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Nov. 27, 2017

The Honorable Scott Pruitt
Administrator
US Environmental Protection Agency
Office of Regulatory Reform
Mail code 1803A
1200 Pennsylvania Ave NW
Washington, DC 20460

The Honorable Douglas W. Lamont
Senior Official Performing the duties of the
Asst. Secretary of the Army for Civil Works
Department of the Army
104 Army Pentagon
Washington, DC 20310-0104

Re: Docket ID No.EPA-HQ-OW-2017-0480

Dear Mr. Pruitt and Mr. Lamont:

These comments were prepared by the Association of State Floodplain Managers (ASFPM) in response to the Aug. 28, 2017 Federal Register notice of a Proposed Rule: "Definition of Waters of the United States" – Recodification of Pre-existing Rules and Schedule of public meetings.

ASFPM is a professional non-profit organization with 18,000 members and 36 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 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 program that involve the Clean Water Act and the Waters of the U.S. rule. While this letter represents the overall view of ASFPM, we urge the federal agencies to carefully consider all comments that are based on sound science and facts during this review.

The agencies propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles Justice Scalia outlined in the Rapanos plurality opinion.

ASFPM has and continues to support the 2015 WOTUS rule implementing Section 404 of CWA. We do not support reverting to the old rule, which all sides 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. It would be non-productive to revert to a process where every determination of jurisdiction needs to be

made on a case-by-case basis. If anything, it would be better to implement the 2015, test it and modify if needed based on experience.

The important role of the 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.

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 arising from 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 removal of federal jurisdiction from some waters. Some states will lose protection over more waters than other states, particularly with respect to ephemeral systems and dredge and fill activities in streams, rivers, lakes and wetlands.

Our comments focus primarily on how changes in the definition of WOTUS will impact the regulation of dredge and fill activities as provided by §404 of the Clean Water Act and impacts the rule revision may have on increasing flood risk of the nation and adversely impacting the natural and beneficial functions of public waters of the U.S. However, 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 the Association of Clean Water Administrators.

Some will be surprised that the Clean Water Act plays an important role in reducing taxpayer costs for flood disasters. Natural riverine and coastal wetlands play a key role in minimizing the impacts of natural hazards, especially flooding from increasingly intense storms, variable winter snowpack and droughts, which can all have negative impacts on the economy and industry.

ASFPM is concerned that a narrow interpretation of federal jurisdiction over the nation's waters should be avoided and could have unintended consequences such as increased pollution, less safe water, increased costs to states that assume a greater role in the federal program by more work in permitting and enforcement, and confusing 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.

The devastation of Hurricanes Harvey, Irma and Maria should lead us to do more to strengthen sound and science-based rules and regulations that reduce impact of these natural disasters. Any reduction in the definition of federal jurisdiction will have a major impact on the protection of the natural channels 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.

The EPA and U.S. Army Corps of Engineers have proposed revoking the 2015 Clean Water Rule. We understand the agencies ultimately propose to replace the rule with a new CWA jurisdiction rule based in part on the Scalia plurality opinion in the Rapanos case. In the interim, it is proposed the previous definitions promulgated in 1986 (Corps) and 1988 (EPA) in conjunction with the jurisdictional guidance that was in use prior to 2015 and during the current court mandated stay of the 2015 rule would be applied.

The federal agencies justify this action based primarily on the legal situation that would result should the U.S. Supreme Court rule that the 6th Circuit Court does not have authority to review or stay the Clean Water Rule, leaving a patchwork of legal decisions in response to multiple lawsuits in many of the lower courts throughout the country. ASFPM questions whether rescinding the 2015 rule will achieve its intended objectives for two primary reasons.

ASFPM does not believe that rescinding the rule will improve program stability. Rather, it is likely to lead to added instability due to more delay in judicial clarity and lengthen the time required for resolving the jurisdictional definition. ASFPM believes it would be possible to address many of the concerns raised concerning the 2015 rule by revising components of the 2015 Rule, and through other programmatic measures to respond to unique regional challenges, as described later in these comments instead of delaying the entire rule.

The 2015 Clean Water Rule reflects broad public acceptance of federal jurisdiction over many primary categories of the nation's waters, and is based on a comprehensive scientific review. Rescission of the rule should not undermine aspects of the Clean Water Rule that are well founded in science and acceptable to the public. CWA jurisdiction over the majority of waters—including territorial seas, traditional navigable waters, interstate waters, permanently standing or flowing waters such as lakes and streams, impoundments of these waters, tributaries of these waters, and immediately adjacent wetlands—is generally accepted.

Most categories of waters have been included in the definition of Waters of the United States since promulgation of rules in 1986 and 1988. In addition, there has been considerable support for protection by rule of special categories of waters listed in the 2015 Clean Water Rule – including prairie potholes, Delmarva and Carolina Bays, pocosins, western vernal pools, and Texas coastal prairie wetlands, supported by sound scientific documentation.

