Re: Comments on repeal, replacement or modifications to EPA Regulations

The Association of State Floodplain Managers is responding to a request by the Environmental Protection Agency for comments on the repeal, replacement or modification of existing regulations in accordance with Executive Order 13777. ASFPM is a national professional non-profit representing 17,000 flood risk managers throughout America who support the use of science and sound public policy to reduce flood losses and protect federal taxpayers. Our members work in local, state and private sector to reduce flood damage and loss of life, as well as protecting those natural systems that help reduce flooding and provide our natural resources.

ASFPM is very concerned in broad reductions in EPA regulations. These regulations are designed to protect the health of safety of all citizens. By protecting our natural resources, we use natural systems to store and convey floodwater. When these resources are lost, flood levels increase, as does the threat to citizens and all federal taxpayers. Flood damage far exceed $10 billion each year, and as sea level rises and storms intensify, the damage increases.

We are especially concerned with Section 404 of the CWA, which like many components of the Clean Water Act, regulates dredge and fill activities in wetlands and other waters. Successful application of this section has relied on cooperative federal/state/tribal collaboration for the past 40 years. Dredge and fill activities occur primarily at the land/water interface, so multiple programs are involved, including state land use and floodplain regulations, and state and federal water regulations. Over the past decades, numerous agreements among state, tribal, local and federal agencies have been developed to ensure that these closely aligned programs are 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.

ASFPM Recommendations:

EPA should only consider the repeal, replacement or modification of federal regulations within the context of its application in collaboration with other federal, state/tribal and local agencies. Too often, some only consider these rules in the narrower view of the language of an individual regulation. Furthermore, when parallel changes in the federal budget and provision of funds for federal and state programs are impacted, this complexity should also be taken into account.

States, tribes, the 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 federal agencies, the majority of these decisions are typically made within a few weeks – a testimony to the effectiveness of the regulatory mechanisms that has evolved and been adjusted over time.
A major modification of key components of federal regulations may destabilize the carefully balanced coordination of agencies and programs, with unintended consequence of significantly disrupting, rather than enhancing, the efficiency and effectiveness of resource regulations. Review and approval of a proposed action impacting water resources may well be delayed significantly if understanding and collaboration among state, tribal, local and federal programs are uncertain.

Over the years a number of federally-financed incentive programs such as CWA Section 319 (h) were developed to provide an alternative to more regulations that might otherwise be required to address pollution from agricultural and urban sources. These have become an important, although indirect component, of the interwoven federal, state/tribal, and local regulatory mechanisms. Loss of funding for these programs will 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.

**Clarification of assumable waters under Section 404.** Under CWA Section 404, many but not all, Waters of the United States decisions may be delegated to a qualified state or tribe. However, only Michigan and New Jersey have assumed the program. A 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. In addition, a lack of a dedicated federal funding source for state-assumed programs, especially for smaller states, is a barrier.

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

**Technical assistance and funding to states to support program development is critical.** Many states and tribes that are unable to assume full Section 404 authority can nonetheless play a major role in parts of the regulatory process. These include: (1) collaborating with the Corps to develop Regional General Permits that address the specific needs of a state to expedite similar categories of activities; (2) review of proposed Corps permit actions through CWA Section 401 Water Quality Certification Programs and Coastal Management Programs; and (3) 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.

**Technical support and funding to state wetland programs is important and essential to develop assessment methods, improve mitigation methods, expand the use of Geographic Information Systems (GIS) and related technology that can expedite the identification and evaluation of stream and wetland resources, is essential for protection of waters of the U.S.** For example, development of remote sensing technology at the federal level provides a nationally-acceptable standard and common database and minimizes the duplication of effort by many states. 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, train staff and public for outreach. WPDG and other
grant programs greatly facilitate the development of state/tribal program capabilities, and progress toward state/tribal and national program goals.

**Actions on CWA Jurisdictional Rule and alternative means of regulatory reform.** ASFPM recognizes there will be actions likely to result in repeal, replacement or modification of the 2015 rule. We appreciate the steps already initiated by EPA and the Department of Army to collaborate with states and tribes in regard to this rule, and again offer our ongoing support to EPA.

ASFPM does recommend to EPA and the Corps that alternative forms of “regulatory reform” beyond rulemaking be considered to address areas of ongoing uncertainty in CWA jurisdiction. America has very diverse wetlands and other aquatic resources, as well as a plethora of land use practices that impact these resources. This may require development of regional approaches since it is extremely difficult to define 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. EPA and the Corps should work with states and tribes 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). Also, the regionalization of wetland delineation criteria has been carried out in recent years.

EPA regulations on all aspects of water are critically important for the economy, environment and community resilience. Each rule or regulation has been developed to address a need for one of those purposes in the nation. Any revision to those regulations must go through a similar and thorough process. To do otherwise would be a disservice to our citizens, especially future generations.

ASFPM appreciates the opportunity to provide comments on this important issue during its early stages. We trust the EPA and Corps will continue to coordinate with us during the entire process. Please contact me with any questions or concerns at 608 828-3000 or cberginnis@floods.org or Larry Larson larry@floods.org.

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