

## COMMENTS OF THE ASSOCIATION OF STATE WETLAND MANAGERS

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## U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE U.S. ARMY CORPS OF ENGINEERS IN RESPONSE TO THE JULY 12, 2018 *FEDERAL REGISTER* SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING REGARDING DEFINITION OF “WATERS OF THE UNITED STATES” – RECODIFICATION OF PREEXISTING RULE

**August 8, 2018**

The federal agencies – that is, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corp of Engineers (Corps) published supplemental materials in the *Federal Register* on July 12, 2018 to support and clarify the reasoning for their previous proposal to revoke the 2015 Clean Water Rule and have requested comments on these materials. The Association of State Wetland Managers (ASWM) has reviewed the supplemental notice and is responding with the following comments. We also request that the federal agencies consider ASWM’s previous comments related to this rulemaking.<sup>1</sup>

SINCE 1972, the federal agencies have consistently asserted support for the primary goal of the Clean Water Act (CWA)– that is, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The agencies also stress the importance of a secondary goal of the CWA, that is to “recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and to “plan the development and use... of land and water resources.”

ASWM agrees that effective administration of the CWA requires a thoughtful and sometimes complex balancing of state and federal interests. States have demonstrated a general willingness to develop and administer regulations at the state level to implement many CWA programs, and to do so in accordance with requirements established by the federal agencies, and with financial and technical support of the federal agencies. State environmental agencies have demonstrated the ability to work effectively and efficiently on the ground to make field level decisions in a timely manner, consistent with both state and

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<sup>1</sup> **June 16, 2017 comments** in response to EPA’s federalism consultation on Waters of the United States  
[https://www.epa.gov/sites/production/files/2017-09/documents/us-aswm\\_2017-06-16.pdf](https://www.epa.gov/sites/production/files/2017-09/documents/us-aswm_2017-06-16.pdf)

**September 11, 2017 comments** in response to the *Federal Register* notice - Proposed Rule – recodification of a preexisting rule

Cover Letter: [https://www.aswm.org/pdf/lib/final\\_aswm\\_cover\\_letter\\_for\\_step\\_1\\_comments.pdf](https://www.aswm.org/pdf/lib/final_aswm_cover_letter_for_step_1_comments.pdf)

Comments: [https://www.aswm.org/pdf/lib/final\\_comments\\_of\\_aswm\\_wotus\\_step\\_1\\_rule.pdf](https://www.aswm.org/pdf/lib/final_comments_of_aswm_wotus_step_1_rule.pdf)

**November 28, 2017 comments** in response to the *Federal Register* notice regarding Schedule of Public Meetings

Cover Letter: [https://www.aswm.org/pdf/lib/aswm\\_cover\\_letter\\_step\\_2\\_pre\\_proposal\\_112817.pdf](https://www.aswm.org/pdf/lib/aswm_cover_letter_step_2_pre_proposal_112817.pdf)

Comments: [https://www.aswm.org/pdf/lib/aswm\\_comments\\_step\\_2\\_pre\\_proposal\\_112817.pdf](https://www.aswm.org/pdf/lib/aswm_comments_step_2_pre_proposal_112817.pdf)

federal requirements. The federal agencies also play a critical role in providing national consistency, and in protecting the public and the public's water resources where waters cross state boundaries and thus require broader – that is, federal – regulation.

The current proposal to rescind the 2015 Clean Water Rule combined with additional actions described in Executive Order 13778 “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule” indicates the overall intent of the current and future rulemakings planned by the agencies is to reduce the scope of federal protection of aquatic resources defined heretofore as Waters of the United States (WOTUS). If brought to fruition as proposed in the Executive Order, ASWM is concerned the reduction in the scope of Clean Water Act jurisdiction will result in:

- Continued uncertainty regarding federal protection for tributary and headwater streams regulated under the CWA since 1972 - as verified Corp regulations promulgated in 1975 and by the legislative history of CWA amendments of 1977, but uncertain since the U.S. Supreme Court decision in *Rapanos* decision (2006).
- Continued lack of federal protection for non-abutting adjacent wetlands that play a critical role in functioning of aquatic systems, after the Supreme Court decision in *SWANCC* (2001).
- Reduced federal protection for states impacted by pollution, contamination, and destruction of waters in upstream states, or states that are adjacent to large waterbodies such as Chesapeake Bay, the Great Lakes, and the Mississippi River.
- A shift in the balance of responsibility between state and federal agencies, necessitating additional regulatory workload for the states with reduced federal support for carrying out (at a minimum) dredge and fill permitting and overall enforcement of violations in areas currently protected jointly by the states and federal agencies through state regulations and the Clean Water Act CWA.
- Potential for increased losses of aquatic resources that help to mitigate the effect of floods, drought, extreme storms, and habitat loss over large geographic areas.

