- On March 15, 2017, Administrator Pruitt and Department of Transportation Secretary Elaine Chao announced that EPA intends to reconsider the final determination, issued on January 12, 2017, that recommended no change to the greenhouse gas standards for light duty vehicles for model years 2022- 2025. (82 Fed. Reg. 14671; March 22, 2017).

- *Steam Electric ELG* - "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category," (80 Fed. Reg. 67838; November 3, 2015). This update to effluent limitation guidelines primarily affects coal-fired electric generating units.
  - On April 11, 2017, the Administrator sent a letter to each state governor notifying them of the Agency's intent to consider postponing compliance dates as well as petitions for reconsideration of the final rule.
  - On April 12, 2017, the Administrator announced the EPA decision to reconsider the final rule and to postpone compliance dates that have not yet passed (82 Fed. Reg. 19005; April 25, 2017).

- *Landfill Methane Rules* - "Standards of Performance for Municipal Solid Waste Landfills," 81 Fed. Reg. 59332 and "Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills," 81 Fed. Reg. 59276, both published August 29, 2016. While this rule does not directly impact domestic energy production, it was part of two reports identified for rescission in Section 3(b) of EO 13783 – The President's Climate Action Plan (June 2013) and the Climate Action Plan Strategy to Reduce Methane Emissions (March 2014).
  - On May 5, 2017, EPA sent a letter announcing it was convening a proceeding for reconsideration of the final rules and issuing a 90-day stay of the effectiveness of both final rules.

II. Plan for Additional Reviews

In addition to the above actions, there are several other initiatives currently ongoing regarding regulatory review. EPA will utilize the information gathered from these activities to identify and prioritize additional energy-related actions that may be appropriate for repeal, replacement, or modification to make them less burdensome. These key initiatives include:

- Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, issued January 24, 2017.
- EO 13777 – Enforcing the Regulatory Reform Agenda, issued February 24, 2017.

Below is a discussion of the details of these key initiatives and how EPA will use information derived from them to inform the Agency's EO 13783 review.

a. Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing

As directed by the President's January 24, 2017, Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, the Department of Commerce issued a formal request for information (RFI) seeking information on the impact of Federal permitting requirements on the construction and expansion of domestic manufacturing facilities and on regulations that adversely impact domestic manufacturers. EPA is analyzing the 170 entries in the public docket received by Commerce for those that are relevant to EPA's permitting and/or regulatory requirements. Public comments identified as relevant to EPA and related to domestic energy production and use will inform the review of Agency actions under EO 13783.

b. Executive Order 13777 – Enforcing the Regulatory Reform Agenda

Executive Order 13777 on "Enforcing the Regulatory Reform Agenda" (82 FR 12285, March 1, 2017), directs federal agencies to designate a Regulatory Reform Officer and to establish a Regulatory Reform Task Force (Task Force). As articulated in a March 27, 2017, agency-wide memorandum, the EPA Administrator has designated a Regulatory Reform Officer and established a Regulatory Reform Task Force. Samantha Dravis, Senior Counsel and Associate Administrator for Policy will serve as EPA's Regulatory Reform Office (RRO) and a member of the Task Force. Ryan Jackson, Chief of Staff, will serve as the chairman of the Task Force. Other members of the Task Force include Byron Brown and Brittany Bolen, Deputy Chief of Staff for Policy and Office of Policy Deputy Associate Administrator, respectively.

Under EO 13777, the Task Force is charged with evaluating existing regulations and making recommendations to the Administrator regarding those that can be repealed, replaced, or modified to make them less burdensome. Specifically, the Task Force should identify regulations that: eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; are inconsistent with the requirements of the Information Quality Act or guidance issued pursuant to that law; or derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Because the Task Force is already charged with identifying and reviewing regulations across EPA for burden reduction, it is well positioned to identify the regulations that are specifically burdensome for the energy sector. Accordingly, in an April 19, 2017, agency-wide memorandum, the Administrator directed the Task Force to lead the Agency's EO 13783 review as well. This direction is consistent with OMB's May 8, 2017, guidance on Section 2 of EO 13783 which encourages agencies to coordinate reviews under EO 13783 with their compliance with EO 13777.

EO 13777 also requires that the Task Force seek input from entities significantly affected by the Agency's regulations, including state, local and tribal governments, small businesses, consumers, non-governmental organizations and trade associations. In response, EPA issued a request for comment on April 11, 2017, soliciting public input to inform EPA's Task Force. Comments are due by May 15, 2017, (83 Fed. Reg. 17793, April 13, 2017). As of May 11, 2017, over 50,000 comments have been received in the docket.

Additionally, the Administrator has directed that key program offices conduct public outreach meetings to solicit comments on EPA regulations and opportunities for reform. The Task Force

will ensure that comments received through these forums will be treated equally among the written public comments submitted to the docket. The following meetings were held:

- The Office of Air and Radiation (OAR) held a public meeting via teleconference on April 24, 2017.
- The Office of International and Tribal Affairs (OITA) hosted an outreach call with tribal representatives on April 24, 2017.
- The Office of Small and Disadvantaged Business Utilization (OSDBU) held a meeting on April 25, 2017.
- The Office of Congressional and Intergovernmental Relations (OCIR) hosted a meeting with intergovernmental representatives on April 26, 2017.
- The Office of Chemical Safety and Pollution Prevention (OCSPP) hosted a public meeting on May 1, 2017, on opportunities for regulatory reform as it relates to the Toxic Substance Control Act (TSCA) Subchapters I (Control of Toxic Substances), II (Asbestos Hazard Emergency Response) and VI (Formaldehyde Standards for Composite Wood Products) rules as well as EPCRA Subchapter II §11023 (Toxic Release Inventory program) rules.
- OCSPP hosted a public meeting on May 1, 2017, on opportunities for regulatory reform as it relates to TSCA Subchapter IV (Lead Exposure Reduction) rules.
- The Office of Water (OW) hosted a virtual listening session for the public on May 2, 2017.
- OCSPP held a public meeting with the Pesticide Program Dialogue Committee on May 4, 2017.
- The Office of Land and Emergency Management (OLEM), hosted a public meeting on May 9, 2017.

EPA program offices have begun to identify major and recurrent themes and specific policy suggestions they have heard in the public meetings. The Administrator has requested that program and regional offices to identify actions that may burden domestic energy resources and to provide the Regulatory Reform Task Force with specific recommendations by May 15, 2017, that have been informed by the public meetings held to date. In addition, public comments received in the docket will soon be screened, categorized, analyzed, and prioritized – actions relevant to domestic energy production and use will be highlighted for further, specific analysis.

Conclusion

EPA plays a critical role in shaping policies that may affect domestic energy resources. EPA believes EO 13783 offers an important and unique opportunity to revisit its regulations and identify and remedy those that impose unnecessary burdens on domestic energy production and use. EPA is taking regulatory reform very seriously, and has been proactive in soliciting input in a variety of venues that will inform the Agency's regulatory efforts related to EO 13783 and EO 13777. The Agency looks forward to continued dialog with the public about those efforts, and will build on the information and comments received in preparation for the draft report due in late July.

To: Dravis, Samantha[dravis.samantha@epa.gov]; Greenwalt, Sarah[greenwalt.sarah@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]
From: McGartland, Al
Sent: Mon 6/26/2017 2:45:13 PM
Subject: Fw: Provisional Final OMB WOTUS Comments
WOTUS Draft Proposed Rule (OMB 06-23-17).docx
WOTUS Draft Proposed EA (OMB 06-23-17).docx

Deliberative Process / Ex. 5

From: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
Sent: Friday, June 23, 2017 5:36 PM
To: Nickerson, William; Owens, Nicole
Cc: Ferris, Ann; McGartland, Al; Marten, Alex; Wehling, Carrie; Eisenberg, Mindy; Goodin, John
Subject: Provisional Final OMB WOTUS Comments

Nicole/Bill,

Deliberative Process / Ex. 5

Please feel free to email me over the weekend if necessary. I'll keep an eye on my inbox. You can also call me on my cell. My number is Personal Phone / Ex. 6

Vlad

To: Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Fotouhi, David[fotouhi.david@epa.gov]; Greenwalt, Sarah[greenwalt.sarah@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]
From: Schwab, Justin
Sent: Mon 6/26/2017 2:30:00 PM
Subject: Re: WOTUS

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 26, 2017, at 10:29 AM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

Yes.

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 26, 2017, at 10:26 AM, Schwab, Justin <schwab.justin@epa.gov> wrote:

Vlad just sent an invite for 12:30. I assume this is the same meeting.

Sent from my iPhone

On Jun 26, 2017, at 9:58 AM, Fotouhi, David <fotouhi.david@epa.gov> wrote:

I should be available to join at noon.

Sent from my iPhone

On Jun 26, 2017, at 9:51 AM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

I am trying to get the call in info from Anthony but no response yet. Standby

From: Greenwalt, Sarah
Sent: Monday, June 26, 2017 9:48 AM

To: Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Bolen, Brittany <bolen.brittany@epa.gov>; McGartland, Al <McGartland.Al@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Subject: RE: WOTUS

I'll be on it. Do you have call-in information or should we meet in your office?

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722|Cell: Personal Phone / Ex. 6

Greenwalt.Sarah@epa.gov

From: Dravis, Samantha
Sent: Monday, June 26, 2017 9:30 AM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Bolen, Brittany <bolen.brittany@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; McGartland, Al <McGartland.Al@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Subject: RE: WOTUS

Sorry to clarify – OMB and EPA career and political staff are holding a call at noon today. I was informed of this last night by Anthony Campau - please try to join if you can.

From: Dravis, Samantha

Sent: Monday, June 26, 2017 9:29 AM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Bolen, Brittany <bolen.brittany@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; McGartland, Al <McGartland.Al@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Subject: RE: WOTUS

It's not optional or propose another time. There is a call taking place at that time.

From: Schwab, Justin
Sent: Monday, June 26, 2017 9:27 AM
To: Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Bolen, Brittany <bolen.brittany@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; McGartland, Al <McGartland.Al@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Subject: Re: WOTUS

Before 11:30 or after 12:30 would be better

Sent from my iPhone

On Jun 26, 2017, at 9:26 AM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

> Is everyone free for a call at noon on WOTUS?

To: Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Bolen, Brittany[bolen.brittany@epa.gov]; Greenwalt, Sarah[greenwalt.sarah@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]
From: McGartland, Al
Sent: Mon 6/26/2017 2:27:17 PM
Subject: Re: WOTUS

Yes. I can call.

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 26, 2017, at 9:26 AM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

Is everyone free for a call at noon on WOTUS?

To: Fotouhi, David[fotouhi.david@epa.gov]
Cc: Bowman, Liz[Bowman.Liz@epa.gov]; Dravis, Samantha[dravis.samantha@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Greenwalt, Sarah[greenwalt.sarah@epa.gov]
From: Jackson, Ryan
Sent: Fri 6/23/2017 2:28:33 PM
Subject: RE: RE:

Ok so here's what I know.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks.

Ryan.

From: Fotouhi, David
Sent: Friday, June 23, 2017 9:57 AM
To: Jackson, Ryan <jackson.ryan@epa.gov>
Cc: Bowman, Liz <Bowman.Liz@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Subject: Re: RE:

I'm at an offsite meeting, but can step out and call in if that would be helpful. Copying Justin who may be in the office.

Sent from my iPhone

On Jun 23, 2017, at 9:53 AM, Jackson, Ryan <jackson.ryan@epa.gov> wrote:

> Ok.
>
> **From:** Bowman, Liz
> **Sent:** Friday, June 23, 2017 9:53 AM
> **To:** Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
> **Subject:** RE:
>
> We can come to your office, that's probably easier.
>
> **From:** Jackson, Ryan

Sent: Friday, June 23, 2017 9:51 AM
To: Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Subject:

Deliberative Process / Ex. 5

Ryan Jackson

Chief of Staff

U.S. Environmental Protection Agency

(202) 564-6999

To: Dravis, Samantha[dravis.samantha@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]
From: McGartland, Al
Sent: Thur 6/22/2017 11:14:31 PM
Subject: Fwd: Employment discussion

Deliberative Process / Ex. 5

Sent from my iPhone

Begin forwarded message:

From: "Dorjets, Vlad EOP/OMB" <Vladik_Dorjets@omb.eop.gov>
Date: June 22, 2017 at 7:03:18 PM EDT
To: "McGartland, Al" <McGartland.Al@epa.gov>
Cc: "Ferris, Ann" <Ferris.Ann@epa.gov>, "Thomas, Amanda L. EOP/OMB" <Amanda_L._Thomas@omb.eop.gov>, "Laity, Jim A. EOP/OMB" <James_A._Laity@omb.eop.gov>
Subject: RE: Employment discussion

+ Jim

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

the matter.

I'm heading home in a few minutes but am happy to discuss this tomorrow. My day is quite open.

Vlad

-----Original Message-----
From: McGartland, Al [mailto:McGartland.Al@epa.gov]
Sent: Thursday, June 22, 2017 6:09 PM
To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
Cc: Ferris, Ann <Ferris.Ann@epa.gov>; Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>
Subject: Re: Employment discussion

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 22, 2017, at 5:51 PM, Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov> wrote:

Deliberative Process / Ex. 5

-----Original Message-----

From: McGartland, Al [mailto:McGartland.Al@epa.gov]

Sent: Thursday, June 22, 2017 5:29 PM

To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>; Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>; Ferris, Ann <Ferris.Ann@epa.gov>

Subject: RE: Employment discussion

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

-----Original Message-----

From: Dorjets, Vlad EOP/OMB [mailto:Vladik_Dorjets@omb.eop.gov]

Sent: Thursday, June 22, 2017 5:06 PM

To: Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>; McGartland, Al <McGartland.Al@epa.gov>; Ferris, Ann <Ferris.Ann@epa.gov>

Subject: RE: Employment discussion

Deliberative Process / Ex. 5

-----Original Message-----

From: Thomas, Amanda L. EOP/OMB

Sent: Thursday, June 22, 2017 4:47 PM

To: McGartland, Al <McGartland.Al@epa.gov>; Ferris, Ann <Ferris.Ann@epa.gov>

Cc: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>

Subject: RE: Employment discussion

Deliberative Process / Ex. 5

From: McGartland, Al [mailto:McGartland.Al@epa.gov]

Sent: Thursday, June 22, 2017 2:47 PM

To: Ferris, Ann <Ferris.Ann@epa.gov>

Cc: Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>

Subject: Re: Employment discussion

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 22, 2017, at 2:41 PM, Ferris, Ann <Ferris.Ann@epa.gov <mailto:Ferris.Ann@epa.gov> > wrote:

Hi Amanda and Al,

Deliberative Process / Ex. 5

Thanks,

Ann

202-564-3207

<WOTUS Step 1 Draft EA (OMB)_employment_June22.docx>

<WOTUS Step 1 Draft EA (OMB)_employment_June22 (4).docx>

To: Bolen, Brittany[bolen.brittany@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: McGartland, Al
Sent: Thur 6/22/2017 5:28:21 PM
Subject: RE: OMB update

Deliberative Process / Ex. 5

-----Original Message-----
From: Bolen, Brittany
Sent: Thursday, June 22, 2017 1:17 PM
To: McGartland, Al <McGartland.Al@epa.gov>
Cc: Dravis, Samantha <dravis.samantha@epa.gov>
Subject: Re: OMB update

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 22, 2017, at 12:26 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>

Deliberative Process / Ex. 5

> Sent from my iPhone
>
>> On Jun 22, 2017, at 12:19 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>>

Deliberative Process / Ex. 5

>> Sent from my iPhone
>>
>>> On Jun 22, 2017, at 12:01 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>>>

Deliberative Process / Ex. 5

>>> -----Original Message-----
>>> From: McGartland, Al
>>> Sent: Wednesday, June 21, 2017 7:13 PM
>>> To: Bolen, Brittany <bolen.brittany@epa.gov>
>>> Cc: Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin
>>> <schwab.justin@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>;
>>> Fotouhi, David <fotouhi.david@epa.gov>
>>> Subject: Re: OMB update
>>>

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

>>> Sent from my iPhone
>>>
>>>> On Jun 21, 2017, at 6:43 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>>>>

Deliberative Process / Ex. 5

>>>> -----Original Message-----
>>>> From: McGartland, Al
>>>> Sent: Wednesday, June 21, 2017 6:31 PM
>>>> To: Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany
>>>> <bolen.brittany@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>;
>>>> Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David
>>>> <fotouhi.david@epa.gov>
>>>> Subject: Re: OMB update
>>>>

Deliberative Process / Ex. 5

>>>>

Deliberative Process / Ex. 5

>>>> Sent from my iPhone
>>>>
>>>>> On Jun 21, 2017, at 5:50 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>>>>>
>>>>> Hi All,

Deliberative Process / Ex. 5

>>>>> Thanks,
>>>>> Mindy
>>>>>
>>>>> Mindy Eisenberg
>>>>> Acting Director, Oceans, Wetlands & Communities Division Office of
>>>>> Wetlands, Oceans and Watersheds U.S. Environmental Protection
>>>>> Agency
>>>>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
>>>>> (202) 566-1290
>>>>> eisenberg.mindy@epa.gov
>>>>>
>>>>> -----Original Message-----
>>>>> From: Dorjets, Vlad EOP/OMB [mailto:Vladik_Dorjets@omb.eop.gov]
>>>>> Sent: Wednesday, June 21, 2017 5:32 PM
>>>>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
>>>>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>>>>> Subject: RE: Check in
>>>>>
>>>>> Mindy,

>>>>>

Deliberative Process / Ex. 5

>>>>>
>>>>>
>>>>>
>>>>>
>>>>> -----Original Message-----
>>>>> From: Eisenberg, Mindy [mailto:Eisenberg.Mindy@epa.gov]
>>>>> Sent: Tuesday, June 20, 2017 7:22 PM
>>>>> To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
>>>>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>>>>> Subject: Check in
>>>>>
>>>>> Hi Vlad,

Deliberative Process / Ex. 5

>>>>>
>>>>> Sent from my iPhone
>>>>>

To: McGartland, Al[McGartland.Al@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: Bolen, Brittany
Sent: Thur 6/22/2017 5:17:08 PM
Subject: Re: OMB update

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 22, 2017, at 12:26 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>

Deliberative Process / Ex. 5

> Sent from my iPhone
>
>> On Jun 22, 2017, at 12:19 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>>

Deliberative Process / Ex. 5

>>
>> Sent from my iPhone
>>
>>> On Jun 22, 2017, at 12:01 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>>>

Deliberative Process / Ex. 5

>>>

Deliberative Process / Ex. 5

>>> -----Original Message-----
>>> From: McGartland, Al
>>> Sent: Wednesday, June 21, 2017 7:13 PM
>>> To: Bolen, Brittany <bolen.brittany@epa.gov>
>>> Cc: Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
>>> Subject: Re: OMB update
>>>

Deliberative Process / Ex. 5

>>>
>>> Sent from my iPhone
>>>
>>>> On Jun 21, 2017, at 6:43 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>>>>

Deliberative Process / Ex. 5

>>>> -----Original Message-----
>>>> From: McGartland, Al
>>>> Sent: Wednesday, June 21, 2017 6:31 PM

>>>> To: Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany
>>>> <bolen.brittany@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>;
>>>> Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David
>>>> <fotouhi.david@epa.gov>
>>>> Subject: Re: OMB update
>>>>

Deliberative Process / Ex. 5

>>>>

Deliberative Process / Ex. 5

>>>> Sent from my iPhone
>>>>
>>>>> On Jun 21, 2017, at 5:50 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>>>>>

Deliberative Process / Ex. 5

>>>>> Thanks,
>>>>> Mindy
>>>>>
>>>>> Mindy Eisenberg
>>>>> Acting Director, Oceans, Wetlands & Communities Division Office of
>>>>> Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
>>>>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
>>>>> (202) 566-1290
>>>>> eisenberg.mindy@epa.gov
>>>>>
>>>>> -----Original Message-----
>>>>> From: Dorjets, Vlad EOP/OMB [mailto:Vladik_Dorjets@omb.eop.gov]
>>>>> Sent: Wednesday, June 21, 2017 5:32 PM
>>>>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
>>>>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>>>>> Subject: RE: Check in
>>>>>
>>>>> Mindy,
>>>>>

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

>>>>> Vlad
>>>>>
>>>>>
>>>>>
>>>>>
>>>>> -----Original Message-----
>>>>> From: Eisenberg, Mindy [mailto:Eisenberg.Mindy@epa.gov]
>>>>> Sent: Tuesday, June 20, 2017 7:22 PM
>>>>> To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
>>>>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>>>>> Subject: Check in
>>>>>
>>>>> Hi Vlad,

Deliberative Process / Ex. 5

>>>>>
>>>>> Sent from my iPhone
>>>>>

To: Bolen, Brittany[bolen.brittany@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: McGartland, Al
Sent: Thur 6/22/2017 4:26:38 PM
Subject: Re: OMB update

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 22, 2017, at 12:19 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>

Deliberative Process / Ex. 5

> Sent from my iPhone
>
>> On Jun 22, 2017, at 12:01 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>>

Deliberative Process / Ex. 5

>> -----Original Message-----
>> From: McGartland, Al
>> Sent: Wednesday, June 21, 2017 7:13 PM
>> To: Bolen, Brittany <bolen.brittany@epa.gov>
>> Cc: Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
>> Subject: Re: OMB update
>>

Deliberative Process / Ex. 5

>> Sent from my iPhone
>>
>>> On Jun 21, 2017, at 6:43 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>>>

Deliberative Process / Ex. 5

>>> From: McGartland, Al
>>> Sent: Wednesday, June 21, 2017 6:31 PM
>>> To: Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany
>>> <bolen.brittany@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>;
>>> Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David
>>> <fotouhi.david@epa.gov>
>>> Subject: Re: OMB update
>>>

Deliberative Process / Ex. 5

>>> Sent from my iPhone
>>>
>>>> On Jun 21, 2017, at 5:50 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>>>>

Deliberative Process / Ex. 5

>>>> Mindy
>>>>
>>>> Mindy Eisenberg
>>>> Acting Director, Oceans, Wetlands & Communities Division Office of
>>>> Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
>>>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
>>>> (202) 566-1290
>>>> eisenberg.mindy@epa.gov
>>>>
>>>> -----Original Message-----
>>>> From: Dorjets, Vlad EOP/OMB [mailto:Vladik_Dorjets@omb.eop.gov]
>>>> Sent: Wednesday, June 21, 2017 5:32 PM
>>>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
>>>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>>>> Subject: RE: Check in
>>>>
>>>> Mindy,
>>>>

Deliberative Process / Ex. 5

>>>>
>>>> Vlad
>>>>
>>>>
>>>>
>>>>
>>>> -----Original Message-----

>>>> From: Eisenberg, Mindy [mailto:Eisenberg.Mindy@epa.gov]
>>>> Sent: Tuesday, June 20, 2017 7:22 PM
>>>> To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
>>>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>>>> Subject: Check in
>>>>
>>>> Hi Vlad,

Deliberative Process / Ex. 5

>>>> Sent from my iPhone
>>>>

To: McGartland, Al[McGartland.Al@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: Bolen, Brittany
Sent: Thur 6/22/2017 4:19:10 PM
Subject: Re: OMB update

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 22, 2017, at 12:01 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:

Deliberative Process / Ex. 5

> I will let OW know as well. Amanda said she would make sure that Vlad was told too.
> -----Original Message-----
> From: McGartland, Al
> Sent: Wednesday, June 21, 2017 7:13 PM
> To: Bolen, Brittany <bolen.brittany@epa.gov>
> Cc: Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
> Subject: Re: OMB update

Deliberative Process / Ex. 5

> Sent from my iPhone
>
>> On Jun 21, 2017, at 6:43 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:

Deliberative Process / Ex. 5

>> -----Original Message-----
>> From: McGartland, Al
>> Sent: Wednesday, June 21, 2017 6:31 PM
>> To: Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany
>> <bolen.brittany@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>;
>> Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David
>> <fotouhi.david@epa.gov>
>> Subject: Re: OMB update
>>

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

>>> On Jun 21, 2017, at 5:50 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:
>>>
>>> Hi All,

Deliberative Process / Ex. 5

>>> Thanks,
>>> Mindy
>>>
>>> Mindy Eisenberg
>>> Acting Director, Oceans, Wetlands & Communities Division Office of
>>> Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
>>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
>>> (202) 566-1290
>>> eisenberg.mindy@epa.gov
>>>
>>> -----Original Message-----
>>> From: Dorjets, Vlad EOP/OMB [mailto:Vladik_Dorjets@omb.eop.gov]
>>> Sent: Wednesday, June 21, 2017 5:32 PM
>>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
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>>>
>>> Mindy,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

>>>
>>>
>>>
>>>
>>> -----Original Message-----
>>> From: Eisenberg, Mindy [mailto:Eisenberg.Mindy@epa.gov]
>>> Sent: Tuesday, June 20, 2017 7:22 PM
>>> To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
>>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>>> Subject: Check in
>>>

>>> Hi Vlad,

Deliberative Process / Ex. 5

>>> Sent from my iPhone
>>>

To: Dravis, Samantha[dravis.samantha@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]
Cc: Schwab, Justin[schwab.justin@epa.gov]; Greenwalt, Sarah[greenwalt.sarah@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]
From: McGartland, Al
Sent: Thur 6/22/2017 4:01:18 PM
Subject: RE: OMB update

Deliberative Process / Ex. 5

From: McGartland, Al
Sent: Wednesday, June 21, 2017 7:13 PM
To: Bolen, Brittany <bolen.brittany@epa.gov>
Cc: Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Subject: Re: OMB update

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 21, 2017, at 6:43 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:

Deliberative Process / Ex. 5

> From: McGartland, Al
> Sent: Wednesday, June 21, 2017 6:31 PM
> To: Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany
> <bolen.brittany@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>;
> Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David
> <fotouhi.david@epa.gov>
> Subject: Re: OMB update
>

Deliberative Process / Ex. 5

>
> Sent from my iPhone
>
>> On Jun 21, 2017, at 5:50 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

>>

Deliberative Process / Ex. 5

>>
>> Mindy Eisenberg
>> Acting Director, Oceans, Wetlands & Communities Division Office of
>> Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
>> (202) 566-1290
>> eisenberg.mindy@epa.gov
>>
>> -----Original Message-----
>> From: Dorjets, Vlad EOP/OMB [mailto:Vladik_Dorjets@omb.eop.gov]
>> Sent: Wednesday, June 21, 2017 5:32 PM
>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>> Subject: RE: Check in
>>
>> Mindy,

Deliberative Process / Ex. 5

>>
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>>
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>> -----Original Message-----
>> From: Eisenberg, Mindy [mailto:Eisenberg.Mindy@epa.gov]
>> Sent: Tuesday, June 20, 2017 7:22 PM
>> To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
>> Cc: Owens, Nicole <Owens.Nicole@epa.gov>
>> Subject: Check in
>>

Deliberative Process / Ex. 5

>>
>> Sent from my iPhone

>>

EPA IN ACTION: ACCOMPLISHMENTS WITH PRUITT'S LEADERSHIP

Updated June 20, 2017

FIRST 100 DAYS:

- Since being sworn in, I have spearheaded nearly two dozen significant regulatory reform actions and have taken meaningful steps to restore our relationship with state and local partners in the name of cooperative federalism.
- I am implementing President Trump's executive orders to protect the environment, save manufacturing jobs, streamline our permitting processes, and promote American energy independence.

TOP JOB NUMBERS:

- Jobs: Over 1.4 million jobs threatened by the actions of the Obama administration.
- Overall Regulatory Impact: $204 billion from the Obama EPA's regulatory actions.
- CAFE standards: 1.1 million jobs
- Clean Power Plan: 400,000 jobs threatened.
- ELG Rule: 100 jobs saved at a chemical processing plant in Florida.

EXAMPLES:

- **ELG** – Costs about $480 million annually, $1.2 billion per year in the first five years.
- **Hard Rock Mining** – Could cost American businesses $171 million annually.
- **CCR rule** – Costs power plants between $500 and $745 million – per year.
- **CAFE** –$200 billion by 2025 to comply.
- **WOTUS** – Between $600 million and $1.2 billion.
- **Methane ICR** – Compliance costs exceeding $37 million.
- **RMP Rule** – Costs about $131.8 million annually, $1.3 billion over ten years.

DETAILS on KEY REGULATORY REFORM ACTIONS:

- ✓ **TSCA Implementation:** Clearing the backlog of new chemicals that were waiting for approval from EPA, so they can go to market, and companies can create jobs and continue to innovate. We also are on track to meet the deadlines outlined in the Lautenberg Chemical Safety Act. Our significant rules on prioritizing chemicals that need to be reviewed for safety as well as a companion final rule that establishes the Agency's TSCA Risk Evaluation Process are currently under OMB review.
- ✓ **WOTUS:** EPA is restoring states' important role in the regulation of water by reviewing the "Waters of the U.S." or WOTUS. A rule with a regulatory impact analysis of between $600 million and $1.2 billion. Our draft to rescind the WOTUS rule is currently under OMB review.
- ✓ **CPP:** Launched a review of the so-called Clean Power Plan that threatens over 125,000 U.S. jobs. Our draft to rescind the CPP is currently under OMB review.
- ✓ **Oil and Gas Methane NSPS:** EPA announced a decision to reconsider the Oil and Gas Methane New Source Performance Standards for new and modified sources, delaying a costly compliance requirement. On June 2, 2017, we issued a 90-day administrative stay on the rule's compliance deadlines. Our proposed long-term delay of the rule has been

published in the Federal Register and is currently open for public comment.

- ✓ **ELG Rule:** EPA announced a decision to reconsider the effluent limitations guidelines and standards for the steam electric power generating category under the Clean Water Act (ELG Rule), which costs an estimated $480 million annually, and about $1.2 billion per year in the first five years of compliance. We issued a 90-day administrative stay on the rule's compliance. Our proposed long-term delay of the rule has been published in the Federal Register and is currently open for public comment.
- ✓ **Coal Combustion Residuals (CCR Rule):** CCR rule is estimated to cost power plants between $500 and $745 million – per year. We developed draft guidance for the states on the CCR rule that is currently under OMB review.
- ✓ **Landfill Methane Rules:** EPA announced a decision to review the New Source Performance Standards and Emission Guidelines for Landfills. On May 5, EPA convened a proceeding for reconsideration of the rules and issued a 90-day stay of the effectiveness of these rules. Our proposed long-term stay of the rules is currently under OMB review.
- ✓ **Methane ICR:** We rescinded the overly burdensome, unnecessary information collection request to more than 15,000 owners and operators in the oil and gas industry. This rescission saved an estimated $37 million.
- ✓ **CAFE Standards:** EPA rescinded an unjustified, premature evaluation of greenhouse gas and fuel economy standards for model year 2022-2025 vehicles, and is working with DOT to conduct a collaborative and robust review of the standards. According to the Auto Alliance, "no agency has ever set emission limits so far into the future," and the previous administration's determination would have put 1.1 million jobs at risk and cost the industry $200 billion by 2025.
- ✓ **New Source Performance Standards for EGUs:** Reviewing the New Source Performance Standards for coal-fired power plants, which prevents companies from building new plants.
- ✓ **GHG Federal Plan/Trading Rules for EGUs:** On March 28, EPA signed a notice withdrawing these proposed rules.
- ✓ **Ozone Standard:** Requested delay of oral arguments on the ozone standard. We also sent letters to governors announcing a one-year delay of designations under the 2015 standard.
- ✓ **Hard Rock Mining:** EPA extended the comment period on the Hard Rock Mining proposed rule that could cost American businesses $171 million annually.
- ✓ **Energy Independence EO:** Following the President's Energy Independence Executive Order, Administrator Pruitt signed four notices to review and, if appropriate, to revise or rescind major, economically significant, burdensome rules the last Administration issued. Per the EO, EPA submitted a draft regulatory review plan to OMB on May 12. We are on schedule to provide OMB a draft report due in July.
- ✓ **Flint, Michigan:** The Agency is allocating funds for vital environmental projects that go directly to the health of our citizens, such as providing $100 million to upgrade drinking water infrastructure in Flint, Michigan.
- ✓ **Chlorpyrifos:** EPA denied a petition from the NRDC and the Pesticide Action Network North America, which was seeking a ban on a pesticides used on 40,000 farms and 50 different crops because there was never enough science to justify the ban.
- ✓ **Certified Pesticide Applicators Rule:** EPA extended the effectiveness of this rule and initiated a review.

- ✓ **Formaldehyde Emission Standards for Composite Wood Products:** EPA extended the compliance deadlines and a direct final rule to address key issues with the rule.
- ✓ **Regulatory Reform:** Launched the EPA Regulatory Reform Task Force to undergo extensive reviews of the misaligned regulatory actions from the past administration, and opened a public comment period to get public feedback on opportunities to rescind or revise existing regulations. Per the President's Executive Order 13771, EPA's Task Force also delivered a 90-day progress report to the Administrator on May 25.
- ✓ **Risk Management Rule (RMP Rule):** EPA estimates the RMP rule to cost $131.8 million annually, or $1.3 billion over ten years. EPA finalized its delay of the rule while the Agency reviews the comments raised by petitions for reconsideration.
- ✓ **Superfund Sites:** We are getting real results at cleaning up Superfund sites, including: East Chicago (IN), West Oakland (CA) and Pompton Lake (NJ). First EPA Administrator to visit East Chicago site.
- ✓ **Superfund Plan:** We announced new plans to get better results at Superfunds, including a new task force and a new authority for the Administrator to decide remedies that cost over $50 million.
- ✓ **Water Infrastructure:** Opened the application process for EPA's WIFIA program; a low-risk loan for businesses that will provide $1 billion in credit to finance over $2 billion in water infrastructure investments.
- ✓ **Meetings with National/International Leaders:** EPA Administrator Scott Pruitt has consulted 22 bipartisan governors, 25 bipartisan members of congress, three foreign leaders, four state agriculture departments, and over a dozen bipartisan organizations.
- ✓ **EPA Originalism:** EPA Administrator Pruitt launched a "Back-to-Basics" Agenda, touring a Pennsylvania coal mine, a Missouri power plant, and visiting a contaminated "Superfund" site in E. Chicago, to discuss how EPA is refocusing the agency on its core mission of protecting the environment through sensible regulations developed in cooperation with state, local and tribal partners.
- ✓ **MATS Rule:** DoJ has obtained abeyance of a challenge to the rule to allow time for policy review. Given the broad-reaching economic implications of the Mercury and Air Toxics Rule (MATS rule), we are reviewing the costs of the rule to determine whether it complies with our statutory mandate, abides by sound regulatory principles, and is in line with the pro-jobs, pro-growth directives of this Administration.
- ✓ **Clean Air Act/SSM SIP:** Asked the court to postpone oral arguments over an Obama-era rule making 36 states rework their Clean Air Act compliance plans.
- ✓ **Pebble Mine:** Entered into a settlement agreement with the Pebble Limited Partnership to resolve litigation from 2014 relating to EPA's prior work in the Bristol Bay watershed in Alaska. This will provide Pebble a fair process for their permit application and help steer EPA away from costly and time-consuming litigation.
- ✓ **Presidential Directive on Permit Streamlining and Reducing Regulatory Burdens for Domestic Manufacturers:** Per this Presidential memorandum, EPA submitted to the Department of Commerce a detailed account of the Agency's permitting programs and identified opportunities for reducing regulatory burdens on domestic manufacturers. EPA is currently working with the Department of Commerce to finalize its report to the President.

To: Dravis, Samantha[dravis.samantha@epa.gov]
From: Schwab, Justin
Sent: Sat 6/17/2017 12:16:34 AM
Subject: Fwd: revised WOTUS preamble
WOTUS Draft Proposed Rule revisions 6-15-17 plus econ edits.docx
ATT00001.htm

Sent from my iPhone

Begin forwarded message:

> **From:** "Eisenberg, Mindy" <Eisenberg.Mindy@epa.gov>
> **Date:** June 16, 2017 at 8:13:22 PM EDT
> **To:** "Fotouhi, David" <fotouhi.david@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>
> **Subject: Fwd: revised WOTUS preamble**
>
> Here you go
>
> Sent from my iPhone
>
> Begin forwarded message:
>
> > **From:** "Owens, Nicole" <Owens.Nicole@epa.gov>
> > **Date:** June 15, 2017 at 4:08:32 PM EDT
> > **To:** "Dorjets, Vlad EOP/OMB" <Vladik_Dorjets@omb.eop.gov>
> > **Cc:** "Eisenberg, Mindy" <Eisenberg.Mindy@epa.gov>, "Nickerson, William" <Nickerson.William@epa.gov>
> > **Subject: revised WOTUS preamble**
> >
> > Hello Vlad –
> >
> > Attached is a revised version of the WOTUS preamble. Please let us know if you have questions.
> >
> > Thanks,

Nicole

To: Bolen, Brittany[bolen.brittany@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: McGartland, Al
Sent: Thur 6/15/2017 11:50:32 PM
Subject: Re: Wotus

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 15, 2017, at 7:43 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>

Deliberative Process / Ex. 5

>
>> On Jun 15, 2017, at 7:39 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>>

Deliberative Process / Ex. 5

>> Sent from my iPhone
>>
>>> On Jun 15, 2017, at 6:59 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>>>

Deliberative Process / Ex. 5

>>>
>>>> On Jun 15, 2017, at 5:48 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>>>>

Deliberative Process / Ex. 5

Sent from my iPhone

To: McGartland, Al[McGartland.Al@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: Bolen, Brittany
Sent: Thur 6/15/2017 11:43:42 PM
Subject: Re: Wotus

Deliberative Process / Ex. 5

Sent from my iPad

> On Jun 15, 2017, at 7:39 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>

Deliberative Process / Ex. 5

> Sent from my iPhone
>
>> On Jun 15, 2017, at 6:59 PM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:
>>

Deliberative Process / Ex. 5

>>
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>>>

Deliberative Process / Ex. 5

>>> Sent from my iPhone

To: Bolen, Brittany[bolen.brittany@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: McGartland, Al
Sent: Thur 6/15/2017 11:39:58 PM
Subject: Re: Wotus

Deliberative Process / Ex. 5

Sent from my iPhone

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Deliberative Process / Ex. 5

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>>

Deliberative Process / Ex. 5

>> Sent from my iPhone

To: McGartland, Al[McGartland.Al@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: Bolen, Brittany
Sent: Thur 6/15/2017 10:59:52 PM
Subject: Re: Wotus

Deliberative Process / Ex. 5

> On Jun 15, 2017, at 5:48 PM, McGartland, Al <McGartland.Al@epa.gov> wrote:

Deliberative Process / Ex. 5

>
> I can fill you in tomorrow. Better by phone.
> Sent from my iPhone

To: Dravis, Samantha[dravis.samantha@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]
From: McGartland, Al
Sent: Thur 6/15/2017 9:48:37 PM
Subject: Wotus

Deliberative Process / Ex. 5

I can fill you in tomorrow. Better by phone.
Sent from my iPhone

To: Dravis, Samantha[dravis.samantha@epa.gov]; Bolen, Brittany[bolen.brittany@epa.gov]
Cc: Kime, Robin[Kime.Robin@epa.gov]
From: McGartland, Al
Sent: Wed 6/14/2017 2:54:53 PM
Subject: RE: Request for Review: OECD CBA Book -- also update on WOTUS

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Dravis, Samantha
Sent: Wednesday, June 14, 2017 10:45 AM
To: McGartland, Al <McGartland.Al@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Cc: Kime, Robin <Kime.Robin@epa.gov>
Subject: RE: Request for Review: OECD CBA Book

Deliberative Process / Ex. 5

From: McGartland, Al
Sent: Tuesday, June 13, 2017 10:08 PM
To: Bolen, Brittany <bolen.brittany@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Kime, Robin <Kime.Robin@epa.gov>
Subject: Fwd: Request for Review: OECD CBA Book

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

they even know what cost benefit analysis is.

