

# EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE



7/14/2017

**Waters of the United States  
2017 Report**

Local  
Government  
Advisory  
Committee



**From the LGAC's Charter, defining general goals:**

The LGAC is a policy-oriented committee. To assist the agency in ensuring that its regulations, policies, guidance and technical assistance improve the capacity of local governments to carry out these programs, the LGAC provides advice and recommendations to the EPA Administrator.



*"Water is the lifeblood of all our communities and our economic prosperity. And we also want to be good stewards of our Nation's water resource for now and the years to come. This is why having a clear and enforceable 'Waters of the U.S.' rule is so important to us. It also is important that it is financially sustainable and does not overreach, but affirms our goals to make our communities a better place to live and work for all of our citizens."*

**Mayor Bob Dixon,  
LGAC Chairman**



*"Clean, safe and affordable drinking water is a cornerstone of health, recreation and commerce. EPA has a critical role to create a facilitative, cooperative and collaborative regulatory environment in which local, tribal, state and the federal partners work together to protect one of our nation's most important resources."*

**Susan Hann,  
LGAC Water Workgroup Chairwoman**

# EPA's Local Government Advisory Committee

## WATERS OF THE UNITED STATES 2017 REPORT

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Sawtooth Mountains, South of Stanley, ID-Photo Source: Eric Vance, EPA

## EXECUTIVE SUMMARY

The EPA Administrator issued a compelling charge to the Local Government Advisory Committee that provided an opportunity for local, tribal and state governments to advise the EPA regarding 'Waters of the United States.' The *LGAC Waters of the United States Report 2017* provides both policy perspective and specific responses to the charge that can help guide the EPA in moving forward with rulemaking.

Clean, safe and affordable drinking water is vital to the health and prosperity of our communities. As local, state and tribal representatives, the LGAC is committed to this mission in philosophy and action. The report includes several thematic concepts:

- Local, tribal and state governments are partners in the mission to provide and preserve clean, safe and affordable drinking water. We connect with citizens and know our unique communities. Armed with this knowledge, we can act locally in the interest of clean water.
- Clarity and predictability are paramount to success. The lack of clarity and predictability are serious challenges to effectuating any rulemaking process. Clear definitions and criteria are needed for jurisdictional determinations rather than interpretations. Simplifying the jurisdictional determination process is one of the most important steps.
- Flexibility and consideration of regional differences are needed. Several examples of potential regional exemptions are included in the report.
- There are opportunities to enhance state and local roles. Local and state governments want to be engaged and can do so with the appropriate resources through State Assumption of the 404 program or State Programmatic General Permits.
- Regulatory reform should include incentives for best practices including green infrastructure, stormwater management systems, agricultural innovation and other evolving innovations. Exemptions for activities that clearly have a net positive impact need to be considered.
- The permitting process must be more predictable. Jurisdictional determinations of "yes", "no", or "maybe" within a definitive time frame such as 60-90 days would be a tremendous improvement. Technology, including mapping, and other innovations, can improve efficiency and effectiveness. Utilizing the 2008 guidance (with definitional changes) can be a good foundation for jurisdictional determinations.
- Source water protection remains a primary concern as this is the foundation of the nation's drinking water system and health of our communities. Ultimately, a community's ratepayers absorb the cost of treating source water, which can become unmanageable as source water quality deteriorates.
- Affordability is a universal theme heard across the nation. Whether it is the cost of source water treatment, compliance costs and penalties, infrastructure development or a myriad of other costs – the ability of citizens to pay must be considered in the equation. If a community cannot develop an affordable rate structure, then citizens do not truly have access to clean, safe drinking water.

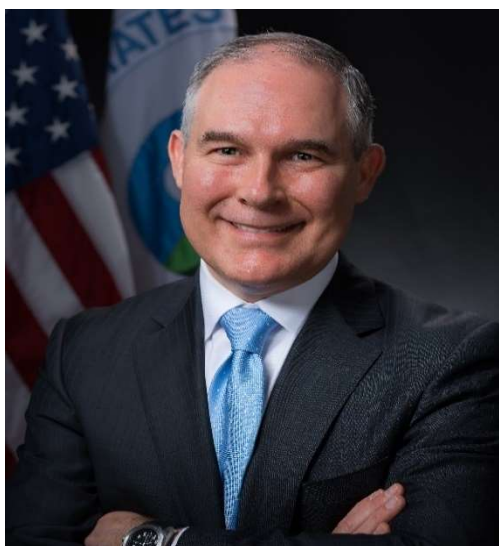
In summary, the *LGAC Waters of the United States 2017* report delivers a series of recommendations that can assist EPA in evolving the regulatory framework in a way that collaborates with local governments, improves efficiency and effectiveness and advances the goal of clean, safe and affordable drinking water for our communities.



## I. Introduction and Background

### A. EPA'S PROPOSED WATERS OF THE U.S. RULE

On February 28, 2017, the President signed the Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule* (issued June 2015).<sup>1</sup> The Executive Order gives direction to the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule (CWR) and “publish for notice and comment a proposed rule rescinding or revising the rule.” The E.O. also directs that EPA and the Army “shall consider interpreting



**The Honorable Scott Pruitt, EPA Administrator**

the term ‘navigable waters’ in a manner “consistent with Justice Scalia’s opinion in *Rapanos*”<sup>2</sup> which includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

As part of EPA’s efforts to consult with state and local government officials, EPA’s Local Government Advisory Committee (LGAC) is providing its recommendations to the Administrator on revising the definition of ‘Waters of the United States’ (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

On April 10, 2017, EPA Administrator Scott Pruitt sent out a solicitation for input on the forthcoming proposal to rescind and

seek input from officials as an important step for the EPA in the process prior to proposing regulations that may have implications on federalism.

The LGAC’s charge is also an opportunity to hear from state, local and tribal partners from across the country on approaches to consider for a WOTUS rule and other significant issues to be considered in developing and implementing a revised WOTUS rule.

*"We greatly look forward to the opportunity to sit at the table with our state and local partners from across the country to discuss the rule and develop an approach to address this significant issue while keeping States at the forefront of our mission."*

The Honorable Scott Pruitt, Administrator, EPA

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<sup>1</sup> <https://www.whitehouse.gov/the-pres-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

<sup>2</sup> *Rapanos v. United States*, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 L.Ed. 2d 159

The agencies intend to follow an expeditious, two-step process that will provide certainty across the country: 1) an initial rulemaking to rescind the 2015 rule and reinstate the regulatory approach that, except for a brief two-month period prior to the 6th Circuit stay of that rule, has been the law in place since 1986, and thus maintains the status quo, and 2) promulgation of a revised definition of 'Waters of the U.S.' consistent with direction in the February 28, 2017, E.O.



***"Our goal is to help the EPA be a better partner with State administrators and policy-makers to better achieve our shared objectives: protecting the waters of the U.S. and protecting the economic interests of Americans."***

**State Representative Tom Sloan, Kansas**

**State Representative Tom Sloan, Kansas**

## **B. COMMITTEE CHARGE**

As part of EPA's efforts to consult with state and local government officials, EPA's Local Government Advisory Committee (LGAC) puts forth our findings and recommendations to the Administrator on revising the definition of 'Waters of the United States' (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

***"EPA Administrator Pruitt gave the LGAC a great opportunity to provide broad input not only on proposed rules, but also on their effective implementation. 'Waters of the US' rule is particularly challenging, but the LGAC embraced the charge, by providing our unique perspective to better help clarify, define and protect our important water resources across America."*** Jeff Witte,  
Secretary, New Mexico Department of  
Agriculture



**Jeff Witte, Secretary, New Mexico Department of Agriculture**

The LGAC consists of 35 local, state and tribal government elected and appointed officials representing cities, parishes, counties, municipalities, and other local political jurisdictions. Local officials are knowledgeable and provide unique perspectives on issues relating to a revised rule. Further, the LGAC offers balanced views from diverse on-the-ground perspectives.

Through a collaborative process, the LGAC was charged to provide Administrator Pruitt with expeditious and meaningful advice relating to a revised 'Waters of the U.S.' rule. Overall, the goal is to provide recommendations on approaches the EPA should consider when formulating a revised rule.

*"The City of Aurora Colorado appreciates the EPA's efforts to reach out to local communities to gather comments for potential approaches to the WOTUS rule."* Council Member Brad Pierce

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Council Member Brad Pierce, Aurora, CO

This Report highlights our findings and recommendations from our unique local government perspective which will assist the agency to help shape a revised rule that will better promote cooperative federalism. It also provides our perspectives on the best means to communicate a revised rule with state, local and tribal governments.

## C. HISTORICAL PERSPECTIVE

Congress enacted the Clean Water Act (CWA) in 1972 [33 U.S.C. §§1251 to 1387] to prevent the pollution of 'Waters of the United States', including waters not deemed traditionally "navigable" such as streams, lakes, and wetlands. Since then, the CWA has been instrumental in protecting public health and the environment. However, Supreme Court decisions in 2001 and 2006 interpreted the Clean Water Act in ways that changed the approach for determining whether a water body was protected under the Act.

The Supreme Court's decisions shifted focus away from potential effects on interstate commerce, and towards connectivity among waters and potential effects of a water on the integrity of downstream navigable waters. The intent of the 2015 rule was to clarify what waters were covered under the Clean Water Act. Following Supreme Court decisions in 2001 and 2006, determining protection for streams and wetlands became more complex. Requests for a rule to provide clarity came from Congressional members, state and local officials, industry, agriculture, environmental groups and the public.

In May 2014, the LGAC undertook an extensive analysis and collaboration to provide recommendations to the EPA on a proposed rule to clarify 'Waters of the U.S.' in the 1972 Clean Water Act. It was published in the Federal Register on April 21, 2014 [79 Fed. Reg. 22,188] with a public comment period that was extended twice. In response to the May 2014 Charge, the LGAC held four face-to-face public meetings from across the country to engage local officials regarding the proposed rule. The goal of these public meetings was to hear input and develop recommendations for the EPA to consider in promulgating a final rule. To engage a wide range of officials, the meetings were held in diverse geographical regions: St. Paul, Minnesota; Atlanta, Georgia; Tacoma, Washington; and Worcester, Massachusetts.

***"We would like to recognize the efforts of those on the LGAC. Your work on the 'Waters of the U.S.' is thoughtful and insightful. On behalf of the NACo, we thank you for your dedication, time and ongoing commitment to these efforts!"***

**Julie Ufner, National Association of Counties (NACo)**



The LGAC heard diverse viewpoints from individuals of local, state and tribal representatives. These perspectives were deliberated and incorporated in a Report for the EPA to consider entitled, *"Initial Findings and Recommendations Pertaining to EPA's Clean Water Act Waters of the U.S. Proposed Rule."*<sup>3</sup>

The LGAC heard many concerns expressed across the country regarding clarity, sufficient time to give input; regulatory delays and the costs (financial and resources) of implementation. Despite some changes to the final rule as a result of the public comments and some LGAC recommendations incorporated, the 2015 final rule still lacked clarity and was contested by states, industry and other organizations. Some LGAC members felt that EPA's detailed response to comments would demonstrate to participants that their concerns were heard and acknowledged. Other LGAC members felt that the public, and especially those involved in the LGAC public outreach, should have the opportunity to comment on a substantially revised rule. The LGAC concluded that it was (and remains) important to EPA's credibility to be responsive to the concerns of local governments expressed through the public outreach process.

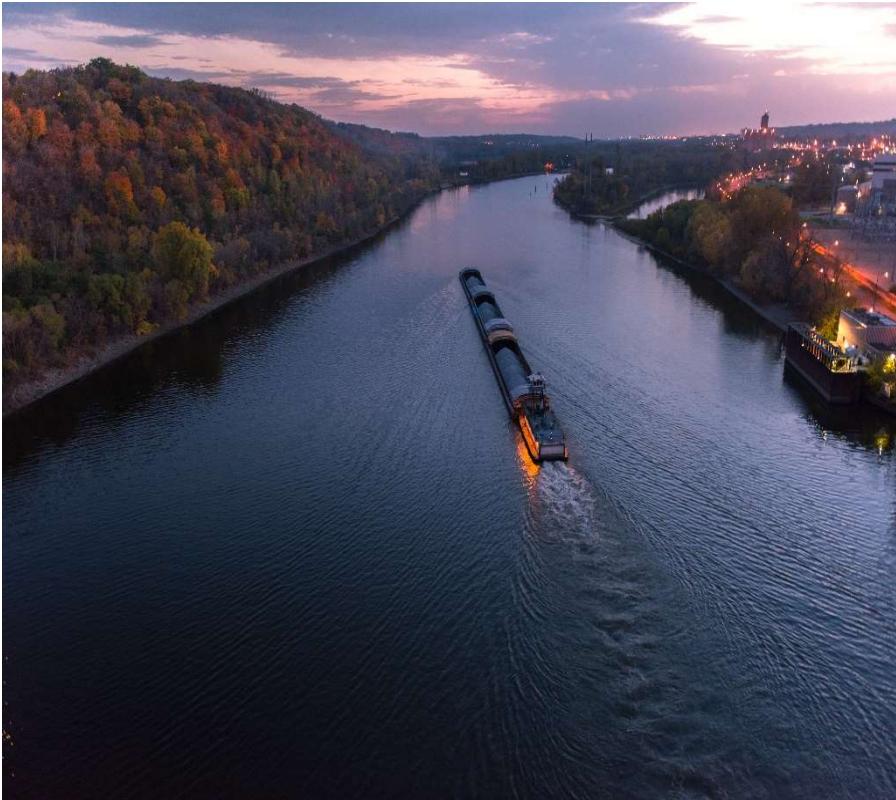
**LGAC 2014 Meeting, Atlanta, GA, with Mayor Kasim Reed**

<sup>3</sup> [https://www.epa.gov/sites/production/files/2015-10/documents/11.5.14\\_w.o.f.u.s.\\_report.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/11.5.14_w.o.f.u.s._report.pdf)



## II. Water and Our Communities

### A. Water: Our Nation's Health and Wealth



Water resources are the lifeblood for our nation's cities, towns and small rural communities. It is essential for the health, prosperity and security for our citizens, and is among the top priorities for us in local governments. As State, local and tribal government partners we desire to manage our water resources so that we have reliable and safe water supplies to create jobs, attract industry and investments, and provide for the health and welfare of our citizens. A common understanding of the value of water and how it impacts the health and prosperity of us at

Evening barge trip on the Mississippi River near downtown Saint Paul, MN.

Photo Source: Davin Brandt, Ramsey County, MN

the local level is important for governmental decision-making. For example, water infrastructure costs are estimated to be \$100 per household per year. For smaller communities, these same costs are \$400 to \$800 more per year.<sup>4</sup> It is estimated that for every \$1 million investment in water infrastructure it supports between 15 and 18 jobs throughout the economy. Therefore, disruption in our nation's water supply could be devastating to communities. Therefore, protections under the Clean Water Act for the 117 million people (one third of Americans) that rely on these waters as part of our public drinking water assets are decisions of public trust and stewardship.

