

**County Engineers Association of California  
Flood Control and Water Resources Policy Committee  
Meeting on  
August 26, 2010**

**1. Construction General Permit**

Nadeem with Orange County reported on the State's 2009 Construction General Permit. Each permit requires identification of a "legally responsible person" who is responsible for anything that occurs on a project site. This is problematic for a project that the County has no direct control over, for example, a developer project or a Corps flood control project. The Corps refused to sign on the Construction General permit as the legally responsible person on an Orange County flood control project and the County had to sign in order for the project to go forward. In another example, a developer was building a flood control channel and the County agreed to sign, but only after the developer placed a large cash deposit into escrow. The State Board has recognized the problems created by this and are reportedly working on a fix, however, that could take some time.

**2. Fish and Game Mitigation and Endowment Requirements and Section 404 Maintenance Permits**

Nadeem reported on the efforts that Orange County is taking to resolve the Fish and Game mitigation and monitoring and endowment requirements. Fish and Game is now talking about third party monitoring to ensure objectivity. The regional meetings which were occurring throughout the state have been stalled for some time, due to a variety of reasons, but most notably staff shortages at Fish and Game and the economy in general. Attached is a briefing on the current efforts in Orange County on the endowment issue. (See attachment 1). Nadeem also reported on the latest efforts of Orange County on streamlining the Section 404 process. (See attachment 2).

**3. Needs Assessment Update**

Terri Wagoner, with DWR, reported on the current status of the Needs Assessment. The project has been stalled over the last year due to cash flow issues. However, cash flow has been approved recently so efforts can begin. The consultant has been hired, CH2MHILL, and DWR is working on task orders. CEAC will be invited to review the task orders. There was some discussion about the bonds and how they have been released over the last year. Some projects are continuously appropriated and others must be approved through the State budget. This fall the consultants will put together a framework for developing the overall planning effort and Terri would like the CEAC Subcommittee to review

this with the consultant and DWR. Phase one of the work product is due in 2012.

#### **4. Proposed Wetland and Riparian Area Policy**

This is a policy the State Water Board has been working on for the last three years or so. It is broken down into three phases. Phase one will focus on dredge and fill projects. This is defining "waters of the US" to include three factors that need to be present (soils, water and vegetation). This will impact vernal pools, roadside ditches, upper watershed swales, etc. Staff is currently working on defining wetlands of the State. The second phase will come later and will look at widening the application of permitting for wetlands. The third phase will extend into riparian areas with new beneficial uses and water quality objectives. All of this will be implemented through a basin plan modification. Watershed planning will be given a high priority. For example, if you have a watershed plan you will get preference for your permit application. Cece Sellgren, with Contra Costa County, transmitted a more detailed status of the project in a separate email.

#### **5. Corps Levee Vegetation Policy**

There was general discussion about the Corps policy on vegetation. If the policy is not modified, vegetation will have to be removed from all Corps levees or the County will risk losing funding through the PL 84-99 program. Contra Costa and Bay Area Flood Control Districts are opposing the policy and seeking changes while at the same time applying for a variance under protest. The Bay Area counties are preparing a letter from Congress to the Corps. It was agreed that this letter will be sent to all counties in draft form for review. After the letter is finalized each county will ask their congressional delegation sign the letter if they feel it's appropriate. This will be transmitted in a separate email. In the Delta the Corps is viewing flood control facilities as a system and if your neighbor has not maintained the levee up to standards (for example not removing vegetation) then the entire system, including your facilities, are deemed unacceptable.

#### **6. Legislative and Administrative Priorities**

Karen reviewed the legislative and administrative policy guidelines and they were all approved with the addition of an item covering the Corps Vegetation Policy and an item covering the State Water Board's proposed wetland and riparian policy.

#### **7. Water Resource Development Act**

Lance and Dan discussed a proposal to seek authorization from Congress for a new title to fund projects that would address impacts from public lands. This new program would then be able to appropriate money through a budget bill for

specific projects to mitigate impacts of storm runoff from public lands. For example, after a fire on public wildlands a Flood Control District could seek funding to desilt a downstream debris basin. The proposal would not impact or take away funding from other existing programs. Chris Stone agreed to lead a working group of County Engineers to flesh out this proposal with Lance and Dan. If you would like to join this working group please call Chris.

