

WRITTEN STATEMENT FOR THE RECORD

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ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS

BEFORE THE
U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
AND THE
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON
TRANSPORTATION AND INFRASTRUCTURE

FEBRUARY 4, 2015
WASHINGTON, D.C.

Thank you, Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio and members of the U.S. Senate Environment and Public Works and the U.S. House of Representatives Transportation and Infrastructure committees for the opportunity to testify on the "waters of the United States" proposed rule and the potential impact on state and local governments.

My name is Sallie Clark and I serve as the First Vice President of the National Association of Counties (NACo). I am an elected county commissioner from El Paso County, Colo., the home of Pikes Peak, one of the highest summits on the southern edge of the Rocky Mountains. I have served in this capacity since 2005.

About NACo

NACo is the only national organization that represents county governments in the United States, including Alaska's boroughs and Louisiana's parishes. Founded in 1935, NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

About Counties

Counties are highly diverse, not only in my state of Colorado, but across the nation and vary immensely in natural resources, social and political systems, cultural, economic and structural circumstances, and 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 50 percent of counties have populations below 25,000 residents. On the other hand, there are more than 120 major urban counties that provide essential services to more than 130 million resident each day. If you've seen one county, you've seen one county, and there are 3,068 more to go.

Regardless of size, counties nationwide continue to be challenged with fiscal constraints and tight budgets. According to a report released by NACo last month, only 65 of the nation's 3,069 counties have fully recovered to pre-recession levels, due to their booming energy and agricultural economies. However, in many parts of the country, the economic recovery is still fragile. In addition, county governments in more than 40 states must operate under restrictive revenue constraints imposed by state policies, especially property tax assessment caps.

About El Paso County, Colorado

As a county commissioner, former councilmember and utilities board member, and current small business owner, I interact with constituents and businesses on a daily basis. While El Paso County, Colorado is considered "urban," with a population of more than 640,000 residents, we have a very diverse mix of urban, suburban and rural areas. In fact, we have over 113,857 acres of federal land within our jurisdiction. The county lies in east central Colorado and encompasses more than 2,100 square miles, twice the size of Rhode Island. The western part of El Paso County is extremely mountainous and the eastern part is largely prairie land with strong agricultural components.

Despite being one of the most populous counties in Colorado, El Paso County faces constant risks of wildfires, drought and flooding. In the past several years, we've had two major wildfires in the Waldo Canyon and Black Forest areas, totaling about $40 million in damage and burning more than 32,500 acres. Over 70,000 residents were evacuated and 834 homes were lost during these two horrific events that were declared presidential disasters. These fires in our county have significantly changed our landscape; the county is now home to charred, barren hillsides and the vegetation that once protected the area from stormwater runoff is now gone, resulting in dangerous flash floods. Our county has been fully focused on not only pre- and post-disaster mitigation, but also improving our infrastructure through public safety projects that will protect our citizens and businesses. Over $50 million has been invested to date to repair these vital watersheds.

Many of the projects we are working on—and many other county projects across the nation—would be significantly affected by the changes to the definition of "waters of the U.S." that have been proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). **Therefore, we have urged the agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed.** In fact, many prominent national associations of regional and local officials have expressed similar concerns including Colorado Counties Inc., U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, National Association of County Engineers, American Public Works Association and the National Association of Flood and Stormwater Management Agencies.

Today, I will discuss potential on-the-ground impacts of this proposed rule on my county and on counties nationwide.

1. **The "Waters of the U.S." Proposed Rule Matters to Counties**—*Clean water is essential for public health and safety, and state and local governments play a significant role in ensuring that local water resources are protected. This issue is so important to counties because not only do we build, own and maintain a significant portion of public safety infrastructure, but we are also mandated by law to work with federal and state governments to implement Clean Water Act (CWA) programs.*

2. **The Consultation Process with State and Local Governments was Flawed**—*Counties are not just another stakeholder group in this discussion—we are a key partner in our nation's intergovernmental system. Because counties work with both federal and state governments to implement Clean Water Act (CWA) programs, it is important that all levels of government work together to form practical and workable rules and regulations that achieve the shared goals of protecting clean water, ensuring the safety of our communities and minimizing unnecessary delays and costs.*

3. **Counties Have Significant Concerns with the Proposed Rule; A One-Size-Fits-All Federal Regulation is Not the Answer**—*For over a decade, counties have been voicing concerns on the existing "waters of the U.S." definition, as there has been much confusion regarding this definition, even after several Supreme Court cases. While we agree that there needs to be a clear, workable definition of "waters of the U.S.," we do not believe that the new proposed definition provides the certainty and clarity needed for operations at the local level. After consulting extensively with county technical experts—including county engineers, attorneys, stormwater managers and other county authorities—*

on the proposed rule's impact on daily operations and local budgets, our key concerns include undefined and confusing definitions and potential for sweeping impacts across all Clean Water Act programs.