*Our communities depend on water for economic progress.*

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<sup>4</sup> <http://www.nerwa.org/gwnews/db212.pdf>, The Value of Water and the Water Operator, by Doug Buresh, Circuit Rider #3

Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred directly to rate payer - **at the tap.**



**Mayor Norm Archibald, Abilene, TX**



*"One of the most important resources for any community is its water supply. The ability to provide for the future is the ability to provide water for the future. As our city plans ahead, the building of the Cedar Ridge Reservoir is at the heart of our plans. It is imperative we work hand-in-hand with our federal and state agencies to streamline the permitting processes. The next generation is counting on us."* **Mayor Norm Archibald, Abilene, TX**

## **B. Local Governments and Cooperative Federalism**

The Clean Water Act (CWA) as amended in 1972, established the basic structure for protecting our nation's water resources by regulating pollutant discharges into the 'Waters of the United States.' Clean Water Act programs are largely federal, state and tribal programs.

The Clean Water Act applies to "navigable waters," defined in the statute as 'Waters of the United States.' On February 28, 2017, the President of the United States issued an Executive Order directing EPA and Department of the Army to review and rescind and/or revise the 2015 Rule.

The EPA and the U.S. Army Corps of Engineers are in the process of considering a revised definition of 'Waters of the United States' consistent with the Executive Order. Local governments support a straight-forward rulemaking process, inclusive of the tenets of cooperative federalism. This approach acknowledges the shared responsibility of state and local governments in the governance and in the cooperation to work out details of responsibility.



"The U.S. Conference of Mayors sincerely appreciates the work of the Local Government Advisory Council (LGAC) for working on the issue of 'Waters of United States' and for providing multiple forum to listen to the concerns of the many parties that have concerns. This rule will have an enormous impact on the nation and it is important that the views of local government are well represented."

Judy Sheahan, Assistant Executive Director  
The U.S. Conference of Mayors



Homestake Reservoir – Pitkin and Eagle Counties,  
Colorado Photo Source: City of Aurora, CO

The CWA Section 404 is jointly administered by EPA and the Corps of Engineers and regulates discharges of dredged or fill materials into 'Waters of the United States', including wetlands. CWA Section 404 is largely federal with the exception of a small number of State Assumed 404 Programs (Michigan and New Jersey). If empowered, states and tribes could play an increased and more efficient role in managing the program. Local governments too, have a strong role to play and can be key strategic partners in protecting our nation's water resources. Local governments too manage broad water quality protection efforts such as managing stormwater, flood protection and enhanced watershed protection along with protecting the sources of drinking water.

Local governments have the tools to strengthen wetland and stream protection efforts that better support community goals with greater protection for the resource. Integrated Planning (IP) offers municipalities the opportunity to meet multiple Clean Water Act requirements by sequencing separate wastewater and stormwater programs while maximizing investments so that the highest priority projects come first. EPA, states, and municipalities have achieved progress in implementing IP approaches while addressing the most serious water quality issues in order of priority to protect public health and the environment.

*In Portland, Maine, we're lucky to have water resources at our door step. Water is vital to our regional economy and way of life. Therefore, our city and regional stakeholders collaborate with state and national partners to ensure we keep our rivers, streams, and bays clean. Everyone plays an important role! **Councilor Jill Duson, Portland, ME***



Councilor Jill Duson, Portland, ME and Vice -Chair of LGAC

***"We should be gravely concerned about the minimization of the federal role in the Clean Water Act. Any changes at the federal level must be accompanied by the commitment and action to enhance protection by state and local officials. This requires frank discussion given the financial challenges faced by some local communities and states."*** Mayor Karen Freeman-Wilson, Gary, IN



Mayor Karen Freeman-Wilson, Gary, IN

### C. Clarity and Predictability

A central theme heard by the LGAC in public meetings of state, local and tribal government officials on the 2015 'Waters of the U.S.' rule is that definitions were too broad or confusing and were subject to interpretation through litigation.



Supervisor Ryan Sundberg, Humboldt County, CA

*"It is very important that we have a clear definition when it comes to WOTUS. Without clear definitions, the costs of doing business rise, and we jeopardize our ability to provide jobs and remain competitive. The LGAC has collected great input from around the Country and I am hopeful to see some positive changes."*

Supervisor Ryan Sundberg, Humboldt County, CA

Key terms used in the 2015 WOTUS rule were vague such as: “uplands,” “tributary,” “floodplain,” “significant nexus,” “adjacent,” and “neighboring”. But they are also important in defining what waters are jurisdictional. These terms are either broadly defined, or not defined at all which has led to further confusion, not less, over what waters fall within federal jurisdiction. Local governments need a rule that puts forward clear definitions and provides examples and graphics for further clarity. Without this clarity, it could lead to further unpredictability and result in unnecessary project delays, subjective judgements and inconsistency across the country.



Ohio River, City of Huntington, West Virginia  
Photo Source: Huntington Quarterly

## D. Flexibility and Regionalization

In formulating a revised ‘Waters of the U.S.’ rule it should have flexibility and reflect natural and regional variability of our nation’s waters. As a basic approach, criteria could be established that recognize natural ecoregions (delineated on the basis of natural and anthropogenic factors) to recognize geographic variability

***"In the West, water quantity is a challenge, but quality is equally important. Protecting watershed health of the eastern Sierra is crucial to northern Nevada local communities."***

***Council Member David Bobzien,  
Reno, NV***



***Council Member David Bobzien, Reno, NV***



“Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts.” **Council Member Andy Beerman, Park City, UT**

among regions. States and tribes should have further input in this process to modify or improve on this basic approach. Workgroups made up of federal, state and local officials could help establish local delineation factors characteristic of these regional water bodies such as western ephemeral streams, and other regional unique wetlands such as pocosins, Carolina bays etc.



**Council Member Andy Beerman, Park City, UT**

Western arid streams may need further regional determinations as to whether these areas are otherwise dry channels characterized by irregular (not seasonal) ephemeral flows or may actually qualify as ‘Waters of the United States.’ These jurisdictional calls of WOTUS should be the exception rather than the rule. Also, wetlands and streams in the State of Florida also should be considered in separate regional guidance since most of the State could be classified as ‘Waters of the U.S.’ due to high groundwater tables and surface connections with ‘Waters of the U.S.’



“Arroyos are common geographic water features in the arid west. The examples in these photographs are non-permanent, ephemeral waters that only carry water during extreme precipitation events. This is an example of land structures which cause confusion under a one size fits all approach.” Image Credit: Dripping Springs Road and Baylor Canyon Road Improvement Project Environmental Assessment, BLM & FHWA, April 2015.

## E. Enhanced State and Local Government Role

States play a vital role in the protection of wetlands by addressing waters and activities that are not regulated under the Section 404 program, or by imposing additional limits on activities that are regulated under that program. Pursuant to Section 404(g) of the Clean Water Act, a state can assume the authority to issue permits for the discharge of dredged or fill material into waters regulated under the Clean Water Act other than traditional navigable waters or waters seaward of the high water mark. (33 U.S.C. § 1344(g)).



Clearwater

*“Since the passage of the Clean Water Act in 1972, tremendous progress has been made cleaning up America's waterways. Water crises in Flint, MI, Newburgh and Hoosick Falls, New York, remind us: The Clean Water Act is as important today, as it was then. It needs to be clarified, strengthened and enforced. All waters are connected to the water we drink. It's important to the economy, and it's important to each of us”. [Legislator Manna Jo Greene, Ulster County, NY](#)*



Legislator Manna Jo Greene, Ulster County, NY

EPA's regulations also authorize tribes to assume Section 404 permitting authority within their jurisdiction (40 C.F.R. § 233.2). In order to assume the Section 404 permitting program, a state must enact laws and regulations to create a program that meets requirements designed to ensure that the state can administer the Section 404 permitting program as the Corps.

This process could be streamlined and could be incentivized for state assumption. States can play a greater role in the administration of the federal program and streamline permitting for developers in the state through the issuance of State Programmatic General Permits. CWA Section 404(e) authorizes the Corps of Engineers to issue general



permits “on a state, regional or nationwide basis for any category of activities involving discharges of dredged or fill material”, if there are only minimal adverse environmental effects.

Local regulation of wetlands in addition to the state and federal programs have many benefits as well. Local decision-makers have numerous land use tools available to them that can be more effective at less cost. They can also protect sensitive landscapes valuable to their community, such as with building permits, zoning authority, sanitary

and health codes, and soil erosion control.

Back Cove runner, Portland ME. Photo Source: Corey Templeton Photography

## F. Scalia Approach: Challenges and Opportunities

Local governments, in general, support a narrow interpretation of the Clean Water jurisdiction. The Scalia opinion applies a narrow interpretation to CWA jurisdiction. Such an interpretation would extend jurisdiction to only “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters. The LGAC puts forth an approach that would yield categorical answers of jurisdiction of ‘yes’, ‘no’ or ‘maybe’ using criteria such as contained within the 2008 guidance and consistent with the Scalia approach.



*"Certainly America's waters must be protected. We should not sacrifice the quality of our streams. However, pragmatism must also be reflected in our regulations. A pristine stream in a desert of economic activity creates an unnecessary tension between the intent to protect our environment and those who simply seek an honorable way to provide for their families. We must always be prepared to balance the scales between environmental protection and economic opportunity."* **Mayor Stephen Williams, Huntington, WV**

Mayor Stephen Williams, Huntington, WV



Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities' drinking water (source water) are regulated and protected. These significant water bodies form the assets of our water infrastructure and these areas may or may not fall within the Scalia interpretation as "connected to a federal navigable waterway." Local governments would support States and Tribes assisting to identify these significant water bodies by delineating and mapping these significant 'Waters of the State'. These areas once identified should have primacy in decision-making.



**Dr. Hector Gonzalez, M.D.**

***"We need to protect our streams and wetlands that are the water source for many of our communities, especially for our EJ communities now and for our future generations. And we need to engage EJ communities to look at local solutions."***

***Dr. Hector Gonzalez, M.D., Director  
City of Laredo Health Department, TX***

## **G. Exemptions**

Exemptions for stormwater and green infrastructure are important for local government. Local governments would be supportive of a revised rule that would retain codification of the waste treatment exemption. It should also extend to municipal separate storm sewer systems (MS4s), stormwater ponds,

**"Ensuring clean water is vitally important for *all* Americans. Here in Michigan, we know this story far too well because of the Flint Water Crisis and continuing conversations about how we can ensure access to quality drinking water. The WOTUS rule must be carefully vetted to ensure that each level of government has the tools, resources, and clarity it needs to ensure clean water."**

**State Representative Stephanie Chang, Michigan**



**Representative Stephanie Chang, Michigan**

settling basins and recycled water facilities which depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. There has also been a major concern of county governments that roadside ditches are also exempt.

***“The EPA Local Government Advisory Committee is key to supporting and building the local-federal partnership. The local officials that serve on the LGAC are able to directly share feedback with EPA on rules and regulations and to help shape them to best meet the needs of communities across the country.”*** *Carolyn Berndt, National League Of Cities*

water recycling.<sup>5</sup>

The revised rule should affirm that reservoirs and ponds along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of “complete waste treatment system” found in existing federal regulations. This would include features such as storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with

## H. Permitting Reform

CWA Section 404 permitting is complex and outdated. Agencies’ budgets and staffing are overwhelmed and lack resources to respond to individual permits. At the same time, the private sector confronts time-consuming requirements that pose significant delays and economic burdens.



*“It’s not just about getting a permit done quickly. It’s about ‘why’ you have the permit in the first place. As long as we keep in mind that it’s about our environment, and it’s about our water, we can implement that in any way we choose.”*

***Commissioner Victoria Reinhardt, Ramsey County, MN.***

**Commissioner Victoria Reinhardt,  
Ramsey County, MN**

<sup>5</sup> 1 See 40 C.F.R. §35.2005(b)(12), defining “complete waste treatment system” as “all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including recycling or reuse, or from the treatment process.”

Permitting can be made more efficient and more effective. For example, permitting can be done more efficiently and in less time (less than 90 days). It can also be more flexible, decentralized and integrated with community goals. Local governments would be generally in favor of the State Assumption of the 404 program. Also, further consideration of General Permits and mapping would aid in permitting reform.

## I. Agriculture and Rural Communities

Agriculture and rural communities have expressed concerns about the 'Waters of the U.S'. Most of the concern of the 2015 rule has been whether it would modify existing statutory provisions that exempt "normal farming and ranching" practices from dredge and fill permitting or others that exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff, from all CWA permitting. The other key area of concern was the confusion whether or not ditches were exempt.



*"The Small Community Advisory Subcommittee (SCAS) received many great comments from across the nation, particularly as the issue applies to agriculture and small communities. We have done our best to incorporate them into our recommendations, and hope we can help to formulate a clean water rule that can work across the nation."*

**Commissioner Dr. Robert Cope, DVM  
Salmon, ID, Chair of Small Community Advisory  
Subcommittee  
SCAS Chairman**

**Commissioner Dr. Robert Cope, DVM, Salmon, ID,  
Chair of the Small Community Advisory Subcommittee (SCAS)**

Normal agricultural and silvicultural practices are exempt but the interpretive rule issued in 2014 (later rescinded) to clarify the 56 practices that are exempt from CWA Section 404 permitting was very confusing to the agricultural community. Another issue for rural communities is the National Pollutant Discharge and Elimination System (NPDES) permitting for application of pesticides and herbicides in WOTUS. Also, there is a concern that 'prior converted croplands' which are exempt if they are certified by NRCS, it should also be exempt from wetland regulations administered by the Army Corps of Engineers and EPA (Section 404 of the Clean Water Act).





However, if the land changes to a non-agricultural use, or is abandoned, according to the criteria established by the Corps and EPA, it may be regulated under the CWA. These issues combined with the complexity of the WOTUS and the role of the NRCS poses significant issues for the agricultural sector and rural communities.

Fencing Livestock, Lexington, KY-Photo Source, Eric Vance, EPA

*"Waters of the United States' give us the unique opportunity to make sure all Americans have access to the best drinking water possible. We also have a duty to preserve the most vital part of life- Water."*

*Mayor (Former) Johnny DuPree, Ph. D.  
Hattiesburg, MS*



**Mayor (Former) Johnny DuPree, Ph.D., Hattiesburg,  
Vice-Chair, Small Community Advisory Sub-  
Committee**

MS

## J. Outreach to Local Governments

There is a need for enhanced outreach to local governments. Its significance in WOTUS decision-making is all the more critical. A comprehensive communication strategy is needed for local governments that improves the channels of information distribution, and enhances explicit communication at all levels of government. Getting information into the hands of local governments where it will have the most impact must be a priority. This is particularly relevant in small, disadvantaged and ethnically diverse communities. Local governments need to act effectively so that information will reach all relevant parties so it can also be readily communicated effectively to citizens.



