

COMMENTS OF THE ASSOCIATION OF STATE WETLAND MANAGERS

TO THE

U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE U.S. ARMY CORPS OF ENGINEERS IN RESPONSE TO THE JULY 27, 2017 *FEDERAL REGISTER* NOTICE OF A PROPOSED RULE: “DEFINITION OF WATERS OF THE UNITED STATES” – RECODIFICATION OF PRE-EXISTING RULES

SEPTEMBER 11, 2017

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to the *Federal Register* notice of a Proposed Rule: “Definition of Waters of the United States” – Recodification of Pre-existing Rules.¹ Our review of the proposed rule and these resulting comments and recommendations were prepared with input from the ASWM Board of Directors, ASWM staff, and a workgroup of members and associates having extensive experience in state and federal wetland programs. While our analysis accurately represents the overall view of the Association, we recognize that individual states may have differing viewpoints, and urge the federal agencies to carefully consider the individual comments of all states and tribes.

Our comments focus primarily on the regulation of dredge and fill activities and aquatic resource protections provided by §404 of the Clean Water Act (CWA) and parallel state, tribal, and local authorities. However, we recognize that the question of jurisdiction over Waters of the United States is very broad and also impacts other CWA programs, including §402 and nonpoint source programs, as well as other legislation that adopts CWA jurisdictional definitions by reference, such as the Oil Pollution Control Act, and thus also urge full consideration of comments prepared by other state organizations, including the Environmental Council of the States and the Association of Clean Water Administrators.

The impact of any change in the definition of federal jurisdiction will have a major impact on the states and tribes – both directly by altering the extent of federal protection of vital clean water resources (the economic value of which is discussed below) and indirectly by potentially altering the existing relationships among multiple state/tribal, federal, and local authorities that protect an array of public resources while minimizing overlap and delay of necessary permit processes. We urge that any modification of rules governing federal jurisdiction take these factors into account.

Our comments address four major topics:

- The proposed revocation of the 2015 Clean Water Rule;

¹ *Federal Register*, Thursday July 27, 2017, pages 34899-34909

- The economic analysis prepared to support proposed revocation of the 2015 Clean Water Rule;
- Suggested measures that may be initiated now to improve currently used jurisdictional guidance pending completion of the proposed “Step 1” (revocation) and “Step 2” (replacement) rules; and,
- Initial considerations for a proposed “Step 2” Scalia plurality opinion-based rule.

COMMENTS AND RECOMMENDATIONS

I. Proposed Revocation of the 2015 “Clean Water Rule” Defining Waters of the U.S.

The Environmental Protection Agency (EPA) and the U.S. Department of Army (Corps) have proposed revoking the 2015 Clean Water Rule. We understand that the agencies ultimately propose to replace the rule with a new CWA jurisdiction rule based in part on the Scalia plurality opinion in the *Rapanos* case². In the interim, it is proposed that the previous definitions promulgated in 1986 (Corps) and 1988 (EPA) in conjunction with the jurisdictional guidance that was in use prior to 2015 and during the current court mandated stay of the 2015 rule would be applied. The federal agencies justify this action based primarily on the legal situation that would result should the U.S. Supreme Court rule that the 6th Circuit Court does not have authority to review or stay the Clean Water Rule, leaving a patchwork of legal decisions in response to multiple lawsuits in many of the lower courts throughout the country. **ASWM questions whether rescinding the 2015 rule will achieve its intended objectives for two primary reasons.**

1. **Revoking the 2015 rule will neither improve program stability, nor expedite completion of a new final rule that relies on the Scalia opinion in *Rapanos*.** While it is true that the Supreme Court may rule that the 6th Circuit Court lacks jurisdiction to stay the Clean Water Rule - producing the outcome detailed by the agencies in the *Federal Register* notice - it is also possible that the Court may rule in the opposite manner.³ Given the legal uncertainty associated with *any* course of action taken to clarify CWA jurisdiction, as well as the inevitable legal challenges that will be brought in

² *Rapanos v. United States*, 547 U.S. 715 (2006)

³ A decision on the challenge to the 2015 rule on the merits will be made in the appropriate court(s) as determined by the U.S. Supreme Court.

Rescission of the 2015 Rule may unintentionally prolong this layer of uncertainty. Such an action would render the challenge to the 2015 Rule moot, and then the Supreme Court would likely decline to decide which court is the proper forum for challenges to WOTUS regulations. Thus, should the federal agencies proceed with Step 1 (and Step 2), we could see years of litigation wrangling over which court has jurisdiction to consider the resulting legal challenges.

response to rescinding the 2015 Rule, we do not believe that rescinding the rule will improve program stability. Rather, it is likely to delay judicial clarity and lengthen the time required for resolving the jurisdictional definition.

ASWM believes it would be possible to address many of the concerns raised by states and others by revising components of the 2015 Rule, and through other programmatic measures to respond to unique regional challenges, as described later in these comments.

