WRITTEN STATEMENT FOR THE RECORD

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COMMISSIONER CHAIR, BERKS COUNTY, PENNSYLVANIA

ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

OVERSIGHT HEARING ON EPA'S REGULATIONS' IMPACT ON STATES, LOCAL AND TRIBAL GOVERNMENTS

BEFORE THE SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT AND REGULATORY OVERSIGHT

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

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WASHINGTON, D.C.

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Thank you, Chairman Rounds, Ranking Member Markey and members of the subcommittee, for the opportunity to testify on the impact of U.S. Environmental Protection (EPA) regulations on state, local and tribal governments.

My name is Christian Leinbach and I serve as Chairman of the Berks County Board of Commissioners in Pennsylvania, and today I am representing the National Association of Counties (NACo).

Elected in 2007, I am now in my ninth year serving on the county board. Additionally, I was elected to NACo's Executive Committee as the Northeastern Region representative by counties in Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania and West Virginia. I am also the past president of the County Commissioners Association of Pennsylvania.

About NACo

Founded in 1935, NACo is the only national organization that represents county governments in the United States and brings together county officials to advocate with a collective voice on national policy, exchange ideas and build new leadership skills, pursue transformational county solutions, enrich the public's understanding of county government, and exercise exemplary leadership in public service.

About Counties

Counties are highly diverse, not only in the Commonwealth of Pennsylvania, but across the nation, and vary immensely in natural resources, social and political systems, cultural, economic, public health and environmental responsibilities. Counties range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Of the nation's 3,069 counties, approximately 70 percent are considered "rural," with populations less than 50,000, and 50 percent of these have populations below 25,000 residents. At the same time, there are more than 120 major urban counties, which collectively provide essential services to more than 130 million people each day. If you've seen one county, you've seen one county, and there are 3,068 more to go.

About Berks County, Pennsylvania

While Berks County is generally considered "urban" with a population close to 415,000 residents, we have a very diverse mix of urban, suburban and rural components. The county lies in southeastern Pennsylvania and has a land mass of about 866 square miles. The county seat is Reading, the fifth largest city in Pennsylvania. While manufacturing accounts for more than 30,000 jobs in Berks County, agriculture is actually the county's largest industry with over 240,000 acres dedicated to farmland. In fact, Berks County is Pennsylvania's third largest producer of agricultural products.

As a county commissioner and a former vice president of a local advertising agency, I have seen firsthand how our state, local community, and important infrastructure projects have been directly and indirectly impacted by federal regulations—and specifically those from the EPA.

Today, I will discuss three key points for your consideration as the Committee continues to assess federal regulations and their impact on state and local governments:

1. **Counties and local governments play a key role in the federal regulatory process**

2. **The growing number of federal regulations and mandates has significant impacts on counties and our residents**

3. **Finally, meaningful intergovernmental consultation will build consensus around and increase the effectiveness of federal regulations**

First, counties and local governments play a key role in the federal regulatory process

County governments exist to deliver public services at the local level, with accountability to our constituents and communities as well as to state and federal authorities. In fulfilling this mission, counties are not only subject to state and federal regulations, but also help to implement them at the local level. **Therefore, as both regulated entities and regulators, it is critical that counties be fully engaged as intergovernmental partners through the entire federal regulatory process—from initial development through implementation.**

Counties are subject to both state and federal regulations

As major owners of public infrastructure—including 45 percent of America's road miles, nearly 40 percent of bridges, 960 hospitals, more than 2,500 jails, 650 nursing homes and a third of the nation's airports and transit systems—counties are regulated by both states and the federal government.

Many of the basic functions of county government, including ownership and maintenance of public infrastructure, are affected by federal environmental regulations. For example, counties own and maintain a wide variety of public safety infrastructure including roadside ditches, flood control channels, stormwater culverts and pipes, Municipal Separate Storm Sewer Systems (MS4), and other infrastructure used to funnel water away from low-lying roads, properties and businesses. Built and maintained by counties to prevent flooding and accidents, these also are governed by water quality regulations.

So when federal agencies, like the EPA, change or update rules, their decisions will inevitably affect our ability to serve residents at the local level.

Counties are also regulators

Charged with protecting the health and well-being of our communities, counties have the ability to issue rules and regulations. We enact zoning and other land use ordinances to safeguard valuable natural resources and protect the safety of our citizens.

For example, under the federal Clean Air Act (CAA), counties are often responsible for controlling air pollution, which may include enforcement authority for rules governing burning or vehicle emissions. Similarly, under the federal Clean Water Act (CWA), counties may enact rules on illicit discharges, remove septic tanks and adopt setbacks for land use plans, and may be responsible for water recharge areas, green infrastructure, water conservation programs and pesticide use for mosquito abatement. We also provide extensive outreach and education to residents and businesses on protecting water quality and reducing water pollution.

In Berks County, while most of the county is in the Delaware River watershed, ten percent of the county drains into the Chesapeake Bay watershed. Since 2010, the communities in the Chesapeake Bay region have been required to reduce water pollution under the Chesapeake Bay Total Maximum Daily Load (TMDL) program. To that end, our county works closely with the Berks County Conservation District to help farmers manage their operations to limit nitrogen, phosphorous and sediment runoff into the Bay.

Additionally, we have taken on further responsibilities under the Federal MS4 Program that is managed through Pennsylvania's State Department of Environmental Protection (DEP). Even though the state government has delegated the MS4 responsibilities to our municipalities, in Berks County, the City of Reading, townships and boroughs are financially unable to implement the MS4 Program. Berks County—along with Berks Nature (our local conservancy organization) and our Conservation District—has coordinated MS4 educational oversight and assistance for thirty-six of our municipalities. We have done this by creating an intergovernmental cooperation agreement among the county, Berks Nature, Berks County Conservation District and municipalities that provide educational outreach and guidance along with coordination of programming to meet MS4 regulatory requirements.

As regulated and regulating entities, counties are uniquely positioned to play a key role in the development and implementation of federal environmental regulations.

Second, the growing number of federal regulations and mandates has significant impacts on counties and our residents

Federal agencies have been issuing an increasing number of regulations in recent years. In 2015, only 114 laws were enacted by Congress, compared to 3,140 rules that were issued by federal agencies.[1] According to the

[1] Competitive Enterprise Institute, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (2016 Edition)

White House Office of Management and Budget (OMB), unfunded mandates from federal rules and regulations cost local governments, our citizens and businesses between $57 billion and $85 billion a year.[2]

These growing number of regulations come at a time when counties—regardless of size—are experiencing significant fiscal constraints and our capacity to fund compliance activities is often limited. According to NACo's County Economies report[3] released this January, only 214 of the nation's 3,069 counties have fully recovered to pre-recession economic conditions.

Even if the counties' economic picture was improved, states put significant restrictions on counties' ability to generate local revenue. In fact, more than 40 states limit counties' ability to collect sales and/or property tax. Some states also limit counties' ability to levy taxes for environmental mandates such as fees on solid waste, water and/or sewer services.[4]

Among the most complex and often costly regulatory mandates are those that involve environmental compliance.

For example, counties nationwide continue to be very concerned about EPA's final "Waters of the U.S." (WOTUS) rule. The final rule extends federal jurisdiction over a greater number of county projects, compromising our ability to fulfill significant infrastructure construction and maintenance responsibilities. The expanded federal oversight may now require additional federal permits, which can be cumbersome, time-consuming and costly, all the while falling short of the goal to protect water quality.

Additionally, EPA also proposed a rule this year to tighten existing safety programs at facilities that use chemicals like chlorine, ammonia and other flammable chemicals. While we agree with the agency's public safety goals, many local governments own water and waste water facilities and there has been very little consultation on the proposal. As a result, we have ongoing concerns about how local governments will be able to comply with costly new requirements and want to ensure that local emergency managers have the necessary resources to complete their duties.

It is important to note that the cost of compliance with EPA regulations cannot be calculated in isolation from the other responsibilities and requirements that the federal government places on counties.

Regulations and mandates come in many shapes and sizes. They can range from requiring localities to implement complex water quality regulations to providing health care services to inmates in jails.

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[2] Office of Management and Budget, Office of Information and Regulatory Affairs, Executive Office of the White House, *2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, (2015)

[3] National Association of Counties, *County Economies 2015: Opportunities and Challenges*, NACo Trends Analysis Paper Series (2016)

[4] National Association of Counties, *The Impact of the Economic Crisis on County Revenue Sources—A Discussion* (March 2009)

In my state of Pennsylvania, the fiscal impact of federal and state mandates on counties is substantial. Our counties report significant unfunded mandates for prison medical costs ($70,000-$8.9 million per county), prison compliance ($70,000-$37 million), reimbursement for children and youth services ($5,000-$4.5 million), 911 service costs ($5,000-$4.5 million), county portion of costs for Medicaid nursing facility residents ($158,000-$4 million) and stormwater management plans ($2,000-$400,000).

When the true cost of implementing federal regulations is shifted to local governments, it can create budgetary imbalances that may require cuts to other critical local services like fire protection, law enforcement, emergency response, education and infrastructure or increases in local taxes and fees to make up the difference. Ultimately, it is our residents and local communities that shoulder the increased cost of federal mandates.

In addition to the impact on county budget and operations, we are also very concerned about how the growing number of EPA regulations affects our local businesses and county economies.

EPA's National Ambient Air Quality Standards (NAAQS) for Ozone rule could significantly impact local economies—especially in the Berks County region where manufacturing is one of our primary industries. Under the new rule, hundreds of counties would not meet the more stringent air quality standards and would be designated as in non-attainment status. This designation can have devastating effects on local economies—impacting everything from transportation projects to job growth.

Our county and local businesses have experienced significant challenges in trying to comply with EPA's air quality regulations. These regulations have a chilling effect on our local jobs recovery and economic growth.

In the last few years, two areas in our county were deemed in non-attainment under the 2008 NAAQS for Lead, because according to EPA, our region had only one and a half years of data to show instead of the required three years. The point being, although we were technically in compliance, EPA still gave us a negative designation, which made it difficult to attract new industries to the areas.

