



THE UNITED STATES
CONFERENCE OF MAYORS



February 7, 2022

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Oceans, Wetlands and Communities
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Stacey Jensen
Office of the Assistant Secretary of the Army for Civil
Works
Department of the Army
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Washington, DC 20310-0104

RE: Docket ID No. EPA-HQ-OW-2021-0602

Dear Ms. Christensen and Ms. Jensen,

On behalf of the nation's mayors, cities and counties, we appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Army Corps) proposed rule on the "Revised Definition of "Waters of the United States." This proposed rule aims to define the scope of federally protected waters under the Clean Water Act (CWA).

Collectively, our organizations represent the nation's 3,069 counties, 19,000 cities, towns and villages, and the mayors of the 1,400 largest cities. Local governments serve as co-regulators with the federal government and ultimately help implement new and existing laws, including CWA programs. Additionally, cities and counties own public safety facilities and infrastructure directly impacted by federal laws and regulations. To that end, federal, state and local governments must work together to craft reasonable and practicable rules and regulations.

Our residents and communities' health, well-being, and safety are top priorities for local leaders. As partners in protecting America's water resources, it is essential that local governments clearly understand the vast impact that a change to the definition of "waters of the United States" (WOTUS) will have on all aspects of the CWA.

After close consultation with local leaders, we provide four overall thoughts on what the change in the definition of WOTUS means for local governments. In this letter, we provide insight into what local governments like about the proposed rule and provide recommendations on how to improve the proposed rule. We outline a crucial difference between the pre-2015 regulatory framework and this proposal and discuss the regulatory process. Please find our previously submitted comments on WOTUS rulemakings.¹

In the *Federal Register*² notice, the EPA and Army Corps outline their efforts to ensure critical protections for our nation's vital water resources, which support public health, environmental protection, agricultural activity, and economic growth across the United States. Local governments applaud the agencies for this laudable goal and look forward to partnering with the

¹ <https://naco.sharefile.com/d-s3a41a89fb6c44b92a6ceaba70856c740>

² <https://www.federalregister.gov/d/2021-25601/p-3>

federal government to protect our nation's water supply. As stewards of the environment, local governments appreciate the efforts of the EPA and Army Corps to implement water pollution programs and regulate quality standards.

During a House Appropriations Subcommittee budget hearing on April 21, 2021, EPA Administrator Michael Regan stated that the EPA has no intention of reinstating verbatim the original Obama Waters of the U.S. rule. We appreciate and strongly support his commitment to pursue a rule that "is not overly burdensome but gives the states the flexibility to protect water quality and protect the local agricultural economy."³

Local Governments Support a Clear and Implementable Rule

Enforcing the pre-2015 regulatory framework gives local governments regulatory certainty. In 28 states, water quality laws have not significantly changed since 2015. Although this proposed rule includes a slight change from the pre-2015 regulatory framework, local governments will work with our federal partners to help implement a final rule. The foundational waters consisting of traditional navigable waters, interstate waters and territorial seas are familiar to local governments. Adjacent wetlands, tributaries and impoundments of these foundational waters are also familiar to local governments.

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 to be deemed federal jurisdiction. The agencies borrow this language from Justice Scalia's opinion in *Rapanos v United States*. This standard is one that local governments are familiar with and can quickly determine on their own.

Recommendations on How to Improve the Proposed Rule

Local governments recognize that this proposed definition is simply not returning to the pre-2015 framework. Some key differences are leading to significant concerns at the local level.

The EPA and Army Corps have acknowledged that a case-by-case analysis will likely occur for any water that isn't clearly a foundational water body by reinstating the relatively permanent standard and significant nexus standard. Local governments recommend streamlining this process by clarifying which waters are jurisdictional, without the need to hire consultants and expend valuable and limited resources in determining if a water is under federal jurisdiction. Under the Navigable Waters Protection Rule, it was clear cut which waters were regulated by the federal government or given to the states. As a co-regulator and regulated entity, local governments seek that level of clarity in this definition.

Local governments appreciate the exclusions listed in the proposed definition. We strongly appreciate the exclusions for agriculture - artificially irrigated areas; artificial lakes or ponds used for agriculture; artificial reflecting or swimming pools; water-filled depressions filled in upland; swales or erosional features caused by infrequent or short-duration rainfall.

However, we strongly urge the EPA and Army Corps to strengthen the rule and streamline the process by making public and private stormwater control features and

³ [Regan pledges not to return to Obama-era WOTUS definition | 2021-04-21 | Agri-Pulse Communications, Inc.](#)

other municipally-owned facilities, particularly those related to drinking water, wastewater, and stormwater control features, explicitly excluded under the proposed rule, as was in both the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule.

