The Association of State Wetland Managers, Inc.

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

From: Jeanne.Christie@ASWM.org
To: CWAwotus@epa.gov
CC: Andrew Hanson, Hanson.Andrew@epa.gov
ASWM Board
Date: June 16, 2017
Subject: Comments of the Association of State Wetland Managers in Response to Federalism Consultation on Waters of the United States

The Association of State Wetland Managers is providing the attached comments in response to your request of April 19, 2017, during a presentation by EPA staff relative to their response to the Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States Rule." We deeply appreciate the invitation for consultation with the Association of State Wetland Managers. We welcome future opportunities to consult with EPA and other state organizations as the proposed rulemaking progresses.

Federal protection of the nation's water resources is of increasing importance given our recognition of the limited supply of water for many critical needs from drinking water to irrigation to recreation to manufacturing. It is also important to recognize the vital role played by wetlands and intermittent streams in filtering runoff from developing areas prior to introducing it into the nation's groundwater and surface water supplies and minimizing the impacts of natural hazards such as flooding from increasingly intense storms, reduced winter snowpack and recurring droughts. The federal level of protection also provides security for states from the actions of upstream states, and provides a level playing field among states in terms of the use and alteration of the Nation's waters.

At the same time, we recognize the public need for clarity, consistency, and predictability regarding the extent of federal jurisdiction. The public reasonably expects rules that are science-based, account for regional differences in the extent and use of water, and also acknowledge legal principles governing water use by the public that vary significantly from east to west. Of equal importance is the public expectation that rules will be sufficient to ensure safe, clean water for drinking, commercial and recreational use.

While ASWM understands the desire to simplify regulatory requirements, and to improve the clarity of the federal limits of jurisdiction under the Clean Water Act, we are concerned that an oversimplified approach based on the definitions of "relatively permanent waters" and adjacent wetlands having a "continuous surface connection" can achieve neither goal -- not

the public's expectation for protection of waters nor clarification of the outer boundary of federal regulatory limits. We are further concerned that defining these terms in a way that narrows federal jurisdiction would have significant unintended environmental and economic consequences.

While the opinion of Justice Scalia may inform rulemaking, it is essential that additional regulatory elements be included. We recommend in the attached comments that these elements include (1) regionalization; (2) continued or expanded use of well-integrated state-federal regulatory programs; and (3) increased attention to permitting options such as Regional General Permits, and State Programmatic General Permits. These options can offer refined, streamlined permitting where appropriate for different regions in the country, while providing needed protection. This type of permit can be used to facilitate permitting for particular activities in regions where they are of concern, with appropriate regional conditions, without losing all regulatory control over waters. Maintaining broader jurisdictional boundaries, but using general permit mechanisms to reduce regulatory pressure on specified activities of concern to a state or region, can further both the goals of protecting critical waters and providing fair and effective regulation.

We also believe that federal jurisdiction is already clear in most instances, and that effective components of current regulations should be retained, while focusing revisions on specific areas of concern to the public. We recommend against a totally new approach that fails to incorporate the best elements of the previous rulemaking as we believe this would result in a prolonged period of uncertainty and confusion in both state and federal regulatory programs. We believe the Scalia opinion was never intended to form the sole basis upon which to establish a new clean water jurisdictional definition but that elements of his opinion can help to inform needed modifications.

These general considerations and the potential impact of the proposed step two rulemaking on the states and tribes are detailed in the attached comments. While we have highlighted some of the issues of importance to ASWM, these comments do not express the totality of our concerns, and we anticipate responding with more detailed information as proposed rulemaking proceeds. Please contact me should you have questions regarding ASWM's positions or would find it beneficial to further discuss these issues. We also urge your attention to the specific comments provided by the individual states and tribes, as well as other associations, which may address perspectives, positions or concerns that are also important to informing EPA and the Corps' decision making going forward. The Association is committed to working with you and other stakeholders to address national questions and concerns regarding the protection and the use of wetlands and other waters. Thank you and we look forward to your continued consultation with the states and state associations.

Sincerely,

Jeanne Christie
Executive Director

Attachment

COMMENTS OF THE ASSOCIATION OF STATE WETLAND MANAGERS IN RESPONSE TO FEDERALISM CONSULTATION ON WATERS OF THE UNITED STATES

JUNE 16, 2017

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to EPA's federalism consultation under Executive Order 13132. ASWM is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Our comments were compiled with input from the ASWM Board of Directors and a workgroup of interested members convened for purposes of responding to EPA's request.

