

EPA'S LOCAL GOVERNMENT
ADVISORY COMMITTEE (LGAC)

REPORT ON THE PROPOSED 2018 WATERS OF
THE UNITED STATES RULE (WOTUS)



“Water is essential for our communities, for the health of our people and our economic growth. Managing water resources is increasingly more challenging. We cannot rely merely on federal regulation to sustain our supply of clean and safe water. All levels of government must work together as stewards of our natural resources. We must find new ways to collaborate and cooperate. The LGAC puts forth a new model of WOTUS rule-making. This model is for shared governance for states, tribes and local governments to work with the EPA and the USACE for improved environmental management to protect our water for generations to come.”

Bob Dixon, Chairman

“We have an opportunity and a responsibility to change the way we regulate water resources across the United States. Moving away from the “one size fits all” regulatory approach and towards a regional approach that engages our tribal, local and state partners can yield enhanced community-based water resource protection within the context of a broader national framework.”

**Susan Hann, Chair,
LGAC Water Workgroup**





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EXECUTIVE SUMMARY


EPA's Local Government Advisory Committee (LGAC) is pleased to present the LGAC's Report entitled, *"Report on the Proposed 2018 Waters of the United States (WOTUS) Rule"* which offers our detailed findings and recommendations in response to our charge. As public elected and appointed officials we are keenly aware of the importance of protecting our nation's water resources and we appreciate the opportunity to provide input from the State, Tribal and local government perspective.

On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE), jointly proposed a new WOTUS rule. On February 12, 2019 the LGAC was charged to give our advice and recommendations on the proposed rule. As LGAC Members we represent diverse perspectives of state, tribal and local elected and appointed colleagues across the country. Although there is strong consensus that the proposed rulemaking is generally going in the right direction, we also concur that the rule must consider regional differences. There is no "one size fits all" approach.

In comparison to the 2015 rule, the proposed rule provides greater clarity regarding definitions and exclusions. Both have been sources of confusion and disagreement. However, with the greater clarity came the realization that the rule must allow for regional differences in order to properly protect water resources across the country without unnecessary regulatory burdens.

One way to address regional differences is to amend the rule to give greater flexibility for states, tribes and local governments to manage and protect Waters of the United States. A potential approach would have federal jurisdiction remain over all interstate and navigable waters, their tributaries and all adjacent wetlands, while the jurisdictional authority over intermittent and ephemeral streams, ditches and isolated wetlands would be developed through a shared governance model. The LGAC believes this is one of the most significant themes to emerge from our outreach and collaboration.

Regional differences make it very challenging to craft a rule that can be universally applied across the country. It was clear in our deliberations that a regulation seen as too little in one part of the country could also be too much in another part of the country. This



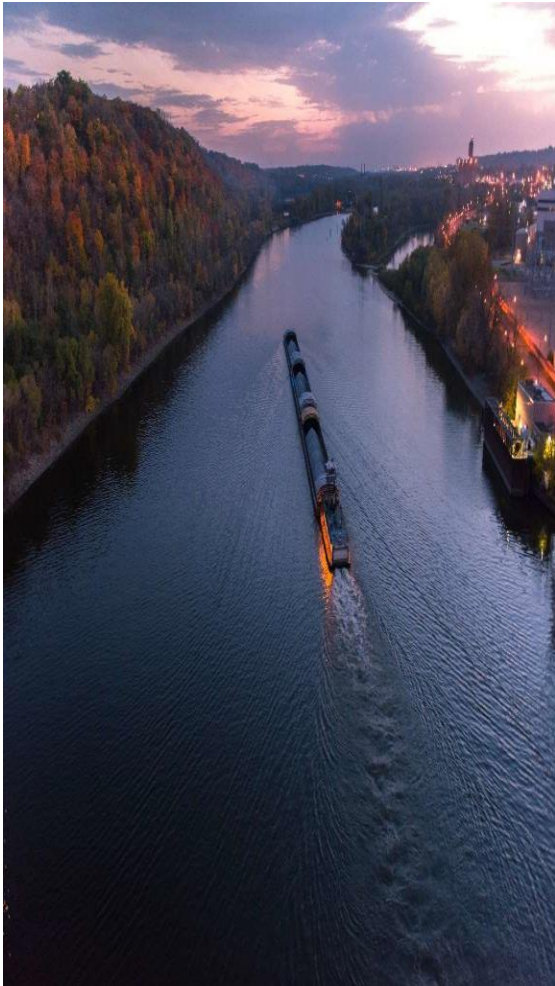
collaborative approach proposed by the LGAC is a way to respect regional differences while providing a reasonable and appropriate nationwide regulatory framework.

The LGAC found differing views as to the protection of isolated wetlands. Some agree with the narrow interpretation of WOTUS in the proposed rule, but others countered that all wetlands in their area are important as economic drivers and valuable natural resources. The LGAC heard several concerns that the loss of wetlands due to lack of federal regulation could be catastrophic to a local fishing industry or coastal economy. Likewise, in some regions ephemeral and intermittent streams and especially headwater streams provide a key role in maintaining the source and quality of drinking water and livestock. Many LGAC Members expressed concern that protection of our headwaters streams is important to prevent flooding hazards and to prevent degradation of the watershed and rivers. These issues all require an approach that considers regional differences and engages state, tribal and local governments in the process.

The LGAC supports the exclusion of all ditches, except those ditches identified in paragraph (a)(3), from WOTUS. As local governments we regularly design, construct and maintain ditches for a variety of purposes including public safety. Therefore, it is imperative that ditches do not fall under an extensive regulatory burden. In order to develop additional guidance on ditches the LGAC recommends a collaborative approach through an Interagency Task Force. The Interagency Task Force should include the EPA, the Corps and state, local and tribal stakeholders. The goal would be to jointly develop greater clarity on ditches that can be understood and applied at the local level. This would also provide a forum for data sharing across jurisdictions.

Data sharing and mapping tools were also consistently noted through our outreach efforts. Ideally, 'Waters of the United States' could be delineated utilizing Geographic Information System (GIS) tools. Several local government representatives indicated the availability of reliable data to share in a collaborative approach. This could be another important assignment for the Interagency Task Force.

If the WOTUS rule is to be successfully implemented, the permitting process must be evaluated and redesigned for shared governance. The LGAC heard significant concerns from stakeholders about permitting delays and inconsistencies. The recent collaborative work between the EPA and the Corps is a significant step forward. The recommended Interagency Task Force could also play a leadership role in resolving these concerns.



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

Photo Source: Davin Brandt

I. BACKGROUND

EPA’s Local Government Advisory Committee is chartered to give advice to the EPA Administrator on environmental and public health issues which impact state, tribal and local government and communities. As State, Tribal and local officials, clean and safe water are paramount to our communities, businesses, health and prosperity. In 1972, Congress enacted the Clean Water Act (CWA) ¹to prevent the pollution of waters of the United States, including waters not deemed traditionally “navigable” such as streams, lakes, and wetlands. The CWA has been instrumental in protecting our nation’s water, human health and the environment. In 2001 and 2006 Supreme Court interpretations took up the CWA and questioned what water bodies are protected under the CWA. In response, the EPA published the 2015 CWA WOTUS rule with the intent to clarify what waters were covered under the Clean Water Act.

The LGAC was asked and provided extensive input on the development of the 2015 WOTUS rule. Since this time, numerous District Court cases and opinions have challenged the 2015 rule. In 2017, EPA announced a two-part process to replace the 2015 rule. The LGAC published a Report in 2017 presenting to EPA what should be considered in a replacement rule from the local government perspective. On December 11th, 2018 the EPA published a proposed a replacement WOTUS rule. On February 12th, 2019 EPA issued a charge for the

¹ [33 U.S.C. §§1251 to 1387]

LGAC to review and give advice and recommendations from our ‘on the ground’ perspective on the Administration’s December 2018 proposed rule. Herein are our findings and recommendations regarding the proposed 2018 Waters of the U.S. rule.

