

US EPA ARCHIVE DOCUMENT

November 5, 2014

**INITIAL FINDINGS AND RECOMMENDATIONS PERTAINING  
TO EPA'S CLEAN WATER ACT  
WATERS OF THE U.S. PROPOSED RULE**

LOCAL  
GOVERNMENT  
ADVISORY  
COMMITTEE

Protecting  
America's Waters  
Workgroup



*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 policy advice and recommendations to the EPA Administrator.

**Message from the LGAC Chair:**

*I am honored to be the Chair of this LGAC composed of 28 local elected and appointed officials. LGAC Members share a love for the environment and our communities. The proposed Waters of the U.S. rule is an important tool for federal, state, tribal and local officials to use in our collaborative role in environmental stewardship. But, the rule and its implementation must be clear, predictable and equitable.*

*Thank you to EPA Administrator McCarthy for partnering with the LGAC to reach out to local communities regarding the proposed rule. The outreach process provided an insightful, community-based view of the rule and how it will be received at the local level. The LGAC is hopeful that the findings and recommendations resulting from this process can guide the EPA moving forward.*

*Thank you to the many local officials who contributed to the process and special thanks to Administrator McCarthy and the EPA staff for their inclusive and collaborative approach. By working together, I am confident we can achieve a legacy of clean and safe water throughout our nation.*



**Mayor Bob Dixon, Greensburg, Kansas, and  
Chair of the LGAC**



**Susan Hann, City Manager, Palm Bay,  
Florida and Chairwoman of the LGAC  
Protecting America's Waters Workgroup**

**Message from the Workgroup  
Chairwoman:**

*The EPA's engagement of the LGAC's Protecting America's Waters Workgroup broadened the community conversations regarding the proposed rule and is indicative of the Administrator's "new era of partnership" with local government. The Workgroup found that communities across the country were very receptive to and appreciative of the opportunity to engage in collaborative dialogue to evolve the rule in a way that advances clean water objectives within a facilitative framework.*

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## Executive Summary

The LGAC has been charged with providing advice and recommendations on the proposed Waters of the U.S. rule. In order to gain input from other local governments, the Workgroup convened public outreach meetings in St. Paul, Minnesota; Atlanta, Georgia; Tacoma, Washington and Worcester, Massachusetts. These regional meetings provided an excellent cross section of perspectives from across the country.

In summary, all agreed that clean water is essential for public health, recreation and commerce. However, the Workgroup also heard a strong theme that the proposed rule, as written, does not achieve the clarity intended, which causes great concern over implementation at the local level.

Yet, despite the implementation concerns, many are willing to collaborate to develop a rule that works at the local level. State, tribal and local governments are where clean water policy meets action. This report reflects the innovation and creative thinking that resulted from the Workgroup outreach process. Additional collaboration with local agencies and subject matter experts can further evolve the rule to achieve optimum results.

The Workgroup, in cooperation with the Small Communities Advisory Subcommittee, the Environmental Justice Workgroup and the entire membership of the LGAC, has prepared detailed recommendations regarding clarity of definitions and agricultural parameters. Regional differences will require flexibility and creativity in the permitting framework. Also noted is that Municipal Separate Storm Sewer System (MS4) permittees are a potential source of best management practices, especially in the realm of green infrastructure, which can be incentivized through the proposed rule.

This public outreach process has revealed that the proposed rule is a starting point. Considerable work remains if the rule is to be embraced locally. Fortunately, there is strong interest at the local level to work with EPA and the US Army Corps of Engineers to craft a rule that will be effective and facilitative.

## I. Introduction and Background

### A. The LGAC and Protecting America's Waters Workgroup

The LGAC is a chartered federal advisory committee charged with crafting recommendations to EPA on various issues. The LGAC has twenty-eight (28) elected and appointed members representing local, state and tribal governments.

The LGAC *Protecting America's Waters Workgroup* was established in December 2010 to address the LGAC's need to provide input on the nation's water infrastructure and water quality with the local community perspective. It consists of 13 local government officials.

Protecting America's waters through improving and maintaining water quality, protecting drinking water and addressing water infrastructure needs are priorities for EPA. In regards to water, EPA's overall charge to the LGAC is to provide recommendations on the following priorities:

1. Water infrastructure needs
2. Local strategies (including green infrastructure) for addressing nonpoint source pollution, including stormwater runoff
3. Protecting great water bodies and neglected urban rivers

*From the Administrator's speech in St. Paul, Minnesota:*

"The workgroup will identify issues the agencies could use in a rule defining "Waters of the U.S." that would help protect local communities' interests in clean drinking water; decreased frequency and severity of flooding and drought; maintaining safe water-based recreation; ensuring adequate useable water for growing food, generating energy, and for manufacturing; and ensuring healthy waterfront development."

In the past, The Protecting America's Waters Workgroup has provided recommendations on:

1. Integrated municipal stormwater and wastewater planning framework
2. Stormwater management practices
3. Managing the environmental impacts of hydraulic fracturing

Consequently, the Workgroup is the logical choice to engage local communities in conversations regarding water resource issues.



## B. The New Era of Partnership

EPA has launched a new model of collaborating with local government partners to achieve a cleaner, healthier environment. Rules enacted at the federal level are often implemented at the local level. Consequently, a foundation of trust and partnership allows a culture of shared responsibility and accountability to develop. The Administrator's emphasis on partnership is producing results in that local agencies are stepping up to bring their ideas to the table resulting in a widening pool of best practices.



LGAC Member Kevin Shafer with EPA Administrator Gina McCarthy

Engaging the LGAC and the Water Workgroup to do outreach with local agencies regarding the proposed rule clarifying the definition of Waters of the United States is another example of the Administrator's commitment to partnership.

## C. Historical Context and EPA's Proposed Waters of the U.S. Rule

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 U.S. Environmental Protection Agency and the U.S. Army Corp of Engineers have proposed a joint rule 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 has been extended twice to close on November 14, 2014.

The intent of the proposed rule is to clarify what waters are 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 Congress members, state and local officials, industry, agriculture, environmental groups and the public.

The proposed rule provides specific exclusions for agriculture. It both preserves exemptions that have existed previously, while including new exemptions in coordination

with the US Department of Agriculture under an Interpretive Rule released at the same time as the proposal.

#### D. Committee Charge

The formal charge outlines the role of the Workgroup relating to the proposed rule which defines 'Waters of the United States'.

*The Workgroup will:*

1. Develop recommendations for the chartered LGAC to consider in developing advice for the EPA to help identify and analyze priority issues related to the proposed rule
2. Identify areas where the agencies could provide clarity on how it will impact local activities
3. Determine the issues that agencies could use in a rule defining *Waters of the US* that would help protect local community interest in drinking water, decreased flooding and drought, maintaining water-based recreation, ensuring adequate water for agriculture, generating energy, manufacturing and healthy waterfront development
4. Recommend how the EPA can work with local governments more effectively on issues-what additional interactions between EPA and local governments would help disseminate understanding of how the rule would apply? Are there additional policy discussions that could help address local questions about implementation, such as ditch maintenance or green infrastructure?

*The Mississippi River is important to the quality of life and economic prosperity of not just this city (St. Paul), but also the nation. This is why this discussion of 'water' is so very important to local governments.*

*-Mayor Chris Coleman  
St. Paul, MN*

#### E. Public Meetings



Tacoma, WA was a meeting site for Protecting America's Waters Workgroup on Aug. 13, 2014

In response to this charge, the Workgroup held four face to face public meetings to engage local officials regarding the proposed rule. The goal of these meetings was to hear input and develop recommendations for the chartered LGAC to consider in their advice and recommendations to the EPA Administrator. Local officials have tremendous knowledge and offer unique on the ground perspectives on environmental issues that impact their communities. The meetings were held in diverse geographical regions to engage a wide range of officials. These meetings were held in St. Paul, Minnesota; Atlanta, Georgia; Tacoma, Washington and Worcester, Massachusetts.

This has been a collaborative process, where the Workgroup heard from a very diverse group of local agency representatives and then distilled these perspectives into a set of recommendations for the LGAC to adopt and transmit to the EPA Administrator.

## II. Water and our Communities

Throughout the country, there has been a general consensus that protecting the nation's water sources is important to local government. Local governments realize that water quality affects the health and economies of their communities.

*"Water has always been in the heart of our city. We want our waters to be clean, safe and cost-effective so our municipalities can thrive."*

*-Mayor Marilyn Strickland  
Tacoma, WA*

Although the Workgroup has developed specific recommendations in response to the Administrator's Charge, the preamble to the recommendations is a brief discussion of why clean water is important to the nation's ecological resources and to the health of our communities as well as to agriculture.

### A. Ecological Services

Small streams, including those that do not flow all of the time, make up the majority of the nation's waters.<sup>1</sup> These water sources, which scientists refer to as headwater streams, are often unnamed and rarely appear on maps. Yet the health of small streams is critical to the health of downstream communities and the entire network of our nation's rivers.

Headwaters, seasonal streams and rain-dependent streams absorb significant amounts of rainwater, runoff and snowmelt. These streams play a critical role in protecting downstream communities by moderating flooding during heavy flow and by maintaining flow during dry weather. Wetlands function as natural sponges that trap and slowly release surface water, rain, snowmelt, groundwater and flood waters. Wetland vegetation slows the flow of flood waters and protects shorelines and stream banks against erosion. Over the last 30 years, freshwater flooding has cost an average of \$7.8 billion in direct damage to property and crops each year, according to a 30-year average calculated by the National Weather Service.<sup>2</sup> Functioning wetlands, seasonal streams, and rain-dependent streams can buffer communities from some of the worst impacts of severe floods. In fact, preserving and restoring wetlands can often help provide the level of flood control otherwise provided by expensive dredge operations and levees.



Wetland in Louisiana

Streams and wetlands that only flow for part of the year are unique and contain diverse habitats which can support thousands of species, including plants, fish, amphibians, birds and mammals. These water features are important as spawning and nursery habitats,

<sup>1</sup> "Water: Rivers & Streams." EPA.

<sup>2</sup> "Hydrologic Information Center-Flood Loss Data." NOAA's National Weather Service.

seasonal feeding areas, refuge from predators and competitors, shelter from extreme weather, and travel corridors.

Wetlands are some of the most biologically productive natural ecosystems in the world, comparable to tropical rain forests and coral reefs in their productivity and the diversity of species they support. Abundant vegetation and shallow water provide diverse habitats for fish and wildlife, and supports valuable commercial fish and shellfish industries. Streams and wetlands can reduce the pollution that flows to larger downstream rivers, lakes, bays, and coastal waters. They are able to retain sediments and excess nutrients, such as nitrogen and phosphorus, and prevent these pollutants from traveling further downstream where they could cause algal blooms or dead zones. This characteristic makes streams an important source of drinking water – 1 in 3 Americans, about 117 million people, utilize drinking water systems that rely on streams.<sup>3</sup>

## B. Water and Environmental Justice Communities

Even today, some communities, particularly environmental justice (EJ) communities, have unreliable access to clean safe drinking water. These communities may face additional health risks (to an already burdened area) every time they use their local water source for recreation and/or drinking water. Furthermore, in many communities economic livelihood is directly or indirectly connected to the quality of their local water source. The proposed rule is intended to serve as another important tool towards advancing clean water for all communities throughout the country.

*"When headwater streams and wetlands are destroyed, drinking water systems get destroyed. I've seen that across the Northeast. I've seen flooding events become more severe across the Northeast. We need to protect these not just for water quality but public health."*

*-Curt Spalding, Regional Administrator, Region 1*

### Reliable Clean, Safe Drinking Water

The lack of access to reliable, safe, and clean drinking water disproportionately affects low income EJ communities (who already have significant health disparities) and vulnerable populations across the country. Oftentimes, these communities' waters suffer the downstream impact of agricultural runoff, sewage, industrial waste, mining, and improper disposal of medical waste. The Rio Grande River, is one such water body that is affected by all of these activities. Communities that rely on the Rio Grande River for drinking water include predominately Latino communities in large urban centers, rural areas and unincorporated areas called "colonias" in which 25% of residents lack treated water

and one-third live below the poverty line. Communities like this around the nation are disproportionately affected by drinking water contamination.

## Public Health

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<sup>3</sup> "Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S." EPA.



Contaminated water bodies can significantly harm the health of a community. The cumulative health risk from drinking or fishing from a local water source is much higher in these communities and have particularly adverse effects on pregnant women and children. For example, in 2010, 1.1 million pounds of toxic waste from nearby industries were discarded, directly and via streams, into the James River.<sup>4</sup> Among this waste were arsenic and benzene-known carcinogens that have also been associated with developmental disorders. Additionally, those that do not have direct contact with water can still experience the health effects of water contamination. The Anacostia River, despite having been a dumping ground for sewage and toxic waste, provides fish for 17,000 people annually.<sup>5</sup> These anglers, predominately minorities, fish from the river regularly and are likely to share their catch with their families.<sup>6</sup> Those who consume contaminated fish from such waters around the country are at risk for cancer and liver disease. Pregnant women, children, and unborn children are particularly susceptible to these diseases. Therefore, the health of these waters whether used for drinking, recreation, or fishing can be directly related to the health of these communities. With climate change exacerbating water quality issues, infrastructure resources for water treatment plants and waste water treatment facilities must be addressed, especially for EJ communities.



Trash in the Anacostia River

### Communities with Water Dependent Economies:

Finally, communities with economies embedded in fishing, tourism, and manufacturing are more susceptible to harmful changes in water quality. American Indian tribes, like those near the Puget Sound region, exemplify this highly dependent relationship. In 2007, hatchery and harvest operations reeled in about \$18 million to tribal personal income.<sup>7</sup> In an area where the average annual income is \$10,233, a decline in the availability of healthy fish can significantly impact the economies of these communities.<sup>8</sup> Good water quality is not only essential for fishing communities but is also important to those areas that rely on tourism and

*"It's not just about protection of natural resources- it's about jobs, the shellfish industry, tourism, how we recreate, fishing, spending time with our children, about our Native cultures. Saving the Puget Sound is a big deal."*

*-Sheida Sahandy,  
Puget Sound Partnership*

<sup>4</sup> "Virginia Second-Worst State for Toxic Chemicals Dumped into Its Waterways." Environment Virginia.

<sup>5</sup> "Addressing the Risk: Understanding and Changing Angler's Attitudes About the Dangers of Consuming Anacostia River Fish." Anacostia Watershed Society.

<sup>6</sup> "Addressing the Risk: Understanding and Changing Angler's Attitudes About the Dangers of Consuming Anacostia River Fish." Anacostia Watershed Society.

<sup>7</sup> "Draft Environmental Impact Statement on Two Joint and State Tribal Resource Management Plans for Puget Sound Salmon and Steelhead Hatchery Programs." NOAA Fisheries-West Coast Region.

<sup>8</sup> "Draft Environmental Impact Statement on Two Joint and State Tribal Resource Management Plans for Puget Sound Salmon and Steelhead Hatchery Programs." NOAA Fisheries-West Coast Region.

recreational water usage. Additionally, the economies of communities that are not located near waters can suffer the effects of water pollution. For example, manufacturing jobs are important to many inland communities including Fitchburg, MA. As certain types of manufacturing require high quality water, the livelihoods of such communities are tied to the health of water sources, even if they are miles away. Improving the quality of water is not just a public health issue, but also a step towards a sustainable economy that will safeguard our future generations.

### C. Water and Agriculture



Water used for agricultural irrigation

Agriculture plays a critical role in our nation's economy and is the backbone of all of our communities. According to the USDA, agriculture accounts for about 70% of our livelihoods and contributes to national food security. Agriculture also accounts for 80% of the nation's water use.<sup>9</sup> Aside from groundwater, much of the water used for irrigation in agriculture originates in rivers, wetlands, and other surface waters. Pollution of these sources affects the quality of crops which can be produced and sold. Toxics like PCB and arsenic, found

in some of the waters mentioned previously, are absorbed by plants via the roots and can cause harmful health effects if ingested. Therefore the vitality of agricultural communities and industries is tied to water quality. The intent of the proposed rule is to allow for better protection of these water sources thus safeguarding producers and consumers of agricultural products. However, it must be noted that topography and water sources vary from region to region as do agricultural practices. The rule and the exemptions must allow for regional differences.

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<sup>9</sup> "Irrigation & Water Use." USDA ERS.



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

*The LGAC acknowledges that the purpose and intent of the EPA in proposing the Waters of the U.S. rule is to help provide predictability and equitability in permitting for activities in waters of the U.S. Water resources are critical to the prosperity of our cities and communities. There is an implied public trust held in managing our water resources at the national level, and this trust is held by public officials at all levels. The LGAC appreciates that the EPA has charged the Committee with providing advice and recommendations on these issues that adjoin our local government concerns for managing our communities' natural resources. Given this charge, the LGAC proposes the following recommendations to address the proposed rule language, which currently lacks the clarity and definitions needed for the rule to be implemented and defensible.*



*"This is a critical time in which water is needed to strengthen our economy. Rivers are a limited resource that are supporting larger and larger communities. Their protection is paramount."*  
-Mayor Kasim Reed, Atlanta, GA (pictured above at LGAC public meeting)

**A. Charge: Develop recommendations for the chartered LGAC to consider in developing advice for the EPA to help identify and analyze priority issues related to the proposed rule.**

The LGAC has met four times in different locales across the country and has heard from local government, communities, and agriculture groups in these areas. Throughout these meetings, six main priority areas were identified and will be elaborated in depth throughout this report.

- Clarity in definitions
- Explicit exemptions
- Simplifying the permit process
- Improved communication to local government
- Consideration of Environmental Justice communities
- Cost

## B. Charge: Identify areas where the agencies could provide clarity on how it will impact local activities.

### 1. Definitions

#### **Findings:**

*The purpose of the proposed Waters of the U.S. rule is to provide clarity. The LGAC fully supports and endorses EPA's efforts for clarification of Waters of the United States. These improvements are long overdue. However, the proposed rule maintains some vague language and omits key definitions, leaving open the same basic questions of jurisdiction and potentially resulting in inconsistent implementation. Without these definitions in place, the EPA is not clarifying and is not providing for consistent regulation.*

"We did an exhaustive survey of every WOTUS court case since *Rapanos*. What we found was chaos. Courts within a circuit and among circuits would have different interpretations. We can't have law that's interpreted so differently. We like that the rule creates clearer categories. We think that there's room for improvement but that it is a strong step forward for protection, federalism, and clarity of the law".  
-Philip Bein, Assistant Attorney General, NY

*While the LGAC does not have specific language recommendations for all of the definitions of the proposed rule, the LGAC does offer the following for the EPA to consider including, redefining or clarifying.*

#### **Recommendations:**

- ◆ The LGAC recommends that 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.
- ◆ The LGAC recommends that an Interagency Workgroup be tasked to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review.
- ◆ The LGAC recommends that definitions 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 LGAC recommends that the public have the opportunity to comment on these proposed definitions.

- ◆ The LGAC recommends that the following terms, among others, 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 LGAC recommends that the current definition of wetlands 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 LGAC recommends using the definition of the Interagency Taskforce on Floodplains-“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**

- The LGAC recommends that ‘floodway’ be defined as a flood course within the banks or within a canyon where water would be expected to flow under normal circumstances.