- 2. The 2015 Clean Water Rule reflects broad public acceptance of federal jurisdiction over many primary categories of the nation's waters, and is based on a comprehensive scientific review. Rescission of the rule should not undermine aspects of the Clean Water Rule that are well founded and acceptable to the public.** CWA jurisdiction over the majority of waters - including the territorial seas, traditional navigable waters, interstate waters, permanently standing or flowing waters such as lakes and streams, impoundments of these waters, tributaries of these waters, and immediately adjacent wetlands – is generally accepted. Most categories of waters have been included in the definition of Waters of the United States since promulgation of rules in 1986 and 1988. In addition, there has been considerable support for protection by rule of special categories of waters listed in the 2015 Clean Water Rule – including prairie potholes, Delmarva and Carolina Bays, pocosins, western vernal pools, and Texas coastal prairie wetlands, supported by sound scientific documentation.

Moreover, positive steps were taken under the 2015 rule to define waters that *will not* be regulated and provide straightforward criteria for waters that are regulated. ASWM recognizes that clarity is still needed regarding some of the more remote or intermittent types of waters, but we believe that momentum in gaining transparency and certainty for many waters where there is long-standing support for jurisdiction should not be lost. The scientific and public interest record for the 2015 rule remains relevant.

Issues that would require further consideration if the agencies were directed to pursue implementation of the 2015 rule include clarification of jurisdiction over intermittent and ephemeral streams, the identification of “adjacent” wetlands at the field level, differentiating man-made ditches and channelized streams, and in general the end points of federal jurisdiction. In our opinion, many of these issues will be best resolved by accounting for regional differences, and through regionalized programmatic solutions, e.g. use of Regional and State Programmatic General Permits, and regional guidance.

II. Comments on The Economic Analysis Prepared to Accompany the Proposed Rule

ASWM finds the economic analysis associated with the proposed rule to be incomplete and misleading. Economic values of wetlands are deemed “unquantifiable” and therefore are zeroed out in the “benefits” column. Studies that were cited in the cost benefit analysis that supported promulgation of the 2015 Rule were deemed out of date.

The key difference between the 2015 and 2017 economic analyses of the 2015 Clean Water Rule is the incorporation of wetlands in the benefits column of the EPA’s benefit cost analysis in 2015.⁴ The 2015 analysis estimated that the Clean Water Rule will result in approximately \$306.1 million in economic benefits from wetland protection. In the 2015 analysis, the 2015 rule has a benefit-cost ratio of above 1, which is supported by the incorporation of wetland benefits. By contrast, the 2017 analysis completely removes the benefits of these values, such as storm protection, waterfowl hunting opportunities, and commercial fish habitat, reducing the benefit-cost ratio for the 2015 rule as a whole to below 1. The federal agencies’ reasons for this dramatic change are stated as follows:

“The 2015 CWR wetland benefits were derived through a benefit transfer exercise using 22 estimates from 10 studies, examining households’ willingness to pay for wetland preservation. The studies were published between 1986 and 2000, although the agencies attempted to find more recent studies. More recent wetland studies were not available. The age of these studies introduces uncertainty, because public attitudes toward nature protection could have changed. The past 30 years have also seen tremendous advances in statistical and economic methods that have improved the ability to collect and analyze data on the willingness to pay for changes in environmental amenities.”⁵

The key claims made in the preceding quotation are addressed in the following comments.

1. The age (1986-2000 publication year) of studies in the 2015 analysis “introduces uncertainty, because public attitudes toward nature protection could have changed”.

The economic analysis erroneously dismisses past studies of ecosystem services and other values based on the statement that “public attitudes toward nature protection could have changed.” This statement is unsubstantiated. If public attitudes *have* changed in recent

⁴ Environmental Protection Agency & Department of the Army, 2015. Economic Analysis of the EPA-Army Clean Water Rule. Retrieved at: https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf

⁵ Environmental Protection Agency & Department of the Army, 2017. Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules. Retrieved at: https://www.epa.gov/sites/production/files/2017-06/documents/economic_analysis_proposed_step1_rule.pdf

years, it is through *increased* recognition of the vital need for and limited supply of clean water resources. If anything, the public today places a higher value on unpolluted drinking water, sufficient supplies of water for other domestic, agricultural, and commercial needs, and on minimizing the cost of natural disasters including flooding, severe storms, and drought.⁶

Gallup polls regarding environmental concerns indicate that the percentage of Americans that worry about the quality of the environment a “great deal or fair amount” is unchanged (77%) between 2001 and 2017.⁷ The percentage of people that have a great deal of concern has actually increased between 2001 and 2017 (42% to 47%), implying that Americans may be more concerned about wetland benefits than in the past.

It is moreover clear that the public desire for protection of aquatic resources is resulting in effective and cost efficient actions by state and local government, for example:

- **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, which may include construction or restoration of wetlands, establishment of stream buffer strips, and numerous other measures.
- **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.⁸ 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.⁹ These benefits, from cost savings

⁶ See 2016 Value of Water Campaign poll, <http://thevalueofwater.org/sites/default/files/Value%20of%20Water%20National%20Poll%202016%20Presentation.pdf>

⁷ Gallup, 2017. In Depth: Topics A to Z – Environment. Retrieved at: <http://www.gallup.com/poll/1615/environment.aspx>

⁸ 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/>

⁹ 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.

