

An aerial photograph showing a two-lane asphalt road stretching from the foreground into the distance. The road is flanked by lush green wetlands and marshes. A small white car is visible on the road, moving away from the viewer. The landscape is a mix of green vegetation and blue water, with some areas appearing to be flooded or saturated. The sky is overcast with soft, grey clouds.

# EPA'S NEW PROPOSED RULE **WATERS OF THE UNITED STATES**

NACo REGULATORY ANALYSIS:  
THE IMPACT OF WOTUS ON COUNTIES

JUNE 2022









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# OVERVIEW

The “Waters of the U.S.” (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. As co-regulators of, and regulated entities under, CWA, the definition of WOTUS directly impacts counties across the country. Clean water is essential to America’s counties, who are responsible for protecting residents by preserving local resources and maintaining public health and safety.

Clean water is essential to the wellbeing of the country and integrated and cooperative programs across all levels of government are necessary to protect water quality. Clean water is necessary to the health of our nation’s communities, economy and environment. Counties serve as first line of defense to ensure the availability of clean water and take this job seriously.

Counties also play a major role in the nation’s water infrastructure system, with local governments providing over 95 percent of the total funding for water infrastructure and the nation’s growing water infrastructure needs. This is a vital responsibility, given the the current threats posed to our nation’s health and safety as it faces aging water and wastewater infrastructure and increased risk for both natural and human-made disasters, and one that counties do not take lightly.


The CWA establishes the basic structure for regulating discharges and pollutants into WOTUS. Since the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) first implemented regulations defining WOTUS in the 1980s, the two agencies have made substantial changes to the definition - including in 2015 through the Clean Water Rule and in 2020 through the Navigable Waters Protection Rule.

The two agencies are now in the process of updating the definition of WOTUS again.


As good stewards of the environment and integral stakeholders in CWA implementation, counties urge our federal, state and local intergovernmental partners to work together to craft a practical and durable definition of WOTUS that protects our nation’s waters. Counties are committed to creating and maintaining healthy, safe and vibrant communities for our residents.

NACo has established the Waters of the U.S. Action Center to help counties track the WOTUS rulemaking process. At the end of this analysis, there is a glossary of key terms.





“As good stewards of the environment and valuable stakeholders in CWA implementation, counties urge our federal, state and local intergovernmental partners to work together to craft a practical and workable final water rule that protects our nation’s waters.”





## Why a new rule?

Since January 2021, President Biden has indicated his intention to craft a durable definition of WOTUS based on Supreme Court precedent that draws from the lessons learned from the current and previous regulations.

EPA and the Army Corps have now initiated a two-step rulemaking process to rewrite WOTUS. The first step includes codifying the regulations in place prior to the issuance of the 2015 Clean Water Rule. The agencies outlined that this rule would be guided by:

- Protecting water resources and communities consistent with the CWA;
- The latest science and the effects of climate change on our waters;
- Emphasizing a rule with a practical implementation approach for state and Tribal partners; and
- Reflecting on the experiences of and input received from landowners, the agricultural community, states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns.

EPA and the Army Corps released a proposed rule in November 2021 and are now in the process of finalizing it. The proposed rule is based on the administration's interpretation of the CWA. The agencies state the proposed rule's protection of water resources advances both the goals of the CWA and the goals identified in Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*.

The agencies justify the need for a new rule that listens to science, improves public health and protects our environment. According to the agencies, the proposed rule will ensure access to clean water; limit exposure to dangerous chemicals and pesticides; hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; and bolster resilience to the impacts of climate change.

The agencies also propose that the new definition advances the CWA by defining WOTUS to include waters that significantly affect the chemical, physical or biological integrity of traditional navigable waters, interstate waters and the territorial seas and waters that are relatively permanent or that have a continuous surface connection to such waters.

## The History of WOTUS

In the 1980s, the EPA and Army Corps defined WOTUS to include among other things, all waters and wetlands that use, degradation or destruction of which could affect interstate or foreign commerce.

