FLOOD PROTECTION TEAM

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Implementation of Policy Reforms under WRRDA of 2014 for Flood Damage Reduction Projects

Requested Action:
The U.S. Army Corps of Engineers (USACE) must collaboratively engage with non-federal sponsors in the development of balanced, effective, and implementable policy and guidance for the Civil Works Program as mandated under the Water Resources Reform and Development Act of 2014 (WRRDA 2014). The Sacramento region seeks a suggested addition to Section 3012 of WRRDA 2014 for flexibility in crediting, streamlining of Section 408 permission for locally initiated projects, and collaboration on flexible guidance for levee vegetation policy.

Background:
WRRDA 2014 was signed into law by the President on June 10, 2014, as Public Law 113-121. This was the first water resources authorization bill since 2007. The changing political dynamics, economic issues, and the adoption of a no earmark rule by the Administration and Congress required a revised approach to the development and passage of the legislation. The Reform element of the bill addressed the areas that Congress felt required programmatic changes and a new approach in how the USACE has been doing business.

Since implementation of WRRDA 2014, the USACE, stakeholders, and Congress have been working to put into practice specific directives outlined in the sections of the legislation. This has proven to be a challenge due to the internal process of the USACE and other agencies, coordination with the Office of Management and Budget over policy and funding implications to the USACE budget, and developing a new process for project and study identification and authorization.
WRRDA 2014 laid out specific reforms in the USACE process to improve partnership with non-federal sponsors and interests and increase transparency, accountability, and Congressional oversight in reviewing and prioritizing future water resources development investments.

Implementing WRRDA 2014 requires the USACE to develop and issue roughly 200 pieces of implementation guidance. Since enactment of the bill in June 2014, the USACE has issued approximately 56% of the implementation guidance, most of which address the non-technical sections of the law.

Stakeholders and Congress have been asking the USACE to complete the guidance and collaborate in its development with non-federal interests, consistent with WRRDA 2014, which directs the USACE in at least 15 separate provisions to consult with non-federal sponsors and interests. The Sacramento region requests specific collaboration in the areas of crediting, Section 408 permission, and the USACE levee vegetation policy.

**Meaningful Input on Implementation**
We appreciate that the USACE created a series of WRRDA implementation listening sessions. We believe the USACE cannot stop with only arms-length engagement. WRRDA directs the USACE in at least 15 separate provisions to consult with non-federal sponsors and interests, and active, responsible consultation requires more than one-way listening. The projects and policies of WRRDA require significant investment from non-federal sponsors and other interests, and will have major impact on our communities. WRRDA in many ways reforms the USACE’s policies and procedures to ensure that non-federal interests take on a greater role in developing policy and defining projects for which they will ultimately assume greater operation and maintenance responsibilities.

In particular, we believe a meaningful dialogue on issues such as crediting, vegetation on levees, and 408 permits would result in more feasible guidance and regulation. While a public comment period is required as guidance and regulations are revised for each of these three programs, consultation with non-federal sponsors and interests in preparation of proposed policy changes is expressly mandated for in-kind credit (Section 1018) and levee vegetation (Section 3013).

**Crediting Reform**
WRRDA 2014 maximizes the ability of non-federal interests to contribute their own funds to move studies and projects forward. Under the law, non-federal interests have the opportunity to contract with the USACE to perform the studies, designs, and construction of water resources projects, using their own funding and gaining credit for some of those expenses. This effort to increase flexibility builds on Section 1018 of WRRDA 2014 and amendments to Section 221 of the Flood Control Act of 1970.
WRRDA 2014 authorizes a non-federal sponsor to apply credit for in-kind contributions that are in excess of the non-federal share to other water resources development projects being carried out by the same non-federal sponsor. Simply put, if a non-federal sponsor(s) had multiple water resource projects they could transfer excess credits from one project to another without penalty.

To address this point, we support language recently proposed by the Sacramento Area Flood Control Agency (SAFCA) to revise WRRDA 2014, Section 3012, Subsection (a) to read as follows (underscored and italicized words are added language):

(a) IN GENERAL. – If 2 or more flood control projects are located within the same geographic area, the Secretary shall, at the request of the non-Federal interests for the affected projects, consider those projects as a single program for budgetary or project management purposes, if the Secretary determines that doing so would not be incompatible with the authorized project purposes. **Non-federal credits within such programs shall be transferable among projects without regard for the status of completion of the donor project, subject to verification of such credits by the Secretary.**

As noted by SAFCA, in certain circumstances, non-federal interests make contributions that are in excess of cost-sharing requirements which, through statutory construction or application of USACE implementation guidance, either (1) cannot qualify for usage or (2) would become eligible too late to be useable for transfer. For example:

(1) Section 1018 of WRRDA 2014 (Credit for In-Kind Contributions) allows for the transfer of credits among separable elements of the same project.

