COLORADO Department of Agriculture | COLORADO Department of Natural Resources | COLORADO Department of Public Health & Environment

June 19, 2017

Andrew Hanson and Donna Downing
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U.S. Environmental Protection Agency

Re: Revisions to Definition of Waters of the United States

Dear EPA:

Colorado is submitting these comments with respect to the Environmental Protection Agency's (EPA) request for comment on making changes to the definition of "waters of the United States."

Colorado's primary interests in the jurisdiction and application of the Clean Water Act (CWA) to waters flowing within state borders relate to water quality, water supply and administration, and continuation of agricultural activities. It is the policy of the State of Colorado to prevent injury to beneficial uses of waters, to maximize the beneficial uses of water, and to achieve the maximum practical degree of water quality. Colorado has vested interests in securing and protecting the rights to use water that originates within Colorado and provides a water supply to 19 states and Mexico. Consequently, Colorado maintains significant interests in the efficient and wise management of water resources and in preserving the State's clear authority to administer and allocate water within its boundaries. Agriculture is a large economic driver in Colorado; given the arid nature of the state, Colorado depends heavily on irrigated agriculture. In considering proposed rule language, EPA must keep in mind that states have sovereign authority to administer water within their states as well as the expertise to evaluate the implications of proposed changes to jurisdiction. It is with these understandings that Colorado submits the following comments.

Need for Clarity and Dialogue:

As Colorado noted in 2014, prior to the completion of the 2015 WOTUS rulemaking, there was a great deal of uncertainty regarding the scope of CWA jurisdiction following the United States Supreme Court decisions in *SWANCC* and *Rapanos*. Colorado supports clarifying the scope of CWA jurisdiction. Colorado urges EPA to engage in meaningful and extensive dialogue up front to ensure that a proposed definition clarifies the scope of jurisdiction rather than creating additional uncertainty. Uncertainty with respect to the scope of EPA's jurisdiction leads to uncertainty in the permitting process which slows down essential water projects in Colorado and creates an inefficient permitting system.

Given the unique characteristics of waters throughout the country and how the impact of waters can vary depending on those characteristics, it is essential that EPA take the time to engage in meaningful discussion with states as co-regulators to learn about the different ways that a revised definition will impact each state in order to develop an appropriate definition. EPA must give careful thought to a revised definition to ensure it is both protective and also has reasonable impacts nationwide.

Colorado encourages EPA to engage in significant dialogue with states and other affected entities prior to proposing any revised definition to ensure that any proposed definition protects the watersheds of our states in a reasonable manner and is an interpretation that the states are confident will withstand legal challenge. Colorado has concerns that a definition based on Scalia's opinion alone may not be consistent with the Supreme Court's direction and not able to withstand legal challenge as the majority opinion. While we understand EPA's need to revise the existing definition, Colorado believes that the most defensible definition should be consistent with Kennedy's test.

Agricultural Exemptions:

Any revised definition must retain intact all of the CWA agricultural exemptions. Agriculture is one of the largest economic sectors in our state; our farmers and ranchers feed the people of Colorado and beyond while conserving environmental resources. Best available technology has allowed us to produce more with less water, fertilizer/chemicals and energy. It is essential that any revisions to the provisions defining the scope of CWA jurisdiction and its exemptions not create any confusion for the agricultural sector, and that the proposed definitions do not impact the scope of the agricultural exemptions. Compliance with the CWA must be straightforward and reasonable, as the industry makes tremendous advancements in Best Management Practices.

Cumulative Impacts:

As a headwaters state, Colorado is particularly interested in protection of our high quality water resources. Many of our headwaters are small tributaries that run seasonally and which cumulatively can have a large impact on waters at lower elevation that are ultimately used by the public for domestic water supply, recreation, and agricultural use. Therefore, these headwaters are an economic driver for our state. Accordingly, it is a high priority for Colorado that in considering how to define "relatively permanent" and "continuous surface connection," that the definition include an assessment of whether waters alone or in combination with other similarly situated waters have a significant nexus. Colorado believes strongly that it is appropriate to consider the cumulative impacts of potential activities on multiple tributaries upstream of traditionally navigable waters within a particular watershed and can only support a federal rule that includes this concept.

Similarly, Colorado has many ephemeral waters which flow only in response to storm events, some of which may have measurable and significant impact on downstream navigable waters. Colorado expects that EPA will involve states in meaningful and substantive dialogue as it evaluates how ephemeral streams will be treated under a new proposed definition.