In 1985, the Supreme Court unanimously upheld "adjacent wetlands" in the *United States v. Riverside Bayview Homes*.

In 2001, the Supreme Court heard *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). This case does not confer federal jurisdiction over isolated waters because they provide habitat for migratory birds.

In 2006, the Supreme Court heard *Rapanos v. United States*, which argued that WOTUS encompasses "relatively permanent, standing or continuously flowing bodies of water," such as streams, rivers, or lakes and wetlands that have a "continuous surface connection" to waters subject to the CWA. Furthermore, wetlands with a "significant nexus" to traditionally navigable waters were also deemed as under federal jurisdiction.

In 2015, the Obama Administration finalized a new and controversial WOTUS definition through the Clean Water Rule. The Clean Water Rule immediately faced legal challenges, leaving the pre-2015 regulatory framework in effect in 28 states and the new rule in place in the remaining 22.



The Trump Administration repealed and replaced the 2015 rule and released its definition of WOTUS within the Navigable Waters Protection Rule (NWPR) in January 2020, more than two years after an Executive Order (EO) was issued to withdraw and rewrite the 2015 rule. NACo submitted comments on this rule, detailing its potential impact on counties and offering recommendations.

In January 2021, President Biden signed EO 13990, which triggered a review of the 2020 rule to uphold a campaign promise of repealing and replacing the Navigable Waters Protection Rule. On June 9, 2021, the EPA and the Army Corps announced their intent to initiate a new two-step rulemaking process.

On August 30, 2021, the U.S. District Court for the District of Arizona vacated and remanded the NWPR in the case *Pasqua Yaqui Tribe v. United States Environmental Protection Agency*. Due to the Court's decision, the EPA and Army Corps are interpreting WOTUS consistent with the pre-2015 regulatory regime until further notice.

On October 4, 2021, the public comment period for the EPA and Army Corps' federalism partners closed. NACo submitted public comments to the federalism consultation. Please visit NACo's WOTUS Action Center to review those comments. Additionally, NACo submitted joint comments with the National League of Cities and the U.S. Conference of Mayors.

On November 18, 2021, the EPA and Army Corps announced the proposed rule to codify the EPA and Army Corps implementation of the pre-2015 WOTUS guidelines.

On December 7, 2021, the EPA and Army Corps published in the *Federal Register* the proposed rule revising the definition of WOTUS. NACo submitted comments on this proposed rule.

## Proposed Definition of WOTUS: Key Terms

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 includes the following definitions:

- **Relatively permanent standard:** Waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.
- **Significantly affect:** This definition is 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.

## Impacts on County-Owned Infrastructure

The WOTUS definition directly impacts local governments as owners and operators of local infrastructure. Counties own and operate public safety water conveyances, stormwater municipal separate stormwater 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.

- **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:** Including, but 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:** Including facilities built to generate additional water supply, their ponds, recharge basins, canals and ditches.

Similar to 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.

Under the agencies' longstanding approach to determining which waters are WOTUS, certain ditches are generally not considered WOTUS. The preamble to the 1986 regulations explains that “[n]on-tidal drainage and irrigation ditches excavated on dry land” are generally not considered “waters of the United States.”

The agencies shifted this approach slightly in the Rapanos Guidance. They explained that “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 waters of the United States.” Furthermore, the proposed rule states that these features are generally not considered WOTUS because they are not tributaries, or they do not have a significant nexus to downstream traditional navigable waters.



As for ditches, counties will need to work with agencies to determine the jurisdictional status of each ditch. The agencies will analyze each ditch to see if it is jurisdictional under the relatively permanent or significant nexus standards. If it is determined that it is not connected to a foundational water, it is likely the ditch would not be considered a WOTUS.

Consistent with previous practice, ditches constructed wholly in uplands and draining only uplands with the ephemeral flow would generally not be considered “waters of the United States.”

