



# Association of State Floodplain Managers, Inc.

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April 18, 2011

U.S. Army Corps of Engineers  
Attn: CECW-CO-R  
441 G Street, N.W.  
Washington, DC 20314-1000

RE: Docket # COE-2010-0035; ZRIN 0710-ZA05

Submitted via email to [NWP2012@usace.army.mil](mailto:NWP2012@usace.army.mil) and Rulemaking Portal at [www.regulations.gov](http://www.regulations.gov).

Dear Mr. Olson:

The following comments to the Proposed Nationwide Permits are submitted on behalf of the Association of State Floodplain Managers (ASFPM), and more than 14,000 ASFPM members who are the Federal government's partners in efforts to identify, stabilize, and reduce flood losses. We appreciate this opportunity to share with you our comments and suggestions regarding the Proposed Nationwide Permits (NWP) and their potential impact on flood risk and associated loss of life, property, and floodplain natural resources. Through these comments, we wish to address the need for NWP to assure coordination with existing Federal, State, and local floodplain management regulations as part of the Section 404 and Section 10 permitting processes. We also address potential floodplain impacts likely to result from the Proposed NWP as they are currently drafted, and provide for your consideration our suggestions to lessen the likelihood of those impacts.

The U.S. Army Corps of Engineers and ASFPM have enjoyed a successful partnership for many years. We appreciate this opportunity to provide these comments. Please feel free to contact us with any questions you may have regarding this comments, and any time we can be of assistance.

Sincerely,

Greg Main, CFM  
ASFPM Chair

Larry Larson, P.E., CFM  
ASFPM Executive Director

CC: Lieutenant General Robert L. "Van" Van Antwerp, USACE  
Major General William Grisoli, USACE  
Jo-Ellen Darcy, Assistant Secretary, Civil Works, ASA

## Before the Department of the Army, Corps of Engineers

### Comments of the Association of State Floodplain Managers, Inc.

#### Proposed Reissuance of Nationwide Permits for Section 404 of the Clean Water Act and Section 10 of the Rivers & Harbors Act

##### Background

Section 404 of the Clean Water Act requires permits for any discharges of dredged or fill material into "Waters of the United States."<sup>1</sup> This requirement covers filling of wetlands, floodplains, coastal floodplains, and flood ways. This process requires public and regulatory input on the questions of need, alternatives, and cumulative impacts. All projects are required to avoid any impacts to the resource or surrounding properties if possible and to provide mitigation if possible. The Clean Water Act allows the issuance of general permits only for activities that are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."<sup>2</sup> Each permit also must comply with the requirements of the Clean Water Act § 404(b)(1) Guidelines.<sup>3</sup>

Section 10 of the Rivers and Harbors Act requires authorization from the U.S. Army Corps of Engineers (USACE) for the construction of any structure in or over any navigable water of the United States, the excavation, dredging or deposition of material in these waters.<sup>4</sup> Any obstruction in or alteration of a "navigable water" requires a permit if the structure or work affects the course, location, condition, or capacity of the water body.

##### Coordination with Nonfederal Floodplain Management Permits

State Floodplain Managers and local floodplain administrators work through State and local permitting processes to help assure that flood risks and floodplain impacts are identified and managed, and mitigated where required. Proposed development projects must comply with all applicable Federal, State, regional, and local regulatory processes. However, floodplain managers observe that, once Federal regulations are complied with, project applicants may not seek or obtain other applicable required floodplain permits. We wish to draw your attention to this problem, and make the following recommendations to address it.

1. The current and proposed NWP lack a way of determining the cumulative impacts of previous permits that were granted on a specific "navigable water" or watercourse in regards to flooding and water quality impacts. A more holistic approach is necessary to look at these impacts outside the specific project limits and riparian properties.
2. The NWPs need explicitly to require coordination with and approval from the local floodplain manager that the project complies with all applicable floodplain regulations, and would not increase the risk of flooding as an individual project or when added to the cumulative impacts of past projects or future similarly situated projects.

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<sup>1</sup> 33 U.S.C. § 1344.

<sup>2</sup> 33 U.S.C. § 1344(e).