Protection of the nation's waters is of paramount concern not only to the federal agencies, but also to states and tribes, as well as local governmental organizations. The important and unique role of states in the management of water resources is clearly recognized in the Clean Water Act (CWA). Any action taken by the federal government to either expand or contract the scope of federal protection will thus have direct and significant impacts on the states. We appreciate the opportunity to advise EPA regarding potential state impacts, and to provide our recommendations regarding the most practical and appropriate approach to cooperative state-federal management and protection of wetlands and other water resources.

ASWM RECOMMENDATIONS REGARDING JURISDICTIONAL RULEMAKING

In light of these and other considerations discussed below, ASWM makes the following recommendations to EPA in regard to their proposed rulemaking to clarify the scope of federal jurisdiction over Waters of the U.S.

1. Future rulemaking should ensure continued federal protection for the nation's critical water resources to maintain or increase supplies of clean, safe water for drinking water and domestic use, agriculture, industry, recreation, fish and wildlife habitat, and other uses which contribute to public health and well-being, to the Nation's economy, and to a safe and healthy environment.

   The role of federal regulation in maintaining a level regulatory playing field among the states, and in protecting states from pollution originating from upstream states, should also be recognized.

2. A narrow interpretation of federal jurisdiction over the nation's waters should be avoided given multiple unintended consequences, including:

- Increased pollution and degradation of waters of the states and the nation, and a reduction in supplies of clean, safe water;

- Disruption of existing state-federal mechanisms that streamline regulatory review under multiple programs for major projects, leading to potential delays and increased cost for overall project approval;

- Increased costs for states that assume a greater role in permit review and enforcement if the federal role is reduced;

- Adverse impacts borne unequally among the states. Costs could significantly increase for downstream states that receive increased pollutant loads from upstream states following removal of federal jurisdiction from some waters. Some states would be likely to lose protection over more waters than others, particularly with respect to dredge and fill activities in streams, rivers, lakes and wetlands.

3. To increase clarity and improve the predictability of federal jurisdiction while maintaining protection of vital resources, ASWM recommends an approach that includes these elements:

    - Integrated state/tribal and federal cooperation and regulatory review to avoid duplication of effort, and to expedite permit review to the extent possible;

    - Regionalization and recognition that permitting mechanisms already authorized under the CWA such as General Permits and Regional General Permits can be used to tailor the level of permit review to a particular geographic area.

    - Expanded use of flexible but science-based permitting mechanisms such as general permits, regional permits, state programmatic general permits, and state program assumption where appropriate to tailor permitting processes to the scale and types of projects under consideration, the diverse characteristics of waters across the US, and to the specific needs and concerns of states, tribes and permit applicants.

4. ASWM recognizes the Scalia opinion goal of providing jurisdictional limits that are clear, predictable, and understandable. However, we believe that an oversimplified approach to federal jurisdiction under the CWA based primarily on definitions of "relatively permanent waters" and adjacent wetlands with a "continuous surface connection" cannot alone meet these goals. There are no consistent, science-based definitions for these terms, and it is extremely difficult to imagine that any newly-devised definition could be uniformly applicable to the varying geologic, climatic, and hydrologic conditions that occur among the states. We recommend an approach that also includes the elements listed above in item #3.

5. It should be acknowledged that many current regulatory mechanisms developed under the CWA have been largely very effective; uncertainty and associated legal challenges are primarily associated with gray areas such as headwaters (ephemeral waters), man-made waters and remote wetlands. Therefore, we recommend that components of previous regulations that have proven effective be retained, and that the modifications be limited to situations where greater clarity is needed. This will serve to limit the time needed to make modifications, as well as the period of uncertainty associated with ongoing rulemaking.

6. ASWM encourages EPA to consider the findings outlined in the 2013 Science Advisory Board Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and to ensure that definitions of jurisdictional wetlands and headwater streams account for the significant ecological contributions of more remote wetlands, such as prairie potholes and smaller headwater streams, to overall watershed health. More limited definitions that discount the functions and values of these waters will adversely affect both downstream water quality and increase the risk of flooding, increase water and wastewater treatment costs, and potentially reduce property values in lower reaches of watersheds.

