

REWRITE OF THE “WATERS OF THE U.S.” RULE

ACTION NEEDED:

Urge the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) to rewrite the Waters of the U.S. (WOTUS) rule in a manner 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:

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. There have been several iterations of regulation guiding implementation of the term.

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 Army Corps to review rules including the 2020 WOTUS rule – the Navigable Waters Protection Rule (NWPR).

Subsequently, the EPA and Army Corps initiated a two-step rulemaking process to rewrite WOTUS. The first step would be to withdraw NWPR and codify the regulations in place prior to the issuance of the 2015 WOTUS rule (Rule 1). The second step would be to propose a new, durable definition of WOTUS based on guidance from the Supreme Court and lessons learned from previous iterations of the rule (Rule 2).

In November 2021, EPA and the Army Corps issued a proposed version of Rule 1, and they expect to issue a final version of Rule 1 soon. Following that, the agencies will turn to drafting Rule 2. Currently, EPA and Army Corps are enforcing their interpretation of the pre-2015 regulatory framework.

Since the beginning of this two-step rulemaking process, NACo has engaged with consultations with EPA and the Army Corps under the terms of Federalism, E.O. 13132. NACo additionally submitted comments on the proposed version of Rule 1.

To learn more about how WOTUS impacts counties, please visit www.naco.org/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

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PROPOSED DEFINITION OF WOTUS UNDER RULE 1:

Under the proposed rule, the agencies interpret WOTUS to include:

- Traditional navigable waters
- Interstate waters
- Territorial seas

Throughout the regulation, the agencies call the traditional navigable waters, interstate waters, and territorial seas "foundational waters." In addition to the foundational waters, the agencies are proposing to include:

- Adjacent wetlands to foundational waters, tributaries, impoundments that meet either the relatively permanent standard or the significant nexus standard
- Impoundments of foundational waters and impoundments that meet either the relatively permanent standard or the significant nexus standard
- Tributaries of foundational waters
- Other waters that meet either the relatively permanent standard or the significant nexus standard

The proposed rule defines the term "relatively permanent standard" to mean waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.

The proposed rule defines the term "significantly affect," for purposes of determining whether a water meets the significant nexus standard to mean "more than speculative or insubstantial effects on the chemical, physical, or biological integrity of" a foundational water.

The proposal also identifies specific "factors" that will be considered when assessing whether the "functions" provided by the water, alone or in combination, are more than speculative or insubstantial. The factors include readily understood criteria (e.g., distance, hydrologic metrics, and climatological metrics) that influence the types and strength of the chemical, physical, or biological connections and associated effects on those downstream foundational waters. The functions can include measurable indicators (e.g., nutrient recycling, runoff storage) that are tied to the chemical, physical, and biological integrity of foundational waters.

The agencies also concluded that federal protection is appropriate where a water meets the relatively permanent standard. Waters that meet this standard are an example of a subset of waters that will virtually always have the requisite connection to foundational waters, and therefore fall within the CWA's scope. However, the agencies acknowledge that the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the CWA as it is inconsistent with the statute and objective and runs counter to the science.



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 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.

Under the proposed rule, the ditch provisions are still very complicated. Like pre-2015, counties will have to work with the agencies to complete a case-specific analysis of the ditch's jurisdictional status. The agencies will then determine if a ditch meets the definition of tributaries or satisfies the significant nexus and relatively permanent tests to be federally regulated.

FEDERAL AGENCIES OF JURISDICTION

U.S. ENVIRONMENTAL PROTECTION AGENCY

Office of Water

Radhika Fox, Assistant Administrator

U.S. ARMY CORPS OF ENGINEERS

Office of the Assistant Secretary of the Army for Civil Works

Michael Connor, Assistant Secretary of the Army for Civil Works

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