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.¹⁰ 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.

2. "Wetland studies from after 2000 are not available."

A review of the Earth Economics' database - the Ecosystem Valuation Toolkit, revealed that at least four contingent valuation¹¹-based studies of wetland value have been published between 2005 and 2012.¹² These studies include:

- Whitehead, J. C., Groothuis, P. A., Southwick, R., Foster-Turley, P. 2005. The Economic Values of Saginaw Bay Coastal Marshes. Southwick Associates, Inc.
- Petrolia, D. R., Interis, M. G., Hwang, J., Hidrue, M. K., Moore, R. G., Kim, T. 2012. America's Wetland? A National Survey of Willingness to Pay for Restoration of Louisiana's Coastal Wetlands. *Marine Resource Economics* 29(1): 17-37.
- Awondo, S. N., Egan, K. J., Dwyer, D. F. 2011. Increasing Beach Recreation Benefits by Using Wetlands to Reduce Contamination. *Marine Resource Economics* 26(1): 1-15.
- Whitehead, J. C., Groothuis, P. A., Southwick, R., Foster-Turley, P. 2009. Measuring the economic benefits of Saginaw Bay coastal marsh with revealed and stated preference methods. *Journal of Great Lakes Research* 35(3): 430-437.

¹⁰ CH2MHill. June 2013. Milwaukee Metropolitan Sewerage District Regional Green Infrastructure Plan. MMSD Contract No: M03064P03.

¹¹ Contingent valuation was the methodology used for wetland studies incorporated into the 2015 analysis.

¹² Earth Economics, 2017. Ecosystem Valuation Toolkit. Retrieved at: <http://www.earthconomics.org/ecosystem-valuation-toolkit>.

A brief search performed by the Association of State Wetland Managers found 5 willingness to pay (WTP) studies between the years 2009-2016, including:

- Loomis, J., Haefele, M. 2015. [Economic Contribution, Impacts, and Economic Benefits of Deer, Waterfowl and Upland Game Bird Hunting in North and South Dakota: Relationship to CRP Lands.](#)
- Murray, B., Jenkins, A., Kramer, R., Faulkner, S.F. 2009. [Valuing Ecosystem Services from Wetlands Restoration in the Mississippi Alluvial Valley.](#) Nicholas School of the Environment, Duke University.
- Newell, L.W., Swallow, S.K. 2013. [Real-payment choice experiments: Valuing forested wetlands and spatial attributes within a landscape context.](#) Ecological Economics, 92: 37-47.
- Patton, D., Bergstrom, J., Covich, A., Morre, R. 2012. [National Wildlife Refuge Wetland Ecosystem Service Valuation Model, Phase 1 Report: An Assessment of Ecosystem Services Associated with National Wildlife Refuges.](#) University of Georgia. Prepared for the Division of Refuges and Division of Economics, U.S. Fish and Wildlife Service, Washington, D.C.
- Young, N. 2016. [The Economic Value of Riparian Buffers.](#) American Rivers, Washington, D.C.

A recent study was found using the avoided cost method of valuation to estimate the economic value of floodplain wetlands:

- Watson, K.B., Ricketts, T., Galford, G., Polasky, S., O'Neil-Dunne, J. 2016. [Quantifying flood mitigation services: The economic value of Otter Creek wetlands and floodplains to Middlebury, VT.](#) Ecological Economics 130 (2016) 16-24.

Additionally, multiple studies have been published between 2000-2017 that show significant ecological benefits from wetland protection and restoration that do not provide monetary value, but are valuable nonetheless in showing quantitative improvements to wildlife habitat and watershed health, thereby producing benefits for communities in the form of floodwater attenuation, stormwater filtration, nutrient reduction and increased outdoor recreation opportunities.¹³

¹³ A list of representative studies of this nature is posted on the ASWM web pages at https://www.aswm.org/pdf/lib/examples_of_recent_studies_demonstrating_the_ecological_benefits_of_wetland_protection_and_restoration.pdf.

3. “Statistical and economic methods used within contingent valuation have improved, leading to increases in study quality over the past 30 years.”

The past 30 years have certainly seen advances in statistical and economic methods. However, the framework for contingent valuation has existed since the 1940s¹⁴ and the first contingent valuation was conducted in the early ‘60s as a PhD thesis.¹⁵ While contingent valuation has improved since 1986, the methodology had been subject to 20+ years of research and development before 1986. Contingent valuation was well-developed when studies cited in the economic analysis associated with the 2015 rule were conducted.

Earlier this year the Congressional Research Service (CRS) reviewed EPA’s economic analysis of the 2015 Rule. In their report, the CRS notes that the wetlands protected under the 2015 rule change provide public benefits of over \$500 million per year. This includes values ranging from water quality enhancement, habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection.¹⁶ The figure cited by CRS does not include the benefits of protecting water resources such as small streams. Removing protection from 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 consequences for local, state/tribal, and federal governments in terms of increased costs for water quality enhancements and associated benefits.

