Resolution on Clean Water Act Jurisdiction Issues that Require Clarification from Congress

WHEREAS, the Association of State Floodplain Managers supports the Clean Water Act of 1972 and subsequent amendments, the Act’s historical protections for the “waters of the United States”; and the important federal, state, and local government partnerships created by the Act in order to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters”; and

WHEREAS, the U.S. Supreme Court’s decisions in the _SWANCC_ (Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001)) and _Carabell/Rapanos_ (Rapanos et ux., et al. v. United States, 547 U.S. 715 (2006)) cases have interpreted more narrowly the scope of some portions of the Clean Water Act’s protections and created uncertainty in jurisdiction for all Clean Water Act programs; and

WHEREAS, the waters (whose protections are jeopardized by the Supreme Court decisions and federal policy guidance and represent over 50% of U.S. stream miles in the lower 48 states and an estimated 20 million acres of wetlands, both according to U.S. Environmental Protection Agency (EPA) estimates) are critical to achieving the goals of the Clean Water Act; and

WHEREAS, the Association of State Floodplain Managers believes that failing to continue to exercise broad jurisdiction under the Clean Water Act would result in substantial increases in flood risks by losses to the quality and quantity of the nation’s waters and notably to their natural and beneficial functions; and

WHEREAS, the issuance by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency of supplementary guidance concerning Clean Water Act jurisdiction has not alleviated the confusion, has further complicated all permitting programs established by the Clean Water Act, jeopardizes protections for intermittent and ephemeral streams and wetlands, and has added substantial delay to valid permit actions; and

WHEREAS, states that have developed and implemented their own wetland rules both before and in response to the _SWANCC_ and _Carabell/Rapanos_ decisions are undermined by the continued confusion at the federal level; and

WHEREAS, state programs and laws are significantly intertwined with the Clean Water Act, which established minimum protections for “waters of the United States” and over one-third of states are prohibited from protecting water not covered by the Clean Water Act;

NOW, THEREFORE, BE IT RESOLVED THAT THE ASSOCIATION OF STATE FLOODPLAIN MANAGERS

Supports continued and consistent federal wetlands jurisdiction over “waters of the United States”; and
Agrees that some form of Congressional action is needed to eliminate confusion, provide clarity concerning Clean Water Act jurisdiction, restore jurisdiction under the Clean Water Act to adequately protect the waters of the United States, and support protection of those waters historically protected and properly identified in the long-standing EPA and Corps regulations at 40 CFR 122.2 and 33 CFR 328.3, which include “all waters which are subject to the ebb and flow of the tide; . . . all interstate waters, including interstate ‘wetlands’; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, ‘wetlands,’ sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds; . . . all impoundments . . . tributaries . . . the territorial sea; and ‘wetlands’ adjacent to [these] waters . . .”; and

Encourages the U.S. Congress to act immediately to reestablish Clean Water Act jurisdiction to cover the full scope of the waters protected before the above-named Supreme Court decisions, and to work in cooperation with other interested organizations to resolve issues of Clean Water Act jurisdiction.

APPROVAL BY THE ASFPM BOARD OF DIRECTORS

Adopted by the ASFPM Board on: February 12, 2009

Attested by Judy Watanabe, Secretary, ASFPM