4. **The Current Process Already Presents Significant Challenges for Counties; the Proposed Rule Only Complicates Matters**—*Under federal law as it pertains to the Clean Water Act, counties serve as both the regulator and regulated entity and are responsible to ensure that clean water goals are achieved and that our constituents are protected. However, the current system already presents major challenges—including getting permits approved by the agencies in a timely manner, juggling multiple and often duplicative state and federal requirements, and anticipating and paying for associated costs. The proposed rule, as currently written, only adds to the confusion and uncertainty over how it would be implemented consistently across all regions.*

1. The "Waters of the U.S." Proposed Rule Matters to Counties

First, clean water is essential to all of our nation's counties, who play vital roles in protecting our citizens by 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. *Let me be clear, counties support clean water.*

Counties play a key role in protecting the environment. We pass zoning and other land use ordinances to safeguard valuable natural resources and protect our local communities depending on state law and local responsibility. Counties provide extensive outreach and education to residents on water quality and stormwater impacts. We also establish rules on illicit discharges and fertilizer ordinances, remove septic tanks, work to reduce water pollution, adopt setbacks for land use plans, and are responsible for water recharge areas, green infrastructure and water conservation programs.

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

For example, some counties in low-lying areas have consistently high groundwater tables and must carefully maintain drainage conveyances to both prevent flooding and reduce breeding grounds for disease-causing mosquitoes. On the other hand, counties in the arid west are facing extreme drought conditions where the availability of water has become scarce. In these regions, counties are using stormwater and water and wastewater ditch infrastructure to preserve water for future use.

El Paso County has taken our own steps to protect our local water resources by prohibiting illegal discharges into the county's stormwater system and establishing significant financial penalties for violations. We also have a robust public information and education program, and regulate development by administering standards for best management practices for storm water management.

Second, counties have much at stake in this discussion as we are 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. Counties also own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule, 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. These not only protect our water quality, but prevent accidents and flooding. Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining our public safety ditches and other infrastructure.

Counties are also the first line of defense in any disaster, particularly as it relates to public infrastructure. Following a major disaster, county local police, sheriffs, firefighters and emergency personnel are the first on the scene. In the aftermath, counties focus on clean-up, recovery and rebuilding. After the Black Forest fire in our county, two roads were washed out, residents were stranded and major flooding and sediment changes occurred. The county had to take quick action to work with multiple federal agencies to rebuild critical infrastructure.

This is neither partisan, nor a political issue for counties. It is a practical issue and our position has been guided by county experts—county engineers, attorneys and stormwater practitioners—who are on the ground working every day to implement federal and state mandated rules and policies. NACo's position on the proposed rule has been approved and supported by urban, suburban and rural county elected officials and our association's policy is based on the real world experiences of county governments within the current Clean Water Act (CWA) permitting process.

2. The Consultation Process with State and Local Governments was Flawed

Counties are not just another stakeholder group in this discussion—we are a key part of the federal-state-local partnership. Because counties work with both federal and state governments to implement Clean Water Act (CWA) programs, it is important that all levels of government work together to form practical and workable rules and regulations that achieve the shared goals of protecting clean water, ensuring the safety of our communities and minimizing unnecessary delays and costs.

Throughout this process, counties were not properly consulted as outlined by federal law. 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. Under the Regulatory Flexibility Act (RFA) and Executive Order 13132—Federalism, federal agencies are required to work with impacted state and local governments on proposed regulations that will have a substantial direct effect on them. We believe the "waters of the U.S." proposed rule triggers federal consultation requirements with state and local governments.

