



Written statement of

The Honorable Gary Moore
County Executive, Boone County, Ky.

On behalf of the National Association of Counties

Unfunded Mandates: Examining Federally Imposed Burdens on State and Local
Governments

Before the
House Committee on Oversight and Government Reform
Subcommittee on Intergovernmental Affairs

United States House of Representatives
April 26, 2017
Washington, D.C.

Chairman Palmer, Ranking Member Demings, Chairman Chaffetz, Ranking Member Cummings and distinguished members of the Committee and Subcommittee, thank you for holding today's hearing to further examine federally imposed burdens on state and local governments. I am honored to provide testimony on behalf of the National Association of Counties (NACo) to share with you both how unfunded mandates impact counties and the importance of strengthening a strong intergovernmental consultation process that provides for a substantial review of potential mandates in federal legislation and regulation.

My name is Gary Moore and I am the elected Judge-Executive County Executive for Boone County, Kentucky. With nearly 130,000 residents, Boone County has more than tripled its population over the last 30 years and is one of the fastest growing counties in the nation. Located in the largest bend of the Ohio River just a few miles from Cincinnati, Ohio, Boone County is complete with natural beauty, a rich history, a strong economy, visionary leadership and wonderful people.

At NACo, I serve as chair of the Environment, Energy and Land Use Policy Steering Committee and I chaired NACo's joint Opioid Epidemic Task Force with the National League of Cities. NACo is the only national organization that represents county governments in the United States, including Alaska's boroughs and Louisiana's parishes. Founded in 1935, NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

Counties are highly diverse, not only in my state of Kentucky, but across the nation, and we vary immensely in natural resources, social and political systems, and cultural, economic and structural circumstances. Despite this diversity, all counties fulfill many similar responsibilities at the local level. Counties are responsible for supporting and maintaining public infrastructure, transportation and economic development assets, providing justice, law enforcement and public safety services, and protecting the public's health and well-being.

These responsibilities are shared among federal, state and local partners, as they are the fundamental components of a broader national interest in serving our citizens. While the policies and programs established by the federal government are intended to guide and coordinate efforts, counties are ultimately the implementers, or even co-regulators, at the local level. That is why **federal policies matter to counties and counties matter to federal policies.**

State and local governments have experienced a dramatic shift in how the federal government seeks to implement policies. Rather than pursuing cooperation, state and local governments increasingly are subject to legislation and regulations that impose obligations without funding

to assist implementation. Intense advocacy efforts two decades ago resulted in the passage of the Unfunded Mandates Reform Act (UMRA) of 1995.

I am here to testify that, despite the success of passing UMRA, unfunded federal mandates continue to challenge counties today. Counties are encouraged by the focus on this issue on Capitol Hill and by this committee, and urge Congress to pursue further improvements to both the legislative and regulatory processes to comprehensively address federal unfunded mandates on state and local jurisdictions.

Today, I would like to share three key points that Congress should weigh as it considers updating and improving the consultation process:

- 1) The established framework for the consultation process between federal agencies and state and local governments should be updated and improved**
- 2) Counties will continue to face mounting fiscal stress from mandates if the process is not improved**
- 3) Our system of federalism requires a strong federal, state and local partnership to achieve our shared goals**

First, the established framework for the consultation process between federal agencies and state and local governments can be updated and improved.

Under the framework established by UMRA, Congress defined federal mandates as any provision in legislation, statute or regulation that “would impose an enforceable duty upon state, local, or tribal governments” or “reduce or eliminate the amount” of federal funding authorized to cover the costs of an existing mandate. Some portions of UMRA have successfully reduced the occurrence of unfunded mandates. However, others have been less effective, and there are ways Congress can strengthen and improve the consultation process.

UMRA Should Be Updated to Ensure Local Input

Over the last few decades, UMRA’s Title I helped identify and reduce the number of mandates being considered and imposed through the legislative process and established a procedural framework to shape how Congress considers proposed legislation that could place unfunded mandates on state and local governments. According to the Congressional Research Service (CRS), since UMRA’s enactment, unfunded mandates were found in only one percent of over ten thousand cost estimates of proposed legislation prepared by the CBO. This evidence

indicates that Title I helped reduce the number of bills imposing unfunded mandates on state and local governments.

Unfortunately, UMRA's Title II consultation process with federal agencies has not been as effective as Title I.

Title II of the law established a framework for federal agencies to consult with state and local governments to help assess the effects of federal regulatory actions containing intergovernmental mandates. However, UMRA leaves the responsibility to each agency to develop its own consultation process, resulting in a consultation process that varies from agency to agency, and often within agencies as well.

Further, counties are often responsible for implementing and helping fund policies and programs established by the states and federal government. In many instances, we even function as co-regulators with the states and federal agencies. Given these important intergovernmental roles and responsibilities, counties are more than mere stakeholders or members of the interested public – counties are intergovernmental partners. Unfortunately, all too often, our opportunity to engage in the rulemaking process is limited to the same comment period offered to the public.

Meaningful consultation with counties and local government early in the rulemaking process is imperative to reduce the risk of unfunded mandates produce more pragmatic and successful strategies for implementing federal policies. For intergovernmental consultation to be truly meaningful, Congress should direct federal agencies to engage state and local governments as partners, actively participating in the planning, development and implementation of rules. Counties are often the level of government closest to the people and directly accountable to our constituents.

To give you a sense of the consequences of less than ideal consultation, I will highlight two examples of recent regulations where agencies did not engage in what we consider an effective and meaningful intergovernmental consultation process.

U.S. Environmental Protection Agency's "Waters of the U.S." Rule

In May 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued the final rule on the definition of "Waters of the United States" under the Clean Water Act (CWA). The rule sought to clarify the EPA's authority under the CWA. Throughout the development of the rule, the EPA did not, and in fact refused to, meaningfully consult counties prior to the proposed rule's publication, despite our having repeatedly requested to be at the table to work together towards a practical rule.

When the final rule was released, it immediately created more confusion than clarity and significantly expanded the EPA's CWA jurisdiction to potentially include county-owned and maintained roadside ditches, flood control channels, drainage conveyances and wastewater and storm water systems.

Had state and local stakeholders been consulted from the beginning, many of the pitfalls of this rule could have been avoided. Throughout the process we have argued the best remedy would be robust intergovernmental consultation and collaboration to develop definitions and regulations that make sense on the ground. The new administration has started a state and local consultation process on this rule, and we look forward to working with our federal partners on this important issue.

U.S. Department of Labor's Overtime Pay Rule

In July 2015, the U.S. Department of Labor (DOL) issued a proposed rule to update and revise the regulations issued under the Fair Labor Standards Act (FLSA) that would change the way employers determine minimum wage and overtime pay for executive, administrative and professional employees. The rule would double the current salary threshold for overtime pay eligibility and establish a mechanism to automatically update the threshold.

As employers, counties provide both wages and benefits to 3.3 million employees. The substantial threshold increase could negatively impact county employees' wages and benefits. Some counties have calculated that the overtime pay change could increase their payroll costs dramatically in the first year of implementation and beyond. For example, Berks County, Pa. estimated that 97 employees would be eligible for overtime pay under the rule. In the first year alone, this could cost an additional \$1.5 million to the county. Most counties must operate on a balanced budget and would not have the financial resources for major pay increases without increasing taxes or finding reductions in areas like employee benefits or employee work hours.

Despite this substantial direct effect, DOL did not adequately consult state and local governments to assess the potential impact of the proposed rule. Because there was no meaningful consultation, NACo has requested an extension of the comment period to perform additional analysis on the administrative and fiscal impact on county governments. Earlier and more meaningful consultation with state and local governments could have resulted in a rule that would have been less challenging to implement at the local level.

These are just two of many examples we can provide and have shared recently with lawmakers. It is worth noting that **we do not necessarily disagree with the underlying objectives of these**

or many other rules; we are concerned with how the agencies are conducting the rulemaking process without truly consulting their intergovernmental partners.

Ways to Improve the Consultation Process

Although UMRA established some guidelines for the consultation process between federal agencies and state and local governments, the process itself needs to be strengthened and improved, and Congress is well positioned to make those adjustments.

For example, CBO's consultation approach for analyzing legislative mandates is worth replicating in the regulatory process. CBO periodically and proactively brings together NACo and other state and local government organizations to discuss and seek input on mandates in proposed legislation. This collaborative process allows CBO to learn about the direct impacts of intergovernmental mandates from those most affected – state and local governments. Although the process is not perfect, it allows local government partners to weigh in with CBO.

Additionally, counties are encouraged by efforts like H.R. 50, the Unfunded Mandates Information Transparency Act (UMITA), which passed the House of Representatives last Congress and was reintroduced earlier this year, and its Senate companion bill from last Congress, S. 189. Provisions in the bill, such as requiring enhanced levels of consultation by federal agencies with state and local governments, establishing principles for federal agencies to follow when assessing the effects of regulations on state and local governments and expanding the scope of reporting requirements to include regulations imposed by most independent regulatory agencies, are positive ways to address some of the concerns we are raising.

Finally, we are hopeful that legislation like H.R. 1009, the OIRA Insight, Reform and Accountability Act, will increase levels of consultation and collaboration between agencies and state and local stakeholders. The bill asks each agency to include “a summary of the agency’s plan to coordinate with state, local, and tribal governments throughout the regulatory process” in its annual Regulatory Plan and explanation about “agency efforts to coordinate with state, local, and tribal governments throughout the regulatory process,” both of which we hope will increase collaboration with counties earlier in the rule making process.

An example of positive early consultation is the Federal Emergency Management Agency’s (FEMA) “disaster deductible” proposed by the agency last year. If implemented, the rule would require states and local governments to satisfy an insurance-like deductible before receiving Public Assistance funding from the federal government to repair and rebuild damaged

infrastructure after major disasters. FEMA shared an initial draft of the proposal last year with intergovernmental partners seeking feedback. After receiving initial comments from stakeholders, FEMA released the second iteration of the proposal in January to solicit further comments. These actions were taken prior to the agency initiating a public comment period. In response, NACo and the U.S. Conference of Mayors expressed serious concerns about the deductible concept. Throughout this process, FEMA has remained engaged at a high level and proactively sought input and consultation from counties and other stakeholders. We remain hopeful that by consulting with local governments so early in the process, FEMA will understand the potential impacts on counties and enact meaningful alterations to their proposal.

Ultimately, the consultation process should be consistent across the federal agencies and require that state and local governments, as intergovernmental partners, are meaningfully consulted throughout the rulemaking life cycle. Counties should be brought in at the earliest possible stage during policy development, prior to a proposed rule being published in the *Federal Register*. Seeking county input late in the rulemaking process is a missed opportunity to collaborate and develop rules that are both practical and effective.

Second, absent congressional action to improve intergovernmental collaboration, counties will face steadily increasing fiscal pressure due to unfunded federal mandates.

Absent congressional action to improve intergovernmental collaboration in the development and implementation of federal agency regulations, these mandates will add another layer of fiscal strain on counties already operating under considerable pressure. In many instances, counties are mandated to provide a growing number of services while operating under greater state and federal restrictions on how we generate revenue.