<sup>3</sup> *Id.*

<sup>4</sup> 33 U.S.C. § 401 *et seq.*

3. Any modification of “navigable waters” that results in a change to the extent of either the regulatory floodplain or floodway should require a Conditional Letter of Map Revision (CLOMR) be submitted by the permit applicant to the Federal Emergency Management Agency or their designee. This coordination seems to be lacking in the current application process and needs to be strengthened.
4. Where § 404 individual permits are required, it is important that USACE staff familiar with flooding and hydrologic and hydraulic modeling review individual permits to determine specific and cumulative impacts of the project during the application process. This may be difficult under current staffing levels but is critical for the long term sustainability of water resources and reducing the impacts of flood events on coastal and riverine communities and economies. Options to work with State or local entities who have this review capability should be explored.

### **Specific Comments to Proposed NWPs**

Despite significant investment in identifying and reducing flood risk, losses continue to rise due to development of flood-prone areas, combined in many instances with degrading flood control infrastructure. In light of increasing flood losses, along with the economic and community vulnerability and instability that accompany any flood disaster, we encourage the USACE to reconsider the decision to remove the prohibition on the use of NWPs for development in Special Flood Hazard Areas.

The USACE rationale for prohibiting the use of these development NWPs in the floodplain was appropriate: “We are very concerned with the loss of life and property resulting from unwise development in the floodplain.”<sup>5</sup> Previous (2000 and 2002) NWPs prohibited the use of NWPs 39 (residential, commercial, and institutional developments), 40 (agricultural activities), 42 (recreational facilities), 43 (stormwater management facilities), and 44 (mining activities) to authorize permanent above grade fills within mapped 100-year floodplains located below the headwaters.<sup>6</sup> They also prohibited the use of NWPs 39, 40, 42, and 44 within mapped floodways above the headwaters.<sup>7</sup> The USACE should return to this prohibition and ensure such floodplain development cannot be allowed with the use of NWPs and must undergo the scrutiny of the individual review process.

The prohibition on use of NWPs to authorize floodplain fills is central to a coordinated federal, state, and local effort to reduce the U.S. flood losses. The USACE noted that this prohibition “reinforces the ‘FEMA program to minimize impacts to floodplains.’”<sup>8</sup> By prohibiting the use of NWPs in the floodplain, the USACE can help ensure that above-grade fills for development in the floodplain and floodway are carefully reviewed by, among others, federal, state, and local floodplain managers. Without the notice and comment and interagency consultation procedures associated with individual permit review, floodplain managers are far less likely to learn of proposed flood-increasing fills, which require permits in order to comply with their commitment and compliance with the NFIP, and to help ensure that proposed activities do not increase flood risk on site or to adjacent and downstream properties.

Since disruptive climate impacts are already underway and anticipated to increase, ASFPM prioritizes adaptation strategies for the built environment, including structures, infrastructure, cultural resources, commerce, and industry, and related natural resources within and dependent on the floodplain. By

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<sup>5</sup> 67 Fed. Reg. at 2,073; see also 65 Fed. Reg. at 12,880.

<sup>6</sup> See, e.g., 67 Fed. Reg. at 2,093.

<sup>7</sup> *Id.* at 2,093-94.

<sup>8</sup> See *NAHB v. Corps of Engineers*, 453 F.Supp.2d 116, 133 (D.D.C. 2006) (citing 67 Fed. Reg. at 2,073).

requiring that proposed floodplain fills undergo individual permit review, the USACE would help support the critical local role in managing flood risks, which is especially important in a changing climate.

#### **USACE Public Interest Review and E.O. 11988**

Floodplains carry out the following functions “important to the public interest”: moderation of flood flows, water quality maintenance, groundwater recharge, fish, wildlife and plant resource conservation, open space, natural beauty, scientific study, outdoor education, recreation, agriculture, aquaculture, and forestry.<sup>9</sup> The USACE public interest review directs Corps districts to “avoid to the extent practicable, long and short term significant adverse impacts associated with the occupancy and modification of floodplains, as well as the direct and indirect support of floodplain development whenever there is a practicable alternative.”<sup>10</sup> This regulation further requires that “the district engineer shall ensure, to the maximum extent practicable, that the impacts of potential flooding on human health, safety, and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains are restored and preserved.”<sup>11</sup>

Given the importance of floodplains to flood control, President Carter issued Executive Order 11988, “Floodplain Management,” instructing federal agencies to take measures to protect and restore the natural and beneficial values of floodplains when undertaking federal projects that might impact floodplains.<sup>12</sup> The USACE proposal to allow the use of NWP in the 100-year floodplain directly defies the USACE own public interest review regulations and E.O. 11988 and it should be withdrawn. To satisfy these directives, the USACE should strengthen, not weaken, the prohibition on the use of NWP in the 100-year floodplain and floodways.

