

Comments from 88 Conservation Organizations Review of Existing Rules, Docket Number COE-2017-0004

October 18, 2017

Via Federal eRulemaking Portal at <http://www.regulations.gov>

Lt. General Todd Semonite
Commanding General and Chief of Engineers
U.S. Army Corps of Engineers
441 G St. NW
Washington, DC 20314-1000

Re: United States Army, Corps of Engineers; Subgroup to the DOD Regulatory Reform Task Force, Review of Existing Rules, Docket Number COE-2017-0004, 82 Fed. Reg. 33470 (July 20, 2017)

Dear Lt. General Semonite:

The undersigned 88 organizations working to ensure that America's water policies and projects are environmentally and economically sound appreciate the opportunity to comment on the above-referenced Federal Register Notice for the Review of Existing Rules (the "Notice").

For the reasons discussed in these comments, our organizations urge the U.S. Army Corps of Engineers ("Corps") to retain its environmentally-focused regulations and reject any requests to repeal, replace, or modify those regulations based on the criteria in the Notice. The Corps should instead focus its resources on ensuring robust compliance with its environmental regulations.

Detailed Comments

Our organizations urge the Corps to retain the agency's environmentally-focused regulations outlined below for at least the following four reasons.

First, regulations that advance the effective implementation of the nation's environmental laws produce enormous benefits to the public by helping to protect the nation's rivers, coasts, and wetlands. These natural systems help protect communities from storms and floods, ensure clean and healthy drinking water, provide critical wildlife habitats, and support vibrant outdoor and resource-based economies.

Wetlands act as natural sponges, storing and slowly releasing floodwaters after peak flood flows have passed, and coastal wetlands buffer the onslaught of hurricanes and tropical storms. Restoring a river's natural flow and meandering channel, and giving at least some floodplain back to the river, slows down floodwaters and gives the river room to spread out without harming homes and businesses. A single

acre of wetland can store one million gallons of floodwaters.¹ Just a one percent loss of a watershed's wetlands can increase total flood volume by almost seven percent.²

A recent study found that by reducing flood heights, coastal wetlands avoided more than \$625 million in flood damages in the 12 coastal states affected by Hurricane Sandy. Flood damages were reduced by an average of 22% in more than half the zip codes that lay in Sandy's path. In "the four states with the greatest wetland coverage—Maryland, Delaware, New Jersey, and Virginia—wetlands are estimated to have reduced flood damages between 20-30%."³

Healthy rivers, floodplains, and wetlands provide extensive recreational opportunities such as boating, fishing, and bird watching that help drive the nation's economy. The outdoor recreation economy, which relies on healthy rivers, coasts, and wetlands generates \$887 billion in consumer spending each year and supports 7.6 million American jobs. The U.S. Fish and Wildlife Service reports that:

"In 2016, more than 101 million Americans – a staggering 40 percent of the U.S. population – participated in some form of fishing, hunting or other wildlife-associated recreation such as birdwatching or outdoor photography. And in doing so, we spent an estimated \$156.3 billion on equipment, travel, licenses and fees. These expenditures represent 1 percent of the nation's Gross Domestic Product – creating and supporting thousands of jobs and communities across the nation."⁴

Healthy coasts "supply key habitat for over 75% of our nation's commercial fish catch and 80-90% of the recreational fish catch."⁵ Healthy rivers are equally important to these fisheries and the economic benefits they provide. For example, commercial fishing in the Apalachicola River and Bay in Florida contributes \$200 million annually to the regional economy and directly supports up to 85 percent of the local population. Recreational fishing in the Apalachicola River and Bay contributes \$191 million to the local economy each year. In 2016, more than 35.8 million Americans spent "spent \$46.1 billion on trips, equipment, licenses, and other items to support their fishing activities."⁶

Second, the repeal, replacement, or modification of environmental regulations based on the criteria in the Notice will undermine important protections for the nation's waters. Changes to the Corps' National Environmental Policy Act (NEPA) and Clean Water Act implementing regulations could also substantially undermine the public's ability to provide input into Corps projects, programs, and permits that can have profound impacts on their lives and livelihoods. As more than 75 case studies compiled by the Natural

¹ Environmental Protection Agency, *Wetlands: Protecting Life and Property from Flooding*, May 2006 (EPA 843-F-06-001) (available at <https://www.epa.gov/sites/production/files/2016-02/documents/flooding.pdf>).

² Demissie, M. and Abdul Khan. 1993. "Influence of Wetlands on Streamflow in Illinois." Illinois State Water Survey, Contract Report 561, Champaign, IL, Table 7, pp. 44-45.

³ Siddharth Narayan, Beck M. et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, Scientific Reports, 7:94963, August 31, 2017 (DOI:10.1038/s41598-017-09269-z) (available at <https://www.nature.com/articles/s41598-017-09269-z.pdf>).

⁴ U.S. Fish and Wildlife Service, 2016 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: National Overview, Issued August 2017.

⁵ Restore America's Estuaries, *Jobs & Dollars BIG RETURNS from coastal habitat restoration* (September 14, 2011) (http://www.estuaries.org/images/81103-RAE_17_FINAL_web.pdf).

⁶ U.S. Fish and Wildlife Service, 2016 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: National Overview, Issued August 2017.

Resources Defense Council make clear, meaningful environmental review and public participation under NEPA make projects better while also protecting the environment.⁷

Projects planned and constructed prior to enactment of the National Environmental Policy Act, and the Act's requirement to give full consideration to agency and public comments, often produced devastating impacts. For example, construction and operation of the Mississippi River Gulf Outlet (MRGO) in Louisiana destroyed more than 27,000 acres of coastal wetlands and damaged more than 600,000 acres of coastal ecosystems surrounding the Greater New Orleans area. During Hurricane Katrina, the MRGO funneled Katrina's storm surge into New Orleans, resulting in devastating flooding in St. Bernard Parish and the lower Ninth Ward. Congress ultimately closed the project and authorized restoration, which still must be funded and implemented.

Third, the repeal, replacement, or modification of federal environmental regulations based on the criteria in the Notice would violate clear legislative directives. These include the directive against arbitrary and capricious decision making established by the Administrative Procedure Act (5 U.S.C. § 706(2)(A)) and directives established by NEPA, the Clean Water Act and other federal environmental laws. The Corps may not properly withdraw or modify regulations promulgated under those laws based on the criteria established in the EO.

Fourth, the Notice provides no information on the regulations listed in the Notice, and no information on the benefits provided to the nation when those regulations are followed. The Notice also fails to identify the type of supporting information that would be helpful to the Corps in analyzing any comments submitted in response to the Notice. As such, the Notice could be improperly interpreted to be soliciting input based on personal animus to long-established regulatory requirements.

Eliminating or weakening regulations that help ensure important protections for aquatic resources, would harm the nation's rivers, coasts, and wetlands and the fish, wildlife and outdoor recreation economies that rely on those vital resources. Such actions would also add significant burdens to individuals, communities, and federal taxpayers through increased flood and storm damages, federal disaster relief payments, community dislocation, business losses and disruptions, and medical expenses.

Instead of repealing, replacing, or modifying properly promulgated environmental regulations based on the criteria in the Notice, the Corps should focus its resources on ensuring robust compliance with those regulations, including the following regulations which provide vital protections to the nation's waters:⁸

⁷ See <https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories>.

⁸ Many of our organizations do support strengthening aspects of the Corps' environmental regulations for reasons that are fundamentally unrelated to the criteria established in the Notice. For example, many organizations support amending the overly broad definition of fill material (33 CFR 323.2) that allows the dumping of untreated mining wastes directly into America's streams and lakes, destroying them for good. This definition, which was established in 2002, is inconsistent with the Clean Water Act's purpose of ending the use of lakes, rivers, streams and wetlands as waste dumps. The Environmental Protection Agency has concluded that the disposal of mining overburden from mountaintop coal mining buries vital habitat and transforms the buried areas into sources of pollution that add to the contamination of downstream waters, with substantial adverse impacts to fish and wildlife.

- **Definition of Waters of the United States, 33 CFR Part 328:** The definition of “waters of the United States” (section 328.3) was revised in 2015 to clarify and restore much—but not all—of the historic scope of the Clean Water Act to protect the small streams and wetlands that provide drinking water to 117 million Americans and critical habitat to fish and wildlife. The waters protected by this revision (typically known as the Clean Water Rule) have a significant impact on the quality of larger downstream rivers, bays, and lakes; provide important flood damage reduction benefits; and provide critical fish and wildlife habitat, including spawning grounds for fish and vital nesting habitat for the majority of waterfowl in North America.

The Clean Water Rule is critical to the clean waters and healthy wetlands that form the backbone of the nation’s \$200 billion hunting and fishing economy, and 83% of the 47 million Americans who hunt and fish each year support applying the Clean Water Act to smaller streams and wetlands. The economic analysis of the Clean Water Rule prepared by the Corps and the Environmental Protection Agency demonstrates that the benefits of the Clean Water Rule exceed the costs under all scenarios. Benefits are projected to range from \$338.9 to \$572.3 million per year, while costs are projected to range from \$158.4 to \$465 million per year.⁹

- **Procedures for Implementing NEPA, 33 CFR Part 230:** These regulations establish the general procedures that the Corps must follow to comply with NEPA. As discussed above, robust NEPA review and meaningful public participation have a long history of improving project plans while also protecting the environment. The Corps’ NEPA implementing regulations advance these goals, including by directly referencing important, long-standing NEPA regulations established by the Council on Environmental Quality. The Corps’ NEPA implementing regulations also properly require monitoring of mitigation committed to in a Record of Decision (a requirement also established for civil works projects by 33 U.S.C. § 2283(d)).
- **Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR Part 332:** These regulations establish important requirements to help ensure that compensatory mitigation will be properly planned, carried out, and monitored to achieve ecological success. Compensatory mitigation provides an important safety net in cases where all practicable steps have been taken to avoid and minimize adverse impacts to aquatic resources. Many federal and non-federal activities are premised on the commitment to effectively compensate for stream and wetland damages that cannot be avoided, and the compensatory mitigation regulations help ensure that these commitments will be met.
- **Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 CFR Part 323:** These regulations establish the general policies, practices and procedures that the Corps must follow in determining whether to issue permits under section 404 of the Clean Water Act, including establishing the Corps’ “public interest test.” The “public interest test” prohibits the Corps from issuing a Clean Water Act 404 permit that “would be contrary to the public interest” even if that permit can pass muster under the Clean Water Act 404(b)(1) Guidelines.

⁹ U.S. Environmental Protection Agency and U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 2015).

- **Permits for Ocean Dumping of Dredged Material, 33 CFR Part 324:** These regulations establish the general policies, practices and procedures that the Corps must follow in determining whether to issue Ocean Dumping permits under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972.
- **Permits for Dams and Dikes in Navigable Waters of the United States, 33 CFR Part 321:** This regulation establishes special policies and procedures for evaluation of permits for the construction of dikes or dams under section 9 of the Rivers and Harbors Act of 1899. Among other things, this regulation requires Congressional approval for a section 9 permit in an interstate waterbody, and approval of the state legislature for such a permit in an intrastate water body. These extra layers of approval help ensure comprehensive evaluation of dams and dikes that can have significant adverse impacts on the environment and public safety.
- **Processing of Department of the Army Permits, 33 CFR Part 325:** These regulations establish the policies and procedures that the Corps must use when processing Corps permits, and include the NEPA Implementation Procedures for the Permitting Program.

At least one commenter¹⁰ has recommended amending these regulations to exempt all projects impacting fewer than 5 acres of waters from permitting requirements. Our organizations strongly oppose this recommendation which would violate clear legal requirements, including those applicable to the Nationwide Permit Program, and result in extensive damage to the nation's waters. Increasing the acreage thresholds in the already-lax Nationwide Permits would clearly be unlawful as Nationwide Permits may be authorized only for activities that are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." 33 U.S.C. § 1344(e).

- **Public Hearings, 33 CFR Part 327:** These regulations establish important rules for granting requests for public hearings, for conducting those hearings, and for ensuring that information provided during such hearings are included in the administrative record. Public involvement in Corps decision making leads to better and less environmentally damaging projects and permits. Public involvement is greatly facilitated by public hearings that allow members of the public to speak directly to Corps decision makers.
- **Factors to be Considered in the Evaluation of Army Corps of Engineers Dredging Projects Involving the Discharge of Dredged Material into Waters of the United States and Ocean Waters, 33 CFR Part 336:** These regulations clarify the policies and procedures that must be followed in approving Corps dredging plans. Among other important items, these regulations make clear that the Corps must obtain a State Clean Water Act 401 water quality certification for such activities, and where applicable, a State Coastal Zone Consistency Determination.

¹⁰ Comments of Dow Chemical Company on United States Army Corps of Engineers; Subgroup to the DoD Regulatory Reform Task Force, Review of Existing Rules COE-2017-0004 at 3 (September 18, 2017) ("Trigger thresholds need to be increased to require permitting. Dow recommends a reversion to 5 acre trigger.")

Conclusion

Our organizations urge the Corps to retain its environmentally-focused regulations and reject any requests to repeal, replace, or modify those regulations based on the criteria in the Notice. The Corps should instead focus its resources on ensuring robust compliance with its environmental regulations. Please do not hesitate to contact Melissa Samet at the National Wildlife Federation (415-762-8264, sametm@nwf.org) if you have questions regarding these comments.

Sincerely,

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