7. Finally, ASWM urges continued collaboration with the states and tribes throughout the rulemaking under consideration. States can identify possible issues with proposed regulatory proposals and recommend potential alternatives early in the process, and assist in responding to the concerns of other stakeholders. That is, the states are willing and able to serve as full partners in the development of regulations, and to develop a more stable and less controversial approach to water resource management and protection.

The foregoing recommendations are supported by the following information and discussion.

THE IMPERATIVE FOR PROTECTION OF THE NATION'S VITAL WATER RESOURCES UNDER THE CLEAN WATER ACT.

The fundamental need for federal protection of the nation's waters has not diminished since passage of the CWA. On the contrary, there is now growing awareness of the long-term consequences of cumulative point and nonpoint source pollution, which together with aging infrastructure have led to contamination of urban drinking water supplies. Changing weather patterns have increased storm damage and flooding in some locations and produced drought in others, with both social and economic consequences. Multiple stressors are adversely impacting fish and wildlife that also depend upon aquatic systems, leading to loss of biodiversity as well as recreational opportunities which are important to many local economies. Wetlands play an especially critical role in limiting the damage and

high economic loss resulting from natural hazards such as extreme storm events. In many parts of the nation, supplies of clean, safe water are no longer abundant. Our society cannot afford increased pollution, degradation, or loss of increasingly limited clean water resources.

The economic impacts of removing CWA protection. The potential economic loss associated with narrowing of jurisdiction under the CWA is uncertain but could be substantial. The benefits of wetland and stream protection stem from the provision of ecosystem services. Narrowing CWA jurisdiction puts these critical systems at risk. The Congressional Research Service (CRS) conducted an economic analysis of the 2015 rule change that clarified jurisdictional determination. In the analysis, the CRS cites that the wetlands protected under this rule change provide public benefits of over $500 million per year.[1] This includes values ranging from water quality enhancement, habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection.[2] This figure does not include the benefits of protecting water resources such as small streams. Impacts to streams would have impacts on downstream users, pushing up the total loss from reducing protections. Under multiple scenarios, the narrowing of jurisdiction would have negative impacts on local, state, and federal governments in terms of increased costs for water quality enhancements and associated benefits.

Potential economic losses include those arising from a reduction in the supply of safe, clean, useable water for drinking and domestic use, industrial use, agricultural use, recreation, and fish and wildlife habitat. Each of these uses is important to a healthy economy and the increased cost of treatment over time should be carefully evaluated in an economic analysis of lost federal protection arising from a change in federal CWA jurisdiction. As an example of potential economic activity relying on safe, clean, water, the Outdoor Industry Association (OIA) cited waters as being part of the basic infrastructure of outdoor industry infrastructure. In its most recent report (2017), OIA builds upon its previous 2012 study and finds that the spending on outdoor recreation totaled $887 billion annually, directly supporting 7.6 million jobs and generating in $124 billion in annual federal, state, and local tax revenue. Many of these activities rely on clean water resources.

The potential loss of federal protection of wetlands and small and possibly mid-sized streams is likely to result in an increase in unregulated dredge and fill activities which would in turn lead to future increased costs at the federal, state, and local level for engineered infrastructure to store flood waters, purify nonpoint source runoff, treat drinking water, sustain recreation opportunities and stabilize shorelines. The loss of protection for wetlands and small streams would likely lead to cumulative impacts reflected in human health threats as well as increased property damage from natural hazards including intense storms, drought, and flooding.

[1] EPA & U.S. Army. 2015. Economic Analysis of the EPA-Army Clean Water Rule.

[2] Copeland, C. 2017. EPA and the Army Corps' Rule to Define "Waters of the United States". Congressional Research Service

There are clear examples of the cost savings from water protection over water treatment.