ASWM wishes to emphasize that the states are willing to assume responsibility as anticipated by Congress, but it believes that overall there will be reduced capacity to fulfill the goals of the CWA unless the federal role is also maintained.

#### **THE BALANCE BETWEEN STATE AND FEDERAL ROLES, THE ROLE OF THE STATES, AND COOPERATIVE FEDERALISM**

Throughout the Supplemental Notice, the federal agencies focus on the important balance of federal and state roles in implementation of the Clean Water Act (CWA), citing Section 101(b): “*the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution*” and “*to plan the development and use of land and water resources.*” Moreover, the federal agencies state

that they, “believe that the 2015 Rule may have altered the balance of authorities between the federal and State governments.”

The federal agencies are inconsistent in their discussion of the impact of the proposed rule on the states. On the one hand, the agencies assert that the proposed rule would not affect state-federal relationships because the proposed rule would not alter the jurisdiction of the CWA compared to what is “currently being applied”. However, direction provided by Executive Order 13778 is to permanently repeal the 2015 rule and to introduce a rule based on the Scalia test, which is much narrower in scope than the present, pre-2015 rule. The agencies also assert that “any change in interpretation of ‘waters of the United States’ may change the scope of waters subject to CWA jurisdiction and thus may change the scope of waters for which states may assume these responsibilities [state development of water quality standards, TMDL programs, and Section 401 water quality certification of federal permits and licenses] under the Act”. Development of a new rule regarding jurisdiction, as the agencies indicate here that they “may” do and have previously stated that they will do, would clearly impact the states. There is no doubt that the state-federal relationship is impacted by any and all rulemakings that alter or replace the rule defining WOTUS.

ASWM agrees that the States (and Tribes) play a critical role in implementation of the CWA, but disagrees with the agencies’ characterization of what is required to maintain a balance between state and federal authorities. As discussed in detail in ASWM’s previous comments regarding the WOTUS rulemaking, ASWM defines cooperative federalism as integrating state and federal roles over Waters of the U.S., with both state and federal agencies playing an important part.<sup>2</sup> Through the 1977 amendments to the CWA, Congress recognized and protected the rights and responsibilities of the states by ensuring a major role in the implementation of many CWA programs. States have the option of assumption of the Section 404 dredge and fill permitting program, may rely on Section 401 water quality certification to incorporate state concerns, may operate independent state permitting programs, or a combination of the above. States have determined the appropriate balance of these choices for their respective states based on the current scope of CWA jurisdiction. Significantly reducing the scope of jurisdiction, as anticipated by a definition of WOTUS based largely on the Scalia plurality decision, will require them to reassess their respective approaches. Where states elect not to address the regulatory gap caused by reduced federal jurisdiction, the goals of the CWA will not be met. This is because upstream impacts must be regulated to prevent harm to the downstream waters that are defined as being under federal jurisdiction by the Scalia decision; the Scalia waters cannot be protected by regulating only the Scalia waters.

Following the publication of the final 2015 rule there were lawsuits filed by 31 states challenging the rule as well as 8 supporting the rule. Clearly states were concerned about some of the proposed changes. However, the currently implemented definition of waters of the U.S. is based on Kennedy plus Scalia in *Rapanos* and ASWM does not believe that these

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<sup>2</sup> See in particular ASWM’s comments of November 28, 2017 in response to a Federal Register notice regarding the Schedule of Public Meetings.

lawsuits can be interpreted as reliably signaling future support for reducing CWA jurisdiction to a definition consistent only with the Scalia plurality decision in *Rapanos*.

Additional important insights can be gleaned from the state response to the January 10, 2003 “Advanced Notice of Proposed Rulemaking on the Definition of Waters of the U.S.” published following the Supreme Court decision in *SWANCC* to gain public input on the potential for EPA and the Corps to revise the Waters of the U.S. rule to reduce federal jurisdiction. While much of the focus in recent years has been on the Supreme Court decision in *Rapanos*, the early *SWANCC* decision also reduced the scope of jurisdiction under the Clean Water Act. At least 42 states provided public comment. Forty states opposed reducing the scope of WOTUS and two states supported it. States opposing rulemaking consistently raised the following concerns:

- The cost of developing state controls to fill the new gaps in regulation would be burdensome and many states were already experiencing cuts in wetland protection staff.
- The proposed change in jurisdiction would have created the potential for significant disparities (and the associated lack of consistency) between state permitting programs across the country.
- The additional step of having to identify which waters were jurisdictional at the federal level and which at the state level would lead to a patchwork of definitions and controls, adding steps to the permitting process, creating confusion and making permitting more time-consuming.
- The consistent application of water resource protection across the country is important and reducing CWA jurisdiction would create complex and contradictory programs among the states.
- The CWA and its coordination of federal protections across the United States had achieved major gains over the last thirty years, from which states have benefitted through clean water and its associated economic and environmental benefits. Many states argued that the objectives of the CWA could not be effectively realized in the absence of the current federal jurisdiction.

