



# ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

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The Honorable Andrew Wheeler  
Acting Administrator  
U.S. Environmental Protection Agency

April 11, 2019

The Honorable R.D. James  
Assistant Secretary of the Army  
Department of the Army, Civil Works

U.S. Environmental Protection Agency  
EPA Docket Center  
Office of Water Docket  
Mail Code 28221T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460  
[Ow-docket@epa.gov](mailto:Ow-docket@epa.gov)

**Re: Docket ID No. EPA-HQ-OW-2018-0149**

Dear Administrator Wheeler and Assistant Secretary James:

These comments were prepared by the Association of State Floodplain Managers in response to the Feb. 14, 2019 Federal Register notice of a proposed rule defining the scope of waters federally regulated under the Clean Water Act. The proposed rule is the second step in implementation of the Executive Order signed Feb. 28, 2017, instructing the Environmental Protection Agency and U.S. Army Corps of Engineers to revise the 2015 Clean Water Rule. ASFPM submitted comments on the first step of the revision process Nov. 27, 2017.

ASFPM is a professional nonprofit organization with 19,000 members and 37 chapters throughout the nation. Our mission is to promote education, policies and activities that mitigate current and future losses, costs and human suffering caused by flooding, and to protect the natural and beneficial functions of floodplains—all without causing adverse impacts. Our review

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# Association of State Floodplain Managers, Inc.

of the proposed rule and these resulting comments and recommendations were prepared with input from ASFPM staff and members with experience in state and federal programs that involve the Clean Water Act and the Waters of the U.S. rule.

This letter represents the overall view of ASFPM and is primarily focused on assessing the impacts of changes to the scope of the waters regulated by the Clean Water Act and their potential impacts on flood damage nationally and the natural and beneficial functions of floodplains. We recognize that the question of jurisdiction over Waters of the U.S. is very broad and also impacts other CWA programs, including §402 and nonpoint source programs, as well as other legislation that adopts CWA jurisdictional definitions by reference. With this in mind, ASFPM urges full consideration of comments obtained in public meetings and those prepared by other state organizations, including the Association of State Wetland Managers, Environmental Council of the States and Association of Clean Water Administrators. We urge federal agencies to carefully consider all comments based on sound science and facts during this review.

ASFPM opposes the proposed rule as it represents a large-scale deregulation of wetlands and streams that have a direct role in reducing flood damage and protecting the natural and beneficial functions of floodplains. ASFPM has consistently expressed support for the 2015 WOTUS rule implementing Section 404 of CWA, and has objected to reverting to the post-Rapanos guidance, which all sides, including the regulated community, agree did not provide the clarity and process necessary to satisfy either the users of the nation's waters or those who support minimizing impacts on those waters so their benefits support future generations.

While ASFPM supports the goal of improving clarity in definitions, jurisdiction, review standards and procedures, the proposed rule falls short of this goal.

## **Relationship between the Clean Water Act and Floodplain Management**

Congress passed the Clean Water Act in 1972 in order to "restore and maintain the chemical, physical and biological integrity of the nation's waters," and since then the Clean Water Act has safeguarded nearly all of the nation's rivers, streams, lakes and wetlands. The proposed rule is a departure from the congressional intent of the Clean Water Act and from long-standing national policies to protect water resources and communities while not impeding economic development.

Some will be surprised that the Clean Water Act plays an important role in reducing impacts and taxpayer costs for flood disasters. Natural riverine and coastal wetlands play a key role in reducing impacts of natural hazards, especially floods from increasingly intense storms, variable

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# Association of State Floodplain Managers, Inc.

winter snowpack and droughts, which can all have negative impacts on the nation's economy and industries. Small tributary streams and wetlands absorb rainwater, runoff and snowmelt. As watersheds become more urbanized, natural stream channels are often replaced with storm sewers, pipes and other artificial means of moving water downstream. The loss of natural flood storage areas such as the wetlands and ephemeral streams that will be excluded from regulation under the proposed rule will increase flood frequency and higher flood elevations downstream. These increases in potential flooding will be a drag on the economy with a large share of major disaster costs picked up by the federal taxpayers.