Additionally, in March 2014, EPA put Berks County on a maintenance plan for oxides of nitrogen (NOx). This impacted our Titus Station coal-fired power plant. Due to the high cost of compliance with the EPA regulations, the power plant closed last year. As a result, 75 employees who earned an average of $76,000 a year lost their jobs and the county lost $44,403 in annual tax revenue.

We do not necessarily disagree with the underlying objectives of many federal rules, but we are concerned that neither the rule-making process nor the enforcement mechanisms adequately balance these goals with the capacity of local communities to absorb the costs or manage the impact on our local businesses and economies.

Finally, meaningful intergovernmental consultation will create greater consensus around and increase the effectiveness of federal regulations

The American federal system of government is rooted in cooperation, with each level of government – federal, state and local – contributing to the public good. This requires balancing the need to establish national standards geared towards shared goals; adequate funding to ensure that no one level of government is left to shoulder the burden of policy implementation; and building in local flexibility while still accomplishing policy goals.

Unfortunately, the partnership is often out of balance because federal agencies impose rules without meaningfully consulting with the county officials whose experience and expertise helps us identify alternative, more cost-effective methods to address an issue.

Under the Unfunded Mandates Reform Act (UMRA), each federal agency is supposed to consult with state and local governments to help assess the effects of federal regulatory actions containing intergovernmental mandates. However, UMRA leaves the responsibility to each agency to develop its own consultation process and provides no uniform standards for agencies to follow. As a result, the requirement has been inconsistent and each agency's internal process is different.

Meaningful consultation with counties and local governments early in the rulemaking process would not only reduce the risk of unfunded mandates but would also result in more pragmatic and successful strategies for implementing federal policies.

But in order for intergovernmental consultation to be truly meaningful, Congress should direct federal agencies to engage state and local governments as partners, actively participating in the planning, development and implementation of rules. Unfortunately, all too often, our opportunity to engage in the rulemaking process has been limited to the comment period offered to the general public.

While EPA has one of strongest internal consultation requirements, it is inconsistently applied. In *"EPA's Action Development Process: Guidance on Executive Order 13132: Federalism,"*[5] it states that states and local governments must be consulted on rules if they impose substantial compliance costs of $25 million or more, preempt state or local laws and/or have substantial direct effects on state and local governments.[6] For rules that trigger this requirement, EPA is required to consult in a "meaningful and timely" manner with a specific set of state and local elected officials or their organizations. This group includes NACo, National League of Cities, U.S. Conference of Mayors, National Governors Association, National Conference of State Legislatures,

[5] Environmental Protection Agency, *Action Development Process: Guidance on Executive Order 13132: Federalism* (Nov. 2008) *available at* http://www.govexec.com/pdfs/111908rb1.pdf.

[6] Id. at 5.

International City/County Management Association, National Association of Towns and Townships, County Executives of America, Environmental Council of the States and the Council of State Governments.[7]

Throughout the development of the "Waters of the U.S." rule, EPA did not provide meaningful and timely consultation, despite repeated requests to help develop a practical rule that would accomplish our shared goals.

Throughout the development of EPA's risk management rule, local government groups were not consulted at all—despite the major potential impact on our facilities and emergency response services.

Similarly, in the development of the new ozone standards, EPA rapidly moved forward with the new more stringent standard, despite repeated requests for consultation—even though the earlier 2008 ozone standard had yet to be fully implemented.

While we share many of the same goals as our federal partners and implement these rules in our local communities, the current consultation process needs to be strengthened. If we work together, we can craft rules that relieve the pressure of unfunded mandates on local governments and are more practical to administer.

CONCLUSION

Chairman Rounds and Ranking Member Markey, counties are encouraged by your efforts to study the impacts of EPA regulations on state and local governments. Although UMRA provides a framework, it is clear that the consultation process must be strengthened. Counties stand ready with innovative approaches and solutions to work side-by-side with our federal and state partners to ensure the health, well-being and safety of our citizens.

Thank you again for the opportunity to testify today on behalf of America's 3,069 counties. I would welcome the opportunity to address any questions.

Attachments:

- NACo's Compilation on Status of Pending EPA Regulations of Interest to Counties (June 2016)
- NACo's Compilation of Unfunded Mandates and Other Regulatory Impacts on Counties (Nov. 2015)
- Joint letter submitted to EPA from National Association of Counties, National League of Cities and the U.S. Conference of Mayors on EPA's Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (May 13, 2016)
- NACo letter submitted to EPA and the Corps on the "Waters of the U.S." proposed rule (Nov. 14, 2014)

[7] Id. at 4.

- Joint letter submitted to EPA from National Association of Counties, National League of Cities, U.S. Conference of Mayors and National Association of Regional Councils on proposed ozone rule (March 17, 2015)
- Joint letter submitted to the White House's Office of Information and Regulatory Affairs from National League of Cities, National Association of Counties and U.S. Conference of Mayors on EPA's Definition of "Waters of the U.S." (Nov. 8, 2013)

STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

NAME	STATUS • FINAL	RIN #	BACKGROUND	LOCAL GOVERNMENT IMPACT
Definition of "Waters of U.S." under Clean Water Act (CWA)	Final Rule: Aug. 2015 *Rule temporarily delayed by court	RIN: 2040-AF30	According to the EPA, the purpose of this rule is to clarify which bodies of water (and their ditches) fall under federal jurisdiction in the Clean Water Act (CWA). The rule was implemented Aug. 28, 2015.	Local governments that oversee a number of ditches (roadside, stormwater, floodwater, etc.) that would be impacted.
Forest Roads: Determination under Clean Water Act	Status: Advanced Notice of Proposed Rule-making (NPRM) Notice: June 2016	RIN: 2040-AF43	For the past couple of decades, stormwater runoff from forest roads has been regulated through state-adopted Best Management Practices (BMPs). However, due to a recent court order in *Environmental Defense Center (EDC) v. EPA*, *344 F.2d 832 (9TH Cir. 2003)*, the EPA is required to assess whether the agency should regulate stormwater runoff from forest roads itself.	Whether or not a forest road is considered a point or non-point source is relevant to county governments, which own 45 percent of the roads and highways in the U.S. Additionally, county-owned roads may run through federal, state and private forested lands.
Municipal Separate Storm Sewer System General Permit Remand Rule	Status: NPRM Comment Period Closed March 2016 Final Rule: Nov. 2016	RIN: 2040-AF57	This rule derives from a 2003 court decision which stated that the EPA must update public participation and permit review requirements for Phase II small municipal separate storm sewer systems (MS4s).	MS4s are stormwater and wastewater collection systems, generally operated by local governments. Phase II "small" MS4s include "urbanized areas," as defined by the U.S. Census. Approximately 6,789 "small" MS4s will be impacted by the MS4 remand rule.
Stormwater Regulations Revision to Address Discharges from Developed Sites	Withdrawn; however, provisions will be incorporated into renewed permits	RIN: 2040-AF13	EPA was working on an updated version of its existing stormwater rule. This rule was halted after the proposal was deemed to be too expensive to implement.	While the proposed rule was halted, the agency has indicated that when a municipal separate storm sewer system (MS4) permit is renewed (every five years), the new permit may include some of the provisions included in the original proposal.
Regulations Implementation Section 1417 of the Safe Drinking Water Act: Prohibition on Use of Lead Pipes, Solder and Flux	Status: NPRM, August 2016 Final Rule: Feb. 2018	RIN: 2040-AF55	This regulation would set lead limitation levels for pipes and fixtures in drinking water systems. Additionally, EPA will codify language exempting fire hydrants from the lead rule.	This rule will impact local governments that own or operate water utilities.
Drinking Water Regulations: Regulation of Lead and Copper	Status: NPRM, Dec. 2016 (projected) Final Rule: June 2018	RIN: 2040- AF15	EPA announced it is assessing rule-making options on lead and copper in to determine if there is a national problem related to elevated lead and copper levels in drinking water.	This rule will impact local governments that own or operate water utilities.

STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

Rulemaking to Establish Regulatory Procedures for Eligible Tribes to Assume Authority Over Clean Water Act Programs	Status: NPRM, Jan. 2016	RIN: 2040-AF52	The EPA is considering giving eligible Indian tribes the the same authority states have to regulate impaired waters on Indian reservations and to establish total maximum daily loads (TMDLs) standards on water resources.	This may be relevant for counties that have services or infrastructure on tribal lands or crosses tribal lands.
NPDES Permit Requirements for Municipal Sanitary Systems and Peak Flow Treatment Facilities	Status: Pre-proposal	RIN: 2040-AD02	The Agency is considering proposing standard permit conditions for inclusion in permits for publicly owned treatment works (POTWs) and municipal sanitary sewer collection systems for monitoring, reporting, and discharge obligations.	This would impact counties that own and operate sanitary sewer overflow (SSO) systems.
Water Quality Standards Regulatory Revisions	Final Rule: Aug. 2015	RIN: 2040-AF16	Water Quality Standards (WQS) are a key component of the Clean Water Act. WQS designs specific goals – e.g. fishable/swimmable – for water bodies designated as "waters of the U.S." and sets pollution-limiting criteria to protect those uses. The final rule was finalized on Aug. 21, 2015.	Local governments are tasked with achieving WQS for water pollution control – tighter standards would impact Total Maximum Daily Loads (TMDLs) and National Pollution Discharge Elimination System (NPDES) permits.
Unregulated Contaminant Monitoring Rule (UCMR 4) for Public Water Systems	Status: NPRM Dec. 2015 Final Rule: Jan. 2017	RIN: 2040-AF49	The Safe Drinking Water Act (SDWA) requires that the EPA establish criteria for monitoring no more than 30 unregulated contaminants every five years.	Relevant for counties that own drinking water utilities.
Bioreactor/Wet Land Regulations	Status: ANPR, July 2016	RIN: 2050-AG86	EPA is considering whether to create new national standards for the operations of "wet" landfills and bioreactor landfills. EPA plans to request information and data on the performance of wet landfills and bioreactors and request comments on whether new national standards are appropriate.	This proposal may be relevant for local governments that operate "wet" and bioreactor landfills. Wet and bioreactor landfills use water to speed up the the decomposition of materials, this process creates more methane gas, as well as creates more space at existing landfills.
Emissions Guidelines and Compliance Tables for Municipal Solid Waste Landfills	Final Rule: July 2016	RIN: 2060-AS23	EPA is currently undergoing a review of the air emissions guidelines for municipal solid waste landfills. The rule will also include regulatory issues on landfill gas treatment systems: startup, shutdown and malfunction.	Counties that own landfills will be required to install controls for collecting and combusting landfill gas. This applies to landfills constructed, reconstructed or modified after November 8, 1987 and before July 17, 2014.

STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

NAME	STATUS • FINAL	RIN #	BACKGROUND	LOCAL GOVERNMENT IMPACT
Lead: Renovation, Repair, and Painting for Public and Commercial Buildings	Status: NPRM Projected Final Rule: April 2017	RIN:2070-AJ56	In 2008, the EPA established a final rule to address lead-based paint (LBP) activities in housing and child care facilities. However, EPA was sued for not addressing LBP hazards in public and commercial buildings. In a settlement agreement, EPA agreed to determine whether activities that impact LBP in public buildings must be federally regulated.	This proposal will impact any county that owns a public building with lead-based paint.
Lead-Based Paint Activities: Bridges and Structures; Training, Accreditation, and Certification Rule and Model State Plan Rule	Status: Pre-proposal	RIN: 2070-AC64	On September 2, 1994, EPA proposed a rule to govern work practices for bridges and structures with lead-based paint (LBP). This rule will look at model state laws and LBP impacts for bridges and other structures.	This proposal may impact counties that own bridges that, at one point, were painted with LBP. The rule may govern bridge maintenance activities for bridges with lead-based paint.
Modernization of the Accidental Release Prevention Regulations (Risk Management Program)	Status: Final Rule, Dec. 2016	RIN: 2050-AG82	As a result of a 2013 West, Texas chemical explosion, EPA is proposing to tighten safety procedures in and around facilities that use chemicals. Additionally, the proposed rule increases emergency response protocol around these facilities, which include water/wastewater plants.	The proposed rule would potential impact counties in two ways. First, as owners of water/wastewater facilities, they would be subject to tighter reporting and emergency protocol requirements. Second, each individual facility within a local jurisdiction would be required to run notification exercises, tabletop and field exercises with local emergency personal on an annual basis.
Polychlorinated Bipherryls (PCB) Light Fixtures	Status: Projected, NPRM, June 2016	RIN: 2070-AJ38	Due to a lawsuit, EPA is considering whether to require all building operators who may still use ballast light fixtures (common in buildings older than 1978 and have not been subject to energy efficiency upgrades) to replace them. These fixtures may be common in schools, hospitals, government centers, etc.	If EPA required an immediate replacement for all PCB fixtures, this would create a substantial unfunded mandate on local governments.

STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

NAME	STATUS • FINAL	RIN #	BACKGROUND	LOCAL GOVERNMENT IMPACT
Management Standards for Hazardous Waste Pharmaceuticals	Status Final Rule: Oct. 2016	RIN: 2050-AG39	A small portion of pharmaceuticals are regulated as hazardous waste under the Resource Conservation and Recovery Act when discarded. Health care (and associated) facilities that have excess hazardous waste pharmaceuticals have reported difficulties complying with the manufacturing-oriented framework of the hazardous waste regulations.	Counties own and operate nursing homes and hospitals that may be impacted. Also uncertain is the impact on local pharmaceutical give-back programs.
Review of the National Ambient Air Quality Standards for Ozone	Status: Rule Finalized Oct. 2015	RIN: 2060-AP38	On Oct. 1, 2015, the EPA released a final rule to tighten air quality standards for ozone from 75 parts per billion (ppb) to 70 ppb. Additionally, as part of the rule, 32 states are required to expand their air monitoring season. Over the next two years, EPA will work with the states to determine final designations – likely using 2014-2015 air quality data – and the final designations will be made by Oct. 2017. The rule will likely be implemented several years after that, barring legal challenges.	Currently, 227 counties — primarily urban and in the East — are considered in non-attainment of existing ozone standards. However, under the rule, this number could increase, as could the costs for compliance. Under a 70 ppb standard, using 2011-2013 air quality monitoring data, approximately 358 counties would be in violation. Counties in non-attainment areas often have difficulty attracting and keeping businesses, which must comply with the tighter standards. Additionally, a tighter standard will impact transportation conformity plans.

May 13, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Docket # EPA-HQ-OEM-2015-0725

Dear Administrator McCarthy:

On behalf of the nation's cities, counties and mayors, we respectfully submit comments on the U.S. Environmental Protection Agency (EPA) proposed rule for *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Docket # EPA-HQ-OEM-2015-0725.*

Cities, counties and mayors across the country have a significant interest in this proposed rule. Local governments play an instrumental role in managing and overseeing public safety policy and services including police and sheriff departments, 911 call centers, emergency management professionals, fire departments, public health officials, public records and code inspectors, among others. They are the first responders in any disaster, and are often the first emergency response and recovery teams on the scene. Additionally, local governments own and operate water and wastewater facilities that would be required to comply with this proposed rule.

Under the proposed rule, local governments may be most impacted on two fronts. First, as owners and operators of publically owned water/wastewater treatment facilities, local governments would be regulated through new requirements on facilities. In particular, we are concerned that in addition to the increased managerial costs associated with compliance, EPA is considering subjecting these facilities to safer alternative technology (STAA) reviews. Safer technology alternatives to reduce risk at a water treatment plant could inadvertently counter other federal environmental quality objectives and, selecting the most appropriate water treatment chemicals and technology applications should be made by water utility managers based on science, practical experience, and their professional opinion of what will most effectively make water safe for public consumption and comply with the Safe Drinking Water Act.

Second, since local governments often serve as our nation's first line of defense before and after disasters strike, changes to emergency protocol will directly impact them. The proposed rule will expand local government responsibilities, without providing funding to implement the more complex requirements.

In EPA's cost benefit analysis, we believe that EPA has not adequately considered all the necessary local government costs that would be needed to implement these new responsibilities. The proposed rule would require local governments to coordinate emergency response activities with 11,900 individual facilities. This will be costly and complex for local governments to implement, and more staff and other resources will be needed to effectively meet the goals of the rule. Furthermore, EPA did not consider how an increased local government workload as a result of this rule would be funded. Since publicly owned water treatment systems are funded through user fees, under law, the new facility management costs would be borne by them.

Additionally, we are concerned that the costs and impacts of a more prescriptive risk management program will fall disproportionately on smaller communities, compounding their challenges of complying with the new federal mandates. These jurisdictions generally have small staffs who are already managing a wide range of issues. Larger communities will also be faced with increased reporting and activity burdens as first responders, emergency planners, and regulators of land use activities.

Moreover, while we are appreciative the agency held a one-hour briefing for our organizations during the rule's public comment period, we remain concerned about the proposed rule's direct impact on local governments. We believe the agency missed a valuable opportunity to engage local governments prior to the rule's publication in the *Federal Register*. This is counter to EPA's internal "Guidance on Executive Order 13132: Federalism" (Nov. 2008), which specifies that states and local governments must be consulted on rules if they impose substantial compliance costs, preempt state or local laws and/or have "substantial direct effects on state and local governments." If the agency had engaged us prior to public comment period, we believe we could have flagged some of these problems and identified potential solutions.

For these reasons, we urge you to delay advancing the proposed rule and perform a local government impact analysis and consultation with the nation's cities, counties and mayors before finalizing this rule.

As an intergovernmental partner, we thank you for the opportunity to comment on the proposed rule, which will have a major impact on our various constituencies. On behalf of the nation's cities, counties and mayors, we thank you for your consideration of our request. If you have any questions, please contact us: Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; or Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org.

Sincerely,

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

Matthew D. Chase
Executive Director
National Association of Counties

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

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

ENVIRONMENTAL PROTECTION AGENCY	
Clean Air Act	Compliance with federal air pollution standards, including, but not limited to, monitoring air quality; retrofitting stationary and mobile sources of pollution and obtaining required permits; ozone and particulate matter (PM) standards for PM 10 and PM 2.5. While tighter standards for PM 10 have been temporary tabled, the reconsideration process for air standards resets every five years.
Particulate Matter Standards	Mentioned briefly above, lowering PM standards is problematic, especially for rural areas, where practices governing regular everyday events such as cars driving down dirt roads and agricultural practices that sustain local economies could be regulated, as could natural events such as wildfires, droughts or wind storms. Because of the high, naturally occurring, dust levels found in arid climates, many western counties have a difficult time meeting the current PM standard. This, in turn, affects their economic base, which will further restrain economic recovery. Based on previous experience, non- attainment areas have difficulty maintaining and attracting businesses to their regions, since these businesses would have to operate under the tighter standards. Most businesses chose to relocate or not even build in a non-attainment area.
Ozone Standards	The EPA is currently assessing whether to tighten the current National Ambient Air Quality Standards (NAAQS) for ozone. 358 to 558 additional counties would be considered in non-attainment under the standards. For counties designated as being in non-attainment, this impacts both economic development and transportation conformity projects.
Clean Water Act	Compliance with federal regulations and mandates related to: county owned water and wastewater treatment regulations; combined and sanitary sewer overflow consent decrees; "Waters of the U.S." definitional changes (refer below for more specific problems with the navigable “waters of the U.S.” regulation program); regulation of point and non-point discharges (including those from forest roads), including standards for improving and maintaining water quality; stormwater regulations; and inconsistent blending and bypass rules.
Pesticides Regulation	The general permit for pesticides became effective the end of October, 2011. NACo has heard mixed reviews from our counties. Some counties, have changed spraying patterns, which may not be as effective as previous practices. The general permit has a heavier paperwork burden for spraying activities. This in turn has changed the way counties administer the program. Since county governments serve as primary service providers for their residents, this permit has significant effects on county programs, particularly mosquito abatement and noxious weed control efforts, creating unfunded mandates for both urban and rural counties through the tight reporting requirements. Additionally, the final “Waters of the U.S.” rule may trigger expanded regulation for counties
Stormwater Regulations	CWA stormwater regulations, also known as municipal separate storm sewer systems (MS4s), apply to counties with populations of 100 thousand or more and certain counties in or near urban areas. MS4s are required to meet water criteria standards, generally through Best Management Practices (BMPs). However, in recent years MS4 permits are moving away from BMPs to stricter nutrient numerical limits which can make it both infeasible and very expensive to comply with permit requirements.