ASWM believes that these concerns are still very relevant and likely to be raised formally by states in response to a proposed rule to significantly reduce the scope of Clean Water Act jurisdiction.

#### State Assumption of Section 404

Any State may request authorization to administer its own permit program over dredge and fill activities in wetlands and other waters covered by Section 404 of the CWA in lieu of the Corps permit program, with approval of the EPA. While only two states have done so,

this program allows states to assume primary responsibility over a major category of CWA regulations, with federal oversight and assistance, in most waters of the state. It is worth noting that the Corps must retain jurisdiction over traditional navigable waters to ensure protection of interstate navigational channels. If the scope of federal jurisdiction is rolled back, as described in Executive Order 13778, then the federal role is reduced, while the state would have the increased responsibility for protection of other public waters.

It is also worth noting that Congress clearly divided state and federal responsibilities during the development of the 1977 amendments, as noted in the Legislative History of the CWA. As referenced in the Supplemental Notice at footnote 11, the legislative history is discussed in the *Final Report of the Assumable Waters Subcommittee [under NACEPT]* (May 2017). This report includes a discussion of the division of state and federal responsibility under a state assumed Section program, based on the language of 1975 Corps regulations which established phases for implementation of the Section 404 Program, as follows:

*Phase I:* [effective immediately] discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto are subject to ... regulation.

*Phase II:* [effective July 1, 1976] discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to ... regulation.

*Phase III:* [effective after July 1, 1977] discharges of dredged material or of fill material into any navigable water [including intrastate lakes, rivers and streams landward to their ordinary high water mark and up to the headwaters that are used in interstate commerce] are subject to ... regulation.

All waters defined in these three phases are subject to federal jurisdiction. Congress further specified that in the event of state assumption of the Section 404 program, regulation of Phase I waters would be retained by the Corps, but that States would assume responsibility for Phase II and Phase III waters. If Phase II and III waters were not under federal jurisdiction, then a state would not have anything to assume, and thus would not play a role in this component of the CWA.

It is also worth noting here that Phase II and III waters include freshwater tributaries, freshwater wetlands contiguous *or* adjacent to primary tributaries, lakes, and any navigable water including intrastate lakes, rivers, and streams landward to their ordinary high-water mark and up to headwaters that are used in interstate commerce.

#### *The role of states that do not assume Section 404 authority*

Those states who do not assume authority under CWA Section 404 retain other avenues to assert their regulatory concerns.<sup>3</sup> They may develop state water quality standards over all waters over which the federal government has jurisdiction; and, they may review any federal regulatory action under CWA Section 401 by issuing, denying, or conditioning state

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<sup>3</sup> States may, of course, also implement many other CWA programs, which have similar concerns.

water quality certification. In pertinent waters, a state may also carry out a Coastal Zone Management Act consistency review, and object to federal actions that are inconsistent with state regulations and programs.

Should the federal agencies roll back federal jurisdiction over waters, then these avenues to coordinate with the federal agencies are closed. The development of state-only programs to replace federal programs may be a very significant logistic and economic burden for states. Currently only 24 states have independent authority to issued dredge and fill permits for some portion of the aquatic resources in their respective states. The remaining 27 rely primarily on Section 401 certification of federal Section 404 permits.

*The critical role of the federal agencies in protecting neighboring and downstream states.*

In the division of responsibilities under the CWA, the federal agencies play a critical role that cannot be assumed by the states – that of protecting waters that impact more than one state and which cannot be controlled by states beyond their own boundaries. A state has little recourse in controlling pollution or the physical alteration of waters within other states that ultimately have serious consequences in downstream states, or in states that border large aquatic systems such as the Great Lakes, Chesapeake Bay, or the Mississippi River. Should the federal agencies roll back jurisdiction, states will potentially be subject to individual and cumulative impacts resulting from the action of upstream states that result in increased flooding, drought exacerbated by upstream withdrawal of water, or contamination and public health impacts where federal authority is reduced due to a reduction in CWA jurisdiction.