The recent record breaking flooding in the Midwest along with the increases in flood disasters over the last decade should bring pause to ideas of reducing water resource protections, but should lead the federal government to do more to strengthen sound and science-based rules and regulations that reduce impacts of these natural disasters. Any reduction in the definition of federal jurisdiction of our stream and wetland systems will have a major impact on the protection of the natural channels floodplains and coastal areas that are the first line of defense against disasters. ASFPM urges caution in implementing any modification of federal jurisdiction without taking these factors into account.

## **Impacts to States**

The proposed rule narrows the objective of the Clean Water Act and shifts the burden of regulating non-WOTUS waters to the states. The important role of states and tribes in management of water resources is clearly recognized in the Clean Water Act. 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, so this action must proceed with caution and full consideration of integrating protection of public health, private property and taxpayer dollars.

A narrow interpretation of federal jurisdiction over the nation's waters should be avoided and could have unintended consequences. Examples such as increased pollution, unsafe drinking water, degraded water resources and increased costs to states that assume a greater role in the federal program by more work in permitting and enforcement, and increased confusion to the existing processes that have been worked out between states and federal agencies. All of this can result in delays and added costs for those seeking permits.

It is important that federal regulations maintain a level, regulatory playing field among the states, and in protecting states and communities from pollution and flood risk originating in upstream states. Adverse impacts caused by users of the nation's waters are often borne unequally among the states. Costs could significantly increase for downstream states that receive increased quantities of water and pollutant loads from upstream states following

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# Association of State Floodplain Managers, Inc.

removal of federal jurisdiction from some waters. Some states will lose protection over more waters currently not covered under their state laws, particularly with respect to ephemeral stream systems and dredge and fill activities in streams, rivers, lakes and wetlands.

## **Impacts of the Proposed Rule on Protections of Waters under the Clean Water Act**

It is difficult to analyze the full extent of impacts of the proposed rule on waters of the U.S. in the limited 60-day comment period, however the impacts will be significant. The Agencies are proposing to drastically limit which water bodies are protected under the Clean Water Act. An enormous number of streams and wetlands would be excluded from the Waters of the United States and protections under the Clean Water Act including hundreds of thousands of ephemeral stream miles and almost half of the nation's wetlands.<sup>1</sup> The proposed rule would limit Clean Water Act protections to only waters with a permanent or consistent flow, or direct surface hydrological connection to other waters. Our concerns regarding specific aspects of the proposed rule are described below, including the significant changes being proposed that are related to wetlands and tributary streams, which are key features of the Nation's floodplains and require protection under the Clean Water Act.

## **Wetlands**

The proposed rule would drastically reduce the protections provided to wetlands and streams by limiting the definition of "adjacent" to mean only wetlands that "abut" or have a direct surface (not groundwater) hydrologic connection to waters of the United States, where "abut" is defined as meaning that a wetland physically touches the water in question.

This redefinition is extremely concerning. It is not possible to protect traditional navigable waters without regulating activities in wetlands hydrologically connected by groundwater. Many wetlands are supported in part by groundwater and groundwater may be the predominant source of supporting hydrology. Groundwater supported wetlands are a critical component of watershed hydrology, storing and slowing the release of flood water; contributing base flow to maintain permanent, perennially or seasonally flowing waters; and providing water quality, water supply and habitat benefits.

The definition would only recognize continuous surface connections through flood inundation during a typical year or precipitation. Surface water connections can vary from year to year, and it could be very difficult and onerous for trained professionals to make a determination of which wetlands are "adjacent" under the new "abut" definition during a typical year. Given the shifting

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<sup>1</sup> EPA falsely claims 'no data' on waters in WOTUS rule, Ariel Wittenberg and Kevin Bogardus, E&E News, reporters, Greenwire: Tuesday, December 11, 2018  
<https://www.eenews.net/stories/1060109323>

# Association of State Floodplain Managers, Inc.

regional hydrologic cycles due to climate change, it will become even more difficult for professionals to make these determinations in the future, let alone the average landowner.