*In **Portland, Maine**, The Portland Water District (PWD) maintains low rates for their 200,000 constituents by investing in watershed protection over downstream water treatment. John Talbert, Ph.D. and others at the World Resource Institute conducted a green-gray analysis (GGA) to provide a basis for investing in both natural and built infrastructure alternatives. As development pressures increase, the PWD faces the decision to invest in watershed protection or built alternatives. Over a 20 year period, the PWD would save taxpayers a minimum of $12 million and up to $110 million in water treatment costs by implementing green infrastructure projects.*

***Philadelphia, PA** is making similar efforts. By spending $1.1 billion in green infrastructure projects, the City of Philadelphia provides water quality enhancements while avoiding $6 billion in grey infrastructure solutions.* The cumulative impact of the green infrastructure investment is estimated at nearly $3.2 billion, including benefits from air quality enhancements, water quality improvements from wetland protection, improved aesthetics, and job creation.** These benefits, from cost savings and ecosystem services provision, would not be realized without appropriate protection of wetlands and riparian habitat within the watershed.*

*In **Milwaukee, WI**, the Milwaukee Metropolitan Sewerage District (MMSD) is saving money by investing in green infrastructure. By acquiring land that would be filled for development in the floodplain, the MMSD will save $45.9 million in capital costs related to flooding and combined sewer overflows while improving habitat and recreational opportunities and increasing carbon sequestration.*** This is of particular significance in underserved urban service areas, where low-income households spend a larger portion of their income on necessities like water and sewage service. These savings are then injected into the economy in other ways. The proposed rule change puts many of these waterways under threat of poorly designed development, impacting downstream users by reducing water quality and increasing the risk of flooding and combined sewer overflows. This increases costs of water treatment for industrial and residential uses alike and would negatively impact human health if left untreated.*

** Green, Jared. "The New Philadelphia Story is About Green Infrastructure". 12/18/2013. Accessed 02/13/17 from https://dirt.asla.org/2013/12/18/the-new-philadelphia-story-is-about-green-infrastructure/*

***Stratus Consulting. August 2009. A Triple Bottom Line Assessment of Traditional and Green Infrastructure Options for Controlling CSO Events in Philadelphia's Watersheds, Final Report. Prepared for: Howard M. Neukrug, Director, Office of Watersheds, City of Philadelphia Water Department. Boulder, CO.*

****CH2MHill. June 2013. Milwaukee Metropolitan Sewerage District Regional Green Infrastructure Plan. MMSD Contract No: M03064P03.*

The EPA estimates that every $1 spent in protection helps avoid an average of $27 in future contaminated clean-up costs.[3] Reducing federal protection places the burden of protection on local and state governments to protect their water resources. This becomes difficult as water travels across jurisdictions. Protection at the federal level can reduce the costs for local water users.

Importance of the federal role in protection of water quality. Although the states can – and in most instances, do – play a major role in implementation of water programs, the underlying federal authority must provide a strong, stable, and well-researched foundation to protect national resources. A robust, baseline federal level of protection of wetlands and other waters is important to ensure protection of downstream states and tribes from upstream pollutants, and to maintain a "level playing field" when it comes to water. Without federal protection or the replacement by states of permitting programs such as the Section 404 dredge and fill program, downstream states can incur the high cost of treating unregulated pollution from upstream states, or be subject to the loss of clean and safe water supplies.

In addition, federal resources are needed to evaluate the impact and effectiveness of regulations that impact numerous states, and to provide the research needed to improve the effectiveness and efficiency of both state and federal water programs.

Importance of the fairness and efficiency of regulations. The need for protection of critical water resources must be balanced with recognition of the impact of regulation on those who rely on and use or impact wetlands and other water resources, including private landowners, business and industry, the agricultural sector, and agencies responsible for public infrastructure including transportation and utilities. The public has a reasonable expectation that regulation of the nation's natural resources will be clear, predictable, and practical enough to provide for timely decisions, fundamentally based on science and the underlying law and not applied arbitrarily. At the same time, the public has the expectation that the CWA will continue to ensure a supply of clean, safe water for drinking, agricultural use, industrial use, and recreation.

FINDING REGULATORY BALANCE AND THE UNINTENDED CONSEQUENCES OF LIMITING FEDERAL JURISDICTION

Developing regulations which provide both effective protection for waters and practicality/reasonableness is extremely challenging given the immense variability of the Nation's water resources including widely diverse geography and varying regional scarcity or abundance of water resources, prevalent regional patterns of water use, and climatic conditions. For example, annual precipitation in the lower 48 states varies from less than 10 inches annually in Nevada to over 60 inches in Louisiana. State legal principles underlying water use in the East (generally, reasonable use) are significantly different than in the West (allocated use). Thus, fair and consistent protection of water resources

[3] EPA, 1995. BCA of Community Wellhead Protection Volume 1. Office of Ground Water and Drinking Water.

requires a degree of flexibility in implementation at the state level.

