



December 15, 2011

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Federalism Consultation E.O. 13132: "Waters of the U.S." Definitional Change

Dear Administrator Jackson:

On behalf of the National Association of Counties (NACo), we appreciate the opportunity to provide input on upcoming modifications to the current "waters of the U.S." definition in the Clean Water Act (CWA). NACo is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties.

NACo recognizes that the availability of an adequate supply of clean water is vital to our nation. Water quality degradation can impose human health risks through contaminated drinking water supplies, diseased fish, and unsafe or polluted water bodies used for recreation, and can lead to the loss of valuable wildlife habitat. Because the elimination of water pollution is a long-term process limited by economic and social costs, we believe a reasonable relationship between costs and benefits should be a key consideration toward reaching the goal of improved water quality throughout the nation. These definitional changes, as proposed, will have a serious financial impact on our counties, without necessarily ensuring clean water.

We would like to thank the U.S. Environmental Protection Agency (EPA) for recognizing state and local government concerns and acknowledge the EPA's efforts to provide an open and honest dialogue during its Federalism Consult on Executive Order 13132. We thank you for moving forward with a formalized and transparent open rule-making process, rather than finalizing a guidance document. We would urge the EPA to continue on the regulatory path rather than moving forward with a controversial guidance document.

We are concerned however, with the scope of the "Waters of the U.S." definitional proposal. While originally drafted as a guidance document, the proposal is significantly broader in scope than previous guidance documents on this subject. Previous guidance documents referred narrowly to Section 404 wetlands jurisdiction, in light of the SWANCC and Rapanos Supreme Court decisions. This proposal, on the other hand, takes federal jurisdiction well beyond the Section 404 permit program, into every crevice of the Clean Water Act (CWA), and thus, affecting every CWA program.

We also have concerns over the methodologies used to determine economic costs and benefits to the proposed regulations. We believe the methodology is flawed. For example, the data used to

compute costs for Section 404 comes from submitted Section 404 permit applications for FY 2009- 2010. The economic analysis does not acknowledge or recognize that, under the proposal, additional waters, currently not jurisdictional (and thus, no permits have been submitted), will become jurisdictional. This reasoning is flawed and does not give a true accounting of potential costs or benefits.

According to the EPA, there is no way to measure what waters may (or may not) be jurisdictional once the regulation is finalized. Furthermore, the EPA believes it is premature to assume if one stream is jurisdictional within a watershed, all streams will be jurisdictional within the same watershed (thus raising costs), even though the draft proposal explicitly states that if one similarly situated water in a watershed is jurisdictional, other similarly situated waters should be jurisdictional. NACo would urge the EPA to work out jurisdictional understanding prior to publication of the proposed rule. If there is misunderstanding over what is and is not jurisdictional now, the confusion will grow, leading to future legal battles.

We ask the U.S. Environmental Protection Agency (EPA) to withdraw the proposal until after a more detailed and comprehensive analysis is completed on how the definitional changes will directly and indirectly impact all Clean Water Act (CWA) programs, beyond Section 404, for federal, state, and local governments and private parties. *This analysis must include direct and indirect costs of complying with the new definitions, along with the estimated time needed to obtain permits.* We also ask the EPA to clarify more succinctly which waters they plan to claim under this proposal.

The Timing of this Regulation is Misguided

Counties are tasked with the heavy responsibility to protect the health, welfare, and safety of their citizens, as well as maintain and improve their quality of life. This includes protection of valuable water resources, whether as a regulated entity or regulator, to ensure the nation's waters remain clean.

Regardless of size, counties nationwide are coping with shrinking budgets. County revenues have declined and ways to effectively increase county treasuries are limited. Additional federal mandates require more money. Counties are laying off their staffs, delaying or cancelling capital infrastructure projects, cutting services, and fighting to keep firefighters and police on the streets.

Changes to the scope of the "waters of the U.S." definition, without a true understanding of the direct and indirect costs to state and local governments, is dangerous in these shaky economic times. According to the EPA, this regulation increases waters under federal jurisdiction.

The "waters of the U.S." proposal acknowledges "that decisions concerning whether or not a waterbody is subject to the CWA have consequences for states, tribal and local governments..." however, the documentation does not analyze specific impacts to state and local governments. This will lead to a significant increase of state and local waters under federal jurisdiction, creating unfunded mandates and preemptions, without necessarily ensuring clean water.