The challenge of fiscal constraints and tight budgets is shared by most counties, regardless of size. In fact, 45 states impose some type of limitation on county property taxes, affecting the main revenue source for counties. According to a report released by NACo last year, 55 percent of counties reported general revenues paying a larger share of county expenses in 2013 compared to 2007. Additionally, in a 2016 NACo survey, 44 percent of counties reported reducing or eliminating services in their last fiscal year due to revenue constraints and increasing costs of mandated services.

In my state of Kentucky, these revenue restrictions are particularly harmful as our counties face growing costs for mandated services. Recent reductions in the state budget resulted in reduced funding for jails and inmate health care. Even moderate reductions in funding can have substantial impacts – in Boone County alone we spent nearly \$17 billion on justice and public

safety expenditures in 2014. This includes funding for our county-run 911 system, which has also seen a reduction in revenue as the number of telephone landlines in the county decreases.

Counties are also responsible for significant public infrastructure maintenance in Kentucky, as we own 55 percent of public road miles and 34 percent of public bridges statewide. Though counties contribute the vast majority of funding to maintaining our public infrastructure, the state funding formula that contributes to county infrastructure disadvantages rapidly growing counties such as Boone County. Finally, increasing EPA regulations and a drop in natural gas prices and the county share of the coal severance tax are compounding county financial problems.

But it's not just in Kentucky. In Montgomery County, New York, for example, federal and state mandates consume 86 percent of the total tax levy for the county. A majority of that figure consists of the county's local share of Medicaid, which consumes 44 percent of local property tax revenue. In 2015, the county's tax levy brought in over \$27 million dollars. But after paying for mandates like the county's share of Medicaid, corrections, community colleges and social services, only slightly less than \$4 million remained for all other services and functions of county government.

These examples highlight what is most damaging about unfunded mandates: they hide from policy makers the true impact of federal programs when the cost of implementing them is shifted onto local governments that are already overburdened. In many instances, the shift creates budgetary imbalances that require cuts to other critical local services like fire, law enforcement, emergency, education and infrastructure, or increases in local taxes and fees on constituents to make up the difference.

This is perhaps the most important reason for strengthening the intergovernmental consultation process, especially as it relates to regulations: federal policies and programs developed with only the impact on the federal treasury and not the impact on state and local governments in mind put the ability of local governments to fulfill our responsibilities at risk. At the end of the day, it is our shared constituents who will suffer from reduced public services or increased taxes at the local level.

Finally, our system of federalism requires a strong federal, state and local partnership to achieve common goals.

The American federal system of government is rooted in cooperation between all levels of government – federal, state and local – to ensure the public good. This requires balancing the need to establish national standards geared towards a shared goal; adequate funding to ensure

no one level is left to shoulder the burden of policy implementation; and incorporating local flexibility while still accomplishing the policy's goal.

Unfortunately, the partnership is often out of balance as federal agencies impose a one-size-fits-all approach, taking decision making away from local officials with experience and expertise in solving problems at the local level. As the closest form of government to the people, counties have the greatest ability to understand the diverse needs of our local communities. Our local experience and expertise helps us identify alternative, more cost-effective methods to address an issue, as opposed to a top-down federal directive.

A recent example of good collaboration and meaningful consultation regarding the Endangered Species Act (ESA) demonstrates that when federal, state and local governments work together, we see impactful results.

Counties recognize the importance of protecting America's fish, wildlife and plants. ESA requirements, however, can have a considerable economic, financial and public safety impact on county governments. In 2014 and 2015, the U.S. Department of Interior considered listing the bi-state sage-grouse as a threatened species under the ESA, a decision that would have impacted over 80 percent of the land in Mono County, California. In response, the county led a collaborative approach to achieve species conservation as well as ensure that new regulatory burdens were not imposed on private land owners in the impacted area.

The county and federal and state agencies worked collaboratively to assist in species population monitoring, provide technical support to local landowners to help mitigate the impacts of land use on bi-state sage-grouse habitat, make certain the best practices for conservation were being implemented on the landscape and secure necessary resources for conservation work in the region. The county also hosted outreach and education forums to ensure that the community members and land owners were informed on all aspects of the status under ESA, the impacts of a critical habitat designation on private and public land use and how individuals could contribute to species conservation.

These efforts proved successful. In April 2015, the Secretary of the U.S. Department of Interior, Sally Jewell, determined that the bi-state sage-grouse would not need to be listed as threatened under the ESA.

In this case, the synergy between the biological expertise of state and federal agencies and the county's ability to bring the local perspective on land use activities and the economic impacts of ESA decisions demonstrated that, when working in partnership, solutions can be found. This is only one example of many success stories of locally driven efforts. **Congress should build on**

these successes by strengthening the mandate review process to ensure the perspective brought to the table by each partner is fully considered.

Conclusion

Mr. Chairman, thank you again for bringing the county voice to the table today to discuss the importance of federally imposed burdens on state and local governments. The OIRA legislation discussed earlier includes provisions to ensure each agency has “assessed the effects of the regulatory action on state, local and tribal governments, including specifically the availability of resources to carry out the regulatory action, and minimized the burdens that uniquely or significantly affect such governmental entities.” This is, in essence, the regulatory process we hope Congress will implement across the federal government: consultation with state and local partners early and often, an assurance that the county voice will be at the table and an understanding of the local, state and federal barriers we face across the country.

Taking steps like these will help bring our system of federalism back into balance. Any action should encourage and foster a true dialogue where the strengths of each partner, as well as the challenges they face, are understood by all parties involved. Counties stand ready with innovative approaches and solutions to work side-by-side with our federal and state partners to ensure the health, well-being and safety of our citizens.

Chairman Palmer, Ranking Member Demings and distinguished members of the Committee, thank you for the opportunity to speak to you today. I will be happy to take any questions.

Attachments:

- NACo letter submitted to Chairman Chaffetz on unfunded mandates on January 20, 2017
- Joint letter submitted to Congress from National Governors Association, National Conference of State Legislatures, The Council of State Governments, National Association of Counties, National League of Cities, U.S. Conference of Mayors and International City/County Management Association in support of the Unfunded Mandates Information and Transparency Act on November 17, 2015
- NACo’s Compilation of Unfunded Mandates and Other Regulatory Impacts on Counties
- NACo letter submitted to EPA and the Corps on the “Waters of the U.S.” proposed rule on November 14, 2014
- NACo letter submitted to DOL on “overtime pay” proposed rule on August 31, 2015

- Joint letter submitted to EPA from National Association of Counties, National League of Cities, U.S. Conference of Mayors and National Association of Regional Councils on proposed ozone rule on March 17, 2015



January 20, 2017

Chairman Jason Chaffetz
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Chaffetz,

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we thank you for your efforts to study and minimize the effects of unfunded mandates on state, local and tribal governments and private entities. As an integral part of the federal-state-local intergovernmental process, counties are directly impacted by federal unfunded mandates and look forward to working with you on this effort.

Counties are highly diverse across our nation and vary significantly in size, population, natural resources, political systems and cultural, economic and structural circumstances. Yet, as an arm of the state, counties are mandated through federal and state law to fulfill many responsibilities at the local level. Additionally, county governments directly affect the economic vitality and quality of life in our communities. This role encompasses a range of services, from maintaining 45 percent of America's roads to supporting nearly 1,000 hospitals to keeping communities safe through law enforcement. These services require massive resources including more than \$106 billion annually in building infrastructure and maintaining and operating public works, more than \$53 billion annually in construction of public facilities and nearly \$70 billion annually for community health and hospitals.

County governments exist to deliver public services at the local level, with accountability to our constituents and communities as well as to state and federal authorities. In fulfilling this mission, counties are not only subject to state and federal regulations, but also help to implement them at the local level. Therefore, as both regulated entities and regulators, it is critical that counties be fully engaged as intergovernmental partners through the entire federal regulatory process—from initial development through implementation.

While responsibilities are shared among all levels of government, the primary oversight for these programs occurs at the local level. In recent years, under both federal and state rules, county responsibilities have expanded, often without additional funding to meet these new requirements, creating unfunded mandates for our counties. This leaves counties in a precarious position. On one

hand, we are obligated under law to implement these new requirements; on the other hand, counties are limited by the states in our ability to adequately raise revenue. This dynamic often forces counties to prioritize spending set in a manner that is often at odds with community needs.

Counties are further challenged because states are limiting counties' revenue authority to fund these essential services. The main general revenue source for most counties is property and sales taxes. However, while counties in 45 states collect property taxes, under state law, we only can keep about a quarter (23.7 percent) of the taxes collected. **Additionally, 42 states limit the authority of counties to raise or change property taxes.** This limits a county's ability to effectively raise additional revenue to pay for unfunded mandates. Attached is a 2016 NACo report, "Doing More with Less: State Revenue Limitations and Mandates on County Finances," which further explains county fiscal restraints.

In addition to implementing state and federal programs, local governments are also expected by our constituency to provide local services, like public safety and after school programs. **When the cost of unfunded mandates outweighs available funds, counties often have to make difficult budget choices on these services—for example, do we cut hours at local libraries, delay road and bridge maintenance projects or even cut back on emergency response services?** Ultimately, when counties are faced with these difficult choices, it is our residents and local communities that are negatively impacted.

To aid your efforts of studying unfunded mandates, we have listed below several examples of existing and proposed federal regulations that create unfunded mandates on our counties. Additionally, attached to this letter is a more comprehensive list of unfunded mandates that impact local governments.

Uncompensated Health Care

Nationally, counties invest \$83 billion annually in community health for more than 300 million residents nationwide. Through 961 county-supported hospitals, 883 county-owned and supported long-term care facilities and 1,943 county public health departments, counties deliver health services to millions of Americans, including many Medicaid beneficiaries. Additionally, through 750 county behavioral health authorities and community providers, county governments plan and operate community-based services for persons with mental illnesses and substance abuse conditions which represent 75 percent of the U.S. population.

The majority of states require counties to provide some level of health care for low-income, uninsured, or underinsured residents—but this care is often not reimbursed. The Urban Institute estimates that states and localities spent \$20 billion for uncompensated care in 2013. In Harris

County, Texas, for example, resident pays more than \$500 million per year in property taxes to cover the cost of uncompensated care in the county's public hospitals.

Providing Costly Health Services for Individuals in Jail

At a cost of \$176 billion annually, criminal justice and health systems are a huge budget item for counties. As owners and operators of 87 percent of the nation's jails, we are required to provide adequate health care for individuals entering the criminal justice system, even for those individuals who are awaiting trial and presumed innocent. Under federal law, once a person is booked into jail, even though still presumed innocent until adjudicated, they are unable to access their federal Medicaid and veterans' health benefits. The jail assumes all medical and/or mental health care service costs for that individual until they leave the jail. This is a significant expense for counties since it is estimated that 68 percent of inmates have a history of substance abuse, 64 percent of inmates struggle with mental illness and 40 percent have a chronic health condition. Ultimately, these extra expenses are borne by county tax-payers.

For example, in 2014, in State of Washington, King County Public Health paid \$29 million in health care services for incarcerated people in the custody of the King County jail, which accounted for 20 percent of total jail costs for the county. According to the 2011 Indiana State Healthcare Spending Report, the average national healthcare cost for inmates is \$3,025 per month. However, the cost could be significantly higher depending on the health of the individual in jail.

