Owen McDonough, PhD
Environmental Policy Program Manager
omcdonough@nahb.org

October 18, 2017

Headquarters
U.S. Army Corps of Engineers
Attn: CECW-CO-N (Ms. Mary Coulombe)
441 G Street NW
Washington, DC 20314-1000

**RE: Docket ID COE-2017-0004**

Dear Ms. Coulombe:

On behalf of the National Association of Home Builders ("NAHB"), I am pleased to submit the following recommendations regarding U.S. Army Corps of Engineers ("Corps") regulations, guidance, and policies that may warrant consideration as the Agency formulates its response to Executive Order 13777, "Enforcing the Regulatory Reform Agenda."[1] These comments are submitted in response to the Corps' July 20, 2017, Federal Register notice *United States Army, Corps of Engineers; Subgroup to the DoD Regulatory Reform Task Force, Review of Existing Rules*.[2]

NAHB is a federation of more than 700 state and local associations representing more than 140,000 member firms nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Collectively, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new housing units within the U.S. each year. Due to the wide range of activities they conduct on a regular basis to house the nation's residents, NAHB's members are often required to comply with various Corps mandates to meet their business goals. Of particular interest to builders and developers are the regulations, guidance, and policies related to the Corps' Clean Water Act ("CWA") Section 404 regulatory program which requires NAHB's members to obtain permits from the Corps and mitigate impacts when their activities result in the discharge of dredged or fill material into waters of the United States.[3]

The number and breadth of the Corps' rules and policies often impose significant costs, delays, and other challenges that not only impact the ability of NAHB's members' businesses to thrive and grow, but may also negatively affect housing affordability and stifle economic development. As such, NAHB is pleased to provide the following suggestions and is hopeful that the Administration's focus on regulatory reform and reducing burdens will provide meaningful relief for the nation's home building industry.

[1] 82 Fed. Reg. 12,285 (March 1, 2017).
[2] 82 Fed. Reg. 33,470 (July 20, 2017).
[3] 33 U.S.C § 1344.

## I. Background

Reducing unnecessary regulatory burdens, promoting economic growth and job creation, and minimizing the impacts of government actions on small businesses are central tenets of President Trump's agenda. To effectuate these goals, President Trump signed Executive Order ("E.O.") 13771, "Reducing Regulation and Controlling Regulatory Costs," on January 30, 2017.[4] Among other things, for each new regulation issued, E.O. 13771 directs the agencies to identify at least two prior regulations to be modified or eliminated such that the net cost of the regulation is zero. Recognizing the challenges associated with this Order's implementation, on February 24, 2017, the President signed E.O. 13777, "Enforcing the Regulatory Reform Agenda," which provided additional guidance as to how the agencies are to "alleviate unnecessary regulatory burdens" on the American people.[5]

Section 3(a) of E.O. 13777 requires each federal agency to establish a "Regulatory Reform Task Force" that is charged with evaluating existing regulations and "making recommendations to the agency head regarding their repeal, replacement, or modification." The term "regulation" is defined to include any rules, regulations, or policies that "establish an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedures or practice requirements of an agency."[6] As such, "regulation" can be broadly interpreted to include regulations, policies, guidance documents, and even federal programs that prescribe procedures or practices that either the Corps or regulated entities must follow to comply with agency requirements. Importantly, when evaluating existing regulations and making recommendations for repeal, replacement or modification, each federal agency is also directed to ensure their respective Regulatory Reform Task Forces "seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations including State, local and tribal governments, small businesses, consumers, non-governmental organizations and trade associations."

Directing federal agencies to periodically review existing regulations for potential repeal or modification and asking for public input is not a new concept. The idea of presidentially-directed regulatory review was introduced by President Clinton in 1993 through E.O. 12866, "Regulatory Planning and Review,"[7] and most succeeding presidents have tweaked these provisions or added new ones to ensure systematic and periodic review of most regulations. In addition, Congress, under Section 610 of the Regulatory Flexibility Act, requires all federal agencies to periodically review existing regulations.[8] NAHB does not view these two retrospective review processes as redundant or duplicative. Rather, they underscore the importance both Congress and the Administration place on ensuring federal regulations, policies, and programs remain relevant, efficient, and accomplish their stated objectives, while imposing the least possible burdens upon the regulated community. Unfortunately, while compelling in concept, these efforts, to date, have resulted in arguably minimal improvements for the small businesses that feel the brunt of the regulatory bite.

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[4] 82 Fed. Reg. 9,339 (February 3, 2017).
[5] 82 Fed. Reg. 12,285 (March 1, 2017).
[6] E.O. 13771 at Section 4.
[7] 58 Fed. Reg. 51,735 (October 4, 1993).
[8] 5 U.S.C. § 610.

