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CLEAN WATER ACT – SECTION 404 PERMITTING

REQUESTED ACTION: Amend Section 404 of the Clean Water Act (CWA) to provide a maintenance exemption for removal of sediment, debris and vegetation from flood control and drainage facilities. In addition, amend the Act to extend the general permit term from five to 10 years.

BACKGROUND: The CWA and subsequent amendments have had a positive impact on the health of many of the nation’s rivers and streams. One of the unintended consequences of the Act, however, is its impact on the maintenance of flood protection and drainage facilities from CWA Section 404 permitting.

The CWA, first authorized in 1972 and amended in 1977 and 1987, governs the discharge of “dredge or fill material” into waters of the United States and exempts certain activities from requiring permits, including activities performed “for the purpose of maintenance of currently serviceable structures.” Counties and other local entities are required to obtain Section 404 permits from the U.S Army Corps of Engineers (the Corps) to perform maintenance removal of sediment, debris, and overgrown vegetation from flood protection facilities.

Section 404 (f) (1) (B) of the CWA defines non-prohibited discharge of dredge or fill material as... “discharge of dredge or fill material for purposes of maintenance including reconstruction...,” leading to the conclusion that Congress intended for maintenance activities of currently serviceable flood protection facilities to be exempt from 404 permit requirements.

However, the Corps has interpreted that the maintenance exemption of Section 404 does not apply to routine maintenance removal of accumulated sediment, debris, and overgrown vegetation from flood protection facilities and drainage ditches. This narrow interpretation of the maintenance exemption that some Corps’ districts have adopted increases their workload, causing a significant backlog in permit processing that is thwarting local agencies’ efforts to perform their maintenance in a timely and responsive manner.

Failure to perform essential maintenance activities results in undue liability for flood damages on local flood protection agencies. Further, the processing time – normally one to three years – and compensatory mitigation required to obtain Section 404 permits, have become an impediment for local entities to provide critical flood protection. This proposal is not applicable when endangered specie is present in the directly affected maintenance area.

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