



Energy, Environment and Natural Resources

2022 Congressional City Conference

In-Person

Sunday, March 13, 2022

1:00-4:00 p.m.

**Agenda: Energy, Environment
and Natural Resources Federal
Advocacy Committee**

NLC Congressional City
Conference
Sunday, March 13, 2022
1:00-4:00 p.m. eastern

1:00 p.m. WELCOME, INTRODUCTIONS AND MEETING OVERVIEW

The Honorable Emily Larson, Chair
Mayor, City of Duluth, Minnesota

Introductions, overview of expected outcomes from the meeting
and Board of Directors report.

1:10 pm STRENGTHENING THE LOCAL-FEDERAL PARTNERSHIP

Danielle Decker
*Deputy Director, Office of Intergovernmental and External
Affairs, U.S. Department of the Interior*

Casey Katims
*Deputy Associate Administrator for Intergovernmental
Relations, U.S. Environmental Protection Agency*

Mia Mayberry
*Deputy Director, Office of External & Intergovernmental
Affairs, U.S. Department of Agriculture*

Aimee Witteman
*Deputy Assistant Secretary for Intergovernmental Affairs,
U.S. Department of Energy*

Federal agency intergovernmental liaisons will engage in a
conversation on how they are working with local elected officials
on key priorities for their agencies and how they can support and
partner with local governments.

1:30 p.m. NLC OFFICER GREETING

**The Honorable Victoria Woodards, NLC 1st Vice
President**
Mayor, City of Takoma Park, Washington

**1:35 p.m. TAKING ACTION IN 2022 – NLC’S FEDERAL ACTION
AGENDA**

Carolyn Berndt
*Legislative Director for Sustainability, Federal Advocacy,
National League of Cities*

Committee members will hear an update on NLC's Federal Action Agenda, as well as energy and environmental issues before Congress, the Administration and the courts. Committee members will also discuss advocacy actions they can take in 2022 to advance local priorities.

1:50 p.m. SUSTAINABILITY PROGRAM UPDATE

Cooper Martin

Director, Sustainability and City Solutions, National League of Cities

Committee members will hear an update on NLC's sustainability programs, initiatives and research.

2:05 p.m. CLIMATE CHANGE: NLC REPORT ON DOMESTIC CLIMATE MIGRATION

Anna Marandi

Program Manager, Sustainability and Resilience, National League of Cities

Committee members will hear a preview of NLC's forthcoming report on domestic climate migration in U.S. cities, which focuses on the impacts and opportunities of population movements due to climate change. The report offers recommendations for cities, states and federal agencies.

2:25 p.m. WATER INFRASTRUCTURE: CONDUCTING A LEAD PIPE INVENTORY

Richard Leadbeater

Global Manager: State/Provincial Government Industry Solutions and Government Trade Associations, Esri

Sunny Fleming

Industry Specialist – Environment and Conservation, Esri

Bill Eller

Vice President of Water Solutions, HomeServe

Under the EPA Lead and Copper Rule Revisions, all community water systems will be required to conduct a lead service line inventory by October 16, 2024. Committee members will learn about tools and resources to support cities, towns and villages as they begin on a path toward compliance.

3:10 p.m. SMALL GROUP DISCUSSION: ARPA AND IJA IMPLEMENTATION IN YOUR COMMUNITY

Committee members will share with each other how they are using American Rescue Plan Act funds for water, sustainability and climate related projects, as well as priority projects for funding through the Infrastructure Investment and Jobs Act.

Committee members will also share the challenges they are facing in using these funds and what resources NLC can provide to support cities, towns and villages.

3:45 p.m. CLOSING AND ADJOURN

Upcoming EENR Committee Meetings:

April Conference Call: April 25 at 3 pm eastern

May Conference Call: TBD

June Conference Call: TBD

NLC Summer Board and Leadership Meeting: TBD

Enclosures

- NLC Policy Development and Advocacy Process
- 2021 City Summit EENR Executive Summary
- 2022 EENR Work Plan
- Energy and Environment Legal Update
- NLC Blog: Why 16 Minnesota Cities Joined together in a Climate Emergency Campaign
- NLC Blog: EPA Announces Path Forward on Lead and Copper Rule
- Energy, Environment and Natural Resources Committee Roster

NLC POLICY DEVELOPMENT AND ADVOCACY PROCESS

As a resource and advocate for more than 19,000 cities, towns and villages, the National League of Cities (NLC) brings municipal officials together to influence federal policy affecting local governments. NLC adopts positions on federal actions, programs and proposals that directly impact municipalities and formalizes those positions in the [National Municipal Policy \(NMP\)](#), which guides NLC's federal advocacy efforts.

NLC divides its advocacy efforts into seven subject areas:

- Community and Economic Development
- Energy, Environment and Natural Resources
- Finance, Administration and Intergovernmental Relations
- Human Development
- Information Technology and Communications
- Public Safety and Crime Prevention
- Transportation and Infrastructure Services

For each of the seven issue areas, a Federal Advocacy Committee advocates in support of NLC's federal policy positions. Members of each Committee serve for one calendar year and are appointed by the NLC President.

Federal Advocacy Committees

Federal Advocacy Committee members are responsible for providing input and advocating on legislative priorities and reviewing and approving policy proposals and resolutions. Additionally, Committee members engage in networking and sharing of best practices throughout the year.

Federal Advocacy Committees are comprised of local elected and appointed city, town and village officials from NLC member cities. NLC members must apply annually for membership to a Federal Advocacy Committee. The NLC President makes appointments for chair, vice chairs, and general membership. In addition to leading the Federal Advocacy Committees, those appointed as Committee chairs will also serve on NLC's Board of Directors during their leadership year.

At the Congressional City Conference, Federal Advocacy Committee members are called upon to advocate for NLC's legislative priorities on Capitol Hill, as well as develop the committee's agenda and work plan for the year. Committee members meet throughout the year to further the plan, hear from guest presenters, discuss advocacy strategies and develop specific policy amendments and resolutions. At the City Summit, Committee members review and approve policy proposals and resolutions. These action items are then forwarded to NLC's Resolutions Committee and are considered at the Annual Business Meeting, also held during the City Summit.

Advocacy

Throughout the year, Committee members participate in advocacy efforts to influence the federal decision-making process, focusing on actions concerning local governments and communities. During the Congressional City Conference, Committee members have an opportunity, and are encouraged, to meet with their congressional representatives on Capitol Hill. When NLC members are involved in the legislative process and share their expertise and experiences with Congress, municipalities have a stronger national voice, affecting the outcomes of federal policy debates that impact cities, towns and villages.

2021 CITY SUMMIT
EENR EXECUTIVE SUMMARY

POLICY

The following policy sections were amended:

- **Section 2.00 Environmental Quality**
 - D. Principles

- **Section 2.02 Energy**
 - A. Goals
 - E. Renewable Energy
 - F. Conventional Energy Sources
 - G. Electricity
 - H. Transportation and Energy

- **Section 2.04 Solid and Hazardous Waste**
 - A. Problem
 - B. Goals
 - C. Solid Waste Policies
 - D. Nuclear Waste Management Policies

- **Section 2.10 Security of Critical Infrastructure**
 - C. Federal Policies

- **Section 2.11 Health-Focused Local Food Systems**

RESOLUTIONS

Ten resolutions were adopted:

- **NLC RESOLUTION #09:** Supporting Local Pace Programs

- **NLC RESOLUTION #10:** Supporting and Advancing Resilient Communities to Prepare for Changing Climate and Extreme Weather Events

- **NLC RESOLUTION #11:** Supporting Urgent Action to Reduce Carbon Emissions and Mitigate the Effects of Climate Change

- **NLC RESOLUTION #12:** Addressing Lead Contamination and Calling for Nationwide Federal Support for Water Infrastructure

- **NLC RESOLUTION #13:** Increase Federal Investment in Water Infrastructure

- **NLC RESOLUTION #14:** Support for Integrated Planning and New Affordability Consideration for Water

- **NLC RESOLUTION #15:** Calling on the Federal Government to Take Action to Address PFAS Contamination
- **NLC RESOLUTION #16:** Improve the Benefit-Cost Analysis for Federally Funded Flood Control Projects and Supporting Beneficial Reuse of Dredged Material
- **NLC RESOLUTION #17:** Increase Funding for Border Water Infrastructure Projects
- **NLC RESOLUTION #18:** Supporting Local Control of Water Infrastructure Projects

**ENERGY, ENVIRONMENT AND NATURAL RESOURCES
FEDERAL ADVOCACY COMMITTEE
2022 WORK PLAN**

The main purpose of the Energy, Environment and Natural Resources (EENR) Federal Advocacy Committee is to 1) provide input and advocate on legislative priorities, 2) review and approve policy proposals and resolutions, and 3) engage in networking and sharing of best practices.