WOTUS 2018 Proposed Rule

On December 11, 2018 the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) released a proposed “Waters of the U.S.” (WOTUS) definition to replace the 2015 WOTUS rule. In general, the proposed WOTUS December 2018 rule does the following:

- Creates six (6) categories of regulated waters including: traditional navigable waters; tributaries; certain ditches; certain lakes and ponds; impoundments; and adjacent wetlands.
- Specifies 11 exclusions;
 - ✓ Does not meet one of the six listed categories, it will not be considered a WOTUS
 - ✓ ditches, features that are only wet during rainfall events, groundwater, stormwater control features, wastewater recycling infrastructure built in uplands, converted cropland and waste treatment systems.
- Comports with case law on Waters of the U.S.



Farm, Lexington, Kentucky

Photo Source: Eric Vance

II. GENERAL ISSUES

Herein summarized are the major themes and conclusions coming forward from the LGAC's analysis and deliberations.

A. Defensible and Enforceable- The Waters of the United States rule, also known as WOTUS, seeks to clarify wetlands and small waterways which are protected under the Clean Water Act of 1972. Various court decisions have increased the legal uncertainty heightened by Supreme Court decisions and District court opinions of implementation in only 37 states. The 2018 proposed Water rule provides clarity in definitions so that it can be implemented uniformly and be enforced.

B. Categories of Waters of the U.S. and Exclusions

The LGAC supports the categories in the Waters of the U.S. as articulated in the proposed 2018 rule. This includes six categories of waters proposed as WOTUS. There are eleven (11) exclusions from the definition of "Waters of the United States." The LGAC concludes that the proposed exclusions generally reflect current practice and provides greater clarity over which waters are, and are not, regulated under the CWA. However, the LGAC believes that "interstate waters" should be included as a long-standing category of WOTUS. Removing 'interstate waters' could pose significant uncertainty regarding state to state and tribal waters where different definitions of 'waters' could apply. This could result in permitting delays as well as litigation.



"A change in culture is necessary in managing our water resources. The LGAC has proposed a new approach to the WOTUS rule for us to work together at all levels of government to manage our water resources more efficiently for the benefit of the environment and the communities we serve."

Mayor Elizabeth Kautz
Burnsville, Minnesota



C. Ditches

The proposed 2018 WOTUS rule excludes all ditches except those outlined in section in paragraph (a)(1) of the proposed rule. The rule provides additional clarity and predictability regarding the regulation of ditches such as artificial features and proposes to exclude these from the definition of WOTUS. Ditches are an important part of what local governments oversee and manage. These conduits transport water away from roads (reducing flooding and road maintenance). They are also used in agriculture to provide needed irrigation. Grass-lined ditches also filter and absorb pollutants that can also reduce erosion. For local, state and tribal governments, the regulation of ditches has been the most problematic aspect of the CWA rule. This has been particularly problematic for the, municipalities and county government, and water supply and stormwater management agencies, agricultural sector and farmers, ranchers, irrigation districts that manage and maintain ditches.

For example, in the Eastern Shore of Maryland, there is a network of approximately 821 miles of ditches maintained by 101 public drainage associations (PDAs), in four Public Watershed Associations (PWAs) in Caroline, Queen Anne's Somerset, Wicomico and Worcester counties of Maryland.² These ditches help drain 183,000 acres of land composed of crop land, forest land, roadways, commercial areas and home sites, conveying storm water runoff from rural towns on Maryland's Eastern Shore.

The LGAC recommends that the local role of regulating ditches is very important; therefore, there should be further guidance given to clarify ditches in the 2018 WOTUS rule. The LGAC is also recommending that an Interagency Taskforce be established which would engage experts among the federal agencies, state, tribal and local experts to provide further clarity on ditches and WOTUS. The Taskforce results can be incorporated in implementing guidance.

² https://mda.maryland.gov/resource_conservation/Pages/pda_pwa.aspx

D. Wetlands

The LGAC is supportive of the definition of wetlands in the proposed 2018 rule. The LGAC believes that the three parameters of hydric soils, hydrophytic vegetation and hydrology should be utilized in the definition. Isolated wetlands are an issue the LGAC believes should be taken on a case by case basis. The proposed changes could remove federal protections from 51% of wetlands nationwide as well as 18% of streams. Wetlands provide municipalities with green infrastructure that collect storm water runoff and mitigates flood damage of property and loss of life. Wetlands also translate profitability for communities in supporting the fishing industry. Coastal cities and many tribal nations generate more than \$208 billion dollars in sales annually for the fishing industry and supports 1.6 million jobs.³The LGAC concludes that a case by case determination of isolated wetlands over an acre could be an important consideration to be incorporated within WOTUS. The LGAC also concludes that this could also should be a topic for further interagency taskforce investigation to resolve which wetlands are important for federal protection.

E. Prior Converted Wetlands

The "prior converted cropland" exclusion is intended to allow farmers to continue planting crops or plowing in historical wetlands without needing Clean Water Act permits. Wetlands first farmed prior to 1985 that are still used for agricultural purposes haven't been regulated since 1993. The 2018 WOTUS proposal would maintain exclusions for prior converted cropland as long as it has been used "for or in support



“The Waters of the U.S. Rule is challenging. As Vice-Chair of the LGAC, I appreciate the opportunity to provide our unique perspectives on the proposed rule and its implementation. Providing protections to our water resources are important and ensuring that local input is considered is imperative as each area has unique features. Striking that balance ensures success.” **Jeff Witte, Secretary, Department of Agriculture, New Mexico**

³ <https://www.fisheries.noaa.gov/coastal-wetlands-too-valuable-lose#benefits-of-coastal-wetlands>

of agricultural purposes at least once in the immediately preceding five years." If not, these areas would be considered "abandoned," and lose its exclusion. At that point, the Army Corps would have to re-evaluate whether it met the federal definition of a wetland or had become permanently converted to land. The LGAC is generally supportive of the agricultural provisions.



Stanley, Idaho

Photo Source: Eric Vance

III. Implementation

A. Role of States and Locals-No One Size Fits All

States and Tribes should play a significant role in determining WOTUS and be a cooperative partner in its implementation. Transferring full responsibility of the CWA to States and Tribes to fill in the gaps may constitute an unfunded mandate. Some States and Tribes currently have legislative authority to regulate "waters of the state," many do not. Currently less than one-half of the states have their own permitting programs for freshwater wetlands. In 20 states, §401 certification provides the primary or the sole mechanism by which states regulate activities. States and Tribes should also have a role in making jurisdictional calls and be partners in implementation. States and Tribes should be given primacy in decision-making unless it involves interstate or intertribal boundaries then the federal primacy should apply. Local governments also have a significant role in providing informational resources on the history of land use and other local databases. Local governments also have governance of local zoning ordinances which can be an important role in protecting waters and wetlands. The LGAC concludes that the States and Tribes should have an increased role in implementation. This role should be codified in the

rule and in implementing guidance. The LGAC suggests an approach that EPA should request States and Tribes to develop criteria for jurisdiction state by state and tribe by tribe.



“At the end of the day, we all know that the purpose of the Waters of the United States and the Clean Water Act is to protect our water and our natural environment for generations to come”.

Commissioner Victoria Reinhardt, Ramsey County, Minnesota

B. Mapping and Technology

Mapping and technological tools can greatly assist in CWA and WOTUS implementation. The LGAC expresses strong consensus that mapping tools and technology should be developed and its use enhanced in implementation of WOTUS. The goal should be to reduce the burden of permitting so that jurisdictional waters can be determined without the expense of thousands of dollars in engineering and legal expenses. These technology aides will provide greater assistance to local governments. Information about streams and other water features can be drawn from the USGS National Hydrography Dataset (NHDPlus). The EPA has been working with USGS for over 30 years in the development of this data for mapping purposes.⁴ Mapping may not suffice entirely for jurisdictional determinations, but it does correspond well with waters that are categorically WOTUS under the proposed rule. Landsat imagery and maps at the local level can also readily be used in assisting in implementation. The LGAC concludes that mapping efforts are critical for local governments and rural and small communities that lack resources.

⁴, EPA uses NHDPlus in their implementation of the CWA. (See for example EPA’s “My Waters” mapper at <http://www.epa.gov/waters/mywatersmapper/>.)



“I congratulate the EPA and the Corps on the proposed rule to replace the 2015 rule defining ‘Waters of the United States’. It reflects a considerable amount of thoughtful consideration in identifying the problems in the 2015 rule, and addressing solutions that those of us in Jackson County, Mississippi can appreciate. As a member of the LGAC and Vice-Chair of SCAS, I value the opportunity to provide meaningful input on the proposed rule.”