Within the proposed rule, the agencies indicated they "voluntarily undertook federalism consultation." While we appreciate the agencies' outreach efforts, we believe that EPA prematurely truncated the Federalism consultation process. In 2011, EPA initiated a formal Federalism consultation process. In the 17 months between the

consultation and the proposed rule's publication, the agency failed to avail itself of the opportunity to continue meaningful discussions during this intervening period, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.

As part of the rulemaking process, the agencies must also "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). This 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. In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, the Small Business Administration's (SBA) Office of Advocacy expressed significant concerns that the proposed rule was "improperly certified…used an incorrect baseline for determining…obligations under the RFA…and imposes costs directly on small businesses" and "will have a significant economic impact…"

The office also 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." Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports their conclusions.

Further, because a thorough consultation process was not followed, the agencies released an incomplete and inaccurate economic analysis that did not fully consider the potential impact on other Clean Water Act programs. Further, they used permit applications from 2009-2010 as a baseline to estimate the costs when there was more current data available. NACo has repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.

3. Counties Have Significant Concerns with the Proposed Rule; A One-Size-Fits-All Federal Regulation is not the Answer

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

After consulting extensively with county technical experts—including county engineers, attorneys, stormwater managers and other county authorities—on the proposed rule's impact on daily operations and local budgets, we are very concerned about:

- *undefined and confusing definitions*
- *cascading negative impacts across all Clean Water Act programs*

First, specific definitions within the proposed rule are undefined and unclear, which could be used to claim federal jurisdiction more broadly. 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 could increase the types of public infrastructure that is considered jurisdictional under the CWA. For counties that own and manage public safety infrastructure, the potential implication is that public safety

ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different.

NACo has worked with the agencies to clarify these key terms and their intent, but has received little assurance about how each region will interpret and implement the new definition. In fact, the agencies have delivered inconsistent information about what waters would or would not be covered under federal jurisdiction.

Second, the proposed rule could have a cascading impact on all CWA programs, not just the Section 404 program. This means that changing the definitions within the proposed rule could have far-reaching impacts on even more local stormwater programs and county owned infrastructure. NACo has asked for clarification from the agencies and has yet to receive a direct answer on the potential reach and implications of a new definition to "waters of the U.S.".

4. <u>The Current Clean Water Act Section 404 Permit Process Already Presents Significant Challenges for Counties; the New Proposed Rule Only Complicates Matters</u>

Under federal law as it pertains to the Clean Water Act, counties serve as both the regulator and regulated entity and are responsible to ensure that clean water goals are achieved and that their constituents are protected. In practical terms, counties implement and enforce Clean Water Act programs, and also must meet Clean Water Act requirements ourselves.

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

Ditches are pervasive in counties across the nation; until recently, they were not required to have federal CWA Section 404 permits. However, in recent years, some Corps districts have inconsistently required counties to have federal permits for construction and maintenance activities on our public safety ditches. *It is critical for counties to have clarity, consistency and certainty on the types of public safety infrastructure that require federal permits.*

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

One Midwest county had five road projects that were significantly delayed by the federal permitting process for over two years. After studying the projects, the county determined that the delays and extra

requirements added approximately $500,000 to the cost of completing these projects. Some northern counties have even missed entire construction seasons as they waited for federal permits.

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

For example, one California county was told that they had to obtain a maintenance permit to clean out an earthen stormwater ditch. Because the ditch is now under federal jurisdiction, the county is only permitted to clear overgrowth and trash from the ditch six months out of the year due to potential ESA impacts. Since the county is not allowed to service the ditch regularly, it has flooded private property several times and upset the surrounding community.

Another county in Florida applied for 18 specific maintenance exemptions on the county's network of drainage ditches and canals. The federal permitting process became so challenging that the county ended up having to hire a consultant to compile all of the data and surveying materials that were required for the exemptions. Three months later and at a cost of $600,000, the county was still waiting for 16 of the exemptions to be determined. At that point, the county was moving into its seasonal rainy season and had to deal with calls from residents as ditches that did not have a decision from the Corps were flooding.

El Paso County is responsible for bridges and culvert maintenance in over 250 locations. These critical pieces of infrastructure cross streams, wetlands and rivers, and annual maintenance is essential for long-term stability and safety. If the proposed rule moves forward and dramatically increases the waters under federal jurisdiction, it would significantly impact daily county operations and our ability to serve constituents.

