Ravalli County Commissioners Office

From: MACO <MACO@mtcounties.org>
Sent: Thursday, July 2, 2015 8:06 AM
To: MACO
Subject: Legal options on Waters of the U.S.
Attachments: Legal Options for Consideration-WOTUS.pdf

Commissioners,

I am forwarding a message from NACo about potential actions concerning the EPA Waters of the US Rules. I have also included an announcement from MT Attorney General Tim Fox announcing he has joined a group of 12 other states in mounting a legal challenge.

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Montana and 12 Other States Challenge New EPA & Corps of Engineers Regulation

Counties, farmers, ranchers, other groups support multi-state legal challenge

HELENA – Today Montana Attorney General Tim Fox and 12 other states filed a lawsuit against the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) over the new regulation broadly expanding the definition of "Waters of the U.S." under the Clean Water Act. The case was filed in the U.S. district court for the District of North Dakota.

In their complaint, the states contend the new definition of "Waters of the U.S." violates provisions of the Clean Water Act, the National Environmental Policy Act, and the United States Constitution.

"Congress and the U.S. Supreme Court have rejected the very regulatory expansion that the EPA and Corps of Engineers are implementing through this new rule," Attorney General Fox said. "This is yet another example of a federal agency acting by decree to bypass Congress and violate rights of states reserved under the law and the U.S. Constitution."

The states assert that the EPA's and Corps' new rule wrongly broadens federal authority by placing a majority of water and land resource management in the hands of the federal government. Congress and the courts have repeatedly affirmed that the states have primary responsibility for the protection of intrastate waters and land management. The states argue that the burdens created by these new regulations on waters and lands are harmful and will negatively affect farmers, ranchers, and landowners. As a result, landowners will have to seek additional federal permits or face substantial fines and federal criminal enforcement actions.

"Clean water is important to all of us, and we Montanans know how to protect our waters," Fox said. "Through our state Constitution, the 1971 Water Quality Control Act, and other legislation, we have established strong water protections tailored to the unique needs of our communities. These new federal regulations add a complicated and unnecessary layer of rules."

The states are asking the court to vacate the rule and enjoin the EPA and Corps from enforcing the new, significantly expanded definition of "Waters of the U.S."

Senator Brad Hamlett (D-Cascade), chairman of the legislature's Water Policy Interim Committee, spoke in support of the lawsuit. "Montana's Constitution states that all of the water that falls and flows within the boundaries of Montana belongs to the state for the beneficial use of its citizens," Sen. Hamlett said. "Now we have two federal executive branch agencies, the EPA and the Army Corps of Engineers, attempting to assert control over Montana state waters by rule. This is, in my opinion, unconstitutional, a deliberate interference with our state's most valuable resource, and must be stopped dead in its tracks. This is not about clean water, it is about jurisdiction, as Montana being a headwaters state cherishes and protects its waters and knowing the lay of the land and our waters best we definitely, constitutionally, and practically need to remain in control."

Montana's local governments and agricultural community also expressed their support of Attorney General Fox's decision to challenge the new federal regulations.

"The Montana Association of Counties is pleased that Attorney General Fox is joining other states in challenging these new regulations," said Harold Blattie, executive director of the Montana Association of Counties. "The EPA and Corps failed to consider concerns expressed by over 40 Montana counties about placing an undue burden on their ability to perform routine road maintenance. The final regulation lacks the clarity for counties to even be able to tell which roadside ditches are now under the EPA's and Corps' jurisdiction and which are not."

"In our initial review of the finalized Waters of the U.S. regulation, it represents a significant expansion of federal jurisdiction beyond current practices and the limitations affirmed by the U.S. Supreme Court," said Errol Rice, Executive Vice President of the Montana Stockgrowers Association. "The final regulation ignores state and local efforts to protect these waters and will have major implications for all Montanans. As ranchers who already have practices in place to promote water quality, we see the final regulation as problematic to implement and causing more harm and confusion rather than clarifying the law."