EPA has suggested limiting its interpretation of "relatively permanent" to perennial waters only on one end of the spectrum, or perennial waters and waters that flow for at least 3 months of the year on the other end of the spectrum. Colorado has many waters that would not fall into either of these proposed definitions, and yet those waters can have measurable and significant impact on downstream navigable waters. When addressing these issues, Colorado is urging EPA to develop criteria that clarify the protections previously afforded these waters under prior jurisdiction determinations. Because waters that may have a significant impact on downstream navigable waters will vary by state, it is important that Colorado and all states be given a seat at the table to consider the most appropriate way to establish objective criteria.

Resource Impacts

Colorado is concerned that a change in interpretation of "waters of the U.S." could compromise Colorado's ability to leverage 319 funding and other federal support for waters

that EPA no longer considers to be jurisdictional. In Colorado, there are many small tributaries in the headwaters that are impacted by legacy mining and are not within other federal cleanup programs. Colorado relies heavily on 319 monies and other federal support to conduct projects to clean up the water quality impacts from legal mining. If EPA were to restrict its funding support for those mining impacted tributaries, Colorado would suffer.

Moreover, there is broader concern that EPA or other federal agencies may tie the amount of financial and other support provided to states for water related programs to only "waters of the U.S." If federal funding or other resources provided to states for implementation of the CWA or other programs are tied to the jurisdictional waters in the state then any reduction of jurisdictional waters could result in a loss of federal resources to, or available for, state programs. EPA's financial responsibilities for protection of the environment go beyond "waters of the U.S." A reduction in CWA jurisdiction should not be used as a mechanism to reduce funding or other resources to states.

Federalism:

Colorado understands that EPA is considering a more restrictive definition of waters of the U.S. As a practical matter, if EPA limits waters under the jurisdiction of the CWA, many waters - especially the headwaters of important western streams - may be left unprotected under the CWA. States may choose to protect these waters under their own programs, but this shift away from federal protections would significantly increase the burden on the states. EPA should not unduly shift the additional and substantial burden onto the states to protect waters that have a significant impact on the larger watershed. If this burden is shifted to the states sufficient federal funding should be provided.

We appreciate the opportunity to provide this input generally. Colorado understands that developing a definition of WOTUS that recognizes the complexity and uniqueness of the hydrology, water quality, and water uses in each state will be challenging. Colorado urges EPA to work closely with all states in the development of the definition of waters of the United States. We look forward to the opportunity to have a meaningful dialogue with EPA to provide input on potential changes to the definition of waters of the United States and to explore the implications of a revised definition on Colorado and its programs.

Sincerely,

Dr. Larry Wolk
Executive Director
Colorado Department of Public Health and Environment

Bob Randall
Executive Director
Colorado Department of Natural Resources

Don Brown
Commissioner of Agriculture
Colorado Department of Agriculture

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TO: DNREC Secretary Shawn Garvin
Department of Agriculture Michael Scuse

FROM: Brian Winslow, Executive Director
Brenna Goggin, Director of Advocacy

SUBJECT: Clean Water Rule Comments

Delaware Nature Society is a private, non-profit, membership organization with more than 6,500 members statewide. We connect people to the natural world through education, advocacy and preservation.

Delaware Nature Society has a long history of advocating for the protection and preservation of our waterways and wetlands. As a member of multiple Freshwater Wetland Advisory Council(s) throughout the past 30 years, we have advocated for a statewide non-tidal regulatory program to protect Delaware's unique Delmarva Bays and other category 1 wetlands. We applaud Delaware's Department of Agriculture and Department of Natural Resources and Environmental Control (DNREC) for hosting a diverse, stakeholder meeting in response to Mr. Pruitt's request for information. As you know, Delaware relies exclusively on EPA for the regulation and protection of our non-tidal wetlands.

Delaware Nature Society believes the best way to improve water quality is to prevent pollution at its source, which is much cheaper than trying to remove pollution downstream. Since the *SWANCC* and *Rapanos* U.S. Supreme Court decisions issued in 2001 and 2006, respectively, we, through our affiliation with the National Wildlife Federation, have been actively engaged in the effort to clarify the definition of "Waters of the United States" that underpins the 1972 Clean Water Act.

The goal of the 1972 Clean Water Act was "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters" to ensure fishable, swimmable, drinkable waters. This has historically been a bipartisan goal and we believe it still is—and must be. Whereas capital investments in water infrastructure are essential to make water supplies safe to drink and remove pollution from wastewater, the Clean Water Act is the best tool our nation has to proactively protect our water resources and reduce our long-term capital requirements. Clearly defining the "Waters of the United States" within the Act's safeguards is essential for the Act to work effectively, which is why EPA Administrators serving Republican Presidents, from Russell Train (1973-1977) to William Reilly (1989-1993), strongly supported broad protections for wetlands and streams. Republican leader Senator Howard Baker of Tennessee echoed these words of support when the Clean Water

Act was amended in 1977: "[t]he once seemingly separate types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the *entire resource*."[1] In 1986, the Reagan administration developed the inclusive definition of waters of the United States[2] and President George H.W. Bush confirmed "no net loss" of wetlands as his administration policy in January, 1989.

