Comments in Response to the August 13, 2014 Webinar by the U.S. Army Corps of Engineers on the Water Resources Reform and Development Act of 2014

Category/Session I
Deauthorizations and Backlog Prevention and Project Development and Delivery (including Planning)

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The National Waterways Conference, Inc. submits these written comments in response to the webinar held by the U.S. Army Corps of Engineers (Corps) on August 13, 2014, to receive public input to inform the Corps’ implementation of the Water Resources Reform and Development Act of 2014 (Pub. L. 113-121) (“WRRDA”). The August 13th session addressed WRRDA provisions applicable to Deauthorizations and Backlog Prevention, and Project Development and Delivery (including Planning), as set forth in the Federal Register on July 29, 2014, 79 Fed. Reg. 44014, and related supplementary information.

General Observations

We appreciate the opportunity to participate in the webinars the Corps has scheduled to receive feedback from its water resources partners and stakeholders as it develops guidance to implement the Water Resources Reform and Development Act of 2014 (WRRDA). In addition to offering our views during the webinars, we intend to submit written comments after each webinar responsive to the particular statutory sections referred to in each session. As this process moves forward, we may seek to revise or extend these comments, particularly as we learn more about the Corps’ views of particular provisions of this important legislation, as well as the views that may be suggested to the Corps by other stakeholders.

WRRDA establishes significant new policies and programs regarding the development, management and protection of the nation’s water resources. The new law provides non-federal sponsors with new opportunities to be more actively engaged in the development of these projects, as well as imposes new requirements on non-federal sponsors. As such, it is imperative that the Corps establish a process by which stakeholders have an opportunity to provide meaningful input and feedback on the new law. In addition to the listening sessions and the opportunity to submit written comments, a forum for candid conversation and an open and transparent exchange of ideas would provide for a more robust process. A true dialogue with subject matter experts from the Corps would elicit more meaningful feedback, leading to more effective stewardship of the nation’s water resources. Many provisions of WRRDA require consultation, coordination, and the opportunity to provide comment by processes which contemplate more formal and interactive discussions than provided by listening sessions and written comments. We respectfully request that the Corps consider utilizing those processes to provide for a more meaningful strategic engagement with its stakeholders.

Comments on specific WRRDA provisions

Title VI - Deauthorizations and backlog prevention

- As a general matter in implementing the provisions in Title VI, we urge the Corps not to use the same metrics when developing deauthorization recommendations that it uses in developing its year-to-year O&M funding requests. Current funding metrics serve to pit one waterway against another, leading to bias against smaller systems, ignoring the economic activity associated with the smaller systems. This type of approach fails to take into consideration whether a system can produce economic benefits that outweigh annual funding needs. Projects were originally developed by the Corps and authorized by the Congress on the basis of whether their value to the region and nation outweighed the
cost. The Corps should return to an analysis of that nature when preparing deauthorization recommendations for Congress.

- Similarly, the current status of a waterway does not explain or predict the utility of the waterway when it is properly maintained, nor does it account for the broader benefits that accrue with proper maintenance. We suggest instead that the Corps should determine potential utilization and associated regional economic activity, along with other related benefits, if channels were maintained on a reliable basis. The Congress should support this approach, as it is consistent with the recent Senate Energy and Water Appropriations Subcommittee draft report, see, e.g., pages 9, 13, 14, 33-34, 40, and 58.

- Section 6001(a)(2) calls for the creation of a process to deauthorize projects that are no longer viable for construction. We urge the Corps to consult with its non-federal sponsors in developing this process, including as it decides what should be considered a “viable” project.

- Section 6001(b) calls for a comprehensive status report of ongoing projects, including identifying (in section (3)(B)), the amount of funds obligated for each project or separable element. We urge that funds contributed by non-federal sponsors be considered as obligated, and further note that this provision clearly reflects that such funds must be obligated, rather than expended, as those terms are commonly used by the Corps and OMB.

- In implementing section 6001(c) which requires the development of an interim deauthorization list, we note the requirements to seek public input and provide for a 90 day comment period.

Project development and delivery (including planning)

- Section 1001 - We support the Corps’ efforts to expedite the planning and project delivery process through its 3x3x3 initiative. In carrying out the requirements of section 1001, we encourage the Corps to engage in meaningful discussions with the non-federal sponsors at the earliest practicable opportunity.
  - (b) – in determining that a study will not be completed within the established time frames, we urge the Corps to consult with the non-federal sponsor during the preparation of an updated study schedule and cost estimate, rather than simply “notifying” the non-federal partner.
  - (d) – similarly, in determining whether to extend a timeline because a project is deemed “too complex,” we urge the Corps to prioritize the preference of the non-federal sponsor as it considers the factors enumerated in the statute.
  - In developing the interim report required by subsection (f) and the final report called for in subsection (g), we encourage the Corps to engage stakeholders well in advance to solicit feedback, including the opportunity to provide comments about how the process is working.
- Section 1002 – in establishing the list of milestones for the completion of feasibility studies, we request that the Corps collaborate with its non-federal cost-share partners in order to fully consider their interests, needs, obligations, and legal requirements as it works to develop a viable, workable process.

- Section 1004 – the final conference report notes the continued importance of value engineering, and we encourage on-going collaboration with the non-federal sponsor during this process. Further, we recommend that at the request of a non-federal sponsor, a value engineering study be performed as part of the federal project.

- Section 1005 – We support the provisions to accelerate project delivery, including directing the Corps to serve as the lead among other federal agencies, and we note that this provision does not undermine or otherwise interfere with the statutory requirements, goals and objectives of NEPA. In that regard, we would further encourage the Corps to look for ways, within its existing authorities, to minimize regulatory burdens in carrying out its other statutory programs. In carrying out the requirement to consult with relevant Federal, state, and local government agencies, Indian tribes and the public, as the first step in drafting the guidance required under this provision, we encourage the Corps to employ a robust and transparent process that allows for a meaningful dialogue.

- Section 1040 – we encourage the Corps to ensure that mitigation plans be appropriate in terms of both the scope and cost related to any particular project. In addition, we note that the new requirements of this provision do not apply to existing projects.

- Section 1044 – we support the increased threshold for application of independent peer review, noting its importance in certain situations, and we further encourage the Corps to look for ways to improve the application of this tool to lead to greater efficiency.

- Section 7001 – Annual report to Congress. This important provision establishes a new process by which non-federal interests may seek authorization for a new feasibility study or the modification to an existing study or project. We appreciate the Corps’ publication of a Federal Register notice earlier this month to implement this requirement. Equally important to the proposals to be included in the final report is the required appendix which must include a list of those proposals that were not included in the final report and the reasons why those proposals did not satisfy the criteria prescribed in the law. We encourage the Corps to utilize a collaborative and transparent process that will aid the public and the Congress in the oversight and management of the nation’s water resources.