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April 24, 2010

U.S. Army Corps of Engineers
Attn: CECW-CE
Douglas J. Wade
441 G Street NW
Washington, DC 20314-1000

Attention: Docket ID No. COE-2010-0007

Subject: Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls

Dear Mr. Wade:

The National Association of Flood and Stormwater Management Agencies (NAFSMA) hereby submits comments on the U.S. Army Corps of Engineers' (USACE) proposed updates to the process for requesting a variance from vegetation standards for levees and floodwalls, as published in the Federal Register, February 9, 2010.

NAFSMA is a 30 year old national organization based in our nation's capital that represents close to 100 local and state flood and stormwater management agencies. Its members serve a total of more than 76 million citizens by flood and/or stormwater management. The following comments, questions and suggestions embody the experience of a wide range of organizations which NAFSMA represents, including local, regional and state flood and stormwater management agencies. Most of our members are local sponsors, or non-Federal partners, for USACE studies and projects and have direct experience with USACE inspections and vegetation requirements for levees and floodwalls.

NAFSMA appreciates the opportunity to submit comments concerning the proposed revisions to the "Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls."

NAFSMA believes that it is important that project sponsors have the ability to receive variances from USACE standards to allow additional vegetation on or near levees, while retaining the safety, structural integrity, and functionality of the levee as well as accessibility for inspection and flood fighting. The association has a strong interest in the proposed updates.

Variance Approval Process

Many of our member agencies applaud the requirement that Headquarters USACE (HQUSACE) provide the final approval for each variance, thus assuring national consistency in applying the standards. However, most member agencies also questioned the need for six iterations of review at three different USACE levels. The revised Guidelines provide for standardized application, requiring documented engineering justification for the request – this should not require extensive technical review and oversight of initial findings at several levels within USACE. Compare the proposed variance approval chain to FEMA’s levee certification/accreditation process, which requires just one level of review and a final approval to manage a complex and comprehensive set of data and engineering justification documents.

Instead, NAFSMA recommends one technical review (including, but not limited to, a 30-day review for completeness of the application, so that the requesting agency can provide additional material as needed in a timely manner), with a time limit of 90 days. This should be done by the District Levee Safety Officer (LSO), who will have the most familiarity with local conditions. From there, the application should be sent directly to HQUSACE for perfunctory approval based on uniform compliance with national standards. This final step should also be concluded within 90 days. NAFSMA further recommends that to provide some operational certainty for the applying agency, a variance request be deemed concluded and approved if USACE does not respond within a certain time period, recommended at 180 days.

These recommended changes to the variance approval process will be more efficient, and both USACE and the local sponsor will save significant time and money for other necessary work.

Apparent Change in Standards for Granting Variance

Currently, under *ER 500-1-1, Section 5-22 Regional Variances on Vegetation Standards-Policy*, a variance can be granted to “allow additional vegetation to grow on levees, when allowing such vegetation would preserve, protect, and/or enhance natural resources.” The entity seeking the variance must meet four specific criteria, but the entity can request, and could be granted, a variance.

Under the proposed Guideline, variances for any “woody vegetation” on most of the entire levee structure would be prohibited. This is a significant change to the substantive requirements of a variance, instead of simply clarifying the process. The local sponsor should have the opportunity to prove that an alternate design is safe, if for

instance a levee was overbuilt and could support woody growth without affecting the structural integrity, or as another example, if a levee is very small and a 15' buffer may be out-of-proportion to the safety benefits of a vegetation-free zone.

Environmental Compliance Issues

NAFSMA members believe that many variance requests will be based on pre-existing environmental compliance mandates, and many more will be based on required mitigation in order to resolve conflicting federal agency requests. In many cases, existing vegetation creates or comprises habitat for endangered species and substantial coordination with federal and state wildlife agencies will be required. Therefore, it is recommended that such coordination be included as part of the official process of submitting a variance request. A streamlined variance process could provide for direct coordination between federal agencies and the local sponsor before the variance review process commences. Early variance coordination could eliminate unnecessary studies and extensive wait periods.

In the case where pre-existing vegetation that has already been approved and inspected by USACE must be removed (presuming a variance is not available), then compensatory environmental mitigation will likely be required to comply with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA) and State environmental protection statutes. Because previously-allowed vegetation (under various approved O&M plans or local variances, etc.) would now be required to be removed by USACE, it is the opinion of some NAFSMA members that USACE would be responsible for the cost of mitigation and associated procurement of conservation easements. Under the revised Variance Guidelines, USACE should assess and report to the Administration and Congress the costs associated with environmental mitigation and procurement of conservation easements, and the cost to the nation for lost benefits for projects placed in an inactive status for not meeting requirements in a timely manner.

The proposed Policy Guidance Letter should also include guidance on U.S. Fish and Wildlife Service approved Habitat Conservation Plans (HCPs)¹. Of specific concern is to ensure any Section 7 consultations that may ensue from complying with the proposed Vegetation and/or Variance guidance are consistent with the approved Habitat Conservation Plan and are completed in a timely manner. NAFSMA is proposing that the Environmental Compliance Section of the proposed Policy Guidance Letter be revised to read as follows, "The sponsor is responsible for providing all National Environmental Policy Act (NEPA), Endangered Species Act (ESA) Section 7 consultation, Habitat Conservation Plan consistency analysis, and any other environmental compliance... The sponsor must evaluate the feasibility of any avoidance or minimization measures, if needed, to comply with ESA before the sponsor may participate or continue participation, in the Public Law..."

¹ For example, in Southern California, the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), the Coachella Valley MSHCP, Orange County Southern Subregion MSHCP, San Diego County MSHCP, et al.