## II. The Need for Reform

The burdens confronting the U.S. housing market, particularly those affecting the small businesses that comprise the vast majority of residential construction companies, are real and widespread. They include an increasingly tight labor market, lack of available financing for new construction projects, cost impacts from trade sanctions on lumber prices, declining housing production levels, and declined home values and their collective impact on remodeling activity. Furthermore, residential construction is one of the most heavily regulated industries in the country. In these economic times, the decrease in production, loss of jobs within the industry, and other factors point to the need to reduce the regulatory burden on this vital industry.

The majority of NAHB's members run small businesses that construct ten or fewer homes each year and/or have fewer than twelve employees. Small businesses are the engine of growth for the U.S. economy. At the same time, they are disproportionately impacted by federal regulations, underscoring the need for, and importance of, conducting meaningful reform to reduce these onerous requirements. For example, residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners.

NAHB estimates that, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.[9] The significant cost of regulations reflected in the final price of a new home has a very practical effect on housing affordability. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by government regulations.[10] Given the outsized impact of these regulations on the final price of a newly built single-family home, it is critical that each existing regulation, whether found at the federal, state, or local level, actually addresses the problem it was created for, avoids duplication with identical or similar regulation, and is designed in a manner to impose the least possible burden on the regulated entities. Further, because the cumulative burdens associated with layers of regulations can be overwhelming, the federal agencies must also be cognizant of the challenges that will continue to remain if the cumulative impacts from complying with regulations at all levels of government are not fully considered and addressed.

In an effort to provide necessary relief to the residential construction industry, NAHB strongly urges the Administration to use this opportunity to make housing a priority. By focusing its retrospective review and oversight responsibilities for new rules on those policies that impact builders and developers, this Administration has an opportunity to create jobs and restore a

[9] Paul Emrath. *Government Regulation in the Price of a New Home.* National Association of Home Builders. Special Study for Housing Economics. (May 2016). Available online: http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.358516237.1489032231.

[10] Natalia Siniavskaia. *14 Million Households "Priced Out" by Government Regulation*. National Association of Home Builders. Eye On Housing. (May 12, 2016). Available online: http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/

broken segment of the economy. By examining the cumulative impacts and burdens placed by myriad regulations – many of which are duplicative, overlapping, or contrary to one another – along with assessing their performance, NAHB is certain that the Agency will find sufficient room for efficiencies and streamlining.

In the following comments, NAHB provides recommendations for improving the Corps' regulatory program and accomplishing the Administration's regulatory reform objectives. Our comments first describe steps the Corps can take to ensure the Environmental Protection Agency ("EPA") does not unnecessarily interfere with the Corps' operation of the CWA Section 404 program. We then offer support for the Corps' ongoing actions to rescind the 2015 "Clean Water Rule," re-codify the *status quo*, and ultimately issue a new, clear, legally defensible definition of "waters of the United States." Given the importance of the Corps' CWA Section 404 program for NAHB's members, we provide specific recommendations the Corps should take to improve its 404 program. Finally, we recommend that any efforts by the Corps to implement E.O. 13690 and the Federal Flood Risk Management Standard (FFRMS) must cease in response to President Trump's E.O. 13807, which rescinded E.O. 13690.

## III. The Corps must have Authority to Run its Clean Water Act Section 404 Program without EPA Interference

Section 404 of the CWA recognizes the limited role of the EPA relative to the Corps in regulating the discharge of dredged or fill material into "waters of the United States."[11] The Act gives the Corps, not EPA, the primary authority to issue 404 permits and make decisions regarding the scope of federal jurisdiction. Over time, however, EPA has asserted undue influence on the Corps' 404 permitting process, creating inconsistency, delay, and uncertainty for regulators and land owners alike. NAHB provides the following recommendations to minimize EPA interference in the Corps' implementation of the CWA Section 404 program.

### *A. The Corps should Rescind or Revise the Civiletti Memorandum*

In 1979, U.S. Attorney General Benjamin Civiletti signed a memorandum entitled "Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act" ("Civiletti Memo"), giving EPA the final word on CWA § 404.[12] Regrettably, Civiletti's position is not supported by the legislative history or the text of the Act.[13] Additionally, the Civiletti Memo makes little sense given the Corps' expertise in administering the day-to-day operation of the 404 program. The Corps has decades of experience operating the 404 program and has conducted hundreds of thousands – perhaps millions – of CWA jurisdictional determinations and issued countless 404 permits over the years. EPA does not have this experience and does not make jurisdictional determinations nor issue permits. Yet, the Civiletti Memo allows EPA to delay, block, or second-guess the Corps' expertise in managing the 404 program. This creates regulatory delay, inconsistency, and uncertainty.

[11] 33 U.S.C. § 1344.
[12] Benjamin Civiletti, 43 Op. Att'y. Gen. 197 (1979).
[13] The Civiletti Memo itself states that "no specific provision of the [CWA] or specific statement in its legislative history speaks directly to the question" of which agency has the final administrative authority under CWA § 404.

