The Association of State Wetland Managers, Inc.
"Dedicated to the Protection and Restoration of the Nation's Wetlands"

May 15, 2017

U.S. Environmental Protection Agency
Office of Water
1200 Pennsylvania Avenue, N.W. (MC: 4101M)
Washington, DC 20460

Re: Docket ID no. EPA-HQ-OA-2017-0190
Evaluation of Existing Regulations

To Whom It May Concern:

The Association of State Wetland Managers (ASWM) is responding to the request by the Environmental Protection Agency (EPA) for comments on the repeal, replacement, or modification of existing regulations in accordance with Executive Order 13777. ASWM is a nonprofit professional organization that supports the use of sound wetland science, law, and policy in developing and implementing state and tribal wetland programs. Our interest in the Executive Order is primarily in regard to regulations associated with the Clean Water Act (CWA) and with Section 404 in particular.

Like many other components of the CWA, Section 404 – which regulates dredge and fill activities in wetlands and other waters – has relied heavily on cooperative federalism for the past 40 years. Dredge and fill activities occur primarily at the land/water interface, typically requiring coordination with multiple programs including state land use and floodplain regulations, and state and federal water regulations. Over past decades, numerous agreements among state, tribal, local, and federal agencies have been developed to ensure that these closely aligned programs are both effective in protecting vital water supplies and are as efficient and timely as possible in meeting stakeholder expectations for authorization of proposed activities that impact surface waters and wetlands.

Recommendations

I. **Recognition of potential adverse impacts of regulatory modification on interwoven federal, state/tribal, and local regulatory frameworks.** ASWM would like to emphasize both the complexity and the benefits of federal, state, tribal and local collaborations in managing and protecting vital water resources. While the public may not comprehend the extent to which multiple programs related to water resource use, protection, and management are interwoven, the nature of this most vital of resources requires consideration of multiple scientific, ecological, economic, and social factors in making routine decisions – including those made through Section 404 and other CWA programs. The states and tribes, the Army Corps of Engineers (Corps), and EPA issue thousands of decisions each year regarding actions taken under Section 404, providing for input from multiple layers of government and program areas as diverse as floodplain management, threatened and endangered species, toxic materials, the hydrodynamics of stream systems, drinking water protection, and many others. In states that collaborate closely with the federal agencies, the majority of these decisions are typically made within a few weeks – a testimony to the effectiveness of the regulatory mechanisms that have been developed. Importantly, a major modification of key

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components of federal regulations may desynchronize the carefully balanced coordination of agencies and programs and may result in the unintended consequence of significantly disrupting, rather than enhancing, the efficiency and effectiveness of resource regulations.

ASWM urges EPA to consider the repeal, replacement, or modification of federal regulations within the context of their application in collaboration with other federal, state/tribal, and local agencies and not in the narrower view of the language of an individual regulation. The implication of parallel changes in the federal budget and provision of funds for both federal and state programs should also be considered. It should be recognized that regulatory modifications have the potential to adversely affect collaboration, understanding and certainty among state, tribal, local and federal programs to the extent that review and approval of a proposed action impacting water resources may well be delayed significantly, rather than expedited. It should also be recognized that in many states with smaller water resource programs, resources to respond to federal modifications may not be available, seriously disrupting water management at the state level.

Many federally financed incentive programs such as CWA Section 319 (h) were developed to provide an alternative to further regulations and thus are an important, although indirect, component of the interwoven federal, state/tribal, and local regulatory mechanisms. Incentive programs were created to provide an alternative to increased regulation that might otherwise be required to address pollution from both agricultural and urban sources. Loss of funding for these programs is likely to lead to increasing levels of pollution and a corresponding need for increased regulation at either the local, state, tribal or federal level to address those higher pollution levels in the future. For example, an increased level of regulatory control for implementation of point source pollutant load reduction practices, such as municipal and industrial wastewater, may be required to offset reductions in voluntary non-point source activities where achievement of water quality goals for impaired waters is lagging.

II. Clarification of assumable waters under Section 404. Under CWA Section 404, a qualified state or tribe may be authorized to assume administration of the 404 Permit Program for many, but not all, Waters of the United States. To date, however, only the states of Michigan and New Jersey have assumed the program. This is in part due to lack of a dedicated federal funding source for state-assumed programs, and because states and tribes with small water resources programs may not have the resources on any level to assume the 404 Permit Program. Another barrier to assumption is a lack of clarity regarding the scope of waters that may be assumed by a state or tribe, versus those that must be retained under the authority of the Corps.

