

**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 AUGUST 28, 2017 FEDERAL REGISTER NOTICE**  
**OF A DEFINITION OF “WATERS OF THE UNITED STATES”**  
**- SCHEDULE OF PUBLIC MEETINGS**

**November 28, 2017**

Clean, safe water free from sources of pollution is essential to meet the fundamental needs of our society. And given that both excess water – in the form of floods and severe storms – and insufficient water – in the form of drought – can devastate our communities, the protection and management of water requires well integrated federal, state, and local programs based on a broad scientific understanding of multiple disciplines and carefully balanced, sound public policy. The definition of the scope of federal “waters” is one critical component of programs to protect and manage the nation’s waters; excessive regulation is clearly inefficient, but on the other hand, failure to provide adequate protection is a clear threat to human health and safety and ecological integrity. The Clean Water Act (CWA) and CWA jurisdiction provide the framework for division of responsibility between federal and state government for maintaining and restoring healthy aquatic resources.

The Association of State Wetland Managers (ASWM) thus views the proposed definition of jurisdictional waters by the federal agencies as a complex issue that provides the framework for multiple federal and related state actions. Our comments reflect the complexity of the issue. We have attempted to summarize the scope of waters that should be protected, and to make recommendations that will maximize the clarity and efficiency of regulatory programs without leaving important waters unprotected.

ASWM has previously provided comment on federalism<sup>1</sup>, and responded to the proposed revocation of the 2015 Clean Water Rule by EPA and the U.S. Army Corps of Engineers (Corps)<sup>2</sup>. We continue to stress the essential functions and benefits of the nation’s waters to public health and well-being. These include protection of drinking water and of surface waters used for agriculture, recreation, other domestic uses, commercial and industrial uses, navigation, and recreation as well as for provision of diverse fish and wildlife habitat. In addition, wetland protection and restoration provide a cost-effective strategy for minimizing flooding and damage from storms, and provide critical surface and groundwater storage that in turn feeds the base flow of streams and groundwater resources during periods of drought. At this time, we will address our concerns more directly to a potential new Step 2 rule defining waters of the U.S.

The Clean Water Act (CWA) is a multifaceted law that strives to balance protection of water resources with the use and enjoyment of those resources by the public. An appropriate level of federal regulation is necessary to assure a minimum standard baseline to ensure the continued supply of safe, clean water, and protection from physical degradation of waters. Numerous programmatic tools and procedures have been developed over past decades by state and federal

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<sup>1</sup> See ASWM [comments](#) to the EPA dated June 16, 2017

<sup>2</sup> See ASWM [cover letter](#) and [comments](#) to EPA and the Corps dated September 11, 2017

agencies to align state/tribal and federal programs, avoid duplication of effort among the agencies, and expedite permitting of actions having a minor impact, while maintaining a base level of protection of water resources on a national basis.

Development of a Waters of the United States (WOTUS) definition to meet the needs of the CWA should thus take into account a number of factors. From the perspective of the §404 dredge and fill permit program, ASWM recommends that any proposed jurisdictional rules should be consistent with the following overarching criteria. A proposed jurisdictional rule should:

- Protect navigable, tidal, interstate, and other waters that support navigation and interstate commerce, and support CWA goals of maintaining the physical, chemical, and biological integrity of those waters;
- Protect downstream/neighboring states/tribes from the degradation or loss of waters due to actions in upstream states;
- Take full advantage of both state and federal programs and abilities while avoiding duplication of effort, and supporting efficient permitting systems on the ground;
- Minimize legal challenges and expedite return to a stable regulatory system by assuring consistency with decisions of the U.S. Supreme Court, including *Riverside Bayview*, *SWANNC*, and *Rapanos*. For *Rapanos*, consider multiple positions (Kennedy and Scalia) in the Court's fragmented opinion;
- Reflect current science, including the compilation of pertinent information for past rulemaking on jurisdiction; and,
- Maximize clarity, efficiency, and practicality as implemented from the perspective of a public that is expressing heightened concern over water pollution<sup>3</sup>.

ASWM believes that the following recommendations meet these criteria.

