



National Association of Flood & Stormwater Management Agencies

PO Box 56764, Washington, DC 20040 Ph: 202-289-8625

May 15, 2017

Subject: NAFSMA Comments on Reducing the Regulatory Burden
Docket ID No. EPA-HQ-OA-2017-0190

The National Association of Flood and Stormwater Management Agencies (NAFSMA) submits the following comments in response to the request for comment on the evaluation of existing EPA regulations (82 Fed. Reg. 17793, April 13, 2017) as part of the agency's effort to implement Executive Order 13777 the Presidential Executive Order on Enforcing the Regulatory Reform Agenda. NAFSMA appreciates the opportunity to comment on this important federal initiative.

NAFSMA is a local and regional public agency driven organization based in the nation's capital, with a focus on furthering effective flood, floodplain and stormwater management in urban areas. The association's mission for 39 years has been to advocate public policy and encourage technologies in watershed management that focus on flood protection, stormwater and floodplain management.

NAFSMA has worked closely with EPA on the stormwater management program, as well as the Section 404 Wetlands Protection program and other water quality efforts for more than 30 years. NAFSMA participated in the Federal Advisory Committee that helped to design the national NPDES stormwater program for communities under 100,000 in population and also participated in EPA's Wet Weather Advisory Committee as well and has continued to work with EPA's Office of Water on national stormwater management issues, as well as wetlands protection issues, and has signed a memorandum of understanding with the Office of Water on green infrastructure issues.

NAFSMA members are on the front line, protecting their communities and regions from flood hazards that can result in loss of life and property. They are responsible for flood mitigation, stormwater, floodplain and emergency management activities, as well as water quality protection. In carrying out their missions, local flood, floodplain and stormwater management agencies are responsible for meeting numerous local, state and federal regulations as part of their responsibilities. Complying with the number and complexity of the requirements associated with these regulations requires significant funding and staffing resources.

General Considerations for Improving Federal Water Resources Regulations

In carrying out this review of federal environmental, and in particular water resources regulations, NAFSMA urges EPA to consider whether the regulations being reviewed meet the guidelines listed below which NAFSMA outlined in its 2011 Resolution titled "Regulations and Policies – A Reasonable and Sustainable Approach:"

- Respect local authority and regional differences;
- Are reasonable with the current technical and economic environment;
- Protect local and regional flood control agencies from unfunded mandates;

- Streamline state and federal permitting environmental permitting processes; and
- Provide support for sustainable programs at all levels of government.

Engage Stakeholders throughout This Process

NAFSMA urges that the agency work closely with key local and regional water quality and flood risk management stakeholder groups, including NAFSMA, to solicit input throughout this regulatory review effort in a meaningful way. This engagement will serve to direct resources to the highest priority areas and will leverage local expertise to help make this effort successful and achieve the most valuable water quality achievements.

NAFSMA's perspective is unique in that our members manage not only water quality issues, but water quantity issues as well, and the association and its members have been working with this comprehensive approach since NAFSMA's establishment in 1978.

Reaffirm Positive Approaches – Integrated Planning Framework

EPA's Office of Water and local agencies have recently made strides to provide more flexibility to local water resource management agencies to prioritize their local investments to meet federal and local water quality goals in a manner that provides the best financial investment while achieving the maximum environmental benefits. This integrated planning framework provides a valuable tool for communities to meet their water quality goals and NAFSMA urges the Administration to continue down this path to achieve important water quality objectives.

NAFSMA also urges that this framework encourage and incentivize regional stormwater recharge and reuse as an alternative to the traditional approach to stormwater regulation. Such an approach can increase water supply, protect resources downstream of the MS4, reduce treatment costs and encourage municipalities to address discharges both at the source and before they exit the municipal storm sewer system.

Consider Full Cost-Benefit and Net Environmental Benefits of All Water Quality Regulations, Including Total Maximum Daily Load Regulations

Under current procedures, not all of EPA's actions that significantly impact local NPDES permits are currently required to go through the full public review process. As a result, some local governments are being required to implement measures to achieve numeric water quality-based permit limitations in stormwater NPDES permits that can be extreme and are not reasonably achievable or financially responsible. NAFSMA urges that Total Maximum Daily Load (TMDL) limits and other water quality criteria also go through the full public review process, including cost-benefit and net environmental benefit review.