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

Blending and Bypass	In a March 2013 court case, *Iowa League of Cities v. EPA,* the U.S. Court of Appeals for the 8th Circuit struck down EPA's prohibitions against the practice of blending wastewater at Publically Owned Treatment Works (POTW) during wet weather events and against the use of mixing zones in permits for compliance with bacteriologic standards. Despite requests by NACo and other local government groups that this practice should not be prohibited nationwide, EPA stated that the use of blending and bypass is only applicable to areas within the 8th Circuit Court's jurisdiction and not applicable to other areas of the country. This court decision should be applied to all regions rather than just to the 8th Circuit Court region.
Drinking Water	Establishes maximum contaminant levels for contaminants in public water systems and specifies treatment techniques to be used. Upcoming regulations that will have a direct impact on local governments that own/operate drinking water facilities include the lead and copper rules and the cyanotoxin advisory requirements.
Resource Conservation and Recovery Act	Cleanup at landfills, superfund sites and underground storage tanks - Local governments who own landfills are subject to federal standards regarding location, operating criteria, groundwater monitoring, corrective actions, closure and post- closure care. For Superfund sites, the issues stem from institutional controls such as zoning around sites, setting and enforcing easements and covenants and overseeing building and/or excavation near sites.
Brownfields Redevelopment/Dioxin	Brownfields redevelopment has created some of the biggest success stories for local governments. However, the EPA is assessing whether to drop its dioxin levels to a point that would halt all brownfields development in the nation. While dioxin can be created as a byproduct through manufacturing, it is also naturally occurring. The levels the EPA proposed to lower dioxin are equal to many naturally occurring levels. NACo would urge the EPA the revisit the science used behind the health standards. Otherwise, this could be a huge loss for local governments.

ARMY CORPS OF ENGINEERS – SPECIFIC PROBLEMS DEALING WITH THE 404 PERMIT PROGRAM (EPA & USACE)

Compensation Wetland Mitigation	Rule issued in conjunction with EPA. Local governments request added flexibility in meeting wetland mitigation requirements. Specific example includes variance between state and federal requirements. In this case, the state has an expanded set of options to meet the requirement that is not necessarily followed at the federal level. Therefore a local government may satisfy state requirements but not be able to meet federal requirements.
Ditch Drainage Requirements	The excessive amount of requirements necessary to provide information for USACE to review before a project is approved is both costly and time consuming for counties. For example, a county that wished to pursue and complete a drainage project was informed that the following was needed by USACE before work could be started: detailed plans showing existing condition, photos of areas where work will be done, details concerning existing water surface elevation, ordinary high water line, calculations of amount of material to be excavated, and a wetland delineation. Just to do this, the county would need to hire engineers to survey and perform calculations. All of this would significantly add to the cost of the project without necessarily ensuring clean water.

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

Post construction requirements – 404 Permit Related	The post construction monitoring process adds costs for channel rebuilds and other mitigation measures. For example, one county, after completion of a bridge replacement project, was required by NOAA Fisheries and FHWA to reinitiate formal consultation due to shifting boulders in the stream bed. State fish and wildlife officials supported the county in its objection and in its request to allow the channel to continue to stabilize. An updated BA and additional reporting would cost the county $50,000 in this instance. Should the reconstruction of the stream bed be required by the agencies, almost $1M in additional costs could be incurred.
Waters of the U.S.	Any changes to "Waters of the U.S." definition within the CWA will have an impact on county owned and maintained ditches such as roadside, flood control, stormwater, etc. Additionally, since there is only one "waters of the U.S." definition in the CWA, changes would impact more than the Section 404 permit program. What those changes are is not well understood nor has it been fully studied. This may have a significant impact on local governments.

TRANSPORTATION

Grant Requirements	Requirements do not provide flexibility during implementation phase. For example, a county applies for funding to install electronic dynamic driver feedback speed limit signs. The county would like to purchase the signs using grant funding and then use county resources (e.g. staff) to install them. Requirements however, dictate that all stages of the process must be let out to private contractors, which further implies other requirements, e.g. Davis-Bacon, EEO, etc.
MAP-21	MAP-21 provides for some major reforms in regard to project delivery/environmental streamlining. It also proposes to modify the categorical exclusion process for NEPA review of certain projects. NACo continues to be engaged in rulemakings pertaining to these areas.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

National Marine Fisheries Service	The Biological Assessment (BA) process through NMFS is extremely time consuming and raises costly barriers. For example, one county was working on a joint interchange project with the state to address urban growth. In an attempt to navigate the federal environmental permitting process, the project took two years alone to navigate the BA consultation with NMFS. A standard BA consultation generally takes9-12 months but the NMFS process added more than a year in time and approximately $1M in additional engineering costs with no added value to the project.

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

MISCELLANEOUS/MULTIPLE AGENCIES

Inmate Healthcare	The Supreme Court required counties to provide health care for jail inmates in Estelle v. Gamble, 429 U.S. 97 (1976), while the federal government refuses to contribute to the provision of Medicaid, Medicare, CHIP or veterans' health benefits or services for otherwise eligible inmates.
Funding assistance-applications	When applying for funding assistance from separate sources/agencies for one project, multiple applications are required. The duplicity and lack of interchangeability of the forms and the agencies is very time consuming for local governments.
Use of ".gov" Domain for County Websites	The U.S. General Services Administration regulates the use of this extension. Arguably, this would make county sites easier to recall for constituents. Rules for use, however, restrict counties from enacting local ordinances/laws to assist in offsetting technology costs associated with website operation and maintenance via approved and regulated advertising.
Website Accessibility	The Department of Justice is currently considering a rule that would establish requirements to make websites for state and local governments accessible to individuals with disabilities. An advanced notice of the proposed rule was issued in 2010; however the Department has yet to issue the proposed rule. While counties support ensuring individuals with disabilities are able to access public information, the resources and additional funding needed for county websites to meet whatever standard is required by the rule will vary on a county by county basis and must be taken into consideration when determining the implementation period of the rule.
Overtime Pay	In July 2015, the U.S. Department of Labor (DOL) released a proposed rule to amend regulations under the Fair Labor Standards Act governing the "white collar" exemption from overtime pay for executive, administrative and professional employees. In the proposed rule, DOL would change (more than double) the threshold for employees who are eligible to receive overtime pay, from $23,660 to $50,440. This level would also be adjusted annually. NACo submitted comments requesting DOL to extent the 60 day comment period to allow counties to calculate the financial and administrative burden this would impose on counties. NACo counties to collect information from counties regarding the financial and administrative impact of the overtime pay change.

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

Assessment of Fair Housing	The U.S. Department of Housing (HUD) released a final rule on updating Affirmatively Furthering Fair Housing practices and a proposed rule on the Assessment of Fair Housing Tool. HUD grantees are supposed to use the Assessment of Fair Housing (AFH) tool to analyze their fair housing goals to more effectively carryout their obligation to affirmatively further fair housing. AFH replaces the current Analysis of Impediments (AI) process which required HUD grantees that receive CDBG, HOME and Emergency Shelter Grants funding to identify local barriers to fair housing choice. The AFH is a much more comprehensive planning process, requiring jurisdictions to look at patterns of segregation and integration; racially and ethnically concentrated areas of poverty, and disparities in access to opportunity, as well as the contributing factors of those issues. The Tool is expansive and will take staff time and likely financial resources to implement. NACo submitted comments expressing concerns about the AFH Tool due to the lack of data provided by HUD for the new planning process and because HUD is not providing any funding to grantees to implement the new planning process and because HUD is not providing any funding to grantees to implement the new planning process. NACo continues to engage the Administration and Congress about county concerns with the AFH rulemaking.

March 17, 2015

Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket No. EPA-HQ-OAR-2008-0699, National Ambient Air Quality Standards for Ozone

Dear Administrator McCarthy:

On behalf of the nation's mayors, counties, cities and regions, we respectfully submit our comments on the U.S. Environmental Protection Agency's (EPA) "Draft Documents Related to the Review of the National Ambient Air Quality Standards (NAAQS) for Ozone."

Our organizations, which collectively represent the nation's 19,000 cities and mayors, 3,069 counties and more than 500 regional councils, support the goals of the Clean Air Act (CAA) and the National Ambient Air Quality Standards (NAAQS) that protect public health and welfare from hazardous air pollutants. Local governments across the country are actively working toward meeting these goals of improving air quality.

The NAAQS applies to counties and cities within a metropolitan region and plays a critical role in shaping regional transportation plans and can influence regional economic vitality. The proposed rule would revise the current NAAQS for ozone of 75 parts per billion (ppb), which was set in 2008, proposing to reduce both the primary and secondary standard to within a range of 65-70 ppb over an 8-hour average. EPA is also accepting comments on setting the standard at a level as low as 60 ppb.

Because of the financial and administrative burden that would come with a more stringent NAAQS for ozone, we ask EPA to delay implementation of a new standard until the 2008 standard is fully implemented. The current 2008 standard of 75 ppb has yet to be implemented due to litigation opposing the standard. The 1997 standard of 80 ppb is still generally used by regions and it will take several additional years to fully implement the more stringent 2008 standard.

A more stringent NAAQS for ozone will dramatically increase the number of regions classified as non-attainment. By EPA's own estimates, under a 70 ppb standard, 358 counties and their cities would be in violation; under a 65 ppb standard, an additional 558 counties and their cities would be in violation. Unfortunately, there is very little federal funding available to assist local governments in meeting CAA requirements. According to EPA, under this proposed rule a 70 ppb standard would cost approximately $3.9 billion per year; a 65 ppb standard would cost approximately $15.2 billion annually to implement.[1]

Moreover, these figures do not take into account the impact that the proposed rule will have on the nation's transportation system. Transportation conformity is required under the CAA[2] to ensure that federally-supported transportation activities (including transportation plans, transportation improvement programs, and highway and transit projects) are consistent with state air quality implementation plans. Transportation conformity applies to all areas that are designated non-attainment or ''maintenance areas'' for transportation-related criteria pollutants, including ozone.[3] Transportation conformity determinations are required before federal approval or funding is given to transportation planning and highway and transit projects.