In those cases where existing vegetation creates or comprises habitat for endangered species, what will be the process for complying with USACE guidance when the vegetation cannot be removed because of ESA regulations? USACE needs to address this issue prior to requiring full compliance with strict vegetation standards.

Preserving, Protecting and Enhancing

According to the Guidance, variances will be allowed only in cases where the vegetation would "preserve, protect and enhance natural resources" but that such enhancement is only allowed where there is no feasible alternative. We can expect that questions concerning the preservation, protection and enhancement of natural resources will often present complex evaluation challenges. For example, if a local agency seeks a variance to allow vegetation because hawks live in the trees and they will prevent squirrel population increase, which in turn reduces burrows and reduces the potential of listed species that take up residence in the burrows...will preserving said vegetation meet the standard of preserving, protecting and enhancing natural resources?

Does the standard to "preserve, protect and enhance natural resources" preclude the possibility that there could be landscape enhancements for the sake of aesthetics that do not endanger the structure of the levee or impair access or maintenance? NAFSMA recommends deleting the language about no feasible alternatives - the litmus test should be whether the structural integrity is preserved and whether maintenance, inspection and flood-fighting access is hampered.

Right of Way

Section 93, p. 6366 states "*no vegetation variance involving woody vegetation, as defined in ETL 1110–2–571 shall be granted for the following portions of a levee: The upper third of the river-side (or floodside) slope, the crown, the land-side (or protected-side) slope, or within 15 feet of the land-side (or protected-side) toe (subject to preexisting right-of-way).*" In reference to "subject to preexisting right-of-way," NAFSMA understands that if the project owner does not hold right-of-way for the full 15' beyond the outboard slope, vegetation will not be required to be removed (on another entity's property). Although USACE has elsewhere developed written Guidance that covers this situation, some agencies have experienced varied interpretations of that exemption. NAFSMA recommends that the guidance is made explicitly clear that a variance is not needed for vegetation occurring outside the project's original right-of-way, even if it is less than 15' from the outboard toe of a levee or floodwall.

Request Conference with Levee Safety Officer

Because there are many unique situations (e.g., levees built adjacent to pre-existing and previously vegetated 'farm' levees... levees built with exceptionally shallow side-slopes and then landscaped... previously-allowed vegetation that is part of a mitigation plan...), NAFSMA recommends that an application conference be available to the local

agency so that local agency staff can meet with the LSO to present and explain any unusual circumstances relevant to the Variance application. A site-visit or a presentation with Q&A may help to alleviate misunderstandings that could lead to inappropriate rejection of the Variance application.

Pre-existing vegetation

Section 7d, p. 6365: reads as if the Variance only relates to permission for new plantings. Suggest using the word “Variances” rather than “changes” in this section to clarify that a Vegetation Variance can apply to pre-existing conditions, native habitat, etc.

If, in fact, this Variance can not apply to pre-existing vegetation, several questions must be addressed, such as how previously approved conditions are to be recorded for future maintenance inspections when they have been established in design, permitting, construction and/or long term maintenance of a project (with regular USACE inspections). When newly applied inspection requirements contradict conditions that had previously been accepted by USACE, local sponsors are at risk of losing status in USACE programs such as the PL84-99 Rehabilitation and Inspection Program.

If a Variance application is made for an area with pre-existing vegetation (which had previously been acknowledged and approved by USACE), and the Variance application is denied, what is the consequence? Is there an appeals process? What is the recourse for the local agency?

Evolving Vegetation Standards

The California Central Valley Levees Roundtable is a local-state-federal (including USACE) partnership that is working collaboratively to more clearly understand the effects of vegetation on levees – both positive and negative. Research is being conducted that might significantly inform potential regional variances for levee vegetation. How will USACE’S Variance process relate to this ongoing research? Where applicable, we believe the new findings from this research should be applied to levees beyond California’s Central Valley.

A description of ongoing research from the Roundtable: “Peer reviewed scientific research will be conducted to support development of a technically defensible vegetation management policy in support of California’s FloodSAFE initiative. Research will consider both beneficial and harmful impacts of levee vegetation on Central Valley levees. It is expected scientific research, as well as long-term evaluation and monitoring of vegetation life cycles with respect to performance of project levees in the Central Valley, will support granting of regional variances to the national standards for the Sacramento and San Joaquin levee systems. In addition, research is expected to identify appropriate engineering actions from a risk perspective to mitigate leaving select vegetation on levees.”

More information on the Central Valley Roundtable process is here:
<http://www.safca.org/protection/CalifRoundtable.html>

Timeline

The proposed guidance states that all new and existing variances will need to apply under this process by September 30, 2010. Given that the approval of the policy is not yet certain or final, and given the significant information needs for the application, we urge that this deadline be extended to at least one year after approval of the policy. Agencies need sufficient time to program funding and complete any necessary contracting arrangements necessary to complete the application.

Specific Questions & Definitions

Please define or refer to standard published definitions for the following terms:

- Ordinary High Water
- Normal Water Surface

Section 6b, p. 6365: Can a Variance Request be denied because of lack of USACE District funds to review it? If this is an issue, perhaps the local sponsor could fund the review.

Section 7a, p. 6365: It appears that the sponsor is supposed to coordinate with USACE District counsel in formulating the request. How does the local sponsor get the time and attention of USACE District Counsel, especially before the District LSO has "officially" seen the request?

Thank you for the opportunity to comment. We look forward to viewing your response to our comments and to viewing a revised Process in the near future.

Very truly yours,

A handwritten signature in black ink that reads "Gale Wm. Fraser, II" followed by a stylized flourish.

Gale William Fraser, II, PE
President, NAFSMA