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THE STATES' DEFINITIONS OF 'WATERS OF THE STATE' February 2009

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INTRODUCTION

The court cases that have affected the Clean Water Act's (CWA's) jurisdictions since 2001's *SWANCC vs. United States* have left the states, to which much of the CWA is delegated, in uncertainty. ECOS addressed this issue in Spring 2008 with two resolutions on the matter, one¹ recommending that Congress adopt the definition of "waters of the United States" found in 40 CFR 122.2 (the U.S. EPA regulation on the matter), and a second² urging Congress to remove barriers that make it difficult for states to assume implementation (i.e., delegation) of the Section 404 (sometimes called "dredge and fill") portion of the Act. These solutions continue to be ECOS' policy, and our organization is working with Congress and many other stakeholders to implement it.

STATEMENT OF ISSUE

States' definitions are nearly always broader than those of the CWA. State definitions often include phrases like "all surface waters,"³ or they may exclude certain waters (i.e., "waters within the territorial limits of the states but not in private lakes or ponds").⁴ Most states include "groundwater" as well.

¹ http://www.ecos.org/files/3115_file_Copy_Resolution_08_2.pdf

² http://www.ecos.org/files/3117_file_Copy_of_Resolution_08_3.pdf

³ 26 states include "any (or) all surface waters" within definition of "waters of the state" (AK, AR, CA, CO, CT, FL, HI, IL, KS, LA, ME, MD, MO, MT, NY, ND, OH, OR, RI, SD, UT, VA, WA, WV, WI, WY)

⁴ 28 state definitions include "groundwater" or "underground water" (AK, AL, AR, CA, CT, FL, IL, KY, LA, MD, MA, MI, MN, MS, MT, NY, ND, OH, OR, RI, SC, SD, UT, VT, VA, WA, WI, WY)

Groundwater, for example, is not included in the aforementioned CFR definition of waters of the U.S. “Underground water” is mentioned in the Act,⁵ but the Act does not regulate groundwater in the same manner it does water in surface streams and lakes.

In short, states’ definitions of their waters are likely to be much broader than the federal definition of “waters of the U.S.” This means that states may exert jurisdiction over waters within their boundaries that are not covered by the Clean Water Act. In *SWANCC*, the court ruled that “isolated wetlands” were not covered by the Act, but 20 states have rules that do regulate such places.⁶ Every state also has a groundwater protection program.⁷

SUMMARY

One issue that troubles some stakeholders is the difference between “federal waters” and “state waters.” This report provides the state definitions of its waters, usually as found in statute. The discerning reader will note that the states’ definitions tend to be much broader than the federal ones. This should not be a surprise, as the use of water long has been considered a primary responsibility and right of the states.

DEFINITIONS

<p>Alaska</p>	<p>(AS 46.03.900) "Waters" include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passages, canals, the Pacific Ocean, Gulf of Alaska, Bering Sea, and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under the jurisdiction of the state. http://touchngo.com/lglcntr/akstats/Statutes/Title46/Chapter03/Section900.htm</p> <p>Submerged Lands Act (1953): All lands permanently or periodically covered by tidal waters up to, but not above, the line of mean high tide and seaward to a line three geographical miles from the coast mean low tide line is owned by the state. http://www.dnr.state.ak.us/mlw/factsht/tide_sub.pdf</p>
<p>Alabama</p>	<p>(Section 22-22-1) Waters (refers to) all waters of any river, stream, watercourse, pond, lake, coastal, ground or surface water, wholly or partially within the state, natural or artificial. This does not include waters which are entirely confined and retained completely upon the property of a single individual, partnership, or corporation unless such waters are used in interstate commerce.</p>

⁵ <http://epw.senate.gov/water.pdf>; Sections 102, 319, 520

⁶ Association of State Wetland Managers

⁷ http://www.gwpc.org/e-library/documents/state_information/state_information_list.xls