When the USACE announced its 2000 NWP, it announced that by 2003, it would conduct an analysis and prepare a report of the extent to which its NWP are being used in the floodplain areas experiencing repeat flood damages.<sup>13</sup> However, we are not aware that any such report has ever been prepared. The draft decision documents for the 2011 NWP included no data on the use of NWP in the 100-year floodplain or floodway. The 2007 and 2011 draft decision documents for NWP 29 and 39 do acknowledge, however, that flood storage capacity (as well as water quality and fish and wildlife floodplain values) may be impacted by the use of these NWP.<sup>14</sup> In fact, by definition, fill placed in a 1-percent annual-chance floodplain will displace flood storage and conveyance capacity. In larger floods, this commonly results in increasing flood impacts to adjacent and nearby properties. The impacts are certain in floodway portions of floodplains.

Floodplain natural resources and human investment in flood-prone areas warrant the heightened review and protection of the individual permitting process. The Corps should reinstate its prohibition on the use of NWP 39, 40, 42, 43, and 44 in the 100-year floodplain. In addition, the Corps should extend the existing prohibition to NWP 29 (residential development). We encourage the Corps to:

- Conduct an analysis and prepare a report of the extent to which its NWP are being used in floodplain areas, particularly in areas that are experiencing repeat flood damages.

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<sup>9</sup> 33 C.F.R. § 320.4(l).

<sup>10</sup> 33 C.F.R. § 320.4(l)(2).

<sup>11</sup> *Id.*

<sup>12</sup> Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 24, 1977).

<sup>13</sup> 65 Fed. Reg. at 12,880.

<sup>14</sup> See NWP 29 and 39 draft decision documents at 17.

- Require documentation of compliance with FEMA minimum standards by a licensed professional engineer; and
- Provide for consultation with the resource agencies regarding habitat and biodiversity impacts on wetland and stream resources for projects proposed to be located in the floodplain.

### **NWP 29**

Five years ago the Corps removed text requiring permittees to minimize on- and off-site impacts and avoid flooding. The rationale for this change was that language in the general conditions addressed these issues. However, the general conditions do not address this issue directly and, as a result, may allow unmitigated flooding and/or water quality impacts to adjacent sites. Subdivisions should not go in unless the developers can demonstrate that they will not cause an increase flood hazard on other properties. To do otherwise puts the federal government in the position of aiding the permittee to impact the property rights of other property owners without compensation.

### **NWP 31**

The Proposed NWP 31 (Maintenance of Existing Flood Control Facilities) states that mitigation is to occur only one time per facility regardless of how many times maintenance on that facility might be carried out, and regardless of how much damage is caused to waters of the United States during subsequent maintenance work. This limitation may result in substantial and adverse impacts to floodplains and increase flood risk for those who rely on these existing flood control structures. In addition to allowing more than minimal impacts, both individually and cumulatively, NWP 31 may inhibit comprehensive basinwide flood risk management planning and restoration approaches that will help to safeguard communities and protect the nation's natural defenses. The Corps proposal to authorize the removal of levee vegetation adds to this problem.

The Corps issuance of a NWP that includes levee vegetation removal is a one-size-fits-all approach that may not be appropriate for all structures and communities. An independent peer review commissioned by the Corps concluded that the Corps proposed levee vegetation removal policies "lack scientific foundation, as evidenced by broad anecdotal assumptions and the lack of non-USACE literature citations."<sup>15</sup> Levee vegetation removal would be best addressed by a regional approach that reflects regional differences in soils, plant species, and climate, is based on science, and is permitted through individual permits with public notice and comment and state and federal interagency consultation.

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<sup>15</sup> Battelle Memorial Institute, 2008. Revised Final Independent Peer Review Report for US Army Corps of Engineers Vegetation Policy for Local Flood Damage Reduction Systems. Contract number W91NF-07-D-0001.