April 30, 2014

Nancy K. Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW (4101M)
Washington, DC 20460

Via email to: stoner.nancy@epa.gov

Dear Acting Assistant Administrator Stoner:

Re: Assumable Waters under Clean Water Act Section 404

In the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) regarding the scope of the definition of "waters of the United States," a statement in the preamble explains that the rule does not affect the scope of waters subject to state assumption in accordance with §404(g). 79 Fed. Reg. 22,188, p. 22,200 (April 21, 2014). The undersigned organizations appreciate that such language was included in the proposed rule addressing this critical aspect of state §404 program assumption.

We agree with the preamble statement in the rule that "[c]larification of waters that are subject to assumption by states or tribes or retention by the Corps could be made through a separate process under section 404(g)" (ibid). We recommend that steps to further clarify the scope of assumable and non-assumable waters be initiated in a timely manner. We are concerned that states currently considering assumption are having difficulty making progress because of the current uncertainty.

We would appreciate the opportunity to actively engage in a discussion with EPA to address this issue. Our organizations recognize that any steps toward clarification must be undertaken thoughtfully in accordance with the provisions of §404(g), and without altering the existing state 404 programs in Michigan and New Jersey.

Clear identification of assumable and non-assumable waters has been made more difficult by legal decisions that address terms such as "navigable" and "adjacent." Nonetheless, Congress intended that states be able to assume regulatory responsibility for the majority of waters within their boundaries. Clarification of assumable waters will help to facilitate state assumption where it is desired – providing benefits to the public, the resource, and the state and federal agencies.

Under §404 of the Clean Water Act – all waters regulated by the Corps or by a state/tribal program – are deemed "waters of the United States." We believe that "other waters," as well as some portion of both "navigable waters," and "adjacent wetlands" may be administered by a state or tribe in accordance with 404(g). We look forward to discussions with EPA to explore this very important area of public policy.

Our goal is to work collaboratively to discern the criteria that will be used by a state/tribe, EPA, and the Corps to identify assumable/non-assumable waters pursuant to §404(g). We would also like to reach agreement on how to formalize these criteria (e.g., Memorandum of Understanding). Several steps may be needed to address both the immediate concerns of states pursuing assumption and the needs of those that may do so in the future.

Our organizations are committed to supporting state efforts to assume the Section 404 program by identifying issues and working with partners to resolve them. See, for example, ECOS Resolution #08-3 on State Delegation of the Clean Water Act Section 404 Permit Program – originally approved in 2008 – was on April 2, 2014 reaffirmed, with the addition of the following language: "[NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES] Encourages U.S. EPA to work with states to bring clarity and certainty to the identification of assumable and non-assumable waters."

We look forward to a timely and productive discussion with you. Please contact Jeanne Christie of ASWM at 207-892-3399 or jeanne.christie@aswm.org, to discuss this request. Thank you again for your attention to this matter.

Sincerely,

Alexandra Dapolito Dunn	Sean Rolland	Jeanne Christie
ECOS	ACWA	ASWM

Cc: Ken Kopocis, EPA
Benita Best-Wong, EPA
Jim Pendergast, EPA
Bill Ryan, OR DSL
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