#### **Ditches**

- The LGAC recommends a clear definition of ‘ditch’ be provided in the proposed rule.
- The LGAC recommends 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.

### **Tributaries**

- The LGAC recommends a clear definition of ‘tributaries’ be included in the proposed rule using clarifying examples.
- The proposed rule refers to a term “rain dependent stream”. The LGAC recommends that this term be defined and an example of a stream that is not rain dependent be provided.

### **Significant Nexus**

- The LGAC regards this to be 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 LGAC recommends that the agency consider all three parameters of water quality in this determination so that “the chemical, physical, and biological integrity of water” be the criteria used 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 term “significant effect” and also recommends language of “insignificant or speculative” be deleted.
- The LGAC is aware that the EPA has charged the Science Advisory Board with interpreting significant nexus and connectivity based on the best science available. The LGAC is uncertain how to comment on this without the benefit of these important and critical definitions being in place.

**C. Charge: Determine the issues that agencies could use in a rule defining Waters of the US that would help protect local community interest in drinking water, decreased flooding and drought, maintaining water-based recreation, ensuring adequate water for agriculture, generating energy, manufacturing and healthy waterfront development.**

#### **1. Environmental Justice**

#### **Findings:**

*The Committee recognizes that disparities in access to clean, safe drinking water are prevalent in our country and disproportionately affect low income, small and rural*

*communities, minorities and vulnerable populations. Because of this, the LGAC urges the EPA to further their engagement with EJ communities. The proposed rule could improve access to clean and safe water for these communities but in order to do so, communication of the rule is critical. Additionally, the LGAC has concerns about how the agency will incorporate EJ into the final rule; and whether EJ communities will be given consideration in permitting consistent with Executive Order 12898.*

### **Recommendations:**

- ◆ The LGAC recommends that EPA expand their communication of the proposed rule and its effects to low income EJ communities, especially those with poor access to clean water. This would involve on-the-ground engagement with community members and creating outreach materials that are community-oriented and multi-lingual.
- ◆ The LGAC recommends that the EPA, before issuing a permit such as those for MS4s, analyze the impact to nearby communities and identify whether a community is disproportionately affected. The Committee recommends that if a community is disproportionately affected, a permit should not be authorized.

## **2. Jurisdictional Issues and Exemptions**

### **Findings:**

*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.*

*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.*

*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. Many communities already heavily focus on water quality programs and projects; these communities should be encouraged and incentivized to do more. The proposed 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.*

*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.*

**Recommendations:**

- ◆ 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 ecologically significant and to list these areas and provide examples.
- ◆ 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.
- ◆ The LGAC highly recommends explicitly specifying when ditches would be considered jurisdictional.
- ◆ 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.
- ◆ 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.
- ◆ The LGAC recommends that the rule incentivize green infrastructure projects.
- ◆ 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.
- ◆ 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.



- ◆ 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.
- ◆ The LGAC recommends that EPA work directly with stormwater associations to provide guidance to best address MS4s, stormwater controls, and their jurisdictional determinations.
- ◆ 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.
- ◆ The LGAC recommends addressing how mining impoundments or borrow pits will be addressed within jurisdiction of WOTUS.
- ◆ 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.
- ◆ 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.)*

### 3. Agriculture

*The Small Community Advisory Subcommittee (SCAS) of the LGAC investigated in greater depth the agricultural related issues of the proposed 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 Report on connectivity not yet completed, the SCAS was not entirely able to assess the impacts and full merits of the proposed rule as it is currently written.*

*Agricultural issues remain an area where there is a great deal of uncertainty and confusion. 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 excluded from WOTUS.
- ◆ The LGAC recommends that floodplains be established at a level of 50 year, 100 year and 500 years 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.

#### 4. Interpretative Rule

##### **Findings:**

*The LGAC has heard differing views on the Interpretative Rule. There needs to be consistency 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.*

##### **Recommendations:**

- ◆ 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 more effective outreach to agricultural communities and small rural communities on this proposed rule.

**D. Charge: Recommend how the EPA can work with local governments more effectively on issues such as: what additional interactions between EPA and local governments would help disseminate understanding of how the rule would apply? Are there additional policy discussions that could help address local questions about implementation, such as ditch maintenance or green infrastructure?**

#### 1. Implementation

##### **Findings:**

*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 the proposed rule could further delay permits at the local level.*

##### **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.

- ◆ 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 costly issue for local governments.
- ◆ 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.
- ◆ The LGAC recommends that EPA regionalize wetlands delineation manuals to take into account regional and local variability of vegetation, hydromorphology and hydroperiods.
- ◆ 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 the proposed rule in its current state will affect our ability at the local level to protect our significant ecological areas.

## 2. State Assumption

*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.*

*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.<sup>10</sup> The average time of the permitting process is 21 days.*

### **Findings:**

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

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<sup>10</sup> "Wetlands Protection." Michigan Department of Environmental Quality. [www.mi.gov/wetlands](http://www.mi.gov/wetlands).

more effectively interact with local governments, businesses, agriculture and private landowners.

**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.
- ◆ However, in order for these 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. 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.

**3. Local Solutions****Findings:**

*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 proposed rule would result in federal government impairing these efforts. 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.*

**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.
- ◆ 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.

- ◆ The LGAC recommends that EPA acknowledge that some states have jurisdiction which is more protective than the federal WOTUS regulation. The LGAC recommends that where these local protections are in place that the federal rule would work in concert with, but not overrule, local protections.
- ◆ The LGAC notes that regional and state delegation of the CWA Act Section 404 could be expanded if dedicated funding sources were identified and enacted for this delegation authority.

#### **4. Cost to Local Government**

##### **Findings:**

*The Workgroup 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 proposed rule and permit process implementation must recognize the scarcity of these resources such that results are optimized for the level of investment.*

##### **Recommendations:**

- ◆ The LGAC recommends that EPA strongly engage 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.
- ◆ 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.

#### **5. Enforcement**

##### **Findings:**

*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 based on the proposed rule as written. The LGAC also believes that the definitions contained within a final rule will be critical to effective and equitable enforcement of the rule.*



**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.
- ◆ The LGAC recommends that EPA work with state and local governments once the final rule is developed regarding enforcement options.

**6. Outreach to States, Tribes and Local Governments****Findings:**

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

*The LGAC, consistent with concerns heard throughout the outreach process, noted the mixed messages relating to the economic analysis.*

*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.*

**Recommendations:**

- ◆ The LGAC recommends that a clear one pager with graphics and side by side comparison of what the rule currently is and what is proposed be developed and included to enhance public understanding of the rule.
- ◆ 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 field meetings, local agencies are already 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.

- ◆ 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.

## IV. Next Steps and Conclusion

### A. Next Steps

#### **Findings:**

*The importance of clarity in the rule regarding Waters of the United States is paramount to achieving the clean water objectives for commerce, recreation and health in our communities. One of the primary recurring themes heard at the public outreach meetings is that the proposed rule, as written, does not achieve the intended level of clarity.*

*The Workgroup also heard extensive concerns with the current permitting process as well as a strong consensus that the proposed rule could further degrade an already highly stressed and inefficient permitting process, while placing an excessive economic burden on local government.*

*Moving forward, the LGAC recommends that EPA and the US Army Corps of Engineers continue to evolve the rule such that it addresses the concerns and incorporates the recommendations of local government.*

#### **Recommendations:**

As to the next steps in rule development, the LGAC discussed the options relative to the Administrative Procedures Act (APA). The proposed rule will likely be modified, perhaps substantially, as a result of the public comments and the LGAC public outreach process. We understand that the APA requires that the EPA provide detailed responses to comments, but does not allow for an additional public comment period if the rule is substantially revised.

Whether a revised rule warrants additional public comment was debated by the LGAC. Some members felt that EPA's detailed response to comments would demonstrate to participants that they were heard. 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. Regardless of the approach EPA takes, the LGAC believes it is important to EPA's credibility that they are highly responsive to the concerns expressed through the public outreach process. The EPA stands behind a message of partnership and collaboration. Their work on the rule to date has clearly demonstrated this commitment and it should continue through the finalization of the rule.

## B. Conclusion

The LGAC and the Protecting America's Water Workgroup, in cooperation with the Small Communities Advisory Subcommittee and the Environmental Justice Workgroup, have developed a series of findings and recommendations regarding the proposed rule that encourage further refinement of the rule. The LGAC finds that the Clean Water Act has been, and remains, a critical law that protects one of the most precious resources that this country enjoys. While all agree that clean water is vitally important to the nation, all also agree that a rule supporting the act works best when it:

- Is Clear;
- Has workable and understandable definitions;
- Has clearly delineated exemptions;
- Is certain as to implementation; and
- Controls costs to localities already under severe resource constraints.

The extensive work and public outreach done by EPA, including extending the deadline for public comment, is very much appreciated. Presentations to the public have been clear and well received. The LGAC has heard the range of comments from support of the rule to withdrawal of the rule. This Report, which includes findings and recommendations, has been created to bridge that gap to make the best rule possible.



## V. Acknowledgements

The LGAC and the Water Workgroup thank the EPA and Administrator Gina McCarthy for engaging us to connect with local communities regarding the proposed Waters of the U.S. rule. Although the Protecting America's Waters Workgroup received the charge, the project was a true team effort that included the Environmental Justice Workgroup, the Small Communities Advisory Subcommittee and all the Members of the LGAC.

We also express our utmost appreciation for EPA Regions 1, 4, 5, and 10 for helping to host the public meetings, in cooperation with EPA Region 2. Special thanks and appreciation goes to EPA OCIR Interns: Jeremy Allen, Jenna Behrendt and Jincy Varughese who have contributed greatly to the development of this work. Especially, thanks to Jincy Varughese who worked on the EJ section, research and formatting the final report.

Also many thanks go to the host cities of St. Paul, Atlanta, Tacoma and Worcester for their hospitality and assistance with meeting logistics. The mayors of these great American cities invested their time to welcome the event and provide the local perspectives of their community.

Finally, we would like to thank the many people who participated in the public outreach meetings. As we conclude our work, we are so encouraged by the dedication, innovation and wisdom of our local government partners. Thank you for being part of our process. Your contributions have given a strong local voice to the evolution of the final rule.



## Appendices

Appendix I: LGAC Workgroup Members

Appendix II: List of Public Presenters

Appendix III: Workgroup Meeting Records

LGAC Waters Workgroup Meeting in St. Paul, MN, May 28, 2014

Discussion on the Proposed Rule

Public Comments

LGAC Waters Workgroup Meeting in Atlanta, GA, July 10, 2014

Discussion on the Proposed Rule

Public Comments

LGAC Waters Workgroup Meeting in Tacoma, WA, August 13, 2014

Discussion on the Proposed Rule

Public Comments

LGAC Waters Workgroup Meeting in Worcester, MA, September 22, 2014

Discussion on the Proposed Rule

Public Comments

Appendix IV. EPA's Waters of the U.S. Proposed Rule

Appendix V: Clean Water Act Exclusions and Exemptions Continue for Agriculture

Appendix VI: Proposed Waters of the U.S. Rule  
Presentation



Bald eagle, Lake Murray, SC-Photo-Mary Eargle

## Appendix I: LGAC Protecting America's Waters Workgroup Members

Ms. Susan Hann (Workgroup Chair)

City Manager, Palm Bay, FL

The Honorable Elizabeth Kautz (Workgroup Vice- Chair)

Mayor, Burnsville, MN

The Honorable Cindy Circo

City Council Member, Kansas City, MO

The Honorable Jill Duson

Councilor, Portland, ME

Mr. Kevin Shafer, PE

Executive Director, Milwaukee Metropolitan Sewerage District, WI

The Honorable Jeffrey Tiberi

Executive Director, Montana Association of Conservation Districts, Soil and Water Conservation Districts of Montana, Inc., Helena, MT

The Honorable Tom Hickner

County Executive, Bay County, MI

Dr. Hector Gonzalez, MD

Director of Health Department, Laredo, TX

The Honorable Ralph Becker

Mayor, Salt Lake City, UT

The Honorable Dave Richins

City Councilmember, Mesa, AZ

The Honorable Carolyn Peterson

Board Member, Tompkins County Environmental Management Council, Ithaca, NY

The Honorable Robert Cope

Commissioner, Lemhi County, ID

The Honorable Dave Somers

Council Member, Snohomish County, WA



## Appendix II: Public Presenters

Rich Sve	Commissioner, Lake County, MN
Craig Johnson	League of Minnesota Cities
Eric Anderson	Mayor, Mankato, MN
Nick Riley	Ramsey County Commissioner's Office
Gary Gamble	Commissioner, Cook County, MN
Randy Neprash	Minnesota Cities Stormwater Coalition
Mike Hanson	North Star Electric Co-operative
John Schueller	Commissioner, Redwood County, MN
Dennis Hoyle	Commissioner, Edmunds County, SD
Kelly Bengston	Kittson County, MN
David Lekson	U.S. Army Corps of Engineers, Savannah District
Steven	
Benjamin	Mayor, Columbia, SC
Bryant Keller	Public Works, Griffin, Georgia
Jai Templeton	Deputy Commissioner for Tennessee Dept of Agriculture
Sydne Smith	Commissioner's Office, Georgia Dept of Agriculture
Todd Edwards	Association of County Commissioners of Georgia
Cassel Gardner	Center for Water and Air Quality at Florida A&M
Roger Raines	Savannah, GA Stormwater Dept
Steven James	Florida Association of Counties
Kurt Spitzer	Florida and Southeast Stormwater Associations
Zhaleh McCullers	Director of Stormwater for Jefferson Valley, AL
Chris Pettit	Palm Beach County
Alan Merrill	City Planning Commission, Chattahoochee Hills, GA
Marilyn Strickland	Mayor, City of Tacoma
William Ruckelshaus	Former EPA Administrator
Sheida Sahandy	Executive Director of Puget Sound Partnership
Lorna Mauren	City of Tacoma Environmental Services Dept.
Stephen Bernath	Washington Dept of Ecology
Mark Daily	Puget Sound Partnership
David Vogel	Washington Association of Conservation Districts
Gary Row	Washington Association of Counties
Stuart Whitford	Kitsap Public Health District
Joe Petty	Mayor, Worcester, MA
Heather Parent	Maine Dept. of the Environment
Philip Bein	Deputy New York Attorney General
Michael Bobinsky	Public Services, Portland, ME
Tom Fogan	Massachusetts Municipal Association
Karen Horne	Vermont League of Cities and Towns
Jim Buffet	City Planner
Dan Margato	Town Manager
Aubrey Strause	Consultant, Scarborough, ME

U.S. Environmental Protection Agency

**Local Government Advisory Committee  
(LGAC) Protecting America's Waters  
Workgroup**

**May 28th, 2014**

**Meeting Summary**

*The Meeting Summary that follows reflects what was conveyed during the course of the meeting that is summarized. The Workgroup is not responsible for any potential inaccuracies that may appear in the meeting summary as a result of information conveyed. Moreover, the Workgroup advises that additional information sources be consulted in cases where any concern may exist about statistics or any other information within the Meeting Summary.*

***Protecting America's Waters Workgroup***  
**Wednesday, May 28, 2014**  
**9:00 a.m. - 12:30 p.m.**  
**City Hall, Room 40 A and B**  
**15 Kellogg Boulevard West, St. Paul, Minnesota**

**MEETING NOTES**

**I. Call to Order**

*Sue Hann, Chairwoman of the Protecting America's Waters Workgroup*

The Chairwoman called the meeting to order. She stated the purpose of the meeting is to provide a means for public input on EPA's proposed rule on the Clean Water Act Waters of the United States (WOUS). This input and these recommendations will be given to EPA's Local Government Advisory Committee and EPA's Administrator, to provide the local government perspective. The EPA has invited the Protecting America's Waters Workgroup of the Local Government Advisory Committee to broaden outreach to local, state and tribal agencies to better understand the local implications from the proposed rule clarifying WOTUS. The Workgroup was charged by the EPA to provide input on the proposed WOTUS rule to the full LGAC and to the EPA Administrator. The Chairwoman announced that there were about 20 speakers signed up to give public comments. She encouraged speakers to be mindful to address comments relevant to the Committee's Charge and invited comments on these priority issues. She also asked for the benefit of the Committee to address how the EPA can best communicate with local governments on aspects of the rule once it is finalized and implemented.

Comments may also be submitted to the LGAC in writing. She also gave contact information so individuals could also give comments to the Agency directly through the EPA's Office of Water Staff. She requested that interactive dialogue be limited so that all speakers can be heard. Chairwoman Sue Hann stated that, "we all can agree that clean drinking water, decreased flooding, safe water-based recreation, healthy waterfront communities and sufficient water for growing food, generating energy and manufacturing purposes are all goals that resonate locally and nationally." Given that the local, state and tribal agencies should all be aligned with broad-based national goals, the rulemaking should then reflect how to best accomplish these goals. She argued that although implementation may be regulated at the federal level, the actions taken are at the local level. Consequently, achieving clarity on the regulatory framework for responsible action at the local level is necessary to achieve and maintain healthy and prosperous water supplies for our nation and our communities. The Chairwoman thanked all in attendance, and she stated that the Workgroup would compile comments into their deliberation and consider them in their advice to the LGAC and then to the Administrator.

**II. Opening Remarks**

*Mayor Elizabeth Kautz, Vice-Chairwoman*

Mayor Kautz welcomed everyone to Minnesota. She stated that this was an appropriate place for the LGAC to take on this very important discussion of WOUS. She also stated that she appreciated everyone that attended the meeting.

At the March 27-28<sup>th</sup> LGAC meeting when this discussion was raised, she had invited the EPA Administrator Gina McCarthy to visit Burnsville, Minnesota, and was very pleased that the

Administrator took her up on that invitation today. She said that she was looking forward to everyone's input.

*Mayor Bob Dixon, Chair of LGAC*

Chairman Dixon thanked everyone for attending this very important discussion for EPA's Local Government Advisory Committee. Speaking on behalf of the Committee, he thanked Chairwoman Sue Hann and Mayor Kautz, Vice-chair, for the work they are doing for the Committee. Water is so critically vital to all of our communities for our well-being, our quality of life and for our many generations to follow. Chairman Dixon said that the discussion today will be vital to the discussions of the Committee (as a whole) and that all comments will be considered. He stated his appreciation for the many representatives of state, local and tribal officials coming out today in response to the invitation of the Committee. As Chair of the LGAC, he ensured that this workgroup and the full Committee would consider all perspectives in their deliberation and final advice to the EPA Administrator. He said that the LGAC was delighted to have the EPA Administrator and the EPA Region 5 Administrator here at the meeting. Their presence speaks to the importance of the issue. He also thanked Mayor Chris Coleman, for hosting this meeting. Both the mayor and his staff are appreciated for providing such a great place for this discussion, in City Hall next to the great Mississippi River. He thanked Mayor Coleman for being a part of this meeting.