To address this, the Corps should revise or rescind the Civiletti Memo to confirm that the Corps has ultimate administrative authority to operate the 404 program, issue permits, and make jurisdictional determinations under the CWA. Recognizing the Corps' authority over its own 404 program would promote consistency and certainty, as permit holders could rely on a jurisdictional determination or 404 permit issued by the Corps without having to wonder if EPA will insert itself into the decision making process and undermine the Corps' positions.

The Civiletti Memo is simply an interpretation of the Act issued by a former Attorney General and lacks the binding force of Law. As such, the Administration can rescind or replace it with an interpretation that is more practical and better in line with the structure of the CWA. NAHB strongly encourages the Corps to do so.

### *B. The Corps should Coordinate with EPA to Rescind or Revise the Section 404(q) Memorandum of Agreement*

In 1992, the Corps and EPA entered into a CWA Section 404(q) Memorandum of Agreement ("MOA"), which establishes time frames and a process for resolving issues and reviewing permits under Section 404.[14] NAHB's members have experienced permit processing challenges and delays when EPA – using the MOA's elevation procedures – has inserted itself into the Corps' Section 404 permitting process often without justification.

The Section 404(q) MOA requires the EPA Regional Office to notify the Corps District Engineer in writing during the comment period if EPA believes permitted activities *may* result in substantial and unacceptable impacts to aquatic resources of national importance ("ARNIs"). The EPA Region must further notify the District Engineer within 25 days of the close of the comment period if EPA believes the project will have substantial and unacceptable impacts to ARNIs. The notification must explain why such impacts will occur, why the permit needs to be modified or denied to protect ARNIs, and how EPA came to its conclusions. There are several problems with this. First, although ARNIs are supposed to be of national importance, EPA often declares a resource an ARNI so that it may slow the process and use the elevation procedure. Second, even after the District Engineer makes a permit decision, the EPA Region may still insert itself into the process by elevating the issue via a request for review by the Assistant Secretary of the Army for Civil Works ("ASACW") – adding up to 30 additional days of review. Following ASACW review, EPA may still initiate proceedings under CWA Section 404(c), which prevent the permit from being issued until EPA concludes its review and reaches its final decision.

The 404(q) review and elevation process is convoluted and can add months to the 404 permitting process. As such, it runs contrary to the very purpose of CWA Section 404(q), which is to minimize delays in issuing permits.[15] And like the Civiletti Memo, it conflicts with the Act's

[14] U.S. EPA and U.S. Army Corps of Engineers. Clean Water Act Section 404(q) Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army. August 11, 1992.
[15] *See* 33 U.S.C § 1344(q): ". . . the [Assistant] Secretary [of the Army for Civil Works] shall enter into agreements with the [EPA] Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal *agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits* under [Section 404]" (emphasis added).

structure that recognizes the Corps as the proper agency to run the 404 program. Yet, at the end of the day, EPA regularly uses the 404(q) MOA to slow or even block permits. This inappropriate use of the MOA is unacceptable.

To resolve these issues, the Corps should coordinate with EPA to rescind or revise the MOA to reduce or eliminate EPA's undue influence on the 404 permitting process. Otherwise, the MOA will continue to be used as a means to impose unnecessary, burdensome, and duplicative requirements on permit applicants, causing delay and undermining the Corps' authority to operate its 404 program.

### *C. The Corps should Work with EPA to Limit EPA's Involvement in Environmental Impact Statements*

In addition to addressing the Civiletti Memo and the 404(q) MOA, the Corps should work with EPA to limit EPA's involvement in other agencies' National Environmental Policy Act ("NEPA") reviews. Under current EPA policy, when the Corps (or any other federal agency) issues a Draft Environmental Impact Statement ("DEIS") in connection with a project, EPA reviews the DEIS and "rates" the environmental impacts of the proposal and the adequacy of the DEIS. EPA ratings of the environmental impacts range from "Lack of Objections" to "Environmentally Unsatisfactory," and EPA DEIS ratings include "Adequate," "Insufficient Information," and "Inadequate." If EPA has unresolved concerns with the impacts of the proposal or the DEIS itself, it can elevate it to the Council on Environmental Quality ("CEQ") to be resolved.

EPA asserts its authority to review DEISs is provided by NEPA, CEQ regulations at 40 CFR §§ 1500 - 1508, Clean Air Act Section 309, and CWA Section 404. While these authorities do allow EPA to review and comment on NEPA documents, they do not require the rating system or review process EPA has created.

EPA review of Corps NEPA reviews often causes significant project delays and duplication. What's more, it is nonsensical that EPA should *rate and review* DEISs and yet it has no experience or expertise *writing* DEISs. The Corps should work with EPA to review its policy to limit EPA's involvement in other agencies' NEPA reviews.

## IV. The Corps and EPA Should Rescind the 2015 "Clean Water Rule" and Redefine WOTUS in a Future Rulemaking

On February 28, 2017, President Trump signed Executive Order 13778 "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States,'" directing the Corps and EPA to review the 2015 "Clean Water Rule" ("2015 Rule") and "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law."[16] Section 3 of the Order calls upon the Agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with" Justice Scalia's opinion in *Rapanos*."