Moreover, positive steps were taken under the 2015 rule to define waters that will not be regulated and provide straightforward criteria for waters that are regulated. ASFPM recognizes that clarity is still needed regarding some of the more remote or intermittent types of waters, but we believe momentum in gaining transparency and certainty for many waters where there is long-standing support for jurisdiction should not be lost. The scientific and public interest record for the 2015 rule remains relevant.

Issues that would require further consideration if the agencies were directed to pursue implementation of the 2015 rule include clarification of jurisdiction over intermittent and ephemeral streams, the identification of "adjacent" wetlands at the field level, differentiating manmade ditches and channelized streams, and in general the end points of federal jurisdiction. ASFPM believes that many of these issues will be best resolved by accounting for regional differences, and through regionalized programmatic solutions.

ASFPM finds the economic analysis associated with the proposed rule to be incomplete and misleading. Economic values of wetlands are 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.

The key difference between the 2015 and 2017 economic analyses of the 2015 CWR is the incorporation of wetlands including flood-risk reduction in the benefits column of the EPA's benefit cost analysis in 2015. The 2015 analysis estimated the CWR will result in approximately $306.1 million in economic benefits from wetland and flood protection. In the 2015 analysis, the 2015 rule has a benefit-cost ratio of above one, which is supported by the incorporation of wetland benefits. By contrast, the 2017 analysis completely removes the benefits of these values, such as flood and storm protection, waterfowl hunting opportunities, and commercial fish habitat, reducing the benefit-cost ratio for the 2015 rule as a whole to below one. The federal agencies' stated reasons for this dramatic change were:

> "*The 2015 CWR wetland benefits were derived through a benefit transfer exercise using 22 estimates from 10 studies, examining households' willingness to pay for wetland preservation. The studies were published between 1986 and 2000, although the agencies attempted to find more recent studies. More recent wetland studies were not available. The age of these studies introduces uncertainty because public attitudes toward nature protection could have changed. The past 30 years have also seen tremendous advances in statistical and economic methods that have improved the ability to collect and analyze data on the willingness to pay for changes in environmental amenities.*"

The economic analysis erroneously dismisses past studies of ecosystem services and other values based on the statement that "public attitudes toward nature protection could have changed." This statement is unsubstantiated. Public attitudes have changed in recent years through increased recognition of the vital need for and limited supply of clean water resources. The public today places a much higher value than in the past on unpolluted drinking water, and on minimizing the cost of natural disasters including flooding, severe storms and drought.

Further debunking the agencies' reasons, there are numerous recent studies quantifying the value of wetlands as it is an intensive area of ongoing research. Several studies post-Katrina have quantified values of coastal wetlands as have more recent studies post-Sandy. In fact, a basic Google search on the value of wetlands in the U.S. pulls up several studies done since 2013. One of the most recent studies published just this past August was on the *Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA,* which concluded that

wetlands avoided $625 million in direct flood damages during Hurricane Sandy, which is hardly an insignificant value.

Even further debunking the agencies' reasons, earlier this year the Congressional Research Service reviewed EPA's economic analysis of the 2015 Rule. In its report, the CRS notes that the wetlands protected under the 2015 rule change provide public benefits of over $500 million per year. This includes values ranging from water quality enhancement, habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection. The figure cited by CRS does not include the benefits of protecting water resources such as small streams, especially the ephemeral streams of the arid west.

Removing protection from streams would have impacts on downstream users, pushing up the total loss from reducing protections. Under multiple scenarios, the narrowing of jurisdiction would have negative consequences for local, state, tribal and federal governments in terms of increased costs for flooding, water quality and loss of ecosystem benefits.

In short, the economic losses that would arise from a reduction in federal protection of water resources are enormous, and it is incorrect and a disservice to the public to exclude consideration of these factors from the benefit cost analysis. The potential loss of federal protection of wetlands and small- and mid-sized streams is likely to result in an increase in unregulated dredge and fill activities, which would in turn lead to future increased costs at the federal, state and local level for disaster assistance, engineered infrastructure to store flood waters, purify nonpoint source runoff, treat drinking water, sustain recreation opportunities and stabilize shorelines. The loss of protection for wetlands and small streams would likely lead to cumulative impacts reflected in human health threats, as well as increased property damage from natural hazards including intense storms, drought and flooding.

Finally, a recently published study of the role of wetlands in reducing the damage from hurricanes and coastal flooding, serves as a timely statement regarding the public value of wetland resources. "The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA," Scientific Report 7, Article number: 9463 (2017), reports the outcome of an extensive study to evaluate the economic benefit of coastal wetlands in minimizing damage from Hurricane Sandy, and to evaluate long-term benefits of flood reduction in a specific local area. The study estimates that coastal wetlands reduced flood heights and thus avoided more than $625 million (U.S.) in flood damage across 12 coastal states affected by Sandy, from Maine to North Carolina.