**Brian Fulton, County Administrator,
Jackson County, Mississippi**

C. Implementing Guidance and Interagency Taskforce

The LGAC believes that implementing guidance will be helpful on many WOTUS issues such as ditches, intermittent streams, wetlands, prior converted wetlands and mapping efforts. The use of an Interagency Taskforce made up of federal, state, tribal and local government experts will assist with the WOTUS implementation and in giving further guidance on these aspects of the rule. Furthermore, the LGAC recommends that the development of implementing guidance should be a transparent process and available for public review and comment.

D. Enforcement

LGAC Members are dedicated to protecting water resources. We are also concerned about clean water enforcement given the past history of confusion with WOTUS and new proposed changes with the final WOTUS rule. The LGAC urges EPA to consider new ways of thinking to address CWA implementation and water quality issues.

The LGAC encourages EPA to establish at a minimum a grace period to approach CWA enforcement. This will give opportunity for the regulated public to become educated on the new provisions of the WOTUS rule. This will also give agencies the opportunity for training and education of new rule requirements, and at the same time prevent a backlash of the regulated public on significant issues. The LGAC also at the same time urges that EPA consider a new paradigm in enforcement incorporating the concepts of integrated planning including all aspects of the CWA and the Safe Drinking Water Act.

E. Expanded Use of General Permits

On January 6, 2017, the U.S. Army Corps of Engineers (Corps) issued its revised 2017 Nationwide Permits (NWP) for work in streams and wetlands under Section 404 of the federal Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899.⁵ NWP are designed to regulate certain activities in jurisdictional waters and wetlands that have minimal adverse environmental impacts while allowing the activities to proceed with minimal delay and paperwork. The Corps reissued fifty-two existing NWPs and added two new NWPs: NWP 53, authorizing removal of low head dams, and NWP 54, authorizing construction and maintenance of Living Shoreline in coastal waters. Each Corps District may also address regional issues of concern. General and regional permits could be expanded to take into consideration regional differences in WOTUS implementation.



“I am pleased with the work of the LGAC in the development of the proposed and revised WOTUS Rule. It incorporates practicality and wise stewardship of our natural resources. I hope that the final rule will be a sensible framework to guide all interested parties found under its governance.” **Jai Templeton, West Tennessee River Basin Advisory Board and Former Tennessee Commissioner of Agriculture**

F. Communication & Outreach

Communication and transfer of information is crucial at all levels of government to successfully implement WOTUS. It will be crucial for EPA to work with states, tribes and local governments to assist with communication and outreach on WOTUS. EPA has tools and resources that states, tribes, and locals could utilize to enhance communication on WOTUS. Many of these tools are not known and readily available. EPA has begun enhanced communication on WOTUS with regional listening sessions. This approach should be continued and tailored to address states, tribes, localities and small communities. EPA should further develop comprehensive communication and information sharing with state, tribal and local governments.

⁵[82 Fed. Reg. 1860.](#)



“The LGAC and Small Community Advisory Subcommittee (SCAS) have worked for five (5) years to gather views from across the nation on WOTUS. This Report represents a gathering of consensus on what is important to consider in the Rule. It is particularly important for small and rural communities who don’t often have a voice, but who are most often the most affected by decisions on water resources.”

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

G. Training

EPA through the Regional offices should continue education and step up training programs for states and tribes to articulate the new WOTUS changes so that a uniform standard of application can be built across the nation. This training should also include technical and communication training so that those in the field will have access to available tools and technology.



“We should be gravely concerned about the minimization of the federal role in the Clean Water Act. Any changes at the federal level must be accompanied by the commitment and action to enhance protection by state, tribal and local officials. This requires frank discussion given the financial challenges faced by local communities, States and Tribes”

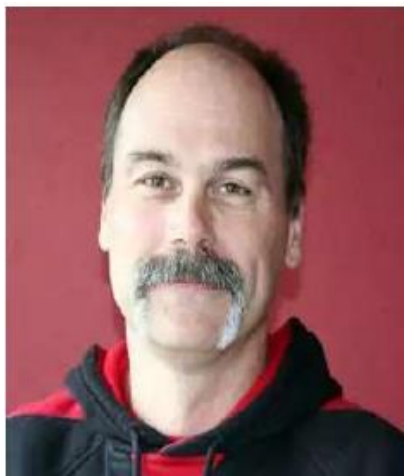
Mayor Karen Freeman-Wilson
Gary, Indiana

H. Tribal Perspective-A Unique View of WOTUS and Water Quality Protection Important to Tribal Rights and Resources

EPA held five national meetings; five regional tribal meetings; three tribe-specific leader-to-leader consultations; and seven tribe-specific staff-level teleconferences on WOTUS. As sovereign nations, Tribes have a unique government-to-government relationship with the U.S. Federal authority over waters. This authority is paramount to Tribes for protection of their water resources and the quality of waters that are essential to tribal treaty-protected resources, commercial ventures, culture, and the health of tribal members. This trust relationship is codified in treaties which certain Tribes have negotiated with the United States, which often included reservations of fishing and water rights, and WOTUS rule revisions could impact these treaty rights and trust responsibilities.

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

Chairman Shawn Yanity, Stillaguamish Tribe



For example, the Confederated Tribes and Bands of the Yakama Nation, the Nez Perce Tribe, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation and the 20 treaty tribes in Western Washington

have sovereign rights for fishing in their ancestral homelands.^{6 7} This right has been upheld and affirmed in several U.S. Supreme Court decisions. This territory is expansive in the states of Washington, Oregon, and Idaho. Tribes have expressed concern that limiting federal oversight could not only affect the Columbia River Basin but all water resources in Indian Country.

Significant progress has been made in reducing the discharge of pollutants to our nation’s waters. However, more waters are listed as impaired and reduction of CWA jurisdiction could further jeopardize water quality of floodplains, tributaries, headwaters, and wetlands (all critical to the quality of water that tribal members depend upon). Additionally, current federal efforts to reduce water quality protections through erosion of current standards and adopting less protective standards increases threats to tribal communities and resources. If water quality has improved over time, then the U.S. could consider turning over jurisdiction of waters. However, Tribes rely on their federal trustees, in this case, the EPA and the U.S. Army Corps, to implement and enforce the CWA to prevent continued impairment of their drinking water, fisheries, and endangered species recovery efforts. Those efforts include recovery of Southern Resident Killer Whales (SRKW) that are dependent on clean water, and functioning floodplains and wetlands.

“The LGAC did an extensive review of WOTUS to assure we safeguard all bodies of water- taking into consideration local input into what locals consider important in protecting a body of water-such as livelihoods, economy, spiritual, cultural and international significance. “

Dr. Hector Gonzalez, M D.



⁶ 1 Treaty with the Yakama Tribe, June 9, 1855, 12 Stat. 951; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957.

⁷ The NWIFC member tribes are the Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S’Klallam, Jamestown S’Klallam, Lower Elwha Klallam, Makah, Quileute, Quinault, and Hoh, which signed the Treaty of Point Elliot, 12 Stat 927 (1859); Treaty of Medicine Creek, 10 Stat. 1132, (1854); Treaty of Point No Point, 12 Stat. 933 (1859); Treaty of Olympia, 12 Stat. 971 (1855); and *Treaty of Neah Bay*, 12 Stat. 939 (1855).

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

Tom Sloan, (Former) State Representative, Kansas




IV. LGAC Charge Questions-Findings and Recommendations

EPA issued the following WOTUS charge questions for the LGAC to give input. Herein are the findings and recommendations to the charge.


A. Charge Question 1: Are there issues the agencies should consider relative to implementation of WOTUS for state, local and tribal government?

Findings and Recommendations

- ❖ A clear and precise WOTUS rule is the single most important factor for CWA implementation. As co-regulators at the state, tribal and local levels of government, rule language should be clear and defensible. This is critical for implementation and enforcement.
- ❖ The LGAC commends the EPA and the Corps on their collaborative work together with states and tribes to develop the proposed 2018 WOTUS rule. This continued collaboration will be critical in developing implementing guidance and in providing tools for state, tribal and local implementation.