Sent from my iPhone

Begin forwarded message:

From: "Marten, Alex" <Marten.Alex@epa.gov>
Date: June 13, 2017 at 6:32:26 PM EDT
To: "McGartland, Al" <McGartland.Al@epa.gov>
Cc: "Bowen, Jennifer" <Bowen.Jennifer@epa.gov>, "Snyder, Brett" <Snyder.Brett@epa.gov>, "Newbold, Steve" <Newbold.Steve@epa.gov>, "Garbaccio, Richard" <Garbaccio.Richard@epa.gov>
Subject: Fwd: Request for Review: OECD CBA Book

Deliberative Process / Ex. 5

--

Alex L. Marten
phone: (202) 566-2301
email: marten.alex@epa.gov

Begin forwarded message:

From: "Mourant, Alex" <Mourant.Alex@epa.gov>
To: "Marten, Alex" <Marten.Alex@epa.gov>, "Newbold, Steve" <Newbold.Steve@epa.gov>, "Garbaccio, Richard" <Garbaccio.Richard@epa.gov>
Subject: RE: Request for Review: OECD CBA Book

Deliberative Process / Ex. 5

From: Marten, Alex
Sent: Monday, June 12, 2017 11:01 AM
To: Mourant, Alex <Mourant.Alex@epa.gov>; Newbold, Steve <Newbold.Steve@epa.gov>; Garbaccio, Richard <Garbaccio.Richard@epa.gov>
Subject: RE: Request for Review: OECD CBA Book

Hi Alex,

Deliberative Process / Ex. 5

--
Alex L. Marten

phone: (202) 566-2301<tel:%28202%29%20566-2301>
email: marten.alex@epa.gov<mailto:marten.alex@epa.gov>

From: Mourant, Alex
Sent: Monday, June 12, 2017 10:53 AM
To: Newbold, Steve <Newbold.Steve@epa.gov<mailto:Newbold.Steve@epa.gov>>; Garbaccio, Richard <Garbaccio.Richard@epa.gov<mailto:Garbaccio.Richard@epa.gov>>; Marten, Alex <Marten.Alex@epa.gov<mailto:Marten.Alex@epa.gov>>
Subject: RE: Request for Review: OECD CBA Book

Hello all,

Deliberative Process / Ex. 5

Best,
Alex Mourant

From: Mourant, Alex
Sent: Tuesday, November 15, 2016 10:33 AM
To: Newbold, Steve <Newbold.Steve@epa.gov<mailto:Newbold.Steve@epa.gov>>; Garbaccio, Richard <Garbaccio.Richard@epa.gov<mailto:Garbaccio.Richard@epa.gov>>; Marten, Alex <Marten.Alex@epa.gov<mailto:Marten.Alex@epa.gov>>
Subject: Re: Request for Review: OECD Paper on Distributional Effects of Environmental Policies and CBA

Steve,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Best,

Alex

From: Newbold, Steve
Sent: Thursday, November 10, 2016 10:03:01 AM
To: Mourant, Alex; Garbaccio, Richard; Marten, Alex
Subject: Re: Request for Review: OECD Paper on Distributional Effects of Environmental Policies and CBA

Hi Alex,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

****
Steve Newbold
U.S. EPA
National Center for Environmental Economics (NCEE)
EPA West, 4316T, MC 1809T
1200 Pennsylvania Ave NW
Washington, DC 20004
(202) 566-2293
****

_____
From: Mourant, Alex
Sent: Thursday, November 3, 2016 1:50 PM
To: Garbaccio, Richard; Marten, Alex; Newbold, Steve
Subject: Request for Review: OECD Paper on Distributional Effects of Environmental Policies and CBA

Richard, Alex, and Steve,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks in advance.

Best,

Alex Mourant

International Environmental Program Specialist

Office of Global Affairs and Policy

Office of International and Tribal Affairs

U.S. Environmental Protection Agency

Phone: (202) 564-3180

<ENV-EPOC-WPIEEP(2016)19-REV1-ENG.pdf>

To: Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Bolen, Brittany[bolen.brittany@epa.gov]
From: McGartland, Al
Sent: Wed 6/14/2017 3:01:11 PM
Subject: wednesday morning WOTUS meeting

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

To: Letendre, Daisy[letendre.daisy@epa.gov]
From: Dravis, Samantha
Sent: Mon 7/10/2017 7:50:07 PM
Subject: RE: Materials for WOTUS Briefing

Deliberative Process / Ex. 5

From: Letendre, Daisy
Sent: Monday, July 10, 2017 3:48 PM
To: Dravis, Samantha <dravis.samantha@epa.gov>
Subject: RE: Materials for WOTUS Briefing

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Dravis, Samantha
Sent: Monday, July 10, 2017 3:43 PM
To: Letendre, Daisy <letendre.daisy@epa.gov>
Subject: FW: Materials for WOTUS Briefing

From: Greenwalt, Sarah
Sent: Monday, July 10, 2017 3:05 PM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Brown, Byron <brown.byron@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Subject: RE: Materials for WOTUS Briefing

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722|Cell: Personal Phone / Ex. 6

Greenwalt.Sarah@epa.gov

From: Greenwalt, Sarah
Sent: Monday, July 10, 2017 9:55 AM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Brown, Byron <brown.byron@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Subject: Materials for WOTUS Briefing

All –

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Let me know if you have any questions!

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722|Cell: Personal Phone / Ex. 6

Greenwalt.Sarah@epa.gov

To: Letendre, Daisy[letendre.daisy@epa.gov]
From: Dravis, Samantha
Sent: Mon 7/10/2017 7:43:14 PM
Subject: FW: Materials for WOTUS Briefing

From: Greenwalt, Sarah
Sent: Monday, July 10, 2017 3:05 PM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Brown, Byron <brown.byron@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Subject: RE: Materials for WOTUS Briefing

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Deliberative Process / Ex. 5

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722|Cell: **Personal Phone / Ex. 6**

Greenwalt.Sarah@epa.gov

From: Greenwalt, Sarah
Sent: Monday, July 10, 2017 9:55 AM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Brown, Byron <brown.byron@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Subject: Materials for WOTUS Briefing

All –

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Let me know if you have any questions!

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722|Cell Personal Phone / Ex. 6

Greenwalt.Sarah@epa.gov

To: Lovell, Will (William)[lovell.william@epa.gov]
Cc: Kime, Robin[Kime.Robin@epa.gov]
From: Dravis, Samantha
Sent: Mon 7/10/2017 4:13:28 PM
Subject: FW: Materials for WOTUS Briefing
ESA Options Paperv 6.20.17.docx
small entity options paper revised.docx
WOTUS2_options May 31.docx
Rapanos v. United States_ 547 U.S. 715.pdf

Deliberative Process / Ex. 5

From: Greenwalt, Sarah
Sent: Monday, July 10, 2017 9:55 AM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Brown, Byron <brown.byron@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Subject: Materials for WOTUS Briefing

All –

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

Let me know if you have any questions!

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722|Cell: Personal Phone / Ex. 6

Greenwalt.Sarah@epa.gov

To: Bowman, Liz[Bowman.Liz@epa.gov]
From: Dravis, Samantha
Sent: Thur 6/29/2017 10:23:18 PM
Subject: RE: econ analysis is live on web

Deliberative Process / Ex. 5

From: Bowman, Liz
Sent: Thursday, June 29, 2017 6:10 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Ferguson, Lincoln <ferguson.lincoln@epa.gov>; Graham, Amy <graham.amy@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>
Subject: Fwd: econ analysis is live on web

Deliberative Process / Ex. 5

Sent from my iPhone

Begin forwarded message:

From: "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Date: June 29, 2017 at 5:48:53 PM EDT
To: "Bowman, Liz" <Bowman.Liz@epa.gov>
Cc: "Jones, Enesta" <Jones.Enesta@epa.gov>
Subject: Fwd: econ analysis is live on web

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

Begin forwarded message:

From: "Eisenberg, Mindy" <Eisenberg.Mindy@epa.gov>

Date: June 29, 2017 at 5:33:01 PM EDT
To: "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Cc: "Hewitt, Julie" <Hewitt.Julie@epa.gov>
Subject: econ analysis is live on web

Deliberative Process / Ex. 5

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

On Jun 29, 2017, at 5:23 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

Greg,

Deliberative Process / Ex. 5

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Many thanks, Rose!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

To: Schwab, Justin[schwab.justin@epa.gov]; Greenwalt, Sarah[greenwalt.sarah@epa.gov]
From: Dravis, Samantha
Sent: Thur 6/22/2017 11:54:39 PM
Subject: Fwd: Employment discussion

Deliberative Process / Ex. 5

Sent from my iPad

Begin forwarded message:

From: "McGartland, Al" <McGartland.Al@epa.gov>
Date: June 22, 2017 at 7:14:31 PM EDT
To: "Dravis, Samantha" <dravis.samantha@epa.gov>, "Bolen, Brittany" <bolen.brittany@epa.gov>
Subject: Fwd: Employment discussion

Deliberative Process / Ex. 5

Sent from my iPhone

Begin forwarded message:

From: "Dorjets, Vlad EOP/OMB" <Vladik_Dorjets@omb.eop.gov>
Date: June 22, 2017 at 7:03:18 PM EDT
To: "McGartland, Al" <McGartland.Al@epa.gov>
Cc: "Ferris, Ann" <Ferris.Ann@epa.gov>, "Thomas, Amanda L. EOP/OMB" <Amanda_L._Thomas@omb.eop.gov>, "Laity, Jim A. EOP/OMB" <James_A._Laity@omb.eop.gov>
Subject: RE: Employment discussion

+ Jim

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

I'm heading home in a few minutes but am happy to discuss this tomorrow. My day is quite open.

Vlad

-----Original Message-----
From: McGartland, Al [mailto:McGartland.Al@epa.gov]
Sent: Thursday, June 22, 2017 6:09 PM

To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>
Cc: Ferris, Ann <Ferris.Ann@epa.gov>; Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>
Subject: Re: Employment discussion

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 22, 2017, at 5:51 PM, Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov> wrote:

Deliberative Process / Ex. 5

-----Original Message-----

From: McGartland, Al [mailto:McGartland.Al@epa.gov]

Sent: Thursday, June 22, 2017 5:29 PM

To: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>; Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>; Ferris, Ann <Ferris.Ann@epa.gov>

Subject: RE: Employment discussion

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

-----Original Message-----

From: Dorjets, Vlad EOP/OMB [mailto:Vladik_Dorjets@omb.eop.gov]

Sent: Thursday, June 22, 2017 5:06 PM

To: Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>; McGartland, Al <McGartland.Al@epa.gov>; Ferris, Ann <Ferris.Ann@epa.gov>

Subject: RE: Employment discussion

Deliberative Process / Ex. 5

-----Original Message-----

From: Thomas, Amanda L. EOP/OMB

Sent: Thursday, June 22, 2017 4:47 PM

To: McGartland, Al <McGartland.Al@epa.gov>; Ferris, Ann <Ferris.Ann@epa.gov>

Cc: Dorjets, Vlad EOP/OMB <Vladik_Dorjets@omb.eop.gov>

Subject: RE: Employment discussion

Vlad has my additional suggested edits.

From: McGartland, Al [mailto:McGartland.Al@epa.gov]

Sent: Thursday, June 22, 2017 2:47 PM

To: Ferris, Ann <Ferris.Ann@epa.gov>

Cc: Thomas, Amanda L. EOP/OMB <Amanda_L._Thomas@omb.eop.gov>

Subject: Re: Employment discussion

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 22, 2017, at 2:41 PM, Ferris, Ann <Ferris.Ann@epa.gov <mailto:Ferris.Ann@epa.gov> > wrote:

Hi Amanda and Al,

Deliberative Process / Ex. 5

Thanks,

Ann

202-564-3207

<WOTUS Step 1 Draft EA (OMB)_employment_June22.docx>

<WOTUS Step 1 Draft EA (OMB)_employment_June22 (4).docx>

To: Schaefer-Gomez, Julia[Schaefer-Gomez.Julia@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Hanson, Andrew
Sent: Wed 7/12/2017 9:04:18 PM
Subject: FW: Iowa WOTUS Comments
Iowa WOTUS Comments.pdf

From: Groen, Stephanie [mailto:stephanie.groen@iowa.gov]
Sent: Monday, June 19, 2017 6:41 PM
To: Hanson, Andrew <Hanson.Andrew@epa.gov>; CWAwotus <CWAwotus@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>
Cc: Lyon, Kayla <kayla.lyon@iowa.gov>
Subject: Iowa WOTUS Comments

Andrew and Tate,

Attached you will find the State of Iowa's comments regarding Waters of the United States.

Thanks,

Stephanie

--

Stephanie Groen | Director of State-Federal Relations

Office of the Governor, State of Iowa

Gov. Kim Reynolds and Lt. Gov. Adam Gregg

202.624.5479 | stephanie.groen@iowa.gov

www.governor.iowa.gov

www.ltgovernor.iowa.gov

KIM REYNOLDS
GOVERNOR

OFFICE OF THE GOVERNOR

ADAM GREGG
LT GOVERNOR

June 19, 2017

The Honorable Scott Pruitt
U.S. Environmental Protection Agency

RE: EPA Request for Federalism Comments on Waters of the United States

Dear Administrator Pruitt,

The Iowa Department of Agriculture and Land Stewardship and the Iowa Department of Natural Resources offer the following feedback on the U.S. Environmental Protection Agency's (EPA) request for comments regarding "Waters of the United States." We appreciate the opportunity to comment on this matter, and support the Environmental Protection Agency's intentions to follow an expeditious process to rescind and revise the definition of the Waters of the United States.

The state of Iowa prides itself on being a national leader in improving water quality. In 2013, the Iowa Nutrient Reduction Strategy was put into place to assess and reduce nutrients delivered to Iowa waterways and the Gulf of Mexico using a science and technology-based approach. The strategy outlines voluntary efforts to reduce nutrients in surface water from both point sources, such as wastewater treatment plants and industrial facilities, and nonpoint sources, including farm fields and urban areas, in a scientific, reasonable and cost effective manner. This statewide strategy, which follows the recommended framework provided by the Environmental Protection Agency, has served as a model for several states and has led to measurable progress in Iowa water quality. Early results include farmers and 200 local organizations working together in 56 demonstration projects in targeted watersheds to help implement and demonstrate water quality practices. This includes 16 targeted ag demonstration projects, 7 projects focused on expanding the use and innovated delivery of water quality practices, and 34 urban water quality demonstration projects. These partners will provide more than $26.5 million to go with more than $17.2 million in state funding going to these projects. The total nitrogen load reduction from 3 select conservation practices was more that 3.8 million pounds. These early results are great examples of Iowa's historic collaborative efforts to maintain the health and vitality of our rivers, lakes, and streams. Unfortunately we have experienced delays in implementation of environmentally beneficial projects and other burdens resulting from the current definition and implementation of the Waters of the United States Rule. We provide the following input on how this rule could be more effective and less restrictive for Iowa, and allow us to reach the ambitious goals laid out in the Iowa Nutrient Reduction Strategy and clean water overall.

Question 1 - How would you like to see the concepts of "relatively permanent" and "continuous surface connection" defined and implemented? 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?

Given the inconsistency and various interpretations of the scope of the Clean Water Act's authority over bodies of water such as wetlands and seasonal streams, we believe there needs to

ED_001271B_00081315-00001 WOTUS_Rule_FOIAs_0020229

be specific, concise language used regarding the concepts of "navigable water," "relatively permanent" and "continuous surface connection." The often repeated goal of EPA and USACE efforts to revise the definition of Waters of the U.S. (WOTUS) is to provide clarity. The rules must take into consideration the language of the Clean Water Act and all applicable U.S. Supreme Court Rulings. The 2015 rulemaking sacrificed clarity in its attempt to implement the significant nexus test. This welcome switch to Justice Scalia's approach must focus solely on the goal of a clear and concise definition that is implementable by the States and understandable to the regulated public. Jurisdiction must be limited to those physical land features that contain water at all times except during extraordinary circumstances such as drought. To that end, "relatively permanent" should be limited to perennial rivers and streams and permanent lakes and wetlands that are adjacent, and connected directly to, perennial rivers and streams. The perennial nature of the rivers and streams would satisfy both criteria of being relatively permanent and having a continuous surface water connection. The connection between a lake or wetland and the adjacent river should also be continuous except during extraordinary circumstances such as drought.

There is precedent in Iowa for the determination by EPA that only perennial rivers and streams are jurisdictional. Pursuant to the EPA's regulations, states must assume that all jurisdictional waters are capable of attaining all aquatic life, recreational, and other uses unless a scientific analysis has been completed and determined that certain uses could not be attained. For purposes of implementing this rebuttable presumption in Iowa, the EPA in 2006 approved Iowa administrative rule 567 IAC 62.3(1)(b) in which Iowa has applied the presumption to "All perennial rivers and streams as identified by the U.S. Geological Survey 1:100,000 DLG Hydrography Data Map (published July 1993) or intermittent streams with perennial pools in Iowa are designated as Class A1 waters." A similar approach undertaken nationally would provide much needed clarity, and would be consistent with Justice Scalia's plurality opinion in *Rapanos v. United States*.

In developing the new rules consistent with President Trump's Executive Order, "*Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule,*" it is important to note that all exemptions from the 2015 Clean Water Rule should be re-instated. For example, the previously-exempt Conservation Reserve Enhancement Program (CREP) wetlands serve to improve water quality through the removal of nutrients and other contaminants. We request that the Environmental Protection Agency consult with States to determine what additional exemptions should be included in any revised rule.

Question 2 - What opportunities and challenges exist for your state or locality with taking a Scalia approach?

The state of Iowa would benefit from taking a "Scalia approach" to the Waters of the United States proposed rule and from considering the statutory language of the Clean Water Act and other U.S. Supreme Court precedent. We are confident this would result in a positive opportunity to reduce administrative overhead, cost and amount of administrative work, and would provide significant benefit to taxpayers. Previously, we have experienced delays related to jurisdictional determinations and establishment of the conditions of permits associated with the development of environmentally beneficial projects. There are potential opportunities for greater efficiencies in the implementation of future road construction and other critical infrastructure projects. We feel that the "Scalia approach" offers a more efficient, and expeditious approach to associated implementation of the new WOTUS rule.

Question 3 - Do you anticipate any changes to the scope of your state or local programs regarding CWA jurisdiction? If so, what sort of actions do you anticipate would be needed?

The overriding concern of a diverse group of impacted stakeholders, including state leaders, is that any new rule may impose significant barriers to the advancement of innovative, state- and local-driven conservation and environmental practices that would actually advance our common goal of water quality. The Trump Administration's intentions that "waters are kept free from pollution while at the same time promoting economic growth and minimizing regulatory uncertainty" are achieved with the goals that we have previously discussed. We further stress the importance of engaging stakeholders that will be impacted by the new WOTUS rule at all levels and especially at the local level. There must be engagement in developing this rule from the ground up, and not just at the federal agency level. This ensures that end users, such as our landowners and others that enjoy the use of Iowa's rivers, lakes, and streams, can better understand the impact that this new rule can and will have on their livelihoods.

Question 4 - Are there any other programs specific to our region, state, or locality that could be affected but would not be captured in such an economic analysis?

There are likely programs specific to the state of Iowa that could be affected but would not be captured in the federal Clean Water Act economic analysis. Until we see proposed language for any new definition or rule, we cannot adequately determine what programs will be impacted and to what extent. A more narrow definition of WOTUS that aligns with the statute could be beneficial to Iowa programs to provide more certainty or predictability regarding what is jurisdictional within a project, therefore streamlining the administrative portion of a project which will result in cost savings.

We strongly urge the EPA and US Army Corps of Engineers to listen to the consensus concerns of the States, including Iowa, to revise and put into place a better, less restrictive and more effective, Waters of the United States rule. Together, we look forward to continuing our commitment to improve water quality and our water resources.

Sincerely,

Kim Reynolds
Governor of Iowa

Adam Gregg
Lt. Governor of Iowa

Cc: Bill Northey, Secretary, Iowa Department of Agriculture and Land Stewardship
Chuck Gipp, Director, Iowa Department of Natural Resources

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Fri 7/7/2017 5:17:50 PM
Subject: As requested: materials for Sara's calls to initiate early interagency engagement on WOTUS-2
Early Inter-Agency Engagement Overview.docx
TPs for political-level calls re early interagency engagement Draft v1.docx

Hi Mindy:

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Please let me know if you have any questions or suggestions. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Fri 7/7/2017 4:43:04 PM
Subject: WOTUS-2 materials responding to Ann's request
Attachment 2 Options for Scalia test v1.docx
Attachment 4 WOTUS2 Effects on Other Programs.docx
Table for Options 3-8-2017 v4.docx
Table WOTUS2_Step 2 options v2.docx
wotus 2 Legal Considerations draft 3-17.docx
WOTUS2 proposed plan 3-22-17 draft.docx
Scope of Clean Water Act Program Impacts Beyond Section 404 v1.docx
December 2008 Rapanos Guidance.pdf

Hi Mindy:

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Please let me know if you would like additional materials in response to Ann's request. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

MINNESOTA

June 19, 2017

Mr. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave N.W.
Office of the Administrator 1101A
Washington, D.C. 20460

Mr. Douglas W. Lamont, P.E.
Senior Official Performing the Duties of the Assistant Secretary of the Army (Civil Works)
Army Corps of Engineers
108 Army Pentagon
Washington, D.C. 20310-0108

Re: Comments on the February 28, 2017, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule.

Submitted via email to: CWAwotus@epa.gov

Dear Mr. Pruitt and Mr. Lamont:

Thank you for requesting comments on the concepts embodied in the February 28, 2017, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (referred to herein as "Executive Order"). The Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Natural Resources (DNR) work together to protect Minnesota's abundant surface water, wetland, and groundwater resources. The health of these water resources underpins our economy and is critical to the health of our citizens and our extraordinary fish and wildlife resources. The ability to implement our agency missions is to a degree tied to the Clean Water Act (CWA); therefore, any change in the CWA rules is of high interest. The approach contemplated in the Executive Order is of particular interest given its potential implications across the full range of CWA provisions that underpin the federal-state partnership in protecting and managing water resources in the United States.

The U.S. Environmental Protection Agency (EPA) has described implementation of the Executive Order as a two-step process. In step one, EPA and the U.S. Army Corps of Engineers (Corps) will recodify the Waters of the United States (WOTUS) rule that was in place prior to issuance of the 2015 rule amendments, thus returning to the *status quo*. The *status quo* reverts to relying on the 1986 rule definition and 2008 Bush Administration guidance on applying that definition. In step two, the EPA and Corps would develop a new definition to replace the 2015 rule amendments.

Support for Step One, but Not Step Two

The *status quo* works; another rulemaking is not worth the time and effort. Minnesota has been conscientiously and successfully implementing the CWA using the *status quo* definition of WOTUS. The stated intent of the Obama Administration's 2015 WOTUS rulemaking was to clarify the definition in order to make it easier for states and others to implement the CWA, in part by reducing the number of jurisdictional determinations required. The result of that effort, for a variety of reasons, did not clarify anything. Rather, Minnesota and the rest of the country is now in the position of waiting for a multitude of legal challenges to work through the system. Without repeal of

the 2015 rule amendments, that litigation could take a decade. In the meantime, because implementation of the 2015 rule amendments has been stayed by the courts, the states are continuing to effectively implement the CWA regulations with the *status quo* definition of WOTUS. For all the time and effort expended by states, federal regulators, and stakeholders during the development of the 2015 rule amendments, we are left in the same administrative position as if the rulemaking had not happened.

The value proposition of investing time and effort in developing a new rule is very low, based on the experience from the previous rulemaking effort. There is strong reason to believe that interest groups will be as engaged in a new rulemaking as in the 2015 rulemaking. There is reason to believe that multiple lawsuits will be the result of a new rulemaking. There is reason to believe the courts will stay implementation of a new rule, just as occurred with the 2015 rule. All this will again take a decade to work through the court system. That will leave states in the exact same position as we are now, implementing the *status quo.* Minnesota and its citizens do not believe it is prudent to invest in yet another effort to modify the WOTUS definition, when the likelihood of a successful resolution is so low. Under the *status quo* definition of WOTUS, we can continue our work to protect the waters on which our economy rests.

For these reasons, the MPCA and DNR support implementing step one of the Executive Order, but urge you not to pursue yet another rule change. The course of action we are recommending maintains the *status quo* for the multiple CWA authorities that the state implements, including existing delegation agreements, permitting, and funding. It also maintains the working relationship between Minnesota and federal agencies developed over four decades. We do not believe another rule amendment will dispel ambiguity. It most certainly will not stop the lawsuits. The time and effort expended for what may be limited additional clarity is not worth the investment.

If You Do Proceed to Step Two

If, however, EPA and the Corps choose to undertake step two, we offer several suggestions. Our suggestions are aimed at maximizing three characteristics that are essential to a successful rule. The rule must provide additional clarity, protect water resources, and be based on hydrological principles.

Take advantage of the "cooperative" in cooperative federalism. First, in order to ensure clarity in a new rule, we strongly encourage you to work closely and substantively with Minnesota and other states throughout the development of the new rule. The CWA is firmly grounded in a cooperative federalism structure, giving both the federal government and states direct roles and responsibilities in implementation. Based on their long-term implementation and enforcement of the CWA, states have a unique understanding of how the *status quo* definition works and how alternatives may or may not work. To develop a new rule without active involvement of such partners increases the risk of, yet again, missing the target. True cooperative federalism cannot be achieved with a few requests for written comments at the beginning and end of the process; it will only result from an equal partnership in thoroughly discussing ideas and reaching consensus. Although we prefer EPA and the Corps not undertake a new rulemaking, Minnesota will be an active partner if one is undertaken.

A regional approach in the rule language is ill-advised. Second, a new definition must protect resources across the country in an equivalent manner. Indeed, that is the very purpose of having a federal Clean Water Act. We have concerns about suggestions from EPA staff that the definition may include regional variations. As has been proven through decades spent implementing the CWA and the *status quo* WOTUS definition, it is constitutionally defensible to apply a single definition across all regions. The Rapanos v. United States, 547 U.S. 715 (2006) (Rapanos) decision expressed no concern about applying a single, non-regionalized definition to waters throughout the country. Regardless of which Rapanos test is used, there are waterbodies that fall outside the WOTUS definition. As the *status quo* rule does now, the federal rule should establish a baseline level of protection for all WOTUS sufficient to ensure that the fundamental goals of the Clean Water Act are achieved. Acting through principles of federalism, states can always adopt protections above the floor.

It is almost impossible to choose a scale at which to regionalize the definition. Waterbodies vary by region of the country, by state, by region within a single state, and ultimately waterbody-by-waterbody. We recognize there are some high-level regional water characteristics. But, even within a region, the WOTUS definition is applied to a specific water body that may have characteristics very different from a "typical" water in the region. The definition itself does not need to be regionalized. A new rule should not be circumscribed by regional definitions that fail to account for the range of conditions within a region and even within a state. Practical regionalization results from the application of a consistent definition to specific waters.

Most importantly, including regional variations would add a layer of extreme complexity to drafting the definition, increase the risk of inconsistent definitions between regions, and erode the baseline level of protection established for all waters, and thus for the people and fish and wildlife that depend on those waters. The EPA's and Corps' current practice is to provide regional guidance on implementing the *status quo* definition. These documents use regional terms to guide implementers on how to apply the *status quo* definition to waters that may be more or less permanent, or have more or less connectivity. A regional approach in the rule will require an entire new set of terminology to be incorporated into the rule itself, rather than just using that terminology in regional guidance. Rule language would have to describe typical water resources for each region and contrast those against water resources in other regions. A regional approach in the rule presents difficulties in drafting that risk inconsistencies in protecting water resources across regions; and it would produce no different result than we have presently with a non-regionalized rule definition coupled with implementation guidance specific to each region.

Using the Scalia test does not remove ambiguity. Third, a new rule must be based on hydrological principles. If a new rulemaking is undertaken, EPA and the Corps must recognize that Justice Scalia's test as stated in Rapanos, while on its surface perhaps more clear than Justice Kennedy's test, is still not clear from a hydrological perspective. Justice Scalia gave little guidance about the terms "relatively permanent" and "continuous surface connection." How much of the year does a stream or wetland have to be wet to be "relatively permanent"? Can a "continuous surface connection" be established through a series of year-round wetlands that are in very near proximity to one another, but not quite adjacent? Replacing the *status quo* definition of WOTUS with language merely repeating Justice Scalia's test will not remove ambiguity from the definition.

Hydrological science must be at the forefront of any new rulemaking. Water protection, by necessity, is bound to hydrological and geological realities. The EPA and the Corps should rely on the most comprehensive review of connectivity science which is contained in EPA's "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." We are proud to say that Minnesota scientists participated in this review. A new rule should incorporate core hydrological principles that will provide flexibility to the states in applying the rule, for example through regional and programmatic general permits and individual permits.

Recent presentations by the EPA and Corps include options for defining the terms "relatively permanent" and "continuous surface connection." It is unclear how each of these options, presented in broad outlines, are supported by hydrological science. It is impossible for us to react to any of these options without understanding the rational scientific basis underlying the options. It is also impossible for us to conduct an evaluation of the implications of each option on Minnesota water resources given the short time frame for submitting comments.

Consider unintended consequences. Fourth, the definition of waters of the United States is a foundational jurisdictional concept that touches every single provision of the CWA and its rules. A change in the definition will affect funding to states that is based on jurisdictional waters. It could affect permitting programs and impaired waters programs. Thoughtful, comprehensive deliberation should occur before making a definitional change that could have unintended consequences. Involving potentially affected states in developing any rule change could significantly reduce the risk of any unintended consequences.

Conclusion. The preferred course we suggest to you is the simplest one. Stop after step one and allow states to continue our good work without the burden of another rulemaking effort that we believe will require extraordinary time and effort for minimal gain. If this is not possible, then keep in front of you the essential elements for success: provide additional clarity, protect water resources equally, and incorporate hydrological principles. Success cannot be met without engaging your key federalism partners, the states. States bring unique knowledge gained from decades of implementation and enforcement of the CWA. States are liaisons to local governments, permittees, landowners, and others. To proceed without such key partners is, at best, guaranteed to make the path difficult, and, at worst, will result in a rule that cannot be implemented.

Thank you for the opportunity to submit comments on this important, far-reaching question. We look forward to partnering closely with EPA and the Corps as the Executive Order is implemented. Please contact us if you have any questions.

Sincerely,

John Linc Stine
Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155

Tom Landwehr
Commissioner
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155

JLS/TL:mo

cc: Rebecca Flood, Assistant Commissioner, MPCA
Barb Naramore, Assistant Commissioner, DNR

From:	Mike Hyde
To:	CWAwotus
Cc:	Hanson, Andrew; jufner; Gregory Todd; Ken Burdick; Ron Winterton; Celeste Maloy; Rex L. Sacco; Meier, Cheryl; Doug Smith; Jack Lytle
Subject:	Waters of the US
Date:	Monday, June 12, 2017 5:14:46 PM
Attachments:	WOUS-Definition_Comments.doc

On behalf of the Duchesne County Commissioners, we appreciate the opportunity to contribute thoughts in today's Federalism Consultation webinar.

As I stated during the comment period today, Duchesne County was one of many counties across the nation that objected to the heavy-handed regulatory approach of the previous administration (see our November 2014 comment letter attached).

Over-regulation in this country over the past 8 years has cost this nation thousands of jobs, which were transferred overseas to avoid such burdens. It is one of the reasons that we have President Trump in the White House today.

We support a withdrawal of the 2015 WOTUS rule and a common-sense approach to developing a new rule. We believe that the intent of the CWA was to regulate navigable waters or streams that carry flow throughout the year except during periods of extreme drought ("relatively permanent waters" in the Scalia opinion) and that wetlands should be considered WOTUS only if they directly touch a jurisdictional water.

Duchesne County's economy relies on the oil & gas and agricultural industries. It would be a significant blow to our economy if dry washes, which see water only during brief periods of snow melt and thundershowers, are considered WOTUS. Energy companies are already heavily regulated and find it difficult to do business on federal lands in our region. Also, many agricultural lands contain ditches and wetlands that collect irrigation water. Subjecting such waters to federal regulation would add to the burdens on farmers locally and nationwide.

The 2015 rule also impacted the County directly in that many roadside ditches may seasonally contribute water to intermittent streams. The 2015 rule would add to the cost of constructing and maintaining county roads and drainage facilities in the future.

Duchesne County does not believe in a "one size fits all" regulatory scheme, whether it comes from our state or federal government. Such schemes often don't work well at the County level either. For that reason, we identify "zones" in which different land use regulations apply.

The comments during today's webinar underscore the fact that regulations that may make sense in the Southeastern US will likely not make sense in the Intermountain West. Most of the populated areas of our county receive about 10 inches of precipitation annually. Wetter areas of the country, with more extensive surface hydrology, should be treated differently. A regional approach to regulation and management should be considered. Perhaps this approach could be based on climatic zones or drainage basins (such as the Colorado River Drainage Basin in our area) rather than jurisdictional boundaries? We believe that this concept of a regional approach deserves further study.

Thank you for the opportunity to comment! We look forward to additional opportunities to review proposals in the future.

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November 10, 2014

Water Docket, Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attention: Docket ID No. EPA–HQ–OW–2011–0880

Subject: Proposed rule defining the scope of waters protected under the Clean Water Act

Dear EPA Staff:

These comments regarding the proposed rule cited above are submitted by Duchesne County, Utah.

These comments address the proposed rule published in the Federal Register / Vol. 79, No. 76 / Monday, April 21, 2014, pages 22188-22274. The Environmental Protection Agency and the Department of the Army, Corps of Engineers ("Agencies") have published specific requests for information they seek. Our comments address these questions as well as additional concerns we have as elected officials. We appreciate the opportunity to submit comments and information concerning the proposed rule for a new definition of the "Waters of the United States" (WOUS) as it pertains to the Clean Water Act (CWA).

We are very concerned that the proposed rule would modify existing regulations, which have been in place for over 25 years. Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards. We have concerns with the process used to create this proposal, and specifically whether impacted state and local groups were adequately consulted throughout the process.

County officials are elected to manage on-the-ground daily governmental activities that involve the health, safety and welfare of local citizens. Local government responsibilities include protecting our citizens from adverse impacts of federal actions. Local governments are the foundation upon which higher levels of government depend to ensure the peaceful and orderly existence of the American way of life - our customs and cultures. Local government responsibilities most definitely include developing, managing and sustaining a supply of clean water for the citizens of their communities as well as downstream users of water.

Counties are responsible for public safety. Counties own and manage public safety ditches including roads and roadside ditches and other drainage features. Counties are liable for ensuring that public safety ditches are maintained—there have been cases where counties have been sued for not maintaining their ditches and flooding occurred as a result.

Under current "Waters of the U.S." regulations, some counties are required to obtain federal permits for any type of construction or maintenance activities on these ditches, called jurisdictional ditches. Obtaining these federal permits can be very expensive, cumbersome and

time-consuming. A number of counties have waited years for federal permits at a significant cost. Counties have missed building seasons waiting for federal permits. Federal permit requirements for ditch maintenance activities also vary from area to area. NACo has documented numerous examples of problems that exist under the current "Waters of the U.S." regulation. The proposed rules will make the current problems noted above even worse as the rule does not make clear how certain perennial, intermittent and ephemeral ditches will be exempted.

Key terms used by the "waters of the U.S." definition—tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed—are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays.

While individuals and non-governmental organizations are always encouraged to take advantage of the opportunity to review proposed federal rules and to assess the potential beneficial and adverse impacts of these proposed rules, local governments have the additional responsibility for ensuring that the proposed rules are in compliance with the enabling legislation as it pertains to protecting the health, safety and welfare of their local citizens. As elected officials, we recognize and accept the responsibility to address the proposed changes to the definition of the WOUS that affect local citizens in a thorough and serious manner.

We submit these comments because it is important for the Agencies to recognize, honestly represent and openly disclose the adverse impacts (not just the benefits) that will result from the Agencies' actions pursuant to changing the definition of the WOUS. While the CWA directs the Environmental Protection Agency, the Army Corps of Engineers and other federal agencies to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, other federal laws require federal agencies to disclose information related to the effects of their actions on the American public.