NLC's Federal Action Agenda is a biannual agenda mapped to the Congressional cycle and guides local advocacy efforts on Capitol Hill and with the Administration. The agenda for 2022 builds off the success of NLC's advocacy efforts in 2021 with the passage of the American Rescue Plan Act (ARPA) and the Infrastructure Investment and Jobs Act (IIJA, also known as the bipartisan infrastructure bill).

The charge to each of NLC's federal advocacy committees is to develop a work plan to further the Federal Action Agenda, specifically around [Building Sustainable and Resilient Infrastructure](#). While Congress supported many of our advocacy priorities with [investments in water and climate resilience](#) in 2021, several priorities remain. The committee will meet over the course of the year to engage in advocacy activities and develop policy recommendations, as necessary.

Summary of Last Year's Activities

Last year, the EENR Committee supported advocacy efforts on climate change and water infrastructure with the infrastructure package. In addition to federal financial resources for local governments, the committee focused on the need to build community resilience, strengthen disaster preparedness and mitigation, and address water affordability and equity.

Legislative Victory:

- November 2021 – Congress passed and the President signed the bipartisan [Infrastructure Investment and Jobs Act](#), which includes \$550 billion in new federal investments in America's infrastructure. The bill makes significant progress toward helping them build sustainable and resilient infrastructure, with critical investments in our nation's transportation, water and broadband infrastructure. Read more about the [water infrastructure](#) and [climate change](#) priorities included in the legislation.

EENR Focus – Building Sustainable and Resilient Infrastructure

Water

What to watch in 2022:

- **Water Resources and Development Act** – Congress will continue its biannual tradition of authorizing water resources projects under the U.S. Army Corps of Engineers for navigation, flood control and ecosystem restoration. Unlike in years past where this legislation has grown to include both Clean Water Act and Safe Drinking Water Act provisions, House and Senate leaders are likely to keep this bill to just Army Corps. This is a traditionally bipartisan process, and as such, Congressional leaders are aiming for committee passage of their respective bills in Spring and early Summer, with a final bill by the August recess.
- **Clean water and drinking water grants** – While the IIJA included significant water infrastructure funding through the state revolving fund program, most of that funding will go from states to local governments in the form of loans. IIJA also authorized, but did not fund, a number of clean water and drinking water grant programs including for lead pipe

replacement, low income water assistance, sewer overflows and stormwater reuse, alternative water source projects, individual household decentralized wastewater treatment systems (septic systems). NLC will continue to advocate for appropriation for these grant programs through legislation such as the Build Back Better Act or similar legislation.

- **Clean water and drinking water policy changes** – House and Senate leaders are discussing water-related policy provisions related to addressing PFAS drinking water contamination, National Pollutant Discharge Elimination System (NPDES) permit length, establishing a water affordability program similar to the Low Income Home Energy Assistance Program (LIHEAP), a national moratorium on water shutoffs, and changes to the way the Safe Drinking Water Act considers costs.

Climate Change and Community Resilience

What to watch in 2022:

- Bipartisan efforts to reauthorize the **Energy Efficiency and Conservation Block Grant** ([H.R. 425](#)), which [NLC supports](#).
- Will there be **bipartisan action to address climate change**? In the Senate, there have been talks about separating out the climate provisions from the Build Back Better Act and passing them as standalone legislation, although this has yet to materialize. Senate Energy and Natural Resources Committee Chair, Joe Manchin (D-WV) has stated that there could be 50 votes for some kind of climate legislation. Additionally, last Congress in the House in the waning days of 2020, Reps. David McKinley (R-WV) and Kurt Schrader (D-OR) introduced a [bipartisan bill](#) to advance clean energy technologies and establish a clean energy standard to reduce greenhouse gas emissions 80% by 2050.
- **Climate resilience legislation** – Addressing climate change and resilience is a key priority for the Biden Administration and Congressional Democrats. NLC is supporting legislation that would strengthen community resilience and federal-state-local pre-disaster mitigation and hazard mitigation. These bills include:
 - [Resilient AMERICA Act \(H.R. 5689, bipartisan\)](#), which contains a host of provisions designed to create a significant number of new resources for communities to better protect themselves ahead of natural catastrophes such as increased funding for pre-disaster mitigation. The bill will also establish a new pilot program under the Federal Emergency Management Agency to provide resources to communities and homeowners for the purpose of retrofitting existing homes and buildings.
 - [National Climate Adaptation and Resilience Strategy Act \(S. 3531/H.R. 6461, bipartisan\)](#) would require the development of a whole-of-government National Climate Adaptation and Resilience Strategy and authorize a Chief Resilience Officer in the White House to direct national resilience efforts and lead the development of the U.S. Resilience Strategy.
 - [Federal Agency Climate PREP Act \(H.R. 5477\)](#) to require each federal agency to maintain a Climate Action Plan.
- **Climate litigation** – See legal update.

Parks and Open Space

What to watch in 2022:

- **Outdoors for All Act** – The Outdoors for All Act would codify and establish a dedicated funding source for the Outdoor Recreation Legacy Partnership program (ORLP). Established by Congress in 2014 and administered through the National Park Service, ORLP is a competitive grant funded through the Land and Water Conservation Fund (LWCF) that helps communities create and improve parks and other outdoor recreation

areas to improve public access, particularly in disadvantaged or low-income communities. In February 2021, Rep. Nanette Barragan (D-CA) introduced the bill as an [amendment](#) to a public lands passage, which passed the House later that month. Separately, in Sept. 2021, Reps. Barragan, Michael Turner (R-OH) and Sens. Alex Padilla (D-CA) and Susan Collins (R-ME) introduced [standalone legislation \(H.R. 5413/S. 2887\)](#), with NLC support.

- **21st Century Conservation Corps Act** – Legislation [introduced](#) by Sen. Ron Wyden (D-OR) and Rep. Joe Neguse (D-CO) would support natural resource management, develop a conservation workforce and bolster wildfire prevention and preparedness. The bill would invest in workforce training and jobs to support conservation programs and reforestation to restore our public lands; address deferred maintenance and expand recreation access on our public lands; provide direct relief for outfitters and guides; improve access to clean drinking water; and mitigate the risk of catastrophic wildfires.
- **Civilian Climate Corps Act** – Legislation [introduced](#) by Sens. Martin Heinrich (D-NM), Ben Ray Lujan (D-NM), Chris Coons (D-DE) and Reps. Neguse and Abigail Spanberger (D-VA) would authorize the administration to utilize existing national service programs and coordinate with federal and non-federal entities to create a Civilian Climate Corps. A reimagined civilian climate corps would create jobs, help tackle the climate crisis and engage the next generation in efforts to restore lands and communities. NLC is coordinating with several organizations to help stand up and implement the program, should this legislation pass.

Other Priorities

Brownfields Reauthorization

In 2018, NLC successfully advocated for a reauthorization of the EPA Brownfields program with key changes to assist with the cleanup and redevelopment of large, complex brownfields sites. Specifically, these changes included:

- Authorizing multipurpose grants up to \$1 million
- Increasing funding for remediation grants to \$500,000, with the ability for EPA to go up to \$650,000 per site
- Allowing up to 5 percent of grant amounts to be used for administrative costs
- Allowing local governments to be eligible to receive brownfield assessment or remediation grants for brownfields properties that were acquired prior to Jan. 11, 2002
- Addressing liability concerns for the “voluntary” acquisition of properties
- Reauthorizing the program through 2023 and maintains the existing authorization level of \$200 million annually.

