

# 2019 POLICY BRIEF

## NACo SUBMITS DETAILED COMMENTS ON PROPOSED “WATERS OF THE U.S.” RULE

### QUICK FACTS

- 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 2015, the Obama Administration finalized a revised definition of WOTUS, which was immediately challenged in the courts.
- Currently, the 2015 WOTUS rule is currently in effect in 23 states, while regulations from the 1980s are in effect in the other 27 states.

### UPDATE ON WOTUS RULEMAKING

On February 14, 2019, the U.S. Environmental and Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) [officially released](#) the Trump Administration’s new proposed “Waters of United States” (WOTUS) rule, defining which bodies of water across the country 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.

Currently, the pre-2015 WOTUS rule is in effect in 28 states and the 2015 WOTUS rule is the law of the land in 22 states. The agencies plan to release a final rule by the end of 2019.

### NACo SUBMITS DETAILED COMMENTS ON PROPOSED WOTUS RULE

In response to the proposed definition, in April 2019, NACo submitted two sets of comment letters. The [first letter](#), with the National League of Cities and the U.S. Conference of Mayors, highlighted the opportunities and challenges that counties, cities and mayors potentially face. The [second letter](#) was exclusively focused on counties and went into greater detail on how the rule could potentially impact county-owned infrastructure. It also offered recommendations to the agencies.

In its letters, NACo detailed several concerns and recommendations for EPA and Army Corps:

#### **Draw a clear distinction between natural streams and ditches intended for public safety**

While the proposed rule attempts to draw a bright line between tributaries and ditches, there remains uncertainty about when a ditch may be jurisdictional. For example, while 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. For example, some roadside and drainage ditches built decades ago in natural stream systems would be jurisdictional if the ditch has year-round or intermittent (seasonal) flow. However, ditches that are only wet during rainfall events would not be jurisdictional under the proposed rule.

NACo requested that the agencies provide a clear-cut exemption for public safety ditches.

#### **Status of the current ditch maintenance exemption is uncertain in the pending WOTUS rule**



Under law, ditches are regulated under CWA Section 404 for both construction and maintenance activities. While a Section 404(f) exemption exists for ditch maintenance activities, Army Corps districts apply it inconsistently. In some areas, local governments have a blanket exemption, but in other areas, local governments must apply for a special Section 404 permit for ditch maintenance activities. 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.

NACo asked the agencies to reaffirm in the final rule's preamble the role that the Section 404(f) ditch maintenance exemption plays. Additionally, we requested clarification on how and when Section 404(f) exemption can be used and an unequivocal exemption for ditch maintenance activities in the final rule.

#### **The proposed rule's definition for "intermittent" is cause for concern**

In lieu of setting a baseline for what the term intermittent means, the agencies have indicated that the term will be defined at the regional level, which means definitions could vary and be applied differently across the country.

NACo asked that the agencies clarify how "intermittent" will be defined at the local level. For example, which federal agency would take the lead, how will the geographic region be determined (i.e. via Army Corps or EPA district, state, watershed, etc.) and how will regional district offices crafting the regional intermittent definition include state and local governments in the process?

#### **Exemptions for stormwater features and wastewater recycling structures constructed in uplands need further clarification**

The proposed rule contains a clear exemption for stormwater control features excavated or constructed in uplands to convey, treat, infiltrate or store stormwater runoff. It also exempts wastewater recycling structures constructed in uplands, such as detention, retention and infiltration basins and ponds,

and groundwater recharge basins. NACo is generally supportive of these, with a few exceptions.

NACo requested that the agencies clarify the use of the term uplands for stormwater systems, including whether the whole system is jurisdictional if the system is only partially constructed in uplands. We also asked the agencies to include an exemption for stormwater systems, regardless of whether the system is part of a Municipal Separate Storm Sew System.

#### **Effectively craft a nationwide WOTUS map**

Within the proposed rule, the agencies asked 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.

NACo supported 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. Furthermore, NACo urged the agencies to consult with state and local governments on available data resources that may be helpful for this effort.

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