## Exemptions from Federal Jurisdiction

The proposed rule would not affect the existing statutory or regulatory exemptions or exclusions from section 402 NPDES permitting requirements, such as agricultural stormwater discharges and return flows from irrigated agriculture or the status of water transfers. The agencies also exempt waste treatment systems and prior converted croplands.

The agencies are proposing to retain the waste treatment system exclusion from the 1986 regulations and return to the longstanding version of the exclusion that the agencies have implemented for decades. Specifically, the proposed rule provides that “waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States.”

The proposed rule would promulgate the regulatory exclusion for prior converted cropland first codified in 1993, which provided that prior converted cropland is not a WOTUS and that “for purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA,” notwithstanding any other Federal agency’s determination of an area’s status.

This proposal would restore longstanding and familiar practice under the pre-2015 regulatory regime and generally maintain consistency between the agencies’ implementation of the CWA and the U.S. Department of Agriculture’s implementation of the Food Security Act, providing certainty to farmers seeking to conserve and protect land and waters under federal law.

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### THE PROPOSED RULE FURTHER EXCLUDES:

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Artificially irrigated areas which would revert to upland if the irrigation discontinued

Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are exclusively used for such purposes as stock watering, irrigation, settling basins or rice growing

Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons

Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of WOTUS

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow). The agencies try to distinguish these features from ephemeral streams based on the absence of ordinary high-water mark indicators



## Key Changes from the Pre-2015 Regulatory Framework

The agencies stated that the country would be returning to the pre-2015 regulatory framework throughout the regulatory process. However, in some instances, that is not the case, and they have changed how they interpret the 2007 and 2008 Rapanos Guidance.

**Proposed Rule:** Under the proposed rule, the agencies would assess if the impoundment itself is or is not a relatively permanent, standing, or continuously flowing body of water. If it is, the agencies would assess if the adjacent wetlands have a continuous surface connection with the impoundment. Wetlands adjacent to relatively permanent impoundments and that lack a continuous surface connection to

**With the change to the significant nexus standard, the proposed rule will require only one of the chemical, physical, or biological integrities of downstream foundational waters be impacted to be considered under federal jurisdiction. Justice Kennedy's opinion in Rapanos uses the phrase "and" and the agencies are using "or" throughout the proposed regulation. This key change significantly expands federal jurisdiction under the proposed rule.**

**Below are some key examples of how this definition differs from the pre-2015 regulatory framework.**

1. **Pre-2015 Regulatory Framework:** "Significantly affects" must alter chemical, physical **and** biological integrity of downstream foundational waters.

**Proposed Rule:** The proposed rule changes it to alter the "chemical, physical **or** biological integrity of downstream foundational waters."

2. **Pre-2015 Regulatory Framework:** Included language around WOTUS impacting interstate and foreign commerce

**Proposed Rule:** The proposed rule will delete all of the provisions referring to authority over activities that "could affect interstate or foreign commerce" and replace them with the relatively permanent and significant nexus standards.

The proposed rule would also replace the interstate commerce test with the relatively permanent and significant nexus standards.

3. **Pre-2015 Regulatory Framework:** The Rapanos Guidance did not address wetlands adjacent to impoundments of jurisdictional waters.

the impoundment and wetlands adjacent to non-relatively permanent impoundments would be considered under the significant nexus standard.

## Federal Resources

The agencies provide several resources to identify a federally-protected WOTUS. To identify whether a water would be federally protected while applying for a permit, a county would need to utilize the below maps as well as state specific maps. The federal resources are as follows:

- U.S. Geological Survey (USGS) Stream Gage Data
- USGS Topographic Maps
- USGS StreamStats
- Federal Emergency Management Agency (FEMA) Flood Zone Maps
- National Oceanic and Atmospheric Administration (NOAA) National Snow Analyses Maps
- USDA Natural Resources Conservation Service (NRCS) Soil Maps
- NRCS Snow Maps
- U.S. Fish and Wildlife Service (FWS) Wetlands Inventory Map







# GLOSSARY OF TERMS

## ■ **Traditional Navigable Waters**

- » The proposed rule retains the provision in the 1986 regulations that defines “waters of the United States” to include “all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”

## ■ **Interstate Waters**

- » The proposed rule would restore the longstanding categorical protections for interstate waters, regardless of their navigability, that was established by the earliest predecessors to the 1972 Clean Water Act and remained in place until the promulgation of the NWPR.
- » Interstate waters are waters of the several states and therefore unambiguously “waters of the United States.”