If more waters fall under federal jurisdiction, it is reasonable to assume counties will be submitting more Section 404 permits. 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 is then subjected to a multitude of regulatory requirements required under CWA. It triggers application of other federal laws like environmental impact statements, NEPA and impacts on the Endangered Species Act (ESA). These 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 our California counties have told us this process takes easily three to five years or more, with costs in the millions for one project.

Additionally, the definitional changes will impact a host of CWA programs beyond Section 404. This includes a number of programs that are implemented by state and local governments. Expansion of jurisdiction in these programs will have a negative impact on a county's finances.

Potential Negative Effects on All CWA Programs

According to the proposal, there is only one definition of "waters of the U.S." within the CWA and 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. However, the Courts also acknowledge there is a limit to federal jurisdiction. This proposal, as drafted, goes well beyond the Courts dictates, essentially making all water (and their tributaries) within a watershed jurisdictional.

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.

Section 404 Wetlands Permitting Program – The EPA and Corps state the purpose of the proposal is to provide clarity and to reduce costs and delays with the permitting process. However, the proposal does little to negate these concerns since the agencies state that each jurisdictional determination will be made on a case by case basis "considering the facts and circumstances..." If more waters are claimed under the guidance, the conditions attached to each permit must be negotiated individually. As stated earlier, the costs associated with a permit's special conditions are very expensive. Consultants may be hired. It is reasonable to assume that if more waters are jurisdictional, the process will become even more cumbersome, especially if the process is not streamlined nor accompanied by a Corps staff increase.

It is imperative 404 permits be processed in a timely manner by the Corps. Delays in the permitting process have resulted in flooding of constituent and business properties, placing our counties in a difficult position in choosing between public safety and environmental protection.

County Examples of Section 404 Permit Process - During pre-consult discussions on the proposed “Waters of the U.S.” definitional 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.

Numerous NACo members have voiced concern regarding officials at local Corps offices deciding to regulate man-made ditches as jurisdictional waters under the CWA. Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Whether or not a ditch is regulated under Section 404 has significant financial implications for counties.

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 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.

While storm water projects are the most common ones that cause Corps scrutiny, one county in California reported trying to construct a wildlife crossing that required the removal of a standard concrete-lined “v-ditch.” The Corps not only took jurisdiction over the v-ditch, but also over a gutter that ran alongside the street and through the storm drain system.

Over the past several years, a number of our counties have been required to obtain special maintenance permits to clean out drainage ditches. 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.

Stormwater Regulations (NPDES) – Under the NPDES program, all facilities which discharge pollutants from any point source into waters of the United States are required to obtain a permit; this includes localities with Municipal Separate Storm Sewer Systems (MS4s). The EPA is studying ways to expand the current NPDES program, which may encompass smaller, less financially stable counties.

During the Federalism consultation process, at times, EPA seemed unclear on whether the NPDES permit program would be affected by these definitional changes. At times, it was indicated the NPDES program may be affected but at other times, EPA staff indicated the effects would be negligible.

Additionally, EPA staff indicated that identifying ‘waters that are subject to the CWA’ and identifying “Waters of the U.S.,” are terms that are used interchangeably. This is potentially problematic when identifying impacts to the NPDES Section 402 permit program.

For example, stormwater is subject to the CWA and is regulated under Section 402. But stormwater is not a “Water of the U.S.” The definitional changes could easily be interpreted to include MS4 systems or portions thereof. However, if stormwater were considered a “Water of the U.S.,” it would be subject to a different level of regulation requiring all discharges into the stormwater system to be regulated, as opposed to only regulating discharges from a NPDES system. If all regulated waters are also identified as “Waters of the U.S.,” would they not be subject to use attainability studies, total maximum daily loads (TMDL), numeric effluent limits for discharges into those waters, etc.?

Additionally, if an MS4 discharge into navigable and/or interstate waters and/or their jurisdictional tributaries, will relevant MS4s then become “waters of the U.S.?” Likewise, if an MS4 discharges into a “waters of the U.S.,” how will MS4 discharges to a “water of the U.S.” be treated? Will they be covered under the NPDES program or required to comply with a new federal mandate in these tight fiscal times?