## **THE SCIENTIFIC BASIS FOR REGULATIONS**

The Supplemental Notice states that the agencies “believe that they previously placed too much emphasis on the Connectivity Report when setting jurisdictional lines in the 2015 Rule”. However, the basis for this statement appears to be missing. The Supplemental Notice provides no documentation of errors in the Connectivity Report, other than highlighting the scientific limitations already documented and explained in the report itself. Rather than citing specific issues in the report, the Supplemental Notice discusses comparisons among Justice Kennedy’s decision in *Rapanos*, statements by the Scientific Advisory Board, existing Corps regulations, and the 2015 Rule to support concerns regarding scientific inconsistency.

For example, the Supplemental Notice quotes the agencies in issuance of the 2015 Rule as stating that “science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial function to downstream waters.” This statement is fully consistent with the Connectivity Report, which simply explains, in detail, 1) what connections exist among waters, 2) the factors that impact the strength of those connections, and 3) indicators of connections. In fact, this quotation essentially supports the reliability of the Connectivity Report, which acknowledges the limitations of the science. Moreover, this statement in the Connectivity report articulates the difficulty of

applying a simple “bright line” definition for all Waters of the U.S. on a nationwide basis and supports the need for case by case evaluation of potential impacts.

The Supplemental Notice is critical of the methods used by the Corps of Engineers to estimate the overall percent change in jurisdiction between the 2015 Rule and regulations that were previously in place. In evaluating the 2015 Rule, the Corps estimated a modest increase of between 2.84 and 4.65 percent in positive jurisdictional determinations under the 2015 Rule – taking into account the potential change in jurisdiction over all waters – that is, rivers and streams, wetlands, and all other waters. The Supplemental Notice disputes this statement, preferring to look only at the category of “other waters” that were considered *non-jurisdictional* under the post-Rapanos guidance, and that would become jurisdictional under the 2015 Rule (primarily as a result of their position in the floodplain) – a higher number. By selectively attacking a subset of the data as over-estimating the expected increase in jurisdiction, the Notice artificially inflates the perceived problem. This is akin to estimating the change in sales of all agricultural products by looking at only an increase in the sale of avocados.

In only a single example of clear misrepresentation of Supreme Court decisions, the Supplemental Notice quotes from the Kennedy opinion in *Rapanos* in which Justice Kennedy indicates that existence of an ordinary high-water mark may provide a reasonable measure of the significant nexus between *a minor tributary and a navigable water*. Kennedy goes on to say that these physical characteristics may not be suitable to determine whether *adjacent wetlands* also play an important role in the aquatic system. However, the Supplemental Notice misinterprets these two statements to criticize the 2015 Rule for using the presence of a bed and banks to help define a *tributary*, implying an inconsistency with the Kennedy decision – when actually the Kennedy decision supported using the presence of a bed and bank as criteria for confirming a significant nexus to navigable waters. (In his opinion, Kennedy goes on to suggest that a case by case evaluation of significant nexus with navigable waters must be used to determine jurisdiction over *wetlands adjacent to tributaries*. This approach is also consistent with the 2015 Rule.)

In short, the agencies’ expressed concern with the Connectivity Report offers no concrete finding of fault with the report itself, but rather focuses on misinterpretations of legal decisions, and statistically faulty criticisms of estimates of the change in jurisdiction under the 2015 Rule to attack the scientific basis of the 2015 Rule. Rather, the scientific analysis undertaken in production of the Connectivity Report was very extensive, thorough, and well documented.

#### **ADDRESSING REGULATORY UNCERTAINTY**

ASWM agrees with the importance of maximizing regulatory certainty and predictability. In addition, we recognize that litigation regarding the 2015 Rule has made the scope of federal jurisdiction under the CWA less predictable – particularly since no final decisions in that litigation have been reached. However, we cannot agree that regulatory uncertainty is entirely the result of the 2015 Rule, or that certainty will be gained by a (likely temporary)

return to the 1986 Rule together with post-*Rapanos* guidance. The experience of the public and multiple agencies has been that the 1986 rule provided greater regulatory certainty than guidance issued following the Supreme Court decisions in *SWANCC* and *Rapanos*. However, the old 1986 rule together with the post-*Rapanos* guidance has resulted both in a reduction of overall CWA jurisdiction and increased costs for program applicants and regulatory agencies when applying the *Rapanos* guidance to determine jurisdiction.