## ■ **Other Waters**

- » The agencies propose to retain the “other waters” category from the 1986 regulations in the definition of “waters of the United States,” but with changes informed by relevant Supreme Court precedent. Under the 1986 regulations, “other waters” (such as intrastate rivers, lakes, and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional if the use, degradation, or destruction of the water could affect interstate or foreign commerce. The proposed rule amends the 1986 regulations to delete all of the provisions referring to authority over activities that “could affect interstate or foreign commerce” and replace them with the relatively permanent and significant nexus standards the agencies have developed based on their best judgment and relevant Supreme Court case law.
- » The proposed rule provides that “other waters” meet the relatively permanent standard if they are relatively

permanent, standing or continuously flowing bodies of water with a continuous surface connection to a traditional navigable water, interstate water, or the territorial seas. The proposed rule also provides that “other waters” meet the significant nexus standard if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas.

## ■ **Impoundments**

- » The proposed rule retains the provision in the 1986 regulations that defines “waters of the United States” to include impoundments of “waters of the United States” with one change. Waters that are determined to be jurisdictional under the “other waters” provision would be excluded from this provision under the proposed rule.
- » Under the proposed rule and pre-2015 practice, impounding waters can create traditional navigable waters, even if the waters that are impounded are not themselves traditional navigable waters. In addition, under the proposed rule impounding a water can create a relatively permanent water, even if the water that is being impounded is a non-relatively permanent water. For purposes of implementation, relatively permanent waters include waters where water is standing or ponded at least seasonally.

## ■ **Tributaries**

- » The proposed rule retains the tributary provision of the 1986 regulations, updated to reflect consideration of relevant Supreme Court decisions. The 1986 regulations defined “waters of the United States” to include tributaries of traditional navigable waters, interstate waters, “other waters,” or impoundments. The proposed rule defines “waters of the United States” to

include tributaries of traditional navigable waters, interstate waters, impoundments, or the territorial seas if the tributary meets either the relatively permanent standard or the significant nexus standard.

#### ■ **Territorial Seas**

- » The Clean Water Act, the 1986 regulations, and the NWPR all include “the territorial seas” as a “water of the United States.” This proposed rule makes no changes to that provision and would retain the territorial seas provision near the end of the list of jurisdictional waters, consistent with the 1986 regulations.
- » The Clean Water Act defines “navigable waters” to include “the territorial seas” in section 502(7). The Clean Water Act then defines the “territorial seas” in section 502(8) as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”

#### ■ **Adjacent Wetlands**

- » In this proposed rule, the agencies are retaining the definition of “adjacent” unchanged from the 1986 regulations, which defined “adjacent” as follows: “The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.” In addition to retaining the definition of “adjacent” from the 1986 regulations, the proposed rule adds language to the adjacent wetlands provision regarding which adjacent wetlands can be considered “waters of the United States” to reflect the relatively permanent and significant nexus standards.
- » Under the proposed rule, the agencies would continue, as they did under the 1986 regulations and the Rapanos

Guidance, to assert jurisdiction over wetlands adjacent to traditional navigable waters without the need for further assessment.

- » The proposed rule also would add the relatively permanent standard and the significant nexus standard to the 1986 regulations’ adjacent wetlands provisions for wetlands adjacent to impoundments and tributaries.

