

June 9, 2015

RE: Update on Federal Developments

- I. EPA Releases Final "Waters of the U.S." Rule
- II. House to Vote on Preemption on Internet Taxes
- III. Committee Hearing Fails to Consider Sales Tax Equity Matter
- IV. Supreme Court Rules on Religious Accommodation Case

Dear Mayor:

Thanks again to the Federal Relations staff at the National League of Cities (NLC), here is an update on some recent actions in our Nation's Capital, important to local governments.

I. EPA Releases Final "Waters of the U.S." Rule

On May 27, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) released the [final "waters of the U.S." rule](#) to clarify which waters fall under federal jurisdiction pursuant to the Clean Water Act (CWA). The rule will be effective 60 days after publication in the Federal Register.

Under the final rule, "waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (commonly referred to as "traditional navigable waters")
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters otherwise identified as waters of the United States;
5. All "tributaries" of waters identified in 1-3 above;
6. All waters "adjacent" to a water identified in 1-5 above, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
7. Waters including Prairie potholes, Caroline bays and Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands where it is determined, on a case-specific basis, to have a "significant nexus" to a water identified in 1-3 above;
8. All waters located within the 100-year floodplain of a water identified in 1-3 above and all waters located within 4000 feet of the high tide line or ordinary high water mark of a water identified in 1-5 above where they are determined on a case-specific basis to have a significant nexus to a water in 1-3 above.

The final rule includes definitions of "tributary," "adjacent," and "significant nexus," among others. This new definition of "waters of the U.S." has the potential to expand the number of waterbodies that are federally regulated under the CWA.

Among the most significant changes from the proposed rule is an exclusion for "stormwater control features constructed to convey, treat, or store stormwater that are created in dry land." The possibility that water conveyances, including but not limited to MS4s (municipal separate storm sewer systems) could meet the definition of a "tributary" under the proposed rule and thus be jurisdictional as a "waters of the U.S." was one of NLC's top concerns with the proposed rule.

While the language establishes a broad categorical exclusion, it does not apply to stormwater control features that were built on wet land or if the features are part of a traditionally navigable water, interstate waters or the territorial seas. For example, the exclusion may not apply to infrastructure in coastal or low-lying areas. Additionally, some features, such as channelized or piped streams, would be jurisdictional.

While the final rule does not include a specific exclusion for green infrastructure as NLC had requested, the preamble states, "this rule is designed to avoid disincentives to [the] environmentally beneficial trend in stormwater management practices"-using green infrastructure to manage stormwater at its source and keep it out of the conveyance system.

The exclusion for stormwater control features "is intended to address engineered stormwater control structures in municipal and urban environments-those that address runoff that occurs during and shortly after precipitation events; as a result stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow."

The final rule also includes an exclusion for wastewater management systems, as NLC requested. The exclusion covers "wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling." As with MS4s, the concern with the proposed rule was that water delivery and reuse facilities could be considered a "tributary" and therefore jurisdictional.

It is important to note that even if stormwater and wastewater infrastructure are not considered a "waters of the U.S.," they may still be regulated as a point source under the CWA Section 402 permit program.

NLC continues to review and analyze the final rule. This chart details a preliminary analysis covering NLC's specific concerns with the proposed rule. EPA will host a webinar on Thursday, June 11 from 1-2:30 p.m. EDT providing a broad overview of the final rule. You must register in advance to attend this webinar.

II. House to Vote on Preemption on Internet Taxes

This week, the full House is expected to consider H.R. 235, the Permanent Internet Tax Freedom Act (PITFA). As it has for years, NLC continues to vigorously oppose this legislation because it would preempt local authority to tax Internet access. Currently, a temporary ban blocks local

governments from doing this except for in a handful of states. The temporary ban is set to expire on October 1, 2015, and this legislation would make the ban permanent for all states.

In general, taxation of Internet access refers to applying state and local taxes to the monthly charge that subscribers pay for access to the Internet through an Internet Service Provider. The original intent of the Internet Tax Freedom Act in 1998 was to encourage development of the Internet, which at the time was a new technology. This justification is no longer applicable given the substantial advancements in technology that have occurred since. A permanent tax moratorium on Internet access will result in increasing amounts of lost revenue on which state and local governments rely to fund essential services in their communities, like firefighters and police officers, schools, parks, libraries and continued investments to address aging infrastructure.

III. Committee Hearing Fails to Consider Sales Tax Equity Matter

The House Judiciary Committee's Regulatory Reform, Commercial and Antitrust Law Subcommittee held a hearing last week on three tax bills: the Business Activity Tax Simplification Act (BATSA, scheduled for introduction on Monday June 8 by Rep. Chabot), the Mobile Workforce State Income Tax Simplification Act (H.R. 2315), and the Digital Goods and Services Tax Fairness Act (H.R. 1643). The common thread throughout the discussion was the issue of nexus or what should be considered a "sufficient physical presence" standard in these tax bills. This same question of how much nexus is sufficient is also a central issue to resolving the remote online sales tax collection issue.

The question of sufficient nexus is important since it is a threshold inquiry for purposes of establishing, among other issues, whether a state can compel out of state online retailers to collect sales or use taxes from in-state purchasers.

Despite the obvious connection between the main topic at the hearing and e-fairness or Marketplace Fairness, it was conspicuously missing from the hearing. This omission did not deter supporters of e-fairness, both from the panel of tax experts and supporters on the Subcommittee itself, from using the opportunity to advocate for resolution of the issue or passage of the legislation. NLC also took advantage of the opportunity to raise its concerns with the bills on the agenda and to chastise the committee for the missed opportunity to give e-fairness a hearing.

IV. Supreme Court Rules on Religious Accommodation Case

In [*EEOC v. Abercrombie & Fitch Stores*](#) the Supreme Court held 8-1 that to bring a religious accommodation claim an applicant or employee need only show that his or her need for a religious accommodation was a motivating factor in an employment decision. NLC joined in an [*amicus* brief](#) filed by the State and Local Legal Center (SLLC) arguing that to bring a failure to accommodate claim the applicant/employee should have to notify the employer of the need for a religious accommodation.

Abercrombie & Fitch refused to hire Samantha Elauf because she wore a headscarf to her interview. Abercrombie suspected she wore it for religious reasons but she did not ask for an accommodation. The EEOC sued Abercrombie alleging it violated Title VII by failing to accommodate Elauf's religious beliefs.

The Court concluded that to bring a religious accommodation claim an applicant/employee need not show that the employer had "actual knowledge" of the need for an accommodation. Instead the employee/applicant only must show that his or her need for an accommodation was a motivating factor in the employer's decision. Title VII prohibits employers from taking an adverse employment action "because of" religion. Thus, the Title VII standard prohibits even making religion a motivating factor in an employment decision. Simply put, the Court would not add an "actual knowledge" requirement to Title VII.

According to the Court, while a knowledge requirement could not be added to the motive requirement, arguably the motive requirement cannot be met unless the employer at least suspects the practice in question is religious. Here Abercrombie at least suspected Elauf wore a head scarf for religious reasons so the Court did not decide whether the motive requirement could be met without knowledge. Justice Alito, in a concurring opinion, stated that the Court should have decided this question--in the negative.

If you have questions on any of these matters, contact Jon Moran at 609-695-3481, ext. 121 or jmoran@njslom.com

Very truly yours,

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