The proposed rule would eliminate federal jurisdiction over wetlands that are “physically separated from jurisdictional waters by upland or by dikes, barriers, or similar structures and also lack a direct hydrologic surface connection to jurisdictional waters.” This is a far more limiting restriction than previously proposed post-Rapanos and could exacerbate floods. Even Justice Scalia noted in Rapanos, “In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways.”

The National Levee Database has 29,485 miles of levees. However, there may be more miles of levees (including thousands of miles of irrigation and water-supply canal embankments) that were built by public or private entities and operated by nonfederal, public or private organizations”.<sup>2</sup> The proposed rule change would require regulatory agencies to find and evaluate hydrologic connections between rivers and wetlands in leveed areas, and to determine whether there is a hydrologic connection in a “typical” year (a 30-year period as defined by the proposed rule). This would be an excessive burden on agencies.

Riverine wetlands are often commonly connected hydrologically to rivers and streams through shallow subsurface connections and water can filter through artificial berms. Floodplain managers and river engineers are well aware of the subsurface connection between rivers and wetlands, as they commonly witness under seepage during floods as rising rivers exert pressure on groundwater causing water to seep up on the land inside levees.

The agencies propose to eliminate the case-by-case application of Justice Kennedy’s significant nexus test, which would eliminate the need for case-by-case jurisdictional determinations. While this change simplifies the definition of federal jurisdiction, it does so at the expense of a significant number of waters that would no longer be subject to Clean Water Act protections.

In addition, the 2015 rule defined five special wetland types including prairie potholes, Delmarva and Carolina Bays, pocosins, western vernal pools and Texas coastal prairie wetlands. The inclusion of these wetland types had considerable support and was supported by sound scientific documentation. ASFPM is disappointed that the proposed rule does not include these

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<sup>2</sup> National Research Council. 2013. Levees and the National Flood Insurance Program: Improving Policies and Practices. Washington, DC: The National Academies Press (pages 118-119). <https://doi.org/10.17226/18309>

# Association of State Floodplain Managers, Inc.

areas as Waters of the U.S. and offers no justification other than elimination of the case-by-case evaluation based on the significant nexus analysis.

## **Tributaries**

The proposed rule would eliminate protections for ephemeral streams for the first time. Ephemeral streams are roughly estimated to account for 48 percent of the streams across the nation.<sup>3</sup> These precipitation dependent streams may only flow after a rain event or snow melt, but they are the headwaters that feed larger streams and rivers. They play a critical role within a watershed, from moderating how quickly precipitation and runoff flows downstream, to capturing pollutants and providing habitat. Elimination of Clean Water Act protections for ephemeral streams could result in modifications to these streams that would convey increased volumes of stormwater and runoff downstream at a faster rate, which could result in higher flood levels and increasing flood damage in more populated and built-out areas, including impacts to traditional navigable waters.

Given the significant extent of ephemeral streams throughout the nation, the proposed definition of “tributary” as a “...channel that contributes perennial or intermittent flow...” is extremely limiting and will not implement the Clean Water Act objective to restore and maintains the quality of the nation’s water, which the proposed rule purports to do.

Recent research indicates that “even when dry or not flowing, intermittent rivers and ephemeral streams perform multiple ecosystem services that complement those of nearby perennial rivers”<sup>4</sup>, including the protection of downstream water quality. Therefore, federal regulation of ephemeral streams will directly support the objective of the CWA to restore and maintain the “chemical and biological” ...integrity of the nation’s waters.

The agencies also propose to further define tributaries as having flows that originate from a particular source or that occur seasonally or during a typical year. This is a narrow view of the physical processes that form a “channel,” which is fundamental descriptor of the tributary definition used in the proposed rule. The definition of a tributary should not be solely associated with the presence of water, but rather with the presence of a channel created by “waters,”

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<sup>3</sup> Estimated based on a percentage of an assumed total 3.2 to 3.4 million miles of streams in the U.S. consisting of first order streams; i.e., wet-weather streams that are normally dry and have no tributaries (Strahler, A.N., 1952. Hypsometric (Area-Altitude) Analysis of Erosional Topography; Leopold et al, 1964. “Fluvial Processes in Geomorphology”; and Tockner and Stanford, 2002. “Review of: Riverine Flood Plains: Present State and Future Trends”).

