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June 19, 2017

The Honorable Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

Re: Federalism Process and WOTUS Rule Development

Dear Administrator Pruitt,

The Association of Clean Water Administrators (ACWA) is the independent, nonpartisan, national organization of state and interstate (hereinafter “states”) water program directors, responsible for the daily implementation of the Clean Water Act’s (CWA) water quality programs. We appreciate the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term “navigable waters” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006) and as part of EPA’s federalism consultation under Executive Order 13132.

We appreciate the emphasis you placed on cooperative federalism when discussing EPA priorities for the new administration. Your remarks at the ACWA’s Mid-Year Meeting on March 20, 2017 illustrated a desire to build upon the relationship between EPA and states to ensure our work together results in smarter, more cost efficient, and more flexible environmental protection. Your staffs in the Office of Water and Office of Intergovernmental Affairs have emphasized to us a willingness to have an ongoing dialogue on a number of related issues, including development of a definition of Waters of the U.S. Accordingly, ACWA has convened a working group of representatives from a geographically diverse cross section of states to discuss questions presented to ACWA by EPA about development of a revised definition of waters of the U.S., and offers the following preliminary comments.

#### **I. Federalism and EPA 2-Step Process**

Members of ACWA have been briefed by EPA about the “2-step” process which EPA and the Corps are using to implement the “*Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule*” in an efficient, expedient manner. While ACWA supports EPA taking immediate action to bring more certainty to the regulated community and the public, we also request that EPA and the Corps take whatever time is needed to ensure that a final rule is the result of thorough

examination of the science and implementation concerns, as well as extensive consultation with states throughout the rulemaking. States appreciate EPA making themselves available for discussion on numerous occasions throughout the federalism consultation process. Unfortunately, states have received limited information in the way of draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule; therefore, states can only provide similarly broad guidelines and advice at this juncture. ACWA will be considerably more useful as a resource for the agencies, and be able to provide state perspectives crucial to drafting a practically sound and legally defensible rule, if EPA shares proposed regulatory text or more specific regulatory options that are under consideration before EPA begins drafting the anticipated proposed rule of “step 2”.

While ACWA has provided high level guidance and recommendations to EPA in these comments, our state members are eager to provide more detailed feedback and advice. However, for this feedback and advice to be effective EPA would have to provide states with more information such as what factors are being considered as the agency defines terms like “relatively permanent” and “continuous surface connection,” how much flexibility does EPA have in crafting regional implementation guidelines, and what are the potential implications on grant funding to the states because of fewer jurisdictional waters. ACWA members are the Directors of surface water protection programs across the country and they have real-world experience understanding the complexity of Clean Water Act. When commissioners and elected officials need to discern how to implement this new rule and what effects it will have on locals, our members are the experts they will turn to. ACWA urges EPA to continue to take advantage of consulting with our members, by asking for feedback as the proposed rule is drafted.

## II. Scalia Test

The new administration’s Executive Order on reviewing and revising the Waters of the United States rule directs both federal agencies to consider interpreting the term “navigable waters” in a manner consistent with Justice Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). While Justice Scalia’s opinion emphasized clarity and limitation of federal jurisdiction, and underscored the importance of limited jurisdiction to “relatively permanent” waters and wetlands with “a continuous surface connection” to them, the opinion was a non-majority opinion. The non-majority opinion did not provide EPA with clear guidance on how to define the aforementioned terms, making input from stakeholders such as states critically important for crafting the new rule.

For example, the opinion describes “relatively permanent” waters as “*continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows*”, but also notes in a footnote that “*By describing “waters” as “relatively permanent,” we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months*” and “*we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a “wate[r] of the United States.*”

Indeed, the occasion for that decision is this rulemaking process. States in our dedicated workgroup have not yet come to a consensus on what an appropriate definition would be for “relatively permanent” or for “continuous surface connection”, due to states having diverse hydrologic, regulatory, and political considerations. However, because the impacts of waters which do not plainly flow throughout the entire year vary greatly, outwardly physical characteristics alone should not serve as a primary basis for jurisdictional determinations. Many intermittent waters with sustained seasonal flow impact downstream waters, yet the extent of downstream impacts is greatly influenced by site specific hydrographic factors. What is insubstantial in one region may not be in another region.

Consensus has been reached within the states represented in the workgroup regarding the most restrictive options for each definition presented by EPA to ACWA on April 19<sup>th</sup>: the “perennial streams only” definition for “relatively permanent” and the “wetland must directly touch jurisdictional waters” definition for “continuous surface connection.” Of the options EPA presented, those two are both rigid and overly simplistic, and will likely not be reflective of regional variability and consideration of hydrographic impacts of some non-perennial streams. Accordingly, ACWA recommends EPA remove those options from consideration, and recommends EPA include flexibility measures in the final rule to accommodate regional variability.

ACWA members in the workgroup have also concluded that the other options provided by EPA for “relatively permanent” and “continuous surface connection” are more reasonable and a better starting point for discussion than “perennial streams only” and “wetland must directly touch jurisdictional water.” These other options (perennial plus seasonal, perennial plus measured flow, and varying levels of connectivity for wetlands) can incorporate elements such as seasonality and flow/connectivity metrics, making these options more appropriate. Those options allow for regional considerations as well, which are especially important when delineating which non-perennial waters and indirectly connected wetlands should fall under federal jurisdiction. They also leave room for scientific considerations. For example, when deciding on an appropriate length of time for stream flow for “seasonal” streams, three months may have no inherent scientific value and may not provide the protection needed for critical waters that flow less often such as snowmelt-derived water which is often seasonal, can vary in duration, yet is critical for delivering downstream water quality. While a difficult task, EPA must ensure that the resulting rule and definitions contained within it are regionally practical, as well as easily implemented and justified by good science (such as the EPA report “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”). ACWA recommends EPA consult with the Corps and USGS to ensure definitional and scientific consistency and ease of implementation, and reiterates the need for consulting with states as concepts, ideas, and definitions are being developed in order to ensure the proposed rule meets these objectives.

Thank you again for the opportunity to comment on this important rulemaking in the very early stages of development. As the process continues and regulatory language is developed by EPA and the Corps, ACWA look forward to providing additional feedback. ACWA members will continue to discuss the critical questions posed by EPA, such as: potential impacts of a rule centered on Justice Scalia’s *Rapanos* decision on other state CWA programs, how states would react to changes in federal jurisdiction given that some states have “Waters of the State” definitions allowing no more stringent definition than EPA’s, while others have more expansive “Waters of the State” definitions, and how states with less robust state permitting

infrastructure would adapt to changes in the number of jurisdictional waters. We look forward to future opportunities to share our perspectives on these and other issues as the rule is drafted. Lastly, while these comments represent the views of ACWA membership, we also encourage EPA to consider feedback presented by states in their own individual comments.

ACWA remains ready to answer any questions or concerns EPA has in follow-up to our comments, and would be pleased to facilitate any further dialogue with our state member agencies, your co-regulators. Please contact ACWA's Executive Director, Julia Anastasio, at (202) 756-0601 or [janastasio@acwa-us.org](mailto:janastasio@acwa-us.org) with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter LaFlamme". The signature is fluid and cursive, with a large initial "P" and "L".

Peter LaFlamme  
Director, Watershed Management Division  
Vermont Department of Environmental Conservation  
President, ACWA

Cc: Mike Shapiro, Acting Assistant Administrator, Office of Water