"Waters of the U.S.": Costly Maintenance and Permitting Requirements

While NACo has numerous examples of the impact of environmental mandates on counties, the most significant examples come from the current Clean Water Act's (CWA) definition on "waters of the U.S." (WOTUS) or Clean Air Act (CAA) regulations.

Under CWA, many of the basic functions of county government, including ownership and maintenance of roads and roadside ditches, bridges, stormwater systems and flood control channels, are regulated under federal and state water policies. Ditches, in particular, are pervasive across the nation and, until recently, were never considered to be jurisdictional under WOTUS. However, in the last decade, certain Army Corps of Engineers (Corps) districts have inconsistently found public safety ditches jurisdictional. Once a ditch falls under federal jurisdiction, the CWA Section 404 permit is triggered, often leading to extremely cumbersome, time-consuming and expensive processes.

One Midwest county recently studied five road projects that were delayed over a period of two years as the county awaited federal permits. Conservatively, the cost to the county for the delays

was \$500,000. Some counties have missed building seasons waiting for federal CWA Section 404 permits.

Further, while the CWA Section 404 permit contains provisions to exempt ditch maintenance activities, these provisions are unevenly applied. For example, a county in Florida applied for 18 specific maintenance exemptions on the county's network of drainage ditches and canals. Due to the complicated federal permitting process, the county had to hire a consultant to compile the data and surveying materials that were required for the exemptions. Within three months, the county had spent \$600,000 and was still waiting for 16 of the exemptions to be determined. Due to the time-consuming maintenance process, the county was unable to maintain upkeep of the ditches, resulting in extreme flooding in residential areas.

Tighter Air Quality Standards: EPA's Clean Air Act Rules

As both regulated and regulating entities, counties are uniquely positioned to play a key role in the development and implementation of CAA regulations. Counties fulfill both of these roles and are responsible for ensuring that CAA goals are achieved. This is demonstrated under the CAA National Ambient Air Quality Standards (NAAQS) program. NAAQS establishes national air pollution limits for ozone, particulate matter, carbon monoxide, lead, sulfur dioxide and nitrogen dioxide.

New NAAQS rules have a significant impact for counties who are required to implement and enforce new air pollution rules and regulations at the local level, such as implementing rules governing open-air burning or limiting vehicle emissions. Implementing these new rules and regulations can be costly for local governments and may have an unintended impact on local economic development efforts. Many of our counties have watched businesses and industry find alternative locations for their plants outside of NAAQS nonattainment areas to avoid new requirements. This impacts the ability of counties to attract and retain businesses within their borders.

For example, in the last several years, Berks County, Pennsylvania, was placed on a maintenance plan for the 2008 NAAQS for lead, which led to tighter air quality requirements in the county. This, in turn, led to a major coal-fired power plant closing. As a result, 75 employees lost their jobs and the county lost \$44,403 in annual tax revenue.

DOL's Overtime Pay Rule: Requiring County Employers to Make Difficult Decisions

In May of 2016, the U.S. Department of Labor (DOL) released a final rule that would increase the salary threshold for "white collar" employees who are eligible for overtime pay from \$23,660 to \$47,476. Since counties employ over 3.6 million people, the rule could have the unintended effect of placing additional strain on already limited county budgets throughout the country, hindering our ability to provide crucial services to our local communities.

For example, in Sebastian County, Arkansas, which has a population of 127,342, under DOL's new rules, 35 of the county's current 382 full-time employees are eligible for overtime pay. This will result in an additional unexpected financial burden of almost \$228,000 in the first year alone, which may reduce incentive compensation opportunities and require county employers to make difficult employee decisions.

After the DOL rule was finalized, Mineral County, a small rural county of 4,478 in western Nevada, determined that at least ten percent of their workforce would be impacted by the new rule. This would be significant for a county of this size and it led the county to make several difficult decisions on cutting non-essential but popular community programs. For example, the county assessed whether to close the county's sole library, which was a key source for Internet access to the residents, or severely limit access to its library resources. These examples highlight the challenges our counties faced with the new DOL overtime rule.

Preemption of Local Tax Authorities: Internet Tax Freedom Act

Most counties are limited in our abilities to collect additional revenue to pay for mandated and un-mandated public services and find themselves depending heavily on property and sales taxes. This dependence was put to the test in 1998, after Congress passed the Internet Tax Freedom Act (ITFA) which limited state and county ability to collect Internet sales tax and has resulted in a loss of hundreds of millions of dollars. Since counties own and maintain the roads, bridges and other public infrastructure and public safety used to deliver and safeguard goods purchased online, it is reasonable that a portion of the Internet sales should be dedicated to supporting this infrastructure.

The scale of lost revenue that local governments are facing is evident in the fact that the seven states (Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Texas and Wisconsin) who are grandfathered under ITFA—and thus allowed to collect Internet tax revenue—are collecting over \$500 million a year in taxes. Counties in non-grandfathered states doubtlessly feel the impact of this loss of revenue on their already strained budgets.

For example, in Georgia alone, local governments lost \$737 million in revenue in 2013. And in the State of Washington, local governments lost \$663.8 million in uncollected sales tax revenue during the same year.

These examples demonstrate the heavy burden that unfunded mandates continue to place on counties. Reforms to the Unfunded Mandates Reform Act of 1995 (UMRA) are needed to remedy this situation and enable counties to provide needed services to local communities. NACo's suggestions for such reforms are respectfully listed below.

Strengthen the Federal-State-Local Rulemaking Partnership

Over two decades ago, Congress passed UMRA. While UMRA resulted in progress on unfunded mandates, further improvements are needed to strengthen the federal-state-local government partnership.

Over the last few decades, UMRA's Title I has helped to identify and reduce the number of mandates in the legislative process. Specifically, it established a procedural framework to shape how Congress considers proposed legislation that could place unfunded mandates on state and local governments. According to the Congressional Research Service (CRS), since UMRA's enactment, unfunded mandates in proposed legislation were found in only one percent of over ten thousand cost estimates prepared by the Congressional Budget Office (CBO).

However, UMRA's Title II consultation process with federal agencies has not been as effective as Title I. Under UMRA's Title II, each federal agency is required to consult with state and local governments to assess the effects of federal regulatory actions containing intergovernmental mandates. However, UMRA leaves the responsibility up to each agency to develop its own consultation process and provides no uniform standards for agencies to follow. As a result, the requirement has been inconsistent and each agency's internal process is different.

Many of the issues could be prevented if counties were regularly consulted in the rulemaking process. Meaningful consultation early in the process not only reduces the risk of unfunded mandates, but also results in more pragmatic and successful strategies for implementing federal policies. If the federal government works with counties, we can strengthen legislative and regulatory processes and craft rules that relieve the pressure of unfunded mandates on local governments.

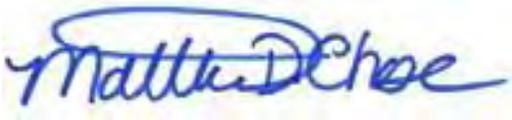
For example, while EPA has an internal guidance document that governs the agency's interactions with state and local governments on pending rules, it is inconsistently applied at the agency. Under "*EPA's Action Development Process: Guidance on Executive Order 13132: Federalism*," it states that states and local governments must be consulted on rules if they impose substantial compliance costs of \$25 million or more, preempt state or local laws and/or have substantial direct effects on state and local governments. For rules that trigger this requirement, EPA is required to consult in a "meaningful and timely" manner with a specific set of state and local elected officials or their organizations. In theory, EPA's guidance is a good first step in strengthening the consultation process, however, if the policy is haphazardly applied, the agency loses valuable insight into how proposed rules and regulations impact state and local governments.

The bottom line is that Congress should require federal agencies to engage with state and local governments often, and as early as possible, when considering proposed and pending rules that have a direct impact on state and local governments. Meaningful consultation with

counties and local governments early in the rulemaking process would not only reduce the risk of unfunded mandates, but would result in more pragmatic and successful strategies for implementing federal policies.

We thank you for your time and stand ready to work with you to strengthen the regulatory process between federal, state and local governments that we hope will result in successful strategies for implementing federal policies.

Sincerely,

A handwritten signature in blue ink that reads "Matthew D. Chase". The signature is fluid and cursive, with a large loop at the beginning of the first name.

Matthew D. Chase
Executive Director
National Association of Counties

November 17, 2015



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Washington, DC 20515

The Honorable Loretta Sanchez
U.S. House of Representatives
1211 Longworth House Office Building
Washington, DC 20510

RE: The Unfunded Mandates Information and Transparency Act (S. 189/H.R. 50)

Dear Senators Lankford and Fischer and Representatives Foxx and Sanchez:

On behalf of the Big 7, a coalition of national organizations that represent state and local officials, we applaud your efforts to make improvements to the Unfunded Mandates Reform Act (UMRA) of 1995. Monitoring federal regulations and planning for unfunded mandates continues to be one of the most pressing issues for state and local leaders. In particular, we support strengthening the required analysis of pending legislation and your call for a strong regulatory look back process. This additional information is critical for improving both the legislative and regulatory processes.

As you know, UMRA was designed to limit the imposition of unfunded federal mandates on state, local, and tribal governments by requiring the Congressional Budget Office and regulatory agencies to provide a qualitative and quantitative assessment of the anticipated costs of legislation and certain regulations, respectively. As UMRA begins its third decade, its goal to "...curb the practice of imposing unfunded Federal mandates on State and local governments," is even more important.

A report by the White House Office of Management and Budget stated that federal regulations and unfunded mandates cost states, cities and the general public between \$44 and \$62 billion each year. With many states and local governments continuing to face difficult economic conditions, the federal government should avoid imposing any new unfunded mandates. Moreover, federal regulatory agencies should work more closely with state and local governments and other stakeholders during the rule making process to gather input and identify practical solutions.

We commend you for your leadership in advocating the enactment of this legislation, and we look forward to working with you and your staff to ensure its passage.

