Memorandum on State Water Regulation

To: Mr. David Ross, U.S. Environmental Protection Agency; Mr. Ryan Fisher, U.S. Army Corps of Engineers

From: Association of Clean Water Administrators (ACWA) Staff

Re: Survey on State Authority, Jurisdiction, and Flexibility regarding Surface Water Regulation

The purpose of the survey was to serve as a follow up to a prior ACWA survey regarding whether states have statutory language preventing them from having more stringent environmental protection regulations than the Federal government. This follow-up survey focused exclusively on water, rather than environmental protection broadly, and asked a number of questions regarding state statutes, constitutions, definitions of Waters of the State, state authority depending or incorporating on the Clean Water Act by reference, etc. States were given two weeks to respond, and the questions were similar to the survey provided by Western States Water Council to their members. The following states responded: WI, WA, NV, WY, MO, DC, NY, SD, MN, AK, OH, IA, IN, MA, NH, HI, MT, CA, OR, VA, MI, OK. The respondents are a useful cross section of states but should not be viewed as representing trends nationally or representing all states. For your convenience, we have provided summaries of the responses to each question below, as well as select takeaways.

1. Does your state constitution contain any provisions to protect the quality of waters within your borders? Please include relevant citation(s).

The results showed twelve respondent states with provisions mentioning water quality management or protection, and ten not mentioning anything about water quality protection. However, provisions cited as mentioning water quality protection varied greatly in their language and purpose. For example, The Ohio Constitution in Art. I, § 19b provides an "Affirmation of certain property interests with respect to ground water and other water on or flowing through a property owner's land", and the Washington constitution (Article VII, §10) creates a natural resources and outdoor recreation trust fund to be used to enhance water quality, but the trust has never been funded.

2. Do your state statutes contain any provisions to protect the quality of waters within your borders? Please include relevant citation(s).

Every state which responded had many state statutory provisions dealing with protecting water quality. It will be best to view the individual survey responses. The statutory provisions vary widely and cover a host of issues such as: defining waters of the state, state clean water acts, establishment of state agencies, establishing groundwater protection requirements, limits and prohibitions on discharges of pollutants, permit requirements, and much more.

3. Do your state statutes or regulations define "waters of the state" or delineate the scope of state jurisdiction over waters within state boundaries? Does this jurisdiction explicitly include water quality protection purposes? Please include relevant citation(s).

Thirteen respondent states have definitions of waters of the state broader than the EPA definition: WI, CA, MA, IN, WA, OH, MN, NY, NH, OR, IA, MI, and VA. The other eight respondent states have definitions that are narrower than the EPA definition: MI, MT, NV, SD, WY, AK, HI, and DC.

4. Do any of your state water quality statutes or regulations depend explicitly upon the authority of the Clean Water Act or delegated federal authority to implement Clean Water Act programs? Please include relevant citation(s).

Thirteen respondent states incorporate the CWA into state statutes and regulations for very narrow or specific purposes, such as delegated permitting authority stemming from the CWA and EPA regulations, generally citing the goals of the CWA, or prohibiting the state from adopting stricter technology limits than federally required. The other nine respondents answered that their state statutes and regulations do not depend on the CWA at all.

5. Do your state statutes or regulations contain any provisions for protecting water quality that are similar in purpose to the following sections of the Clean Water Act? Please include relevant citation(s).

- ***a. §303(d) – water quality standards (WQS) and total maximum daily load (TMDL) programs***
- ***b. §311 - oil spill prevention and response program***
- ***c. §402 – national pollutant discharge elimination system (NPDES) permit program***
- ***d. §404 – dredge and fill permit program***

Every state we surveyed had provisions similar in purpose to §303(d), ranging from authorizing whole programs and requiring development of water quality standards to providing processes for developing TMDLs and developing impaired waters lists.

The following states had water quality provisions in state statutes or regulations similar to §311: WA, WY, NY, SD, MN, AK, IA, IN, MA, NH, HI, CA, OR, OK. The remaining respondents did not.

All respondent states had a state statute or regulation implementing NPDES permit administration, including MA which has a provision providing for joint administration of their NPDES program with EPA.

Of the respondents, only DC and SD did not have provisions either similar to or complementing §404. Most respondent states did not have provisions authorizing state permits due to not having assumed the program. Most respondents had provisions with some analogous or complementary feature to §404, such as managing discharges into wetlands (sometimes isolated wetlands), facilitating §401 Water Quality Certifications from EPA as a part of the §404 program, or directing a state to consider or seek assumption of the §404 permit program in the case of AK. Additionally, Michigan has two laws as part of it s assumed Section 404 program which are very similar to §404.

6. Do your state statutes or regulations offer, allow, or facilitate additional water quality protections beyond what is available under the Clean Water Act? Please include relevant citation(s).

The following 15 states have water quality protections beyond CWA: IA, MO, SD, WY, NV, IN, MN, OH, WI, WA, NH, MA, NY, CA, OK, MI, VA, and OR. The following 8 do not regulate beyond requirements of the CWA: DC, HI, AK, MO, MT, SD, WY, NV.

7.

A. Do your state statutes or regulations restrict or prohibit water quality protections from being more stringent than federal requirements?

Eleven state respondents had statutory or regulatory limitations prohibiting water quality protection requirements more stringent than federal requirements: IN, MN, OH, WA, WI, IA, MI, MT, NV, SD, WY. Several states surveyed (both with such regulatory/statutory limitations and without them) also have provisions to provide more stringent requirements for water quality protection if needed to meet WQS. Such provisions often require a showing of proof or facts by the state agency and reporting to and/or approval by state legislature.

B. If yes, how might a revised, or specifically narrowed (in some level of accordance with the Rapanos opinion by Justice Scalia) "waters of the U.S." definition impact the scope of your state water quality protection?

Among those eleven states, answers varied greatly. For example, despite language limiting state regulation to be no more stringent than federal law in certain situations, Wisconsin was able to protect a broader scope of "waters of the state" in both wetlands and WPDES permit programs.

Several states which were not limited in their regulatory flexibility by federal requirements commented on potential effects of less flexibility and a narrower definition on border states with interstate waterbodies and waterways, i.e. upstream states having intermittent streams with higher pollutant loading becoming non-jurisdictional under a narrower definition putting additional burden on downstream state permittees.

Washington remarked that a narrower definition would place additional burden on them due to a need to replace the 401 WQC process that would no longer apply to projects which affect waters no longer considered WOTUS, and also commented on a loss of permit streamlining created by projects authorized by the US Army Corps' Nationwide Permits. Ohio provided similar remarks, answering that they would need to develop a permitting program to allow impacts to resources from dredge and fill of federally unprotected streams "created" by a narrower federal definition which would still be protected as waters of the state in Ohio under state statutes. Oregon commented on how a narrower federal definition would have an impact on Oregon because of interstate waters, federal land management, and section 401 certifications.

C. Do you foresee a need for your state to revise regulations or pass legislation regarding jurisdiction should a narrower definition of "waters of the US" be implemented by US EPA?

A small number of respondents answered that state legislators would look at options to adjust state statutes or expand permitting programs to cover newly less-regulated or unregulated activities, but most respondents did not think so. Michigan specifically responded that their legislature would likely propose changes to bring state statutes in line with the narrower federal definition.