For non-attainment areas, the federal government can withhold federal highway funds for projects and plans. Withholding these funds can negatively affect job creation and critical economic development projects for impacted regions, even when these projects and plans could have a measurable positive effect on congestion relief.

Additionally, these proposed new ozone regulations will add to an already confusing transportation conformity compliance process due to a recent decision by the United States Court of Appeals for the District of Columbia Circuit. In 2012, after the 2008 NAAQS for ozone was finalized, EPA issued a common-sense proposal to revoke the 1997 NAAQS for ozone in transportation conformity requirements to ensure that regulated entities were not required to simultaneously meet two sets of standards—the 1997 and 2008 NAAQS for ozone. However, the court disagreed, and on December 23, 2014 ruled, in *Natural Resources Defense Council vs. Environmental Protection Agency and Gina McCarthy,* that EPA lacked the authority to revoke conformity requirements. This ruling has left state and local governments with a conformity process that is now even more confusing and administratively burdensome, and a new NAAQS for ozone will add to the complexity.

Given these financial and administrative burdens on local governments, we urge EPA to delay issuing a new NAAQS for ozone until the 2008 ozone standard is fully implemented.

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[1] The cost to California is not included in these calculations, since a number of California counties would be given until 2032–2037 to meet the standards.
[2] Section 176(c) (42 U.S.C. 7506(c))
[3] See 40 CFR Part 93, subpart A

If you have any questions, please contact us: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Joanna Turner (NARC) at 202-618-5689 or Joanna@narc.org.

Sincerely,

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

Matthew D. Chase
Executive Director
National Association of Counties

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

Joanna L. Turner
Executive Director
National Association of Regional Councils

November 14, 2014

Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314

Re: Definition of "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Dear Ms. Downing 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 (Corps) jointly proposed rule on *Definition of "Waters of the United States" Under the Clean Water Act*.[1] We thank the agencies for their ongoing efforts to communicate with NACo and our members throughout this process. **We remain very concerned about the potential impacts of the proposed rule and urge the agencies to withdraw it until further analysis has been completed.**

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

The Importance of Clean Water and Public Safety

Clean water is essential to all of our nation's counties who are on the front lines of protecting the citizens we serve through both preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality.

Counties are not just another stakeholder group in this discussion—they are a valuable partner with federal and state governments on Clean Water Act implementation. To that end, it is important that the federal, state and local governments work together to craft practical and workable rules and regulations.

Counties are also responsible to protect the public. Across the country, counties own and maintain public safety ditches including road and roadside ditches, flood control channels, stormwater culverts and pipes, and other infrastructure that is used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidents. **Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining their public safety ditches and infrastructure.**

[1] Definition of Waters of the U.S. Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014).

NACo shares 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.

EPA asserts that they are not trying to regulate any waters not historically or previously regulated. But this is misleading. Prior to a 2001 Supreme Court decision,[2] virtually all water was jurisdictional. The EPA's and the Corps economic analysis agrees. It states that "Just over 10 years ago, almost all waters were considered "waters of the U.S."[3] This is why we believe the proposed rule is an expansion of jurisdiction over current regulatory practices.

Hundreds of counties, including their respective state associations of counties, have submitted public comments on the proposed rule over concerns about how it will impact daily operations and local budgets. We respectfully urge the agencies to examine and consider these comments carefully.

This letter will highlight a number of areas important to counties as they relate to the proposed rule:

- **Counties Have a Vested Interest in the Proposed Rule**
- **The Consultation Process with State and Local Governments was Flawed**
- **Incomplete Data was Used in the Agencies' Economic Analysis**
- **A Final Connectivity Report is Necessary to Justify the Proposed Rule**
- **The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."**
- **Potential Negative Effects on All CWA programs**
- **Key Definitions are Undefined**
- **The Section 404 Permit Program is Time-Consuming and Expensive for Counties**
- **County Experiences with the Section 404 Permit Process**
- **Based on Current Practices—How the Exemption Provisions May Impact Counties**
- **Counties Need Clarity on Stormwater Management and Green Infrastructure Programs**
- **States Responsibilities Under CWA Will Increase**
- **County Infrastructure on Tribal Land May Be Jurisdictional**
- **Endangered Species Act as it Relates to the Proposed Rule**
- **Ensuring that Local Governments Are Able to Quickly Recover from Disasters**

Counties Have a Vested Interest in the Proposed Rule

In the U.S., there are 3,069 counties nationally which vary in size and population. They range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Forty-eight of the 50 states have operational county governments (except Connecticut and Rhode Island). Alaska calls its counties boroughs and Louisiana calls them parishes.

Since counties are an extension of state government, many of their duties are mandated by the state. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court

[2] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'r (SWANCC),* 531 U.S. 159, 174 (2001).

[3] U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), *Econ. Analysis of Proposed Revised Definition of Waters of the United States,* (March 2014) at 11.

systems and county hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, and land use planning/zoning and water quality.

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 45 percent of public roads in 43 states (Delaware, North Carolina, New Hampshire, Vermont and West Virginia counties do not have road responsibilities). These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Of the nation's 3,069 counties, approximately 70 percent of our counties are considered "rural" with populations less than 50,000 and 50 percent of these are counties have populations below 25,000 residents. Any additional cost burdens are challenging to these smaller governments, especially since more rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased federal and state regulations with the limited financial resources available to local governments poses significant implementation challenges.

Changes to the scope of the "waters of the U.S." definition, without a true understanding of the direct and indirect impact and costs to state and local governments, puts our local governments in a precarious position, choosing between environmental protection and public safety. Counties do not believe this needs to be an either/or decision if local governments are involved in policy formations from the start.

Regardless of size, counties nationwide are coping with fiscally tight budgets. County revenues have declined and ways to effectively increase county treasuries are limited. In 2007, our counties were impacted by the national financial crisis, which pushed the nation into a recession. The recession affected the capacity of county governments to deliver services to their communities. While a number of our counties are experiencing moderate growth, in some parts of the country, economic recovery is still fragile.[4] This is why we are concerned about the proposed rule.

The Consultation Process with State and Local Governments was Flawed

Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism. Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which includes meaningful consultation with impacted state and local governments.

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires federal agencies to consider potential impacts of proposed rules on small entities. This process was not followed for the proposed "waters of the U.S." rule.

Under RFA, small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. RFA requires agencies to analyze the impact any proposed rule

[4] Nat'l Ass'n of Counties, *County Tracker 2013: On the Path to Recovery*, NACo Trends Analysis Paper Series, (2014).

could have on small entities and provide less costly options for implementation. The Small Business Administration's (SBA) Office of Advocacy (Advocacy) oversees federal agency compliance with RFA.

As part of the rulemaking process, the agencies must "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). To certify a proposed rule, federal agencies must provide a "factual basis" to certify that a rule does not impact small entities. This means "at minimum…a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[5]

The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. **The agencies determined, incorrectly, there was "no SISNOSE"—and therefore did not provide a necessary review.**

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, SBA Advocacy expressed significant concerns that the proposed "waters of the U.S." rule was "improperly certified…used an incorrect baseline for determining…obligations under the RFA…imposes costs directly on small businesses" and "will have a significant economic impact…" Advocacy requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[6] **Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports the SBA Office of Advocacy conclusions.**

President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999. **Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments.** We believe the proposed "waters of the U.S." rule triggers Executive Order 13132. Under Federalism, agencies must consult with state and local officials early in the process and must include in the final draft regulation a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns.[7] **A federalism impact statement was not included with the proposed rule.**

EPA's own internal guidance summarizes when a Federalism consultation should be initiated.[8] Federalism may be triggered if a proposed rule has an annual implementation cost of $25 million for state and local governments.[9] Additionally, if a proposal triggers Federalism, EPA is required to work with state and local governments in a "meaningful and timely" manner which means "consultation should begin as early as possible and continue as you develop the proposed rule."[10] Even if the rule is determined not to impact state

[5] Small Bus. Admin. (SBA), Office of Advocacy (Advocacy), *A Guide for Gov't Agencies: How to Comply with the Regulatory Flexibility Act,* (May 2012), at 12-13.

[6] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Adm'r, EPA and Gen. John Peabody, Deputy Commanding Gen., Corps of Eng'r, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014).

[7] Exec. Order No. 13132, 79 Fed. Reg. 43,255 (August 20, 1999).

[8] U.S. Envtl. Prot. Agency, *EPA's Action Development Process: Guidance on Exec. Order 13132: Federalism*, (November 2008).

[9] *Id.* at 6.

[10] *Id.* at 9.

and local governments, the EPA still subject to its consultation requirements if the proposal has "any adverse impact above a minimum level."[11]

Within the proposed rule, the agencies have indicated they "voluntarily undertook federalism consultation."[12] While we are heartened by the agencies' acknowledgement of our concerns, we are disturbed that EPA prematurely truncated the state and local government Federalism consultation process. **EPA initiated a formal Federalism consultation process in 2011. In the 17 months between the consultation and the proposed rule's publication, EPA failed to avail itself of the opportunity to continue substantial discussions during this intervening period with its intergovernmental partners, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.**

Recommendations:

1. **Pursuant to the rationale provided herein, as well as that put forth by the SBA Chief Counsel for Advocacy, formally acknowledge that this regulation does not merit a "no SISNOSE" determination and, thereby, must initiate the full small entity stakeholder involvement process as described by RFA SBREFA**

2. **Convene a SBAR panel which provides an opportunity for small entities to provide advice and recommendations to ensure the agencies carefully considers small entity concerns**

3. **Complete a multiphase, rather than one-time, Federalism consultation process**

4. **Charter an ad hoc, subject-specific advisory committee under the authority of the Federal Advisory Committee Act (FACA), as EPA has done on numerous occasions for less impactful regulations, to underpin the development of this comprehensive regulation**

5. **Accept an ADR Negotiated Rulemaking process for the proposed rule**: Because of the intrinsic problems with the development of the proposed rule, we would also ask the agencies to consider an Alternative Dispute Resolution (ADR) negotiated rulemaking with all stakeholders. An ADR negotiated rulemaking process would allow stakeholders of various groups to "negotiate" the text of a proposed rule, to allow problems to be addressed and consensus to be reached.