In short, the economic losses that would arise from a reduction in federal protection of water resources are enormous, and it is both incorrect and a disservice to the public to exclude consideration of these factors from the cost-benefit analysis. Potential economic losses include those arising from a reduction in the supply of safe, clean, useable water for drinking and domestic use, industrial use, agriculture 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 clean 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

¹⁴ Hicks, 1946. Value and Capital. Oxford University Press, Oxford.

¹⁵ Davis, 1963. The value of outdoor recreation: an economic study of the marine woods. PhD Thesis. Harvard University; Cambridge.

¹⁶ Copeland, C. 2017. EPA and the Army Corps’ Rule to Define “Waters of the United States”. Congressional Research Service.

supporting 7.6 million jobs and generating \$124 billion in annual federal, state, and local tax revenue.¹⁷ Many of these activities rely on clean water resources.

The potential loss of federal protection of wetlands and small and 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.

Finally, a recently published study of the role of wetlands in reducing the damage from hurricanes and coastal flooding, serves as a timely statement regarding the public value of wetland resources. “The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA”, Scientific Reports 7, Article number: 9463(2017), reports the outcome of an extensive study to evaluate the economic benefit of coastal wetlands in minimizing damage from Hurricane Sandy, and to evaluate long term benefits of flood reduction in a specific local area.¹⁸

- “The study estimates that temperate coastal wetlands reduced flood heights and thus avoided more than US \$625 Million in flood damages across 12 coastal states affected by Hurricane Sandy, from Maine to North Carolina.”
- “In Barnegat Bay, Ocean County, locations with salt marshes had significantly lower annual flood losses compared to locations without marshes. Properties behind a marsh, on average, save 16% in flood losses every year compared to properties where marshes have been lost.”

III. Suggested Interim Measures to Support Use of the Post-Rapanos Guidance

We understand that, should the 2015 Clean Water Rule be revoked, or until its status is otherwise resolved by the courts, the federal agencies will rely on post-*Rapanos* guidance to define federal jurisdiction. Unfortunately, the issues that led to the 2015 rulemaking remain. The process for rendering a jurisdictional determination under the previous guidance can result in an extended delay for the permit applicant. As a result, many permit applicants have accepted federal jurisdiction without a full review simply in order to expedite the permitting process; this may potentially result in unnecessary permitting

¹⁷ Outdoor Industry Association 2017, *The Outdoor Recreation Economy* See https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf

¹⁸ The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA. See <https://www.nature.com/articles/s41598-017-09269-z>

costs where jurisdiction is in fact lacking. At the same time, some important wetlands may not be protected by that guidance, such as the special ecological types included in the 2015 Rule. Reliance only on guidance has resulted in jurisdictional determination inconsistencies across the nation. Therefore, we recommend that the federal agencies consider taking steps now to improve implementation of the post-*Rapanos* rule during this interim period, using approaches that we also recommend for the “Step 2” rulemaking.

1. Clarification through regional programmatic approaches, including guidance, state federal agreements and field methods. As previously noted, ASWM believes that federal regulations and definitions of uniform federal criteria are essential to provide a baseline level of protection of the nation’s waters, regardless of the existence of state, tribal, or local laws or rules. The Clean Water Act also defines a common direction, and provides a scientifically based framework for management of waters that cross state boundaries impacting multiple states.

Conversely, it is technically difficult, if not impossible to use identical standards, field methods, and regulatory procedures across the nation’s highly diverse geographical, climatic, and human land use patterns. The CWA recognizes this by providing an active role for state and tribal governments, in allowing for water quality standards to be defined by each state or tribe (in accordance with federal guidelines), and by allowing for development of state and regional general permitting categories and criteria (again, in compliance with foundational federal requirements). While these comments focus on §404 dredge and fill permitting, we recognize that parallel general permits are widely used in other CWA programs, e.g. regulation of common discharges associated with stormwater management, construction, and other pollution control programs under §402.

The use of state and regional programmatic approaches may be used to authorize routine and locally essential actions that typically have minimal impacts on waters of the U.S. and that do not fit squarely under CWA exemptions, *without* eliminating overall protection of those waters. This results in regulations that make greater sense to the public – being more closely aligned with local aquatic resource conditions and use of those resources. We believe that concerns regarding such issues as agricultural irrigation and ditch networks, protection and management of combined streams/designated drains, and stormwater management can be effectively addressed through thoughtful application of existing provisions of the CWA. We also stress our belief that the proper use of state and regional permitting addresses local realities while maintaining the national level of protection of waters prescribed by the CWA.

ASWM therefore recommends that the federal agency make full use of existing regional regulatory approaches, and consider development of regional field guidance that would be equally pertinent under the existing guidance, implementation of the 2015 Rule should that occur, or under a newly developed Scalia plurality opinion-based rule. Examples of regionalized approaches include the following.

- a. State/Tribal and Regional conditioning of Nationwide General Permits (NWP's).** The Corps of Engineers has, for decades, made use of NWP's to efficiently authorize regulated activities that have a minimal individual or cumulative impact as defined by CWA regulations. Corps District Engineers may add regional conditions to such permits to address localized geographic, climatic, or related ecological concerns, or more localized activities. In addition, states and tribes may provide a conditional Water Quality Certification under CWA §401 or CZMA consistency review to address specific concerns.

