

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Thank you, Senator Fischer for the opportunity to testify on the "Waters of the United States" proposed rule and the potential impact on County governments.

My name is Mary Ann Borgeson and I serve as the Chair of the Douglas County Board of Commissioners having been first elected as County Commissioner in 1994. I also serve on the Board of Directors for the Nebraska Association of Counties, the Board of Directors for the National Association of Counties, Chair the Health Services Committee, and am a member of the Healthy Counties Advisory Board.

For the record, portions of my testimony have been taken verbatim from the testimony presented by the Honorable Sallie Clark, First Vice President of the National Association of Counties (NACo), to the U.S. Senate Committee on Environment and Public Works and the U.S. House of Representatives Committee on Transportation and Infrastructure, February 4, 2015. While Ms. Clark's testimony represents Counties nationwide, many of her points are particularly germane to Douglas County, Nebraska and therefore have been added to my testimony.

About Counties

Counties nationwide continue to be challenged with fiscal constraints and tight budgets. In addition, county governments in more than 40 states must operate under restrictive revenue constraints imposed by state policies, especially property tax assessment caps.

About Douglas County, Nebraska

While Douglas County, Nebraska is considered "urban," with a population of more than 537,000 residents, we have both rural and suburban areas, with substantial portions within FEMA designated floodplains. As you know, Douglas County lies on the eastern edge of Nebraska, encompasses 340 square miles, is home to the largest city (Omaha) in the state, and comprises a significant portion of the state's largest metropolitan area. The county has 11 square miles of open water not including rivers, farm ponds or wetlands. The western part of Douglas County is comprised entirely of floodplain between and adjacent to the Elkhorn and

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Platte Rivers. Agriculture and sand and gravel extraction are major economic activities in this area, while agriculture and complementary land uses are common in the non-floodplain areas of the county. Most of the roads in this area are gravel roads. The water table is always high and maintaining the ditches is an ongoing challenge to protect both the roads and the surrounding fields.

Impacts of the current and proposed rule on County projects

Projects we are working on are already impacted by the current regulations. Those and future projects could be further and significantly affected by the changes to the definition of "waters of the U.S." that have been proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). The National Association of Counties (NACo) has urged the agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed. In addition, a number of prominent national associations of regional and local officials have expressed similar concerns including Colorado Counties Inc., U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, National Association of County Engineers, American Public Works Association and the National Association of Flood and Stormwater Management Agencies.

Douglas County concurs with this recommendation.

The Importance of Clean Water

Clean water is essential to all of our nation's counties. The availability of an adequate supply of clean water is vital to our nation and the best way to protect our water quality is to cooperate on programs at all levels of government.

Green Infrastructure, Land Use and Zoning Implications

Douglas County is a "Phase II" community under the National Pollutant Discharge Elimination System (NPDES) section of the CWA. A major emphasis of the County's

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Stormwater Management Plan (SWMP) is to improve water quality by reducing stormwater runoff volumes. This approach is lock step with EPA's push to implement "green infrastructure" as a key strategy to improve our nation's overall water quality. Simply put, "green infrastructure" can have significant positive benefits for water quality and with this being an EPA priority, it is essential that the proposed "Waters of the U.S." rule be supportive of, and not contradictory to, the continued implementation of "green infrastructure" across the country. Put another way ..., if the "Waters of the U.S." rule negatively impacts the implementation of green infrastructure, it will mean that taxpayer dollars will be needlessly wasted on "process" instead of being directly spent on water quality improvements.

Counties play a key role in protecting the environment, primarily through zoning and other land use regulations that safeguard natural resources. Consistent with our NPDES permit requirements, we provide outreach and education to residents on water quality and stormwater impacts and we establish rules on illicit discharges and actively monitor stormwater outfalls and other areas, following up to eliminate any illicit discharges. For example, we have recently ramped up our coordination efforts with the Douglas County Health Department regarding septic systems, looking to identify potential contamination of creeks and streams and address the impaired streams and waterbodies within Douglas County. The County's current Comprehensive Land Use Development plan, adopted in 2007, has a major emphasis on the use of low impact development and green infrastructure in mitigating stormwater runoff – clearly illustrating Douglas County's early adoption of and leadership in implementing these techniques that improve water quality.

