

Agenda Item Report



Winnebago County
The Wave of the Future

DATE: April 7, 2022

FROM: Chad Casper, Director of Land & Water Conservation Department

RE: Resolution to Support NACo's Position on Defining the Waters of the United States (WOTUS) and Regulations with Agricultural Considerations

General Description:

Redefining the "Waters of the United States" (WOTUS) is the Biden Administration's goal of outlining the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' authority in regulating water. The proposed definition aims to enforce a stricter definition and cumbersome definition of WOTUS.

Action Requested:

Motion to approve the attached resolution to support NACo's position to urge the Biden Administration to recognize state and local authority to protect rural, disadvantaged frontier communities, from regulations gravely affecting the Nation's agricultural supply chain.

Procedural Steps:

Committee of Jurisdiction: <u>Land Conservation</u>	Meeting date: <u>4/7/22</u>
Action taken: <u>Recommend passage</u>	Vote: <u>6-0</u>

<u>County Board</u>	Meeting date: <u>4/26/22</u>
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Background:

As both co-regulators and regulated entities under the Clean Water Act (CWA), the "Waters of the United States" (WOTUS) definition directly impacts each and every county within the country. Since regulations under the CWA were first established in 1979, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) substantially changed the definition of WOTUS in 1986, 2015 and 2020. Redefining the WOTUS is the Biden Administration's goal of outlining the U.S. EPA and U.S. Army Corps authority in regulating water. The proposed rule expands federal jurisdiction and is based on the administration's interpretation of the CWA. The new definition ignores state and local authority in regulating our resources with local dignity and best practices.

Policy Discussion:

The proposed WOTUS definition includes waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas and waters which are relatively permanent or that have a continuous surface connection to such waters.

Under the proposed rule, the agencies interpret WOTUS to include:

- Traditional navigable waters
- Interstate waters
- Territorial seas

The agencies call the traditional navigable waters, interstate waters, and territorial seas "foundational waters."

In addition to the foundational waters, the agencies are proposing to include:

- Adjacent wetlands to foundational waters, tributaries, impoundments which meet either the relatively permanent standard or the significant nexus standard
- Impoundments of foundational waters and impoundments which meet either the relatively permanent standard or the significant nexus standard
- Tributaries of foundational waters
- Other waters which meet either the “relatively permanent standard” or the significant nexus standard

The proposed rule includes the following definitions:

- **Relatively permanent standard:** *Waters which are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.*
- **Significant nexus standard:** *Waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the "foundational waters").*

The new WOTUS definition expands federal jurisdiction and directly impacts counties as owners and operators of local infrastructure. Counties own and operate public safety water conveyances, stormwater municipal separate sewer systems (MS4), green infrastructure construction and maintenance projects, water reuse and infrastructure, and emergency management readiness. Depending on the final definition of WOTUS, counties may need to apply for a federal permit to maintain or build new infrastructure projects such as:

- **Public Safety Water Conveyances:** *Roads and roadside ditches, flood control channels, drainage conveyances, culverts, etc.*
- **Stormwater Municipal Separate Storm Sewer Systems (MS4):** *Comprised of channels, ditches and pipes*
- **Green Infrastructure Construction and Maintenance Projects:** *Includes but is not limited to low-impact development projects (LID), bioswales, vegetative buffers, constructed wetlands, stormwater detention ponds, etc.*

Suggest supporting the following for the definition of WOTUS under Clean Water Act regulations:

- Maintain a definition consistent with traditionally navigable waters, territorial seas, their regularly flowing tributaries, and abutting wetlands. Oppose broadening the definition of WOTUS to expand federal jurisdiction.
- Maintain the exclusion related to agriculture and provide clear exclusions for agricultural specific features, including prior converted croplands and stock ponds. Clarity and consistency are imperative for all segments of the agricultural supply chain.
- Ephemeral features with water flowing less than 120 days; intermittent streams; isolated water features; agricultural stock ponds; ditches and culverts; previously converted cropland; and groundwater are intrastate resources and should be excluded from federal jurisdiction.
- Ensure clear, concise language that is easy for counties to interpret without the need to hire experts or legal counsel and so that a reasonable person would be able to identify that a body of water is either regulated by the federal government or by their state government.

Attachments:

Resolution to Support NACo's Position on Defining the Water of the United States (WOTUS) and Regulations with Agricultural Considerations