The Clean Water Rule, under President Obama, was developed by the EPA and the Army Corps of Engineers after several years of stakeholder engagement and after a state-of-the-art evaluation of the science on the connectivity of wetlands and headwater streams. Sportsmen, conservation groups, and many other stakeholders submitted over one million public comments that helped to shape the final rule, which was broadly celebrated for restoring guaranteed protections to headwater streams and millions of acres of wetlands previously at greater risk of being polluted or destroyed because of legal confusion. We believe the rule that was developed was legally sound, scientifically supported, and represented an appropriate jurisdictional balance consistent with the Clean Water Act.

Delaware Nature Society strongly encourages the Committee to support the Clean Water Rule. To rescind the Rule and instead use former Supreme Court Justice Antonin Scalia's plurality opinion in *Rapanos v. United States* as a basis for revision could harm the drinking water supplies of more than 117 million Americans by leaving nearly as many as 60% of U.S. streams without the protection of the Clean Water Act. At least 5,000 acres of non-tidal wetlands, many of which provide essential water quality, flood protection, and fish and wildlife habitat, are at risk in Delaware. In fact, the rate of wetlands loss increased by 140% during the 2004-2009 period – the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago during the Nixon administration. Such a rollback of stream and wetland protections will cause irreparable harm for fish and wildlife, hunting and fishing, the outdoor recreation economy, and clean drinking water.

The final rule clarifies and definitively restores Clean Water Act protection to two major categories of waters, while drawing clarifying and limiting boundaries:

1. Tributaries to traditionally navigable and interstate waters and the territorial seas. For example, intermittently-flowing headwater streams that have a defined bed and bank and ordinary high water mark, and flow to a traditionally navigable or interstate water body; and

2. Wetlands, lakes, and other water bodies located adjacent to these tributaries (including those within the 100-yr floodplain up to a maximum distance of 1,500 ft.).

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[1] 123 Cong. Rec. 26,718 (Aug. 4, 1977) (emphasis added).

[2] See http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf at 37056.

Based on a careful review of the wetland science and the "significant nexus" test, the final rule also authorizes protections for waters that are "similarly situated" and located beyond river floodplains when they significantly affect downstream waters' condition. As independent scientific advisors recommended, the rule also finds that specified wetlands -- prairie potholes in the Dakotas, western vernal pools in California, Carolina and Delmarva bays and pocosins along the Atlantic coastal plain, and Texas coastal prairie wetlands along the Gulf of Mexico -- are "similarly situated" in how they provide fish and wildlife habitat, especially for waterfowl, important flood storage and drought resistance, and critical pollution filtration..

While these clarifications remove uncertainty, and better protect many wetlands and streams that have been at risk for the last decade, the fact is that the final Clean Water Rule actually *narrows* the historic scope of Clean Water Act jurisdiction, excluding protections for some wetlands and other waters protected for almost 30 years prior to 2001. Indeed, in our view, a couple of the 2015 Clean Water Rule's waters of the U.S exclusions go too far, removing protections for wetlands and other waters that the science indicates are likely to have a significant nexus to downstream traditionally navigable or interstate waters.

First and foremost, the rule deletes the pre-existing and longstanding "other waters provision that provided Clean Water Act jurisdiction over many types of waters based on their potential effect on interstate commerce. Given the breadth of the federal commerce clause power, and the Clean Water Act legislative intent to regulate to the full extent of that power, this provision provided for Clean Water Act coverage for over millions of wetland acres protected for almost 30 years prior to 2001. In response to the Court's consideration of waters' ecological links to downstream waters, EPA and the Corps deleted this section and instead expressly linked all jurisdictional "waters of the U.S." determinations to science-based findings of significant nexus to downstream waters. As a result, many of the intrastate, non-navigable, geographically "isolated" wetlands, lakes, and ponds previously covered by the Clean Water Act regulations will no longer be covered under the final Clean Water Rule.

Second, the definition of "waters of the U.S." includes – for the first time -- a clear definition of "tributary" that both clarifies and limits Clean Water Act jurisdiction over streams, ditches, and other tributaries. To be guaranteed protection as a tributary, a waterway must have a bed, bank, and ordinary high water mark. To further clarify what is *not* a protected tributary, the final rule expressly excludes – again for the first time – several types of ditches, as well as gullies, rills, non-wetland swales, and lawfully constructed grassed waterways.

