

1 **CHARGE QUESTIONS AND DRAFT RESPONSES**

2       ➤ **Question: 1-** How would you like to see the concepts of 'relatively permanent' and 'continuous  
3 surface connection' be defined? How would you like to see the agencies interpret 'consistent  
4 with Scalia'? Are there particular features or implications of any such approaches that the  
5 agencies should be mindful of in developing the step 2 proposed rule?  
6

7 **1.a. How would you like to see the concepts of 'relatively permanent' and 'continuous surface  
8 connection' be defined?**  
9

10 **Background:**

11 In the *Rapanos v. United States* 547. U.S. 715 (2006), the Supreme Court provided a plurality decision of four  
12 justices, led by Justice Scalia. The decision basically challenged federal jurisdiction to regulate isolated wetlands  
13 under the Clean Water Act. It also applied a very narrow interpretation to CWA jurisdiction, extending the agencies'  
14 regulatory authority only to "relatively permanent, standing or continuously flowing bodies of water" connected to  
15 traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent  
16 waters. Justice Kennedy focused on whether the waters in question have a "significant nexus" to traditional navigable  
17 waters, *i.e.*, whether they, "either alone or in combination with similarly situated lands in the region, significantly affect  
18 the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

19 The LGAC has previously commented that they would prefer a clear and simple approach for jurisdictional  
20 determinations such as an approach that yields categorical answers of jurisdiction in these categories: 'yes', 'no' or  
21 'maybe' responses. Any of these answers are sufficient for local governments if these answers are provided in a  
22 timely fashion.

23 **Recommendation:** EPA and the Corps should apply simple approaches that yield jurisdictional calls with simple  
24 criteria that give a 'yes', 'no' or 'maybe' answer. (LGAC Report 2014)

25 **[Council Member Brad Pierce-City of Aurora, CO Comments]**  
26

27 **Potential Approaches to "Relatively Permanent" Waters**

28 The potential approaches to include streams with seasonal flows or streams with another outflow will  
29 capture ephemeral and intermittent streams into the definition of "relatively permanent" waters,  
30 which we believe is inappropriate. Each of these approaches would need to define metrics and  
31 thresholds at which a stream is considered "relatively permanent," and such metrics will vary  
32 geographically on a case-by-case basis and the definition of thresholds will be subjective.

33 Including perennial streams only as "relatively permanent waters" is the appropriate approach. EPA  
34 should ensure that ephemeral and intermittent streams and erosional features in the arid West, such  
35 as arroyos and dry washes, are non-jurisdictional. Ditches and canals that only carry intermittent flows  
36 of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control  
37 features that periodically flow in response to significant precipitation events, should also be exempted.

38 **Potential Approaches to Wetlands with a "Continuous Surface Connection"**

39 The potential approach to develop metrics to identify "some degree of connectivity" should not be  
40 utilized. This will require subjectively defining thresholds for what constitutes a significant degree of  
41 connectivity, which should be avoided. While including as jurisdictional those wetlands that directly  
42 touch jurisdictional waters is appropriate, there may also be circumstances where the current  
43 practice of considering wetlands with a continuous surface connection, regardless of distance, to be

44 jurisdictional is not appropriate. Such connections should be perennial and should not include  
 45 ephemeral and intermittent connections.

46 Wetlands with permanent, continuously flowing, surface connections should be included. Where  
 47 such connections do not exist, the wetlands should be exempted. EPA should ensure that where  
 48 there are overland flows through dryland breaks to a WOTUS, this type of break renders a tributary  
 49 up gradient of the dryland break to be non-jurisdictional. EPA should explicitly recognize that  
 50 features where water may be present (for instance, in residual ponds resulting from placer or other  
 51 mining efforts) are not jurisdictional where a continuous physical channel is absent, a bed-and-bank  
 52 is not discernible, an ordinary high water mark is not observable, and/or there are no flow  
 53 characteristics.

54  
 55 **1.b. How would you like to see the agencies interpret 'consistent with Scalia'?**

56 **Background:**

57 EPA and the Corps issued the 2008 guidance document following the Rapanos case that was intended to clarify  
 58 WOTUS. It does so by asserting CWA jurisdiction over waters that would meet *either* the plurality test (relatively  
 59 permanent, continuous surface connection) *or* the Kennedy test (significant nexus). In the Guidance and  
 60 Memorandum of Agreement between the Corps and EPA, there is a list of key questions and answers, that generally  
 61 breaks the jurisdictional analysis into three major categories. **NOTE: This guidance did not go out sufficiently for  
 62 public review and was not communicated well to local governments and other stakeholders.** The first, and  
 63 presumably more manageable, category includes those waters over which CWA jurisdiction will be asserted in every  
 64 case; those that do not and the maybe that have a 'significant nexus'.

65 **1.c. Are there particular features or implications of any such approaches that the agencies should be  
 66 mindful of in developing the step 2 proposed rule?**

67  
 68 ♦Recommendation: Criteria as outlined in the 2008 guidance and or modified can be modified to address clearer  
 69 definitions and pose a series of questions of relatively permanent or continuous. If answers are 'yes' or 'no' it leads to  
 70 a 'yes', 'no' or 'maybe' jurisdictional determination.

71 ♦Recommendation: EPA and the Corps should establish an Interagency Taskforce to develop the matrix of  
 72 questions to determine 'permanent' and 'continuous' indicators. Their results should be published and the public  
 73 given the opportunity to give comment. (LGAC 2014 Report)

74 ♦Recommendation: An application for Smart phone or hand-held computer should be developed to give a quick  
 75 jurisdictional determination and sent to all interested parties. (LGAC 2014 Report)

76 ♦Recommendation: Manmade conveyances, stormwater treatment systems, ditches, farm and irrigation ditches and  
 77 green infrastructure amenities should be exempt from jurisdiction. Where possible, EPA and the Corps should work  
 78 with State, local and tribal governments to map these features as well. (NOTE: Drinking water and wastewater  
 79 treatment utilities may have these features mapped as part of Asset Management features). (LGAC 2014 Report)

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 81  
 82  
 83  
 84

85 ➤ **Question 2-** What opportunities and challenges exist for your locality with relying on Justice  
 86 Scalia's opinion?  
 87

88 **Background:**

89 Cities and communities care deeply about the quality of water. A concern is where interpretative rules that do not  
 90 provide sufficient clarity, may add to costs and delays without causing important improvement to water quality.

91 **(Goodman letter)** We understand that the goal is to make it easier to identify WOTUS a rule interpreting Scalia may  
 92 not draw bright enough lines for local governments to easily identify those waters affected. Therefore, the use of the  
 93 Scalia approach of itself is unlikely to significantly resolve all of the considerable uncertainty surrounding CWA  
 94 jurisdiction (either then or now), or prevent continuing litigation to test the agencies' interpretations in the federal  
 95 courts. However, the 2008 guidance does have criteria that will pose less uncertainty and yield faster results. If the  
 96 guidance were to be revised to include clearer definitions and for review to get input from states, local and tribal  
 97 governments and other stakeholders it could perhaps help to resolve these issues.  
 98

99 ♦**Recommendation:** Relying on a modified Scalia approach with modified 2008 guidance can provide a clearer  
 100 certainty of federal jurisdictional waters which will lead to more certainty and more ease in permitting.