Review Outdated Requirements and Procedures

Outdated requirements create an unnecessary financial and staff burden on regulated communities. As an example, in comments filed by the San Antonio River Authority on EPA's Regulatory Review, SARA discusses the current bacteria standard and its impact on 303(d) listings which have triggered costly TMDL studies and implementation plans in Texas. SARA notes "in Texas alone, 32 counties and 134 water quality segments were listed in 2013 as having bacteria impairment thereby triggering TMDL studies" and the agency has reached the conclusion after significant investments in modeling that the 126#/dL E. coli standard is dated and not reflective of the varying eco-regions across the country.

SARA believes that the bacteria standard is a major regulatory burden. Not only is it non-attainable, but it can be misleading to the general public. NAFSMA recommends that this and other similar standards and procedures be reviewed to confirm that they are reasonable, achievable and actually lead to improved water quality.

Permit Simplification

EPA should develop guidelines for permit writers to simplify permits and clearly identify performance standards based on the types of water being protected and on the known field performance of applicable Best Management Practices. Permit simplification is critical for success of the overall stormwater management program.

Preserve Flexibility for the States

NAFSMA urges that States be allowed to take the lead on policy decisions and NPDES permit requirements. Regions across this nation have wide variations in climate and geographic issues; population density; constitutional frameworks; taxing and enforcement capabilities; land use authorities; and different water resources challenges. As a result, implementation of the Clean Water Act needs to provide flexibility for the States to implement the law.

Clean Water Act §404(f)(1)(b) and §404(f)(2)

Evident from the Clean Water Act §404(f)(1)(b), Congress intended for routine maintenance of flood control channels to be exempt from permitting. However, narrow interpretation of the maintenance exemption severely limited its application; and expansive interpretation of §404(f)(2) recaptured otherwise exempt maintenance activities back under regulatory jurisdiction.

NAFSMA requests EPA, in conjunction with the U.S. Army Corps of Engineers, to clearly exempt routine maintenance of flood control channels. Once the initial construction of a flood control channel has been lawfully permitted and its impacts fully mitigated, the routine maintenance of the facility should exempt as Congress intended under the Clean Water Act.

Clean Water Act – General Permit Term

The Clean Water Act §404 (e)(2) limits the term of general permits to five years. Given the cost, complexity and length of time required to obtain routine maintenance permits for flood damage reduction systems, we recommend that the EPA support changes to the Clean Water Act to increase the term of general permits to 10 years or longer.

Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, April 10, 2008

In 2008, the EPA and USACE promulgated a new rule for compensatory mitigation and outlined the procedures for establishing mitigation banks and in-lieu fee (ILF) programs. However, the rule did not distinguish between private entities and local governments that wish to establish a mitigation bank or ILF program. Consequently, the rule contemplates a single path for any entity, regardless of risk level.

NAFSMA urges EPA and USACE to create a separate, simpler process for local governments that wish to create a single-user mitigation bank or ILF program. In this case, a local government would create a mitigation bank or ILF program for its own sole use--mitigation credits cannot be sold. In addition, local governments are enduring institutions that operate in the public interest and do not dissolve at the end of a development or conclusion of a project; and a banking/ILF process should be commensurate with the risk. Furthermore, a single-user bank/ILF neither transfers the benefits nor the obligations and the requirements should also reflect the lower risk.

NAFSMA urges EPA and USACE to develop a simpler approval process and banking template for single-user, local government mitigation banks/ILF program. Furthermore, the credit release schedule should be relaxed and financial assurance requirement should be waived. Again, local governments are enduring institutions and the obligations reside with the beneficiaries of the mitigation bank/ILF programs. Just as the 2008 Mitigation Rule acknowledged that financial assurance is not always necessary for government entities in permittee responsible mitigation, a mitigation bank/ILF is essentially a form of advance permittee responsible mitigation, and financial assurance should similarly be waived.

Waters of the United States – Section 404 Rulemaking

NAFSMA appreciates the initiative undertaken by the Administration to review the Waters of the United States rulemaking. NAFSMA has provided comments on many occasions as the rule moved through the regulatory process. The association will be submitting separate comments on this rulemaking to the agency on the WOTUS rule, which has significant impacts on the operation and maintenance of flood damage reduction systems.

NAFSMA looks forward to working with EPA on this effort. Thank you for the opportunity to comment on this important effort to review federal water resource regulations. Please contact Executive Director Susan Gilson at sgilson@nafsma.org or 202-289-8625 with any questions.