

March 12, 2020

The Honorable Andrew Wheeler  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

Lieutenant General Todd T. Semonite, P.E.  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314

Dear Administrator Wheeler and Lieutenant General Semonite:

The American Association of State Highway Transportation Officials (AASHTO) is a non-profit, non-partisan association representing highway and transportation departments in the 50 states, the District of Columbia and Puerto Rico. Our primary goal is to foster the development, operation and maintenance of the national transportation system. AASHTO also serves as a liaison between state departments of transportation (state DOTs) and the Federal government. We are writing to request that the Environmental Protection Agency (USEPA) and the Army Corps of Engineers (USACE) confer to revise Item 6 in the 2009 guidance entitled *Army Corps of Engineers Standard Operating Procedures* to eliminate the requirement for Section 404 authorization for temporary discharges necessary for conducting exempted maintenance activities.

An important part of our member states mission is to keep roadways safe and help to preserve investments in the transportation networks through maintenance of serviceable transportation-related structures and other infrastructure. This maintenance includes routine maintenance, maintenance replacement, and emergency reconstruction for the purpose of protecting, repairing or otherwise restoring the functionality of these assets.

State DOTs annually allocate a significant portion of their overall transportation funding for road maintenance and operations. A significant amount of these funds is dedicated to projects where structures such as bridges and culverts are replaced in-kind, or structural components are repaired, or are cleared of accumulated sediment and debris. On the operations side, state DOTs routinely perform maintenance on tens of thousands of miles of roadside drainage ditches each year. State DOT maintenance budgets are used for both scheduled projects/activities and those performed in response to emergency conditions.

By their nature, these structure and ditch maintenance projects and activities often occur in waterways and roadside ditches that meet the criteria set forth in law, regulations and guidance as waters of the United States (WOUS) and are therefore subject to regulation under the Clean Water Act (CWA). Accordingly, state DOT staff must determine the federal permitting requirements for jurisdictional impacts before maintenance can be performed. These permit

determinations and coordination can cumulatively consume significant manpower and other resources and potentially affect maintenance schedules.

A review of Title 33 of the U. S. Code provides that many maintenance projects and activities are exempted from the permitting requirements provided that certain conditions are met:

**33 U.S.C. § 1344. Permits for dredged or fill material**

**(f) Non-prohibited discharge of dredged or fill material**

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

...

(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;

(C) for...the maintenance of drainage ditches;

...

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) 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.

The Clean Water Act Section 404(f)(1) and implementing regulations (see 33 CFR 323.4(a) and 40 CFR 232.3(c)) reference relief from Section 404 permit requirements for the type of commonplace structure and ditch maintenance projects described above. The discharge of dredged or fill material resulting from these maintenance activities into navigable waters are exempted provided that such maintenance does not include any modification that changes the character, scope or size of the original fill design and that any emergency reconstruction occurs within a reasonable period of time following the damaging event.

Section 404(f)(2) is a recapture provision that subjects the maintenance activities to a Section 404 permit if the use of the navigable waters is changed. Specifically, the discharge of fill material resulting from the maintenance activity must both: 1) have the purpose to convert an area of the WOUS into a use to which it was not previously subject, and 2) impair the flow or circulation of WOUS or reduce the reach of such waters, for the maintenance activity to require a Section 404 permit.

In accordance with the conditions of the Section 404 exemption, only maintenance activities on serviceable structures where the character, scope, or size of the original fill design remains unchanged qualify. Examples of these maintenance activities include:

- Bank stabilization repair;
- Scour protection repair;
- Bridge abutment/wingwall repair or in-kind replacement;
- Bridge pier/footer repair or in-kind replacement;
- Pipe and culvert repair or in-kind replacement;
- Sediment and debris removal within or adjacent to structure; and
- Stream ford crossing repair.

Typical roadside ditch maintenance is performed by DOTs for the purpose of removing accumulated sediments and debris and returning a drainage ditch to its original design standard and functionality or a channelized stream to its original channelized dimension. Examples of routine roadside ditch maintenance activities include:

- Excavation of accumulated sediments and debris back to original contours;
- Re-shaping of side slopes;
- Stabilization of side slopes; and
- Armoring, lining, and/or paving where the ditch was previously armored, lined, or paved.

These structure and ditch maintenance activities do not convert any areas to new use or change the use of the navigable waters where the flow or circulation of navigable waters may be impaired or their reach reduced. Therefore, these activities are not subject to Section 404(f)(2) and comply with the Section 404(f)(1)(B) and (C) exemptions.

In performing these exempted maintenance activities, erosion and sediment control law and regulations and practical considerations require the use of measures such as non-erodible temporary cofferdams (e.g., placement of sandbags) and stream pump-around operations, resulting in a temporary “discharge” of fill material into navigable waters. The temporary discharge of fill material in these circumstances is integral to the structure and ditch maintenance activities, is also covered under the Section 404(f)(1)(B) and (C) exemptions, and therefore should not require Section 404 authorization.

Unfortunately, what appears to be clear relief both for the maintenance activity and appurtenant temporary fill activities is confounded by current Army Corps of Engineers Standard Operating Procedures.\* This 2009 guidance states under Item 6 “*Exemptions*”:

*Activities that are exempt from the permit requirements of Section 404 of the Clean Water Act are listed at 33 CFR 323.4. Activities that are exempt from the permit requirements of Section 10 of the Rivers and harbors Act of 1899 are listed at 33 CFR 322.4. If temporary discharges of dredged or fill material into waters of the United States, such as cofferdams or temporary access roads, are necessary to conduct exempt activities, Section 404 authorization is needed for those temporary discharges.*

This guidance does not appear to be consistent with Congressional intent of the Section 404(f)(1)(B) and (C) exemptions. AASHTO member states are indicating that USACE District offices are using this guidance to require Section 404 permits for temporary discharges incidental to the exempt maintenance activities. This has placed unnecessary regulatory burden both on DOTs as well as USACE District offices.

AASHTO respectfully requests that USEPA and USACE confer to revise Item 6 in the 2009 guidance to eliminate the requirement for Section 404 authorization for temporary discharges necessary for conducting exempted maintenance activities.

Thank you for your consideration of AASHTO's request, and if you have any questions or would like additional information, please contact Shannon Eggleston, Program Director for Environment, at (202) 624-3649.

Sincerely,

A handwritten signature in black ink that reads "Patrick K. McKenna". The signature is written in a cursive, flowing style with a long, sweeping tail on the final letter.

Patrick K. McKenna  
President, American Association of State Highway and Transportation Officials  
Director, Missouri Department of Transportation