### III. **Welcome Remarks**

*Mayor Chris Coleman, St. Paul, Minnesota*

Mayor Chris Coleman stated he was looking forward to hearing from everyone and was glad to be in attendance. He appreciated the EPA for seeking the input of local officials in this very important action to clarify "Waters of the U.S." He said that this issue is too important for our future generations to remain unclear. It is important that we seek perspectives from across the country. He also stated what a great location for discussion this was, since it was along the banks of the great Mississippi River. He stated the importance of the river to the city of St. Paul. He also stated that the river was important to the quality of life and economic prosperity of not just this city (St. Paul), but also the nation. He stated that this is why this discussion of 'water' is so very important to local governments. He also stated that he appreciated the Administrator turning to local governments for solutions to environmental issues.

### IV. **Introduction of the EPA Administrator**

*Mark Rupp, Deputy Associate Administrator, Intergovernmental Relations*

Mark Rupp thanked the Committee and all who came to the meeting for this very important discussion of 'Waters of the U.S.' He also outlined the important role the LGAC plays in EPA's decision-making process. Local governments provide on the ground solutions which everyone can learn from. He introduced Administrator Gina McCarthy as someone who has spent her entire career (three decades) in public service and someone who understands the importance of engagement of all levels of government, whether it be, for 'Waters of the U.S.' or in building partnerships for sustainable and resilient communities to address climate change impacts.

## V. Delivery of the Charge

*Gina McCarthy, Administrator of the U.S. Environmental Protection Agency*

The Administrator stated it was wonderful to see so many representatives of state, local, and tribal governments actively engaged in this issue and here today to provide comments on the proposed rule to clarify protection under the Clean Water Act for streams and wetlands. EPA and the Army Corps have extensively consulted with stakeholders in the development of the proposed rule. Since 2011, EPA has met with stakeholders and held discussions with our state, local, and tribal partners, the regulated community including small businesses, and the general public. EPA is committed to engaging with all stakeholders to gather their input on the proposed rule.

EPA's Local Government Advisory Committee (LGAC) does tremendous work advising the EPA on how to develop stronger intergovernmental partnerships and build State and local capacity to deliver environmental services and programs. She emphasized the critical role the LGAC can play in gathering input and preparing recommendations on how the EPA can improve the proposed "Waters of the U.S." rule as it is finalized. The Administrator expressed admiration for state, local, and tribal officials for their knowledge on what works in local communities, thus providing unique perspectives on issues and concerns relating to the proposal. The Administrator issued the following charge to the LGAC, based on aspects of the rule where information and feedback from local governments will be most helpful to EPA:

- The Workgroup will develop recommendations for the chartered LGAC to consider in developing advice to assist the EPA in identifying and analyzing priority issues related to the proposed rule defining waters of the U.S.
- The Workgroup will identify areas where the agencies could clarify in a final rule how it will affect local activities affecting waters.
- The Workgroup will identify issues the agencies could use in a rule defining "waters of the U.S." that would help protect local communities' interests in clean drinking water; decreased frequency and severity of flooding and drought; maintaining safe water-based recreation; ensuring adequate usable water for growing food, generating energy, and for manufacturing; and ensuring healthy waterfront development.
- 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 interactions between EPA and local governments would most effectively help local governments understand how this rule would apply?
  - Are there additional policy discussions that could help address local questions about implementation, such as ditch maintenance or green infrastructure?

Today's meeting represents the first of four meetings the Workgroup will convene to gather local input related this charge. Dates and locations for the remaining three meetings are currently being determined. Details with more information are published in the Federal Register. Based on what is heard at these meetings, the Workgroup will draft a detailed report summarizing issues and concerns relating to the proposed rules, which will be submitted to the LGAC for the Full Committee to consider before sending forward to the Agency. The Administrator thanked all participants in today's meeting. She said she hopes participants will



take advantage of this opportunity to share their thoughts on the rule and its impact for their communities.

*Susan Hedman, EPA Region 5 Administrator*

EPA Region 5 Administrator Susan Hedman thanked the Administrator for coming to EPA Region 5 and stated that she was looking forward to the Burnsville site visit with Mayor Elizabeth Kautz. She thanked Mayor Coleman for hosting this meeting. She also thanked the LGAC for its great work in helping the Agency grapple with many environmental issues affecting local governments and stated that she looks forward to the LGAC's recommendations. Finally, she acknowledged the Region 5 LGAC Members: Mayor Elizabeth Kautz, Vice-Chair of the Workgroup, and Burnsville Mayor; Kevin Shafer, Executive Director, Milwaukee Sewer Authority; County Executive Tom Hickner, Bay County, Michigan (not present), and Mayor Karen Freeman-Wilson, Gary, Indiana (not present).

*Ellen Gilinsky, Senior Policy Advisor at EPA's Office of Water presents a briefing of the proposed Waters of the U.S. which can be found in Appendix VI.*

## **VI. Discussion of the Charge**

Commissioner Don Larson inquired about the 56 agricultural practices which are exempted in the proposed rule. He said that his county is discussing this new rule in detail. Constituents are concerned as to whether these water goals are attainable, and what the definition of upland is. He stated his concern about the consistency of definitions across the agencies, between the USDA, Army Corps and EPA. The rule needs to be clear and in plain English. He also said that the Army Corps often determines what is a WOTUS, not EPA." EPA only has the final word about jurisdiction before offering a CWA 404 permit.

Executive Director Jeff Tiberi said that a graphic illustrating what is a WOTUS "is worth more than a thousand words, and would be very helpful."

Councilor Jill Duson said that "a process matrix may be helpful for the LGAC as well for the general public on WOUS." She also said, "This is an 88 page rule, it would be helpful to have outreach material which says exactly what the rule actually does (with clarifying examples)." Outreach material should have definitions, and examples. Particularly, defining tributaries would be important. The paragraph structure is difficult to follow in the actual rule.

Commissioner Don Larson said he received an email from the USDA on the EQUIP program and there is no mention of the EPA. He said the Interpretative Rule says that if you are doing these 56 exempted agricultural practices, do not worry about getting a permit. He clarified that normal silvicultural practices do not require a permit, but this needs to be better explained.

Executive Director Kevin Shafer added that much of the issues come from the implementation of WOUS and its effects across the board on CWA wetlands permits. The Army Corps handles this in Michigan and New Jersey. And some states have the delegated authority to manage CWA Section 404 programs. He said that some discharge permits are delegated to most states, which may impact implementation of the definition.

Commissioner Don Larson said that “if we have concerns, we are to be held accountable and mutually responsible for reporting them.” He stated the public has to trust that the intention of the EPA rule making is “good”, through making the process open to the public. Dialogue is a process of refinement, whereby concerns need to be clarified. He stated we all care about water as do most counties. He argued that more restrictive laws are unhealthy, and prohibit economic opportunity.

*Chairwoman Sue Hann, upon agreement by the workgroup, opened up questions to the EPA speaker. Several questions came forward from the audience concerning the extent of coverage to ditches and questions concerning the agricultural exemptions.*

## VII. Public Comment Period

Commissioner Rich Sve said that Lake County, Minnesota has 841 lakes, hundreds of streams and is bordered by Lake Superior. He articulated a number of concerns regarding diverse land use, ditches and draining procedures. He needed clarification on “uplands,” as it relates to ditches, and “does not contribute to flow.” He argued exemptions are narrow and difficult to obtain, particularly regarding the exemption for ditches. He is concerned that the connectivity study is not yet finalized and cannot be viewed for comment. He said delays from permitting have impacts for taxpayers due to higher construction costs and MN has short construction season. The state of Minnesota’s current water laws are successful, with robust protection for wetlands. He requested reasonable regulations for states. He said that the Association of MN Counties has requested a meeting to discuss issues in depth: permitting roads, ditches, etc. and for an extension of public comment period.

Craig Johnson, League of Minnesota Cities said there are 830 members in the League of Cities. Minnesota has acted as a leader in addressing water issues and he suggested EPA look at the programs they already have in place. He said stormwater is not dealt with explicitly enough in the proposed rule. He asked for clarity in the exemption section, especially regarding blanket exemptions, and consistency between “on-the-ground” understanding and courts’ understanding of the rule. What about conveyance systems for stormwater? He said definition of “upland” is not just an agricultural issue; it is also important for stormwater issues. He said it is important to consider how different staff members will apply the rule and how the courts will interpret it.

Bill Stowe, Des Moines Water Works (signed up to speak, was called upon and was not present)

Mayor Eric Anderson’s, Mankato, Minnesota community is located at the confluence of two rivers, with the largest processing plant for soybeans. He asked for clarity on exemptions. Concerns were raised about the additional burden of permitting. Agencies need to walk hand-in-hand with surrounding agricultural businesses. He stated there is ambiguity in the rule on effects to agricultural practices. It is imperative that there is a clearer definition of the 56 agricultural practices that are exempt. He also is concerned that clearing runoff from the urban areas could potentially become a burden.

Nick Riley, for Victoria Reinhardt, Ramsey County, Minnesota requested an extension of the public comment period. He voiced concern about ditches with high water marks that could be jurisdictional and WOTUS. He asked who has jurisdiction for roadside ditches with low flow.

Flooding with limited connectivity could be an issue. Ditch maintenance is also an issue. Hand excavated ditches cannot be substantiated. The exemption of safety ditches could be time consuming. There are also questions as to how ditches that cross state lines will be handled. He asked how exemptions will be determined and if a ditch does not contribute to flow restrictions, is it exempt. He asked for a clear definition of upland. He argued this rule will leave counties open to lawsuits, in regard to MS4's. He asked if green infrastructure used to address stormwater impact MS4's, and whether interstate federal highway system ditches are exempt like state road, county road and federal highway ditches are.

Commissioner Garry Gamble, Cook County, MN said the rule needs clarification so people can understand it and then decide if they support it. His county borders Lake Superior. NACO has questions about this rule, as does AMC. He argued that "there is a new kind of servitude of unrestrained power and where freedoms are silently encroached and this jurisdiction is burdensome for all of those involved, and dangerous to the environment." He asks for patience in the process, to protect our water and requests a rule that does not bring about so many concerns. He argued that "we are good stewards of our environment, and asks the EPA to consider that in the rule making process."

Randy Neprash, Minnesota Cities Stormwater Coalition stated that his city coalition regulates 500 cities and green infrastructure manages a wide range of ditches which convey water across a landscape. He said they are currently utilizing rain gardens, and have hundreds of ditches. He argued local municipalities have responsibility to manage these systems. But he agreed for a national permitting system, it is important for the federal government to clarify these system definitions. He said the rule needs clarity, in regards to: the exemption for stormwater ponds, waste treatment systems designed to meet requirements of CWA, whether rain gardens are considered Waters of the U.S., ditch exemptions, where does urban stormwater fit in, and the definition of upland. He requested EPA staff and state-level coalitions have a meeting. He said that he spoke with the EPA and learned that they react well to public works and safety issues and that he wanted EPA to talk with these groups.

Mike Hanson, North Star Electric Co-operative stated that his area has 98% of pre-settlement wetlands still intact; it is extremely rural. He said he has experienced difficulties working with the Army Corps. He articulated that people want to be able to call local folks to deal with issues; not to call Washington, DC. He is concerned about impacts on electricity transmission.

Commissioner John Scheuller, Redwood County, MN said the definition of ditches needs clarification. He said that approximately 90% of MN is in tillage, and most wetlands have been drained. His county is reliant on ditch systems, which do not contribute to the river, and should be exempt. He said that about 60% of streams are seasonal or ephemeral. He said that the Army Corps has worked on a clean water project for three years and has not signed off, and now the costs have increased, so project may not be finished. He requested clarity for ephemeral streams, ditches and an uplands definition.

Commissioner Dennis Hoyle, Edmunds County, SD voiced concern that the proposed rule represents "mission creep" and has the potential for unintended consequences (and fears that greatly). He asked whether rain from roof tops that goes into a WOUS would be considered as a "significant nexus".

Kelly Bengston, Kittson County, MN voiced concern over change from “navigable waters” to “waters of the U.S.” She said the Army Corp CWA 404 permitting process has led to construction delays and cost overruns. She would like to see exemptions for ditch maintenance clarified and expanded. Her county is building many private ditches that are designed to meet safety standards and would like clarity for soil that is adjacent to an embankment.

*Chairwoman Hann invited others in the audience not signed up to speak who would like to address the Workgroup to come forward. None came forward. The public comment portion of the meeting was closed.*

## VIII. Wrap-Up/Next Steps

*Chairwoman Sue Hann called on the LGAC Chairman Mayor Dixon to make concluding remarks.*

Mayor Dixon, Chairman of LGAC

Mayor Dixon thanked Chairwoman Hann and stated that “we all work in and for our communities”. His town of Greensburg, Kansas is small town and was leveled by a F5 tornado and mentioned the accidental fire on the Cuyahoga River many years ago as examples of environmental disasters. He argued that “we all have conservation values and we have to be stewards of our environment and find commonsense approaches.” He stated that decisions regarding the environment are not political and have to transcend politics and administrations. He stated that “As members of the LGAC, we leave politics at the door and talk about our passion for making a better world to carry us in the future.” He also articulated a need for this rule to be well thought out and clear to local governments and the public.

Sue Hann, Chairwoman

Chairwoman Hann thanked everyone for their input. She summarized the public comment period stating that “healthy water is not only good for the environment but for business and energy production.” Some of what we heard is very supportive of the proposed rule. It seems that there is a lot of uncertainty about implementation which could be problematic. The comments are important because it will help shape what the LGAC advises to the EPA Administrator. Chairwoman Hann invited the public into the dialogue with the LGAC. She appreciated the participation and encouraged anyone to provide written comments to the Workgroup. The proposed Waters of the US Rule should be a means to ensure that our nation’s waters are healthy and plentiful. With your cooperation and input, she said there is the opportunity to work with the EPA Administrator to achieve a rule that can be an effective tool to protect and preserve our nation’s water in a collaborative partnership with local agencies.

**Environmental Protection Agency  
Local Government Advisory Committee  
May 28, 2014**

**MEETING PARTICIPANTS**

**LGAC Members**

City Manager Susan Hann, Workgroup Chair  
Mayor Elizabeth Kautz  
Mayor *Pro tem* Cindy Circo  
Mayor Bob Dixon, LGAC Chair  
Councilor Jill Duson, Esq.  
Commissioner Don Larson  
Executive Director Kevin Shafer  
Executive Director Jeffrey Tiberi

**EPA Representatives**

Administrator Gina McCarthy  
Mark Rupp, Deputy Associate Administrator, OCIR  
Frances Eargle, DFO, LGAC  
Damaris Christensen, OWOW  
Ellen Gilinsky, OW  
Emma Zinsmeister, OCIR  
EPA Region 5 Administrator Susan Hedman  
Taylor Ficus, EPA Region 5

**Members of the Public**

Chris Coleman, Mayor, St. Paul  
Randy Neprash, Minnesota Cities Stormwater Coalition  
Nick Riley, Ramsey County  
Mike Hanson, North Star Electric  
Garry Gamble, Commissioner  
Mary Gail Scott, Metro Corail  
Victoria Reinhart, Ramsey County  
Mary Bartleowiah, Forest County Potawatomi  
Matt Steinbach, Forest County Potawatomi  
Al Milham, Forest County Potawatomi  
Nick Tiedek, Minnesota Department of Transportation  
Bill Stowe, Des Moines Water Works  
Jean Coleman, MPCA  
Annalee Garletz, AMC  
Rich Sve, Lake County  
Mark Tomasek, MPCA  
Dru Buntin, Umbra  
Roger Berggen, McLiod County  
Kale Van Bruggen, Rinke Noonan  
Lark Weller, National Park Service  
Eric Anderson, Mayor of Mankato



Don Bash, NRCS  
Craig Johnson, League of Minnesota Cities  
Bill Black, Minnesota Municipal Utilities Association  
Anne Lewis, America's Waterways Associations  
John Schueller, Redwood County Commissioner  
Kerry Netzke, Redwood-Cottonwood Rivers Control Area  
Commissioner Dennis Hoyle, Edmunds County, SD  
Kelly Bengston, Kittson County, MN

## U.S. Environmental Protection Agency

# Local Government Advisory Committee (LGAC) Protecting America's Waters Workgroup

**July 10, 2014**

### **Meeting Summary**

*The Meeting Summary that follows reflects what was conveyed during the course of the meeting that is summarized. The Workgroup is not responsible for any potential inaccuracies that may appear in the meeting summary as a result of information conveyed. Moreover, the Workgroup advises that additional information sources be consulted in cases where any concern may exist about statistics or any other information within the Meeting Summary.*

**Martin Luther King, Jr. Federal Building  
77 Forsyth Street SW, Atlanta, GA  
Atlanta Rooms 1 and 2**

Thursday, July 10, 9:00 am - 12:30 pm

**Meeting Summary**

**I. Call to Order**

*Susan Hann, Chairwoman*

Chairwoman Susan Hann thanked everyone for attending the meeting. She stated that the purpose of the meeting was to gather local officials' perspectives on the EPA's proposed rule to clarify the Clean Water Act (CWA) Waters of the United States (WOTUS).

The LGAC is chartered under the Federal Advisory Committee Act (FACA) and has been in existence since 1993. It's comprised of state, local and tribal elected and appointed officials from around the country. The LGAC's mission is to provide advice and recommendations to assist the EPA in developing stronger partnerships with local government. The Workgroup is here today to hear and receive input from local officials in the southeast about the Waters of the U.S. rule.

She introduced Workgroup members:

Mayor Elizabeth Kautz, Vice Chairperson of the Protecting America's Waters Workgroup  
Kevin Shafer, the Executive Director of the Milwaukee Metropolitan Sewerage District  
Jeff Tiberi, the Executive Director of the Montana Association of Conservation Districts  
Robert Cope, Commissioner, Lemhi, Idaho and Chair of the Small Community Advisory Subcommittee  
Cindy Circo, Mayor Pro tem, Kansas City, MO  
Commissioner Carolyn Peterson, Tompkins County, NY  
Mayor Johnny DuPree, Hattiesburg, MS  
Council Member Dave Richins, Mesa, AZ.

*Mayor Elizabeth Kautz, Vice-Chairwoman*

Mayor Elizabeth Kautz greeted participants and stated that the Workgroup's role was to listen and gather information to bring recommendations to the Local Government Advisory Committee (LGAC), and then ultimately, to the EPA Administrator. Mayor Kautz stated that the Committee would listen to the issues brought forth today and take them back to provide additional clarity where it is needed.

*Mayor Johnny DuPree  
Hattiesburg, Mississippi*

Mayor Johnny DuPree also thanked everyone for their participation. He also thanked the Chair and Vice-chair for the opportunity to speak “on issues that affect all of us.” He said that, “whether we come from small cities, large cities, townships, villages – this issue effects all types of municipalities and counties.” He discussed a recent tornado that hit his town, and the increase in jobs since then dealing with waste water management. He also discussed the importance of clean water to a community, and to the economy. He said that he is aware that his city is not alone in the search in the struggle to find grants and funding sources for water infrastructure projects. At a recent forum on sustainability, he said there was agreement among local officials: “If it’s not affordable, it’s not sustainable.” He emphasized the economic and public health value of water, and he appreciated the opportunity to be here in Atlanta to discuss the importance of water. He also thanked EPA Region 4 Administrator Heather McTeer Toney for hosting the Workgroup and for being here. He thanked the EPA for their support and also for the 15 million dollars in bonds for these water infrastructure projects.