**Administrator Pruitt meets with Mayor Elizabeth Kautz, Burnsville, MN and Vice-Chair, Protecting America's Waters Workgroup-at the U.S. Conference of Mayors, Photo Source: Eric Vance, EPA**

Therefore, there will be a pressing need to improve governmental communication and transfer of information among the EPA, state, tribal and local governments, and to get that information out to the public. Specific tailored information for local elected officials is also needed to convey the effective changes on any new WOTUS rule.

***“A change in culture is necessary in managing our water resources. Working together to solve our problems is what is needed rather than imposing fines on cities who already cannot pay.”***

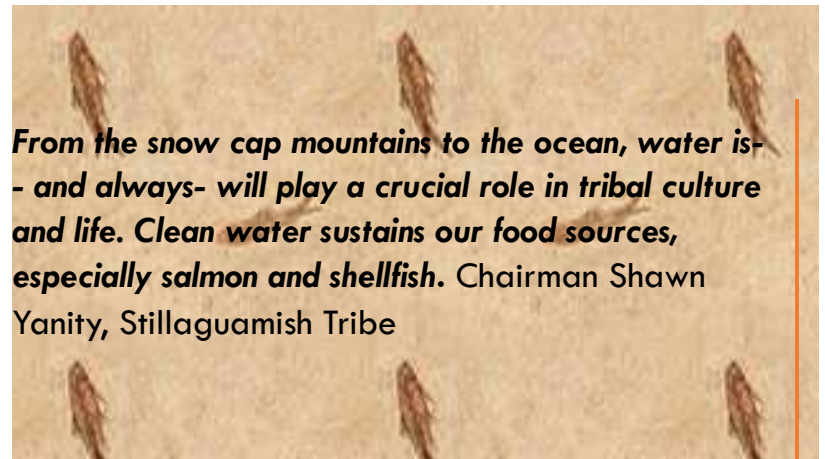
*Mayor Elizabeth Kautz, Burnsville, Minnesota and Vice-Chair of the Protecting America's Waters Workgroup*



**Mayor Elizabeth Kautz, Burnsville, MN**



Chairman Shawn Yanity, Stillaguamish Tribe



## K. Financial Sustainability

One of the common themes heard by LGAC members revolves around affordability. This issue has several components including compliance, pollution and clean-up costs. Punitive costs only serve to reduce local government resources and increase the disproportionate costs for small and economically disadvantaged communities. If the goal is safe, clean water throughout the country, innovation in approach and cost allocation must be considered at the federal, state and local levels.



Mayor Sal Panto, Easton, PA

*The availability and cleanliness of our water supply is paramount to building a great nation.*

**Mayor Sal Panto, Easton, PA**





*"Waters of the U.S. needs an education piece so that others are given a clear understanding that clean and safe water is a precious resource connected to everything-the water we drink and the food we eat. And we have a responsibility to protect it not only this generation but the generations to come."* Samara Swanston  
Counsel to the New York City Legislature

**Samara Swanston, Counsel to the New York City Legislature**

### III. Response to Charge: Findings and Recommendations

- **Question: 1-** How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined? How would you like to see the agencies interpret 'consistent with Scalia'? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

#### 1.a. How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined?

##### **Background**

In the *Rapanos v. United States* 547 U.S. 715 (2006), the Supreme Court provided a plurality decision of four justices, led by Justice Scalia. The decision basically challenged federal jurisdiction to regulate isolated wetlands under the Clean Water Act. It also applied a very narrow interpretation to CWA jurisdiction, extending the agencies' regulatory authority only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. Justice Kennedy focused on whether the waters in question have a "significant nexus" to traditional navigable waters, i.e., whether they, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The LGAC has previously commented that they would prefer a clear and simple approach for jurisdictional determinations such as an approach that yields categorical answers of jurisdiction in these categories: 'yes', 'no' or 'maybe' responses. Any of these answers are sufficient for local governments if these answers are provided in a timely fashion.

## Recommendations:



EPA and the Corps should apply simple approaches that yield jurisdictional calls with simple criteria that give a 'yes', 'no' or 'maybe' answer. (2014 LGAC Report)



The LGAC recommends using State criteria for these terms as a potential Approach to Wetlands with a "Continuous Surface Connection" and "Relatively Permanent" Waters. Here are a few examples of such criteria:

### Jurisdictional

- ✦ Streams with seasonal flows or streams with man-made flows from other water bodies should not cause ephemeral and intermittent streams to be defined as 'relatively permanent'. Metrics and thresholds should be established when a stream is considered "relatively permanent." Such metrics will vary geographically, and the thresholds will be subjective, and made on a case-by-case basis.
- ✦ Perennial streams only as "relatively permanent waters".
- ✦ Wetlands that directly touch jurisdictional waters are jurisdictional.
- ✦ Wetlands with permanent, continuously flowing, surface connections should be included as jurisdictional.

### Non Jurisdictional

- ✦ Erosional features in the arid West, such as arroyos and dry washes should be 'non-jurisdictional'. However, there may also be circumstances where the current practice of considering wetlands with a continuous surface connection, regardless of distance, to be jurisdictional is not appropriate. Such connections should be perennial (and not include ephemeral and intermittent connections).
- ✦ Ditches and canals that only carry intermittent flows of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control features that periodically flow in response to significant precipitation events, should also be exempted.
- ✦ Develop metrics to identify when "some degree of connectivity" should not be utilized. This will require subjectively defining thresholds for what constitutes a significant degree of connectivity, which should be avoided if at all possible.
- ✦ Wetlands where connections do not exist should be exempted from jurisdiction.
- ✦ Overland flows that flow through dryland breaks to a WOTUS (rendering a tributary up gradient of the dryland break) should be non-jurisdictional.

- ✚ Water features that may be present (for example, residual ponds resulting from placer or other mining efforts) are not jurisdictional where a continuous physical channel is absent; a bed-and-bank is not discernible; an ordinary high water mark is not observable; and/or there are no flow characteristics are not jurisdictional.

## 1.b. How would you like to see the agencies interpret 'consistent with Scalia'?

### Background

EPA and the Corps issued the 2008 guidance document following the *Rapanos* case that was intended to clarify WOTUS. It does so by asserting CWA jurisdiction over waters that would meet *either* the plurality test (relatively permanent; continuous surface connection) *or* the significant nexus test. In the Guidance and Memorandum of Agreement between the Corps and EPA, there is a list of key questions and answers, that generally breaks the jurisdictional analysis into three major categories. *NOTE: The 2008 guidance did not go out sufficiently for public review and was not communicated well to local governments and other stakeholders.* The first, and presumably more manageable category includes those waters over which CWA jurisdiction will be asserted in every case. And then the second category of waters that are not 'Waters of the U.S.' The third category of 'maybe' will go to criteria developed by the states on waters that are significant and should be included as jurisdictional waters.

### Recommendations:

- Criteria as outlined in the 2008 guidance should be used for a revised rule, along with revised definitions and the use of state-specific criteria.
- Definitions should be modified to provide clarity.
- Criteria should be developed that state a series of questions to determine 'relatively permanent' or 'continuous'. If answers are 'yes' or 'no' it leads to a 'yes', 'no' or 'maybe' jurisdictional determination. If there is a 'maybe', it diverts to state-specific criteria for jurisdictional determination.

## 1.c. Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

- EPA and the Corps should establish an Interagency Taskforce to develop the matrix of questions to determine 'permanent' and 'continuous' indicators. Their results should be published and the public given the opportunity to give comment. (LGAC 2014 Report)






The LGAC recommends these following examples of state- specific criteria for the revised rule:

### **Intermittent streams, playa lakes, wetlands, and other waters:**


- ✚ In cooperation with the states, the EPA should designate intermittent streams and other waters as non-waters of the U.S. based on the following criteria:
  - ❖ Seasonal flow of running or standing water — each state to develop its own criteria subject to EPA review and approval;
- ✚ Because of the variability of conditions within and among states, the EPA should provide guidelines for state standards that include factors to be considered, but which do not necessarily constitute federal standards (such as the Science Advisory Board's Connectivity Report).<sup>6</sup>
- ✚ Such factors to include are:
  - ✓ Average number of days of stream flow;
  - ✓ Seasonality of stream flow;
  - ✓ Rate of stream flow;
  - ✓ TMDL levels during such periods, amount of water and TMDLs delivered to the "discharge" body of water; and
  - ✓ Any other relevant factors as the Agency deems appropriate.
- ✚ States should have standards/factors which reflect possible ground water recharge rates on intermittent streams, playa lakes, wetlands, and other waters. Similarly, factors should include potential contamination of ground water from such water bodies.
- ✚ States should develop metrics for each standard they propose and submit to the EPA for review and approval. EPA should respond within 90 days from receipt of a completed state plan to review, propose revisions, or deny the submitted standards and metrics. Failure to complete the analysis within 90 days, subject to the EPA and state agreeing on a time extension, shall result in the submitted standards and metrics being deemed accepted.
- ✚ Once the state-submitted standards (three years) are accepted, each state should submit a report to the EPA detailing whether the waters in question continue to meet the EPA-accepted standards, as determined by the state's metrics. The EPA should determine whether each state should submit subsequent reports on an annual or other timeline basis.
- ✚ States should use generally accepted scientific findings on issues that affect water quality related to intermittent streams, playa lakes, wetlands, or other designated waters. The EPA may request states review their standards and submit proposed revised plans for the Agency's consideration and approval.

<sup>6</sup> U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-11/098B, 2013.

## Permanent Bodies of Water:

-  Many wetlands are seasonal and have been addressed above. For those wetlands that are permanent, states should be empowered to develop metrics that demonstrate whether the water draining a wetland connected to jurisdictional water are "cleaner" than the water that otherwise would flow, if the wetlands were not present.
-  States should submit proposed criteria and measurement techniques to the EPA for review and approval. EPA should have 90 days from receipt of completed state plan to review, suggest revisions, and approve or deny the submitted plan. If the review is not completed within 90 days, subject to extension if the EPA and state agree, the submitted plan shall be deemed accepted.
-  States should be encouraged to develop water quality criteria and standards for wetlands and other water bodies that impact ground and source water quality.

 An application for Smart phone or hand-held computer should be developed to give a quick jurisdictional determination and the output sent to all interested parties. (LGAC 2014 Report)

 Manmade conveyances, stormwater treatment systems, ditches, farm and irrigation ditches and green infrastructure amenities should be exempt from jurisdiction. Where possible, EPA and the Corps should work with State, local and tribal governments to map these features as well. *NOTE: Drinking water and wastewater treatment utilities may have these features mapped as part of Asset Management features.* (LGAC 2014 Report)

- **Question 2-** What opportunities and challenges exist for your locality with relying on Justice Scalia's opinion?

## Background

Cities and communities care deeply about the quality of water. One concern is that a rule that is left entirely to interpretation and does not provide sufficient clarity, may add to costs and delays without causing important improvement to water quality. (Iowa NLC Letter) We understand that the goal is to make it easier to identify WOTUS and a rule interpreting the Scalia decision may not draw bright enough lines for local governments to easily identify those waters affected. Therefore, the use of the Scalia approach in and of itself is unlikely to significantly resolve all of the considerable uncertainty surrounding CWA jurisdiction (either then or now), or prevent continuing litigation to test the agencies' interpretations in the federal courts. However, the 2008 guidance does have criteria that will pose less uncertainty and yield faster results. If the 2008 guidance were revised to include clearer definitions with input from states, local and tribal governments and other stakeholders, with state-specific criteria, it could perhaps help to resolve these issues.

## Recommendations:

 Relying on a modified Scalia approach and incorporating the 2008 guidance into a revised rule can provide a clearer certainty of federal jurisdictional waters which will lead to more certainty and more ease in permitting.

➤ **Question 3: Are there other approaches to defining “waters of the U.S.” that you would like the agencies to consider to providing clarity and regulatory certainty?**

### Background

The 2008 guidance document (issued post- *Rapanos*) offers assistance and criteria to assess jurisdiction of WOTUS (post- *Rapanos*). It is consistent with the Scalia approach but also asserts criteria to be used for further consideration of CWA jurisdiction (over some waters). This approach would reflect the opportunity to cover waters significant to states, localities and tribes. The new WOTUS rule should also confirm certain exemptions from federal jurisdiction, offering federal clarification where there has previously been uncertainty. These exemptions include stormwater detention ponds, wastewater treatment facilities, irrigation ditches and "puddles."

### Recommendations:



The LGAC recommends that a similar approach articulated in the guidance to the 2008 guidance be used to revise the WOTUS rule.



The 2015 CWR regulates any area having a trace amount of water if it also has – or ever had – a bed, bank, and an ordinary high water mark (OHWM). This could include many channels and other features that are almost perpetually dry. For the 2017 revised rule, there should be more predictability and certainty in general if there is a dry bed with a OHWM (with historical aerial or infrared photography that it can be established as a WOTUS) or exempt.

➤ **Question 4-The agencies’ economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could be affected but would not be captured in such an economic analysis?**

### Background

A revised Clean Water Rule is expected to have increased clarity and certainty to the process of making jurisdictional determinations under the CWA. Individual jurisdictional determinations can be time-consuming and resource-intensive for the agencies, permittees, business community and local governments. A revised rule should be designed to reduce the uncertainty and clarify categories of waters that are jurisdictional or not jurisdictional by simplifying the process. Clarifying the CWR will reduce the costs and have positive economic benefits. However, the rule itself does not incur direct costs. The rule only applies when a permit is required for a pollutant discharge that would degrade, pollute or destroy a water body. On a positive jurisdictional call, it is uncertain how high the direct costs would be and who would pay those costs. More clearly defined exemptions will lessen the trigger for a CWA permit. However, it is uncertain the direct costs of either a positive or negative jurisdiction determination. Conceivably, a positive jurisdictional determination could trigger permitted activities potentially threatening or polluting waterways. This is especially a concern of local governments as it applies to water bodies that are used for drinking water sources. Because of the high costs of water treatment to meet drinking water standards these costs are often transferred directly to the rate payer and citizens. If a water body is polluted or destroyed, then cost at the local level could pose serious economic costs. Whereas, under a CWA permit, the permittee would seemingly be required to pay mitigation costs rather than the costs transferred to the local government or rate payer. Also, as state or local programs assume more authority, likely with more



efficiency, the costs to manage permitting program could increase. States and local governments would not be able to assume these costs without additional resources. Therefore, the economic analysis should be broad and the direct and indirect costs be considered.

### **Recommendations:**



The Economic Analysis should be broad to include impacts to not only Clean Water Act programs but also state and local programs.