[16] 82 Fed. Reg. 12,497 (March 3, 2017).

The Corps and EPA are planning to use a two-step process to develop a new "waters of the United States" definition. On July 27, 2017, the Agencies proposed step one to rescind the 2015 Rule and recodify the definition of "waters of the United States" that was in place prior and that is currently being implemented.[17]

NAHB supports rescinding the 2015 Rule because it ignores the intent of Congress and impermissibly expands federal jurisdiction of the CWA, is inconsistent with Supreme Court precedent, usurps States' authority to regulate non-navigable waters, and fails to provide needed clarity and certainty for both regulators and the regulated community. Rescission of the 2015 Rule and recodification of the pre-existing regulations will return the Code of Federal Regulations to the regulations that existed prior to the 2015 Rule and reflect the current legal regime under which the Agencies are operating pursuant to the 6th Circuit's October 9, 2015, nationwide stay order.[18] Additionally, NAHB acknowledges that while rescinding the 2015 Rule and the corresponding recodification of the pre-existing regulations is necessary in the near term for clarity and regulatory certainty, there are many issues with the pre-existing regulations and guidance documents that should be addressed in a new rulemaking. As such, NAHB supports a second, future rulemaking to define "waters of the United States" clearly and in a manner consistent with the statute, case law, and principles of cooperative federalism.

## V. The Corps should Improve its Clean Water Act Section 404 Permitting Program

The Corps and EPA jointly administer Section 404 of the CWA, which regulates the discharge of dredged or fill material into waters of the United States, including wetlands. In short, Section 404 requires project proponents to obtain a permit before dredged or fill material may be discharged into a jurisdictional water or wetland.

In addition to taking specific actions to limit EPA interference with the Corps' Section 404 program and rescinding the flawed 2015 "Clean Water Rule," there are various ways in which the Corps can improve its administration and implementation of the dredge and fill permitting program.

### *A. Corps Headquarters should Assert Centralized Control and Oversite over the Regulatory Program*

Home builders and developers rely on permitting programs that are predictable, timely, and consistent. Unfortunately, due in part to the absence of strong oversite and central guidance from Corps Headquarters on important regulatory interpretations, there has been inconsistency among Corps districts as they implement the CWA Section 404 program. These inconsistencies create uncertainty for both regulators and NAHB's members and make it difficult for Corps staff to administer the program and for builders and developers to navigate the permitting process.

Of late, Corps Headquarters often takes a "hands off" approach with its Districts, deferring to district-by-district implementation of key regulations and policies. Contrary to this practice, NAHB believes that Corps Headquarters must establish clear lines of authority to direct the

[17] 82 Fed. Reg. 34,899 (July 27, 2017).
[18] *In re EPA*, 803 F.3d 804 (6th Cir. 2015).

implementation of key Corps regulations and policies. Headquarters should not merely make suggestions to be interpreted and implemented by regulators in the field. Until Corps Headquarters makes this fundamental change, there will continue to be inconsistency, uncertainty, and delay associated with the CWA Section 404 permitting process. To address this, NAHB urges the Corps to implement the following recommendations.

### *i. The Corps should Rescind or Revise Regional Supplements to the 1987 Wetland Delineation Manual*

It is the Corps' responsibility under CWA Section 404 to conduct delineations and verify which waters and/or wetlands are jurisdictional under the Act. The Corps defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[19] To identify and delineate wetlands in particular, the Corps published the "1987 Corps of Engineers Wetlands Delineation Manual" ("the 1987 Manual").[20] The 1987 Manual, intended to be used nationwide, describes the technical guidelines and methods to be used to determine whether an area is a jurisdictional wetland for purposes of Section 404. Specifically, the 1987 Manual requires positive evidence of three parameters to identify a wetland:

1) Hydrophytic vegetation;
2) Hydric soils; and
3) Wetland hydrology.

Over time, there have been several attempts to revise and update the 1987 Manual, but none have been successful. Recognizing the challenges and in an attempt to put an end to the uncertainty surrounding how delineations would be conducted, in 1993, the Energy and Water Development Appropriations Act was passed. It specified, "the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted."[21] Rather than adopting a new manual through the proper rulemaking process, however, the Corps has made a practice of "supplementing" the national 1987 Manual with regional variations.