Counties must also plan for the unexpected and remain flexible to address regional conditions that may impact the safety and well-being of our citizens. Specific regional differences, including condition of watersheds, water availability, climate, topography and geology are all factored in when counties implement public safety and common-sense water quality programs.

For example, low-lying areas have consistently high groundwater tables and we must be diligent in maintaining drainage conveyances to prevent flooding. It should also be pointed out that

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

recharging aquifers is an important element in the overall water cycle and drainage elements such as ditch infrastructure, as well as the aforementioned "green infrastructure" can help to facilitate such groundwater recharge.

Through the Stormwater Management Regulation, Douglas County prohibits illegal discharges into the county's stormwater system and establishes financial penalties for violations. Also, consistent with our NPDES Phase II Stormwater Permit requirements, we provide public information and education, and have mechanisms in place to address stormwater on construction sites, and for the long term in both developed and rural areas, focusing on the use of green infrastructure to control runoff close to the source. Such techniques mimic natural systems, providing more sustainable and cost-effective stormwater management. It is important, therefore, that any "Waters of the U.S." rule be consistent with, and supportive of, our green infrastructure approach ... which, as I mentioned previously, is consistent with the nationwide approach championed by EPA. I mention these things because they contribute directly to improving water quality instead of being laden with "process" that is not necessarily providing any direct benefit to water quality but most certainly results in more expense for taxpayers.

Public Infrastructure.

Counties own and maintain a wide variety of public infrastructure that is already impacted by the current regulations and would be further impacted by the proposed rule. This infrastructure includes roadside ditches, flood control channels, stormwater culverts and pipes, Municipal Separate Storm Sewer Systems (MS4), and other facilities used to funnel water away from low-lying roads, properties and businesses. These infrastructure improvements not only protect our water quality, but prevent accidents and flooding. Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining our drainage ditches and other infrastructure.

Counties are also the first line of defense in any disaster, particularly as it relates to public infrastructure. Following a major disaster, county local police, sheriffs, firefighters and emergency personnel are the first on the scene. In the aftermath, counties focus on clean-up, recovery and rebuilding. The county typically needs to take quick action to work with municipalities and utilities and multiple federal agencies to rebuild critical infrastructure.

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

For over a decade, counties have been voicing concerns on the existing “waters of the U.S.” definition, as there has been much confusion regarding this definition even after several Supreme Court decisions. While there needs to be a clear, workable definition of “waters of the U.S.,” the new proposed definition does not provide the certainty and clarity needed for operations at the local level.

The current system already presents major challenges—including the existing permitting process, multiple and often duplicative state and federal requirements, and unanticipated project delays and costs. The proposed rule, as currently written, only adds to the confusion and complicates already inconsistent definitions used in the field by local agencies in different jurisdictions across the country.

Ditches are pervasive in counties across the nation; until recently, they were not required to have federal CWA Section 404 permits. However, in recent years, some Corps districts have inconsistently required counties to have federal permits for construction and maintenance activities on drainage ditches. It is critical for counties to have clarity, consistency and certainty on the types of public safety infrastructure that require federal permits. Furthermore, there are green infrastructure improvements that clearly improve water quality and since the implementation of green infrastructure is a major emphasis of EPA it is imperative that this emphasis not be contradicted by a “Waters of the U.S.” rule. To do so simply adds unnecessary confusion and costs while reducing the dollars that can be applied directly to water quality improvements.