We feel that the Agencies do not meet this requirement with the proposed rule and further, that the Agencies have engaged themselves in an effort to sway the public into supporting a new definition of the WOUS that the Agencies have determined is necessary but is independent of what is intended or presented in the CWA. This effort to gain support for an unnecessary new definition of the WOUS is carried out despite a recent Supreme Court decision that clearly defines the WOUS.

The proposed rule will affect every American, impacting how communities and landowners manage their public and private property using pesticide and fertilizer products. Landowners will be subject to CWA provisions for permitting and will be vulnerable to citizen lawsuits challenging their ability to manage their own property. For example, professionals making pesticide and fertilizer applications to turf and ornamental plants, golf courses, and to manage invasive and noxious terrestrial and aquatic weeds will also be impacted as will those making public health applications to control mosquitoes and ticks.

Expanding the definition of "waters of the U.S." expands the scope of waters subject to NPDES permits for mosquito control applications. This makes it more difficult for professional applicators to obtain permits and treat areas at high risk for West Nile Virus and Dengue Fever, creating a great concern for public health and safety. West Nile Virus claimed some 286 lives in 2013.

This rule would make it more difficult to control harmful pests on private and public property if any water is near the area. Professional applicators and homeowners would have to obtain

permits to protect properties from pests like ticks, which carry harmful diseases like Lyme disease.

The proposed expanded jurisdiction affects vegetation management applicators' ability to keep right-of-ways safe and passable because they would need to obtain costly NPDES permits to treat near water bodies and ditches considered jurisdictional under the proposed rule. Such applications keep our roadways and power lines clear and safe.

Under the rule, EPA could compel states to place restrictions on the amount or type of fertilizer that can be used on public and private property including individual home lawns, gardens, parks and golf courses.

Expanding the definition of "waters of the U.S." also expands the scope of waters subject to NPDES permits for algae and aquatic weed control applications. Golf course water hazards and man-made lakes in residential communities or on an individual's private property could be subject to these expanded permitting requirements.

The expanded scope of the Clean Water Act could leave landowners and professionals applying fertilizers and pesticides vulnerable to nuisance lawsuits. Well-maintained lawns are important for the environment and properly-cared for lawns reduce run-off into nearby waters. One of the unintended consequences of EPA's proposed rule could be increased erosion and run-off into many connected water bodies.

Uncontrolled growth of poison ivy, poison oak, and poison sumac poses risk to children and adults alike as more than one-half of the U.S. population is allergic to these noxious weeds, which must be controlled with herbicides.

The proposed rule would have a profound and significant impact on small businesses providing pest, turf and lawn control solutions around the United States. The cost of pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also have to be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services.

Most important to Duchesne County, the application of CWA regulations to “other waters” and dry washes within our boundaries could severely hamper agricultural practices and energy development in our area. Duchesne County has an unemployment rate of 2.7% according to the most recent estimates from the Utah Department of Workforce Services. Allowing federal regulators to expand jurisdiction over “other waters” and dry washes could cause our unemployment rate to rise to the higher levels being experienced nationally if doing so makes it more difficult for energy companies to develop oil and gas facilities.

The oil and gas exploration and production industry anticipates significant operational and economic impacts from this proposal. As stated in a letter from the Independent Petroleum Association, the American Exploration & Production Council and the Western Energy Alliance, these impacts are based upon tangible assessments of actual operations in several energy producing regions of the country.

We agree with the American Farm Bureau Federation in their assessment of the impacts of the proposed rule on farmers:

- Farmers and ranchers are stewards of the land and care about the environment and water quality. But this rule is confusing. Regional offices would be left to interpret and apply

the regulations to farms on an inconsistent basis. Farmers know the ground they farm and should have clear guidance about how to comply with the law.

- Third-party lawsuits have become the new norm for regulating farmers. Even if farmers protect water quality and comply with the law, they could be forced to defend themselves in court.
- Under the proposed rule, farmers, ranchers and other landowners would face a tremendous roadblock to ordinary land-use activities, from building a fence to treating for or pulling weeds to controlling insects.
- Getting a permit to plant grapes, build a fence or clear out brush is not a simple task. It could require consultation with state and federal agencies, hiring consultants and waiting for approvals. If the permit is obtained, it often includes paperwork and reporting requirements in addition to any requirements aimed at protecting water quality. Farmers just want to continue to farm and be stewards of the land, leaving it in better shape for future generations.

Overall, the proposed rule will have little to no positive impact on water quality while definitions and other aspects of the rule will be defined by the courts in anticipated citizen action lawsuits.

We see the following major issues with the proposed rule:

Issue 1: Conflicting intent and incorrect purpose given for the proposed rule

Reference: FR title: *Definition of "Waters of the United States" Under the Clean Water Act*

FR page 22188 column 1: [The Agencies] *are publishing for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA),*

FR page 22190, column 3: *The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying ''waters of the United States'' less complicated and more efficient.*

Discussion: The title of the proposed rule clearly states that the subject matter is the definition of a term, "Waters of the United States". The purpose of such a definition is declared to be to define the scope of waters that are protected under the CWA. However, the most significant and the most looming gorilla in the room associated with the Agencies' proposed regulatory definition is that there is no valid or justifiable need or purpose in redefining "waters of the United States", and that the actual purpose of the proposed rule is not to create a definition but to mask a tremendous expansion of the scope of CWA protected waters.

The task of establishing the parameters of the scope of responsibility for the Agencies that will enable them to carry out their missions[1] cannot be accomplished by proposing to redefine a term that already has a well-understood meaning in the English language. The Agencies, in couching the proposed rule as a request for unnecessary and inappropriate redefinitions of that and multiple additional terms, beg the question of actual intent for doing so.

[1] The EPA mission is to protect human health and the environment. http://www2.epa.gov/aboutepa

The mission of ACE is to "Deliver vital public and military engineering services; partnering in peace and war to strengthen our Nation's security, energize the economy and reduce risks from disasters." http://www.usace.army.mil/About/MissionandVision.aspx

Summary of the Clean Water Act 33 U.S.C. §1251 et seq. (1972) The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. http://www2.epa.gov/laws-regulations/summary-clean-water-act

The Agencies have stated in the Federal Registry that there is a need for adopting a formal statement of the meaning or significance of the phrase "waters of the United States". The Agencies stated that the need for this proposed rule was because the scope of CWA protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006.

A regulatory definition, ideally, would be consistently and systematically used by the Agencies when interpreting and implementing the Clean Water Act (CWA). The Agencies' proposal that the definition of "waters of the United States" be defined masks the fact that no such new definition is needed or even wanted by the Agencies. In fact, the Agencies would be delighted for the public to accept "waters of the United States" at face value.

This approach is a "bait and switch" process based on confusion caused by self-referential internal definitions within the proposed rule, making any real definition of any term nearly impossible. The proposed rule is presented with an ultimate objective of substantially increasing the scope of waters protected by the CWA (the switch) as a consequence of getting the public to agree to using the term "waters of the United States" at face value meaning.

The bait is the pretense that a real rule change is being proposed to meet legal requirements for public notice and mandated public hearings (the bait), while bypassing not only the objective of public notice and public discussion on the actual rules, but avoiding the scrutiny of the legislative and judicial eyes (enabling the switch).

Any ordinary speaker of the English language understands "waters of the United States" to mean, in plain writing and common use, "all waters located within the territorial boundaries of the United States". None of the words are hard to comprehend, and the use of this type of phraseology is common to native speakers of the English language. It is a non-specific term that does not exclude any specific kinds of water to be found within the United States.

No matter what definition could come about from the proposed rule, "waters of the United States" means *all* waters, including waters over which the Agencies have not previously had jurisdictional authority, e.g. waters of the States and private lands. This is not the intent of the CWA, although it apparently is the intent of the Agencies.

In the English language when a word or term must be qualified with a modifier it is an indicator that the word or term is too general for the intended meaning. Thus the reason for the many modifiers for "waters of the United States" in the CWA is because the CWA was not intended to apply to every drop of water located within the territorial boundaries of the United States. Modifying words have been used to provide parameters for implementation of protection of water quality since the Water Pollution Control Act of 1948.

Thus when the CWA uses the term "navigable waters" to modify "waters of the United States", there should be no question that the Agencies should address waters that can be sailed on, i.e. that are passable by a vessel that floats on water. Using this clear and commonly understood meaning further leads to understanding that connected waterways and significant nexus waters will be waters that can be used for sailing on or that directly feed such waters. Limiting the Agencies' jurisdiction to the actual meaning of "navigable waters" yields to a simple test: *Can you float your boat on the water?*

It is not the business of the Agencies to reinvent language, nor is it right or proper for the Agencies to use confusing language and incorrectly stated purpose to attempt to expand a federal Agency's jurisdictional authority.

Recommendation: Withdraw the proposed rule. If the Agencies are confused about their scope of jurisdiction, they should seek Congressional and judicial guidance.

Issue 2: Failure to provide legal justification for the proposed rule

Reference**:** FR page 22188, column 3: *The SWANCC and Rapanos decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public and results in significant resources being allocated to these determinations by Federal and State regulators.*

Discussion**:** We find this statement to be self-serving and misleading. There is no doubt that with the plurality decision in the *SWANCC* and *Rapanos* cases the Supreme Court has already provided a clear definition of "waters of the United States". *(See summary of the Supreme Court's decision in the attached "Syllabus of RAPANOS ET UX. Et AL v. UNITED STATES"[2])*

Interpreting the law and providing a clear meaning to the intent of laws when there is doubt or a dispute is the primary role of the Supreme Court. The Supreme Court has done its job concerning the definition of "waters of the United States" and "jurisdictional waters" under the CWA. We find that the Agencies have been and are continuing to struggle with "mission creep", i.e. self-determined expansion of their mission beyond their statutory authority, as demonstrated by their unwillingness to accept the (Rapanos) Supreme Court decision and instead formulating this proposed rule. Unwilling to accept the Supreme Court definitions, the Agencies are attempting to implement their own definition of the "waters of the United States", which has led to much confusion and uncertainty for the American public.

There can only be one reason for the Agencies' concern with having to evaluate jurisdiction of waters on a case-specific basis: The Agencies' desire to expand their scope of jurisdiction over the nation's waters. The perceived need to control land use activities across most of the nation, which has swept through the upper administrative levels of the Agencies, is not a need for states or the American public, nor is it a valid or acceptable justification for the proposed rule.

The Agencies' bid to expand their scope of jurisdiction over the nation's waters and the need to control land use activities across most of the nation is clearly evident in the fact that the EPA has taken it upon themselves to commission the development of a "Water Body Connectivity Report" and to further go to the trouble of setting up their own EPA Science Advisory Board (SAB) review of the report. It is hard to believe the outcome of this self-serving process would lead to anything but a finding that all waters are connected in one way or another, and to conclude that the Agencies must be granted jurisdiction for permitting just about every land use activity in the nation**.**

Unfortunately for the Agencies, the Constitution does not grant power to any federal agency to establish their own authorities or jurisdictional boundaries independent of Congress and the Supreme Court.

Recommendation: Withdraw the proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law. Furthermore, they must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority.

[2] http://www.law.cornell.edu/supct/html/04-1034.ZS.html Accessed 06/24/14

Issue 3: Failure to provide justification for expansion of authority and jurisdiction

Reference: FR page 22189, column 1: *The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or waters in the region, is significant based on data, science, the CWA, and case law.*

In addition, the agencies propose that ''other waters'' (those not fitting in any of the above categories) could be determined to be ''waters of the United States'' through a case-specific showing that, either alone or in combination with similarly situated ''other waters'' in the region, they have a ''significant nexus'' to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated ''other waters'' in the region should be identified.

Discussion**:** The above statements not examples of agencies adding clarity to existing laws. Instead, these statements are additional examples of "mission creep", i.e. self-determined expansion of their mission beyond statutory authority. These statements serve to usurp the authority and jurisdiction of state and local governments. Although the powers of the federal government are vested by the U.S. Constitution, it is state government that tends to have a greater influence over most Americans' daily lives.

The Tenth Amendment to the United States Constitution prohibits the federal government from exercising any power not delegated to it by the states in the U.S. Constitution; thus the states, through local governments (county, municipal governments and the elected officials of soil and water conservation districts), handle the majority of issues most relevant to individuals within their respective jurisdictions.

Federal agencies are established by governments to provide specific services. The personnel of federal agencies are not elected officials, but rather civil servants. Agencies implement the actions required by laws (statutes) enacted by Congress, and may not take action that goes beyond their statutory authority or that violates the Constitution.

By virtue of the Acts of 1866, 1870, and 1877 the federal government divested itself of its authority over all non-navigable waters in the West, ceding that authority to the states. This action of Congress has only been changed in the past by the exemption of water from appropriation under state law. Thus, non-navigable waters of the West are still outside of the jurisdictional authority of the Agencies.

The proposed expansion of authority and jurisdiction over lands that may be or are covered with water for short periods of time cannot be justified. These are non-navigable waters. Clearly this expanded role is not the role the EPA and Corps were created to accomplish.

What is even more troubling with the proposed rule is the idea that because intertwined "water connectivity" and nebulous "significant nexus" to navigable waters might exist, somehow that connectivity and nexus should give the Agencies jurisdictional authority to fit their perceived needs. This is especially troublesome given the fact that what is being proposed has already resulted in multiple court cases that have gone as far as the Supreme Court of the United States, and has already resulted in the Supreme Court rendering multiple decisions that define "waters of the United States".

We finds it is very disheartening to have to deal with a proposed rule that is counter to the latest Supreme Court decision (*Rapanos ET UX. Et Al v. United States),* which has clearly addressed this matter. By issuing the current proposed rule the Agencies appear to be attempting to

override the *Rapanos* Supreme Court decision, which for the most part dismissed the notion that intertwined "water connectivity" and the presence of some kind of nebulous "significant nexus" to navigable waters give the Agencies jurisdiction for permitting a much expanded jurisdictional authority, including authority over a broader suite of land use activities.

In the *Rapanos ET UX. Et Al v. United States* decision, Justice Scalia's plurality opinion, section VII, clearly addresses and shows the errors with the Agencies notion that "water connectivity" and the presence of a "significant nexus" somehow come from and are part of the CWA. In this opinion, it is stated in the first paragraph of page 37:

> *"One would think, after reading JUSTICE KENNEDY's exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of "significant nexus" between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from SWANCC's cryptic characterization of the holding of Riverside Bayview."*

This statement alone should have been a red flag to the Agencies that the occurrence of "water connectivity" and the presence of a "significant nexus" was somehow a mandate for them to take it upon themselves to redefine what constitutes "waters of the United States" for CWA purposes.

We find it alarming that the Agencies feel free to ignore the intent of Congress through bypassing the CWA and ignoring the findings of the Supreme Court. It is even more troubling that the Agencies would attempt to convince the public that they are somehow empowered to greatly expand their jurisdictional authorities, which would open the door for them to substantially increase their influence in land use activities across the entire nation.

Recommendation: Withdraw the current proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law, specifically incorporating the "waters of the United States" definition presented by the plurality Supreme Court opinion in the *RAPANOS ET UX. Et AL v. UNITED STATES* decision. Furthermore, the Agencies must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority.

Issue 4: Misrepresentation of Agencies' authority in the proposed rule

Reference: Page 22189, column 3: *This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. CWA section 101(b).*

This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

Discussion**:** The above two statements are misleading because they are presented in the proposed rule in a way that tends to create the impression the Agencies are dealing with solely Congressional policy and not requirements of the CWA. The above two statements are in fact a clearly stated objective of the CWA.

The lead-in paragraph for Section 101 of the CWA states: *The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act --- (b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to … and* (g) *It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act…*

When the above statements are presented in the context that they are found in the CWA it becomes much more evident that Congress did intend for Federal actions conducted under authority of the CWA to not interfere with state rights and authorities, and state responsibilities to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.

We also have a concern with the statements: "*This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states …"*and *"This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State..."* When considering all of the concerns and problems that have occurred with the current implementation of the CWA it is difficult to believe that the actions called for under the proposed rule would not add an additional burden on the states as they work to carry out their rights and responsibilities to manage the water and land resources within their jurisdiction.

Having a federal agency permitting land and water management activities from distant and often out-of-state offices with no knowledge of local conditions and no connection with local citizens can only lead to further complicate matters. It is clear that Congress, when it originally enacted and then amended the CWA never intended for the Agencies to act as the primary permitting and enforcement agency for land and water use activities across the nation. Contrary to what is being presented in the proposed rule it is obvious that the Agencies are attempting to set themselves up as the distant and often out-of-state permitting authority that will have the ability to greatly influence the land and water uses in all States and across the entire nation.

For over one hundred years the nation's state and local governments have dealt with the planning, development and use of land and water resources, including water pollution within their jurisdictions. These tasks have been carried out faithfully at the local level without having to take extremely punitive measures, which seems to be the norm when federal agencies have intervened in the recent past. This heavy-handed approach to gain compliance is now a common practice in the way the Agencies conducts their permitting activities. This constant fear of harsh fines and threats of being imprisoned by federal agencies has greatly affected the states' responsibilities and rights when dealing with local efforts to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. We can only foresee this situation becoming much worse if the proposed rule is implemented.

Congress has over the years been very careful to encourage state and local government responsibility for and involvement in the planning, permitting and proper implementation of land and water use activities. Only in the last twenty or thirty years has the role of the states and local governments been usurped by the mission creep of federal agencies. This proposed rule is another example of a mission creep that is being fueled and driven by a few select elite environmental organizations that will stop at nothing to impose their will on the American public.

Recommendation: Withdraw the current proposed rule.

Additionally, the Agencies must:

- End actions that allow mission creep within the federal governmental agencies.
- Discontinue unconstitutional self-serving efforts to increase the Agencies' boundaries of jurisdiction over land use activities across the nation.
- Work diligently to divest themselves of all permitting authority and rather put their efforts towards helping the states and local governments coordinate and jointly plan for permitting and implementing sound land and water use practices across the entire United States, which is the clear intent of the CWA.
- Connect with the American public and not give in to the desires of a select group of environmental organizations that hope to gain control of the nation's land and water resources through the manipulation of the Federal land and resource management agencies.

Issue 5: Failure to comply with Executive Orders 12866, 13132 and 13563

References: FR page 22188, column 1. *This proposal would enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of ''waters of the United States'' protected under the Act.*

FR page 22189, column 1. *...the agencies request comment on alternate approaches to determining whether ''other waters'' are similarly situated and have a ''significant nexus'' to a traditional navigable water, interstate water, or the territorial seas.*

FR page 22189, column 1. *In particular, the agencies are interested in comments, scientific and technical data, caselaw, and other information that would further clarify which ''other waters'' should be considered similarly situated for purposes of a case-specific significant nexus determination.*

FR page 22189, column 2. *The agencies also solicit comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.*

FR page 22189, column 2. *...the agencies also request comment on determining which waters should be determined non-jurisdictional.*

FR page 22189, column 2. *The agencies seek comment on how inconclusiveness of the science relates to the use of case specific determinations. As the science develops, the agencies could determine that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule or that as a class they do not have such a significant nexus and might not be jurisdictional.*

FR page 22189, column 2. *The agencies pose the questions because of the strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and are not subject to CWA jurisdiction. These comments on alternate approaches will inform the agencies in addition to the comments on the case-specific determination proposed in the rule.*

FR page 22190, column 1. *This notice also solicits information and data from the general public, the scientific community, and tribal, state and local resource agencies on the aquatic resource, implementation, and economic implications of a definition of "waters of the United States" as described in the proposal. The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment*

Discussion: Executive Orders 12866 Regulatory Planning and Review (1993) and 13563 Improving Regulation and Regulatory Review (2011) require that the federal regulatory system ensure, among other things, regulations that are consistent, written in plain language, and easy to understand. The proposed rule fails on all counts.

The stated purpose of this proposed rule, as evidenced by its title, is to define the "Waters of the United States" under the Clean Water Act, and as stated elsewhere (see above references), to increase clarity as to the scope of "waters of the United States". As has already been addressed, above, that term does not need to be defined. The CWA and the Supreme Court have already very adequately provided a definition. However, the proposed rule goes on to request comments that address so many other issues, and in such a self-referential and circular manner, that the proposed rule becomes nearly impossible to understand.

The Agencies have not published a proposed rule, but rather a request for the public to do the Agencies' own work. Rather than publish a proposed rule that presents definitions of terms and alternatives to those definitions in a consistent and easy to understand manner for the public to analyze and evaluate, the Agencies have created a rule that goes back and forth between confusing definitions scattered throughout the document and soliciting additional comments about definitions of terms that are not found anywhere near the request for comments. (*See Issue 1 above, "bait and switch" discussion*).

In the midst of all the confusion, it is difficult to understand precisely how the alleged purpose of clarification of scope actually would be achieved by complying with the proposed rules requests for comments. In fact, these many requests (only some of which are cited, above) are actually extremely loaded questions based on undisclosed presumptions meant to limit direct replies to only those that serve the Agencies' agenda.

Nowhere in the proposed document is it stated, in plain and direct language, that the result of defining the terms for the various waters would be that all waters so defined would automatically fall within the scope of jurisdictional authority of the Agencies. As has been mentioned in several comments prior to this one, this amounts to "mission creep", which is enabled by not complying with the Executive Order's directives on regulatory planning.

The Proposed rule raises federalism concerns and could impose direct and indirect costs. Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of "waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations. However, the agencies' cost-benefits analysis—Economic Analysis of Proposed Revised Definition of Waters of the U.S. (March 2014)—contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (page 2). Since states, local governments and their agencies implement and enforce CWA programs, we believe the "waters of the U.S." definitional change does have a substantial direct effect on these entities. The economic analysis agrees, stating that CWA "programs may subsequently impose direct or indirect costs as a result of implementation..." (Page 2).

Recommendation: Withdraw the proposed rule. It is inappropriate and in violation of Executive Orders on regulatory planning and federalism.

Issue 6: Failure to list all supporting documents.

Reference: FR page 22188, column 2. All documents in the docket are listed in the http://www.regulations.gov index.

Discussion: FR page 22188, column 1 states that the proposed rule is published "in light of" court cases. Column 3 of the same page refers to the SWANCC and Rapanos court cases.

The SWANCC and Rapanos decisions are crucially important to understanding the whole reason the Agencies contend that the proposed rule is necessary, yet the Agencies have not made them available in the docket under "Supporting & Related Material. This is not only unfair to the public, but it is also a false statement made in the proposed rule.

The proposed rule should follow, not precede, the draft science report. We are concerned with the sequence and timing of the draft science report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, and how it fits into the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule.

Recommendation: Provide links to the SWANCC and Rapanos court cases as well as any other caselaw "in light of" their important connection to the proposed rule. Allow the public sufficient time to respond to the proposed rule after the science report is made available.

Issue 7: Violation of Fifth Amendment "regulatory taking"

Discussion: The extraordinary expansion of the Agencies' jurisdictional authority that would come about through this proposed rule, and the resulting vastly increased restrictions imposed on private waters through permitting would result in regulatory taking, a violation of the Fifth Amendment. The increased permitting available to the Agencies would result in citizens being required to obtain permits and pay the government for ordinary activities on private property. This amounts to a seizure of that property without compensation, i.e. a regulatory taking. Although the Supreme Court does not require government compensation where regulations substantially advance legitimate governmental interests, this is not true when the regulations prevent a property owner from making "economically viable use of his land." Agins v. City of Tiburon, 447 U.S. 255 (1980).

In other words, the government should pay the market value of seized property rather than the property owner paying the government via a permit for the privilege of improving that property.

This type of violation of the Fifth Amendment would not come about except that the Agencies propose to include non-navigable waters in their definition of the scope of their jurisdictional authority. The mission of the Agencies, in particular the EPA, is to protect and sustain water quality, not own the water or manage its use.

Recommendations: Withdraw the proposed rule.

Issue 8: Improper dismissal of negative impact (small business)

Reference: FR page 22220, columns 1-2: *The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-*

comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions….

Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations

Discussion: The above statement in the rule is patently self-contradictory. Expansion of the scope of the Agencies' jurisdictional authority to include practically any and all surface waters of the territorial United States will obviously impact many more small businesses than are already impacted, not fewer. The impact of regulatory overreach of the Agencies on small businesses cannot simply be dismissed by pretending that more is less through twisting language and doublespeak.

Apparently the Agencies expect the public (particularly farmers, ranchers and the no doubt millions of other small business owners that would be impacted by this propose rule) to believe that increasing the scope of jurisdiction, i.e. defining all waters as "waters of the United States", somehow means that fewer individual waters would be involved. This would be like saying that a bushel of apples is a smaller amount of apples than the 125 apples in the bushel basket, just because a bushel is one unit whereas the second description includes many units.

The Agencies' bid for increased jurisdictional authority would have exponentially expanding impacts on small businesses, and these impacts will have significant adverse economic impacts on the general public, including but not limited to reduced land value and, increased costs of doing business due to regulatory burdens (e.g. having to hire consultants to prepare permits, cost of permits, project delays, restrictions on land use and the cost of complying with permitting requirements, including mitigation and failure of projects to make a profit).

Property owners, particularly farmers and ranchers and citizens in rural areas, count their land as their principal asset. Land is often used as collateral for loans and other capital purchases needed for business operations or capital improvements.

The tremendous direct and indirect adverse impacts and cumulative impacts of this proposed rule on small businesses cannot simply be dismissed as the Agencies have decided to do. It is no surprise that the Small Business Administration's Office of Advocacy has recently called for the withdrawal of the proposed rule, stating that the proposed rule will result in a "direct and potentially costly impact on small businesses" and that the limited economic analysis submitted with the rule "provides ample evidence of the potentially significant economic impact."

Recommendation: Withdraw the proposed rule. Should the Agencies put forth another proposed rule, the true impacts of expansion of waters under the CWA on small businesses must be fully disclosed for the public to analyze and evaluate.

Issue 9: Failure to address economic impact

Reference: FR page 22220, column 1: [The Agencies] *prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in ''Economic Analysis of Proposed Revised Definition of Waters of the United States.''*

Discussion:

The Agencies' estimate of the costs and benefits associated with the regulatory redefinition of "waters of the United States" has not been adequately addressed in the proposed rule or in the associated document cited above. The inclusion of categories of non-navigable waters that were previously never regulated by the Agencies under CWA, such as waters in floodplains, riparian areas, and certain ditches, will broaden the jurisdictional authority of the Agencies and will significantly increase the costs associated with each program; however the above cited document severely underestimates the impact of the definitional changes, excludes important costs, and uses a flawed benefits transfer methodology to estimate the benefits of expanding jurisdiction.

According to a May 15, 2014 report by David Sunding, Ph.D. of the Waters Advocacy Coalition[3], the numerous errors, omissions, and lack of transparency render the analysis virtually meaningless. Estimates of economic impacts to other programs rely on an incremental jurisdiction determination that is deeply flawed. The systematic exclusion of various costs and benefits ignores important impacts to permit applicants and permitting agencies. The analysis suffers from a lack of transparency. Explanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided; the entire report is based on records from the Corps' internal ORM2 database, which is unavailable to the public, and thus the validity of the underlying data cannot be determined due to lack of requisite transparency.

In simple terms, the agency's cost-benefit analysis assumptions and methodologies are flawed. While the agencies have performed cost-benefit analysis of the definitional changes on CWA programs, they have acknowledged that the data used and the assumptions made to craft the analysis may be flawed. Additionally, the methodologies used to determine economic costs and benefits to the proposed rule are misleading. In its economic cost analysis for the proposed rule, the agencies have indicated that 2.7 percent of new waters will be considered jurisdictional under the Section 404 program. However, the data used to compute costs for Section 404 comes from submitted Section 404 permit applications for FY2009-2010. The economic analysis does not acknowledge or recognize that, under the proposal, additional waters, currently not jurisdictional (and thus, no permits have been submitted), will become jurisdictional. This reasoning is flawed and does not give a true accounting of potential costs or benefits.

Recommendation: Withdraw the proposed rule. Withdraw the economic analysis. If the Agencies wish to resubmit a proposed rule, it must be based on an adequate economic analysis.

CONCLUSION

Many more examples of the misguided direction and misleading information found in the proposed rule could be cited and addressed in these comments, but doing so would be a waste of time and resources since the comments presented have brought forward key and fatal flaws of the current proposed rule. While the entire proposed rule is lacking integrity and is obviously loaded with bias toward the federal takeover of land and water use activities across the nation, we can only hope that the actions of the Agencies to expand their jurisdictional boundaries and increase their authority over land and water use activities will be recognized for what they are: gross incompetence and blatant mission creep.

The mission of the Agencies is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters for the continuing benefit of the American people. This mission will work much better when done with the support of and interaction with state and local governments, and the citizens of the United States. The proposed rule would impose tremendous

[3] http://www.nam.org/~/media/9CE236BA1E11491982C77E72B2D5AFD8/WOTUS_Economic_Report_FINAL.pdf Accessed 07/24/14

burdens on the taxpaying public and on small businesses, making it more difficult to farm and ranch, build homes, develop energy resources (a major economic sector in our County), engage in conservation activities and otherwise use the land. In fact, the Agencies have obscured rather than promoted their own missions and the purpose of the Clean Water Act.

We agree with the 24 members of the United States Senate who, in their October 23, 2014 letter concluded that "the proposed rule would provide EPA and Corps (as well as litigious environmental groups) with the power to dictate the land use decisions of homeowners, small businesses and local communities throughout the United States. With few exceptions, it would give the agencies virtually unlimited regulatory authority over all state and local waters, no matter how remote or isolated such waters may be from truly navigable waters. The proposed rule thus usurps legislative authority and Congress's decision to predicate Clean Water Act jurisdiction on the law's foundational term, ***navigable waters***."

Thank you for your attention to our comments and we hope our harsh criticism will lead to actions that restore the faith of the American public in the ability of the Agencies to honestly and transparently work with States and local governments in caring for and managing the WOUS.

We, the undersigned, appreciate your attention to and serious consideration of our comments and recommendations on the proposed rule.

Sincerely,

DUCHESNE COUNTY COMMISSIONERS

pc: Governor Gary Herbert, PO Box 142220, Salt Lake City, UT 84114-2220
Senator Mike Lee, 316 Hart Senate Office Building, Washington, D.C. 20510
Senator Orrin Hatch, 104 Hart Senate Office Building, Washington, D.C. 20510
Congressman Rob Bishop, 123 Cannon House Office Building, Washington, D.C. 20515
Congressman Chris Stewart, 323 Cannon House Office Building, Washington, DC 20515
Congressman Jason Chaffetz, 2464 Rayburn House Office Bldg, Washington, DC 20515
Congressman Jim Matheson, 2211 Rayburn House Office Bldg, Washington, DC 20515
Senator Kevin VanTassell, 3424 W 1500 N, Vernal, UT 84078
Representative Mel Brown, PO Box 697, Coalville, UT 84017
Kathleen Clarke, PLPCO, PO Box 141107, Salt Lake City, UT 84114-1107
Mark Ward, Utah Association of Counties, 5397 S. Vine Street, Murray, UT 84107
Julie Ufner, National Association of Counties, (jufner@naco.org)
Scott Chew, Utah Farm Bureau Federation, 9865 S. State St., Sandy, Utah 84070
Utah Petroleum Assoc., 10714 S. Jordan Gateway, Suite 260, South Jordan, Utah 84095

State of Utah

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Governor

SPENCER J. COX
Lieutenant Governor

Office of the Governor
PUBLIC LANDS POLICY COORDINATING OFFICE

KATHLEEN CLARKE
Director

June 19, 2017

Submitted via electronic mail: CWAwotus@epa.gov

Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (1101A)
Washington, D.C. 20460

Subject: EPA Request for local government comment on Waters of the United States

Dear Administrator Pruitt:

The State of Utah (State) respectfully submits the following comment letter regarding the definition of Waters of the United States (WOTUS), in response to the EPA's request for state and local input on revisions to the 2015 WOTUS final rule. The State appreciates the Environmental Protection Agency's (EPA's) efforts to seek the involvement of state and local governments regarding changes to the definition of WOTUS. The EPA and the State share the goal of maintaining and improving supplies of clean water through cooperative federalism. The State's experience with managing water resources shows that protections for water are most effective when the federal government respects the State's legal authority over waters within its borders. A revision to the EPA's 2015 WOTUS rule is an important first step to restoring the proper balance between state and federal authority over clean water.

The following comments contained a proposed redefinition of WOTUS, developed in conjunction with the Utah Association of Counties as well as policy makers and experts from throughout the western United States.

Sincerely,

Kathleen Clarke
Director

5110 State Office Building, PO Box 141107, Salt Lake City, Utah 84114-1107 · telephone 801-537-9801

PROPOSED Clean Water Rule: Definition of "Waters of the United States" 40 CFR 230.3[i]

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL.

* * * * *

§230.3 Definitions.

* * * * *

(o) The term *waters of the United States* means:

a. For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term ''waters of the United States'' includes only:

1. Those interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce. These waters include the territorial seas.
2. Relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters described in a.1.[ii]
3. Those wetlands that directly abut and are indistinguishable from the waters described in a.1. and a.2. Wetlands are those areas inundated or saturated by surface or groundwater 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 are indistinguishable from the waters described in a.1. and a.2.[iii]
4. The following are never "Waters of the U.S.":[iv]
   A. Groundwater or channels through which waters flow intermittently or ephemerally.[v]
   B. Ditches, conveyances, and other structures, manmade or otherwise, used primarily for agricultural, or flood abatement or storm-water control purposes.
5. The following definitions apply to terms used under this section:
   A. Indistinguishable means that the waters have merged so there is no clear demarcation between the two.[vi]
   B. Relatively permanent waters are those waters that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards, and have an indistinguishable surface connection with navigable-in-fact waters described in a.1.

* * * * *

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[i] The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) have requested, pursuant to Exec. Order No. 13778, 82 Fed. Reg. 41 (Mar. 3, 2017), substantive comments from state and local governments to help develop a new "Waters of the United States" definition under the Clean Water Act (CWA) Section 404 permit program based on Supreme Court Justice Antonin Scalia's opinion in *Rapanos v. United States,* 547 U.S. 715 (2006) (*Rapanos*). This proposed definition is the result of a collaborative effort to capture Justice Scalia's plurality opinion in *Rapanos*.

[ii] The EPA and Corps have asked about three potential approaches to the term "relatively permanent" waters: (1) Perennial plus streams with "seasonal" flow (Current practice: seasonal flow = about 3 months (varies regionally); (2) Perennial plus streams with another measure of flow; and (3) Perennial streams only. The language in (a)(2) and (a)(5)(B) adopts the first approach, and codifies the three-month period of time as a minimal flow requirement and relies on USGS standards for determining extreme drought or precipitation. Relatively permanent waters are catered towards arid regions, especially those with snowmelt or hyporheic connections. This approach would address concerns within the arid regions, and avoids the regional variations which often swallow the rule and provides the brightest line for the regulators and regulated public.

This definition directly addresses Justice Scalia's explanation of "relatively permanent":

> "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months – such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. Common sense and common usage distinguish between a wash and seasonal river. Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available, ..., we have no occasion in this litigation to decide exactly when the drying-up of a stream-bed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.' It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams, that is, streams whose flow is '[c]oming and going at intervals... [b]roken, fitful,' Webster's Second 1296, or 'existing only, or no longer than, a day; diurnal... short lived,' are not.'" *Rapanos*, 547 U.S. at 733 FN 5.

[iii] The EPA and Corps have asked about three potential approaches to the term "Continuous Surface Connection": (1) Surface connection even though non-jurisdictional feature; (2) Some degree of connectivity; or (3) Wetland must directly touch jurisdictional waters. The only approach consistent with Justice Scalia's opinion is the third approach, that the "wetland must directly touch jurisdictional waters." According to Justice Scalia, the two must be "indistinguishable" like the wetlands that literally merged with the Black River in *Riverside Bayview*.

> "Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that merely 'neighboring' wetlands came within the Corps' jurisdiction. *Obiter* approval of that proposition might be inferred, however, from the opinion's quotation without comment of a statement by the Corps describing covered 'adjacent' wetlands as those 'that form the border of *or are in reasonable proximity* to

> other waters of the United States.' The opinion immediately reiterated, however, that adjacent wetlands could be regarded as 'the waters of the United States' in view of 'the inherent difficulties of defining precise bounds to regulable waters,' a rationale that would have no application to physically separated 'neighboring' wetlands. Given that the wetlands at issue in *Riverside Bayview* themselves "actually abut[ted] on a navigable waterway;' given that our opinion recognized that unconnected wetlands could not naturally be characterized as 'waters' at all; and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands' mere 'reasonable proximity' to waters of the United states is not enough to confer Corps jurisdiction. In any event, as discussed in our immediately following text, any possible ambiguity has been eliminated by *SWANCC*." *Rapanos*, 547 U.S. at 741 FN 10 (citations excluded).
>
> "Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 741.

Thus, the proposed verbiage does not use the term "continuous surface connection" and instead adopts the term "indistinguishable" to reduce confusion as it might be applied both to sections (a)(2) and (a)(3). In *Rapanos*, Justice Scalia only used the term "continuous surface connection" to identify the connection between a wetland and a covered water and as described in the previous paragraph it means 'indistinguishable." The term "indistinguishable" was selected over "continuous surface connection" because that term is more exact and it was used by Justice Scalia to describe what he meant by "continuous surface connection." This also reduces any potential confusion with the term "continuously flowing."

This approach adopts the Corps 1987 Manual which responds to the debate over "adjacent" and precludes the EPA from regulating land or other features between the wetlands and the covered waters. US Army Corps of Engineers. *Corps of Engineers Wetlands Delineation Manual: Technical Report Y-87-1*. U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. 1987. This again avoids the regional variations which often swallow the rule and provides the brightest line for the regulators and regulated public.

