

1 ➤ **Water: Our Nation's Health and Wealth**

2 Water resources are the lifeblood for our nation's cities, towns and small rural communities. It is
 3 essential for the health, prosperity and security for our citizens and is among the top priorities
 4 for us in local governments. As State, local and tribal government partners we desire to manage
 5 our water resources so that we have reliable and safe water supplies to create jobs, attract
 6 industry and investment, and provide for the health and welfare of citizens. A common
 7 understanding of the value of water and how it impacts the health and prosperity of us at the
 8 local level is important for governmental decision-making. For example, water infrastructure
 9 costs are estimated to be \$100 per household per year, for smaller communities, these same
 10 costs are \$400 to \$800 more per year.¹ Estimates range for every \$1 million investment in water
 11 infrastructure it supports between 15 and 18 jobs throughout the economy. Disruption in our
 12 nation's water supply, would greatly impact our economy on a large scale.² For example, one
 13 day's disruption for the service industry would result in a 70% reduction in sales. For the
 14 petroleum industry (highest), the loss would be \$5,800 per employee (7 days the equivalent of
 15 1% of annual income). Therefore, protections under the Clean Water Act for the 117 million
 16 people (one third of Americans) that rely on these waters as part of our public drinking water
 17 assets are decisions of public trust and stewardship. Balancing the CWA authorities to protect
 18 rivers, lakes, streams and wetlands and to keep them healthy and safe is the responsibility of all
 19 levels of government. At the same time costs of treatment should not be transferred directly to
 20 the rate payer - *at the tap*.

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 22 ➤ **Local Governments and Cooperative Federalism**

23 The Clean Water Act (CWA) as amended in 1972, established the basic structure for protecting
 24 our nation's water resources by regulating pollutant discharges into the waters of the United
 25 States. Clean Water Act programs are largely federal, state and tribal programs. The CWA
 26 Section 404 is an EPA and Corps of Engineer (joint program) which regulates discharges of
 27 dredged or fill materials into Waters of the United States, including wetlands. On February 28,
 28 2017, the President of the United States issued an Executive Order directing EPA
 29 and Department of the Army to review and rescind or revise the 2015 Rule. The EPA and the
 30 Army Corps of Engineers are in the process of considering a revised definition of "Waters of the
 31 United States" consistent with the Executive Order. Local governments support a straight-
 32 forward rulemaking process, inclusive of the tenants of cooperative federalism. This approach
 33 acknowledges the shared responsibility of state and local governments in the governance and
 34 cooperation to work out details of responsibility. CWA Section 404 is largely federal with the
 35 exception of a small number of State Assumed 404 Programs (Michigan and New Jersey). If
 36 empowered, states and tribes could play an increased and more efficient role in managing the

¹ <http://www.nerwa.org/gwnews/db212.pdf>, The Value of Water and the Water Operator, by Doug Buresh, Circuit Rider #3

² [http://thevalueofwater.org/sites/default/files/Economic%20Impact%20of%20Investing%20in%20Water%20Infrastructure VOW FINAL pages.pdf](http://thevalueofwater.org/sites/default/files/Economic%20Impact%20of%20Investing%20in%20Water%20Infrastructure%20FINAL%20pages.pdf)-The Value of Water

37 program. Local governments too, have a strong role to play and can be key strategic partners in
 38 protecting our nation's water resources. Local governments manage broader water quality
 39 protection efforts such as managing stormwater, flood protection and enhanced watershed
 40 protection along with protecting the sources of drinking water. Local governments have the
 41 tools to strengthen wetland and stream protection efforts that better support community goals
 42 with greater protection for the resource. Integrated Planning (IP) offers municipalities the
 43 opportunity to meet multiple Clean Water Act requirements by sequencing separate
 44 wastewater and stormwater programs while maximizing investments so that the highest priority
 45 projects come first. EPA, states, and municipalities have achieved progress in implementing IP
 46 approaches while addressing the most serious water quality issues in order of priority to protect
 47 public health and the environment.