In February, NLC and the U.S. Conference of Mayor [jointly testified before the House Energy and Commerce Subcommittee on Environment and Climate Change](#). The Energy and Commerce Committee shares jurisdiction over the Brownfields program with the Transportation and Infrastructure Committee, which also held a recent hearing on the program. The hearings kick off the reauthorization process, and NLC looks forward to working with Congressional leaders on any additional improvements to the program. NLC member feedback is critical to this advocacy effort.

PFAS Drinking Water Contamination

For the past several years, there has been a growing concern across all levels of government about drinking water contamination from PFAS—a group of human-made chemicals that were made and used in a variety of industries around the globe, which have made their way into drinking water

systems across the country, particularly in communities near military installations or industrial sites. NLC urges EPA and other federal agencies to continue to make progress on a comprehensive nationwide action plan for addressing PFAS contamination, including identifying both short-term solutions for addressing these chemicals and long-term strategies that will help states, tribes and local communities provide clean and safe drinking water to residents.

What to watch in 2022:

- Continued **legislative action** to address PFAS contamination – will it be included in water infrastructure legislation and/or the defense authorization bill? A key issue for local governments is around liability – local governments (including municipal airports, fire departments landfills and water utilities) should not be held liable for PFAS contamination or cleanup costs.
- Continued **federal action** to address PFAS contamination, including [several rulemakings by EPA](#). In particular, with EPA's 2021 [final regulatory determination](#) for PFOA and PFOS in drinking water—the two most well-know and studied PFAS chemicals—the agency is now moving forward with a rulemaking process to establish a National Primary Drinking Water Standard.

Rethinking and Reimagining our Nation's Recycling Infrastructure and Programs

While solid waste management is a local issue, the federal government is an important partner. Cities, towns and villages across the country urge the federal government to develop a national policy that includes source reduction, volume reduction and resource recovery. Collaborative efforts to reimagine and restructure our nation's waste management and recycling systems are even more critical given the wide-spread and significant budget shortfalls at the local level due to COVID-19 and the impacts the Chinese National Sword Policy has had on recycling markets.

What to watch in 2022:

- **Congressional legislation** to help local governments improve recycling infrastructure, develop recycling programs, and build community awareness. Additional legislation to create an extended producer responsibility/product stewardship framework, as well as addresses source reduction and the phasing-out of single use plastic products.
- Continued **federal action** on a [National Recycling Strategy](#), which EPA released last year. The strategy identifies strategic objectives and actions needed to create a stronger, more resilient, and cost-effective U.S. municipal solid waste recycling system. Last year, NLC released a policy brief, [Beyond Recycling: Policy to Achieve Zero Waste Management](#), that identifies major challenges and principals for reform to reimagine our recycling system. Many of NLC's recommendations are included in EPA's National Strategy.

CCC Workshops and Activities of Interest

NLC University: Federal Advocacy Media Training 101 – Sunday, March 13 at 9 am (complementary NLCU session)

NLC University: Managing Federal Grants 101: Understanding Uniform Guidance – Sunday, March 13 at 11 am (complementary NLCU session)

Learning Session: Making Your Community More Energy Wise: New Federal Grants for Energy Efficiency and Clean Energy – Monday, March 14 at 10:45 am

Learning Session: Improving Your Community's Water Infrastructure: Opportunities for Federal Support – Monday, March 14 at 1:45 pm

Learning Session: How Federal Infrastructure Investments Can Help Small and Rural Communities – Tuesday, March 15 at 8:30 am

Learning Session: Federal Support for Local Resilience: How the New Infrastructure Law Can Help Your Community Invest in Disaster Mitigation – Tuesday, March 15 at 8:30 am

ARPA Peer to Peer Networking: ARPA Implementation in your Community: Sharing Successes and Challenges – Tuesday, March 15 at 10:30 am

Federal Agency Office Hours: NLC Infrastructure Headquarters – Monday and Tuesday, March 14 and 15 from 9 am to 5 pm

Other Upcoming Events of Interest

WaterNow Alliance [Tap Into Resilience Summit](#) – April 13-14 – in person in Philadelphia

United for Infrastructure – “[Infrastructure Week](#)” – May 16-20 – in person and virtual in communities across the country.

ENERGY AND ENVIRONMENT LEGAL UPDATE

NOTE: At issue in cases 1-8 below is whether cities and counties may bring state common law claims seeking damages or compensation for climate change impacts. Given the long history of local government reliance on public nuisance and other state common law claims to address widespread social problems affecting the public health and welfare, it is imperative that the courts recognize the viability of this type of claim. Local governments everywhere have an interest in affirming the principles of federalism underlying state common law.

Cities and counties across the United States have brought lawsuits against major oil and gas companies claiming they knew for decades their products caused climate change but denied or downplayed the threat. These lawsuits have been brought under state common law (including public and private nuisance, trespass, negligence, design defect and failure to warn). The suits seek damages or compensation for current and future costs associated with climate change.

Lawsuits have been filed in California (eight separate lawsuits), Colorado, Delaware, Hawaii, Minnesota, New Jersey, New York, Rhode Island, Washington and Washington, DC, among others. There are at least 15 similar cases being litigated at various stages, of which NLC is/was participating in nine. The circuit courts have ruled on five cases, with the local government position upheld in all.

The lower courts all consider the following two cases: In *American Electric Power v. Connecticut* (2011) the Supreme Court held a federal common law public nuisance lawsuit seeking an injunction against power companies to reduce greenhouse gas emissions (GHGs), brought by cities and states, was displaced by the Clean Air Act, which delegates authority to regulate GHGs to the U.S. Environmental Protection Agency (EPA). In *Native Village of Kivalina v. ExxonMobil* (2012) the Ninth Circuit held that a federal common law public nuisance lawsuit seeking damages for climate change brought by a Native village in Alaska was also displaced by the Clean Air Act. (Displacement of federal common law by a federal statute is, in essence, the same as preemption of state common law by a federal statute.)

1. Mayor and City Council of Baltimore v. BP et al. – Fourth Circuit

Update since City Summit: *The Fourth Circuit heard oral argument in this case in January on the question of jurisdiction. A decision is expected later this year. (Read more [here](#).)*

On June 10, 2019, the U.S. District Court for Maryland granted the City of Baltimore's motion to remand to Maryland state court the City's case against fossil fuel companies for climate change-related damages. In a lengthy and comprehensive opinion, the judge rejected each of defendants' "proverbial 'laundry list' of grounds for removal." The court held that the City's public nuisance claim was not governed by federal common law, and that its claims did not necessarily raise substantial and disputed federal issues and were not completely preempted. The court also held that there was no federal enclave jurisdiction, no jurisdiction under the Outer Continental Shelf Lands Act, no federal officer removal jurisdiction, and no bankruptcy removal jurisdiction. The decision follows a similar order granting remand in the San Mateo County appeal currently pending in the Ninth Circuit.

Federal law allows defendants to "remove" a case brought in state court into federal court if the federal court has jurisdiction over the case. BP claims that the federal court has jurisdiction to hear this case on eight grounds, including the federal officer removal statute. This statute allows federal courts to hear cases involving a private defendant who can show that it "acted under" a

federal officer, has a “colorable federal defense,” and that the “charged conduct was carried out for [or] in relation to the asserted official authority.”

A federal district court rejected all eight grounds BP alleged supported removing this case to federal court. The federal district court remanded the case back to Maryland state court.

28 U.S.C. §1447(d) generally disallows federal courts of appeals to review federal district court orders remanding a case back to state court which was removed to federal court. The statute creates an exception for “an order remanding a case to the State court for which it was removed pursuant to” the federal officer removal statute or the civil-rights removal statute (not at issue in this case).