In further response to concerns from agricultural and water treatment and delivery sectors, and in addition to existing exemptions for prior converted cropland and waste treatment systems, **the final rule also explicitly excludes from the definition of waters of the U.S. other water features in dry land, including artificially irrigated areas, stormwater control features and wastewater recycling systems**.

In addition, the final rule adds physical and measurable distance limits to define adjacent waters, further narrowing jurisdiction and excluding wetlands and other waterbodies previously covered by the Clean Water Act.

And, of course, the final rule does not alter the Clean Water Act provisions generally excluding several activities from applicable permitting requirements:

- Common farming and ranching practices, including "**plowing, cultivating, seeding, minor drainage, harvesting** for the production of food, fiber, and forest products;"
- "Construction or maintenance of **farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;**"
- "**Agricultural stormwater discharges and return flows from irrigated agriculture;**"
- "Construction of **temporary sediment basins** on a construction site;" and
- "Construction or maintenance of **farm or forest roads or temporary roads for moving mining equipment.**"

We hope you take these points into consideration as you move forward with your response to EPA Administrator Scott Pruitt. Thank you for the opportunity to provide comment.

EPA'S LOCAL GOVERNMENT DVISORY COMMITTEE (LGAC)

Thursday, June 29 2017
2:00 p.m.-3:00 p.m. EST Teleconference

Nonresponsive Conference Code/ Ex. 6

Meeting Agenda

2:00 pm-2:05 pm **Call to Order/Introductions**
Chairman, Mayor Bob Dixson
Vice-Chairwoman, Councilor Jill Duson

2:05pm- 2:15pm **EPA Remarks**

Troy Lyons, Associate Administrator
Office of Congressional and Intergovernmental Relations
Intergovernmental Relations

The Honorable Scott Pruitt (Invited)
EPA Administrator

2:15pm-2:30pm **Public Comments**

DRAFT

2:30pm-2:55 pm ***Workgroup Actions-Report-Out***

Small Community Advisory Subcommittee (SCAS)
Commissioner Robert Cope, Chair
Mayor Johnny Dupree, Vice-Chair

ACTION: Report Out

Protecting America's Waters Workgroup
Susan Hann, Chairwoman
Mayor Elizabeth Kautz, Vice-Chair

ACTION: Discussion and Vote:

1) *Draft LGAC Waters of the United States (WOTUS) Report*

2) *Draft Transmittal Letter for WOTUS*

Environmental Justice (EJ) Workgroup
Dr. Hector Gonzalez, Chair

ACTION: Report Out

Air, Climate and Energy Workgroup
Commissioner Robert Cope, Acting Chair

ACTION: Report Out

Cleaning Up Our Communities Workgroup
Councilor Jill Duson, Chairwoman
Mayor Karen Freeman-Wilson, Vice-Chairwoman

ACTION: Report Out

2:55pm-3:00 pm ***LGAC Concluding Remarks***
Mayor Bob Dixson, Chair of LGAC

Robin Richardson
Principal Deputy Associate Administrator

DRAFT

3:00pm **Adjournment**
Mayor Bob Dixson, Chair of LGAC

2017

EPA's Local Government Advisory Committee (LGAC)

MEETING SUMMARY
FRIDAY, JANUARY 13, 2017
TELECONFERENCE

EARGLE, FRANCES

EPA's Local Government Advisory Committee (LGAC)

Friday, January 13, 2017
12:30 p.m.-1:30 p.m. (ET) WJC North 3528 TELECONFERENCE

MEETING SUMMARY

I. Call to Order/Introductions

Chairman Bob Dixson called the meeting to order and began introductions. He welcomed everyone to the public meeting of EPA's Local Government Advisory Committee. He stated the purpose of the meeting was to hear and take action on two business items: 1) LGAC Biannual Report 2015-2016 and the 2) Ozone Letter.

He stated for the record that the LGAC is a chartered committee of state, local and tribal elected and appointed officials representing communities from coast to coast-large, small, urban and rural communities.

The LGAC operates in accordance with the Federal Advisory Committee Act, and therefore conduct meetings open to the public. Members of the public are invited to speak and address the committee during the time designated on the agenda to speak.

He indicated that Administrator Gina McCarthy would join the meeting to give a farewell address to the Committee.

Chairman Dixson recognized Vice-chairwoman Councilor Jill Duson for opening remarks. Vice-chairwoman Jill Duson also welcomed everyone to the meeting.

II. Remarks of the EPA Administrator

Mark Rupp, Deputy Associate Administrator gave opening remarks and introduced the Administrator. Administrator Gina McCarthy began by thanking the Chairman and Vice-chairwoman, and the Committee for inviting her to speak.

She thanked LGAC Members for their hard work on behalf of the EPA. She said that she had been "obnoxiously demanding of the LGAC" and that was because their advice was so good and so needed.

She thanked Mayor Dixson for his leadership as well as Vice-Chairwoman Councilor Jill Duson. She said that the most important issues the LGAC takes on is to review what we ask of the states and whether we ask of them can work. Administrator McCarthy reflected on the LGAC's

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work on the Clean Water rule, Clean Power Plan and Drinking Water. She said that the work on environmental justice (EJ) was also helpful. She said the LGAC's advice always helped her to gain a greater understanding of what needs to be done. She also commented on the great work on the Drinking Water Plan and the short turnaround.

She thanked LGAC Members for hosting her in their communities. She thanked Mayor Elizabeth Kautz for the tour of Burnsville, Minnesota. She was pleased to say goodbye to the last coal train there. She thanked Kevin Shafer for the water infrastructure tour of their work in Milwaukee. She thanked Mayor DuPree for his visits on many occasions to raise the awareness and challenges of marginalized communities, health disparities and water infrastructure. She said that the Drinking Water Plan clearly outlines the need to act with equity to address these issues.

She stated that she was grateful for the time spent with Mayor Marilyn Murrell in her town of Arcadia, Oklahoma. She said that she met of most of her family members and she said that "if you understand community this is what it is all about." She said that it is why the work is so important and also important "in our work together." She concluded by saying that the work with the LGAC was "a huge part of my most memorable moments."

Chairman Dixson thanked the Administrator. **Vice-Chairwoman Duson** also thanked her for her leadership and her commitment to open engagement. She also thanked her for promoting regional leadership with the EPA Regional offices. She also stated that the LGAC can see our fingerprints at work.

Mayor Elizabeth Kautz also thanked the Administrator for her openness, transparency and responsiveness. She appreciated the travel to hear from local leaders. And she also appreciated the affirmative leadership to make sure that "we are cleaning up the environment." She also said that she was going to miss her style of leadership that speaks from the heart and works cooperatively to solve problems.

Commissioner Victoria Reinhardt commented that "what the Administrator had done did indeed make a difference." **Mayor Dawn Zimmer** also thanked the Administrator for EPA's work to help her city of Hoboken, New Jersey which was hard hit by Hurricane Sandy. She said that there was a huge flood event and EPA had helped with a long- term plan flood control plans. She said that "EPA's presence was making a difference at the local level."

Mayor Mark Stodola also thanked her for EPA's work to support the city of Little Rock's sustainability work and economic redevelopment. Administrator McCarthy said that one of the reasons that she enjoyed her work so much was to witness the work at the state and local level. She said that "you know things happen not only because of regulations but also because we care and our partnerships are meaningful." EPA will continue to work together on strong

partnerships. She said that "the agency has strong and good people." The public cares about clean water and clean air. She said that the work that has been done will continue.
She thanked the LGAC for "letting me part of your life." She also thanked Mark Rupp for the great job he had done to make use of the LGAC's advice and recommendations, and their time as LGAC Members.

III. Public Comments

Chairman Dixson announced the time for public comments. He invited members of the public to speak. [No members of the public came forward to speak].

IV. *LGAC Business Actions and Workgroup Report-Outs*

1. Draft LGAC Biannual Report-2015-2016

Chairman Dixson opened the business portion of the meeting by recognizing that there was a quorum present. He said the first order of business was to review the Draft LGAC Biannual Report. The Report was presented on behalf of the Executive Committee, which presented the Report which is a compilation of the LGAC's work for the last two years (2015-2016).

The Report summarizes and highlights the many charge issues, and highlights the over 300 individual findings and recommendations of the Committee. It also includes a summary of the Drinking Water Report. The Report also highlights where agency action was taken on our some of the LGAC recommendations. **Chairman Dixson** stated that the Small Community Advisory Subcommittee (SCAS) and all of the Workgroups have reviewed the Report and provided input.

Chairman Dixson thanked the EPA staff and interns for helping on the Report. He said that the Report is a culmination of the very active work of the LGAC over the last two years.

He opened it up for discussion. **Sue Hann** made a motion to accept the Report, it was seconded by **Representative Jeff Morris**. All were in favor of the motion, said 'aye'.

Chairman Dixson thanked all of the Members of the LGAC. He said that everyone contributed to the Report and the LGAC work highlighted in the Report.

Chairman Dixson indicated that he would transmit the Report electronically by email to the Administrator. He said that a transmittal to the new Administrator was being worked on by the

Executive Committee and that in the appropriate time that the LGAC would be called in another meeting to discuss a letter to the incoming Administrator.

2. Small Community Advisory Subcommittee (SCAS)

Commissioner Bob Cope reported out on the SCAS meeting held just prior to the LGAC meeting. He said the SCAS discussed and approved the Biannual Report. He also said that the SCAS had given input on the Report. The SCAS also discussed the ozone letter and had given input to that letter as well.

He reported that Ron Carlton, EPA's Agricultural Advisor, gave farewell remarks to the SCAS. Commissioner Cope recognized Mayor DuPree, Vice-chairman of the SCAS to give any remarks. Mayor DuPree said that he appreciated all of the work of the SCAS and the LGAC.

3. Air, Climate and Energy (ACE) Workgroup

Commissioner Carolyn Peterson presented the ACE's *Draft Ozone Standard Letter* to the LGAC. She said that the letter provided in the meeting attachments with the redline additions contained input which was added to the letter. This language had been approved by the workgroup and the Executive Committee. The redline additions were introduced by the Environmental Justice Workgroup to address cross-boundary ozone issues.

She also said that all of the workgroups have looked at the letter. It also addresses truck traffic at railroad crossings. It favors option 1 on how communities adjust to, new additions and unique local and regional situations.

Commissioner Peterson made a motion to approve the letter**. Sue Hann** seconded the motion. Motion carried. **Commissioner Carolyn Peterson** thanked everyone. And Chairman Dixson thanked Carolyn Peterson and the work of the ACE on the letter.

4. Protecting America's Waters Workgroup (PAWW)

Sue Hann, Chairwoman of the PAWW, reported out for the Workgroup. She said that Eric Burneson addressed the Workgroup at their December meeting to thank the LGAC for their work and to give a report out on the status of implementation of the National Drinking Water Action Plan. She also said that the Workgroup had a briefing on asset management planning which is a key feature of managing water infrastructure.

Sue Hann also reported out to the LGAC that she had just participated in a Water Infrastructure Leadership Conference held in Washington, D.C. on January 11-12th. She said that it specifically addressed issues of water infrastructure needs of communities in need and in rural areas.

Generally, smaller communities are in greater need of resources. And it is more difficult to reach out to smaller communities. There were four (4) topics discussed at the conference: state level coordination; funding sources that make projects work; capacity building and alternative funding sources.

There were really looking for examples of local strategies where local governments have put together innovative funding resources to make their projects work. There was a sense that not a lot of funding packages were replicable. Everyone seems to have unique projects and there was not a 'one size fits all for funding'. There was a sense that a clearinghouse is needed. The biggest theme was capacity building.

Alternative funding and financing are often not available for communities in need. There is a real need to connect communities with accessible resources. There is expected to be a report out in early spring of the conference proceedings. Sue Hann will send a link to Fran Eargle to send out when it is available.

Mayor Elizabeth Kautz, Vice-chairwoman, PAWW, thanked everyone for the great progress of the workgroup over the year. She thanked Susan Hann for her leadership as chairwoman. And she thanked Chairman Dixson for his leadership of the LGAC.

5. ***Environmental Justice (EJ) Workgroup***

Mr. Gonzalez, City of Laredo staff, reported out for Dr. Hector Gonzalez, Chair of the EJ Workgroup. Mr. Gonzalez thanked everyone on the Committee for their tremendous work.

6. ***Cleaning Up Our Communities Workgroup***

Councilor Jill Duson, Chairwoman of CUOC, thanked the Workgroup for their work to support the LGAC. Councilor Duson said that they are working with the Office of Land and Emergency Management on the brownfields program. There are various elements of the brownfields program of interest to Members and to local governments. The CUOC is also continuing to work with the Water Workgroup on drinking water issues and how to protect source water from contamination. The CUOC will also be investigating new topics to bring to the forefront.

The Chairwoman also congratulated the Vice-chairwoman, Mayor Karen Freeman-Wilson for her segment on *Undercover Boss*. [1] It was a great opportunity to see what her great city does, and the importance of the work of municipalities on an everyday basis.

Chairman Dixson thanked Councilor Duson and Mayor Karen Freeman Wilson for their leadership.

V. *Concluding Remarks*

Chairman Dixson said that there was one order of business left for the Committee which is to approve the October 7th Meeting Summary.

Ms. Susan Hann made a motion to accept the Meeting Summary, and Mayor Kautz seconded the motion. Motion carried.

Chairman Dixson recognized Robin Richardson for concluding remarks.

Robin Richardson
Principal Deputy Associate Administrator

Robin Richardson thanked Chairman Dixson for another great meeting, and his great leadership as chairman. She also thanked the Committee for their work. She said that she had now served in the Office of Congressional and Intergovernmental Relations for 4 months. She said that this is the second opportunity to meet with the LGAC and see their work in action. She also commended the LGAC for their work on the Drinking Water Report, and how well done that was. She also said that she looked forward to reading the LGAC Biannual Report.

