
Federal Regulations that Could Impact Your County



November 4, 2015

Regulations & Counties | Overview

- 40 Percent Excise Tax
- DOL Overtime Pay
- Excess Property Program
- New Ozone Standard
- Waters of the U.S.
- HUD's Fair Housing
- 340B Pricing Program

Regulations & Counties | Environmental Issues



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Regulations & Counties | Waters of the U.S.

- “Waters of the U.S.” is a term used currently in the Clean Water Act that defines which water falls under federal law and regulations and which waters are regulated under state law.
 - In 2014, both the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed to modify the term under the Clean Water Act in the Federal Register. The agencies received over a million comments on their proposal, but only about 3,000 were considered substantial.
 - On June 29 of this year, EPA released their final rule, which was then implemented on August 28. While the final rule attempts to exempt certain types of ditches, these exemptions are very narrow.
- NACo expressed repeated concerns that the proposed definition would impact more county owned and managed public safety infrastructure, and ask for the proposed rule be withdrawn until a more in depth consultation process was undertaken.

Regulations & Counties | Waters of the U.S.

Legislation related to Waters of the U.S.

- U.S. Senate: Federal Water Quality Act (S. 1140)
 - This legislation would have withdrawn the final WOTUS rule and require EPA and the Corps to restart the rule-making process. [Senators blocked the bill by a vote of 57-41.](#)
 - The Senate passed the Senate Joint Resolution 22 (S.J. Res. 22) by a vote of 53-44 that nullifies WOTUS and prohibits regulators from using provisions in the current WOTUS rule for future rule-making.
- U.S. House: Regulatory Integrity Protection Act (H.R. 1732)
 - Very similar to Senate bill, H.R. 1732 would withdraw the final rule and require agencies to restart the rule-making process, inclusive of state and local governments. On May 12, [the House passed the Regulatory Integrity Protection Act \(H.R. 1732\) by a vote of 261-155.](#)
- Both Senate and House FY 2016 Interior, Environment and Related Agencies Appropriations bill contained language to withdraw the final rule, but may face a veto threat from the President.

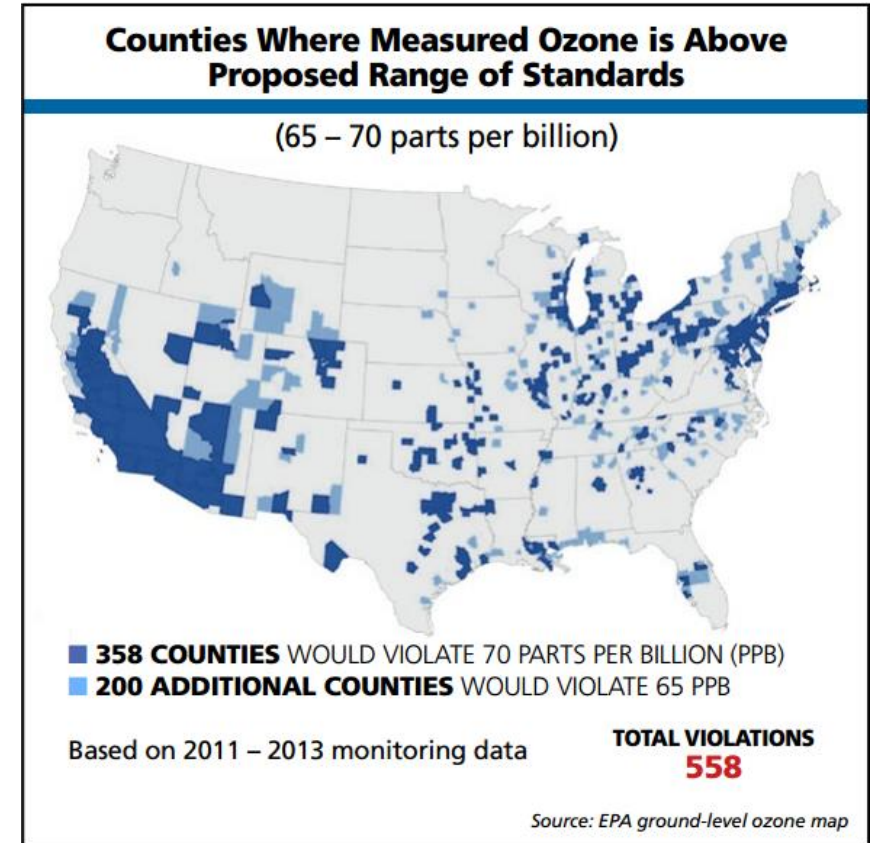
Action Needed!