- 1. Cooperative Federalism. A definition of waters of the U.S. should be developed in a manner that preserves the elements of cooperative federalism established by the CWA. Existing coordination among numerous interwoven federal and state/tribal programs provides a coherent system of water resource management and protection of public resources that (1) maintains a foundation of federal resources protection while (2) allowing flexibility for states to address their unique needs.**

**Discussion and rationale.** The CWA has fostered a high degree of cooperative federalism that has benefited both the state and federal agencies, and other stakeholders in the permit program. States are provided a significant amount of flexibility in the development of processes to mesh with CWA authorities – as is appropriate and necessary given differences in the extent of water resources and of primary land uses that impact water resources among the states. At the same time, the CWA

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<sup>3</sup> <https://blogs.chapman.edu/wilkinson/2017/10/11/americas-top-fears-2017/>

successfully provides a strong national foundation to protect critical water resources on an interstate and national basis. Thus, states and tribes having more limited water resources and/or state and tribal programs with limited authorities to protect state waters are fully protected from those actions with major impacts, or which occur in critically important waters - either within or outside their borders - that may reduce the public's access to clean and safe water resources.

CWA provisions that support interwoven state/tribal and federal programs must be fully understood during development of rules governing the extent of federal jurisdiction over water resources. The §404 dredge and fill permit program makes provisions for states (and tribes) to play a significant role in the regulation of activities resulting in physical alteration of streams, wetlands and other water resources, avoiding and minimizing water pollution and aquatic degradation from many construction activities related to transportation, energy infrastructure, housing and commercial development, and other activities that affect water resources. Given the authority of the states and tribes to control land use, 24 states have developed their own active dredge and fill permitting programs, which may or may not address waters currently regulated under the CWA. The extent of coverage varies from state to state.

Congress provided for states to assume primary responsibility over dredge and fill activities in all waters of the U.S. (other than those waters regulated by the Corps under Section 10 of the Rivers and Harbors Act of 1899), through state assumption of the §404 Program<sup>4</sup>. A state that has assumed §404 authority operates under state laws, but integrates the parallel federal review, with oversight from EPA. Under this process, any person who requires both state and federal authorization must submit only a single state application. Moreover, state programs are generally faster and more efficient than federal programs given availability of local staff and processes of state programs.

While only a limited number of states have assumed §404 authority to date for several reasons<sup>5</sup>, numerous other states have developed cooperative programs with the Corps and other federal agencies to increase permitting efficiency, reduce

**An Example:  
Virginia's Collaborative Wetland Program**

The Virginia Department of Environmental Quality (DEQ) has developed numerous mechanisms to align state and federal dredge and fill regulatory programs.

- A State Programmatic General Permit has been in place for over 16 years, reducing duplicative state and federal regulatory requirements.
- The Virginia DEQ and the Corps co-chair the mitigation banking Interagency Review Team, ensuring early resolution of both state and federal issues and reducing processing timeframes for mitigation projects.
- Virginia DEQ and Corps senior technical staff and regulatory managers meet semi-annually to discuss joint program initiatives. These include development of a Joint Permit Application, allowing the regulated community to submit a single request for authorization that satisfies both regulatory programs.

<sup>4</sup> See §404(g-h); 40 CFR §233

<sup>5</sup> See report of NACEPT Assumable Waters Subcommittee at [https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalrepprt\\_05-2017\\_tag508\\_05312017\\_508.pdf](https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalrepprt_05-2017_tag508_05312017_508.pdf)

duplication of effort or interagency conflict, ensure compliance with state water quality regulations and other related regulations and to expedite approval of dredge and fill permits where appropriate. Even in states that do not have their own individual authority, interagency cooperation is facilitated by state §401 water quality certification and Coastal Zone Management Act consistency review of both individual and general Corps permits. State certification of general permits facilitates expedited review processes to incorporate not only federal requirements, but any special conditions needed to simultaneously achieve state approval.

Other states use a special category of general permit termed State Programmatic General Permits under which the state takes primary responsibility for defined categories of minor activities, again reducing duplication and making the best use of the resources of each agency. At present, at least 23 States operate their own, robust state wetland program, cooperating in some manner with the federal agencies.

