



National Association of Flood & Stormwater Management Agencies
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Testimony of the National Association of Flood
And Stormwater Management Agencies

Clean Water Restoration Act of 2007

U.S. House of Representatives
Transportation and Infrastructure Committee

Rep. James Oberstar, Chairman

April 16, 2008

The National Association of Flood and Stormwater Management Agencies (NAFSMA) is very pleased to submit this testimony addressing the pending Clean Water Restoration Act on behalf of its membership.

Background on NAFSMA

NAFSMA is a national organization based in the nation's capital that represents close to 100 local and state flood and stormwater management agencies, most of which are in large urban areas. Its members serve a total of more than 76 million citizens by providing flood and or storm water management and as a result, the association has a strong interest in the proposed Clean Water Restoration Act.

The mission of the Association is to advocate public policy and encourage technologies in watershed management that focus on issues relating to flood protection, stormwater and floodplain management in order to enhance the ability of its members to protect lives, property, and economic activity from the adverse impacts of storm and flood waters. Many of NAFSMA's members are currently non-federal partners with the U.S. Army Corps of Engineers in water resources projects, including flood damage reduction and environmental restoration projects and also hold municipal stormwater permits under the National Pollutant Discharge Elimination System (NPDES) program authorized under Section 402(p) of the Clean Water Act. Due to the nature of the activities carried out by their agencies, NAFSMA members are very well versed in the permitting aspects of both the federal water quality programs under the Clean Water Act's Section 402 and wetlands protection regulation under Section 404.

Formed in 1978, NAFSMA works closely with the Corps, the Federal Emergency Management Agency and the U.S. Environmental Protection Agency to carry out its mission. NAFSMA members are on the front line protecting their communities from loss of life and property. Therefore, the organization is keenly aware that flood management is a wise and necessary investment required first to prevent loss of life and ensure the safety of our citizens and secondly, to prevent damages to peoples' homes and businesses and protect them from economic disruption. Flood management has proven to be a wise investment that pays for itself by preserving life and property, thereby reducing the probability of repeat requests for federal disaster assistance.

NAFSMA Supports Sound Wetlands Protection Goals

NAFSMA supports the spirit and intent of the Clean Water Act and would urge the Committee to develop a wise and workable approach to wetlands protection based on environmentally sound programs. Our member agencies are extremely pleased to be part of the successes and achievements this country has made in the water quality arena in the 30 years since NAFSMA's founding and the almost 36 years since the passage of the Clean Water Act.

Wetlands Permitting As It Relates To Flood and Stormwater Management Activities

A critical piece to providing flood and storm water management is the ability to carry out necessary operations and maintenance on flood management channels and related infrastructure such as levees. It is essential to perform maintenance activities before a flood damage reduction project becomes functionally impaired or failures begin. This maintenance is critical to ensuring the proper functioning of a total flood management system. Over the years, it has become more and more difficult for our member agencies to carry out the required maintenance activities outlined in the operations and maintenance manuals provided with federally-partnered flood damage reduction projects due to increases in the amount of permits required and the time it takes to process these permits.

NAFSMA appreciates the committee's interest in these critical issues and look forward to working with you to develop a wise and workable approach to protecting our nation's wetlands while providing flood and stormwater management agencies with the tools needed to protect citizens from the risks associated with flooding and hurricanes.

NAFSMA is very pleased to hear that committee leadership has indicated that it would welcome proposals for modifying the pending Clean Water Restoration legislation as originally proposed. While NAFSMA member agencies have focused on strong environmentally-sound programs and approaches to wetlands protection in their individual communities and regions, as part of their flood and storm water protection efforts, agencies have faced many difficulties related to the implementation of the Section 404 program, both before and after the SWANCC and Rapanos court decisions.

These problems have related to time delays in processing permit requests, failure of the program guidances to recognize regional differences and needs, jurisdictional determinations, differences and the impacts of those differences in approaches and decisions by individual permit writers on the permit program, and cumbersome and sometimes repetitive mitigation requirements for maintenance activities, especially for removal of yearly vegetation growth, which in a number of cases have resulted in our members needed to carry out redundant and expensive mitigation projects.

