



Legislative UPDATE

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Number 1

EPA Proposes New “Waters of the U.S.” Rule

The Environmental Protection Agency (EPA) and the Army Corps of Engineers have issued a [proposed rule](#) defining what type of water bodies are subject to regulation under the Clean Water Act. The rule is commonly referred to as “waters of the United States (WOTUS)” because it largely seeks to define that term in the Act. The proposal follows the Trump Administration’s repeal of regulations issued by the Obama Administration.

Two U.S. Supreme Court opinions created questions surrounding the definition of “WOTUS.” The opinions, issued in 2001 and 2006, directed the EPA and the Corps to revisit the definition and the overall Clean Water Act regulatory regime. In [Solid Waste Agency of Northern Cook County \(SWANCC\) v. Army Corps of Engineers](#) and [Rapanos v. United States](#), the Supreme Court put limits on what the EPA and the Corps can define as WOTUS subject to their regulatory reach.

In *SWANCC*, the Court overturned the so-called “migratory bird rule.” The opinion concluded that the use by migratory birds of isolated waters with no clear surface connection to a navigable waterway or its tributary was not sufficient grounds for EPA and Corps jurisdiction under the Act.

In *Rapanos*, a divided court opined as to whether the Act covers non-navigable waters and isolated wetlands. Four justices, led by Scalia, found that it applies only to navigable waters. Four of the remaining justices found that the Act applies to most wetlands and other waters adjacent to navigable waters. Justice Kennedy sided with Scalia, but he issued a [concurring opinion](#) that: (1) non-navigable waters are subject to regulation if they exhibit a relatively

permanent flow; and (2) wetlands are subject to regulation only if they have a continuous surface water connection to a relatively permanent water body. According to Kennedy, an intermittent stream or isolated wetland has significant nexus to a navigable waterway if it, either by itself or through connections with other bodies of water, significantly affects the physical, chemical, or biological integrity of a downstream navigable waterway.

The 2015 Obama Administration rule was largely guided by Kennedy's concurring opinion in *Rapanos*. The current proposed rule marks a departure from that Kennedy-centric approach and is instead based on Scalia's opinion that only navigable waters are WOTUS.

The EPA and the Corps are seeking comments on the overall proposal as well as to specific questions on the various definitions outlined in the proposed rule. Comments on the proposed rule will be due 60 days after it is formally published in the Federal Register. The proposed rule, other docket materials, and public comments will be published at <http://www.regulations.gov> at Docket Number EPA-HQ-OW-2018-0149.

EPA has posted the pre-Federal Register version of the proposed rule, along with a press release, fact sheets, and other information, at <https://bit.ly/2SLbyHd>.

(Editor's note: The edited article above is reprinted with permission of the National League of Cities.)

Interim Report: **Senate Intergovernmental Relation Committee**

The Senate Intergovernmental Relations Committee has released its [interim report](#), which contains a number of city-related items. A summary of the relevant charges and the committee's recommendations are provided below.

ETJ Limitations and Notice Charge: Review the existing regulatory authority granted to home rule municipalities within the extraterritorial jurisdiction (ETJ), including practices used by cities to expand ETJ boundaries, and whether proper notification is provided to property owners added to a city's ETJ following an annexation proceeding. Determine the limitations that need to be placed on a city's authority within the ETJ to better protect the private property rights of individuals and landowners, and ways to notify individuals of the impact of being within a city's ETJ. Develop a statewide rule and minimum requirements for such notifications.

Recommendations:

1. The legislature should encourage greater interaction in the planning phase of growth in municipalities in order to have better guided growth and to safeguard local and regional economies.
2. The legislature should consider continuing to monitor the implementation of the 85th Legislative Special Session's annexation overhaul legislation (S.B. 6) to better determine

its impact on municipalities in order to better provide municipalities with the ability to revitalize themselves and attract industry, retail businesses, and curtail urban migration. Specifically, the legislature should consider codifying the Dallas Court of Appeals' ruling in regards to a city's ability to enforce its building codes in their ETJ. (*Editor's Note*: the opinion in *Collin County v. City of McKinney v. Custer Storage Center* concluded that "The City lacks authority to require a landowner developing property in its [extraterritorial jurisdiction] to obtain City building permits, inspections and approvals, and pay related fees.")