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- ❖ In 2014, the LGAC undertook a nationwide inquiry and investigation to give EPA feedback on the 2015 WOTUS proposed rule. From the 2014 LGAC hearings we heard extensively in over 60 hours of testimony from our state, tribal and local colleagues across that the 2015 rule had serious flaws particularly in regard to definitions and a lack of clarity. The LGAC also heard testimony of inefficiencies in the CWA permitting system. Delays and uncertainty in permitting are costly at the local level. Permitting reform for CWA Section 404 could enhance the CWA implementation of the Waters of the U.S. rule so that it is carried out legally and expeditiously.
 - ❖ The LGAC believes that the proposed rule has clear definitions which is of utmost importance to local governments.
 - ❖ As less waters are considered WOTUS, that means they become “Waters of the State” or “Waters of the Tribe”. This means the state or tribe would be responsible for oversight. Some states and tribes have strong laws for this. Some states have budgets that cover policy mandates while others do not. In some cases, states are delegating responsibilities to local governments which can be an unfunded mandate. For example, in North Carolina and Virginia, these states have delegated storm water responsibilities to local governments. This is very costly, and many state, tribal and local government officials consider it unsustainable.
 - ❖ Developing and pushing out tools to aid in WOTUS determinations is critical for WOTUS implementation. Tools can aid and enhance WOTUS jurisdictional calls such as mapping efforts and technology.
 - ❖ State, tribal and local governments provide the best resources for land use history, photographs, local experts, and data collection on flow regimes. Local expertise can provide critical input in the process of jurisdictional determinations. Other resources such as StreamStats by the U.S. Geological Survey and other tools available through the Natural Resources Conservation Service (NRCS) for hydrologic tools and soil maps and identification of field indicators, such as vegetation and macroinvertebrates ⁸ could be helpful. These data tools could be regionalized (for example, the Streamflow Duration Assessment Method such as developed for the Pacific Northwest and could be replicated in

⁸ <https://streamstats.usgs.gov/ss/>




other regions⁹. Specific climatic conditions and precipitation data are important elements to consider. FEMA maps also could be helpful on a watershed-scale basis for meeting the tributary definition. Another helpful data base is WETS tables (or similar tools) by the NRCS National Water and Climate Center¹⁰.

- ❖ Clarifying exemptions of WOTUS is important to implementation. Ditches and maintenance of them are inherent in the operations and activities of local government either in maintaining roads, flood protection, agricultural operations and mosquito abatement to name a few. Ditches are proposed to be excluded from the definition of WOTUS. Ditches, by definition, are limited to conditions in paragraph (a)(1). This would include an exclusion for “ditches which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, as well as ditches which are subject to the ebb and flow of the tide. It may include waters such as navigable canals and tidal drainage ditches.” A ditch would also be considered a “water of the United States” if it is constructed in a tributary as defined in paragraph (c)(11) and also satisfies the conditions of the tributary definition. There is more work that needs to be done to clarify the ditch exclusion.
- ❖ Technical tools that are easily accessible and easy to use can help in assisting to make jurisdictional determinations for ditches which is important for state, tribal and local government.
- ❖ Implementing guidance is critical for efficient and consistent implementation across the country. Implementing guidance should be regionalized to take into account regional and local differences. For example, it is estimated that in one county in Mississippi (Jackson County) about 50 % of the waters would be considered WOTUS. Regional approaches would be better to look at this issue and figure out

⁹ <http://www.epa.gov/measurements/streamflow-duration-assessment-method-pacific-northwest>, which could be expanded to other regions).

¹⁰ (<http://www.wcc.nrcs.usda.gov/climate/wetlands.html>)




ways to use general permits. Without regional approaches, communities like Jackson County, Mississippi could lose economic opportunities.

- ❖ Technical guidelines, tools and resources will be important for local, state and tribal government. Local governments can provide information on land use and can be a good resource on whether a ditch was constructed in upland or not. If the evidence suggests that a ditch may have been constructed in a natural waterway, the agencies would likely need to review the available evidence to determine whether that natural waterway would qualify as a tributary under this proposed rule. In making this determination of ditches, field data and current land use information will be important tools and resources as well as local expertise in the decision-making process.
- ❖ The LGAC believes that general permits, under Section 404(e) of the Clean Water Act, offers potential to reduce the regulatory burden. If expanded, this could be used for a wide variety of smaller projects that do not pose significant impacts. General permits could particularly be helpful with stream restoration, stormwater maintenance and stream activities that abate public safety hazards.

Recommendations

- The LGAC commends the collaborative approach that the EPA and the Corps are using in approaching development of the proposed 2018 WOTUS rule. The LGAC recommends that the Natural Resource Conservation Service (NRCS) also be included in this collaboration.
- The LGAC recommends that the EPA and the Corps work together to provide states and tribes training on the implementation of WOTUS 2018. In addition to one-on-one training sessions, technical tools should be made available to assist with implementation.
- The LGAC recommends that the EPA, Corps and NRCS develop implementation guidance on the 2018 rule. States and Tribes should also be included on working groups to develop implementation guidance on the final WOTUS 2018 rule.

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- The LGAC recommends that the EPA and the Corps consult with local, state and tribal officials in jurisdictional decisions on issues of importance to local government such as the ditch exclusion. The EPA and the Corps should work in tandem in making jurisdictional determinations on any necessary permits needed for ditches either for Section 404 permits or Section 402 permits.
 - The EPA and the Corps should authorize states and tribes to assist in identifying wetlands, ephemeral and intermittent streams, ditches, etc. that are of “significant nexus”. This criteria developed by states and tribes should be included in implementing guidance for WOTUS.
 - The LGAC recommends that state and tribal agencies should be designated with the primacy of enforcement of CWA permits over local governments and private citizens.
 - In regard to determining intermittent and perennial flow, EPA and the Corps should establish an Interagency Taskforce to develop criteria for flow- based matrix of questions to determine ‘permanent’ and ‘continuous’ indicators of flow. The results should be published in the Federal Register, and the public given the opportunity to give comment.
 - An application for Smart phone or hand-held computer should be developed to give a quick jurisdictional determination and the output sent to all interested parties. This information could be accessible by all parties in real time.
 - The LGAC recommends the expanded use of State General permits to reduce the regulatory burden and address smaller projects with minimal impacts. It could also be used to address regional and state-specific activities and special water bodies.

B. Charge Question 2: From a local government perspective, are there particular features or implications of any proposed policy approaches that the agencies should be mindful of in developing the step 2 final rule?

Definitions

Waters of the U.S. Definition


Findings and Recommendations

- ❖ The LGAC is generally supportive of the 2018 proposed rule definition and think it is an improvement. “Waters of the United States” is to encompass ‘traditional navigable waters’. This would, include the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters. However, there are wetlands, ephemeral, and intermittent streams that have a “significant nexus” that should be defined by States and Tribes to be included in WOTUS. Therefore, States and Tribes should develop criteria for these areas which should be included in implementing guidance.
- ❖ The proposed 2018 WOTUS departs from other approaches in the 2015 rule to make a distinction in federal jurisdiction and what is considered state jurisdiction of Waters.
- ❖ The LGAC generally finds that the definitions in the 2018 proposed rule are much clearer and reduces uncertainty over the 2015 rule. This clarity is something that local governments and the public have called for.
- ❖ The LGAC supports the agencies’ approach using case law, the plurality decision and protection of our nation’s source water in drafting a final 2018 rule.