The benefit of this approach is that federal protection of important components of the nation's aquatic system is maintained, but without imposing a significant regulatory burden on minor activities. In some instances, an abbreviated request for authorization may be submitted, and in others, no notification of the proposed action is needed, provided that the criteria specified in the general permit are met.

- b. Issuance of Regional General Permits or Letters of Permission.** Corps District offices may also issue Regional General Permits (RGPs) for minor activities that are specific to a given state or states. For example, a number of specific activities in Michigan, associated with the management of Great Lakes shorelines may be authorized under a Regional General Permit issued by the Detroit District Corps, in some instances under conditions specified by the State §10/CZMA certification.¹⁹ As with other categories of general permits, baseline CWA criteria for authorization of a project must be met, but minor actions commonly authorized in a specific state or states may be authorized expeditiously. Rather than eliminating protection for broad categories of waters of the U.S. altogether, ASWM believes that greater use may be made of RPGs, and encourages development of additional guidance for states and Corps staff to promote this approach.
- c. Issuance of State Programmatic General Permits.** Where states are willing to undertake a greater role in review of CWA §404 dredge and fill activities, the Corps and a State may agree on a State Programmatic General Permit (SPGP) to authorize defined minor activities through review and approval by the state agency. While the final authorization is made under Corps §404 authority and approval, processing of a proposed activity by the state simultaneously with review and approval under state authority, provides an efficient and typically faster permitting process.

¹⁹ See

http://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/19902000050S16_Final%20with%20Regional%20Conditions-RMD_PN.pdf

In many instances, particularly in the New England states, SPGP's have provided a more regionalized and efficient process than use of NWP's. However, some states have found the process of SPGP issuance, and re-issuance at the expiration of a mandated 5-year permit period, to be cumbersome and time consuming. We encourage the Corps and EPA to make full use of SPGP's to regionalize the regulatory program by developing additional guidance for states and Corps District offices.

- d. Encouraging Section 404 State/Tribal Program Assumption.** Assumption of the §404 Program by a state or tribe represents a fully regionalized approach for qualified states or tribes, parallel to state/tribal administration of the NPDES program. §404 assumption has been discussed in detail elsewhere.²⁰ ASWM encourages EPA to continue efforts to support state assumption through revisions of governing regulations at 40CFR Part 233, in accordance with the majority recommendations recently made by the Assumable Waters Subcommittee of NACEPT.²¹

- 2. Development and issuance of regional field technical manuals.** The Army Corps of Engineers has already initiated development of stream identification manuals to account for regional needs, similar to regional wetland delineation supplements. We recommend that this process be continued, and include information on intermittent and ephemeral streams along with perennial streams. Additional information and field guidance for making jurisdictional determinations on channelized or otherwise altered streams used for drainage purposes would also be very useful and address some major and long-standing concerns related to Waters of the U.S. jurisdiction. Regardless of the eventual criteria for federal jurisdiction, methods of field identification of stream headwaters in particular will be highly useful.

Additional consideration might also be given to the need for accurate identification manuals for ecologically important, but less common types of wetlands, such as vernal pools or pocosins, in the regions where such wetland types occur.

IV. Considerations for Step 2 “Scalia-based” Rulemaking

Should the federal agencies proceed as proposed with revocation of the 2015 rule, we suggest that they consider the following issues as development of a new version of the jurisdictional rule is initiated under “Step 2.” Some of these recommendations would also be valid in clarification of the post-Rapanos guidance while it is in use, or in revision of the 2015 rule should the agencies decide to pursue that approach.

²⁰ See https://www.aswm.org/pdf/lib/cwa_section_404_program_assumption.pdf

²¹ Available at <https://www.epa.gov/sites/production/files/2017-05/documents/awsbnaceptpresent5-final.pdf>

- 1. Clarification of the meaning of “Waters of the U.S.” based on the Scalia plurality opinion in the *Rapanos* case.** While the Scalia plurality opinion in *Rapanos* was considered when developing the 2015 Rule, we strongly believe that Scalia’s opinion by itself is wholly insufficient to define the scope of waters of the United States. Taken alone, it is inconsistent with the legislative history of the Clean Water Act, and moreover inconsistent with past Supreme Court decisions including the unanimous *Riverside Bayview Homes*.

Little guidance was provided by Justice Scalia in the *Rapanos* decision to aid in developing readily understood definitions and field procedures which would yield clear jurisdictional determinations. We offer the following considerations to assist a scientifically defensible interpretation of Scalia’s words.

The discussion of connectivity in the Scalia opinion refers only to surface water connections. Peer reviewed scientific literature demonstrates that there is increasing evidence of the importance of shallow ground water connections between seemingly “isolated” wetlands and relatively permanent surface waters, though there may not be an obvious surface connection. Seasonally high groundwater tables supporting wetlands exist in many parts of the country. These groundwater-supported wetlands, if subject to unregulated discharges, may transport pollutants via shallow groundwater connections to regulated surface waters used for contact recreation, drinking water, or other commercially-supported uses, resulting in adverse effects to health and safety. Any discussion and decision on language of waters of the U.S. should consider that new information on surface and groundwater interactions may indicate that limited definitions and criteria for jurisdictional waters and wetlands will be inadequate to ensure safe, clean water.