ASFPM recommends these federal agencies make full use of existing regional regulatory approaches, and consider development of regional field guidance that would be equally pertinent under the existing guidance, implementation of the 2015 Rule should that occur, or under a newly developed Scalia plurality opinion-based rule. The benefit of this approach is that federal protection of important components of the nation's aquatic system is maintained, but without imposing a significant regulatory burden on minor activities. In some instances, an

abbreviated request for authorization may be submitted, and in others, no notification of the proposed action is needed, provided that the criteria specified in the general permit are met.

A rollback of federal CWA jurisdiction reliant on the Scalia adjacency test could remove federal dredge and fill permitting from an unknown but substantial portion of the approximately 54,574,445 acres of freshwater wetlands located in states that lack statewide dredge and fill permitting. And could eliminate protection for an undetermined, but likely significant portion of intermittent and ephemeral streams, which include approximately 2,374,298 stream miles in states without a dredge and fill program. This figure represents approximately 78% of all non-perennial stream miles in the U.S., not including Alaska.

Given the extensive state concerns to the proposed actions regarding the 2015 Clean Water Rule, ASFPM recommends the following considerations:

1. ASFPM recognizes the public and user need for clarity, consistency and predictability regarding the extent of federal jurisdiction. To all users, especially the public, it is important rules are science-based, acknowledge legal principles governing water use, and account for regional differences in the extent and use of water that can vary significantly from one part of this nation to another. Ensuring safe, clean water for drinking, commercial and recreational use, including aquatic and estuarine habitat, must be the outcome of these rules in order to support the vast number of people and industries that rely on these waters for economic reasons.

2. ASFPM understands many interests ask to clarify and simplify regulatory requirements of the federal limits of jurisdiction under the Clean Water Act. However, an oversimplified approach based on the definitions of “relatively permanent waters” and adjacent wetlands having a “continuous surface connection” cannot achieve either goals for protection of waters or clarification of regulatory limits. Defining these terms in a way that narrows federal jurisdiction would have significant, unintended environmental and economic consequences. For example, ephemeral streams in the southwest portion of the nation and elsewhere. If this proposed rule is not done correctly, it could mean they have no protection at all at the federal level, which impacts a good section of the nation. Ephemeral steams are critical for habitat and water supply in many parts of the country, not just the southwest.

3. We believe a flexible but science-based permitting mechanism for general permits, regional permits, state programmatic general permits, and state program assumption will better address the specific needs and concerns of states, tribes and permit applicants. Effective components of current regulations should be retained because experience shows federal jurisdiction is already clear in most instances, so any changes should focus on revisions to specific areas of concern to the public. A completely new approach that fails to incorporate the best elements of the previous rulemaking would not be wise or supportable. A completely new approach would result in an extensive period of uncertainty and confusion in state and federal regulatory programs.

Uncertainty and associated legal challenges remains primarily in gray areas such as headwaters (ephemeral waters), manmade waters and remote wetlands. Therefore, components of previous regulations that have proven effective should be retained, and the modifications limited to situations where greater clarity is needed.

4. In the semi-arid West, most of our waterways are not "navigable" year round, but rather flow seasonally or intermittently, leaving many of these vital services unprotected for millions of people. Any pollution from these waterways will ultimately flow downhill into "navigable waters."

There are two nuances that make this issue of arid waterways protection particularly critical:

a) Many riparian areas in and around cities of the southwest are dependent on effluent or dependent on incidental return flows via the drainage system of urban runoff such as landscape irrigation etc. The proposed rule would incentivize actions that would lead to these areas being "dried up."
b) In-stream sand and gravel mining, similar to other western mining falls outside many regulations. Floodplain use permits and 404 were two consistent permits that protected stream function. In stream pits severely alter sediment transport and promulgate erosion in all directions impacting infrastructure and fluvial geomorphology functions.

5. Sport enthusiasts, conservationists and recreationalists know the critical importance of clean water and its essential role in maintaining fish and wildlife populations

6. Rolling back the rule will result in the same regulatory confusion that resulted in broad-based calls for clarity about which "waters" the Clean Water Act protects. Rolling back the rule is bad governance, bad for businesses that rely on regulatory certainty, and bad for U.S. communities that expect and deserve clean water.

7. Rescinding the 2015 Clean Water Rule will also place additional burdens on EPA and the Corps at a time when these agencies are already under difficult staffing and budgetary constraints.

Thank you for accepting our comments. Please contact me should you have questions regarding ASFPM's positions. We are committed to working with you and other stakeholders to address national questions and concerns regarding the protection and the use of wetlands and other waters. Thank you and we look forward to continued consultation with your agencies as well as states and their organizations.

Sincerely

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