Sincerely,



David Adkins
CEO and Executive Director
The Council of State Governments



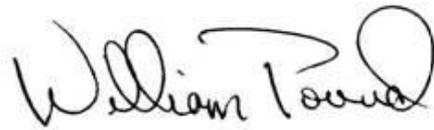
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Robert J. O'Neill, Jr.
Executive Director
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CC: Members of the United States Senate and House of Representatives



UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

ENVIRONMENTAL PROTECTION AGENCY

Clean Air Act	Compliance with federal air pollution standards, including, but not limited to, monitoring air quality; retrofitting stationary and mobile sources of pollution and obtaining required permits; ozone and particulate matter (PM) standards for PM 10 and PM 2.5. While tighter standards for PM 10 have been temporary tabled, the reconsideration process for air standards resets every five years.
Particulate Matter Standards	Mentioned briefly above, lowering PM standards is problematic, especially for rural areas, where practices governing regular everyday events such as cars driving down dirt roads and agricultural practices that sustain local economies could be regulated, as could natural events such as wildfires, droughts or wind storms. Because of the high, naturally occurring, dust levels found in arid climates, many western counties have a difficult time meeting the current PM standard. This, in turn, affects their economic base, which will further restrain economic recovery. Based on previous experience, non-attainment areas have difficulty maintaining and attracting businesses to their regions, since these businesses would have to operate under the tighter standards. Most businesses chose to relocate or not even build in a non-attainment area.
Ozone Standards	The EPA is currently assessing whether to tighten the current National Ambient Air Quality Standards (NAAQS) for ozone. 358 to 558 additional counties would be considered in non-attainment under the standards. For counties designated as being in non-attainment, this impacts both economic development and transportation conformity projects.
Clean Water Act	Compliance with federal regulations and mandates related to: county owned water and wastewater treatment regulations; combined and sanitary sewer overflow consent decrees; "Waters of the U.S." definitional changes (refer below for more specific problems with the navigable "waters of the U.S." regulation program); regulation of point and non-point discharges (including those from forest roads), including standards for improving and maintaining water quality; stormwater regulations; and inconsistent blending and bypass rules.
Pesticides Regulation	The general permit for pesticides became effective the end of October, 2011. NACo has heard mixed reviews from our counties. Some counties, have changed spraying patterns, which may not be as effective as previous practices. The general permit has a heavier paperwork burden for spraying activities. This in turn has changed the way counties administer the program. Since county governments serve as primary service providers for their residents, this permit has significant effects on county programs, particularly mosquito abatement and noxious weed control efforts, creating unfunded mandates for both urban and rural counties through the tight reporting requirements. Additionally, the final "Waters of the U.S." rule may trigger expanded regulation for counties
Stormwater Regulations	CWA stormwater regulations, also known as municipal separate storm sewer systems (MS4s), apply to counties with populations of 100 thousand or more and certain counties in or near urban areas. MS4s are required to meet water criteria standards, generally through Best Management Practices (BMPs). However, in recent years MS4 permits are moving away from BMPs to stricter nutrient numerical limits which can make it both infeasible and very expensive to comply with permit requirements.

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

Blending and Bypass

In a March 2013 court case, *Iowa League of Cities v. EPA*, the U.S. Court of Appeals for the 8th Circuit struck down EPA's prohibitions against the practice of blending wastewater at Publically Owned Treatment Works (POTW) during wet weather events and against the use of mixing zones in permits for compliance with bacteriologic standards. Despite requests by NACo and other local government groups that this practice should not be prohibited nationwide, EPA stated that the use of blending and bypass is only applicable to areas within the 8th Circuit Court's jurisdiction and not applicable to other areas of the country. This court decision should be applied to all regions rather than just to the 8th Circuit Court region.

Drinking Water

Establishes maximum contaminant levels for contaminants in public water systems and specifies treatment techniques to be used. Upcoming regulations that will have a direct impact on local governments that own/operate drinking water facilities include the lead and copper rules and the cyanotoxin advisory requirements.

Resource Conservation and Recovery Act

Cleanup at landfills, superfund sites and underground storage tanks - Local governments who own landfills are subject to federal standards regarding location, operating criteria, groundwater monitoring, corrective actions, closure and post- closure care. For Superfund sites, the issues stem from institutional controls such as zoning around sites, setting and enforcing easements and covenants and overseeing building and/or excavation near sites.

Brownfields Redevelopment/Dioxin

Brownfields redevelopment has created some of the biggest success stories for local governments. However, the EPA is assessing whether to drop its dioxin levels to a point that would halt all brownfields development in the nation. While dioxin can be created as a byproduct through manufacturing, it is also naturally occurring. The levels the EPA proposed to lower dioxin are equal to many naturally occurring levels. NACo would urge the EPA to revisit the science used behind the health standards. Otherwise, this could be a huge loss for local governments.

ARMY CORPS OF ENGINEERS – SPECIFIC PROBLEMS DEALING WITH THE 404 PERMIT PROGRAM (EPA & USACE)

Compensation Wetland Mitigation

Rule issued in conjunction with EPA. Local governments request added flexibility in meeting wetland mitigation requirements. Specific example includes variance between state and federal requirements. In this case, the state has an expanded set of options to meet the requirement that is not necessarily followed at the federal level. Therefore a local government may satisfy state requirements but not be able to meet federal requirements.

Ditch Drainage Requirements

The excessive amount of requirements necessary to provide information for USACE to review before a project is approved is both costly and time consuming for counties. For example, a county that wished to pursue and complete a drainage project was informed that the following was needed by USACE before work could be started: detailed plans showing existing condition, photos of areas where work will be done, details concerning existing water surface elevation, ordinary high water line, calculations of amount of material to be excavated, and a wetland delineation. Just to do this, the county would need to hire engineers to survey and perform calculations. All of this would significantly add to the cost of the project without necessarily ensuring clean water.

Post construction requirements – 404 Permit Related

The post construction monitoring process adds costs for channel rebuilds and other mitigation measures. For example, one county, after completion of a bridge replacement project, was required by NOAA Fisheries and FHWA to reinitiate formal consultation due to shifting boulders in the stream bed. State fish and wildlife officials supported the county in its objection and in its request to allow the channel to continue to stabilize. An updated BA and additional reporting would cost the county \$50,000 in this instance. Should the reconstruction of the stream bed be required by the agencies, almost \$1M in additional costs could be incurred.

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

Waters of the U.S.

Any changes to “Waters of the U.S.” definition within the CWA will have an impact on county owned and maintained ditches such as roadside, flood control, stormwater, etc. Additionally, since there is only one “waters of the U.S.” definition in the CWA, changes would impact more than the Section 404 permit program. What those changes are is not well understood nor has it been fully studied. This may have a significant impact on local governments.

TRANSPORTATION

Grant Requirements

Requirements do not provide flexibility during implementation phase. For example, a county applies for funding to install electronic dynamic driver feedback speed limit signs. The county would like to purchase the signs using grant funding and then use county resources (e.g. staff) to install them. Requirements however, dictate that all stages of the process must be let out to private contractors, which further implies other requirements, e.g. Davis-Bacon, EEO, etc.

MAP-21

MAP-21 provides for some major reforms in regard to project delivery/environmental streamlining. It also proposes to modify the categorical exclusion process for NEPA review of certain projects. NACo continues to be engaged in rulemakings pertaining to these areas.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

National Marine Fisheries Service

The Biological Assessment (BA) process through NMFS is extremely time consuming and raises costly barriers. For example, one county was working on a joint interchange project with the state to address urban growth. In an attempt to navigate the federal environmental permitting process, the project took two years alone to navigate the BA consultation with NMFS. A standard BA consultation generally takes 9-12 months but the NMFS process added more than a year in time and approximately \$1M in additional engineering costs with no added value to the project.

MISCELLANEOUS/MULTIPLE AGENCIES

Inmate Healthcare

The Supreme Court required counties to provide health care for jail inmates in *Estelle v. Gamble*, 429 U.S. 97 (1976), while the federal government refuses to contribute to the provision of Medicaid, Medicare, CHIP or veterans’ health benefits or services for otherwise eligible inmates.

Funding assistance-applications

When applying for funding assistance from separate sources/agencies for one project, multiple applications are required. The duplicity and lack of interchangeability of the forms and the agencies is very time consuming for local governments.

Use of “.gov” Domain for County Websites

The U.S. General Services Administration regulates the use of this extension. Arguably, this would make county sites easier to recall for constituents. Rules for use, however, restrict counties from enacting local ordinances/laws to assist in offsetting technology costs associated with website operation and maintenance via approved and regulated advertising.

Website Accessibility

The Department of Justice is currently considering a rule that would establish requirements to make websites for state and local governments accessible to individuals with disabilities. An advanced notice of the proposed rule was issued in 2010; however the Department has yet to issue the proposed rule. While counties support ensuring individuals with disabilities are able to access public information, the resources and additional funding needed for county websites to meet whatever standard is required by the rule will vary on a county by county basis and must be taken into consideration when determining the implementation period of the rule.

UNFUNDED MANDATES AND OTHER REGULATORY IMPACTS ON COUNTIES

Overtime Pay

In July 2015, the U.S. Department of Labor (DOL) released a proposed rule to amend regulations under the Fair Labor Standards Act governing the “white collar” exemption from overtime pay for executive, administrative and professional employees. In the proposed rule, DOL would change (more than double) the threshold for employees who are eligible to receive overtime pay, from \$23,660 to \$50,440. This level would also be adjusted annually. NACo submitted comments requesting DOL to extend the 60 day comment period to allow counties to calculate the financial and administrative burden this would impose on counties. NACo counties to collect information from counties regarding the financial and administrative impact of the overtime pay change.

Assessment of Fair Housing

The U.S. Department of Housing (HUD) released a final rule on updating Affirmatively Furthering Fair Housing practices and a proposed rule on the Assessment of Fair Housing Tool. HUD grantees are supposed to use the Assessment of Fair Housing (AFH) tool to analyze their fair housing goals to more effectively carryout their obligation to affirmatively further fair housing. AFH replaces the current Analysis of Impediments (AI) process which required HUD grantees that receive CDBG, HOME and Emergency Shelter Grants funding to identify local barriers to fair housing choice. The AFH is a much more comprehensive planning process, requiring jurisdictions to look at patterns of segregation and integration; racially and ethnically concentrated areas of poverty, and disparities in access to opportunity, as well as the contributing factors of those issues. The Tool is expansive and will take staff time and likely financial resources to implement. NACo submitted comments expressing concerns about the AFH Tool due to the lack of data provided by HUD for the new planning process and because HUD is not providing any funding to grantees to implement the new planning process and because HUD is not providing any funding to grantees to implement the new planning process. NACo continues to engage the Administration and Congress about county concerns with the AFH rulemaking.



November 14, 2014

Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314

Re: Definition of “Waters of the United States” Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we respectfully submit comments on the U.S. Environmental Protection Agency’s (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed rule on *Definition of “Waters of the United States” Under the Clean Water Act*.¹ We thank the agencies for their ongoing efforts to communicate with NACo and our members throughout this process. **We remain very concerned about the potential impacts of the proposed rule and urge the agencies to withdraw it until further analysis has been completed.**

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

The Importance of Clean Water and Public Safety

Clean water is essential to all of our nation’s counties who are on the front lines of protecting the citizens we serve through both preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality.

Counties are not just another stakeholder group in this discussion—they are a valuable partner with federal and state governments on Clean Water Act implementation. To that end, it is important that the federal, state and local governments work together to craft practical and workable rules and regulations.

Counties are also responsible to protect the public. Across the country, counties own and maintain public safety ditches including road and roadside ditches, flood control channels, stormwater culverts and pipes, and other infrastructure that is used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidents. **Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining their public safety ditches and infrastructure.**

¹ Definition of Waters of the U.S. Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014).

NACo shares the EPA's and Corps goal for a clear, concise and workable definition for "waters of the U.S." to reduce confusion—not to mention costs—within the federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

EPA asserts that they are not trying to regulate any waters not historically or previously regulated. But this is misleading. Prior to a 2001 Supreme Court decision,² virtually all water was jurisdictional. The EPA's and the Corps economic analysis agrees. It states that "Just over 10 years ago, almost all waters were considered "waters of the U.S."³ This is why we believe the proposed rule is an expansion of jurisdiction over current regulatory practices.