[iv] (a)(4) is meant to capture all of the examples listed by Justice Scalia in *Rapanos* which are not "Waters of the United States." We request that the EPA and Corps include in the preamble to their rule Justice Scalia's list of exclusions, as well as those examples provided in individual comment letters to help illustrate various scenarios. This will provide necessary clarity and intent during implementation to show clearly what is not "Waters of the United States". The list as provided by Justice Scalia's plurality in *Rapanos* includes:

> Ditches, including roadside ditches, manmade ditches, and irrigation ditches;

> Drains; Channels that provide only drainage, such as from rainfall; Conduits; Highly artificial, manufactured, enclosed conveyance systems; Discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, main, pipe, hydrant, machinery, building, and other appurtances and incidents of systems of water works; Ephemeral streams; Wet meadows; Storm sewers; Culverts; Directional sheet flow during storm events; Drain tiles; Storm drains systems; Man-made drainage ditches; Typically dry land features such as arroyos, coulees, washes, and channels; Transitory puddles; Floods and inundations; and Intrastate waters, whether navigable or not.

[v] Groundwater should include groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters.

[vi] This definition directly addresses Justice Scalia's explanation for when wetlands are covered by the rule:

> "Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in SWANCC." *Rapanos*, 547 U.S. at 741.

To: Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Wesson, Dolores[Wesson.Dolores@epa.gov]
From: Christensen, Damaris
Sent: Wed 7/12/2017 7:04:07 PM
Subject: FW: REMINDER! TOMORROW, LGAC Executive Committee Teleconference, Thursday, July 13th, 3:00-4:00 EST-Call in: Nonresponsive Conference Code/ Ex. 6 and meeting materials
EC-Agenda-July13-2
LGAC-WOTUS DRAFT Report 1.3.1-June97.pdf
LGAC Final TransmittalLetter-WOTUS-July13-17.pdf

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

From: Eargle, Frances
Sent: Wednesday, July 12, 2017 2:04 PM
To: mayor <mayor@greensburgks.org>; Jill Duson < Personal Email / Ex. 6 >; Robert Cope Personal Email / Ex. 6 DuPree, Mayor Johnny L. <jdupree@hattiesburgms.com>; Susan Hann < Personal Email / Ex. 6 Elizabeth B. Kautz <Elizabeth.Kautz@burnsvillemn.gov>; Hector F. Gonzalez <hgonzalez@ci.laredo.tx.us>; Karen Freeman-Wilson <kfreemanwilson@ci.gary.in.us>
Cc: Erika Martinez <emartinez8@ci.laredo.tx.us>; Macheal Collins <Macheal.Collins@burnsvillemn.gov>; Joi Whiteside <jwhiteside@ci.gary.in.us>; Lyons, Troy <lyons.troy@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>; Bangerter, Layne <bangerter.layne@epa.gov>; Cory, Preston (Katherine) <Cory.Preston@epa.gov>; Bowles, Jack <Bowles.Jack@epa.gov>; Matthews, Demond <matthews.demond@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: REMINDER! TOMORROW, LGAC Executive Committee Teleconference, Thursday, July 13th, 3:00-4:00 EST-Call in: Nonresponsive Conference Code/ Ex. 6 genda and meeting materials

Reminder! TOMORROW, LGAC Executive Committee Teleconference, Thursday, July 13th, 3:00-4:00 EST

Good Afternoon,

The LGAC Executive Committee will meet **TOMORROW, Thursday, July 13th, 3:00-4:00 EST**. The call in number is **Nonresponsive Conference Code/ Ex. 6** he EC will

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks!

Fran Eargle

202-564-3115

Attachments:

-EC July 13th Agenda

-LGAC Final Waters of the U.S. Report

-LGAC Transmittal Letter (Final)

Local Government Advisory Committee

Hon. Bob Dixson, Chairman
Greensburg, Kansas
Hon. Jill Duson, Vice – Chairwoman
Portland, Maine
Ms. Susan Anderson
Portland, Oregon
Hon. Norm Archibald
Abilene, Texas
Hon. Kitty Barnes
Catawba County, North Carolina
Mr. Rodney Bartlett (SCAS)
Peterborough, New Jersey
Hon. Andy Beerman
Park City, Utah
Hon. David Bobzien
Reno, Nevada
Mr. Scott Bouchie
Mesa, Arizona
Hon. Stephanie Chang
State of Michigan
Hon. Robert Cope
Salmon, Idaho
Hon. Hardie Davis
Augusta, Georgia
Hon. Kim Driscoll
Salem, Massachusetts
Hon. Johnny DuPree
Hattiesburg, Mississippi
Hon. Karen Freeman-Wilson
Gary, Indiana
Dr. Hector Gonzalez, M.D.
Laredo, Texas
Ms. Teri Goodmann
Dubuque, Iowa
Hon. Manna Jo Greene
Ulster County, New York
Ms. Susan Hann
Breavard County, Florida
Hon. Elizabeth Kautz
Burnsville, Minnesota
Hon. Cynthia Koehler
Marin County, California
Hon. Merceria Ludgood
Mobile County, Alabama
Hon. Sal Panto
Easton, Pennsylvania
Hon. Brad Pierce
Aurora, Colorado
Hon. Victoria Reinhardt
Ramsey County, Minnesota
Hon. Mary Casillas Salas
Chula Vista, California
Mr. Kevin Shafer
Milwaukee, Wisconsin
Hon. Tom Sloan
State of Kansas
Hon. Mark Stodola
Little Rock, Arkansas
Hon. Ryan Sundberg
Humboldt County, California
Samara Swanston, Esq.
New York, New York
Hon. Stephen T. Williams
Huntington, West Virginia
Hon. Miro Weinberger
Burlington, Vermont
Mr. Jeff Witte
State of New Mexico
Hon. Shawn Yanity
Stillaguamish Tribe, Washington
Hon. Dawn Zimmer
Hoboken, New Jersey

Frances Eargle, DFO

July 14, 2017

Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Administrator Pruitt:

We are writing on behalf of your Local Government Advisory Committee (LGAC), which is composed of 35 elected and appointed officials of state, local and tribal government. We very much appreciate the opportunity to provide input on clarifying the regulatory status of "Waters of the United States" (WOTUS). We also commend your leadership in recognizing and resolving the regulatory confusion and complexity of WOTUS by issuing a new rule.

The LGAC has been engaged in 'Waters of the United States' since May 2014. Through a series of outreach meetings and conference calls, the LGAC has heard over 60 hours of comments and recommendations from our colleagues across the United States. The *LGAC Waters of United States 2017 Report* is a compilation of recommendations from a diverse group of local leaders who have experienced the current regulatory framework.

One of the most important themes we have heard (and experienced) is the lack of clarity and predictability in the current permitting process. The EPA's enhanced partnership with the U.S. Army Corps of Engineers is a tremendous step towards resolving these issues that impede economic growth and hamper public infrastructure projects.

Although permitting is a complex issue, some practical solutions such as establishing a less than 90 -day time frame for jurisdictional determinations can significantly ease the regulatory uncertainty. In addition, state-specific or region-specific criteria can be developed to provide much needed flexibility within a national standard. The LGAC also supports exemptions such as ditches, stormwater management systems, green infrastructure, normal farming practices and converted crop lands.

Additional exemptions may be appropriate at the regional level, such as in the West with ephemeral streams.

The approach the LGAC puts forward also invites an enhanced state and local role in implementing the Clean Water Act Section 404 and WOTUS. Local governments are very interested in being part of the solution, but will need dedicated resources to fully assist through assumption of the Section 404 program and for greater utilization of state and regional general permits.

As local government officials, the availability and accessibility of clean and safe water is one of our highest priorities. Source water protection is a key element and certain water bodies may need case-specific jurisdictional reviews. The LGAC recommends that EPA work with state and local government to identify these significant waterbodies and provide maps of these areas. Improving transparency and predictability will ease the regulatory uncertainty that currently exists. The LGAC acknowledges that there were many comments we received during our work on the Charge. The LGAC encourages the EPA to consider all of the various comments the agency receives in the rule-making process.

In summary, the LGAC appreciates your leadership and collaboration with local, tribal and state partners. We offer our continued assistance to you, Administrator Pruitt, and to the team at EPA as you move forward. The opportunity exists to develop a clear and predictable regulatory framework that will protect source water and provide clean, safe and affordable water for the American people while promoting sustainable economic development. Thank you for the opportunity to comment and for your consideration of our recommendations.

Sincerely,

Mayor Bob Dixson
Chairman

Ms. Susan Hann, P.E.
Chairwoman, Protecting America's Waters Workgroup

Commissioner Dr. Robert Cope, DVM
Chairman, Small Community Advisory Subcommittee (SCAS)

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

Dr. Hector Gonzalez, M.D.
Chairman, Environmental Justice (EJ) Workgroup

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE

7/13/2017

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 Dixson,
LGAC Chairman

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"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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Executive Summary

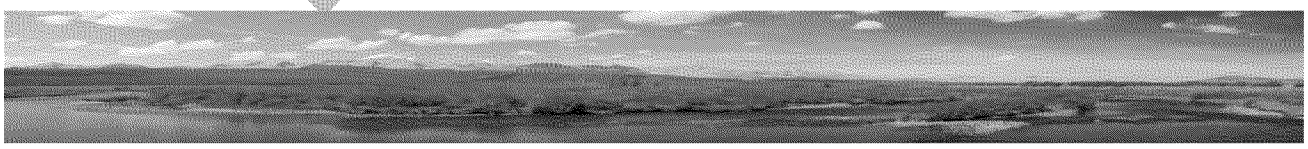
I. Introduction and Background
A. EPA's Proposed Waters of the U.S. Rule
B. Committee Charge
C. Historical Context

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

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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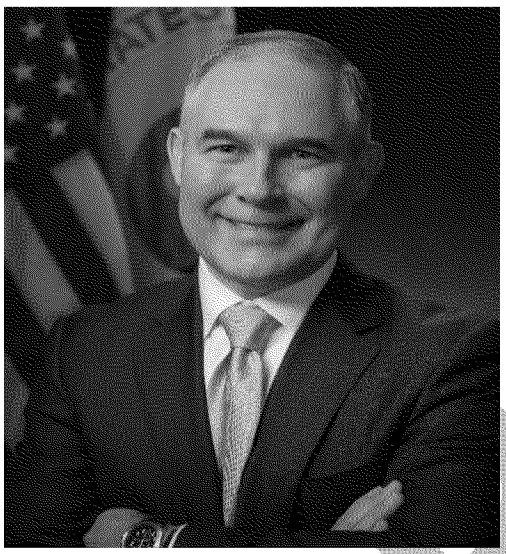
I. Introduction and Background

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 expeditious, 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 6t h 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.

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 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***

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.

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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 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)

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

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 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.

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

II. Water and Our Communities

A. Water: Our Nation's Health and Wealth

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

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 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.[4] 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.

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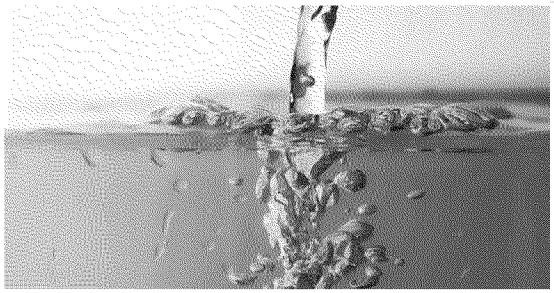
Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred directly to rate payer ***- at the tap.***



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.

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"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 forums 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."

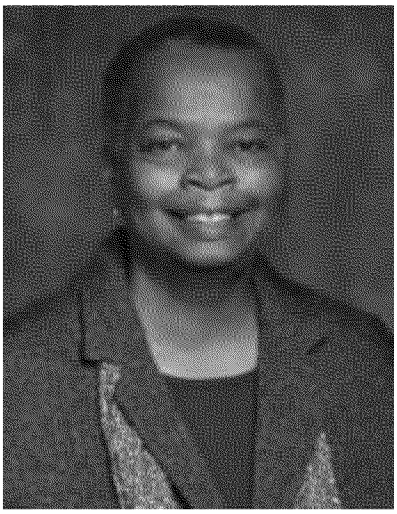
Judy Sheahan, Assistant Executive Director
The U.S. Conference of Mayors

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

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"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

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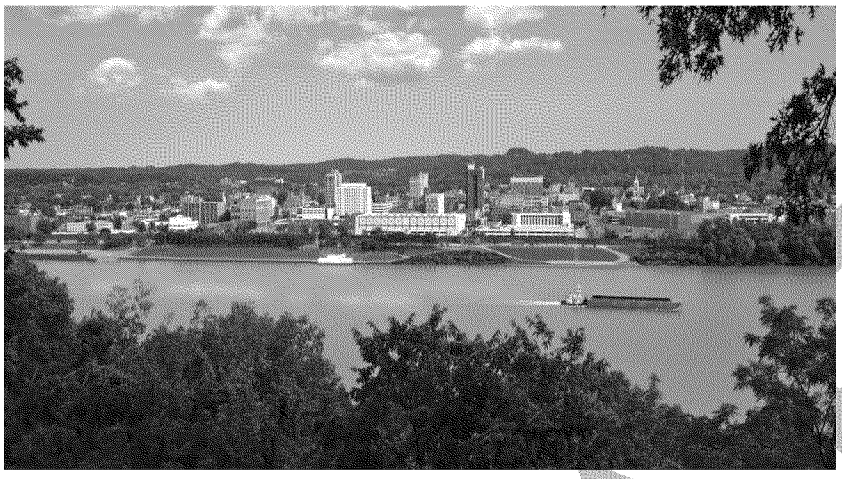
Key terms used in the *2015* WOTUS rule *were* vague such as: "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring". But they are also important in defining what waters are jurisdictional. These terms are either broadly defined, or not defined at all which has led to further confusion, not less, over what waters fall within federal jurisdiction. Local governments need a rule that 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.



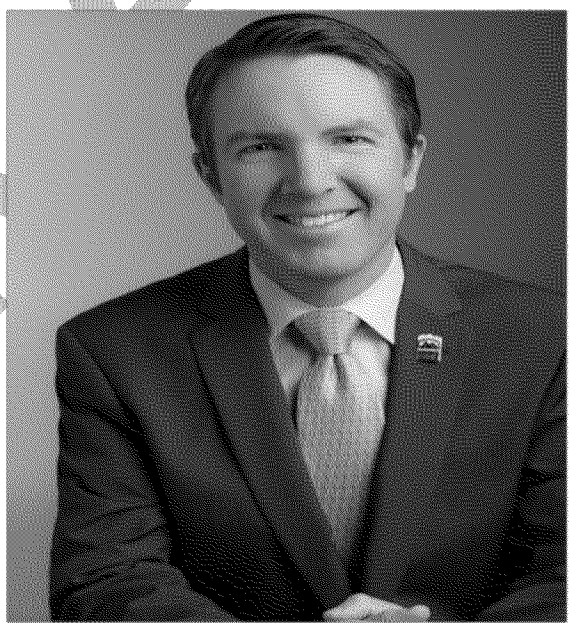
Ohio River, City of Huntington, West Virginia
Photo Source: Huntington Quarterly

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

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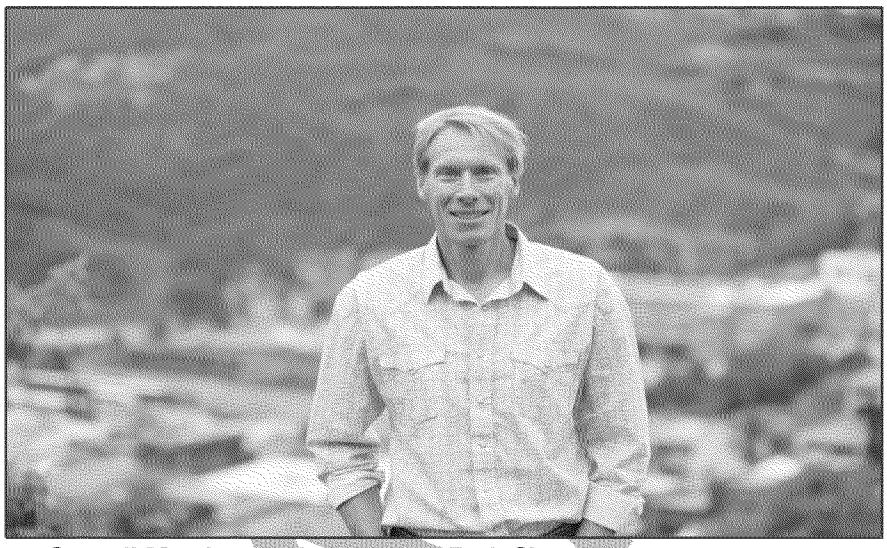
"Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts." **Council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

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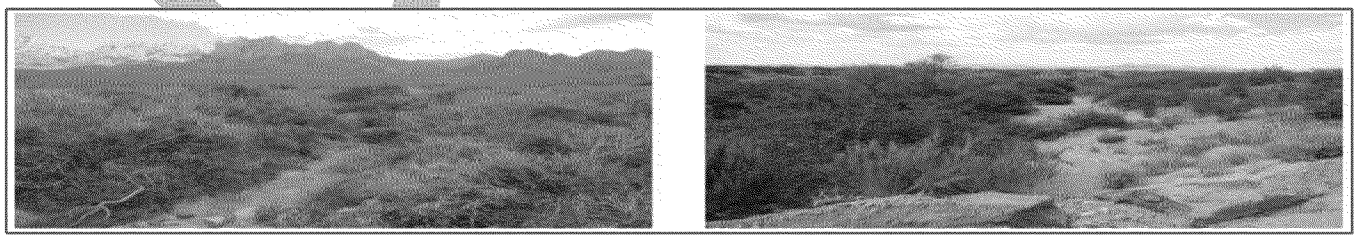

"Arroyos are common geographic water features in the arid west. The examples in these photographs are non-permanent, ephemeral waters that only carry water during extreme precipitation events. This is an example of land structures which cause confusion under a one size fits all approach." Image Credit: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

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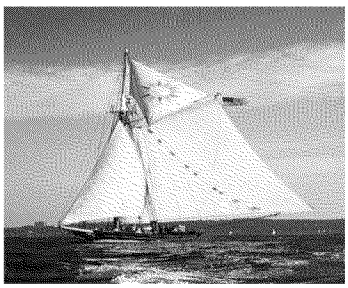
E. Enhanced State and Local Government Role

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

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

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.

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

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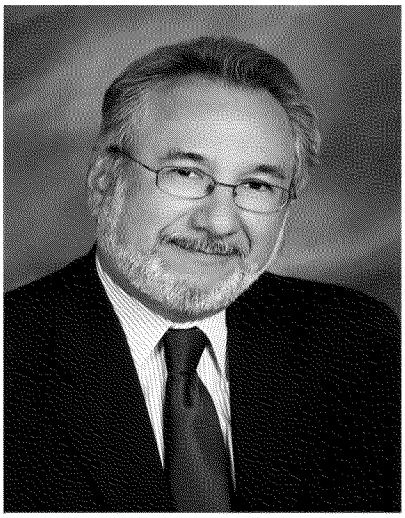
Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities' drinking water (source water) are regulated and protected. These significant water bodies form the assets of our water infrastructure and these areas may or may not fall 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 [illegible] tally important for all America[illegible] here in Michigan, we know this s[illegible] far too well because of the Flint [illegible] Crisis and continuing conversatio[illegible] about how we can ensure access to qu[illegible] drinking water. The WOTUS rul[illegible] st be carefully vetted to ensure th[illegible] ch level of government has the too[illegible] ources, and clarity it needs to en[illegible] clean water."

State Representative [illegible]hanie Chang, Michigan

State Representative Stephanie Chang, Michigan

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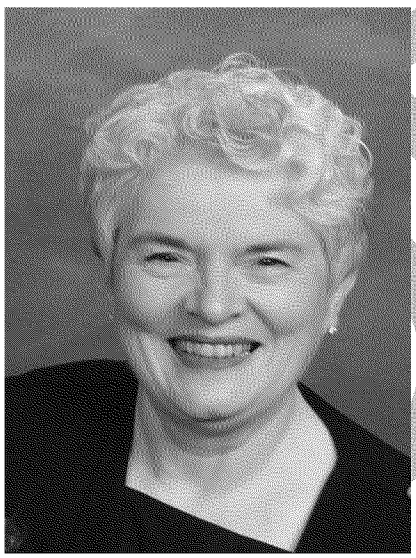
settling basins and recycled water facilities which depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. There has also been a major concern of county governments that roadside ditches are also exempt.

"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*

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 water recycling.[5]

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.



Commissioner Victoria Reinhardt, Ramsey County, MN

"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.

[5] 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."

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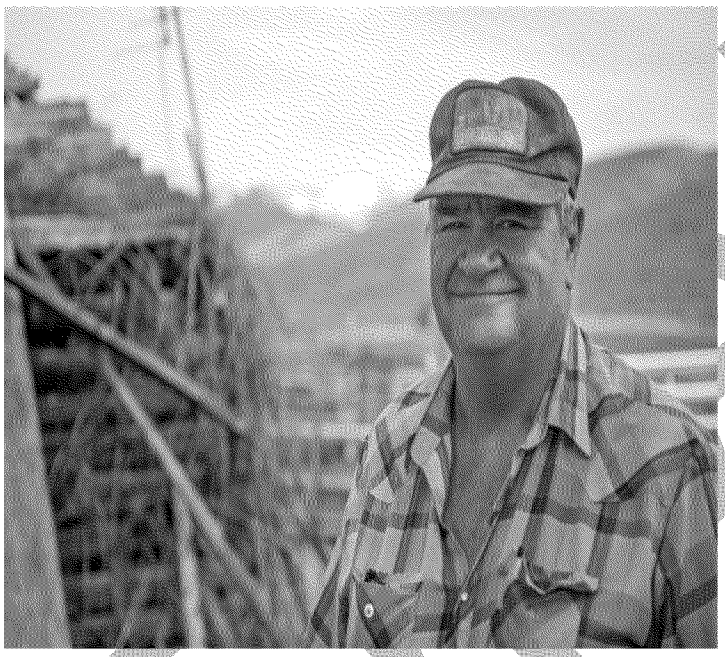
Permitting can be made more efficient and more effective. For example, permitting can be done more efficiently and in less time (less than 90 days). It can also be more flexible, decentralized and integrated with community goals. Local governments would be generally in favor of the State Assumption of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

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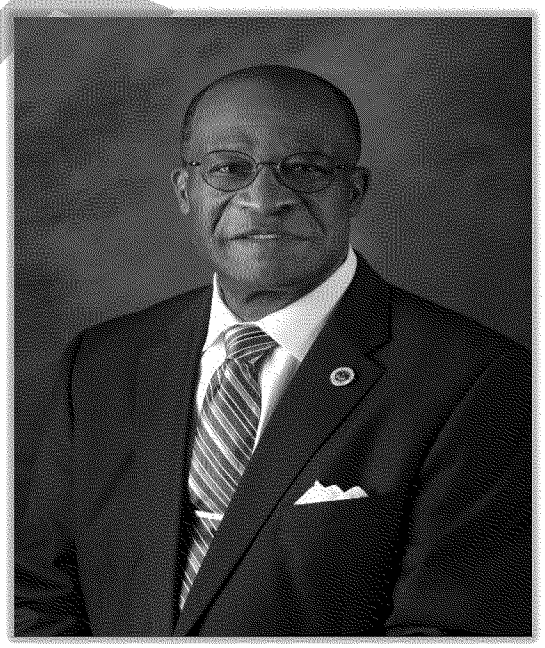
Fencing Livestock, Lexington, KY-Photo Source, Eric Vance, EPA

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.

"'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, MS

Vice-Chair, Small Community Advisory Sub-Committee

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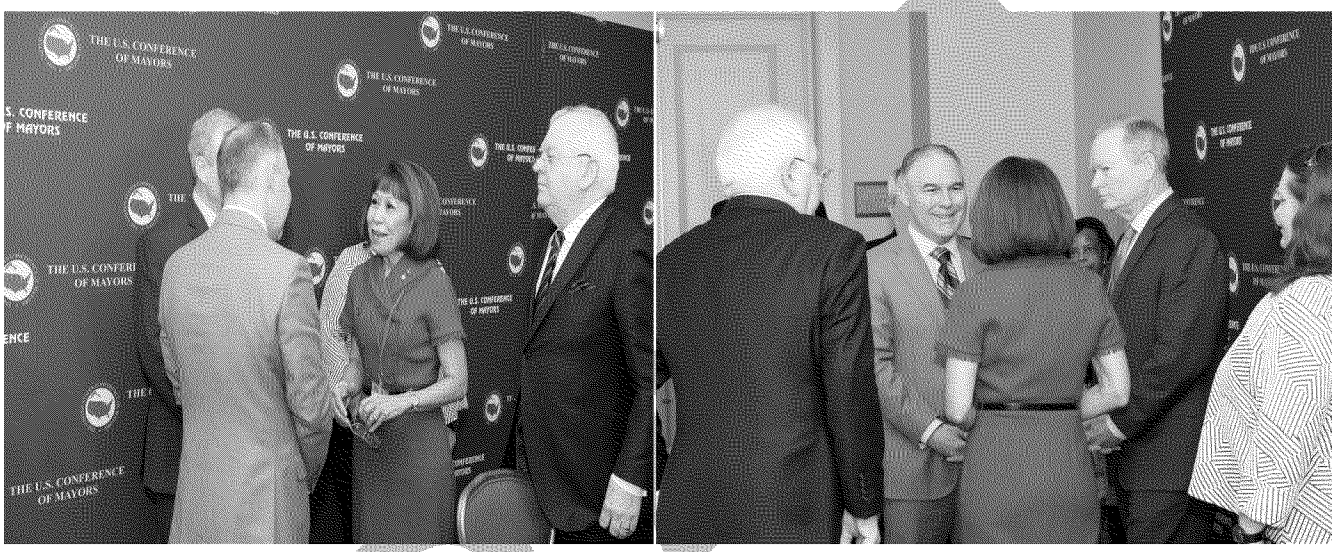
J. Outreach to Local Governments

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

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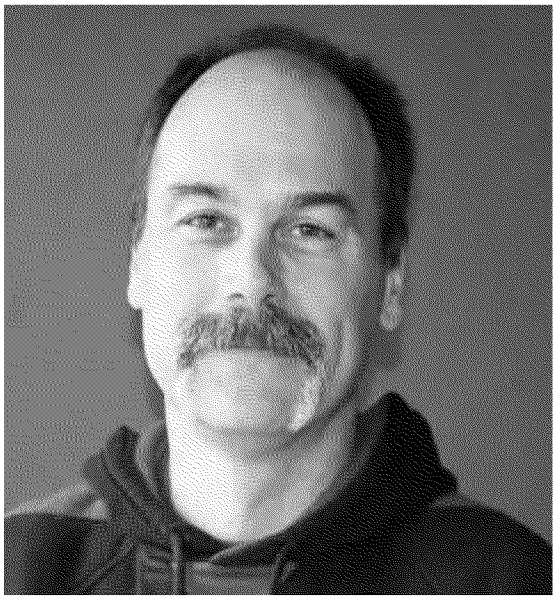

Chairman Shawn Yanity, Stillaguamish Tribe

From the snow cap mountains to the ocean, water is- - and always- will play a crucial role in tribal culture and life. Clean water sustains our food sources, especially salmon and shellfish. 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

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"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.

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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.

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- 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)

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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 n ot necessarily constitute federal standards (such as the Science Advisory Board's Connectivity Report).[6]

- 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.

[6] 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.

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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 wit hin 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.

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- **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

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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, disproportionally 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

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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

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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.

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- 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)

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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

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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).

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- 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

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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)

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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)

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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.

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- 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.[7]

[7] "Wetlands Protection." Michigan Department of Environmental Quality. www.mi.gov/wetlands.

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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)

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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.

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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?**

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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.

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- 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

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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

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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

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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

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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.*

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Roster of LGAC Members

Waters of the United States
2017 Report

2017 ROSTER LGAC AND SCAS MEMBERS

Chair of LGAC

The Honorable Bob Dixson
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

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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
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

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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

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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

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APPENDIX 2

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE (LGAC) DRAFT 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).[8] 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 [9] 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

[8] https://www.whitehouse.gov/the pres-office/2017/02/28/presidential-exeuctive-order-restoring-rule-law-federalism-and-economic
[9] Rapanos v. United States, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 LEd. 2d 159

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same time promoting economic growth and minimizing regulatory uncertainty. The following are specific charge questions and issues for the LGAC to consider:

Charge Questions

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.

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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)

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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.

Request for EPA Response: The EPA should conduct the consultation procedure outlined by E.O. 13132.
Request for EPA Response: 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 the 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 (l)(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 (l)(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 or by phone at (515) 883-0925. Mr. Miller can assist the Agency in contacting those cities that have signed onto these comments.

Sincerely,

Alan W. Kemp
Executive Director

DRAFT

TOM SLOAN
REPRESENTATIVE, 45TH DISTRICT
DOUGLAS COUNTY

STATE CAPITOL, 521-E
300 SW 10TH AVENUE
TOPEKA, KANSAS 66612
(785) 296-7632
1-800-432-3924

772 HWY 40
LAWRENCE, KANSAS 66049-4174
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tom.sloan@house.ks.gov

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIRMAN: WATER AND ENVIRONMENT

MEMBER: AGRICULTURE
AGRICULTURE AND NATURAL RESOURCES BUDGET
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,

Tom Sloan

Dr. Thomas J. Sloan

Kansas' 45th District Representative

Aurora Water
City of Aurora
Water Administration
15151 E. Alameda Parkway, Ste. 3600
Aurora, Colorado 80012
303.739.7370
Worth Discovering • auroragov.org

May 15, 2017

Submitted via email to:
Donna Downing — CWAwotus@epa.gov
Andrew Hanson — Hanson.Andrew@epa.gov

Dear Ms. Downing and Mr. Hanson:

Thank you for the opportunity to provide some initial comments on t he 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 variousorganizations 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 su bmitted 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

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The potential approaches to include streams with seasonalflows or streams with another nteasure offlow 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,

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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.

Sincerely,

Marshall P. Brown

cc: Brad Pierce, Aurora City Council

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DRAFT

DRAFT

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DRAFT

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.

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D. **Summary Comments:**

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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.

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]
From: Hewitt, Julie
Sent: Thur 6/29/2017 9:36:39 PM
Subject: RE: econ analysis is live on web

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Thursday, June 29, 2017 5:33 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: econ analysis is live on web

Deliberative Process / Ex. 5

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

On Jun 29, 2017, at 5:23 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

Greg,

Deliberative Process / Ex. 5

Many thanks, Rose!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Matthews, Demond
Location: Nonresponsive Conference Code/ Ex. 6
Importance:
Subject: SCAS Public Meeting Teleconference
Start Date/Time: Thur 6/29/2017 5:00:00 PM
End Date/Time: Thur 6/29/2017 5:45:00 PM
LGAC-WOTUS DRAFT Report 1.2-June27.pdf
SCAS-Agenda-June 29-2017.docx

******* Waters of the United States 2017 Draft Report added *******

******* Agenda updated*******

Good Afternoon Small Communities Advisory Subcommittee Members,

The SCAS will have a public meeting **Thursday, June 29, 1:00-1:50pm EDT.** Topics discuss will be an update of EPA agricultural issues, EPA Updates, Waters of the U.S. (WOTUS) update as well as an opportunity for the public to provide comments. Members will be afforded the opportunity to move on the WOTUS Draft Report to the full LGAC Committee. The call in number is: Nonresponsive Conference Code/ Ex. 6

The agenda attached.

The LGAC Full Committee meeting will follow the SCAS meeting on Thursday, June 29 at 2:00pm - 3:00pm EDT.

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE'S

6/27/2017

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

DRAFT

EPA's Local Government Advisory Committee's

WATERS OF THE UNITED STATES 2017 REPORT

DRAFT

Executive Summary

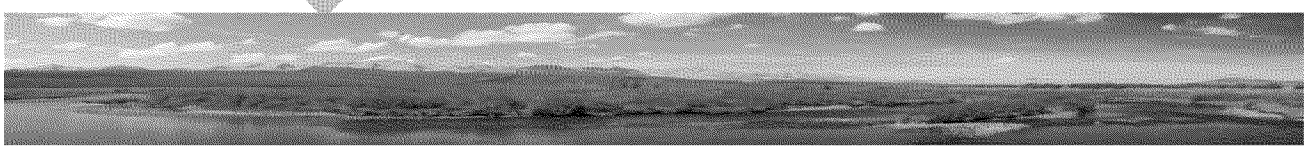
I. Introduction and Background
A. EPA's Proposed Waters of the U.S. Rule
B. Committee Charge
C. Historical Context

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.

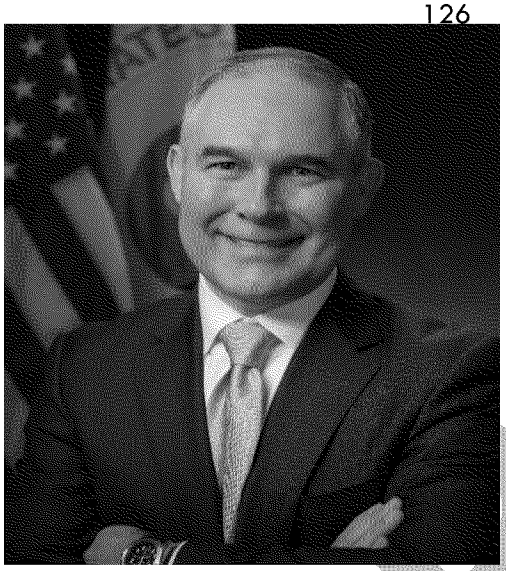
In summary, the LGAC Waters of the United States 2017 report delivers a series of recommendations that can assist EPA in evolving the regulatory framework in a way that collaborates with local governments, improves efficiency and effectiveness and advances the goal of clean, safe and affordable drinking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

DRAFT

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

DRAFT

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 proposed 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 the 2015 Waters of the U.S. Rule. The U.S. Environmental Protection Agency and the U.S. Army Corp of Engineers proposed a joint rule (2014) to clarify the definition of "waters of the United States" 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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II. Water and Our Communities

A. Water: Our Nation's Health and Wealth

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

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 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.[4] 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.

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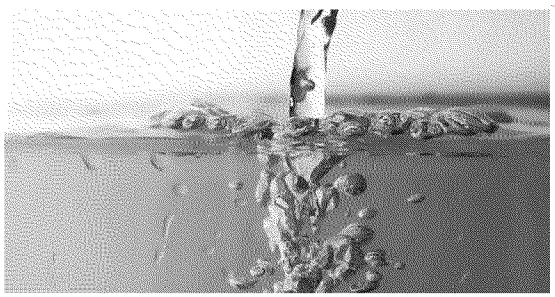
Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred directly to rate payer ***- at the tap.***



"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 tenants 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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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 forums 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."

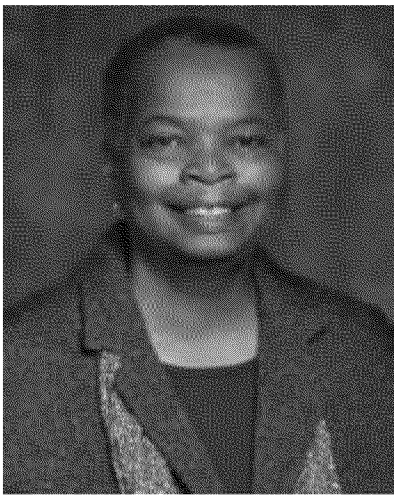
Judy Sheahan, Assistant Executive Director
The U.S. Conference of Mayors

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

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"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

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322 **Mayor Karen Freeman-Wilson, Gary, IN**

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324 ## C. Clarity and Predictability

325

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

"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

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330 Supervisor Ryan Sundberg, Humboldt County, CA

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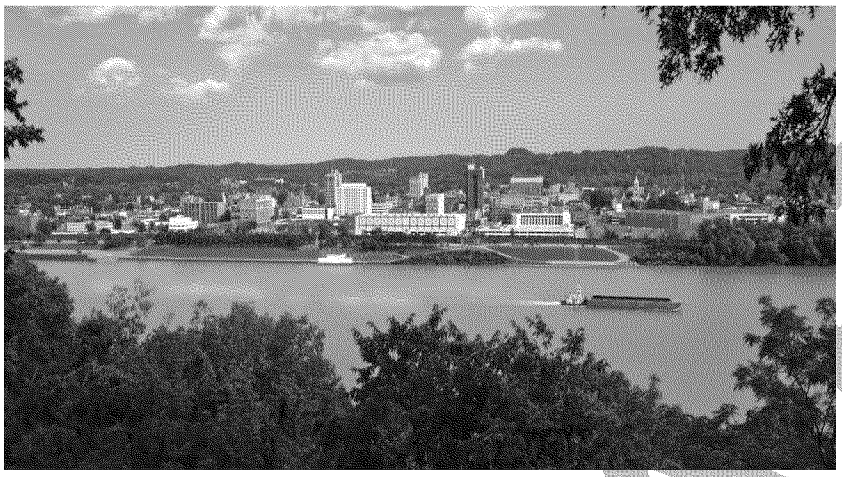
Key terms used in the WOTUS rule are vague such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" but are also important in defining what waters are jurisdictional. These terms are either broadly defined, or not defined at all which has led to further confusion, not less, over what waters fall within federal jurisdiction. Local governments need a rule that 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

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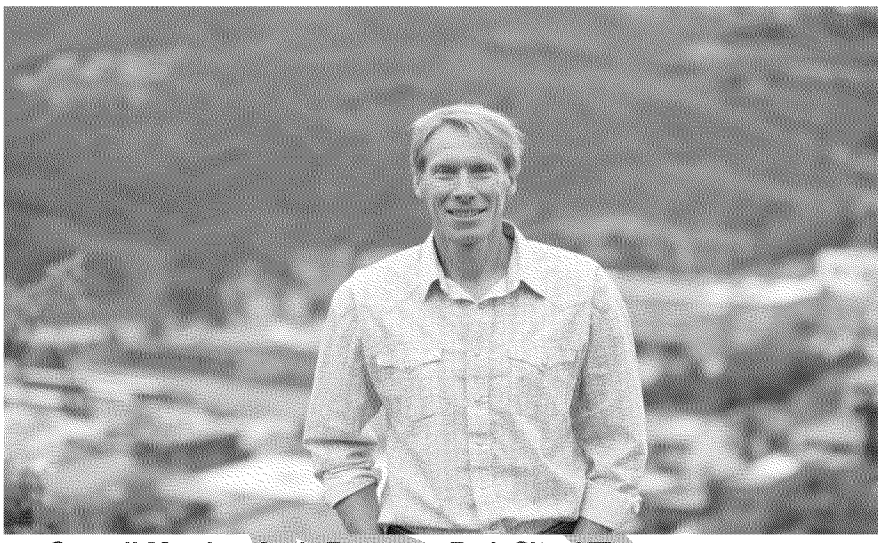
"Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts." **Council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



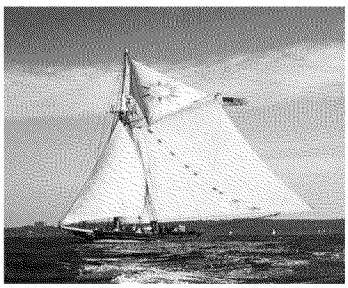
Council Member Andy Beerman, Park City, UT

Western arid streams may need further regional determinations as to whether these areas are washes and 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.