ASWM recommends clarification of the scope of assumable waters through revision of the Section 404 State Program Regulation at 40 CFR Part 233. In 2015, EPA established a subcommittee to provide advice and recommendations on assumable waters under the National Advisory Council for Environmental Policy and Technology (NACEPT). This subcommittee presented its final report to NACEPT earlier this month. We urge that EPA consider acting expeditiously on the majority recommendations contained in this report. Revision of the Section 404 State Program Regulations that clarify the scope of potentially assumable waters will allow interested states to determine the efficacy of proceeding with their pursuit of assumption.

III. Provision of technical assistance and funding to states to support program development. Many states and tribes that are not in a position to assume full Section 404 authority nonetheless play a major role in the regulatory process, through a range of program options. These include collaborating with the Corps to develop Regional General Permits that address the specific needs of a state to expedite similar categories of activities; review of proposed Corps permit actions through CWA Section 401 Water Quality Certification Programs and Coastal Management Programs; and development and implementation of State Programmatic General Permits, under which Corps decisions are streamlined based largely on actions taken by a state under the state's regulatory framework. In all of these instances, active involvement by the state reduces that Corps workload, coordinates and expedites project review and approval under multiple federal, state, and local regulations, and provides for more holistic, consistent and predictable state and federal decision making.

ASWM recommends that EPA continue to provide both technical support and funding to state wetland programs to develop assessment methods, expand the use of Geographic Information Systems (GIS) and related technology that can expedite the identification and evaluation of stream and wetland resources, improve mitigation methods, and otherwise support state and tribal contributions to protection of waters of the U.S. While states and tribes provide major support for their own resource management goals, they often do not have the financial resources to support major research and development projects that are more feasible at the national level. For example, development of remote sensing technology at the federal level minimizes the duplication of effort by many states. Also, research undertaken by EPA and other federal agencies can provide technical support to inform state regulatory decision making and support program consistency and predictability across state lines. In addition grant programs such as the State Wetland Program Development Grants (WPDG) have been used to develop tools and science–based procedures to improve wetland management and efficiency such as acquisition of new scientific methods and technology, for training of staff, and for outreach to the public. WPDG and other grant programs greatly facilitate the development of state/tribal program capabilities, and progress toward state/tribal and national program goals.

IV. Actions on CWA Jurisdictional Rule and alternative means of regulatory reform. ASWM recognizes that there will be attention to the CWA rule on jurisdictional issues, which are likely to result in repeal, replacement or modification of the 2015 rule. We appreciate the steps that have already been initiated by EPA and the Department of Army to collaborate with the states and tribes in regard to this rule, and again offer our ongoing support both to the agencies and to our members in addressing jurisdictional issues. We will be offering detailed comments regarding this rule in a letter specific to that collaboration.

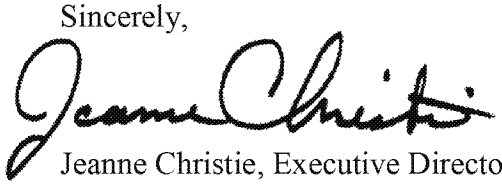
In general, however, we recommend to EPA and the Army that alternative forms of "regulatory reform" beyond rulemaking be considered to address areas of ongoing uncertainty in CWA jurisdiction. The United States has very diverse wetlands and other aquatic resources as well as a diversity of land use practices that impact these resources. Therefore, providing predictability and consistency will ultimately require development of regional approaches. We recognize the extreme difficulty of defining jurisdictional boundaries on a national basis given the variety of types of wetlands and other waters present in the landscape, and the impact of vast geographical differences on wetland/aquatic resource ecology and public benefits. We encourage EPA and the Army to work

with the states as well as local and tribal governments to identify areas where development of regional approaches will enable jurisdictional decisions to incorporate regional variation. This approach has been used very effectively in the application of Corps Nationwide General Permits, which may be modified with regional conditions, or through regional agreements with states and tribes (such as State Programmatic General Permits). Another example is the regionalization of wetland delineation criteria carried out in recent years. We are hopeful that similar approaches can be used to address areas of ongoing uncertainty and meet the needs of various states, tribes and local governments while retaining federal jurisdiction over those waters that may have national and interstate significance in many regions of the United States.

ASWM appreciates the opportunity to consult with the EPA during this early stage of EPA's response to the Executive Orders on Regulatory Reform. We anticipate that proposed actions to modify federal regulations will become more specific over time, and request that the consultation with our organization that has been initiated continues during this process. ASWM is prepared to provide the states and tribes with current information, to provide opportunities for the states and tribes to discuss these issues among themselves and share their own innovations, and to convey information regarding state actions to EPA.

Please contact me (jeanne.christie@aswm.org or 207-892-3399) should you wish to discuss these comments, or to plan for future collaboration.

Sincerely,



Jeanne Christie, Executive Director

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ASWM Board of Directors