"Farmers and ranchers are still very concerned with the EPA's new regulation," said Nicole Rolf of the Montana Farm Bureau Federation. "It takes power away from state and local governments, while at the same time burdening farmers and ranchers with unnecessary and ridiculous rules. We very much appreciate that Attorney General Tim Fox recognizes these problems and is willing to defend Montanans who make their living raising food."

The Montana Chamber of Commerce, Montana Building Industry Association, Montana Contractors Association, and the Montana Association of Realtors are also in support of the legal challenge.

Joining Montana in the suit are the states of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

From: Deborah Cox [dcox@naco.org]
Sent: Wednesday, July 01, 2015 2:22 PM
To: saes
Cc: Julie Ufner; Mike Belarmino
Subject: Legal options on Waters of the U.S.

"Waters of the U.S." Legal Options

Over the past few weeks, NACo has been inundated with questions from counties on next steps now that the Waters of the U.S. rule has been finalized. In particular, there have been a number of questions about what legal options counties can pursue.

To answer some of these questions, we have put together the attached informational document which outlines some of the options moving forward.

We hope that you will find this helpful and please let us know if you have questions,

Deborah Cox
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WATERS OF THE U.S. FINAL RULE

Legislative and Legal Options

NACo has received many questions recently regarding potential next steps once the final Waters of the U.S. rule is published. The purpose of this document is to explore some of the options, both legislative and legal. This document is in no way intended to serve as a recommendation or endorsement by NACo of any particular action.

On June 29, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published their final Definition of Waters of the U.S. Under the Clean Water Act (renamed the Clean Water Rule) in the Federal Register. It will become effective 60 days after publication on August 28, 2015. Throughout the rule-making process, NACo has expressed strong concerns over the rule's impact on county-owned and maintained roadside ditches, bridges, flood control channels, drainage conveyances and wastewater treatment and stormwater systems.

With the rule's publication, NACo has been asked to compile a list of potential legal options for counties to challenge the final rule. This memo provides an overview of the options.

Background

Under preliminary analysis, NACo has found the final rule will likely broaden the types of waters that are considered jurisdictional under federal regulation. The rule classifies eight types of waters as jurisdictional.

The first four are relatively non-controversial since they have long been considered jurisdictional:

1. Traditionally navigable
2. Interstate waters
3. Territorial seas
4. Impoundments of waters

The following four categories of waters are at the center of the controversy and may significantly expand federal jurisdiction if broadly interpreted:

5. Tributaries of navigable, interstate and territorial seas
6. Waters that are "adjacent" to any of #1-5
7. Certain regional categories of waters—prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands—if they have a significant ***nexus*** to jurisdictional waters
8. And waters that are located within the 100-year floodplain or within 4,000 feet of the high tide or ordinary high water mark

For more information, refer to NACo's Summary of the Final Regulation. This can be found at www.naco.org.

Legal Options for Consideration

With the release of the final "waters of the U.S." rule, generally there are two routes counties (and various stakeholders) could take to challenge the rule.

- **Federal Legislative Fix** — Several relevant bills have been introduced in the U.S. Congress including H.R. 1732 and S. 1140. H.R. 1732 was passed by the House of Representatives on May 12 by a vote of 261-155. The measure would stop implementation of the final rule and require the agencies to restart the rule-making process, with state and local government involvement.

  While H.R. 1732 has been sent to the Senate for review, it is unlikely the Senate will vote on this bill since they have a similar bill, S. 1140. The Senate measure also would stop implementation of the final rule. Additionally, it contains a list of principals the agencies should consider when rewriting the rule, including the types of waters that should be considered exempt. S. 1140 passed out of committee and is awaiting floor action.

  However, the White House has issued a veto threat on H.R. 1732, which complicates matters since neither chamber has the two-thirds needed to override this veto. So, Congressional members are also moving language to defund the final rule in the yearly federal appropriations process. But, it remains to be seen if this route will be successful.

- **Legal Challenges**—The second potential route — litigation — is somewhat uncertain as well. However, we have been requested to outline the potential challenges and opportunities

It is important to keep in mind that with litigation, it will most certainly be a multi-year/multi-stage process given the potential course through the court system (U.S. District Court, U.S. Court of Appeals, U.S. Supreme Court) that a case could follow.

