have led to uncertainty and a need for clarification.” This current proposed rulemaking returns the country to a state with competing and differing interpretations of these U.S. Supreme Court decisions.

Before the NWPR was fully implemented in July 2021, federal courts left the pre-2015 regulatory regime in effect in 28 states. This means that county engineers in 22 states will need time to re-learn the pre-2015 regulatory regime, drastically slowing the speed of local projects and infrastructure. With the U.S. District Court for Arizona’s order vacating and remanding the NWPR in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, all states are currently operating under the pre-2015 guidance.

Since 2015, counties have experienced a significant staff turnover and a loss in institutional knowledge. From changes in staff at the federal, state and local level to the varying interpretations of the definition, counties will experience additional delays and increased costs to complete even the most basic maintenance tasks. It will take time for county engineers to re-learn this regulatory regime and begin implementing it to protect our natural resources.

To ensure counties can efficiently and effectively implement the pre-2015 regulatory regime, we request that the agencies provide adequate resources to ensure our employees are able to understand the vast changes.

Additional analysis is needed on the economic impacts of changing the WOTUS definition

Given our role as operators and owners of local infrastructure, counties request that additional analysis be conducted to understand the full economic impact of returning to the pre-2015 regulatory regime. Under the pre-2015 regulatory regime, more projects being subject to the permitting process and will ultimately therefore will slow down the construction and increase costs of projects. This change may create unintended economic consequences for counties at a time when we are still recovering from the immense fiscal impacts of the COVID-19 pandemic.

As Congress is working to pass much-needed federal funding for infrastructure in the Infrastructure Investments and Jobs Act (IIJA), by expanding the definition of WOTUS to the pre-2015 definition, we believe it will slow down the implementation of these much-needed investments.

As co-regulators, counties must understand their responsibilities and additional costs under the new rule and the CWA. Currently, water bodies defined as WOTUS are subject to all CWA regulations, including: Section 402 National Pollutant Discharge Elimination System (NPDES); total maximum daily load and other water quality standards program; state water quality certification standards; and Spill Prevention, Control and Countermeasure programs.

Therefore, for both rules, counties urge the agencies to conduct a comprehensive review of the actual costs and consequences of a WOTUS definition change on all of these programs beyond the Section 404 permit program. If necessary, EPA should consider revising existing policies for these programs to address any unintended consequences.

To ensure a reasonable and practical definition of WOTUS is reached, a strong intergovernmental partnership is needed throughout the regulatory process

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

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. We appreciate the Federalism consultation on August 5, 2021, with association staff to discuss the path forward on WOTUS regulations and look forward to this level of engagement throughout both rulemakings. Additionally, we appreciate the agencies extending the public comment to sixty days for counties and other federalism partners.

Conclusion

On behalf of the nation's counties, we thank you for engaging with NACo and county leaders. We look forward to working with you 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