Evolution of Jurisdictional Definitions. The Clean Water Act as enacted in 1972 and amended in 1977 was farsighted in recognizing the need to balance protection and efficient regulation of water, and recognized the important role of the states in managing water resources. For the most part, state and federal agencies have cooperated effectively to extend protection to the vast majority of the nation's waters with minimal uncertainty. However, clarification of the boundaries between federal and non-federal waters has proven more challenging.

The Supreme Court recognized in *United States v Riverside Bayview Homes* that wetlands adjacent to federal waters must also be protected to achieve CWA goals. In the *SWANCC* case[4], the Court clearly indicated that there are limits to federal regulation, and excluded use of the migratory bird rule as the sole basis for federal jurisdiction. The Supreme Court decision in *Rapanos v United States* included greater discussion of the limits of federal authority, but without clear consensus as to the definition of those limits. It is now proposed that the federal rule issued in 2015 to clarify jurisdiction be repealed. Greater emphasis on the Scalia opinion within the *Rapanos* decision has been suggested, but as discussed below, ASWM does not believe that the Scalia opinion alone will provide sufficient clarity and predictability to resolve the issue of federal limits on jurisdiction under the CWA. Nor do we believe that all components of the previous 2015 rule were incorrect or wholly lacking in utility since it did identify limits to CWA jurisdiction.

Evolution of the state role in interwoven state/federal programs. Cooperative state/federal programs have played a major role in implementation of the CWA over many decades. Given overlapping state and federal authorities, many states have worked with federal agencies to coordinate regulatory review, share information, and reduce duplication of effort, all of which can lead to more efficient and timely decision making. Numerous states also may combine decision making on multiple resource issues in a single review, taking into account for example floodplain regulations, decisions related to water rights and water use, and impacts on fish and wildlife -- in particular on state or federally listed threatened and endangered species. State agencies and their federal partners often complete parallel evaluations under the CWA, including Section 401 Water Quality Certification, and for coastal states a consistency determination under the Coastal Zone Management Act. The Federal Highways Administration has worked with states to facilitate development of consolidated decision making under NEPA and Section 404 of the Clean Water Act. Other state and federal regulations protecting drinking water, historical artifacts, wild and scenic rivers, and other special resources have also been coordinated. In addition, there are other laws whose jurisdiction is defined by CWA jurisdiction including the Oil Pollution Control Act and Oil Spill Trust Funds.

Regardless of the level of state involvement, interwoven state-federal regulatory reviews for routine projects are often carried out in the context of expedited permit processes. In programs such as Section 404 dredge and fill permitting, where thousands of

[4] *Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers*

authorizations are requested annually for a wide array of public and private construction or land use activities, expedited permits may be issued within a matter of weeks, while ensuring consistency with multiple related resource regulations. A significant change to CWA jurisdiction would have a direct impact on these coordinated decision-making processes likely leading to delays in permitting decisions, uncertainty and inconsistency during the time it would require for new agreements to be negotiated. Based on past experience these new agreements take time and can only be pursued after a final rule and new guidance on how to implement the rule is in place.

Existing state dredge and fill programs, and the differing impact of potentially reduced federal regulation. Twenty-three states have a formal state-level freshwater dredge and fill permitting program that serves as their primary regulatory mechanism for protecting wetlands, streams, rivers, ponds, and lakes, from dredge and fill impacts.[5] Two of these states (Michigan and New Jersey) have "assumed" the §404 permitting program, meaning that they have broad state control over Clean Water Act dredge and fill permitting decisions for the regulating of waters in their state. The other 21 states have varying permitting authority to take over regulation of waters no longer covered by the CWA jurisdiction.