These and other mechanisms used to smoothly integrate state and federal water protection and management programs rely on a clear definition setting forth the scope of federal jurisdiction over water resources to facilitate both state/federal and public understanding of the roles and responsibilities of each agency.

2. **Federally Protected Waters. The definition of waters of the U.S. must protect the full range of waters that are necessary for public health and safety; that provide for navigation, support interstate commerce – including agriculture, recreation, and development of infrastructure; and that provide habitat for fish and wildlife and the maintenance of natural ecosystems, along with other public uses.**

**This basic legal framework supports continued cooperative federalism between state and federal agencies to meet the purposes of the Act. The waters of all states should be afforded the same fundamental level of federal protection, regardless of differing state or local regulations.**

Although the definition of waters of the U.S. should extend equally in all states, flexibility should be used in tailoring programmatic procedures and in coordinating with state programs as implemented on the ground to address the unique geology, hydrology, and climate of each state/region. Regional measures can be identified in regional guidance documents, field manuals, and similar ways developed after a final rule is published, that clarify by region the foundation supplied by a rule defining waters of the U.S. Such an approach could provide needed clarity to the states/tribes as well as the public and regulated community. Cooperative federalism comes into play in aligning state and federal concerns and programs, and in making full use of the human resources of programs at all levels of government.

- a. **A definition of waters of the U.S. should include all waters that have long been clearly defined and accepted as waters of the United States in federal law and regulations, and that have also been unambiguously supported by past decisions of the U.S. Supreme Court. Such waters include the territorial seas, traditional navigable waters, interstate waters, relatively permanent standing and flowing waters including streams and lakes, and adjacent wetlands, as well as impoundments of these waters.**

### **Improving Predictability through Cooperative Federalism**

ASWM appreciates recognition of parallel state and federal regulatory programs in the Step 2 proposal. However, it is also critical that EPA and the Corps acknowledge the extent to which state and federal programs have been interwoven over the years to address both environmental and permit applicant concerns, and the unintended consequences of disrupting those relationships. Limited understanding of the extensive integration of state and federal water programs can result in proposals for the jurisdictional definition that are potentially counterproductive, confusing, and likely to delay rather than expedite regulatory decisions. Under an uncoordinated system, applicants would wait for a federal jurisdictional determination, then possibly wait again while a state decides the extent of its jurisdiction.

For example, a June 19, 2017 comment letter to the EPA from a number of State Attorneys General proposes that – for all waters other than permanent standing and flowing waters strictly defined by the Scalia opinion – the federal agencies should assert jurisdiction only for waters not protected by state programs. This proposal is apparently based on the statement by the AG's that, *"the States have robust programs to protect their own waters, regardless of whether those waters are regulated under the CWA"*, further noting that 46 states have primacy in the NPDES program. However, the letter does not address the current status of state dredge and fill programs for streams, rivers, lakes and wetlands. Far fewer states currently have independent authority to issue freshwater dredge and fill permits, and only 2 states have assumed administration of the CWA Section 404 program.

- At least 26 states do not currently have statutory authority to issue dredge and fill permits statewide. Others have authority to regulate impacts to wetlands, but not to streams and other waters. States without established regulations would face the choice of accepting federal jurisdiction over many waters, or enacting potentially costly new state programs to ensure compliance with state water quality standards.
- The cost of establishing a new or expanded dredge and fill program would be significant for states, given that existing state dredge and fill permitting is typically financed through a combination of general funds and permit fees. There is no dedicated federal funding for partially supporting such state programs.
- A significant rollback in CWA jurisdiction would complicate coordination with other federal programs, e.g. flood control, fisheries, and endangered species. This would result in a shift of these responsibilities onto the permit applicant – e.g. the permit applicant would be responsible for consulting with the U.S. Fish and Wildlife Service regarding listed species, given that there would no longer be a federal §404 permit process.
- This proposal would essentially negate the process established by the CWA for state assumption of regulatory authority over most waters, the existing approach to promote cooperative federalism.
- The loss of federal protection could put at risk the waters of downstream states by actions of upstream states that lack sufficient regulatory programs.