Incomplete Data was Used in the Agencies' Economic Analysis

As part of the proposed rule, the agencies released their cost-benefit analysis on *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2014). We are concerned about the limited scope of this analysis since it bases its assumptions on a narrow set of CWA data not applicable to other CWA programs. Since EPA has held its 2011 Federalism briefing on "waters of the U.S.," **we have repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.**[13] [14] [15]

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[11] *Id.* at 11.

[12] 79 Fed.Reg. 22220.

[13] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA & Jo Ellen Darcy, Assistant Sec'y for Civil Works, U.S. Dep't of the Army, "Waters of the U.S." Guidance (July 29, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf.

[14] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA, Federalism Consultation Exec..Order 13132: "Waters of the U.S." Definitional Change (Dec. 15, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Dec%2015%202011_final.pdf.

The economic analysis uses CWA Section 404 permit applications from 2009-2010 as its baseline data to estimate the costs to all CWA programs. There are several problems with this approach. Based on this data, the agencies expect an increase of approximately three percent of new waters to be jurisdictional within the Section 404 permit program. The CWA Section 404 program administers permits for the "discharge of dredge and fill material" into "waters of the U.S." and is managed by the Corps.

First, we are puzzled why the agencies chose the span of 2009-2010 as a benchmark year for the data set as more current up-to-date data was available. In 2008, the nation entered a significant financial recession, sparked by the housing subprime mortgage crisis. Housing and public infrastructure construction projects were at an all-time low. According to the National Bureau of Economic Research, the recession ended in June 2009,[16] however, the nation is only starting to show signs of recovery.[17] By using 2009-2010 data, the agencies have underestimated the number of new waters that may be jurisdictional under the proposed rule.

Second, the economic analysis uses the 2009-2010 Corps Section 404 data as a baseline to determine costs for other CWA programs run by the EPA. Since there is only one "waters of the U.S." definition used within the CWA, the proposed rule is applicable to all CWA programs. The Congressional Research Service (CRS), a public policy research arm of the U.S. Congress, released a report on the proposed rule that stated "costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the proposal." The report reiterates there would be "additional permit application expenses (for CWA Section 404 permitting, stormwater permitting for construction and development activities, and permitting of pesticide discharges…for discharges to waters that would now be determined jurisdictional)."[18]

We are concerned the economic analysis focuses primarily on the potential impacts to CWA's Section 404 permit program and does not fully address the cost implications for other CWA programs. The EPA's and the Corps economic analysis agrees, "…the resulting cost and benefit estimates are incomplete…Readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis." [19]

Recommendation:

- **NACo urges the agencies to undertake a more detailed and comprehensive analysis on how the definitional changes will directly and indirectly impact all Clean Water Act programs, beyond Section 404, for federal, state and local governments**

- **Work with national, state and local stakeholder groups to compile up-to-date cost and benefit data for all CWA programs**

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[15] Letter from Tom Cochran, CEO and Exec. Dir., U.S. Conf. of Mayors, Clarence E. Anthony, Exec. Dir., Nat'l League of Cities, & Matthew D. Chase, Exec. Dir., Nat'l Ass'n of Counties to Howard Shelanski, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. and Budget, EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule & Connectivity Report (November 8, 2013) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/NACo%20NLC%20USCM%20Waters%20of%20the%20US%20Connectivity%20Response%20letter.pdf.

[16] Nat'l Bureau of Econ. Research, Bus. Cycle Dating Comm. (September 20, 2010), *available at* www.nber.org/cycles/sept2010.pdf.

[17] Cong. Budget Office, *The Budget & Economic Outlook: 2014 to 2024* (February 2014).

[18] U.S. Cong. Research Serv., EPA & the Army Corps' Proposed Rule to Define "Waters of the U.S.," (Report No. R43455; 10/20/14), Copeland, Claudia, at 7.

[19] Econ. Analysis of Proposed Revised Definition of Waters of the U. S., U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'r, 11 (March 2014), at 2.

A Final Connectivity Report is Necessary to Justify the Proposed Rule

In addition to the aforementioned issues, we are also concerned that the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, used as a scientific basis of the proposed rule, is still in draft form.

In 2013, EPA asked its' Science Advisory Board (SAB), which is comprised of 52 scientific advisors, to review the science behind the report. The report focused on more than 1,000 scientific studies and reports on the interconnectivity of water. In mid-October, 2014, the SAB completed its review of the draft report and sent its recommendations to the EPA.[20]

The SAB recommendations have yet to be incorporated into the draft connectivity report. Releasing the proposed rule before the connectivity report is finalized is premature—the agencies missed a valuable opportunity to review comments or concerns raised in the final connectivity report that would inform development of the proposed "waters of the U.S." rule.

Recommendations:

- **Reopen the public comment period on the proposed "waters of the U.S." rule when the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report is finalized**

The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."

Clean water is essential for public health and state and local governments play a large role in ensuring local water resources are protected. It is important state and local governments are involved as a significant partner in the CWA rule development process.

The Clean Water Act charges the federal government with setting national standards for water quality. Under a federal agreement for CWA enforcement, the EPA and the Corps share clean water responsibilities. The Corps is the lead on the CWA Section 404 Dredge and Fill permit program and the EPA is the lead on other CWA programs.[21] 46 states have undertaken authority for EPA's Section 402 NPDES permit program—EPA manages NPDES permits for Idaho, Massachusetts, New Hampshire and New Mexico.[22] Additionally, all states are responsible for setting water quality standards to protect "waters of the U.S."[23]

"Waters of the U.S." is a term used in CWA—it is the glue that holds the Clean Water Act together. The term is derived from a law that was passed in 1899, the Rivers and Harbors Act, that had to do with interstate commerce—any ship involved in interstate commerce on a "navigable water," which, at the time, was a lake, river, ocean—was required to have a license for trading.

[20] Letter from Dr. David T. Allen, Chair, Science Advisory Bdd & Amanda D. Rodewald, Chair, Science Advisory Bd. Panel for the Review of the EPA Water Body Connectivity Report to Gina McCarthy, Adm'r, EPA, SAB Review of the Draft EPA Report Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Sci. Evidence (October 17, 2014).

[21] Memorandum of Agreement Between the Dep't of the Army & the Envtl. Prot. Agency Concerning the Determination of the Section 404 Program & the Applications of Exemptions Under Section(F) of the Clean Water Act, 1989.

[22] Cong. Research Service, Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia, at 4.

[23] *Id.*

The 1972 Clean Water Act first linked the term "navigable waters" with "waters of the U.S." in order to define the scope of the CWA. The premise of the 1972 CWA was that all pollutants discharged to a navigable water of the U.S. were prohibited, unless authorized by permit.

In the realm of the CWA's Section 404 permit program, the courts have generally said that "navigable waters" goes beyond traditionally navigable-in-fact waters. However, the courts also acknowledge there is a limit to jurisdiction. What that limit is within Section 404 has yet to be determined and is constantly being litigated.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers,* the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. [24] In SWANCC, Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.[25]

In 2006, in *Rapanos v. United States*, the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program.[26] In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites.[27] Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

Potential Negative Effects on All CWA Programs

There is only one definition of "waters of the U.S." within the CWA which must be applied consistently for all CWA programs that use the term "waters of the U.S." While Congress defined "navigable waters" in CWA section 502(7) to mean "the waters of the United States, including the territorial seas," the Courts have generally assumed that "navigable waters of the U.S." go beyond traditional navigable-in-fact waters such as rivers. However, the Courts also acknowledge there is a limit to federal jurisdiction.

Previous Corps guidance documents on "waters of the U.S." clarifications have been strictly limited to the Section 404 permit program. A change to the "waters of the U.S." definition though, has implications for ALL CWA programs. This modification goes well beyond solely addressing the problems within the Section 404 permit program. These effects have not been fully studied nor analyzed.

Changes to the "waters of the U.S." definition within the CWA will have far-reaching effects and unintended consequences to a number of state and local CWA programs. As stated before, the proposed economic analysis needs to be further fleshed out to recognize all waters that will be jurisdictional, beyond the current data of Section 404 permit applications. CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs, will be impacted.

[24] 531 U.S. 159, 174 (2001).

[25] *Id.*

[26] 547 U.S. 715, 729 (2006).

[27] *Id.*

Key Definitions are Undefined

The proposed rule extends the "waters of the U.S." definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that will be used to claim jurisdiction more broadly. All of these terms will broaden the types of public infrastructure that is considered jurisdictional under the CWA.

"Tributary"—The proposed rule states that a tributary is defined as a water feature with a bed, bank, ordinary high water mark (OHWM), which contributes flow, directly or indirectly, to a "water of the U.S." A tributary does not lose its status if there are man-made breaks (bridges, culverts, pipes or dams) or natural breaks upstream of the break. The proposed rule goes on to state that **"A tributary…includes rivers, streams, lakes, ponds, impoundments, canals, and ditches…"**[28]

For counties that own and manage public safety infrastructure, the potential implication is that roadside ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different. Public safety ditches should not be classified as tributaries. Further fleshing out the exemptions for certain types of ditches, which is discussed later in the letter, would be beneficial.

"Uplands"—The proposed rule recommends that "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are exempt, however, the term "uplands" is undefined.[29] This is problematic. County public safety ditch systems—roadside, flood, drainage, stormwater—can be complex. While they are generally dug in dry areas, they run through a transitional area before eventually connecting to "waters of the U.S." It is important to define the term "uplands" to ensure the exemption is workable.

"Significant Nexus"—The proposed rule states that "a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters."[30]

This definition uses the watershed approach to determine jurisdiction—a watershed is an area of land where all of the rivers, streams, and other water features drain to the same place. According to the EPA, "Watersheds come in all shapes and sizes. They cross county, state, and national boundaries. In the continental U.S., there are 2,110 watersheds, including Hawaii, Alaska, and Puerto Rico, there are 2,267 watersheds."[31]

There are very few parts of the country that are not in a watershed. This definition would create burdens on local governments who maintain public safety ditches and infrastructure near natural waterbodies; this infrastructure could be considered jurisdictional under the "significant nexus" definition.