Below are programs from a local government perspective that should be considered in the Economic Analysis:



**Source Water Protection**-There is a general consensus that protecting the nation's water resources is important to local government. Local governments realize that poor water quality affects the health and economies of their communities, disproportionately impacting those that are low-income. Local governments also realize that protecting source water bodies like rivers, lakes, streams, wetlands and groundwater is paramount to protecting drinking water. (LGAC 2016 Drinking Water Report). **Under the Safe Drinking Water Act**, Source Water Assessments (SWAs) provide information about sources of drinking water used by public water systems. SWAs are studies or reports developed by states to help local governments, water utilities, and others protect sources of drinking water and are done differently by each state. Each program is adapted to a state's water resources and drinking water needs. To protect source water, the tools of the Safe Drinking Water Act (SDWA) and Clean Water Act (CWA) programs are utilized to protect source water. Additional protection tools can be found in other EPA programs and various agricultural programs. Changes made to CWA programs may greatly impact state and local source water protection programs and plans. This could have significant economic impacts to local communities. For example, in Flint, Michigan, shifting the source water to the Detroit River water resulted in significant deterioration of water quality that produced significant public health and economic problems. In Portland, Oregon, where source water is protected, treatment cost is less by having Clean Water Protection programs in place. It is unclear how changes in a revised rule will impact streams and tributaries that impact local sources of drinking water. If adequate CWA protections are not in place, it could have significant negative economic impacts to water utilities. These costs are likely be transferred to local governments and rate payers. It is also unclear how this may impact the prevalence of toxic algal blooms which have proved very costly impacts to communities' drinking water.



**CWA Section 402** - The NPDES permits and discharges could hold significant economic issues for local governments in regard to WOTUS for wastewater treatment, stormwater management, CSOs, and application of pesticides (used for vector control). There has been a concern about expanded federal jurisdiction to previously unregulated streams, ditches, and wetlands. However, a revised rule will include exclusions beneficial for those that operate MS4s. The rule includes key exclusions that may be useful for localities. The rule retains a long-standing exclusion for "waste treatment systems," such as treatment ponds and lagoons. It also adds new exclusions for artificially created ponds, settling basins, construction and mining excavation pits, and wastewater recycling structures. Lastly, the revised rule could finally codify the well-understood principle that the CWA does not apply to groundwater. For MS4s, the primary concern about the 2015 CWR was it could potentially be used as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are "waters of the US." For example, that could mean that NPDES permit coverage would be required to discharge into an MS4 or that a CWA 404 permit would be required to do maintenance on a BMP. The 2015 CWR includes, for the first time,

a regulatory exclusion for “Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.” However, the exclusion does not apply to ditches that were created in previously existing streams or wetlands. The rule’s exclusions are important because they take precedence over the rule’s jurisdictional tests. For example, a stormwater conveyance ditch that qualifies for the stormwater exclusion would be excluded from CWA jurisdiction even if the ditch would be considered a jurisdictional water under the tributary test. Furthermore, in a reversal of EPA and the Corps’ previous position, the agencies stated that they do not retain any discretion to extend CWA jurisdiction to water features that qualify for one of the rule’s exclusions. It is unclear how a revised rule will impact Section 402 permits. Potentially, Section 402 permits could prove more costly than Section 404 permitting at the local level in regard to stormwater and wastewater treatment.

-  **Pesticide Applications in Waters of the U.S.-** Since 2011, pesticide applications into, over, or near WOTUS are permitted under the CWA National Pollutant Discharge Elimination System (NPDES) Program due to a 2009 U.S. Court of Appeals for the Sixth Circuit ruling. Agricultural producers, pesticide applicators and local governments have opposed or expressed concerns on the permitting largely on the grounds that it is duplicative and unnecessary to regulate pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Local governments, mainly county governments are largely responsible for vector control programs to manage mosquitos and spraying of insecticides to reduce vectors and public health concerns. Although the 2015 CWR would have arguably expanded the scope of the waters requiring pesticide permitting, the replacement or elimination of the CWR will not end NPDES requirements for pesticides. However, it may provide opportunity to clarify what discharge waters are subject to federal versus state permits.
-  **Section 303 (d)-** Currently, The National Rivers and Streams Assessment (NRSA) 2008-2009 report provides information on the biological and recreational condition of the nation’s rivers and streams and the key stressors that affect them. The Report indicated that about half of our nation’s streams (some of which provide sources of drinking water) have poor water quality. Poorer water quality could result in significant treatment costs such as Impaired Water sites under CWA Section 303(d) which could transfer the costs to local governments. In addition, in communities that rely on these water bodies for drinking water and source water, the cost will ultimately be transferred to rate payers, having a significant economic impact to local governments. It is uncertain how changes in a revised WOTUS rule will impact on local governments and their local efforts to improve access to clean water.
-  **Section 319 and Other Grants-**It is uncertain as to how the determination of WOTUS will impact grants to states and communities. A grant may be given a priority if given to protect a ‘Water of the U.S.’ It is uncertain how that would impact states and communities.
-  **The Coastal Zone Management Act (CZMA) of 1972** provides for the management of the nation’s coastal resources, including the Great Lakes, administered by the National Oceanic and Atmospheric Administration (NOAA). The goal is to “preserve, protect, develop, and where possible, to restore or enhance the resources of the nation’s coastal zone.” The National Coastal Zone Management (CZMA) Program aims to balance competing land and water issues through

state and territorial coastal management programs managed through state and local Coastal Zone permits. These CZMA Programs work in tandem with the many tools of the CWA including Section 404. The Economic Analysis should include an assessment of the economic impact to coastal resources and wetlands, including an economic impact analysis to water dependent industries such as fishery (salmon and seafood industry), tourism, and other water dependent industries. For example, in the Puget Sound region, fish hatchery and harvest operations reeled in about \$18 million to tribal personal income. In areas where the average annual per capita income is around \$10,000, a decline in the availability of healthy fish can significantly impact the economies of these communities. (LGAC Drinking Water Report). An example, the LGAC worked with is evaluating the impacts of the Deepwater Horizon Spill to local governments in the Gulf of Mexico. The Gulf fishing and tourism industries produce \$3.5 - \$4.5 billion a year. Without adequate federal CWA authorities in place other potential impacts could occur, having deleterious impacts to local economies and natural resources.

➤ **Question 5- What additional information can you provide from a local government perspective that EPA should be aware of?**

## DEFINITIONS

### Background

Clear definitions are critical for the revised WOTUS rule. The LGAC fully supports and endorses EPA's efforts for clarification of 'Waters of the United States'. These improvements are long overdue. The LGAC highlights clarity in definitions, which is critical for the revised rule. While the LGAC does not have specific language recommendations for all of the definitions of a revised rule, the LGAC offers the following for the EPA to consider including, redefining or clarifying in the rule.

### Recommendations:

The LGAC puts forward the following definitions brought forward to consider in the 2017 WOTUS Rule.



EPA should, where appropriate, use definitions that are used consistently across all of the federal agencies, e.g. EPA, Army Corps of Engineers, Federal Emergency Management Agency, Department of Agriculture, U.S. Geological Survey and U.S. Forest Services. (LGAC 2014 Report)



EPA should task an Interagency Workgroup to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review. (LGAC 2014 Report)



Definitions should be practical, written in plain English, and be enforceable. (LGAC 2014 Report)



The LGAC recommends that narrative descriptions with examples be provided to augment the definitions, as well as pictures, where this could achieve greater clarity. (LGAC 2014 Report)



The public should have the opportunity to comment on revised definitions. (LGAC 2014 Report)



The following terms, among others, should be defined concisely and with clarity: 'other waters', 'adjacent', 'irrigation-induced wetlands' and 'upland'. Furthermore, the LGAC recommends 'upland' be defined based upon exclusion of what it is not. (LGAC 2014 Report)



The LGAC recommends that EPA consider the following when defining these terms: (LGAC 2014 Report)

### **Wetlands**

- ✦ The current definition of wetlands should be used: "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

### **Floodplains**

- ✦ The definition of the Interagency Taskforce on Floodplains should be used: "Floodplains include low-lying areas adjacent to and the water bodies of streams, rivers, lakes, estuaries, and coastal zones that are inundated or may become inundated as a result of changing conditions." The definition of floodplains should take into account movement of flood lines due to extreme weather events.

### **Riparian area**

- ✦ The LGAC recommends that riparian areas be defined as "an area bordering a water where surface or subsurface hydrology directly influences the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."

### **Floodway**

- ✦ 'Floodway' should be defined as a flood course within the banks or within a canyon where water would be expected to flow under normal circumstances.

### **Ditches**

- ✦ A clear definition of 'ditch' should be provided in the proposed rule.
- ✦ The following Google Dictionary definition of 'ditch': a "narrow channel dug in the ground typically used for drainage". Examples listed are trench, croft, channel, dike, drain, watercourse conduits.

### **Significant Nexus**

- ✦ The most important definition contained within the proposed rule and at the heart of jurisprudence in the issue of 'Waters of the U.S.' is 'significant nexus'. It is uncertain how 'significant' nexus would be interpreted so the Committee recommends EPA describe significant nexus such that it is in plain English, with specific terms and examples.
- ✦ The agency should consider all three parameters of water quality "the chemical, physical, and biological integrity of water" as criteria for 'significant nexus'. Likewise, the LGAC does not



agree that only one of these features be used as the benchmark, but that all three parameters of chemical, physical and biological integrity of a water body are all equally important.

- ✚ The LGAC does not agree with the use of the term “significant effect” and also recommends language of “insignificant or speculative” should not be used.
- ✚ EPA charged the Science Advisory Board with interpreting significant nexus and connectivity based on the best science available. The LGAC is uncertain as to how the revised rule will make benefit of these important and critical definitions; however, the findings may be important to factor into a revised rule.

## Streams and Tributaries

### Tributaries

- ✚ A clear definition of ‘tributaries’ be included in the proposed rule using clarifying examples.

### Streams

- ✚ The revised rule should define the term “rain dependent stream”. An example of a stream that is not rain dependent be provided.

## ENVIRONMENTAL JUSTICE

### Background

The LGAC would like to assure that all, but especially EJ, small, rural and tribal communities have access to safe drinking water and these water sources protected and made accessible. (For example, disproportionately low income communities do not have access to drinking water and source water which is sometimes the only source of drinking water).

#### EJ Communities:

- ✚ Must have regulation and enforcement that is coordinated among all levels (federal, state and local) to assure we protect water now and for our future generations, since water is life.
- ✚ Must have protections against current contaminants but, as well, engage the scientific community to preserve safe drinking water, and recreational waters from new and emerging contaminants. EJ communities and Tribal communities depend on clean and safe water for their food supply, as well.
- ✚ Need to have clearly defined WOTUS, what they are and engage EJ communities to better understand protection of these valuable watersheds and bodies of water.
- ✚ Look to local communities to find local solutions. Water infrastructure resources, including clean and safe source water, are needed for EJ communities to ensure safe and accessible drinking water.
- ✚ Must have assurances that for all issues of WOTUS that EJ communities are included in any economic analysis to assess cumulative risks for the lack of safe drinking water and/or for being exposed to contaminated water (lead, mercury).

- ✚ Need to be integrated in urban and rural planning in coordination with state and federal partners for Flood control impacts of a narrow CWA interpretation.

### **Recommendations:**



The revised WOTUS rule should serve as another important tool towards advancing clean safe drinking water for all communities throughout the country, but especially for EJ, small, rural and tribal communities.



The revised WOTUS rule must include protections for the access of reliable, clean and safe drinking water especially for disproportionately affected low income EJ communities (who already have significant health disparities) and vulnerable populations across the country.



The revised WOTUS rule should protect communities against downstream impacts of agricultural runoff, sewage, industrial waste, mining, flooding and improper disposal of medical waste.



The revised WOTUS rule must assure protection of water bodies from contamination that can significantly harm the health of a community.

### **➤ Question 6- Are there other issues the agencies should consider which would help ease the regulatory burden for implementation of WOTUS for state, local and tribal government?**

### **Background**

The LGAC believes that clear boundaries of WOTUS jurisdiction and clear exemptions are crucial for the support of local governments. Clear boundaries provide for more equitable and predictable permitting and also for better protection of our water resources. (LGAC 2014 Report)

The LGAC concludes, based upon the testimony that we heard and the analysis of the Committee, that a revised rule can significantly clarify the historic confusion and uncertainty resulting from conflicting case law and Supreme Court decisions. (LGAC 2014 Report)

In 2014, the LGAC heard a broad level of concerns raised by municipal associations and county governments concerning MS4s. The LGAC is uncertain of what the regulatory impact will be on MS4s as a revised rule is currently not written. MS4s and green infrastructure are foundational to the continuum of care that is being implemented at the local level to improve water quality. (LGAC 2014 Report)

Much of the uncertainty of MS4s (in 2014), was that stormwater and green infrastructure is centered on whether these collection systems or portions of the systems would be required to meet State Water Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load (TMDL) because they will now be considered a "Water of the United States." WQS and TMDL were not designed

for this application so application within a collection system seems not warranted. WQS define goals for a water body by designating its uses and setting criteria to protect those uses, but there is no established designated use for MS4s. Without a designated use, the default is "fishable/swimmable," unless the state demonstrates that it is not attainable for one of six particular reasons, none of which is because the waters serve as stormwater conveyances. A pending EPA proposed rule on water quality standards could make use designation analyses more stringent (i.e., by requiring a "highest attainable use" presumption). Also, if it is not deemed jurisdictional under Section 404 it will likely need a Section 402 permit and subject to WQS. (Iowa NLC Letter)

There could be potential impacts to wastewater systems and NPDES permitting related to these systems. Because of the exclusion language, the Agency did not seem to analyze the impact to wastewater systems but some cities have raised questions whether some part of combined sewer systems or other aspects of a wastewater treatment systems would be considered within the jurisdiction of the EPA, based upon the WOTUS rule. (Iowa NLC Letter)

Many communities already heavily focus on water quality programs and projects; these communities should be encouraged and incentivized to do more. A revised WOTUS rule should recognize that much of the action towards cleaner water happens at the local level. High performing local agencies should be noted as following best practices and afforded a relaxed regulatory environment in those circumstances where water quality objectives are met and exceeded. (LGAC 2014 Report)

The LGAC believes that making jurisdiction calls of what is 'exempt' and what is not in a timely fashion is critical to protecting water resources and providing predictability to state and local governments. The LGAC believes that easily accessible predictive tools need to be developed and utilized to speed this process. (LGAC 2014 Report)

### **Recommendations:**



The LGAC recommends that the use of State General permits be expanded to reduce the regulatory burden and also be used for smaller projects with minimal impacts. It could also be used to address regional and state-specific activities and special water bodies. Under Section 404(e) of the Clean Water Act, the U.S. Army Corps of Engineers can issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects. Nationwide permits can authorize a wide variety of activities such as mooring buoys, residential developments, utility lines, road crossings, mining activities, wetland and stream restoration activities, and commercial shellfish aquaculture activities. All permits, whether individual or general, must be reissued every five years.