Below are several legal options now that the final rule has been published in the Federal Register:

1. Counties/Associations File Suit
   This option is likely the most resource-intensive since the county/association would need to retain a law firm to guide you through the legal process, i.e. manage the case from beginning to end. Some counties may choose this route provided if they have "in-house" attorneys with the capacity to pursue legal options. Suits would likely have to be filed under the Administrative Procedure Act (APA) [1] rather than Clean Water Act's (CWA) Section 509[2].

[1] The Administrative Procedures Act (APA) authorized judicial review for federal agencies decisions by assessing when the agency acted in an "arbitrary, capricious, or an abuse of discretion" and complied with relevant federal statutes.

[2] The Clean Water Act's Section 509 allows for judicial review for EPA regulations. However, filing under Section 509 is often difficult because circuit courts are split on scope of the authority granted under Section 509. Since the final rule is a definitional change, rather than a regulation, there is a question whether the case would have standing. Finally, if a Section 509 suit is unsuccessful, it disallows future suits in the future.

2. **Counties/Associations Join State Suits**

Several states have initiated litigation, primarily through their state Attorney General's office. Depending on whether your state files suit, your county may have the option of joining as a co-plaintiff.

Additionally, even if your home state is not part of the lawsuit, you may be able to join as a co-plaintiff in another state's effort (within your federal circuit). However, there is a caveat. You would need to double check with your state that your county has the authority to join as a co-plaintiff.

If a state is handling the matter entirely in-house, rather than using outside counsel, counties would likely not be requested to make a financial contribution. We are aware of several suits joined by multiple states that have already been filed in various federal district courts. The list below is divided by the group of states participating in each suit:

- Seeking to vacate the rule in its entirety because it violates the CWA and the APA – *Georgia, West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, Wisconsin*
- Seeking to vacate the rule in its entirety because it was issued in violation of the CWA and APA – *North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico Environment Department, New Mexico State Engineer, South Dakota and Wyoming*
- Challenging the rule as a unlawful because it is inconsistent with, and in excess of, the EPA's and Corps' statutory authority under the CWA – *Texas, Louisiana and Mississippi*
- Requesting the rule be vacated and that EPA propose a new rule consistent with the CWA and U.S. Constitution – *Ohio and Michigan*

For additional information, including potential opportunities to become involved, counties and associations are encouraged to contact their state attorney general's office.

3. **Counties/Associations Join Non-state Suits**

In addition to states filing suit, other trade organizations may choose to file suit. As with the prior options, these suits will also likely be instituted under the APA and not under the CWA. For this option, depending on the particular organization, they may or may not want additional parties to join.

If a county or association selected this option, there is the increased likelihood that the organizations will seek financial contribution from those wishing to join their suit. The amount could range depending upon the number of groups joining and this could fluctuate depending on the stage the case is at (i.e. District, Appeals and/or U.S. Supreme Court). But, given the wide range of stakeholders interested in the outcome of this rule, it could also be possible to find a firm or organization willing to do the work at competitive rates.

4. **File Amicus Briefs**

As noted earlier, any litigation would entail a multi-stage process that would offer several opportunities for counties and/or state associations to become involved.

Filing an amicus brief [3] is one option that would not require the full level of commitment that comes with filing suit. Amicus briefs are especially relevant when a case is under appeal since appellate courts are normally limited to the factual record and arguments from the lower court. An amicus brief is an ideal way to introduce concerns in a case that may have broader implications beyond the parties directly involved in the case. For example, as part of the State and Local Legal Center, NACo has joined amicus briefs in several cases potentially impacted state and local governments before the U.S. Supreme Court.

This option may require financial resources unless a county/association has the internal capacity to draft a brief or you have a pro bono brief writer.

Again, this list is not intended to be exhaustive, rather, demonstrative of the various options to counties and state associations to challenge the "waters of the U.S." final rule. NACo is not making any recommendations as there is no single, right path forward. Each county/association must decide what the most practical option would be based on their own internal assessment.

[3] An amicus (amicus curiae) brief is filed by some individual or entity that is not a party to a case but seeks to offer information that could enlighten the court about the case.