Wetlands with year-round or nearly year-round surface water are relatively rare in many parts of the country. It is more common for wetlands to only show seasonal surface water or high ground water early in the growing season, sometimes for less than a month, after which obvious surface connections are often absent. Many of these wetlands often alternate seasonally between recharging groundwater and discharging water back to the surface, making them critical for processes which maintain water quality, water supply, and shallow groundwater connections to other wetlands and surface waters. Ironically, these seasonal wetlands are critical to water quality and biodiversity, yet are often undervalued precisely because they are not wet all year long. Ephemeral and intermittent streams, which are a critical water source in certain parts of the country, also show surface water for only limited durations. Given these considerations, we recommend that “relatively permanent” waters and wetlands not refer to the extended duration of surface water present in a given year, but that sufficient surface or groundwater water levels be present during the growing season of most years or for a sufficient duration to support important functions and values. For

example, a determination that sufficient inundation or saturation is “relatively permanent” may mean that the water is present 6 out of 10 years.

Finally, if a Scalia-based Rule were to limit the definition of “traditionally navigable waters” to “relatively permanent” waters with a continuous surface connection to truly navigable waters, this significant narrowing of WOTUS jurisdiction could increase the burden for downstream MS4s, from unregulated, upstream discharges to tributaries (deemed no longer jurisdictional under the federal program). These discharges could contribute to increases in pollutant loads in the receiving waters and thus increase financial burdens for those communities who would become responsible for treatment of those pollutant loads.

- 2. Retention of widely accepted components of the 2015 Clean Water Rule, and the scientific basis for those components** As previously discussed, we encourage the federal agencies to retain broadly accepted and science-based provisions of the 2015 Clean Water Rule. These include jurisdiction over the territorial seas, traditional navigable waters, interstate waters, relatively permanent standing and flowing waters including streams and lakes, and adjacent wetlands. We also encourage retention of concepts related to the connections between traditional navigable waters and headwaters and/or adjacent wetlands, and their use in identification of waters of the U.S.

We encourage the federal agencies to retain and bring forward the EPA Science Advisory Board report – *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*²² - to provide a scientific basis for the new rule, in addition to any recent scientific studies on this topic. This exhaustive report should not be discarded or ignored.

We also encourage development of guidance directing that the special wetland types identified in the 2015 Rule – including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands – are jurisdictional because they are so much alike that they have similar hydrographic characteristics or are so close to navigable waters that they have an effect on those waters.

- 3. Develop programmatic approaches that allow regionalization of field methods to resolve issues related to local hydrologic conditions and local water use factors that are difficult to address on a national basis.** The agencies should consider the use of programmatic regional approaches as discussed above under interim recommendations to address complexities at the field level that arise from major geographic and climatic differences in various regions of the U.S. It is, for example, nearly impossible to develop consistent national guidance over intermittent and ephemeral streams, the hydrologic properties and public importance of which might be vastly different in wetter and dryer portions of the nation. However, regional

²² U.S. Environmental Protection Agency, Washington D.C., 2013

conditioning of Nationwide General Permits, development of Regional General Permits, development of State Programmatic General Permits, and specific state/tribal conditions on §401 certification and Coastal Zone Management Act (CZMA) consistency reviews of general permits may all be used to provide adequate review of impacts to such waters, and authorization of proposed actions have minimal impact.

4. Recognize and take advantage of the complex integration of federal, state, tribal, and local water resource management programs. Step 2 rulemaking (or rule revision) should fully acknowledge and integrate understanding of the multiple intertwined federal, state, tribal, and local programs which protect water resources and their use by the public. Rulemaking should proceed in a manner that does not jeopardize the ability of states/tribes and local governments to manage and protect:

- Public health and availability of clean water supplies for drinking water and domestic use, as well as for watering livestock, irrigation and industrial uses, and recreation;
- Habitat, including for recreational use and for protection of threatened and endangered species, as well as other wildlife populations;
- Protection from natural hazards including flooding, impacts of high energy storms and storm surges, and drought; and,
- Related programs that both impact and rely on water resources, including energy (hydropower and cooling water supply); transportation projects, that both necessitate stream crossings and potentially degrade waters traversed by highways; nonpoint source management; and regulation of large projects such as mining that have the potential to severely degrade or obliterate headwater resources.

Federal agencies such as the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA) are directly involved in such matters, as are state agencies that rely on §401 Certification and CZMA consistency reviews. The complexity of programs that manage and protect the nation's water resources is both understandable and necessary, given the essential need for water in multiple aspects of our culture. However, numerous state/tribal, federal and local agencies have developed processes to ensure interagency coordination and consideration of multiple perspectives, while minimizing overlap and regulatory delays.

