



April 15, 2019

Mr. Michael McDavit  
Oceans, Wetland and Community Division  
Office of Water, 4504-T  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Ms. Jennifer A. Moyer  
Regulatory Community of Practice  
(CECW-CO-R)  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314

**RE: U.S. EPA and U.S. Army Corps of Engineers Revised Definition of “Waters of the United States,”  
Docket No. EPA-HQ-OW-2018-0149**

Dear Mr. McDavit and Ms. Moyer,

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we respectfully submit comments on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) proposed *Revised Definition of “Waters of the United States,”* Docket No. EPA-HQ-OW-2018-0149. We thank the agencies for their ongoing efforts to communicate and engage with our members during the public comment period.

Specifically, we appreciate the agencies’ willingness to hold a half day Feb. 28 meeting with our members to work through some outstanding concerns with the proposed rule. This was a productive meeting for all and gave our members a stronger understanding of the types of information that would be most helpful to provide to the agencies during the public comment period. As the rulemaking process unfolds, we hope to continue to be a trusted agency resource on how “Waters of the U.S.” (WOTUS) definitions impact county governments.

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

**The Importance of Clean Water and Public Safety**

Clean water is essential to our nation’s counties who are on the front lines of protecting the citizens we serve through preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality. Without clean water, our

communities would not exist, businesses would not site within our borders and our tax base would be nonexistent. Counties are the first line of defense to protect these waters and we take our jobs seriously.

Additionally, counties are not just another stakeholder group in this discussion, but a valuable partner with federal and state governments on Clean Water Act (CWA) implementation. We enact zoning and land use ordinances to safeguard valuable natural resources and protect our local communities depending on state law and local responsibility. Counties provide extensive outreach and education to residents on water quality and stormwater impacts. We also establish rules on illicit discharges and fertilizer ordinances, remove septic tanks, work to reduce water pollution, adopt setbacks for land use plans and are responsible for water recharge areas, green infrastructure and water conservation programs. To that end, it is important that the federal, state and local governments work together to craft practical and workable rules and regulations.

Counties are also responsible to protect the public. Across the country, counties own and maintain public safety ditches including road and roadside ditches, flood control channels, stormwater culverts and pipes, and other infrastructure that is used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidents. **Defining which waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining public safety ditches and infrastructure.**

NACo shares the agencies' goals for a clear, understandable and implementable definition for "Waters of the U.S." to reduce confusion – and costs – within the federal permitting process. With this new proposed rule, we believe the agencies are moving in the right direction in developing a clear, workable rule. As described below, however, we have a concern with the pre-proposal rulemaking process, as well as recommendations on areas where additional clarification is warranted.

### **Counties Have a Vested Interest in the Proposed Rule**

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, wastewater and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 46 percent of the nation's road miles and their associated ditches, 38 percent of bridges, flood control channels, drainage conveyances and culverts used to prevent flooding. County responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

For example, some counties in low-lying areas have consistently high groundwater tables and must carefully maintain drainage conveyances to both prevent flooding and reduce breeding grounds for disease-causing mosquitoes. On the other hand, counties in the arid west are facing extreme drought conditions where the availability of water has become scarce. In these regions, counties are using stormwater and wastewater ditch infrastructure to preserve water for future use. **To reiterate, defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining their public safety ditches and infrastructure.**

### **The Consultation Process with State and Local Governments Was Limited**

While we appreciate and thank the agencies for the time they spent with our members once the WOTUS rule was proposed, we are concerned about the limited consultation with state and local governments prior to the rule's proposal. Unlike other stakeholder groups, state and local government officials engage with federal agencies on rule development since these entities help to implement and enforce final rules and regulations on the ground. This is sanctioned under Executive Order 13132: Federalism (EO 13132), issued by President Bill Clinton in 1999.

Under EO 13132, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments. Specifically, agencies must consult "meaningfully" with state and local officials early (and often) in the process, even before the rule is formally proposed. EPA's own policy "*Action Development Process: Guidance on Executive Order 13132: Federalism*" (Nov. 2018) designates how, when and why the agency must consult with state and local governments on pending agency regulations and policies.

As discussed in the joint WOTUS comment letter filed jointly with the National League of Cities and the U.S. Conference of Mayors (April 2019), we had hoped for a more robust WOTUS Federalism consultation process. The EPA and the Army Corps initiated a Federalism consultation meeting in April 2017. However, after this meeting, the agencies did not hold another WOTUS-related meeting for over 19 months, until after the rule was formally proposed in the Federal Register.

Because a thorough consultation process was not followed, the agencies released an incomplete economic analysis that did not fully consider the potential impact on other Clean Water Act programs. Had the Federalism consultation process been followed, our organization and members could have provided additional information on the implications of the proposed rule to allow for a more comprehensive and accurate economic analysis and more clarity could have been provided on the issues outlined below.

