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November 12, 2014

Mr. Ken Kopocis
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Ms. Jo Ellen Darcy
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Via email to: ow-docket@epa.gov

Re: Definition of “Waters of the United States” Under the Clean Water Act Proposed Rule: Docket ID No. EPA-HQ-OW-2011-0880

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

The Association of Clean Water Administrators (ACWA) appreciates the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the proposed national rulemaking *Definition of “Waters of the United States” Under the Clean Water Act* (79 Fed. Reg. 22188, April 21, 2014) (hereinafter, “Proposed Rule”). 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. ACWA’s members have reviewed and considered the Proposed Rule and have remaining comments, questions and concerns and, therefore, we are unable to support or oppose the rule at this time.

Following publication of the Proposed Rule, ACWA coordinated with EPA and other state associations to hold three co-regulator calls to discuss questions from states and gain further understanding of the Proposed Rule. More recently, EPA and three state associations, including ACWA, held four additional engagement calls to further share information and perspectives. These discussions were helpful and ACWA appreciates the time and effort that EPA and the Corps (hereinafter, “the Agencies”) expended in order to explain what the rule is intended to do, and not do, and to hear viewpoints of states. We are,

however, disappointed that the Corps did not participate in the second set of discussions.

The following comments reflect some of the overarching questions and concerns of states. These comments do not supersede or alter the comments of any individual state. ACWA encourages the Agencies to consider all individual comments submitted by states, as these concerns may not be shared by all states.

I. Lack of Consultation with States

Members of ACWA feel very strongly that states should have been consulted early on, as co-regulators, during the development of the Proposed Rule. It would have been very helpful for EPA and the Corps to have a detailed and nuanced understanding of how states currently implement the CWA before concluding that the Proposed Rule will only result in a change in jurisdiction of three percent (3%). As the primary entities responsible for carrying out the CWA, States are uniquely positioned to provide input on how the Proposed Rule would impact their current activities under the various CWA programs, and how the reach of jurisdiction may change dependent on their current authority under state law. The Proposed Rule also raises implementation issues and questions that vary from state to state, important considerations when developing a national rule of this breadth.

II. Timing of Proposed Rule Relative to Science Advisory Board Report

States find that the timing of the Proposed Rule was not appropriate relative to the timing of the report that EPA relied on as scientific underpinning for the Proposed Rule, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. Specifically, review of the report by EPA's Science Advisory Board (SAB) panel should have been carried out to completion before the rule was proposed, so that the Agencies would have had the full benefit of those findings in developing the Proposed Rule, and the states in reviewing the Proposed Rule. For example, in a draft review by the SAB, the panel recommended that connectivity be examined in terms of a gradient that reflects the spectrum of different aspects of connections, such as the frequency, duration, and consequences of those connections. The Proposed Rule appears to take a more binary approach, wherein connections are either present or absent, and implementation of this approach is very different and can pose challenges to regulators.

III. Geographic Variability

Due to state-to-state differences in geohydrology and water-related legal authorities, as well as uncertainty as to the effects of the rule on implementation of CWA Sections 303(d), 402, 404 and 319 programs, ACWA finds it very difficult to comment on whether the Proposed Rule is suitable for all states. For example, some states question federal jurisdiction over all ephemeral tributaries since some rain-dependent streams flow so infrequently as to render their effect on downstream waters inconsequential. However, some states are supportive of this inclusion, either because they have identified a strong connection between ephemeral streams and downstream

protection in their state or because case-by-case determinations of whether ephemeral streams have a significant nexus to downstream waters would be too resource and time intensive.

Due to these differences, ACWA requests continued dialogue with the Agencies in order to craft a final rule that is beneficial for implementing the CWA programs administered by our member state agencies. Writing such a fundamental rule that applies nationally is a very difficult task, and state regulators can help due to their intimate knowledge of their watersheds and delegated authorities, and understanding of on-the-ground implementation of CWA programs.