101 ➤ **Question 3:** Are there other approaches to defining "waters of the U.S." that you would like  
 102 the agencies to consider to providing clarity and regulatory certainty?  
 103

104 **Background:**

105 The 2008 guidance document issue post Rapanos offers assistance and criteria to assess jurisdiction of WOTUS  
 106 (post Rapanos). It is consistent with the Scalia approach but also asserts a modified CWA jurisdiction over some  
 107 waters. This approach would reflect the opportunity to cover waters significant to states, locals and tribes. The  
 108 WOTUS rule also confirms certain exemptions from federal jurisdiction, offering federal clarification where there has  
 109 previously been uncertainty. These exemptions include stormwater detention ponds, wastewater treatment facilities,  
 110 and "puddles."  
 111

112 ♦**Recommendation:** The LGAC recommends that a similar approach articulated in the guidance to the 2008 guidance  
 113 be used to revise the WOTUS rule.

114 ♦**Recommendation:** "Significant nexus" test refers to waters that "significantly affect the chemical, physical, *and*  
 115 biological integrity" of traditionally navigable waters, the 2015 WOTUS Rule covers waters that affect the "chemical,  
 116 physical, *or* biological integrity" of navigable waters. That should be changed to 'and' and include all three  
 117 parameters. (LGAC 2014 Report)

118 ♦**Recommendation:** The 2015 rule regulates any area having a trace amount of water if it also has – or ever had – a  
 119 bed, banks, and an ordinary high water mark (OHWM). This could include many stormwater channels and other  
 120 features that are almost perpetually dry. Any channel that is part of a stormwater, drinking water utility treatment  
 121 system should be exempt from a WOTUS jurisdictional determination. For the 2017 revised rule, there could be more  
 122 predictability and certainty in general if there is a dry bed with a OHWM (with historical aerial or infrared photography  
 123 that it can be established a WOTUS)

124 ➤ **Question 4-**The agencies' economic analysis for step 2 intends to review programs under CWA  
 125 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could  
 126 be affected but would not be captured in such an economic analysis?  
 127

128 The Economic Analysis should be broad to include impacts to not only Clean Water Act programs but also state and  
 129 local programs. Below are programs from a local government perspective that should be considered in the Economic  
 130 Analysis:

131 **Source Water Protection-**There is a general consensus that protecting the nation's water resources is important to  
 132 local government. Local governments realize that poor water quality affects the health and economies of their

133 communities, disproportionately impacting those that are low-income. Local governments also realize that protecting  
 134 source water bodies like rivers, lakes, streams, wetlands and groundwater is paramount to protecting drinking water.  
 135 (LGAC 2016 Drinking Water Report). **Under the Safe Drinking Water Act**, Source Water Assessments (SWAs)  
 136 provide information about sources of drinking water used by public water systems. SWAs are studies or reports  
 137 developed by states to help local governments, water utilities, and others protect sources of drinking water and are  
 138 done differently by each state. Each program is adapted to a state's water resources and drinking water needs. To  
 139 protect source water, the tools of the Safe Drinking Water Act (SDWA) and Clean Water Act (CWA) programs are  
 140 utilized to protect source water. Additional protection tools can be found in other EPA programs and various  
 141 agricultural programs. Changes made to CWA programs may greatly impact state and local source water protection  
 142 programs and plans. This could have significant economic impacts to local communities. For example, in Flint,  
 143 Michigan shifting the source water to the Detroit River water resulted in significant deterioration of water quality that  
 144 produced significant public health and economic problems. In Portland, Oregon where source water is protected it  
 145 results in less cost to the rate payers by having Clean Water Protection programs in place. It is unclear how changes  
 146 in a revised rule will impact streams and tributaries that impact local sources of drinking water. If adequate CWA  
 147 protections are not in place it could have significant negative economic impacts to water utilities. This costs are likely  
 148 be transferred to local governments and rate payers. It is also unclear how this may impact the prevalence of toxic  
 149 algal blooms which have proved very costly on drinking water.

150 **CWA Section 402** - The NPDES permits and discharges could hold significant economic issues for local  
 151 governments in regard to WOTUS for wastewater treatment, stormwater management, CSOs, and application of  
 152 pesticides (used for vector control). WOTUS IN 2015 had been a concern about expanded federal jurisdiction to  
 153 previously unregulated streams, ditches, and wetlands. However, the final rule includes exclusions beneficial for  
 154 those that operate MS4s. The rule includes key exclusions that may be useful for localities. The rule retains a  
 155 long-standing exclusion for "waste treatment systems," such as treatment ponds and lagoons. It also adds new  
 156 exclusions for artificially created ponds, settling basins, construction and mining excavation pits, and wastewater  
 157 recycling structures. Lastly, the rule finally codifies the well-understood principle that the CWA does not apply to  
 158 groundwater. For MS4s, the primary concern about the rule has been that it could potentially be used  
 159 as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are "waters of  
 160 the US." That could mean, for example, that NPDES permit coverage would be required to discharge **into** an MS4 or  
 161 that a CWA 404 permit would be required to do maintenance on a BMP. The final rule includes, for the first time, a  
 162 regulatory exclusion for "Stormwater control features constructed to convey, treat, or store stormwater that are  
 163 created in dry land." However, the exclusion does not apply to ditches that were created in previously  
 164 existing streams or wetlands. The rule's exclusions are important because they take precedence over the rule's  
 165 jurisdictional tests. For example, a stormwater conveyance ditch that qualifies for the stormwater exclusion would be  
 166 excluded from CWA jurisdiction even if the ditch would be considered a jurisdictional water under the tributary test.  
 167 Furthermore, in a reversal of EPA and the Corps' previous position, the agencies stated that they do not retain any  
 168 discretion to extend CWA jurisdiction to water features that qualify for one of the rule's exclusions. It is unclear how a  
 169 revised rule will impact Section 402 permits. Potentially, Section 402 permits could prove more costly than Section  
 170 404 permitting at the local level in regard to stormwater and wastewater treatment.

171  
 172 **Pesticide Applications in Waters of the U.S.** - Since 2011, pesticide applications into, over, or near WOTUS are  
 173 permitted under the CWA National Pollutant Discharge Elimination System (NPDES) Program due to a 2009 U.S.  
 174 Court of Appeals for the Sixth Circuit ruling. Agricultural producers, pesticide applicators and local governments have  
 175 opposed or expressed concerns on the permitting largely on the grounds that it is duplicative and unnecessary to  
 176 regulate pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act  
 177 (FIFRA). Local governments, mainly county governments are largely responsible for vector control programs to  
 178 manage mosquitos and spraying of insecticides to reduce vectors and public health concerns. Although the CWR  
 179 would have arguably expanded the scope of the waters requiring pesticide permitting, the replacement or elimination  
 180 of the CWR will not end NPDES requirements for pesticides however it may provide opportunity to clarify what  
 181 discharge waters are subject to federal versus state permits.