Contact your members of Congress and urge them to support any legislative vehicle that would stop the final rule and require them to work with state and local governments on a rewrite.

Urge your county policy and technical staff to engage with the Corps at the local/corps district level to work out implementation kinks.

Regulations & Counties | Clean Air Act: Ozone

- On October 1, the Environmental Protection Agency (EPA) released its final ozone rule to **tighten the current ozone standard from 75 parts per billion to 70 parts per billion**.
- Based on 2011-2014 data, non-attainment counties will rise from 227 to **over 350**. The number may not be precise, since EPA plans to use 2014-2016 air monitoring data.
- EPA will work with the states on final designation, which will be made on October 1, 2017. **When a decision is made, the rule will most likely not be implemented for another several years.**
- **NACo opposes efforts to implement the 2015 ozone standard** until the 2008 National Ambient Air Quality Standard (NAAQS) for ozone has been fully implemented.



Regulations & Counties | Clean Air Act: Ozone

Opposition to the New Ozone Standard

- Tightening the ozone standard has been controversial due to the potential costs of implementation, which EPA estimates at \$1.4 billion.
- The Clean Air, Strong Economies Act (H.R. 1388/S. 751) was introduced earlier this year to prevent the EPA from moving forward with a tighter standard until at least 85 percent of the counties in nonattainment meet the current 75 ppb standard (NACo currently does not have policy on this).
- Similar language was inserted into the fiscal year 2016 EPA and Department of the Interior spending bills in both chambers of Congress, and could be added to an Omnibus spending bill. Even if such language passed both chambers, it is unlikely to be approved by the President.

Action Needed!

Contact your U.S. Senators and Representatives and explain how this rule could impact counties, and urge them to include language opposing the new ozone standard in any end of the year bills.

Regulations & Counties | Community Development Issues



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Regulations & Counties | DOL Overtime Pay

- The U.S. Department of Labor (DOL) released a proposed rule to amend regulations under the Fair Labor Standards Act governing the “white collar” exemption from overtime pay for executive, administrative and professional employees. This would change the threshold for employees who are eligible to receive overtime pay, from \$23,660 to \$50,440.
- NACo submitted comments requesting DOL extend the short 60 day comment period to allow counties to calculate the financial and administrative burden this would impose on counties. NACo also requested DOL provide further analysis on the potential impact on local governments prior to finalization of the rule.
- These proposed amendments would impact counties, who collectively employ 3.3 million people, many of whom would be newly eligible for overtime pay.

Regulations & Counties | DOL Overtime Pay

Action Needed!

NACo urges counties to estimate the financial and administrative impacts of the proposed overtime pay amendment and share their findings with NACo and the U.S. Department of Labor (DOL).

Regulations & Counties | Fair Housing

- The Fair Housing Act prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions because of race, color, religion, sex, familial status, national origin, or handicap. The Fair Housing Act requires that the U.S. Department of Housing and Urban Development (HUD) programs and activities be administered in a manner to affirmatively further the policies of the Fair Housing Act.
- Released in July, HUD's Affirmatively Furthering Fair Housing (AFFH) final rule attempts to clarify existing fair housing rules for HUD grantees that receive funding for programs including the Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), and Emergency Shelter Grants (ESG).
- HUD also developed a new Assessment of Fair Housing (AFH) and Toolkit for HUD grantees to analyze their fair housing landscape and set locally-determined fair housing goals in order to more effectively carry out their obligation to further fair housing. AFH and the Toolkit are both expansive and will take time and financial resources to implement.