Recommendations

- The LGAC recommends that the EPA adopt the definition of ‘Waters of the United States’ as proposed in the 2018 final rule. However, there are wetlands, ephemeral, and intermittent streams that have a “significant nexus” that should be defined by states and tribes to be included in WOTUS. Therefore, states and tribes should develop criteria for these areas which should be included in implementing guidance.
- The LGAC recommends that the EPA proceed to encompass ‘traditional navigable waters’ in the final 2018 rule.
- The LGAC recommends that the EPA include source water as a separate category of ‘Waters of the U.S.’ Source water may in some cases be considered ‘traditional navigable waters, and some may not. Therefore, this category of ‘waters’ is important to include.
- The LGAC recommends establishment of clear categories of jurisdictional waters (articulated in the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions) and away from the case-by-case of ‘significant nexus’ test. The LGAC notes that case-by-case determinations can be significantly costly and require complex engineering and legal assistance. These bright lines of categories can potentially reduce the cost-burden to permittees. However, there are some cases where case-by-case determinations will be necessary.
- EPA and the Corps should apply simple approaches that yield jurisdictional determinations for WOTUS with simple criteria that give a ‘yes’, ‘no’ or ‘maybe’ answer.
- The LGAC recommends that the EPA move forward with the proposed rule with the approach to articulate clear categories of jurisdictional waters.
- The LGAC recommends that clear examples of jurisdictional waters be provided including photographs to supplement the information.
- The LGAC recognizes that discrepancies will occur when making jurisdictional determinations. The LGAC recommends that ‘case-by-case’



determinations may be necessary and may be requested. The LGAC supports a provision in the proposed rule for a permittee to request a case-by-case determination (which could be rendered to be more accurate).

Interstate Waters

Findings and Recommendations

- ❖ Removal of interstate waters as a category of jurisdiction departs from a long-standing history in the CWA. Removing interstate waters could pose significant uncertainty regarding state to state or state to tribal water quality standards, and it could result in permitting delays. The LGAC believes that further work needs to be done to include further input from states and tribes on this issue.
- ❖ The 2018 proposed rule approaches “interstate waters” as other jurisdictional waters and not as a separate category. It would therefore fall within the traditional category of jurisdictional or one of the other proposed categories, such as tributaries or lakes and ponds.

Recommendations


- The LGAC recommends that the EPA seek further input from states and tribes specifically whether ‘interstate waters’ should be a separate category of jurisdiction.
- The LGAC also recommends that the agencies develop clarifying guidance to apply to “interstate waters” recognizing the rights and responsibilities of the States and Tribes.
- The LGAC recommends that “interstate waters” be added back as a category of WOTUS.



Tributaries


Findings and Recommendations

- ❖ The LGAC generally supports the definition of ‘tributaries’ as it provides clear and plain English examples and exclusions. It is also clear that a tributary does not lose its status if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break.
- ❖ A tributary in the proposed rule is defined as “a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream.”
- ❖ The proposed rule eliminates case-specific “significant nexus” analysis by providing a clear definition of “tributary” which the LGAC notes may enhance implementation.
- ❖ Excluded waters and features would be those that do not have perennial or intermittent flow (e.g., ephemeral features). Tributaries as defined in this proposed rule do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features.
- ❖ The proposed rule defines “perennial” to mean “surface water flowing continuously year-round during a typical year.” The proposed definition of “intermittent” is “surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation.”
- ❖ The term “ephemeral” is defined as “surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall.”
- ❖ The proposed rule states that a tributary “must contribute perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year.”

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- ❖ Ditches are generally proposed *not* to be “waters of the United States” unless they meet certain criteria, such as functioning as traditional navigable waters, if they are constructed in a tributary and also satisfy the conditions of the proposed “tributary” definition, or if they are constructed in an adjacent wetland and also satisfy the conditions of the proposed “tributary” definition.
 - ❖ The 2018 proposed rule does distinguish between “intermittent” and “ephemeral” flows which attempts to strike a balance in case law, available science, and stakeholder feedback. Ephemeral features, such as dry washes and arroyos, that lack the required perennial or intermittent flow are excluded from the definition. However, an ephemeral feature may constitute a point source that discharges pollutants to a “water of the United States.” (Rapanos, 547 U.S. at 743-44 (Scalia, J., plurality)). States and Tribes may likely need to address ephemeral features as “waters of the State” or “waters of the Tribe” under their appropriate laws as appropriate.
 - ❖ The LGAC is of the opinion after hearing from our Committee Members and colleagues across the country that there is ‘no size fits all’ determinant of ‘intermittent’ and ‘ephemeral’ flow. The LGAC believes that States and Tribes are in a better circumstance with local information to develop state and tribal criteria for jurisdictional determinations. The LGAC recognizes that the EPA cannot necessarily require States and Tribes to provide this information. But incentives could be offered to provide the EPA with this criteria when applying the WOTUS rule to their respective states and tribes.

Recommendations

- The LGAC recommends that the EPA definition proposed for tributaries provides clarity and should be adopted in the final rule.
- The LGAC further recommends clarifying examples be developed in guidance with photographs provided.
- The LGAC also recommends that the EPA work with States and Tribes to identify and map jurisdictional waters and provide the science to support state and tribal inclusion of state and tribal waters.

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- The LGAC recommends that States and Tribes develop criteria for these terms as a potential Approach to Wetlands with a "Continuous Surface Connection" and "Relatively Permanent" Waters. Examples of such criteria:
 - ✚ Streams with seasonal flows or streams with man-made flows from other water bodies should not be defined as 'relatively permanent' or 'intermittent'.
 - ✚ Metrics and thresholds should be established when a stream is considered "relatively permanent." Such metrics will vary geographically, and the thresholds will be subjective, and made on a case-by-case basis.

 - The proposed rule does not specify duration or amount of surface flow that would categorize water as jurisdictional in "intermittent flow" under the CWA. Instead, the agencies recognize that what constitutes intermittent flow can vary widely across the country based on a number of different variables. Local governments will have land-based experience and knowledge of local conditions of what might constitute "intermittent flow" within their region and should be consulted throughout the implementation of the rule.


 - States and Tribes should develop criteria and measurement techniques and submit to the EPA for review and approval for determination of 'intermittent' flow. EPA should have 90 days from receipt of completed state or tribal plan to review, suggest revisions, and approve or deny the submitted plan. If the review is not completed within 90 days, subject to extension if the EPA and state/tribe agree, the submitted plan shall be deemed accepted.

 - States and Tribes should also be encouraged to develop water quality criteria and standards for wetlands and other water bodies that impact ground and source water quality.

Impoundments

Findings and Recommendations

- ❖ Historically impoundments have been jurisdictional because impounding a "Water of the United States" generally does not change the water body's status as a "Water



of the United States.” The proposed rule does not propose to make any changes to the impoundment category of “Waters of the United States” as it existed in the 1986 regulations.

- ❖ However, the LGAC points out that impoundments are oftentimes created in uplands without connection to a navigable surface water body. These impoundments are often used in agricultural practices and should be excluded as WOTUS.


Recommendations

- The LGAC recommends that ‘impoundments’ that are currently proposed in the 2018 rule are jurisdictional WOTUS.
- The LGAC recommends that an impoundment created in uplands with no connection to a navigable surface water body should be excluded from jurisdictional WOTUS.

Ditches


Findings and Recommendations

- ❖ For local, state and tribal governments, the regulation of ditches as a WOTUS was the most controversial aspect of the 2015 CWA rule. This has been particularly problematic for the agricultural sector and farmers, ranchers, irrigation districts, municipalities and county government, and water supply and stormwater management agencies. Therefore, the LGAC is providing our detailed input on this aspect of the proposed rule.
- ❖ The proposed 2018 rule provides additional clarity and predictability regarding the regulation of ditches such as artificial features and proposes to exclude all other ditches from that definition. The proposed rule addresses whether ditches are point sources or “Waters of the United States” and provides clear categories for regulators and the regulated community on the exclusion of ditches.