182 **Section 303 (d)**- Currently, The National Rivers and Streams Assessment (NRSA) 2008-2009 report provides  
 183 information on the biological and recreational condition of the nation's rivers and streams and the key stressors that  
 184 affect them. The Report indicated that about half of our nation's streams (some of which provide sources of drinking  
 185 water) have poor water quality. Poorer water quality could result in significant treatment costs such as Impaired Water  
 186 sites under CWA Section 303(d) and transfer the costs to local governments. In addition, communities that rely on  
 187 these water bodies for drinking water and source water the cost will ultimately be transferred to rate payers having a

188 significant economic impact to local governments. It is uncertain how changes in a revised WOTUS rule will impact  
 189 on local governments and their local efforts to improve access to clean water.

190 Section 319 and Other Grants-It is uncertain as to how the determination of WOTUS will impact grants to states and  
 191 communities. A grant may be given a priority if it given to protect a Water of the U.S. It is uncertain how that would  
 192 impact states and communities.

193 The Coastal Zone Management Act (CZMA) of 1972 provides for the management of the nation's coastal resources,  
 194 including the Great Lakes. The goal is to "preserve, protect, develop, and where possible, to restore or enhance the  
 195 resources of the nation's coastal zone." It is administered by the National Oceanic and Atmospheric Administration  
 196 (NOAA). The National Coastal Zone Management Program aims to balance competing land and water issues through  
 197 state and territorial coastal management programs through state and locally managed Coastal Zone permits. These  
 198 CZMA Programs work in tandem with the many tools of the CWA including Section 404. The Economic Analysis  
 199 should include an assessment of the economic impact to coastal resources and wetlands, including an economic  
 200 impact analysis to water dependent industries such as fishery (salmon and seafood industry), tourism, and other  
 201 water dependent industries. For example, in the Puget Sound region, fish hatchery and harvest operations reeled in  
 202 about \$18 million to tribal personal income. In areas where the average annual per capita income is around \$10,000,  
 203 a decline in the availability of healthy fish can significantly impact the economies of these communities. (LGAC  
 204 Drinking Water Report). An example, the LGAC worked with is evaluating the impacts of the Deepwater Horizon Spill  
 205 to local governments in the Gulf of Mexico. The Gulf fishing and tourism industries produce \$3.5 - \$4.5 billion a year.  
 206 Without adequate federal CWA authorities in place other potential impacts could occur having deleterious impacts to  
 207 local economies and natural resources.

- 208
- 209 ➤ **Question 5- What additional information can you provide from a local government**
- 210 **perspective that EPA should be aware of?**
- 211

212 **DEFINITIONS (LGAC 2014 Report)**

213 **Background:**

214 *The LGAC fully supports and endorses EPA's efforts for clarification of Waters of the United States.*  
 215 *These improvements are long overdue. The LGAC highlights clarity in definitions is critical for the*  
 216 *revised rule. While the LGAC does not have specific language recommendations for all of the*  
 217 *definitions of a revised rule, the LGAC offers the following for the EPA to consider including,*  
 218 *redefining or clarifying in the rule.*

219  
 220 *These recommendations for definitions are brought forward to consider in the 2017 WOTUS Rule.*

221  
 222 **Recommendations:**

223 ♦ *The LGAC recommends that EPA should, where appropriate, use definitions that are used*  
 224 *consistently across all of the federal agencies, e.g. EPA, Army Corps of Engineers, Federal*  
 225 *Emergency Management Agency, Department of Agriculture, U.S. Geological Survey and U.S.*  
 226 *Forest Services.*

227  
 228 ♦ *The LGAC recommends that an Interagency Workgroup be tasked to develop a glossary of*  
 229 *definitions and publish this Interagency Glossary of Terms, following public review.*

230  
 231 ♦ *The LGAC recommends that definitions be practical, written in plain English, and be*  
 232 *enforceable.*

233

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

236  
 237 ♣ *The LGAC recommends that the public have the opportunity to comment on these proposed*  
 238 *definitions.*

239  
 240 ♣ *The LGAC recommends that the following terms, among others, be defined concisely and with*  
 241 *clarity: 'other waters', 'significant nexus', 'adjacent' and 'upland'. Furthermore, the LGAC*  
 242 *recommends 'upland' be defined based upon exclusion of what it is not.*

243  
 244 ♣ *The LGAC recommends that EPA consider the following when defining these terms:*

245  
 246 **Wetlands**

247 ♣ *The LGAC recommends that the current definition of wetlands be used: "areas that are inundated*  
 248 *or saturated by surface or ground water at a frequency and duration sufficient to support and that*  
 249 *under normal circumstances do support a prevalence of vegetation typically adapted for life in*  
 250 *saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."*

251  
 252 **Floodplains**

253 ♣ *The LGAC recommends using the definition of the Interagency Taskforce on Floodplains-*  
 254 *"Floodplains include low-lying areas adjacent to and the water bodies of streams, rivers, lakes,*  
 255 *estuaries, and coastal zones that are inundated or may become inundated as a result of changing*  
 256 *conditions." The definition of floodplains should take into account movement of flood lines due to*  
 257 *account extreme weather events.*

258  
 259 **Riparian area**

260 ♣ *The LGAC recommends that riparian areas be defined as "an area bordering a water where surface*  
 261 *or subsurface hydrology directly influence the ecological processes and plant and animal community*  
 262 *structure in that area. Riparian areas are transitional areas between aquatic and terrestrial*  
 263 *ecosystems that influence the exchange of energy and materials between those ecosystems."*

264  
 265 **Floodway**

266 ♣ *The LGAC recommends that 'floodway' be defined as a flood course within the banks or within a*  
 267 *canyon where water would be expected to flow under normal circumstances.*

268  
 269 **Ditches**

270 ♣ *The LGAC recommends a clear definition of 'ditch' be provided in the proposed rule.*

271 ♣ *The LGAC recommends the following Google Dictionary definition of 'ditch': a "narrow channel dug*  
 272 *in the ground typically used for drainage". Examples listed are trench, croft, channel, dike, drain,*  
 273 *watercourse conduits.*

274  
 275 **Tributaries**

276 ♣ *The LGAC recommends a clear definition of 'tributaries' be included in the proposed rule using*  
 277 *clarifying examples.*

278 ♣ *The proposed rule refers to a term "rain dependent stream". The LGAC recommends that this term*  
 279 *be defined and an example of a stream that is not rain dependent be provided.*

280 **Significant Nexus**

281 ♦ *The LGAC regards this to be the most important definition contained within the proposed rule and*  
 282 *at the heart of jurisprudence in the issue of Waters of the U.S. It is uncertain how 'significant' nexus*  
 283 *would be interpreted so the Committee recommends EPA describe significant nexus such that it is in*  
 284 *plain English, with specific terms and examples.*

285  
 286 ♦ *The LGAC recommends that the agency consider all three parameters of water quality in this*  
 287 *determination so that "the chemical, physical, and biological integrity of water" be the criteria used*  
 288 *for 'significant nexus'. Likewise, the LGAC does not agree that only one of these features be used as the*  
 289 *benchmark, but that all three parameters of chemical, physical and biological integrity of a water*  
 290 *body are all equally important.*