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49 ➤ **Clarity and Predictability**

50 A central theme heard by the LGAC in public meetings of state, local and tribal government
 51 officials on the 2015 'Waters of the U.S.' rule is that definitions were too broad or confusing and
 52 were subject to interpretation through litigation. Key terms used in the WOTUS rule are vague
 53 such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring"
 54 but are also important in defining what waters are jurisdictional. These terms are either broadly
 55 defined, or not defined at all which has led to further confusion, not less, over what waters fall
 56 within federal jurisdiction. Local governments need a rule that that puts forward clear
 57 definitions and provides examples and graphics for further clarity. Without this clarity, it could
 58 lead to further unpredictability and result in unnecessary project delays, subjective judgements
 59 and inconsistency across the country.

60

61 ➤ **Flexibility and Regionalization**

62 In formulating a revised 'Waters of the U.S.' rule it should have flexibility and reflect natural and
 63 regional variability of our nation's waters. As a basic approach, criteria could be established that
 64 recognizes natural ecoregions (delineated on the basis of natural and anthropogenic factors) to
 65 recognize geographic variability among regions. States and tribes should have further input in
 66 this process to modify or improve on this basic approach. Workgroups made up of federal, state
 67 and local officials could help establish local delineation factors characteristic of these regional
 68 waterbodies such as western ephemeral streams, and other unique wetlands such as pocosins,
 69 Carolina bays etc. should be factored. Western arid streams may need further regional
 70 determinations as whether these areas are washes and otherwise dry channels characterized by
 71 irregular (not seasonal) ephemeral flows or may actually qualify as waters of the United States.
 72 These jurisdictional calls of WOTUS should be the exception rather than the rule. Also, wetlands
 73 and streams in the State of Florida also should be considered in separate regional guidance since
 74 most of the State could be classified as a Waters of the U.S. due to high groundwater tables and
 75 surface connections with waters of the U.S.

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77 ➤ **Enhanced State and Local Government Role**

78 States play a vital role in the protection of wetlands by addressing waters and activities that
 79 *are not* regulated under the Section 404 program, or by imposing additional limits on

80 activities that *are* regulated under that program. Pursuant to Section 404(g) of the Clean
 81 Water Act, a state can *assume* the authority to issue permits for the discharge of dredged or
 82 fill material into waters regulated under the Clean Water Act other than traditional
 83 navigable waters or waters seaward of the high water mark (33 U.S.C. § 1344(g)). EPA's
 84 regulations also authorize tribes to assume Section 404 permitting authority within their
 85 jurisdiction (40 C.F.R. § 233.2). In order to assume Section 404 permitting program, a state
 86 must enact laws and regulations to create a program that meets requirements designed to
 87 ensure that the state can administer the Section 404 permitting program as the Corps. This
 88 process could be streamlined and could be incentivized for state assumption. States can
 89 play a greater role in the administration of the federal program and streamline permitting
 90 for developers in the state through a State Programmatic General Permit. CWA Section
 91 404(e) authorizes the Corps of Engineers to issue general permits "on a state, regional or
 92 nationwide basis for any category of activities involving discharges of dredged or fill
 93 material" if there are only minimal adverse environmental effects. Local regulation of
 94 wetlands in addition to the state and federal programs have many benefits as well. Local
 95 decision makers have numerous land use tools available that can be more effective, and
 96 with less cost, protect sensitive landscapes valuable to their community such as with
 97 building permits, zoning authority, sanitary and health codes, and soil erosion control.

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 99 ➤ **Modified Scalia Approach**

100 The Scalia opinion applies a narrow interpretation to CWA jurisdiction, extending the agencies'
 101 regulatory authority only to "relatively permanent, standing or continuously flowing bodies of
 102 water" connected to traditional navigable waters, and to "wetlands with a continuous surface
 103 connection to" such relatively permanent waters. Local governments in general support a
 104 narrow interpretation and put forward that the criteria in the 2008³ guidance has clear criteria
 105 for categorical jurisdiction of 'yes', 'no' or 'maybe' which might be considered as a modified
 106 Scalia approach. Local governments are also concerned about the assurances that water
 107 resources which provide (or potentially provide) our communities' drinking water and source
 108 water are regulated and protected. These significant waterbodies form the assets of our water
 109 infrastructure and these areas may or may not fall within the Scalia interpretation as "connected
 110 to a federal navigable waterway." Local governments would potentially support States and
 111 Tribes assisting to identify these significant waterbodies by delineating and mapping these
 112 significant 'Waters of the State'. These areas once identified should have primacy in decision-
 113 making.

