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10th Floor West Tower
Washington, DC 20005
www.nafsma.org

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Executive Director

Susan Gilson

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, NW
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OW-2011-0409

Dear Sir or Madam:

The National Association of Flood and Stormwater Management Agencies (NAFSMA) has reviewed the *Environmental Protection Agency (EPA) and Army Corps of Engineers' (USACE) Guidance Regarding Identification of Waters Protected by the Clean Water Act (CWA)* published in the Federal Register dated May 2, 2011. NAFSMA appreciates the opportunity to provide comments on this important jointly-issued guidance.

NAFSMA is an organization of public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. The mission of the Association is to advocate public policy, encourage technologies and conduct educational programs which facilitate and enhance the achievement of the public service function of its members.

NAFSMA members are partners with the U.S. Army Corps of Engineers on flood damage reduction and ecosystem restoration projects. Many NAFSMA members are also MS4s with NPDES stormwater permits issued by EPA or their state regulatory agencies under the federal NPDES stormwater management programs. As written, the proposed draft guidance will have great impacts on both operation and maintenance activities associate with Corps-partnered projects and MS4 operations and activities as well as other areas of NAFSMA member activities.

NAFSMA's comments are both general in nature, referring primarily to the process of issuing a proposed guidance rather than utilizing the rulemaking process, and specific.

General Comments

1. Because the Guidance will significantly expand the scope of CWA jurisdiction (as noted by the USACE and EPA when they have stated that they expect “the extent of waters over which the agencies assert jurisdiction under the CWA will increase” based on the understandings stated in the Guidance) to include waters that were not previously covered under Section 404 of the Clean Water Act, the guidance cannot be issued without formal notice-and comment rulemaking. It is a key objection in the April 14, 2011 letter from Congress sponsored by Reps. Gibbs and Holden and signed by 170 of their fellow lawmakers. This was also reported to be the opinion expressed by the Department of Justice’s Deputy Assistant Attorney General, John Cruden, at a meeting between EPA, state and Justice Department officials in early March.

NAFSMA also believes that stating that the Guidance will eventually be followed by a formal rulemaking to “further clarify” the scope of CWA jurisdiction does not make the Guidance itself any more lawful.

2. NAFSMA members are committed to carrying out provisions of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA) to aid in better protection of our Nation’s public health and aquatic resources. The proposed guidance, the current guidance document, and past Supreme Court decisions (i.e., *Solid Waste Agency of Northern Cook County vs. the United States Army Corps of Engineers*, *Rapanos vs. the United States*, and CWA of 1972) have been great efforts in trying to clarify the jurisdiction of waters of the U.S. However, the problems with clarity and consistency when determining these waters’ boundaries still remain.

This proposed guidance does not provide the clarity needed to improve the predictability and reduce costs and delays in obtaining CWA permits. Rather than speeding up the process of jurisdictional determinations, NAFSMA is concerned that this guidance will make the process more cumbersome and unclear than it is already and further will increase the likelihood of future litigation.

3. It is important for the proposed guidance to be as easy to understand as possible. The guidance as proposed should be edited to address some cumbersome and complex sentences. For instance, the sentence before the associated bullet list on page 4 includes 41 words and a double negative. There is also considerable repetition of the same concepts throughout the document and the terminology used is not consistent throughout. It might be helpful to present some of the included information in tables or graphics. The “Summary of Key Points” on page five was very helpful.

Issues Specific to the Flood Risk Management and MS4 Communities

1. NAFSMA members have repeatedly expressed concerns over the uncertainties associated with federal CWA jurisdiction over detention ponds and roadside ditches. In its “Summary

of Key Points,” the Guidance attempts to deflect such concerns by listing certain areas that are “generally” not protected by the CWA, including:

- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing ; and
- Erosion features (gullies and rills), and swales and ditches that are not tributaries or wetlands.