In *NRDC v. County of Los Angeles* (9th Cir. March 10, 2011), the court ruled Los Angeles County was responsible for discharges of polluted stormwater from its MS4 system into “waters of the U.S.” even though the water pollution did not originate from the county itself. The county’s MS4 system collects stormwater pollution from its incorporated cities and unincorporated areas into the county’s flood control and storm-sewer MS4 system. This ruling has a significant financial impact on any local government that operates a federally mandated MS4 system and may have implications within the Draft Guidance.

The EPA must specifically clarify in the proposed regulation whether and how the NPDES program is affected by the “waters of the U.S.” proposal.

County-owned Forest Roads (NPDES) – The Silvicultural Rule, 40 C.F.R. § 122.27(b)(1), specifically defines timber “harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff” to be “non point source silvicultural activities,” and thus, excluded from NPDES permitting requirements.

On August 17, 2010 the United States Court of Appeals for the Ninth Circuit disagreed with the Silvicultural Rule, holding that stormwater runoff that is collected and channeled in a system of

ditches and culverts before being discharged into streams and rivers constitutes a point source and should be regulated under the NPDES program. The Court's decision has potentially sweeping implications. If broadly read, this opinion would require NPDES permits for every road in the country that is served by ditches or culverts that eventually discharge to natural surface waters and that is not already regulated by the CWA.

Contrary to the court's assumptions of fact, many forest roads, including the roads at issue in this case, are not dedicated just to logging. They are used for a variety of public and private purposes, beyond just logging and many are owned and operated by rural counties. Under the proposal, what implications are there for county-owned forest roads?

Pesticide Permit Program (NPDES) – The EPA recently released a pesticide permit for all “waters of the U.S.” This means anytime a pesticide is applied on or near a “waters of the U.S.” a permit is needed. Counties use pesticides in a number of ways including treatment of weeds in ditches on the side of the road and treatment of mosquitoes and other pests which can prevent public health outbreaks. A number of counties indicated they plan to put their pesticide spraying programs on hold while they assess the new monitoring requirements (and associated financial costs) with the new pesticides permit in “waters of the U.S.” before, during and after spray events. If more waters become jurisdictional under the proposal, these costs will only skyrocket for counties.

Constructed Wetlands – A number of state and local governments are using constructed wetlands for a variety of reasons. Some of the reasons includes using constructed wetlands to remove contaminants from the water supply, for groundwater recharge, and for water recycling programs. Has the EPA looked at how the new “waters of the U.S.” definition will impact these programs? While the agencies intend to maintain the waterwater treatment exemption, the construction and management of these wetlands for their intended use must be expressly preserved in the proposed rule. The language contained in the draft guidance was vague and subject to wide interpretation.

Total Maximum Daily Load (TMDL)/Water Quality Standards – An increase in the scope of CWA jurisdiction means the states would be required to expand and increase current water quality designations, TMDLs and wasteload and load allocations. 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. Many counties, in the role of regulator, have their own watershed/storm water management plans that would also have to be modified.

Endangered Species Act (ESA) / National Environmental Policy Act (NEPA) – Once a “water” is deemed jurisdictional under CWA, it must go through a permit process for any activities affecting the “water” (aka ditch). This federal permit process includes Section 7 Consultations with U.S. Fish and Wildlife Service on ESA determinations. Likewise, the NEPA process must be considered. Both Acts contain detailed consulting requirements which are time consuming and increase the costs associated with projects.

Emergency Exemptions – Counties who have experienced natural or man-made disasters have expressed concerns about clean-up around ditches classified as “Waters of the U.S.” For example, one Gulf county said the U.S. Army Corps of Engineers would not let the county clean-up areas that were classified as “Waters of the U.S.” after last year's oil spill.

Additionally, after a number of tornados hit counties in the heartland last year, several local governments stated they were not allowed to clean up “Waters of the U.S.” areas. It’s our understanding from counties that emergency waivers are rarely given. This, in turn, damages habitat and endangers public health. We would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as “Waters of the U.S.”

Appeals Process - Many of the definitions used in the proposal are incredibly broad and may lead to further confusion and lawsuits. To lessen confusion, since there is no appeals process associated with jurisdictional determinations, we recommend the agencies implement a transparent and understandable appeals procedure for entities to challenge agency decisions without having to go to court.