### **Draw a Clear Line Between Tributaries and Ditches Used for Public Safety**

Ditches are pervasive in counties across the nation and, until the past several decades, were never considered to be jurisdictional by the Army Corps. In recent years, certain Army Corps districts have inconsistently found public safety ditches jurisdictional, both for construction and maintenance

activities. Once a ditch falls under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive.

In the proposed rule, the agencies state that they believe most ditches will be exempt since the rule defines tributaries as a naturally occurring stream and ditches as artificial, manmade conveyances. However, since ditches can be considered tributaries in certain circumstances under the rule, this could cause confusion about the types of ditches that may be jurisdictional, which would be counterintuitive to the intent of the rule.

Many county ditches alongside roads were constructed more than a century ago. No historical records exist, potentially making it difficult to quantify which portion of a ditch is jurisdictional. Additionally, in the example above, it is unclear if the whole length of a ditch is jurisdictional, or just the section in the tributary.

**Based on counties' experiences, while the jurisdictional determination process may be time consuming, lengthy and resource-intensive delays also occur after federal jurisdiction is claimed.** Once jurisdictional, the project triggers application of other federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money.

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. Several California counties have communicated this process can easily take three or more years, with costs in the millions for one project.

One Midwest county studied five road projects that were delayed over the period of two years. Conservatively, the cost to the county for the delays was \$500,000. Some counties have missed building seasons waiting for federal permits. These are real world examples happening now for many of our counties.

Counties are liable for ensuring their public safety ditches are maintained, and in some cases, counties have been sued for not maintaining their ditches. It is imperative that Section 404 CWA permits be processed in a timely manner by the Army Corps. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties in a precarious position – especially those who are balancing small budgets against public health and environmental protection needs.

County ditch systems can be complex: they can run for hundreds of miles continuously, be multi-use in nature, and utilized for irrigation purposes and public safety. Given the agencies' request for feedback on whether roadside ditches should be categorically excluded from jurisdiction, we recommend taking the

exclusion a step further and categorically exempt all publicly-owned and managed ditches intended to protect public safety.

### **Clarify the Status and Intent of the Existing CWA Ditch Maintenance Exclusion**

Over the years, numerous local governments and public agencies have expressed concerns that regional Army Corps offices sometimes require CWA Section 404 permits for maintenance activities on public safety infrastructure conveyances, even though an exemption technically exists in Section 404(f) of the CWA. Under this exemption, counties should be allowed to perform maintenance activities in ditches without a federal permit.

However, in recent years, this exemption has been narrowly and inconsistently applied across Army Corps districts nationwide. Some Army Corps districts give a blanket exemption for maintenance activities. **In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt.**

Additionally, several Army Corps districts are using the CWA “recapture provision” to override the exemption. Under the “recapture clause,” previously exempt ditches are “recaptured” into jurisdiction and must comply with the Section 404 permitting process for maintenance activities. 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 flooding events of private property. In the past several years, we’ve heard from non-California counties who also must obtain Section 404 permits for ditch maintenance activities.

Additionally, Army Corps districts may require documentation to original specifications of the ditch showing original scope, measurements and more. Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist.

In other parts of the country, counties must formally request an exemption through the Army Corps. As part of the request, the county may be required to include land and water surveys and other data, which can be expensive to obtain. One Florida county applied for 18 exemptions at a cost of \$600,000 (as part of the exemption request process, the entity must provide data and surveying materials), three months later, only two exemptions were granted and the county was still waiting for the other 16 to be granted. At that point, the county moved into its seasonal rainy season and received calls from concerned residents who were worried about flooding from the ditches.

Finally, some counties in hurricane impacted areas have reported difficulty obtaining Section 404(f) exemptions to clean out drainage ditches filled with silt from flooding. These ditches are used to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. It is the responsibility of local governments to ensure the long-term operation and protection of

public safety infrastructure. Whether or not a ditch is regulated under Section 404 has significant financial implications for local governments and public agencies.

We ask the agencies to reaffirm the role that the Section 404(f) ditch maintenance exemption plays in keeping ditches safe and in working order. We also ask that the Army Corps clarifies how and when the Section 404(f) exemption can be used. Furthermore, we ask that the agencies provide an unequivocal exemption for ditch maintenance activities on publicly-owned public safety ditches. This should include clear information, whether within the final WOTUS rule or as follow up guidance, on the types of documentation that local governments should provide in order to be covered under the ditch maintenance exclusion. Finally, we encourage the agencies to grant emergency waivers for ditch maintenance activities if a public safety risk exists in ditches that would be traditionally jurisdictional.

### **County Experiences with the Section 404 Permit Process**

During discussions on the proposed WOTUS definition changes, 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. These examples have been provided to the agencies.

One Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Army 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 cost associated with going through the Army 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.