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

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

These are just a few examples of the real impact of the current federal permitting process. The new proposed rule creates even more confusion over what is under federal jurisdiction. If the approval process is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety and stormwater ditches.

CONCLUSION

Chairmen Inhofe and Shuster and members of the U.S. Senate Environment and Public Works Committee and the U.S. House of Representatives Committee on Transportation and Infrastructure, the health, well-being and safety of our residents is a top priority for counties. Our bottom line is that the proposed rule contains many terms that are not adequately defined and NACo believes that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal.

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

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

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

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

Attachments:

- NACo letter submitted to EPA and the Corps on the "waters of the U.S." proposed rule on November 14, 2014
- Joint letter submitted to EPA and the Corps from U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, National Public Works Association, National Association of Flood and Stormwater Agencies, National Association of County Engineers and National Association of Counties on November 14, 2014
- Resolution on "waters of the U.S." proposed rule passed by Colorado Counties, Inc. on December 2, 2014

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.
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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 14, 2014

Ms. Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

RE: Proposed Rule on "Definition of "Waters of the United States" Under the Clean Water Act," Docket No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rule on *"Definition of "Waters of the United States" Under the Clean Water Act."* We thank the agencies for educating our members on the proposal and for extending the public comment period in order to give our members additional time to analyze the proposal. We thank the agencies in advance for continued opportunities to discuss these, and other, important issues.

The health, well-being and safety of our citizens and communities are top priorities for us. To that end, it is important that federal, state and local governments all work together to craft reasonable and practicable rules and regulations. As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact that a change to the definition of "waters of the U.S." will have on all aspects of the Clean Water Act (CWA). That is why several of our organizations and other state and local government partners asked for a transparent and straight-forward rulemaking process, inclusive of a federalism consultation process, rather than having changes of such a complex nature instituted though a guidance document alone.

As described below, we have a number of overarching concerns with the rulemaking process, as well as specific concerns regarding the proposed rule. In light of both, we have the following requests:

1. We strongly urge EPA and the Corps to modify the proposed rule by addressing our concerns and incorporating our suggestions to provide greater certainty and clarity for local governments; and
2. We ask that EPA and the Corps issue a revised proposed rule with an additional comment period, so that we can be certain these concerns are adequately addressed; or
3. Alternatively, if an additional comment period is not granted, we respectfully call for the withdrawal of this proposed rule and ask the agencies to resubmit a proposed rule at a later date that addresses our concerns.

Overarching Concerns with the Rulemaking Process

While we appreciate the willingness of EPA and the Corps to engage state and local government organizations in a voluntary consultation process prior to the proposed rule's publication, we remain concerned that the direct and indirect impacts of the proposed rule on state and local governments have not been thoroughly examined because three key opportunities that would have provided a greater understanding of these impacts were missed:

1. Additional analysis under the Regulatory Flexibility Act, which examines economic impacts on small entities, including cities and counties;
2. State and local government consultation under Executive Order 13132: Federalism, which allows state and local governments to weigh in on draft rules before they are developed or publicly proposed in order to address intergovernmental concerns; and
3. The agencies' economic analysis of the proposed rule, which did not thoroughly examine impacts beyond the CWA 404 permit program and relied on incomplete and inadequate data.

Additionally, we believe there needs to be an opportunity for intergovernmental state and local partners to thoroughly read the yet-to-be-released final connectivity report, synthesize the information, and incorporate those suggestions into their public comments on the proposed rule. These missed opportunities and our concerns regarding the connectivity report are discussed in greater detail below.

1. The **Regulatory Flexibility Act (RFA)** requires federal agencies that promulgate rules to consider the impact of their proposed rule on small entities, which under the definition includes cities, counties, school districts, and special districts of less than 50,000 people. RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, requires agencies to make available, at the time the proposed rule is published, an initial regulatory flexibility analysis on how the proposed rule impacts these small entities. The analysis must certify that the rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). 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. The RFA process was not undertaken for this rule.

Based on analysis by our cities and counties, the proposed rule will have a significant impact on all local governments, but on small communities particularly. Most of our nation's cities and counties—more than 18,000 cities and 2,000 counties—have populations less than 50,000. The RFA SISNOSE analysis would be of significant value to these governments.

