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June 19, 2017

Ms. Donna Downing, Office of Water  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW.  
Washington, DC 20460

Re: Federalism Process for WOTUS Rule Development

Dear Ms. Downing,

The New England Interstate Water Pollution Control Commission (NEIWPCC) and the Commonwealth of Massachusetts 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.

NEIWPCC concurs with EPA’s underscoring cooperative federalism when discussing EPA priorities for the administration. EPA staff in the Office of Water and Office of Intergovernmental Affairs have emphasized a willingness to have an ongoing dialogue on a number of related issues, including development of a definition of Waters of the U.S. NEIWPCC has discussed the questions presented by EPA within our region regarding the development of a revised definition of waters of the U.S., and offer the following preliminary comments.

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

NEIWPCC has been informed 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*” through several calls and webinars. While NEIWPCC supports EPA’s work to proceed quickly in order to bring certainty to the regulated community and the public, we also implore EPA and the Corps to take whatever time is needed to ensure that a final rule is the result of a thorough examination of the science and implementation concerns, as well as extensive consultation with all states throughout the rulemaking process.

We appreciate EPA making themselves available through these calls and webinars on numerous occasions throughout the federalism consultation process. Unfortunately, we have received minimal information about the draft rule text or even broad inclinations of how EPA and the Corps expect to write the rule, and the resulting comments NEIWPCC can provide are similarly broad guidelines and advice.

NEIWPCC anticipates that we will be significantly more useful as a resource for the agencies, and be able to provide our regional states’ perspectives crucial to drafting a practically sound and legally defensible rule, once EPA shares proposed regulatory text or regulatory options that are under consideration before the EPA begins drafting the anticipated proposed rule of “step 2.”

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NEIWPC is emphatic in its comment that the rulemaking process must work to provide a rule that will provide clarity, consistency, and predictability to WOTUS jurisdiction as well as a reasonable baseline for protective standards. We are looking to provide more detailed feedback and advice, however, for this feedback and advice to be effective, more information is needed. This would include important factors under consideration such as how the agency defines terms like “relatively permanent” and “continuous surface connection,” how much flexibility EPA has in crafting regional implementation guidelines, and what are the potential implications on grant funding to the states because of fewer jurisdictional waters, and what constitutes a reasonable minimum federal standard of protection.

## 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 was not a mandate, and 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.’*”

The occasion for that decision is this rulemaking process. 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 are greatly influenced by site specific hydrographic factors. What is insubstantial in one region may not be in another region.

Through regional discussions, we did not come to a consensus on what an appropriate definition might be for “relatively permanent” or for “continuous surface connection” due to states having diverse hydrologic, regulatory, and political considerations within our region alone. There is general agreement in our region that the most restrictive options presented by EPA on the calls and webinars are both too rigid and overly simplistic, referring to 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, the aforementioned will likely not be conducive to regional flexibility and consideration of hydrographic impacts of some non-perennial streams. NEIWPC recommends EPA remove these options from consideration during the rulemaking process, and recommends EPA include regional flexibility measures in the final rule.

NEIWPC also generally agrees that the other options (perennial plus seasonal, perennial plus measured flow, and varying levels of connectivity for wetlands) provided by EPA for “relatively permanent” and “continuous surface connection” are more reasonable than “perennial streams only” and “wetland must directly touch jurisdictional water.” These other options can take into account elements such as seasonality and flow/connectivity metrics, making these options more appropriate. Perennial plus seasonal, perennial

plus measured flow, and varying levels of connectivity for wetlands allow for regional considerations, 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 and ecological considerations. For example, when deciding on an appropriate length of time for stream flow for “seasonal” streams, three months has no inherent scientific value and may not provide the protection needed for critical waters that flow less often. Ensuring that the resulting rule and definitions are regionally practical and justified by scientific study (such as the EPA report “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”), yet still easily implemented, is the difficult yet necessary task ahead of EPA.

NEIWPCCC echoes recommendations that EPA continue consultation with the Corps and U.S. Geological Survey 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 an improved proposed rule. There are many other issues which NEIWPCCC will discuss as the rule takes shape, including: 1) impacts of a rule centered on Justice Scalia’s *Rapanos* decision on other state CWA programs, 2) effects that changes in the federal definition may have on states’ “Waters of the State” definitions, particularly in states where jurisdiction is mandated to be no more stringent than the federal definition, and 3) definitional consistency from EPA in consultation with the Corps and USGS as the rule is written.

Lastly, while these comments represent the views of NEIWPCCC and the Commonwealth of Massachusetts, we also encourage EPA to fully consider feedback presented by states in their own individual comments.

Thank you again for the opportunity to comment on this important rulemaking in its very early stages. As the process continues and regulatory language is developed by EPA and the Corps, NEIWPCCC and our member states will be able to provide additional feedback

Please do not hesitate to contact me or Kimberly Roth of my staff at 978-349-2512 or kroth@neiwpc.org with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Poltak". The signature is fluid and cursive, with a large initial "R" and "P".

Ronald Poltak  
Executive Director  
New England Interstate Water Pollution  
Control Commission