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April 15, 2019

Andrew Wheeler
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

R.D. Secretary James
Assistant Secretary, U.S. Army Corps of Engineers
441 G Street NW Washington, DC 20314

Re: Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Assistant Secretary James,

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 proposed rule “Revised Definition of “Waters of the United States” and appreciate the agencies’ efforts to work with states to create a clear, effective rule. Our members who were able to participate in the recent, albeit limited, state outreach sessions in Kansas City, Atlanta, Seattle, and Albuquerque appreciate the opportunity they had had to ask questions and provide feedback on the proposal. Several states were unable to travel to these outreach sessions and as such, ACWA encourages the agencies to hold additional outreach before publication of a final rule to ensure that all states are afforded an opportunity to provide input into the text of the rule, the Resource and Programmatic Assessment, and associated implementation plans before the proposal is finalized.

Moreover, ACWA members universally encourage the agencies to engage states on the proposed rule in a dialogue rather than simply taking input and emerging with a final rule without opportunity to provide input on a final draft. ACWA urges the agencies to host discussion-based outreach sessions, such as targeted technical webinars, where states can weigh in on important implementation concerns. ACWA members also encourage the agencies to provide states with appropriate advance notice of these important outreach sessions as many states have processes for accommodating travel which are difficult to expedite. Lastly, ACWA also encourages continued outreach after publication of a final rule to ensure implementation plans are executed efficiently and unintended consequences are minimized.

In order to develop the following comments, ACWA convened a working group of representatives from a geographically diverse cross section of states to discuss the proposed rule. Our members' perspective as surface water program managers give us a unique position among stakeholders, and these comments provide the agencies with insight into the thoughts and concerns of state co-regulators as they prepare their programs, staff, and regulated community for implementation of a revised definition of Waters of the United States.

However, while ACWA represents the broad coalition of state surface water program managers, the agencies will receive comment letters from our individual member states which are vital and important sources of advice for the agencies to consider as they move forward with this rulemaking. Accordingly, we encourage the agency to also consider recommendations provided by individual states.

Lastly, the accelerated comment period made it difficult for many states and ACWA to fully evaluate and understand the potential consequences of the new proposal on existing CWA programs. We urge the agencies to take the time necessary to fully understand the potential programmatic consequences to state CWA programs before proceeding to a final rule.

Comments on the Definitions and Terms in the Rule

ACWA Members Support Increased Clarity

ACWA members support the agencies' dedication to clarity and ease of implementation while creating regulatory certainty. ACWA members appreciate the effort to create a simplified framework where the default assumption is that if a water does not fit into a listed category, it is expressly not jurisdictional. ACWA members also appreciate the clarity provided by the listed exemptions to the rule. Some members support that the agencies created a separate category for lakes and ponds in the proposed the rule.

ACWA Members Encourage EPA to Reexamine Certain Terms and Definitions to Increase Clarity

Certain terms and definitions contained in the proposed rule may not lend themselves to increased clarity, flexibility, and practical implementation. ACWA members expressed varying perspectives on certain terms and definitions, and ACWA encourages the agencies to work with ACWA and individual states to identify and fully understand where clarity in the proposed rule may be added. ACWA concerns stem from the potentially broad variability in how those terms and definitions may be implemented across our varied landscape.

Ditches

Many states voiced concerns about the definition of ditches, and their relationship to tributaries. Defined as “artificial channels used to convey water”¹, ditches would be jurisdictional under the proposed rule if they are constructed in a tributary, which is defined as a naturally occurring surface water channel². The tension in these definitions between waters which are artificial or naturally occurring has led to some confusion about what ditches and tributaries would be jurisdictional. It is also not clear what a ditch “constructed in a tributary” means in many instances. For example: if a tributary is rerouted into a ditch excavated in upland, is the tributary no longer “naturally occurring”? Would the ditch itself be considered “constructed in a tributary” and if not, does that introduce a temporal element into the definition as well? We encourage the agencies’ to further clarify the treatment of ditches.

