Comments in Response to the September 10, 2014 Webinar by the U.S. Army Corps of Engineers on the Water Resources Reform and Development Act of 2014

Category/Session III
Levee Safety, Dam Safety, and Regulatory (including 408)

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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 September 10, 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 September 10th session addressed WRRDA provisions applicable to dam safety, levee safety, and regulatory issues, including Section 408, as set forth in the Federal Register on July 29, 2014, 79 Fed. Reg. 44014, and related supplementary information.

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 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.

LEVEE SAFETY

Levees are both abundant and integral to economic development and flood damage reduction in hundreds of large and small communities, industrial zones, urban areas, agricultural regions, and vitally strategic zones around the United States. The National Committee on Levee Safety (NCLS) estimates that tens of millions of people live and work in leveed areas. By some estimates, nearly 50 percent of Americans live in counties with levees or related flood protection infrastructure. Corps’ levee systems provide a 6:1 return ratio on flood damages prevented compared to initial costs, and the Mississippi River and Tributaries system provides a 44:1 return on investment ratio. In short, soundly constructed and well-maintained levees work by protecting the lives and property behind them.

Levees also serve an important role in our nation’s energy framework by protecting many power plant facilities, as well as the oil, gas and petrochemical industries along the Texas and Louisiana Gulf coast and the agri-business economy throughout California’s Central Valley, the Mississippi Delta Region and the Midwest. Well-conceived levees, floodwalls and appurtenant infrastructure protect fire and police departments, hospitals, and schools. They are critical to the viability of our overall public infrastructure network, protecting other infrastructure, including roads, bridges, railroads, port facilities, wastewater treatment plants, and municipal water supply facilities. The following examples are just a few of the many that illustrate the benefits provided to the nation by well-maintained levee systems.

In the Port Arthur area along the Texas Gulf Coast, the Jefferson County Drainage District No. 7 operates and maintains a Federal project providing hurricane and flood protection for an area covering 107 square miles. The Federal project helps to protect approximately 100,000 local residents of not only Port Arthur but the municipalities of Groves, Port Neches and Nederland, as well as critical facilities owned and operated by Motiva Inc., which, upon completion of a $10 billion expansion project in May of 2012, became the largest refinery in North America. The refinery produces in excess of 60% of the nation’s aviation fuel and is
considered the world’s largest single site producer and provider of base oils throughout the world. Other major industrial facilities are Premcor Refining Group/Valero, TOTAL, BASF, Chevron-Phillips and Huntsman Chemical Inc. These facilities combined have completed, or are in the process of completing, multi-billion dollar improvements to increase production. The strategic value of this area has been confirmed in recent years as the President’s Budget Request to Congress has included a total of $4.4 million to examine expanded and improved coastal protection as a part of the USACE-Texas General Land Office Sabine to Galveston Feasibility Study.

Nearby, in south central Brazoria County, the Velasco Drainage District operates and maintains another Federal Hurricane and Flood Protection System covering 236 square miles. An estimated 65,000 local residents occupy the area and the project provides protection for a large industrial investment with replacement capital estimated to be approximately $30 billion. Industries such as Dow Chemical, BASF, Shintech, Huntsman & Gulf Metallurgical are among those which produce a variety of petrochemicals that subsequently flow into the downstream market place. The multiplier in the downstream markets and job sectors is estimated to be about 6-7 which translates to a significant impact to the national economy. The entire industrial investment is located in this coastal zone. This area is likewise included in the Sabine to Galveston Feasibility Study because of its overall impact to the national economy.

The St. Francis Levee District in West Memphis, Arkansas, made up of 411 miles of main line and tributary levees along the Mississippi and St. Francis Rivers, protects over 250,000 people and over 2,000,000 acres. Much of those acres are farm land which is considered to be some the most fertile ground in the country. It is also home to many major industries including Nucor Steel, Nucor-Yamato Steel, and Plum Point Power Corp., which are multi-million dollar facilities. The Sny Island Levee Drainage District’s 100-year accredited main stem Mississippi River levees protect about 125,000 acres, of which about 110,000 acres is in crop production, along with multiple major state and interstate highway routes and two national rail lines. In addition to the 1500 residents protected in this rural levee district, the levee-protected production acreage is valued at more than $1.2 billion, more than double the estimated value without levee protection.