BP asked the Fourth Circuit to review all eight of its grounds for removing the case to federal court because one of the grounds it alleged--federal officer removal--is an exception allowing federal appellate court review.

The Fourth Circuit refused to review all eight grounds. It cited to a Fourth Circuit case decided in 1976, *Noel v. McCain*, holding that “when a case is removed on several grounds, appellate courts lack jurisdiction to review any ground other than the one specifically exempted from §1447(d)’s bar on review.” BP argued that a 1996 Supreme Court case and the Removal Clarification Act of 2011 “effectively abrogated” the 4th Circuit decision. The Fourth Circuit disagreed but acknowledged other courts have reached different conclusions.

NLC filed an [amicus brief](#) in this case in the Fourth Circuit. Oral arguments were held in December 2019. In March, the Fourth Circuit upheld the district court’s ruling to remand the case to state court, consistent with NLC’s amicus brief. Later in March, the defendants filed a certiorari petition in the U.S. Supreme Court.

On July 31, 2019, the judge denied defendants’ motion for a stay pending appeal of her remand order. The 4th Circuit declined to stay the district court’s remand of the case to state court pending the appeal. This then caused the defendants to ask the district court to extend its stay of the remand, pending a petition for an emergency stay to the U.S. Supreme Court. The district court agreed, but also gave plaintiffs the opportunity to move to rescind the stay. The petition for an emergency stay was denied by the U.S. Supreme Court in October. The only precedent for anything like this would be the Supreme Court’s stay of the Clean Power Plan.

In Oct. 2020, the U.S. Supreme Court decided to take up the case. The Court will decide whether a federal appellate court may review all the grounds upon which a defendant claims its case should not be sent back to state court when only one of the grounds the defendant alleges is specifically listed in federal statute as a basis for federal appellate court review. The U.S. Supreme Court heard oral argument in this case in January 2021. The State and Local Legal Center filed a [brief](#) in the case, with NLC participating.

In June 2021, the U.S. Supreme Court held that a federal court of appeals may review any grounds the district court considered for trying to remove a case to federal court where one of the grounds was federal officer or civil rights removal. In September 2021, NLC filed an [amicus brief](#) in the remand of the case by the U.S. Supreme Court back to the Fourth Circuit.

2. City of Oakland v. BP et al. – Ninth Circuit

Update since City Summit: *None – In June 2021 the U.S. Supreme Court denied cert. The case was remanded to the lower court to act on the original motion. No action to date from the Ninth Circuit.*

In the case [City of Oakland v BP et al.](#) the district court ruled that cities and counties may not bring state common law claims and dismissed the lawsuit. Similar to New York City case, in this case, the district court concluded that, first, a federal common law public nuisance claim for climate change does exist and, second, that as a result of the existence of a federal nuisance claim cities and counties cannot bring state common law claims for damages for climate change. NLC filed an [amicus brief](#) in this case. In May, the Ninth Circuit reversed the district court's ruling to dismiss the case and remanded it back to the district court for further analysis and action, consistent with NLC's amicus brief. In August 2020, the Ninth Circuit denied a request for a rehearing en banc.

In January 2021, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court. The petition for cert posed the following different questions from the other cases below: "Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law" and "Whether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment." On June 14, the Court denied cert on that question, so the case goes back to the district court to act on Oakland's original motion to remand the case to state court. Oakland also filed a motion to amend its complaint to withdraw federal common law public nuisance claims, which they added only conditionally after the district court originally denied remand so that any trial that took place in federal court considered that issue as well.

3. County of San Mateo v. Chevron et al. – Ninth Circuit

Update since City Summit: *None – The U.S. Supreme Court has remanded the case to the lower court to reexamine its decision in light of the Baltimore holding. No action to date from the Ninth Circuit.*

In the case [County of San Mateo v. Chevron et al.](#) the district court ruled cities and counties may bring state common law claims and ordered the case remanded to state court. In contrast to the New York City and Oakland cases, the district court concluded that the existence of a federal common law claim does not eliminate the state common law claim, and that the Clean Air Act's delegation of regulatory authority to EPA doesn't preempt state law claims. NLC filed an [amicus brief](#) in the case. In May, the Ninth Circuit upheld the district court's ruling, consistent with NLC's amicus brief.

The district court stated:

"To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes "to be exclusive.""

In August 2020, the Ninth Circuit denied a request for a rehearing en banc. In December 2020, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court.

4. Board of County Commissioners of Boulder County v. Suncor Energy et al. – Tenth Circuit

Update since City Summit: *None – The U.S. Supreme Court has remanded the case to the lower court to reexamine its decision in light of the Baltimore holding. No action to date from the Tenth Circuit.*

On Sept. 5, 2019, the U.S. District Court for Colorado granted the City and County of Boulder’s motion to remand to Colorado state court the local governments’ case against fossil fuel companies for climate change-related damages. The decision closely resembles the San Mateo, Baltimore, and Rhode Island decisions. Defendants have filed an appeal in the 10th Circuit Court of Appeals. NLC filed an [amicus brief](#) in this case. Oral argument was heard in May. In July 2020, the Tenth Circuit [ruled](#) in favor of the local government position. In December 2020, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court.

5. State of Rhode Island v. Chevron et. al – First Circuit

Update since City Summit: *None – The U.S. Supreme Court has remanded the case to the lower court to reexamine its decision in light of the Baltimore holding. No update on the schedule for oral arguments at this time.*

On July 22, 2019, the U.S. District Court for Rhode Island granted the State of Rhode Island’s motion to remand to Rhode Island state court the State’s case against fossil fuel companies for climate change-related damages. The decision rejected each of defendants’ grounds for removal. The court held that the State’s public nuisance claim was not governed by federal common law, and that its claims did not necessarily raise substantial and disputed federal issues and were not completely preempted. The court also held that there was no federal enclave jurisdiction, no jurisdiction under the Outer Continental Shelf Lands Act, no federal officer removal jurisdiction, and no bankruptcy removal jurisdiction. The decision follows a similar order granting remand in the San Mateo County appeal currently pending in the Ninth Circuit, and as well as a similar order granting remand in Baltimore’s case, currently pending in the Fourth Circuit. The defendants have filed an appeal in the 1st Circuit Court of Appeals. NLC filed an [amicus brief](#) in this case.

Oral argument was heard in the First Circuit in September 2020. In October 2020, the First Circuit issued its [decision](#), holding that federal officer removal only permits interlocutory appeal of that one issue and not other grounds for removal, agreeing with the local government position. In December 2020, defendants filed a petition for a writ of certiorari with the U.S. Supreme Court. NLC filed an [amicus brief](#) in this case in September 2021.

6. State of Minnesota v. American Petroleum Institute, et al. – Eighth Circuit

Update since City Summit: *In August, NLC filed an [amicus brief](#) in this case. The Eighth Circuit will hear oral argument on March 15.*

The NLC brief focuses on the right of state and local governments to be the masters of their complaints, just as any other plaintiff is, that doing so and choosing to litigate state law issues in state court is not “artful pleading,” and that there is no relevant federal cause of action that supplants the state causes of action pleaded.

It is important that each circuit is aware that there are important federalism issues in removal to federal court as articulated by groups that have a stake in federalism concerns.

7. *City and County of Honolulu v. Sonoco LP, et al. – Ninth Circuit*

Update since City Summit: *The Ninth Circuit heard oral argument in February. Shortly after, the court put the case in abeyance pending the issuance in the San Mateo case.*

While the Ninth Circuit is familiar with the Federalism arguments NLC has made in similar cases, it is possible that *Honolulu* will be heard by a new panel unfamiliar with the arguments. The brief serves as a “raise the flag” effort to make sure the Court understands that local government groups support the right of cities to pursue state law causes of action as plaintiffs like this in state court. NLC filed an [amicus brief](#) in this case in September.