Typical Year

Typical year is defined in the rule as “the normal range of precipitation over a rolling 30-year period for a particular geographic area”³, and in supplementary information section the agencies explain that the definition is not intended to include times of drought or extreme flooding⁴. Notably, the agencies propose to consider a year to be “typical” when “observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a rolling 30-year rainfall average.”⁵ The agencies also propose to use a “watershed-scale basis” as the geographic area for typical year.⁶ Finally, the definition for intermittent waters also introduced another modifier, describing intermittent waters as surface waters flowing continuously during “certain times of a typical year”.⁷

Taken together, “typical year” and the related terms and modifiers have not added clarity to the proposed rule, instead introduce considerable uncertainty. Some states, for example, have noted that if the definition is based off rainfall from the 30th to 70th percentiles in a rolling thirty-year period, the definition would be excluding significant drought and rainfall events. Other states have questions about the geographic area to which this definition will be applied and the implications of that on program implementation, as data and monitoring resources are not distributed equally in any given area. Additionally, the appropriate area for such a definition may necessarily cross state borders, potentially introducing another level of uncertainty if neighboring states disagree on appropriate boundaries or scales for a regionalized “typical year” definition. States appreciate the efforts by the agencies to delineate a geographic scale for this term in order to provide flexibility, but caution the agencies to ensure that the definition itself (as well as other definitions incorporating it and modifying it by limiting “typical year” further with vague modifiers such as “certain times of typical year”) does not end up becoming confusing or cumbersome.

¹ 84 FR 4204

² *Id.*

³ *Id.*

⁴ *Id.* at 4174

⁵ *Id.* at 4177

⁶ *Id.*

⁷ 84 FR 4204

Intermittent

Intermittent is defined as “surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts.”⁸ Some states expressed that elements of that definition introduce additional uncertainty into the proposed rule. For example, what does the term “certain times” of a typical year mean and how far does the surface water have to flow to be “continuous.”

States commented further that because of the inevitability of waters which may not definitively be classified as ephemeral or intermittent, the agencies should work with states to create a framework for making determinations which relies on state expertise and authority on waters which are difficult to classify. Finally, states also acknowledge the role of regional guidance issued by the agencies on making jurisdictional determinations and ask the agencies to begin discussing potential regional guidance with states in advance of issuance of a final rule.

Interstate Waters

Some ACWA members voiced concerns about “Interstate Waters” being removed as a de facto category of jurisdictional waters. They believe that interstate waters were an easy-to-identify, simple category of waters. Additionally, EPA can best serve as a federal partner who can help mitigate and manage water quality impacts from upstream to downstream states. States appreciate the agencies highlighting the state role as co-regulators in implementation of the CWA, but states also appreciate the role of EPA as fellow co-regulator – especially for water quality issues not solely in control of one, or more than one state due to the movement of pollutants downstream. Accordingly, ACWA encourages EPA to consider unintended consequences to removal of interstate waters as a de facto jurisdictional category, particularly where a waterbody is not in itself a Traditional Navigable Water or tributary to one.

I. Role of Science in the Proposed Rule

ACWA members appreciate the agencies grounding the proposed rule in the language and structure of the CWA, making legal distinctions on what waters are appropriate for federal jurisdiction given factors present in the CWA. However, ACWA members also stress the importance of recognizing that any new proposal must also be grounded in science. While not all member states agree on the application of different reference documents and scientific research as the agencies redefine Waters of the United States, ACWA encourages the agencies to create a final rule which reflects sound science when considering questions such as “what sort of flow regime should be used when finding the outer boundaries of jurisdictional intermittent waters?” or “should a typical year consist of rainfall from the 20th to 80th percentile or 30th to 70th percentile?” Ultimately, such questions are as likely to be resolved by looking at the scientific effects of the options available to the agencies as they are also looking at case law or legislative

⁸ *Id.*

history.

II. Questions about Supporting Documents and Rule Implementation

Accuracy and Importance of State-by-State Program Descriptions provided by Agencies

ACWA applauds EPA's efforts to collect regulatory information from states, tribes, and territories to inform the proposed rule. The "State-by-State Program Descriptions," located in *Appendix B* of the *Appendices to the Resource and Programmatic Assessment for the "Proposed Revised Definition of Waters of the United States"* (hereafter "Appendix B"), provide important and vital context for the text of the proposed rule. However, ACWA members also want to point out to the agencies that several states have identified errors in their individual state program descriptions. We encourage the agencies to work with the states to ensure that these program descriptions are accurate reflections of existing statutory and legal authority possessed by individual states to regulate waters within their borders.