291  
 292 ♦ *The LGAC does not agree with the term "significant effect" and also recommends language of*  
 293 *"insignificant or speculative" be deleted.*

294  
 295 ♦ *The LGAC is aware that the EPA charged the Science Advisory Board with interpreting significant*  
 296 *nexus and connectivity based on the best science available. The LGAC is uncertain as to how the revised*  
 297 *rule will make benefit of these important and critical definitions; however, the findings may be*  
 298 *important to factor into a revised rule. (REWRITTEN from LGAC 2014 Report)*

299  
 300 **[Representative Tom Sloan comments]**

301 Intermittent streams, playa lakes, wetlands, and other waters:

302 1. In cooperation with states, the EPA to designate intermittent streams and other waters as non-waters  
 303 of the U.S. based on the following criteria:

304 a. Seasonal flow of running or standing water — each state to develop its own criteria subject to  
 305 EPA review and approval;

306 b. Because of the variability of conditions within and between states, the EPA to provide guidelines  
 307 for state standards that include factors to be considered, but which do not constitute federal standards.  
 308 Such factors to include average number of days of stream flow, seasonality of stream flow, rate of stream  
 309 flow, TMDL levels during such periods, amount of water and TMDLs delivered to the "next" body of water,  
 310 and such other relevant factors as the Agency deems appropriate.

311 c. State standards/factors should reflect possible ground water recharge rates from intermittent  
 312 streams, playa lakes, wetlands, and other waters. Similarly, factors should include potential  
 313 contamination of ground water from such water bodies.

314 d. States shall develop metrics for each standard they propose and submit to the EPA for review and  
 315 approval. EPA to have 120 days from receipt of a completed state plan to review, propose revisions, or  
 316 deny the submitted standards and metrics. Failure to complete the analysis within 120 days, subject to  
 317 the EPA and state agreeing on a time extension, shall result in the submitted standards and metrics being  
 318 deemed accepted.

319 e. Three years after the state-submitted standards are accepted, each state shall submit a report to  
 320 the EPA detailing whether the waters in question continue to meet the EPA-accepted standards, as  
 321 determined by the state's metrics. The EPA shall determine whether each state shall submit subsequent  
 322 reports on an annual or other timeline basis.

323 f. If new, generally accepted scientific findings on issues that may affect water quality standards  
 324 related to intermittent streams, playa lakes, wetlands, or other designated waters are  
 325 determined, the EPA may request states review their standards and submit proposed revised  
 326 plans for the Agency's consideration and approval.

327 Permanent Bodies of Water:

328 a. Some wetlands are seasonal and have been addressed above. For those that are permanent,  
 329 states should be empowered to develop metrics that demonstrate whether the waters released from the  
 330 wetlands to jurisdictional waters are "cleaner" than the waters that otherwise would flow to those  
 331 jurisdictional waters if the wetlands were not present.

332 b. States to submit proposed standards and measurement techniques to the EPA for review and  
 333 approval. EPA to have 120 days from receipt of completed state plan to review, suggest revisions, and  
 334 approve or deny the submitted plan. If the review is not completed within 120 days, subject to extension  
 335 if the EPA and state agree, the submitted plan shall be deemed accepted.

336 c. States to be encouraged to develop standards and metrics regarding waters from wetlands and  
 337 other bodies' impact on ground water quality.

338 ➤ **Question 6- Are there other issues the agencies should consider which would help ease the**  
 339 **regulatory burden for implementation of WOTUS for state, local and tribal government?**  
 340

341 **Background**

342 *The LGAC believes that clear boundaries of WOTUS jurisdiction and clear exemptions are crucial*  
 343 *for the support of local governments. Clear boundaries provide for more equitable and predictable*  
 344 *permitting and also for better protection of our water resources. (LGAC 2014 Report)*  
 345

346 *The LGAC concludes, based upon the testimony that we heard and the analysis of the Committee,*  
 347 *that a revised rule can significantly clarify the historic confusion and uncertainty resulting from*  
 348 *conflicting case law and Supreme Court decisions. (LGAC 2014 Report)*  
 349

350 *The LGAC has heard a broad level of concerns from municipal associations and county*  
 351 *governments concerning MS4s. The LGAC is uncertain of what the regulatory impact will be on*  
 352 *MS4s as the proposed rule is currently written. MS4s and green infrastructure are foundational to*  
 353 *the continuum of care that is being implemented at the local level to improve water quality.*  
 354 *(LGAC 2014 Report)*  
 355

356 Much of the uncertainty of MS4s, stormwater and green infrastructure is centered on whether  
 357 these collection systems or portions of the systems will be required to meet State Water  
 358 Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load

359 (TMDL) because they will now be considered a "water of the United States." WQS and TMDL  
360 were not designed for this application so application within a collection system seems  
361 improper. WQS define goals for a waterbody by designating its uses and setting criteria to  
362 protect those uses, but there is no established designated use for MS4s. Without a designated  
363 use, the default required designated use is as "fishable/swimmable," unless the state  
364 demonstrates that it is not attainable for one of six particular reasons, none of which is because  
365 the waters serve as storm-water conveyances. A pending EPA proposed rule on water quality  
366 standards could make use designation analyses more stringent (i.e., by requiring a "highest  
367 attainable use" presumption). Also, if it is not deemed jurisdictional under Section 404 it will  
368 likely need a Section 402 permit and subject to WQS. (Goodman Letter)

369  
370 There could be potential impacts to wastewater systems and the NPDES permitting related to  
371 these systems. Because of the exclusion language, the Agency did not seem to analyze the  
372 impact to wastewater systems but some cities have raised questions whether some part of  
373 combined sewer systems or other aspects of a wastewater treatment systems would be  
374 considered within the jurisdiction of the EPA based upon the WOTUS rule. (Goodman Letter)

375  
376 *Many communities already heavily focus on water quality programs and projects; these*  
377 *communities should be encouraged and incentivized to do more. A revised rule should recognize*  
378 *that much of the action towards cleaner water happens at the local level. High performing local*  
379 *agencies should be noted as following best practices and afforded a relaxed regulatory*  
380 *environment in those circumstances where water quality objectives are met and exceeded. (LGAC*  
381 *2014 Report)*

382  
383 *The LGAC believes that making jurisdiction calls of what is exempt and what is not in a timely*  
384 *fashion is critical to protecting water resources and providing predictability to state and local*  
385 *governments. The LGAC believes that easily accessible predictive tools need to be developed and*  
386 *utilized to speed this process. (LGAC 2014 Report)*

387  
388 **Recommendations:**

389 ♦ *The LGAC recommends that the use of State General permits be expanded to reduce the regulatory*  
390 *burden and also be used for smaller projects with minimal impacts. It could also be used to address*  
391 *regional and state specific activities and types of water bodies. Under Section 404(e) of the Clean Water*  
392 *Act, the U.S. Army Corps of Engineers can issue general permits to authorize activities that have minimal*  
393 *individual and cumulative adverse environmental effects. Nationwide permits can authorize a wide*  
394 *variety of activities such as mooring buoys, residential developments, utility lines, road crossings, mining*  
395 *activities, wetland and stream restoration activities, and commercial shellfish aquaculture activities. All*  
396 *permits, whether individual or general, must be reissued every five years.*