Hundreds of counties, including their respective state associations of counties, have submitted public comments on the proposed rule over concerns about how it will impact daily operations and local budgets. We respectfully urge the agencies to examine and consider these comments carefully.

This letter will highlight a number of areas important to counties as they relate to the proposed rule:

- **Counties Have a Vested Interest in the Proposed Rule**
- **The Consultation Process with State and Local Governments was Flawed**
- **Incomplete Data was Used in the Agencies' Economic Analysis**
- **A Final Connectivity Report is Necessary to Justify the Proposed Rule**
- **The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."**
- **Potential Negative Effects on All CWA programs**
- **Key Definitions are Undefined**
- **The Section 404 Permit Program is Time-Consuming and Expensive for Counties**
- **County Experiences with the Section 404 Permit Process**
- **Based on Current Practices—How the Exemption Provisions May Impact Counties**
- **Counties Need Clarity on Stormwater Management and Green Infrastructure Programs**
- **States Responsibilities Under CWA Will Increase**
- **County Infrastructure on Tribal Land May Be Jurisdictional**
- **Endangered Species Act as it Relates to the Proposed Rule**
- **Ensuring that Local Governments Are Able to Quickly Recover from Disasters**

Counties Have a Vested Interest in the Proposed Rule

In the U.S., there are 3,069 counties nationally which vary in size and population. They range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Forty-eight of the 50 states have operational county governments (except Connecticut and Rhode Island). Alaska calls its counties boroughs and Louisiana calls them parishes.

Since counties are an extension of state government, many of their duties are mandated by the state. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court

² *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'r (SWANCC)*, 531 U.S. 159, 174 (2001).

³ U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), *Econ. Analysis of Proposed Revised Definition of Waters of the United States*, (March 2014) at 11.

systems and county hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, and land use planning/zoning and water quality.

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 45 percent of public roads in 43 states (Delaware, North Carolina, New Hampshire, Vermont and West Virginia counties do not have road responsibilities). These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Of the nation's 3,069 counties, approximately 70 percent of our counties are considered "rural" with populations less than 50,000 and 50 percent of these are counties have populations below 25,000 residents. Any additional cost burdens are challenging to these smaller governments, especially since more rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased federal and state regulations with the limited financial resources available to local governments poses significant implementation challenges.

Changes to the scope of the "waters of the U.S." definition, without a true understanding of the direct and indirect impact and costs to state and local governments, puts our local governments in a precarious position, choosing between environmental protection and public safety. Counties do not believe this needs to be an either/or decision if local governments are involved in policy formations from the start.

Regardless of size, counties nationwide are coping with fiscally tight budgets. County revenues have declined and ways to effectively increase county treasuries are limited. In 2007, our counties were impacted by the national financial crisis, which pushed the nation into a recession. The recession affected the capacity of county governments to deliver services to their communities. While a number of our counties are experiencing moderate growth, in some parts of the country, economic recovery is still fragile.⁴ This is why we are concerned about the proposed rule.

The Consultation Process with State and Local Governments was Flawed

Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism. Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which includes meaningful consultation with impacted state and local governments.

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires federal agencies to consider potential impacts of proposed rules on small entities. This process was not followed for the proposed "waters of the U.S." rule.

Under RFA, small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. RFA requires agencies to analyze the impact any proposed rule

⁴ Nat'l Ass'n of Counties, *County Tracker 2013: On the Path to Recovery*, NACo Trends Analysis Paper Series, (2014).

could have on small entities and provide less costly options for implementation. The Small Business Administration's (SBA) Office of Advocacy (Advocacy) oversees federal agency compliance with RFA.

As part of the rulemaking process, the agencies must "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). To certify a proposed rule, federal agencies must provide a "factual basis" to certify that a rule does not impact small entities. This means "at minimum...a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."⁵

The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. **The agencies determined, incorrectly, there was "no SISNOSE"—and therefore did not provide a necessary review.**

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, SBA Advocacy expressed significant concerns that the proposed "waters of the U.S." rule was "improperly certified...used an incorrect baseline for determining...obligations under the RFA...imposes costs directly on small businesses" and "will have a significant economic impact..." Advocacy requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."⁶ **Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports the SBA Office of Advocacy conclusions.**

President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999. **Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments.** We believe the proposed "waters of the U.S." rule triggers Executive Order 13132. Under Federalism, agencies must consult with state and local officials early in the process and must include in the final draft regulation a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns.⁷ **A federalism impact statement was not included with the proposed rule.**

EPA's own internal guidance summarizes when a Federalism consultation should be initiated.⁸ Federalism may be triggered if a proposed rule has an annual implementation cost of \$25 million for state and local governments.⁹ Additionally, if a proposal triggers Federalism, EPA is required to work with state and local governments in a "meaningful and timely" manner which means "consultation should begin as early as possible and continue as you develop the proposed rule."¹⁰ Even if the rule is determined not to impact state

⁵ Small Bus. Admin. (SBA), Office of Advocacy (Advocacy), *A Guide for Gov't Agencies: How to Comply with the Regulatory Flexibility Act*, (May 2012), at 12-13.

⁶ Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Adm'r, EPA and Gen. John Peabody, Deputy Commanding Gen., Corps of Eng'r, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014).

⁷ Exec. Order No. 13132, 79 Fed. Reg. 43,255 (August 20, 1999).

⁸ U.S. Env'tl. Prot. Agency, *EPA's Action Development Process: Guidance on Exec. Order 13132: Federalism*, (November 2008).

⁹ *Id.* at 6.

¹⁰ *Id.* at 9.

and local governments, the EPA still subject to its consultation requirements if the proposal has "any adverse impact above a minimum level."¹¹

Within the proposed rule, the agencies have indicated they "voluntarily undertook federalism consultation."¹² While we are heartened by the agencies' acknowledgement of our concerns, we are disturbed that EPA prematurely truncated the state and local government Federalism consultation process. **EPA initiated a formal Federalism consultation process in 2011. In the 17 months between the consultation and the proposed rule's publication, EPA failed to avail itself of the opportunity to continue substantial discussions during this intervening period with its intergovernmental partners, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.**

Recommendations:

1. Pursuant to the rationale provided herein, as well as that put forth by the SBA Chief Counsel for Advocacy, formally acknowledge that this regulation does not merit a "no SISNOSE" determination and, thereby, must initiate the full small entity stakeholder involvement process as described by RFA SBREFA
2. Convene a SBAR panel which provides an opportunity for small entities to provide advice and recommendations to ensure the agencies carefully considers small entity concerns
3. Complete a multiphase, rather than one-time, Federalism consultation process
4. Charter an ad hoc, subject-specific advisory committee under the authority of the Federal Advisory Committee Act (FACA), as EPA has done on numerous occasions for less impactful regulations, to underpin the development of this comprehensive regulation
5. **Accept an ADR Negotiated Rulemaking process for the proposed rule:** Because of the intrinsic problems with the development of the proposed rule, we would also ask the agencies to consider an Alternative Dispute Resolution (ADR) negotiated rulemaking with all stakeholders. An ADR negotiated rulemaking process would allow stakeholders of various groups to "negotiate" the text of a proposed rule, to allow problems to be addressed and consensus to be reached.

Incomplete Data was Used in the Agencies' Economic Analysis

As part of the proposed rule, the agencies released their cost-benefit analysis on *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2014). We are concerned about the limited scope of this analysis since it bases its assumptions on a narrow set of CWA data not applicable to other CWA programs. Since EPA has held its 2011 Federalism briefing on "waters of the U.S.," **we have repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.**^{13 14 15}

¹¹ *Id.* at 11.

¹² 79 Fed.Reg. 22220.

¹³ Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA & Jo Ellen Darcy, Assistant Sec'y for Civil Works, U.S. Dep't of the Army, "Waters of the U.S." Guidance (July 29, 2011) available at <http://www.naco.org/legislation/policies/Documents/Energy.Environment.Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf>.

¹⁴ Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA, Federalism Consultation Exec..Order 13132: "Waters of the U.S." Definitional Change (Dec. 15, 2011) available at http://www.naco.org/legislation/policies/Documents/Energy.Environment.Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Dec%2015%202011_final.pdf.

The economic analysis uses CWA Section 404 permit applications from 2009-2010 as its baseline data to estimate the costs to all CWA programs. There are several problems with this approach. Based on this data, the agencies expect an increase of approximately three percent of new waters to be jurisdictional within the Section 404 permit program. The CWA Section 404 program administers permits for the "discharge of dredge and fill material" into "waters of the U.S." and is managed by the Corps.

First, we are puzzled why the agencies chose the span of 2009-2010 as a benchmark year for the data set as more current up-to-date data was available. In 2008, the nation entered a significant financial recession, sparked by the housing subprime mortgage crisis. Housing and public infrastructure construction projects were at an all-time low. According to the National Bureau of Economic Research, the recession ended in June 2009,¹⁶ however, the nation is only starting to show signs of recovery.¹⁷ By using 2009-2010 data, the agencies have underestimated the number of new waters that may be jurisdictional under the proposed rule.

Second, the economic analysis uses the 2009-2010 Corps Section 404 data as a baseline to determine costs for other CWA programs run by the EPA. Since there is only one "waters of the U.S." definition used within the CWA, the proposed rule is applicable to all CWA programs. The Congressional Research Service (CRS), a public policy research arm of the U.S. Congress, released a report on the proposed rule that stated "costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the proposal." The report reiterates there would be "additional permit application expenses (for CWA Section 404 permitting, stormwater permitting for construction and development activities, and permitting of pesticide discharges...for discharges to waters that would now be determined jurisdictional)."¹⁸

We are concerned the economic analysis focuses primarily on the potential impacts to CWA's Section 404 permit program and does not fully address the cost implications for other CWA programs. The EPA's and the Corps economic analysis agrees, "...the resulting cost and benefit estimates are incomplete...Readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis."¹⁹

Recommendation:

- **NACo urges the agencies to undertake a more detailed and comprehensive analysis on how the definitional changes will directly and indirectly impact all Clean Water Act programs, beyond Section 404, for federal, state and local governments**
- **Work with national, state and local stakeholder groups to compile up-to-date cost and benefit data for all CWA programs**

¹⁵ Letter from Tom Cochran, CEO and Exec. Dir., U.S. Conf. of Mayors, Clarence E. Anthony, Exec. Dir., Nat'l League of Cities, & Matthew D. Chase, Exec. Dir., Nat'l Ass'n of Counties to Howard Shelanski, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. and Budget, EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule & Connectivity Report (November 8, 2013) available at <http://www.naco.org/legislation/policies/Documents/Energy.Environment.Land%20Use/NACo%20NLC%20USCM%20Waters%20of%20the%20US%20Connectivity%20Response%20letter.pdf>.

¹⁶ Nat'l Bureau of Econ. Research, Bus. Cycle Dating Comm. (September 20, 2010), available at www.nber.org/cycles/sept2010.pdf.

¹⁷ Cong. Budget Office, *The Budget & Economic Outlook: 2014 to 2024* (February 2014).

¹⁸ U.S. Cong. Research Serv., EPA & the Army Corps' Proposed Rule to Define "Waters of the U.S.," (Report No. R43455; 10/20/14), Copeland, Claudia, at 7.