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## CEAC FLOOD POLICY COMMITTEE FISH & GAME FINANCIAL ASSURANCE POLICY

AUGUST 2010

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### Background - DFG Financial Assurance Requirement

- DFG interpretation of Fish & Game Code § 2081(b)(4) authority: "...applicant shall ensure adequate funding to implement [mitigation]..."
- Escrow funds or irrevocable letter-of-credit for mitigation establishment (short-term).
- Endowment funds for mitigation site maintenance in perpetuity (long-term).
- Required for local government as well as private entities.
- Unnecessary financial burden on local government.

### Orange County Legislative Proposal Status – SB1446 (Correa)

- SB1446 passed Senate Natural Resources Committee; currently inactive in Senate Appropriations Committee while OC pursues negotiations with DFG.
- Thanks to supporters: CSAC, LA County Flood, AGC, SCAC, AAA, RCRC, League of CA Cities, ASCE OC Branch, OCTA, CA State Council of Laborers.

### Orange County Pledge of Revenue Proposal

- County and DFG have been working on financial assurance issue for over a year.
- OC had proposed pledge of revenue as financial assurance.
- State already accepts pledges of revenue as financial assurance for long-term public and resource protection (landfill closures and surface mining).
- OC Proposal:
  - Pledge of revenue.
  - Single, common contingency fund for all future projects. *funding pool*
  - Contingency fund based on geographic area & population formula to approximate future impacts & therefore mitigation management costs.

### DFG Pilot Program for Local Government Endowment Alternative

- June 24, 2010 – DFG reported to the F&G Commission, DFG's proposal for endowment alternative pilot program for local government.
- DFG recognizes that endowments are a financial burden on local government.
- Pilot program:
  - Limited to Natural Community Conservation Planning (NCCP) program participants (only 4 counties have implemented NCCPs).
  - Pledge of revenue or agreement specifying financial mechanism.
  - Short term contingency fund and longer term assurances to fund management of mitigation sites.
- OC engaged in dialogue with DFG on pilot program.

Contact: Vincent Gin, P.E., tel. (714) 834-5732, [vincent.gin@ocpw.ocgov.com](mailto:vincent.gin@ocpw.ocgov.com)

Attach. 2

## REPORT TO CEAC FLOOD CONTROL POLICY COMMITTEE

AUGUST 26, 2010

### SUBJECT: STREAMLINING CLEAN WATER ACT (CWA) SECTION 404 MAINTENANCE PERMITS

#### BACKGROUND

The CEAC 404 Maintenance Permit subcommittee developed recommended legislative language for insertion into the proposed Clean Water Restoration Act (S 787) being considered by the 111th Congress. This language is supported by CSAC and has been forwarded to CSAC's lobbyist in Washington DC (attached). At the last CSAC Policy Conference in March 2010, the 404 Permit Subcommittee reported on the next step which was to seek legislative support for insertion of the recommended language in the S 787 or a companion House bill.

#### CURRENT STATUS

Orange County and Los Angeles County Public Works departments have been in contact with key Representatives or their staffs in their respective counties seeking support for insertion of the proposed amendments to the Clean Water Restoration Act.

Orange County contacted Representative Gary Miller, a member of the House Water Resources and Environment Subcommittee (WR&E), who agreed to support insertion of legislative language to streamline 404 Maintenance Permits. The WR&E Subcommittee will act on any amendments to the CWA.

Representative Miller took the additional step of asking the Corps to provide draft amendment language that would accomplish the intended streamlining of 404 Maintenance Permits we were requesting; and, in addition, submitted the proposed language developed by the CEAC 404 Maintenance Permit subcommittee. The Corps responded with the attached draft language, which, with few exceptions, is identical to the subcommittee's recommended language. Please note the disclaimer on the Corps' Drafting Service document, which indicates that providing drafting services does not signify a Corps or Administration position on the subject issue or language.

#### NEXT STEPS

While we now have legislative language to share with and recruit supporters, the Clean Water Restoration Act (S 787) is unlikely to be considered before December 2010 when this Congress adjourns. A similar bill will more than likely be introduced in the next, 112<sup>th</sup> Congress, which begins in January 2011; and we will be prepared to submit our amendments at that time.