Physical infrastructure upgrades are occurring in numerous places around the country. For the most part, these costs are being borne by non-federal sponsors. To continue to accrue the economic, life safety and cultural benefits derived from well-built and carefully maintained flood control infrastructure, sufficient reinvestment must occur and be complemented by thoughtful national policy and intergovernmental coordination. To that end, as a threshold matter, any levee safety program established in accordance with the directives in WRRDA must have a goal of protecting people and property behind levees. (Section 3016 of Public Law 113-121; 33 U.S.C. 3301 note). Such an approach understands that, as a nation, we are not looking at a clean slate and deciding when and where to allow building, but instead, recognizes the reality of existing development in the floodplain. Based on that common understanding, a comprehensive levee safety program must strengthen our existing flood protection systems as well as find ways to reduce risk. In addition, implementation of a levee safety program provides for the opportunity to clarify Federal and non-Federal roles, establishing a truly collaborative partnership wherein Federal project involvement is grounded upon economic benefits, and state,
regional and local authorities maintain plenary responsibility for life safety and/or landside risk reduction measures such as emergency action plans to include evacuation, land use practices, building codes, and risk communication. A program aimed primarily at buying down or reducing risk, with approaches that penalize rather than protect and incentivize floodplain occupants, would fail to meet the nation’s flood damage reduction needs.

Section 3016 – Levee Safety

Section 3016(e) amends the Water Resources Development Act of 2007 (WRDA 2007) by inserting a new Section 9005, which requires the development and implementation of a levee safety initiative. Section 9005(c) requires the Secretary to establish levee safety guidelines within one year of the enactment of WRRDA 2014. That section requires “coordination” with state, local and tribal governments and organizations with expertise in levee safety in developing the guidelines. In addition, before any such guidelines can become final, draft guidelines must be issued for public comment, and importantly, any comments received must be considered in the development of the final guidelines.

Utilize an open and transparent process to develop levee safety guidelines

The process called for in Section 3016 is akin to a notice-and-comment type of proceeding as set forth in the Administrative Procedure Act (APA) (5 U.S.C. § 551). Like the APA requirements, this section calls for the publication of draft comments. Further, like the APA, this section mandates that any comments received must be considered in the drafting of the final guidelines. In that regard, the agency would be required to respond to and discuss the comments it receives and articulate why it did or did not find particular comments to be persuasive.

Additional support for an APA-type proceeding is found in Executive Order 13563, Improving Regulation and Regulatory Review, which requires agencies to afford the public a meaningful opportunity to comment on proposed regulations, with a comment period of at least 60 days. Similarly, OMB’s “Final Bulletin for Agency Good Guidance Practices” (often referred to as the Good Guidance Bulletin) sets forth general policies and procedures for developing, issuing and using guidance documents. Designed to ensure that guidance documents of Executive Branch departments and agencies are developed with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements, the Good Guidance Bulletin supports utilizing an APA-type proceeding to develop the levee safety guidelines, especially where they would be considered “significant” as that term is defined in the Good Guidance Bulletin - when they have a broad and substantial impact on regulated entities, the public or other Federal agencies. In this instance, levee safety guidelines, although described as voluntary, will be substantially intertwined with and impacted by numerous other policies and programs, including Public Law 84-99, the National Flood Insurance Program (NFIP), and flood control operation and maintenance repair, replacement and rehabilitation (OMRRRR). As a consequence, it is critically important that they be developed in the most open and transparent manner as possible.
Recognize Federal and non-federal responsibilities and obligations

Similarly, given that WRRDA 2014 calls for the establishment of “voluntary” guidelines, they must be drafted in a manner that recognizes that the states and Indian tribes are uniquely positioned to oversee, coordinate and regulate local and regional levee systems, rather than implement a top-down federal mandate. Any guidelines must appropriately accommodate place-based variation and preserve state and local government prerogatives, such that they properly serve as a “guide” for states, but that decisions on whether to adopt and implement should be left to the discretion of the states.” This is particularly important given the overlap and inter-relationship between and among various flood control and flood reduction programs, as mentioned above. Equally important, these guidelines must not be “voluntary” in name only, in effect, leaving non-federal sponsors with limited flexibility, and in turn, promoting federal involvement in areas that are clearly the responsibility of states and local governments.