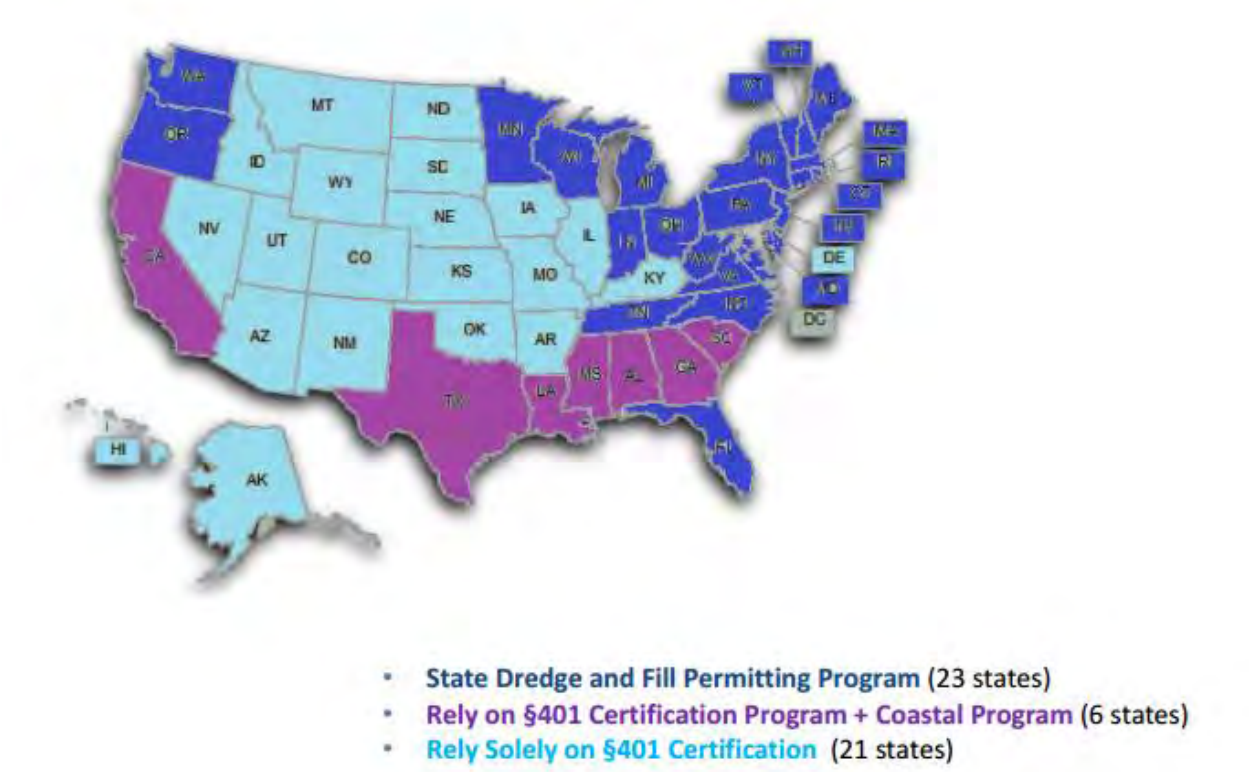
The remaining 27 states rely exclusively on §401 Certifications of federal dredge and fill permits to provide input into the permitting process for disturbances to freshwater wetlands, streams, rivers, ponds and lakes. In these states, regulatory programs do not have the legal capacity to take on regulatory control of activities in waters no longer covered by the federal definition of Waters of the United States. A significant reduction in federal jurisdiction would require these states to create new state permitting programs to address dredge and fill activities in any waters no longer protected under the Clean Water Act. It is unclear how many would be likely to do so.

Six of the 27 states that rely primarily on §401 certification do have coastal permitting programs that protects at least some portion of the state's coastal wetlands and other waters which might provide the basis for developing a statewide dredge and fill permitting program.

A reduction in the scope of federal jurisdiction under the CWA would disproportionately affect western states, where the vast majority of states that rely solely on §401 Certification are located. It is important to note that this area of the country has also been identified as the portion of the country with wetlands in the poorest condition.[6] Since states in the arid west are dominated by ephemeral and intermittent waters, narrowing of federal jurisdiction would likely leave these states with the majority of their wetlands and streams unprotected from dredge and fill activities by either federal or state regulation. A loss of additional regulatory control by states in this part of the country would likely lead to greater degradation of wetlands already in poor condition as well as other waters and reduce the ability of these states to direct how these resources are managed.