<sup>4</sup> Datry, T., Bonada, N., Boulton, A.J., 2017. Chapter 1 – General Introduction, Intermittent Rivers and Ephemeral Streams. Academic Press, pp. 1–20.

<https://besjournals.onlinelibrary.wiley.com/doi/pdf/10.1111/1365-2664.12941>

# Association of State Floodplain Managers, Inc.

flowing over time, including water flowing less than continuously (i.e., ephemeral), which has the potential to erode and scour the earth and form a channel.

The proposed rule addresses methods for identifying tributaries, but these appear to be focused solely on “flow regime.” Quantitative techniques are available to define the threshold location where channelized flow begins, based on topographic and geomorphic parameters, and these methods should also be considered.

Lastly, the removal of federal protection for half of the tributary streams in the U.S. would have a devastating impact on flood risk in the U.S. The potential for increased unregulated upstream development would lead to increased flood risk to downstream property owners and inhabitants, and accelerate already increasing trends in flood damage costs and associated expenditures for flood recovery and management.

For example, in recent years USACE has frequently requested supplemental appropriations from Congress to cover unanticipated costs incurred for flood-fighting activities and repairs to flood-control infrastructure, while flood losses in the U.S. continue to increase, reaching an annual average of \$20 billion in the recent 2000s, a nearly tenfold increase from the early 1900s.<sup>5</sup> The lack of jurisdiction by the Corps will mean many non-regulated projects will still need a floodplain permit from the community, which will need an environmental assessment. This just transfers the work to the community, or the local governmental agency, many without the capability to enforce/understand, and therefore jeopardize their eligibility in the NFIP. Inadequate permit reviews could lead to lawsuits, which would also delay project implementation which was why the original WOTUS rule was proposed in the first place.

## **Interstate Waters**

The agencies propose to eliminate “interstate waters” as a jurisdictional category, and these waters would only be jurisdictional if they also meet the definition of traditionally navigable or another category of jurisdictional waters. The protection of interstate waters serves to protect states from the actions of upstream or neighboring states that harm downstream interstate waters. Without this protection, states have no mechanism to compel an upstream state to control pollution of waters flowing downstream that are not protected under the Clean Water Act. Riverine and coastal wetlands tend to be linear, and can impact multiple states and communities along a river or coastline. This change, in combination with the definition of

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<sup>5</sup> National Research Council. 2012. Dam and Levee Safety and Community Resilience: A Vision for Future Practice. Washington, D.C.: The National Academies Press.  
<https://doi.org/10.17226/13393>

# Association of State Floodplain Managers, Inc.

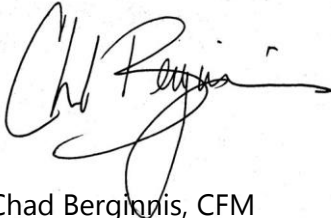
"adjacent" and deregulation of ephemeral streams could impact the extent of flooding and storm damage in adjacent communities and states.

## **Economic Analysis**

ASFPM previously commented that we found the economic analysis associated with the proposed rule to be incomplete and misleading. Economic values of wetlands were deemed "unquantifiable," and therefore are zeroed out in the "benefits" column. Studies cited in the benefit cost analysis that supported promulgation of the 2015 Rule were deemed out of date. It is unclear as to why studies used in 2015 were determined to be outdated, when the time frame of studies cited in 2015 and the current economic analysis overlap. The current economic analysis was difficult to review and compared with the previous economic analysis. Results were confusing, unsupported and inconsistent.

In conclusion, ASFPM opposes the proposed rule as the deregulation of wetlands and ephemeral streams would lead to increased flood risk and taxpayer costs in the nation and adversely impact the natural and beneficial functions of public waters of the U.S.

Sincerely

A handwritten signature in black ink, appearing to read "Chad Berginnis", with a long horizontal flourish extending to the right.

Chad Berginnis, CFM  
ASFPM Executive Director