	http://alisondb.legislature.state.al.us/acas/ACASLogin.asp
Arizona	<p>(Section 45-141) Public Nature of Waters of the State: The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste, or surplus water, and of lakes, ponds, and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.</p> <p>Any person, the State of Arizona, or a political subdivision thereof may appropriate unappropriated water for domestic, municipal, irrigation, stock watering, water power, recreation, wildlife, including fish, nonrecoverable water storage pursuant to section 45-833.01 or mining uses, for his personal use or for delivery to consumers.</p> <p>A water source that is located on land owned by the United States and that has been or may be appropriated under state law may be beneficially used on any land whether or not owned by the United States.</p> <p>http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=45</p>
Arkansas	<p>(Section 8-4-102) "Waters of the state" means all streams, lakes, marshes, ponds, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state.</p> <p>http://www.arkleg.state.ar.us/NXT/gateway.dll?f=templates&fn=default.htm&vid=blr:code</p>
California	<p>(Section 13050-13051) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.</p> <p>http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=797811557+5+0+0&WAIAction=retrieve</p>
Colorado	<p>(Section 25-8-103) "State waters" means any and all surface and subsurface waters which are contained in or flow in or through this state, but does not include waters in sewage systems, waters in treatment works of disposal systems, waters in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed.</p> <p>http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=</p>
Connecticut	<p>(Section 22a-367) "Waters" means all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways, wells, springs, lakes, ponds, marshes, drainage systems, and all other surface or underground streams, bodies, or accumulations of water, natural or artificial, public or private, which are contained within, flow through, or border</p>

	upon this state or any portion thereof. http://search.cga.state.ct.us/dtsearch_pub_statutes.html
Delaware	(Section 3-403) "Waters of the state" means all the tidal waters under the jurisdiction of the state where the lunar tide regularly ebbs and flows and all nontidal waters under the jurisdiction of this state except for nontidal waters contained in aquacultural facilities registered with the Department of Agriculture. http://delcode.delaware.gov/title3/c004/index.shtml
Florida	(Section 62-520.200) "Waters" include, but are not limited to, rivers, lakes, streams, springs, impoundments, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters. Waters owned entirely by one person other than the state are included in regard to possible discharge on other property or water. Underground waters include, but are not limited to, all underground waters passing through pores of rock or soils or flowing through in channels, whether manmade or natural. http://www.dep.state.fl.us/legal/Rules/shared/62-520/62-520.pdf
Georgia	(Section 27-1-2.73) "Waters of this state" means any waters within the territorial limits of this state and the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to or from the shore of this state except ponds or lakes not open to the public, whether or not such ponds or lakes are within the lands of one title. http://law.justia.com/georgia/codes/27/27-1-2.html
Hawaii	(Section 174C-3) "Water" or "waters of the state" means any and all water on or beneath the surface of the ground, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground. http://www.state.hi.us/dlnr/cwrm/regulations/Code174C.pdf
Idaho	"Waters" means all accumulations of water, surface and underground, natural and artificial, public and private or parts thereof, which are wholly or partially within, flow through, or border upon this state except for private waters as defined in section 42-212 , Idaho Code. Here is a link to the statute: http://www.legislature.idaho.gov/idstat/Title39/T39CH1SECT39-103.htm
Illinois	(Section 35C-1-301.200) "Waters" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon the State of Illinois, except that sewers and treatment works are not included except as specially mentioned; provided, that nothing herein contained shall authorize the use of natural or

	<p>otherwise protected waters as sewers or treatment works except that in-stream aeration under agency permit is allowable.</p> <p>http://www.ipcb.state.il.us/documents/dsweb/Get/Document-33352/</p>
Indiana	<p>(IC 14-8-2-307) "Water of the state," means a lake, reservoir, marsh, waterway, or other water: under public ownership, jurisdiction, or lease; or that has been used by the public with the acquiescence of any or all riparian owners.</p> <p>http://www.in.gov/legislative/ic/code/title14/ar8/ch2.html</p>
Iowa	<p>(Section 482.2) "Waters of the state" means all of the waters under the jurisdiction of the state.</p> <p>http://search.legis.state.ia.us/NXT/gateway.dll/2007codesupp/1/27810?f=templates&fn=default.htm</p>
Kansas	<p>(Section 28-16-58) "Waters of the state" means all surface and subsurface waters occurring within the border of the state, or forming part of the border between Kansas and one of the adjoining states.</p> <p>http://www.kdheks.gov/pdf/regs/28-16-58.pdf</p>
Kentucky	<p>(Section 151.100) The word "stream" or "watercourse" shall mean any river, creek, or channel, having well defined banks, in which water flows for substantial periods of the year to drain a given area, or any lake or other body of water in the Commonwealth;</p> <p>The word "diffused surface water" shall mean that water which comes from falling rain or melting snow or ice, and which is diffused over the surface of the ground, or which temporarily flows vagrantly upon or over the surface of the ground as the natural elevations and depressions of the surface of the earth may guide it, until such water reaches a stream or watercourse;</p> <p>The word "groundwater" or "subterranean water" shall mean all water which fills the natural openings under the earth's surface including all underground watercourses, artesian basins, reservoirs, lakes, and other bodies of water below the earth's surface.</p> <p>http://www.lrc.ky.gov/KRS/151-00/CHAPTER.HTM</p>
Louisiana	<p>(Section 33-9-1) "Waters of the state" refers to both the surface and underground waters within the State of Louisiana including all rivers, streams, lakes, estuaries, groundwaters, and all other water courses and waters within the confines of the state, and all bordering waters and the Gulf of Mexico.</p> <p>http://www.deq.louisiana.gov/portal/Portals/0/planning/regs/title33/33v09-200809.pdf</p>
Maine	<p>(Section 3-38 §361-A) "Waters of the state" means any and all surface and subsurface waters that are contained within, flow through or under, or border upon this state or any portion of the state, including the marginal and high seas, except such waters as are confined and retained completely upon the property of one person and do not drain into or connect with any other waters of the State,</p>