(2) In its implementation guidance for Section 1020 of WRRDA 2014 (Transfer of Excess Credit), USACE states that determination of excess credits can only be made after the completion of a study/project.

Therefore, the proposed revision noted above would allow transfer of credits among projects that are considered a single program under that section without the requirement that the “donor” project be complete before credits can be transferred, provided such credits are validated by USACE.

This proposal is an example of where non-federal interests can collaborate with USACE in development of sound implementing guidance consistent with WRRDA 2014 and in a manner that functions well at the federal and non-federal levels to complete mutually beneficial projects.

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Finally, before issuing any new or revised guidance, Section 1018 requires the ASA to consult with affected non-Federal interests, to publish the proposed guidelines developed in the Federal Register, and provide the public with an opportunity to comment on the proposed guidelines. We strongly encourage the ASA to proceed with this effort in a collaborative and transparent manner. Indeed, the use of the term “consult,” separate from merely referencing “notice and comment,” demonstrates that a collaborative effort was intended by Congress and is required. We recommend that the USACE convene a task force of responsive stakeholders to discuss these issues and develop a consensus approach that meets the needs of the Federal Government and the non-Federal interests alike.

Reform of Federal Approval Process for Locally-Initiated Projects
Federal law provides that the USACE must approve any modification to a federally-authorized levee under Section 14 of the Rivers and Harbors Act of 1899 (more commonly referenced as Section 408 permission as it is established in 33 USC Section 408). This approval requirement is logical in assuring that modifications will allow the system to function as (or better than) intended and that it will not have negative impacts on others. Unfortunately, the approval process has become extensive and lengthy, often lasting several years, leaving communities with an unacceptably high level of flood risk, and, therefore, an unnecessary threat to public safety during this process.

The Sacramento region requests that the USACE reconstitute a forum similar to the 408 Task force created in 2007 and jointly develop guidance to ensure needed protections while accelerating the review process.

One specific concern is the length of the review process under the National Environmental Policy Act (NEPA) for Section 408 permission, especially given the more expansive scope of Section 408 to lesser actions than those previously subject to review. A possible solution for streamlining lies within the USACE's own programs, namely the Nationwide Permit (NWP) program under the Clean Water Act (CWA) Section 404 permitting process. The CWA NWP program has worked well for decades and constitutes established guidelines that function well for the USACE at the District level and for permittees across the country. A key component of the streamlining is programmatic review under NEPA, effectively meaning that NEPA is complete for those actions that qualify under the NWP program. The same concept could be applied to Section 408 permission, and in fact there is high overlap between the actions subject to USACE review under both Section 404 and Section 408 (such as utility crossings of jurisdictional waters, linear transportation projects, and many others).

Two ideas that further explore this concept:
The CWA NWP is subject to periodic renewal and re-authorization. The renewal process for the next re-authorization (believed to be in 2017) could include a review of applicability for Section 408 to integrate USACE’s permitting, as is currently done between CWA Section 404 and Section 10 of the Rivers and Harbors Act.

A pilot program could be launched within a District to explore how the program could be implemented before being applied nationally. The Sacramento District might be an ideal pilot given the volume of Section 408 activity and high overlap with Section 404 permits for those actions.

We urge USACE-HQ to consider these ideas, and the Sacramento region would be pleased to participate and work with the USACE in developing a program through white papers, case studies, dialogues, or other mechanisms of engagement.

**Levee Vegetation**

Section 3013 of WRRDA 2014, as clarified under the Stipulation and Order issued in the United States District Court for the Eastern District of California on September 11, 2014, directs the Secretary of the Army to carry out a comprehensive review of applicable policy guidelines for management of vegetation on levees (Guidelines) in order to determine whether current federal policy relating to levee vegetation is appropriate for all regions of the United States. These Guidelines include Engineering Technical Letter ETL 1110-2-583 entitled “Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures” (ETL) issued April 30, 2014, and the draft Policy Guidance Letter entitled “Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls” (PGL) dated February 17, 2012.