The Guidance states that the agencies’ position regarding waters such as settling basins is “unchanged” from that described in previous regulatory preambles, however the agencies’ existing interpretation was inconsistently applied, such that settling basins might be deemed “tributaries” to navigable waters, or subject to jurisdiction because they were created by excavating or diking jurisdictional waters. These inconsistent interpretations would remain unaffected by the Guidance, which thus fails to provide clarity exactly where it is needed.

More importantly, the statement that swales and ditches are “generally” not protected is undermined by the detailed discussion at page 12 of the Guidance. It suggests that “roadside and agricultural ditches” are not jurisdictional tributaries *except* where they “connect directly or indirectly to a traditional navigable or interstate water” and have one of the following five characteristics:

- natural streams that have been altered (channelized, straightened or relocated);
- ditches that have been excavated in jurisdictional waters (including wetlands);
- ditches that have relatively permanent flowing or standing water;
- ditches that connect two or more jurisdictional waters; or
- ditches that drain natural water bodies (including wetlands) into tributaries of jurisdictional waters.

NAFSMA is concerned that all roadside drainage ditches connect “indirectly” to a navigable water at some point, and will have at least one of these five characteristics identified above.

The Guidance goes on to state that “natural and man-made swales” are not jurisdictional tributaries *unless* they meet the regulatory definition of wetlands. Thus, ditches and swales will be considered wetlands when they meet the applicable criteria in the Corps’ Wetlands Delineation Manual, or in the “appropriate regional supplement” to that manual.

Furthermore, the Guidance states that *even when* they are not jurisdictional waters themselves, swales and ditches “may still contribute to a surface hydrologic connection between” navigable waters and adjacent wetlands (presumably subjecting them to regulation under CWA § 404). In addition, the Guidance states that swales and ditches

“may function as” point sources under the CWA, such that discharges through these features could be subject to NPDES permitting requirements (i.e. to comply with water quality standards and TMDL wasteload allocations).

NAFSMA does not believe the interpretations described above accurately reflect the intent of the CWA and that these interpretations alone will lead to exponentially increasing the number of required 404 permits and will overburden both state and federal wetland regulators.

2. The Guidance understates the extent to which CWA jurisdiction over “adjacent” wetlands will be expanded under its reinterpretation of the Act. In fact, the Guidance creates an entirely new concept of “ecological (biological) connection” to expand “physical proximity” or “hydrological connection” that governed previous agency determinations of adjacency. While acknowledging that they cannot use migratory species (birds) as a basis for demonstrating an “ecological interconnection” for adjacency (a nod to the Supreme Court’s 2001 *SWANCC* decision), the agencies now suggest that the movement between jurisdictional waters and adjacent wetlands of species such as amphibians, reptiles, waterfowl, invertebrates and fish for “spawning, nesting, feeding, refuge and other life stage requirements” can be used to establish federal jurisdiction over those wetlands.
3. The Guidance fails to address the critical issue of clarifying the statutory exemptions for operation and maintenance of flood protection facilities, including levees and channels. It is critical that the existing exemption from the dredge and fill permitting requirement set forth in CWA § 404(f)(1)(B) for maintenance of dikes, dams, levees, etc. be clarified by adding the words “drainage or channel inverts (including the removal of sediment, debris and vegetation from the same.” It also critical that the exemption in CWA § 404(f)(1)(A) for activities such as minor drainage and soil and water conservation be clarified by adding the words “and flood damage reduction” practices. The Guidance explicitly states that it “does not address” the existing regulatory exclusions, and “does not affect” any of the exemptions from CWA 404 permitting requirements. Once again, the Guidance fails to provide clarification in a key area where it is needed.

NAFSMA is concerned that normal operations and maintenance of federally-partnered flood damage reduction projects needs to be performed so that the flood mitigating and multi-objective aspects of a project and the community can realize the project’s benefits. It is critical for agencies with operations and maintenance responsibilities to perform maintenance activities before a flood damage reduction project becomes functionally impaired or failures begin. This commitment to maintenance activities should be at all levels of government for all flood damage reduction features, such as levees, open channels, and detention basins. Problems associated with the need for maintenance activities are being exacerbated by the difficulty in obtaining necessary 404 permits to complete much-needed maintenance activities.