In addition, we encourage the agencies to expand the pool of state data which they draw upon for the "*Resource and Programmatic Assessment for the "Proposed Revised Definition of Waters of the United States"*" (hereafter "RPA") to inform this proposed rule. In the RPA, the agencies state that they rely on a mix of association surveys which did not include responses from a majority of states, an older report from the Environmental Law Institute (with no link or title provided), comments from the 2015 rulemaking correcting said ELI report, and 24 individual state responses to the agencies after the agencies shared summaries of data collected during this rulemaking.⁹ While these are all useful sources of information, we strongly encourage the agencies to continue seeking a fuller picture of state programs and authorities before issuing any rule by continuing to reach out to states to verify the agencies' gathered information. It is important for the agencies to fully understand these authorities for *all* states and then reassess any conclusions drawn from the RPA before finalization a new definition.

Assumptions by Agencies in the Resource and Programmatic Assessment

In the "*Summary of Programs in States, Territories, and the District of Columbia*", the subsection titled "*State Responses to Past Jurisdictional Clarifications*" is included to illustrate the variety of state regulatory adaptations to past Waters of the United States related events. The agencies point to state changes which occurred immediately after the landmark case *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers, et al. (SWANCC)*¹⁰, while acknowledging that such actions are not indicative of future state action but are "useful in helping the agencies understand how aquatic resources could be regulated at a state level under a revised "waters of

⁹ P. 54, footnote 68, Resource and Programmatic Assessment for the "Proposed Revised Definition of Waters of the United States"

¹⁰ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)

the United States” definition”¹¹. ACWA encourages the agencies to analyze how states have responded not only to *SWANCC* but to other CWA cases as well as EPA actions through the years to prevent unnecessary assumptions about how states may respond to this proposed rule. ACWA supports studying prior state adaptations to changes in jurisdiction or case law to inform potential future state changes, so long as the agencies understand that many states have entirely different political, regulatory, and even hydrographic landscapes which may prompt different responses from the state today compared to what may have happened in decades past.

The agencies conclude by summarizing the potential effects of this proposed revised definition, writing that most states have options to expand coverage, and some states would encounter obstacles from lack of such options:

“Most states that have commented on what might be potential effects to their state programs under a revised definition have stated that state laws and regulations allow them to address aquatic resources that are not subject to CWA jurisdiction. A few states have said the opposite, expressing concerns about the potential effects to their programs and would have to re-evaluate their programs to consider addressing waters in their state should they no longer be regulated under the CWA. However, based on the limited preproposal information the agencies provided, most states were generally unsure of the potential impacts to their programs.”¹²

Above all, ACWA members want to caution the agencies from viewing potential changes to state water resources regulation in response to this proposed rule as a binary choice of adaptive expansion or contraction. Throughout the preamble, the agencies refer to drawing a “line between Federal and State waters”, but the reality is that jurisdiction and its impacts cannot be boiled down to shifting a line and shifting resources, as many states have regulatory overlap between Waters of the State and Waters of the U.S. and have built their state programs and their cooperative relationship with the agencies around that complicated overlap. As illustrated in the “Potential Programmatic Consequences” section below, states have concerns about how the proposed rule could create unintended programmatic consequences for states. These structural issues are not without remedy, however, addressing these issues can require a combination of state actions both inside and outside of state clean water programs, including building new state programs and hiring staff, passing new legislation, amending existing legislation, or going through a public rulemaking process. Given the number of factors potentially influencing the success of these solutions, the agencies should consider a multi-year delay in the effective date of the final rule to provide those states who may need to create new or expand existing regulatory programs with ample time to thoughtfully consider and develop sound and efficient programs.

Programmatic Consequences

¹¹ P. 55, Resource and Programmatic Assessment for the “Proposed Revised Definition of Waters of the United States”

¹² *Id.* At 60

Section 303(c), (d): Water Quality Standards, and Listing and Total Maximum Daily Load (“TMDL”) Programs

States have several concerns regarding potential unintended consequences to state 303(d) programs under this proposed rule. Most of the concerns stem from changes which would occur should certain waters become non-jurisdictional federally under the proposed rule, and what that may mean for wasteload allocations and load allocations in TMDLs (and the associated permit limits for dischargers). If a waterbody or watershed has a new distribution of jurisdictional and non-jurisdictional waters, that could change where pollutant discharges are allocated, and could change the balance of responsibility among permitted dischargers as well as between point and nonpoint sources. There are approximately 73,000 TMDLs that were developed over the last 30 years, some of which may be legally vulnerable if not revised to reflect the new jurisdictional framework. Revisions to TMDLs can be costly and time consuming for states, not to mention potential sources of litigation, and given the sheer number of TMDLs, the effect of these potential changes on states collectively could impact water quality protection in unexpected ways and result in additional uncertainty for the regulated community. Additionally, some states allocate staff time and receive federal grant funding for important monitoring and assessment work based on which waters are or are not federally impaired as a matter of practicality, so reducing the number of waters which are jurisdictional could also reduce monitoring and assessment of important waters. Finally, many states play a role in large interstate TMDLs, and the agencies should ensure they work with states to consider potential effects on those disproportionately important waters and watersheds which make up interstate TMDLs.