These "regional supplements" relax the three parameter threshold needed to determine that an area is a jurisdictional wetland and unlawfully expand the Corps' regulatory authority. For instance, the supplement that applies to Alaska uses a standard for determining the growing season that is much more relaxed than the one found in the national manual.[22] In doing so, the Corps has inappropriately expanded its authority over all permafrost across the state. Similarly, in Chapter 5 of the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region and Chapter 5 of the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region, the Corps

[19] 33 C.F.R. § 328.3(b).
[20] U.S. Army Corps of Engineers. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1. January 1987.
[21] Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, 106 Stat. 1315 (1992).
[22] U.S. Army Corps of Engineers, Engineer Research and Development Center. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0). ERDC/EL TR-07-24. September 2007.

can consider areas to be regulable wetlands even if they exhibit only two of the three required criteria.[23] In other words, if hydric soils and hydrophytic vegetation are observed, the Corps is free to presume the presence of wetland hydrology. In doing so, the Corps has disregarded the national standard and expanded its authority over areas not previously considered wetlands under the 1987 Manual. If the supplements are not eliminated or significantly revised, the Corps will continue to unlawfully exert federal jurisdiction over non-wetland features. The permits needed to operate in waters deemed jurisdictional can be prohibitively expensive and time consuming,[24] preventing projects from moving forward and costing jobs.

In response to E.O. 13777 and as the agency with primary authority to conduct jurisdictional determinations under the CWA's Section 404 program, NAHB strongly urges the Corps to eliminate the regional supplements. This could be done by issuing a memorandum from Corps Headquarters stating to all Corps Divisions and Districts that the regional supplements shall not be used to conduct wetland delineations; rather, Corps staff must use the 1987 Manual. NAHB further recommends that EPA and the Corps conduct a formal rulemaking to finalize the criteria used to define jurisdictional wetlands, as required by the 1993 statute.

### *ii. The Corps should Improve Implementation of the 2008 Mitigation Rule*

The Corps' 2008 rule entitled "Compensatory Mitigation for Losses of Aquatic Resources" ("Mitigation Rule") sets standards and criteria for compensatory mitigation for activities authorized by Corps' permits.[25] The Mitigation Rule provides the Corps Districts discretion to apply mitigation requirements to a particular project. While some District-level discretion is appropriate to allow for regional and site-specific conditions and variability, the Corps has allowed individual Districts too much flexibility in interpreting the Rule. This has created significant inconsistencies among the Districts and, in some cases, has resulted in the Districts implementing more stringent standards than the Rule requires.

The following are examples of Corps Districts' inconsistent or problematic implementation of the Mitigation Rule:

- Disregard for the Mitigation Hierarchy and Watershed Approach: According to the Mitigation Rule preamble, the Corps' regulations establish a "hierarchy in § 332.3(b) . . . for selecting the type and location of compensatory mitigation with an explicit preference for mitigation bank credits over advance credits from in-lieu fee programs when appropriate bank credits are available for use."[26] And 33 C.F.R. § 332.3(b)(1) provides,

[23] U.S. Army Corps of Engineers, Engineer Research and Development Center. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0). ERDC/EL TR-10-20. November 2010; U.S. Army Corps of Engineers, Engineer Research and Development Center. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region (Version 2.0). ERDC/EL TR-12-9. April 2012.
[24] *See* David Sunding and David Zilberman. The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Program, 42(1) *Nat. Resources J.* 60 (2002). This study found that it takes an average of 788 days and 271,596 to obtain an individual CWA Section 404 permit and 313 days and $28,915 for a "streamlined" nationwide permit.
[25] 73 Fed. Reg. 19,594 (April 10, 2008).
[26] *Id* at 19,600.

"In general, the required compensatory mitigation should be located within the same watershed as the impact site . . ." Yet, Corps regulatory staff in the Buffalo District took the position that the "watershed approach" codified in the regulation gives them the discretion to require applicants to mitigate in the same 8-digit Hydrologic Unit Code (HUC) watershed. This means that even though impacts were located within the approved geographic service area – which can cover several 8-digit HUCs – of existing, established mitigation banks, Corps staff were requiring applicants to utilize The Nature Conservancy's statewide in-lieu fee program when the proposed impacts were not located in the same 8-digit HUC as the bank. This is inconsistent with the Mitigation Rule regulations at 33 C.F.R. § 332.3. What's more, this is costing permit applicants nearly double for their compensatory mitigation and is diverting revenue from bank sponsors that already had invested millions in the establishment of mitigation banks with the expectation that the Corps, via the Mitigation Rule, would require their use. To avoid future inconsistent application of the Mitigation Rule, the Corps should standardize the watershed approach and preferred mitigation hierarchy among all Districts while still allowing the District Engineer to exercise discretion in certain instances, such as when mitigation options are not financially viable for the project application and aquatic resources would not be lost using an alternative mitigation approach. Supporting this, the Mitigation Rule itself provides "When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the *costs* of the compensatory mitigation project."[27]

- Mitigation for Upland Impacts: Consistent with the limits of Corps' authority under CWA Section 404,[28] the Mitigation Rule explicitly confirms that mitigation can be required only for the impacts of discharges to navigable waters and not impacts to uplands or impacts of non-jurisdictional activities.[29] Nevertheless, contrary to statutory and regulatory authority, some Districts have required mitigation for impacts to uplands or for non-jurisdictional activities. The Corps should clarify that the Districts have no authority to require mitigation for impacts to uplands or those stemming from non-jurisdictional activities.