Regulations & Counties | Fair Housing

County Impact

- Many counties have stated that they will have to hire a consultant to assist with implementation of the new planning process and tool. Hiring a consultant could cost on average about \$50,000 or more.
- HUD has stated that it will provide data to HUD grantees on patterns of integration and segregation; racially and ethnically concentrated areas of poverty; disproportionate housing needs and disparities in access to opportunity, as well as technical assistance.

AFH and Counties

Currently, there are seven counties that are grantees of the new AFH, including:

- Dauphin County, Penn.
- Jefferson County, Mo.
- St. Charles County, Mo.
- El Paso County, Colo.
- Clackamas County, Ore.
- Harford County, Md.
- Henry County, Ga.

Regulations & Counties | Fair Housing

Counties' Concerns

- NACo submitted comments to HUD last November expressing concerns about the new AFH Tool and the lack of data provided, as well as the toolkit's potential to be an unfunded mandate. In addition, NACo asked that HUD grantees not be required to use this new toolkit at this time.
- NACo has also expressed concern about whether the new assessment of fair housing/tool will assist counties in dealing with potential lawsuits regarding their fair housing practices. NACo has requested that HUD certify these new plans, as opposed to merely deeming them approved.
- NACo has been meeting with HUD staff and congressional staff to discuss concerns with the AFH tool.

Action Needed!

The comment period for the AFH final rule closed August 17, 2015 and the rule is expected to be released by the end of the year. After this release, NACo strongly encourages counties to calculate the cost of using the new AFH process and toolkit and to communicate this information to NACo.

Regulations & Counties | Technology Issues



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Regulations & Counties | Excess Property Program

U.S. Department of Defense Excess Property Program (1033 Program)

- The 1033 Program was created by section 1033 of the [National Defense Authorization Act of 1997 \(NDAA\)](#).
- Administered by the [U.S. Department of Defense \(DOD\) Defense Logistics Agency](#).
- The program [permits the free transfer of excess supplies and equipment](#) to federal, state and local law enforcement agencies.

Regulations & Counties | Excess Property Program

Timeline of Events

1. The U.S. Department of Defense Excess Property Program came under criticism following the protests and riots that occurred in Ferguson, Missouri as a result of the police involved shooting death of Michael Brown on August 9, 2014.
2. President Obama issued Executive Order, 13688 *Federal Support for Local Law Enforcement Equipment Acquisition* on January 16, 2015.
3. On May 18, 2015 President Obama's administration announced that it would no longer allow local law enforcement to procure certain military surplus items.

Regulations & Counties | Excess Property Program

Controlled Equipment

- Small Arms
- Night Vision Devices
- Humvees
- Mine Resistant Ambush Protected Vehicles (MRAPs)
- Aircraft
- Watercraft