8. *City of Hoboken v. Exxon Mobil Corp. et. al. – Third Circuit*

New: NLC filed an [amicus brief](#) in this case in December. No update on the schedule for oral argument at this time.

This is the first case for NLC to be on record with in the Third Circuit. The brief is similar to that for Minnesota and Rhode Island. One key difference, however, is a short section that addresses an argument made by the National Association of Manufacturers that these lawsuits cost other local governments money by causing prices to rise.

NOTE: Cases 9-11 below relate to the U.S. Environmental Protection Agency and U.S. Department of Transportation’s joint rulemakings to rollback fuel economy standards and preempt the State of California and others from issuing more stringent greenhouse gas regulations on vehicles. In September 2019 the Trump Administration finalized two related actions that are collectively referred to as “Part 1” of the SAFE Rule: EPA withdrew California’s authority to set its own motor vehicle standards, and NHTSA issued a rule holding that any state or local regulation on tailpipe greenhouse gas emissions is preempted by federal law. NHTSA’s rule was challenged in *California v. Chao* and both actions were challenged in *Union of Concerned Scientists*.

9. *California v. Chao et al. – DC District Court – Preemption*

Update since City Summit: *None – In February 2020, the federal district court for the District of Columbia stayed this case pending resolution of [related litigation](#) in the DC Circuit (see *Union of Concerned Scientists v. National Highway Traffic Safety Administration* below).*

Final regulations of the National Highway Traffic Safety Administration (NHTSA) called the “Preemption Regulation” declare that the Energy Policy and Conservation Act of 1975 (EPCA) preempts state laws that regulate greenhouse gas emissions from new passenger cars and light trucks. California has had emissions standards for light-duty vehicles for 60 years. The federal government has repeatedly granted California and other states who have adopted California’s standards waivers of preemption the Clean Air Act.

At issue in this case is whether the Preemption Regulation is unlawful, exceeds NHTSA’s authority, contravenes Congressional intent, and is arbitrary and capricious because the NHTSA has failed to conduct the analysis required under the National Environmental Policy Act (NEPA).

In September, 23 states, the District of Columbia, and the cities of Los Angeles and New York, filed a [lawsuit](#) in federal district court in DC making numerous arguments against the U.S. Department of Transportation pursuant to the Administrative Procedures Act.

First, the states argue that the Preemption Regulation exceeds NHTSA's statutory authority because "Congress has not delegated to NHTSA any authority to issue a regulation or other legally effective determination under EPCA regarding express or implied preemption under EPCA, nor to adopt regulations declaring particular state laws, or categories of state laws, preempted by EPCA."

Second, the Preemption Regulation is ultra vires, meaning beyond NHTSA's scope of authority because NHTSA "does not identify any statute or other authority that authorizes the regulation."

Third, the lawsuit offers numerous arguments for why the Preemption Regulation is arbitrary and capricious including that it "interprets EPCA as expressly and implicitly preempting state laws regulating or prohibiting—or "having the direct or substantial effect of regulating or prohibiting," p. 224—tailpipe greenhouse gas emissions, regardless of whether EPA has waived Clean Air Act preemption of those laws under Section 209(b) of the Clean Air Act."

Finally, the lawsuit describes NHTSA's assertion that NEPA does not apply to the Preemption Regulation so it didn't comply with it as "arbitrary, capricious, and an abuse of discretion." The lawsuit notes that NEPA "requires the preparation of a detailed environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment."

10. Union of Concerned Scientists v. National Highway Traffic Safety Administration – DC Circuit – California Waiver

Update since City Summit: This case remains in abeyance. While NHTSA has finalized their repeal of the preemption rule, EPA still has not. In January, [state and local government petitioners](#) and [respondents](#) requested that the cases remain in abeyance while EPA continues its reconsideration of the challenged rule.

Background: In September 2019, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a withdrawal of waiver it had previously provided to California for that State's greenhouse gas and zero-emissions vehicle programs under section 209 of the Clean Air Act.

Before this withdrawal of waiver, California had adopted emissions standards for passenger cars and light trucks for 60 years that were more rigorous than the federal standard. The federal government had repeatedly granted California and other states who have adopted California's standards waivers under the Clean Air Act.

Litigation Status: To date, revocation of this waiver has generated four lawsuits: [California and other states](#); three California air districts; the National Coalition for Advanced Transportation, which represents Tesla and other electric vehicle-aligned companies; and eleven environmental groups. NLC filed an [amicus brief](#) in the *Union of Concerned Scientists* case in July 2020 and the DC Circuit had planned to take briefing on both the California waiver and NHTSA preemption issues.

The waiver lawsuit brought by California and other states has been filed in the D.C. Circuit. The Trump administration asked the court to combine the waiver lawsuit and a related preemption lawsuit against the National Highway Traffic Safety Association ([California vs. Chao](#) above).

Under the new Biden Administration, the U.S. Environmental Protection Agency asked the U.S. Department of Justice (DOJ) to seek a pause on the litigation while the Administration considers rewriting the rule. The DC Circuit has granted DOJ's request, placing the case on hold.

11. California v. Wheeler – DC Circuit – Fuel Economy Standards Rollback

Update since City Summit: *This case remains in abeyance. January, respondents [requested](#) that the cases remain in abeyance until NHTSA concludes reconsideration of its part of the joint SAFE II Rule, with a motion to govern the case due 30 days after that action.*

This case is the challenge to the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule. The SAFE Rule was promulgated by the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) in March 2020. The rule significantly weakens greenhouse gas and fuel economy standards for new passenger motor vehicle rules and light trucks. In 2012 the Obama Administration issued standards that would have required a 5% improvement in both greenhouse gas emissions and fuel economy every year – the SAFE Rule replaces those standards and requires only a 1.5% improvement in each, and is expected to result in an additional 867-923 million metric tons of carbon dioxide. The SAFE Rule was challenged in the D.C. Circuit by 23 states, several cities, and a coalition of public interest groups, as well as some other petitioners. (Because the case is actually a number of consolidated cases it has a number of titles and is also referred to as *Competitive Enterprise Institute v. NHTSA*). NLC filed an [amicus](#) brief in this case in January 2021.

Under the new Biden Administration, the U.S. Environmental Protection Agency asked the U.S. Department of Justice (DOJ) to seek a pause on the litigation while the Administration considers rewriting the rule. In April 2021, the DC Circuit granted DOJ's request, placing the case on hold.

12. New York v. EPA – DC Circuit – ACE Rule and West Virginia v. EPA – U.S Supreme Court – Clean Power Plan

Update since City Summit: *In January, NLC filed an [amicus brief](#) in *West Virginia v. EPA*. (Read more [here](#).) In February, the U.S. Supreme Court heard oral argument. A decision is expected by the end of June.*

NLC is participating in two related cases: *New York v. EPA* and *West Virginia v. EPA*. *New York* is on hold while the U.S. Supreme Court considers [West Virginia v. EPA](#), which is a collection of appeals asking the court to overturn the D.C. Circuit's January ruling that struck down the Trump administration's Affordable Clean Energy rule.

In *New York v. EPA* states and cities, environmental groups, and other organizations have filed a lawsuit challenging the Trump Administration's repeal of the Clean Power Plan (CPP) and issuance of the Affordable Clean Energy (ACE) Rule, which establishes greenhouse gas emissions standards for existing power plants. The repeal of the CPP and the promulgation of the ACE Rule represent the Trump Administration's most significant climate rollback to date.

In April 2020, NLC filed an [amicus brief](#) in *New York*. The goal of the local government amicus brief, as with our previous efforts in the EPA climate regulation cases, is to highlight

the perspective of localities as the first responders to the impacts of climate change and as climate policy innovators. The brief reflects signatory associations' and local governments' priority concerns related to climate impacts, to highlight local sustainability and climate action plans, and to support the legal arguments set forth by petitioners challenging the regulatory rollback. The brief largely resembles the [one filed](#) in support of the Clean Power Plan in terms of its approach, although of course the legal arguments will be different, focusing on the arbitrary and capricious nature of the new rule and its lack of a rational basis.

