



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

November 30, 2020

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Billie McGrane

EPA Agency Review Team
Biden-Harris Presidential Transition Team
bmcgrane@jbrpt.org

RE: Priorities for the new Biden-Harris Administration

Dear Ms. McGrane,

Thank you very much for the opportunity to provide feedback on priorities for the Biden-Harris Administration for Day One and the first 100 days.

The Association of State Wetland Managers (ASWM) is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Since 1983, our organization and our member states and tribes have had long standing positive and effective working relationships with federal agencies in the implementation of regulatory programs designed to protect our nation’s aquatic resources. ASWM works with states and tribes implementing state and federal dredge and fill permit programs, including § 404 of the Clean Water Act (CWA), state water quality standards for wetlands, and § 401 of the CWA for certification of federal permits and licenses. Our list of priorities and comments are focused on Clean Water Act Jurisdiction as requested during the meeting recently held on Thursday, November 19th.

DAY ONE

• **Revoke EO 13778**

ASWM believes that the first priority on Day 1 should be a revocation of Executive Order 13778, “*Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule.*” The repeal of the 2015 Clean Water Rule and the newly revised definition of Waters of the U.S. (WOTUS) has left more than 50% of the nation’s wetlands and ephemeral streams unprotected by federal jurisdiction. The Navigable Waters Protection Rule (NWPR), with its new definition of WOTUS, created a domino effect, whereas other sections of the Clean Water Act (e.g., Section 401) and other critical aquatic resource protection regulations (e.g., the Nationwide Permits Rule, the Mitigation Rule, etc.) that are based on the foundation of federal jurisdiction as defined by the WOTUS rule, are now either similarly weakened as final rules or in the process of being weakened by new rulemakings. WOTUS is the jurisdictional cornerstone that triggers multiple aquatic resource and water quality protections.

As ASWM stated in a [comment letter](#) for Docket ID No. EPA-HQ-OW-2018-0149, dated April 15, 2019, the federal agencies erred by constructing a verbal wall between law and science, and specifically between the Clean Water Act (CWA) and science. There is perhaps no other federal law that relies more heavily on the foundations of science. The CWA as written by Congress references the need

for a scientific approach throughout the stated goals of the Act, such as the mandates placed on state and federal agencies to support and carry out scientific research, monitoring, and reporting, and the definition of a comprehensive set of water programs that reflect the findings of those scientific activities. The current Administration's efforts to significantly reduce protection of the nation's waters based on the claim that the rule of law must trump and/or be analyzed separately from science – conflicts with the intent and the purpose of the CWA and holdings of the U.S. Supreme Court. *ASWM recommends that the Transition Team review the 2015 EPA "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" and use it as the basis for a revocation of EO 13778, the Navigable Waters Protection rule, and a revised definition of WOTUS.*

- **Enforce Federal Jurisdiction**

Once the NWPR is rescinded, instruct the U.S. Army Corps of Engineers and the EPA to enforce federal jurisdiction based on either Justice Kennedy's significant nexus test (as outlined in the U.S. Supreme Court's 2006 Rapanos decision) or the 2015 Clean Water Rule while a new WOTUS definition is being promulgated.

FIRST 100 DAYS

- **Revoke the "Clean Water Act Section 401 Certification Rule"** as many of the revisions to CWA § 401 are based on the NWPR definition of WOTUS. This final rule also seriously undermines the cooperative federalism relationship between states and the federal government, attempts to undermine state laws that go above and beyond federal protections and is inconsistent with CWA 101(b) policy to protect the primary responsibilities and rights of the States.

- **Stop all actions associated with the proposed rulemaking for "Proposal to Reissue and Modify Nationwide Permits."** Aside from the potential for this rule to reduce compensatory mitigation requirements for critical headwater stream systems across the nation (in some states over 50%), the proposed rule as written is based on the NWPR definition of WOTUS and the new § 401 rule and should therefore be halted.

- **Engage with state and tribes**

The important and unique role of states in the management of water resources is clearly recognized in CWA §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.*" Therefore, any action taken by the federal government to either expand or contract the scope of federal protection will have direct and significant impacts on the states. Effective administration of the CWA requires the complex balancing of state and federal interests and responsibilities, and any changes in the definition of federal jurisdiction will alter this balance. We believe that the coordinated efforts of state and federal agencies will further the goals of the CWA and in turn, more effectively and efficiently protect our nation's critical aquatic resources.

ASWM appreciates the opportunity to comment on the Biden-Harris transition priorities. While these comments have been prepared by ASWM 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.

Sincerely,



Marla J. Stelk
Executive Director
Association of State Wetland Managers