Since many of the nation's flood damage reduction projects were started or completed years before the enactment of the federal Clean Water Act and federal Endangered Species Act, the difficulties now faced by many flood and stormwater management agencies to obtain necessary permits needed to carry out operations and maintenance activities were not envisioned when some of member agencies took over the operations and maintenance activities related to these federally-partnered projects.

NAFSMA Concerns With Pending Clean Water Restoration Legislation

Although NAFSMA members had concerns about the federal wetlands protection program before recent court decisions, the broad brush approach of the proposed legislation would have severe consequences in the form of increased cost and delays on the operations of flood and stormwater management activities throughout the country.

We feel very strongly that the term "navigable waters" expressed clear Congressional intent when the Section 404 wetlands program was included as part of the Clean Water Act and set the definition that some waters were viewed as falling under federal jurisdiction, while others were not. By legislating that this intent really meant "the program should apply to all "waters of the United States" will have the impact of diminishing the value of, and possibly crippling the program. It will weigh the program down with a requirement for jurisdictional delineations on every wash and seep in the country, slowing the progress of the agencies and needed infrastructure.

We also recommend that the phrase in Section 4 "or activities affecting these waters" be deleted. It arguably could be interpreted to include activities taking place many miles from a Water of the U.S. In some portions of the U.S., for example where agriculture has long ago removed historical washes, wide shallow flooding is typical in large events. Expanding the 404 jurisdiction to include these types of agricultural areas simply does not make sense, and there are many other activities that could be given as examples.

As part of NAFSMA's amicus brief in the Tulloch litigation in 1995, the association argued that an exemption for flood control maintenance activities already existed under Section 404 (f) of the legislation. NAFSMA has

requested clarification of the exemption in testimony presented before Congress in the past and would like to raise the issue as part of this debate.

Nationwide Permits Need to Stay in the Savings Clauses

The U.S. Army Corps of Engineers must be able to continue to issue general (nationwide) permits under 404(e) (1) to allow the public works construction to continue in a reasonable and timely manner. The bill should add a new Savings Clause to Sec. 6 (would be a new (3) and renumber to conform) “Section 404(e)(1) relating to the authority of the Secretary to issue general permits on a state, regional, or nationwide basis for any category of activities.”

NAFSMA also recommends cleaning up the “findings” which, although they are not law, are often reference, and relied upon by courts to decipher what the Congressional intent was for otherwise unclear language. Section 7 in particular has many definitional problems. “Start reaches”, “small and intermittent”, “seasonal”, all vary by geography and climate.

As a strong supporter of the goals of the Clean Water Act, NAFSMA advocates that the following objectives that are so critical to flood protection activities be considered in discussions on potential changes to H.R. 2421.

NAFSMA recommends federal assistance with federal environmental permits for new and existing flood damage and ecosystem restoration projects to develop streamlined permitting for operations and maintenance activities for federally-partnered flood damage reduction projects and other non-federal projects. NAFSMA encourages the Corps of Engineers to better coordinate with all local, state and federal agencies to streamline the issuance of federal environmental permits, including those needed under Section 404.

NAFSMA recommends developing a regional permitting approach for permits needed for flood damage reduction and stormwater management operations and maintenance projects. Simply applying regional conditions to a national one size fits all program does not adequately address regional environmental conditions and adds more layers of review to the permits and further complicates and already burdensome process.

NAFSMA supports the inclusion of federal permitting in project operations and maintenance manuals, and in the case of older projects or stormwater management activities, in watershed or watercourse plans that would allow local agencies to perform the required project maintenance and/or construction without the need to obtain federal permits.

NAFSMA supports the development of reasonable guidelines, standards and mitigation requirements that recognize regional differences and the importance of operations and maintenance activities to the nation’s flood protection and stormwater protection activities.

NAFSMA supports adequate funding of resources for regulatory permitting. A lack of federal personnel to implement the wetlands permitting program continues to be an ongoing concern among NAFSMA members. The new rulemaking which will be required by enactment of this legislation will require additional resources for the drafting, comment response and hearing process and new funding should include these new demands.

Again, NAFSMA appreciates the opportunity to submit this testimony and is interested in engaging in discussion with the Committee to address these critical wetlands permitting concerns. Please contact Executive Director Susan Gilson at 202-218-4133 to discuss the pending legislation and NAFSMA’s concerns.