3. In order to afford Texans greater transparency and certainty, the legislature should consider revisiting and supporting the passage of legislative initiatives from the 85th Legislative Regular Session that provided greater notice when a municipality is considering expansion of their ETJ, such as S.B. 655 by Senator Bettencourt. (*Editor's Note*: that bill would have provided that: (1) a home rule city shall make publicly available a digital map (in addition to a paper map under current law) reflecting annexations and extraterritorial jurisdiction (ETJ) changes; (2) a city, before the 90th day after the date it adopts or amends an annexation plan, shall give written notice with certain provisions to each property owner in any area that would be newly included in the city's extraterritorial jurisdiction as a result of the proposed annexation; (3) a home rule city, before the 90th day after the date it adopts or amends an annexation plan, shall create and make publicly available a digital map that identifies the area proposed for annexation and any area that would be newly included in the city's ETJ as a result of the proposed annexation; (4) in addition to publishing notice of annexation hearings in a newspaper of general circulation in the city and area to be annexed, the notice must be published in a newspaper of publish notice of the hearings in a newspaper of general circulation in any area that would be newly included in the city's ETJ resulting from the proposed annexation; and (5) if applicable, the notice for each annexation hearing must include: (a) a statement that the completed annexation of the area will expand the city's ETJ; (b) a description of the area that would be newly included in the city's ETJ; (c) a statement of the purpose of ETJ designation; and (d) a list of municipal ordinances that would be applicable in the area that would be newly included in the city's ETJ; and (6) in addition to the notice requirements for a plan-exempt annexation, a home rule city, before it may institute annexation proceedings, shall create and make publicly available a digital map that identifies the area proposed for annexation and any area that would be newly included in the city's ETJ as a result of the proposed annexation.)
4. The legislature should consider reviewing non-annexation agreements to address any ambiguity that may exist in order to clarify whether non-annexation agreements extend a city's ETJ, and whether these agreements can be considered for the purposes of calculating the boundaries of an ETJ.

Housing Affordability Charge: Examine issues that impact housing affordability, including the effect of local government taxes, fees, and mandates. Evaluate the cost of purchasing a single-family residence in different parts of the state, factoring in the impact of local rules and regulations, to identify matters of policy with the greatest influence, and identify ways to increase transparency and awareness prior to the adoption of costly local ordinances or orders.

Recommendations:

1. The legislature should consider building on the success of urban land banks and consider encouraging more local units of government to engage in land banking by increasing opportunities of converting tax foreclosed property into affordable housing.
2. The legislature should consider encouraging more local units of government to work with their building communities and develop initiatives, such as the waiving of impact fees, to address affordable housing needs.
3. The legislature should consider building on the success of state housing entities and consider encouraging more public-private partnerships, especially with local units of government, to address affordable housing needs.
4. The legislature should consider providing communities that are economically distressed, and that are predominantly rural, the ability to have better guided growth by providing them the necessary statutory structure to prevent dilapidated housing conditions from spreading within their jurisdictions and incurring millions of tax dollars cost in mitigating public health threats.
5. The legislature should consider examining the structure of housing bond projects in the state and work with the appropriate governing agencies to ensure flexibility and better assist Texas developers maximize bond financing.
6. The legislature should consider establishing some basic state guidelines that provide better notice and transparency in the local permitting process (e.g., working with interested parties in setting a maximum amount of time a city may delay in making a determination of whether or not a building permit will be issued) and consider protecting property owners who have already obtained the necessary permits required to begin development or construction from being imposed new permit requirements after the initial permit was already acquired.
7. The legislature should consider the need for homeowners and the building industry to have greater transparency in the regulation of housing development and provide greater consistency by supporting initiatives that strengthen uniformity in the development of ordinances and permitting standards.
8. In order to find a better balance between property rights of homeowners and development needs of municipalities, the legislature should consider developing a means by which land use regulation better adheres with the model of development that provides a basic template that cities can use to reassess their existing land use regulations and provide greater opportunities for the development of affordable housing options within their jurisdiction.
9. In developing greater consistency, the legislature should consider undertaking a review of regulations promulgated by state agencies, such as the Texas Department of Transportation (TxDOT) and the Texas Commission on Environmental Quality (TCEQ), that impact development (e.g., right-of-way policies), and work with the appropriate stakeholders to better implement agency policies that are more cognizant of the needs of the home building industry.
10. The legislature should consider building on the success of urban land banks and statutorily provide counties with the necessary authority to engage in a county land bank program.
11. In order to better assist the public, private, and nonprofit communities that are the backbone of developing housing that addresses the housing needs in the state, the

legislature should consider developing a task force to evaluate the state's low income housing tax credit (LIHTC) program and ensure that it operates under a consistent set of rules that emphasize quality and availability of housing to meet housing demands in Texas. The legislature should consider directing the Task Force to develop reforms and initiatives that better guide LIHTC with consistent and seamless implementation that provide greater consideration to construction cost allowances which develop better housing development opportunities.