2. **Executive Order 13132: Federalism** requires federal agencies to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that a change in the definition of "waters of the U.S." imposes only indirect costs, the agencies state that the proposed rule does not trigger Federalism considerations. We wholeheartedly disagree with this conclusion and are convinced there will be both direct and indirect costs for implementation.

Additionally, while EPA initiated a Federalism consultation for its state and local partners in 2011, the process was prematurely shortened. In the 17 months between the initial Federalism consultation and the publication of the proposed rule, the agencies changed directions several times (regulation versus guidance). In those intervening 17 months between the consultation and the publication of the proposed rule, the agencies failed to continue substantial discussions, thereby not fulfilling the intent of Executive Order 13132.

3. The ***Economic Analysis of Proposed Revised Definition of Waters of the U.S.*** is flawed because it does not include a full analysis of the proposed rule's impact on all CWA programs beyond the 404 program (including the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, and Spill Prevention, Control and Countermeasure (SPCC) programs). Since a number of these CWA programs directly affect state and local governments, it is imperative the analysis provide a more comprehensive review of the actual costs and consequences of the proposed rule on these programs.

Moreover, we remain concerned that the data used in the analysis is insufficient. The economic analysis used 2009-2010 data of Section 404 permit applications as a basis for examining the impacts of the proposed rule on all CWA programs. It is insufficient to compare data from the Section 404 permit program and speculate to the potential impacts to other CWA programs. Additionally, 2009-2010 was at the height of the recession when development (and other types of projects) was at an all-time low. The poor sample period and limited data creates uncertainty in the analysis's conclusions.

In addition to the missed opportunities, we are concerned about the timing of the yet-to-be-finalized *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report, which will serve as the scientific basis for the proposed rule. In mid-October, EPA's Science Advisory Board (SAB), which was tasked with reviewing the document, sent a letter with detailed recommendations on how to modify the report. The SAB raised important questions about the scope of connectivity in their recommendations, which will need to be addressed prior to finalizing the report. We recommend EPA and the Corps pause this rulemaking effort until after the connectivity report is finalized to allow the public an opportunity to comment on the proposed rule in relation to the final report.

In a November 8, 2013 letter from the U.S. Conference of Mayors, National League of Cities and National Association of Counties to the Office and Management and Budget Administrator, we highlight the various correspondences our associations have submitted since 2011 as part of the guidance and rulemaking consideration process. (See attached.) We share this with you to demonstrate that we have been consistent in our request for a federalism consultation, concerns regarding the cost-benefit analysis, and concerns about the process and scope of the rulemaking. With these comments, we renew those requests.

Requests:

- Conduct an analysis to examine if the proposed rule imposes a significant economic impact on a substantial number of small entities per the Regulatory Flexibility Act.
- Initiate a formal state and local government federalism consultation process per Executive Order 13132: Federalism to address local government concerns and issues of clarity and certainty.
- Perform a thorough economic analysis inclusive of an examination of impacts of the proposed rule on all CWA programs using deeper and more relevant data. We urge the agencies to interact with issue-specific national associations to collect these data sets.
- Reopen the comment period for the proposed rule once the connectivity report is finalized for a minimum of 60 days.

Specific Concerns Regarding the Proposed Rule

As currently drafted, there are many examples where the language of the proposed rule is ambiguous and would create more confusion, not less, for local governments and ultimately for agency field staff responsible for making jurisdictional determinations. Overall, this lack of clarity and uncertainty within the language opens the door unfairly to litigation and citizen suits against local governments. To avoid such scenarios, setting a clear definition and understanding of what constitutes a "waters of the U.S." is critical. We urge you to consider the following concerns and recommendations in any future proposed rule or final rule.

Key Definitions

Key terms used in the proposed rule such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" will be used to define what waters are jurisdictional under the proposed rule. However, since these terms are either broadly defined, or not defined at all, this will lead to further confusion over what waters fall under federal jurisdiction, not less as the proposed rule aims to accomplish. The lack of clarity will lead to unnecessary project delays, added costs to local governments and inconsistency across the country.

Request:

- Provide more specificity for proposed definitions such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," "neighboring," and other such words that could be subject to different interpretations.

Public Safety Ditches

While EPA and the Corps have publically stated the proposed rule will not increase jurisdiction over ditches, based on current regulatory practices and the vague definitions in the proposed rule, we remain concerned.