## **II. Remarks by GSA Acting Regional Administrator**

*Erville Koehler, Acting Regional Administrator  
General Services Administration*

Erville Koehler, General Services Administrator (GSA) Acting Regional Administrator acknowledged Mark Rupp and Region 4 Administrator Heather McTeer Toney, and welcomed everyone to the first federal building named after Martin Luther King. He spoke about the Martin Luther King building being an important landmark in Georgia history. He said this is a great meeting place to focus on partnerships, and today’s meeting is an important example of the cooperation between federal and local government. He stated that he was proud of GSA’s role in helping the federal government partner with locals. He’s been in an acting role as Regional Administrator and it’s been a real eye-opener seeing how the federal government interacts with the state and local communities. He said that “No matter how big or small it is, you can always do something to help and that's why everyone is in this room today.”

## **III. Remarks of the EPA Region 4 Administrator**

*Mark Rupp (Introduced the Regional Administrator)  
Deputy Associate Administrator for Intergovernmental Relations  
U.S. Environmental Protection Agency’s (EPA’s) Office of Congressional and Intergovernmental Relations*

Deputy Associate Administrator Mark Rupp thanked Erville Koehler for GSA hosting the location of the meeting. He thanked the LGAC members for their work as public servants in working for their community and for their commitment and devotion to the LGAC. He noted that the meeting today was in addition to their regular LGAC duties. He stated that Administrator McCarthy wishes she could be in attendance, but she is in Missouri. He said that Administrator McCarthy sends her gratitude for everyone in attendance. He stated that she has a pragmatic perspective coming from both the state and local level of government; she knows that federal

regulations have an impact on local communities. She is looking to the LGAC to offer their recommendations on the proposed rule. This ensures that when EPA issues a final rule, it will be able to be implemented. He stated that the purpose of today's meeting was to gain these perspectives. He then introduced Heather McTeer Toney, the Regional Administrator for Region 4. He mentioned that her commitment to her roots is demonstrated by her return to her hometown, Greenville, Mississippi after school. She was appointed in January 2014 by President Barack Obama to oversee the largest region in the EPA – including 8 states and 6 tribes. He commended her for her commitment to visit each R4 state. Mark Rupp thanked Region 4 Administrator McTeer Toney for all of her hard work.

*Heather McTeer Toney*  
*Regional Administrator, EPA Region 4*

Administrator Heather McTeer Toney started by acknowledging the LGAC for their work. She stated, "I know firsthand as an ex-LGAC member (and Chairwoman) the level of time commitment involved. As a former mayor, I appreciate everyone's time in being at this meeting." She thanked GSA Acting Regional Administrator Erville Koehler for hosting the meeting. She thanked Chairwoman Susan Hann and Mayor Elizabeth Kautz, vice-chairwoman for the remarkable work they are doing, at an incredibly critical time. These conversations are of extreme importance, and this meeting is a unique opportunity to have an audience with a genuine interest in hearing concerns from local officials. These LGAC members will take back the concerns they have heard today and will develop collective thoughts about what they heard. What is heard today will be developed into advice and recommendations from the perspective of local communities. This is important because this is a direct channel of these concerns to Administrator Gina McCarthy, who has made it a priority for all of us to work together, and to establish a partnership, so that all of our communities can share in 'sustainability'. She said that this meeting is important and that we are creating a synergy that is not just for today, and not just for this rule, but will carry us and move us forward. EPA has made it a priority to be "conveners and collaborators in that." We have a stake in what is published in the final rule. We will hear comments that may not go along with what we may think is the right thing to do. But what is important is that we are listening to one another and we are listening with open ears, with an open mind and that we have the intent that we will come together. And that we determine the best way to move us forward and leave a better environment for our children. She stated her appreciation for all of the federal family working together, as demonstrated by the presence of the Army Corps today. She stated that water is important to everyone here and that we need to collaboratively work together to determine the best way to protect our critical resource. She then thanked Mayor Kasim Reed for having us in his city, and stated her excitement to be in Atlanta.

#### **IV. Welcome Remarks**

*Mayor Kasim Reed*  
*Atlanta, Georgia*

Mayor Kasim Reed thanked his fellow mayors: Mayor Johnny DuPree, Mayor Elizabeth Kautz, and Mayor Steve Benjamin. He thanked those in attendance, and Region 4 Administrator Heather McTeer Toney for her active outreach and desire to gather local input. He emphasized the importance of this meeting, explaining his great desire to be here today. He stated that the LGAC helps the EPA focus on the questions and concerns of cities and citizens. And those

concerns need to be heard at the federal level. The EPA's Local Government Advisory Committee is an important component helping the EPA focus on the questions and concerns that all of us have in the cities wherever we are in America. As the mayor of Atlanta, I know how vital it is to have the local voice heard at the federal level. He asked members to be excited and to participate fully to give opinions on a rule that will no doubt have impacts on all of us. He stated that this is a critical time in which water is needed to strengthen our economy. Rivers are a limited resource that are supporting larger and larger communities. Their protection is paramount. He said that if you engage with the EPA proactively, they will reciprocate and respond. There are five million people in this region that depend on the Chattahoochee River for our drinking water. The City of Atlanta has had some sewage problems, and is working with the state and the EPA to meet water needs, and uphold EPA regulations. He stated that the City of Atlanta is working on reducing energy and water usage. Collaborative, not confrontational, ways of discussion are required. He argued that leaders who choose collaboration over conflict are more successful, and that is the EPA's movement. In the past, the city had one of the worst water and sewer crises in the United States of America. The city was constantly being fined. He admitted that the city was definitely 'a bad actor' and expressed content with working in partnership with the EPA and the state and their success. With the President's most recent initiative around climate change and resiliency, the EPA is definitely going to be the center of action because issues around climate and sustainability are going to be at the forefront of all of our agendas for the next weeks, months, and years to come. He admitted it was cliché, but having a child has had a large impact on his perspective. He expressed a concern shared by many-the importance of saving resources for our children and grandchildren. He welcomed the LGAC members, and thanked them for their energy and passion.

Chairwoman Susan Hann thanked Mayor Reed for his remarks and mentioned a quote from him in a recent article in the New York Time, "Cities are where hope meets the streets."

#### **V. Briefing on Waters of the U.S.**

*Ellen Gilinsky, Senior Policy Advisor at EPA's Office of Water presents a briefing of the proposed Waters of the U.S. which can be found in Appendix VI.*

*David Lekson, Regulatory Chief  
Savannah District  
U.S. Army Corps of Engineers*

David Lekson began by describing his experience in wetland delineation. He is the Chief of the Savannah District for the Army Corp of Engineers, here representing headquarters as well as other chiefs of different districts. He said that these meetings are important, because the rule needs to be implemented, and implemented in a consistent manner. He stated that in a sense he is also a stakeholder like many members of the public because the EPA will present this to the Corps of Engineers and then he will have to implement it. He manages many field offices across many states. He argued that clarity means consistency and emphasized that the public's feedback and comments are crucial to getting that consistency. He stated that he was impressed with the LGAC Workgroup for participating in CWA guidance review. He said we are "not in the business of regulating what is not in our jurisdiction" and urged everyone in attendance should go online and pull up the electronic document with the proposed rule. Then search for "agencies seek comment" and see how many times that phrase appears. He then thanked the Committee



for the opportunity to speak. He said that his Corps District has to do a full blown analysis for every single delineation, so the rule may provide clarity that could actually speed up some of our processes which is very important.

*Chairwoman Susan Hann thanked David Lekson and Ellen Gilinsky. She then asked if members of the Workgroup had any questions.*

## **VI. Discussion of the Charge**

### *LGAC's Protecting America's Waters Workgroup Members*

Commissioner Robert Cope asked what hydric soils were, and how they were used to determine wetlands. David Lekson answered by discussing the evolution of the delineation process. He said there is a problem with determining restored wetlands currently. If human induced wetlands exhibit enough parameters, then it can be determined to be a wetland, and potentially adjacent to a *Water of the U.S.*

Mayor Pro Tem Cindy Circo stated her appreciation for having David Lekson from the Army Corps present. If the rule is unclear, it is very important for the Army Corp of Engineers to be here.

Deputy Associate Administrator Mark Rupp said that this is a historic process working on developing language regarding *Waters of the U.S.* The EPA received over 100,000 comments, including comments from the US Conference of Mayors asking for a written proposed rule, not just guidance regarding jurisdiction.

Region 4 Administrator Heather McTeer Toney thanked members of Senator Isakson's office and Senator Baccus' office for coming. She then asked if any other Mayors or elected officials were present. She acknowledged Mayor Steve Benjamin from Columbia, South Carolina and Mayor Nancy Denson from Athens, Georgia.

## **VII. Public Comment Period**

Chairwoman Susan Hann indicated that this time on the agenda was for those individuals who had signed up to come forward and make their comments. She stated that if the members of the workgroup have questions to please let her know, and she would ask them to speak. If members of the public have not signed up, and if they want to speak, there will be time toward the end of the agenda to do so.

Mayor Steve Benjamin of Columbia, South Carolina thanked everyone for having members of the public present at this meeting. His city is located in the midlands of South Carolina and home to beautiful rivers. His city is located at the confluence of the Saluda and Broad Rivers and forms the great Congaree River which provides for the primary drinking water source for about 300,000 people. He has worked arm and arm with the EPA rehabilitating, upgrading and improving water systems. He stated his city has reduced sanitary system overflows dramatically over time. He stated his commitment to clean water, knowing how important it is. He emphasized the need to make sure that the waters we are protecting are not dampened down

by unnecessary regulations. He requested that the presentation given today be given in as many places as possible. He addressed his fellow mayors, and said he looked forward to working closely together.

Mayor Nancy Denson from Georgia declined to comment.

Drew Ferguson from Congressman Tom Groves' office declined to comment.

Ethan Vice from Representative Spencer Baccus' office declined comment.

Representatives from Senator Johnny Isakson's office also did not speak.

Bryant Keller, Director of Public Works from Griffin, Georgia stated that his appreciation for the environment is balanced with a financial responsibility as director of Public Works. His work mainly deals with wastewater. There is not much money in public works, and this presents an opportunity to deal with issues. The City of Griffin had the first stormwater utility in Georgia, and the first mandatory recycling program. He thanked the EPA for their grants to the City of Griffin, because the city has been trying to do the right thing. Right now, they are constructing an air flow system. They have the largest regional reservoir. He then stated he has always been a friend to the EPA, but that there are points in the proposed rule that require clarity. He stated that the presentation given today presented all water as jurisdictional. He said he spent two and a half years with the Army Corp of Engineers working on jurisdiction for a ditch, and runoff from a building into a cemetery. He asked how many small rural community's public works departments know about the EPA and the Army Corps. He said the Army Corps is understaffed, and therefore they do not have the physical capability to make these determinations. He pointed out a common problem most communities face-they have to wait for the Corps' permit and determination. However, if they wait too long, environmental groups challenge the city's inaction. He also asked if the EPA or the Corp would come back and support a designation of a water, against litigation from environmental groups. He also asked that if streams are jurisdictional, how to deal with sediment that is going into a major tributary, if it cannot be cleaned up right at the point of dispersal. He said it would be difficult to achieve the principles of the Clean Water Act if every water was determined jurisdictional. He agreed we all want our neighbors downstream to have good water and sustainable flow, which is a big issue in the State of Georgia right now. In the City of Griffin, Mr. Keller said that water rates are up 67%, and stormwater has increased by 37%. He said that he would submit additional comments at another time, and thanked the committee for listening. He said that he was appreciative and happy that the LGAC was hosting these meetings to gain input from the local perspective.

Greg Jones, Assistant to the Mayor of Birmingham declined to speak.

Jim Smith, Representative for the Burnt Fork Creek Watershed Alliance did not comment.

Jai Templeton, Deputy Commissioner of the Tennessee Department of Agriculture said he appreciated this opportunity to share his comments. He mentioned he was a former Mayor, in West Tennessee, and thanked the members representing both governments for being here today. He appreciated the remarks earlier this morning on clarity and communication. The Tennessee Agriculture Department has over 16,000 farming operations. As Deputy Commissioner, he is representing concerns his constituents have about the proposed rule. He

appreciated Ellen Gilinsky's presentation, but it still needs clarification. He thanked the EPA for the extension of the comment period to have a more in-depth understanding of the rule. He said that the definition of a ditch needs to be clarified, as well as when it becomes a tributary. Uplands needs a clearer definition. He stated that there was a discrepancy between a webinar given by the EPA and the proposed rule on the definition of a pond. He asked for clarification on riparian area, floodplain, and recurrence levels. He suggested reviewing the state of Tennessee approach for jurisdictional waters, as an example. He also said that the definition of 'significant nexus' is extremely important, and needs to be clear. As we understand it, the definition of this term is based on a report which has not yet been finalized. He asked that the report be made available for review and comment upon its completion. And if changes to the rule are based on this report then the EPA should publish the revised rule in the Federal Register for additional public comment prior to the rule becoming final. He thanked the members and the EPA for letting him bring forward these concerns. He added that farmers work hard to conserve the resources on their land. He's a sixth generation farmer and agreed that agricultural producers want to conserve our environment and be good stewards of their land and water. Tennessee has an output of forestry and other agricultural products of \$67 billion dollars. He cautioned that with this rule's proposed changes, it should be verified that farms and forests will remain profitable.

Becky Taylor Director of Federal Relations and Research for the Georgia Municipal Association declined to comment.

Sydne Smith, representing the Commissioner Gary Black of the Georgia Department of Agriculture said his comments will be sent to the LGAC. She said he wished he could be in attendance, given the importance of this meeting for his producers. She said that this rule has started a debate between parts of the agriculture community. In Georgia, 1 in 7 jobs are related to agriculture. It is a \$77 billion dollar industry, focused on poultry, peanuts and pecans. They have a vested interest in having producers meet certain requirements without overreach from the state or federal government. She appreciated the purpose of the rule to reduce confusion, but has concerns similar to what other members of the public have already said today. Definitions of ditches and significant nexus are unclear. Producers are concerned about the invasion of property rights. The definition of a ditch is needed in the rule, but the presentation explained it well. The Georgia agriculture community has expressed confusion about the definition of a 'significant nexus'. She asked that the rule be pulled from the Federal Register. She said that there is no more important resource than agriculture, and that she opposes the rule because of its negative impacts on agricultural families. Commissioner Black, if he was present, would say that there's no resource more valuable to Georgia's agricultural community than water. We respectfully but adamantly oppose this proposed rule. She said it is seen as another intrusive layer of federal regulation on farmer families.

Todd Edwards, the Associative Legislative Director for the Association County Commissioners of Georgia (ACCG), said he appreciates this opportunity to speak before the committee and that the intention of the rule is to provide clarity. ACCG represents 159 counties across Georgia, and he has been consulting with members across the state about this rule in preparation for this meeting. He said he also appreciates that this is a formal rule, which they did ask for. There is confusion with the interpretation of the rule. He has participated in conference calls with the National Association of Counties (NACO) and the EPA, and has talked with a number of attorneys about these definitions. He stated there is uncertainty as to whether it intentionally

incurs additional costs, creating delays for stormwater, and limiting the ability to focus on stormwater management. He wants to remove these ambiguities, so litigation which would be very costly for Georgia communities, can be avoided. He also wants to ensure that these unintentional consequences from the rule as currently written will not lead to non-compliance penalties. He said the ACCG does believe the EPA when they say these misconceptions are unintentional, and wants to ensure there are not unintended consequences. Counties rely on ditches to funnel water from low lying roads to prevent flooding and accidents. Increasing the permitting process could lead to lawsuits. He said that how connectivity is determined is unclear. If a counties are faced with a lawsuit from a citizen or an environmental group, will they ever be able to determine or successfully claim that a county maintenance ditch drains only (upland) and does not contribute to a flow of the Waters of the U.S. It may be hard, especially in the southeast, given the amount of land there is and the humidity maintaining wet ditches most, if not all, of the year. He also cautioned that leaving uplands undefined could lead to litigation. Ultimately the county is responsible for ditches, regardless of whether or not they receive a federal permit timely. The rule should clarify, and ensure, that the maintenance of local streets, gutters and ditches are exempt. He also said that stormwater is not explicitly exempt. MS4 advances, with ditches, are already regulated under the CWA program. This infrastructure can be jurisdictional, and waters flowing in can be jurisdictional as well in the rule as written. He appreciated that the EPA has said that this is not their intent, but argued that the language needs to be changed so a lawsuit does not result. He asked for MS4 programs to be specifically made exempt. It is also a concern that not only will this infrastructure be jurisdictional, but also it could be interpreted that water falling into the infrastructure could be jurisdictional as well. Again, in various conference calls, these concerns were brought up with EPA's staff. They clearly stated that this was not their intent. He is just seeking clarity in the rule to make sure that it will not be interpreted differently by a court of law. He thanked the EPA and the Army Corps for the opportunity to speak, and the EPA for its efforts to provide clarity. Since this topic has been the genesis of many lawsuits before, he stated his hope that with additional clarity, it will no longer the case. He cautioned that currently the draft may discourage stormwater infrastructure, and cause economic distress. If not altered, he sees great potential to increase many counties' risk of litigation, to create unnecessary delays and confusion, and cause a disincentive for building adequately constructed and maintained drainage systems and stormwater management infrastructure. It also may divert critical county resources to comply with the rule when there is already under great economic distress.

Silbrina Wright, Executive Director for the National Conference of Black Mayors declined to comment.

Brian Accardo, Special Counsel for Federal Rulemaking from the Florida Department of Environmental Protection declined to speak.

Cassel Gardner, Interim Director Center for Water and Air Quality at Florida A&M University said that he enjoyed the WOTUS presentation. His main concern is about education and asked what provision is being made to educate populations in schools and colleges to carry this information into the field. He asked for a connection between students and people working on water protection and maintenance to retain water resources for future generations. He would like an education component to be included in the rule. He was thankful for the opportunity to be here.

Mike Montone, Regulatory Program Manager of the South Atlantic Division US Army Corps of Engineers had no comment.

Alyssa Cameron, Senior Attorney for the Florida Department of Agriculture and Consumer Services declined to speak.

Roger Raines, an engineer from the Savannah, Georgia stormwater department said the upland definition is very confusing. He found the WOTUS presentation comforting, but expressed distress that what is proposed in writing remains confusing. He asked whether maintenance of ditches would be impacted, if they are connected to downstream waters. He stated concern that more clarification was needed, because of ambiguities. He thanked the members for the opportunity to give comment. A portion that affects his region is ditches, and maintenance. They do connect to downstream water. So, on the one hand, those two pages say that they are regulated. There is an exemption if they are a manmade and they are dry, and but around Savannah, most of the ditches aren't dry, because of the water levels. Therefore, he is concerned about the ambiguity in those two pages.