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 115 ➤ **Exemptions**

116 Exemptions for stormwater and green infrastructure are important for local government. Local
 117 governments would be supportive of a revised rule that would retain codification of the waste

³ <https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents>

118 treatment exemption. It should also extend to MS4s, stormwater ponds, settling basins recycled
 119 water facilities which depend upon artificially created wetlands and storage ponds to treat
 120 millions of gallons of water a day. There has also been a major concern of county governments
 121 that roadside ditches are exempt. The revised rule should affirm also that reservoirs along with
 122 influent and treated effluent storage ponds are within the scope of the waste treatment
 123 exemption, consistent with the regulatory definition of "complete waste treatment system"
 124 found in existing federal regulations including features such as storage ponds, basins, artificially
 125 created wetlands, recycled water reservoirs and other features associated with water recycling.⁴
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127 ➤ **Permitting Reform**

128 The permitting system is complex and outdated. Agencies' budgets and staffing are
 129 overwhelmed and lack resources to respond to individual permits. At the same time, the private
 130 sector confronts time-consuming requirements that pose significant delays and economic
 131 burdens. Permitting can be made more efficient and more effective. For example, permitting
 132 length of time can be done more efficiently (less than 60 days) and it can also be more flexible,
 133 decentralized and integrated with community goals. Local governments would be generally in
 134 favor of State Assumption of the 404 program and other innovations to streamline the
 135 permitting process. Also, further consideration of General Permits and mapping would aid in
 136 permitting reform.
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138 ➤ **Agriculture, Rural Communities and Waters of the U.S.**

139 Agriculture and rural communities have expressed concerns about the Waters of the U.S. Most
 140 of the concern of the rule has been whether it would modify existing statutory provisions that
 141 exempt "normal farming and ranching" practices from dredge and fill permitting or others that
 142 exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff,
 143 from all CWA permitting. The other key area of concern was the confusion whether or not
 144 ditches were exempt. Normal agricultural and silvicultural practices are exempt but the
 145 interpretive rule issued (but then withdrawn) to clarify the 56 practices that are exempt from
 146 CWA Section 404 permitting was very confusing to farmers. Other issues for rural communities
 147 is the NPDES permits for application of pesticides and herbicides in WOTUS. Also, there is a
 148 concern that 'prior converted croplands' which are exempt if they are certified by NRCS are also
 149 exempt from wetland regulations administered by the Army Corps of Engineers and EPA
 150 (Section 404 of the Clean Water Act). However, if the land changes to a non-agricultural use, or
 151 is abandoned, according to the criteria established by the Corps and EPA, it may be regulated
 152 under the CWA. These issues combined with the complexity of the WOTUS and the role of the
 153 NRCS poses significant issues for the agricultural sector and rural communities.
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⁴ 1 See 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process."

155 ➤ **Outreach to Local Governments**
 156 There is a need for enhanced outreach to local governments. Its significance in WOTUS decision-
 157 making is all the more critical. A comprehensive communication strategy is needed for local
 158 governments that improves the channels of information distribution, and explicit
 159 communication at all levels of government. Getting information into the hands of local
 160 governments where it will have the most impact must be a priority. This is particularly
 161 relevant in small, disadvantaged and ethnically diverse communities. Local governments need
 162 to act effectively so that information will reach all relevant parties so it can also be readily
 163 communicated effectively to citizens. Therefore, there will be a pressing need to improve
 164 governmental communication and transfer of information among the EPA, state, tribal and
 165 local governments, and getting that information out to the public. Specific tailored
 166 information for local elected officials is also needed to convey the effective changes of the
 167 WOTUS rule.

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 169 **Affordability**
 170 One of the common themes heard from local governments revolves around affordability. This
 171 issue has several components including the ability of ratepayers to pay the cost of regulatory
 172 compliance, pollution and clean-up costs, punitive costs that only serve to reduce local
 173 government resources and the disproportionate costs for small and economically disadvantaged
 174 communities. If the goal is safe, clean water throughout the country, innovation in approach and
 175 cost allocation must be considered at the federal, state, tribal and local levels.

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