The current process is already complex, time-consuming and expensive, leaving local governments and public agencies vulnerable to citizen suits. Counties across the nation have experienced delays and frustrations with the current Section 404 permitting process. If a project is deemed to be under federal jurisdiction, other federal requirements are triggered such as environmental impact statements, the National Environmental Policy Act (NEPA) process and Endangered Species Act (ESA) implications. These assessments often involve intensive studies and public comment periods, which can delay critical public safety upgrades to county owned infrastructure and add to the overall time and costs of projects.

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Under the current federal program, counties can utilize a maintenance exemption to move ahead with necessary upkeep of ditches (removing vegetation, extra dirt and debris)—however, the approval of such exemptions is sometimes applied inconsistently. These permits come with strict special conditions that dictate when and how counties can remove grass, trees and other debris that cause flooding if they are not removed from the ditches.

Douglas County is responsible for bridges and culvert maintenance in numerous locations. These critical pieces of infrastructure cross streams, wetlands and rivers, and annual maintenance is essential for long-term stability and safety. If the proposed rule moves forward and dramatically increases the waters under federal jurisdiction, it would significantly impact daily county operations and our ability to serve constituents.

Unfortunately, the ongoing arguments on what states and locals consider to be an ever worsening situation with the EPA and Corps of Engineers overstepping the authority granted by Congress often ignores the tremendous strides made in improving water quality in this country since the Clean Water Act was first passed. For example, the eastern part of the county, tied to the City of Omaha sewer system, is currently undergoing a \$2,000,000,000 sewer separation project, part of an unfunded mandate. It is a vital project related to cleaning the water going into the Missouri River from the half million residents in this area of Douglas County. The public does not like paying the two billion dollars in increased sewer use fees but can understand why this is necessary. On the other hand it is difficult for taxpayers to accept a situation like the following from our County Engineer's Office.

The proposed project will extend 180th St, a section line road, from the Old Lincoln Highway to West Maple Road. This is in an expanding area of the county. Besides providing easier access to newly developing areas, it will relieve the traffic load on Old Lincoln Highway, which is on the National Registry and on the section line roads at 168th and 192nd. The immediate area is being passed over for most development due to a lack of access to the major roads to the south, including the Expressway without going miles around. The project includes two 900 foot bridges over railroad tracks and a flowing creek and two other bridges over an unnamed tributary. The initial environmental permitting process for these bridges went relatively smoothly. The project

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

was designated a Categorical Exclusion, the lowest level of environmental involvement. The project was originally planned for construction in 2010. The process began in 2002. The original work on design and permit getting began in 2005. As of today, 2015, the environmental documents are still not signed. The newest projected construction date is 2018 because of the delays.

An example of uncalled for delays, the County simply has a road ditch intended to protect one of the adjacent roads from runoff from adjacent fields. In moderate or heavy rains it carries water. The ditch is several feet deep and wide. It is full of dry land weeds/grasses. There are no wetland plants. This ditch drains to an unnamed tributary that empties into the Papio Creek. At the bottom of the ditch, if you dig through the weeds, is a rut approximately 6" to 8" wide and less than an inch deep. Presumably, it developed when the ditch was dug before any vegetation began to grow. There is no Ordinary High Water Mark associated with this "bed and bank" because when there is rain it is completely underwater. The Corps of Engineers declared this rut a Water of the U.S. The redesign is costing the county hundreds of thousands of dollars and has held up the project for another two years. This is just one example of the Corps and EPA violating the intent of the law and the Supreme Court ruling.

To put this in perspective, if you had a child starting grade school when the process began, they would be graduating from high school this year. With a proposed construction date starting in 2018, assuming no more delays, and a two year construction period that child will not be able drive on this new road or bridges when they graduate from college.