397  
398 ♦ *The LGAC recommends that EPA clearly articulate jurisdictional waters in an outreach plan*  
399 *which, in plain English, describes these areas with a clear statement of why they are in need of*  
400 *protection. This will provide local governments with more certainty and assurance in*  
401 *communicating the rule to their communities. (LGAC 2014 Report)*

402

- 403     ◆ *The LGAC highly recommends explicitly specifying when ditches would be considered*  
 404 *jurisdictional. (LGAC 2014 Report)*  
 405
- 406     ◆ *The LGAC recommends that manmade conveyance components of MS4s be exempt from*  
 407 *Waters of the United States. This includes manmade green infrastructure, roads, pipes, manmade*  
 408 *gutters, manmade ditches, manmade drains, and manmade ponds. (LGAC 2014 Report)*  
 409
- 410     ◆ *The LGAC recommends that natural conveyance components of MS4s are included in Waters*  
 411 *of the United States. This includes natural wetlands and associated modifications to natural*  
 412 *wetlands. (LGAC 2014 Report)*  
 413
- 414     ◆ *The LGAC recommends that green infrastructure projects be exempt from WOTUS and that*  
 415 *they should be incentivized to protect water resources.. (LGAC 2014 Report)*  
 416
- 417     ◆ *The LGAC recommends that there be some criteria which exempt certain activities in Waters*  
 418 *of the U.S. for public safety and hazards. This is particularly critical in flood prone areas and for*  
 419 *disadvantaged communities in floodways that may need to have emergency relief quickly and*  
 420 *rapidly. (LGAC 2014 Report)*  
 421
- 422     ◆ *The LGAC recommends that EPA work to identify regional areas where jurisdictional*  
 423 *determinations could be problematic in terms of sea level rise and where groundwater and*  
 424 *surface flow intermix. For example, it is unclear how the state of Florida juxtaposed nearly at sea*  
 425 *level, will be categorized. In this specific region, conceivably all waters could potentially be*  
 426 *jurisdictional. The LGAC recommends that specific guidance be developed to address and classify*  
 427 *these areas with region-specific criteria used to assess this determination. (LGAC 2014 Report)*  
 428
- 429     ◆ *The LGAC recommends that EPA, working with the Corps of Engineers, develop a tool for use*  
 430 *by local governments which a permittee can use to assess their own jurisdictional status. For*  
 431 *example, this could involve a simple categorical, printable questionnaire in a decision tree*  
 432 *framework with questions aimed with an outcome of 'yes', 'no' or 'maybe-call your local Corps*  
 433 *representative'. The LGAC recommends this method be computerized and developed as a*  
 434 *smartphone application which yields a simple predictive outcome. (LGAC 2014 Report)*  
 435
- 436     ◆ *The LGAC recommends that EPA work directly with stormwater associations to provide*  
 437 *guidance to best address MS4s, stormwater controls, and their jurisdictional determinations.*  
 438 *(LGAC 2014 Report)*  
 439
- 440     ◆ *The LGAC recommends that EPA look to stormwater experts and the practical advice that*  
 441 *stormwater professionals can lend to the final rule the EPA is considering in Waters of the U.S.*  
 442 *(LGAC 2014 Report)*  
 443
- 444     ◆ *The LGAC recommends addressing how mining impoundments or borrow pits will be*  
 445 *addressed within jurisdiction of WOTUS. (LGAC 2014 Report)*  
 446

447 ♣ *The LGAC recommends that regional and local technical manuals as well as other*  
 448 *communication tools (e.g. checklists, smartphone apps, etc.) that account for geographic*  
 449 *differences in each EPA region be developed to assist with jurisdictional calls. (LGAC 2014 Report)*  
 450

451 ♣ *The LGAC recommends that EPA provide planning maps at the state level which could be used*  
 452 *as a planning tool to ascertain jurisdictional probability with high certainty. Such mapping would*  
 453 *include the Hydrologic Unit Codes (HUC) for waterways. (It is presumed that all waterways with a*  
 454 *designation of HUC-12 or less will be included in WOTUS.) (LGAC 2014 Report)*  
 455

456 **IMPLEMENTATION**

457  
 458 **Background**

459 *The LGAC heard a strong concern regarding implementation, especially from local governments.*  
 460 *Several local agencies reported uncertainty in interpretation as well as uncertainty in time and*  
 461 *cost to conclude the permit process. The rule language must be consistently interpreted by all*  
 462 *parties including the EPA, the US Army Corps of Engineers and local agencies. The rule should*  
 463 *stipulate responsiveness of permitting agencies. Otherwise, the LGAC is concerned that a revised*  
 464 *rule could further delay permits at the local level. (LGAC 2014 Report)*  
 465

466 **Recommendations:**

467 ♣ *The LGAC recommends that the rule stipulate time frames for permit review and jurisdictional*  
 468 *determinations. Time frames such as 60 to 90 days to obtain a permit would be well-received at*  
 469 *the local level. (LGAC 2014 Report)*  
 470

471 ♣ *The LGAC recommends that EPA more clearly identify how Preliminary Jurisdictional*  
 472 *Determinations would be processed to avoid unnecessary permit delays. (Goodman Letter)*  
 473

474 ♣ *The LGAC recommends that EPA Administrator work with the Chief of the US Army Corps of*  
 475 *Engineers to determine a process to reduce the issue of permitting delays of Section 404 permits.*  
 476 *These delays are a significant and a costly issue for local governments. (LGAC 2014 Report)*  
 477

478 ♣ *The LGAC recommends that state agency staff be utilized to make jurisdictional calls and*  
 479 *work in cooperation with local districts with subject matter expertise such as county-based*  
 480 *Conservation Districts or water management districts (e.g. Florida Water Management District).*  
 481 *These local agencies can work together with the Corps to streamline permitting. (LGAC 2014*  
 482 *Report)*  
 483

484 ♣ *The LGAC recommends that EPA regionalize wetlands delineation manuals to take into*  
 485 *account regional and local variability of vegetation, hydromorphology and hydroperiods. (LGAC*  
 486 *2014 Report)*

487 ♣ **Recommendation:** *The LGAC recommends that State agencies be delegated the authority to make jurisdictional*  
 488 *determinations. These determinations could be certified by the EPA and Corps District staff. Potentially, private sector*  
 489 *firms and/or individuals could be certified to make these determinations. This could relieve overburdened federal*  
 490 *agencies and accelerate the determination/permit process.*

491     ◆Recommendation: EPA and the Corps should encourage and provide incentives for States and Tribes to identify  
 492     and protect significant state or unique waters such as sources for drinking water to protect.

493     ◆Recommendation: EPA and the Corps should provide mapping of jurisdictional waters (8-Digit HUC). It should also  
 494     be accessible by zip code and available online.