Steven James, from the Florida Association of Counties represents all 67 Florida counties. He also sits on the Florida water coalition, which is coalition of stakeholders focusing on many issues including the numeric nutrient criteria issue that Florida and the EPA worked together to resolve. The coalition has representatives from industry, from chambers of commerce, from the agriculture community, the development community and farm bureaus. He described Florida as a plateau that has been submerged for most of history, and as having more coastline than any other state except Alaska. There are 700 springs, and 1800 rivers. He said in Florida, connectivity and jurisdiction are a big concern since there are underground aquifers that traverse the entire state. He expressed concern that despite assertions to the contrary that this rule does expand a federal jurisdiction. He is also concerned about the aggregation of otherwise isolated waters and groundwater and that it can provide, according to the language of the rule, connectivity and nexus for jurisdiction. He also expressed concern regarding the inclusion of manmade and man altered structures. He argued that the vague treatment of systems and stormwater, the subjective determination process and the narrow list of exemptions give more power to the EPA. He said that determinations are a cumbersome, time consuming process and that there will be an economic impact, hurting rural counties that have not seen their economies pick up since the recession. He said that the economic impact calculated for Florida would be much higher than the predictions in the presentation. He asked what the layperson would think of the rule. Since other waters are determined on a case specific basis, and waters in combination with similarly situated waters can have a significant nexus, this ambiguity leads to the potential opportunity for litigation. He questioned how litigation would interpret the definition of "other waters." The supporting documentation says similarly situated includes waters such as wetlands that may not be hydrologically connected but function together, which could potentially connect waters across a very large area. This is where he, and the people he represent are concerned. He also mentioned concern about humidity in Florida, and concern about its impact on jurisdiction, since if something is wet, it is considered jurisdictional. He said that a 'significant nexus' was a term coined by the Supreme Court, but asked what this means in application. He said waters can now be connected by seeds and the movement of certain animals. In the *SWANCC* Supreme Court case, it was determined that Congress did not intend to expand jurisdiction of the Clean Water Act to include birds as a determinant. He also expressed concern with other terms like tributary, since it is not defined in any other regulation. He said the



definition of tributary is irrespective of bed banks and water marks, and includes ditches, ponds with very narrow exemptions. He asked that uplands and less than perennial flows to be defined further. Essentially all of Florida is in one watershed or another. He said that it was troubling that flow into another tributary was a cause for jurisdiction. He said that the definition of riparian as an area bordering water with surface or subsurface hydrological impacts on plant process or animal structure creates a very large scope of areas that fall under this definition. This rule as written is a significant impingement over the states traditional and primary power over land and water use. He worried about the broad scope of tributaries that include perennial, intermittent, ephemeral flows, manmade streams or ditches. He asked which ditches are subject to the narrow exemption, and expressed concern that ditches that flow into another tributary could be considered tributaries themselves. He asked if, in the definition of floodplain, inundated during moderate to high water flows meant rain. He asked what is inland when considering if a floodplain borders inland. He asked whether Justice Kennedy meant for these waters to be considered adjacent without a significant nexus. He requested that waste water treatment systems are made explicitly exempt. He also asked about systems to address noncompliant fees. He thanked the EPA and the members for the opportunity to comment.

Kurt Spitzer, Representative of the Florida and Southeast Stormwater Associations, said he is interested in water quality improvement through a rational program at the local level. There are many programs where there is a necessity for federal oversight and guidance of local governments. He expressed support for the Clean Water Act and EPA oversight, for programs that require federal guidance. He said now we need to address non-point sources from urbanization and agriculture. He said there are limited resources for funding, particularly for MS4s, indirectly through regulatory means. And for the MS4 program, the stormwater program, funding comes from the general fund or from a stormwater utility fee or indirectly through regulatory measures that you might enact to discourage new sources of pollution entering the system. It is struggle to balance the economic development, the environment protection, water quality programs with the rest of a local community's budget. He articulated the need to be focused on waters people can devote their resources to for improvement. He emphasized realistic water quality improvement with benefits to the environment, to systems in aggregate and to human use. Devoting resources to those water bodies where there's a realistic possibility of seeing improvement in the water quality of those waters will likely see the greatest benefit. But there is not enough money to address all waters. He said the rule is not confusing, but clearly expands the waters that are covered. He asked if it wasn't covered before, why we need to change the rule and include them now. He said the proposal doesn't change the permit program for stormwater, but changes the breadth and depth of waters under jurisdiction, at the expense of rivers. He thanked the committee. If they were jurisdictional before, some would say, "Why do we need a rule now?" He argued it definitely does categorically expand jurisdiction, and thanked the Workgroup for their time and attention.

Zhaleh McCullers, Director of Stormwater for Jefferson Valley, Alabama agreed with Steven James, and Kurt Spitzer. As the person responsible for MS4 permits, he wants clarification. He questioned the MS4 definition of a drainage system. He asked if the new rule would have a definition for similar areas that are going to be included. He asked what the new definition of a MS4 would be. He asked whether all tributaries will be considered if there is an expansion of rules. He also asked if there is a purpose of an MS4 permit if the definition of a tributary is expanded. It is hard to implement the requirements of this rule, and the responsibilities for local communities are hard to understand. He also asked what outflows local communities would be



responsible for, and what the purpose of an MS4 permit would be if tributaries expand in scope. Without understanding our responsibility, it will be hard to implement these rules. He also cautioned that the costs would likely be higher than the current EPA estimates.

Chris Pettit from Palm Beach County thanked Regional Administrator Heather McTeer Toney for her focus on implementation and pragmatism. He is the policy and legislative manager for the water utility. He articulated that the two components of the rule are the technical and scientific. He echoed concerns mentioned by his colleagues regarding the pragmatic applicability of this rule. He said the only reason you have 7 million people living from Palm Beach County down through Miami-Dade, Monroe County is because of a federal project, a flood control project and the associated stormwater and surface water management projects. Under the proposed definition one could argue that basically all South Florida could be considered Waters of the United States. He said the definition of a strike zone is important, but not of interest to him. It's the pragmatic reality, and the fact that the state of Florida has existing MS4 programs and well-developed state stormwater resource permitting processes. Looking for clarity on the scientific side is the EPA's goal from these meetings. But the issues of ditches on roadways needs to be addressed, as well as stormwater management. He acknowledged the need for partnership with the states, Region 4 and Washington, DC to get to a viable solution. He argued there is a separation between discussion regarding connectivity and the pragmatic reality of changing definitions. He argued there is a distinction between scientific discussion, and how it is applied in the real world.

He agreed that clarity is important, especially in regard to definition changes, broad based exemptions, geographic uniqueness, roadway ditches, and stormwater management in MS4 programs. He said in Florida, everything is connected via groundwater subsurface water systems. He mentioned that treatment conveyance systems could be an additional area of concern. He described reclaimed water programs in Palm Beach County, where waste water treatment processes recycle water and bring it close to drinking water standards. This water is then used for stormwater ponds or for golf course irrigation, reducing strain on the aquifer. He expressed concern that under this new rule, these systems would be jurisdictional. He argues that if this rule is not a traditional expansion of authority, it is seen as one in fact. He emphasized the need for pragmatism. He described the Everglades in Florida where agriculture is done on traditionally swampy area, and thus depends on canals. He argued that Florida state programs have addressed these issues well. One example is by paying farmers to hold water higher on properties to limit flooding. Some rain goes into tributaries that harm populations, but the state is working on fixing that. The Army Corp impacts prior converted cropland that could become restored wetlands. He asked what happens if a private company changes this cropland back into a wetland. He said local municipalities need to know how to deal with the national rule. He emphasized that geographical uniqueness requires additional consideration. He thanked the members of the Workgroup.

Alan Merrill from the Chattahoochee Hills, Georgia City Planning Commission introduced his city as the third largest in Georgia. It is bordered by the Chattahoochee River with 32 active farms that have ranch cattle and some organic products. One of their farmers raised 70,000 pounds of vegetables last year. He said that the agriculture is sustainable with a low carbon footprint, and that their ancestors are from an Indian tribe. He stated respect for their heritage, and his focus on the future. It's important to foster the entrepreneurial spirit of the farmers, because that makes them better farmers, better stewards and sustains a foundation for future generations.

He said that if the EPA intended to exempt agriculture, to make sure that is the end result of their actions. As the rule stands, he argues that the EPA is not exempting agriculture, and other agriculture producers need to know that is your overall intent. He suggested not putting out defensive remarks saying, "Well, these are myths." Make sure that you read these and make sure that the rules create an exemption for agriculture that is real. Once you've done that then use the Kansas Livestock Association, Cattlemen's Associations, all of the agricultural associations in the country to get the good word out to farmers that they're exempt from these new rules so they aren't spending time looking over their shoulder worrying about how they're complying with the law.

## VIII. Wrap-Up/Next Steps

*Susan Hann, Chairwoman*

Chairwoman Susan Hann said written comments should go through Frances Eargle, from EPA headquarters or to the EPA directly via the docket. She thanked everyone for all of the participation. She said we heard that all of you are trying to do the right thing and desire clarification to minimize litigation. It's sometimes challenging in the context of federal rules and regulations. So, if we can be as clear as possible on the points that many of you mentioned that will help us all do a better a job in doing the right thing.

She said she clearly heard that we need clarity on many issues. Some of the primary ones included agricultural exemptions, MS4 permits, and ditches. She thanked Mr. Pettit for his comment on pragmatic reality because that's really what all of you and all of us face when we go home.

Chairwoman Hann agreed with the desire for clarity to minimize litigation. We certainly don't want to spend resources on litigation when we could be spending resources on improving our environment. She thanked the public for their comments on agriculture exemptions, MS4 permits and others areas we need to clarify. She said those comments come to the water Workgroup and the LGAC, but those are not official comments on the docket. So, if you want to make official comments on the docket please use the information that Ellen Gilinsky provided earlier. You can do both. But, if you want to provide comments to the LGAC, you should contact Frances Eargle.

Mayor Elizabeth Kautz said it is very important to hear your thoughts because it helps us with recommendations to the Administrator. She acknowledged that this issue is complicated and challenging. She said that in her home state of Minnesota, there are a lot of lakes, which is very different than Florida. She said this meeting was very educational for the Workgroup. The LGAC understands that not everything is consistent across the nation. She acknowledged they have a lot of work ahead of them.

Mayor Pro Tem Cindy Circo said there is a goal to create a rule to get out of litigation, which helps all of us. However the current wording does not get us there, and clarity is still needed. She said we need comments that say we support a rule and this is what works for us. She emphasized that the Committee would appreciate understanding the wording that could be proposed for clarification, rather than just saying, you do not want a rule.

Commissioner Robert Cope compared this process to a similar process done in Idaho. He said at first it was difficult to get people to come forward with opinions. But now there is demonstrable change because someone came forward and expressed an opinion. He acknowledged that as the rule stands a lot of definitions are not defined. From a western standpoint water is lifeblood. He said he appreciated the time the public took to get to this meeting, to provide comments face to face, and give substantive information the Workgroup can work with.

Commissioner Carolyn Peterson stated that there is a lot of water in upstate New York. In her experience, she said it often takes time to make complicated things work. She said that the Workgroup has already asked the Administrator for a longer comment period. She admitted that we don't know what effect that will have. We realize that this is very complicated and we are appreciative of the extension that the EPA has granted but we feel that even more would be worthwhile. She thanked everyone for coming to the meeting.

Mayor Johnny DuPree appreciated these comments, because not everyone takes advantage of the opportunity to do so. He emphasized the diversity in Region 4, and the ability to capitalize on this diversity and create success. He stated his belief that the answer to this discussion will come from Region 4. He acknowledged that stormwater management is a big issue, and there is confusion that needs to be addressed. He echoed the concern that many members mentioned, regarding acting in a timely manner and responses from environmental groups. He mentioned he is currently dealing with a lawsuit with an environmental group. He said we need to "pull up our britches and make it happen." He said we can make it happen with your representation.

Chairwoman Susan Hann then thanked EPA Region 4 Administrator Heather McTeer Toney for being at the meeting, and asked if she would like to add any comments. Susan Hann also commented on the great Southern hospitality in Region 4.

*Heather McTeer Toney, Regional Administrator  
EPA Region 4*

Heather McTeer Toney said she was so proud for all the participants coming to Atlanta, and thanked the LGAC for coming to Region 4. She said it was great to hear from all of these regions and constituency groups, and that they have no idea of how much of a difference their comments make. She emphasized to the public that they are in front of a group that are really listening. She took at least three to four pages of notes of the information shared today. She stated in Region 4, there is a diverse, excellent team of people that you have worked with and will continue to work with. She thanked those of her staff in EPA Region 4 who made today's event possible: the Acting Deputy, Anne Heard, Shea Jones-Johnson and Rosemarie Nelson for all their hard work. She said the EPA staff is passionate about what they do in a spirit of service. She encouraged the public to find them, because they do not exist only in theory, in phone calls or in emails, but also face to face. She thanked the public for coming, for their comments, and for putting a smile on her face. She also thanked the Army Corp of Engineers for coming to the meeting.

Susan Hann thanked the members of the workgroup, the LGAC and the Army Corp. She thanked Region 4, and the Administrator for allowing us to do this outreach. It's really been a great experience so far and she thinks the Workgroup is going to produce some great results for the

EPA. She asked Deputy Associate Administrator Mark Rupp if he would like to say any further remarks.

*Mark Rupp, Deputy Associate Administrator  
EPA's Office of Congressional and Intergovernmental Relations*

Deputy Associate Administrator Mark Rupp said he would like to end where he started, by thanking Chairwoman Susan Hann, Vice-Chairwoman Elizabeth Kautz and the LGAC for their dedication and time commitment to this Workgroup. He will reflect on these comments as the head of intergovernmental relations for the EPA. He discussed the outreach the EPA is participating in from Region 4, and outreach with states and associations. He mentioned that Nancy Stoner, Acting Assistant Administrator for the Office of Water will be with the National Association of Counties (NACO) on July 11 in New Orleans, Louisiana. He said that he spoke with NACO last week. Phone calls and webinars are being set up to address concerns. He emphasized that Administrator Gina McCarthy is nothing but a pragmatist, and has said no final rule will look like the draft rule. The comments heard at today's meeting will make the rule better. He acknowledged the staff that made this event happen, thanking Frances Eargle, Designated Federal Officer for the LGAC for all the work she does, and Jenna Behrendt, OCIR intern for her work. To address agriculture concerns, the Environmental Council of States, state departments, state commissioners are working to make sure that various departments are working and communicating with one another. He worked incredibly closely with the Environmental Council of the States (ECOS) and asked the state commissioners to ensure that the various departments with equities within a particular state are communicating with one another. He appreciated that the Department of Agriculture was here. He urged that if the state is going to comment on the rule, to ensure that we are all working together with a unity of purpose to assess all of the various issues of Waters of the U.S. that come out and fall within discrete purviews. And so, know that all the comments that are being made, all of the work of the LGAC will go into making this a fine rule that is implementable at the end of the day. He thanked David Lekson from the Corp for their partnership and the LGAC members, for being tremendous individuals and saying as a group, there's nothing we can't do.

#### **IX. Meeting Adjourns**

Chairwoman Susan Hann concluded the event thanking everyone for attending. Meeting adjourned.

#### **X. Meeting Participants**

##### **LGAC Members**

<b>First Name</b>	<b>Last Name</b>	<b>Title/Organization</b>
Kevin	Shafer	Executive Director, Milwaukee Metropolitan Sewerage District
Jeffrey	Tiberi	Executive Director, Montana Association of Conservation Districts
Carolyn	Peterson	Commissioner, Thompsons County, NY
Cindy	Circo	Mayor Pro Tem, Kansas City, MO
Susan	Hann	City Manager, Palm Bay, FL
Dave	Richins	Councilmember, Mesa, AZ

Robert	Cope	Commissioner, Lemhi County, ID
Elizabeth	Kautz	Mayor, Burnsville, MN
Johnny	DuPree	Mayor, Hattiesburg, MS

#### EPA Representatives

First Name	Last Name	Title
Heather	McTeer Toney	Region 4 Administrator
Mark	Rupp	Deputy Associate Administrator for Intergovernmental Relations
Ellen	Gilinsky	Senior Policy Advisor, Office of Water
Damaris	Christensen	Environmental Protection Specialist, Office of Water
Frances	Eargle	DFO, LGAC, OCIR
Jenna	Behrendt	EPA OCIR Intern
Shea	Jones Johnson	EPA Region 4
Anne	Heard	EPA Region 4
Allison	Wise	EPA Region 4
Rosemarie	Nelson	EPA Region 4

#### Members of the Public

First Name	Last Name	Title/Organization
Kasim	Reed	Mayor Atlanta, GA
Erville	Koehler	Acting Regional Administrator, General Services Administration
Brant	Keller	Director of Public Works, Griffin, GA
Gregory	Jones	Assistant to the Mayor of Birmingham, AL
Jim	Smith	Representative for the Burnt Fork Creek Watershed Alliance
Jai	Templeton	Deputy Commissioner for TN Department of Agriculture
Becky	Taylor	Director of Federal Relations and Research for the Georgia Municipal Association
Synde	Smith	Policy Director for GA Dept. of Agriculture
Adam	Dye	Public Affairs Coordinator for GA Dept. of Agriculture
Todd	Edwards	Associate Legislative Director/ACCG
Silbrina	Wright	Executive Director, MCBM
Kurt	Spitzer	Executive Director, Florida Stormwater Association
Brian	Accardo	Special Counsel for Federal Rulemaking, Florida Department of Environmental Protection
Steve	Benjamin	Mayor of Columbia, South Carolina
Cassel	Gardner	Interim Director Center for Water and Air Quality at Florida A&M University
Frank	Redmond	Field Representative of U.S. Senator Johnny Isakson
Barton	Lowrey	Field Representative of U.S. Senator Johnny Isakson
Mike	Montone	Regulatory Program Manager, South Atlantic Division US Army Corps of Engineers

Alyssa	Cameron	Senior Attorney/ Florida Department of Agriculture and Consumer Services
Roger	Raines	City of Savannah Stormwater Department
Pascal	Caputo	Chief of Staff and Counsel, Office of Jefferson County Commissioner David Carrington
David	Lekson	Regulatory Chief, Savannah District, US Army Corps of Engineers
Steven	James	Florida Association of Counties
Zhaleh	McCullers	Director of Stormwater, Jefferson Valley, AL
Chris	Petit	Palm Beach County, FL
Alan	Merill	City Planning Commission, Chattahoochee Hills, GA



U.S. Environmental Protection Agency

# Local Government Advisory Committee (LGAC) Protecting America's Waters Workgroup

August 13, 2014

## Meeting Summary

*The Meeting Summary that follows reflects what was conveyed during the course of the meeting that is summarized. The Workgroup is not responsible for any potential inaccuracies that may appear in the meeting summary as a result of information conveyed. Moreover, the Workgroup advises that additional information sources be consulted in cases where any concern may exist about statistics or any other information within the Meeting Summary.*

Municipal Building  
City of Tacoma  
747 Market Street  
Tacoma, Washington  
Wednesday, August 13, 9:00 am - 12:30 pm

## **Meeting Summary**

### **I. Welcome**

#### **Mayor Marilyn Strickland**

Mayor Strickland welcomed everyone to Tacoma, Washington. She stated that, "Water has always been in the heart of our city". The history of our city from an environmental standpoint, has "not been a good one"- Commencement Bay was a Superfund site, but is now cleaned up. EPA has been a significant partner every step of the way to clean up and reclaim our waters.