Development of levee safety guidelines must integrate valid risk reduction measures put in place by local governments and, pursuant to Executive Orders 12866 and 13563, which further the longstanding Federal commitment to cost-benefit analysis as a basis for evaluating policy changes and their impact to national well-being, clear statements must be made about anticipated economic and financial implications associated with guideline promulgation and implementation. Long-term net benefits derived from the guideline, in many cases, may not be self-evident and the basis for the ultimate decisions must be explained and practicable, with careful consideration of pertinent factors.

Use an open and transparent process to develop the hazard potential classification system and to inform how the levee safety action classification will be applied

As part of the WRRDA levee safety initiative, the Secretary is also directed to establish a levee hazard potential classification system (HPCS) under Section 9005(d). Section 9005(c)(2) stipulates that the aforementioned levee safety guidelines “shall be developed taking into consideration the levee hazard potential classification system.” The HPCS is not defined in law, however, nor is its scope, purpose or application specified. Instead, section 9005(d)(3) simply provides that such a system “shall be consistent with and incorporated into the levee safety action classification (LSAC) tool developed by the Corps of Engineers.”

The NCLS report to Congress in January 2009 states that the lack of available data regarding probability of levee failure requires the HPCS to be based solely on consequences of levee failure. The NCLS reported that the HPCS should eventually be phased out with the arrival of better data and replaced by national tolerable risk guidelines to “inform decisions related to the priority and relative urgency of investment and actions related to levees.” As such, there is grave concern that the HPCS and LSAC tools will not reflect actual levee efficacy, O/M, or flood risk management efforts (e.g., flood warning systems, flood fighting, evacuation, etc.) put in place by local sponsors. Only the number of people (who could theoretically be inundated) behind the levee would be considered. The HPCS, if implemented as described by the NCLS, will potentially bear no relation to local sponsor activity or inactivity. Without statutory limitations, public notice and comment requirements, rights to appeal, and regulatory
cost/benefit analyses, the public dissemination of such arbitrary information poses a significant threat to local property values, revenue collection, and economic productivity without having any appreciable risk reduction impact.

Given the potential widespread application of both the hazard potential classification system and the levee safety action classification, we strongly urge the Corps to solicit comment on both of these tools as part of the proceeding it utilizes to solicit comments on the draft levee safety guidelines. We understand the intent to identify populations and property at risk in the event of catastrophic infrastructure failure, but we are concerned about collateral impacts to jobs, property values and area reinvestment that could come with summary dissemination of widely misunderstood information.

Section 9005(g) provides for the establishment of a state and tribal levee safety program, and requires the Secretary to issue guidelines that establish the minimum components for participation in the program. Like Section 9005(c) discussed above, this section requires the Secretary to issue draft guidance for public comment and to consider any comments received in the development of final guidelines. In order to solicit the meaningful input from the states and tribes necessary for the development of this important program, we would urge the Secretary to employ the notice and comment type of proceeding described above in developing this program.

REGULATORY

Section 1006 – Section 1006 makes the Section 214 authority permanent and also provides a short-term expansion of the authority to public utility and natural gas companies. We recommend implementation guidance for this section continue to encourage full adherence to the guidance that has been drafted since Section 214 was first authorized in WRDA 2000. It is imperative that the authority’s process and reporting remain streamlined, transparent and consistent nation-wide. The Corps has perfected its guidance on this authority over time, to meet GAO recommendations and assuage Congressional concerns. We believe that the current guidance utilized by the Corps provides full disclosure of Section 214 agreements, permit reviews and decision making processes, while not impacting overall Corps permit review times.