495     ◆ *The LGAC recommends that EPA work further with the Committee to develop a cohesive*  
 496     *strategy to address local tools for stream and tributary protection so that it does not interfere*  
 497     *with local governments protecting and maintaining water resources for its citizens and*  
 498     *communities. For example, many local governments have zoning ordinances and coastal*  
 499     *management plans that are protective of streams, riparian areas, and sensitive wetland areas. It*  
 500     *is unclear how a revised rule in its current state will affect our ability at the local level to protect*  
 501     *our significant ecological areas. (LGAC 2014 Report)*

502  
 503     ◆*The EPA should work with local communities to utilize the regulatory tools that the Clean Water Act*  
 504     *(CWA) and the Safe Drinking Water Act (SDWA) provide in order to protect source water, especially for*  
 505     *low-income, minority, rural and tribal communities where this threat remains. (LGAC Drinking Water*  
 506     *Report 2016)*

507  
 508     ◆ *The LGAC strongly recommends that the EPA continue to explore how the SDWA and the CWA could*  
 509     *be coordinated to better protect source water and our nation's water resources. In addition, the LGAC*  
 510     *recommends that the EPA coordinate a Memorandum of Agreement with the U.S. Department of*  
 511     *Agriculture's Natural Resources Conservation Service (NRCS) to explore ways to reduce agricultural*  
 512     *runoff and improve soil health. (LGAC Drinking Water Report 2016)*

513  
 514  
 515     **STATE ASSUMPTION OF SECTION 404**

516  
 517     **Background**

518     *Under current regulations, states and some tribes may seek delegation to implement CWA § 404*  
 519     *which governs dredge and fill activities in wetlands and other waters. This CWA assumption*  
 520     *allows a state or tribe to regulate those waters and to take jurisdictional responsibility to*  
 521     *condition, approve or deny dredge and fill permits in lieu of the federal Section 404 program*  
 522     *administered by the Corps and EPA. The state or tribal program must be approved by the EPA and*  
 523     *the Corps of Engineers. States and tribes play a significant role in implement CWA Section 404*  
 524     *Program through assumption and to fully integrated and comprehensive water program*  
 525     *addressing the full range of state, tribal, and CWA requirements. Assumption allows for*  
 526     *flexibility, less time constraints and the ability to integrate state and local water quality*  
 527     *objectives.*

528  
 529     *The State of Michigan has received delegation authority and the LGAC was briefed on their*  
 530     *program. Under the Michigan program, the permitting process is more streamlined and has*  
 531     *incorporated other state statutory programs like CWA § 401 certifications, dam safety and other*  
 532     *state regulatory programs.<sup>1</sup> The average time of the permitting process is 21 days.*

533  
 534     <sup>1</sup> "Wetlands Protection." Michigan Department of Environmental Quality. [www.mi.gov/wetlands](http://www.mi.gov/wetlands).

535  
 536 *Based on the Michigan example, the LGAC believes that states may more effectively administer the*  
 537 *Section 404 program, especially in addressing regional issues. States can more effectively interact*  
 538 *with local governments, businesses, agriculture and private landowners. (LGAC 2014 Report)*

540  
 541 **Recommendations:**

542 ♦ *The LGAC believes that State Assumed CWA and tribal-led programs may provide substantial*  
 543 *cost-savings in time and money and should be investigated further. (LGAC 2014 Report)*

544  
 545 ♦ *The LGAC recommends that guidance be developed to facilitate State Assumption of the Section*  
 546 *404 program.*

547  
 548 ♦ *In order for state assumed programs to be successful, adequate resources must be made*  
 549 *available and comparable water quality protections must be adopted by the state or tribal*  
 550 *government. Despite these perceived barriers, the LGAC believes this is a highly worthwhile*  
 551 *approach. Incentivizing the delegation program could achieve a strong return on*  
 552 *investment.(LGAC 2014 Report)*

553  
 554 ♦ *Local agencies may also be more receptive to the rule if there are state-run programs which are*  
 555 *more responsive to local and regional issues. (LGAC 2014 Report)*

556  
 557 ♦ *The LGAC strongly suggests federal incentives for States and Tribes to assume CWA Section 404*  
 558 *program. These federal incentives should also provide technical, financial and staffing resources to*  
 559 *assume the CWA 404 program. (LGAC 2014 Report)*

560  
 561  
 562 **ENFORCEMENT**

563  
 564 **Background**

565 *The LGAC believes that enforcement will be important in implementing the CWA programs to*  
 566 *follow the proposed rule. It is not possible to ascertain the impacts of enforcement on local*  
 567 *governments based on the proposed rule as written. The LGAC also believes that clarified*  
 568 *definitions contained within a final rule will be critical to effective and equitable enforcement of*  
 569 *the rule. (LGAC 2014 Report)*

570  
 571 **Recommendations**

572 ♦ *The LGAC recommends that flexibility is included within the regulatory context so that*  
 573 *conservation practices can be considered nationwide and be consistent, particularly on*  
 574 *agricultural lands. (LGAC 2014 Report)*

575  
 576 ♦ *The EPA should work collaboratively with state regulators to reduce punitive approaches and*  
 577 *increase facilitative solutions. Generally, communities facing fines and citations are already struggling*  
 578 *with compliance. Fines rarely increase water quality; fines only reduce the local resources available to*  
 579 *achieve compliance. A collaborative approach can be most effective in reaching water quality goals.*

580 *(LGAC Drinking Water Report 2016)*

581  
 582 ♦ *The LGAC recommends that EPA work with state and local governments once the final rule is*  
 583 *developed regarding enforcement options. (LGAC 2014 Report)*

584  
 585 **LOCAL SOLUTIONS -INTEGRATED PLANNING**

586  
 587 **Background**  
 588 *The LGAC believes that the CWA has had tremendously positive impacts on the rivers and streams*  
 589 *of the United States which in turn has led to economic prosperity and well-being for our nation's*  
 590 *communities. Communities and local governments are spending millions of dollars to improve our*  
 591 *waterways and drinking water supplies. Some states even have more protective water standards*  
 592 *than those required by federal law. The LGAC noticed a general feeling of distrust that the 2015*  
 593 *rule generated. Further clarity on definitions, jurisdiction and exemptions should further aid*  
 594 *Integrated Planning. However, it is uncertain how a final rule will factor in Integrated Planning*  
 595 *efforts in general. Furthermore, there is a great deal of uncertainty how CWA 404 and the rule*  
 596 *will impact local ordinances and how it can be integrated into state, tribal and local water quality*  
 597 *plans. (LGAC 2014 Report)*

598  
 599  
 600 **Recommendations:**  
 601 ♦ *The LGAC recommends that EPA work with cities and communities on Integrated Water*  
 602 *Quality Planning that will incorporate all of the Clean Water Act provisions into local plans. This*  
 603 *planning process is already ongoing and the LGAC looks forward to these proactive approaches to*  
 604 *address water quality concerns while providing green infrastructure and multi-use amenities to*  
 605 *serve our public and create jobs. (LGAC 2014 Report)*

