



**National Association of Flood and Stormwater Management Agencies**

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To: Regulations.GOV Docket ID: USACE EC 1165-2-218  
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From: National Association of Flood & Stormwater Management Agencies  
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Subject: Comments on Proposed USACE Engineer Circular 1165-2-218

The National Association of Flood and Stormwater Management Agencies (NAFSMA) is an organization of public agencies whose function is the protection of lives, property, the environment and economic activity from the adverse impacts of storm and flood waters. Since its formation in 1978, NAFSMA's mission has been to advocate public policy, encourage technologies and conduct education programs that facilitate and enhance the public service functions of its members.

Many NAFSMA members are partners with the U.S Army Corps of Engineers on flood damage reduction projects and others are levee owners and operators on projects that were locally constructed and not undertaken with the Corps. Some of those sponsors are participating in the PL84-99 program while others are not. As a result, NAFSMA members have a strong interest in the USACE Levee Safety Program proposed in February and many were planning to participate in one of the in-person meetings that were unfortunately postponed due to COVID-19. NAFSMA had also urged that an extension be provided on the comment period until after these important sessions can be held.

Following up on the July 22<sup>nd</sup> USACE webinar announcement that the Corps will be holding small in-person sessions on the proposed EC 1165-2-218, NAFSMA respectfully requests to hold one of those sessions either in person or virtually at a location to be mutually determined between headquarters levee safety staff and the NAFSMA leadership. NAFSMA appreciates the Corps' commitment to hold these sessions and urge that discussion during these dialogues feed into the comment process for the Engineer Circular. With many of our member agencies currently struggling to address the impacts of COVID-19 on their agency operations and workforce, NAFSMA expects that there are additional comments to be shared from our membership that will not be submitted by the current comment deadline.

In reviewing the draft released for comment in February of this year, there are a number of questions, concerns and recommendations that NAFSMA would like to share. It is clear from discussions with the Levee Safety group at headquarters over the last year that USACE has dedicated a great deal of effort to development of this draft EC. As NAFSMA leaders expressed to the levee safety team in early Spring, the format of the proposed draft EC is much more understandable than similar past documents.

**Voluntary Program**

Although USACE officials describe the levee safety program as voluntary, there is no language in the draft Engineer Circular that describes it as such. We recommend that a paragraph be added that indicates that this EC provides a menu of possible strategies and actions that levee sponsors may opt to implement to improve levee performance.

NAFSMA members have raised concerns over the use of the word “should” throughout the proposed EC when describing levee safety actions by local sponsors. The word “may” would be more appropriate and acceptable to local sponsors.

When partnered with the PL 84-99 Rehabilitation Fact Sheet that is planned to be released along with the final EC the voluntary nature of the program is even more questionable. It is clear from this fact sheet that “Participation in the Levee Safety Program” and “Sharing Information” are two key components of the proposed eligibility criteria for PL 84-99.

## **Volume II Comments**

### **Chapter 1 – Introduction**

#### **Levee Sponsor Authority Differences**

Levee owners and operators, like levees, are not all the same. They come in varying sizes and are established with different authorities and varied powers. The recognition of these differences is not acknowledged in the levee safety EC as drafted.

Although levee sponsors share the mission of operating and maintaining flood protection projects to ensure their structural integrity, many do not have zoning and land use authority for the areas they protect. By relying on internally developed risk assessments of flood plain use and potential landward consequences (instead of project conditions) in the evaluation, rating and treatment of projects, the Levee Safety EC as written seems to hold many sponsors accountable for actions that are out of their control.

To recognize these differences in authorities, NAFSMA urges that the following language be included in the final EC:

*USACE recognizes that the enabling authorities and grants of power vary considerably among local sponsors. USACE does not intend or contemplate through this EC that levee sponsors will seek additional authorities to carry out the strategies outlined herein. Also, neither the issuance of this EC, nor its incorporation into use through other USACE programs, will call for such a change.*

*Further, levee sponsors without the power to implement strategies described in the EC, nor those with these powers shall be punished or rewarded through this and other USACE programs for not implementing land-side programs beyond helping to increase public awareness of residual risk in leveed areas.*

*Levee sponsors are encouraged, but not required, to engage in activities that help build public awareness of residual risk, which may be achieved through understanding and application of tolerable risk guidelines or other means. USACE will assist those levee sponsors and their communities that choose to consider the use of tolerable risk guidelines.*

NAFSMA recommends adding a framework for local sponsors, USACE Districts and other resource agencies to work together to collaboratively expedite permitting and regulatory approvals in a manner that allows local sponsors to implement levee safety improvements within the USACE timeline.

### **Chapter 2 – Preparedness**

## **Inspection and Risk Assessments**

As proposed in the draft EC, inspections will now occur at a minimum of every five years although owners and operators can request them earlier if needed. NAFSMA recommends that a 45-day notice to local sponsors by USACE be required – 10 days seems an incredibly short timeframe to notify a sponsor of an inspection that occurs every five years. For Risk Assessments, NAFSMA recommends that at least a 90-day notice be provided to levee owners and operators.

In addition to the opportunity provided in the draft EC for owners and operators to review the Inspection and Risk Assessment Reports NAFSMA urges that an appeal period be added to the document.

## **Levee System Ratings**

At this time, NAFSMA member agencies do not have a consensus position on the removal of overall inspection ratings. We look forward to further discussions with the Corps to better understand the ramifications of this change.

NAFSMA urges clarity in the EC regarding that fact that all levees are not the same and need to be inspected and assessed based on the individual conditions specific to the levee.