#### ■ **Other Definitions**

- » The proposed rule contains a number of defined terms that remain unchanged from the 1986 regulations. The agencies are not proposing to amend the definitions of “wetland,” “high tide line,” “ordinary high water mark,” and “tidal water” from the 1986 regulations, but to provide additional clarity and consistency in comparison to the 1986 regulations, the proposed rule would include all the defined terms in EPA’s regulations, where such definitions are not already contained. Only the definition of the term “adjacent” was amended in the NWPR; the agencies propose defining the term unchanged from the 1986 regulations.

#### ■ **Wetlands**

- » The proposed rule makes no changes to the definition of “wetlands” contained in the NWPR, which made no changes to the 1986 regulations and defined “wetlands” as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” The agencies are not proposing to amend this definition.



# GLOSSARY OF TERMS

## ▪ **Adjacent**

- » The proposed rule defines the term “adjacent” with no changes from the 1986 regulations as “bordering, contiguous, or neighboring. Wetlands separated from other ‘waters of the United States’ by manufactured dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” This is a longstanding and familiar definition that is supported by Supreme Court case law and science.
- » To be jurisdictional under the proposed rule, however, wetlands must meet this definition of adjacent and either be adjacent to a traditional navigable water, interstate water, or territorial sea or otherwise fall within the adjacent wetlands provision and meet either the relatively permanent standard or the significant nexus standard.

## ▪ **High Tide Line**

- » The proposed rule makes no changes to the definition of “high tide line” contained in the NWPR, which made no changes to the 1986 regulations and defined the term “high tide line” as “the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along with shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency, but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.” The agencies are not proposing to amend this definition.

## ▪ **Ordinary High Water Mark**

- » The proposed rule makes no changes to the definition of “ordinary high water mark” (“OHWM”) contained in the NWPR, which made no changes to the 1986 regulations and defined OHWM as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”
- » This term, unchanged since 1977, see 41 FR 37144 (July 19, 1977) and 33 CFR 323.3(c) (1978), define the lateral limits of jurisdiction in non-tidal waters, provided the limits of jurisdiction are not extended by adjacent wetlands.

## ▪ **Tidal Water**

- » The proposed rule makes no changes to the definition of “tidal water” contained in the NWPR, which made no changes to the 1986 regulations, and defines the term “tidal water” as “those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.”

## ▪ **Significantly Affect**

- » 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 traditional navigable water, interstate water, or the territorial seas.

» The agencies are also proposing that a water may be determined to be a “water of the United States” when it “significantly affects” any one form of chemical, physical, or biological integrity of a downstream traditional navigable water, interstate water, or the territorial seas.

■ **Example of significant nexus:**

» The proposed rule provides the following example as part of the proposed rule. Many Pacific salmon species spawn in headwater streams, where their young grow for a year or more before migrating downstream, live their adult life stages in the ocean, and then migrate back upstream to spawn. Even where they do not provide direct habitat for salmon themselves, ephemeral streams may contribute to the habitat needs of salmon by supplying sources of

cold water that these species need to survive ( i.e., by providing appropriate physical conditions for cold water upwelling to occur at downstream confluences), transporting sediment that supports fish habitat downstream, and providing and transporting food for juveniles and adults downstream. These species thereby create a biological connection along the entire length of the river network and functionally help to maintain the biological integrity of the downstream traditional navigable water. Many other species of anadromous fish—that is fish that are born in freshwater, spend most of their lives in saltwater and return to fresh water to lay eggs—as well as species of freshwater fish like rainbow trout and brook trout also require small headwater streams to carry out life cycle functions.

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## NACo STAFF CONTACTS

### **Mark Ritacco**

Chief Government Affairs Officer  
mritacco@naco.org

### **Eryn Hurley**

Director of Government Affairs & Federal Fellowship Initiative  
ehurley@naco.org  
202.942.4204

### **Sarah Gimont**

Associate Legislative Director,  
Environment, Energy and Land Use  
sgimont@naco.org  
202.942.4254





660 NORTH CAPITOL STREET, NW  
SUITE 400 • WASHINGTON, D.C. 20001  
202.393.6226 • WWW.NACo.ORG



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