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- ❖ The proposed rule defines ditches as “artificial channels used to convey water” For example, such features may be designed to convey irrigation water, to drain agricultural lands, conveying runoff from roads, or for use in interstate or foreign commerce, such as the Erie Canal and the Great Lakes Waterway.
 - ❖ Ditches remain “point sources” under the CWA, 33 U.S.C. 1362(14). The proposed rule language limits ditches as “Waters of the United States” if they “(1) satisfy any of the conditions identified in paragraph (a)(1) of this proposed rule; (2) are ditches constructed in a tributary as defined in paragraph (c)(11) of the proposal as long as those ditches also satisfy the conditions of the tributary definition; or (3) are ditches constructed in an adjacent wetland as defined in paragraph (c)(1) of the proposal as long as those ditches also satisfy the conditions of the tributary definition.”
 - ❖ All other ditches are excluded from the definition of “Waters of the United States.” However, they could still be regulated by States and Tribes and could be subject to CWA permitting if they meet the definition of “point source” in CWA section 502(14).
 - ❖ When Congress enacted the Clean Water Act 1972 amendments, ditches and related artificial features as “point sources,” from which pollutants are or may be discharged.”¹¹ The purpose was to protect the quality of navigable waters by regulating the discharge of pollutants from conveyances like pipes, ditches, channels, tunnels and similar features into “Waters of the United States.”
 - ❖ The proposed rule intends to clarify what is a ‘navigable water’ and ‘point sources’ that can discharge pollutants into those waters, as established by Congress in 1972. *See, e.g., Rapanos*, 547 U.S. at 735-36 (Scalia, J., concurring) For example, irrigation ditches, which typically are constructed in upland and infrequently connect to a “Water of the United States” have been exempted for both the construction and maintenance of such facilities.¹² The proposed 2018 rule attempts to determine whether a ditch may be a ‘Water of the United States’ or a point source, but not both.
 - ❖ The proposed 2018 rule does include ditches that are constructed in a waterbody that meets the proposed definition of “tributary”. And ditches constructed in upland

¹¹ 33 U.S.C. 1362(16).

¹² 33 U.S.C. 1344(f)(1)(C); *see also* 33 U.S.C. 1362(14) -excluding agricultural stormwater discharges and irrigation /return flows from the definition of point source.




are not “Waters of the United States”. The proposed rule does include ditches as “Waters of the United States” if they were constructed in a wetland that meets this proposed definition of “adjacent wetland.”

- ❖ Ditches that used to drain surface and shallow subsurface water from cropland and/or conveying irrigation water to and from fields and managing surface water runoff from lands and roads following precipitation events—all are activities that rely on ditches. These ditches are to be covered by the primary authority of States and Tribes over land and water resources within their purview.
- ❖ The LGAC has heard from intergovernmental stakeholders and amongst LGAC Members that there needs to be additional guidance on the ditch exclusion.

Recommendations

- The LGAC recommends that EPA adopt the proposed rule definition of ditches as “artificial channels used to convey water”. The proposed rule provides additional clarity and predictability regarding the regulation of ditches such as artificial features and proposes to exclude all other ditches from that definition.
- The LGAC recommends using the proposed rule language as written which limits ditches as “Waters of the United States” if they: “(1) satisfy any of the conditions identified in paragraph (a)(1) of this proposed rule; (2) are ditches constructed in a tributary as defined in paragraph (c)(11) of the proposal as long as those ditches also satisfy the conditions of the tributary definition; or (3) are ditches constructed in an adjacent wetland as defined in paragraph (c)(1) of the proposal as long as those ditches also satisfy the conditions of the tributary definition.”
- The LGAC recommends as proposed in the rule language for ditches used to drain surface and shallow subsurface water from cropland and/or conveying irrigation water to and from fields and managing surface water runoff from lands and roads following precipitation events to be covered primarily the authority of States and Tribes over land and water resources within their purview.

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- The LGAC recommends that all roadside ditches be excluded for public safety reasons.
 - The LGAC recommends that further guidance is needed on ditches. The LGAC recommends that an Interagency Taskforce be established to address technical issues regarding ditches such as: the extent of regulation of ditches; whether ditch use should be considered and criteria for such; mapping tools that can be used for jurisdictional determinations; information required by the landowner that should be required for ditches; and maintenance activities exempt from regulation. The Interagency Taskforce should look at the definition of intermittent flow for ditches as a possible for criteria for ditches.

Lakes and Ponds

Findings and Recommendations

- ❖ The proposed lakes and ponds category of WOTUS replaces the 2015 rule that depends on a case-specific “significant nexus” analyses. The definition of ‘lakes and ponds’ focuses on contribution of flow to and connection with traditional navigable waters ¹³.
- ❖ Three separate categories of waters are included for certain lakes and ponds: 1) traditional navigable waters (stated in paragraph (a)(1) and (a)(4)); (2) contribute perennial or intermittent flow; and (3) flooded by water in a typical year and also receives flood waters from a navigable water overtopping in a typical year.
- ❖ Lakes and ponds that contribute flow to traditional navigable waters through ephemeral flow would be excluded ¹⁴.
- ❖ Ephemeral lakes and arroyos are not jurisdictional under this proposed rule. Those features are considered water resources of the States and Tribes.

¹³ Consistent with SWANCC, 531 U.S. at 168 n.3.

¹⁴ Informed by *Rapanos* wherein the plurality rejected the Federal government's hydrologic connection theory in deciding that the phrase “the waters of the United States



Recommendations


- The LGAC recommends adoption of the proposed rule language for the category of “lakes and ponds” category of WOTUS which would replace the 2015 rule that depends on a case-specific “significant nexus” analyses. The definition of ‘lakes and ponds’ focuses on contribution of flow to and connection with traditional navigable waters.
- The LGAC recommends adoption of the proposed rule language that using the three categories of waters which are included for certain lakes and ponds: 1) traditional navigable waters (stated in paragraph (a)(1) and (a)(4)); (2) contribute perennial or intermittent flow; and (3) flooded by water in a typical year and also receives flood waters from a navigable water overtopping in a typical year.
- The LGAC recommends adopting rule language as proposed that lakes and ponds that contribute flow to traditional navigable waters through ephemeral flow would be excluded ¹⁵”.
- The LGAC recommends that lakes and ponds that contribute source water would be considered WOTUS.

Wetlands

Findings and Recommendations


- ❖ Wetlands regulated by WOTUS have been particularly problematic for local, state and tribal government in the 2015 rule. For example, it did not provide adequate clarity on what wetlands which were proposed to be regulated.
- ❖ The 2018 proposed rule provides additional clarify and reduces the confusion by stating that wetlands with a direct hydrologic surface connection occurs as a result

¹⁵ Informed by *Rapanos* wherein the plurality rejected the Federal government's hydrologic connection theory in deciding that the phrase “the waters of the United States



of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water are WOTUS.


- ❖ The longstanding regulatory definition of “wetlands” continues: “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.” The presence and boundaries of wetlands are determined based upon an area satisfying all three of the definition's criteria (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances.”
- ❖ The 2018 proposed rule includes all adjacent wetlands to: Traditional navigable waters, including the territorial seas; tributaries, jurisdictional ditches; jurisdictional lakes and ponds; and impoundments.
- ❖ The 2018 proposed rule defines “adjacent wetlands” to mean wetlands that abut or have a direct hydrologic surface connection to other “Waters of the United States” in a typical year. “Abut” is defined as a wetland touches a water of the United States at either a point or side. A “direct hydrologic surface connection” is defined as “a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water.”
- ❖ The proposed rule excludes those “wetlands that are physically separated from jurisdictional waters by upland or by dikes, barriers, or similar structures and also lack a direct hydrologic surface connection to jurisdictional waters.
- ❖ “Upland” was a term identified in the LGAC 2014 Report that needed definition.¹⁶ The 2018 rule defines it as “any land area above the ordinary high-water mark or high tide line that does not satisfy all three wetland delineation factors (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances, as described in the Corps' 1987 Wetland Delineation Manual. Features that were once wetlands but have been naturally transformed or lawfully converted to upland (*e.g.*, in compliance with a section 404 permit) would be considered upland.” A “typical year” is also defined as “the normal range of precipitation over a rolling 30-year period for a particular geographic area.” The existing Corps definitions for “ordinary high water mark” and “high tide line” from 33 CFR 328.3, is being used also.

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- ❖ The definition of “adjacent wetlands” is based on the core principles and concepts set forth in the three major Supreme Court cases addressing the scope of the phrase “the Waters of the United States,” and establishes a “clear, predictable regulatory framework” that can be efficiently implemented in the field.
 - ❖ The wetlands proposed for exclusion from WOTUS are substantiated in key Supreme Court decisions.¹⁷ While the Court in *Riverside Bayview* identified this inquiry as a task for the Corps and deferred to the Corps’ judgment under *Chevron* principles, the Supreme Court has subsequently recognized outer bounds for the scope of “Waters of the United States.”
 - ❖ Furthermore, the proposed definitions in the 2018 rule would end the current practice of conducting case-specific for significant nexus evaluations for non-abutting wetlands by determining that adjacent wetlands are considered WOTUS.
 - ❖ The LGAC acknowledges that there are some wetlands that are important for mitigating floods, improving surface water and source water quality, provides habitat and are important to communities. Therefore, these wetlands should be considered as “significant nexus” and state and tribal criteria should be used to determine whether they should be included in WOTUS.

