POSSIBLE MOTION

I MOVE TO approve Resolution 2014-17 on first and final reading.

Sponsors: McConnell/Hackett

CITY AND BOROUGH OF SITKA

RESOLUTION NO. 2014-17

A RESOLUTION OF THE CITY AND BOROUGH OF SITKA OPPOSING THE NEWLY PROPOSED RULE ON THE DEFINITION OF WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT

WHEREAS, the proposed "Waters of the U.S." rule may increase the number of Sitka's maintained public infrastructure conveyances, such as water quality, bulk water sales, roadside ditches, floodwater and storm water that would fall under federal authority; and

WHEREAS, the proposed rule would amend the definition of waters of the U.S. in the Clean Water Act (CWA). Enacted in 1972, which would adversely affect Sitka and our ability to market and sell bulk water; and

WHEREAS, the proposed rule would give the federal government jurisdiction over CBS and State of Alaska waters. The cost impact to comply by completing all the needed permits, perform maintenance and required water monitoring would be substantial and the potential penalty(s) for not complying would also pose a financial hardship on the CBS; and

WHEREAS, the proposed rule would increase the asserted scope of CWA jurisdiction, in part due to a declaration that some types of waters are categorically jurisdictional, and by application of new definitions which are ill-defined, extremely broad, ambiguous, and prone to abuse, and

WHEREAS, the CBS provides essential water, wastewater and storm water control services to our community and the proposed rule could serve to impose additional regulatory burdens on our community without any concomitant environmental benefits; and

WHEREAS, the proposed rule uses U.S. Environmental Protection Agency's (EPA) draft report on Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, is currently undergoing review by EPA's Science Advisory Board, as a scientific basis for the new definition; and

WHEREAS while the proposed rule aims to clarify confusion over Section 404 jurisdiction in the field stemming from several U.S. Supreme Court decisions, the definitional change applies to all CWA programs, not just the Section 404 permit program and impacts nine regulatory programs, including Section 402, which establishes the nation's storm water management program and Section 401, which governs water quality certifications

THEREFORE, BE IT RESOLVED, that the Assembly of the City and Borough of Sitka, Alaska by this resolution opposes the proposed rule on the definintion of "Waters of the United States" under the Clean Water Act.

PASSED, APPROVED AND ADOPTED by the assembly of the City and Borough of Sitka, Alaska on this 14th day of October, 2014.

_____
Mim McConnell, Mayor

ATTEST:

_____
Colleen Ingman, MMC
Municipal Clerk

NATIONAL ASSOCIATION OF COUNTIES

POLICY BRIEF

NACo 2014

County Action Needed

New "Waters of the United States" Definition Released

Counties are strongly encouraged to submit written comments on potential impacts of the proposed regulation to the Federal Register

On April 21, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly released a new proposed rule – *Definition of Waters of the U.S. Under the Clean Water Act* – that would amend the definition of "waters of the U.S." and expand the range of waters that fall under federal jurisdiction. The proposed rule, published in the Federal Register, is open for public comment until November 14, 2014.

The proposed rule uses U.S. Environmental Protection Agency's (EPA) draft report on *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which is currently undergoing review by EPA's Science Advisory Board, as a scientific basis for the new definition. The report focuses on over 1,000 scientific reports that demonstrate the interconnectedness of tributaries, wetlands, and other waters to downstream waters and the impact these connections have on the biological, chemical and physical relationship to downstream waters.

Why "Waters of the U.S." Regulation Matters to Counties

The proposed "waters of the U.S." regulation from EPA and the Corps could have a significant impact on counties across the country, in the following ways:

- **Seeks to define waters under federal jurisdiction:** The proposed rule would modify existing regulations, which have been in place for over 25 years, regarding which waters fall under federal jurisdiction through the Clean Water Act (CWA). The proposed modification aims to clarify issues raised in recent Supreme Court decisions that have created uncertainty over the scope of CWA jurisdiction and focuses on the interconnectivity of waters when determining which waters fall under federal jurisdiction. **Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards.**

- **Potentially increases the number of county-owned ditches under federal jurisdiction:** The proposed rule would define some ditches as "waters of the U.S." if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. **Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.**

- **Applies to all Clean Water Act programs, not just Section 404 program:** The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. Among these programs—which would become subject to increasingly complex and costly federal regulatory requirements under the proposed rule—are the following:

  - **Section 402 National Pollution Discharge Elimination System (NPDES) program,** which includes municipal separate storm sewer systems (MS4s) and pesticide applications permits (EPA Program)

  - **Section 303 Water Quality Standards (WQS) program**, which is overseen by states and based on EPA's "waters of the U.S." designations

  - Other programs including **stormwater, green infrastructure, pesticide permits** and **total maxiumum daily load (TMDL) standards**

Background Information

The Clean Water Act (CWA) was enacted in 1972 to restore and maintain the chemical, physical and biological integrity of our nation's waters and is used to oversee federal water quality programs for areas that have a "water of the U.S." The term navigable "waters of the U.S." was derived from the Rivers and Harbors Act of 1899 to identify waters that were involved in interstate commerce and were designated as federally protected waters. Since then, a number of court cases have further defined navigable "waters of the U.S." to include waters that are not traditionally navigable.

More recently, in 2001 and 2006, Supreme Court cases have raised questions about which waters fall under federal jurisdiction, creating uncertainty both within the regulating agencies and the regulated community over the definition of "waters of the U.S." In 2001, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (531 U.S.159, 2001), the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. The Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.

In 2006, in *Rapanos v. United States*, (547 U.S. 715, 2006), the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program. In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites. Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

The newly proposed rule attempts to resolve this confusion by broadening the geographic scope of CWA jurisdiction. The proposal states that "waters of the U.S" under federal jurisdiction include navigable waters, interstate waters, territorial waters, tributaries (ditches), wetlands, and "other waters." It also redefines or includes new definitions for key terms—adjacency, riparian area, and flood plain—that could be used by EPA and the Corps to claim additional waters as jurisdictional.

States and local governments play an important role in CWA implementation. As the range of waters that are considered "waters of the U.S." increase, states are required to expand their current water quality designations to protect those waters. This increases reporting and attainment standards at the state level. Counties, in the role of regulator, have their own watershed/stormwater management plans that would have to be modified based on the federal and state changes. Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans.

Examples of Potential Impact on Counties

County-Owned Public Infrastructure Ditches

The proposed rule would broaden the number of county maintained ditches—roadside, flood channels and potentially others—that would require CWA Section 404 federal permits. Counties use public infrastructure ditches to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidences.

- The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow.

- The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, under the proposed rule, key terms like 'uplands' and 'contribute flow' are undefined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S."

Ultimately, a county is liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. For example, in 2002, in *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the County argued that the Corps permit process did not allow for timely approvals.

The National Association of Counties' policy calls on the federal government to clarify that local streets, gutters, and human-made ditches are excluded from the definition of "waters of the U.S."

Stormwater and Green Infrastructure

Since stormwater activities are not explicitly exempt under the proposed rule, concerns have been raised that Municipal Separate Storm Sewer System (MS4) ditches could now be classified as a "water of the U.S." Some counties and cities own MS4 infrastructure including ditches, channels, pipes and gutters that flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program.

This is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a

"water of the U.S.," they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.

In addition, green infrastructure is not explicitly exempt under the proposed rule. A number of local governments are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes. The proposed rule could inadvertently impact a number of these county maintained sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. In stakeholder meetings, EPA has suggested local governments need to include in their comments whether an exemption is needed, and if so, under what circumstances, along with the reasoning behind the request.

Potential Impact on Other CWA Programs

It is unclear how the proposed definitional changes may impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems. According to a joint document released by EPA and the Corps, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014), the agencies have performed cost-benefit analysis across CWA programs, but acknowledge that "readers should be cautious is examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis."

Submitting Written Comments

NACo has prepared draft comments for counties. Go to NACo's "Waters of the U.S." hub for more information, www.naco.org/wous.

Written comments to EPA and Corps are due no later than November 14, 2014. *If you submit comments, please share a copy with NACo's Julie Ufner at jufner@naco.org or 202.942.4269.*

Submit your comments, identified by ***Docket ID No. EPA–HQ– OW–2011–0880*** by one of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments
- E-mail: ow-docket@epa.gov. Include EPA–HQ–OW–2011–0880 in the subject line of the message
- Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OW–2011–0880.

For further information, contact: Julie Ufner at 202.942.4269 or jufner@naco.org