The LGAC recommends that EPA clearly articulate jurisdictional waters in an outreach plan which, in plain English, describes these areas with a clear statement of why they are in need of protection. This will provide local governments with more certainty and assurance in communicating the rule to their communities. (LGAC 2014 Report)



The LGAC highly recommends explicitly specifying when ditches would be considered jurisdictional. (LGAC 2014 Report)



The LGAC recommends that manmade conveyance components of MS4s be exempt from 'Waters of the United States.' This includes manmade green infrastructure, roads, pipes, manmade gutters, manmade ditches, manmade drains, and manmade ponds. (LGAC 2014 Report)



The LGAC recommends that natural conveyance components of MS4s are included in 'Waters of the United States.' This includes natural wetlands and associated modifications to natural wetlands. (LGAC 2014 Report)



The LGAC recommends that green infrastructure projects be exempt from WOTUS and that they should be incentivized to protect water resources. (LGAC 2014 Report)



The LGAC recommends that there be some criteria which exempt certain activities in 'Waters of the U.S.' for public safety and hazards. This is particularly critical in flood prone areas and for disadvantaged communities in floodways that may need to have emergency relief quickly and rapidly. (LGAC 2014 Report)



The LGAC recommends that EPA work to identify regional areas where jurisdictional determinations could be problematic in terms of sea level rise and where groundwater and surface flow intermix. For example, it is unclear how the state of Florida, with so much land area nearly at sea level, will be categorized. In this specific region, conceivably all waters could potentially be jurisdictional. The LGAC recommends that specific guidance be developed to address and classify these areas with region-specific criteria to assess jurisdictional determinations. (LGAC 2014 Report)



The LGAC recommends that EPA, working with the Corps of Engineers, develop a tool for use by local governments which a permittee can use to assess their own jurisdictional status. For example, this could involve a simple categorical, printable questionnaire in a decision tree framework with questions aimed with an outcome of 'yes', 'no' or 'maybe'. The LGAC recommends this method be computerized and developed as a smartphone application which yields a simple predictive outcome. (LGAC 2014 Report)



The LGAC recommends that EPA work directly with stormwater associations to provide guidance to best address MS4s, stormwater controls, and their jurisdictional determinations. (LGAC 2014 Report)



The LGAC recommends that EPA look to stormwater experts and the practical advice that stormwater professionals can lend to a proposed WOTUS rule that the EPA is considering for 'Waters of the U.S.' (LGAC 2014 Report)




The LGAC recommends addressing how mining impoundments, borrow pits and tailings ponds will be addressed within jurisdiction of WOTUS. (LGAC 2014 Report)



The LGAC recommends that regional and local technical manuals as well as other communication tools (e.g. checklists, smartphone apps, etc.) designed to account for geographic differences in each EPA region be developed to assist with jurisdictional calls. (LGAC 2014 Report)




 The LGAC recommends that EPA provide planning maps at the state level which could be used as a planning tool to ascertain jurisdictional probability with high certainty. Such mapping would include the Hydrologic Unit Codes (HUC) for waterways. (It is presumed that all waterways with a designation of HUC-12 or less will be included in WOTUS.) (LGAC 2014 Report)

## **IMPLEMENTATION**


### **Background**


The LGAC heard strong concerns (in 2014) regarding implementation, especially from local governments. Several local agencies reported uncertainty in interpretation as well as uncertainty in time and cost to undertake the permitting process. The rule language must be consistently interpreted by all parties including the EPA, the US Army Corps of Engineers and local agencies. The rule should stipulate responsiveness of permitting agencies. Otherwise, the LGAC is concerned that a revised rule could further delay permits at the local level. (LGAC 2014 Report)

### **Recommendations:**


 The LGAC recommends that a revised rule stipulate time frames for permit review and jurisdictional determinations. Time frames such as 60 to 90 days to obtain a permit would be well-received at the local level. (LGAC 2014 Report)

 The LGAC recommends that EPA more clearly identify how Preliminary Jurisdictional Determinations would be processed to avoid unnecessary permit delays. (Iowa NLC Letter)

 The LGAC recommends that EPA Administrator work with the Chief of the US Army Corps of Engineers to determine a process to reduce the issue of permitting delays of Section 404 permits. These delays are a significant and a costly issue for local governments. (LGAC 2014 Report)


 The LGAC recommends that state agency staff be utilized to make jurisdictional calls and work in cooperation with local districts with subject matter expertise such as county-based Conservation Districts or water management districts (e.g. Florida Water Management District). These local agencies can work together with the Corps to streamline permitting. (LGAC 2014 Report)


 The LGAC recommends that EPA regionalize wetlands delineation manuals to take into account regional and local variability of vegetation, hydromorphology and hydroperiods. (LGAC 2014 Report)


 The LGAC recommends that State agencies be delegated the authority to make jurisdictional determinations. These determinations could be certified by the EPA and Corps District staff. Potentially, private sector firms and/or individuals could be certified to make these determinations. This could relieve overburdened federal agencies and accelerate the determination/permit process.

 EPA and the Corps should encourage and provide incentives for States and Tribes to identify and protect significant state or unique waters such as sources for drinking water to protect.

 EPA and the Corps should provide mapping of jurisdictional waters (8-Digit HUC). It should also be accessible by zip code and available online. (LGAC 2014 Report)

 The LGAC recommends that EPA work further with the Committee to develop a cohesive strategy to address local tools for stream and tributary protection so that it does not interfere with local governments protecting and maintaining water resources for its citizens and communities. For example, many local governments have zoning ordinances and coastal management plans that are protective of streams, riparian areas, and sensitive wetland areas. It is unclear how a revised WOTUS rule will affect our ability at the local level to protect our significant ecological areas. (LGAC 2014 Report)

 The EPA should work with local communities to utilize the regulatory tools that the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) provide in order to protect source water, especially for low-income, minority, rural and tribal communities where this threat remains. (LGAC Drinking Water Report 2016)

 The LGAC strongly recommends that the EPA continue to explore how the SDWA and the CWA could be coordinated to better protect source water and our nation's water resources. In addition, the LGAC recommends that the EPA coordinate a Memorandum of Agreement with the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) to explore ways to reduce agricultural runoff and improve soil health. (LGAC Drinking Water Report 2016)

## STATE ASSUMPTION OF SECTION 404

### Background

Under current regulations, states and some tribes may seek delegation to implement CWA § 404 which governs dredge and fill activities in wetlands and other waters. This CWA assumption allows a state or tribe to regulate those waters and to take jurisdictional responsibility to condition, approve or deny dredge and fill permits in lieu of the federal Section 404 program administered by the Corps and EPA. The state or tribal program must be approved by the EPA and the Corps of Engineers. States and tribes play a significant role in implementing CWA Section 404 Program through assumption and to fully integrated and comprehensive water program addressing the full range of state, tribal, and CWA requirements. Assumption allows for flexibility, less time constraints and the ability to integrate state and local water quality objectives.

The State of Michigan has received delegation authority and the LGAC was briefed on their program. Under the Michigan program, the permitting process is more streamlined and has incorporated other state statutory programs like CWA § 401 certifications, dam safety and other state regulatory programs. The average time of the permitting process is 21 days.<sup>7</sup>

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<sup>7</sup> "Wetlands Protection." Michigan Department of Environmental Quality. [www.mi.gov/wetlands](http://www.mi.gov/wetlands).


Based on the Michigan example, the LGAC believes that states may more effectively administer the Section 404 program, especially in addressing regional issues. States can more effectively interact with local governments, businesses, agriculture and private landowners. (LGAC 2014 Report)

### **Recommendations:**

 The LGAC believes that State Assumed CWA and tribal-led programs may provide substantial cost-savings in time and money and should be investigated further. (LGAC 2014 Report)

 The LGAC recommends that guidance be developed to facilitate State Assumption of the Section 404 program.

 In order for state assumed programs to be successful, adequate resources must be made available and comparable water quality protections must be adopted by the state or tribal government. Despite these perceived barriers, the LGAC believes this is a highly worthwhile approach. Incentivizing the delegation program could achieve a strong return on investment. (LGAC 2014 Report)

 Local agencies may also be more receptive to a revised WOTUS rule if it is a state-run program which can be more responsive to local and regional issues. (LGAC 2014 Report)


 The LGAC strongly suggests federal incentives for States and Tribes to assume the CWA Section 404 program. These federal incentives should also provide technical, financial and staffing resources to assume the CWA 404 program. (LGAC 2014 Report)

## **ENFORCEMENT**

### **Background**

The LGAC believes that enforcement will be important in implementing the CWA programs to follow a revised rule. It is not possible to ascertain the impacts of enforcement on local governments without a revised rule currently in place. The LGAC also believes that clarified definitions contained within a revised WOTUS rule will be critical to effective and equitable enforcement of the rule. (LGAC 2014 Report)

### **Recommendations:**

 The LGAC recommends that flexibility is important within the regulatory context so that conservation practices can be considered nationwide and be consistent, particularly on agricultural lands. (LGAC 2014 Report)

 The EPA should work collaboratively with state regulators to reduce punitive approaches and increase facilitative solutions. Generally, communities facing fines and citations are already struggling with compliance. Fines rarely improve water quality; fines only reduce the local resources available to achieve compliance. A collaborative approach can be most effective in reaching water quality goals. (LGAC Drinking Water Report 2016)



The LGAC recommends that EPA work with state and local governments once a revised WOTUS final rule is developed and issued regarding enforcement options. (LGAC 2014 Report)

## LOCAL SOLUTIONS -INTEGRATED PLANNING

### Background

The LGAC believes that the CWA has had tremendously positive impacts on the rivers and streams of the United States which in turn has led to economic prosperity and well-being for our nation's communities. Communities and local governments are spending millions of dollars to improve our waterways and drinking water supplies. Some states even have more protective water quality standards than those required by federal law. The LGAC noticed a general feeling of distrust that the 2015 CWR generated. Further clarity on definitions, jurisdiction and exemptions should further aid Integrated Planning. However, it is uncertain how a revised WOTUS rule will factor in Integrated Planning efforts in general. Furthermore, there is a great deal of uncertainty how CWA 404 and the rule will impact local ordinances and how it can be integrated into state, tribal and local water quality plans. (LGAC 2014 Report)

### Recommendations:



The LGAC recommends that EPA work with cities and communities on Integrated Water Quality Planning that will incorporate all of the Clean Water Act provisions into local plans, including Section 404. This planning process is already ongoing and the LGAC looks forward to these proactive approaches to address water quality concerns while providing green infrastructure and multi-use amenities to serve our public and create jobs. (LGAC 2014 Report)



The LGAC recommends that EPA incentivize local, tribal and state agencies to engage in Integrated Water Quality Planning and develop policies, programs and projects that further the goals of the Clean Water Act. The rule should not in any way discourage local efforts to improve water quality through projects and programs. (LGAC 2014 Report)

- **Question 7- What should the agencies consider in communicating the final rule to state, local and tribal governments to help them fully understand these regulatory changes and implementing them efficiently and most cost-effectively?**

### Background


The LGAC believes that clear communication and outreach is essential at every level of government once a revised rule is developed. There are many misconceptions and uncertainties regarding EPA, the Army Corps of Engineers, and a revised WOTUS rule's impact on CWA programs.


In learning from the WOTUS 2015 rule, we heard concerns throughout the outreach process, and noted these concerns about the mixed messages relating to the economic impacts.



## Recommendations:

 The LGAC recommends that the EPA share the LGAC findings and recommendations with the state environmental commissioners, state agricultural directors, state water directors, and other state officials. (LGAC Water Report 2014)


 The LGAC recommends that a Fact Sheet (one-page) be developed laying out the clear messaging of the revised WOTUS rule. It should also have graphics and a side-by-side comparison of what the rule currently is and what the revised rule proposes. This sheet should be developed to enhance public understanding of the rule. (LGAC Water Report 2014).

 The LGAC believes it is important that EPA is aware of the potential for mixed messages in their communication with local agencies regarding the economic impact of a revised rule. Based on the Workgroup's 2014 field meetings, local agencies were skeptical of EPA's strong statement that the proposed rule did not change the definition of the 'Waters of the U.S.' Although this statement may have been factually correct, what likely occurred in the field is that local agencies may have experienced a permitting environment in direct contrast to this statement, as jurisdictional assertion was expected to increase. It is important that the EPA and the US Army Corps of Engineers do not understate the impact the rule may have on local jurisdictions. Also, the economic analysis should include all Clean Water Act programs. (LGAC Water Report 2014)

 The LGAC recommends that the EPA continue to evolve and improve its communication with local governments, as well as EJ, agricultural and small communities with respect to the 'Waters of the United States.'

 The LGAC recommends that EPA develop Fact Sheets to communicate the proposed changes in the WOTUS rule designed *specifically for locally elected officials*.

 The EPA should work with State Municipal Leagues and other intergovernmental organizations to distribute communication materials for local governments. (LGAC Drinking Water Report 2016)

 In EPA's annual or biannual meetings with State Environmental Commissioners, State Public Health Directors and State Agricultural Directors, the EPA should convene a special forum on 'Waters of the U.S.' on ways to assist local governments, EJ communities and rural communities. (LGAC Drinking Water Report 2016)

➤ **Question 8- The Workgroup will also develop recommendations on how the EPA can better work with local governments and engage local governments on issues such as: What additional regulatory issues could be revised or clarified to more effectively to help local governments understand how this rule would apply? Are there additional policy discussions that could help address local questions about implementation, in agricultural and rural small communities? Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?**

**8.a. What additional regulatory issues could be revised or clarified to more effectively to help local governments understand how this rule would apply?**

**Recommendations:**



The LGAC recommends that EPA should consider the impacts of a revised rule on NPDES and Wastewater systems. (Iowa NLC Letter).



The LGAC recommends that EPA consider a bright-line on 'other waters' to provide more clarity on what is jurisdictional under the CWA. For example, it would be well-advised that EPA determine with accuracy what areas are considered to be state or local ecologically significant areas such as source water and drinking water sources, and that states should provide a listing of these areas. (LGAC 2014 Report)

**8.b. Are there additional policy discussions that could help address local questions about implementation, in agricultural and rural small communities?**

**Background**

The Small Community Advisory Subcommittee (SCAS) of the LGAC investigated in greater depth the agricultural related issues to a revised WOTUS rule. The SCAS had some observations from the testimony received. Also, several of the SCAS Members are also agricultural producers or work closely with the Conservation Districts. Generally, at issue for the agricultural community in the 2015 CWR was the lack of clear definitions and the lack of clarity on exemptions.

Agricultural issues remain an area where there is a great deal of uncertainty and confusion regarding WOTUS. The SCAS believes that the agricultural community presents the greatest challenge but also offers the greatest receptivity to recognizing the importance of conservation and protection of our natural resources. Agriculture is a water-dependent business and cannot flourish without adequate supplies of clean and safe water.