Twenty-three cities, counties and mayors have signed onto the brief. For comparison, about [50 signed onto the brief supporting the Clean Power Plan](#).

The U.S. Court of Appeals for the District of Columbia Circuit found that the ACE rule failed to provide adequate environmental and public health protections. The court ruled that EPA relied on a "fundamental misconstruction" of the Clean Air Act. "The question in this case is whether the Environmental Protection Agency (EPA) acted lawfully in adopting the 2019 Affordable Clean Energy Rule (ACE Rule), as a means of regulating power plants' emissions of greenhouse gases. It did not," the court wrote. In January 2021, the U.S. Court of Appeals for the District of Columbia Circuit [vacated and remanded](#) the Trump Administration Affordable Clean Energy (ACE) Rule.

13. Illinois Commerce Commission v. FERC – Seventh Circuit – Market Capacity Order

Update since City Summit: *This case is being held in abeyance until a related case in the Third Circuit is decided or June 30 if not final order has been issued. NLC will file an amicus brief in this case.*

In Dec. 2019, the Federal Energy Regulatory Commission (FERC) [directed](#) PJM, a regional wholesale electricity market covering 13 states in much of the mid-Atlantic and Ohio River Valley, to establish a price floor for state subsidized resources in PJM's capacity market, seeking to ensure grid reliability by auctioning power delivery obligations three years before the electricity is needed. That price floor, called the Minimum Offer Price Rule (MOPR), would block many wind, solar and nuclear plants from clearing those auctions.

The MOPR would increase the price of certain wind, solar, and nuclear power generation that receives subsidies from almost every state in PJM's region, thereby removing the impact of the state's subsidy. Specifically, three states in PJM's territory—Ohio, Illinois and New Jersey—have nuclear subsidies, and eleven have renewable energy mandates that would make new clean energy subject to the MOPR. FERC Chairman Neil Chatterjee did note the MOPR will not apply to existing renewable energy plants, energy storage resources, or power generators that are already under ratepayer-funded "self supply" contracts, like those owned by municipal utilities. This is forecast to exempt about 5,000 MW, a small percentage of the total power usage in the region.

Current status: Following the rule's publication, many states that participate in PJM, the nuclear industry and renewable energy groups asked FERC to rehear the subsidy case. In April 2020, FERC declined to review its Dec. 2019 decision to limit participation of state-subsidized renewable and nuclear energy in PJM, setting the stage for a raft of legal challenges and potential state exits from the region's long-term electricity auctions.

FERC's decision to toss out appeal requests allows opponents of the decision to file legal challenges at the D.C. Circuit Court. Illinois utility regulators, environmental groups and

municipal utilities are filing suit. The case was initially held in abeyance pending FERC's ruling on several petitions for rehearing that were filed with it. FERC has now resolved those petitions and the abeyance will expire on December 14. The court is expected to issue a scheduling order around that time.

The Illinois filing in the U.S. 7th Circuit Court of Appeals was followed by a challenge from the American Public Power Association and American Municipal Power in the D.C. Circuit Court of Appeals. [New Jersey and Maryland have also filed in the DC Circuit.](#) The Sierra Club, Natural Resources Defense Council and Environmental Defense Fund also plan to file at the D.C. Circuit. The National Rural Electric Cooperative Association is also planning to formally file suit against the PJM decision.

Local government impact: FERC's decision to deny a rehearing could also push some PJM states with nuclear power subsidies and renewable energy mandates to end their participation in the region's capacity market, while continuing to utilize its shorter-term real-time and day-ahead markets. This could make meeting local or state renewable energy goals or carbon mitigation goals difficult. PJM has proposed a June deadline for states to leave the market as part of its compliance filing, but some states are concerned that coronavirus complications will make that timeline unworkable.

Related: In June, PJM proposed changes to the MOPR that effectively exempt "state-subsidized" renewables from the rule (see [here](#) for a brief overview). PJM requested FERC approval to implement the change but the Commission took no action. As a result, in accordance with section 205 of the Federal Power Act, the changes automatically took effect in September. This would seem to moot the case, but it hasn't been formally dismissed, and actions challenging the revised MOPR are expected. Requests for rehearing have already been filed with FERC.

14. California Restaurant Association v. Berkeley – Ninth Circuit

Update since City Summit: *NLC filed an [amicus brief](#) in this case in February.*

In this case, a restaurant trade group plaintiff brought suit against the city of Berkeley, California, claiming that Berkeley's 2019 "natural gas ban," which prohibited or restricted gas connections to many new buildings within the city, was preempted by both the U.S. Energy Policy & Conservation Act (EPCA) and state law. The federal district court dismissed the EPCA preemption claims (i.e., all claims under federal law), holding that EPCA -- which preempts state and local standards relating to the energy efficiency or energy use of many appliances -- did not preempt the Berkeley gas ban. (More information about the case can be found on the Sabin Center [blog](#).)

The Restaurant Association has filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit. The *amicus* brief would address the perspective of cities advocating for the less expansive reading of EPCA preemption, consistent with the view of the district court. This less expansive reading would give cities more confidence that many of their policies would not be preempted simply because they have a very tangential relation to the energy efficiency or energy use of an appliance. Read the City of Berkeley's [amicus](#) brief.

15. California River Watch v. City of Vacaville – Ninth Circuit

Update since City Summit: NLC filed an [amicus brief](#) in this case in November. No update on oral argument at this time.

The City of Vacaville, CA draws groundwater from wells and distributes it to city residents. The City's water complies with federal and state drinking water standards, but also contains hexavalent chromium. California River Watch (CRW) sued the city in federal district court under the citizen-suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA), claiming the city's distribution of this water violated RCRA because it constituted the generation and transportation of dangerous solid waste. The district court granted summary judgment to the city on the grounds that the water containing hexavalent chromium was "discarded material" under RCRA.

The Ninth Circuit reversed. The panel's reversal rested on two holdings. First, it held there was a genuine issue of material fact that the hexavalent chromium was "discarded material." Second, the panel held "nothing in RCRA's text suggests that" the city had to "play some role in 'discarding' the waste" to be held liable. "While the City may be distributing groundwater contaminated by others, RCRA's endangerment provision broadly applies to any person, including a governmental instrumentality, like the City, that contributes to the transportation of any waste. So, a transporter of waste need not also be the cause of the waste's existence." As the dissent pointed out the panel thus partly overruled *Hinds Investments, L.P. v. Angioli*, where the Ninth Circuit "require[d] that a defendant be actively involved in or have some degree of control over the waste disposal process to be liable under RCRA."

The panel decision disturbs Ninth Circuit case law and could significantly increase liability risks for municipal and other public water suppliers that are complying with applicable maximum contaminant levels (MCLs) and had no role in introducing contaminants into their water supplies. Indeed, public suppliers could be subject to RCRA litigation for merely conveying contaminants through their distribution systems at levels deemed otherwise acceptable under the Safe Drinking Water Act and implementing federal and state regulations.

The amicus brief will communicate the consequences of the panel's decision on water suppliers. The brief will argue that when a water supplier extracts groundwater containing a contaminant and distributes it to the public, the supplier's actions should be protected by the safe harbor that MCLs are intended to provide, consistent with the Safe Drinking Water Act. The brief will argue for an alternative basis for affirmance of the district court's decision, and the brief takes no position on some of the major issues being argued in the case (namely, the RCRA definitions).

16. Sackett v. EPA – U.S. Supreme Court – "Waters of the U.S."

New: NLC will participate in a State and Local Legal Center amicus brief in this case, which is due in April.

The U.S. Supreme Court has agreed to take up a case pertaining to the definition of "waters of the U.S." under the Clean Water Act (*Sackett v. EPA* – read more [here](#)). While NLC has weighed in on this issue through the regulatory process going back to [2013](#), this is the first case in which NLC will participate in any of the legal challenges to date against either the 2015 Obama Clean Water Rule or the 2020 Trump Navigable Waters Protection Rule.