States also may face a need to adopt water quality standards for waters which are no longer federally jurisdictional, as traditional federal water quality standards are only applicable to federal waters. The combination of limitations on programs regulating beyond the federal floor set by the agencies in some states, and the resource constraints which may limit ability or pace to create state water quality standards may also develop into significant implementation issues for states.

Finally, some ACWA members have voiced antidegradation concerns about higher quality waters meeting water quality standards that are downstream from newly non-jurisdictional waters in states which do not have a codified antidegradation program. Many states have internal antidegradation policies rather than codified requirements, and the uncertainty of how federal and state agencies would adapt antidegradation programs to reduced federal jurisdiction and involvement under the proposed rule should be explored further by the agencies prior to issuing a final rule.

Section 401: State Water Quality Certification Programs

The RPA acknowledges that as “reduction in the scope of jurisdictional waters reduces the number of federal permits, availability of section 401 as a water quality tool similarly will be reduced.”¹³ However, neither the RPA, Appendix B, nor language in the rule or preamble to the

¹³ *Id.* at 86

rule itself discusses potential permitting gaps which will result in a reduced availability of states to use water quality certifications.

Several states in our workgroup have structured their cooperative relationship with the agencies for regulation of surface waters, wetlands, and streams so that the states use section 401 water quality certifications to evaluate impacts of projects on state water quality, rather than a state permitting program. Should applicability of section 401 be reduced commensurately with the reduction of jurisdictional waters under this proposed rule, projects which discharge into, dredge out, or fill formerly jurisdictional waters including both streams and wetlands could go unregulated since there would be no opportunity, through 401 certification, for state evaluation of the project. Furthermore, some states with more expansive waters of the state definitions bar unpermitted discharges to state waters and depend on federal processes such as 401, 402, and 404 to evaluate water quality impacts to waters of the state. In these states, if federal jurisdiction is scaled back, states relying on 401 would have to create a state permitting structure to ensure that discharges to non-jurisdictional state waters and wetlands are not unregulated or in violation of state law.

Section 402: National Pollutant Discharge Elimination System

The RPA concludes that “The agencies assume that the proposed rule would not greatly affect NPDES permitted facilities”¹⁴, and solicits comments on this conclusion. States have discussed several potential unintended consequences of which the agencies should be aware as they continue to analyze potential impacts to NPDES programs. As mentioned above, this proposed rule has the potential to create regulation gaps in certain states. NPDES permits may have to be adjusted as the distribution of point source discharges are changed. Further, many changes may be challenged in court by permittees depending on where existing discharges are and where jurisdictional waters “move” under this proposed rule. A new distribution of jurisdictional and non-jurisdictional waters and associated impacts on 402 programs would vary depending on downstream and upstream sources, as well as downstate and upstate jurisdictions. Likewise, water quality based effluent limits (WQBELs) reliant upon TMDL waste load allocations developed under one jurisdictional framework may no longer be appropriate or defensible under a new jurisdictional framework. States believe EPA needs to reevaluate the potential impacts to the 402 program and in particular the impact to WQBELs.

Section 404: Dredge and Fill Permit Programs

Certain states have broad definitions of waters of the state and prohibitions on unpermitted discharges in waters of the state, coupled with no state-run fill permitting program. Instead, large discharges of fill are permitted solely through federal 404 permits. Under the definition in the proposed rule, federal jurisdiction would be scaled back and discharge of large quantities of fill would, in some states, be unregulated and possibly in violation of state law and/or effectively unregulated due to lack of appropriate federal or state permitting program. Accordingly, states in this scenario, especially western states with more ephemeral waters becoming non-jurisdictional,

¹⁴ *Id.* at 94

would be faced with costly legislative and regulatory processes. Additionally, the regulated community would face increased regulatory uncertainty.