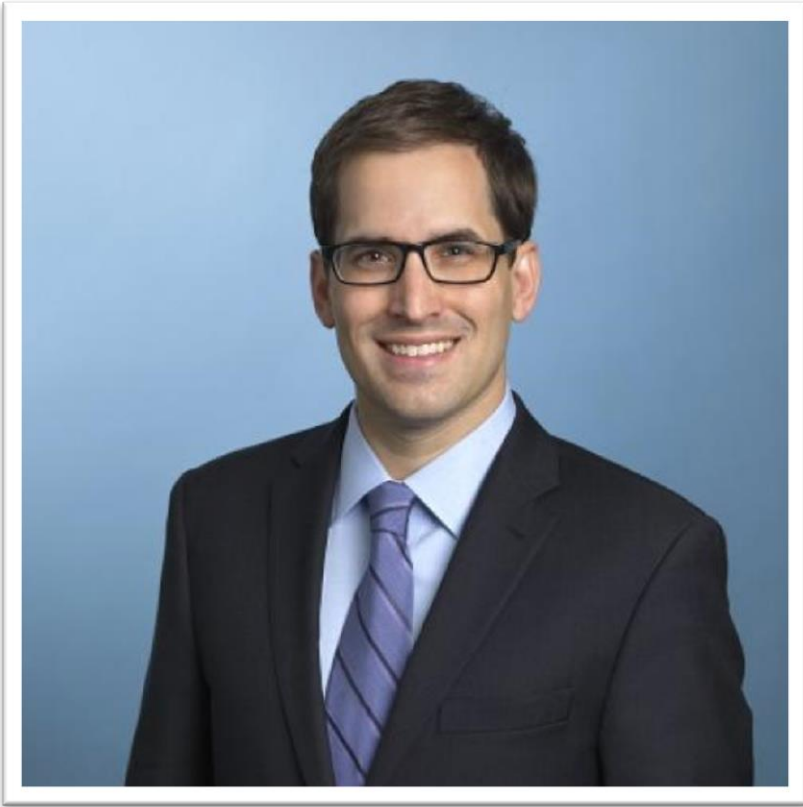
Non-Controlled Equipment

- Commercial vehicles
- Office Furniture
- Generators
- Tents
- Tarps
- Tool Kits

Newly Prohibited Items

- Tracked Armored Vehicles (Tanks)
- Weaponized Aircraft, Vessels, and Vehicles of any Kind
- Grenade Launchers
- Ammunition of .50-caliber or higher
- Bayonets
- Certain Types of Camouflage Uniforms

Regulations & Counties | Health Issues



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Regulations & Counties | Drug Pricing

Overview

- The federal 340B Drug Pricing Program was created in 1992 and requires drug manufactures to provide outpatient drugs to eligible health care organizations and providers at significantly reduced prices.
- Administered by the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA)

Current Status

- On August 28, HRSA issued proposed guidance on a broad range of 340B program issues, including further clarifying eligible individuals and covered entities, and under what circumstances, 340B discounts can be claimed.
- On October 27, NACo submitted official comments to HRSA outlining counties' concern that the proposed guidance, especially provisions around outpatient requirements and auditable and accessible records, could exclude otherwise eligible justice-involved individuals from the 340B Drug Pricing Program.

Regulations & Counties | Drug Pricing

County Impact

- Counties support 976 local hospitals, many of which qualify for the 340B program because they are Disproportionate Share Hospitals (DSH) hospitals serving a large number of Medicaid and uninsured individuals.
- Counties support non-hospital entities covered by the 340B program, including federally qualified health centers (FQHCs), Title X public housing primary clinics, and homeless clinics.
- Counties are responsible for providing health care to 11.6 million individuals whom annually cycle in and out of 3,000 local jails.
- Many justice-involved individuals are currently able to receive their prescriptions through the 340B program due to various arrangements between local providers.

Regulations & Counties | Drug Pricing

340B Program and Justice-Involved Individuals

Challenges

1. **Classification:** Individuals could be labeled as in-patient when receiving care.
2. **Records:** Due to legal and technical barriers, records of individuals within corrections can be lost, sealed or otherwise inaccessible.
3. **Health Challenges:**
 - Higher prevalence of chronic health conditions
 - Increase of serious mental illness among inmates
 - Disproportionately large number of inmates with substance abuse disorders
 - Bring untreated health conditions back to communities

Impact of Exclusion

- **Exacerbate barriers** in accessing health care
- County jails faced with **increase in drug expenses**
- Impact on county budget
 - Inmate populations: **20 percent increase**
 - County corrections cost: **74 percent increase**
- Local taxpayers would have to **bear the burden of increased costs**

Regulations & Counties | Finance Issues



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Regulations & Counties | 40 Percent Excise Tax

- Under the Affordable Care Act (ACA), state and local governments face a 40 percent tax on employer-sponsored health benefits, which would negatively impact many counties.
- The tax would be imposed in 2018 on coverage above \$10,200 for individuals and \$27,500 for spouse or family coverage.
- Cost of coverage includes total contributions paid by both the employer and employee (except cost-sharing amounts like deductibles, coinsurance and copays).
- NACo opposes the taxation of employer-sponsored health benefits and submitted official comments in May and October 2015 to the IRS outlining counties' concerns and is preparing comments for the second IRS notice.

