



Association of State Floodplain Managers, Inc.

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To: CWAawotus@epa.gov

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From: Chad Berginnis, Executive Director ASFPM
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In response to your April 19, 2017 request, the Association of State Floodplain Managers is providing comments on the Executive Order on Restoring the Rule of Law, Federalism and Economic Growth. The Environmental Protection Agency indicated it will implement the Executive Order by reviewing the “Waters of the United States Rule.” ASFPM appreciate the invitation for consultation. We welcome future opportunities to consult with EPA and the Corps of Engineers, and other state and tribal organizations as the proposed rulemaking progresses.

EPA and the Corps of Engineers indicated their plan to meet the EO will be a two-step process:

1. Repeal and replace the 2015 WOTUS rule by re-codifying the regulation that was in place prior to issuance of the Clean Water Rule. In the Step 1 proposed rule, the agencies will define “Waters of the United States” using the regulatory definition in place before the Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.
2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that 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 complained 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 nonproductive to revert to a process where every determination of jurisdiction needs to be made on a case-by-case basis. 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 regulation maintain a level, regulatory playing field among the states, and in protecting states and communities from pollution arising in upstream states.

While some states regulate water resources, federal protection of the nation’s water resources is of increasing importance because America has a limited supply of water for many critical needs like industry, drinking, irrigation and recreation. Water for these various uses comes from underground, springs and streams, wetlands and intermittent streams. Wetlands are key in filtering runoff and pollutants from developing and human used areas prior to introducing it into the nation’s groundwater and surface water supplies. The federal level of protection also provides adequate water and usable water security for states from the actions of upstream

states. In addition, it provides a level playing field among states in terms of the use and alteration of the nation's waters.

Adverse impacts are often borne unequally among the states. Costs could significantly increase for downstream states that receive increased pollutant loads from upstream states following removal of federal jurisdiction from some waters. Some states would likely lose protection over more waters than other states, particularly with respect to dredge and fill activities in streams, rivers, lakes and wetlands

We also recognize 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 the 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.

We understand 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 streams are critical for habitat and water supply in many parts of the country, not just the Southwest.

ASFPM is greatly concerned that the EPA has been directed to implement the opinion of Justice Scalia in their rulemaking. We believe it is essential that additional regulatory elements be included, including (1) appropriate regionalization; (2) continued or expanded use of well-integrated state-federal regulatory programs; and (3) increased attention to more flexible permitting mechanisms that can be tailored to mesh with state or regional ecological and hydrologic conditions, which can be adjusted to meet the potential impacts of various proposed projects and activities. The Scalia opinion was never intended to form the sole basis upon which to establish a new clean water jurisdictional definition. Consideration of the combination and interaction of legally-defined jurisdictional boundaries, *and* regionally adjusted on the ground permitting can achieve a fair and effective regulatory program that provides equivalent protection and balance across the nation.

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 great impact on the economy and industry.

We are concerned that a narrow interpretation of federal jurisdiction over the nation's waters should be avoided and could have unintended consequences, including increased pollution,

less safe water, increased costs to the states that want to assume a greater role in the federal program by more work in permitting and enforcement, and confusing the existing process that have been worked out between states and federal agencies. All of this can result in delays and added costs for those seeking permits.

We believe a flexible but science-based permitting mechanisms 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. As such, a totally new approach that fails to incorporate the best elements of the previous rulemaking would not be wise or supportable. A totally 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.

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 states and their organizations.



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