[5] See *Status and Trends Report on State Wetland Programs in the United States*. Association of State Wetland Managers 2015

[6] National Wetland Condition Assessment - citation



- State Dredge and Fill Permitting Program (23 states)
- Rely on §401 Certification Program + Coastal Program (6 states)
- Rely Solely on §401 Certification (21 states)

<u>Considering the Scalia Opinion: Would use of Scalia's definitions alone achieve the goal of increased simplicity and predictability</u>? In the concluding paragraphs of his opinion on *Rapanos*, Justice Scalia notes the "paucity of information" regarding the waters in question, remanding both cases to determine whether "ditches or drains" are "waters," and whether the wetlands in question are "adjacent." In fact, there was a paucity of information in these case files because it appeared obvious to state and federal regulatory staff that the streams in question were waters, and that the wetlands in question were adjacent to those waters. Thus, although Justice Scalia suggests that "common sense" should be used in developing jurisdictional limits, it is clear that he also demands a more nuanced decision regarding the actual scope of jurisdiction. The vagueness of the terms that he chose to use – "relatively permanent" and "continuous surface water connection" would render a jurisdictional rule based on these terms alone less clear, fair, and predictable than previous rules.

However, it is reasonable to "consider" use of Scalia's opinion, as recommended by the EO. Scalia essentially appears to request two things. Those are: (1) "common sense" definitions of CWA waters and the wetlands adjacent to those waters that are reasonable from the perspective of the public; and (2) recognition of some limit on the extent of jurisdiction under the CWA. Where Justice Kennedy resolved the limits of jurisdiction by requiring analysis of the significant nexus between upstream waters and primary "traditional navigable waters," Justice Scalia focused on relatively simple definitions of regulated waters.

EPA's initial response to the Executive Order on Waters of the U.S. is focused on two terms used by Justice Scalia - "relatively permanent waters" to define the scope of federal jurisdiction over streams, and "continuous surface connection" to define the extent of federal jurisdiction over adjacent wetlands. However, in spite of the appeal of a simple approach, oversimplification would result in regulations that cannot be applied consistently and with an equivalent degree of fairness on a nationwide basis.

- The hydrologic characteristics, ecology, abundance, and uses of waters vary tremendously across the nation. For example, highly variable intermittent streamflow fed by snowmelt may represent one of the most significant sources of water supplies in the montane west, while the volume of flow of lowland streams in coastal states with abundant water supplies may be relatively stable. Applying the same jurisdictional definitions to such waters would result in radically different impacts on states and their resources. Supporting a definition of "relatively permanent" with metrics such as flow duration would likewise result in regional disparities in the level of protection provided.

- While it would be possible to incorporate both legal concerns and environmental factors related to hydrology, connectivity, ecology, and cumulative impacts into a detailed scientific assessment to define the limit of federal jurisdiction on a case-by-case basis, this approach is very time consuming and highly impractical in the context of an efficient permit process. From the perspective of the potential permit applicant, results are far from predictable. Initial attempts following the *Rapanos* decision to base jurisdiction on a full "significant nexus" evaluation delayed decision making to the point where most Section 404 permit applicants felt obliged to waive a formal delineation of Waters of the U.S. and use a verified preliminary jurisdictional delineation instead.

ASWM's RECOMMENDATION: REGIONALIZATION, INTEGRATED STATE-FEDERAL PROTECTION, AND INCREASED ATTENTION TO REGIONALIZED PERMITTING MECHANISMS

ASWM is recommending an alternative approach that acknowledges Justice Scalia's goals of simplicity and reasonableness, but that also takes advantages of regionalization and other relatively flexible components of the permitting process, including flexible permit mechanisms, to alleviate past objections to CWA jurisdiction.

Use of state/regional permitting mechanisms. The CWA authorizes use of general permits to facilitate authorization of actions that have a minimal impact on water resources. In the § 404 Program, a set of *Nationwide* General Permits (NWP) are reauthorized every 5 years, with input from states (including §401 water quality certification and CZMA consistency reviews) and from the public (via a public notice process). In addition, *Regional* General Permits can be issued to address more localized issues. Where NWPs cannot be readily adapted to the needs of a state, they have in several instances been replaced by more specific *State Programmatic* General Permits (SPGP)

(where a state uses its own dredge and fill permitting authority to authorize permits on behalf of the federal government). Thus, general permits offer both the ability to regionalize permits, and to facilitate authorization of actions that are considered minor on either a national or state/regional basis, while at the same time providing protection for water resources. This type of permit can also include conditions that are responsive to the needs of property owners, businesses, and public works agencies, improving timeliness and efficiency of regulatory review.