In short, the agencies, the public, and water resources benefit from existing well-integrated and readily understood state and federal dredge and fill programs. As discussed in these comments, there are several programmatic options to maintain or expand this type of cooperation. A broad transfer of sole authority to the states is likely to lead to a very confusing patchwork of state and federal decision making processes that will differ from state to state. Uncertainty regarding the limits of federal jurisdiction would, based on past experience, unacceptably delay permit processing. Public understanding of and support for dredge and fill regulations will be improved by providing clear and consistent definitions of federal waters that provide uniform protection nationwide.

- b. Waters other than those listed above should be defined as waters of the U.S. if any of the tests in U.S. Supreme Court opinions in *Riverside Bayview Homes*, *SWANCC*, and *Rapanos* are met.** In *Rapanos*, the opinions of both Justice Scalia and Justice Kennedy should be considered, consistent with earlier decisions and the scientific underpinning of the rule.
- c. Tributaries to streams should be protected to the extent necessary to maintain the physical, chemical, and biological integrity of downstream waters.** All streams arise from the merging of small source waters (headwaters), fed by surface waters, ground water, and precipitation. Reduction or elimination of flow or contamination of source waters will contribute to the reduction or contamination of receiving waters. This critical relationship between upstream and downstream waters should be recognized in extending federal protection to those sources that cumulatively support the quality and quantity of navigable waters. ASWM notes that over time, research has shown that smaller waters and wetlands are disproportionately important for providing and maintaining clean, safe water, a factor not originally understood during early years of the Clean Water Act.
- d. Upstream limits of stream systems are best defined on the ground by their physical structure, such as the evidence of a bed and one or more banks, and evidence of the regular (but not necessarily constant) flow of water.** Details of physical structure and evidence of flow are best defined on a regional basis, taking into account the primary sources of water and resulting stream structure in a given geographic region.
- e. Regulations that address man-made or human-altered waters should be clarified, if necessary on a state or regional basis to make use of local terminology and practices.** Where possible, clearly define exclusions from the jurisdictional definition, e.g. upland ditches created in upland and draining only upland – as opposed to channelized natural streams - should be used. Where established regional definitions and use vary significantly, as in defining “drains,” regional field methods can be used to define the extent of jurisdiction. Regional methods may also be more consistent with state practices, stakeholder needs, and environmental sensitivities.
- f. The regulation of intermittent and ephemeral streams should be clarified, using regionalized field approaches as needed.** This may be most practical through a regionalized field approach to align state level practices with underlying federal regulations.
- g. Regulations should acknowledge that adjacent wetlands play an important role in maintaining the physical, chemical, and biological integrity of other waters, and may also provide public protection from hydrologic fluctuations due to drought, flooding, and extreme storm events.** Given the complexity of defining wetlands that provide these functions within a landscape setting, the development of regional metrics may be the most practical approach to the identification and protections of these waters. On a regional basis, the use of surrogate criteria such as distance from other waters, size of the wetland, location within a floodplain, or similar appropriate and practical field measures should be accepted where practical, efficient, and acceptable to stakeholders in a given state or region.

In evaluating the impacts of extreme storm events, there is a robust body of scientific literature demonstrating that protection of upstream waters and wetlands can greatly

reduce pollution as well as the need for expensive engineered infrastructure downstream, in addition to directly buffering the impacts of storms, flood, and drought.

**h. Special categories that by definition provide the significant functions supported by the CWA and that were identified in the 2015 Clean Water Rule, including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands, should be protected by rule.**

**3. Supporting State Assumption of §404. ASWM encourages EPA to amend State §404 Program Regulations at 40 CFR Part 233 to clarify the scope of state assumable waters under §404, and to implement the majority recommendations of the National Advisory Council for Environmental Policy and Technology - Assumable Waters Subcommittee<sup>4</sup>. This action will support the expansion of cooperative federalism under §404 of the CWA.**

**4. The Scientific Basis for Defining Waters of the U.S. ASWM encourages the federal agencies to use the EPA Science Advisory Board report – *Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence*<sup>6</sup> – to provide a scientific foundation for the new rule.**

**5. Legal Consistency. A definition of waters of the U.S. should be based on all pertinent decisions of the U.S. Supreme Court, including *Riverside Bayview Homes*, *SWANNC*, and *Rapanos*, and otherwise be written in a clear manner that will minimize legal challenges and expedite return to a clear, stable regulatory system. Regarding the *Rapanos* case, recognizing that there was no majority decision, the rule should reflect both the plurality opinion of Justice Scalia and the concurring opinion of Justice Kennedy.**