- Arbitrary Mitigation Ratios: The purpose of compensatory mitigation is to develop long-term self-sustaining wetlands and other waters that offset project impacts. As such, compensatory mitigation is a critical tool in helping the federal government meet the longstanding national goal of "no net loss" of wetland acreage and function. Historically, the Corps has determined the required acreage ratio for mitigation after receiving recommendations from the applicant and the appropriate resource agencies. The Corps

[27] 33 C.F.R. § 332.3(a)(1) (emphasis added).
[28] The CWA limits the Corps' regulatory authority to discharges of pollutant "into the navigable waters," and not discharges into uplands. 33 U.S.C § 1344(a).
[29] *See* 33 C.F.R. § 332.3(a)(1) ("The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable *impacts to waters of the United States* authorized by [Corps] permits") (emphasis added).

would consider the functions and values of the wetlands that might be eliminated or degraded, the functions and values of the proposed mitigation site, and the likelihood of success of the proposed mitigation. Based on all of that information, the Corps would establish the mitigation ratio. Unfortunately, oftentimes the Corps districts have arbitrarily established these ratios, thereby generating uncertainty and regularly driving up project costs. NAHB recommends that via notice and comment rulemaking, Corps Headquarters establish a transparent, predictable process to determine mitigation ratios that offset functional losses at a 1:1 basis.

- Management and Assurances in Perpetuity: Although the Mitigation Rule does not require long-term management or financial assurances in perpetuity,[30] some Districts have incorrectly interpreted the Rule to require such perpetual management or financial assurances in CWA Section 404 permit applicants' mitigation plans. If the Corps did not require long-term management or financial assurances in perpetuity in the Rule, individual Districts should not be authorized to impose such requirements. Otherwise, regulated parties are subject to disparate and uncertain permitting and mitigation requirements in different areas of the country that go beyond the Mitigation Rule's already strict requirements. The Corps should clarify that the Districts may not require management or financial assurances in perpetuity.

NAHB urges Corps Headquarters to exercise its oversight authority and issue guidance, as appropriate, directing the Districts to ensure their wetland delineations are consistent with the 1987 Manual and providing guidance on how to interpret key provisions of the Mitigation Rule to ensure consistency and predictability across the country.

### *B. The Corps should Improve the National Wetland Plant List*

Corps regulations define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions,"[31] and the 1987 Manual requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology to identify a wetland.

Wetland delineations are based, in significant part, on the Corps' National Wetland Plant List ("NWPL") which has its origins in a 1988 list of plants published by the U.S. Fish and Wildlife Service. The Corps and the EPA incorporated the 1988 NWPL into the 1987 Manual for use in determining the presence (or absence) of hydrophytic vegetation when classifying areas as wetlands subject to CWA jurisdiction. The List is periodically reviewed and revised by Regional and National Panels composed of federal government wetland ecologists and botanists. In 2006, the Corps assumed responsibility for the NWPL. Plants included in the NWPL are assigned an indicator status that describes the likelihood of each species occurring in wetlands. Despite the Corps' positive response to many of NAHB's recent recommendations regarding the NWPL,[32]

[30] 33 C.F.R. §§ 332.3(n) and 332.7(d).
[31] *Id*. at § 328.3(b)
[32] *See* NAHB comments in response to Corps' National Wetland Plant List Notice, 80 Fed. Reg. 55,103 (Sept. 14, 2015); *see also* 81 Fed. Reg. 22,580 (April 18, 2016).

we draw the Corps' attention to several issues NAHB has previously raised that are unresolved, including the insufficient scientific basis for thousands of plants on the NWPL and the exclusion of non-government experts from the Regional and National Panels.

There are 2,709 species (approximately one-third of the species on the NWPL) that appear to have been rated without any supporting scientific data or literature. Notably, the majority of these species were added to the NWPL in 2012 (or later) and were not part of the 1988 NWPL. It is unclear how (or why) the Panels rated these species because either there is no scientific data supporting the ratings, or the Corps has failed to present the support. As a result, the scientific underpinnings of many of the species on the NWPL remain suspect. Based on a review of the website and available data, the underlying data for many of these species does not amount to reasoned decision-making. Where there is insufficient scientific support for a wetland rating, such plants should be removed from the List unless and until sufficient data to support a wetland rating is provided, reviewed, and made available for public comment.

In order to develop an accurate NWPL with ratings appropriately supported by science, NAHB proposes the following path forward:

1. Remove the 2,709 species from the NWPL for which scientific support is currently absent;

2. If a listing is warranted, request supporting scientific documentation for those species from the public and the Regional and National Panels;

3. If sufficient supporting data is received to propose including a particular species on the List, the Regional and National Panels will review the scientific data and propose an appropriate wetland rating based on the submitted data. Review of such species and supporting data will occur on a biennial basis according to the same timeline as future NWPL updates;

4. As with future NWPL updates, species proposed for inclusion and their supporting documentation will be published in the Federal Register for public comment in September of odd years with final changes occurring and published in the Federal Register in December of odd years.