USACE’s review of its levee vegetation policy and guidance should have a wealth of information to move forward, yet the guidance and associated variance and application efforts are lagging. The USACE has implemented several studies to assess the extent of the issue and has been working on implementation guidance. Thousands of comments from non-federal partners and others around the nation were submitted by the April 2012 deadline on the second component of the Guidelines, the draft Policy Guidance Letter entitled “Process for Requesting a Variance from Vegetation Standard for Levees and Floodwalls”. Unfortunately, the PGL was unchanged despite these
comments. The Secretary should ensure that the extensive comments be considered by the USACE in preparing their implementation guidance for Section 3013.

A stated purpose of the USACE’s review of the collective Guidelines is “to determine whether current federal policy relating to levee vegetation is appropriate for all regions of the United States.” The issue of vegetation on levees varies in different sections of the country. In the Midwest and East, vegetation often restricts access to levees for maintenance and may in some cases compromise the physical integrity of the levees. In the West, vegetation on the levees may provide the only habitat and shade cover for listed fish and aquatic species.

The USACE should consider not only geographic differences, but also the implications of setting design standards vs. the complexity of managing legacy levee vegetation that has been in place for decades. It would be useful to think of the ETL as primarily establishing design standards for new levee construction and the PGL as facilitating practicable management of existing federal levees.

While it makes sense for the USACE to strive for nationwide consistency in their levee design standards, as embodied in the ETL, it makes equal sense for the USACE to collaborate with non-federal sponsors and local levee maintainers to move towards policy compatibility through management of legacy levee vegetation within the context of risk prioritization, while acknowledging mutual environmental and public trust responsibilities and the generally limited resources that are available for annual O&M. A regionally managed variance policy and/or exemption process sufficiently flexible and broad in scope to address the regional differences and issues described below, could be the pathway toward compatibility between the USACE vegetation policy and regionally developed levee vegetation management strategies in pursuit of mutual public safety missions.

3013 (c) Factors:
The General Factors emphasize the need to balance several important – and sometimes competing – interests including providing the greatest public safety benefits within limited resources while ensuring that levee safety investments minimize environmental impacts. Further emphasis is given to considering various benefits provided by woody vegetation, including levee safety (e.g. erosion buffering during high water) and habitat for listed species. The impact of removing vegetation and the available science and historical record regarding linkage of vegetation on levees and flood risk is also to be considered.

The Variance Factors are to be specifically considered by the Secretary in reviewing the practicability of the draft PGL outlining the process for requesting a variance from vegetation standards. These Factors reflect the numerous considerations that may be unique to a
particular region, watershed, institutional governance and/or field conditions that make application of nationwide guidance impracticable. The implementation guidelines for Section 3013 need to allow for formulating variances and/or exemptions on a broader scope.

**3013 (d) Cooperation and Consultations; Recommendations:**
Cooperation and consultation with non-federal entities, especially with the USACE’s cost-sharing partners, should include opportunities to exchange and discuss alternative approaches that could be incorporated within the revised Guidelines. For example, the California Department of Water Resources is developing a Tree Threat Assessment Approach (as a component of its Levee Vegetation Management Strategy within the 2012 Central Valley Flood Protection Plan) to serve as guidance for field identification and assessment of trees that may present an unacceptable threat to levee integrity.

**3013 (e) Independent Consultation:**
The USACE is strongly urged to engage the National Academy of Engineering and the National Academy of Sciences as independent experts. Peer review and consultation by both Academies on preparation of revised national vegetation policy Guidelines would reinforce the USACE’s commitment to ensuring appropriate consideration of the complex engineering and environmental issues associated with managing legacy levee vegetation. The two Academies are well-positioned to enlist experts from around the nation to conduct this important peer review in a technically competent, transparent, and cost-efficient manner.

**3013 (f) Revision to Guidelines:**
The USACE implementation guidance for Section 3013 should allow consideration of guidelines that have been adopted through a public process as an alternate approach that is accepted as being compatible with USACE guidelines. For example, California’s Levee Vegetation Management Strategy is a risk-prioritized approach focused on improving public safety by providing for levee integrity, visibility, and accessibility for inspections, maintenance, and flood fight operations, while protecting and enhancing sensitive habitats – all of which are objectives shared with the USACE.

**3013 (g) Interim Actions:**
The USACE implementation guidelines for Section 3013 should ensure that ongoing or programmed projects and studies, or elements of projects or studies, that remediate public
safety risk factors more significant than the risks posed by levee vegetation, should proceed without interruption or delay.