**Recommendations:**



The LGAC recommends that EPA develop a "rural strategy" which would address the issue of 'Waters of the U.S.' on agricultural lands and rural communities. This rural strategy could provide more comprehensive planning and resources to address the full range of water quality and community issues associated with rural America and disadvantaged small communities.



The LGAC recommends that there be consistency between Natural Resources Conservation Services (NRCS) and EPA on interpretation of normal farming practices and that a clear definition of normal farming practices be included. Furthermore, the LGAC recommends a manual of agricultural exemptions be developed and published.



The LGAC recommends that the jurisdiction of farm ponds, irrigation ditches and ponds, artificial lakes and ponds created by excavation and/or diking dry land for purposes of stock watering, settling basins be exempt from WOTUS. (LGAC 2014 Report)



The LGAC recommends that floodplains be established at a level of 50- year, 100- year and 500 - year for agricultural purposes. (LGAC 2014 Report)



The LGAC was made aware of the State of Tennessee's Water Quality program, and the LGAC recommends that the EPA investigate this approach in regard to jurisdictional waters on agricultural lands. (LGAC 2014 Report)



The LGAC recommends that EPA facilitate better working relationships with the Corps, especially in regard to agricultural lands.



The LGAC recommends that dams and drainages designed for fire prevention be exempt from WOTUS. (LGAC 2014 Report)



The LGAC recommends that settling ponds and basins be determined on a regional case- by -case specific basis.



The LGAC recommends expanding the Conservation Reserve program to enhance protection of riparian areas and wetlands.



The LGAC recommends that EPA continue to work with NRCS to incentivize farming practices that improve water quality. (LGAC 2014 Report)

## **Prior Converted Croplands**

### **Background:**

The Clean Water Rule excludes Prior Converted Croplands (PCC) from the definition of 'Waters of the United States.' (existing since 1992). The Rule also provides that even if another federal agency has deemed land to be PCC, the final authority regarding CWA jurisdiction remains with the EPA. Other provisions such as Swampbuster also incorporates a PCC exception but are administered by the USDA under the Food Security Act of 1985. The Act regulates federal benefits for farmers and includes provisions designed to discourage farming on converted wetlands. Under the Act, farmers who have altered a wetland after November 28, 1990, to make crop production possible are generally prohibited from receiving USDA-FSA-administered commodity, disaster, and conservation program benefits. Likewise, farmers who plant crops on wetlands converted between December 23, 1985, and November 28, 1990, are ineligible for program payments. Generally, drainage systems and other conversions in place before December 23, 1985, may continue in their existing form. The 2014 Farm Bill also reinstated a requirement that farmers must comply with Swampbuster provisions to receive crop insurance premium assistance beginning in 2015. The NRCS is responsible for making wetland determinations for purposes of USDA farm program eligibility only. Once a certified wetlands determination is made (and given to the farmer via form NRCS-CPA-026), it is binding on the property. All determinations made after July 3, 1996, are automatically deemed "certified." Determinations made prior to that date may be considered certified if they meet certain conditions. If a certified wetlands determination exists, the NRCS may not

issue a new determination, absent a request by the landowner and (1) a determination that natural changes have occurred to the topography or (2) an acknowledgment by NRCS that an error exists in the current report. It is uncertain how changes in the WOTUS rule will change the dates for PCC or Swampbuster provisions.

### **Recommendations:**



A process for determining Prior Converted Croplands should be established with the new changes to the WOTUS rule. For example, what date should the PCC be referred to.



On agricultural lands, the Department of Agriculture should be given authority to make WOTUS jurisdictional determinations. (LGAC 2014 Report)



The LGAC recommends that normal agricultural practices be defined more effectively to achieve the desired results and to be accepted by the agricultural community. Normal farming practices are not limited to those listed and will change with advances in science and technology.



The LGAC recommends consistency of definitions among NRCS, EPA and other agencies involved in these issues. The SCAS believes that a glossary defining what agricultural exemptions are will be helpful. Specifically, the LGAC has heard a great deal of concern from Northern Minnesota where there are non-tiled drainage ditches and also from agricultural communities in Georgia. (LGAC 2014 Report)



The LGAC recommends more effective outreach to agricultural communities and small rural communities on a revised WOTUS rule.

### **8.c. Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?**

#### **Background**

Rule language should not have broad inclusions and cities are concerned that jurisdictional calls will be dependent upon agency judgments and discretion for exclusions. The criteria need to be clear enough that cities do not have to either guess at application of a rule or wait for the agency to interpret a rule which creates uncertainty. It is unworkable for cities to rely on agency judgments and discretion for exemptions. There is a concern about the magnitude of the requests the agencies will be forced to address and the timeliness of the agencies' responses given any uncertainty of a new rule. For example, cities cannot be faced with significant delays to address critical storm-water infrastructure while waiting for agency action. Cities should be provided clarity by the agencies so that they can effectively plan and budget for the operation and maintenance of the storm-water collection systems without the uncertainty of the discretion of the agencies and when it will receive that agency judgment. In addition, without a specific exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other components that channel runoff, as well as non-MS4 storm-water systems and features/components, EPA and Army Corps open the door for litigation and citizen suits that could determine that they are. Waters



of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards. (Iowa NLC Letter)

### **Recommendations:**



The EPA should plainly state how WOTUS rulemaking will impact storm-water collection systems and clearly exempt those parts of the systems that EPA does not wish to include. (Iowa NLC Letter)



The EPA should exempt green infrastructure from jurisdiction and outline the Agency's definition of what is included within green infrastructure similarly as for agricultural practices for 'normal farming practices'. (LGAC 2014 Report)

## **IV. Cost to Local Government**

### **Background**

The LGAC heard extensive concerns that the US Army Corps of Engineers simply does not have enough resources to effectuate an efficient permit process now, or under a new rule, without additional resources. An ineffective permit process consumes scarce local, state and federal personnel and financial resources without achieving a value-added return on investment. A revised rule and the permitting process and implementation must recognize the scarcity of these resources such that results are optimized for the level of investment. (LGAC 2014 Report) Delays and additional permitting do not get calculated into a simplistic understanding of affordability of 2 percent of median household income (MHI), which the Agency utilizes to make determinations on significant cost impacts to local communities (Iowa NLC letter).

### **Recommendations:**



The LGAC recommends that the EPA continue to coordinate with the US Army Corps of Engineers to ensure that the permit process is predictable and value-added. The proposed rule must be viewed in the context of how it will be implemented to validate that the resource protection outcome is balanced against the economic cost of the permitting process. Local, tribal and state agencies are at the front lines of achieving the goals of the Clean Water Act. Engaging local agencies as collaborative partners in the conversation with EPA and the US Army Corps of Engineers regarding implementation can only improve the process and the desired water resources protection results. (LGAC 2014 Report)



The LGAC recommends that EPA better understand the cost and resource implications, especially to local, state and tribal agencies, before drafting a revised rule. Local agencies are very concerned about cost, which is exacerbated by the uncertainty in the permitting process. (LGAC 2014 Report)

## **V. CONCLUSION**

The Local Government Advisory Committee (LGAC) provides a strong connection between the EPA and the communities striving to provide clean drinking water and maintain healthy source water. The LGAC's 'Waters of the United States' 2017 Report provides a series of recommendations that offer the EPA

practical solutions to complex challenges based on the experience of local and tribal governments. The LGAC is confident that our concepts and approaches can assist the EPA in developing a regulatory framework that inspires communities to act in the interest of clean, safe and affordable drinking water.

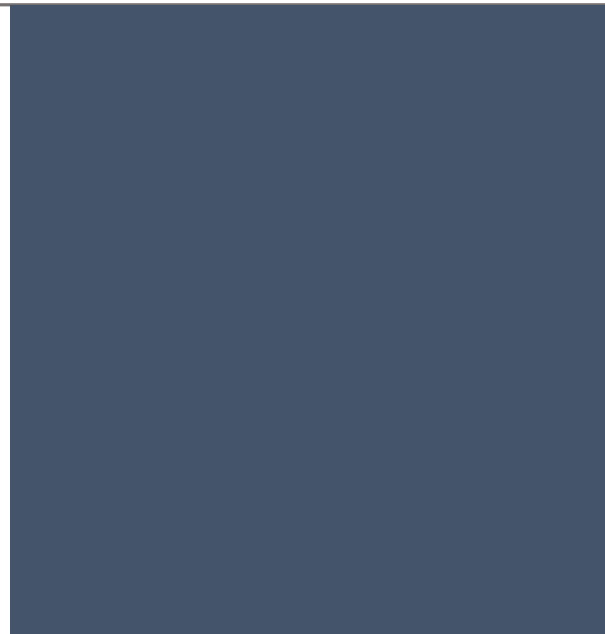
Many communities have already invested their resources in green infrastructure, integrated planning and innovation that advances the state of practice. Local, tribal and state governments are already leading clean water initiatives in their jurisdictions. EPA can utilize this experience, captured in the LGAC report, to develop clear, predictable, flexible and locally adaptable approaches to regulation.

Thank you to the EPA Administrator and the EPA Team for their partnership with the LGAC in advancing the goal of clean, safe and affordable drinking water across the United States.



## APPENDIX

**Disclaimer:** *This Report reflects what was conveyed during the course of the LGAC meetings. The Committee is not responsible for any potential inaccuracies that may appear in the Report as a result of information conveyed. Moreover, the Committee advises that additional information sources be consulted in cases where any concern may exist about statistics or any other information.*



# Roster of LGAC Members

Waters of the United States  
2017 Report





## APPENDIX 1-2017 ROSTER LGAC AND SCAS MEMBERS

### **Chair of LGAC**

**The Honorable Bob Dixon**

**Mayor, Greensburg, KS**

**Greensburg, Kansas**

### **Chair of SCAS**

**The Honorable Robert Cope**

**Commissioner, Planning and Zoning, Salmon, ID**

**Salmon, Idaho**

## **LGAC AND SCAS MEMBERS**

### **Region 1**

**Mr. Rodney Bartlett** (SCAS Only)

**Town Administrator**

**Peterborough, New Hampshire**

**The Honorable Kim Driscoll**

**Mayor, City of Salem**

**Salem, Massachusetts**

**The Honorable Miro Weinberger**

**Mayor, City of Burlington**

**Burlington, Vermont**

**The Honorable Jill Duson (Vice-Chair)**

**Councilor, Portland, Maine**

**Portland, Maine**

### **Region 2**

**Samara Swanston, Esq.**

**Counsel to NYC Council Environmental Protection Committee, New York, NY**

**New York, New York**

**The Honorable Dawn Zimmer**

**Mayor, Hoboken, NJ  
Hoboken, New Jersey**

**The Honorable Manna Jo Greene**

**County Legislator, Ulster County, NY  
District 19 Rosendale, New York**

**Region 3**

**The Honorable Sal Panto, Jr.**

**Mayor, City of Easton  
Easton, Pennsylvania**

**The Honorable Stephen T. Williams**

**Mayor, Huntington, WV  
Huntington, West Virginia**

**Region 4**

**The Honorable Merceria Ludgood**

**Commissioner, Mobile County  
Mobile County, Alabama**

**The Honorable Johnny DuPree, Ph.D.**

**Mayor (former)  
Hattiesburg, Mississippi**

**The Honorable Kitty Barnes**

**Commissioner, Catawba County, NC  
Terrell, North Carolina**

**The Honorable Hardie Davis**

**Mayor, City of Augusta, Georgia  
Augusta, GA**

**Ms. Susan Hann**

**Director, Planning Palm Bay County Schools, FL  
Palm Bay County, Florida**

**Region 5**

**The Honorable Stephanie Chang**

**State Representative- House District 6  
State of Michigan**

**The Honorable Victoria Reinhardt**  
Commissioner, Ramsey County, MN  
St. Paul, Minnesota

**The Honorable Elizabeth Kautz**  
Mayor, Burnsville, MN  
Burnsville, Minnesota

**The Honorable Karen Freeman-Wilson**  
Mayor, Gary, IN  
Gary, Indiana

**Mr. Kevin Shafer, PE**  
Executive Director, Milwaukee Metropolitan Sewerage District  
Milwaukee, Wisconsin

**Region 6**

**The Honorable Mark Stodola**  
Mayor, City of Little Rock  
Little Rock, Arkansas

**The Honorable Norm Archibald**  
Mayor, City of Abilene, TX  
Abilene, Texas

**Jeff Witte**  
Secretary of Agriculture, New Mexico  
New Mexico

**Dr. Hector Gonzalez, MD**  
Director of Health Department, Laredo, TX  
Laredo, Texas

**Region 7**

**Teri Goodmann**  
Assistant City Manager, City of Dubuque  
Dubuque, Iowa

**The Honorable Tom Sloan**  
State House Representative, State of Kansas  
Kansas

**Region 8**

**The Honorable Andy Beerman**

City Councilor  
Park City, Utah

**The Honorable Brad Pierce**

Council Member, City of Aurora, CO  
Aurora, Colorado

**Region 9**

**The Honorable Cynthia Koehler**

Board of Directors, Marin County  
Marin County, California

**The Honorable David Bobzien**

City Councilmember At-Large - City of Reno  
Reno, Nevada

**The Honorable Mary Casillas Salas**

Mayor, City of Chula Vista  
Chula Vista, California

**Scott Bouchie**

Environmental Management and Sustainability Director - City of Mesa  
Mesa, Arizona

**The Honorable Ryan Sundberg**

Supervisor, Humboldt County, CA  
Humboldt County, California

**Region 10**

**Susan Anderson**

Director, Portland Bureau of Planning and Sustainability  
Portland, Oregon

**The Honorable Shawn Yanity**

Chairman, Stillaguamish Tribe  
Arlington, Washington

## APPENDIX 2-EPA's LOCAL GOVERNMENT ADVISORY COMMITTEE'S (LGAC) CHARGE ON 'WATERS OF THE U.S.' (WOTUS)

### OVERVIEW

#### Background and Description

On February 28, 2017, the President signed the Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth* by Reviewing the "Waters of the United States" Rule (issued June 2015).<sup>8</sup> The Executive Order gives direction to the Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule (CWR) and "publish for notice and comment a proposed rule rescinding or revising the rule." The E.O. also directs that EPA and the Army "shall consider interpreting the term 'navigable waters' in a manner "consistent with Justice Scalia's opinion in *Rapanos* "which includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

As part of EPA's efforts to consult with state and local government officials, EPA's Local Government Advisory Committee (LGAC) will provide its recommendations to the Administrator on revising the definition of "Waters of the United States" (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

#### Project Scope

The agencies intend to follow an expeditious two-step process to provide certainty with the rule:

- 1) Establish the legal status quo by re-codifying the regulation that was in place prior to issuance of the CWR now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
- 2) Propose a new definition of Waters of the U.S. that would replace the 2015 CWR that reflects the principles outlined by Justice Scalia (*Rapanos* plurality opinion).