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Definitions and Terminology

Many of the terms in the current Clean Water Act are unclear and the proposed rules would make the situation even worse. This problem has led to a wide variety of interpretations among the Corps of Engineers Districts and individuals within the same district in enforcing these rules. Failing to bring clarity to the existing rules and adding more rules and undefined terms will make the situation worse. Some examples:

Tributary needs to be differentiated from a drainage ditch. By using the words interchangeably it gives a false impression of a ditch that is normally dry as having a continuous flow of water. The generally accepted definition of a tributary is "a stream that flows to a larger stream or other body of water", and a stream "is a body of water with a current that flows within a bed between stream banks." A ditch is a long narrow trench or hole dug into the ground. There are times when a ditch carries water but is normally dry. (Using such a definition equating tributary and ditch in a law makes it legal, a classic example of newspeak.)

The initial definition given in the Clean Water Act says a tributary has a bed, bank and ordinary high water mark. It was then extended to lakes, ponds, ditches, canals and wetlands. The logic, as I understand it, is that Judge Kennedy's statements about wetlands also apply to tributaries. *"...the agencies conclude that tributaries as they propose to define them perform the requisite functions identified by Justice Kennedy for them to be considered, as a category, to be "Waters of the United States." Assertion of jurisdiction over tributaries with a bed and banks and OHWM is also consistent with Rapanos because five Justices did not reject the current regulations that assert jurisdiction over non-navigable tributaries of traditional navigable waters and interstate waters.*" The vote you will recall was 4-1-4. Judge Kennedy was the 1. *This logic is from the Proposed New Rule.*

In the EPA webinar introducing the proposed new rule, there was a lot of emphasis on why controlling "ditches" is so important to them. The proposed rule includes ditches as tributaries and covered by their jurisdiction unless the ditch is exempted. Ditches cut into Uplands are exempt from being considered Waters of the U.S. There is no definition included for the term

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Upland. If the term Upland only means an area of higher ground- at what elevation does it begin? If Upland ditch is referring to streams and rivers carrying fast flowing clear water out of mountainous areas and possessing bedrock or coarse sediment beds then they are not truly ditches.

The current EPA/Corps argument for referring to ditches as tributaries can be extended to make house gutters tributaries contributing to the Waters of the U.S. (This could also be accomplished using "Landscape Jurisdiction," discussed below).

As a county we have many miles of normally dry ditches that we have created to protect our roads. Like most ditches, they are designed to drain runoff "downhill." If the current proposed regulation is enacted "as is"- many of our ditches could become "jurisdictional." It would be virtually impossible to maintain these ditches if every time we need to clean or widen a ditch we have to get a federal permit. Currently it takes months if not years to get permits from the Corps of Engineers. A result of the proposed rules will be more waters of the U.S. being declared and an even greater slowdown in the current process to get permits approved.

The concept of "Bed and Bank" and "Ordinary High Water Mark" (OHWM) needs to be further defined to show the difference between minor ruts at the bottom of a normally dry drainage ditch and the ditch itself. (Example: - Landscape Jurisdiction is a term used in the new rule that is undefined. The following are basic definitions. "Landscape comprises the visible features of an area of land, including the physical elements of landforms such as (ice-capped) mountains, hills, water bodies such as rivers, lakes, ponds and the sea, living elements of land cover including indigenous vegetation, human elements including different forms of land use, buildings and structures, and transitory elements such as lighting and weather conditions." Wikipedia

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

“Jurisdiction” is defined by the Merriam Webster Dictionary as, “the power or right to make judgments about the law, to arrest and punish criminals, etc.; the power or right to govern an area: an area within which a particular system of laws is used.”

No one can determine how enforcement officials will want to interpret the term and how it can be changed over a period of time. The potential cost and control of land to developers, transportation improvements, farmers and ranchers is tremendous. The same authority could be extended to what could be used on lawns as runoff from these properties eventually go to a drainage way that eventually will go to an active stream or river. This term should be totally removed from the document.

If a rut at the bottom of a dry ditch can become a water of the U.S. (see above) and a normally dry ditch defined as a tributary – worst case authoritarian interpretations for Landscape Jurisdiction would seem probable.