¹⁹ Econ. Analysis of Proposed Revised Definition of Waters of the U. S., U.S. Env'tl. Prot. Agency & U.S. Army Corps of Eng'r, 11 (March 2014), at 2.

A Final Connectivity Report is Necessary to Justify the Proposed Rule

In addition to the aforementioned issues, we are also concerned that the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, used as a scientific basis of the proposed rule, is still in draft form.

In 2013, EPA asked its' Science Advisory Board (SAB), which is comprised of 52 scientific advisors, to review the science behind the report. The report focused on more than 1,000 scientific studies and reports on the interconnectivity of water. In mid-October, 2014, the SAB completed its review of the draft report and sent its recommendations to the EPA.²⁰

The SAB recommendations have yet to be incorporated into the draft connectivity report. Releasing the proposed rule before the connectivity report is finalized is premature—the agencies missed a valuable opportunity to review comments or concerns raised in the final connectivity report that would inform development of the proposed "waters of the U.S." rule.

Recommendations:

- **Reopen the public comment period on the proposed "waters of the U.S." rule when the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report is finalized**

The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."

Clean water is essential for public health and state and local governments play a large role in ensuring local water resources are protected. It is important state and local governments are involved as a significant partner in the CWA rule development process.

The Clean Water Act charges the federal government with setting national standards for water quality. Under a federal agreement for CWA enforcement, the EPA and the Corps share clean water responsibilities. The Corps is the lead on the CWA Section 404 Dredge and Fill permit program and the EPA is the lead on other CWA programs.²¹ 46 states have undertaken authority for EPA's Section 402 NPDES permit program—EPA manages NPDES permits for Idaho, Massachusetts, New Hampshire and New Mexico.²² Additionally, all states are responsible for setting water quality standards to protect "waters of the U.S."²³

"Waters of the U.S." is a term used in CWA—it is the glue that holds the Clean Water Act together. The term is derived from a law that was passed in 1899, the Rivers and Harbors Act, that had to do with interstate commerce—any ship involved in interstate commerce on a "navigable water," which, at the time, was a lake, river, ocean—was required to have a license for trading.

²⁰ Letter from Dr. David T. Allen, Chair, Science Advisory Bdd & Amanda D. Rodewald, Chair, Science Advisory Bd. Panel for the Review of the EPA Water Body Connectivity Report to Gina McCarthy, Adm'r, EPA, SAB Review of the Draft EPA Report Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Sci. Evidence (October 17, 2014).

²¹ Memorandum of Agreement Between the Dep't of the Army & the Env'tl. Prot. Agency Concerning the Determination of the Section 404 Program & the Applications of Exemptions Under Section(F) of the Clean Water Act, 1989.

²² Cong. Research Service, Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia, at 4.

²³ *Id.*

The 1972 Clean Water Act first linked the term "navigable waters" with "waters of the U.S." in order to define the scope of the CWA. The premise of the 1972 CWA was that all pollutants discharged to a navigable water of the U.S. were prohibited, unless authorized by permit.

In the realm of the CWA's Section 404 permit program, the courts have generally said that "navigable waters" goes beyond traditionally navigable-in-fact waters. However, the courts also acknowledge there is a limit to jurisdiction. What that limit is within Section 404 has yet to be determined and is constantly being litigated.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland.²⁴ In SWANCC, Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.²⁵

In 2006, in *Rapanos v. United States*, the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program.²⁶ 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.²⁷ 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.

Potential Negative Effects on All CWA Programs

There is only one definition of "waters of the U.S." within the CWA which must be applied consistently for all CWA programs that use the term "waters of the U.S." While Congress defined "navigable waters" in CWA section 502(7) to mean "the waters of the United States, including the territorial seas," the Courts have generally assumed that "navigable waters of the U.S." go beyond traditional navigable-in-fact waters such as rivers. However, the Courts also acknowledge there is a limit to federal jurisdiction.

Previous Corps guidance documents on "waters of the U.S." clarifications have been strictly limited to the Section 404 permit program. A change to the "waters of the U.S." definition though, has implications for ALL CWA programs. This modification goes well beyond solely addressing the problems within the Section 404 permit program. These effects have not been fully studied nor analyzed.

Changes to the "waters of the U.S." definition within the CWA will have far-reaching effects and unintended consequences to a number of state and local CWA programs. As stated before, the proposed economic analysis needs to be further fleshed out to recognize all waters that will be jurisdictional, beyond the current data of Section 404 permit applications. CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs, will be impacted.

²⁴ 531 U.S. 159, 174 (2001).

²⁵ *Id.*

²⁶ 547 U.S. 715, 729 (2006).

²⁷ *Id.*

Key Definitions are Undefined

The proposed rule extends the "waters of the U.S." definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that will be used to claim jurisdiction more broadly. All of these terms will broaden the types of public infrastructure that is considered jurisdictional under the CWA.

"Tributary"—The proposed rule states that a tributary is defined as a water feature with a bed, bank, ordinary high water mark (OHWM), which contributes flow, directly or indirectly, to a "water of the U.S." A tributary does not lose its status if there are man-made breaks (bridges, culverts, pipes or dams) or natural breaks upstream of the break. The proposed rule goes on to state that **"A tributary...includes rivers, streams, lakes, ponds, impoundments, canals, and ditches..."**²⁸

For counties that own and manage public safety infrastructure, the potential implication is that roadside ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different. Public safety ditches should not be classified as tributaries. Further fleshing out the exemptions for certain types of ditches, which is discussed later in the letter, would be beneficial.

"Uplands"—The proposed rule recommends that "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are exempt, however, the term "uplands" is undefined.²⁹ This is problematic. County public safety ditch systems—roadside, flood, drainage, stormwater—can be complex. While they are generally dug in dry areas, they run through a transitional area before eventually connecting to "waters of the U.S." It is important to define the term "uplands" to ensure the exemption is workable.

"Significant Nexus"—The proposed rule states that "a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters."³⁰

This definition uses the watershed approach to determine jurisdiction—a watershed is an area of land where all of the rivers, streams, and other water features drain to the same place. According to the EPA, "Watersheds come in all shapes and sizes. They cross county, state, and national boundaries. In the continental U.S., there are 2,110 watersheds, including Hawaii, Alaska, and Puerto Rico, there are 2,267 watersheds."³¹

There are very few parts of the country that are not in a watershed. This definition would create burdens on local governments who maintain public safety ditches and infrastructure near natural waterbodies; this infrastructure could be considered jurisdictional under the "significant nexus" definition.

"Adjacent Waters"— Under current regulation, only those wetlands that are adjacent to a "waters of the U.S." are considered jurisdictional. However, the proposed regulate broadens the regulatory reach to "adjacent waters," rather than just to "adjacent wetlands." This would extend jurisdiction to "all waters," not just "adjacent wetlands." The proposed rule defines "adjacent as "bordering, contiguous or neighboring."³²

²⁸ 79 Fed. Reg. 22199.

²⁹ *Id.*

³⁰ *Id.*

³¹ U.S. Evtl. Prot. Agency, "What is a Watershed?," available at <http://water.epa.gov/type/watersheds/whatis.cfm>.

³² 79 Fed. Reg. 22199.

Under the rule, adjacent waters include those located in riparian or floodplain areas.³³

Expanding the definition of “adjacency,” will have unintended consequences for many local governments. Stormwater and floodwater infrastructure and facilities are often located in low-lying areas, which may be considered jurisdictional under the new definition. Since communities are highly dependent on these structures for public safety, we would encourage the agencies to assess the unintended consequences.

“Riparian Areas”—The proposed rule defines “riparian area” as “an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” Riparian areas are transitional areas between dry and wet areas.³⁴ Concerns have been raised that there are very few areas within the U.S. that would not meet this definition, especially if a riparian area boundary remains undefined.

“Floodplains”—The proposed definition states that floodplains are defined as areas with “moderate to high water flows.”³⁵ These areas would be considered “water of the U.S.” even without a significant nexus. Under the proposed rule, does this mean that any area, that has the capacity to flood, would be considered to be in a “floodplain?”

Further, it is major problem for counties that the term “floodplain” is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Notwithstanding potential conflicts with other Federal agencies, the multiple federal definitions could create challenges in local land use planning, especially if floodplain designations are classified differently by various agencies.

Aside from potential conflicts between Federal agencies, this would be very confusing to landowners and complicated to integrate at the local level. These definitions could create conflict within local floodplain ordinances, which were crafted to be consistent with FEMA National Flood Insurance Program (NFIP) rules. It is essential that floodplain definitions be consistent between and among all Federal agencies.

“Neighboring”—“Neighboring” is a term used to identify those adjacent waters with a significant nexus. The term “neighboring” is used with the terms riparian areas and floodplains to define the lateral reach of the term neighboring.³⁶ Using the term “neighboring,” without limiting qualifiers, has the potential to broaden the reach of the CWA. No one county is alike, nor are the hydrologic and geological conditions across the U.S. Due to these unique challenges, it is often difficult to craft a one-size-fits-all regulatory approach without considering regional or local differences. Moreover, there could be a wide range of these types of differences within one state or region.

Recommendations:

- **Redraft definitions to ensure they are clear, concise and easy to understand**
- **Where appropriate, the terms used within the proposed rule should be defined consistently and uniformly across all federal agencies**

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

- **Create a national map that clearly shows which waters and their tributaries are considered jurisdictional**

The Section 404 Permit Program is Time-Consuming and Expensive for Counties

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Over the years, numerous local governments and public agencies have expressed concerns that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for local governments and public agencies.

In recent years, certain Corps districts have inconsistently found public safety ditches jurisdictional, both for construction and maintenance activities. Once a ditch falls 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.

Based on our counties' experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER federal jurisdiction is claimed. Once jurisdictional, the project triggers application of other federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of California counties have communicated this process can easily take easily three or more years, with costs in the millions for one project.

One Midwest county studied five road projects that were delayed over the period of two years. Conservatively, the cost to the county for the delays was \$500,000. Some counties have missed building seasons waiting for federal permits. These are real world examples, going on now, for many our counties. They are not hypothetical, "what if" situations. These are actual experiences from actual counties. The concern is, if more public safety ditches are considered jurisdictional, more counties will face similar problems.

Counties are liable for ensuring their public safety ditches are maintained and there have been cases where counties have been sued for not maintaining their ditches. 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 flood control channel that failed due to overgrowth of vegetation. Counties are legally responsible for public safety infrastructure, regardless of whether or not the federal agencies approve permits in a timely manner.

It is imperative that the Section 404 permitting process be streamlined. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties in a precarious position—especially those who are balancing small budgets against public health and environmental protection needs.

The bottom line is, county ditch systems can be complex. They can run for hundreds of miles continuously. By their very nature, they drain directly (or indirectly) into rivers, lakes, streams and eventually the ocean. At a time when local governments throughout the nation are only starting to experience the beginnings of economic recovery,

proposing far reaching changes to CWA’s “waters of the U.S.” definition seems to be a very precarious endeavor and one which should be weighed carefully knowing the potential implications.

