



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Waters of the United States/Clean Water Act: Association of Clean Water Administrators June 19th Letter/Comments to the U.S. Environmental Protection Agency

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The Association of Clean Water Administrators (“ACWA”) submitted comments in the form of a June 19th letter to the United States Environmental Protection Agency (“EPA”) discussing state perspectives on a potential rulemaking redefining “waters of the United States” (“WOTUS”).

ACWA describes itself as the “national voice of State and Interstate water programs.”

ACWA’s comments are stated to be intended to provide EPA and the United States Army Corps of Engineers (“Corps”) with comments on the development of a new rule interpreting the Clean Water Act 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* . . . and as a part of EPA’s federalism consultation under Executive Order 13132.

The Trump administration issued an Executive Order on February 28th addressing the WOTUS rule issued during the Obama Administration that revised/clarified the scope of waters encompassed by the Clean Water Act. The definition of WOTUS is arguably one of the three critical jurisdictional terms in the Clean Water Act. The Executive Order directed EPA to publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law. EPA and the Corps had issued a “Notice of Intention to Review and Rescind or Revise the Clean Water Review” on February 28th.

The June 19th ACWA comments reference comments EPA Administrator Pruitt made at the organization’s mid-year meeting on March 20th. The emphasis that Administrator Pruitt is stated to have placed on cooperative federalism in discussing EPA’s priorities were taken as illustration of 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.

ACWA states it 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. . . .”

ACWA’s June 19th comments address:

- Federalism and EPA 2-step process

- Scalia test

ACWA references EPA briefings in which there was an indication the WOTUS definition would be addressed in an expedient manner. The organization notes its support of EPA taking “immediate action” to bring more certainty to the regulated community and the public but also asks that the agency:

. . . take whatever time is needed to ensure that final rule is the result of thorough examination of the site and implementation concerns, as well as extensive consultation with states throughout the rulemaking.

It notes that states have received limited information in regards to draft rule text or “how EPA and the Corps expect to write the rule.” As a result, concern is expressed about the states’ ability to do anything but provide broad guidelines and advice. The sharing of regulatory text or more specific regulatory options under consideration by EPA is requested.

Concern is also expressed about the Scalia test in terms of its failure to provide EPA clear guidance on how to define various terms such as “relatively permanent” waters and wetlands with a “continuous surface connection.” As a result, ACWA states that input from stakeholders such as states will be critical in crafting any rule.

The remainder of the letter discusses some of the organization’s work in attempting to reach consensus on various terms along with options for EPA to consider.

[A copy of the June 19th comments can be downloaded here.](#)