12. The legislature should consider supporting the passage of legislation that provides more upfront notifications and transparency in the municipal budget process, especially in regard to fee increases, and provides greater electronic access to concerned residents such as envisioned in S.B. 737 of the 85th Legislative Regular Session.
13. The legislature should consider supporting opportunities that encourage cities and counties to engage in pre-emergency planning and direct them to develop reconstruction and recovery plans that may be pre-approved by state government as part of their charter.
14. The legislature should consider supporting the ability of local governments to provide incentive programs and infrastructure investment project that benefit workforce and affordable housing.
15. The legislature should consider supporting the creation of greater opportunities for local units of government to develop affordable housing opportunities through the creation of Neighborhood Empowerment Zones, compiling foreclosed property, undertaking land trusts, and strategically limiting building permit and impact fees such as the successful undertaking by the Cities of San Antonio, Bryan, and Austin.
16. The legislature should consider encouraging local governments to adopt building codes, permit process and systems that speed up development and building processes without lowering quality.
17. The legislature should consider providing a manner by which incorporated areas make available residential locations that are appropriately zoned and affordable for people with modest means.
18. The legislature should consider supporting efforts to address the growing affordable housing needs in the state through a designated source to assist the developing of housing opportunities, including assisting developers with their impacts fees if the housing that is being produced is for affordable housing.
19. The legislature should consider supporting innovative state and private partnerships that provide increased resources to support financial literacy that will benefit existing and prospective homebuyers.

State Infrastructure Bank Transportation Project Loans

The State Infrastructure Bank (SIB) has informed the League that it has money available to lend to Texas cities for roadway projects, which include utility relocations for Texas Department of Transportation (TxDOT) projects. The overall goal of the SIB program is to provide innovative financing methods to communities to assist them in meeting their infrastructure needs.

The SIB allows borrowers to access capital funds at or below market interest rates and several other benefits. More information is available at <https://www.txdot.gov/inside->

txdot/division/debt/sib/application.html or by contacting Deborah Fleming, Portfolio Project Manager, TxDOT, at 512-463-7667 or Deborah.Fleming@txdot.gov.

Get Involved: **TML Grass-Roots Involvement Program**

The Texas Municipal League is once again implementing our Grass-Roots Involvement Program (GRIP). GRIP collects information about your relationship with your legislators and is one way TML staff contacts city officials regarding action on harmful legislation.

To participate in GRIP, go to <http://bit.ly/TMLGRIP2019> and fill out the online form. If you have any questions, please contact JJ Rocha at jj@tml.org or 512-231-7400.

City-Related Bills Filed

Property Tax

No city-related property tax bills were filed this week.

Sales Tax

No city-related sales tax bills were filed this week.

Purchasing

No city-related purchasing bills were filed this week.

Elections

H.B. 527 (Israel) – Voter Registration: would: (1) require the Department of Public Safety to issue a transaction receipt to each qualified applicant for a driver’s license or personal identification certificate who completes a voter registration application; (2) allow a person to use the voter registration receipt as proof of a timely voter registration application if the person does not receive voter registration certificate in time to vote; (3) allow a person to present a voter registration receipt as proof the person registered to vote in the precinct in order to vote a provisional ballot if the sole reason the person has to vote a provisional ballot is because the person’s name is not on the list of registered voters; and (4) require the election officer to attach the voter registration receipt to the person’s provisional ballot envelope.

H.B. 579 (Vo) – Voting: would provide that a person commits an offense if, with respect to another person over whom the person has authority in the scope of employment, the person knowingly: (1) refuses to permit the other person to be absent from work on election day or while early voting is in progress for the purpose of attending the polls to vote; or (2) subjects or threatens to subject the other person to a penalty for attending the polls on election day or while early voting is in progress to vote.