In addition, NAFSMA understands that this a policy document and not guidance related to the actual inspection and assessment of a levee, however, several NAFSMA members have expressed concern regarding the criteria used to develop the inundation area downstream of a levee. The current criteria assume the water surface behind the levee is at the top of the structure during the levee break analysis. With the freeboard often included in the design of the levee, which is also a FEMA requirement, this assumption can lead to a significant amount of flow assumed in the inundation area leading to very conservative inundation limits. When presented this way to the public, there can be concerns by property owners downstream of potential flooding resulting from a levee failure when the probability of that occurring is very low. This could also cause reductions in property values, or having property owners experience costs for programs they may not need, like the voluntary purchase of flood insurance.

## **Chapter 5 – Mitigation**

NAFSMA recommends clarification in this chapter regarding local sponsors revising a levee segment's risk rating after mitigation is implemented. With the USACE keeping and producing levee risk assessments, what is the expectation for the local sponsors? Would a local sponsor implement mitigation in response to a USACE inspection and request a special inspection on that mitigated segment? If so, does that implement changes to USACE risk assessments for that segment?

## **Areas of Risk Mitigation**

NAFSMA urges that Table II.5.2 at the top of page II-39 be reviewed, clarified or deleted all together from the document. The words Performance and Consequence do not seem appropriate as used and this table needs to clearly state in some way that these are potential approaches that may be available for the identified hazards. In trying to simplify these hazards and potential actions, this table fails to provide sponsors with information they could use to aid in addressing potential hazards. Performance and Consequence in this table both seem to be referring to potential actions a levee owner or operator may take to address certain hazards. Without edits, it should be deleted from the document.

## **Liability**

Levee owner/operators can be held liable for the loss of life or property in cases where operation and maintenance of the project is found to be in violation of applicable standards or requirements. As new obligations are generated and existing ones expanded, the potential liability exposure for levee owner/operators increases. Moreover, it is of concern, that as the USACE “calls upon” levee sponsors to take on new mitigation activities, they are not doing so through regulation, but rather through this non-binding guidance. This leaves levee sponsors in the quandary of whether to adhere to the USACE Levee Safety EC and accept an increase in liability exposure, or not comply and accept the consequences.

Further, as written this draft Levee Safety EC detracts levee sponsors from the core mission of assuring project integrity, while creating new expectations for levee sponsors upon which others may seek to rely. Indeed, the USACE identified in its “Levee Safety Action Classification (LSAC)” table used to dictate program activities that, “[L]evee risk is the risk that exists due to the presence of the levee system.”

Accordingly, we urge that USACE make the following changes to the document:

- 1) *Strike - “levee sponsors should consider all sources of risk and prioritize their planned mitigation activities based on what is driving the risk”*
- 2) *Add – “as levee sponsors consider sources of increased risk arising from the physical condition of the levee, its operation and maintenance, it is reasonable to prioritize activities to help maximize reduction of those risks.”*

## **Volume III Comments**

### **Chapter 2 = Program Management Plans**

NAFSMA requests that 2.5(i) on page III-6 be expanded to address the process for reviewing and coordinating all federal permits and regulatory approvals for activities on or around levee systems, including Section 404 and 408, as well as Section 401 Water Quality Certifications and USFWS/NMFS Section 7 consultations. Section III.2.5 should include a framework for local sponsors, USACE Districts and other resource agencies to work together to collaboratively expedite permitting and regulatory approvals in a manner that would allow local sponsors to implement levee safety improvements within the USACE timeline.

### **Chapter 3 – Life Risk Matrix**

This Life Risk Matrix on page III-16 is difficult to read and understand. Additional explanation and clarification of the labelling of both the x and y axis is needed.

### **Chapter 4 - Tolerable Risk Guidelines**

On page III-13, under the Background discussion, 4.1.b.(2)a states that “Tolerable Risk, as it relates to levee systems, is defined as levee risk that:

- (a) First, society is willing to live with the risk associated with the levee system to secure the benefits of living and working in the leveed area.”

NAFSMA is concerned that when it comes to determining project specific decisions who decides what “society” defines as an acceptable risk – non-federal sponsors, elected officials or USACE District staff? This definition seems too general to pass legal review, thereby making it difficult to use in actual situations.

NAFSMA recommends that a methodology be developed working with local sponsors that provides for an agreement between sponsors and USACE defining specific tolerable risk tolerance for specific projects.

### **Chapter 9 – Integration with Other Programs and Processes**

NAFSMA is concerned about language under 9.7 on page III-45 calling for USACE Planning, Design and Construction Projects to meet all four Tolerable Risk Guidelines. While these guidelines and the tolerable risk matrix included in Volume III – Pg. 16 are used for the Dam Safety Program, it doesn't work well for funding flood damage reduction projects. Funding provided for the Dam Safety Program can be used to address dam situations that plot above the line where unacceptable risk needs to be addressed.

The USACE process for recommending levee projects to Congress is still ruled by the Benefit-Cost ratio and the NED. While such factors as life safety and tolerable risk can be good to know they are very seldom able to influence project development and implementation. One possible approach is to include the life safety risk into the benefit calculation.

As long as USACE and the White House Office of Management and Budget (OMB) continue use of the benefit versus cost analysis to make recommendations on projects to Congress, these benefit categories need to reflect the true value to the nation of flood damage reduction projects, including life safety.

If you have questions or would like additional information on these comments, please contact NAFSMA Executive Director Susan Gilson at [sgilson@nafsma.org](mailto:sgilson@nafsma.org) or 202-289-8625.

We appreciate your consideration of these comments and look forward to discussing the draft Levee Safety EC with you at a future time to be determined.