Through this process, NAHB expects that the Panels will only review and consider for a wetland rating those species for which a sufficient scientific basis exists.

In addition to concerns regarding the scientific support for many plants on the List, NAHB has concerns regarding the makeup of the Regional and National Panels whose members determine species indicator statuses. The members of the Panels play a critical role in the management and oversight of the NWPL. The individuals who serve on these Panels are required to evaluate submitted information and consider their own exposure to or experience with each particular species when reviewing its wetland indicator status. Unfortunately, these Panels are currently comprised solely of government employees. This structure unduly limits membership on the Panels and prevents the government, and in turn the public, from benefitting from the expertise

of botanists and other experts who are not federal employees. In order to ensure that the most knowledgeable experts are involved in updates to the NWPL, NAHB urges the Corps to include both private sector and academic representatives on the Regional and National Panels.

NAHB has previously discussed with the Corps whether participation by non-government employees would implicate the Federal Advisory Committee Act ("FACA"). In NAHB's opinion, participation by non-government experts would not implicate FACA because FACA does not apply where the government seeks advice from *individuals*.[33] Panel members *individually* vote on wetland indicator statuses for species. There is no consensus decision that would trigger FACA compliance.[34] Therefore, NAHB urges the Corps to explore options for including non-government experts on the NWPL Panels. The expertise, knowledge and clarity that outside experts could bring to the NWPL process is too significant to ignore.

### *C. The Corps should Reconsider and Revise its Minority Recommendations in the Assumable Waters Report*

Section 404 of the CWA authorizes the Corps to issue permits for the discharge of dredged or fill material to navigable waters. "Navigable waters" is defined under the CWA to mean "the waters of the United States and territorial seas."[35] Section 404(g) of the CWA authorizes states, with approval from EPA, to assume authority to administer the 404 program in some but not all navigable waters and adjacent wetlands.[36] Section 404(g)(1) describes the waters over which the Corps must retain administrative authority even after program assumption by a state or tribe.

Only two states, Michigan and New Jersey, have been approved to assume the Section 404 program. Other states have explored assumption, but those efforts have not borne fruit in part due to uncertainty over the scope of assumable waters and wetlands. EPA formed the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations for NACEPT on how the EPA can best clarify for which waters a state or tribe may assume CWA Section 404 permitting responsibilities, and for which waters the Corps retains Section 404 permitting responsibility under an approved state or tribal program. The Subcommittee included 22 members representing states and tribes, the Corps, and other stakeholders, including NAHB. The Subcommittee finalized its report with recommendations to EPA on state and tribal assumption in May 2017.[37]

After meeting eight times between October 2015 and April 2017, the Subcommittee was split on its findings and recommendations. Two sets of recommendations were put forth: 1) the Majority Recommendations, authored by all Subcommittee members except the member representing the Corps and 2) the Minority Recommendations, penned solely by the member representing the Corps.

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[33] *See* 41 C.F.R. §102-3.40(e).
[34] *Id.* ("Seek individual perspectives, rather than the collective view of a group.").
[35] 33 U.S.C. § 1362(7).
[36] *Id* at § 1344(g)(1).
[37] Final Report of the Assumable Waters Subcommittee. May 2017.

With regard to the waters that must be retained by the Corps, the Majority and the Minority offered the following recommendations:

> **Majority Recommendation** (all members except Corps): Only Rivers and Harbors Act waters on lists kept by Corps district offices must be retained by the Corps.
>
> **Minority Recommendation** (Corps alone): The Corps would retain Rivers and Harbors Act waters plus waters defined as (a)(1) waters in Corps CWA regulations, that is:
>
> > All waters which are currently used, or were used in the past, or may be susceptible to use in interstate for foreign commerce, including all waters which are subject to the ebb and flow of the tide.[38]

Regarding adjacent wetlands that must be retained by the Corps, the Majority and the Minority provided the following recommendations:

> **Majority Recommendation** (all members except Corps): The Corps would retain administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by the state or tribe and the Corps (default = 300 feet).
>
> **Minority Recommendation:** The Corps would retain all wetlands that meet the CWA regulatory definition of "adjacent" to retained waters.

It is telling that the minority recommendations were supported only by the Corps, while the majority recommendations represent the interpretation of 404(g)(1) from a diverse set of stakeholders, including regulated industries, states, tribes, and environmental NGOs. The Corps' recommendations would retain far too many waters under Federal authority and contradict the intent of Congress under 404(g). The Corps' overly expansive interpretation of waters and wetlands to be retained under Corps authority leave little, if any, waters for states and tribes to assume 404 permitting authority over. Ultimately, the Corps' position is inconsistent with the intent of CWA Section 404(g) and does not provide states and tribes the clarity the Subcommittee was tasked with providing. In order to correct these shortcomings, the Corps should submit a letter to the EPA Administrator stating it has revised its position on CWA Section 404(g) and supports the conclusions made by the majority of the Subcommittee.