The regulation’s definition of “Floodplain” as areas with “moderate to high water flows” rather than the usual definitions established by FEMA could have multiple interpretations. But under the proposed rule it would seem reasonable to assume that any area that potentially could flood will be considered jurisdictional. These areas would be considered “water of the U.S.” even without a significant nexus. As an example, the northwest portion of Douglas County lies between the Platte River and The Elkhorn River. It is primarily farmland that, when there is rain, drains to ditches that then drain to the river. The area can easily be seen as an area with potential “moderate to high water flows.” Under the new rule water near a water of the U.S. can be considered jurisdictional IF it falls in a Flood Plain or Riparian Area even if there is no “significant nexus.”

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Combining the concepts of Landscape Jurisdiction and Floodplain offers the potential for the EPA and the Corps of Engineers to control considerably larger land areas than they do today. The concept of "Landscape Jurisdiction" should be totally eliminated from the document. Once the concept is in the regulations it is subject to expansion and a variety of interpretations.

Rep. Lamar Smith (R-Texas), chairman of the House Committee on Science, Space, and Technology, is among the members of Congress who have denounced the EPA's new water regulatory plans as "a massive power grab of private property across the U.S."

In a November 12, 2013 press statement, Rep. Smith declared:

"The EPA's draft water rule is a massive power grab of private property across the U.S. This could be the largest expansion of EPA regulatory authority ever. If the draft rule is approved, it would allow the EPA to regulate virtually every body of water in the United States, including private and public lakes, ponds and streams. "

Storm Clean Up is also a concern for those who deal with disasters such as flooding or wind storms. These types of storms impact many ditches, culverts and tributaries. Trying to get permits is already a problem. Expanding the areas regulated will only make things worse.

A recent report from the Gate's Foundations reported the mosquito to be the most dangerous creature on the planet based on the number of people who died from contact with them. Getting a permit to spray a wetland, tributary etc for mosquitoes or other pests should be looked at to ensure that work can be done in a timely manner when needed. The same may well be a problem with spraying for noxious weeds, which spread rapidly and are a problem to control.

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

Increased Litigation

Additionally, counties are liable for ensuring that our public safety ditches are maintained and in some cases counties have faced lawsuits over ditch maintenance. In 2002, *in Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation.

Counties are also facing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. Even though the counties are following the state and federal permitting rules on water quality, these groups are asserting that the permits are not stringent enough. A number of counties in Washington and Maryland have been sued over the scope and sufficiency of their approved MS4 permits.

These are just a few examples of the real impact of the current federal permitting process. The new proposed rule creates even more confusion over what is under federal jurisdiction. If the approval process is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety and stormwater ditches. Our bottom line is that the proposed rule contains many terms that are not adequately defined and NACo believes that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal.

This is problematic because our members are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches, even if federal permits are not issued by the federal agencies in a timely manner. Furthermore, the unknown impacts on other CWA programs are equally problematic.

Written Testimony on the proposed Waters of the U.S. Rule
Commissioner Mary Ann Borgeson, Chair, Douglas County Board of Commissioners
March 14, 2015.

What we are asking for

We ask that the proposed rule be withdrawn until further analysis has been completed and more in-depth consultation with state and local officials—especially practitioners—is undertaken. NACo and counties nationwide share the EPA's and Corps goal for a clear, concise and workable definition for "waters of the U.S." to reduce confusion—not to mention costs—within the federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

Counties stand ready to work with Congress and the agencies to craft a clear, concise and workable definition for "waters of the U.S." to reduce confusion within the federal CWA program. We look forward to working together with our federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. Counties stand ready to work with our counterparts in states and in the federal government to reach a resolution that makes sense. We can achieve our shared goal of protecting the environment without inhibiting public safety and economic vitality of our communities.

Thank you again for the opportunity to testify today on the proposed Waters of the U.S. rule. I would welcome the opportunity to address any questions.