The proposed SLLC brief in *Sackett* would be narrow in protecting municipal functions and responsibilities as owners and operators of drinking water, wastewater and stormwater systems in whatever definition of “waters of the US” the court decides.

Facts: The Sackett’s purchased a “soggy residential lot” near Idaho’s Priest Lake. To the north of their lot, with a road in between, is a wetland that drains to a tributary that feed into a creek that flows southwest of the Sacketts’ property and empties into Priest Lake. The Sackett’s property is 300 feet from the lake.

After obtaining permits from the county the Sacketts began backfilling the property with sand and gravel to create a stable grade. EPA ultimately issued the Sacketts a “formal administrative compliance order” explaining that “the Sacketts’ placement of fill material onto half an acre of their property without a discharge permit constituted a violation of the CWA.” The order also informed the Sacketts that failure to comply could result in civil and administrative penalties of over \$40,000 per day. (In March 2020 the EPA withdrew the compliance order but the Ninth Circuit said the case isn’t moot).

Issue: Whether the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U. S. C. §1362(7).

Holding and Reasoning: The Ninth Circuit held that Justice Kennedy’s definition of “waters of the United States” from *Rapanos v. United States* (2006) is controlling. The Sacketts argued that Justice Scalia’s definition is controlling.

The Clean Water Act (CWA) extends to all “navigable waters,” defined as “waters of the United States, including the territorial seas,” and it prohibits any person who lacks a permit from discharging pollutants, including rocks and sand, into those waters.

CWA regulations define “waters of the United States” to include “wetlands” that are “adjacent” to traditional navigable waters and their tributaries.

Rapanos concerns the “governing standard for determining CWA jurisdiction over wetlands.”

Justice Scalia, writing for four Justices, stated that “waters of the United States” extends only to “relatively permanent, standing or flowing bodies of water” and to wetlands with a “continuous surface connection” to such permanent waters.

According to Justice Kennedy, writing alone, “jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.” This “significant nexus” inquiry would turn on whether the wetlands, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

According to the Ninth Circuit, while the Scalia plurality did not entirely reject the concept of a “significant nexus,” it opined that only wetlands with a “physical connection” to traditional navigable waters had the requisite nexus to qualify as “waters of the United States.”

It is fair to say that the Kennedy opinion is more pro-wetland than the Scalia opinion.

The question before the Ninth Circuit was whether the Kennedy or the Scalia opinion controlled. The Ninth Circuit held that the Kennedy opinion controlled. In *Marks v. United States* (1977) the Court said if there aren't five votes for one rationale the holding of the case is "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." The Ninth Circuit agreed with the Seventh Circuit that the Kennedy concurrence supplied the controlling rule in *Rapanos*.

Why 16 Minnesota Cities Joined together in a Climate Emergency Campaign

By: Bill Blonigan, Mayor, City of Robbinsdale; Larry Kraft, Councilmember, City of St. Louis Park; and Steve Lindaas, Councilmember, City of Moorhead

Last month, 16 Minnesota cities worked together to each declare a climate emergency or something similar. By acting together, we are amplifying our impact and urging local, state and federal action, with a special emphasis on state action.

Here are three Minnesota local elected officials in their own words on why taking bold action to address climate change is important to their communities.

Larry Kraft, Councilmember, City of St. Louis Park

About a year ago I helped convene a group of primarily city elected officials from around Minnesota, called the MN Cities Climate Caucus, with the goal of sharing best policy practices and having more influence with state government. About six months ago, we came up with a plan to simultaneously declare a climate emergency across multiple cities in January of this year, just before our state legislative session began.

We felt it was the right time to do this for three main reasons:

1. **It is an emergency:** The United Nations Intergovernmental Panel on Climate Change [recently declared](#) that world leaders at all levels must take immediate action to reduce greenhouse emissions to prevent catastrophic impacts.
2. **It's impacting Minnesota now:** Unanticipated occurrences of drought, higher annual temperatures and sustained heat waves, dangerous air quality, repeated incidences of “hundred year” floods, and forest fires of unprecedented size – are all happening now in Minnesota.
3. **Hope:** A conspicuous action like this can provide bold local leadership in a way that connects to a larger statewide effort. People are empowered when they feel what they do matters and when they are part of something larger than themselves.

Our goal was at least ten cities, but ultimately 16 new cities are involved in some fashion, in addition to three cities –Crystal Bay, Minneapolis and Duluth– that had previously declared an emergency. The key to the campaign was creating templates so we had a common messaging framework, while encouraging cities to customize in whatever way they wanted to make it fit with their community needs.

In St. Louis Park (50,000 population, adjacent to Minneapolis) we have a [Climate Action Plan](#), adopted in 2018, with a goal of net-zero greenhouse gas emissions, community-wide, by 2040. Our [Climate Emergency declaration](#) went first through our Environment & Sustainability Commission, and they modified it to put even more emphasis on climate justice, made sure we used it to kick off a local “2022 Year of Climate Action,” and pushed me to make sure that the coalition of cities taking this step would build on the declarations over time to influence state policy.

Bill Blonigan, Mayor, City of Robbinsdale

Robbinsdale is an inner-ring suburb of Minneapolis with a population of 15,000. Our city council unanimously passed a [Climate Emergency Resolution](#) to precipitate awareness and action by the public and state and federal governments. We hope to move you to do something today to help save the planet and your grandchildren.

Robbinsdale has thoroughly examined and substantially cut its energy use in city buildings, via improvements in HVAC, insulation, lighting replacement and starting Minnesota's [Green Step Cities](#) program. Our new \$35 million water treatment plant has been designed to conserve as much water, energy and raw material as possible. It will have our city's first solar panels.

The Resolution is being used to heat our effort up by many degrees. There are specific and general targets for us to study, create and then implement action to move further toward sustainability and resiliency. We have the opportunity to learn much from other cities that are leading the way with a variety of actions that we have not undertaken. Strong majorities of Independents, Republicans and Democrats want government to lead the way toward these goals. What we do next need not be perfect ...but it does need to be now!

Steve Lindaas, Councilmember, City of Moorhead

Moorhead, a community in northwest Minnesota of roughly 45,000, is part of a 250,000+ metro area that includes Fargo and West Fargo, ND. However Moorhead is often considered a rural community in the state. The city council unanimously passed a [Climate Emergency resolution](#) calling for action by the city with support from state and federal governments. There was strong support in the community especially among students attending local colleges.

Climate change hits very close to home in Moorhead, as the area is in the midst of a massive \$3 billion [flood diversion project](#), to protect the area during times of extreme flooding, which are becoming increasingly frequent with climate change.

Moorhead has a public utility and for the last two years the electricity that residents have used in town has been 100% net-zero carbon. Moorhead is also part of the Green Step Cities program and is in reach of the top tier. Landscaping around our main Public Works building is now a native pollinator demonstration planting. Partnership with Audubon Dakota and River Keepers has extended both prairies and riparian tree planting. A local grant created a Resiliency Task Force that includes members from organizations, cities, schools and businesses. This grant has fostered connections and funded the creation of a food forest at a local park. Residents helped plant fruit trees and berry bushes and there is overwhelming support to expand these efforts. Following the passage of the resolution, the city advertised a Sustainability Coordinator position. The creation of this position will help infuse sustainability and resiliency throughout city actions.

About the Campaign

The Minnesota cities that are participating in the climate emergency campaign are: Bloomington, Columbia Heights, Eden Prairie, Edina, Golden Valley, Grand Marais, Grand Rapids, Lauderdale, Maplewood, Minneapolis, Moorhead, Northfield, Red Wing, Robbinsdale,

Rochester, St. Louis Park, and St. Paul. Minnesota cities that previously declared a climate emergency are Crystal Bay, Duluth, and Minneapolis.

Within Minnesota, we're looking to expand the number of cities participating in the climate emergency campaign, and encourage cities from other states to create similar initiatives. [Here are tools](#) that might be helpful for other cities.