IV. Exclusions from CWA Jurisdiction

ACWA agrees that the specific exclusions listed in the Proposed Rule will provide increased clarity for regulators and the regulated community. This, in turn, may help streamline permitting by reducing the number of individual jurisdictional determinations that will have to be made. There are some exclusions, however, that need further clarification. Regarding the exclusion of “[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow”, ACWA encourages the Agencies to clarify in the final rule that such ditches that drain uplands but eventually discharge to waters of the U.S. are not jurisdictional throughout the portion of the ditch that was excavated in uplands. The Agencies should also include detail in either the final rule or subsequent guidance on how to parse out exactly where the line is between nonjurisdictional and jurisdictional sections of such ditches, as well as how to determine that a ditch does not contribute flow to a downstream navigable water. Finally, further clarity is needed on whether, when, or what parts of stormwater collection and treatment systems fall within the exclusion of “waste treatment systems”, and therefore, a definition of these systems, or better criteria through which these systems will be identified, is warranted.

V. Lack of Clarity in Definitions

A final rule could provide increased clarity for identifying tributaries and adjacent waters if clearer definitions are developed. As currently stated, there are no clear bounds on the spatial extent of floodplains and riparian areas. Similarly, more detail is needed on the scope of a “shallow subsurface hydrologic connection”, i.e., how deep can water be located and still be considered “shallow” or, given the size of subterranean streams or surficial aquifers in some regions, how close must the waterbodies be located to become neighboring? While ACWA agrees that shallow subsurface flow can connect adjacent waters to a(1) through a(5) waters, the significance of the connection is a critical factor. The definition of “shallow subsurface hydrologic connection” should establish a limit beyond which a case-by-case significant nexus analysis would be needed to assert jurisdiction. Also, the rule language should clearly state that the shallow subsurface aquifer is, itself, not jurisdictional. Terms like rills, gullies and uplands are also not defined. Finally, ACWA requests that the rule clarify that the definition of navigable waters does not affect the ability of states to assume the 404 program.

A national rule is a difficult vehicle for addressing regional variations in geohydrology, therefore additional regional guidance on how to apply the rule’s definitions is another way that clarity can be provided. For example, states need greater detail on how to identify beds, banks and ordinary

high water marks for the purpose of identifying tributaries. Guidance on this is currently in place in some regions, but not others. States also need greater detail on how to determine if a wetland “contributes flow, either directly or through another water” to one of the (a)(1)-(a)(3) waters. Without clear terms and guidance, states will be left to interpret this rule on their own, which undermines its intent to create national consistency. \

VI. “Other Waters” Category

In contrast to the exclusions mentioned above, which provide for greater clarity when identifying waters of the U.S., the concept of “other waters” that are potentially jurisdictional may slow down projects due to the need for significant nexus determinations. It is also unclear whether the 2008 guidance will still be relied upon to make such determinations. If not, there needs to be enough flexibility in the final rule so that the Agencies can work with partners in each state to develop a process for determining a significant nexus. ACWA also strongly encourages the Agencies to work with states on a regional basis to jointly identify policies that consistently implement the significant nexus analysis and allow for grouping of geomorphically similar waterbodies. For waters that do not easily fit into such groups, the burden should be on the Corps and EPA to determine jurisdiction in a timely manner after requests for jurisdictional determinations are made. Importantly, greater transparency from the Corps and better agreement and consistency between Corps districts and EPA are needed if implementing a final rule will be successful.

VII. Additional Guidance

ACWA would like to stress that for both significant nexus determinations and the desired clarifications described above, development of regional expectations (ecologically delineated) is a potential means of providing greater certainty. But in order for this to be useful, states must be involved in the development. As has been done for identification of regional hydric soils under the Section 404 program, we encourage the formation of regional committees, made up of EPA, the Corps and state partners, to develop any further definitions and guidance that may be needed in order to consistently implement the final rule. In addition to suggested guidance stated earlier, this should include guidance on water quality standards applicable to ephemeral streams. This is important because many of those streams are dry the great majority of the time and do not generally support the CWA rebuttably presumed uses under Section 101(a)(2) (i.e., “fishable and swimmable”), unlike streams and rivers that run for sustained periods (intermittent) or continuously (perennial) throughout the year.

Thank you again for the opportunity to comment on this important rulemaking. We remain ready to answer any questions or concerns the Agencies may have 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) 756-0600 ext. 1 or janastasio@acwa-us.org with any questions.

Sincerely,



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