"Adjacent Waters"— Under current regulation, only those wetlands that are adjacent to a "waters of the U.S." are considered jurisdictional. However, the proposed regulate broadens the regulatory reach to "adjacent waters," rather than just to "adjacent wetlands." This would extend jurisdiction to "all waters," not just "adjacent wetlands." The proposed rule defines "adjacent as "bordering, contiguous or neighboring."[32]

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[28] 79 Fed. Reg. 22199.

[29] *Id.*

[30] *Id.*

[31] U.S. Envtl. Prot. Agency, "What is a Watershed?,"*available at* http://water.epa.gov/type/watersheds/whatis.cfm.

[32] 79 Fed. Reg. 22199.

Under the rule, adjacent waters include those located in riparian or floodplain areas.[33]

Expanding the definition of "adjacency," will have unintended consequences for many local governments. Stormwater and floodwater infrastructure and facilities are often located in low-lying areas, which may be considered jurisdictional under the new definition. Since communities are highly dependent on these structures for public safety, we would encourage the agencies to assess the unintended consequences.

"Riparian Areas"—The proposed rule defines "riparian area" as "an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." Riparian areas are transitional areas between dry and wet areas.[34] Concerns have been raised that there are very few areas within the U.S. that would not meet this definition, especially if a riparian area boundary remains undefined.

"Floodplains"—The proposed definition states that floodplains are defined as areas with "moderate to high water flows."[35] These areas would be considered "water of the U.S." even without a significant nexus. Under the proposed rule, does this mean that any area, that has the capacity to flood, would be considered to be in a "floodplain?"

Further, it is major problem for counties that the term "floodplain" is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Notwithstanding potential conflicts with other Federal agencies, the multiple federal definitions could create challenges in local land use planning, especially if floodplain designations are classified differently by various agencies.

Aside from potential conflicts between Federal agencies, this would be very confusing to landowners and complicated to integrate at the local level. These definitions could create conflict within local floodplain ordinances, which were crafted to be consistent with FEMA National Flood Insurance Program (NFIP) rules. It is essential that floodplain definitions be consistent between and among all Federal agencies.

"Neighboring"—"Neighboring" is a term used to identify those adjacent waters with a significant nexus. The term "neighboring" is used with the terms riparian areas and floodplains to define the lateral reach of the term neighboring. [36] Using the term "neighboring," without limiting qualifiers, has the potential to broaden the reach of the CWA. No one county is alike, nor are the hydrologic and geological conditions across the U.S. Due to these unique challenges, it is often difficult to craft a one-size-fits-all regulatory approach without considering regional or local differences. Moreover, there could be a wide range of these types of differences within one state or region.

Recommendations:

- **Redraft definitions to ensure they are clear, concise and easy to understand**
- **Where appropriate, the terms used within the proposed rule should be defined consistently and uniformly across all federal agencies**

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

- **Create a national map that clearly shows which waters and their tributaries are considered jurisdictional**

The Section 404 Permit Program is Time-Consuming and Expensive for Counties

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Over the years, numerous local governments and public agencies have expressed concerns that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for local governments and public agencies.

In recent years, certain Corps districts have inconsistently found public safety ditches jurisdictional, both for construction and maintenance activities. Once a ditch falls under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.

Based on our counties' experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER federal jurisdiction is claimed. Once jurisdictional, the project triggers application of other federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of California counties have communicated this process can easily take easily three or more years, with costs in the millions for one project.

One Midwest county studied five road projects that were delayed over the period of two years. Conservatively, the cost to the county for the delays was $500,000. Some counties have missed building seasons waiting for federal permits. These are real world examples, going on now, for many our counties. They are not hypothetical, "what if" situations. These are actual experiences from actual counties. The concern is, if more public safety ditches are considered jurisdictional, more counties will face similar problems.

Counties are liable for ensuring their public safety ditches are maintained and there have been cases where counties have been sued for not maintaining their ditches. 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 legally responsible for public safety infrastructure, regardless of whether or not the federal agencies approve permits in a timely manner.

It is imperative that the Section 404 permitting process be streamlined. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties in a precarious position—especially those who are balancing small budgets against public health and environmental protection needs.

The bottom line is, county ditch systems can be complex. They can run for hundreds of miles continuously. By their very nature, they drain directly (or indirectly) into rivers, lakes, streams and eventually the ocean. At a time when local governments throughout the nation are only starting to experience the beginnings of economic recovery,

proposing far reaching changes to CWA's "waters of the U.S." definition seems to be a very precarious endeavor and one which should be weighed carefully knowing the potential implications.

County Experiences with the Section 404 Permit Process

During discussions on the proposed "waters of the U.S." definition change, the EPA asked NACo to provide several known examples of problems that have occurred in Section 404 jurisdictional determinations, resulting in time delays and additional expenses. These examples have been provided to the agencies.

One Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process. The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark. Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal permit process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay tens of thousands in mitigation costs associated with the impacts to the concrete and metal structures. Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

Based on Current Practices—How the Exemption Provisions May Impact Counties

While the proposed rule offers several exemptions to the "waters of the U.S." definition, the exclusions are vague and imprecise, and may broaden jurisdiction in a number of areas. Specifically, we are concerned about the exemptions on ditches and wastewater treatment systems.

"Ditches"— The proposed rule contains language to exempt certain types of ditches: 1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and 2) Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.[37]

For a ditch to be exempt, it must be excavated and drain only to a dry area and be wet less than 365 days a year. This is immediately problematic for counties. County ditches are not dug solely in dry areas, because they are designed to drain overflow waters to "waters of the U.S."

Counties own and manage different types of public safety ditches—roadside, drainage, flood control, stormwater—that protect the public from flooding. They can run continuously for hundreds, if not thousands, of miles throughout

[37] *Id.*

the county. Very few county ditches just abruptly end in a field or a pond. Public safety ditches are generally dug in dry areas, run through a transition area, before connecting directly or indirectly to a "water of the U.S."

Under the proposed rule, if dry ditches eventually connect, directly or indirectly, to a "water of the U.S.," will the length of the ditch be considered jurisdictional waters? Or will portions of a dry ditch be considered exempt, even though the ditch's physical structure interconnects with a jurisdictional river or stream?

The exclusion also states that ditches that do not "contribute to flow," directly or indirectly to "waters of the U.S.," will be exempt. The definition is problematic because to take advantage of the exemption, ditches must demonstrate "no flow" to a river, stream, lake or ocean. Most ditches, by their nature, have some sort of flow in rain events, even if those ditches are dry most of the year. **Since the proposed rule indicates that perennial, intermittent or ephemeral flows could be jurisdictional, the agencies need to further explain this exclusion.[38] Otherwise, there will be no difference between a stream and a publicly-owned ditch that protects public safety.**

The agencies have reiterated that the proposed rule leaves in place the current exemption on ditch maintenance activities.[39] EPA has indicated this exemption is automatic and that counties do not have to apply for the exemption if they are performing maintenance activities on ditches. **However, in practice, our counties have reported the exemption is inconsistently applied by Corps districts across the nation. Over the past decade, a number of counties have been required to obtain special Section 404 permits for ditch maintenance activities.**

These permits often come with tight special conditions that dictate when and how the county is permitted to clean out the relevant ditch. For example, one California county has a maintenance permit for an earthen stormwater ditch. They are only permitted to clear grass and debris from the ditch six months out of the year due to ESA impacts. This, in turn, has led to multiple floodings of private property and upset citizens. In the past several years, we've heard from a number of non-California counties who tell us they must get Section 404 permits for ditch maintenance activities.

Some Corps districts give a blanket exemption for maintenance activities. In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt. Additionally, a number of Corps districts are using the "recapture provision" to override the exemption.[40] Under the "recapture clause," previously exempt ditches are "recaptured," and must comply for the Section 404 permitting process for maintenance activities.[41] Additionally, Corps districts may require documentation to original specifications of the ditch showing original scope, measurements, etc.[42] Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist.

Other districts require entities to include additional data as part of their request for an exemption. One Florida county applied for 18 exemptions at a cost of $600,000 (as part of the exemption request process, the entity must provide data and surveying materials), three months later, only two exemptions were granted and the

[38] 79 Fed. Reg. 22202.

[39] See, 33 CFR 232.4(a)(3) & 40 CFR 202.3(c)(3).

[40] U.S. Army Corps of Eng'r, Regulatory Guidance Letter: Exemption for Construction or Maintenance of Irrigation Ditches & Maint. of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007).

[41] *Id.*

[42] *Id.* at 4.

county was still waiting for the other 16 to be granted. At that point, the county was moving into its seasonal rainy season and fielding calls from residents who were concerned about flooding from the ditches.

This is what is happening to counties now. If the approval process for ditch maintenance exemptions is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety ditches.

It is the responsibility of local governments to ensure the long-term operation and protection of public safety infrastructure. **The federal government must address problems within the current CWA Section 404 regulatory framework, to ensure that maintenance activities on public safety infrastructure do not require federal approval. Without significantly addressing these problems, the federal agencies will hinder the ability of local governments to protect their citizens.**

Recommendations:

- **Exclude ditches and infrastructure intended for public safety**
- **Streamline the current Section 404 permitting process to address the delays and inconsistencies that exist within the existing decision-making process**
- **Provide a clear-cut, national exemption for routine ditch maintenance activities**

"Waste Treatment Systems"—Water treatment refers to the process of taking waste water and making it suitable to discharge back to the environment. The term "waste treatment" can be confusing because it is often linked to wastewater or sewage treatment. However, this can also include water runoff from landscape irrigation, flushing hydrants, stormwater runoff from roads, parking lots and rooftops.

The proposal states that "waste treatment systems,"—including treatment ponds or lagoons, designed to meet the requirements of the CWA—are exempt.[43] In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may be included under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins.

It is important that all constructed features built for the purpose of water quality treatment or runoff control be exempt, whether or not it was built for CWA compliance. Otherwise, this sets off a chain reaction and discourages further investment which will ultimately hurt the goals of the CWA.

Recommendations:

- **The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any* water quality requirements, not just the requirements of the CWA**

[43] 79 Fed. Reg. 22199.

Counties Need Clarity on Stormwater Management and Green Infrastructure Programs

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "waters of the U.S."[44] They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S."