The LGAC consists of 36 local, state and tribal government elected and appointed officials representing cities, parishes, counties, municipalities, and other local political jurisdictions. Local officials are knowledgeable and provide unique perspectives on issues relating to a revised rule. Further, the LGAC has potential to engage other knowledgeable local officials with unique valuable on-the-ground perspectives and knowledge. Through this collaborative process, the chartered LGAC will provide Administrator Pruitt with expeditious and meaningful advice relating to a revised "Waters of the U.S." rule. Overall, the goal would be to develop recommendations to the EPA for consideration on a revised rule. This advice and recommendations come from an 'on the ground' local government perspective which will assist the agency in providing the best means to communicate a revised rule with local officials.

#### Charge Issues

##### LGAC Charge:

The LGAC will develop recommendations for the EPA to consider in developing approaches to a revised rule defining "waters of the U.S." that ensures that the nation's waters are kept free from pollution while at the same time promoting economic growth and minimizing regulatory uncertainty. The following are specific charge questions and issues for the LGAC to consider:

##### Charge Questions

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<sup>8</sup> <https://www.whitehouse.gov/the-pres-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

<sup>9</sup> *Rapanos v. United States*, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 L.Ed. 2d 159



- 1) How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined? How would you like to see the agencies interpret 'consistent with Scalia'? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?
- 2) What opportunities and challenges exist for your locality with relying on Justice Scalia's opinion?
- 3) Are there other approaches to defining "waters of the U.S." that you would like the agencies to consider to providing clarity and regulatory certainty?
- 4) The agencies' economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could be affected but would not be captured in such an economic analysis?
- 5) What additional information can you provide from a local government perspective that EPA should be aware of?
- 6) Are there other issues the agencies should consider which would help ease the regulatory burden for implementation of WOTUS for state, local and tribal government?
- 7) What should the agencies consider in communicating the final rule to state, local and tribal governments to help them fully understand these regulatory changes and implementing them efficiently and most cost-effectively?
- 8) The Workgroup will also develop recommendations on how the EPA can better work with local governments and engage local governments on issues such as: What additional regulatory issues could be revised or clarified to more effectively to help local governments understand how this rule would apply? Are there additional policy discussions that could help address local questions about implementation, in agricultural and rural small communities? Are there other considerations such as ditch maintenance, stormwater management or green infrastructure?

## Deliverables

The LGAC will provide a letter of recommendation to the Administrator to identify approaches to consider in a revised "Waters of the U.S." rule. The chartered LGAC will prioritize and summarize these issues in a report to the EPA that focuses on the charge issues. A final LGAC report will be conveyed to the EPA Administrator with a transmittal letter summarizing findings and recommendations. This Report will be published on the EPA's website for LGAC.

## Preliminary Timeline/Schedule

**April 26, 2017** – Executive Committee meets to discuss and approve the LGAC's Charge (Protecting America's Waters Workgroup) and develops a work plan with timeline.

**May 3**– LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).

**May 18**- LGAC's Protecting America's Waters Workgroup meets with National Intergovernmental organizations to discuss charge (via teleconference).

**June 7** – LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).

**June 29, 2017**-The LGAC meets in a public meeting (via teleconference) to review recommendations on rescission of the 2015 CWR and revising the CWR. (Deliverable: Letter of Recommendation)

### **APPENDIX 3- Letters submitted by LGAC Members**

- Iowa League of Cities-November 13, 2014 (Terri Goodman)
- Representative Tom Sloan- May 09, 2017 (Representative Tom Sloan)
- City of Aurora, CO- May 15, 2017 (Council Member Brad Pierce)



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November 13, 2014

The Honorable Gina McCarthy  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**RE: Comments on Proposed Rule for "Definition of "Waters of the United States Under the Clean Water Act," Docket No. EPA-HQ-OW-2011-0880**

Dear Administrator McCarthy:

Thank you for the opportunity to comment on your proposed rule and the Iowa League of Cities hopes to work with you through the Administrative Procedures Act (APA) process to develop a clearer understanding of the impact and future administration of all Clean Water Act (CWA) programs impacted by this rule.

The Iowa League of Cities has represented cities in Iowa since 1898 and these comments were developed with significant input from some of our over 870 member cities. We are committed to assisting our communities across the state in understanding and interacting with environmental regulations at both the state and federal level. Our members want to do the right thing environmentally but the various priorities that come at them are ultimately borne by their residents. Infrastructure costs are some of the biggest cost drivers in cities and we work hard to ensure that cities are advised of proposed regulations and given time to reasonably evaluate the cost and impact they will have on cities as they comply with the multitude of environmental issues that cities confront.

Our cities are in a unique place as being active regulators of water quality under our pre-treatment permits as well as members of the regulated community under our discharge permits, and users of "waters of the United States" (WOTUS) as drinking water sources, so cities care deeply about the quality of water. What cities cannot accept are interpretative rules which do not provide sufficient clarity, and which may add costs and delay without causing important improvement to water quality. We understand that the goal is to make it easier for our member cities to identify WOTUS but we do not feel like the rule in its proposed form draws bright enough lines for our cities to easily identify those waters affected.

The Iowa League of Cities' national organization, the National League of Cities (NLC) along with other groups, requested a rulemaking in hopes that the Environmental Protection Agency (EPA) would follow the Federalism consultation procedures required under Executive Order (EO) 13132. We do not agree that the impacts of the rule are only "indirect" and believe strongly a consultation process should have been followed. This process would help cities to better understand the Agency's rule and provide examples of how the rule will directly impact municipal storm-water systems.

<b>Request for EPA Response:</b> The EPA should conduct the consultation procedure outlined by E.O. 13132.
--

<b>Request for EPA Response:</b> Will the EPA release an interim rule to follow the federalism consultation process before a final rule?
--



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### AGENCY JURISDICTIONAL INTERPRETATION

The Iowa League of Cities (League) is interested in the EPA's interpretation of its authority coming out of the decisions in *SWANNC* and *Rapanos* but we will not focus our comments on this area as the Agency is likely to receive many comments on this portion of the rule. We understand that the Agency wants to draw the broadest interpretation from those cases but the proposed rule's language on a case-by-case determination utilizing a "significant nexus" does not provide clarity.

It is important to note that from cities' perspective the Federal Register notice on page 22193 points out that a "significant nexus" is not necessarily a scientific determination. But, on the preceding page the rule preamble discusses how science was evaluated and not necessarily cost in the development of the rule. This is extremely important as cities need to understand the cost, both direct and indirect, to plan and budget accordingly.

The data analyzed for the *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* does not provide a complete picture of the impact of the proposed rule. The Agency utilizes the ORM2 database, which was not developed or intended for the type of analysis for which it was utilized. The focus of the analysis was also on the Section 404 program and did not include Section 402 NPDES program, Section 303 Water Quality Standards, TMDLs, storm-water and green infrastructure. Not fully analyzing the waters impacted leaves uncertainty for systems that are used to dealing with EPA and the Iowa Department of Natural Resources (IDNR). According to EPA's and Army Corp's *Economic Analysis of Proposed Revised Definition of Waters of the U.S.*, the impact of this change in definition is largely unknown because the findings are "incomplete" due to the "many data and methodological limitations, as well as the inherent assumptions in each component of the analysis."

The *Economic Analysis* states that about 3 percent more waters would be found jurisdictional. EPA based this calculation on permits that were submitted for review, rather than waters that would be jurisdictional under the rule (where permits are not currently needed). Moreover, the calculation was based off of 2009-2010 data – the height of the recession when development (and other types of projects) was at an all-time low.

**City Example:** One city had only 38 NPDES General Permit No. 2's issued in 2009. By comparison there were 60 issued in 2007 and 54 issued in 2008 in that same city. County wide there were only 147 NPDES General Permits No. 2's issued in 2009. By comparison there were 229 in 2007 and 184 in 2008. The numbers indicate that development was significantly reduced in 2009 based upon the number of NPDES General Permits No. 2's issued.

**Request for EPA Response:** The Agency should further delineate what new waters, if any, would be impacted through this rulemaking that are associated with municipal storm-water systems both internal and external to these systems.

Utilization of only the data analyzed in the *Economic Analysis* would lead to unintended consequences of what the Agency has determined to be "indirect costs" which are impacts to the CWA programs and not just from jurisdictional changes. While this is viewed as indirect to the EPA, these costs will be directly borne by the local jurisdictions for new waters identified because of this rulemaking. Municipal Separate Storm-water Sewer Systems (MS4) and other storm-water systems including drains, roads, pipes, ditches and other components that channel runoff will have significant direct and indirect costs associated





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because of permit costs, wetlands and stream mitigation costs and project delay. Important matters such as delay and additional permitting do not get calculated into a simplistic understanding of affordability of 2 percent of median household income (MHI), which the Agency utilizes to make determinations on significant cost impacts to local communities.

The Agency would likely respond that this uncertainty could be easily taken care of through a Preliminary Jurisdictional Determination (PJD). The League is concerned that this is an insufficient answer because an increased amount of PJD's would lead to longer delays for simple routine maintenance or other projects. Member cities have also raised concern about allowing flexibility for determinations from the Army Corps of Engineers (ACE). It's important to also note that once the PJD is complete, a new water determined to be under the jurisdiction of the EPA and ACE would be subject to other federal legislation such as the National Environmental Protection Act (NEPA), the Endangered Species Act (ESA) and Section 106 of the National Historic Preservation Act (NHPA). The delays caused by these statutory requirements are not fully analyzed by the *Economic Analysis of Proposed Revised Definition of Waters of the U.S.*

**City Example:** *A city in Iowa over the past few years attempted to redevelop a storm-water ditch that connected to a small river. A short time before the public bid process, the ACE ordered them to halt the project as the small river was a WOTUS which was connected to the Mississippi River. The city had to completely redesign the project and was delayed by 12 months to perform a wetland study with completion of the other federal statutory requirements at a significant cost. This small city was completely caught off guard by jurisdiction over this small river and has expressed concern over expansion of jurisdiction to further small water bodies by the ambiguity of the rules language.*

**Request for EPA Response:** We would ask that the EPA more clearly identify how PJDs would be processed to avoid unnecessary delays and to provide a better analysis of new waters that would be impacted because of the rule.

## IMPACT TO STORM-WATER SYSTEMS AND NON-POINT RUNOFF

### Municipal Separate Storm Sewers (MS4)

One of the program areas that will be most impacted by the rulemaking is the area of storm-water. There are more than 40 cities in Iowa that are currently impacted by a Municipal Separate Storm Sewers Systems (MS4) permit. These cities have large numbers of storm water control infrastructure and collection systems. The proposed rule language is not clear on the impact to these storm-water collection systems. The language is broad and inclusive, which is evident by the need to exclude swimming pools from the application of the rule. The language provides broad inclusions and cities are concerned with being dependent upon agency judgments and discretion for exclusions: rules need to be clear enough that cities do not have to either guess at application of a rule or wait for the agency to interpret a rule that creates uncertainty. It is unworkable for cities to rely on agency judgments and discretion for exclusions. There is a concern about the magnitude of the requests the agencies will be forced to address and the timeliness of the agencies response given the uncertainty of the proposed regulation. Cities cannot be faced with significant delays to address critical storm-water infrastructure while waiting for agency action. Cities should be provided clarity by the agencies so that they can effectively plan and budget for the operation and maintenance of the storm-water collection systems without the uncertainty of the discretion of the agencies and when it will receive that agency judgment. In addition, without a specific



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exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other components that channel runoff, as well as non-MS4 storm-water systems and features/components, EPA and Army Corps open the door for litigation and citizen suits that could determine that they are considered a "Waters of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards.

EPA has stated repeatedly in public meetings and conference calls that it is not the intention of the rule to further impact waste water and storm water systems. However, during the Point Source Stakeholder call on June 17 the Agency representatives stated that the rule could impact new waters within MS4 collection systems but could not provide details as to how these determinations would be made. We understand that this discussion is likely focused on western cities but without more explanation this provides uncertainty for Iowa cities trying to determine the potential impact to their systems.

The uncertainty is centered on whether these collection systems or portions of the systems will be required to meet State Water Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load (TMDL) because they will now be considered a "water of the United States." WQS and TMDL were not designed for this application so application within a collection system seems improper. WQS define goals for a waterbody by designating its uses and setting criteria to protect those uses, but there is no established designated use for MS4s. Without a designated use, the default required designated use is as "fishable/swimmable," unless the state demonstrates that it is not attainable for one of six particular reasons, none of which is because the waters serve as storm-water conveyances. A pending EPA proposed rule on water quality standards could make use designation analyses more stringent (i.e., by requiring a "highest attainable use" presumption).

The Agency has stated that that the federal agency does not set WQS/TMDL standards for Iowa. Thus, our triennial review and revision of Iowa WQS could be slowed down through a discussion over setting standards within storm-water collection systems.

**Request for EPA Response:** Clearly identify new waters within MS4 systems and whether these will be subject to Section 303(d) WQS.

**Request for EPA Response:** Plainly state how this rulemaking will impact storm-water collection systems and clearly exempt those parts of the systems that EPA does not wish to include.

**Example Language:**

"(2) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (1)(i) through (viii) of this definition—

"(i) Waste treatment systems, including treatment ponds, lagoons, or Clean Water Act regulated municipal separate storm sewer systems and the component conveyances within such systems regulated under the National Pollutant Discharge Elimination System." [designed to meet the requirements of the Clean Water Act.]"

### Green Infrastructure

Another area within storm-water systems that has raised concerns is the utilization of green infrastructure for the management of storm-water runoff. This includes projects that include permeable paving, dike systems, vegetation, soils and natural processes. Some cities within the Iowa have been lauded by the EPA for their usage of this type infrastructure to control storm-water and gaining additional benefits important to the EPA of nutrient reduction and flood mitigation. These cities now have to question





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whether these projects will need to meet WQS or if maintenance of the systems will require a Section 404 permitting process. Neither, the proposed rule language nor the preamble guidance address these systems for storm-water management.

*City Example: After the 2008 flooding, some cities in Iowa have been utilizing green infrastructure, such as newly constructed wetlands, to control flooding and act as a part of their storm water system. They are concerned that these efforts that have been praised could now be brought under further regulation.*

**Request for EPA Response:** We request that the EPA specifically exclude green infrastructure and outline the Agency's understanding of what is included within green infrastructure similar to what was done for agricultural practices under the joint interpretive rule with the Department of Agriculture.

#### Ditches as Conveyances of Storm-Water

The inclusion of the word "ditches" within the new definition has prompted many of our member cities both large and small to ask questions about how this proposed language will impact their basic storm-water systems and how that will be administered by the Agency. This is the first time that "ditches" has been specifically included within the definition and there is a divergence of opinions on what that word entails. Ditches are not specifically defined in the proposed rule but there is lengthy discussion of this word included within the preamble of the rule and the Agency would likely point to the exemptions provided under § 401.11(2).