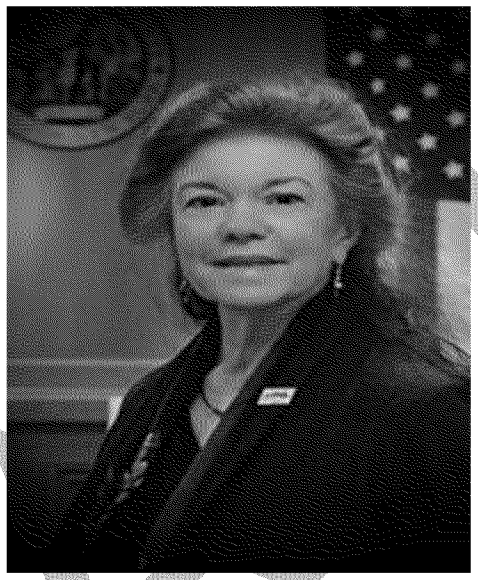
E. Enhanced State and Local Government Role

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. See* 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

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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

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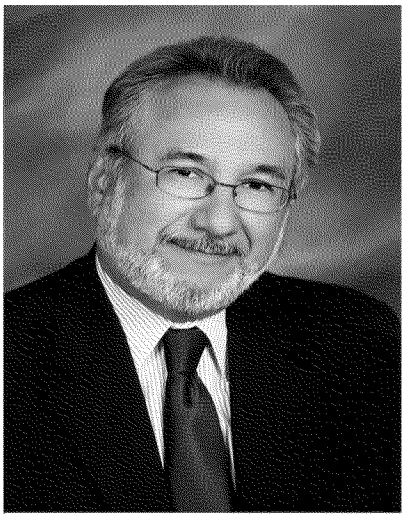
Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities' drinking water (source water) are regulated and protected. These significant water bodies form the assets of our water infrastructure and these areas may or may not fall 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.



"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

State Representative Stephanie Change, Michigan

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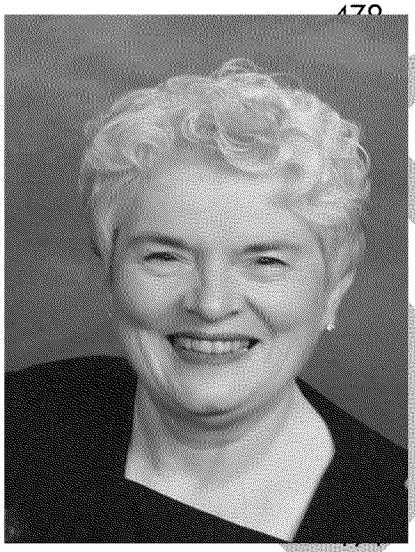
settling basins and recycled water facilities which depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. There has also been a major concern of county governments that roadside ditches are also exempt.

"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

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 water recycling.[5]

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

[5] 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."

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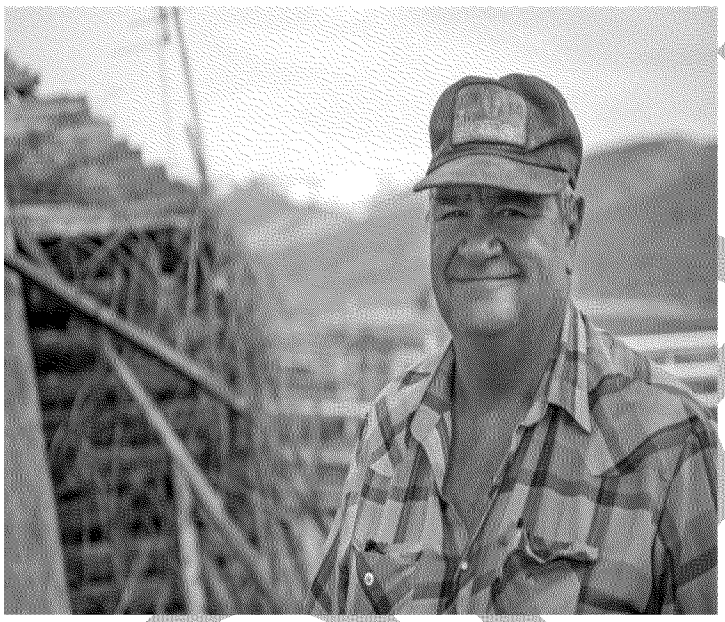
Permitting can be made more efficient and more effective. For example, permitting can be done more efficiently and in less time (less than 90 days). It can also be more flexible, decentralized and integrated with community goals. Local governments would be generally in favor of the State Assumption of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

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).

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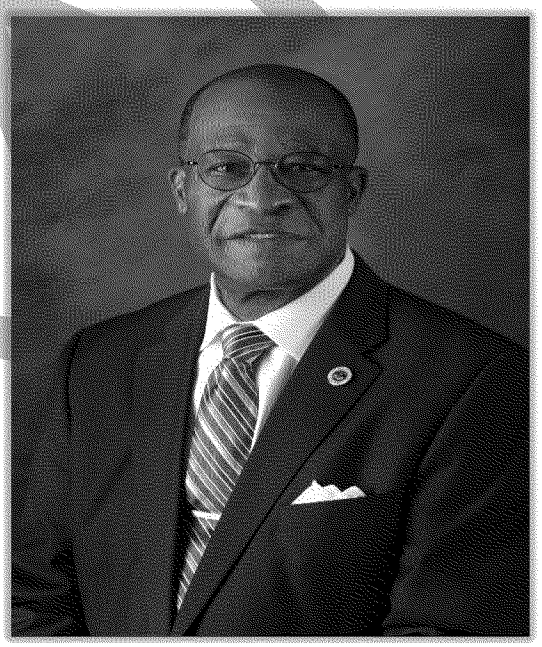
However, if the land changes to a non-agricultural use, or is abandoned, according to the criteria established by the Corps and EPA, it may be regulated under the CWA. These issues combined with the complexity of the WOTUS and the role of the NRCS poses significant issues for the agricultural sector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



Mayor Johnny DuPree, Ph.D., Hattiesburg, MS Vice-Chair, Small Community Advisory Sub-Committee

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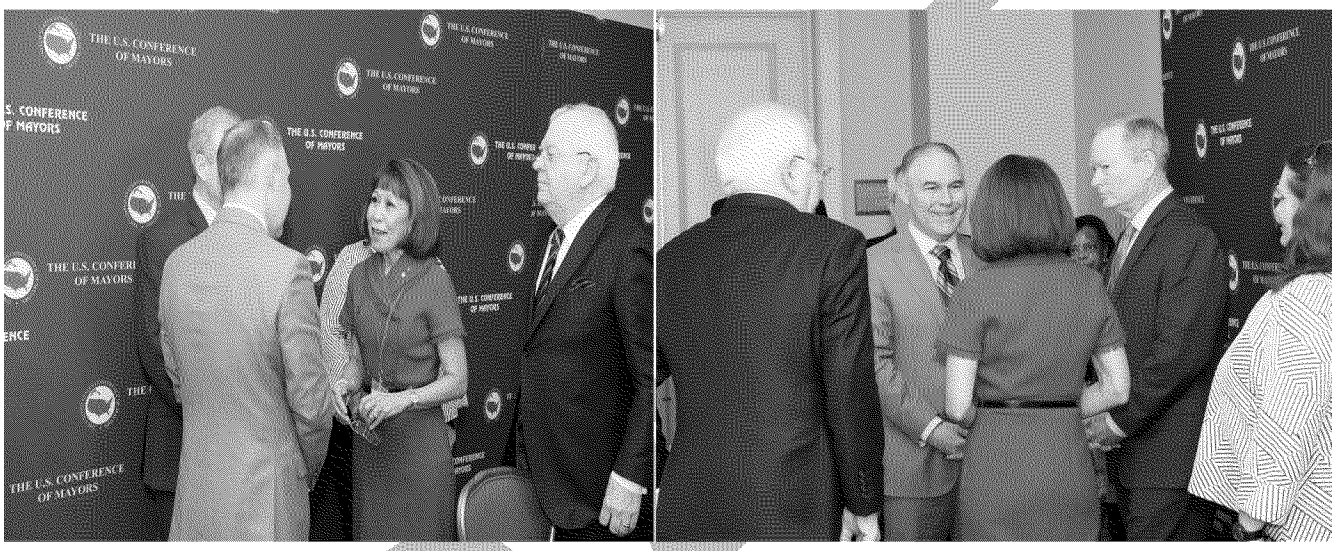
J. Outreach to Local Governments

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 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

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 that only serve to reduce local government resources and 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.

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

Mayor Sal Panto, Easton, PA

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

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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 offflow 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".

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- Wetlands that directly touch jurisdictional waters are 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).

- 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'.

- 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 Kennedy test (significant nexus). 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

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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 n ot constitute federal standards (such as the Science Advisory Board's Connectivity Report).[6]

- 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.

[6] 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.

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- 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.

Permanent Bodies of Water:

- Many wetlands are seasonal and have been addressed above. For those 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 flo w, 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 on 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)

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- **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. (Goodmann 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 rule 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?**

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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, disproportionally 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

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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 on 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 rule 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 final rule 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 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.

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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.

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Recommendations:

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

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- 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.

- EPA should task an Interagency Workgroup to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review.

- Definitions should be practical, written in plain English, and be enforceable.

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

- The public should have the opportunity to comment on revised definitions.

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

- The LGAC recommends that EPA consider the following when defining these terms:

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

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- '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.

[SCAS to include strike language]

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. 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. (GAC 2014 Report)

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,

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disproportionately low income communities do not have access to drinking water and source water is the only source of 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.

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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. (Goodmann 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. (Goodmann 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)

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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

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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. (Goodmann Letter)

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- 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.

- 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)

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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.[7]

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)

[7] "Wetlands Protection." Michigan Department of Environmental Quality. www.mi.gov/wetlands.

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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 rule 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)

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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.

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)

Recommendations:

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.*

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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. (Goodmann 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 rule 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

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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.

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

- 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.

- 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.

- 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.

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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.

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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. (Goodmann Letter)

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. 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 considered a "Waters of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards. (Goodmann 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'. (Goodmann Letter)

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 (Goodmann letter).

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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.

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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.*

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Roster of LGAC Members

Waters of the United States
2017 Report

2017 ROSTER LGAC AND SCAS MEMBERS

Chair of LGAC

The Honorable Bob Dixson
Mayor, Greensburg, KS
Greensburg, KS

Chair of SCAS

The Honorable Robert Cope
Commissioner, Planning and Zoning, Salmon, ID
Salmon, ID

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, MA

The Honorable Miro Weinberger
Mayor, City of Burlington
Burlington, VT

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, NY

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1658
1659 The Honorable Dawn Zimmer
1660 Mayor, Hoboken, NJ
1661 Hoboken, NJ
1662
1663 The Honorable Manna Jo Greene
1664 County Legislator, Ulster County, NY
1665 District 19 Rosendale, NY
1666
1667 Region 3
1668
1669 The Honorable Sal Panto, Jr.
1670 Mayor, City of Easton
1671 Easton, PA
1672
1673 The Honorable Stephen T. Williams
1674 Mayor, Huntington, WV
1675 Huntington, WV
1676
1677 Region 4
1678
1679 The Honorable Merceria Ludgood
1680 Commissioner, Mobile County
1681 Mobile County, AL
1682
1683 The Honorable Johnny DuPree, Ph.D.
1684 Mayor
1685 Hattiesburg, MS
1686
1687 The Honorable Kitty Barnes
1688 Commissioner, Catawba County, NC
1689 Terrell, NC
1690
1691 The Honorable Hardie Davis
1692 Mayor, City of Augusta, GA
1693 Augusta, GA
1694
1695 Ms. Susan Hann
1696 Director, Planning Palm Bay County Schools, FL
1697 Palm Bay County, FL
1698
1699
1700 Region 5
1701
1702 The Honorable Stephanie Chang
1703 State Representative- House District 6
1704 State of Michigan

1705 The Honorable Victoria Reinhardt
1706 Commissioner, Ramsey County, MN

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St. Paul, MN

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

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

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

Region 6

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

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

Jeff Witte
Secretary of Agriculture, New Mexico
New Mexico

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

Region 7

Teri Goodmann
Assistant City Manager, City of Dubuque
Dubuque, IA

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

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Region 8

The Honorable Andy Beerman
City Councilor
Park City, UT

The Honorable Brad Pierce
Council Member, City of Aurora, CO
Aurora, CO

Region 9

The Honorable Cynthia Koehler
Board of Directors, Marin County
Marin County, CA

The Honorable David Bobzien
City Councilmember At-Large - City of Reno
Reno, NV

The Honorable Mary Casillas Salas
Mayor, City of Chula Vista
Chula Vista, CA

Scott Bouchie
Environmental Management and Sustainability Director - City of Mesa
Mesa, AZ

The Honorable Ryan Sundberg
Supervisor, Humboldt County, CA
Humboldt County, CA

Region 10

Susan Anderson
Director, Portland Bureau of Planning and Sustainability
Portland, OR

The Honorable Shawn Yanity
Chairman, Stillaguamish Tribe
Arlington, WA

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APPENDIX 2

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE (LGAC) DRAFT 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).[8] 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*[9] 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

[8] https://www.whitehouse.gov/the pres-office/2017/02/28/presidential-exeuctive-order-restoring-rule-law-federalism-and-economic
[9] Rapanos v. United States, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 LEd. 2d 159

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same time promoting economic growth and minimizing regulatory uncertainty. The following are specific charge questions and issues for the LGAC to consider:

Charge Questions

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

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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)

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Small Community Advisory Subcommittee (SCAS)

Thursday, 29 June, 2017
1:00 pm - 1:50 pm (EDT)

Nonresponsive Conference Code/ Ex. 6

SCAS Members:

Commissioner Robert Cope, Chair
Secretary Jeff Witte
Chairman Shawn Yanity
Councilor Andy Beerman
Mayor Johnny Dupree, Vice-Chair
Supervisor Ryan Sundberg
Mayor Bob Dixson
Mr. Rodney Bartlett

Workgroup Agenda

1:00pm — **Introduction/Welcome**
Commissioner Robert Cope, Chairman
Mayor Johnny DuPree, Vice-Chairman

1:05 - 1:10pm — **EPA Updates**
Tate Bennett
Deputy Associate Administrator for Intergovernmental Relations

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1:10 -1:15pm — **Agriculture Updates**
Chad Nitsch
State and Regional Partnerships
EPA's Office of Intergovernmental Relations

1:15-1:30pm — **Public Comment**

1:30-1:45pm — **Waters of the US (WOTUS) Update**
Mindy Eisenberg
EPA Office of Water
Office of Wetlands, Oceans and Watersheds

Stacey M Jensen
US Army Corps of Engineers

1:45-1:50pm — **Wrap Up/Next Steps**
Commissioner Robert Cope, Chairman

1:50 pm — **Adjournment**
Commissioner Robert Cope, Chairman

To: Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Campbell, Ann
Sent: Wed 6/28/2017 6:56:55 PM
Subject: FW: Signed Proposed Rule - Definition of the "Waters of the United States" Recodification of Pre-existing Rules
WOTUS STEP1.pdf

Did folks receive a copy of this? I'm assuming so because it's on the web…just want to be sure.

From: Threet, Derek
Sent: Tuesday, June 27, 2017 3:04 PM
To: Flynn, Mike <Flynn.Mike@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Graham, Amy <graham.amy@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>; Brown, Byron <brown.byron@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: Grantham, Nancy <Grantham.Nancy@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Hull, George <Hull.George@epa.gov>; Rees, Sarah <rees.sarah@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: Signed Proposed Rule - Definition of the "Waters of the United States" Recodification of Pre-existing Rules

Good afternoon,

The Definition of the "Waters of the United States" Recodification of Pre-existing Rules proposed rule was signed today by Administrator Pruitt and Douglas Lamont, of the Department of the Army. Attached is a scan of the rule.

Let me know if you have any questions.

Thanks.

Derek

****

Derek Jason Threet, Special Assistant

Office of the Administrator (OW, OECA, OEI, OCFO & OIG)

U.S. Environmental Protection Agency

1200 Pennsylvania Ave, N.W.

Washington, D.C. 20004

Telephone: (202) 564-1409

Office Cell Phone: Personal Phone / Ex. 6

6560-50-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA-HQ-OW-2017-0203; FRL-9962-34-OW]

RIN 2040-AF74

Definition of "Waters of the United States" – Recodification of Pre-existing Rules

AGENCIES: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army ("the agencies") are publishing this proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." This first step proposes to rescind the definition of "waters of the United States" in the Code of Federal

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Regulations to re-codify the definition of "waters of the United States," which currently governs administration of the Clean Water Act, pursuant to a decision issued by the U.S. Court of Appeals for the Sixth Circuit staying a definition of "waters of the United States" promulgated by the agencies in 2015. The agencies would apply the definition of "waters of the United States" as it is currently being implemented, that is informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding practice. Proposing to re-codify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the States, agency staff, and the public. In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of "waters of the United States."

DATES: Comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2017-0203, at http://www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The agencies may publish any comment received to the public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The agencies will generally not consider comments or comment contents located outside of the primary submission (i.e. on the

web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit http://www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION, CONTACT: Ms. Donna Downing, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-2428; e-mail address: *CWAwotus@epa.gov*; or Ms. Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street, NW, Washington, DC 20314; telephone number: (202) 761-5903; e-mail address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

The regulatory definition of "waters of the United States" in this proposed rule is the same as the definition that existed prior to promulgation of the Clean Water Rule in 2015 and that has been in effect nationwide since the Clean Water Rule was stayed on October 9, 2016. The agencies will administer the regulations as they are currently being implemented consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents.

State, tribal, and local governments have well-defined and longstanding relationships with the federal government in implementing CWA programs and these relationships are not altered by the proposed rule. This proposed rule will not establish any new regulatory requirements. Rather, the rule simply codifies the current legal *status quo* while the agencies

engage in a second, substantive rulemaking to reconsider the definition of "waters of the United States."

I. Executive Summary

A. What this proposed rule does

In this proposed rule, the agencies define the scope of "waters of the United States" that are protected under the Clean Water Act (CWA). In 2015, the agencies published the "Clean Water Rule: Definition of 'Waters of the United States'" (80 FR 37054, June 29, 2015), and on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court. The agencies propose to replace the stayed 2015 definition of "waters of the United States", and re-codify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit's October 9, 2015 order. The proposed regulatory text would thus replace the stayed rulemaking text, and re-codify the regulatory definitions (at 33 CFR 328 and 40 CFR Parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the Code of Federal Regulations (CFR) as they existed prior to the promulgation of the stayed 2015 definition. If this proposed rule is finalized, the agencies would continue to implement those prior regulatory definitions), informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

B. History and the purpose of this rulemaking

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* ("Clean Water Act" or "CWA" or "Act") "to restore and maintain the chemical, physical and

biological integrity of the Nation's waters." Section 101(a). A primary tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, to "navigable waters" except in accordance with the Act. Section 301(a). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." Section 502(7).

The CWA also provides that States retain their traditional role in preventing, reducing and eliminating pollution. The Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources..." Section 101(b). States and Tribes voluntarily may assume responsibility for permit programs governing discharges of pollution under section 402 for any jurisdictional water bodies (section 402(b)), or of dredged or fill material discharges under section 404 (section 404(g)), with agency approval. (Section 404(g) provides that states may not assume permitting authority over certain specified waters and their adjacent wetlands.) States are also free to establish their own programs under state law to manage and protect waters and wetlands independent of the federal CWA. The statute's introductory purpose section thus commands the Environmental Protection Agency (EPA) to pursue two policy goals simultaneously: (a) to restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution.

The regulations defining the scope of federal CWA jurisdiction currently in effect, which today's proposed rule would recodify, were established in large part in 1977 (42 FR 37122, July 19, 1977). While EPA administers most provisions in the CWA, the U.S. Army Corps of Engineers (Corps) administers the permitting program under section 404. During the 1980s, both

of these agencies adopted substantially similar definitions (51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2).

Federal courts have reviewed the definition of "waters of the United States" and its application to a variety of factual circumstances. Three Supreme Court decisions, in particular, provide critical context and guidance in determining the appropriate scope of "waters of the United States."

In *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." *Id.* at 134.

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The *SWANCC* decision created uncertainty with regard to the jurisdiction of other isolated non-navigable waters and wetlands. In January 2003, EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC* ("the 2003 Guidance"). The guidance indicated that *SWANCC* focused on isolated, intrastate, non-navigable waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations which asserted jurisdiction for waters under 33 CFR 328.3(a)(3)(i-iii). Waters that were jurisdictional pursuant to 33 CFR 328.3(a)(3) could no longer be determined jurisdictional based solely on their use by migratory birds.

Five years after the *SWANCC* decision, in *Rapanos* v. *United States*, 547 U.S. 715 (2006) (*Rapanos*), a four-Justice plurality opinion in *Rapanos*, authored by Justice Scalia, interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water . . .," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection . . ." to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months...." *Id.* at 732 n.5 (emphasis in original). Justice Kennedy concurred with the plurality judgment, but concluded that the appropriate test for the scope of jurisdictional waters is whether a water or wetland possesses a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. The four dissenting Justices in *Rapanos*, who would have affirmed the court of appeals' application of the agencies' regulations, also concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy "either the plurality's [standard] or Justice Kennedy's." *Id.* at 810 & n.14 (Stevens, J., dissenting).

While the *SWANCC* and *Rapanos* decisions limited the way the agencies' longstanding regulatory definition of "waters of the United States" was implemented, in neither case did the Court invalidate that definition.

After the *Rapanos* decision, the agencies issued joint guidance in 2007 to address the waters at issue in that decision but did not change the codified definition. The guidance indicated that "waters of the United States" included traditional navigable waters and their

adjacent wetlands, relatively permanent waters and wetlands that abut them, and waters with a significant nexus to a traditional navigable water. The guidance did not address waters not at issue in *Rapanos*, such as interstate waters and the territorial seas. The guidance was reissued in 2008 with minor changes (hereinafter, the "2008 guidance").[1]

After issuance of the 2008 guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA.

Following public notice and comment on a proposed rule, the agencies published a final rule defining the scope of "waters of the United States" on June 29, 2015 (80 FR 37054). Thirty-one States and a number of other parties sought judicial review in multiple actions in Federal district courts and Circuit Courts of Appeal, raising concerns about the scope and legal authority of the 2015 rule. One district court issued an order granting a motion for preliminary injunction on the rule's effective date, finding that the thirteen State challengers were likely to succeed on their claims, including that the rule violated the congressional grant of authority to the agencies under the CWA and that it appeared likely the EPA failed to comply with Administrative Procedure Act (APA) requirements in promulgating the rule. *State of North Dakota et al. v. US EPA*, No. 15-00059, slip op. at 1-2 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015). Several weeks later, the Sixth Circuit stayed the 2015 rule nationwide to restore the "pre-Rule regime, pending judicial review." *In re U.S. Dep't. of Def. and U.S. Envtl.*

[1] The guidance expressly stated that it was not intended to create any legally binding requirements, and that "interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law." 2008 guidance at 4 n. 17.

Protection Agency Final Rule: Clean Water Rule, No. 15-3751 (lead), slip op. at 6. The Sixth Circuit found that the petitioners had demonstrated a substantial possibility of success on the merits, including with regard to claims that certain provisions of the rule were at odds with the *Rapanos* decision and that the distance limitations in the rule were not substantiated by scientific support. Pursuant to the court's order, the agencies have implemented the statute pursuant to the regulatory regime that preceded the 2015 rule. On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 rule. The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction.

On February 28, 2017, the President of the United States issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Order states, "[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." It directs the EPA and the Army to review the 2015 rule for consistency with the policy outlined in section 1, and to issue a proposed rule rescinding or revising the 2015 rule as appropriate and consistent with law. Section 2. The Executive Order also directs the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*. Section 3.

The agencies have the authority to rescind and revise the regulatory definition of "waters of the United States," consistent with the guidance in the Executive Order, so long as the revised

definition is authorized under the law and based on a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based "on a re-evaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its regulations and programs. *Nat'l Ass'n of Home Builders v. EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15 (Rehnquist, J., concurring in part and dissenting in part)).

The Executive Order states that it is in the national interest to protect the nation's waters from pollution as well as to allow for economic growth, ensuring regulatory clarity, and providing due deference to States, as well as Congress. Executive Order section 1. These various priorities reflect, in part the CWA itself, which includes both the objective to "restore and maintain" the integrity of the nation's waters, as well as the policy to "recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution…" CWA sections 101(a), 101(b). Re-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated to the agencies under the CWA.

This rulemaking is the first step in a two-step response to the Executive Order, intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: a substantive review of the appropriate scope of "waters of the United States."

C. Today's proposed rule

In this proposed rule, the agencies would rescind the 2015 Clean Water Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule and that the agencies are currently implementing under the court stay, informed by applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the *SWANCC* and *Rapanos* Supreme Court decisions, applicable case law, and longstanding agency practice. The proposal retains exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued. Nothing in this proposed rule restricts the ability of States to protect waters within their boundaries by defining the scope of waters regulated under State law more broadly than the federal law definition.

D. *Rationale for this rulemaking*

This rulemaking action is consistent with the February 28, 2017, Executive Order and the Clean Water Act. This action will consist of two steps. In this first step, the agencies are proposing as an interim action to repeal the 2015 definition of "waters of the United States" and codify the legal *status quo* that is being implemented now under the Sixth Circuit stay of the 2015 definition of "waters of the United States" and that was in place for decades prior to the 2015 rule. This regulatory text would, pending completion of the second step in the two-step process, continue to be informed by the 2003 and 2008 guidance documents. In the second step, the agencies will conduct a separate notice and comment rulemaking that will consider

developing a new definition of "waters of the United States" taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

In the 2015 rulemaking, the agencies described their task as "interpret[ing] the scope of the 'waters of the United States' for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience." 80 Fed. Reg. 37,054, 37,060 (June 29, 2015). In so doing, the agencies properly acknowledged that a regulation defining "waters of the United States" in this area is not driven by any one type or piece of information, but rather must be the product of the evaluation and balancing of a variety of different types of information. That information includes scientific data as well as the policies articulated by Congress when it passed the Act. For example, the agencies recognized this construct in the preamble to the 2015 Rule by explaining that what constitutes a "significant nexus" to navigable waters "is not a purely scientific determination" and that "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA." 80 Fed. Reg. at 37,060.[2]

The objectives, goals, and policies of the statute are detailed in sections 101(a)-(g) of the statute, and guide the agencies' interpretation and application of the Clean Water Act. Section 101(a) of the Act states that the "objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and identifies several goals and national policies Congress believed would help the Act achieve that objective. 33 U.S.C.

[2] This notion was at least implicitly recognized by the Chief Justice in his concurring opinion in *Rapanos*: "[T]he Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Ultimately, developing "some notion of an outer bound" from the full range of relevant information is the task facing the agencies.

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§ 1251(a). When referring to the Act's objective, the 2015 rule referred specifically to Section 101(a). 80 Fed. Reg. at 37,056.

In addition to the objective of the Act and the goals and policies identified to help achieve that objective in section 101(a), in section 101(b) Congress articulated that it is "the policy of the Congress" to:

> [R]ecognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.

33 U.S.C. § 1251(b). Therefore, as part of the two-step rulemaking, the agencies will be considering the relationship of the CWA objective and policies, and in particular, the meaning and importance of section 101(b).

The 2015 rule did acknowledge the language contained in section 101(b) and the vital role states and tribes play in the implementation of the Act and the effort to meet the Act's stated objective. *See, e.g.*, 80 Fed. Reg. at 37,059. In discussing the provision, the agencies noted that it was "[o]f particular importance[,] [that] states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404." *Id.* The agencies also noted that "States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in *their jurisdiction*." *Id.* at 37,060. However, the agencies did not include a discussion in the 2015 rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act, despite the recognition that the rule must be drafted "in light of the goals, objectives, and policies of the statute." In the two-step rulemaking process commencing with today's notice, the agencies will more fully consider the

policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction.

The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation. While engaging in such deliberations, however, the agencies recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of "waters of the United States." The pre-CWR regulatory regime is in effect as a result of the Sixth Circuit's stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit's order and could be altered at any time by factors beyond the control of the agencies. The Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit's exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.

As noted previously, prior to the Sixth Circuit's stay order, the District Court for North Dakota had preliminarily enjoined the rule in 13 States (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). Therefore, if the Sixth Circuit's nationwide stay were to expire, the 2015 rule would be enjoined under the North Dakota order in States covering a large geographic area of the

country, but the rule would be in effect in the rest of the country pending further judicial decision-making or substantive rulemaking under the Executive Order.

Adding to the confusion that could be caused if the Sixth Circuit's nationwide stay of the 2015 rule were to expire, there are multiple other district court cases pending on the 2015 rule, including several where challengers have filed motions for preliminary injunctions. These cases – and the pending preliminary injunction motions – would likely be reactivated if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule. The proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit's jurisdiction while the agencies reconsider the 2015 rule. It would ensure that, during this interim period, the scope of CWA jurisdiction will be administered exactly the way it is now, and as it was for many years prior to the promulgation of the 2015 rule. The agencies considered other approaches to providing stability while they work to finalize the revised definition, such as simply withdrawing or staying the Clean Water Rule, but did not identify any options that would do so more effectively and efficiently than this proposed rule would do. A stable regulatory foundation for the *status quo* would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of "waters of the United States" that best effectuates the language, structure, and purposes of the Clean Water Act.

II. General Information

A. How can I get copies of this document and related information?

1. *Docket.* An official public docket for this action has been established under Docket Id. No. EPA-HQ-OW-2017-0203. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official

public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this Federal Register document electronically under the "Federal Register" listings at *http://www.regulations.gov*. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. What is the agencies' authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, including sections 301, 304, 311, 401, 402, 404 and 501.

C. What are the economic impacts of this action?

This proposed rule is the first step in a comprehensive, two-step process to review and revise the 2015 definition of "waters of the United States." The agencies prepared an illustrative economic analysis to provide the public with information on the potential changes to the costs and benefits of various CWA programs that could result if there were a change in the number of positive jurisdictional determinations. The economic analysis is provided pursuant to the

requirements of Executive Orders 13563 and 12866 to provide information to the public. The 2015 CWR is used as a baseline in the analysis in order to provide information to the public on the estimated differential effects of restoring pre-2015 status quo in comparison to the 2015 CWR. However, as explained previously, the 2015 CWR has already been stayed by the Sixth Circuit, and this proposal would merely codify the legal status quo, not change current practice.

The proposed rule is a definitional rule that affects the scope of "waters of the United States." This rule does not establish any regulatory requirements or directly mandate actions on its own. However, by changing the definition of "waters of the United States," the proposed rule would change the waters where other regulatory requirements that affect regulated entities come into play, for example, the locations where regulated entities would be required to obtain certain types of permits. The consequence of a water being deemed non-jurisdictional is simply that CWA provisions no longer apply to that water. There are no avoided costs or forgone benefits if similar state regulations exist and continue to apply to that water. The agencies estimated that the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations. The agencies estimated the avoided costs and forgone benefits of repealing the 2015 rule. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules* and is available in the docket for this action.

III. Public Comments

The agencies solicit comment as to whether it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of "waters of the United States" and the best way to accomplish it. Because the agencies propose to simply codify the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 "waters of the United States" definition nor are the agencies soliciting comment on the specific content of those longstanding regulations. *See P&V Enterprises v. Corps of Engineers*, 516 F.3d 1021,1023-24 (D.C. Cir. 2008). For the same reason, the agencies are not at this time soliciting comment on the scope of the definition of "waters of the United States" that the agencies should ultimately adopt in the second step of this two-step process, as the agencies will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking to adopt a revised definition of "waters of the United States" in light of the February 28, 2017, Executive Order. The agencies do not intend to engage in substantive reevaluation of the definition of "waters of the United States" until the second step of the rulemaking. *See P&V*, 516 F.3d at 1025-26.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

In addition, the agencies prepared an analysis of the potential avoided costs and forgone benefits associated with this action. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules*. A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050-0021 and 2050-0135 for the CWA section 311 program and 2040-0004 for the 402 program.

For the CWA section 404 regulatory program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

C. Regulatory Flexibility Act

We certify that this action will not have a significant economic impact on a substantial number of small entities. Because this action would simply codify the legal *status quo,* we have concluded that this action will not have a significant impact on small entities. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules*. A copy of the analysis is available in the docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The definition of

"waters of the United States" applies broadly to CWA programs. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Consistent with the agencies' policy to promote communications with state and local governments, the agencies have informed states and local governments about this proposed rulemaking.

The agencies will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of "waters of the United States."

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed rule does not have tribal implications as specified in Executive Order 13175. This proposed rule maintains the legal *status quo*. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies will appropriately consult with tribal officials during the development of a subsequent rulemaking that makes changes to the longstanding definition of "waters of the United States." In fact, the agencies have already initiated the formal consultation process with respect to the subsequent rulemaking.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because the environmental health risks or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This proposed rule does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

This proposed rule maintains the legal *status quo*. The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

K. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017) this proposed rule is expected to be an E.O. 13771 deregulatory action.

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List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

Environmental protection, Water pollution control.

Dated: 6/27/2017.

E. Scott Pruitt,

Administrator,

Environmental Protection Agency.

Dated: 6/27/2017.

Douglas W. Lamont,

Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works,

Department of the Army.

Title 33—Navigation and Navigable Waters

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For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1344.

2. Section 328.3 is amended by revising paragraphs (a) through (d) and adding paragraphs (e) and (f) to read as follows:

§328.3 Definitions.

* * * * *

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those 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.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 110—DISCHARGE OF OIL

3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR Parts 1971–1975 Comp., p. 793.

4. Section 110.1 is amended by revising the definition of "Navigable waters" and adding the definition of "Wetlands" in alphabetical order to read as follows:

§110.1 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(3) That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section: Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States;

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency or 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 playa lakes, swamps, marshes, bogs and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

PART 112 –OIL POLLUTION PREVENTION

5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 et seq.; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

6. Section 112.2 is amended by revising the definition of "Navigable waters" and adding the definition of "Wetlands" in alphabetical order to read as follows:

§112.2 Definitions.

* * * * *

Navigable waters of the United States means "navigable waters" as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency or 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 playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

7. The authority citation for part 116 is revised to read as follows:

Authority: Secs. 311(b)(2)(A) and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

8. Section 116.3 is amended by revising the definition of "Navigable waters" to read as follows:

§116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean "waters of the United States, including the territorial seas," and includes, but is not limited to:

(1) All waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, and including adjacent wetlands; the term *wetlands* as used in this regulation shall include those 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 prevelanceof vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas; the term adjacent means bordering, contiguous or neighboring;

(2) Tributaries of navigable waters of the United States, including *adjacent* wetlands;

(3) Interstate waters, including wetlands; and

(4) All other waters of the United States such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including, but not limited to:

(i) Intrastate lakes, rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and

(ii) Intrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and

(iii) Intrastate lakes, rivers, streams, and wetlands which are utilized for industrial purposes by industries in interstate commerce.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

9. The authority citation for part 117 is revised to read as follows:

Authority: Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), ("the Act") and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§117.1 Definitions.

* * * * *

(i) *Navigable waters* means "waters of the United States, including the territorial seas." This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i) (1) through (4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i) (1) through (5) of this section ("Wetlands" means those 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 included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): *Provided*, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et.seq.*

12. Section 122.2 is amended by:

a. Revising the definition of "Waters of the United States".

b. Adding a Note 1 to the definition of "Waters of the United States" and the definition of "Wetlands".

The revision and additions read as follows:

§122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in §122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension.[n1]

[n1] EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

Wetlands means those areas that are inundated or saturated by surface or groundwater 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.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

13. The authority citation for part 230 is revised to read as follows:

Authority: The Clean Water Act, Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

14. Section 230.3 is amended by:

a. Redesignating paragraphs (b) through (d) as (c) through (e).

b. Redesignating paragraphs (e) through (f) as (h) through (i).

c. Redesignating paragraph (g) as paragraph (k).

d. Redesignating paragraphs (h) through (l) as paragraphs (m) through (q).

e. Reserving paragraphs (j) and (l).

f. Redesignating paragraph (m) as paragraph (q-1).

g. Redesignating paragraph (o) as paragraph (s).

h. Redesignating paragraph (n) as paragraph (r).

i. Revising newly redesignated paragraph (s).

j. Adding the definition of "adjacent" at paragraph (b) and the definition of "wetlands" at paragraph (t).