As an example; the State of Michigan assumed administration of the §404 Program in 1984. As a result, a single permit application to the state can provide authorization under §404, water quality and CZMA certification, screening and coordination with state and federal endangered species programs, and authorization under 8 related state laws, including wetland protection, lakes and streams protection, floodplain

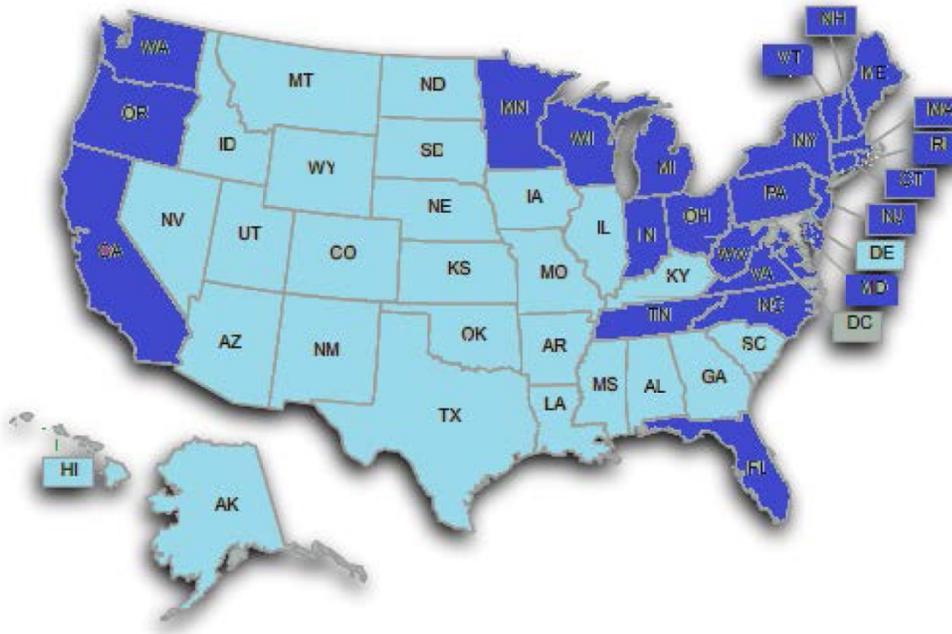
regulation, dam safety, and similar authorities. Because there are state limits on the permitting timeframe, permit decisions are made on average within a few weeks, and as such require well-organized and efficient cooperation among numerous agencies and program staff behind the scenes. This is not an isolated example; many states have developed similar multi-track regulatory mechanisms. It is essential that EPA and the Corps are fully aware of these mechanisms and do not disrupt them to the detriment of the regulated public.

- 5. Plan for the fiscal, human, and technical resources that are needed to support any planned increase in state/local responsibility, as well as to maintain current state water programs.** We understand that one of the goals for revising CWA jurisdiction is to transfer greater responsibility for protection of water to state, tribal, or local agencies. It should be understood that state/tribal and local fiscal and human resources for water programs (including dredge and fill permitting programs) have been reduced in many states in recent years. While numerous non-federal agencies are strongly committed to water resources management, both federal support and time will be needed to revise state and tribal programs. Federal fiscal support (in the form of program grants), and technical support (e.g. development of more efficient remote evaluation field methods) will both be critical to support states in making changes to or establishing new programs.

Importantly the time needed to plan and promulgate additional regulatory programs in willing states and tribes should not be underestimated. If significant changes and/or reductions in the extent of CWA jurisdiction occur as a result of a Scalia plurality opinion influenced rule, time will be needed for states and tribes to put in place regulatory programs to replace lost protection. Existing protection of wetland and stream resources by the states and tribes varies tremendously. ASWM has determined that 23 states have established statewide dredge and fill permitting programs for some or all of their freshwater wetlands and streams.²³ However, 27 states currently lack the authority to issue freshwater dredge and fill permits statewide and rely solely on conditioning §404 permits through §401 water quality certification and in some instances CZMA consistency review to ensure compliance with state water quality standards and other applicable laws.²⁴

²³ This includes the state of California which is currently in the process of establishing a new dredge and fill permitting program.

²⁴ In addition, some states may be constrained to varying degrees by state imposed limitations on state authority to regulate waters not regulated under the Clean Water Act.
<https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>



- **State Dredge and Fill Permitting Program** (23 states)
- **Rely on §401 Certification for Fresh Water Wetlands and Streams** (27 states)

Source: ASWM

Based on our evaluation of the resources of 26 states that lack independent regulatory programs for freshwater wetlands on a statewide basis (not including Alaska which contains an additional 100 million acres of wetlands):

- A rollback of federal CWA jurisdiction reliant on the Scalia adjacency test could remove federal dredge and fill permitting from an unknown but substantial portion of the approximately 54,574,445 acres of freshwater wetlands that are located in states that lack state-wide dredge and fill permitting. Under a Scalia test, it is anticipated that only those wetlands determined under a new rule to be “adjacent” would continue to be protected under the CWA. The rollback of protection in states that do not have state programs to issue dredge and fill permits to protect wetlands could translate into the absence of CWA protection for around 50% of all freshwater wetlands in the U.S., not including Alaska.²⁵

²⁵ The inclusion of the 100,000 acres of wetlands in Alaska would increase this total to 154,676,445 acres of wetlands, or 74% of wetlands in the United States.