S.B. 276 (Rodriguez) – Voter Registration: would, among other things: (1) provide that an election officer serving a polling place for early voting by personal appearance is a deputy voter registrar and has the same authority as a regular deputy registrar; (2) require two voter registrars to be present at each polling place while the polls are open; (3) provide that a person who would be eligible to vote in an election but for the requirement to be a registered voter must be accepted during voting by personal appearance for voting the ballot for the precinct of the person's residence as shown by the identification presented if the person: (a) submits a voter registration application that complies with state law to an election officer at the polling place; and (b) presents as proof of residence a form of photo identification that complies with state law and states the person's current address; (4) require the election officer to return the original proof of residence to the voter; and (5) require a person voting under (3), above, to vote a provisional ballot in accordance with state law, except that the person is not required to submit an affidavit stating the person is a registered voter and is eligible to vote in the election.

S.B. 277 (Menendez) – Direct Recording Electronic Voting Machines: would provide that, beginning on September 1, 2021, a voting system that consists of direct recording electronic voting machines may not be used in an election unless the system is considered to be an auditable voting system.

Open Government

H.B. 543 (Nevarez) – Public Information: would provide that a draft grant application that was prepared by or for a state agency or governmental entity with taxing authority may not be withheld under the agency memoranda exception of the Public Information Act under certain circumstances.

Other Finance and Administration

H.J.R. 39 (Cyrrier) – Sporting Goods Sales Tax: would amend the Texas Constitution to require the net revenue received from the collection of the sporting goods sales tax to be automatically appropriated to the Texas Parks and Wildlife Department and the Texas Historical Commission.

S.B. 280 (Bettencourt) – School Districts: would, among other things, authorize the board of trustees of an independent school district to ask the voters of the district whether to add two trustees who are appointed by the mayor of the city where the district's central administrative

office is located and/or the county judge of the county where the district's central administrative office is located.

Municipal Courts

H.B. 520 (Dutton) – Spoliation: would allow a defendant to make a showing of spoliation of evidence in a criminal case if the state destroys, alters, or losses evidence of a crime.

H.B. 566 (White) – Nondisclosure: would, among other things, provide that a person who is: (1) charged with more than one offense arising out of the same criminal episode; (2) convicted of or placed on deferred adjudication community supervision for at least one but not all of the offenses charged; and (3) charged with another offense arising out of that criminal episode that resulted in acquittal or is dismissal is eligible for an order of nondisclosure with respect to the offense that resulted in acquittal or dismissal.

H.B. 574 (Dutton) – Deferred Adjudication: would, among other things, prohibit the denial of housing, employment or a professional license to an individual who has received a dismissal and discharge after successfully completing deferred adjudication community supervision.

Community and Economic Development

S.B. 253 (Rodriguez) – Substandard Buildings: would: (1) authorize an appeal from an interlocutory order denying a motion filed by a city related to a substandard building determination; and (2) require a court to expedite a proceeding, including an appeal, related to certain substandard building determinations. (Companion bill is **H.B. 36** by **Ortega**.)

S.B. 254 (Rodriguez) – Substandard Property: would expand those persons a court may appoint as a receiver for a substandard property to include any individual that the city demonstrates is competent and able to fulfill the duties of a receiver. (Companion bill is **H.B. 280** by **Ortega**.)

S.J.R. 24 (Kolkhorst) – Sporting Goods Sales Tax: would amend the Texas Constitution to automatically appropriate the net revenue received from the collection of any state taxes on the sale, storage, use, or other consumption of sporting goods to the Parks and Wildlife Department and the Texas Historical Commission, or their successors in function.

Personnel

H.B. 546 (Canales) – Law Enforcement Training: would require that the Texas Commission on Law Enforcement study the training and education requirements for peace officers and submit a report of any findings and recommendations of the study by December 1, 2020.

H.B. 572 (M. Gonzalez) – Unemployment Benefits: would allow an individual to qualify for unemployment benefits if the individual involuntarily leaves the workplaces because of sexual harassment and: (1) reports the sexual harassment to the individual’s employer or a law enforcement agency; or (2) files a sexual harassment complaint with the Texas Workforce Commission or the Equal Employment Opportunity Commission.