Under the current regulatory program, ditches are regulated under CWA Section 404, both for construction and maintenance activities. There are a number of challenges under the current program that would be worsened by the proposed rule. For example, across the country, public safety ditches, both wet and dry, are being regulated under Section 404. While an exemption exists for ditch maintenance, Corps districts inconsistently apply it nationally. In some areas, local governments

have a clear exemption, but in other areas, local governments must apply for a ditch maintenance exemption permit and provide surveys and data as part of the maintenance exemption request.

Beyond the inconsistency, many local governments have expressed concerns that the Section 404 permit process is time-consuming, cumbersome and expensive. Local governments are responsible for public safety; they own and manage a wide variety of public safety ditches—road, drainage, stormwater conveyances and others—that are used to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a local government is liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. In *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey, California liable for not maintaining a levee that failed due to overgrowth of vegetation.

The proposed rule does little to resolve the issues of uncertainty and inconsistency with the current exemption language or the amount of time, energy and money that is involved in obtaining a Section 404 permit or an exemption for a public safety ditch. The exemption for ditches in the proposed rule is so narrowly drawn that any city or county would be hard-pressed to claim the exemption. It is hard—if not impossible—to prove that a ditch is excavated wholly in uplands, drains only uplands and has less than perennial flow.

Request:

- Provide a specific exemption for public safety ditches from the "waters of the U.S." definition.

Stormwater Permits and MS4s

Under the NPDES program, all facilities which discharge pollutants from any point source into a "waters of the U.S." are required to obtain a permit, including local governments with Municipal Separate Storm Sewer Systems (MS4s). Some cities and counties own MS4 infrastructure that flow into a "waters of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. These waters, however, are not treated as jurisdictional waters since the nature of stormwater makes it impossible to regulate these features.

It is this distinction that creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule and opens the door to citizen suits. Water conveyances including but not limited to MS4s that are purposed for and servicing public use are essentially a series of open ditches, channels and pipes designed to funnel or to treat stormwater runoff before it enters into a "waters of U.S." However, under the proposed rule, these systems could meet the definition of a "tributary," and thus be jurisdictional as a "waters of the U.S." The language in the proposed rule must be clarified because a water conveyance cannot both treat water and prevent untreated water from entering the system.

Additionally, waterbodies that are considered a "waters of the U.S." are subject to state water quality standards and total maximum daily loads, which are inappropriate for this purpose. Applying water quality standards and total maximum daily loads to stormwater systems would mean that not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. This, again, creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule.

Request:

- Provide a specific exemption for water conveyances including but not limited to MS4s that are purposed for and servicing public use from the "waters of the U.S." definition.

Waste Treatment Exemption

The proposed rule provides that "waste treatment systems, including treatment ponds or lagoons, *designed to meet the requirements of the Clean Water Act*" (emphasis added) are not "waters of the U.S." 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 the 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 inadvertently fall 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. Therefore, we ask the agencies to specifically include green infrastructure techniques and water delivery and reuse facilities under this exemption.

A. Green Infrastructure

With the encouragement of EPA, local governments across the country are utilizing green infrastructure techniques as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. These more beneficial and aesthetically pleasing features, which include existing stormwater treatment systems and low impact development stormwater treatment systems, are not explicitly exempt under the proposed rule. Therefore, these sites could be inadvertently impacted and require Section 404 permits for green infrastructure construction projects if they are determined to be 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. Moreover, if these features are defined as "waters of the U.S.," they would be subject to all other sections of the CWA, including monitoring, attainment of water quality standards, controlling and permitting all discharges in these features, which would be costly and problematic for local governments.

Because of the multiple benefits of green infrastructure and the incentives that EPA and other federal agencies provide for local governments to adopt and construct green infrastructure techniques, it is ill-conceived to hamper local efforts by subjecting them to 404 permits or the other requirements that would come with being considered a "waters of the U.S."

B. Water Delivery and Reuse Facilities

Across the country, and particularly in the arid west, water supply systems depend on open canals to convey water. Under the proposed rule, these canals would be considered "tributaries." Water reuse facilities include ditches, canals and basins, and are often adjacent to jurisdictional waters. These features would also be "waters of the U.S." and as such subject to regulation and management that would not only be unnecessarily costly, but

discourage water reuse entirely. Together, these facilities serve essential purposes in the process of waste treatment and should be exempt under the proposed rule.