Regulations & Counties | 40 Percent Excise Tax

- The [Internal Revenue Service \(IRS\)](#) charged with developing rules to implement excise tax published two notices seeking public comments issued to date. [The proposed rule is expected to follow in the coming months.](#)

[IRS Notice 2015-16](#)

- Definition of applicable coverage
- Determination of the cost of applicable coverage
- Application of the annual statutory dollar limit to the cost of applicable coverage

[IRS Notice 2015-52](#)

- Identification of the taxpayers who may be liable for the excise tax
- Employer aggregation
- Allocation of the tax among the applicable taxpayers
- Payment of the applicable tax

Regulations & Counties | 40 Percent Excise Tax

Action Needed!

NACo urges counties to contact their members of Congress to support legislation to repeal the tax:

- [H.R. 2050](#) – Middle Class Health Benefits Tax Repeal Act of 2015
 - Rep. Courtney (D-Conn.)
- [H.R. 879](#) – Ax the Tax on Middle Class Americans' Health Plans Act
 - Rep. Guinta (R-N.H.)
- [S. 2045](#) – Middle Class Health Benefits Tax Repeal Act of 2015
 - Sen. Heller (R-Nev.), Sen. Heinrich (D-N.M.)
- [S. 2075](#) – American Worker Health Care Tax Relief Act of 2015
 - Sen. Brown (D-Ohio)

Regulations & Counties| OMB Retrospective Regulatory Review

The **Office of Information and Regulatory Affairs (OIRA)** is a statutory part of the Office of Management and Budget within the White House. It is the federal government's central authority for the **review of Executive Branch regulations**. Among other duties, OIRA reviews drafts of proposed and final regulations and coordinates the retrospective review of regulations under Executive Order (EO)13610.

For more info: www.whitehouse.gov/omb/oira/regulation-reform



Regulations & Counties| OMB Retrospective Regulatory Review

Executive Order 13563

- Issued January 18, 2011
- Required agencies to conduct periodic review of existing significant regulations
- Plans developed by agencies used to determine whether any such regulation should be modified, streamlined, expanded or repealed

Executive Order 13610

- Issued May 10, 2012
- Intended to supplement retrospective review initiated by EO 13563
- Required federal agencies to publish semiannual notice of significant regulations that have been reviewed
- Established public participation in regulatory review that must include a system for requesting and evaluating nominations of regulations in need of review

- As the coordinator of the retrospective review process, **OIRA is seeking feedback from stakeholders, like counties, to help them identify regulations that are most burdensome to state and local governments.**