This problem will become an even greater threat to public safety as flood damage reduction projects constructed under Public Law 566 and other federal programs near the end of their useful life (50-year design life). NAFSMA strongly urges that legislative clarity be provided to address the existing flood control maintenance exemption provided under the Clean Water Act.

It is NAFSMA's belief that Congress intended for maintenance activities of currently serviceable flood control channels to be exempt from requiring a 404 permit, or at least be exempt from requiring mitigation to perform routine maintenance to maintain a flood control facility. Section 1344 (f) (B) of the Clean Water Act defines a non-prohibited discharge of dredge or fill material as: "the discharge of dredge or fill material for the purpose of maintenance, including emergency reconstruction of recent damaged parts, or currently serviceable structures such as dikes, levees, groins, riprap, breakwaters, causeways and bridge abutments or approaches, and transportation structures;"

However, Section 1344 (f) (1) states: "Except as provided in paragraph (2) of the subsection" which said paragraph states:

"(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity as having its purpose bringing an area of the navigable waters into a use to which it was not previously subject where the flow or circulation of navigable waters may be impaired or reach of such waters be reduced, shall be required to have a permit under this section."

Based primarily on this paragraph (2), the U.S. Army Corps of Engineers determined that maintenance activities that could result in an incidental discharge of fill material in flood protection channels and facilities will require Section 404 permits.

As a result of this interpretation, it has become increasingly difficult for public works agencies and special flood control districts (non-federal sponsors of flood damage reduction projects) to be able to obtain the necessary permits to perform needed maintenance activities, which leads to a public safety hazard. By inclusion under the Section 404 program, public works agencies are prevented from performing their construction and maintenance responsibilities in a timely and responsive manner. Repetitive and costly mitigation requirements have also been placed on these public agencies. As a result of this situation, undue liability has been placed on many public agencies. If non-federal sponsors cannot obtain the necessary permits to carry out needed maintenance activities for the project to meet its flood control purposes, local residents and business will sue local governments, who are not immune from such suits.

NAFSMA member agencies in Texas, California and the Northwest have shared a variety of maintenance issues caused by the lack of clarity with the flood control exemption. For example, in one Southern California County, a typical Section 404 permit took three years

which was reducing the flood protection capacity of the channel. As a condition of the permit, the County was required to provide 42 acres of mitigation at a cost of \$2.8 million. The cost of the riparian removal was \$700,000.

It is particularly troubling that these issues are occurring with federally-partnered and constructed infrastructure. Since the Section 404 process was not designed to address regular and routine maintenance and rehabilitation of flood damage reduction projects, the process is particularly burdensome. The recent technical guidance issued by the U.S. Army Corps of Engineers to require removal of non-compliant vegetation from levees and other flood control structures may increase the number of public agencies seeking 404 permits.

In general, the critical maintenance issues focus on the following issues:

- Need for clarification of the exemption for maintenance of flood control facilities, including project channels. Add the definition of flood control facilities under Section 404(f)(1)(B) as follows: “drainage, channel or basin inverts, including the removal of sediment, debris and vegetation from same;”
- Allow for 10-year permits by changing “five years” to “ten years” in Section 404(e)(2)
- Inclusion of needed permits with new operations and maintenance manuals and review and revise manuals for existing projects to include the necessary environmental permits.
- In summary, it is NAFSMA’s belief that in addition to the critical public safety issues and associated responsibilities proper maintenance of flood control facilities is environmentally preferable to improperly maintained facilities. This will lead to better water quality with reduced erosion and sedimentation.

NAFSMA very much appreciates the opportunity to comment on the proposed guidance and urges you to contact Executive Director Susan Gilson at 202-289-8625 with questions on the association’s comments and related issues. We appreciate your consideration.

Sincerely,

A handwritten signature in black ink that reads "Jim Fiedler". The signature is written in a cursive, flowing style.

Jim Fiedler, P.E., D.WRE
President