Additionally, for those States considering the feasibility of assuming section 404 permitting authority they may have to adjust their analyses because of the proposed rule. Several states have spent significant resources analyzing the costs and benefits of assuming section 404 programs including participating with the agencies in the *Assumable Waters Subcommittee* which deliberated on the issue to provide a report to the *National Advisory Counsel for Environmental Policy and Technology* (“NACEPT”)¹⁵. ACWA members commented that a narrowing of federal jurisdiction may impact their evaluation of the efficiencies gained by assuming 404 programs as they may be assuming less waters. ACWA members have previously remarked in letters to the agencies¹⁶ that there are *many* considerations present while evaluating assumption, and while increased definitional clarity would theoretically provide efficiencies in some permitting, unexpected implementation obstacles of a new proposed rule and potential litigation may add to the list of factors creating uncertainty regarding 404 assumption impacting the number of states that may pursue section 404(g) assumption.

Other Potential Unintended Consequences

In addition to the issues raised above, several states raised concerns about the interactions between the CWA and other environmental statutes such as the Endangered Species Act and are concerned that the changes in definition may adversely impact these programs. ACWA members have also raised concerns about the impacts to biosolids, CAFO/AFOs, and source water protection programs at the state level as well. While not all state programs will be impacted in the same way, for some states the proposed rule may have disproportionate and unexpected impacts that cannot yet be identified given the shortness of the comment review period.

Finally, the relationship between states and the agencies beyond the CWA also may impact changes to state water programs caused by this rule. For example, a question which emerged in our workgroup discussion was whether the federal preemption doctrine would play a role in state-federal interactions, especially as it relates to federal lands in the west. For instance, when assigning waste-load allocations in a TMDL or when a federally permitted facility is discharging to newly non-jurisdictional waters regulated by states, there is uncertainty regarding what federal agencies are required to do versus what they may voluntarily do. States would appreciate more time to discuss and reflect on this issue.

¹⁵ Assumable Waters Subcommittee's Final Report (available at: <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>)

¹⁶ See ACWA letter re: Assumable Waters under CWA section 404, with ECOS and ASWM in 2014 (available at <https://www.acwa-us.org/wp-content/uploads/2017/05/Letter-to-EPA-Re-Assumable-Waters.pdf>), with ECOS and ASWM in 2016 (available at <https://www.acwa-us.org/wp-content/uploads/2017/04/Letter-from-ECOS-ACWA-ASWM-on-USACOE-position-on-assumable-waters-1.pdf>), with ECOS and ASWM in 2017 (available at <https://www.acwa-us.org/wp-content/uploads/2017/08/Letter-to-EPA-re-assumption-from-ECOS-ACWA-ASWM.pdf>), and with ASWM in 2018 (available at https://www.acwa-us.org/wp-content/uploads/2019/01/Final-Joint-Letter-on-Assumption_ASWM-ACWA_1.28.19.pdf)

Due to the short time frame for review and comment, our members and our workgroup were unable to discuss many of these issues in detail, let alone discuss the numerous questions posed throughout the proposed rule, to provide a fully complete analysis and understanding of the potential impacts the proposed rule will have on state CWA programs. Accordingly, ACWA urges the agencies to use the feedback provided by the states as a starting point for continued dialogue with ACWA and with individual states as the proposed rule is further developed.

Concerns about Mapping

Throughout the pre-proposal federalism consultation process, the agencies discussed the possible role of state and federal mapping as a tool to help identify jurisdictional waters. States have a wealth of experience with mapping technology and mapping initiatives and, therefore, encourage EPA to continue to work with the states and learn from their breadth of experiences with mapping and the pitfalls to avoid. During our workgroup, ACWA learned that state experiences mapping waters and wetlands vary greatly: certain states which have undertaken mapping initiatives have benefited greatly and developed practical methodology which has since been piloted and scaled up throughout the state successfully for intermittent waters. Other states have attempted mapping and characterize it as a logistical nightmare, serving as an ineffective drain on limited agency resources.