It has taken twelve years and millions of dollars, but today, the city has an active waterfront and it is a beautiful city because of its waterways.

We have also instituted green infrastructure practices to control stormwater and we employ rain gardens for preventing stormwater problems, and to be proactive.

The Center for Urban Waters is at the center of our urban waterways initiative here in Commencement Bay and is a good example of where partnerships and agencies can work together. We are also partners with the Puget Sound Partnership, University of Washington and others.

As Mayor, "I have a vision where EPA is also an important partner. EPA and EPA's Region 10 Administrator Dennis McLerran has been very much a great partner with the city and with Puget Sound, especially in the waste oil recycling program.

We want our waters to be clean, safe and cost-effective where municipalities can thrive.

The City of Tacoma is pleased to have the LGAC meet here today for this important meeting.

### **II. Call to Order/Introductions**

#### **Mayor Elizabeth Kautz, Vice-Chair**

Mayor Kautz called the meeting to order and welcomed everyone. She thanked Mayor Strickland for the work they have done together side by side on many issues.

"Clean and safe water is one of our highest priorities, for our communities and the future"

As background EPA's Local Government Advisory Committee is serve as formal advisory committee under the Federal Advisory Committee Act since 1993. The LGAC is comprised of local, state and tribal elected and appointed officials from across the country. The LGAC assists the EPA in building stronger

intergovernmental relations with EPA. The ultimate goal of the LGAC is to provide citizens of nation more efficient and effective environmental protection at the federal, state and local level.

The LGAC is balanced in terms of points of view and perspectives. The LGAC was charged by the EPA Administrator to give input on the Waters of U.S Proposed Rule.

#### **Council Member Dave Somers**

Council Member Somers welcomed LGAC colleagues to the Puget Sound Region and thanked Administrator McCarthy for her visit to the Region. There are tremendous water resources here that we all care about: the Pacific Salmon, giant ducks, pods of killer whales and “most important we have Bill Ruckelshaus.”

#### **Mayor Elizabeth Kautz, Vice-Chairwoman**

Vice-chairwoman Mayor Elizabeth Kautz expressed her appreciation to Administrator McCarthy for the kick off meeting of the Workgroup on WOTUS in Minnesota. She stated that she felt the people had a general sense that their issues were heard and appreciated. Mayor Kautz also expressed her view that everyone appreciated the Administrator’s candid and direct approach in addressing waters of U.S.

*[Mayor Kautz introduced and recognized Administrator McCarthy].*

### **III. Remarks of EPA Administrator Gina McCarthy**

Administrator McCarthy began by thanking the LGAC for this meeting and recognized that it is a listening session so that her remarks would be brief. Administrator McCarthy also thanked Mayor Strickland for hosting the meeting in the wonderful city of Tacoma in a region where there are abundant natural resources.

She also acknowledged that the Pacific Northwest would not be what it was if we didn’t protect it and realized that it is the economic engine for everything here.

She recognized that this is important issue to come together in a collaborative approach with local governments and EPA and others.

Administrator McCarthy said that it is important because “If we don’t get the Waters of the U.S. right than we won’t be able to protect places like the Puget Sound for the natural resources that we all share.”

She acknowledged William Ruckelshaus for his leadership of the EPA, and thanked him also for being at the meeting and stated that this is an indication of the importance of this meeting.

Administrator McCarthy mentioned the City of Toledo’s issue with contamination of their drinking water. And she stated that this is why it is so important because “what do we do to make sure we are dealing with those situations together – it’s a harsh reality. She also stated, “I’m sure if we do it together we will do it right for the future.”

Administrator McCarthy stated that the LGAC provides the EPA important advice and stated that “we rely on them to tell us what we could do better. She said that this is why the LGAC was asked to take a look at this rule and to have these sessions. She said that she wants to hear – what are people seeing

and hearing, how we can fully engage concerns of local government, so that they are fully heard. We are going to ask for what additional interactions we can have, what more we need to do.

She stated that getting this rule over the finish line to best protect our waters, including drinking water, and waterways. In the end it's important for us to get a rule out that we can all live with.

*(Administrator McCarthy introduced William Ruckelshaus as the first EPA Administrator).*

#### **IV. Speakers**

##### **1) William Ruckelshaus, Former EPA Administrator**

William Ruckelshaus thanked the Vice-Chair Mayor Kautz, the Administrator and Council Member Dave Somers for all of their work. He especially recognized and thanked David Somers for all the good work he is doing, as well as Region 10 Administrator Dennis McLerran.

He joked by saying that he is giving advice to the workgroup of a federal advisory committee (the LGAC) that gives advice to LGAC who then gives advice to Administrator McCarthy, on Waters of the U.S.

He said that he wanted to share some thoughts on what's happened over the last forty two years. He started his public service in the State of Indiana in a public health department when water was considered a health issue. He said that in those days, algae choked lakes, public waterways and rivers.

In 1970, the year the EPA began, the Clean Air Act was passed. The Clean Water Act passed in 1972, overwhelmingly was passed in October (in an election year). President Nixon vetoed the CWA – but Congress overwhelmingly got votes to override the veto and the CWA was passed into public law.

Knowing something of this background (some before, some after when I started at EPA in 1970) – I went to meet with local governments. He said that “by and large state officials were furious – they believed they were doing the best job they could with little or no support.” It was a very instructive time for me and he was convinced that state administrators need to be engaged to make significant progress so that “rivers are no longer flammable.”

He said that at that time, removing phosphorus from detergents and keeping nutrients out of the Great Lakes was a priority. He said that removing phosphorus reduced the vast swaths of algae which was causing low oxygen levels detrimental to fish. He said that the same thing is repeating itself but primarily from nutrient run-off (not phosphorus).

The message is that “These issues come back and we need to keep at it.” In spite of this progress, with CWA permits, nonpoint source pollution (NPS) remains a problem. The rule reflects the reluctance - even when courts intervene on behalf of regulators, to address these issues. We have to look at point source discharge permits and see whether they are doing what they are supposed to--protecting water resources.

##### **2) Sheida Sahandy, Executive Director of Puget Sound Partnership**

Executive Director Sahandy began by stating that small actions combined coming together in alignment will result in a huge activation of resources that will benefit the Puget Sound. To get our resources aligned, we have to have right collective actions that are much greater than the sum of its parts. She said that it is not just about protection of natural resources. It is about jobs, the shellfish industry,

tourism, how we recreate, fishing, spending time with our children, about our Native cultures. Saving the Puget Sound is a big deal. In all its grandeur, we have to also remember what lives there.

The steelhead salmon have a 98% mortality rate – and we don't know why. We have starfish that are literally melting away – literally their limbs are melting away from their bodies. We do not know why. We have ocean acidification impacting shellfish industry right now.

We are still damaging Puget Sound faster than we are healing it. If we are supposed to save the Puget Sound by 2020, we aren't going to meet it at this rate. We need to flip this so that the recovery rate is greater than the impact rate. And it will take out collective partnerships is what's going to make this happen.

EPA has been one of our great partners. Over \$250 million have gone to Puget Sound. This has started about 15,000 jobs, which is greater than 25,000 acres of habitat restored. And we also have the science to establish more monitoring and accountability. She said, "This is something to be proud of, but not satisfied."

So, the efforts of EPA to talk with local governments and others are very welcomed. Local governments are where actions make a difference. Without local governments, we cannot do it. She also said that she was "delighted to hear EPA is really tuning in and getting feedback from local governments. She also thanked the EPA, the Administrator and the LGAC for being here.

#### **V. Clean Water Act -Waters of the U.S. Proposed Rule**

*Ellen Gilinsky, Senior Policy Advisor at EPA's Office of Water presents a briefing of the proposed Waters of the U.S. which can be found in Appendix VI.*

#### **Commissioner Robert Cope, Chair, LGAC's Small Community Advisory Subcommittee**

The Small Community Advisory Subcommittee (SCAS) of the LGAC will be looking at small community issues of WOTUS, especially in areas of communication, implementation with small communities. A workgroup session of the SCAS will meet later today. Even If you have a well-intentioned rule, if it is not clear or if there are not any proper definitions, it ends up in litigation. We are really hoping to get input from you here to put really solid boundaries and get clarification so this will work for everyone. It is challenging to get a "one size fits all" across the nation with both consistency and flexibility. It is a challenge and any help participants can give would be very helpful.

#### **VI. Public Comments**

- 1) **Council Member from City of Auburn** requests a copy of Ellen Gilinsky's presentation. She referred him to the Office of Water. He said that he was here to represent the National League of Cities as Chair of Energy Environment & Natural Resources Steering Committee. We felt compelled to give you our views from our committee.

A number of local governments are using green infrastructure to address environment issues. The proposed rule could require 404 permits for non-MS4 and MS4. It is unclear if a 404 permit will be required for maintenance on a green infrastructure project once this rule is implemented. He gave an example of West Seattle for a CSO green infrastructure project.

Moreover if MS4s are found to be Waters of the U.S. then they would be subject to water quality standards. Currently there is no designated use for MS4 but they could be required to be swimmable and fishable.

As was mentioned earlier by Commissioner Cope, we want to avoid legal cases- that is our concern.

2) **City of Tacoma Environmental Services Dept. – Lorna Mauren, Assistant Division Manager, Environmental Services/Science & Engineering Dept.**

The City of Tacoma welcomes clarification of the definition of waters of U.S. in this proposed rule, and believes these definitions and clarity is overdue. A revised definition goes a long way toward clarity and consistency. However, the City of Tacoma is concerned about any vague definitions.

“Other waters based on significant nexus” is more than speculative or insubstantial; it leaves room for interpretation which may lead to inconsistent interpretation and regulation as these waters would have to be made on case by case basis.

The City of Tacoma urges EPA to provide additional clarification for other waters – a clear definition that can be consistently enforced across all the regions.

3) **Stephen Bernath, Senior Analyst, Washington Department of Ecology**

The Washington Department of Ecology is the delegated agency for water quality for the State of Washington. Our Shorelines program issues CWA 401 water quality certifications permits. I’m in the Water Quality Program Director for the state. Permits for Section 404 permits also require 401 water quality certification from the state.

I’m also active in the Administrator’s webinars and am also an appointee on Washington State’s Water Council. The WA Department of Ecology is actually very happy that you’ve put this rule together. From our perspective we think the rule is consistent with the jurisdiction calls that are currently done. It really won’t affect the way waters are defined. In WA State we regulate ‘waters of the state’ which is broader than the federal definition of waters of U.S.

We do think the proposed rule clarifies where 404 permits are required and, therefore, where our 401 WQ certifications are required.

We are concerned about the “significant nexus determination” because of potential delays in determination of that. We recommend that the EPA Regions and Corps Districts work with the States to identify areas in the states and predetermine those areas that are waters of the U.S. (through mapping, planning tools, etc.)

We also support the tributaries definition.

We also have a delineation manual that’s consistent with the Corps – that is a no brainer to us.

We would like clarification of the definition of floodplain. For example, does it mean 100 year floodplain? Or is it also a floodway such as what is incorporated in our Shorelines Management Act?

The other areas which need clarification is the definition of ‘riparian area’. It is a broad definition which means different things to different people, and in different regulatory environments. How are you going to define these riparian areas?



We believe as Dr. Ellen Gilinsky has indicated that there will not be any change as far as agriculture is concerned. We believe nothing will change for agriculture and we are good with that.

Ditches – We are concerned that ditches excavated in uplands that discharge ultimately to navigable waters, are not jurisdictional. This needs to be clarified.

On the Agriculture Interpretative Rule (IR), we have unanimously requested the Administrator to withdraw that rule. The 56 exemptions – whether or not they are going to actually meet water quality standards. What NRCS practices really are aimed at doing is to meet water quality standards. Particularly some of these practices we wouldn't call either normal farming practices nor would we consider them protecting water quality. We are concerned that taking NRCS non-regulatory practices and making it a regulatory standard as options what may or may not do – is a concern to us.

Finally, some of the conservation practices on that list are detrimental to water quality and to fish in the state. It is unlikely that they protect T&E (Threatened and Endangered) species in the state.

We like the existing definition of normal farming, ranching and silviculture practices in the existing rule, but believe the AG IR is confusing and goes beyond the existing definition.

4) **Mr. Stuart Westford** was recognized but did not have comments.

5) **Marc Daily, Deputy Director of the Puget Sound Partnership**

He echoed concerns of the Department of Ecology comments. He also echoed concerns on the Interpretative Rule. He said that issuing it at the same time as the Waters of the U.S. confuses the two issues which are quite separate. We also believe that the Ag IR is not adequately protective of water quality, and does not support the work we are doing in Puget Sound and across the state itself.

6) **Dave Vogel – Executive Director WA Associated of Conservation Districts**

Dave Vogel stated that he came here to listen, and was not going to speak. He said that he submitted comments to through the National Conservation Commission.

He said unlike his colleagues, he said that he would like EPA to continue to work with NRCS. It has been a struggle for a long time to get the federal agencies to get their act together. It was good news to us that the EPA and the Corps were recognizing the Conservation Practices of NRCS. They aren't regulatory, but they are technical. It's good to see the federal agencies recognizing that incentive programs can integrate with regulatory program. Any time you do that, it can cause confusion. I would encourage you to recommend to the Administrator to keep at that.

He agreed that "the Interpretative Rule botched that." It created real concerns for Ag producers. They felt that the practices which were exempt would no longer be because it had to demonstrate they were installed in compliance with the NRCS standard. And this potentially could put NRCS in a regulatory position of having to ensure compliance with those standards.

On stormwater – whether industrial or on private property – conservation districts enjoy relationships with private property owners. If there is a way they can do these conservation practices without getting all rolled up in regulatory, we would welcome that.

**7) Gary Rowe – WA Association of Counties – Engineers – Transportation**

We have both desert and rainforest environments in Washington State. There will be additional costs with interpretation of the rule and potential delays. Counties already are heavily regulated through Corps of Engineers, WA Dept. of Ecology, WA Dept. of Fish and Wildlife. All of these agencies are updating rules now. Consistency is important.

The proposed rule provides exemptions, but there is concern about potential for different interpretations. It is important that interpretations are clear, understandable, and consistent.

There is a concern about delay related to the issue of determining jurisdiction. (Implication is whatever can be done to reduce the delays for jurisdiction would be good.)

**8) Stuart Whitford – Manager Kitsap Public Health District – Water Quality Restoration Projects –**

I have a staff of twelve. I am confident the streams that we protect will continue to be healthy. We monitor 57 streams and they are the larger streams. So I'm pretty concerned about how the federal rule applies to the non-navigable streams (that a kayak cannot navigate through). These streams need protection.

Ellen Gilinsky commented that it is clarified that these streams are part of the Clean Water Act.

*End of Public Comment.*

**VII. Closing Remarks**

**Mark Rupp, Deputy Associate Administrator, Intergovernmental Relations, EPA's Office of Congressional and Intergovernmental Relations**

I grew up in Bellingham, WA. I want to acknowledge there are number of people in audience I have worked with over the years. I want to thank everyone. If you have additional thoughts or specific comments please post those to the Docket. I really appreciate your comments about working with NRCS.

EPA, historically has faced challenges with agricultural communities. I want to commend the Administrator in getting out to agricultural communities. It is also President Obama's goal to break through the silos and to work with the agricultural communities. The Administrator will continue those conversations NRCS.

Administrator Gina McCarthy is pragmatic – so therefore we will have a rule. It will not probably look like what it looks now, but it will reflect the important input received through these hearings and your comments.

**Cindy Circo, Mayor Pro Tem of Kansas City**, said that she really does want to get the feel of what the community wants to say. She said, "I would like to hear why a lot of folks left the room and did not speak [and] I feel like those who did present gave us some recommendations and that is good."

**Dave Somers, Council Member for Snohomish County**, recognized that a number of folks who had signed up to speak who left weren't necessarily those who had signed up to speak. There was a meeting with the Puget Sound Partnership at the same time as this meeting so perhaps they left to go to that meeting."

**Jeff Tiberi of Montana Association of Conservation Districts** said that he would like to ask the audience if you have any questions while we're here. There is an opportunity to discuss any concerns with Ellen Gilinsky

**Supervisor Salud Carbajal** said that he truly appreciated the input the LGAC received.

**Commissioner Cope** said that there is a very strong representation of states from the west here. We really appreciate your participation, and your representation. We've got a lot of good representation from western states.

**Mayor Kautz** thanked Regional Administrator Dennis McLerran and Mayor Strickland for hosting this meeting-"Thank you for taking your time and your staff so we can have a better product. Please send any comments to Fran Eargle if you have additional thoughts or concerns."

The meeting was adjourned at 11:28 am PT.

## Meeting Participants:

### **LGAC Members:**

Mayor Elizabeth Kautz, Vice-chair  
Supervisor Salud Carbajal, Vice-chair, LGAC  
Commissioner Robert Cope, Chair, SCAS  
Council Member Dave Somers  
Mayor Pro Tem Cindy Circo  
Executive Director Jeff Tiberi  
Council Member Dave Richins

### **EPA Participants:**

Administrator Gina McCarthy  
Region 10 Administrator Dennis McLerran  
Mark Rupp, OCIR  
Fran Eargle, OCIR  
Cindy Schuster, Region 10  
Kendra Tyler, Region 10  
Linda Storm, Region 10  
Tom Eaton, Region 10  
Dr. Ellen Gilinsky, OW

### **Members of the Public:**

Mayor Marilyn Strickland, City of Tacoma, WA  
William Ruckelshaus, former EPA Administrator  
Sheida Sahandy, Puget Sound Partnership  
Council Member from City of Auburn, WA  
Lorna Mauren, City of Tacoma, WA  
Ann Chambers, City of Tacoma, WA  
Ronda Cornforth, City of Tacoma, WA  
Jeff Webster, City of Tacoma, WA  
Ralph Rodriguez, City of Tacoma, WA  
Mark D'Andre, City of Tacoma, WA  
Marc Daily, Puget Sound Partnership  
Bill Peloza, City of Auburn, WA  
Kristina Bonsell, Kitsap Public Health Department  
Judith Callens, Oregon Department of Agriculture  
Amy Cruver, Pierce County, WA  
Lorna Maren, City of Tacoma, WA  
Gary Rowe, Washington State Association of Counties  
Ann Chambers, City of Tacoma, WA  
Kirk Cook, Washington State Department of Agriculture  
Sam Ricketts, Governor Inslee  
John Bolender, Mason County  
Lynn DeLorenzo, City of Tacoma, WA  
Toney Mathison, City of Tacoma, WA  
Nadine Daly, City of Tacoma, WA

Sue O'Neill, City of Tacoma, WA  
Tom Rutherford, City of Tacoma, WA  
Craig Kuntz, City of Tacoma, WA  
Dave Cutterson, Association of Washington Cities  
Brynn Brady, Ceiba Consulting  
Stuart Whitford, Kitsap Public Health Department  
Tim Hagan, Pierce County, WA  
Kaila Kluge, City of Tacoma, WA  
Randall Lewis, City of Tacoma, WA  
Jennifer Hines, City of Tacoma, WA  
Dave Vogel, Washington Association of Conservation Districts  
Stephen Bernath, Washington State Department of Ecology  
Clark Mather, City of Tacoma, WA  
Bryan Ecking, City of Tacoma, WA  
Raymond van der Roest, City of Tacoma, WA  
Ramon Espera, City of Tacoma, WA  
Bill Towne, City of Tacoma, WA  
Ed Bolibol, City of Tacoma, WA  
Rene Ongole, City of Tacoma, WA  
Ceresa O'Bryan, City of Tacoma, WA

## U.S. Environmental Protection Agency

# Local Government Advisory Committee (LGAC) Protecting America's Waters Workgroup

September 22, 2014

### Meeting Summary

*The Meeting Summary that follows reflects what was conveyed during the course of the meeting that is summarized. The Workgroup is not responsible for any potential inaccuracies that may appear in the meeting summary as a result of information conveyed. Moreover, the Workgroup advises that additional information sources be consulted in cases where any concern may exist about statistics or any other information within the Meeting Summary.*



Worcester Public Library  
Sax Conference Room  
City of Worcester  
3 Salem Street  
Worcester, Massachusetts  
Monday, September 22, 10:00 am - 1:00 pm ET

## **Meeting Summary**

### **I. Welcome Remarks/ Introductions**

**Mayor Joe Petty:**

One of the biggest challenges Worcester faces is water. This is why relationships with other states and governments are important. The city appreciates that the EPA is a part of this. He welcomed everyone to Worcester and thanked the LGAC for having this meeting

**Mayor Elizabeth Kautz:**

The LGAC is an ongoing group composed of state and local government to advise the EPA. On May 28, Administrator McCarthy charged the committee with delivering input on the proposed clean water rule, specifically issues of importance to local government and how to make this rule work in local communities across the US be it small, local, urban. Worcester may be the last of our public meetings on WOTUS but it is the first because you'll have the last word. When we all work together, we can get it right. We need your voice and your thoughts about this rule so we can have good findings in our recommendations to the EPA administrator. Water is important to all of us; that is a given. Without clean, safe water we will not have safe communities for ourselves and for our grandchildren. So we need to know how to manage it. It's not surprising that managing water is different for all of us-we have different concerns. States are very different-Florida and Minnesota are very different. We have unique and diverse views about the importance of water today and into the future. We're grateful that you're here today to engage in these issues. We're here to listen to you. Please give us recommendations so we can put them into our findings for our recommendations to the Administrator.