She thanked those on the LGAC who will be departing their service soon for their many efforts. She thanked Mark Rupp as well. She said that she and the staff are here to help. She urged the Committee to continue their great work. And she said that as the Transition Team comes in that she and the office are gearing up to welcome the new Team who will arrive on Friday.

She concluded her remarks with another thank you for the LGAC's hard work and helping the EPA. She also said that she is looking forward to meeting everyone early summer for a possible face to face meeting.

Chairman Dixson acknowledged Mark Rupp's contributions and asked him to give concluding remarks. Mark Rupp began by saying how difficult it is in wrapping up the great work. He said that the work with the LGAC was a high point of the job. He said that the LGAC is an incredible

[1] http://www.cbs.com/shows/undercover_boss/video/O_IR37rmKeeE26CQNXC3q6Y4avbUF2Yg/undercover-boss-mayor-of-gary-indiana/

team. He stated that the work of the LGAC helped the Administrator greatly by the virtue of their advice made EPA's policies work better. He said that he also appreciated the work of the LGAC in going across the country and meeting with elected officials across the country on the Clean Water Rule and the Report that was done to help EPA on the final rule.

He also thanked outgoing LGAC Members**: Jeff Tiberi, Representative Morris and Carolyn Peterson** for all of their contributions.

He also thanked Chairman Dixson for all of his contributions.

Mayor Elizabeth Kautz acknowledged Mark Rupp's contributions. She said that she will miss his presence. She thanked him for all of the support to the LGAC and to local governments.

Commissioner Reinhardt echoed remarks of Mayor Kautz.

Chairman Dixson also wished everyone well. He said that everyone should be very proud of what we have accomplished together.

Commissioner Carolyn Peterson said that she has enjoyed serving on the Committee and the journey we have made together. She said that she remembers the first inquiry to her office whether I would be interested to serve in October 2010. She said that the LGAC has worked together so well, and with the EPA staff. She also reminded the Committee that there would be a vacancy for the chair of the ACE Workgroup. **Chairman Dixson** said that he really appreciated all of Carolyn Peterson's contributions especially in her help to perfect the work products of the Committee.

Chairman Dixson also thanked **Jeff Tiberi** for his contributions and for really giving the LGAC the great perspective on the ground on agriculture and especially in regard to water and agriculture.

Chairman Dixson thanked Representative Jeff Morris for sharing his perspective of state representatives and state issues and said how important that was to the LGAC's work.

Representative Jeff Morris shared that he is currently in his 21st year in serving the State of Washington as a state representative. When he came onboard the LGAC this was the first experience in working so closely with local governments. He said that it has really been a unique opportunity. And he also said that he carried this relationship with him in his work every day. Representative Morris also thanked Mayor Dixson for his leadership of the Committee and complimented his facilitation skills and getting the best from everyone.

12:30pm **Adjournment**
Mayor Bob Dixson, Chair of LGAC

Mayor Dixson adjourned the meeting at 1:31 pm ET.

We hereby certify that, to the best of our knowledge, the foregoing minutes are accurate and complete.

Robert A. Dixson

March 31, 2017

Mayor Bob Dixson
Chairman
Local Government Advisory Committee
U.S. Environmental Protection Agency

Date

March 31, 2017

Frances Eargle
Designated Federal Officer
Local Government Advisory Committee
U.S. Environmental Protection Agency

Date

The Meeting Summary reflects what was conveyed during the course of the meeting that is summarized. The Committee is not responsible for any potential inaccuracies that may appear in the meeting summary 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 within the Meeting Summary.

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MEETING PARTICIPANTS

LGAC Members

Mayor Bob Dixson, Chairman

Councilor Jill Duson, Vice-chair

Mayor Elizabeth Kautz

Mr. Kevin Shafer

Commissioner Carolyn Peterson

Commissioner Robert Cope

Representative Jeff Morris

Mr. Scott Bouchie

Mr. Jeff Witte

Dr. Hector Gonzalez

Mr. Rodney Bartlett

Mayor Mark Stodola

Representative Stephanie Chang

Council Member Dave Bobzien

Commissioner Kitty Barnes

Commissioner Cynthia Koehler

Mayor Steve Williams

Mayor Dawn Zimmer
Ms. Susan Hann

Ms. Samara Swanston

Mayor Johnny DuPree

Council Member Andy Bierman

Commissioner Merceria Ludgood

EPA

Gina McCarthy, Administrator

Robin Richardson, Associate Principal Administrator, Office of Congressional and Intergovernmental Relations (OCIR)