Delays resulting from regulating local drainage features are evident 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 Army 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 permit 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 Army Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

### **Further Define the Term “Intermittent”**

The term “intermittent” is pivotal in the WOTUS definition as the lynchpin in determining if waters are “in” or “out” under the proposed rule. Under the proposed rule, the term “intermittent” is defined as “surface water flowing continuously during certain times of a typical year and more than direct response to precipitation (e.g. seasonally when the groundwater table is elevated or when snowpack melts).” “Intermittent” will be determined by assessing a “typical year” of precipitation over a rolling thirty-year period for a geographic area.

The agencies have indicated that, instead of setting one national standard, the regions will develop a regional definition of the term “intermittent.” However, the agencies have not provided information on how “intermittent” will be developed by the regions. For example, which federal agency would take the lead; how will geographic regions be determined (i.e. via Army Corps or EPA district, state, watershed, etc.); will the process include an opportunity to consult and collaborate with state and local governments, stakeholders and the general public; and will the draft intermittent regional definition be open to public comment?

Furthermore, county experts – engineers, attorneys and stormwater managers – note that in some parts of the country the terms “intermittent” and “ephemeral” can be used interchangeably, which may cause confusion. We ask the agencies to clarify the process by which “intermittent” will be defined. As part of this approach, we urge the agencies to bring its state and local governmental partners to the table early to work through potential regional approaches the agencies may take to define “intermittent.”

### **Counties Need Further Precision on Stormwater Management Exemption**

The proposed rule includes an exemption for stormwater control features that were excavated or constructed in uplands to convey, treat, infiltrate or store stormwater runoff. We support this exemption and thank the agencies for including the term “infiltrate” as part of the exemption, which was not included in the 2015 WOTUS rule. We ask the agencies, however, to provide further clarification on the intent and extent of the stormwater control features exclusion.

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities that discharge pollutants from any point source into a WOTUS are required to obtain a permit, including localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains) owned by a state, tribal, local or other public body, which discharge into a WOTUS. They are designed to collect and treat stormwater runoff within the MS4. We thank the agencies for reaffirming that stormwater features not built in a WOTUS are excluded from jurisdiction.

However, the agencies have indicated in the proposed rule that there could be WOTUS designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could

potentially have a WOTUS within its stormwater system, which would be difficult for local governments to regulate.

The definitional changes could easily be interpreted to include the whole MS4 system, or portions thereof, which would be a significant change compared to current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of a WOTUS within the state, this may trigger a state's oversight of water quality designations within an MS4. Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new designated WOTUS meet water quality standards.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in a WOTUS that is covered under the CWA Section 404 permit program. This automatically sets up a conflict if an MS4 contains a WOTUS, as counties would be unsure whether water treatment be allowed in the WOTUS portion of the MS4, even though it's disallowed under current law. Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

It would be challenging and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health and more. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost-effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a WOTUS, they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

We recommend that natural streams that are part of a stormwater control system, whether or not they are part of an MS4, also be included under this exclusion. We also recommend that the agencies further examine what the practical implications would be for MS4 permit holders if they need to obtain Section 404 CWA permits through the Army Corps for construction and maintenance activities in stormwater control systems. Furthermore, we ask the agencies to include an exemption for stormwater systems, regardless of whether the system is part of the MS4. Finally, as the agencies move forward, we ask for clear information, whether within the final WOTUS rule or follow up guidance, on the types of

documentation that local governments should provide in order to be covered under the stormwater control feature exclusion.

### **Effectively Craft a Nationwide WOTUS Map**

Within the proposed rule, the agencies are asking for comments as to how they could establish an approach to authorize states, tribes and federal agencies to establish geospatial datasets of WOTUS, as well as waters that the agencies propose to exclude in the rule.

While the question focuses primarily on other levels of government, counties collect a variety of Geographic Information System (GIS) data that we use internally and often share with states. This data is used for comprehensive planning, transportation, growth development, redistricting and other uses.

A national map would significantly help counties know with certainty which bodies of water are subject to federal CWA requirements and which ones are not.

We support the agencies' effort to create a national map that clearly shows which waters and their tributaries are considered jurisdictional, and likewise, to show those waters that are not jurisdictional.

### **Conclusion**

On behalf of the nation's 3,069 counties, we appreciate the opportunity to be a part of this rulemaking process. NACo acknowledges the efforts taken by both EPA and the Army Corps to conduct outreach on the proposed rule. This is a priority issue for our nation's counties who are responsible for environmental protection and public safety.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact the proposed WOTUS rule will have on our local communities. We look forward to continuing to work with EPA and the Army Corps as the regulatory process moves forward.

If you have any questions, please feel free to contact Julie Ufner, NACo's Associate Legislative Director at [Jufner@naco.org](mailto:Jufner@naco.org) or 202.942.4269.

Sincerely,



Matthew D. Chase  
Executive Director  
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