	<p>but not excluding waters susceptible to use in interstate or foreign commerce, or whose use, degradation, or destruction would affect interstate or foreign commerce.</p> <p>http://janus.state.me.us/legis/statutes/38/title38sec361-A.html</p>
Maryland	<p>(§5-101) "Waters of the state" includes: both surface and underground waters within the boundaries of the state subject to its jurisdiction; that portion of the Atlantic Ocean within the boundaries of the State; the Chesapeake Bay and its tributaries; all ponds, lakes, rivers, streams, public ditches, tax ditches, and public drainage systems within the state, other than those designed and used to collect, convey, or dispose of sanitary sewage; and the floodplain of free-flowing waters determined by the department on the basis of the 100-year flood frequency.</p> <p>http://www.michie.com/maryland/lpext.dll?f=templates&fn=main-h.htm&2.0</p>
Massachusetts	<p>(Chapter 21-26A) "Waters" and "waters of the commonwealth," all waters within the jurisdiction of the commonwealth, including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, coastal waters, and groundwaters.</p> <p>http://www.mass.gov/legis/laws/mgl/gl-21-toc.htm</p>
Michigan	<p>(R 323.2203) "Waters of the state" means any of the following: groundwater; lakes, including the Great Lakes bordering the state; rivers; streams; all other water courses and bodies of water within the jurisdiction of the state, including wetlands as defined by part 303 of the act, wetlands protection, being SS324.30301 to 324.30323 of the Michigan Compiled Laws. (part 22: groundwater quality)</p> <p>http://www.state.mi.us/orr/emi/admincode.asp?AdminCode=Department&Dpt=EQ&Level_1=Water+Bureau</p>
Minnesota	<p>(Section 104G.005) "Waters of the state" means surface or underground waters, except surface waters that are not confined but are spread and diffused over the land. Waters of the state includes boundary and inland waters.</p> <p>https://www.revisor.leg.state.mn.us/statutes/?id=103G.005</p>
Mississippi	<p>(Section 21-27-203) "Waters of the state" means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, situated wholly or partly within or bordering upon the state, and such coastal waters as are within the jurisdiction of the state, except lakes, ponds, or other surface waters which are wholly landlocked and privately owned.</p> <p>http://michie.com/mississippi/lpext.dll?f=templates&fn=main-h.htm&cp=</p>
Missouri	<p>(Section 644.016) "Waters of the state" refers to all rivers, streams, lakes, and other bodies of surface and subsurface water lying within</p>

	<p>or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned, leased, or otherwise controlled by a single person or by two or more persons jointly or as tenants in common and includes waters of the United States lying within the state.</p> <p>http://www.moga.missouri.gov/statutes/C600-699/6440000016.HTM</p>
Montana	<p>(Section 75-6-102) "State waters" means a body of water, irrigation system, or drainage system, either surface or underground.</p> <p>http://data.opi.mt.gov/bills/mca_toc/75_6_1.htm</p>
Nebraska	<p>(Section 46-202) The water of every natural stream not heretofore appropriated within the State of Nebraska, including the Missouri River, is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation.</p> <p>(Section 37-1206) Waters of this state shall mean any waters within the territorial limits of Nebraska.</p> <p>http://uniweb.legislature.ne.gov/LegalDocs/view.php?page=s3712006000</p>
Nevada	<p>(NRS 445A.415) "Waters of the state" means all waters situated wholly or partly within or bordering upon the state, including but not limited to:</p> <ol style="list-style-type: none"> 1. All streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems, and drainage systems; and 2. All bodies or accumulations of water, surface and underground, natural or artificial. <p>(Added to NRS by 1973, 1709) (Substituted in revision for NRS 445.191)</p>
New Hampshire	
New Jersey	<p>(Section 53:1-11.10) "Waters of the state" means, but shall not be limited to, the waters of the Atlantic Ocean for three nautical miles eastward from the shores of this state; all navigable and non-navigable tidal and non-tidal, rivers, bays, streams, and inlets; and any other water within the jurisdiction of the state.</p> <p>http://www.njleg.state.nj.us/</p>
New Mexico	<p>(Section 72-1-1) All natural waters flowing in streams and watercourses, whether perennial or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw, or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.</p> <p>http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0</p>
New York	<p>(ENV Section 15-0107) "Waters" shall be construed to include lakes,</p>