Dive Deeper

You can utilize NLC's [ARPA Sustainability & Climate Resilience fact sheet](#) to learn more about three eligible use categories under the Coronavirus States and Local Fiscal Recovery Funds (SLFRF) and other federal funding opportunities to advance sustainability and climate resilience in your community.

EPA Announces Path Forward on Lead and Copper Rule

By: Carolyn Berndt, Christopher Hadsall

After months of review by the U.S. Environmental Protection Agency (EPA) the Biden administration has offered a [path forward](#) on the Lead and Copper Rule, part of a comprehensive [Lead Pipe and Paint Action Plan](#). In this blog, we break down how we got here and what the Biden administration's recent announcement means for cities, towns and villages.

How We Got Here

The first Lead and Copper Rule was published in the Federal Register in 1991 pursuant to the Safe Drinking Water Act. The EPA regulations focused particularly on limiting the degree of lead and copper contamination of public drinking water systems.

In Dec. 2020, the Trump administration's EPA signed off on [significant revisions](#) to the Lead and Copper Rule. The Lead and Copper Rule Revisions (LCRR) were published in the [Federal Register](#) on January 15, 2021, but were not slated to take effect until March 16, 2021. Because they had not yet gone into effect when President Biden took office, they were subject to a regulatory freeze and review, as is customary with a new administration. While EPA reviewed the LCRR, the agency pushed back the effective date to Dec. 16, 2021.

As of Dec. 16, 2021, the Biden administration has completed its review of the LCRR. After engaging the public through roundtables, listening sessions, and stakeholder meetings, EPA has concluded that the Trump administration's LCRR will go into effect. At the same time, however, EPA [stated](#) its intent to immediately begin work on a proposed rule focusing on and strengthening the requirements for lead pipe replacement, sampling, trigger and action levels, and prioritizing underserved communities. The agency intends to finalize these Lead and Copper Rule Improvements before October 16, 2024—when cities and states would first need to prove that they are in compliance with the current rule. Nonetheless, the EPA has indicated that it intends to keep the lead service line inventory provisions of the LCRR in place after October 16, 2024.

What This Means for Cities: Prepare for Inventory

These announcements mean that cities, towns and villages should begin preparing to comply with at least the LCRR's lead service line inventory provisions. These provisions require that all community water systems and non-transient non-community water systems either develop a lead service line inventory for all service lines in the distribution system or prove that there are no lead service lines in their jurisdiction by October 16, 2024. The lead service line inventory must be publicly accessible, and water systems serving 50,000 people or more are required to publish the inventory online.

Depending on your community water system's tap sampling frequency requirements, systems will be required to update this inventory either annually or triennially. Water systems that exceed the lead trigger level must conduct tap sampling annually, and therefore, these systems must provide lead service line inventory updates annually. Water systems that exceed the lead action level will conduct tap sampling every six months, however, they are required to update the

inventory annually. Other water systems will be required to provide lead service line inventories every three years. *It is possible these requirements could change in EPA's forthcoming rule that will include proposed changes to tap sampling and action/trigger levels.*

Regardless, any system that has known or possible lead service lines must develop a Lead Service Line Replacement Plan, including a strategy to investigate the material of all unknown service lines.

Water systems with only non-lead services lines, such as those where the entire distribution system (public and private) was constructed after a state or federal lead ban, are still required to conduct an initial inventory, but may designate applicable services lines as “non-lead.”

The LCRR outlines a few additional considerations regarding lead service line inventories:

- Galvanized service lines that are or were downstream from a lead service line must be labeled “Galvanized requiring replacement” and must be replaced as part of the system’s lead service line replacement plan.
- There is no requirement to investigate or inventory lead connectors, but EPA recommends reviewing records on connector material composition during the records search for the initial inventory. *This requirement may also change with the forthcoming proposed rule’s monitoring requirement.*

EPA intends to issue guidance on developing lead service line inventories in compliance with the LCRR, including documents on best practices, case studies and inventory templates. EPA will also update the Safe Drinking Water Information System to support state and local data management needs for compliance. Local leaders should look for these new resources in the coming months. The [Lead Service Line Replacement Collaborative](#) provides good resources for local leaders beginning an inventory project.

How Can Cities Pay for Lead Service Line Inventories?

Cities, towns and villages can begin developing a lead service line inventory using a variety of federal funding sources. In particular, the [American Rescue Plan’s State and Local Fiscal Recovery Fund \(SLFRF\)](#) provides extensive, immediately available funding that local governments can use for drinking water infrastructure projects. The SLFRF offers two eligible use categories that would support a lead service line inventory—the “infrastructure” category and the “revenue loss” category.

For example, the [City of Toledo, Ohio](#) is using \$10 million of its SLFRF allocation to replace approximately 3,000 private lead water lines.

Local leaders interested in using SLFRF funds for drinking water projects under the SLFRF “infrastructure” category can consult [this NLC blog](#) and [fact sheet](#) for more details and local examples.

Additionally, the bipartisan Infrastructure Investment and Jobs Act (IIJA) also offers financing and funding mechanisms that can be used for lead service line projects, including inventories. The bill provides \$11.73 billion over five years for the Drinking Water State Revolving Fund (SRF), as well as an additional \$15 billion over five years through the Drinking Water SRF

specifically for lead pipe replacement projects. These funds will flow through the states and the IIJA requires states to award funds as 49% principal forgiveness/grants and 51% loans. For more information on how the IIJA supports local water infrastructure projects, read [this NLC blog](#).

NLC will be engaging closely with EPA on the forthcoming rulemaking process and supporting local leaders as they work to comply with the LCRR inventory requirements.

Learn More

In 2021, NLC sponsored a three-part series on the EPA Lead and Copper Rule. Watch the recording [here](#).



2022 Energy, Environment & Natural Resources (EENR)

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- Jennifer Duff, Vice Mayor, City of Mesa, AZ
- Rick Elumbaugh, Mayor, City of Batesville, AR
- Christian Espinosa Torres, Small and Emerging Businesses Program Administrator, City of Omaha, NE
- Kwasi Fraser, Mayor, Town of Purcellville, VA
- Raul Gonzalez, Councilmember, City of Arlington, TX

- Adam Graham, Vice Mayor, City of The Village, OK
- Ruth Grendahl, Councilmember, City of Apple Valley, MN
- Marvin Heinze, Councilmember, City of Coronado, CA
- Carly Johnson, Councilmember, City of Oak Park Heights, MN
- Marvin Johnson, Mayor, City of Independence, MN
- Abbie Kamin, Councilmember, City of Houston, TX
- Larry Kraft, Councilmember, City of St. Louis Park, MN
- Debbie Kring, Councilmember, City of Mission, KS
- Lauren Kuby, Councilmember, City of Tempe, AZ
- Mina Layba, Legislative Affairs Manager, City of Thousand Oaks, CA
- Sena Magill, Vice Mayor, City of Charlottesville, VA
- Maurice Muia, Councilmember, City of Richmond Heights, MO
- Nick Palumbo, Alderman, City of Savannah, GA
- Johnnie Parks, Councilor, City of Broken Arrow, OK
- Billy Pearson, Councilmember Ward 2, City of Lincoln, AL
- William Pitt, Councilmember, City of Washington, NC
- Leslie Pool, Councilmember District 7, City of Austin, TX
- Hattie Portis-Jones, Councilmember, City of Fairburn, GA
- Jennifer Selin, Mayor, City of Morgantown, WV
- Pat Showalter, Councilmember, City of Mountain View, CA
- Rick Skinner, Mayor, City of Williamstown, KY
- Ellen Smith, Councilmember, City of Oak Ridge, TN
- Katrina Thompson, Mayor, Village of Broadview, IL
- Digna Cabral, Councilmember, City of Doral, FL
- Andrea Barefield, Councilmember, City of Waco, TX
- Susan Summers Persis, Deputy Mayor, City of Ormond Beach, FL
- Satya Rhodes-Conway, Mayor, City of Madison, WI
- Rachel Junck, Councilmember, City of Ames, IA