**6. Economic Analysis. A proposed rule should be support by a valid economic analysis that fully acknowledges the economic contributions and importance of wetlands, small streams and tributaries. As discussed in our June 17, 2017 comments<sup>1</sup>, the economic analysis utilized to justify proposed revocation of**

### Considerations for Perennial, Intermittent and Ephemeral Streams

The Scalia opinion in the *Rapanos* case emphasizes protection of “permanently standing or flowing” waters, but does not exclude protection of seasonal streams.

- In fact, ephemeral and intermittent streams make up approximately 59% of all streams in the US (excluding Alaska), and over 81% of streams in the arid and semi-arid Southwest.
- Moreover, 78% of all non-perennial stream miles in the U.S. (again excluding Alaska) are in states that do not have dredge and fill permitting programs. Loss of CWA protection of non-perennial streams would thus place the greatest risk on the arid southwest, where state water regulations are more limited.

Intermittent and ephemeral streams provide the same ecological and hydrological functions as perennial streams by moving water, nutrients and sediment, providing an array of ecological functions, and serving as the headwaters of perennial streams. The framework of CWA jurisdiction should recognize the great value of these waters, and the overwhelming dependence of the arid states on non-perennial streams.

<sup>6</sup> U.S. Environmental Protection Agency, Washington D.C., 2013

the 2015 Clean Water Rule was inaccurate and misleading. More recently, an article published in the October 6, 2017 edition of *Science* regarding the economic analysis of clean water regulations compares the economic analyses of the 2015 clean water rule, and the proposed 2017 rescission of the same rule, stating that:

*“The cost estimates remain unchanged, but the quantified benefits in 2017 decrease by almost 90%. The difference stems from a decision in the 2017 RIA [regulatory impact analysis] to exclude wetlands-related benefits – which the same agencies concluded 2 years earlier ranged from \$300 million to \$500 million per year... ..we find no defensible or consistent basis provided by the agencies for the decision to exclude what amounts to the largest category of benefits from the 2017 RIA.”*<sup>7</sup>

- 7. Addressing the Concerns of Stakeholders. The federal agencies should address the concerns of stakeholders through clarification of regulatory language, by providing additional information regarding current exemptions and exclusions, and by the further development of programmatic processes to minimize permitting complexity (e.g. State/Tribal assumption of the §404 Program, use of State and Regional General Permits, and State Programmatic General Permits). Eliminating protection of the critical waters of the nation by rule is not justified where programmatic actions can address stakeholder concerns and desire for an efficient and reasonable regulatory process.**

**Discussion and rationale.** Section 404 of the CWA addresses the physical alteration of the nation’s waters through “dredge and fill” activities. Regulated physical impacts typically arise from a very wide array of land or water use activities impacting water resources that are also controlled by state and local programs, and that are carried out in many instances by private property owners in addition to business, industry, and government entities.

Alteration of public waters may occur – to list only a few examples – through the placement of fill material in wetlands or nearshore areas of lakes and streams; construction of structures including homes, or commercial and industrial buildings in wetlands or next to lakes and streams; construction of infrastructure including roads, bridges, dams, pipelines, power transmission lines, landfills, and airports in part in public waters, streams, lakes, and wetlands; stream channelization or enclosure; excavation of harbors and navigational channels, and construction of piers and seawalls and related structures in public waters; construction of sand and gravel or hard rock mines in waters and wetlands; and ecological restoration of previously altered waters. Other uses that are made of wetlands and other waters including recreation, ongoing farming and grazing of livestock, forestry, and management for fish and wildlife habitat may or may not have a negative impact on these waters. The perception that the §404 program is solely a wetland program is inaccurate. There are more permits issued in streams, rivers, lakes, etc. than wetlands throughout most of the country.