606  
 607 ♦ *The LGAC recommends that EPA incentivize local, tribal and state agencies to engage in*  
 608 *Integrated Water Quality Planning and develop polices, programs and projects that further the*  
 609 *goals of the Clean Water Act. The rule should not in any way discourage local efforts to improve*  
 610 *water quality through projects and programs. (LGAC 2014 Report)*

611  
 612  
 613 ➤ **Question 7- What should the agencies consider in communicating the final rule to state, local**  
 614 **and tribal governments to help them fully understand these regulatory changes and**  
 615 **implementing them efficiently and most cost-effectively?**

616 **Background**  
 617  
 618 *The LGAC believes that clear communication and outreach needs to happen at every level of*  
 619 *government once the final rule is developed. There are many misconceptions and uncertainties*  
 620 *regarding EPA, the Army Corps of Engineers, and the rule's impact on CWA programs.*  
 621  
 622 *The LGAC, consistent with concerns heard throughout the outreach process, noted the mixed*  
 623 *messages relating to the economic analysis.*

624  
 625 *The LGAC recommends that the EPA share the LGAC findings and recommendations with the state*  
 626 *environmental commissioners, state agricultural directors, state water directors, and other state*  
 627 *officials. (LGAC Water Report 2014)*

628  
 629  
 630 **Recommendations:**

631  
 632 ♦ *The LGAC recommends that a Fact Sheet (one-page) be developed laying out the clear*  
 633 *messaging of the revised rule. It should also have graphics and a side by side comparison of what the*  
 634 *rule currently is and what the revised rule proposes should be developed and included to enhance*  
 635 *public understanding of the rule. (LGAC Water Report 2014).*

636  
 637 ♦ *The LGAC believes it is important that EPA is aware of the potential for mixed messages in their*  
 638 *communication with local agencies regarding the economic impact of the proposed rule. Based on*  
 639 *the Workgroup's 2014 field meetings, local agencies were skeptical of EPA's strong statement that*  
 640 *the proposed rule does not change the definition of the Waters of the U.S. Although this statement*  
 641 *may be factually correct, what will likely occur in the field is that local agencies will experience a*  
 642 *permitting environment in direct contrast to this statement, as jurisdictional assertion is expected to*  
 643 *increase. It is important that the EPA and the US Army Corps of Engineers do not understate the*  
 644 *impact the rule may have on local jurisdictions. And the economic analysis should include all Clean*  
 645 *Water Act programs. (LGAC Water Report 2014)*

646  
 647 ♦ *The LGAC recommends that the EPA continue to evolve and improve its communication with*  
 648 *local governments, as well as EJ, agricultural and small communities with respect to the Waters of*  
 649 *the United States.*

650  
 651 ♦ *The LGAC recommends that EPA develop Fact Sheets to communicate the proposed changes in the*  
 652 *WOTUS rule designed specifically for locally elected officials.*

653  
 654 ♦ *The EPA should work with State Municipal Leagues and other intergovernmental information to*  
 655 *distribute communication materials for local governments. (LGAC Drinking Water Report 2016)*

656  
 657 ♦ *In its annual or biannual meetings with State Environmental Commissioners, State Public Health*  
 658 *Directors and State Agricultural Directors, the EPA should convene a special session on Waters of the U.S.*  
 659 *and ways to assist local governments, EJ communities and rural communities. (LGAC Drinking Water*  
 660 *Report 2016)*

661  
 662  
 663  
 664 ➤ **Question 8- The Workgroup will also develop recommendations on how the EPA can better**  
 665 **work with local governments and engage local governments on issues such as: What**  
 666 **additional regulatory issues could be revised or clarified to more effectively to help local**  
 667 **governments understand how this rule would apply? Are there additional policy discussions**  
 668 **that could help address local questions about implementation, in agricultural and rural small**

669 communities? Are there other considerations such as ditch maintenance, stormwater  
 670 management or green infrastructure?

671 8.a. What additional regulatory issues could be revised or clarified to more effectively to help  
 672 local governments understand how this rule would apply?

673  
 674 ♦The LGAC recommends that EPA should consider the impacts of a revised rule on NPDES and  
 675 Wastewater systems. (Goodman Letter).

676  
 677 ♦ The LGAC recommends that EPA consider a bright-line on 'other waters' to provide more  
 678 clarity on what is jurisdictional under the CWA. For example, it would be well-advised that EPA  
 679 determine with accuracy what areas are considered to be ecologically significant and to list these  
 680 areas and provide examples. (LGAC 2014 Report)

681  
 682  
 683 8.b. Are there additional policy discussions that could help address local questions about  
 684 implementation, in agricultural and rural small communities?

685  
 686  
 687 **Background**

688  
 689 *The Small Community Advisory Subcommittee (SCAS) of the LGAC investigated in greater*  
 690 *depth the agricultural related issues to the WOTUs rule. The SCAS had some observations from the*  
 691 *testimony received. Also, several of the SCAS Members are also agricultural producers and work*  
 692 *for the Conservation Districts. Due to lack of clear definitions and the Science Advisory Board's*  
 693 *Report which contained even more uncertainty on connectivity and how that will be applied.*

694  
 695 *Agricultural issues remain an area where there is a great deal of uncertainty and confusion*  
 696 *regarding WOTUS.. The SCAS believes that the agricultural community presents the greatest*  
 697 *challenge but also offers the greatest receptivity to recognizing the importance of conservation*  
 698 *and protection of our natural resources. Agriculture is a water-dependent business and cannot*  
 699 *flourish without adequate supplies of clean and safe water.*

700  
 701  
 702 **Recommendations:** (LGAC 2014 Report)

703 ♦ The LGAC recommends that EPA develop a "rural strategy" which would address the issue of  
 704 Waters of the U.S. on agricultural lands and rural communities. This rural strategy could provide  
 705 more comprehensive planning and resources to address the full range of water quality and  
 706 community issues associated with rural America and disadvantaged small communities.

707  
 708 ♦ The LGAC recommends that there be consistency between Natural Resources Conservation  
 709 Services (NRCS) and EPA on interpretation of normal farming practices and that a clear definition  
 710 of normal farming practices be included. Furthermore, the LGAC recommends a manual of  
 711 agricultural exemptions be developed and published.