ACWA members on the workgroup agreed that the safest route for the agencies regarding mapping would be to use any mapping technology or mapping initiatives strictly as an informational tool, complementing regulatory frameworks rather than replacing jurisdictional determinations and the definitions which inform them. Even as an informational tool, ACWA members caution the agencies to develop a framework in which such maps do not become inflection points in litigation over jurisdictional determinations. Similarly, some states felt that mapping efforts should not be compelled, but rather something states can opt-in and receive technical and financial assistance from the agencies. Conversely, other ACWA members voiced concerns that any mapping initiative, even one which was optional, would be a large undertaking for the agencies which would divert resources from more important tasks. Finally, ACWA members also emphasized that any approach the agencies take to mapping jurisdiction must account for changing wetland and water boundaries over time. ACWA encourages the agencies to reach out to states individually and through ACWA in systematic fashion in order to learn more about potential costs and benefits of mapping jurisdiction.

Funding Implications

The tenets of cooperative federalism require resources in order to be fully realized. As co-regulators of the CWA along with the agencies, ACWA members want to highlight possible funding implications of the proposed rule. Even without accounting for unintended costs to states or increased costs to states that choose to create new regulatory programs to close any gaps in regulation, the proposed rule's reduction of the scope of jurisdictional waters may result in less

federal funding going to states through section 106 funds. In the RPA, the agencies state “The programmatic scope of the section 106 water pollution program grants is sufficiently broad and cross-cutting to minimize the effects of any incremental change in jurisdiction from a grant allocation perspective”¹⁷, however the change in jurisdictional waters may be much greater in certain states than others, and thus the effect on states is not necessarily evenly distributed even if the total change in jurisdiction across the country is “incremental”.

Beyond CWA authorized financial assistance programs such as section 106, ACWA members encourage the agencies to perform additional research on state-specific scenarios in order to more fully grasp programmatic costs borne by states. As mentioned throughout our comments, some states will have to undergo a combination of regulatory and legislative processes in order to maintain their status quo regarding protection of waters and wetlands. The creation of new permitting programs or restructuring of existing programs, hiring of staff, public outreach, and regulatory uncertainty borne by the regulated community will all be strains on the already limited state budgets. As co-regulators, we urge the agencies to do additional outreach and research on potential unintended costs to state budgets so that state co-regulators can adequately prepare ahead of time to implement a new definition of Waters of the United States.

Implementation Timeline & Guidance

ACWA asks the agencies to consider providing details on implementation timetables and consider utilizing a phased approach to implementation in order to provide states with the time to prepare to implement the proposed rule and to develop or modify any regulatory programs in the state. Even in states where the ability to adapt *exists*, and the will to do so also *exists*, there may or may not be enough political capital to affect programmatic shifts *quickly enough* to mitigate unintended consequences such as those discussed above. Working with states to develop a multi-year phased implementation plan would help provide the regulatory certainty that the agencies and regulated community both seek. Given the expedited nature of this rulemaking, the lack of discussion concerning field implementation guidance, and necessary programmatic changes in certain states, a phased approach over the course of several years would allow all stakeholders more time to identify and adjust to both intended and unintended consequences of the rule. ACWA is ready and willing to assist the agencies as they consider the options available to them to make implementation a more efficient and practical process.

Finally, ACWA members consistently expressed a desire for the agencies to discuss their plans regarding implementation guidance such as field guidance that could serve to regionalize definitions. ACWA members did not reach consensus on whether any regionalization is preferred in the rule text itself versus in guidance, but many ACWA members did express disappointment that field guidance used by the agencies in jurisdictional determinations was not a major part of pre-proposal discussions since the rule text alone cannot account for many of the nuances that go into the actual jurisdictional determinations. ACWA urges the agencies to develop any relevant

¹⁷ P. 100, Resource and Programmatic Assessment for the “Proposed Revised Definition of Waters of the United States”

guidance associated with the rule in collaboration with states, concurrently to the rule rather than independently and after publication of a final rule.

Thank you again for the opportunity to comment on this important rulemaking. When commissioners and elected officials need to discern how to implement this new rule and what effects it will have on state government, local landowners, and other stakeholders, on permitting efficiency, and on water quality our members are the experts they will turn to. ACWA urges EPA to continue to take advantage of this expertise and experience, which separates ACWA members from other stakeholders providing comments on the proposed rule, by working directly with ACWA moving forward. As co-regulators, we thank you for continually emphasizing to both us and the general public the importance of an EPA who espouses cooperative federalism for protecting our country's resources, including and especially our surface waters.

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,

Allison Woodall

A handwritten signature in cursive script that reads "Allison Woodall". The signature is written in black ink and is positioned below the typed name.

ACWA President
Special Assistant to the Deputy for the Office of Water
Texas Commission on Environmental Quality