## VI. The Corps must Cease all Efforts to Implement the Federal Flood Risk Management Standard

On January 30, 2015, President Obama signed Executive Order 13690, "Establishing a Federal Flood Risk Management Standard ["FFRMS"] and a Process for Further Soliciting and Considering Stakeholder Input" to improve the resilience of communities and federal assets against the impacts of flooding that are anticipated to increase over time due to climate change.[39]

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[38] 33 C.F.R. § 328.3(a)(1).
[39] 80 Fed. Reg. 6,425 (February 4, 2015).

E.O. 13690 amended President Carter's E.O. 11988 "Floodplain Management"[40] and expanded federal floodplain management requirements beyond the longstanding 100-year floodplain.

E.O. 13690 and the FFRMS required federal agencies, including the Corps, to expand floodplain management from the 100-year floodplain to a "higher vertical elevation and corresponding horizontal floodplain to address current and future flood risk and ensure that projects funded with taxpayer dollars last as long as intended."[41] Pursuant to E.O. 13690 and the FFRMS, federal agencies were directed to define the floodplain for federally funded projects using any of the following approaches:

1. Climate-Informed Science Approach (CISA): Utilizing the best-available, actionable hydrologic and hydraulic data and methods that integrate current and future changes in flooding based on climate science;

2. Freeboard Value Approach (FVA): Freeboard (base flood elevation + X, where X is 3 feet for critical actions and 2 feet for other actions);

3. 0.2 percent annual chance Flood Approach (0.2PFA): 0.2 percent annual chance flood (also known as the 500-year flood); or

4. The elevation and flood hazard area that result from using any other method identified in an update to the FFRMS.

In October 2015, FEMA – serving as Chair of the Mitigation Framework Leadership Group ("MitFLG") – issued Guidelines to assist the agencies in the implementing E.O. 13690.[42] In order to update its agency specific floodplain management decision making procedures, the Corps issued draft Engineer Circular ("EC") 1165-2-217 entitled "Implementation of Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input."[43]

NAHB filed comments addressing serious concerns with respect to the MitFLG's guidelines and the Corps' draft Engineering Circular.[44] Principally, NAHB asserted that the Obama Administration's decision to dramatically expand regulated floodplain areas was made without

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[40] 42 Fed. Reg. 26,951 (May 24, 1977).
[41] E.O. 13690 at Section 1.
[42] Mitigation Framework Leadership Group. *Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input*. October 8, 2015. Available at: https://www.fema.gov/media-library-data/1444319451483-f7096df2da6db2adfb37a1595a9a5d36/FINAL-Implementing-Guidelines-for-EO11988-13690_08Oct15_508.pdf
[43] 81 Fed. Reg. 91,150 (December 16, 2016).
[44] *See* NAHB comments on the *Revised Guidelines for Implementing Executive Order 11988, Floodplain Management* (May 6, 2015). Available at: https://www.regulations.gov/document?D=FEMA-2015-0006-0270. *See also* NAHB comments in response to the Corps draft Engineer Circular (EC) 1165-2-217 "Implementation of Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input."

congressional oversight, without new floodplain maps, without supporting technical data and without comprehensive regulatory impact and cost-benefit analyses. If implemented, the lack of actionable science and accessible, consistent implementation protocols associated with E.O. 13690 and the FFRMS will generate regulatory uncertainty for countless federal programs, products, and permits, in turn threatening jobs and increasing project delays and costs without substantiated benefit. Given the significance the term floodplain has for landowners, states, local governments, and the federal government itself, any effort to change the meaning or geographic extent of the floodplain should be conducted by Congress and supported by federal statute, not by administrative fiat under an Executive Order.

Since E.O. 13690 was signed and for the reasons above, NAHB has urged that order and the FFRMS be withdrawn. On August 15, 2017, President Trump signed Executive Order 13807 "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure."[45] Among other things, E.O. 13807 revoked E.O. 13690.

Given the fact that E.O. 13690 has been revoked and E.O. 13777 at Sec. 3(d)(vi) directs federal agencies to address regulations that "derive from or implement Executive Orders . . . that have been subsequently rescinded . . . ," the Corps should rescind draft EC 1165-2-217 and cease all efforts to implement the FFRMS.

## VII. Conclusion

NAHB appreciates the opportunity to provide the Corps' Subgroup to the DoD Regulatory Reform Task Force Regulatory Reform Task Force with specific examples of existing regulations, regulatory policies, and programs for consideration as the Agency formulates its response to E.O. 13777. Please contact me at (202) 266-8662 or omcdonough@nahb.org if you have any questions regarding any of the regulations, regulatory policies, or programs discussed within this letter. NAHB looks forward to future opportunities to engage with the Corps as it works toward reducing regulatory burdens and improving the overall environment for the nation.

Sincerely,

Owen McDonough, PhD

[45] 82 Fed. Reg. 40,463 (August 24, 2017).