- A focus on the Scalia plurality opinion in *Rapanos* could eliminate protection for an undetermined, but likely significant portion of intermittent and ephemeral streams – which include approximately 2,374,298 stream miles in states without a dredge and fill program. This figure represents approximately 78% of all non-perennial stream miles in the U.S., not including Alaska.²⁶
- It is anticipated that there will be significant costs to establish new programs in states without freshwater dredge and fill permitting programs, as well as to fill gaps in states with dredge and fill permitting programs. Some states such as Washington, Ohio, and West Virginia currently only issue dredge and fill permits for isolated non-federal wetlands and rely on §401 certification of §404 permits for other waters. In many states, permitting fees are substantially higher than the \$10 - \$100 permit fee currently required by the Corps. State fees are higher in order to partially cover the costs of carrying out a state dredge and fill permitting program.²⁷ A number of states use a sliding scale charging more for projects with a larger impact. An estimate of the increased costs to states for adopting and/or expanding dredge and fill permitting programs should be included in a revised economic analysis.

Ideally, there should be time between when the rule is finalized and when it goes into effect so that the 27 states that lack a freshwater dredge and fill permitting program could take actions if they have the public support and the financial resources to do so. It should be recognized that state legislation would likely be required in many if not all of these states, and also in some of the other 23 states that will also need to analyze their programs to identify any new gaps in jurisdiction when a final rule is published. Many state legislatures meet for short periods of time on an annual or biannual basis.

SUMMARY

Given the extensive concerns of the states in regard to the proposed actions regarding the 2015 Clean Water Rule, ASWM recommends the following:

1. Revoking the 2015 Rule is unlikely to improve program stability or expedite completion of a new final rule. Many of the elements of the 2015 Clean Water Rule are broadly accepted, consistent with early legal decisions including *Riverside Bayview Homes*, and have essentially been unchallenged by court

²⁶ See Compleat Wetlander: Distribution of Wetlands and Streams and State Dredge and Fill Permitting Programs in the United States <https://www.aswm.org/wordpress/the-compleat-wetlander-distribution-of-wetlands-and-streams-and-extent-of-state-dredge-and-fill-permitting-programs-in-the-united-states/>

²⁷ Permitting fees are included in state by state summaries at <https://www.aswm.org/wetland-programs/state-wetland-programs>

decisions. We urge the federal agencies to consider retention of these elements by considering how *revision* of problematic components of the 2015 rule could offer a better path to program stability, clarity, and consistency as opposed to essentially starting over with a new rule.

Finalization of the proposed rescission of the 2015 rule will only exacerbate the litigation over WOTUS. It is very likely that the rescission will be challenged, especially given the shortcomings of the economic analysis. ASWM suggests that many of the problems identified in the 2015 rule – including lack of clarity at the field level – may be corrected through revisions to the rule and by adopting regional programmatic measures as recommended above, which can provide greater specificity than the underlying national Clean Water Act jurisdiction framework. This approach could result in a stable and efficient federal/state regulatory program for the protection of vital water resources.

2. The economic analysis for the proposed revocation of the 2015 rule should be recalculated, taking into account the full economic values provided by wetland resources, and also the full cost of the states to assume greater responsibility for protection of those resources. Speculation regarding reduced public support for protection of water resources is unsubstantiated and, we believe, erroneous. Statements regarding public support should be corrected, based on documented sources such as those provided here.
3. Recognizing that the status quo – that is, reliance on post-*Rapanos* guidance – is likely to continue for some time, we recommend that the federal agencies initiate interim steps to address continued concerns arising from that guidance, which led to rulemaking in the first place. We believe that making greater use of existing programmatic tools (e.g. general permits, regional manuals) to address specific concerns on a regionalized basis – while maintaining a consistently defined baseline of federal protection – could do much to clarify the permitting process. These steps, if taken now, will also be useful in development and implementation of a revised rule, or a new rule.
4. Clean Water Act provisions that result in interwoven state/tribal and federal programs need to be fully understood in proceeding with either revision of the 2015 Clean Water Rule, or rescission and development of a new rule. In doing so, it should be acknowledged that:
 - i. Significant time, and appropriate fiscal resources, must both be provided to states and tribes to adapt to any significant change in a jurisdictional rule, thus allowing for modification of state programs to protect vital water resources on a state by state basis.
 - ii. The Scalia plurality opinion in *Rapanos* cannot, on its own, define the scope of federal water resources protected under the CWA, consistent

with past Supreme Court decisions. Existing components of the federal jurisdictional framework that have been generally accepted and that are not subject to adverse legal opinions – such as the definitions of the territorial seas, traditional navigable waters, interstate waters, permanently standing or flowing waters such as lakes and streams, impoundments of these waters, tributaries of these waters, and immediately adjacent wetlands – should be retained. In addition, the development of any new definitions should rely on both extensive scientific findings prepared for the 2015 Clean Water Rule and appropriate components of other opinions in the *Rapanos* decision, as well as past legal decisions.

5. The states and tribes should be consulted during development of any new definitions and revisions to the definition of Waters of the U.S. in as collaborative a process as possible.