Jack Bowles, Director, State and Local, OCIR

Fran Eargle, DFO, LGAC

Demond Matthews, DFO, SCAS

Becky Cook-Shyovitz, OCIR

Charles Lee, OEJ

MEMBERS OF THE PUBLIC

Albert Chula

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE

6/29/2017

Waters of the United States 2017 Report

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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 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 Dixson,
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

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EPA's Local Government Advisory Committee

WATERS OF THE UNITED STATES 2017 REPORT

DRAFT

Executive Summary

I. Introduction and Background
A. EPA's Proposed Waters of the U.S. Rule
B. Committee Charge
C. Historical Context

II. Waters of the U.S. and Local Governments
A. Waters: Our Nation's Wealth and Health
B. Local Governments and Cooperative Federalism
C. Clarity and Predictability
D. Flexibility and Regionalization
E. Enhanced State and Local Government Role
F. Scalia Approach: Challenges and Opportunities
G. Exemptions
H. Permitting Reform
I. Agriculture and Rural Communities
J. Outreach to Local Governments
K. Financial Sustainability

III. Response to Charge: Findings and Recommendations

IV. Conclusion

V. Appendix

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

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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.

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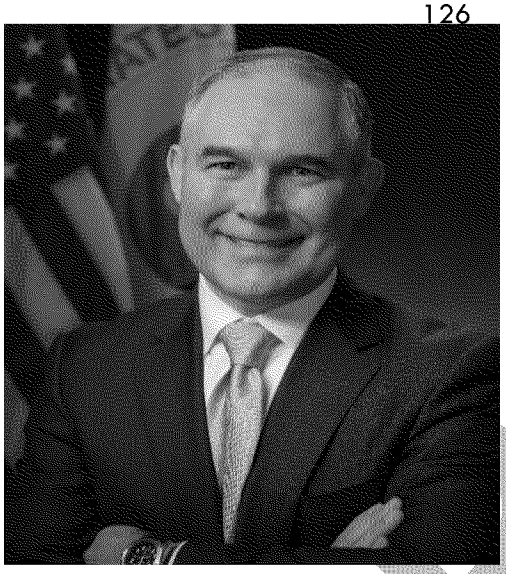
I. Introduction and Background

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).[1] 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 term 'navigable waters' in a manner "consistent with Justice Scalia's opinion in *Rapanos*[2] which includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.



The Honorable Scott Pruitt, EPA Administrator

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

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

[2] *Rapanos* v. United States, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 LEd. 2d 159

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The agencies intend to follow an exp editious, two-step process that will provide certainty across the country: I) 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 bee n 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.

State Representative Tom Sloan, Kansas

"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

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

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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 considering 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***

Council Member Brad Pierce, Aurora, CO

This Report highlights our findings and recommendations from our unique local government perspective which will assist the agency in providing insights from this perspective to help shape a revised rule that will better promote cooperative federalism and also provide 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.

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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 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.*"[3]

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 members felt that EPA's detailed response to comments would demonstrate to participants that their concerns were heard and acknowledged. Other 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

[3] https://www.epa.gov/sites/production/files/2015-10/documents/11.5.14_w.o.t.u.s._report.pdf

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236 ## II. Water and Our Communities

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238 ### 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 citizens. A common understanding of the value of water and how it impacts the health and prosperity of us at

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260 **Evening barge trip on the Mississippi River near downtown Saint Paul, MN.**
261 **Photo Source: Davin Brandt, Ramsey County, MN**
262

263 the local level is important for governmental decision-making. For example, water infrastructure costs are
264 estimated to be $100 per household per year. For smaller communities, these same costs are $400 to
265 $800 more per year.[4] It is estimated that for every $1 million investment in water infrastructure it
266 supports between 15 and 18 jobs throughout the economy. Therefore, disruption in our nation's water
267 supply could be devastating to communities.
268 Therefore, protections under the Clean Water
269 Act for the 117 million people (one third of
270 Americans) that rely on these waters as part
271 of our public drinking water assets are
272 decisions of public trust and stewardship.

Our communities depend on water for economic progress.

273

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

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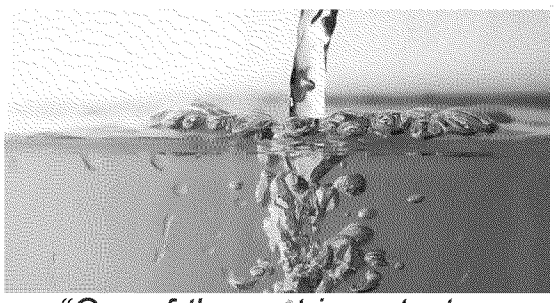
Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred directly to rate payer ***- at the tap.***



"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

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.

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