*Mayor Kautz introduced Mayor Dixon.*

**Mayor Bob Dixon:**

I am honored to be the chair of this Committee which is composed of 28 local elected officials. LGAC Members do a tremendous job volunteering their time because they want to make a difference. This committee focuses on strengths. In 2005, 95% of my community was destroyed by a tornado. That year, we did everything in a tent. It mattered not your socioeconomic status in the community-the next morning all we had was each other. The next morning we could be truly visionary-that's what we're trying to do with this committee. We're trying to look at what is achievable and what is enforceable. We want to hear from you. Each one of us who are here today are committed to making our communities a better place today. I thank you all for coming here today and we value your input. Thank you Ellen Gilinsky, Mark Rupp, Region 1 Administrator Curt Spalding, and Administrator McCarthy. There have been numerous people including Mayor DuPree, who have met one on one with her so we thank her for

this opportunity to meet with you. We have to have clean safe drinking water for our future generation and that is the goal of this. Please don't be shy about voicing your opinion-we want to hear from you.

**Jill Duson:**

Thanks EPA. When EPA was in Maine, I asked to have a Waters of the U.S. meeting in the Northeast and the next thing we know we're having this meeting. Water is important to the Northeast. Our history and our economies have been formed by great water bodies. We have Michael Bobinsky from the City of Portland Public Services and Heather Parent from the Land and Water Bureau of Maine Department of Environment here today. Maine takes great pride in the legacy of Senator Edmund Muskie who was one of the principle authors of the Clean Water Act, and Senator George Mitchell who helped lead the process for adoption of the 1987 CWA amendments. It's been a clear choice of our constituents that we strongly support the protection of clean water. The devil continues to be in the detail-we have to strike the balance between planning for and finding funds to support implementation of the clean water rules.

**Mark Rupp:**

I am here representing the Administrator who really wants to thank the Committee. The Administrator looks to the LGAC not just on WOTUS but the whole of EPA. The LGAC recommends to the Administrator and lets them know the perspectives of local government. Two things that are driving work at the EPA are climate change and Waters of the U.S. Administrator McCarthy is nothing, if not practical, and wants to ensure that government rules work for the people at all levels of government. I want to introduce Regional Administrator Curt Spalding. WOTUS affects all levels of government and we want to make sure that the states are aware of the rule. We have 10 regional administrators and when I am in communities in Region 1, I always hear how great Curt is. Most people hear the work that's done in Region 1 and want to move to Region 1. We have been benefiting immensely from his work ethic and work on building climate resiliency.

**Curt Spalding:**

Thank you Mark. While we're talking about WOTUS, I want to thank all of our state officials who work to protect our waters-friends from Maine who have come down and our representative from the New York Attorney General's office. We're all very proud to have you in Worcester, Massachusetts. This city was an important place for manufacturing in the history of our country. We make a concerted effort to get to know our local governments. This week, I will be meeting with local government across the coast about resilience and climate change issues. I know local governments have a lot of responsibility and we're so fortunate for all you do. Thank you Mayor Lisa Wong, Mayor Bill Finch, and Council Member Jill Duson. Portland is a model for things that are going on in the Northeast. Protecting streams and adjacent wetlands are important in protecting our water resources. I thank Ellen Gilinsky for all the work she does. When headwater streams and wetlands are destroyed, drinking water systems get destroyed. I've seen that across the Northeast. I've seen flooding events become more severe across the Northeast. We need to protect these not just for water quality but for public health. One of the most beautiful things about New England is this next month and driving by our coastal system. It's important that we protect our natural heritage; the revised guidance will allow EPA to continue diligently to protect these water sources. Healthy waters are important for our local communities as they provide drinking water. We have seen a 71% increase in rain events. These intense storms amplified by climate change point to the importance of wetlands which help buffer these events. The largest fishing fleet in the country is in New Bedford, Massachusetts. The economic value of commercial fisheries in New England is estimated to be about \$700 million so these waters and rain events have a significant economic impact. Millions of travelers come in to Cape Cod and Arcadia Wildlife Sanctuary. A recent study found that tourist

spending in Vermont is over \$2 billion. I want to thank the committee, especially the chairman, and everyone in local government. I know, and Administrator McCarthy knows what kind of burden you are under and I know we have to think holistically to get the job done.

**Mayor Bill Finch:**

Waters of the U.S. is an important issue to municipalities like Bridgeport, Connecticut, where I am mayor. In Connecticut, we don't have county governments so it's the responsibility of small towns and cities to figure out these complex water issues. Cities need to work together on this issue and we need federal laws to help guide us so that we are working together.

**Mayor Elizabeth Kautz:**

We all have this collaborative, partnership approach to all of these issues and we think that's the only way we can get things done-by leveraging our brain trust.

**Mayor Bob Dixon:** These (referring to the committee) are not politicians, they are public servants. When we come together, we check our politics at the door. We collaborate to create solutions that can work for all of us.

*Ellen Gilinsky, Senior Policy Advisor at EPA's Office of Water presents a briefing of the proposed Waters of the U.S. which can be found in Appendix VI.*

## **II. Public Comments:**

**Heather Parent, Deputy Commissioner of Land & Water Bureau of Maine Department of the Environment:**

Do you have a sense of the timing of the agriculture interpretation? How would you envision the notification process going?

Gilinsky: I am not sure about the legal process but it will be well advertised.

**Dan Margato, Town Manager:**

As a local official, I am concerned about the impact regulation will have on costs. Who benefits and who pays? It strikes me that this rule has a great benefit to society, but it seems like those who pay are those who cause point source emissions.

**Philip Bein-Assistant New York Attorney General, Watershed Inspector NY:**

Under state law, New York regulates wetlands only of a certain size. We depend on federal regulations to protect our wetlands. In terms of cost, EPA and Army Corps regulating these smaller wetlands save the state money.

We think this rule is a good step forward to furthering the purpose of the CWA. We've submitted comments on behalf of the Attorneys General from Connecticut, Delaware, District of Columbia, Illinois, Maryland, Washington, and Rhode Island.

We support the rule for three reasons. It's supported by science. The peer reviewed studies show that headwater protection of streams and tributaries is crucial to downstream water quality. Ninety percent of New York's water is unfiltered and we can't remain unfiltered if we're not protecting those headwaters. It would cost New York \$10 billion to start filtering most of its water supply so the rule helps save tax payers money. Each of the forty eight states receives water from another state so if we

don't have a clear definition of what WOTUS is, states that don't have control of what happens in upstream states are put at an economic disadvantage. Those downstream states are put in the position where they have to disproportionately control pollution.

We did an exhaustive survey of every WOTUS case since *Rapanos*. What we found was chaos. Courts within a circuit and among circuits would have different interpretations. Some courts supported the significant nexus case, some supported plurality of opinion, and others relied on deference to EPA. We can't have law that's interpreted so differently. We like that the rule creates clearer categories. We think that there's room for improvement but that it is a strong step forward for protection, federalism, and clarity of the law.

**Michael Bobinsky, Director of Public Services, Portland, ME:**

Our department is responsible for implementing the CWA. We have worked very hard in making methodical investments that address the CWA. One of which is a process of abating combined sewer overflows. All those expenditures, supported by our council and economic developers, influence sewer rates. These rates are expected to grow. Currently stormwater is included in our sewer rates and that is a challenge moving forward. The city supports the overall proposed rule. We think clarification by Ellen Gilinsky's presentation was helpful.

The City of Portland is a MS4 community. There are exemptions for that and we want to see those exemptions continue as this rule unfolds. As part of our combined sewage overflow plan, we are building green infrastructure, and we request that the proposed rules affecting green infrastructure is clarified.

We appreciate EPA's consolidation of permits and look forward to the integrated planning process. We applied to the EPA for assistance and are awaiting a planning grant.

We work closely with water quality stakeholders in our community in communicating milestones and projects. We also want more clarification in regards to ponds. We don't anticipate those to be included in the rule.

**Tom Fogan, MA Municipal Association:**

I grew up on the Nashua River. Back in the 70s, it used to turn red on Valentine's Day and green during Christmas. The federal government paid 80% of the cleaning up cost. That has decreased over the years but the river is significantly cleaner. Today, municipalities are concerned when EPA comes up with something that requires a cost. There's usually a cost and municipalities across the state are concerned by this. We are concerned with significant nexus and hope there will be a clarification on that. MS4 permits and impervious surface covers are the largest pollutant. We are concerned with direct and indirect costs. We passed a dam removal bill. A community in MA removed a dam and found that water quality and fishing improves after. Worcester has 3,000 dams which are impediments to fishing, increase water temperature, and contribute to phosphorus buildup. EPA needs to work on that and how to improve water quality as cheaply and efficiently as possible. We are concerned about swimmable and fishable indexes on some of our water. We are concerned that TMDL studies are not up to date for communities like Worcester.

We have communities that are taking land in floodplain areas and creating park land. That has been critical to towns like Fitchburg in economic revival.

It would cost \$20 billion to bring water quality up to standards. Stormwater would cost another \$18 billion. When EPA is making those rules, it must be cost effective.

We hope there will be exemptions for MS4 permits for green infrastructure.

We look forward to working with the EPA.

**Jim Buffet, City Planner:**

We want simplicity and we want clarity in the rule. I recommend using more diagrams to define terms in WOTUS. We are cleaning up our city through the Brownfields program which I think is EPA's best program. That should be a tie-in into this rule. It gives the money to a direct site to clean something up; it doesn't go through layers of review. If a poor developer comes in and tries to use those definitions, it costs them time and money. Let us know what these terms are up front, make sure we all think it's the same thing, and let us do it. So again, brevity, clarity, simplicity, and maybe some pictures.

**Robert Cope:**

How long do you think the permitting process should take?

**Jim Buffet:**

It should take no longer than 90 days but it depends upon the level of involvement that is required-it should be less if just local regulators are necessary and more if state involvement is needed.

**Karen Horne-Vermont League of Cities and Towns:**

Our largest city is 35,000 and smallest is 17. In the wake of tropical storm Irene, we are working to improve resiliency of our communities and streams. Vermont is a delegated state. We had a TMDL for Lake Champlain. In Vermont, EPA rescinded the TMDL and is now working with states but EPA is still involved. With small communities, it's difficult to figure out whether if you get a permit from Vermont, if you also have to get a permit from Army Corps. If the state has definition that encompasses federal definition, delegation should go to the state. We are concerned about definition of a jurisdictional ditch-if it drains into a water (which they all do), is that subject to jurisdiction? Going on a case by case basis will be very difficult to local government and states.

**Ellen Gilinsky:**

States can apply to have the Section 404 program. Only 2 states have done it-Michigan and NJ. But they do not get money to enforce that. But if it has an existing program that is approved, it can do that.

**Aubrey Strause, consultant, Scarborough, Maine:**

I have worked on the Central Massachusetts Regional Stormwater Coalition. I am not speaking for that group officially but I want to provide perspective as a member and president of Maine Water Association. I think there's a lot of room to clarify that green infrastructure is not a WOTUS. It's easy to envision that an engineered wetland is not WOTUS. The challenge with these revisions is that when that structure is not maintained the way it should be it may cause pollutants to enter the water body and it should be under the MS4. The community should have enforcement under the MS4 permit the structure was originally under.

**Heather Parent:**

I am going to speak from the perspective of Maine Department of the Environment. Maine is unique in that we are proud of our wetlands and our water quality programs. Our worst water quality is perhaps better than that of some states. We work hard to improve our water quality. We look at our programs

as watershed based programs. Regulatory predictability and consistency of the proposed rule must be improved. We, the state of Maine, have a definition of WOTUS that's broader than the proposed rule; it encompasses wetlands not covered in WOTUS. We want to make sure that whatever happens with WOTUS does not create inconsistencies with what Maine requires by state of law through the Maine Army Corps.

The phrase "shallow subsurface connection" makes it sound like groundwater would be jurisdictional.

Parent proceeded to read from a letter from City of Auburn

The proposed rule does not provide a predictable permitting requirement and allows for inequitable application

The City of Auburn has the following concerns:

*Clarity*-The proposed rule leaves many concepts undefined. Clear definitions are needed for predictable and consistent application. Does "other waters" include ditches that are not excavated clearly?

*MS4s*-The proposed rule does not exempt MS4s as they do waste treatment system. The City would like EPA to clarify that WOTUS does not include MS4.

*Equity across EPA regions*: Maine is home to rural low income areas. High permitting costs impede development in those areas.

Maine has high wetland mitigation costs so the city asks that EPA do a study on how to apply these rules fairly across regions

The City is concerned that the rule is vague and will expand jurisdiction to manmade features. The rule must be clarified for fair application to all regions. Recognizing the importance of development in the area and the effect this rule might have should be incorporated into the area.

### III. Closing Remarks

#### **Mayor Elizabeth Kautz:**

We appreciate the many perspectives presented today. I reflect on what makes our country so great and it's these perspectives. The decision making teleconference will occur on Oct. 10. I thank Administrator McCarthy for empowering us to go across the country to hear from you and input those recommendations into the proposal.

#### **Mayor Bob Dixon:**

Thank you all. After our disaster, we had federal and state agencies come and they were all talking different languages. We finally got them all in the same room and said, "Listen stop hiding behind your regulations. Stop telling us what we can't do and tell us what we can do." That's what we're trying to do with the LGAC. We want to come up with the best answer for all of us. Yes, we have challenges but let's build on our success. Let's continue working on our communities.

*Dixon introduces Cope as Chairman of SCAS.*



**Robert Cope:**

On behalf of the small communities, one of our biggest challenges is that there's such a huge difference between the regions. I live in a county with 4500 square miles with 90% protected lands. We're protected to death. Because of lack of management, we have overpopulation of trees, beetle kill, and acidic ash sludge when it rains. Addressing a rule that affects Maine, Idaho, and Utah is a huge challenge. In my city, twenty two percent of my city's population is under the poverty line and water costs \$64/unit. This rule has to be uniform enough to be applicable but also flexible enough. I am more than welcome to hear your ideas.

**Mayor Lisa Wong:**

I am the mayor of Fitchburg, Massachusetts and I was just out on the river yesterday with watershed groups and businesses. These groups and businesses have been fighting for these rivers for decades because local streams and rivers are so important to all us. I am particularly focused on the environmental justice aspects of the proposed rule; I want to make certain that this rule is equitable for everyone so that all of our cities can enjoy a sustainable future.

**Mark Rupp:**

I appreciate what you have all brought to this committee and EPA. I appreciate what you've said Mr. Bein. You've all mentioned that there are areas that need clarity. In regards to infrastructure costs on local government, Congress passed Water Resources Development Act, which includes EPA's Water Infrastructure Finance and Innovation Act (WIFIA). So Congress' appropriation may be a source of financing. Hopefully Portland will be successful in the integrated planning grant. It's something that the EPA has been working on-prioritizing your infrastructure needs as well as prioritizing affordability. There were a lot of comments on clarity-the Administrator understands that. She often mentions that the final rule often looks very little like the proposed rule. To the committee who have spent considerable amounts of their time, the EPA and the Administrator thank you so much.

**Curt Spalding:**

We are an innovative laboratory here in New England. One of the things we have been working on is integrated planning and how to make it cost effective. Thank you for all the comments here.

**Mayor Elizabeth Kautz:**

It has been so interesting listening to perspectives around the country. It has given us a different perspective. When you are looking at it from the high up and then the bottom and local applications, you realize that it's very difficult. We thank you all for your time and input today.