One challenge of implementing the CWA has been to protect waters of the U.S. from the wide array of activities that will have an unacceptable impact on public waters and their multiple uses, while avoiding negative impacts on the public – including permit applicants - for whom we

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<sup>7</sup> Kevin J. Boyle, Matthey J. Kotchen, and V. Kerry Smith. “Deciphering dueling analyses of clean water regulations.” *Science*, 6 October 2017, Vol 358 Issue 6359. Pg. 49 - 50

protect water resources. This has been accomplished in several ways.

- Congress provided broad **exemptions** from the need to obtain a §404 permit for several critical sectors, including normal farming and forestry practices, in addition to hunting, fishing, and recreational uses. These exemptions are clarified in federal regulations<sup>8</sup> which define the exemptions, and in some cases (such as construction of farm and forest roads) require compliance with best management practices to qualify for the exemption.
- EPA has also **excluded** certain waters and related management activities from the definition of waters of the U.S. For example, prior converted croplands and waste treatment ponds or lagoons have been excluded from the definition of regulated waters for many years under 1988 jurisdictional definitions.
- A very wide range of relatively minor activities may be authorized under an expedited **General Permit process** authorized by the CWA. About 90% of the Corps regulatory workload is processed in the form of general permits.<sup>9</sup> This results in limited, if any, review by other federal agencies; limited, if any, public notice and comment is required. The time required to obtain authorization under a general permit is also far less than that required for an individual permit.
- Where **a state or tribe assumes administration of the §404 permit program**, no additional federal permit is required in addition to the state/tribal permit issued under such a program.

Importantly, all of these measures maintain federal protection over waters that – while not significantly altered by many specified routine activities carried out in an appropriate manner – are still susceptible to degradation from extensive construction impacts, poorly planned or executed development, or failure to recognize cumulative and secondary impacts. For this reason, it is essential to define the scope of waters of the U.S. in a manner that protects the full range of important national waters from loss or degradation.

8. **Regionalization. Jurisdictional rules should reflect the fact that, although the waters of the nation provide similar functions and benefits which should be protected in every state, there are vast differences in regional hydrologic patterns, interconnectivity, primary land uses, and geologic structures. Therefore, the rule should allow sufficient flexibility to provide for establishment of practical regionalized methods of determining the extent and importance of more remote waters such as ephemeral streams and more distant but hydrologically connected wetlands.** Regional, on the ground measures, in addition to supporting the jurisdictional rule, can be defined in cooperation with states and tribes with dredge and fill permitting authority through State Programmatic General Permits or §404 Program Assumption, and in all states through the Regional and State General Permits. Regional technical manuals similar to the existing regional delineation wetland manuals would also be a valid approach to define these important aquatic resources.

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<sup>8</sup> 40 CFR Part 232

<sup>9</sup> Congressional Research Service January 30, 2012 report: “The Army Corps of Engineers’ Nationwide Permits Program: Issues and Regulatory Developments”

Regionalized permitting processes may also be used to support the identification and protection of regionally exceptional ecosystems, threatened and endangered species, and resources such as drinking water source protection areas, chronically flood prone areas, historic sites, and similar resources, and provide for coordination with related state and federal laws. These areas can be adversely impacted by the degradation and distribution of wetlands, streams, and other aquatic resources. Such collaboration may well expedite completion of regulatory review in these instances.

In addition, regionalized permitting procedures could facilitate authorization of activities that are regional in nature, e.g., provision of irrigation systems in the arid west, or establishment of systems to protect against sea-level rise in the east, while maintaining overall protection of the impacted waters from other actions.

In short, the concerns expressed by many stakeholders can be addressed through programmatic steps and regional approaches, rather than by significantly reducing the longstanding overall protection of the nation's critical water resources under the CWA. Importantly, development of regional procedures would be expected to take place over time as the need arises, and would not delay the completion of a jurisdictional rule.

In closing, ASWM greatly appreciates the opportunity to comment at this stage of the federal agencies proposal for redefining jurisdiction over Waters of the United States. While these comments have been prepared with input from the ASWM Board of Directors and a technical workgroup, they do not necessarily represent the views of all individual states and tribes. We also encourage you to seriously consider the comments of individual states and tribes and other state associations. ASWM is prepared to continue to collaborate with the federal agencies, and to assist in informing the states of proposed actions throughout revision or redrafting of a CWA jurisdictional rule.