Section 1007 - This provision requires the Corps to develop a “process for the review of section 14 applications in a timely and consistent manner.” The Corps recently provided notice of the issuance of Engineer Circular (EC) 1165-2-216, which provides “guidance to how USACE will process requests by others to alter a USACE civil works project” under section 14 of the Rivers and Harbors Appropriations Act of 1899 (RHA), which has been codified (as subsequently amended) at 33 U.S.C. 408. 79 Fed. Reg. 45,790 (Aug. 6, 2014). Consistent with the instructions of Congress to review the 408 approval process, and taking into account EC 1165-2-216, we provide the following comments on the 408 process.

Clarify application of Section 408 process

The Corps should clarify the application of Section 408 to “works.” According to the statute, the Corps’ permission is required with respect to activities that may affect various
“works” that are “built by the United States . . . for the preservation and improvement of any of its navigable waters or to prevent floods.” The Circular states that it applies in the case of any “alteration or occupation or use of the project” (EC 1165-2-216, ¶ 6.a) (emphasis added). The language could be interpreted to suggest 408 applies to any proposal that would alter or occupy any portion of a Corps project, which in turn suggests anything within the project’s property boundaries. However, that is not what Section 408 says, nor is it what Congress intended in enacting Section 14 of the RHA. We trust it is not the intent of the Circular to apply the 408 process beyond the limits of the statute; to ensure proper interpretation at the district level and otherwise, we urge the Corps to clarify this point.

Section 408 protects sea walls, bulkheads, jetties, dikes, levees, wharves, piers, and any “other work.” The statute does not define “other work” or provide any guidance as to what the phrase encompasses, but the list of specific improvements that constitute “works” shows the kinds of structures Congress had in mind. All of the works listed in the statute have two characteristics in common: (1) an intentional function or purpose connected to and in support of the improved waterway; and (2) an artificial, structural presence. Unimproved real estate and any other area not meeting these criteria are different from the works described in Section 408 and, therefore, are outside the coverage of the 408 process.

A broad reference to a Corps “project” without additional clarification may lead a district office to require the 408 process for any proposal that involves any real estate within a Corps project. A common example would be a transmission line or pipeline that crosses Corps’ property. To be clear, the Corps has a right to review and approve that proposal as property owner and potentially as a regulator under Clean Water Act Section 404, RHA Section 10, or other authorities. However, if the project does not touch or affect the “works” regulated under Section 408, then the Corps should not overlay additional 408 requirements beyond whatever other procedure may be required.

The case law interpreting Section 408 supports this perspective. In United States v. Agioi Victores, 227 F.2d 571 (9th Cir. 1955), the court held that an improvement lacking a distinct structure—in that case, the navigation channel—was not a “work” under section 408. The court applied the principle of ejusdem generis to conclude that a dredged ship channel was not an “other work” under section 408 because “[a] dredged channel has no resemblance to any of the works specified in the section,” all of which are “physical structures.” See also United States v. Logan & Craig Charter Serv., 676 F.2d 1216, 1219 (8th Cir. 1982) (holding that a barge anchored to a lock on the Mississippi River was a “work” under section 408 because it functioned as an extension to the entry channel and facilitated use of the channel). A channel like the one at issue in Agioi Victores is, if anything, more similar to the “works” regulated by Section 408 than ordinary real estate. It directly serves navigation, and it may even require dredging or other physical work to maintain its usefulness. Even so, a channel did not have enough structure for the court to find that it was a “work” under section 408.

Again, we do not suggest that the Corps is without authority to review projects proposed to be located on Corps property. The point is only that the additional authority specifically granted by Section 408 is limited to any feature or element of a Corps project that is listed in the statute or is otherwise a “work” for purposes of Section 408. That term does not encompass
undeveloped land or other features of the project, even if owned by the Corps and within the project’s property boundary.