The revision reads as follows:

§ 230.3 Definitions.

* * * * *

(b) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

* * * * *

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means those 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.

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

- 15. The authority citation for part 232 is revised to read as follows:

  Authority: 33 U.S.C. 1344.

- 16. Section 232.2 is amended by revising the definition of "Waters of the United States" and adding the definition of "Wetlands" to read as follows:

§232.2 Definitions.

* * * * *

Waters of the United States means:

All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

Which are used or could be used for industrial purposes by industries in interstate commerce.

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)– (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Wetlands means those 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.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

18. Section 300.5 is amended by revising the definition of "Navigable waters" to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:

(1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(i) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) That are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this section;

(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(7) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of "Navigable waters" to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters as defined by 40 CFR 110.1 means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and

(3) That are used or could be used for industrial purposes by industries in interstate commerce.

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(g) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 302— DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

20. The authority citation for part 302 is revised to read as follows:

Authority: 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

21. Section 302.3 is amended by revising the definition of "Navigable waters" to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters or *navigable waters of the United States* means waters of the United States, including the territorial seas;

* * * * *

PART 401— GENERAL PROVISIONS

22. The authority citation for part 401 is revised to read as follows:

Authority: Secs. 301, 304 (b) and (c), 306 (b) and (c), 307 (b) and (c) and 316(b) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251, 1311, 1314 (b) and (c), 1316 (b) and (c), 1317 (b) and (c) and 1326(c); 86 Stat. 816 et seq.; Pub. L. 92-500.

23. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) The term navigable waters includes: All navigable waters of the United States; tributaries of navigable waters of the United States; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce. Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

To: Jones, Enesta[Jones.Enesta@epa.gov]
Cc: Kwok, Rose[Kwok.Rose@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Christensen, Damaris
Sent: Tue 6/27/2017 9:40:08 PM
Subject: Re: WOTUS repeal proposed rule -- E&E News

That is my understanding as well.

Sent from my iPhone

On Jun 27, 2017, at 4:16 PM, Jones, Enesta <Jones.Enesta@epa.gov> wrote:

Thanks!

From: Kwok, Rose
Sent: Tuesday, June 27, 2017 4:11 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Jones, Enesta <Jones.Enesta@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: WOTUS repeal proposed rule -- E&E News

Yes, that is my understanding.

From: Drinkard, Andrea
Sent: Tuesday, June 27, 2017 4:10 PM
To: Jones, Enesta <Jones.Enesta@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: WOTUS repeal proposed rule -- E&E News

It will be available when the docket goes live, which will happen when the proposal is published in the Federal Register. +Demaris/Rose/Mindy to confirm.

From: Jones, Enesta
Sent: Tuesday, June 27, 2017 4:01 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: Fwd: WOTUS repeal proposed rule -- E&E News

Do you have?

Enesta Jones

U.S. EPA

Office of Media Relations

Office: 202.564.7873

Cell: 202.236.2426

"The root of all joy is gratefulness."

Begin forwarded message:

Resent-From: <Press@epa.gov>
From: Ariel Wittenberg <awittenberg@eenews.net>
Date: June 27, 2017 at 3:59:49 PM EDT
To: "Jones, Enesta" <Jones.Enesta@epa.gov>
Cc: Press <Press@epa.gov>, "Valentine, Julia" <Valentine.Julia@epa.gov>, "Bowman, Liz" <Bowman.Liz@epa.gov>
Subject: RE: WOTUS repeal proposed rule -- E&E News

Hi Enesta and everyone,

Wondering if you could send along a copy of the *Economic Analysis for the Proposed Definition of "Waters*

of the United States" – Recodification of Pre-existing Rules mentioned in the pre-publication proposed rule? If not, when do you think it will be made available?

Ariel

From: Jones, Enesta [mailto:Jones.Enesta@epa.gov]
Sent: Tuesday, June 27, 2017 3:34 PM
To: Ariel Wittenberg <awittenberg@eenews.net>
Cc: Press <Press@epa.gov>; Valentine, Julia <Valentine.Julia@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Subject: Re: WOTUS repeal proposed rule -- E&E News

Pre publication is here:
https://www.epa.gov/wotus-rule/pre-publication-version-proposed-rule-definition-waters-united-states-recodification-pre

Enesta Jones

U.S. EPA

Office of Media Relations

Office: 202.564.7873

Cell: 202.236.2426

"The root of all joy is gratefulness."

On Jun 27, 2017, at 2:38 PM, Ariel Wittenberg <awittenberg@eenews.net> wrote:

Hi All,

Got the email announcing that the Clean Water Rule repeal is being proposed today—can you send me a copy of the actual proposed rule? It's not up on the Federal Register yet.

Ariel

Ariel Wittenberg

E&E News reporter

awittenberg@eenews.net

202-737-4557

@arielwittenberg

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To: Kwok, Rose[Kwok.Rose@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]
Cc: Christensen, Damaris[Christensen.Damaris@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Jones, Enesta
Sent: Tue 6/27/2017 8:16:28 PM
Subject: RE: WOTUS repeal proposed rule -- E&E News

Thanks!

From: Kwok, Rose
Sent: Tuesday, June 27, 2017 4:11 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Jones, Enesta <Jones.Enesta@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: WOTUS repeal proposed rule -- E&E News

Yes, that is my understanding.

From: Drinkard, Andrea
Sent: Tuesday, June 27, 2017 4:10 PM
To: Jones, Enesta <Jones.Enesta@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: WOTUS repeal proposed rule -- E&E News

It will be available when the docket goes live, which will happen when the proposal is published in the Federal Register. +Demaris/Rose/Mindy to confirm.

From: Jones, Enesta
Sent: Tuesday, June 27, 2017 4:01 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: Fwd: WOTUS repeal proposed rule -- E&E News

Do you have?

Enesta Jones

U.S. EPA

Office of Media Relations

Office: 202.564.7873

Cell: 202.236.2426

"The root of all joy is gratefulness."

Begin forwarded message:

Resent-From: <Press@epa.gov>
From: Ariel Wittenberg <awittenberg@eenews.net>
Date: June 27, 2017 at 3:59:49 PM EDT
To: "Jones, Enesta" <Jones.Enesta@epa.gov>
Cc: Press <Press@epa.gov>, "Valentine, Julia" <Valentine.Julia@epa.gov>, "Bowman, Liz" <Bowman.Liz@epa.gov>
Subject: RE: WOTUS repeal proposed rule -- E&E News

Hi Enesta and everyone,

Wondering if you could send along a copy of the *Economic Analysis for the Proposed Definition of "Waters*

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To: Ariel Wittenberg <awittenberg@eenews.net>

Cc: Press <Press@epa.gov>; Valentine, Julia <Valentine.Julia@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Subject: Re: WOTUS repeal proposed rule -- E&E News

Pre publication is here:
https://www.epa.gov/wotus-rule/pre-publication-version-proposed-rule-definition-waters-united-states-recodification-pre

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Ariel Wittenberg

E&E News reporter

awittenberg@eenews.net

202-737-4557

@arielwittenberg

E&E NEWS

122 C Street NW 7th Floor Washington, DC 20001

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Energywire, Climatewire, Greenwire, E&E Daily, E&E News PM, E&ETV

To: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Jones, Enesta[Jones.Enesta@epa.gov]
Cc: Christensen, Damaris[Christensen.Damaris@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Kwok, Rose
Sent: Tue 6/27/2017 8:10:33 PM
Subject: RE: WOTUS repeal proposed rule -- E&E News

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Sent: Tuesday, June 27, 2017 4:10 PM
To: Jones, Enesta <Jones.Enesta@epa.gov>
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From: Drinkard, Andrea
Sent: Tue 6/27/2017 8:09:31 PM
Subject: RE: WOTUS repeal proposed rule -- E&E News

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www.eenews.net | @EENewsUpdates

Energywire, Climatewire, Greenwire, E&E Daily, E&E News PM, E&ETV

To: Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Drinkard, Andrea
Sent: Tue 6/27/2017 7:01:24 PM
Subject: FW: Signed WOTUS Step 1 Rule
WOTUS STEP1.pdf

I meant to send this to you guys too.

-----Original Message-----
From: Drinkard, Andrea
Sent: Tuesday, June 27, 2017 3:00 PM
To: Forsgren, Lee <Forsgren.Lee@epa.gov>
Cc: Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: FW: Signed WOTUS Step 1 Rule

FYI...we're still working to get the web up. I will forward the press release momentarily.

-----Original Message-----
From: Threet, Derek
Sent: Tuesday, June 27, 2017 2:58 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: Signed WOTUS Step 1 Rule

Attached is the signed rule. I'll forward to the usual distribution list in a few minutes.

-----Original Message-----
From: Bowman, Liz
Sent: Tuesday, June 27, 2017 2:24 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>
Cc: Cindy Barger <cindy.s.barger.civ@mail.mil>; Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Threet, Derek <Threet.Derek@epa.gov>
Subject: RE: WOTUS2 I'm in W7129

Deliberative Process / Ex. 5

-----Original Message-----
From: Drinkard, Andrea
Sent: Tuesday, June 27, 2017 1:54 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>
Cc: Cindy Barger <cindy.s.barger.civ@mail.mil>; Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Threet, Derek <Threet.Derek@epa.gov>
Subject: RE: WOTUS2 I'm in W7129

Deliberative Process / Ex. 5

-----Original Message-----
From: Bowman, Liz
Sent: Tuesday, June 27, 2017 1:48 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Cc: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>; Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Threet, Derek <Threet.Derek@epa.gov>
Subject: Re: WOTUS2 I'm in W7129

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 27, 2017, at 1:26 PM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:
>

Deliberative Process / Ex. 5

> -----Original Message-----
> From: Drinkard, Andrea
> Sent: Tuesday, June 27, 2017 1:24 PM
> To: Bowman, Liz <Bowman.Liz@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
> Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Threet, Derek <Threet.Derek@epa.gov>
> Subject: RE: WOTUS2 I'm in W7129
> Importance: High
>

Deliberative Process / Ex. 5

> Thanks.
>
>
> -----Original Message-----
> From: Bowman, Liz
> Sent: Tuesday, June 27, 2017 1:09 PM
> To: Cindy Barger <cindy.s.barger.civ@mail.mil>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
> Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>
> Subject: RE: WOTUS2 I'm in W7129
>

Deliberative Process / Ex. 5

> -----Original Message-----
> From: Barger, Cindy S CIV USARMY HQDA ASA CW (US) [mailto:cindy.s.barger.civ@mail.mil]
> Sent: Tuesday, June 27, 2017 1:06 PM
> To: Bowman, Liz <Bowman.Liz@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
> Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>
> Subject: WOTUS2 I'm in W7129
>

Deliberative Process / Ex. 5

>
> Thanks. Cindy
>
> Sent from my iPhone

6560-50-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA-HQ-OW-2017-0203; FRL-9962-34-OW]

RIN 2040-AF74

Definition of "Waters of the United States" – Recodification of Pre-existing Rules

AGENCIES: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army ("the agencies") are publishing this proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." This first step proposes to rescind the definition of "waters of the United States" in the Code of Federal

ED_001271B_00082103-00001 WOTUS_Rule_FOIAs_0020464

Regulations to re-codify the definition of "waters of the United States," which currently governs administration of the Clean Water Act, pursuant to a decision issued by the U.S. Court of Appeals for the Sixth Circuit staying a definition of "waters of the United States" promulgated by the agencies in 2015. The agencies would apply the definition of "waters of the United States" as it is currently being implemented, that is informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding practice. Proposing to re-codify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the States, agency staff, and the public. In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of "waters of the United States."

DATES: Comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2017-0203, at http://www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The agencies may publish any comment received to the public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The agencies will generally not consider comments or comment contents located outside of the primary submission (i.e. on the

web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit http://www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION, CONTACT: Ms. Donna Downing, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-2428; e-mail address: *CWAwotus@epa.gov*; or Ms. Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street, NW, Washington, DC 20314; telephone number: (202) 761-5903; e-mail address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

The regulatory definition of "waters of the United States" in this proposed rule is the same as the definition that existed prior to promulgation of the Clean Water Rule in 2015 and that has been in effect nationwide since the Clean Water Rule was stayed on October 9, 2016. The agencies will administer the regulations as they are currently being implemented consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents.

State, tribal, and local governments have well-defined and longstanding relationships with the federal government in implementing CWA programs and these relationships are not altered by the proposed rule. This proposed rule will not establish any new regulatory requirements. Rather, the rule simply codifies the current legal *status quo* while the agencies

engage in a second, substantive rulemaking to reconsider the definition of "waters of the United States."

I. Executive Summary

A. What this proposed rule does

In this proposed rule, the agencies define the scope of "waters of the United States" that are protected under the Clean Water Act (CWA). In 2015, the agencies published the "Clean Water Rule: Definition of 'Waters of the United States'" (80 FR 37054, June 29, 2015), and on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court. The agencies propose to replace the stayed 2015 definition of "waters of the United States", and re-codify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit's October 9, 2015 order. The proposed regulatory text would thus replace the stayed rulemaking text, and re-codify the regulatory definitions (at 33 CFR 328 and 40 CFR Parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the Code of Federal Regulations (CFR) as they existed prior to the promulgation of the stayed 2015 definition. If this proposed rule is finalized, the agencies would continue to implement those prior regulatory definitions), informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

B. History and the purpose of this rulemaking

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* ("Clean Water Act" or "CWA" or "Act") "to restore and maintain the chemical, physical and

biological integrity of the Nation's waters." Section 101(a). A primary tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, to "navigable waters" except in accordance with the Act. Section 301(a). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." Section 502(7).

The CWA also provides that States retain their traditional role in preventing, reducing and eliminating pollution. The Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources..." Section 101(b). States and Tribes voluntarily may assume responsibility for permit programs governing discharges of pollution under section 402 for any jurisdictional water bodies (section 402(b)), or of dredged or fill material discharges under section 404 (section 404(g)), with agency approval. (Section 404(g) provides that states may not assume permitting authority over certain specified waters and their adjacent wetlands.) States are also free to establish their own programs under state law to manage and protect waters and wetlands independent of the federal CWA. The statute's introductory purpose section thus commands the Environmental Protection Agency (EPA) to pursue two policy goals simultaneously: (a) to restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution.

The regulations defining the scope of federal CWA jurisdiction currently in effect, which today's proposed rule would recodify, were established in large part in 1977 (42 FR 37122, July 19, 1977). While EPA administers most provisions in the CWA, the U.S. Army Corps of Engineers (Corps) administers the permitting program under section 404. During the 1980s, both

of these agencies adopted substantially similar definitions (51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2).

Federal courts have reviewed the definition of "waters of the United States" and its application to a variety of factual circumstances. Three Supreme Court decisions, in particular, provide critical context and guidance in determining the appropriate scope of "waters of the United States."

In *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." *Id.* at 134.

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The *SWANCC* decision created uncertainty with regard to the jurisdiction of other isolated non-navigable waters and wetlands. In January 2003, EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC* ("the 2003 Guidance"). The guidance indicated that *SWANCC* focused on isolated, intrastate, non-navigable waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations which asserted jurisdiction for waters under 33 CFR 328.3(a)(3)(i-iii). Waters that were jurisdictional pursuant to 33 CFR 328.3(a)(3) could no longer be determined jurisdictional based solely on their use by migratory birds.

Five years after the *SWANCC* decision, in *Rapanos* v. *United States*, 547 U.S. 715 (2006) (*Rapanos*), a four-Justice plurality opinion in *Rapanos*, authored by Justice Scalia, interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water . . .," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection . . ." to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months...." *Id.* at 732 n.5 (emphasis in original). Justice Kennedy concurred with the plurality judgment, but concluded that the appropriate test for the scope of jurisdictional waters is whether a water or wetland possesses a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. The four dissenting Justices in *Rapanos*, who would have affirmed the court of appeals' application of the agencies' regulations, also concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy "either the plurality's [standard] or Justice Kennedy's." *Id.* at 810 & n.14 (Stevens, J., dissenting).

While the *SWANCC* and *Rapanos* decisions limited the way the agencies' longstanding regulatory definition of "waters of the United States" was implemented, in neither case did the Court invalidate that definition.

After the *Rapanos* decision, the agencies issued joint guidance in 2007 to address the waters at issue in that decision but did not change the codified definition. The guidance indicated that "waters of the United States" included traditional navigable waters and their

adjacent wetlands, relatively permanent waters and wetlands that abut them, and waters with a significant nexus to a traditional navigable water. The guidance did not address waters not at issue in *Rapanos*, such as interstate waters and the territorial seas. The guidance was reissued in 2008 with minor changes (hereinafter, the "2008 guidance").[1]

After issuance of the 2008 guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA.

Following public notice and comment on a proposed rule, the agencies published a final rule defining the scope of "waters of the United States" on June 29, 2015 (80 FR 37054). Thirty-one States and a number of other parties sought judicial review in multiple actions in Federal district courts and Circuit Courts of Appeal, raising concerns about the scope and legal authority of the 2015 rule. One district court issued an order granting a motion for preliminary injunction on the rule's effective date, finding that the thirteen State challengers were likely to succeed on their claims, including that the rule violated the congressional grant of authority to the agencies under the CWA and that it appeared likely the EPA failed to comply with Administrative Procedure Act (APA) requirements in promulgating the rule. *State of North Dakota et al. v. US EPA*, No. 15-00059, slip op. at 1-2 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015). Several weeks later, the Sixth Circuit stayed the 2015 rule nationwide to restore the "pre-Rule regime, pending judicial review." *In re U.S. Dep't. of Def. and U.S. Envtl.*

[1] The guidance expressly stated that it was not intended to create any legally binding requirements, and that "interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law." 2008 guidance at 4 n. 17.

Protection Agency Final Rule: Clean Water Rule, No. 15-3751 (lead), slip op. at 6. The Sixth Circuit found that the petitioners had demonstrated a substantial possibility of success on the merits, including with regard to claims that certain provisions of the rule were at odds with the *Rapanos* decision and that the distance limitations in the rule were not substantiated by scientific support. Pursuant to the court's order, the agencies have implemented the statute pursuant to the regulatory regime that preceded the 2015 rule. On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 rule. The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction.

On February 28, 2017, the President of the United States issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Order states, "[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." It directs the EPA and the Army to review the 2015 rule for consistency with the policy outlined in section 1, and to issue a proposed rule rescinding or revising the 2015 rule as appropriate and consistent with law. Section 2. The Executive Order also directs the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*. Section 3.

The agencies have the authority to rescind and revise the regulatory definition of "waters of the United States," consistent with the guidance in the Executive Order, so long as the revised

definition is authorized under the law and based on a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based "on a re-evaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its regulations and programs. *Nat'l Ass'n of Home Builders v. EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15 (Rehnquist, J., concurring in part and dissenting in part)).

The Executive Order states that it is in the national interest to protect the nation's waters from pollution as well as to allow for economic growth, ensuring regulatory clarity, and providing due deference to States, as well as Congress. Executive Order section 1. These various priorities reflect, in part the CWA itself, which includes both the objective to "restore and maintain" the integrity of the nation's waters, as well as the policy to "recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution…" CWA sections 101(a), 101(b). Re-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated to the agencies under the CWA.

This rulemaking is the first step in a two-step response to the Executive Order, intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: a substantive review of the appropriate scope of "waters of the United States."

C. Today's proposed rule

In this proposed rule, the agencies would rescind the 2015 Clean Water Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule and that the agencies are currently implementing under the court stay, informed by applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the *SWANCC* and *Rapanos* Supreme Court decisions, applicable case law, and longstanding agency practice. The proposal retains exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued. Nothing in this proposed rule restricts the ability of States to protect waters within their boundaries by defining the scope of waters regulated under State law more broadly than the federal law definition.

D. *Rationale for this rulemaking*

This rulemaking action is consistent with the February 28, 2017, Executive Order and the Clean Water Act. This action will consist of two steps. In this first step, the agencies are proposing as an interim action to repeal the 2015 definition of "waters of the United States" and codify the legal *status quo* that is being implemented now under the Sixth Circuit stay of the 2015 definition of "waters of the United States" and that was in place for decades prior to the 2015 rule. This regulatory text would, pending completion of the second step in the two-step process, continue to be informed by the 2003 and 2008 guidance documents. In the second step, the agencies will conduct a separate notice and comment rulemaking that will consider

developing a new definition of "waters of the United States" taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

In the 2015 rulemaking, the agencies described their task as "interpret[ing] the scope of the 'waters of the United States' for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience." 80 Fed. Reg. 37,054, 37,060 (June 29, 2015). In so doing, the agencies properly acknowledged that a regulation defining "waters of the United States" in this area is not driven by any one type or piece of information, but rather must be the product of the evaluation and balancing of a variety of different types of information. That information includes scientific data as well as the policies articulated by Congress when it passed the Act. For example, the agencies recognized this construct in the preamble to the 2015 Rule by explaining that what constitutes a "significant nexus" to navigable waters "is not a purely scientific determination" and that "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA." 80 Fed. Reg. at 37,060.[2]

The objectives, goals, and policies of the statute are detailed in sections 101(a)-(g) of the statute, and guide the agencies' interpretation and application of the Clean Water Act. Section 101(a) of the Act states that the "objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and identifies several goals and national policies Congress believed would help the Act achieve that objective. 33 U.S.C.

[2] This notion was at least implicitly recognized by the Chief Justice in his concurring opinion in *Rapanos*: "[T]he Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Ultimately, developing "some notion of an outer bound" from the full range of relevant information is the task facing the agencies.

§ 1251(a). When referring to the Act's objective, the 2015 rule referred specifically to Section 101(a). 80 Fed. Reg. at 37,056.

In addition to the objective of the Act and the goals and policies identified to help achieve that objective in section 101(a), in section 101(b) Congress articulated that it is "the policy of the Congress" to:

> [R]ecognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.

33 U.S.C. § 1251(b). Therefore, as part of the two-step rulemaking, the agencies will be considering the relationship of the CWA objective and policies, and in particular, the meaning and importance of section 101(b).

The 2015 rule did acknowledge the language contained in section 101(b) and the vital role states and tribes play in the implementation of the Act and the effort to meet the Act's stated objective. *See, e.g.*, 80 Fed. Reg. at 37,059. In discussing the provision, the agencies noted that it was "[o]f particular importance[,] [that] states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404." *Id.* The agencies also noted that "States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in *their jurisdiction*." *Id.* at 37,060. However, the agencies did not include a discussion in the 2015 rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act, despite the recognition that the rule must be drafted "in light of the goals, objectives, and policies of the statute." In the two-step rulemaking process commencing with today's notice, the agencies will more fully consider the

policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction.

The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation. While engaging in such deliberations, however, the agencies recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of "waters of the United States." The pre-CWR regulatory regime is in effect as a result of the Sixth Circuit's stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit's order and could be altered at any time by factors beyond the control of the agencies. The Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit's exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.

As noted previously, prior to the Sixth Circuit's stay order, the District Court for North Dakota had preliminarily enjoined the rule in 13 States (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). Therefore, if the Sixth Circuit's nationwide stay were to expire, the 2015 rule would be enjoined under the North Dakota order in States covering a large geographic area of the

country, but the rule would be in effect in the rest of the country pending further judicial decision-making or substantive rulemaking under the Executive Order.

Adding to the confusion that could be caused if the Sixth Circuit's nationwide stay of the 2015 rule were to expire, there are multiple other district court cases pending on the 2015 rule, including several where challengers have filed motions for preliminary injunctions. These cases – and the pending preliminary injunction motions – would likely be reactivated if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule. The proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit's jurisdiction while the agencies reconsider the 2015 rule. It would ensure that, during this interim period, the scope of CWA jurisdiction will be administered exactly the way it is now, and as it was for many years prior to the promulgation of the 2015 rule. The agencies considered other approaches to providing stability while they work to finalize the revised definition, such as simply withdrawing or staying the Clean Water Rule, but did not identify any options that would do so more effectively and efficiently than this proposed rule would do. A stable regulatory foundation for the *status quo* would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of "waters of the United States" that best effectuates the language, structure, and purposes of the Clean Water Act.

II. General Information

A. How can I get copies of this document and related information?

1. *Docket.* An official public docket for this action has been established under Docket Id. No. EPA-HQ-OW-2017-0203. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official

public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this Federal Register document electronically under the "Federal Register" listings at *http://www.regulations.gov*. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. What is the agencies' authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, including sections 301, 304, 311, 401, 402, 404 and 501.

C. What are the economic impacts of this action?

This proposed rule is the first step in a comprehensive, two-step process to review and revise the 2015 definition of "waters of the United States." The agencies prepared an illustrative economic analysis to provide the public with information on the potential changes to the costs and benefits of various CWA programs that could result if there were a change in the number of positive jurisdictional determinations. The economic analysis is provided pursuant to the

requirements of Executive Orders 13563 and 12866 to provide information to the public. The 2015 CWR is used as a baseline in the analysis in order to provide information to the public on the estimated differential effects of restoring pre-2015 status quo in comparison to the 2015 CWR. However, as explained previously, the 2015 CWR has already been stayed by the Sixth Circuit, and this proposal would merely codify the legal status quo, not change current practice.

The proposed rule is a definitional rule that affects the scope of "waters of the United States." This rule does not establish any regulatory requirements or directly mandate actions on its own. However, by changing the definition of "waters of the United States," the proposed rule would change the waters where other regulatory requirements that affect regulated entities come into play, for example, the locations where regulated entities would be required to obtain certain types of permits. The consequence of a water being deemed non-jurisdictional is simply that CWA provisions no longer apply to that water. There are no avoided costs or forgone benefits if similar state regulations exist and continue to apply to that water. The agencies estimated that the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations. The agencies estimated the avoided costs and forgone benefits of repealing the 2015 rule. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules* and is available in the docket for this action.

III. Public Comments

The agencies solicit comment as to whether it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of "waters of the United States" and the best way to accomplish it. Because the agencies propose to simply codify the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 "waters of the United States" definition nor are the agencies soliciting comment on the specific content of those longstanding regulations. *See P&V Enterprises v. Corps of Engineers*, 516 F.3d 1021,1023-24 (D.C. Cir. 2008). For the same reason, the agencies are not at this time soliciting comment on the scope of the definition of "waters of the United States" that the agencies should ultimately adopt in the second step of this two-step process, as the agencies will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking to adopt a revised definition of "waters of the United States" in light of the February 28, 2017, Executive Order. The agencies do not intend to engage in substantive reevaluation of the definition of "waters of the United States" until the second step of the rulemaking. *See P&V*, 516 F.3d at 1025-26.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

In addition, the agencies prepared an analysis of the potential avoided costs and forgone benefits associated with this action. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules*. A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050-0021 and 2050-0135 for the CWA section 311 program and 2040-0004 for the 402 program.

For the CWA section 404 regulatory program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

C. Regulatory Flexibility Act

We certify that this action will not have a significant economic impact on a substantial number of small entities. Because this action would simply codify the legal *status quo,* we have concluded that this action will not have a significant impact on small entities. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules*. A copy of the analysis is available in the docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The definition of

"waters of the United States" applies broadly to CWA programs. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Consistent with the agencies' policy to promote communications with state and local governments, the agencies have informed states and local governments about this proposed rulemaking.

The agencies will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of "waters of the United States."

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed rule does not have tribal implications as specified in Executive Order 13175. This proposed rule maintains the legal *status quo*. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies will appropriately consult with tribal officials during the development of a subsequent rulemaking that makes changes to the longstanding definition of "waters of the United States." In fact, the agencies have already initiated the formal consultation process with respect to the subsequent rulemaking.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because the environmental health risks or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This proposed rule does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

This proposed rule maintains the legal *status quo*. The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

K. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017) this proposed rule is expected to be an E.O. 13771 deregulatory action.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

Environmental protection, Water pollution control.

Dated: 6/27/2017.

E. Scott Pruitt,

Administrator,

Environmental Protection Agency.

Dated: 6/27/2017.

Douglas W. Lamont,

Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works,

Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1344.

2. Section 328.3 is amended by revising paragraphs (a) through (d) and adding paragraphs (e) and (f) to read as follows:

§328.3 Definitions.

* * * * *

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those 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.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 110—DISCHARGE OF OIL

3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR Parts 1971–1975 Comp., p. 793.

4. Section 110.1 is amended by revising the definition of "Navigable waters" and adding the definition of "Wetlands" in alphabetical order to read as follows:

§110.1 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(3) That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section: Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States;

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency or 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 playa lakes, swamps, marshes, bogs and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

PART 112 –OIL POLLUTION PREVENTION

5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 et seq.; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

6. Section 112.2 is amended by revising the definition of "Navigable waters" and adding the definition of "Wetlands" in alphabetical order to read as follows:

§112.2 Definitions.

* * * * *

Navigable waters of the United States means "navigable waters" as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency or 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 playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

7. The authority citation for part 116 is revised to read as follows:

Authority: Secs. 311(b)(2)(A) and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

8. Section 116.3 is amended by revising the definition of "Navigable waters" to read as follows:

§116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean "waters of the United States, including the territorial seas," and includes, but is not limited to:

(1) All waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, and including adjacent wetlands; the term *wetlands* as used in this regulation shall include those 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 prevelanceof vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas; the term adjacent means bordering, contiguous or neighboring;

(2) Tributaries of navigable waters of the United States, including *adjacent* wetlands;

(3) Interstate waters, including wetlands; and

(4) All other waters of the United States such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including, but not limited to:

(i) Intrastate lakes, rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and

(ii) Intrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and

(iii) Intrastate lakes, rivers, streams, and wetlands which are utilized for industrial purposes by industries in interstate commerce.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

9. The authority citation for part 117 is revised to read as follows:

Authority: Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), ("the Act") and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§117.1 Definitions.

* * * * *

(i) *Navigable waters* means "waters of the United States, including the territorial seas." This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i) (1) through (4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i) (1) through (5) of this section ("Wetlands" means those 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 included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): *Provided*, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et.seq.*

12. Section 122.2 is amended by:

a. Revising the definition of "Waters of the United States".

b. Adding a Note 1 to the definition of "Waters of the United States" and the definition of "Wetlands".

The revision and additions read as follows:

§122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in §122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension.[n1]

[n1] EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

Wetlands means those areas that are inundated or saturated by surface or groundwater 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.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

13. The authority citation for part 230 is revised to read as follows:

Authority: The Clean Water Act, Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

14. Section 230.3 is amended by:

a. Redesignating paragraphs (b) through (d) as (c) through (e).

b. Redesignating paragraphs (e) through (f) as (h) through (i).

c. Redesignating paragraph (g) as paragraph (k).

d. Redesignating paragraphs (h) through (l) as paragraphs (m) through (q).

e. Reserving paragraphs (j) and (l).

f. Redesignating paragraph (m) as paragraph (q-1).

g. Redesignating paragraph (o) as paragraph (s).

h. Redesignating paragraph (n) as paragraph (r).

i. Revising newly redesignated paragraph (s).

j. Adding the definition of "adjacent" at paragraph (b) and the definition of "wetlands" at paragraph (t).

The revision reads as follows:

§ 230.3 Definitions.

* * * * *

(b) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

* * * * *

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means those 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.

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

- 15. The authority citation for part 232 is revised to read as follows:

  Authority: 33 U.S.C. 1344.

- 16. Section 232.2 is amended by revising the definition of "Waters of the United States" and adding the definition of "Wetlands" to read as follows:

§232.2 Definitions.

* * * * *

Waters of the United States means:

All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

Which are used or could be used for industrial purposes by industries in interstate commerce.

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)– (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Wetlands means those 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.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

18. Section 300.5 is amended by revising the definition of "Navigable waters" to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:

(1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(i) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) That are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this section;

(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(7) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of "Navigable waters" to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters as defined by 40 CFR 110.1 means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and

(3) That are used or could be used for industrial purposes by industries in interstate commerce.

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(g) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 302— DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

20. The authority citation for part 302 is revised to read as follows:

Authority: 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

21. Section 302.3 is amended by revising the definition of "Navigable waters" to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters or *navigable waters of the United States* means waters of the United States, including the territorial seas;

* * * * *

PART 401— GENERAL PROVISIONS

22. The authority citation for part 401 is revised to read as follows:

Authority: Secs. 301, 304 (b) and (c), 306 (b) and (c), 307 (b) and (c) and 316(b) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251, 1311, 1314 (b) and (c), 1316 (b) and (c), 1317 (b) and (c) and 1326(c); 86 Stat. 816 et seq.; Pub. L. 92-500.

23. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) The term navigable waters includes: All navigable waters of the United States; tributaries of navigable waters of the United States; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce. Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Drinkard, Andrea
Sent: Tue 6/27/2017 4:06:51 PM
Subject: RE: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Tuesday, June 27, 2017 12:06 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: Re: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 27, 2017, at 12:03 PM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Tuesday, June 27, 2017 12:02 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: RE: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Drinkard, Andrea
Sent: Tuesday, June 27, 2017 12:00 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: FW: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Konkus, John
Sent: Tuesday, June 27, 2017 11:29 AM
To: Wade, James <Wade.James@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Orquina, Jessica <Orquina.Jessica@epa.gov>; Hull, George <Hull.George@epa.gov>
Subject: RE: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Wade, James
Sent: Tuesday, June 27, 2017 11:26 AM
To: Konkus, John <konkus.john@epa.gov>
Cc: Orquina, Jessica <Orquina.Jessica@epa.gov>; Hull, George <Hull.George@epa.gov>
Subject: JOHN REVIEW: OW WOTUS Social

John,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

<image001.jpg>

Sent from my iPhone

On Jun 26, 2017, at 10:17 AM, "Wade, James" <Wade.James@epa.gov> wrote:

Good morning John,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

<image001.jpg>

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Drinkard, Andrea
Sent: Tue 6/27/2017 4:03:53 PM
Subject: RE: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Tuesday, June 27, 2017 12:02 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: RE: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Drinkard, Andrea
Sent: Tuesday, June 27, 2017 12:00 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: FW: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Konkus, John
Sent: Tuesday, June 27, 2017 11:29 AM
To: Wade, James <Wade.James@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Orquina, Jessica <Orquina.Jessica@epa.gov>; Hull, George <Hull.George@epa.gov>
Subject: RE: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Wade, James
Sent: Tuesday, June 27, 2017 11:26 AM
To: Konkus, John <konkus.john@epa.gov>
Cc: Orquina, Jessica <Orquina.Jessica@epa.gov>; Hull, George <Hull.George@epa.gov>
Subject: JOHN REVIEW: OW WOTUS Social

John,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 26, 2017, at 10:17 AM, "Wade, James" <Wade.James@epa.gov> wrote:

Good morning John,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

<image001.jpg>

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Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Drinkard, Andrea
Sent: Tue 6/27/2017 3:59:39 PM
Subject: FW: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Konkus, John
Sent: Tuesday, June 27, 2017 11:29 AM
To: Wade, James <Wade.James@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Orquina, Jessica <Orquina.Jessica@epa.gov>; Hull, George <Hull.George@epa.gov>
Subject: RE: JOHN REVIEW: OW WOTUS Social

Deliberative Process / Ex. 5

From: Wade, James
Sent: Tuesday, June 27, 2017 11:26 AM
To: Konkus, John <konkus.john@epa.gov>
Cc: Orquina, Jessica <Orquina.Jessica@epa.gov>; Hull, George <Hull.George@epa.gov>
Subject: JOHN REVIEW: OW WOTUS Social

John,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 26, 2017, at 10:17 AM, "Wade, James" <Wade.James@epa.gov> wrote:

Good morning John,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

<image001.jpg>

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Hewitt, Julie
Sent: Mon 6/26/2017 8:14:56 PM
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 4:11 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

From: Hewitt, Julie
Sent: Monday, June 26, 2017 3:11 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Monday, June 26, 2017 3:08 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>

Subject: RE: new FAQ

Deliberative Process / Ex. 5

Thanks!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Hewitt, Julie
Sent: Monday, June 26, 2017 1:24 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

O R

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 12:21 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: new FAQ

Mindy and Julie,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: McGartland, Al[McGartland.Al@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Marten, Alex[Marten.Alex@epa.gov]; Bowen, Jennifer[Bowen.Jennifer@epa.gov]; Hewitt, Julie[Hewitt.Julie@epa.gov]
From: Massey, Matt
Sent: Mon 6/26/2017 7:20:50 PM
Subject: Response to OMB EA comments
WOTUS Draft Proposed EA (OMB 06-23-17) Response to OMB Comments.docx

Attached is the final version of our response to OMB comments on the EA.

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Hewitt, Julie
Sent: Mon 6/26/2017 7:10:40 PM
Subject: RE: new FAQ

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Monday, June 26, 2017 3:08 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Thanks!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Hewitt, Julie

Sent: Monday, June 26, 2017 1:24 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

O R

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 12:21 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: new FAQ

Mindy and Julie,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: McGartland, Al[McGartland.Al@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Marten, Alex[Marten.Alex@epa.gov]; Bowen, Jennifer[Bowen.Jennifer@epa.gov]
From: Massey, Matt
Sent: Mon 6/26/2017 6:39:00 PM
Subject: Draft CWR response to OMB comments
WOTUS Draft Proposed EA (OMB 06-23-17) __ response to OMB comments.docx

Hi everyone,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks.