712

713     ◆ *The LGAC recommends that the jurisdiction of farm ponds, artificial lakes and ponds created*  
 714 *by excavation and/or diking dry land for purposes of stock watering, irrigation, settling basins or*  
 715 *rice production be excluded from WOTUS.*

716  
 717     ◆ *The LGAC recommends that floodplains be established at a level of 50 year, 100 year and 500*  
 718 *years for agricultural purposes.*

719  
 720     ◆ *The LGAC was made aware of the State of Tennessee's Water Quality program, and the LGAC*  
 721 *recommends that the EPA investigate this approach in regard to jurisdictional waters on*  
 722 *agricultural lands.*

723  
 724     ◆ *The LGAC recommends that EPA facilitate better working relationships with the Corps,*  
 725 *especially in regard to agricultural lands.*

726  
 727     ◆ *The LGAC recommends that dams and drainages designed for fire prevention be exempt from*  
 728 *WOTUS.*

729  
 730     ◆ *The LGAC recommends that settling ponds and basins be determined on a regional case by*  
 731 *case specific basis.*

732  
 733     ◆ *The LGAC recommends increasing the boundaries of riparian areas in the Conservation*  
 734 *Reserve program so that they enhance protection of waters.*

735  
 736     ◆ *The LGAC recommends that EPA continue to work with NRCS to incentivize farming practices*  
 737 *that improve water quality.*

738  
 739     **Prior Converted Croplands (Discussed by Jeff Witte)**

740  
 741     **Background:**

742     The Clean Water Rule excludes Prior Converted Croplands (PCC) from the definition of "waters of the United States."  
 743     (existing since 1992). The Rule also provides that even if another federal agency has deemed land to be PCC, the  
 744     final authority regarding CWA jurisdiction remains with the EPA. Other provisions such as Swampbuster also  
 745     incorporates a PCC exception but are administered by the USDA under the Food Security Act of 1985. The Act  
 746     regulates federal benefits for farmers and includes provisions designed to discourage farming on converted wetlands.  
 747     Under the Act, farmers who have altered a wetland after November 28, 1990, to make crop production possible are  
 748     generally prohibited from receiving USDA-FSA-administered commodity, disaster, and conservation program  
 749     benefits. Likewise, farmers who plant crops on wetlands converted between December 23, 1985, and November 28,  
 750     1990, are ineligible for program payments. Generally, drainage systems and other conversions in place before  
 751     December 23, 1985, may continue in their existing form. The 2014 Farm Bill also reinstated a requirement that  
 752     farmers must comply with Swampbuster provisions to receive crop insurance premium assistance beginning in 2015.  
 753     The NRCS is responsible for making wetland determinations for purposes of USDA farm program eligibility. Once a  
 754     certified wetlands determination is made (and given to the farmer via form NRCS-CPA-026), it is binding on the  
 755     property. All determinations made after July 3, 1996, are automatically deemed "certified." Determinations made prior  
 756     to that date may be considered certified if they meet certain conditions. If a certified wetlands determination exists,  
 757     the NRCS may not issue a new determination, absent a request by the landowner and (1) a determination that  
 758     natural changes have occurred to the topography or (2) an acknowledgment by NRCS that an error exists in the  
 759     current report. It is uncertain how changes in the WOTUS rule will change the dates for PCC or Swampbuster  
 760     provisions.

761 ♦Recommendation: A process for determining Prior Converted Croplands should be established with the new  
 762 changes to the WOTUS rule. For example, what date should the PCC be referred to.

763 ♦Recommendation: On agricultural lands, the Department of Agriculture be given authority to make jurisdictional  
 764 determinations. (LGAC 2014 Report)

765 **Recommendations:**

766 ♦ *The LGAC recommends that normal agricultural practices be defined more effectively to*  
 767 *achieve the desired results and to be accepted by the agricultural community. Normal farming*  
 768 *practices are not limited to those listed and will change with advances in science and technology.*  
 769

770 ♦ *There needs to be consistency between NRCS, EPA and other agencies involved in these issues.*  
 771 *The SCAS believes that a glossary defining what agricultural exemptions are in a glossary will be*  
 772 *helpful. Specifically, the LGAC has heard a great deal of concern from Northern Minnesota where*  
 773 *there are non-tiled drainage ditches and also from agricultural communities in Georgia.*  
 774

775 ♦ *The LGAC recommends more effective outreach to agricultural communities and small rural*  
 776 *communities on this proposed rule.*  
 777

778 **8.c. Are there other considerations such as ditch maintenance, stormwater management or green**  
 779 **infrastructure?**

780 **Background**

781 Rule language should not have broad inclusions and cities are concerned that jurisdictional calls will be  
 782 dependent upon agency judgments and discretion for exclusions. The criteria need to be clear enough  
 783 that cities do not have to either guess at application of a rule or wait for the agency to interpret a rule  
 784 that creates uncertainty. It is unworkable for cities to rely on agency judgments and discretion for  
 785 exclusions. There is a concern about the magnitude of the requests the agencies will be forced to  
 786 address and the timeliness of the agencies response given any uncertainty of a new rule. Cities cannot  
 787 be faced with significant delays to address critical storm-water infrastructure while waiting for agency  
 788 action. Cities should be provided clarity by the agencies so that they can effectively plan and budget for  
 789 the operation and maintenance of the storm-water collection systems without the uncertainty of the  
 790 discretion of the agencies and when it will receive that agency judgment. In addition, without a specific  
 791 exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other components  
 792 that channel runoff, as well as non-MS4 storm-water systems and features/components, EPA and Army  
 793 Corps open the door for litigation and citizen suits that could determine that they are considered a  
 794 "Waters of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards.  
 795 (Goodman Letter)  
 796

797 **Recommendations**

798 ♦The EPA should plainly state how this rulemaking will impact storm-water collection systems  
 799 and clearly exempt those parts of the systems that EPA does not wish to include. (Goodman  
 800 Letter)  
 801

802     ◆ We request that the EPA specifically exclude green infrastructure and outline the Agency's  
 803 understanding of what is included within green infrastructure similar to what was done for agricultural  
 804 practices for 'normal farming practices'. (Goodman Letter)  
 805

806     **Cost to Local Government**

807  
 808     **Background**

809     *The LGAC heard extensive concerns that the US Army Corps of Engineers simply does not have*  
 810 *enough resources to effectuate an efficient permit process now or under a new rule without*  
 811 *additional resources. An ineffective permit process consumes scarce local, state and federal*  
 812 *personnel and financial resources without achieving a value-added return on investment. The*  
 813 *revised rule and the permitting process and implementation must recognize the scarcity of these*  
 814 *resources such that results are optimized for the level of investment. (LGAC 2014 Report) Delays*  
 815 *and additional permitting do not get calculated into a simplistic understanding of affordability of*  
 816 *2 percent of median household income (MHI), which the Agency utilizes to make determinations*  
 817 *on significant cost impacts to local communities (Goodman letter).*  
 818

819     **Recommendations:**

820     ◆ *The LGAC recommends that the EPA continue to coordinate with the US Army Corps of*  
 821 *Engineers to ensure that the permit process is predictable and value-added. The proposed rule*  
 822 *must be viewed in the context of how it will be implemented to validate that the resource*  
 823 *protection outcome is balanced against the economic cost of the permitting process. Local, tribal*  
 824 *and state agencies are at the front lines of achieving the goals of the Clean Water Act. Engaging*  
 825 *local agencies as collaborative partners in the conversation with EPA and the US Army Corps of*  
 826 *Engineers regarding implementation can only improve the process and the desired water*  
 827 *resources protection results. (LGAC 2014 Report)*  
 828

829     ◆ *The LGAC recommends that EPA better understand the cost and resource implications,*  
 830 *especially to local, state and tribal agencies, before drafting the final rule. Local agencies are very*  
 831 *concerned about cost, which is exacerbated by the uncertainty in the permitting process. (LGAC*  
 832 *2014 Report)*  
 833  
 834  
 835