	<p>bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State of New York, and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction.</p> <p>http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS</p>
North Carolina	
North Dakota	<p>(Section 61-01-01) Waters of the state – Public Waters. All waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use must be acquired pursuant to chapter 61-04: waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well-defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground water; all residual waters resulting from beneficial use, and all waters artificially drained; and all waters, excluding privately own waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is any area that does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency more often than once in three years over the latest 30-year period.</p> <p>http://www.legis.nd.gov/cencode/t61c01.pdf</p>
Ohio	<p>(Section 1501.30) “Waters of the state” includes all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within or border upon this state or are within its jurisdiction.</p> <p>http://codes.ohio.gov/orc/1501.30</p>
Oklahoma	<p>Below is the definition of the term “Waters of the state” from Oklahoma Environmental Quality Code. The citation for this definition is Title 27A, Oklahoma Statutes, Section 1-1-201 (20).</p> <p>"Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or</p>

	any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof. Provided, waste treatment systems, including treatment ponds or lagoons designed to meet federal and state requirements other than cooling ponds as defined in the Clean Water Act or rules promulgated thereto and prior converted cropland are not waters of the state.
Oregon	(Section 468B.005) "Water" or "the waters of the state" include lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction. http://www.leg.state.or.us/ors/468b.html
Pennsylvania	
Rhode Island	(Section 46-12-1) "Waters" means all surface waters including all waters of the territorial sea; tidewaters; all inland waters of any river, stream, brook, pond, or lake; and wetlands, as well as all groundwaters. http://www.rilin.state.ri.us/Statutes/TITLE46/46-12/46-12-1.HTM
South Carolina	(Section 50-21-10) "Waters of the state" means waters within the territorial limits of the state but not private lakes or ponds. http://www.scstatehouse.net/CODE/t50c021.htm
South Dakota	(Section 34A-2-2) "Waters of the state" are all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state. http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=34A-2-2&Type=Statute
Tennessee	
Texas	(Water Code § 11.021) STATE WATER. (a) The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state. (b) Water imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state is the property of the state.

	http://tlo2.tlc.state.tx.us/statutes/statutes.html
Utah	(Section 19-5-102) "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state; and does not include bodies of water confined to and retained within the limits of private property, and which do not develop into or constitute a nuisance, a public health hazard, or a menace to fish or wildlife. http://www.livepublish.le.state.ut.us/lpBin22/lpext.dll?f=templates&n=main-j.htm&2.0
Vermont	(Section 10-37-902) "Waters" means any and all rivers, streams, brooks, creeks, lakes, ponds or stored water, and groundwaters, excluding municipal and farm water supplies. http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=10&Chapter=037&Section=00902
Virginia	(§ 62.1-44.3) "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Such waters are a natural resource which should be regulated by the Commonwealth. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. http://leg1.state.va.us/000/cod/TOC6201000.HTM In regards to Potomac: http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.114
Washington	(Section 90.56.010) "Waters of the state" includes lakes, rivers, ponds, streams, inland waters, underground water, salt waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state, sewers, and all other surface waters and watercourses within the jurisdiction of the State of Washington. http://search.leg.wa.gov/pub/textsearch/ViewRoot.asp?Action=Html&Item=1&X=1006080048&p=1
West Virginia	(Section 22C-1-3) "Water resources," "water," or "waters" means any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state, or bordering this state and within its jurisdiction, and includes, without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds

	<p>(except farm ponds, industrial settling basins, and ponds and water treatment facilities), impounding reservoirs, springs, wells, and watercourses.</p> <p>http://www.legis.state.wv.us/WVCODE/22c/code/WVC%2022%20C-%20%201%20%20-%20%20%203%20%20.htm</p>
Wisconsin	<p>(Section 281.01) "Waters of the state" includes those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems, and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.</p> <p>http://nxt.legis.state.wi.us/nxt/gateway.dll/?f=templates&fn=default.htm</p>
Wyoming	<p>"Waters of the state" means all surface and groundwater, including waters associated with wetlands, within Wyoming.</p> <p>http://deq.state.wy.us/out/spills.htm</p> <p>(Section 21-13-101) "Waters of this state" means any waters within the jurisdiction of Wyoming.</p> <p>http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title41/T41CH13.htm</p>