Recommendations

- The LGAC recommends that the EPA adopt this approach to define wetlands and satisfies this proposed definition of a “Water of the United States” but that a significant nexus analysis using state and tribal criteria should be included in rule language and the criteria be established in implementing guidance.
- The LGAC recommends that to satisfy the definition of ‘wetland’ that all three wetland delineation criteria (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils) would provide additional clarity to the definition.

¹⁷ *Riverside Bayview*: “474 U.S. at 132; *SWANCC*, 531 U.S. at 172; The plurality opinion in *Rapanos*, 531 U.S. at 742

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- The LGAC recommends to not use a distance limit to establish the boundaries of adjacency.
 - The LGAC urges that the EPA reconsider whether an exclusion for all wetlands that are physically separated by dikes, barriers, or water control structures as this could promote the destruction of wetlands by prior conversion before a permit.
 - The LGAC support tool development that may be helpful in implementation of the proposed adjacent wetlands category.
 - The LGAC recommends that an Interagency Taskforce be established to develop metrics to identify when "connectivity" or what constitutes a significant degree of connectivity, which should be avoided if at all possible. The Science Advisory Board's Connectivity Report could provide helpful thresholds for determining a wetland.¹⁸
 - The LGAC recommends that an Interagency Taskforce should also determine which isolated wetlands should be considered important to include as jurisdictional (such as Carolina bays, pocosins and other unique wetland features).

Waters and Features That Are Not Waters of the United States


Findings and Recommendations

- ❖ There are eleven (11) exclusions from the definition of "Waters of the United States." The proposed rule would exclude:
 - groundwater, including groundwater drained through subsurface drainage systems;
 - ephemeral surface features and diffuse stormwater run-off such as directional sheet flow over upland;
 - all ditches, except those ditches identified in paragraph (a)(3) of the proposed rule;


¹⁸ U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-11/098B, 2013.


- prior converted cropland (since 1993);
- artificially irrigated areas, including fields flooded for rice or cranberry growing (that would revert to upland should application of irrigation water to that area cease);
- artificial lakes and ponds constructed in upland (water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds);
- water-filled depressions created in upland (incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel);
- stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off;
- wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins. (Note: Waste treatment systems have been excluded from this definition since 1979, and they would continue to be excluded under this proposal) A waste treatment system is defined for the first time to include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge). A waste treatment system requires a section 402 permit if it discharges into a water of the United States.

- ❖ The LGAC finds that the proposed exclusions generally reflect current practice and provides greater clarity over which waters are and are not regulated under the CWA.
- ❖ Groundwater is excluded from “Waters of the United States”. In proposed paragraph (b)(3), the agencies would exclude ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland. Such features would not be jurisdictional under the proposed terms of paragraph (a) or the proposed definitions in paragraph (c). They would be specifically excluded in the proposed rule to avoid confusion. This proposed exclusion would further highlight and clarify that such features are not tributaries under the proposed rule.

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- ❖ The LGAC finds the proposed ditch exclusion a clear exemption for the regulated public and much more straightforward to implement than current practice.
 - ❖ The LGAC generally supports the exclusion of prior converted cropland. However, there is a need for further clarifications as it is currently identified because it relies on the use of 1985 as the year that farmland must have been used for agricultural purposes. This creates a clear barrier to entry. All agricultural land should be excluded because these lands are managed to provide food, fiber, and other necessary products for survival – regardless of whether the agricultural operation was established before or after 1985. There is a need for further clarification that could be addressed by an Interagency Taskforce.
 - ❖ Prior converted cropland continues to be excluded from WOTUS. However, there is added a condition that if the cropland is abandoned *and* the land has reverted to wetlands, and not used in support of, agricultural purposes at least once in the immediately preceding five years than it may be included as a WOTUS¹⁹. Note: Agricultural purposes are defined as “land use that makes the production of an agricultural product possible, including but not limited to grazing and haying.” It is clarified that cropland that is left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use, and therefore maintains the prior converted cropland exclusion. This is the first-time rule language clarifies the meaning of “prior converted cropland,” the application of the exclusion, and a recapture mechanism based on abandonment and reversion to wetlands.
 - ❖ The abandonment principle that the agencies had been implementing since the 1993 rulemaking was not clear. The LGAC believes this is another uncertainty further clarified in the proposed rule and provides regulatory certainty.
 - ❖ The LGAC likes that the upland exclusion is included so that an upland ditch that borders a jurisdictional water would be exempt and remain excluded if it develops wetland characteristics.


¹⁹ Consistent with the 1993 preamble. 58 FR 45033, and the five-year timeframe regarding validity of a jurisdictional determination. See 2005 Corps Regulatory Guidance Letter (RGL) 05-02

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- ❖ The LGAC affirms the listing of non-jurisdictional ponds as exclusions even if it serves another incidental beneficial use. This exclusion also affirms that an applicant that receives a permit to construct a waste treatment system it is relinquished from jurisdiction as long it is used for the permitted purpose (consistent with longstanding practice).
 - ❖ Groundwater exclusion is cited in the proposed rule which also applies to subsurface systems, like tile drains used in agriculture. However, the exclusion would not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in intermittent or perennial streams.
 - ❖ The proposed rule would exclude ephemeral features and diffuse stormwater runoff. This exclusion would include ephemeral flows, swales, and erosional features, including gullies and rills, as non-jurisdictional features. Tributaries can be distinguished from these excluded features by the flow regime proposed in the definition of “tributary.” Tributaries would have intermittent or perennial flow while these proposed excluded features would have ephemeral flow. Some streams are colloquially called “gullies” because they exhibit the characteristics of a tributary. However, waters that meet the definition of “tributary” would not be excluded as ephemeral features.
 - ❖ The LGAC finds that there is further clarification on ‘croplands’ that have been abandoned and wetlands established that site would no longer be valid for purposes of the CWA. Current practice has been to defer to certifications of prior converted cropland made by the USDA for agricultural use. This proposed rule would clarify that the Corps would only apply abandonment principles consistent with the 1993 preamble and would no longer apply the change in use analysis. The Corps will determine if the land has been “abandoned.” If the Corps determines that the land is abandoned, then it must evaluate the current condition of the land to determine whether wetlands conditions have returned. If wetlands are currently present on the property, the Corps must determine whether the wetlands are waters of the United States, consistent with this proposed rule.
 - ❖ The USDA is responsible for making the determination as to whether land is ‘prior converted cropland.’ The EPA and the Corps are responsible for enforcing the prior converted cropland exclusion for CWA purposes and identify whether lands that are no longer prior converted cropland may be “Waters of the United States.”

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- ❖ There is clarification on artificial irrigation exclusion which would apply only to the specific land directly irrigated, including fields flooded for rice or cranberry growing, (which would revert to upland should artificial irrigation cease). Historically, the agencies have taken the position that ponds for rice growing are generally not considered waters of the United States, as reflected in the 1986 preamble and the 2015 Rule. *See* 51 FR 41217.
 - ❖ For the artificial lakes or ponds, farm ponds, log cleaning ponds, and cooling ponds are added to the list of excluded ponds. However, in some circumstances, there may be a point source subject to Section 401 of the CWA.
 - ❖ Water-filled depressions created in upland incidental to mining activity are not considered to be “Waters of the United States”.
 - ❖ Stormwater control features “excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off” are excluded. Wastewater recycling structures constructed in uplands are also excluded. Groundwater recharge basins and infiltration ponds built for wastewater recycling are also excluded. The waste treatment exclusion is still maintained as a longstanding practice. If the treatment system is abandoned, it would not continue to qualify for the exclusion. Note: Some flows from these excluded waters may function as “point sources” under CWA section 502(14), so that discharges of pollutants to navigable waters through these features would be subject to other parts of the CWA (*e.g.*, CWA section 402).

