Rewrite of the “Waters of the U.S.” Rule

Action Needed:
Advocate for the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (Corps) to rewrite the “Waters of the U.S. (WOTUS)” rule in a way that appreciates counties’ role as owners and operators of key public safety and water infrastructure and as an intergovernmental partner in implementing federal regulations under the Clean Water Act.

Background:
In January 2021, President Biden released Executive Order (EO) 13990: Protecting Public Health and the environment and Restoring Science to Tackle the Climate Crisis. EO 13990 instructed the EPA and Corps to review rules including the 2020 Navigable Waters Protection Rule (NWPR). Subsequently, the agencies announced their intent to initiate a new rulemaking process that restores the regulations in place before the 2015 Clean Water Rule and defines WOTUS to be consistent with relevant Supreme Court decisions.

WOTUS is a term used in the Clean Water Act (CWA) to determine what waters and their conveyances fall under federal jurisdiction versus state permitting authority. In 2014, the EPA and the Corps undertook an effort to rewrite and expand the current WOTUS definition. In 2015, the Obama Administration finalized a new definition of WOTUS, which was immediately challenged in the courts. This left the pre-2015 WOTUS rule in effect in 28 states and the 2015 WOTUS rule went into effect in 22 states until April 2020. In January 2020, the Trump Administration repealed and replaced the 2015 rule and released its own definition of WOTUS within the NWPR. NACo submitted comments in response to the proposed 2020 rule, expressing concerns about the rule’s impact on counties’ ability to conduct routine maintenance on local infrastructure, the costly nature of the permitting process and calling for the creation of a nationwide WOTUS map to provide clarity around the rule.

Currently, the EPA and Corps are enforcing the pre-2015 rules due to the August 2021 U.S. District Court ruling in Pasqua Yaqui Tribe v. U.S. Environmental Protection Agency, which vacated and remanded the NWPR. Since the agencies announced the

EPA and the Corps are working to rewrite the WOTUS rule following a two-step process:

1. Withdraw the 2020 Navigable Waters Protection Rule and recodify the regulations in place prior to the issuance of the 2015 rule
2. Propose a new, durable definition of “Waters of the U.S.” based on Supreme Court guidance and lessons learned from previous iterations of WOTUS

- Counties play an important role as both co-regulators and regulated entities under the Clean Water Act
- Counties own public safety infrastructure that may be impacted by a WOTUS designation
- Counties support a durable definition of WOTUS that provides regulatory certainty
new rulemaking process, NACo has engaged in consultations with EPA and the Corps under the terms of Federalism, EO 13132. Through NACo’s efforts, counties received an extended comment period and NACo submitted comments advocating for county priorities in the rulemaking process.

To learn more about how WOTUS impacts counties, please visit [www.naco.org/wotus](http://www.naco.org/wotus).

**KEY TALKING POINTS**

As co-regulators under provisions of the Clean Water Act, counties are not just another stakeholder in this discussion. The WOTUS definition directly impacts counties as owners and operators of local infrastructure. Counties own and operate public safety water conveyances, stormwater municipal separate storm water sewer systems (MS4), green infrastructure construction and maintenance projects, water reuse and infrastructure, and emergency management readiness. Depending on the final definition of WOTUS, counties may need to apply for a federal permit to maintain or build new infrastructure projects such as:

- Public Safety Water Conveyances: Roads and roadside ditches, flood control channels, drainage conveyances, culverts, etc.
- Stormwater Municipal Separate Storm Sewer Systems (MS4): Comprised of channels, ditches and pipes
- Green Infrastructure Construction and Maintenance Projects: Includes but is not limited to low-impact development projects (LID), bioswales, vegetative buffers, constructed wetlands, stormwater detention ponds, etc.
- Drinking Water Facilities and Infrastructure Reservoirs, dams, ponds, canals, large water transport systems (Central Arizona Project, California Aqueduct, Colorado River Aqueduct, etc.)
- Water Reuse and Infrastructure: Includes facilities built to generate additional water supply, their ponds, recharge basins, canals and ditches.

We thank the EPA and Corps for holding an EO 13132 Federalism consultation meeting on August 5 with state and local governments on the WOTUS rulemaking. We encourage the agencies to continue the dialogue with state and local governments throughout the WOTUS rulemaking process, as authorized under EO 13132.

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