

2019 POLICY BRIEF

COUNTIES ARE ENCOURAGED TO WEIGH IN ON PROPOSED “WATERS OF THE U.S.” RULE

QUICK FACTS

- Even non-federal waters are protected by state and local regulations – sometimes even more strictly than federal rules. As co-regulator under provisions of the Clean Water Act, counties are not just another stakeholder in this discussion.
- While the proposed rule exempts ditches that are not only wet during rainfalls, other ditches that flow seasonally or year-round may be jurisdictional.
- The proposed rule newly defines the term tributary as a “naturally occurring surface water channel that contributes perennial or intermittent flow to a WOTUS” and ditches as “artificial, manmade conveyances.”

ACTION NEEDED:

NACo urges counties to provide input and feedback on the administration’s revised definition for “Waters of the U.S.” under the Clean Water Act. Counties are encouraged to provide examples on how the proposed rule will impact county-owned infrastructure such as roads and roadside ditches, drainage and irrigation conveyances, flood control channels, bridge construction and rehabilitation projects and stormwater and wastewater facilities and provide suggestions on how the rule can be modified.

BACKGROUND:

On February 14, the U.S. Environmental and Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) [officially released](#) the Trump Administration’s proposed new “Waters of United States” (WOTUS) rule defining which bodies of water across the United States are subject to federal regulations under the Clean Water Act (CWA). This action represents the second step in the process taken by the EPA and Army Corps to review and replace the Obama Administration’s 2015 WOTUS rule. The proposed rule is open for public comment until April 15, 2019.

The new proposed definition would create six categories of regulated waters and 11 exemptions. The six categories of WOTUS include: traditional navigable waters; tributaries; certain ditches; certain lakes and ponds; impoundments; and adjacent wetlands. The proposed rule specifies that if water does not meet one of the six listed categories, it will not be considered a WOTUS and clarifies that certain other waters will also no longer be considered a WOTUS, such as ditches that are only wet during rainfall events, groundwater, stormwater control features, wastewater recycling infrastructure built in uplands, converted cropland and waste treatment systems.

While the proposed rule tries to draw a bright line between tributaries and ditches, there remains uncertainty about when a ditch may be jurisdictional. For example, even though tributaries are defined as “naturally occurring surface channels” and ditches are defined as an “artificial channel used to convey water,” there are some cases when ditches may be considered jurisdictional under the tributary definition. Case in point, many roadside and drainage ditches were built decades ago in natural stream systems would be jurisdictional if the ditch has year-round or seasonal flow. But, ditches that are only wet during rainfall events, are not jurisdictional under the proposed rule.



Under the proposed rule, the following types of county-owned infrastructure may be jurisdictional:

- Roadside ditches that have flow year-round (perennial flow)
- Roadside and other ditches with intermittent flow (i.e. seasonal) that are a relocated tributary, or are excavated in a tributary, or touch jurisdictional wetlands
- Roadside and other ditches that have a seasonal flow due to snowmelts and monsoons
- Stormwater systems and wastewater recycling infrastructure in low-lying areas

Furthermore, the proposed rule ponders how jurisdictional “intermittent” waters should be defined. But, the proposed rule stops short at proposing a specific duration (e.g. the number of days, weeks or even months) the feature would need to flow to be considered “intermittent.” Currently, intermittent means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or melted snowpack). This lack of a definition could be problematic in some parts of the country due to different climates, topography, and other features.

Finally, the proposed rule contains several exemptions for stormwater features and wastewater recycling structures constructed in uplands and for waste treatment systems. While the waste treatment exemption is a continuation of a previous exemption, the proposed rule defines for the first time the parameters of a waste treatment system. The stormwater exemption is similar to provisions in the 2015 WOTUS rule and raise similar questions about when stormwater systems and/or green infrastructure are considered jurisdictional. These systems are regulated under the CWA Section 402 stormwater permit program which allows water to be treated before it is released to a WOTUS. However,

under law, we cannot treat water in a WOTUS, which will automatically cause conflict with the CWA Section 402 program. This, in turn, opens local governments up to citizen suits. Instead, the stormwater system as a whole should be exempt from WOTUS if it is permitted under Section 402. NACo looks forward to working with the agencies to address these challenges.

“Waters of the U.S.” (WOTUS) is a term used in the Clean Water Act to determine what waters and their conveyances fall under federal and state permitting authority. In 2014, EPA and the Army 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. NACo has expressed multiple concerns on the 2015 WOTUS rule's impact on county-owned and maintained roadside ditches, bridges, flood control channels, drainage conveyances and wastewater and stormwater systems and has [called for the final rule to be withdrawn](#) until further analysis and more in-depth consultation with state and local officials be completed.

Currently, the 2015 WOTUS rule is currently in effect in 22 states (California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Washington), while regulations from the 1980s are in effect in the other 28 states. As a result, in February 2017, President Trump released Executive Order (EO) 13778: [Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the U.S.” Rule](#), which instructed the EPA and the Corps to review and rewrite the 2015 WOTUS rule.

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