- Using a mix of individual and general permits, resource managers can protect wetlands and other waters in more remote reaches from types of activities that have a large footprint or would result in significant adverse impacts. However, common and typically less damaging activities in the same waters (e.g. small impacts associated with single family home development) may be of limited concern, and thus may be facilitated through a general permit process.

- General permits are typically tailored to specific activities – that is, the conditions for a highway crossing would not be the same as for a pipeline crossing.

- General permits can be tailored to the geographic and other conditions of a specific state or region accounting for seasonal limits, natural hazards, and likely cumulative effects related to the scarcity or abundance of water resources.

- State specific general permits can be developed to facilitate especially common activities within a state, such as road construction, timber production, utility lines, or wetland restoration.

- General limitations and conditions can be added to protect sensitive or rare ecosystems or species within a state.

- Large and complex projects not covered by general permits will still receive a thorough review commensurate with their potential impact in a given state, regardless of location in mainstream or tributary waters or adjacent wetlands.

- Should violations of regulations occur, both state and federal agencies can contribute to the enforcement effort.

- The complexity of the permit process can be aligned with the waters being regulated and the type of activity authorized, and may or may not require submittal of a discharge notification and public review. The federal process in particular may be minimal where state review is deemed sufficient. Thus, a general permit may alleviate nearly all federal regulatory burden for those waters and actions that need no significant federal review *in a given region, or given parallel state oversight.*

In short, commonly used regulatory processes including general permits provide a great deal of flexibility. We also recognize that even an approach that emphasizes regionalization and regulatory flexibility will require some definition of the limits on federal jurisdiction, likely needing guidance for field interpretation and implementation. However, by providing regulatory relief through alternative mechanisms within "gray areas" those lines will become less critical to the regulated public.

Integrating and streamlining multiple state, tribal and federal programs. ASWM believes that it is misleading to consider modifications to the jurisdictional rule without considering all aspects of § 404 and other water permit programs, as well as related federal, state, and local regulations that are routinely interwoven with water permit reviews. For example, exemptions established by the Clean Water Act protect specified activities from permit requirements, even if located in jurisdictional wetlands (in wetlands these include normal agricultural and forestry operations, and many recreational uses).

Moreover, additional minor activities in regulated waters can be authorized under a nationwide, regional, or state general permit that significantly simplifies the permit process, up to and including automatic authorization of activities that meet specified conditions and limitations. Finally, under a SPGP, a Corps permit under the CWA may be automatically issued given approval under an approved state program, limiting federal involvement.

On the other hand, coordination between state and federal programs can greatly facilitate review of complex projects that may require authorization under multiple programs, e.g. floodplain authorities, the Endangered Species Act, CZMA, NEPA (the FWHA was worked with states to provide for parallel Section 404 and NEPA review for highway projects), and FERC review of pipeline and utility projects. Coordinated and parallel review of these programs is supported by networks of local, state and federal agencies, and significantly expedites the review of large scale and complex actions. These well-established mechanisms will be lost where federal CWA jurisdiction is narrowed. For example, where an ESA Section 7 consultation is no longer required under a CWA permit, a much costlier and time intensive Section 10 consultation would take its place.

RESULTING CONSIDERATIONS FOR RULEMAKING ON FEDERAL CWA JURISDICTION

If federal jurisdiction is defined narrowly, then any streams, ponds, wetlands, lakes or other waters that are excluded from the definition would receive no protection under the CWA from even the most extreme alteration – such as changing land levels to obliterate these waters for construction, mining, or any other purpose. Thus, if waters that are relied on for a specific purpose such as drinking water, silviculture, surface water for agriculture, stormwater management, or recreation are free from all CWA regulation, then any modification or obliteration of such channels is also unregulated under the primary federal water law. As noted previously the extent of state dredge and fill permitting authority varies widely from state to state. On the other hand, defining jurisdiction in regulation more broadly maintains a national level of protection from unacceptable activities, *while also bringing the rest of the regulatory program into play.* The other components of the

regulatory program can ensure that an appropriate level of review is applied based both on the nature of the water in question AND the type of activity being proposed and its likely impact. Regional realities, state/tribal concerns, and consideration of related programs can also be incorporated into the process.

When considering the regulatory process holistically, a broader interpretation of federal jurisdiction is more appropriate both in regard to the need to protect public trust resources, and to carry out a process of evaluating impacts to public waters in a reasonable manner.