Requests:

- Clarify the waste treatment exemption by stating that green infrastructure practices and water delivery and reuse facilities meet the requirements of the exemption.
- Expand the waste treatment exemption to include systems that are designed to meet *any* water quality requirements, not just the requirements of the CWA.
- Provide a specific exemption for green infrastructure and water delivery and reuse facilities from the "waters of the U.S." definition.

NPDES Pesticide Permit Program

Local governments use pesticides and herbicides in public safety infrastructure to control weeds, prevent breeding of mosquitos and other pests, and limit the spread of invasive species. While the permit has general requirements, more stringent monitoring and paperwork requirements are triggered if more than 6,400 acres are impacted in a calendar year. For local governments who have huge swathes of land, the acreage limit can be quickly triggered. The acreage limit also becomes problematic as more waterbodies are designated as a "waters of the U.S."

Additional Considerations

Finally, we would like to offer two additional considerations that would help to resolve any outstanding confusion or disagreement over the breath of the proposed rule and assist local governments in meeting our mutual goals of protecting water resources and ensuring public safety.

Appeals Process

Many of the definitions in the proposed rule are incredibly broad and may lead to further confusion and lawsuits. To lessen confusion, we recommend the agencies implement a transparent and understandable appeals procedure for entities to challenge agency jurisdictional determinations without having to go to court.

Request:

- Institute a straight-forward and transparent process for entities to appeal agency jurisdictional determinations.

Emergency Exemptions

In the past several years, local governments who have experienced natural or man-made disasters have expressed difficulty obtaining emergency clean-up waivers for ditches and other conveyances. This, in turn, endangers public health and safety and jeopardizes habitats. We urge the EPA and the Corps to revisit that policy, especially as more waters are classified as "waters of the U.S." under the proposed rule.

Request:

- Set clear national guidance for quick approval of emergency exemptions.

Conclusion

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we thank you for the opportunity to comment on the proposed rule. Changing the CWA definition of "waters of the U.S." will have far-reaching impacts on our various constituencies.

As local governments and associated agencies, we are charged with protecting the environment and protecting public safety. We play a strong role in CWA implementation and are key partners in its enactment; clean and safe drinking water is essential for our survival. We take these responsibilities seriously.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact the proposed "waters of the U.S." rule will have on our local communities. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

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

Clarence E. Anthony
Executive Director
National League of Cities

Matthew D. Chase
Executive Director
National Association of Counties

Joanna L. Turner
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National Association of
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Brian Roberts
Executive Director
National Association of County
Engineers

Peter B. King
Executive Director
American Public Works
Association

Susan Gilson
Executive Director
National Association of Flood and
Stormwater Management Agencies

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

COLORADO COUNTIES, INC.
Educate · Advocate · Empower

RESOLUTION TO REDEFINE
"WATERS OF THE UNITED STATES" (WOTUS)

WHEREAS, The United States Environmental Protection Agency (USEPA) and the United States Army Corps of Engineers (USACE) of the Federal Government have jointly issued a proposal to redefine "Waters of the United States" (WOTUS); and

WHEREAS, this proposal to redefine WOTUS is also known as the "Proposed Rule on "Definition of 'Waters of the United States' Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880"; and

WHEREAS, County governments, including Colorado Counties, are responsible for the construction and maintenance of roads, bridges, water quality systems and other infrastructure like roadside ditches, storm water systems, green infrastructure and drinking water facilities; and

WHEREAS, local governments, including Counties, and other local government associated agencies are charged with protecting the environment and protecting public safety; and

WHEREAS, local governments, including Counties, and other local government associated agencies play a strong role in Clean Water Act (CWA) implementation, are key partners in its enactment, and take our responsibilities seriously; and

WHEREAS, NACo supports "common-sense environmental protection" and believes that there is a need for a clear, concise and workable definition for "Waters of the U.S." to reduce confusion and costs within the federal permitting process; and

WHEREAS, NACo has communicated to the USEPA and USACE the importance of the local, state, and federal partnership in crafting practical rules to ensure clean water without impeding counties' fundamental infrastructure and public safety functions; and

WHEREAS, NACo has communicated to USEPA and USACE the essential need for state and local governments to have a clear understanding of the vast impact the federal proposal to redefine WOTUS will have on our local communities; and