#### ACTION ITEMS

We now have more time to seek support from our respective legislators, so it is incumbent upon each of our counties to educate our legislators and their staffs on this issue. With this in mind, please take these two actions: 1) Continue to forward examples of timelines or problems encountered by your county while attempting to perform required maintenance activities on flood protection infrastructure, in a cost effective and timely manner; and 2) work to obtain a resolution from your Board in support of these amendments. All such information should be sent to Karen Keene at CSAC.

Attachment A: CEAC 404 Maintenance Permit Amendment language

Attachment B: Corps Drafting Service Amendments to the CWA

**CLEAN WATER ACT, SECTION 404  
RECOMMENDED CORPS LANGUAGE  
MARCH 23, 2010**

Representative Miller's office was provided following draft language from the Corps as a result of his request for drafting services to clarify the Clean Water Act Section 404 maintenance activities of flood control and drainage facilities. The language shown below, proposed by the Corps closely resembles CEAC/CSAC's proposed amendments.

1. **The USACE has defined channel and drainage inverts as not being part of the "serviceable structure" of a flood protection facility and therefore not exempt from maintenance activities as defined in the Act under Section 404 (f) (1) (B).**

**To clarify this provision the following is proposed to be added to paragraph 404(f) (1) (B):**

**404(f)(1)(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, ~~and~~ transportation structures; ~~and~~ drainage and flood control channel inverts constructed of soil, sand, gravel, rock, rock rip rap, concrete, asphalt or any other material placed in the invert as part of the initial construction or reconstruction of currently serviceable structures; and including the removal of ~~and the~~ sediment, debris and vegetation removal from such ~~said serviceable~~ structures.**

2. **Due to the average three or more years required to prepare and process a 404 maintenance permit, the current five (5) year permit term limit requires a new application to be in process soon after receiving a permit to insure a replacement permit is in place before the existing permit expires. a ten (10) year term would allow for a reasonable time between permit applications and reduce the cost and resources for the Corps and local agencies. Propose extending permit term from five to ten years.**

**Propose Amending Section 404(e)(2) as follows:**

**Section 404(e)(2) No general permit issued under this subsection shall be for a period of more than ~~five~~ ten years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.**

3. **Section 404(f)(2) is the so called "recapture clause" due to its subjective authority and allows the Corps to require a permit "where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced...". This recapture clause has the ability to void most of the maintenance exemptions offered by the act and it is recommended that it not be applicable to maintenance of flood protection and drainage facilities.**

**This can be accomplished by adding, "Except for Sec.404(f)(1)(B)" at the beginning of Sec. 404(f)(2) to read as follows:**

**Section 404(f)(2) Except as provided in paragraph (1)(B) of this subsection, any ~~for Section 404 (f) (1) (B)~~ any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.**

DRAFTING SERVICE

**SUBJECT: Amendments to Sec. 404 of the Federal Water Pollution  
Control Act**  
**DATE: March 23, 2010**

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1           Sec. \_\_\_\_\_. Section 404 of the Federal Water Pollution Control Act (33 U.S.C.  
2 1344) is amended--

3           (a) in subsection (e)(2) by striking "five" and inserting "ten" in lieu thereof;

4           (b) in subsection (f)(1)(B) by--

5                               (1) striking the word "and" where it appears immediately before  
6 the phrase "transportation structures";

7                               (2) inserting the following language immediately after the phrase  
8 "transportation structures":

9                                       ", drainage and flood control channel inverts constructed of  
10 soil, sand, gravel, rock, rip rap, concrete, asphalt or any  
11 other material placed in the invert as part of the initial  
12 construction or reconstruction of currently serviceable  
13 structures; and including the removal of sediment, debris  
14 and vegetation from such structures"; and

15           (c) in subsection (f)(2) by striking the word "Any" and inserting the following  
16 language in lieu thereof:

17                               "Except as provided in paragraph (1)(B) of this subsection, any".

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*The draft legislation is provided as a drafting service at your request and should not be construed as an Army or Administration position on this proposal. Under departmental procedures, the official position on the merits of this legislation will be developed by the Secretary of the Army in response to a request from the Chairman of the Committee having the legislation under consideration, and then only after coordination within the Administration.*