Matt

To: Hewitt, Julie[Hewitt.Julie@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Christensen, Damaris
Sent: Mon 6/26/2017 6:22:09 PM
Subject: RE: new FAQ

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 1:49 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

From: Hewitt, Julie
Sent: Monday, June 26, 2017 1:45 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 1:38 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Mindy,

Deliberative Process / Ex. 5

Damaris

From: Hewitt, Julie
Sent: Monday, June 26, 2017 1:24 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

O R

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 12:21 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: new FAQ

Mindy and Julie,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: Hewitt, Julie[Hewitt.Julie@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Christensen, Damaris
Sent: Mon 6/26/2017 5:49:31 PM
Subject: RE: new FAQ

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

Damaris

From: Hewitt, Julie
Sent: Monday, June 26, 2017 1:45 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 1:38 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Mindy,

Deliberative Process / Ex. 5

Damaris

From: Hewitt, Julie
Sent: Monday, June 26, 2017 1:24 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

O R

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 12:21 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: new FAQ

Mindy and Julie,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Hewitt, Julie
Sent: Mon 6/26/2017 5:45:28 PM
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 1:38 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Mindy,

Deliberative Process / Ex. 5

Damaris

From: Hewitt, Julie
Sent: Monday, June 26, 2017 1:24 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy

<Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

O R

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 12:21 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: new FAQ

Mindy and Julie,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: Hewitt, Julie[Hewitt.Julie@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Christensen, Damaris
Sent: Mon 6/26/2017 5:37:44 PM
Subject: RE: new FAQ

Mindy,

Deliberative Process / Ex. 5

Damaris

From: Hewitt, Julie
Sent: Monday, June 26, 2017 1:24 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

overstated.

From: Christensen, Damaris
Sent: Monday, June 26, 2017 12:21 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: new FAQ

Mindy and Julie,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Hewitt, Julie
Sent: Mon 6/26/2017 5:24:24 PM
Subject: RE: new FAQ

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

O R

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Monday, June 26, 2017 12:21 PM
To: Hewitt, Julie <Hewitt.Julie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: new FAQ

Mindy and Julie,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Chemerys, Ruth
Sent: Mon 6/26/2017 2:38:51 PM
Subject: FW: John's edits
image2017-06-26-101354.pdf

From: DC-WJCW-7318R-M@domain.invalid [mailto:DC-WJCW-7318R-M@domain.invalid]
Sent: Monday, June 26, 2017 10:14 AM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Subject:

To: Bowman, Liz[Bowman.Liz@epa.gov]
Cc: Dennis, Allison[Dennis.Allison@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Grantham, Nancy[Grantham.Nancy@epa.gov]
From: Drinkard, Andrea
Sent: Fri 6/23/2017 7:55:10 PM
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release
wotusfinal.jpg

Deliberative Process / Ex. 5

From: Bowman, Liz
Sent: Friday, June 23, 2017 12:17 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: Re: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Sent from my iPhone

On Jun 23, 2017, at 12:14 PM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

Deliberative Process / Ex. 5

From: Drinkard, Andrea
Sent: Friday, June 23, 2017 10:57 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

-Andrea-

From: Bowman, Liz
Sent: Friday, June 23, 2017 10:25 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Drinkard, Andrea
Sent: Wednesday, June 14, 2017 8:56 AM

To: Bowman, Liz <Bowman.Liz@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Thanks.

From: Bowman, Liz
Sent: Friday, June 09, 2017 3:34 PM
To: Dennis, Allison <Dennis.Allison@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Dennis, Allison
Sent: Friday, June 9, 2017 1:32 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg,

Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Liz,

Deliberative Process / Ex. 5

-----Original Message-----
From: Bowman, Liz
Sent: Friday, June 09, 2017 10:42 AM
To: Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Re: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 9, 2017, at 10:33 AM, Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil> wrote:

>

Deliberative Process / Ex. 5

>

> Thanks!!

> Cindy

>

> -----Original Message-----

> From: Bowman, Liz [mailto:Bowman.Liz@epa.gov]

> Sent: Friday, June 09, 2017 10:15 AM

> To: Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil>

> Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

> Subject: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

> Liz Bowman

>

> U.S. Environmental Protection Agency (EPA)

>

> Office: 202-564-3293

>

>

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To: Bowman, Liz[Bowman.Liz@epa.gov]; Dennis, Allison[Dennis.Allison@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Grantham, Nancy[Grantham.Nancy@epa.gov]
From: Drinkard, Andrea
Sent: Fri 6/23/2017 4:14:15 PM
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Drinkard, Andrea
Sent: Friday, June 23, 2017 10:57 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks and let me know if you have any questions.

-Andrea-

From: Bowman, Liz
Sent: Friday, June 23, 2017 10:25 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Drinkard, Andrea
Sent: Wednesday, June 14, 2017 8:56 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Thanks.

From: Bowman, Liz
Sent: Friday, June 09, 2017 3:34 PM
To: Dennis, Allison <Dennis.Allison@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Dennis, Allison
Sent: Friday, June 9, 2017 1:32 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Liz,

Deliberative Process / Ex. 5

-----Original Message-----
From: Bowman, Liz
Sent: Friday, June 09, 2017 10:42 AM
To: Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Re: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 9, 2017, at 10:33 AM, Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil> wrote:

>

Deliberative Process / Ex. 5

>

> Thanks!!

> Cindy

>

> -----Original Message-----

> From: Bowman, Liz [mailto:Bowman.Liz@epa.gov]

> Sent: Friday, June 09, 2017 10:15 AM

> To: Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil>

> Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

> Subject: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

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> All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

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> Liz Bowman

>

> U.S. Environmental Protection Agency (EPA)

>

> Office: 202-564-3293

>

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To: Bowman, Liz[Bowman.Liz@epa.gov]; Dennis, Allison[Dennis.Allison@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Grantham, Nancy[Grantham.Nancy@epa.gov]
From: Drinkard, Andrea
Sent: Fri 6/23/2017 2:56:52 PM
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release
WOTUS Step 1 Comms Plan 6.23.17.docx
WOTUS_Draft_PR_v1.docx
wotus3.jpg

Deliberative Process / Ex. 5

Thanks and let me know if you have any questions.

-Andrea-

From: Bowman, Liz
Sent: Friday, June 23, 2017 10:25 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>

Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Drinkard, Andrea
Sent: Wednesday, June 14, 2017 8:56 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Thanks.

From: Bowman, Liz
Sent: Friday, June 09, 2017 3:34 PM
To: Dennis, Allison <Dennis.Allison@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Dennis, Allison
Sent: Friday, June 9, 2017 1:32 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Liz,

Deliberative Process / Ex. 5

-----Original Message-----
From: Bowman, Liz
Sent: Friday, June 09, 2017 10:42 AM
To: Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Re: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 9, 2017, at 10:33 AM, Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil> wrote:

>

Deliberative Process / Ex. 5

>

> Thanks!!

> Cindy

>

> -----Original Message-----

> From: Bowman, Liz [mailto:Bowman.Liz@epa.gov]

> Sent: Friday, June 09, 2017 10:15 AM

> To: Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil>

> Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

>

> Liz Bowman

>

> U.S. Environmental Protection Agency (EPA)

>

> Office: 202-564-3293

>

>

>

To: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Dennis, Allison[Dennis.Allison@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Grantham, Nancy[Grantham.Nancy@epa.gov]
From: Bowman, Liz
Sent: Fri 6/23/2017 2:25:12 PM
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Drinkard, Andrea
Sent: Wednesday, June 14, 2017 8:56 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks.

From: Bowman, Liz
Sent: Friday, June 09, 2017 3:34 PM
To: Dennis, Allison <Dennis.Allison@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

From: Dennis, Allison
Sent: Friday, June 9, 2017 1:32 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Liz,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

-----Original Message-----
From: Bowman, Liz
Sent: Friday, June 09, 2017 10:42 AM
To: Cindy Barger <cindy.s.barger.civ@mail.mil>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>;

Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Re: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 9, 2017, at 10:33 AM, Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil> wrote:

>

Deliberative Process / Ex. 5

>

> Thanks!!

> Cindy

>

> -----Original Message-----

> From: Bowman, Liz [mailto:Bowman.Liz@epa.gov]

> Sent: Friday, June 09, 2017 10:15 AM

> To: Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil>

> Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Dennis, Allison <Dennis.Allison@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

> Subject: [Non-DoD Source] For Review: WOTUS Step 1 Press Release

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> **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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> Liz Bowman

>

> U.S. Environmental Protection Agency (EPA)

>

> Office: 202-564-3293

>

>

>

To: Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Eargle, Frances
Sent: Thur 6/22/2017 7:42:52 PM
Subject: FW: REMINDER! TODAY! Thursday, June 22nd, 4:30-5:30 ET- LGAC Protecting America's Waters Nonresponsive Conference Code/ Ex. 6 Agenda and Meeting Materials
LGACWaterWG-AGENDA-June22-2017.docx
LGAC-WOTUS DRAFT Report 1.1-June19.pdf
Transmittal-letter-Pruitt-WOTUS-06-19-17 sh(1).pdf

Here are the latest versions of the Report and Transmittal letter (very minor edits).

Quote added and more expected!

From: Eargle, Frances
Sent: Thursday, June 22, 2017 3:30 PM
To: Susan Hann Personal Email / Ex. 6; 'Elizabeth B. Kautz' <Elizabeth.Kautz@burnsvillemn.gov>; Robert Cope Personal Email / Ex. 6 Bob Bozien <bobziend@reno.gov>; Brad Pierce <bpierce@auroragov.org>; Cynthia Koehler <ckoehler@marinwater.org>; 'Hector F. Gonzalez' <hgonzalez@ci.laredo.tx.us>; Jill Duson Personal Email / Ex. 6 Jeff Witte <jwitte@nmda.nmsu.edu>; 'norm.archibald@abilenetx.com' <norm.archibald@abilenetx.com>; Kevin Shafe Personal Email / Ex. 6 Kim Driscoll <kdriscoll@salem.com>; Mark Stodola <mstodola@littlerock.gov>; Miro Weinberger <mayor@burlingtonvt.gov>; Shawn Yanity <syanity@stillaguamish.com>; Terri Goomann <tgoodman@cityofdubuque.org>; 'Reinhardt, Victoria' <Victoria.Reinhardt@CO.RAMSEY.MN.US>; Sal Panto <spanto@easton-pa.gov>; 'Stephanie Chang' <SChang@house.mi.gov>; Steve Williams <swilliams@cityofhuntington.com>; 'Sundberg, Ryan' <RSundberg@co.humboldt.ca.us>; 'Andy Beerman' <andy@parkcity.org>
Cc: mayor <mayor@greensburgks.org>; Karen Freeman-Wilson <kfreemanwilson@ci.gary.in.us>; Jeff Witte <jwitte@nmda.nmsu.edu>; Johnny DuPree <mayor@hattiesburgms.com>; 'DuPree, Mayor Johnny L.' <jdupree@hattiesburgms.com>; Lyons, Troy <lyons.troy@epa.gov>; Bangerter, Layne <bangerter.layne@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>; Cory, Katherine <cory.katherine@epa.gov>; Bowles, Jack <Bowles.Jack@epa.gov>; Matthews, Demond <matthews.demond@epa.gov>; Cook-Shyovitz, Becky <Cook-Shyovitz.Becky@epa.gov>; Dawn Zimmer <dzimmer@hobokennj.gov>; Elizabeth B. Kautz <elizabeth.kautz@ci.burnsville.mn.us>; Hardie Davis <mayordavis@augustaga.gov>; Jacqueline Goodall Personal Email / Ex. 6 Kitty Barnes (kbarnes@catawbacountync.gov) <kbarnes@catawbacountync.gov>; Manna Jo Greene <mannajo@clearwater.org>; Maria Salas <msalas@chulavistaca.gov>; Merceria Ludgood Personal Email / Ex. 6 Rodney Bartlett <rbartlett@peterboroughnh.gov>; Samara Swanston Personal Email / Ex. 6 Scott Bouchier <scott.bouchie@mesaaz.gov>; Sue Hann Personal Email / Ex. 6 Susan Anderson <Susan.Anderson@portlandoregon.gov>; Tom Sloan <tom.sloan@house.ks.gov>; Angie Bracey <braceya@cityofhuntington.com>; Anna

Kettlewell < Personal Email / Ex. 6 Debbie Orth <Debbie.orth@co.ramsey.mn.us>; Deborah Delk <ddelk@cityofgary.onmicrosoft.com>; Donna DiFrancesco <Donna.DiFrancesco@MesaAZ.gov>; Ellen Heinitz <eheinitz@house.mi.gov>; Erika Martinez <emartinez8@ci.laredo.tx.us>; Jamie Hartranft <jhartranft@easton-pa.gov>; Jen Wessell <JWessell@Salem.com>; Joanne Buonarota <jbuonarota@hobokennj.gov>; Joi Whiteside <jwhiteside@ci.gary.in.us>; Jordan <jordan@burlingtonvt.gov>; Kathy Hayes <Khayes@co.humboldt.ca.us.>; Kim O'Farrell <O'Farrell,Kim<Kim.O'Farrell@leg.wa.gov>>; Lalosa Burns <ldburns@ci.gary.in.us>; Lindsay Rogers (ler@waternow.org) <ler@waternow.org>; Macheal Brooks <macheal.brooks@ci.burnsville.mn.us>; Nellie Flores <nflores@chulavistaca.gov>; Seichner <seichner@marinwater.org>; Stephanie Valentine <Svalenti@cityofdubuque.org>
Subject: FW: REMINDER! TODAY! Thursday, June 22nd, 4:30-5:30 ET- LGAC Protecting America's Waters Work[redacted]genda and Meeting Materials

Nonresponsive Conference Code/ Ex. 6

***USE THESE VERSIONS**: Draft Report (1.1) pdf and Transmittal Letter pdf (1).*
***Thanks**!! Got more quotes!! ☺*

***REMINDER! TODAY!, Thursday,* June 22nd, 4:30-5:30 ET-** LGAC Protecting America's Waters Workgroup**-Call in:** Nonresponsive Conference Code/ Ex. 6

Hi, LGAC Protecting America's Waters Workgroup Members (*And LGAC & SCAS Members*):

Nonresponsive Conference Code/ Ex. 6

The Workgroup will continue review the Discussion Draft LGAC WOTUS Report and Transmittal letter to the Administrator. (see Meeting Agenda). ***LGAC and SCAS Members are also invited to take part (pending any quorum issues).***

The purpose of this meeting will be to review and approve this action to forward the Draft LGAC WOTUS Report and Transmittal Letter to the Executive Committee in preparation for Committee action next week.

A '***Big***' Thanks to everyone for sending in your quotes and photos to add to the Report!!! It certainly gave it a nice touch to your already great work!!! If you have not had opportunity to get them in, ***there is still time!!***

Thanks so much and look forward to the discussion! What a GREAT Committee!!

Fran Eargle

202-564-3115

Attachments:

-Agenda June 22nd Water Workgroup

--Draft LGAC WOTUS Report

--Draft Transmittal Letter

Protecting America's Waters Workgroup

Thursday, June 22 2017
4:30 PM- 5:30 PM ET

A G E N D A

4:30-4:35 PM	**Call to Order and Opening Remarks** *Susan Hann, Chairwoman* *Mayor Elizabeth Kautz, Vice- Chairwoman* *Mayor Bob Dixson, Chair of LGAC*
4:35-4:50	**Remarks by EPA** *Tate Bennett, Intergovernmental Advisor to the Administrator*
4:50-5:25	**Workgroup Discussion on Draft WOTUS Charge** *-Draft WOTUS Report* *ACTION: Discuss and approve Draft Report* *-Draft WOTUS Transmittal Letter* *ACTION: Discuss and approve Draft Letter*
5:25-5:30	**Wrap-Up/Next Steps** Susan Hann, Chairwoman

DRAFT

DISCUSSION DRAFT

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE'S REPORT

6/22/2017

Waters of the United States 2017 Report

1
2
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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

DRAFT

EPA's Local Government Advisory Committee's Report

WATERS OF THE UNITED STATES 2017 REPORT

DRAFT

Executive Summary

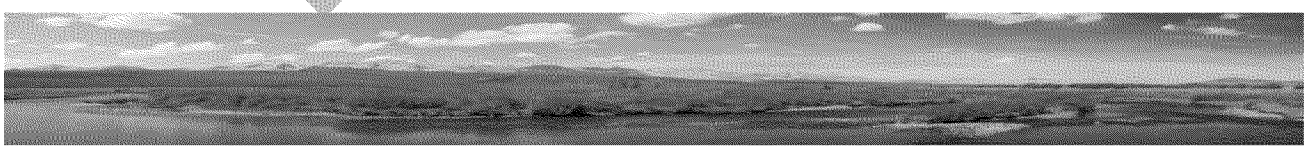
I. Introduction and Background
A. EPA's Proposed Waters of the U.S. Rule
B. Committee Charge
C. Historical Context

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, nor or maybe within a definitive time frame such as 60 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.

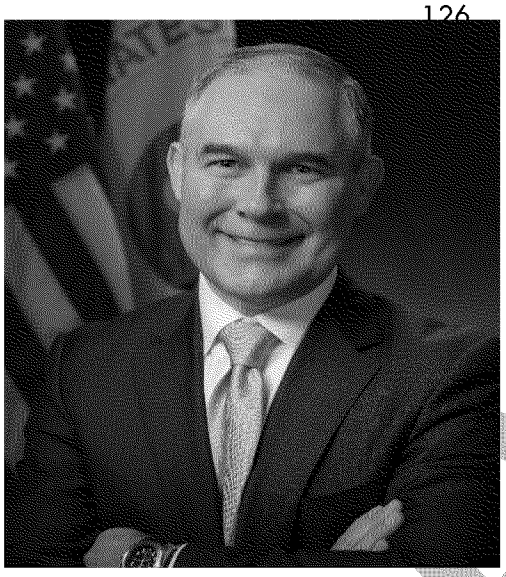
In summary, the LGAC Waters of the United States 2017 report delivers a series of recommendations that can assist EPA in evolving the regulatory framework in a way that collaborates with local governments, improves efficiency and effectiveness and advances the goal of clean, safe and affordable drinking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

DRAFT

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 revise the definition of waters of the United States.[3] Seeking input from state, local and tribal government officials is an important step for the EPA in the process prior to proposing regulations that may have implications on federalism as defined by the EPA's policy for implementing the order.

> ***"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."***
>
> Honorable Scott Pruitt, Administrator, EPA

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

[1] https://www.whitehouse.gov/the pres-office/2017/02/28/presidential-exeuctive-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
[3] Clean Water A
Fed. Reg. 37,054 (June 29, 2015)).

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to be considered in developing and implementing a revised WOTUS rule.

The agencies intend to follow an expeditious, 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 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.

"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 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.

"My City Aurora Colorado appreciates the EPA's efforts reach out 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 proposed 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 the 2015 Waters of the U.S. Rule. The U.S. Environmental Protection Agency and the U.S.

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Army Corp of Engineers proposed a joint rule (2014) to clarify the definition of "waters of the United States" 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 to close on November 14, 2014. 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." rewrite was 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)

LGAC 2014 Meeting, Atlanta, GA, Mayor Kasim Reed

The LGAC heard from 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.*"[4]

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 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.

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

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 investment, 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.[5] Estimates range for every $1 million investment in water infrastructure it supports
266 between 15 and 18 jobs throughout the economy. Disruption in our nation's Therefore, protections under
267 the Clean Water Act for the 117 million
268 people (one third of Americans) that rely on
269 these waters as part of our public drinking
270 water assets are local decisions of public trust
271 and stewardship.

Our communities depend on water for economic progress.

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[5] 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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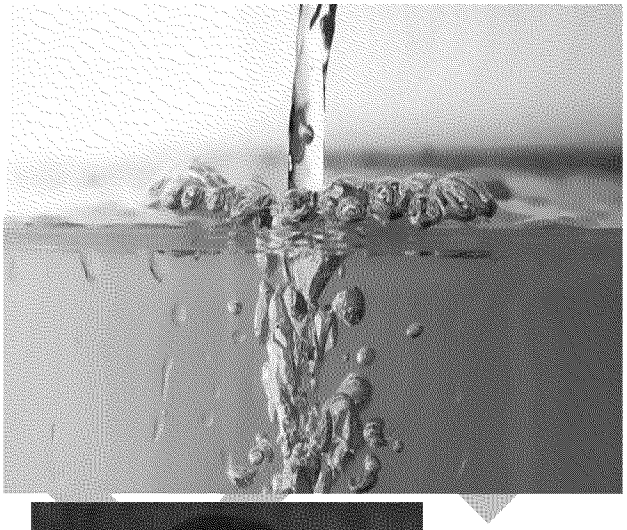
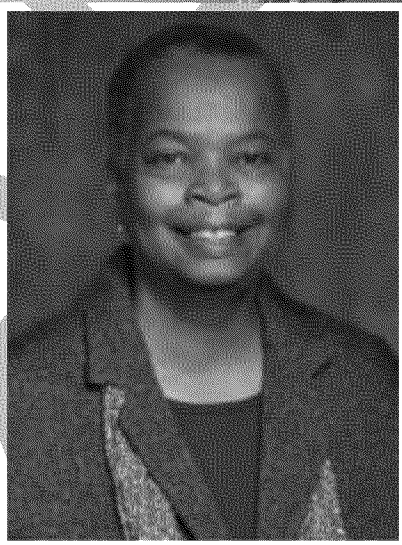
Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred to the directly to rate payer - *at the tap.*



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.

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 the LGAC

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 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 tenants of cooperative federalism. This approach acknowledges the shared responsibility of state and local governments in the governance and cooperation to work out details of responsibility.

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

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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 manage broader 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.

> "***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. Key terms used in the WOTUS rule are vague such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" but 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 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.

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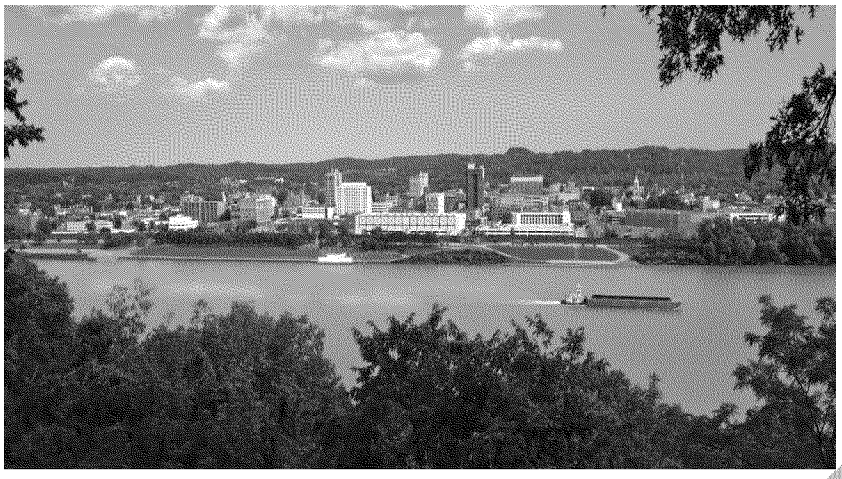

D. Flexibility and Regionalization

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 recognizes natural ecoregions (delineated on the basis of natural and anthropogenic factors) to recognize geographic variability

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

"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

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 waterbodies such as western ephemeral streams, and regional waterbodies such other unique wetlands such as pocosins, Carolina bays etc. should be factored.

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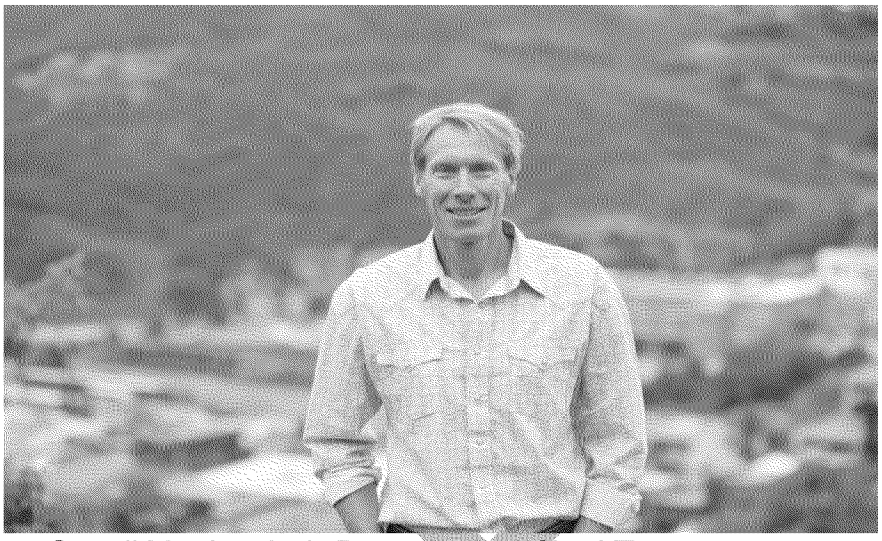
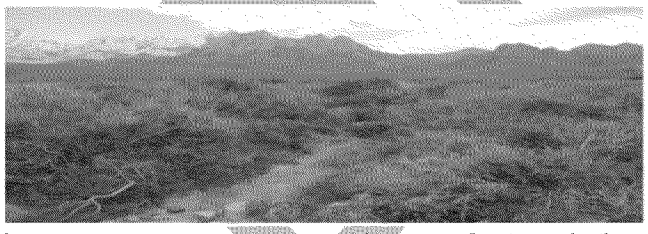
"Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts." **Council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

delineation factors characteristic of these regional waterbodies such as western ephemeral streams, and other unique wetlands such as pocosins, Carolina bays etc. should be factored.



Council Member Andy Beerman, Park City, UT

Western arid streams may need further regional determinations as whether these areas are washes and 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 a 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.

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

Back Cove runner with Portland ME skyline
Photo Source: Corey Templeton Photography

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*. *See* 33 U.S.C. § 1344(g). 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 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 that can be more effective, and with less cost, protect sensitive landscapes valuable to their community such as with building permits, zoning authority, sanitary and health codes, and soil erosion control.

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

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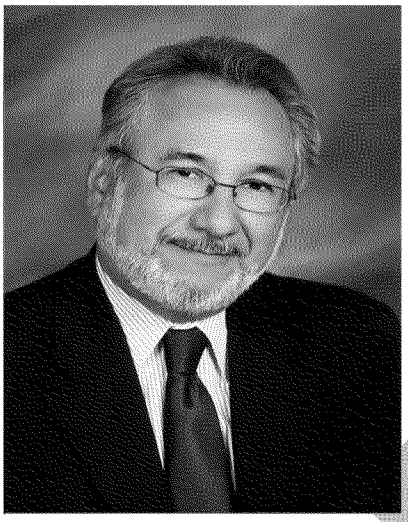
jurisdiction to only "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. The LGAC puts forth an approach that would yield categorical answers of jurisdiction of '*yes', 'no' or 'maybe*' using criteria such as contained within the 2008 guidance and consistent with the Scalia approach.

Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities' drinking water and source water are regulated and protected. These significant waterbodies 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 waterbodies by delineating and mapping these significant 'Waters of the State'. These areas once identified should have primacy in decision-making.



"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.

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 MS4s, stormwater ponds, settling basins 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 exempt. The revised rule should affirm that reservoirs 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 including features such as storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling.[6]

[6] 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."

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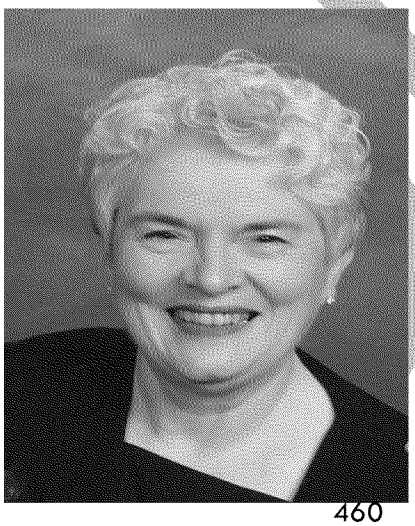
The availability and cleanliness of our water supply is paramount to building a great nation. Mayor Sal Panto, Easton, PA

[Cit[illegible]r source here.]

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

Permitting can be made more efficient and more effective. For example, permitting length of time can be done more efficiently (less than 60 days) and it can also be more flexible, decentralized and integrated

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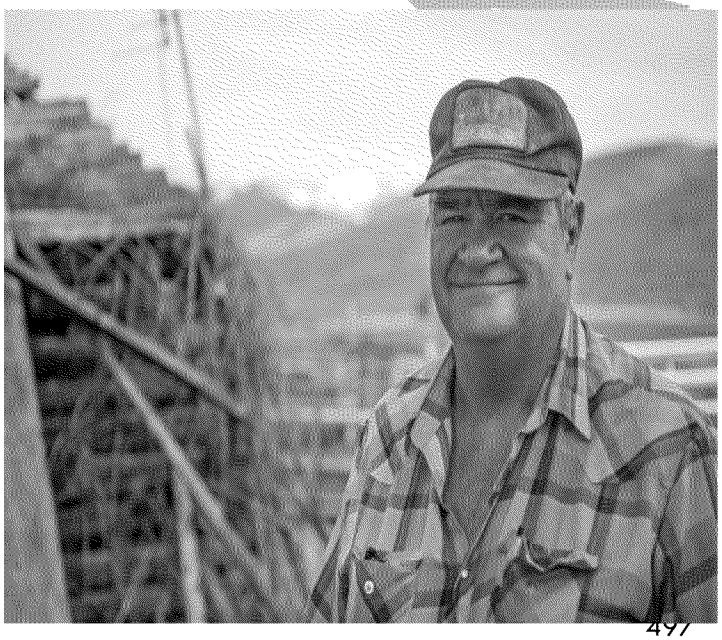
with community goals. Local governments would be generally in favor of State Assumption of the 404 program. Also, further consideration of General Permits and mapping would aid in permitting reform.

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 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.

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

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 farmers. Other issues for rural communities is the NPDES permits 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 are also exempt be 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.



Commissioner Dr. Robert Cope, DVM, Salmon, ID, Chair of SCAS

> *"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*

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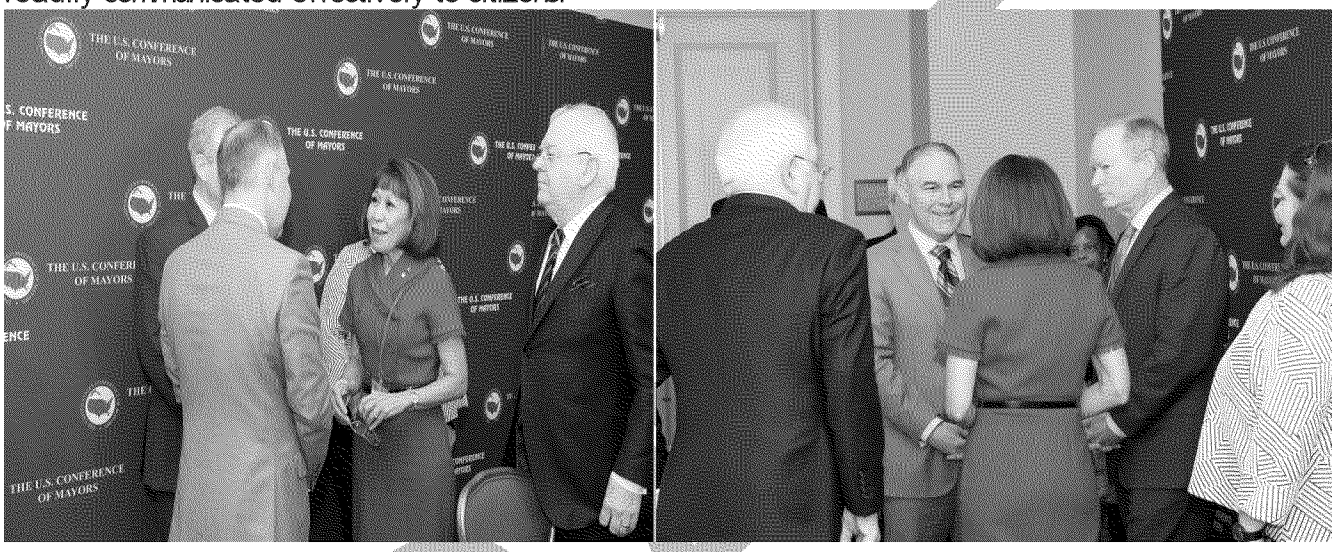
J. Outreach to Local Governments

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 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 of 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*

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 that only serve to reduce local government resources and 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.

"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. Respon[illegible] Findi[illegible] 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

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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 the following Potential Approaches to Wetlands with a "Continuous Surface Connection"-"Relatively Permanent" Waters

Jurisdictional

- Streams with seasonal flows or streams with another offflow which should not capture ephemeral and intermittent streams into the definition of "relatively permanent" waters. Metrics and thresholds should be established when a stream is considered "relatively permanent." Such metrics will vary geographically on a case-by-case basis and the definition of thresholds will be subjective.

- Perennial streams only as "relatively permanent waters".

- Wetlands that directly touch jurisdictional waters are 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).

- 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'.

- 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.

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- 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 and 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 Kennedy test (significant nexus). 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: This 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; those that do not and the maybe that have a 'significant nexus'.

Recommendations:

- Criteria as outlined in the 2008 guidance should be used for a revised rule which provides criteria.

- Definitions should be modified to address clearer definitions. A series of questions using criteria should be used 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)

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The LGAC recommends the following state specific criteria for the revised rule:

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

- In cooperation with 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 between states, the EPA should provide guidelines for state standards that include factors to be considered, but which do not constitute federal standards.

  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.

- 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.

- 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.

- 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.

- 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.

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Permanent Bodies of Water:

- Many 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.

- States should submit proposed criteria and measurement techniques to the EPA for review and approval. EPA should h ave 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.

- States should be encouraged to develop criteria and metrics regarding wetlands and other water bodies that impact on ground water quality.

An application for Smart phone or hand-held computer should be developed to give a quick jurisdictional determination and 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's 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 to be revised to include clearer definitions with input from states, local and tribal governments and other stakeholders and 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.

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- **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, locals 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, 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.

- "Significant nexus" test refers to waters that "significantly affect the chemical, physical, ***and*** biological integrity" of traditionally navigable waters, the 2015 WOTUS Rule covers waters that affect the "chemical, physical, ***or*** biological integrity" of navigable waters. That should be changed to 'and' and include all three parameters. (LGAC 2014 Report)

- The 2015 rule regulates any area having a trace amount of water if it also has – or ever had – a bed, banks, 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 final 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

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when a permit is required for a pollutant discharge that would degrade, pollute or destroy a waterbody. On a positive jurisdictional call, it is uncertain the direct costs and who would pay the costs. More clearly defined exemptions will lessen the trigger for a CWA permit. However, it is uncertain the costs of positive or negative determinations which could both potentially trigger activities potentially threatening or polluting waterways. This is especially a concern of local governments as it applies to waterbodies 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 waterbody 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 and assume these permitting burdens could drastically increase. And states and local governments would not be able to assume these costs. 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, disproportionally 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 it results in less cost to the rate payers 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. This 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 on 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

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expanded federal jurisdiction to previously unregulated streams, ditches, and wetlands. However, the final rule includes 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 rule finally codifies the well-understood principle that the CWA does not apply to groundwater. For MS4s, the primary concern about the rule has been that it could potentially be used as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are "waters of the US." That could mean, for example, 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 final rule 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 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) and transfer the costs to local governments. In addition, 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.

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- **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 it 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. The goal is to "preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone." it is administered by the National Oceanic and Atmospheric Administration (NOAA). The National Coastal Zone Management Program aims to balance competing land and water issues through state and territorial coastal management programs through state and locally managed 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 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.
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- 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.

- EPA should task an Interagency Workgroup to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review.

- Definitions be should be practical, written in plain English, and be enforceable.

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

- The public have the opportunity to comment on these proposed definitions.

- The following terms, among others, should be defined concisely and with clarity: 'other waters', 'significant nexus', 'adjacent' and 'upland'. Furthermore, the LGAC recommends 'upland' be defined based upon exclusion of what it is not.

- The LGAC recommends that EPA consider the following when defining these terms:

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 account 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 influence 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

- 'Flloodway' 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.

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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. 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. (REWRITTEN from LGAC 2014 Report)

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 its water source is protected and accessible (some disproportionately affected communities don't have access to drinking water).

EJ Communities:

- Must have regulation and enforcement that is coordinated between all levels (fed, state and local) to assure we protect water now and for our future generations as water is life.

- Must have protections against current contaminants but as well engage science community to prepare for new and emerging water contaminants, as we need to preserve safe drinking water, recreational water and water life for many communities (EJ and tribal) depend on it for food.

- Need to have clearly defined WOTUS, what they are and engage them to better understand these definitions to protect these valuable watersheds and bodies of water.

- Look to local communities for local solutions and work on infrastructure resources for EJ communities to ensure safe and accessible drinking water.

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- Must be assurances that for all issues of WOTUS that EJ communities are included in any 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.

Recommendations:

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

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

- The revised 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 has heard a broad level of concerns from municipal associations and county governments concerning MS4s. The LGAC is uncertain of what the regulatory impact will be on MS4s as the proposed rule is currently 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 will be required to meet State Water Quality

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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). Also, if it is not deemed jurisdictional under Section 404 it will likely need a Section 402 permit and subject to WQS. (Goodman Letter)

There could be potential impacts 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 WOTUS rule. (Goodman Letter)

Many communities already heavily focus on water quality programs and projects; these communities should be encouraged and incentivized to do more. A revised 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 types of 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)

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- 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 juxtaposed 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 used to assess this determination. (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-call your local Corps representative'. 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 the final rule the EPA is considering in Waters of the U.S. (LGAC 2014 Report)

- The LGAC recommends addressing how mining impoundments or borrow pits 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.) that account for geographic differences in each EPA region be developed to assist with jurisdictional calls. (LGAC 2014 Report)

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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 a strong concern regarding implementation, especially from local governments. Several local agencies reported uncertainty in interpretation as well as uncertainty in time and cost to conclude the permit 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 the 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. (Goodman 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.

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

- 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 rule in its current state 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 implement 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.[7]

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)

[7] "Wetlands Protection." Michigan Department of Environmental Quality. www.mi.gov/wetlands.