County Experiences with the Section 404 Permit Process

During discussions on the proposed “waters of the U.S.” definition change, the EPA asked NACo to provide several known examples of problems that have occurred in Section 404 jurisdictional determinations, resulting in time delays and additional expenses. These examples have been provided to the agencies.

One Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process. The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project’s completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a “bank on each side” and had an “ordinary high water mark. Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal permit process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay tens of thousands in mitigation costs associated with the impacts to the concrete and metal structures. Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

Based on Current Practices—How the Exemption Provisions May Impact Counties

While the proposed rule offers several exemptions to the “waters of the U.S.” definition, the exclusions are vague and imprecise, and may broaden jurisdiction in a number of areas. Specifically, we are concerned about the exemptions on ditches and wastewater treatment systems.

“Ditches”— The proposed rule contains language to exempt certain types of ditches: 1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and 2) Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.³⁷

For a ditch to be exempt, it must be excavated and drain only to a dry area and be wet less than 365 days a year. This is immediately problematic for counties. County ditches are not dug solely in dry areas, because they are designed to drain overflow waters to “waters of the U.S.”

Counties own and manage different types of public safety ditches—roadside, drainage, flood control, stormwater—that protect the public from flooding. They can run continuously for hundreds, if not thousands, of miles throughout

³⁷ *Id.*

the county. Very few county ditches just abruptly end in a field or a pond. Public safety ditches are generally dug in dry areas, run through a transition area, before connecting directly or indirectly to a "water of the U.S."

Under the proposed rule, if dry ditches eventually connect, directly or indirectly, to a "water of the U.S.," will the length of the ditch be considered jurisdictional waters? Or will portions of a dry ditch be considered exempt, even though the ditch's physical structure interconnects with a jurisdictional river or stream?

The exclusion also states that ditches that do not "contribute to flow," directly or indirectly to "waters of the U.S.," will be exempt. The definition is problematic because to take advantage of the exemption, ditches must demonstrate "no flow" to a river, stream, lake or ocean. Most ditches, by their nature, have some sort of flow in rain events, even if those ditches are dry most of the year. **Since the proposed rule indicates that perennial, intermittent or ephemeral flows could be jurisdictional, the agencies need to further explain this exclusion.³⁸ Otherwise, there will be no difference between a stream and a publicly-owned ditch that protects public safety.**

The agencies have reiterated that the proposed rule leaves in place the current exemption on ditch maintenance activities.³⁹ EPA has indicated this exemption is automatic and that counties do not have to apply for the exemption if they are performing maintenance activities on ditches. **However, in practice, our counties have reported the exemption is inconsistently applied by Corps districts across the nation. Over the past decade, a number of counties have been required to obtain special Section 404 permits for ditch maintenance activities.**

These permits often come with tight special conditions that dictate when and how the county is permitted to clean out the relevant ditch. For example, one California county has a maintenance permit for an earthen stormwater ditch. They are only permitted to clear grass and debris from the ditch six months out of the year due to ESA impacts. This, in turn, has led to multiple floodings of private property and upset citizens. In the past several years, we've heard from a number of non-California counties who tell us they must get Section 404 permits for ditch maintenance activities.

Some Corps districts give a blanket exemption for maintenance activities. In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt. Additionally, a number of Corps districts are using the "recapture provision" to override the exemption.⁴⁰ Under the "recapture clause," previously exempt ditches are "recaptured," and must comply for the Section 404 permitting process for maintenance activities.⁴¹ Additionally, Corps districts may require documentation to original specifications of the ditch showing original scope, measurements, etc.⁴² Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist.

Other districts require entities to include additional data as part of their request for an exemption. One Florida county applied for 18 exemptions at a cost of \$600,000 (as part of the exemption request process, the entity must provide data and surveying materials), three months later, only two exemptions were granted and the

³⁸ 79 Fed. Reg. 22202.

³⁹ See, 33 CFR 232.4(a)(3) & 40 CFR 202.3(c)(3).

⁴⁰ U.S. Army Corps of Eng'r, Regulatory Guidance Letter: Exemption for Construction or Maintenance of Irrigation Ditches & Maint. of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007).

⁴¹ *Id.*

⁴² *Id.* at 4.

county was still waiting for the other 16 to be granted. At that point, the county was moving into its seasonal rainy season and fielding calls from residents who were concerned about flooding from the ditches.

This is what is happening to counties now. If the approval process for ditch maintenance exemptions is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety ditches.

It is the responsibility of local governments to ensure the long-term operation and protection of public safety infrastructure. **The federal government must address problems within the current CWA Section 404 regulatory framework, to ensure that maintenance activities on public safety infrastructure do not require federal approval. Without significantly addressing these problems, the federal agencies will hinder the ability of local governments to protect their citizens.**

Recommendations:

- **Exclude ditches and infrastructure intended for public safety**
- **Streamline the current Section 404 permitting process to address the delays and inconsistencies that exist within the existing decision-making process**
- **Provide a clear-cut, national exemption for routine ditch maintenance activities**

“Waste Treatment Systems”—Water treatment refers to the process of taking waste water and making it suitable to discharge back to the environment. The term “waste treatment” can be confusing because it is often linked to wastewater or sewage treatment. However, this can also include water runoff from landscape irrigation, flushing hydrants, stormwater runoff from roads, parking lots and rooftops.

The proposal states that “waste treatment systems,”—including treatment ponds or lagoons, designed to meet the requirements of the CWA—are exempt.⁴³ In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may be included under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, settling basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins.

It is important that all constructed features built for the purpose of water quality treatment or runoff control be exempt, whether or not it was built for CWA compliance. Otherwise, this sets off a chain reaction and discourages further investment which will ultimately hurt the goals of the CWA.

Recommendations:

- **The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any* water quality requirements, not just the requirements of the CWA**

⁴³ 79 Fed. Reg. 22199.

Counties Need Clarity on Stormwater Management and Green Infrastructure Programs

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "waters of the U.S."⁴⁴ They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S."

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "waters of the U.S." However, EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. **Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.**

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

⁴⁴ 40 CFR 122.26(b)(8).

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. 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.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Recommendations:

- **Explicitly exempt MS4s and green infrastructure from "waters of the U.S." jurisdiction**

States Responsibilities Under CWA Will Increase

While the EPA and the Corps have primary responsibility for water quality programs, everyday CWA implementation is shared with the states and local governments.⁴⁵ Under the CWA, states are required to identify polluted waters (also known as impaired waters) and set Water Quality Standards (WQS) for them. State WQS are intended to protect jurisdictional "waters of the U.S.," such as rivers, lakes and streams, within a state. As part of the WQS process, states must set designated uses for the waterbody (e.g. recreation, drinkable, fishable) and institute Total Maximum Daily Loads (TMDL) for impaired waters.

Currently, WQS regulation focuses on waters regulated under federal law, however, NACo is concerned the proposed rule may broaden the types of waters considered jurisdictional. This means the states will have to regulate more waters under their WQS and TMDL standards. This would be extremely costly for both the states and localities to implement.

In EPA's and the Corps economic analysis, it states the proposed rule "may increase the coverage where a state would...apply its monitoring resources...It is not clear that additional cost burdens for TMDL development would result from this action."⁴⁶ The data used to come to this conclusion is inconclusive. As discussed earlier, the agencies used data from 2009-2010 field practices for the Section 404 program as a basis for the economic analysis. This data is only partially relevant for the CWA Section 404 permit program, it is not easily interchangeable for other CWA programs.

Because of vague definitions used in the proposed rule, it is likely that more waters within a state will be designated as "waters of the U.S." As the list of "waters of the U.S." expand, so do state responsibilities for

⁴⁵ Cong. Research Serv., Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia.

⁴⁶ Econ. Analysis of Proposed Revised Definition of Waters of the United States, U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), (March 2014) at 6-7.

WQS and TMDLS. The effects on state nonpoint-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes.

Recommendation:

- **NACo recommends that the federal agencies consult with the states to determine more accurate costs and implications for the WQS and TMDL programs**

County Infrastructure on Tribal Lands May Be Jurisdictional

The proposed rule reiterates long-standing policy which says that any water that crosses over interstate lines—for example if a ditch crosses the boundary line between two states—falls under federal jurisdiction. But, this raises a larger question. If a ditch runs across Native American land, which is considered sovereign land, is the ditch then considered an “interstate” ditch?

Many of our counties own and maintain public safety infrastructure that runs on and through Native American tribal lands. Since these tribes are sovereign nations with self-determining governments, questions have been raised on whether county infrastructure on tribal land triggers federal oversight.

As of May 2013, 566 Native American tribes are legal recognized by the Bureau of Indian Affairs (BIA).⁴⁷ Approximately 56.2 million acres of land is held in trust for the tribes⁴⁸ and it is often separate plots of land rather than a solidly held parcel. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage roads on tribal lands.

A number of Native American tribes are in rural counties—this creates a patchwork of Native American tribal, private and public lands. Classifying these ditches and infrastructure as interstate will require counties to go through the Section 404 permit process for any construction and maintenance projects, which could be expensive and time-consuming.

NACo has asked the federal agencies to clarify their position on whether local government ditches and infrastructure on tribal lands are currently regulated under CWA programs, including how they will be regulated under the final rule.

Recommendation:

- **We request clarification from the federal agencies on whether ditches and other infrastructure that cross tribal lands are jurisdictional under the “interstate” definition**

Endangered Species Act as it Relates to the Proposed Rule

NACo is concerned that provisions of the proposed rule may interact with provisions of the Endangered Species Act (ESA) and its implementing regulations in ways that may produce unintended negative outcomes.

For instance, when a species is proposed for listing as endangered or threatened under ESA, large swaths of land may be designated as critical habitat, that is essential to the species' protection and recovery. Critical

⁴⁷ U.S. Dept. of the Interior, Indian Affairs, *What We Do*, available at <http://www.bia.gov/WhatWeDo/index.htm> .

⁴⁸ *Id.*

habitat requires special management and conservation, which can have enormous economic impacts on county governments and private landowners.

This effect is intensified when the Section 404 permit program is triggered. Section 7 consultation under the ESA could be required, which can be time-consuming and expensive, especially for public safety projects. Some counties are already reporting strict ESA requirements on maintenance of public safety ditches.

To further compound the issue, the vague terms used in the proposed rule such as "floodplains," may also trigger ESA compliance. In recent years, the Federal Emergency Management Agency (FEMA) has been sued for not considering the habitat needs of threatened and endangered species in National Flood Insurance Program (NFIP) floodplain designations. Local governments in certain states, who participate in the NFIP, must now certify they will address ESA critical habitat issues in floodplain areas. **This litigation-driven approach circumvents local land use planning authority and creates an atmosphere of mistrust rather than providing incentives to counties and private landowners to actively engage in endangered species conservation.**

If the agencies plan to use broad definitions within the proposed rule, regulation by litigation would seem to be an increasingly likely outcome. These issues need to be carefully considered by the agencies.

Ensuring that Local Governments Are Able to Quickly Recover from Disasters

In our nation's history, our citizens have experienced both manmade and natural disasters. Counties are the initial line of defense, the first responders in protection of its residents and businesses. Since local governments are responsible for much of what constitutes a community—roads and bridges, water and sewer systems, courts and jails, healthcare, parks, and more—it is important that local governments quickly recover after disasters. This includes removing wreckage and trash from ditches and other infrastructure that are considered jurisdictional.⁴⁹

Counties in the Gulf Coast states and the mid-west have reported challenges in receiving emergency waivers for debris in ditches designated as "waters of the U.S." after natural and manmade disasters. This, in turn, damages habitat and endangers public health. NACo would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as "waters of the U.S."