Through the language provided in the preamble and the exemptions, the extrapolation of the EPA's understanding of the word "ditches" misses the mark on the purpose of a ditch in both large and small communities for the purposes of storm-water control. The exemptions provided for ditches are rendered meaningless as the ditch must move water upland and the water must remain upland and as to the other do not contribute to flow toward the amorphous case-by-case definition that was discussed above. Without a clear understanding of the new waters to be included, cities will continue to have questions about whether their system will somehow be regulated through the CWA.

Large communities in Iowa have been working diligently to control storm-water flow as the regulation of storm-water by EPA has increased. This has included separating storm systems and developing new storm-water projects that would include canals, ditches, tunnels, etc. These major municipal systems want to understand how their systems will be impacted internally and if there is the possibility that portions of their systems will now be included as a "water of the United States".

Also, small communities in Iowa have utilized roadside ditches extensively to move storm-water through their communities. These communities want to better understand if it is the intention of the Agency to include their ditches now a point source thus subject to WQS and potentially require permitting under Section 404. These communities have raised concern that routine maintenance or weed removal could trigger additional requirements that were never contemplated by the city. These ditches are used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidences. Ultimately, local governments are liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. Many local governments who are subject to Section 404 permitting requirements report the process can be extremely time-consuming, cumbersome and expensive.



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**City Example:** *There are 946 cities across the state of Iowa and over 500 of those cities are under 500 in population. Many of these communities are utilizing controlled discharge lagoons for their wastewater systems and have a system of roadside ditches to control storm-water. These small cities move water away from the community and to a low lying area. These ditch systems have never been regulated and the communities have never considered them to be point sources that would come under the jurisdiction of the EPA. Small cities like this are concerned about how the proposed rule could these storm ditches and would request that these ditches be excluded under the rule.*

**Request for EPA Response:** The Iowa League of Cities suggests that the EPA better clarify those man-made storm-water improvements that have never been considered “waters of the U.S.” are specifically exempted.

**Example language:**

“(2) The following are not ‘waters of the United States’ notwithstanding whether they meet the terms of paragraphs (1)(1)(i) through (viii) of this definition—

“(viii) Component conveyances of municipal storm sewer systems.”

**Request for EPA Response:** The EPA should better define ditch and specifically define the term so cities can understand how this will impact ditches that are utilized for the management of storm-water.

#### IMPACT TO NEW DEVELOPMENTS ON GREENFIELDS

Other organizations will likely provide substantial comments related to new housing and commercial development on greenfields and specifically on the Section 404 permitting program, but the League wants to make sure the Agency contemplates the impact from the city perspective in this area. Cities work in partnership with developers as they continue to expand and this rulemaking’s impact varies across cities but the potential for delay and additional costs will impact the land use development surrounding cities. This issue is related to the initial issue of identification of new waters impacted. Cities and developers need a clearer understanding of the additional waters to be impacted by the rule and how the Agency anticipates processing increased PJDs.

**Request for EPA Response:** Will the EPA provide additional information as to the new waters impacted surrounding urban areas?

**Request for EPA Response:** How will the EPA process increased PJDs related to greenfield development surrounding urban areas?

#### EXEMPTION FOR WASTEWATER SYSTEMS

The League is also concerned about any potential impact to wastewater systems and the NPDES permitting related to these systems. Because of the exclusion language, the Agency did not seem to analyze the impact to wastewater systems but some cities have raised questions whether some part of combined sewer systems or other aspects of a wastewater treatment systems would be considered within the jurisdiction of the EPA based upon the proposed rule.

We also have a current issue in Iowa where several cities are having some difficulty getting approval of certain components of a wastewater treatment system from the engineers at IDNR. Some cities are concerned that this situation could lead to a portion of a system that has not been approved by IDNR being considered a “water of the U.S.” under the proposed rule. Even though the activities fall within the



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permit, cities are concerned that not getting sign off from engineers at IDNR would move those portions outside of the exemption.

**Request for EPA Response:** Does the EPA anticipate that wastewater systems could be impacted by this rule?

**Request for EPA Response:** Would a project, such as an equalization basin, be exempted or included as a "water of the United States" if a state agency that operates their NPDES permitting has not signed off on this portion of a system as being part of the design of the wastewater treatment plant?

### CONCLUSION

The League appreciates the opportunity to provide comments on the proposed rule and looks forward to working with the Agency as the rule moves through the process. For any specific questions please contact our General Counsel, Dustin J. Miller at [dustinmiller@iowaleague.org](mailto:dustinmiller@iowaleague.org) or by phone at (515) 883-0925. Mr. Miller can assist the Agency in contacting those cities that have signed onto these comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "Alan W. Kemp".

Alan W. Kemp  
Executive Director



TOM SLOAN  
REPRESENTATIVE, 45TH DISTRICT  
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STATE OF KANSAS



TOPEKA

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ENERGY, UTILITIES &  
TELECOMMUNICATIONS

May 9, 2017

EPA - Comments on Waters of the U.S. Rules

Re: E.O. 13132

**A. Competing perspectives:**

1. There will always be conflicts over definitions and applicability of those definitions to specific cases. The goal should be to recognize that conflicts will often exist between those landowners (and their representatives) whose properties touch the waters in question and those persons, who frequently live a great distance from the waters in question, who espouse a more global perspective.
2. It is also important to recognize that both parties may rely on economic arguments in establishing their positions. The landowners will rely on the economic impact that such waters directly contribute or on the adverse impact such waters (e.g., intermittent streams) have on their economic opportunities. Those advocating a more global perspective will tie downstream economic values and factors as far upstream as possible.
3. The EPA and state policy-makers must attempt to balance the competing interests, while objectively examining the science and economics of their respective positions.
4. The EPA and state policy-makers must also recognize that one rule for all situations is unlikely to resolve the conflicting perspectives. Accordingly, ensuring that initial decisions about what waters constitute the Waters of the U.S. at the most local applicable level, subject to review at one or more higher levels, is likely to best reflect the goal of all persons – a reasonable rule that is measurable and enforceable.

**B. Intermittent streams, playa lakes, wetlands, and other waters:**

1. In cooperation with states, the EPA to designate intermittent streams and other waters as non-waters of the U.S. based on the following criteria:
  - a. Seasonal flow of running or standing water – each state to develop its own criteria subject to EPA review and approval;
  - b. Because of the variability of conditions within and between states, the EPA to provide guidelines for state standards that include factors to be considered, but which do not constitute federal standards. Such factors to include average number of days of stream flow, seasonality of stream flow, rate of stream flow, TMDL levels during such periods, amount of water and TMDLs delivered to the “next” body of water, and such other relevant factors as the Agency deems appropriate.

- c. State standards/factors should reflect possible ground water recharge rates from intermittent streams, playa lakes, wetlands, and other waters. Similarly, factors should include potential contamination of ground water from such water bodies.
- d. States shall develop metrics for each standard they propose and submit to the EPA for review and approval. EPA to have 120 days from receipt of a completed state plan to review, propose revisions, or deny the submitted standards and metrics. Failure to complete the analysis within 120 days, subject to the EPA and state agreeing on a time extension, shall result in the submitted standards and metrics being deemed accepted.
- e. Three years after the state-submitted standards are accepted, each state shall submit a report to the EPA detailing whether the waters in question continue to meet the EPA-accepted standards, as determined by the state's metrics. The EPA shall determine whether each state shall submit subsequent reports on an annual or other timeline basis.
- f. If new, generally accepted scientific findings on issues that may affect water quality standards related to intermittent streams, playa lakes, wetlands, or other designated waters are determined, the EPA may request states review their standards and submit proposed revised plans for the Agency's consideration and approval.

**C. Permanent Bodies of Water:**

- a. Some wetlands are seasonal and have been addressed above. For those that are permanent, states should be empowered to develop metrics that demonstrate whether the waters released from the wetlands to jurisdictional waters are "cleaner" than the waters that otherwise would flow to those jurisdictional waters if the wetlands were not present.
- b. States to submit proposed standards and measurement techniques to the EPA for review and approval. EPA to have 120 days from receipt of completed state plan to review, suggest revisions, and approve or deny the submitted plan. If the review is not completed within 120 days, subject to extension if the EPA and state agree, the submitted plan shall be deemed accepted.
- c. States to be encouraged to develop standards and metrics regarding waters from wetlands and other bodies' impact on ground water quality.

**D. Summary Comments:**

- a. EPA-state collaboration in defining Non-Waters of the U.S. within the context of intermittent streams, playa lakes, wetlands, and other bodies of water should be based on state-generated metrics that are reviewed and approved by the EPA.
- b. The EPA should specify the factors on which state metrics must be based, but states should be permitted to establish different criteria for bodies of water that are or are not in contact with designated Waters of the U.S. Such different criteria within a single state should be based on geographic, geological, climate, or other identifiable factors and approved by the EPA prior to the metrics being developed.
- c. State evaluations and recommendations based on the previously approved metrics should be reviewed, revised, accepted, or rejected by the EPA within 120 days of submission.

Thank you for considering my thoughts on how the EPA and states can collaboratively address Waters and Non-Waters of the U.S.

Sincerely,

A handwritten signature in black ink that reads "Tom Sloan". The signature is written in a cursive, flowing style.

Dr. Thomas J. Sloan

Kansas' 45<sup>th</sup> District Representative

Water Administration  
15151 E. Alameda Parkway, Ste. 3600  
Aurora, Colorado 80012  
303.739.7370



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May 15, 2017

Submitted via email to:

Donna Downing — [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov)

Andrew Hanson — [Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)

Dear Ms. Downing and Mr. Hanson:

Thank you for the opportunity to provide some initial comments on the potential approaches for defining "Waters of the U.S." as discussed at the April 19, 2017 E.O. 13132 Federalism Consultation Meeting. We have been asked by Aurora City Council member Brad Pierce, a member of the Local Government Advisory Committee Water workgroup, to specifically provide comments on the Potential Approaches to "Relatively Permanent" Waters and Potential Approaches to Wetlands with a "Continuous Surface Connection." Aurora has previously offered comments directly, and through various organizations in which we are active members, to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on a number of occasions as the Waters of the U.S. (WOTUS) rule was being developed. In particular, our comments submitted through the Western Urban Water Coalition are specific to issues of concern for western U.S. water providers, and are reflected in the comments below.

The West is one of the regions that will be the most directly and significantly affected by implementation of a new rule because of its unique geology and hydrology, which includes dry arroyos, washes, ditches, isolated ponds, vernal pools, and ephemeral or intermittent water bodies. To meet water supply and wastewater treatment needs, as well as storm water control requirements, western water agencies must make substantial infrastructure investments, often requiring creative and innovative approaches. It is essential that these critical activities, including those undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and its concomitant lengthy and costly permitting procedures.

The West is typified by intermittent and ephemeral streams, rather than the perennial streams typical of the Eastern U.S. Ephemeral streams are defined by the Corps as having flowing water only during, and for a short duration after, precipitation events — groundwater is not a source of water for the stream. Intermittent streams flow during certain times of the year, when groundwater and precipitation combined provide water for streamflow. The contribution of flows from these streams to a traditionally navigable water (TNW) is negligible, and in many cases, nonexistent, and such streams do not provide a significant nexus to a TNW. Ephemeral and intermittent streams may not have sufficient or consistent-enough flow to connect to a

TNW or physically, chemically, or biologically affect the integrity of a TNW.

## POTENTIAL APPROACHES TO "RELATIVELY PERMANENT" WATERS

The potential approaches to include streams with seasonal flows or streams with another measure of flow will capture ephemeral and intermittent streams into the definition of "relatively permanent" waters, which we believe is inappropriate. Each of these approaches would need to define metrics and thresholds at which a stream is considered "relatively permanent," and such metrics will vary geographically on a case-by-case basis and the definition of thresholds will be subjective.

Including perennial streams only as "relatively permanent waters" is the appropriate approach. EPA should ensure that ephemeral and intermittent streams and erosional features in the arid West, such as arroyos and dry washes, are non-jurisdictional. Ditches and canals that only carry intermittent flows of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control features that periodically flow in response to significant precipitation events, should also be exempted.

## POTENTIAL APPROACHES TO WETLANDS WITH A "CONTINUOUS SURFACE CONNECTION"

The potential approach to develop metrics to identify "some degree of connectivity" should not be utilized. This will require subjectively defining thresholds for what constitutes a significant degree of connectivity, which should be avoided. While including as jurisdictional those wetlands that directly touch jurisdictional waters is appropriate, there may also be circumstances where the current practice of considering wetlands with a continuous surface connection, regardless of distance, to be jurisdictional is not appropriate. Such connections should be perennial and should not include ephemeral and intermittent connections.

Wetlands with permanent, continuously flowing, surface connections should be included. Where such connections do not exist, the wetlands should be exempted. EPA should ensure that where there are overland flows through dryland breaks to a WOTUS, this type of break renders a tributary up gradient of the dryland break to be non-jurisdictional. EPA should explicitly recognize that features where water may be present (for instance, in residual ponds resulting from placer or other mining efforts) are not jurisdictional where a continuous physical channel is absent, a bed-and-bank is not discernible, an ordinary high water mark is not observable, and/or there are no flow characteristics.

## OTHER COMMENTS

Project proponents consider the ramifications of federal permitting as part of their project planning and alternatives evaluation and carefully weigh alternatives that do not require a federal action. Project proponents choose to avoid federal actions when they can because of the expense and time to process the reviews by multiple federal agencies triggered by a single federal nexus. The federal approval process also provides a forum for litigation and frequently undermines the predictability of the planning process. In the arid West, many project proponents steer away from alternatives that involve rivers and perennial streams and toward alternatives that involve dry ephemeral and intermittent drainages that are isolated from and/or lack a significant nexus to a TNW because such drainages have been traditionally considered nonjurisdictional and thereby avoid a federal action, particularly a Section 404 permit through the Corps. Steering projects away from rivers and perennial streams toward nonjurisdictional ephemeral and intermittent drainages results in fewer projects in jurisdictional waters and wetlands and fewer impacts on the resources and functions associated with such jurisdictional waters and wetlands. This provides incentives to project proponents to develop alternatives that avoid impacts on jurisdictional waters and wetlands that have greater potential to provide significant resources and functions (i.e., those with perennial water sources). Projects can thus be permitted much more quickly and mitigation efforts, which



add significantly to the financial burdens associated with these beneficial water and wastewater initiatives, can be minimized. This will also result in lesser adverse effects on the resources associated with perennial drainages. Limiting the approaches as recommended above will maintain the incentive for a project proponent to avoid perennial drainages and avoid adverse impacts to jurisdictional waters and wetlands. Thank you again for this opportunity to provide comments. If you have any questions, please don't hesitate to contact me by phone at (303) 739-7378 or by email at [mbrown@auroragov.org](mailto:mbrown@auroragov.org).

Sincerely,

  
Marshall P. Brown

cc: Brad Pierce, Aurora City Council