Public Safety

H.B. 550 (Canales) – Driver Responsibility Program: would, among other things: (1) require the Department of Public Safety (DPS) to reduce any surcharge imposed under the driver responsibility program that is pending on or after September 1, 2021, by 50 percent, regardless of whether the surcharge was imposed before that date; (2) expire the drivers responsibility program on September 1, 2023; and (3) require DPS to adopt and enforce rules to continue the surcharges under the expired drivers responsibility program beginning September 1, 2023, until September 1, 2027.

H.B. 551 (Canales) – Marihuana Concentrate: would: (1) add marihuana concentrate as a controlled substance subject to criminal penalties; (2) create certain exceptions for the possession of marijuana concentrate for use in therapeutic research programs or under a valid prescription; (3) create criminal penalties for distribution and possession of marihuana concentrate; (4) create criminal penalties for delivering marihuana concentrate to a child; (5) create criminal penalties for bartering for, spending on, or investing in marihuana concentrate in certain quantities; (6) provide that marihuana concentrate is subject to enhanced punishment in drug-free zones; (7) provide jurisdictional requirements for prosecuting crimes relating to marihuana concentrate; (8) require that law enforcement notify the school if a child is arrested for use, sale, or possession of marihuana concentrate; (9) provide that a student may be expelled if the student sells, gives, delivers, possesses, uses, or is under the influence of marihuana concentrate while on school property or attending a school-related activity; (10) provide that teachers, school administrators, and school employees are not liable for reporting a student whom the teacher suspects of using, passing, or selling marihuana concentrate or an abusable volatile chemical on school property; (11) provide that a child charged under (3) can be assigned to a drug education program; (12) allow for a city or county to establish a drug court for an offense for use or possession of marihuana concentrate; (13) allow a person who committed an offense under (3) solely as a victim of trafficking of persons to seek an order of nondisclosure of criminal history; (14) provide that a caretaker or parent receiving financial assistance for a dependent child may not use, sell, or possess marihuana concentrate; and (15) provide that a group health benefit plan does not require coverage for the treatment of marihuana concentrate used in violation of the law.

H.B. 581 (White) – Fireworks: would expand the days that a retail fireworks seller may sell fireworks to individuals to five days before Labor Day through midnight on Labor Day.

H.B. 582 (White) – Fireworks: would expand the days that a retail fireworks seller may sell fireworks to individuals beginning June 14 and ending on June 19.

H.B. 595 (Rosenthal) – False Report or Alarm Penalties: would increase the criminal penalty for certain false alarms or reports because of bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference or by status as a peace officer or judge.

S.B. 250 (Zaffirini) – Animals in Cars: would provide immunity from liability for damages to an individual who removes a domesticated animal from a car in certain circumstances.

S.B. 274 (Watson) – Driver Responsibility Program: would, among other things: (1) reduce the amount of the surcharge for driver’s license points, certain intoxicated driver offenses, driving while license invalid or without financial responsibility, and driving without valid license; and (2) modify how much of the program’s revenue is allocated to trauma funding.

S.B. 278 (Menéndez) – 9-1-1 Service: would make it a criminal offense for a person, with the intent to harass, annoy, alarm, abuse, torment, or embarrass a public safety assistance point (“PSAP”) employee or other public servant, to encourage or induce another to make a call to a 9-1-1 service or a PSAP or request 9-1-1 or PSAP service or assistance using an electronic communications device.

Transportation

H.B. 537 (Murphy) – Red Light Cameras: would (1) require a local authority that has a photographic traffic signal enforcement system to: (a) contract with an independent engineering firm to conduct a traffic engineering study every five years; and (b) report the findings of the study to a citizen advisory committee; and (2) prevent a local authority from imposing a civil penalty if it fails to conduct the study.

H.B. 568 (Minjarez) – Neighborhood Electric Vehicles: would prevent a political subdivision or state agency from imposing a franchise or other regulation on a neighborhood electric vehicle.

S.B. 273 (Watson) – Motorcycle Lane-Splitting: would provide that the operator of a motorcycle operating on a limited-access or controlled-access highway may operate the motorcycle for a safe distance between lanes of traffic moving in the same direction during periods of traffic congestion if the operator operates the motorcycle: (1) at a speed not more than five miles per hour greater than the speed of the other traffic; and (2) in traffic that is moving at a speed of 20 miles per hour or less.

Utilities and Environment

No city-related utilities or environment bills were filed this week.

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