Conclusion

We appreciate the opportunity to be a part of this process. NACo acknowledges the efforts taken by both EPA and the Corps to conduct outreach on the proposed rule. This is a priority issue for our nation's counties who are responsible for environmental protection and public safety.

As stated earlier, we believe that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal. This is problematic because counties are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches. Furthermore, the unknown impacts on other CWA programs are equally problematic, the degree and cost of regulation will increase dramatically if these features are redefined as "waters of the U.S." **We urge you to withdraw the rule until further study on the potential impacts are addressed.**

⁴⁹ Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong. (2014) (statement of Linda Langston, President, Nat'l Ass'n of Counties).

We look forward to working together with our federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. If you have any questions, please feel free to contact Julie Ufner, NACo's Associate Legislative Director at Jufner@naco.org or 202.942.4269.

Sincerely,



Matthew D. Chase
Executive Director
National Association of Counties



August 31, 2015

Mary Zeigler
Director of the Division of Regulations, Legislation, and
Interpretation, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees;
Proposed Rule; Regulatory Information Number (RIN) 1235-AA11**

Dear Director Zeigler:

On behalf of the nation's 3,069 counties, the National Association of Counties (NACo) respectfully submits the following comments on the proposed rule to amend regulations under the Fair Labor Standards Act governing the "white collar" exemption from overtime pay for executive, administrative and professional employees. In the proposed rule, the U.S. Department of Labor (DOL) would change the salary threshold for employees who are eligible for overtime pay from \$23,660 to \$50,440. This salary threshold would also be updated annually in the Federal Register.

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient communities and provide their residents with essential services such as education, law enforcement, search and rescue, road maintenance and public health.

County governments are a major employer and economic engine for workers across the U.S. Today, America's 3,069 county governments employ more than 3.3 million people, providing service to over 305 million county residents. Counties provide health benefits to nearly 2.5 million employees and nearly 2.4 million of their dependents. For health insurance premiums alone, counties spend an estimated \$20 to \$24 billion annually.

Because counties are responsible for everything from transportation and infrastructure, to justice and public safety, to public health, to search and emergency rescue, 911 operations, fire prevention, and much more, this proposed rule could have a major impact on county operations—and the ability of county governments to provide these critical services to the people we serve—especially during crisis events or even disasters.

NACo's comments reflect our concerns about the proposed rule to increase the threshold amount for "white collar" employee exemption from overtime pay—and the potential impact that the proposed rule could have on county government budgets and administration. The proposed rule could also potentially have a substantial impact on the nation's rural counties (almost 70 percent of counties are considered rural

and have less than 50,000 residents).

Because counties need additional time to examine and calculate the potential economic or administrative impact on their county, NACo respectfully urges DOL to extend the comment period provided in the proposed rule. We also urge DOL to perform further analysis on the potential impact of the proposed rule on county and local governments prior to its finalization.

Concerns with Changing the Overtime Pay Exemption Threshold

Under the proposed rule, DOL would require employers to more than double the minimum salary level for an employee to qualify as “exempt” from overtime pay. DOL would change the salary threshold for “white collar” employees who are eligible for overtime pay, from \$23,660 to \$50,440. This is a substantial increase over a one-year period.

This increase could have harmful consequences on county governments—and ultimately on county employees—particularly when many are still recovering from the U.S. recession. According to NACo’s 2014 County Economic Tracker report, only 65 county economies had recovered (based on four indicators—job growth, unemployment rates, economic input (GDP) and median home prices) to their pre-recession levels.¹ As employers, county governments provide both wages and benefits to their employees. The proposed overtime pay exemption threshold increase could negatively impact county employees’ wages and benefits at a time when county economies are still in a fragile state.

Some counties have calculated that the overtime pay change could increase their payroll costs dramatically in the first year of implementation and beyond. For example, according to Berks County, Pennsylvania, 97 of the current 419 exempt employees would be eligible for overtime pay. Under the proposed rule, Berks County has estimated that the additional financial burden could cost the county as much as \$1.5 million in the first year alone. ***Most counties must operate on a balanced budget and many do not have the financial resources to make major pay increases without increasing taxes, reducing employee fringe benefits and/or reducing their county employee work hours or staff.***

In fact, 43 states have some type of limitation on the property taxes collected by counties, including 38 states that impose statutory limitations on property tax rate, property tax assessments or both. Only 12 states authorize counties to collect their own local gas taxes, which are limited to a maximum rate in most cases and often involve additional approvals for implementation.

In many counties, the overtime salary change could reduce the number of exempt employees and change their classifications. The change from exempt to non-exempt status could reduce these county employees’ fringe benefits and incentive compensation. For instance, in Columbia County, Pennsylvania the proposed overtime pay guidelines would make an additional 43 currently exempt employees eligible for overtime pay. For this rural county, the proposed rule would have a major financial impact.

NACo urges DOL to allow for an extended comment period and to perform additional analysis on the impact of the proposed rule on county government. The proposed changes are substantial, and thus would result in the need of county governments to increase both administrative time and expenses to ensure that they are in compliance.

¹ Istrate, Emilia, Nicholas Lyell. County Economic Tracker 2014: Progress through Adversity, Washington D.C.: National Association of Counties. Available at http://www.naco.org/sites/default/files/documents/County_Economic_Tracker2014-FINAL.pdf

Concerns with Automatic Annual Adjustments/Increases

The proposed rule would also annually adjust the overtime pay threshold—potentially increasing the exempt threshold each year. **This change would create uncertainty for county governments and would place an undue administrative and monetary burden on county governments, as it would become difficult to plan for and implement salary increases due to these annual undefined overtime pay changes. NACo urges DOL to provide additional clarity into the potential annual increase and to strongly consider the increased administrative and financial burdens it could place on county governments on an annual basis.**

Requesting Separate Comment Period for Changes to Duties Test

In the proposed rule, DOL is considering whether there should be changes made to the “duties” test under this proposed rule. A duties test examines employees’ functions to determine whether they are exempt or non-exempt. The Department modernized the duties test in 2004. **NACo urges DOL to not make any changes to the “duties” test at this time, but instead publish a separate proposed rule and give adequate time for comments on potential changes to the “duties” test.**

Additional Time Needed for Public Comment

Many counties have expressed concerns about the length of the comment period provided in the proposed rule. The 60 day timeframe has not been sufficient for many counties to calculate the economic or administrative impact on their county and provide comments. **NACo urges DOL to consider extending the public comment period for at least an additional 90 days.**

We thank you for the opportunity to comment. If you have any questions, please feel free to contact Daria Daniel, NACo’s Associate Legislative Director at ddaniel@naco.org or 202.942.4212.

Sincerely,



Matthew D. Chase
Executive Director
National Association of Counties



March 17, 2015

Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket No. EPA-HQ-OAR-2008-0699, National Ambient Air Quality Standards for Ozone

Dear Administrator McCarthy:

On behalf of the nation's mayors, counties, cities and regions, we respectfully submit our comments on the U.S. Environmental Protection Agency's (EPA) "Draft Documents Related to the Review of the National Ambient Air Quality Standards (NAAQS) for Ozone."

Our organizations, which collectively represent the nation's 19,000 cities and mayors, 3,069 counties and more than 500 regional councils, support the goals of the Clean Air Act (CAA) and the National Ambient Air Quality Standards (NAAQS) that protect public health and welfare from hazardous air pollutants. Local governments across the country are actively working toward meeting these goals of improving air quality.

The NAAQS applies to counties and cities within a metropolitan region and plays a critical role in shaping regional transportation plans and can influence regional economic vitality. The proposed rule would revise the current NAAQS for ozone of 75 parts per billion (ppb), which was set in 2008, proposing to reduce both the primary and secondary standard to within a range of 65-70 ppb over an 8-hour average. EPA is also accepting comments on setting the standard at a level as low as 60 ppb.

Because of the financial and administrative burden that would come with a more stringent NAAQS for ozone, we ask EPA to delay implementation of a new standard until the 2008 standard is fully implemented. The current 2008 standard of 75 ppb has yet to be implemented due to litigation opposing the standard. The 1997 standard of 80 ppb is still generally used by regions and it will take several additional years to fully implement the more stringent 2008 standard.

A more stringent NAAQS for ozone will dramatically increase the number of regions classified as non-attainment. By EPA's own estimates, under a 70 ppb standard, 358 counties and their cities would be in violation; under a 65 ppb standard, an additional 558 counties and their cities would be in violation. Unfortunately, there is very little federal funding available to assist local governments in meeting CAA requirements. According to EPA, under this proposed rule a 70 ppb standard would cost approximately \$3.9 billion per year; a 65 ppb standard would cost approximately \$15.2 billion annually to implement.¹

Moreover, these figures do not take into account the impact that the proposed rule will have on the nation's transportation system. Transportation conformity is required under the CAA² to ensure that federally-supported transportation activities (including transportation plans, transportation improvement programs, and highway and transit projects) are consistent with state air quality implementation plans. Transportation conformity applies to all areas that are designated non-attainment or "maintenance areas" for transportation-related criteria pollutants, including ozone.³ Transportation conformity determinations are required before federal approval or funding is given to transportation planning and highway and transit projects.

For non-attainment areas, the federal government can withhold federal highway funds for projects and plans. Withholding these funds can negatively affect job creation and critical economic development projects for impacted regions, even when these projects and plans could have a measurable positive effect on congestion relief.

Additionally, these proposed new ozone regulations will add to an already confusing transportation conformity compliance process due to a recent decision by the United States Court of Appeals for the District of Columbia Circuit. In 2012, after the 2008 NAAQS for ozone was finalized, EPA issued a common-sense proposal to revoke the 1997 NAAQS for ozone in transportation conformity requirements to ensure that regulated entities were not required to simultaneously meet two sets of standards—the 1997 and 2008 NAAQS for ozone. However, the court disagreed, and on December 23, 2014 ruled, in *Natural Resources Defense Council vs. Environmental Protection Agency and Gina McCarthy*, that EPA lacked the authority to revoke conformity requirements. This ruling has left state and local governments with a conformity process that is now even more confusing and administratively burdensome, and a new NAAQS for ozone will add to the complexity.

Given these financial and administrative burdens on local governments, we urge EPA to delay issuing a new NAAQS for ozone until the 2008 ozone standard is fully implemented.

¹ The cost to California is not included in these calculations, since a number of California counties would be given until 2032–2037 to meet the standards.

² Section 176(c) (42 U.S.C. 7506(c))

³ See 40 CFR Part 93, subpart A

If you have any questions, please contact us: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Joanna Turner (NARC) at 202-618-5689 or Joanna@narc.org.

Sincerely,



Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors



Matthew D. Chase
Executive Director
National Association of Counties



Clarence E. Anthony
CEO and Executive Director
National League of Cities



Joanna L. Turner
Executive Director
National Association of Regional Councils