## IV. Meeting Participants

### LGAC Members

First Name	Last Name	Title
Elizabeth	Kautz	Mayor of Burnsville, MN
Bob	Dixon	Mayor of Greensburg, KS
Salud	Carbajal	Supervisor, Santa Barbara, CA
Jill	Duson	Councilor, Portland, ME
Bill	Finch	Mayor of Bridgeport, CT
Carolyn	Peterson	Environmental Management Council, Ithaca, NY
Robert	Cope	Commissioner, Lemhi County, ID
Johnny	DuPree	Mayor of Hattiesburg, MS
Lisa	Wong	Mayor of Fitchburg, MA
Dave	Richins	Council member, Mesa, AZ

### EPA Representatives

First Name	Last Name	Title
Mark	Rupp	Deputy Associate Administrator for Intergovernmental Relations
Ellen	Gilinsky	Senior Policy Advisor, Office of Water
Curt	Spalding	Region 1 Administrator
Nancy	Grantham	Region 1
Doug	Gutro	Region 1
Kate	Melanson	Region 1
Frances	Eargle	DFO, LGAC, OCIR
Jincy	Varughese	EPA OCIR Intern

### Public Participants

First Name	Last Name	Title/Organization
Michele Mochnoc	Higgins	Assistant Commissioner, Utilities
Michele S.W.	Paul	Director of Environmental Stewardship, City of New Bedford, MA
Dan	Rivera	Mayor, City of Lawrence, MA
Lisa	Torrissi	Chief of Staff, City of Lawrence, MA
Brian	Pena	Water & Sewer Commissioner, City of Lawrence, MA
James	Molloy	Town Manager, West Borough, MA

Tom	Holder	Director of Public Works, City of Medway, MA
Bridget	Graziano	Conservation Agent, City of Medway, MA
Michael	Bobinsky	Director, Public Services, City of Portland, ME
Nancy	Gallinaro	Assistant Commissioner, Utilities
Richard	Stinson	Director, Public Works- City of Wakefield, MA
Joseph	Lobao	Manager, Wilmington Public Works
Aubrey L.	Strause,	Central MA Regional Stormwater Coalition
Rob	McNeil	Central MA Regional Stormwater Coalition
Heather	Parent	Acting Deputy Commissioner, Land & Water Bureau ME Dept of the Environ.
Steve	Buck	City Manager, City of Sanford, ME
Clint	Deschene	City Manager, City of , Auburn, ME
Kimberly	Roth	Environmental Analyst, New England Interstate Water Pollution Control Commission
Michael	Kuhns	Director or Bureau of Land and Water Quality
Michael	Gervasi	Facilities Manager, Department of Public Works, Weymouth, MA
Elizabeth	Wolters	Associate Director of National Affairs -New York Farm Bureau
Lauren	Williams	Assistant Director of Public Policy at New York Farm Bureau
Sarah B.	Brancatella	Associate Counsel -Association of Towns
Philip	Bein	NY Assistant Attorney General
Dan	Margato	Town Manager
Tim	Fogan	Massachusetts Municipal Association
Jim	Buffet	City Planner
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## Appendix IV: EPA's Proposed Waters of the U.S. Rule

### Current regulatory definition: 40 CFR 230.3(s) and (t)

(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.

**PROPOSED REGULATIONS WOULD REPLACE 40 CFR 230.3(s)**

(s) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (t) of this section, the term “waters of the United States” means:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters identified in paragraphs (s)(1) through (3) and (5) of this section;
- (5) All tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- (6) All waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of this section; and
- (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (s)(1) through (3) of this section.

(t) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—

- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- (2) 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.
- (3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- (4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.
- (5) The following features:
  - (i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
  - (ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - (iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - (iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - (v) Water-filled depressions created incidental to construction activity;
  - (vi) Groundwater, including groundwater drained through subsurface drainage systems; and
  - (vii) Gullies and rills and non-wetland swales.

(u) Definitions --

- (1) **Adjacent.** The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters.”
- (2) **Neighboring.** The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.
- (3) **Riparian area.** The term *riparian area* means 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.
- (4) **Floodplain.** The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.
- (5) **Tributary.** The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (t)(3) or (4) of this section.
- (6) **Wetlands.** The term *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.



- (7) **Significant nexus.** The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section.

## Appendix V: Clean Water Act Exclusions and Exemptions Continue for Agriculture

U.S. EPA and the U.S. Army Corps of Engineers have proposed a joint rule to clarify the types of waters that are and are not covered by the Clean Water Act to bring certainty and predictability, including to agriculture. For the past several years, EPA and the Army Corps have listened to important input from the agriculture community. Using the input from those discussions, the agencies then worked with the U.S. Department of Agriculture to ensure that concerns raised by farmers and the agricultural industry were addressed in the proposed rule.

The proposed rule focuses on reducing the confusion and complexity about where the Clean Water Act applies following Supreme Court decisions in 2001 and 2006. The proposed rule is consistent with the more narrow readings of Clean Water Act protection by the Supreme Court. Any normal farming activity that does not result in a point source discharge of pollutants into waters of the U.S. still does not require a permit.

The proposed rule preserves existing Clean Water Act exemptions and exclusions for agricultural activities. In addition, in coordination with USDA's Natural Resource Conservation Service, EPA and the Army Corps will now exempt 53 established NRCS conservation practices implemented in accordance with published standards from Clean Water Act Section 404 dredged or fill permitting requirements if they occur in waters covered by the Clean Water Act.

### The proposed rule will:

- Preserve current agricultural exemptions for Clean Water Act permitting, including:
  - Normal farming, silviculture, and ranching practices. Those activities include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products.
  - Upland soil and water conservation practices.
  - Agricultural stormwater discharges.
  - Return flows from irrigated agriculture.
  - Construction and maintenance of farm or stock ponds or irrigation ditches on dry land.
  - Maintenance of drainage ditches.
  - Construction or maintenance of farm, forest, and temporary mining roads.
- Provide greater clarity and certainty to farmers.
- Avoid economic burden on agriculture.
- Encourage the use of voluntary conservation practices.
- Be consistent with and support existing USDA programs.

### The proposed rule will NOT:

- Cover groundwater
- Cover tiles drains
- Increase regulation of ditches
- Protect any new types of waters
- Affect areas generally previously excluded from jurisdiction, including:
  - Artificially irrigated areas that would revert to upland if irrigation stops.
  - Artificial lakes or ponds created by excavating and/or diking dry land and used for purposes such purposes as rice growing, stock watering or irrigation.

- o Artificial ornamental waters created for primarily aesthetic reasons.
- o Water-filled depressions created as a result of construction activity.
- o Pits excavated in upland for fill, sand, or gravel.
- o Prior converted cropland.
- o Waste treatment systems (including treatment ponds or lagoons).

### **Improving Opportunities for Conservation Programs**

EPA and the Army Corps have worked with USDA to improve opportunities for farmers, ranchers, and foresters to participate in USDA's voluntary conservation programs that help to protect water quality and improve the environment.

During the coordination with USDA, the agencies ensured that 53 specific agriculture conservation practices that help protect or improve water quality will not be subject to Clean Water Act dredged or fill permitting requirements, including habitat restoration and establishing riparian forest buffers. This is being done through an interpretive rule that was published at the same time as the proposed rule and will go into effect immediately.

To qualify for this exemption, the activities must be part of an established farming, forestry, or ranching operation, consistent with the statute and regulations and be implemented in conformance with Natural Resource Conservation Service technical standards.

Farmers and producers will not need a determination of whether the activities are in "waters of the United States" to qualify for this exemption nor will they need site-specific pre-approval from either the Corps or the EPA before implementing these specified agricultural conservation practices to qualify for the exemption.

Through a memorandum of understanding, EPA, the Army Corps, and USDA have set up a process for working together to implement these new exemptions and for periodically identifying, reviewing, and updating NRCS conservation practice standards and activities that would qualify under the exemption.

**More Information:** [www.epa.gov/uswaters](http://www.epa.gov/uswaters)

## Appendix VI: Proposed Waters of the U.S. Rule Briefing Presentation

Slide 1

### Waters of the U.S. Proposed Rule

Slide 2

### Waters of the U.S. Proposed Rule

Clarifies protection  
under the  
Clean Water Act  
for streams and wetlands



Slide 3

The objective of the  
Clean Water Act is  
"to restore and maintain  
the chemical, physical,  
and biological integrity  
of the Nation's waters"



Slide 4

### The Clean Water Act

Protects “waters of the United States”



Slide 5

What is the current definition of Waters of the U.S.?

- Traditionally navigable waters
- Coastal waters
- Waterways that cross state borders
- Lakes made by damming a water of U.S.
- Waters that could affect interstate commerce
- Tributaries of these waters
- Wetlands next to these waters

Slide 6



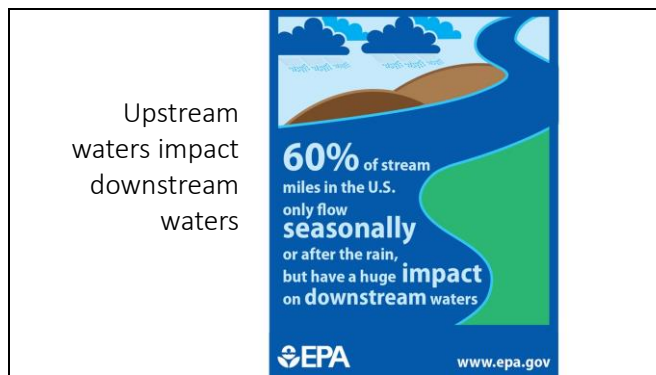
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Slide 8

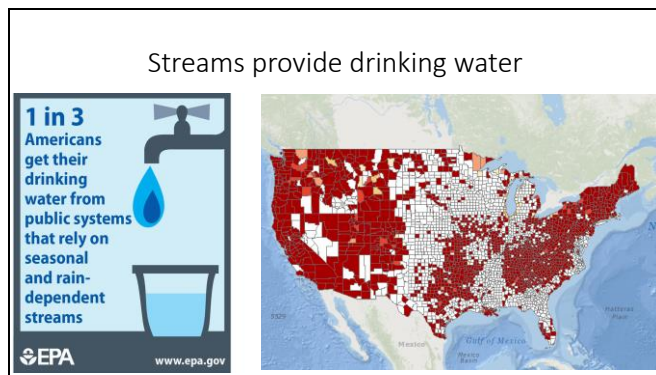


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Slide 11



Slide 12



## Slide 13

## Supreme Court Decisions Affecting Water of the U.S.

**Riverside Bayview Homes** (1985): Unanimous decision upholding agencies' regulatory definition including "adjacent wetlands" as waters of U.S.

**SWANCC** (2001): Use of waters by migratory birds not sufficient basis for jurisdiction.

**Rapanos** (2006): Splintered decision provides relative permanence and significant nexus as standards for determining CWA protection.



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## Slide 14

## Determining Jurisdiction

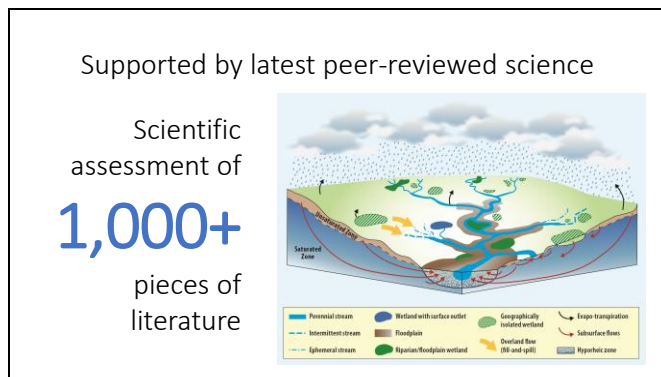
Complex  
Confusing  
Inconsistent

## Slide 15

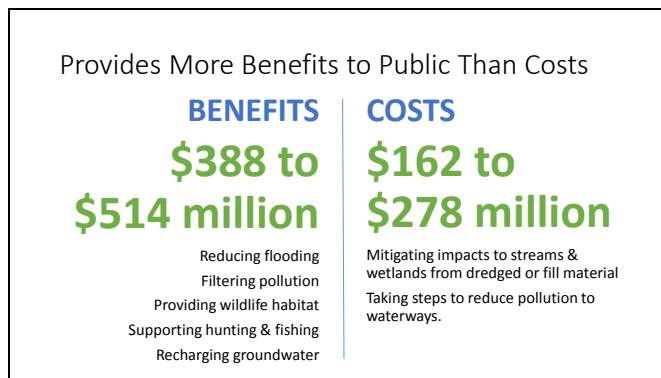
Rulemaking was requested by many stakeholders

Congress Industry Public  
State and local government Agriculture  
Hunters and fishermen Environmental groups

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Slide 17



Slide 18



Slide 19

Helps States Protect Their Waters

**2/3** of states rely on the federal definition

Slide 20



What the  
Rule Does

Slide 21

What is the proposed definition of Waters of the U.S.?

- Traditionally navigable waters
- Coastal waters
- Waterways that cross state borders
- Lakes made by damming a water of U.S.
- Waters that have a significant nexus (connection)
- Tributaries of these waters (bed, bank, high water mark)
- Waters next to rivers, lakes, streams, coastal waters

Slide 22

Stream systems are protected



Slide 23

### Proposed Rule Changes

Tributaries are jurisdictional but only when they meet the regulatory definition of tributary.

Proposed rule definition: **"waters with bed and banks and an ordinary high water mark that contribute flow to traditionally navigable waters, interstate water or territorial seas."**

Slide 24

Waters near  
rivers and  
streams  
are protected



Slide 25

### Proposed Rule Changes

Adjacent waters are jurisdictional.  
**Adjacency applies to all surface waters, not just wetlands.**

Existing regulations define "adjacent" as "bordering, contiguous or neighboring."  
**This rule adds a definition of neighboring.**



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Other types of waters will be evaluated on a case specific basis.



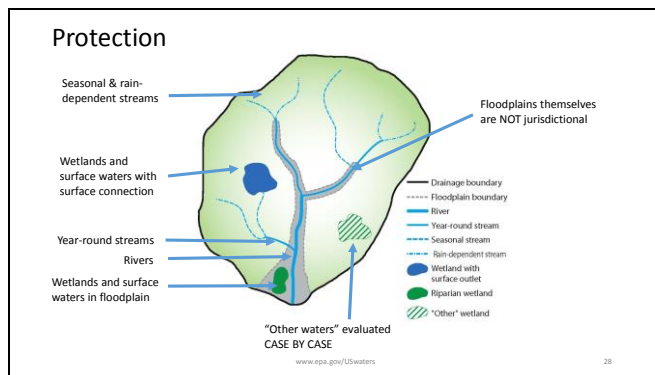
Slide 27

### Proposed Rule Changes

"Other waters" are jurisdictional only where a case-specific analysis shows they have a significant nexus to a traditionally navigable water, interstate water or territorial sea.



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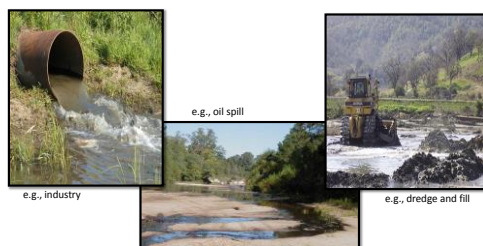


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What the Rule  
Does Not Do

Slide 30

Remember: Clean Water Act permitting requirements apply ONLY when there is a discharge of a pollutant from a point source into a Water of the U.S.



## Slide 31

What the Rule Does **NOT** Do

- Does **NOT** protect any new types of waters
- Does **NOT** broaden historical coverage of the Clean Water Act
- Does **NOT** remove any exemption or exclusion for agriculture
- Does **NOT** regulate groundwater, including tile drains
- Does **NOT** expand regulation of ditches

## Slide 32

What the Rule Does **NOT** Do

- Does **NOT** change permitting requirements for any farming activities
- Does **NOT** change the exemption for farm stock ponds
- Does **NOT** regulate water-filled areas & erosional features on crop fields
- Does **NOT** regulate land or land use
- Does **NOT** regulate floodplains

## Slide 33

## The Facts About Ditches

Ditches that are **IN** are those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.

Ditches that are **OUT** are those that are dug in dry lands and don't flow all the time, and ditches that don't flow into a jurisdictional water.



Slide 34



Slide 35



Slide 36

All Permitting Exemptions Preserved

- Normal farming, silviculture, and ranching practices.
- Upland soil & water conservation practices.
- Agricultural stormwater discharges.
- Return flows from irrigated agriculture.
- Construction/maintenance of farm or stock ponds or irrigation ditches.
- Maintenance of drainage ditches.
- Construction or maintenance of farm, forest, and temporary mining roads.



www.epa.gov/USwaters 36

## Slide 37

## All Jurisdictional Exclusions Preserved

- Artificial lakes or ponds created by excavating and/or diking dry land and used for purposes such as rice growing, stock watering or irrigation.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Prior converted cropland.
- Waste treatment systems (including treatment ponds and lagoons).
- Water-filled depressions created as a result of construction activity.
- Artificially irrigated areas that would revert to upland if irrigation stops.



## Slide 38

Permit not needed for the specific NRCS practices



## Slide 39

**56** conservation practices exempt  
from dredged or fill permitting

Conservation cover   Wildlife habitat restoration  
Wetland enhancement   Riparian forest buffer  
Tree/shrub establishment   Stream crossing

Slide 40

## Local Government Issues

Slide 41

### Local Governments Serve Many Functions

- Build and maintain roads and roadside ditches
- Manage stormwater to prevent flooding and protect water quality
- Provide safe drinking water
- Protect and restore rivers, lakes, and other surface waters

Slide 42

### Ditches

- Some ditches are currently regulated, some are not
- Proposed rule intends to clarify the current practice and to clearly identify ditches that are not regulated in the rule.
- The proposed rule does not expand jurisdiction over any ditches that are not already regulated (as channelized streams).
- If an exemption applies, the exemption applies regardless of whether a ditch meets the tributary or adjacent water definitions



## Slide 43

## Stormwater and MS4s

- Stormwater can cause flooding, basement backups, water quality degradation and other problems for local governments.
- MS4s are complex systems, and some may currently include waters of the US
- Proposed rule does not change the regulation of MS4s, including 404 permitting requirements.



## Slide 44

## Green Infrastructure

- If no permit needed now, no permit will be needed after this rule is finalized
- Most stormwater features are not waters of the U.S.
  - Rain gardens
  - Grassy swales
  - Permeable pavement
  - Rain barrels
  - Cisterns



## Slide 45

## Water Supply Structures

- Waters of the U.S. provide the source water for millions of Americans.
- Some water supply structures today are waters of the U.S., and some are not.
- The proposed rule does not change the CWA jurisdiction of a water supply structure.
- Also, the proposed rule does not require any change in operation of these water structures.

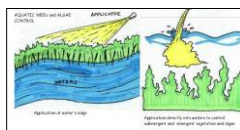




Slide 46

### Pesticides and Herbicides

- Local governments may use herbicide and pesticides in or near waters of the U.S.
  - Weed control in ditches
  - Treatment of mosquitoes and other pests
- General NPDES permits are required and available for pesticide applications made directly to waters of the U.S.



Slide 47

Input is  
Important

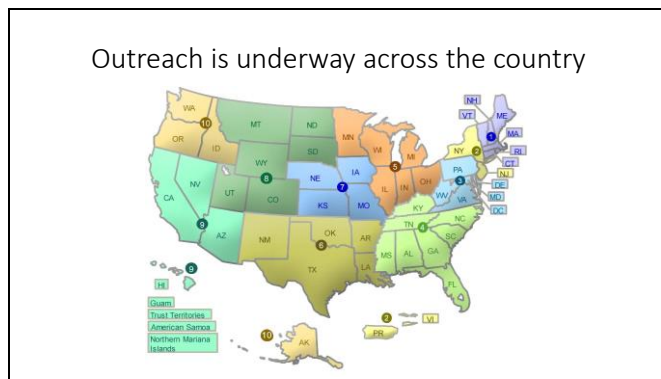
Slide 48

Public input was considered

**4+** years of dialogue

**415,000** comments

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Slide 50

Want Comments and Input on Proposed Rule

**180** day public comment period

**October 20** comment period closes

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How to Comment on the Proposed Rule

- Submitting comments on the proposed rule, identified by Docket ID No. EPA-HQ-OW-2011-0880, can be done by one of the following methods:
  - Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
  - Email: [ow-docket@epa.gov](mailto:ow-docket@epa.gov). Include EPA-HQ-OW-2011-0880 in the subject line of the message.
- 180-day comment period closes October 20, 2014

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[www.epa.gov/uswaters](http://www.epa.gov/uswaters)

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Questions?



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