Increase of “Waters” under Jurisdiction and Contradicting Provisions

Tributaries – The 2008 Rapanos Guidance stated: “Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water” are generally not jurisdictional. According to the 2011 proposed regulation, a tributary is jurisdictional if it has a bed, bank, and an ordinary high water mark (OHWM). This would include tributaries that have been “channelized” and lined in concrete. By our estimate, a large number of county-owned public infrastructure projects, including road-side ditches, flood control channels, culverts, etc, would become jurisdictional under this definition. This is an expansion of authority over the 2008 Guidance.

In conversations with the Corps and EPA, the agencies have stressed continuation of their current exemption of maintenance of ditches. However, while an exemption exists on paper, in reality, a number of our counties are required to obtain 404 maintenance permits to cut down vegetation and/or clean out debris of man-made ditches. Delays in the process and associated financial requirements cause financial hardship on our counties (refer to above section, *Effects on All CWA Programs, Section 404 Wetlands Permitting Program*). NACo believes human-made ditches, streets, and gutters should not be considered “Waters of the U.S.”

Interstate Waters - Under the proposal, the term ‘interstate waters’ is defined for the first time as “other waters that flow across, or form a part of, state boundaries, even if such waters are not traditional navigable waters.” According to an EPA representative, if tributaries (aka ditches) meet the bed, bank, and OHWM and flow into interstate waters, regardless of distance, they could be regulated. Interstate water jurisdiction could be claimed over several miles or several thousand miles depending on the circumstances and waters flowing directly or indirectly into interstate waters could also be regulated. This means a number of traditional intrastate waters could be regulated as “Waters of the U.S.” impacting a state’s authority over its “Waters of the State.”

Significant Nexus Determination - Jurisdictional waters must have a significant nexus to navigable and/or interstate waters. A significant nexus is defined as a water that, “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.” This could include biological, hydrological, habitat of species, etc.

This definition uses the watershed approach to determine jurisdiction – if one “similarly situated” water is jurisdictional, it is likely that similar features in the same watershed will also be jurisdictional. It will also apply to all CWA programs, beyond the 404 permit program.

Seasonal Waters – The proposal attempts to define seasonal waters when it has a predictable flow during wet seasons. However, the document acknowledges the definition may differ across the country and will be determined by the regional Corps districts.

While this is a step in the right direction, away from a federal one-size-fits-all approach, this is still a top-down approach. A give and take is needed between the federal government and regulated entities, such as counties, to allow for local flexibility to account for local conditions. As stated in the proposal, what constitutes season waters could vary greatly in the various regions. To that end, it is important that the federal, state and local government work together to craft reasonable and workable standards that impact them.

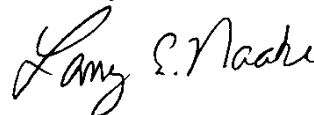
Ephemeral Streams – For the first time ever, the EPA proposes to regulate ephemeral streams, even though authority is not granted under statute, any other existing regulation and/or guidance. Current regulations only speak to intermittent streams. A number of ditches may be classified as “ephemeral” in nature. Additionally, the definition of ephemeral could change from region to region. We would encourage the agencies to be flexible and acknowledge that a one-size-fits-all approach is not always successful.

Contradicting Provisions – While the proposal document states that the intent is to provide clarity for agency field staff in making determinations about whether waters are protected by the CWA, the proposal contains contradictory and confusing criteria to determine federal jurisdiction.

For example, the proposal sets up specific parameters on determining jurisdiction for traditionally navigable and/or interstate water using a significant nexus. It implies there is a limit to those waters deemed jurisdictional. However, it also states determinations will be made from a watershed basis, thus negating the perceived limit placed on federal jurisdiction. Conceivably, all waters and their conveyances to these waters could then be considered jurisdictional. It would be difficult to find an area of the country that is not in a watershed.

On behalf of NACo, we thank the EPA again for following Executive Order: 13132 Federalism on the “Waters of the U.S.” definitional proposal. We appreciate the opportunity to be a part of this process. If you need additional information, please do not hesitate to contact us. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry E. Naake".

Larry E. Naake
Executive Director