**Support decision-making at the District level**

The Corps should keep decisions at the District level as much as possible. We appreciate the importance of a careful review of proposals that may affect the improvements at a Corps project. We also understand the need for the Corps’ headquarters to engage in oversight to ensure appropriate implementation at the district and division level. At the same time, we also believe that the districts are capable of competent review of specific proposals, and their local knowledge is likely to provide a perspective that is superior to that of the headquarters staff in many important respects. It is also a reality that whenever a district decision is elevated even to the division level and especially to headquarters, that adds time to the process. Delays can be significant depending on the circumstances.

Issuance of EC 1165-2-216 largely accomplishes the oversight that is necessary. We urge the Corps to exercise restraint in determining which proposals require elevation to headquarters. For example, we urge the Corps to clarify that the districts may exercise some discretion to interpret Paragraph 6.t(3) in a reasonably narrow fashion. That paragraph requires a headquarters decision for a proposed alteration that would “change how the USACE project will meet its authorized purpose.” The specific example included in that portion of the circular would involve a permanent breach of a levee system. The Corps should be clear that only proposals of comparable significance require elevation. As is stated at the end of Paragraph 6.t, the district can always contact the division or headquarters if there is uncertainty.

**Consolidate reviews as much as possible**

The Corps should consolidate 408 and 10 reviews, and any others, as much as possible. From time to time, the Corps may consider a proposal that triggers review under more than one authority. For example, a proposal could require review under both Section 408 and RHA Section 10. In situations where both Section 408 and Section 10 apply, we recommend that the Corps instruct non-federal entities proposing to alter federal navigation projects to submit consolidated permit applications under Section 10. If needed, applicants may provide whatever additional data is necessary to respond to any additional issues specifically raised by the 408 process.

**Streamline the review process and avoid unnecessary regulatory duplication**

We also urge the Corps to minimize the number of different groups within the district that are required to process a Section 408 request. For example, if the regulatory group typically handles a Section 10 permit application, and a proposal requires authorization under Sections 10 and 408, the regulatory group also should handle the 408 process. If it is necessary to solicit the views of any other group (navigation, real estate, etc.), that should happen under specific time limits, with a single group remaining in control of the timeline and ultimate outcome. Leaving one group in charge allows the Corps better to manage any conflicting recommendations and facilitate timely decisions.
A broad application of the term “project” as the basis for determining jurisdiction under both Section 10 and Section 408 could lead to unnecessary and frequent findings of overlap of the two. We would again urge the Corps to review the statutory language as a basis to avoid unnecessary regulatory duplication. The scope of Section 408 “works” is explained above. Section 10, in turn, applies to an “obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States.” Both are concerned with important Corps functions, and both could apply if a proposal both obstructs or crosses a waterway (Section 10) and affects an improvement (Section 408). Nevertheless, Section 10 and Section 408 cover distinct situations. Indeed, Congress originally enacted those two different sections at the same time, within the same statute. In so doing, Congress surely did not intend both generally to cover the same situations.

Support participation of the non-federal sponsor

We support providing an active role and opportunity for participation for the non-federal sponsor. NWC members include many non-federal sponsors of Corps projects. We support the Circular’s inclusion of the non-federal sponsor in the process to consider a proposal offered by another party, including especially the requirement of Paragraph 6.d that the 408 proposal have the non-federal sponsor’s support. We urge the Corps also to allow an opportunity for the non-federal sponsor to be present at any pre-coordination meeting and other meetings on the 408 request.

Clarify key terms

We request clarification on the meaning and intent of key terms in EC 1165-2-216 that are important for an understanding of the 408 process. We specifically would request an explanation and clarification of the following:

- Paragraph 6.n, Hydrologic and Hydraulics Impacts: Please clarify “substantial adverse changes in water surface profiles.”

- Paragraph 6.t, Section 408 Decision Level: If an impact to a work is positive, can that be the basis to avoid elevation from the district level? Under part (3), if the proposal improves the level of protection (for example, from 1/50 to 1/100 or 1/500), is that a change in the authorized purpose?