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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 the rule if there are state-run programs which are more responsive to local and regional issues. (LGAC 2014 Report)

- The LGAC strongly suggests federal incentives for States and Tribes to assume 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 the proposed rule. It is not possible to ascertain the impacts of enforcement on local governments without a revised rule in place. The LGAC also believes that clarified definitions contained within a revised rule will be critical to effective and equitable enforcement of the rule. (LGAC 2014 Report)

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Recommendations:

- The LGAC recommends that flexibility is included 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 increase 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 the final rule is developed regarding enforcement options. (LGAC 2014 Report)

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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 standards than those required by federal law. The LGAC noticed a general feeling of distrust that the 2015 rule generated. Further clarity on definitions, jurisdiction and exemptions should further aid Integrated Planning. However, it is uncertain how a final 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. 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 polices, 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 needs to happen 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 the rule's impact on CWA programs.

What we learned from the 2015 rule, there were concerns heard throughout the outreach process, noted the mixed messages relating to the economic impacts.

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)

Recommendations:

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The LGAC recommends that a Fact Sheet (one-page) be developed laying out the clear messaging of the revised rule. It should also have graphics and a side by side comparison of what the rule currently is and what the revised rule proposes should be developed and included 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 the proposed rule. Based on the Workgroup's 2014 field meetings, local agencies were skeptical of EPA's strong statement that the proposed rule does not change the definition of the Waters of the U.S. Although this statement may be factually correct, what will likely occur in the field is that local agencies will experience a permitting environment in direct contrast to this statement, as jurisdictional assertion is 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. And 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 information to distribute communication materials for local governments. (LGAC Drinking Water Report 2016)

In its annual or biannual meetings with State Environmental Commissioners, State Public Health Directors and State Agricultural Directors, the EPA should convene a special session on Waters of the U.S. and 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?**

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Recommendations:

- The LGAC recommends that EPA should consider the impacts of a revised rule on NPDES and Wastewater systems. (Goodman 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 the WOTUs rule. The SCAS had some observations from the testimony received. Also, several of the SCAS Members are also agricultural producers and work for the Conservation Districts. Due to lack of clear definitions and the Science Advisory Board's Report which contained even more uncertainty on connectivity and how that will be applied.

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, artificial lakes and ponds created by excavation and/or diking dry land for purposes of stock watering, irrigation, settling basins or rice production be exempt from WOTUS.

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

- 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.

- 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.

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

- The LGAC recommends increasing the boundaries of riparian areas in the Conservation Reserve program so that they enhance protection of waters.

- The LGAC recommends that EPA continue to work with NRCS to incentivize farming practices that improve water quality.

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.

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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 between NRCS, EPA and other agencies involved in these issues. The SCAS believes that a glossary defining what agricultural exemptions are in a glossary 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.

- The LGAC recommends more effective outreach to agricultural communities and small rural communities on this proposed 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 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 any uncertainty of a new rule. 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 considered a "Waters of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards. (Goodman Letter)

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Recommendations:

- The EPA should 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. (Goodman Letter)

- The EPA specifically exempt green infrastructure from jurisdiction and outline the Agency's understanding of what is included within green infrastructure similar to what was done for agricultural practices for 'normal farming practices'. (Goodman Letter)

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. The 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 (Goodman 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 the final 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

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Waters of the Unities 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 approach 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.

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APPENDIX

Local Government Advisory Committee

Roster

Waters of the United States 2017 Report

2017 BIOGRAPHIES OF LGAC AND SCAS MEMBERS

Chair of LGAC

The Honorable Bob Dixson *(Chair)*
Mayor, Greensburg, KS
Greensburg, KS

Chair of SCAS

The Honorable Robert Cope
Commissioner, Planning and Zoning, Salmon, ID
Salmon, ID

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, MA

The Honorable Miro Weinberger
Mayor, City of Burlington
Burlington, VT

The Honorable Jill Duson
Councilor, Portland, Maine
Portland, Maine

Region 2

Samara Swanston, Esq.
Counsel to NYC Council Environmental Protection Committee, New York, NY (*Appointed)*
New York, NY

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1592
1593 The Honorable Dawn Zimmer
1594 Mayor, Hoboken, NJ
1595 Hoboken, NJ
1596
1597 The Honorable Manna Jo Greene
1598 County Legislator, Ulster County, NY
1599 District 19 Rosendale, NY
1600
1601 Region 3
1602
1603 The Honorable Sal Panto, Jr.
1604 Mayor, City of Easton
1605 Easton, PA
1606
1607 The Honorable Stephen T. Williams
1608 Mayor, Huntington, WV
1609 Huntington, WV
1610
1611 Region 4
1612
1613 The Honorable Merceria Ludgood
1614 Commissioner, Mobile County
1615 Mobile County, AL
1616
1617 The Honorable Johnny DuPree, Ph.D.
1618 Mayor
1619 Hattiesburg, MS
1620
1621 The Honorable Kitty Barnes
1622 Commissioner, Catawba County, NC
1623 Terrell, NC
1624
1625 The Honorable Hardie Davis
1626 Mayor, City of Augusta, GA
1627 Augusta, GA
1628
1629 Ms. Susan Hann
1630 Director, Planning Palm Bay County Schools, FL
1631 Palm Bay County, FL
1632
1633
1634 Region 5
1635
1636 The Honorable Stephanie Chang
1637 State Representative- House District 6
1638 State of Michigan

1639 The Honorable Victoria Reinhardt
1640 Commissioner, Ramsey County, MN

DRAFT

St. Paul, MN

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

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

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

Region 6

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

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

Jeff Witte
Secretary of Agriculture, New Mexico
New Mexico

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

Region 7

Teri Goodmann
Assistant City Manager, City of Dubuque
Dubuque, IA

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

Region 8

DRAFT

The Honorable Andy Beerman
City Councilor
Park City, UT

The Honorable Brad Pierce
Council Member, City of Aurora, CO
Aurora, CO

Region 9

The Honorable Cynthia Koehler
Board of Directors, Marin County
Marin County, CA

The Honorable David Bobzien
City Councilmember At-Large - City of Reno
Reno, NV

The Honorable Mary Casillas Salas
Mayor, City of Chula Vista
Chula Vista, CA

Scott Bouchie
Environmental Management and Sustainability Director - City of Mesa
Mesa, AZ

The Honorable Ryan Sundberg
Supervisor, Humboldt County, CA
Humboldt County, CA

Region 10

Susan Anderson
Director, Portland Bureau of Planning and Sustainability
Portland, OR

The Honorable Shawn Yanity
Chairman, Stillaguamish Tribe
Arlington, WA

APPENDIX 2

DRAFT

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE (LGAC) DRAFT 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).[8] 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*[9] 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:

[8] https://www.whitehouse.gov/the pres-office/2017/02/28/presidential-exeuctive-order-restoring-rule-law-federalism-and-economic
[9] Rapanos v. United States, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 LEd. 2d 159

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Charge Questions

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).

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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)

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Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Administrator Pruitt:

We are writing on behalf of your Local Government Advisory Committee (LGAC), which is composed of 35 elected and appointed officials of state, local and tribal government. We very much appreciate the opportunity to provide input on clarifying the regulatory status of "Waters of the United States" (WOTUS). We also commend your leadership in recognizing and resolving the regulatory confusion and complexity of WOTUS by issuing a new rule.

The LGAC has been engaged regarding Waters of the United States since May 2014. Through a series of outreach meetings and conference calls, the LGAC has heard over 60 hours of comments and recommendations from our colleagues across the United States. The LGAC Waters of United States 2017 Report is a compilation of recommendations from a diverse group of local leaders who have experienced the current regulatory framework.

One of the most important themes we have heard and experienced is the lack of clarity and predictability in the current permitting process. The EPA's partnership with the U.S. Army Corps of Engineers is a tremendous step towards resolving these issues that impede economic growth and hamper public infrastructure projects.

Although permitting is a complex issue, some practical solutions such as establishing a 60 day time frame for jurisdictional determinations can significantly ease the regulatory uncertainty. In addition, state-specific or region-specific criteria can be developed to provide much needed flexibility within a national standard. The LGAC also supports exemptions such as ditches, stormwater management systems, green infrastructure, normal farming practices and converted crop lands. Additional exemptions may be appropriate at the regional level, such as in the West with ephemeral streams.

This approach also invites an enhanced state and local role in implementing the Clean Water Act Section 404 and WOTUS. Local governments are very interested in being part of the solution, but will need dedicated resources to fully assist through assumption of the Section 404 program and for greater utilization of state and regional general permits.

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As local government officials, the availability and accessibility of clean and safe water is one of our highest priorities. Source water protection is a key element and certain water bodies may need case specific jurisdictional reviews. The LGAC recommends that EPA work with state and local government to identify these significant waterbodies and provide maps of these areas. Improving transparency and predictability will ease the regulatory uncertainty that currently exists.

In summary, the LGAC appreciates your leadership and collaboration with local, tribal and state partners. We offer our continued assistance to you, Administrator Pruitt, and to the team at EPA as you move forward. The opportunity exists to develop a clear and predictable regulatory framework that will protect source water and provide clean, safe and affordable water for the American people. Thank you for the opportunity to comment and for your consideration of our recommendations.

Sincerely,

Mayor Bob Dixson
Chairman

Ms. Susan Hann, P.E.
Chairwoman, Protecting America's Waters Workgroup

Commissioner Dr. Robert Cope
Chairman, Small Community Advisory Subcommittee (SCAS)

Dr. Hector Gonzalez, M.D.
Chairman, Environmental Justice Workgroup

DRAFT

To: Goodin, John[Goodin.John@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Christensen, Damaris
Sent: Thur 6/22/2017 2:47:48 PM
Subject: LGAC prep
LGACWaterWG-AGENDA-June22-2017.docx
LGAC-WOTUS DRAFT Report 4.1-June22.pdf
Transmittal-letter-Pruitt-WOTUS-06-19-17 sh.docx

John,

I've finally connected with Fran about today's meeting. This is the subcommittee's final meeting to work on their draft report before submitting to the larger LGAC. As suspected, a brief update of what's happened ("not much change since we talked with you last") and thanks to the committee and Susan Hahn (and maybe Fran) for their work on the report is all they want. You probably don't have to stay for the whole discussion although I said I would stay on the line.

Deliberative Process / Ex. 5

Damaris

FW: REMINDER! TOMORROW! Thursday, June 22nd, 4:30-5:30 ET- LGAC Protecting America's Wate **Nonresponsive Conference Code/ Ex. 6** -202-564-3115#-Agenda and Meeting Materi

From: Eargle, Frances
Sent: Wednesday, June 21, 2017 8:39 PM
To: Susan Hann **Personal Email / Ex. 6** ; Elizabeth B. Kautz <Elizabeth.Kautz@burnsvillemn.gov>; Robert Cope **Personal Email / Ex. 6** Bob Bozien <bobziend@reno.gov>; Brad Pierce <bpierce@auroragov.org>; Cynthia Koehler <ckoehler@marinwater.org>; Hector F. Gonzalez <hgonzalez@ci.laredo.tx.us>; Jill Duson **Personal Email / Ex. 6** witte@nmda.nmsu.edu; norm.archibald@abilenetx.com; Kevin Shafer **Personal Email / Ex. 6** ; Kim Driscoll <kdriscoll@salem.com>; Mark Stodola <mstodola@littlerock.gov>; Miro Weinberger <mayor@burlingtonvt.gov>; Shawn Yanity <syanity@stillaguamish.com>; Terri Goomann <tgoodman@cityofdubuque.org>; Reinhardt,

Victoria <Victoria.Reinhardt@CO.RAMSEY.MN.US>; Sal Panto <spanto@easton-pa.gov>; Stephanie Chang <SChang@house.mi.gov>; Rodney Bartlett <rbartlett@peterboroughnh.gov>; Andy Beerman <andy@parkcity.org>; Tom Sloan <tom.sloan@house.ks.gov>; Steve Williams <swilliams@cityofhuntington.com>
Cc: mayor <mayor@greensburgks.org>; Karen Freeman-Wilson <kfreemanwilson@ci.gary.in.us>; Johnny DuPree <mayor@hattiesburgms.com>; Johnny DuPree <mayor@hattiesburgms.com>; Lyons, Troy <lyons.troy@epa.gov>; Bangerter, Layne <bangerter.layne@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>; Bowles, Jack <Bowles.Jack@epa.gov>; Matthews, Demond <matthews.demond@epa.gov>; Cook-Shyovitz, Becky <Cook-Shyovitz.Becky@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>; Dawn Zimmer <dzimmer@hobokennj.gov>; Elizabeth B. Kautz <elizabeth.kautz@ci.burnsville.mn.us>; Hardie Davis <mayordavis@augustaga.gov>; Jacqueline Goodall Personal Email / Ex. 6 Kitty Barnes (kbarnes@catawbacountync.gov) <kbarnes@catawbacountync.gov>; mannajo@clearwater.org; Maria Salas <msalas@chulavistaca.gov>; Merceria Ludgood Personal Email / Ex. 6 Ryan Sundberg <rsundberg@co.humboldt.ca.us>; Samara Swanston Personal Email / Ex. 6 ; scott.bouchie@mesaaz.gov; Sue Hann Personal Email / Ex. 6 Susan Anderson <Susan.Anderson@portlandoregon.gov>; Angie Bracey <braceya@cityofhuntington.com>; Anna Kettlewell <akettlewell@mmsd.com>; Debbie Orth <Debbie.orth@co.ramsey.mn.us>; Deborah Delk <ddelk@cityofgary.onmicrosoft.com>; donna.difrancesco@mesaaz.gov; Ellen Heinitz <eheinitz@house.mi.gov>; Erika Martinez <emartinez8@ci.laredo.tx.us>; Jamie Hartranft <jhartranft@easton-pa.gov>; Jen Wessell <JWessell@Salem.com>; Joanne Buonarota <jbuonarota@hobokennj.gov>; Joi Whiteside <jwhiteside@ci.gary.in.us>; Jordan <jordan@burlingtonvt.gov>; Kathy Hayes <Khayes@co.humboldt.ca.us.>; Kim O'Farrell <O'Farrell>; Kim <Kim.O'Farrell@leg.wa.gov>; Lalosa Burns <ldburns@ci.gary.in.us>; Lindsay Rogers (ler@waternow.org) <ler@waternow.org>; Macheal Brooks <macheal.brooks@ci.burnsville.mn.us>; Nellie Flores <nflores@chulavistaca.gov>; Seichner <seichner@marinwater.org>; Stephanie Valentine <Svalenti@cityofdubuque.org>
Subject: FW: REMINDER! TOMORROW! Thursday, June 22nd, 4:30-5:30 ET- LGAC Protecting America's Waters Workgroup-Call in: Nonresponsive Conference Code/ Ex. 6 Agenda and Meeting Materials

***REMINDER! TOMORROW, Thursday,* June 22nd, 4:30-5:30 ET-** LGAC Protecting America's Waters Workgroup Nonresponsive Conference Code/ Ex. 6

Hi, LGAC Protecting America's Waters Workgroup Members (*And LGAC & SCAS Members*):

The ***LGAC Protecting America's Waters Workgroup*** **will meet TOMORROW**

Nonresponsive Conference Code/ Ex. 6

The Workgroup will continue review the Discussion Draft LGAC WOTUS Report and Transmittal letter to the Administrator. (see Meeting Agenda). ***LGAC and SCAS Members are also invited to take part (pending any quorum issues).***

The purpose of this meeting will be to review and approve this action to forward the Draft LGAC WOTUS Report and Transmittal Letter to the Executive Committee in preparation for Committee action next week.

A '***Big***' Thanks to everyone for sending in your quotes and photos to add to the Report!!! It certainly gave it a nice touch to your already great work!!! If you have not had opportunity to get them in, ***there is still time!!***

Thanks so much and look forward to the discussion! What a GREAT Committee!!

Fran Eargle

202-564-3115

Attachments:

-Agenda June 22nd Water Workgroup

--Draft LGAC WOTUS Report

--Draft Transmittal Letter

Protecting America's Waters Workgroup

Thursday, June 22 2017
4:30 PM- 5:30 PM ET

A G E N D A

4:30-4:35 PM **Call to Order and Opening Remarks**
Susan Hann, Chairwoman
Mayor Elizabeth Kautz, Vice- Chairwoman

Mayor Bob Dixson, Chair of LGAC

4:35-4:50 **Remarks by EPA**
Tate Bennett, Intergovernmental Advisor to the Administrator

4:50-5:25 **Workgroup Discussion on Draft WOTUS Charge**

-Draft WOTUS Report
ACTION: Discuss and approve Draft Report

-Draft WOTUS Transmittal Letter
ACTION: Discuss and approve Draft Letter

5:25-5:30 **Wrap-Up/Next Steps**
Susan Hann, Chairwoman

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DISCUSSION DRAFT

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE'S REPORT

6/22/2017

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's Report

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44 WATERS OF THE UNITED STATES 2017 REPORT

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49 B. Committee Charge

50 C. Historical Context

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52 **II. Waters of the U.S. and Local Governments**

53 A. Waters: Our Nation's Wealth and Health

54 B. Local Governments and Cooperative Federalism

55 C. Clarity and Predictability

56 D. Flexibility and Regionalization

57 E. Enhanced State and Local Government Role

58 F. Scalia Approach: Challenges and Opportunities

59 G. Exemptions

60 H. Permitting Reform

61 I. Agriculture and Rural Communities

62 J. Outreach to Local Governments

63 K. Financial Sustainability

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65 **III. Response to Charge: Findings and Recommendations**

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67 **IV. Conclusion**

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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, nor or maybe within a definitive time frame such as 60 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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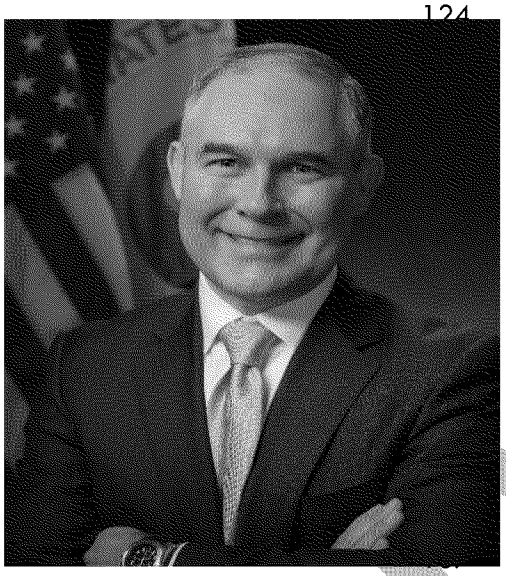
I. Introduction and Background

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 revise the definition of waters of the United States. [3]Seeking input from state, local and tribal government officials is an important step for the EPA in the process prior to proposing regulations that may have implications on federalism as defined by the EPA's policy for implementing the order.

> ***"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."***
>
> Honorable Scott Pruitt, Administrator, EPA

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.

[1] https://www.whitehouse.gov/the pres-office/2017/02/28/presidential-exeuctive-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
[3] Clean Water A
Fed. Reg. 37,054 (June 29, 2015)).

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The agencies intend to follow an expeditious, 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 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.

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 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.

"My City Aurora Colorado appreciates the EPA's efforts reach out 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 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.

B. 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 proposed 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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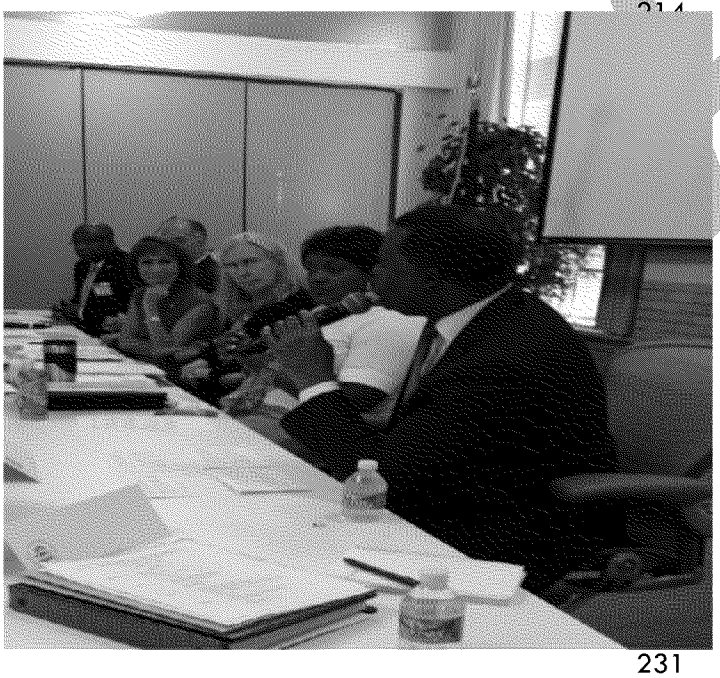
In May 2014, the LGAC undertook an extensive analysis and collaboration to provide recommendations to the EPA on the 2015 Waters of the U.S. Rule. The U.S. Environmental Protection Agency and the U.S. Army Corp of Engineers proposed a joint rule (2014) to clarify the definition of "waters of the United States" 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 to close on November 14, 2014. 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." rewrite was 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)



LGAC 2014 Meeting, Atlanta, GA, Mayor Kasim Reed

The LGAC heard from 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.*"[4]

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 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.

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

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II. Water and Our Communities

A. Water: Our Nation's Health and Wealth

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

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 investment, 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 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.[5] Estimates range for every $1 million investment in water infrastructure it supports between 15 and 18 jobs throughout the economy. Disruption in our nation's 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 local decisions of public trust and stewardship.

Our communities depend on water for economic progress.

[5] 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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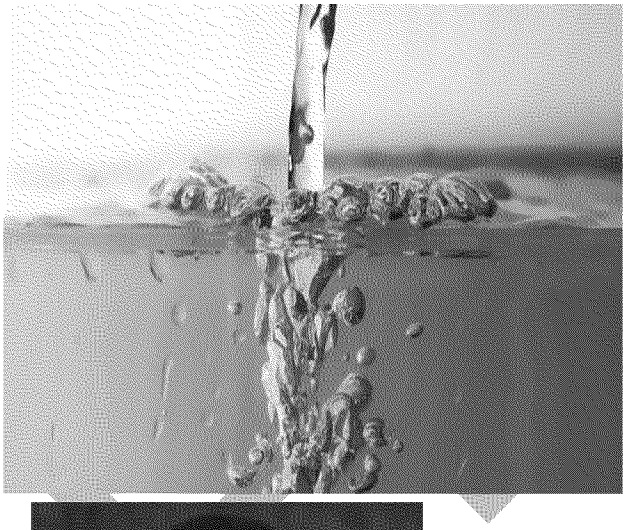
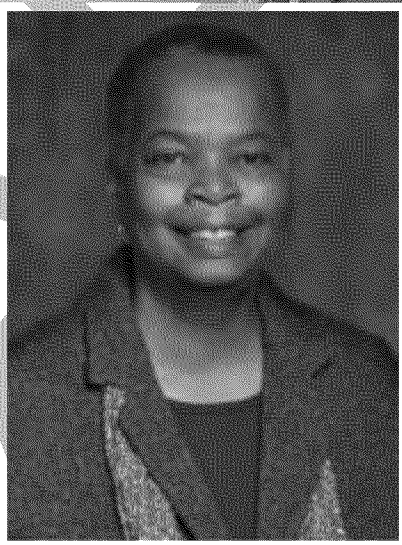
Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred to the directly to rate payer - *at the tap.*



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.

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 the LGAC

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 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 tenants of cooperative federalism. This approach acknowledges the shared responsibility of state and local governments in the governance and cooperation to work out details of responsibility.

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

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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 manage broader 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.

> "***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

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. Key terms used in the WOTUS rule are vague such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" but 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 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.

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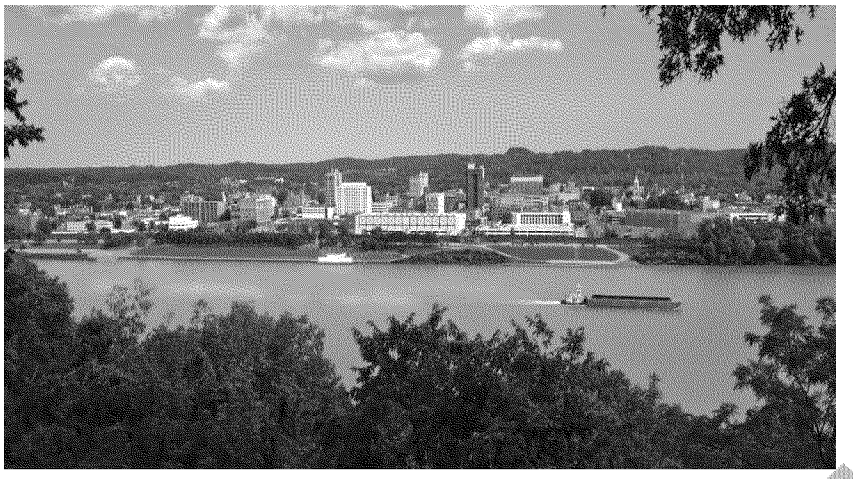

D.Flexibility and Regionalization

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 recognizes natural ecoregions (delineated on the basis of natural and anthropogenic factors) to recognize geographic variability

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

"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

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 waterbodies such as western ephemeral streams, and regional waterbodies such other unique wetlands such as pocosins, Carolina bays etc. should be factored.

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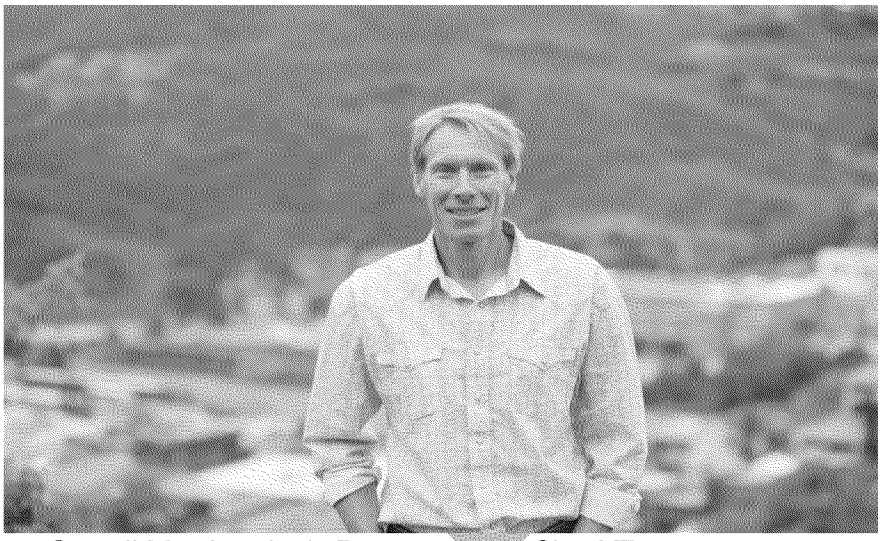
"Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts." **Council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

delineation factors characteristic of these regional waterbodies such as western ephemeral streams, and other unique wetlands such as pocosins, Carolina bays etc. should be factored.



Council Member Andy Beerman, Park City, UT

Western arid streams may need further regional determinations as whether these areas are washes and 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 a Waters of the U.S. due to high groundwater tables and surface connections with waters of the U.S.

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

Back Cove runner with Portland ME skyline
Photo Source: Corey Templeton Photography

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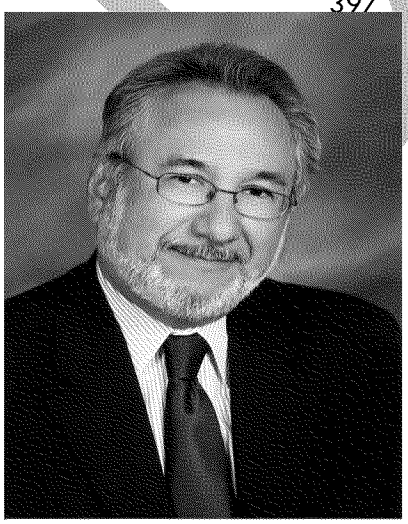
C. Enhanced State and Local Government Role

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*. *See* 33 U.S.C. § 1344(g). 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 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 that can be more effective, and with less cost, protect sensitive landscapes valuable to their community such as with building permits, zoning authority, sanitary and health codes, and soil erosion control.

D. 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.



"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.

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Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities' drinking water and source water are regulated and protected. These significant waterbodies 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 waterbodies by delineating and mapping these significant 'Waters of the State'. These areas once identified should have primacy in decision-making.

E. 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 MS4s, stormwater ponds, settling basins 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 exempt. The revised rule should affirm that reservoirs 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 including features such as storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling.[6]

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.

F. 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.

[6] 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."

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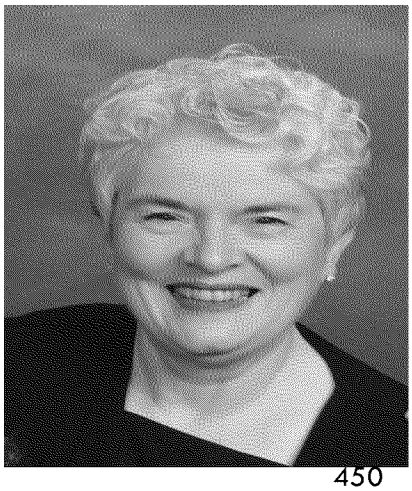

> *"It's not just about getting a permit done quickly. It's about why you have the permit in the first place. As long as we keep in mind that it's about our environment, and it's about our water, we can implement that in any way we choose."*
>
> Commissioner Victoria Reinhardt, Ramsey County, MN.

Commissioner Victoria Reinhardt
Ramsey County, MN

Permitting can be made more efficient and more effective. For example, permitting length of time can be done more efficiently (less than 60 days) and it can also be more flexible, decentralized and integrated with community goals. Local governments would be generally in favor of State Assumption of the 404 program. Also, further consideration of General Permits and mapping would aid in permitting reform.

G. Agriculture and Rural Communities

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

Agriculture and rural communities have expressed concerns about the Waters of the U.S. Most of the concern of the 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.

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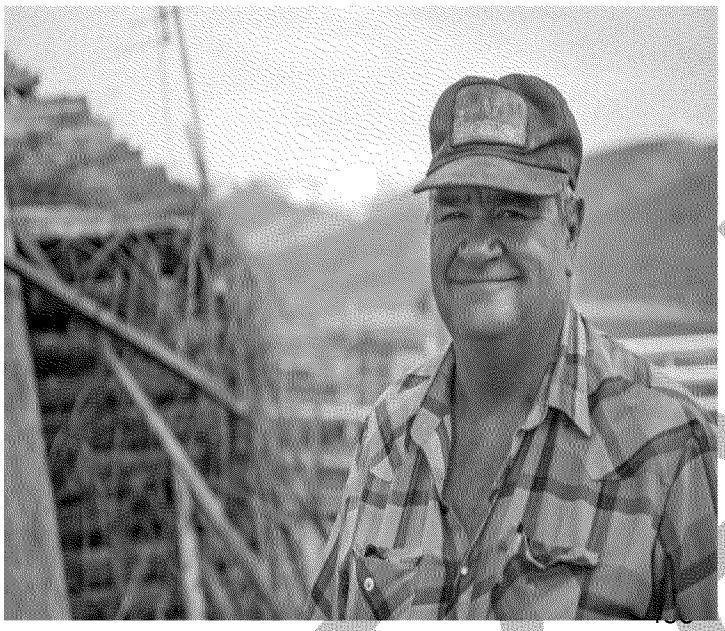
Normal agricultural and silvicultural practices are exempt but the interpretive rule issued in 2014 (later rescinded) to clarify the 56 practices that are exempt from CWA Section 404 permitting was very confusing to farmers. Other issues for rural communities is the NPDES permits for application of pesticides and herbicides in WOTUS. Also, there is a concern that 'prior converted croplands' which are exempt if they are certified by NRCS are also 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.



Commissioner Dr. Robert Cope, DVM, Salmon, ID
Chair, Small Community Advisory Subcommittee

"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

H. 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 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.

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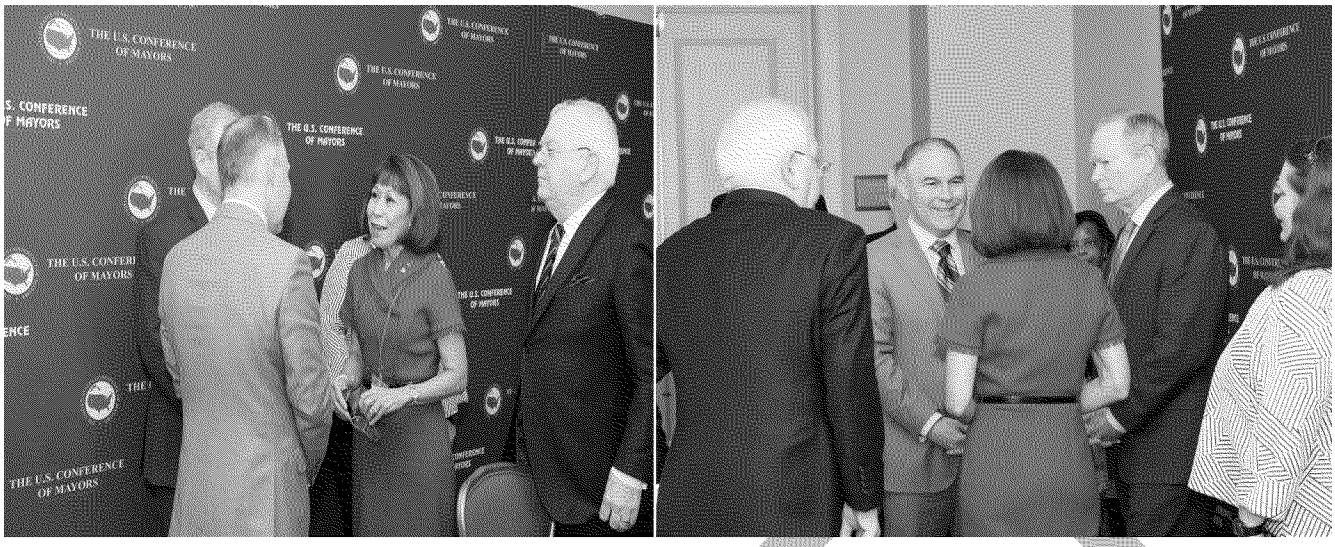

Administrator Pruitt meets with Mayor Elizabeth Kautz, Burnsville, MN and Vice-Chair, Protecting America's Waters Workgroup-at the U.S. Conference of Mayors, Photo Source: Eric Vance, EPA

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 of any new WOTUS rule.

I. 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 that only serve to reduce local government resources and the disproportionate costs for small and economically disadvantaged communities.

"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*

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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.

"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.'"

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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 the following Potential Approaches to Wetlands with a "Continuous Surface Connection"-"Relatively Permanent" Waters

Jurisdictional

- Streams with seasonal flows or streams with another offflow which should not capture ephemeral and intermittent streams into the definition of "relatively permanent" waters. Metrics and thresholds should be established when a stream is considered "relatively permanent." Such metrics will vary geographically on a case-by-case basis and the definition of thresholds will be subjective.

- Perennial streams only as "relatively permanent waters".

- Wetlands that directly touch jurisdictional waters are 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).

- 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'.

- 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.

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- 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 and 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 Kennedy test (significant nexus). 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: This 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; those that do not and the maybe that have a 'significant nexus'.

Recommendations:

- Criteria as outlined in the 2008 guidance should be used for a revised rule which provides criteria.

- Definitions should be modified to address clearer definitions. A series of questions using criteria should be used 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 the following state specific criteria for the revised rule:

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

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- In cooperation with 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 between states, the EPA should provide guidelines for state standards that include factors to be considered, but which do not constitute federal standards.

  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.

- 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.

- 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.

- 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.

- 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.

Permanent Bodies of Water:

- Many 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.

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- States should submit proposed criteria and measurement techniques to the EPA for review and approval. EPA should h ave 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.

- States should be encouraged to develop criteria and metrics regarding wetlands and other water bodies that impact on ground water quality.

- An application for Smart phone or hand-held computer should be developed to give a quick jurisdictional determination and 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's 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 to be revised to include clearer definitions with input from states, local and tribal governments and other stakeholders and 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?**

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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, locals 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, 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.

- "Significant nexus" test refers to waters that "significantly affect the chemical, physical, ***and*** biological integrity" of traditionally navigable waters, the 2015 WOTUS Rule covers waters that affect the "chemical, physical, ***or*** biological integrity" of navigable waters. That should be changed to 'and' and include all three parameters. (LGAC 2014 Report)

- The 2015 rule regulates any area having a trace amount of water if it also has – or ever had – a bed, banks, 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 final 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 waterbody. On a positive jurisdictional call, it is uncertain the direct costs and who would pay the costs. More clearly defined exemptions will lessen the trigger for a CWA permit. However, it is uncertain the costs of positive or negative determinations which could both potentially trigger activities potentially threatening or polluting waterways. This is especially a concern of local governments as it applies to waterbodies that are used for drinking water sources. Because of the high costs of water treatment to meet drinking water

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standards these costs are often transferred directly to the rate payer and citizens. If a waterbody 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 and assume these permitting burdens could drastically increase. And states and local governments would not be able to assume these costs. 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, disproportionally 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 it results in less cost to the rate payers 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. This 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 on 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, the final rule includes 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

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artificially created ponds, settling basins, construction and mining excavation pits, and wastewater recycling structures. Lastly, the rule finally codifies the well-understood principle that the CWA does not apply to groundwater. For MS4s, the primary concern about the rule has been that it could potentially be used as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are "waters of the US." That could mean, for example, 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 final rule 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 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) and transfer the costs to local governments. In addition, 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 it given to protect a Water of the U.S. It is uncertain how that would impact states and communities.

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- **The Coastal Zone Management Act (CZMA) of 1972** provides for the management of the nation's coastal resources, including the Great Lakes. The goal is to "preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone." it is administered by the National Oceanic and Atmospheric Administration (NOAA). The National Coastal Zone Management Program aims to balance competing land and water issues through state and territorial coastal management programs through state and locally managed 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 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.
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- 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.

- EPA should task an Interagency Workgroup to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review.

- Definitions be should be practical, written in plain English, and be enforceable.

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