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Executive Director & General Counsel
Julia Anastasio

June 15, 2018

Mr. James C. Dalton, P.E.
Director of Civil Works
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Dear Mr. Dalton:

The Association of Clean Water Administrators (ACWA) welcomes this opportunity to provide you and your staff with additional input on ways to streamline the federal permitting process for critical infrastructure projects and thanks you for inviting us to participate in the recent discussions concerning the President's Infrastructure Initiative. As the primary entities responsible for carrying out Clean Water Act (CWA) programs, states are very interested in all national regulatory or policy positions that may affect their ability to implement the CWA in their states.

Founded in 1961, the ACWA is the independent, non-partisan, national organization of state, interstate and territorial water program managers who on a daily basis implement the water quality programs of the Clean Water Act (CWA). States are responsible, under the federal CWA and under a state's own laws and regulations, to advance the attainment of clean and healthy waters and to work toward attaining and maintaining standards designed to support these goals. ACWA members agree that there is tremendous need for additional and innovative funding and financing of infrastructure projects and support the efforts to reform and streamline the federal permitting process. However, we are concerned that efforts to streamline the environmental review processes associated with the permitting of infrastructure projects may result in unintended consequences. The reforms as currently designed would limit states'

ability to exercise their authority to certify that infrastructure and development projects will not adversely impact state water quality standards and would also create additional confusion for those states interested in pursuing assumption of the § 404 program under the CWA. For these reasons, we urge the ACOE to consult with ACWA and its members states/interstates.

The CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating water quality standards for surface waters. While the EPA has oversight authority and the U.S. Army Corps of Engineers (ACOE) authority to implement the § 404 permit program, the CWA's delegation and authorization structure makes states directly responsible for implementation of these programs. Because of this shared responsibility, it is critical that ACOE recognize the states' unique role as co-regulators and the states' responsibilities in implementing the CWA. The states are uniquely responsible for implementing CWA regulations and policies, and therefore proposed changes to applicable regulations and policies by federal partners should be developed in collaboration with the states. The complexity of today's water quality issues requires effective partnership to ensure reasonable, balanced and effective strategies for more streamlined permitting and for water quality protection and improvement.

ACWA, as the voice of the states, believes strong coordination between the states and ACOE must be a priority to ensure that the water quality improvements accomplished over the past few decades remain intact, and to facilitate a practical and effective response to current and future challenges. ACWA's member states believe that water quality needs and solutions are more appropriately addressed at the state level and that our federal partners will better understand and consider these priorities by consulting extensively with states. Consultation with states as partners is different from "public participation" and "stakeholder outreach." While other stakeholder groups are impacted by regulations, as noted before, the CWA's delegation and authorization structure shifts the responsibility for implementation of CWA programs directly to the states. In order to advance the most focused and results-oriented programs possible, ACOE must maintain as a priority of involving states early in both the development and implementation of any efforts to the environmental permitting review processes.

Under § 401 of the CWA states and tribes have the ability to certify, deny, condition or waive nationwide permits. Section 401 assures that federal agencies will not issue permits or licenses

that result in exceedances of water quality standards, or other applicable authorities, of a state. The importance of this provision in assuring continued state control over their aquatic resources is well established. Section 401 can also be a useful tool in integrating state and federal programs, reducing overlap in a more holistic approach to resource management. The water quality certification, made by the state in which the discharge originates, declares that the discharge will comply with applicable provisions of the act, including water quality standards. Section 401 provides states with two distinct powers: one, the power withhold certification; and two, the power to impose conditions upon federal permits by placing limitations on certification. Many states have come to view § 401 as an important tool in their overall programs to protect the physical, biological, and chemical integrity of their waters. Without § 401 certification, federal agencies could permit activities that would undermine a state's knowledge of and investment in pollution control efforts and impose a double standard for different activities affecting the same in-stream values.

ACWA is also concerned that any permit streamlining efforts could affect states' abilities to assume the § 404 program. Section 404(g) of the CWA authorizes states to assume authority to administer the § 404 program in some, but not all, navigable waters and adjacent wetlands. Only two states, Michigan and New Jersey, have been approved to assume the § 404 program. Other states have explored assumption, but those efforts have not borne fruit in part due to uncertainty over the scope of assumable waters and wetlands.

ACWA, along with ECOS and ASWM, jointly requested that EPA actively engage in a discussion clarifying those waters that are subject to assumption by interested states, and those waters that should be retained by the ACOE. Formation of the Assumable Waters Subcommittee under the NACEPT in response to our request initiated significant progress in addressing this issue. The subcommittee was very thorough in its consideration of all information potentially available to guide identification of assumable waters, and we are pleased with the resulting majority recommendation. Many states believe that a simplified and more flexible process for state assumption of the § 404 permit program in order to improve effectiveness and provide more efficient and effective permitting for applicants while maintaining protection of wetlands in the United States is needed and there is concern that any efforts focused on permit streamlining would

only lead to further confusion and delays in more states assuming the § 404 program. States believe that state assumption of the § 404 program could result in a more responsive, stable and consistently implemented program that would improve the dredge and fill permitting process for stakeholders in those states that take on the program.

Thank you for taking the necessary steps to implement the Administration's Infrastructure Initiative and ACWA hopes that you will consult with your state partners as you work to streamline the federal infrastructure permitting process. Should you have any questions or if you would like to discuss this further, please feel free to reach out to ACWA's Executive Director and General Counsel, Julia Anastasio, at janastasio@acwa-us.org.

Sincerely,

A handwritten signature in black ink that reads "Jennifer Wigal". The signature is fluid and cursive, with the first name "Jennifer" written in a larger, more prominent script than the last name "Wigal".

Jennifer Wigal
Deputy Water Quality Administrator
Oregon Department of Environmental Quality