Recommendations


- The LGAC recommends adoption of the proposed eleven (11) exclusions from the definition of “waters of the United States.” However, the LGAC recommends that “interstate waters” should be added back as a category of WOTUS.
- The LGAC recommends as proposed in the rule that groundwater be excluded from “Waters of the United States”.
- The LGAC recommends that proposed rule language in paragraph (b)(3), be adopted to exclude such as ephemeral features and diffuse stormwater run-off.

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- The LGAC recommends adoption of the exemption for prior converted cropland be excluded from WOTUS.
 - The LGAC recommends that an Interagency Taskforce address the issue of abandoned cropland issue to determine conditions where these waters would be WOTUS.
 - The LGAC recommends that the USDA be the agency responsible for making the determination as to whether land is ‘prior converted cropland.’
 - The LGAC recommends that the language on artificial irrigation exclusion would apply only to the specific land directly irrigated, including fields flooded for rice or cranberry growing, (which would revert to upland should artificial irrigation cease as reflected in the 1986 preamble and the 2015 Rule. *See* 51 FR 41217).
 - The LGAC recommends that the proposed rule language that exempts artificial lakes or ponds, farm ponds, log cleaning ponds, cooling ponds, water-filled depressions, and ponds incidental to mining activity.
 - The LGAC recommends that proposed rule language excluding the following be adopted: stormwater control features “excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off”; wastewater recycling structures constructed in uplands; groundwater recharge basins and infiltration ponds built for wastewater recycling.

Placement of the Definition of Waters of the United States in the Code of Federal Regulations

Finding and Recommendation

- ❖ The definition of “Waters of the United States” is proposed to be placed in the Code of Federal Regulations, the agencies propose to locate the proposed definition of



“Waters of the United States” at 33 CFR 328.3, 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 401.11, and Appendix E to 40 CFR part 300.

Recommendation

- The LGAC recommends that the definition of ‘Waters of the U.S.’ be applicable throughout the Federal Regulations 33 CFR 328.3, 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 401.11, and Appendix E to 40 CFR part 300.


State, Tribal and Federal Agency Datasets of “Waters of the United States”

Finding and Recommendations

- ❖ State and tribal involvement in jurisdictional determinations are very important. Several States and Tribes suggested the agencies increase the role of States and Tribes in identifying those waters that are “Waters of the United States.” Stakeholders also indicated that maps could increase certainty and transparency regarding the data and methods used to determine which waters are jurisdictional and which waters are not.
- ❖ Datasets that are available to the public in real time such as available on a phone app or download from the internet could be valuable in aiding jurisdictional determinations.

Recommendations


- The LGAC recommends that state, tribal and local government resources and data be used in jurisdictional determinations.
- The LGAC recommends that a phone app be established that can be used by all parties in the jurisdictional determination process.

- 
- The LGAC recommends that an Interagency Taskforce be established to determine and update datasets for jurisdictional determinations.

C. Charge Question 3: What should the agencies consider in communicating the final rule to state, local and tribal governments to help them fully understand these regulatory changes and how to implement them efficiently and most cost-effectively?

Findings and Recommendations

- ❖ The agencies have been effective in consultation with state, tribal and local governments during the development of step 2 of the final rule. The LGAC appreciates the federalism approach that the agencies have taken and believe it will result in a more effective rule. Ultimately, it is the regulated community that must know and understand the regulations for the rule to be effective.
- ❖ State, Tribal and local governments are the best conduits for passing information on to the regulated community since many waters may not be CWA jurisdictional any more. Thus, the final rollout should achieve Administrator Wheeler’s stated goal of helping the regulated community “understand whether or not a project on their property will require a federal permit without having to hire outside professionals.”
- ❖ Executive Order 13132 and Executive Order 13175 requires Federalism consultation and consultation with states, tribes and local government officials, or their representative national organizations, which is an important step in the process prior to proposing regulations that may have implications for State, Tribal and local governments. State and local governments were consulted at the outset of rule development starting on April 19, 2017. The agencies held nineteen Federalism meetings between April 19 and June 16, 2017; Seventeen intergovernmental associations, including nine of the ten organizations identified in EPA's 2008 E.O. 13132; The LGAC held meetings and met 10 times during this




period to address the charge given to its members by the EPA Administrator on a revised rule and completed a report addressing the questions outlined in their charge.²⁰

Recommendations

- The agencies should stress in communication materials that rulemaking is based on the law and that it may be informed by science, but science is not the only basis for the rule.
- The final 2018 WOTUS rule communication materials should articulate that the goal of the final 2018 rule is to have a rule that simplifies the permitting process so that permittees will have a simplified process to understand jurisdictional calls and will not have to make expenditures for hiring outside professionals for that service.
- Transfer of federal authority to state or tribal authority on some waters, poses more uncertainty. Prediction of required permitting becomes less reliable for the public and private sector with both federal, state and tribal rule-making. Clarity for all becomes muddled. What will the costs be? What could be offsets? Who provides technical assistance? This needs to be clearly communicated at all levels of government with focus on efficiency and cost-effectiveness.
- EPA should provide as part of the communication strategy to have ongoing training sessions for state, tribal and local government once the final 2018 rule is in place.
- The LGAC encourages EPA to consider establishing a grace period to approach CWA enforcement which should be included in the communication strategy. This will give opportunity for the regulated public to become educated on the new provisions of the WOTUS rule.
- This rule will give agencies the opportunity for training and education on new rule requirements, and at the same time prevent a backlash of the

²⁰ The LGAC July 14, 2017 Final Report: <https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf>.



regulated public on significant issues. The LGAC urges that EPA consider a new paradigm in enforcement incorporating the concepts of integrated planning including all aspects of the CWA and SDWA.

- The LGAC recommends that state, tribal and local governments are important in communicating the WOTUS rule changes. Furthermore, the EPA and the Corps should develop template communication materials for local governments to use in communicating WOTUS rule changes.

V. Conclusion

The LGAC appreciates the evolution of the proposed rule to achieve greater clarity. As a result, regional differences have emerged as the next challenge. The LGAC is recommending a collaborative, shared governance model that can achieve regional flexibility within a reasonable and clear regulatory framework.

The LGAC recognizes that it is a delicate balance of federal, state, tribal and local authority needed to ensure our nation's water resources are clean, safe and reliable. The LGAC thanks EPA for the opportunity to provide our recommendations regarding this important issue.

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



Appendix

Local Government Advisory Committee Members

Bob Dixon, Chairman
(Former) Mayor
Greensburg KS

Ms. Susan Lessard
Town Manager
Town of Bucksport, Maine
Bucksport, ME

Honorable Ron Poltak
Chairman
Auburn Planning Commission
City of Auburn, New Hampshire
Auburn, NH

Honorable Jose C. Aponte
Dalmau
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City of Caroliña
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Mr. Michael T. Scuse
Secretary
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Mr. Jeff Witte, Vice-Chair
Secretary of Agriculture
State of New Mexico
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Mr. Brian Fulton
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Honorable Carvel Lewis
Chairman
Georgetown-Quitman
Consolidated County Government
Georgetown, Georgia



Honorable Kitty Barnes
Commissioner
Catawba County, NC
Terrell, NC

Ms. Susan Hann
Director, Planning
Brevard County School Board
Malabar, FL

Honorable Elizabeth Kautz
Mayor
City of Burnsville, Minnesota
Burnsville, MN

Honorable Victoria Reinhardt
Commissioner
Ramsey County, Minnesota
Saint Paul, MN

Ms. Teri Goodmann
Assistant City Manager
City of Dubuque, Iowa
Dubuque, IA

Honorable Karen Freeman-
Wilson
Mayor
City of Gary, Indiana
Gary, Indiana

Honorable Ben Kimbro
Council Member
City of Tulsa, Oklahoma
Tulsa, OK

Honorable Jeff Branick
County Judge
Jefferson County, Texas
Beaumont, Texas

Honorable Tom Sloan
(Former) State Representative
State of Kansas
Lawrence, KS

Honorable Libby Szabo
Commissioner
Jefferson County, Colorado
Golden, CO

Honorable Mark Fox
Chairman
Mandan, Hidatsa, and Arikara
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Director of Health
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Laredo, TX

Honorable Andy Beerman
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Park City, UT

Mr. Norm Archibald
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Honorable Shawn Yanity
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Stillaguamish Tribe
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Small Community Advisory Subcommittee (SCAS)

Members

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