Regulations & Counties | NACo Resources

NACo's EPA Regulations Chart

<http://www.naco.org/node/88511>



NATIONAL ASSOCIATION OF COUNTIES • LEGISLATIVE AFFAIRS • NOVEMBER 2015


STATUS OF PENDING EPA REGULATIONS OF INTEREST TO COUNTIES

NAME	STATUS • FINAL	RIN #	BACKGROUND	LOCAL GOVERNMENT IMPACT
Definition of "Waters of U.S." under Clean Water Act (CWA)	Status: Final *Rule temporarily delayed by court	RIN: 2040-AF30	According to the EPA, the purpose of this rule would clarify which bodies of water (and their ditches) fall under federal jurisdiction in the Clean Water Act (CWA). The rule was implemented Aug. 28, 2015.	Local governments that oversee a number of ditches (roadside, stormwater, floodwater, etc.) that would be impacted.
NPDES Regulations to Address Water Quality Impacts From Forest Road Discharges	Status: Advanced Notice of Proposed Rule-making (NPRM) To be determined	RIN: 2040-AF43	The EPA is looking at flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads, including logging roads, in order to address water quality impacts from those discharges. The EPA is under court ordered deadline to decide by May 2016 whether regulation of forest road runoff is necessary.	If EPA is moving toward a flexible policy comprised of best management practices (BMPs), this will allow counties the flexibility needed to address water quality issues on forest roads.
Stormwater Regulations Revision to Address Discharges from Developed Sites	Status: Dead, however, provisions will be incorporated into renewed permits	RIN: 2040-AF13	EPA was working on crafting an updated version of its existing stormwater rule. This rule was halted after the proposal was deemed to be too expensive to implement.	While the proposed rule was halted, the agency has indicated when a municipal separate storm sewer system (MS4) permit is renewed (every five years), it may include some of the provisions included in the original proposal.
Drinking Water Regulations: Regulation of Lead and Copper	Status: NPRM, December 2016 (projected)	RIN: 2040-AF15	EPA announced it is assessing rule-making options on lead and copper in to determine if there is a national problem related to elevated lead and copper levels in drinking water.	This rule will impact local governments that own or operate water utilities.
Water Quality Standards Regulatory Revisions	Status: Final	RIN: 2040-AF16	Water Quality Standards (WQS) are a key component of the Clean Water Act. WQS designs specific goals – e.g. fishable/swimmable – for water bodies designated as "waters of the U.S." and sets pollution-limiting criteria to protect those uses. The final rule was finalized on Aug. 21, 2015.	Local governments are tasked with achieving WQS for water pollution control – tighter standards would impact Total Maximum Daily Loads (TMDLs) and National Pollution Discharge Elimination System (NPDES) permits.

Regulations & Counties | NACo Resources

NACo's Unfunded Mandates Chart

<http://www.naco.org/node/88511>

 NATIONAL ASSOCIATION of COUNTIES		NATIONAL ASSOCIATION OF COUNTIES • LEGISLATIVE AFFAIRS • NOVEMBER 2015
Waters of the U.S.		Any changes to "Waters of the U.S." definition within the CWA will have an impact on county owned and maintained ditches such as roadside, flood control, stormwater, etc. Additionally, since there is only one "waters of the U.S." definition in the CWA, changes would impact more than the Section 404 permit program. What those changes are is not well understood nor has it been fully studied. This may have a significant impact on local governments.
TRANSPORTATION		
Grant Requirements	Requirements do not provide flexibility during implementation phase. For example, a county applies for funding to install electronic dynamic driver feedback speed limit signs. The county would like to purchase the signs using grant funding and then use county resources (e.g. staff) to install them. Requirements however, dictate that all stages of the process must be let out to private contractors, which further implies other requirements, e.g. Davis-Bacon, EEO, etc.	
MAP-21	MAP-21 provides for some major reforms in regard to project delivery/environmental streamlining. It also proposes to modify the categorical exclusion process for NEPA review of certain projects. NACo continues to be engaged in rulemakings pertaining to these areas.	
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION		
National Marine Fisheries Service	The Biological Assessment (BA) process through NMFS is extremely time consuming and raises costly barriers. For example, one county was working on a joint interchange project with the state to address urban growth. In an attempt to navigate the federal environmental permitting process, the project took two years alone to navigate the BA consultation with NMFS. A standard BA consultation generally takes 9-12 months but the NMFS process added more than a year in time and approximately \$1M in additional engineering costs with no added value to the project.	
MISCELLANEOUS/MULTIPLE AGENCIES		
Inmate Healthcare	The Supreme Court required counties to provide health care for jail inmates in <i>Estelle v. Gamble</i> , 429 U.S. 97 (1976), while the federal government refuses to contribute to the provision of Medicaid, Medicare, CHIP or veterans' health benefits or services for otherwise eligible inmates.	
Funding assistance-applications	When applying for funding assistance from separate sources/agencies for one project, multiple applications are required. The duplicity and lack of interchangeability of the forms and the agencies is very time consuming for local governments.	
Use of ".gov" Domain for County Websites	The U.S. General Services Administration regulates the use of this extension. Arguably, this would make county sites easier to recall for constituents. Rules for use, however, restrict counties from enacting local ordinances/laws to assist in offsetting technology costs associated with website operation and maintenance via approved and regulated advertising.	