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "waters of the U.S." However, EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. **Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.**

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

[44] 40 CFR 122.26(b)(8).

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Recommendations:

- **Explicitly exempt MS4s and green infrastructure from "waters of the U.S." jurisdiction**

States Responsibilities Under CWA Will Increase

While the EPA and the Corps have primary responsibility for water quality programs, everyday CWA implementation is shared with the states and local governments.[45] Under the CWA, states are required to identify polluted waters (also known as impaired waters) and set Water Quality Standards (WQS) for them. State WQS are intended to protect jurisdictional "waters of the U.S.," such as rivers, lakes and streams, within a state. As part of the WQS process, states must set designated uses for the waterbody (e.g. recreation, drinkable, fishable) and institute Total Maximum Daily Loads (TMDL) for impaired waters.

Currently, WQS regulation focuses on waters regulated under federal law, however, NACo is concerned the proposed rule may broaden the types of waters considered jurisdictional. This means the states will have to regulate more waters under their WQS and TMDL standards. This would be extremely costly for both the states and localities to implement.

In EPA's and the Corps economic analysis, it states the proposed rule "may increase the coverage where a state would…apply its monitoring resources…It is not clear that additional cost burdens for TMDL development would result from this action."[46] The data used to come to this conclusion is inconclusive. As discussed earlier, the agencies used data from 2009-2010 field practices for the Section 404 program as a basis for the economic analysis. This data is only partially relevant for the CWA Section 404 permit program, it is not easily interchangeable for other CWA programs.

Because of vague definitions used in the proposed rule, it is likely that more waters within a state will be designated as "waters of the U.S." As the list of "waters of the U.S." expand, so do state responsibilities for

[45] Cong. Research Serv., Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia.

[46] Econ. Analysis of Proposed Revised Definition of Waters of the United States, U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), (March 2014) at 6-7.

WQS and TMDLS. The effects on state nonpoint-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes.

Recommendation:

- **NACo recommends that the federal agencies consult with the states to determine more accurate costs and implications for the WQS and TMDL programs**

County Infrastructure on Tribal Lands May Be Jurisdictional

The proposed rule reiterates long-standing policy which says that any water that that crosses over interstate lines—for example if a ditch crosses the boundary line between two states—falls under federal jurisdiction. But, this raises a larger question. If a ditch runs across Native American land, which is considered sovereign land, is the ditch then considered an "interstate" ditch?

Many of our counties own and maintain public safety infrastructure that runs on and through Native American tribal lands. Since these tribes are sovereign nations with self-determining governments, questions have been raised on whether county infrastructure on tribal land triggers federal oversight.

As of May 2013, 566 Native American tribes are legal recognized by the Bureau of Indian Affairs (BIA).[47] Approximately 56.2 million acres of land is held in trust for the tribes[48] and it is often separate plots of land rather than a solidly held parcel. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage roads on tribal lands.

A number of Native American tribes are in rural counties—this creates a patchwork of Native American tribal, private and public lands. Classifying these ditches and infrastructure as interstate will require counties to go through the Section 404 permit process for any construction and maintenance projects, which could be expensive and time-consuming.

NACo has asked the federal agencies to clarify their position on whether local government ditches and infrastructure on tribal lands are currently regulated under CWA programs, including how they will be regulated under the final rule.

Recommendation:

- **We request clarification from the federal agencies on whether ditches and other infrastructure that cross tribal lands are jurisdictional under the "interstate" definition**

Endangered Species Act as it Relates to the Proposed Rule

NACo is concerned that provisions of the proposed rule may interact with provisions of the Endangered Species Act (ESA) and its implementing regulations in ways that may produce unintended negative outcomes.

For instance, when a species is proposed for listing as endangered or threatened under ESA, large swaths of land may be designated as critical habitat, that is essential to the species' protection and recovery. Critical

[47] U.S. Dept. of the Interior, Indian Affairs, *What We Do, available at http://www.bia.gov/WhatWeDo/index.htm* .

[48] *Id.*

habitat requires special management and conservation, which can have enormous economic impacts on county governments and private landowners.

This effect is intensified when the Section 404 permit program is triggered. Section 7 consultation under the ESA could be required, which can be time-consuming and expensive, especially for public safety projects. Some counties are already reporting strict ESA requirements on maintenance of public safety ditches.

To further compound the issue, the vague terms used in the proposed rule such as "floodplains," may also trigger ESA compliance. In recent years, the Federal Emergency Management Agency (FEMA) has been sued for not considering the habitat needs of threatened and endangered species in National Flood Insurance Program (NFIP) floodplain designations. Local governments in certain states, who participate in the NFIP, must now certify they will address ESA critical habitat issues in floodplain areas. **This litigation-driven approach circumvents local land use planning authority and creates an atmosphere of mistrust rather than providing incentives to counties and private landowners to actively engage in endangered species conservation.**

If the agencies plan to use broad definitions within the proposed rule, regulation by litigation would seem to be an increasingly likely outcome. These issues need to be carefully considered by the agencies.

Ensuring that Local Governments Are Able to Quickly Recover from Disasters

In our nation's history, our citizens have experienced both manmade and natural disasters. Counties are the initial line of defense, the first responders in protection of its residents and businesses. Since local governments are responsible for much of what constitutes a community—roads and bridges, water and sewer systems, courts and jails, healthcare, parks, and more—it is important that local governments quickly recover after disasters. This includes removing wreckage and trash from ditches and other infrastructure that are considered jurisdictional.[49]

Counties in the Gulf Coast states and the mid-west have reported challenges in receiving emergency waivers for debris in ditches designated as "waters of the U.S." after natural and manmade disasters. This, in turn, damages habitat and endangers public health. NACo would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as "waters of the U.S."

Conclusion

We appreciate the opportunity to be a part of this process. NACo acknowledges the efforts taken by both EPA and the Corps to conduct outreach on the proposed rule. This is a priority issue for our nation's counties who are responsible for environmental protection and public safety.

As stated earlier, we believe 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 counties are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches. Furthermore, the unknown impacts on other CWA programs are equally problematic, the degree and cost of regulation will increase dramatically if these features are redefined as "waters of the U.S." **We urge you to withdraw the rule until further study on the potential impacts are addressed.**

[49] Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong. (2014) (statement of Linda Langston, President, Nat'l Ass'n of Counties).

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. If you have any questions, please feel free to contact Julie Ufner, NACo's Associate Legislative Director at Jufner@naco.org or 202.942.4269.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties

November 8, 2013

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street N.W.
Washington D.C. 20503

RE: EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule and Connectivity Report (Docket ID No. EPA-HQ-OA-2013-0582)

Dear Administrator Shelanski:

On behalf of the nation's mayors, cities and counties, we are writing regarding the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rulemaking to change the Clean Water Act definition of "Waters of the U.S." and the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which EPA indicated will serve as a basis for the rulemaking. We appreciate that EPA and the Corps are moving forward with a rule under the Administrative Procedures Act, as our organizations previously requested, however, we have concerns about the process and the scope of the rulemaking.

Background

In May 2011, EPA and the Corps released Draft Guidance on Identifying Waters Protected by the Clean Water Act (Draft Guidance) to help determine whether a waterway, water body or wetland would be jurisdictional under the Clean Water Act (CWA).

In July 2011, our organizations submitted comments on the Draft Guidance, requesting that EPA and the Corps move forward with a rulemaking process that features an open and transparent means of proposing and establishing regulations and ensures that state, local, and private entity concerns are fully considered and properly addressed. Additionally, our joint comments raised concerns with the fact that the Draft Guidance failed to consider the effects of the proposed changes on all CWA programs beyond the 404 permit program, such as Total Maximum Daily Load (TMDL) and water quality standards programs and the National Pollutant Discharge Elimination System (NPDES) permit program.

In response to these comments, EPA indicated that it would not move forward with the Draft Guidance, but rather a rulemaking pertaining to the "Waters of the U.S." definition. In November 2011, EPA and the Corps initiated a formal federalism consultation process with state and local government organizations. Our organizations submitted comments on the federalism consultation briefing in December 2011. In early 2012, however, EPA changed course, putting the rulemaking on hold and sent a final guidance document to the Office of Management and Budget (OMB) for interagency review. Our organizations submitted a letter to OMB in March 2012 repeating our concerns with the agencies moving forward with a guidance document.

Most recently, in September 2013, EPA and the Corps changed course again and withdrew the Draft Guidance and sent a draft "Waters of the U.S" rule to OMB for review. At the same time, the agencies released a draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Concerns

While we acknowledge the federalism consultation process that EPA and the Corps began in 2011, in light of the time that has passed and the most recent developments in the process toward clarifying the jurisdiction of the CWA, we request that EPA and the Corps hold a briefing for state and local governments groups on the differences between the Draft Guidance and the propose rule that was sent to OMB in September. Additionally, if EPA and the Corps have since completed a full cost analysis of the proposed rule on all CWA programs beyond the 404 permit program, as our organizations requested, we ask for a briefing on these findings.

In addition to our aforementioned concerns, we have a new concern with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "Waters of the U.S." rulemaking process, especially since the document will be used as a basis to claim federal jurisdiction over certain water bodies. By releasing the draft report for public comment at the same time as a proposed rule was sent to OMB for review, we believe EPA and the Corps have missed the opportunity to review any comments or concerns that may be raised on the draft science report actually inform the development of the proposed rule. We ask that OMB remand the proposed rule back to EPA and the Corps and that the agencies refrain from developing a proposed rule until after the agencies have thoroughly reviewed comments on the draft science report.

While you consider our requests for additional briefings on this important rulemaking process and material, we also respectfully request additional time to review the draft science report. We believe that 44 days allotted for review is insufficient given the report's technical nature and potential ramifications on other policy matters.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast affect that a change to the definition of "Waters of the U.S." will have on all aspects of the CWA. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

Tom Cochran	Clarence E. Anthony	Matt Chase
CEO and Executive Director	Executive Director	Executive Director
The U.S. Conference of Mayors	National League of Cities	National Association of Counties

cc: Gina McCarthy, Administrator, U.S. Environmental Protection Agency
Lt. General Thomas P. Bostick, Commanding General and Chief of Engineers, Army Corps of Engineers