



NARC Summary: The U.S. Senate Committee on Environment and Public Works and the U.S. House Committee on Transportation and Infrastructure's Bicameral Hearing on Local Impacts of the WOTUS Rule

Executive Summary

On February 4th, 2015, Administrator McCarthy of the U.S. Environmental Protection Agency met with both the U.S. Senate Committee on Environment and Public Works and the U.S. House of Representatives Committee on Transportation and Infrastructure, to discuss the recently proposed Waters of the United States rule. Administrator McCarthy testified that EPA's connectivity report that was recently released provides the scientific basis for defining terms and jurisdictional waters under the *Clean Water Act*.

Numerous Committee members expressed confusion on the vague terminology, the types of waters that would be regulated, and how current exemptions would be impacted, particularly for agriculture and groundwater. NACO's Vice President Sallie Clark supported those positions and added that the EPA's mandated process for developing these rules, wherein local and state officials must be consulted prior to the initial release of the rule, had not been followed. The impact on local economies and restrictions on land use that would result from this rule are also seen as threats to the financial and managerial capacity of small communities, according to Clark's testimony.

The Administrator argued that the more than 1 million comments submitted during the 200 day comment period echoed NACO's concerns, and those comments will be incorporated into the final rule. She stated that in the final rule, all terms will be defined more clearly, the types of waters that are jurisdictional will be defined, and all current exemptions will remain in place, while others may be expanded.

Several senators, including Senator Whitehouse and Senator Cardin, voiced concerns that the CWA has been weakened since its initial passing and this rule continues down that path by failing to protect headwaters from agricultural runoff.

A summary of Administrator McCarthy's Q&A session with the bicameral committees is below.

Question: The jurisdictional oversight of the EPA is expanding. Would passing an amendment that states this rule will not expand the authority of the *Clean Water* and *Clean Air Acts* negatively impact your proposal?

EPA Response: If Congress passed that amendment, it would not impact the WOTUS rule because the EPA will actually have jurisdiction over fewer waters, but the waters that are regulated may be different. EPA completed extensive connectivity reports to pinpoint precisely how, where, and to what extent water bodies are connected in order to identify how significantly each water body impacts the overall quality of the navigable waters they are connected to.

Question: The EPA failed to uphold its mandate in crafting these rules when state and local governments were not properly consulted prior to the release of the initial rule. The process is being shrouded in secrecy and the proper stakeholders are not being included in the process.

EPA Response: The EPA put forth initial inquiries on the topic to gauge the opinions of state and local governments. Additionally, more than 400 workshops have been held around the country to engage local officials in the process of submitting comments. In order to ensure all interested parties had the opportunity to comment on the rule, the comment period was extended twice. All comments are being considered and incorporated into the final rule, which should be released this spring. Congress will have 60 days to review it at that point in time.

Question: The EPA will now seek to regulate isolated puddles, isolated ponds that are not connected to other water, artificially irrigated areas, evaporation, reflecting pools, groundwater, water filled depressions incidental to construction, tire tracks that fill with water, and all ditches.



EPA Response: Other than some ditches and ponds that are significantly connected to navigable waters as determined by our connectivity report, none of those will be regulated. It is particularly worth noting that groundwater is not subject to regulation under the CWA.

Question: The Supreme Court previously stated that during the navigable waters debate that the impact of the rule change would significantly impact economies. The EPA does not have the mandate to impact economies and therefore this rule should be withdrawn. Local governments are going to face an unfair burden in the implementation process and will likely run in to capacity issues when it comes to processing the necessary permits.

EPA Response: EPA performed the necessary economic analysis and we have not yet completed the process of crafting this rule. EPA released it for public comment and extended the comment periods to be certain that all interested stakeholders could voice their opinions. Now, EPA is incorporating those concerns into the final rule. EPA has found that 75% of fishers and anglers support restoring clean water protections under the CWA and 80% of small business owners support clean headwaters.

Question: The agricultural sector will now face an avalanche of new permitting requirements in order to comply with the EPA rule and many agricultural exemptions will be removed or weakened.

EPA Response: All current agricultural exemptions will remain in place and some will be expanded. Additionally, return flows from agriculture are not subject to regulation under the CWA.

Question: Non-point source pollution has been found to be the greatest threat to freshwater; however, the CWA deals almost exclusively with point-source pollution. This new rule reduces the stringency of the Act and fails to address threats like fertilizer and manure runoff. The algal blooms in Toledo, OH were caused by runoff from agriculture, how can we prevent that from happening again?

EPA Response: As stated, return flows from agriculture are not subject to regulation under the CWA. While the Act does not give the EPA the power to regulate those issues, the EPA has been working closely with the USDA to craft new programs that work to reduce those runoffs through different programs.

Question: Storm sewers and water management canals are not WOTUS but this rule would put them under federal control.

EPA Response: There will be exclusions for MS4 permits and similar programs. We support these other programs and this rule does not influence those. Other water bodies and issues that have never previously been under jurisdiction of the CWA will continue to remain free from CWA regulation. This rule is meant to clarify, not expand, the definition of WOTUS at the request of the Supreme Court. Following the Rapanos decision, the Court asked that Congress or the Agencies clarify the rule. Congress did not act, so this is the EPA's response. If you were previously exempt from regulation under the CWA, you will remain exempt.

Question: The cost of inactivity will be greater than the cost of acting.

EPA Response: EPA agrees. It will become more expensive to restore and protect certain bodies of waters if EPA allows the current regulatory scheme to exist. EPA needs this rule to be clarified in order to streamline the permitting process because it will be easier for individuals and towns to understand which bodies of water actually need to be regulated. The final rule will lay out specific definitions for each type of body of water and metrics will be clarified.