



THE UNITED STATES
CONFERENCE OF MAYORS



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 nation's mayors, cities and counties, we appreciate the opportunity to 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," which aims 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.

Collectively, our organizations represent the nation's 3,069 counties, 19,000 cities and the mayors of the 1,400 largest cities. The health, well-being and safety of our citizens and communities are top priorities for local leaders. Local governments serve as co-regulators with the federal government and are ultimately responsible for implementing new and existing laws, including CWA programs. Additionally, cities and counties own public safety facilities and infrastructure directly impacted by federal laws and regulations.

After close consultation with state and local organizations and leaders, we provide five general thoughts on what it means to local governments to change the definition of "Waters of the U.S." (WOTUS). In summary, local governments need regulatory certainty and will need time to implement the pre-2015 regulatory regime. Additionally, we are interested in learning more about the economic impacts of changing the WOTUS definition and how the agencies will move forward interpreting relevant and related U.S. Supreme Court cases, which have caused confusion and discrepancies under the CWA. Finally, we elaborate on the regulatory process. Please find our previously submitted comments on WOTUS rulemakings [here](#).

1. Local governments need regulatory certainty

Local elected officials 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 citizens and communities are top priorities for local elected officials. However, they need regulatory certainty to allow for the effective and sustainable planning and investment of finite public resources. Federal, state and local governments must work together to craft reasonable and practicable rules and regulations, including clear and concise definitions. As partners in protecting America's water resources, it is essential that local governments

clearly understand the vast impact that a change to the definition of WOTUS will have on all aspects of the CWA.

For example, this two-step rulemaking process must create a clear, understandable and implementable definition of WOTUS under the CWA. This definition should provide states and local governments a clear understanding of the difference between a federally protected waterway and a state-protected waterway. The agencies should 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, local governments urge our federal partners to create a “one-stop-shop” permitting process for WOTUS to streamline the current multi-agency permitting process. Depending on the project, each project should have a lead agency, either the Army Corps or EPA. This will prevent local governments from being bounced between federal agencies to determine who makes the final jurisdictional determination. Additionally, the lead agency should be responsible for coordinating all reviews, analyses, opinions, statements, permits, or other federal approvals required under federal law.

2. Local governments need time to implement pre-2015 regulations

Returning to the pre-2015 regulatory regime on WOTUS means returning to guidance the agencies developed in 2003 in response to the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States* and guidance the agencies developed in 2007 in response to the U.S. Supreme Court decision in *Rapanos v. United States* and *Carabell v. United States*. However, it was these guidance documents and the competing and differing interpretations of the two 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 where there are competing and differing interpretations of these two U.S. Supreme Court decisions.

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

Local governments have experienced significant staff turnover in the last six years and a loss in institutional knowledge. It will take time for municipal engineers to re-learn these regulations and begin implementing them. Therefore, we urge the agencies to provide resources to state and local governments to help officials understand and implement the pre-2015 WOTUS regulatory regime.

3. Economic impacts of changing WOTUS definition

Local officials are interested in learning more about the economic impacts of returning to the pre-2015 regulatory regime. With more projects being subject to the permitting process, this will significantly slow down the construction of projects and increase costs. As Congress is working to pass much-needed federal funding for infrastructure through the Infrastructure Investments

and Jobs Act (IIJA), expanding the definition of WOTUS to the pre-2015 definition could slow down the implementation of these much-needed investments.

As co-regulators, local governments need to understand their complete responsibilities and additional costs under the rule and the CWA. 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 programs, state water quality certification process and Spill Prevention, Control and Countermeasure programs. For this proposed rule and the forthcoming proposed rule on WOTUS, we ask 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.

While the agencies each have websites showing approved jurisdictional determinations throughout the country, we urge our federal partners to provide additional resources for state and local leaders. We recommend that the agencies consider including an online map that shows all waters that would be considered a jurisdictional WOTUS under the pre-2015 regulatory regime and any new proposed rule.

4. How the U.S. Supreme Court has impacted WOTUS

On [EPA's website](#) announcing this two-step rulemaking process, the agency states that the “forthcoming rule will propose to restore the regulations defining WOTUS in place for decades until 2015, updated to be consistent with relevant Supreme Court decisions.” Local governments seek clarification on exactly which U.S. Supreme Court decisions the agencies refer to because this could drastically change the implementation of the CWA. There is the long-standing tension between the Scalia and Kennedy opinions on the *Rapanos* case, further requiring local governments to hire consultants, increasing costs and labor on projects to determine federal jurisdiction.

Other U.S. Supreme Court decisions could impact WOTUS as well. For example, local governments are still learning to implement the *County of Maui, Hawaii v. Hawaii Wildlife Fund* decision, which also pertains to the CWA. The Maui case decided that a “functional equivalent of a direct discharge” from a point source to navigable waters requires an NPDES permit under the CWA. On September 15, EPA announced the rescission of its 2021 guidance that followed the Maui case. Therefore, local governments seek insight and clarification on how the agencies plan to incorporate this definition into future rulemakings.

5. Regulatory Process

As partners in protecting America's water resources, it is essential that state and local governments clearly understand the vast impact the proposed WOTUS rule will have on our local communities, residents and resources.

Due to the responsibilities and the complicated nature of determining federal jurisdiction under WOTUS, our organizations have consistently asked for a transparent and straightforward rulemaking process, including a meaningful and engaging Federalism consultation process pursuant to Executive Order 13132. We appreciate the Federalism consultation on August 5, 2021, with association staff to discuss the path forward on WOTUS regulations and look forward to the agencies' continued adherence to the Federalism consultation process moving forward

through both rulemakings. Furthermore, we appreciate the agencies extending the public comment to 60 days for its federalism partners.

On behalf of the nation's mayors, cities and counties, we thank you for engaging our organizations and local governments. We look forward to working with you to develop a new "Waters of the U.S." definitional rule. Changing the CWA definition of WOTUS will have far-reaching impacts on local governments.

If you have any questions, please do not hesitate to contact our staff: Judy Sheahan (USCM) at jsheahan@usmayors.org; Carolyn Berndt (NLC) at berndt@nlc.org; or Adam Pugh (NACo) at apugh@naco.org.

Sincerely,



Matthew Chase
Executive Director
National Association of
Counties



Clarence E. Anthony
CEO and Executive Director
National League of Cities



Tom Cochran
CEO and Executive Director
U.S. Conference of Mayors