While the Supplemental Notice states that, “the agencies have been implementing the pre-2015 regulations (hereinafter referred to as the ‘1986 regulations’) almost uninterrupted since 1986”, this statement is simply untrue. The CWA regulatory definition of WOTUS was – in spite of a number of challenges - relatively stable and consistent until 2001. However, since that time public understanding, certainty, predictability, and stability of the definition of WOTUS has been changing. Initially, this was a result of decisions of the Supreme Court, and later by difficulty in consistently interpreting those decisions - by various federal agencies, the public, and the courts. The federal agencies issued guidance (the post-*Rapanos* guidance) in an attempt to improve this situation, but the result failed to fully clarify the scope of WOTUS. The 2015 Rule was developed as a result of requests to further clarify the scope of CWA jurisdiction.

In addition, we believe the 2015 Rule was developed to provide greater certainty than the pre-existing regulations by building on numerous federal court decisions that have agreed that either the Kennedy or the Scalia opinion in *Rapanos* could be used to define jurisdiction. Moreover, a sound scientific foundation for the 2015 rule was provided by the extensive compilation of information from peer-reviewed science that resulted in the Connectivity Report.

We are concerned that increased uncertainty regarding the scope of CWA jurisdiction has arisen from the actions regarding the long-term intention of the federal agencies over the past 18 months. The Executive Order signed February 28, 2017 required the federal agencies to evaluate the 2015 rule to determine *whether it should be revised or rescinded*; and, in defining “navigable waters” to *consider* [emphasis added] whether it should be defined in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*. The agencies elected not to pursue revisions to the 2015 Rule building on the work already completed, and we are concerned that the reasons provided for electing to rescind the 2015 rule in this supplemental may not establish a strong foundation for current and future rulemaking concerning WOTUS.

#### **LEGAL AUTHORITY FOR 2015 RULE**

The federal agencies that promulgated the 2015 Rule question in this notice whether there was adequate legal authority to support that rule. They support this position in part by citing ongoing litigation challenging the 2015 Rule, and in part by proposing a new and different federal interpretation of the *Rapanos* decision. ASWM believes that the agencies



should reconsider this position, particularly as it relates to rulemaking underway to reduce Clean Water Act jurisdiction, for the following reasons:

- The interpretation of the federal agencies in the Supplemental Notice of the 2006 Supreme Court decision in *Rapanos*, and the Kennedy opinion in particular, is in direct conflict with over a decade of legal briefs on the WOTUS issue filed in federal courts by the United States.

The interpretation of the Kennedy opinion in the Notice is clearly erroneous on its face in regard to some points, and in the matter of jurisdiction over tributaries based on the presence of banks and a bed, cited above.

- No court to date has interpreted the *Rapanos* decision in a manner that is consistent with the proposal to develop a rule based only on the Scalia plurality decision.
- The case law regarding the 2015 Rule cited in the Supplemental Notice rests entirely on requests for preliminary injunction against implementation of the 2015 Rule; in no instance of which we are aware has a court yet even been briefed on the merits of the case.
- In response to the 2003 Advanced Notice of Proposed Rulemaking, the state comments provided strong support for retaining the (then) current scope of Clean Water Act jurisdiction.

#### **SUMMARY OF ASWM POSITIONS**

The Supplemental Notice raised a myriad of questions regarding jurisdiction over WOTUS, not all of which can be answered directly here. However, we urge the federal agencies to consider the concerns of ASWM and its member states regarding the following.

- ASWM believes that there is not sufficient basis provided for repeal of the 2015 Clean Water Rule. The 2015 rule has a sound legal basis, and a sound scientific basis, and the potential, with further clarification, to contribute to achievement of the basic goals of the Clean Water Act.
- ASWM requests that the federal agencies recognize the very significant impact that the repeal of the 2015 Rule and replacement with a new Scalia-based rule would have on the states. The changes proposed by the federal agencies would transfer a great deal of responsibility to the states, as a result of narrowing CWA jurisdiction based on Scalia plurality decision. The proposed actions would also limit the role of the federal government in protecting states from the contamination or alteration of water based on the actions of upstream states.
- ASWM believes that the actions of the federal agencies are having the unintended consequence of reducing public understanding of CWA requirements, and creating

public uncertainty and concern regarding federal protection of public waters. Public uncertainty is a result not only of this specific proposal to repeal the 2015 Rule, but additional rulemaking underway to reduce the scope of federal protection of the nation's waters.

- ASWM supports actions directed to achieving the fundamental goals of the CWA – that is, to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. We also support recognition of the primary responsibilities of the state in regard to public waters, and the need to balance state and federal roles. We are concerned that the Supplemental Notice and subsequent actions identified through E.O. 13778 do not provide a path toward achieving these goals.

ASWM appreciates the opportunity to review and comment on this Supplemental Notice. While these comments have been prepared with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations.