



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

December 13, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Office of Policy Regulatory Reform
Mail Code 1803A
1200 Pennsylvania Avenue NW
Washington, DC 20460

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

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FL Dept. of Environmental Protection

Re: Docket ID No. EPA-HQ-OW-2017-0644

Dear Mr. Pruitt and Mr. Lamont:

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to the November 22, 2017 *Federal Register* Notice regarding “**Definition of Waters of the United States**” – **Addition of an Applicability Date to 2015 Clean Water Rule**. We are pleased to convey our comments to the Environmental Protection Agency and the Department of the Army.

As a non-profit representative of states and tribes engaged in protection and management of wetlands and other waters, including state involvement in dredge and fill programs such as §404 of the Clean Water Act (CWA), we have previously commented in response to multiple *Federal Register* notices all related to revocation, replacement, and now delayed implementation of the 2015 Clean Water Rule. Our objective throughout these comments has been to offer a pragmatic perspective based on the role of the states in delivering a practical, transparent, science based, and timely regulatory program to permit applicants, while also providing adequate protection of essential water resources. The states and tribes have worked positively with your agencies over several decades to develop effective approaches to meet these goals.

We are, however, deeply concerned that this proposed rule would not achieve the stated goal of avoiding confusion, but rather would have the unintended consequence of further delaying the achievement of regulatory predictability and timely permit decisions regarding the definition of jurisdiction under the CWA. The publication of three distinct but interdependent rulemakings with overlapping timelines

addressing the same jurisdictional rule is creating significant confusion rather than providing clarification. In addition, ongoing decision-making in the U.S. Supreme Court and - depending upon that decision - in lower courts, is multiplying the level of uncertainty. For this reason, we believe that the proposed delay in implementation of the 2015 Clean Water Rule regardless of the legal outcome may be premature.

This proposal is almost certain to result in yet another layer of legal challenges, especially given that the U.S. Court of Appeals in the D.C. Circuit has previously blocked a similar rule suspension related to standards for control of methane and other pollutants, indicating that such a delay is “tantamount to amending or revoking a rule”. Accordingly, any amended or revoked rule must be justified on a scientific and economic basis. Given pending and potential legal challenges, we anticipate that multiple interrelated legal actions are likely to transpire in multiple courts nationwide, over an extended period.

Because of the apparently inevitable delay in clarification of the rule, we repeat our recommendations regarding development of interim *programmatic* measures to improve and clarify components of the jurisdictional definition, prior to resolution of legal challenges and/or promulgation of a new rule. ASWM made recommendations in this regard in our letter to you, dated September 11, 2017, commenting on the “Step One” rule. The pertinent section of that letter is attached for your reference.

It is possible that ASWM’s concerns regarding the current proposal of the agencies could be somewhat alleviated by further definition of the meaning and impact of an “applicability date”. We understand, based on definitions in a federal document drafting handbook, that the term applicability date is the same as a compliance date which would – for example – define when an individual NPDES permit holder under §402 of the CWA would be expected to comply with a new standard. Such a date has no possible meaning in the context of §404 of the CWA, given that a holder of a dredge and fill permit cannot “come into compliance” at a later date after construction is completed, since this would potentially require “un-building” or removing the completed construction. We would welcome clarification of the meaning of the federal agencies in the present context.

ASWM remains committed to supporting the actions of both federal and state agencies with responsibilities for issuance of §404 permits - whether directly or through programmatic permits, §401 state water quality certification and/or CZMA consistency reviews – and equally to providing a timely, scientifically, and legally valid decision to those who apply for such permits. We strongly urge the EPA and the Department of Army to move expeditiously to reach a final decision regarding the Waters of the U.S. Rule. Further, ASWM recommends the avoidance of actions that result in unintended consequences and are unlikely to provide both environmental and regulatory predictability, and consideration of interim programmatic measures to improve permitting actions on the ground.

In closing, we appreciate your continued coordination with the states and tribes and their representative organizations. We agree with your stated goal of fostering cooperative federalism. For the members of ASWM, cooperative federalism is more than a good process; it must also result in a good rule, one that achieves the publicly supported water quality and conservation goals of the CWA.

While these comments have been prepared with input from the ASWM Board of Directors to provide a cross-sectional viewpoint of the membership, they do not necessarily represent the views of all individual states and tribes. We also encourage you to seriously consider the comments of individual states and tribes and other state associations. We will continue to assist in informing the states and tribes of development of a rule defining Waters of the U.S., and will as

always be pleased to provide your staff with such information as we have available. Please do not hesitate to contact me if it would be helpful to discuss these comments.

Sincerely,

A handwritten signature in black ink that reads "Jeanne Christie". The signature is written in a cursive, flowing style with a large initial "J".

Jeanne Christie
Executive Director

ATTACHMENT

CC: Donna Downing, USEPA, OWOW
Stacey Jensen, USACE
ASWM Board of Directors