- Public safety water and stormwater conveyances, including roads and roadsides ditches, flood control channels, drainage conveyances and culverts, should be explicitly excluded from the final rule.
- Municipal Stormwater Sewer Systems (MS4s) and constructed stormwater ponds, channels, ditches, and pipes in the MS4 system should be excluded from federal jurisdiction.
- Green infrastructure stormwater control features should be excluded under the final rule. Green infrastructure includes bioswales, vegetative buffers, constructed wetlands, vegetated infiltration features, and rain gardens owned and operated by local governments and private entities.
- Drinking-Water Facilities and infrastructure consisting of reservoirs, dams, ponds, canals serving drinking water facilities should all be excluded from federal jurisdiction.
- Water Reuse Infrastructure should also be excluded from federal jurisdiction. These facilities are built to generate additional water supply, like ponds, recharge basins, canals and ditches serving water reuse facilities.

As stated in the 2015 Clean Water Rule preamble: “Codifying these longstanding practices supports the agencies’ goals of providing greater clarity, certainty, and predictability for the regulated public and regulators, and makes rule implementation clear and practical.” These explicit exclusions are needed so that owner/operators and local stormwater and drinking water system managers can do their essential operations and maintenance work efficiently and effectively.

Even making slight modifications to the pre-2015 regulatory framework will take time and resources for municipal engineers to learn and implement. Therefore, we urge the agencies to provide technical assistance and funding to local governments to help officials and employees understand and implement this proposed definition. Alternatively, the EPA and Army Corps can create one WOTUS map that clearly shows all waters that would be considered jurisdictional WOTUS under the new proposed rule. Right now, the EPA and Army Corps recommend local governments check and monitor eight different mapping resources, plus any that their respective state has to offer, to try to determine if a water is federally regulated.

Key Difference Between Pre-2015 Regulatory Framework and the Proposed Definition

Significant Nexus Standard

The proposed rule reintroduces the "significant nexus standard" and promotes case-by-case analysis to determine federal jurisdiction. Local governments strongly believe that this will slow down projects and increase costs. Furthermore, we firmly believe that the language used in the proposed rule, instead of Justice Kennedy's opinion in *Rapanos*, significantly expands federal jurisdiction overnight by assessing within the "chemical, physical, **or** biological connections" to downstream foundational waters. Justice Kennedy required it to significantly affect downstream

foundational waters' "chemical, physical, **and** biological integrity." In St. John's Law Review⁴ Kenneth Adams and Alan Kaye outline that "*and*" conveys conjunction, with items linked by *and* are considered together. Adams and Kaye state that "*or*" introduces alternatives. Using these definitions, the EPA and Army Corps are significantly expanding federal jurisdiction by simply changing *and* to *or* in the proposed rule, thereby only requiring one of water's chemical, physical or biological integrity to be impacted, instead of all three. **We strongly urge our federal partners to revert to the pre-2015 regulatory framework by including Supreme Court decisions as written in the final rule to define waters of the United States under the Clean Water Act.**

Regulatory Process

As partners in protecting America's water resources, it is essential that state and local governments clearly understand the vast impact the proposed WOTUS rule will have on our local communities, residents and resources. We seek a definition that does not require local leaders to hire professional consultants to determine a jurisdictional status.

As outlined in our October 2021 letter⁵, due to the responsibilities and the complicated nature of determining federal jurisdiction under WOTUS, our organizations have consistently asked for a transparent and straightforward rulemaking process, including continued meaningful and engaging Federalism consultations under Executive Order 13132.

As intergovernmental partners, we look forward to meeting with the EPA and Army Corps more as this definition is developed.

On behalf of the nation's mayors, cities and counties, we thank you for engaging with our organizations and local governments. We look forward to working with you as you continue to develop a new "waters of the United States" definitional rule. Again, changing the CWA definition of WOTUS will have far-reaching impacts on local governments.

If you have any questions, please do not hesitate to contact our staff: Judy Sheahan (USCM) at jsheahan@usmayors.org; Carolyn Berndt (NLC) at berndt@nlc.org; or Adam Pugh (NACo) at apugh@naco.org.

Sincerely,



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Clarence E. Anthony
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Tom Cochran
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⁴ [Revisiting the Ambiguity of "And" and "Or" in Legal Drafting](#)

⁵ <https://naco.sharefile.com/share/view/s3eadde669aa24d68bfea7b7a51df27f2>