WHEREAS, The National Association of Counties (NACo) has voiced serious concerns, has requested more clarity, and has communicated that the federal proposal to redefine WOTUS has had a flawed consultation process with Counties, an incomplete analysis of economic impacts, and falls short of the goal of reducing confusion and costs; and

WHEREAS, expanded federal oversight and increased ambiguity on the definition of WOTUS and/or implementation of regulations would create delays in critical work, drain local budgets, and not have any increased environmental benefit; and

WHEREAS, NACo submitted joint comments in a joint letter dated November 14, 2014 *(attached here as Exhibit A)* to the Federal Registry with the American Public Works Association, National Association of County Engineers, National Association of Flood & Storm water Management Agencies, National Association of Regional Councils, National League of Cities, and the U.S. Conference of Mayors; and

WHEREAS, at least one Colorado County having natural hot springs that have been developed for recreational use at municipal pool complexes, vapor caves, and soaking pools at a number of lodging and recreational establishments, has identified that these natural hot springs whose waters are mineral rich and unaltered from their natural water quality should be exempt from additional water quality regulations imposed by the proposed redefinition of Waters of the U.S.; and

WHEREAS, the Colorado Counties, Inc. (CCI) 2014-2015 policy statement regarding water states, " CCI recognizes adequate supplies of water are critical to the agricultural industry and that water is one of Colorado's most precious natural resources," and " CCI supports efforts to maintain and seek state primacy of federal water quality programs and believes provision of adequate funding to counties is essential to ensure compliance with the federal Clean Water Act".

NOW THEREFORE, BE IT RESOLVED:

CCI adopts the concerns and recommendations expressed in the NACo November 14, 2014 joint letter (Exhibit A) and listed below:

1. We strongly urge USEPA and the USACE to modify the proposed rule by addressing concerns and suggestions below to provide greater certainty and clarity for local governments:

a) Conduct an analysis to examine if the proposed rule imposes a significant economic impact on a substantial number of small entities per the Regulatory Flexibility Act; and

b) Initiate a formal state and local government federalism consultation process per Executive Order 13132: Federalism, which allows state and local governments to weigh in on draft rules before they are developed or publicly proposed in order to address intergovernmental concerns was not performed, so as to address local government concerns and issues of clarity and certainty; and

c) Perform a thorough economic analysis inclusive of an examination of impacts of the proposed rule on all CWA programs using deeper and more relevant data, not just on the CWA 404 program. We urge the agencies to interact with issue-specific national associations to collect these data sets; and

d) Reopen the comment period for the proposed rule once the connectivity report is finalized for a minimum of 60 days; and

e) Provide more specificity for proposed definitions such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," "neighboring," and other such words that could be subject to different interpretations; and

f) Provide a specific exemption for public safety ditches from the "Waters of the U.S." definition; and

g) Provide a specific exemption for water conveyances including but not limited to MS4s that are purposed for and servicing public use from the "Waters of the U.S." definition; and

h) Clarify the waste treatment exemption by stating that green infrastructure practices and water delivery and reuse facilities meet the requirements of the exemption; and

i) Expand the waste treatment exemption to included systems that are designed to meet *any* water quality requirements, not just the requirements of the CWA; and

j) Provide a specific exemption for green infrastructure and water delivery and reuse facilities from the "Waters of the U.S." definition; and

k) Examine the acreage limit of 6,400 acres that can be impacted in a calendar year as local governments often have huge swathes of land and can quickly trigger the acreage limit, especially if more water bodies are designated as a "Waters of the U.S."; and

l) Institute a straight-forward and transparent process for entities to appeal agency jurisdictional determinations; and

m) Set clear national guidance for quick approval of emergency exemptions.

2. We ask that the USEPA and the USACE issue a revised proposed rule with an additional comment period, so that we can be certain these concerns are adequately addressed; or

3. Alternatively, if an additional comment period is not granted, we respectfully call for the withdrawal of this proposed rule and ask the agencies to resubmit a proposed rule at a later date that addresses our concerns; finally,

4. CCI shares the concern that Colorado's developed and undeveloped hot springs whose mineral-rich thermal waters have been flowing into Colorado water bodies, including those currently designated as "Waters of the U.S." should be made exempt to water quality regulations that would require treatment of these natural waters.

Adopted by Colorado Counties, Inc.
December 2, 2014