Comments in Response to the September 24, 2014 Webinar by the U.S. Army Corps of Engineers on the Water Resources Reform and Development Act of 2014

Category/Session IV
Non-Federal Implementation, Water Supply and Reservoirs, and Navigation

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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 24, 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 24th session addressed WRRDA provisions applicable to non-federal implementation, water supply and reservoirs, and navigation, 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 the 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.

**Non-Federal Implementation**

**Section 1014** - We support the provisions designed to enhance the role of the non-Federal sponsor in project development and encourage the Corps to implement this provision in accordance with the clear congressional intent to expand the role of non-federal entities in project delivery. In essence, the Civil Works program is a partnership with local stakeholders. We believe the sponsor empowerment provisions help to strengthen those relationships while supporting the civil works program and its long term mission.

**Section 1014(a),** which amends section 203 of WRDA 1986, requires the Secretary to issue guidelines to assist non-Federal interests in carrying out feasibility studies. We encourage the Corps to solicit input from non-federal sponsors as it develops these guidelines and to utilize as transparent a process as permitted. We also encourage the Corps to include in its guidance the opportunity for local interests who are carrying out studies to contract with the Secretary to perform selected parts of those studies.

**Section 1014(b),** amends section 204 of WRDA 1986. We urge the Corps to continue the policy set forth in Policy Guidance Letter 53, written specifically to address Section 211(f) of WRDA 1996, to allow for reimbursement for completion of discrete segments of projects. Otherwise, it will be extremely difficult for local sponsors to take the lead in the study, design and construction of a federal project under Section 1014 if this provision is interpreted to require completion of an entire project before the local sponsor can receive credits or reimbursement. Given the congressional intent to provide opportunities for increased local sponsor involvement, such an interpretation would appear contrary to congressional intent. We also urge that the implementation guidance include a provision for the Secretary to approve for reimbursement, a project for which one or more discrete segments have already been constructed by the local sponsor, at their own risk, prior to the signing of a final Project Partnership Agreement. This would allow a local sponsor to undertake at their own risk certain discrete segments and have
those assets on the ground working to reduce the risk of flood long before the study is completed and an agreement finally reached.

**Section 1043** – This section calls for the Secretary to establish, within 180 days, pilot programs to evaluate the cost-effectiveness and efficiency of non-federal sponsors carrying out both feasibility studies and projects. We request clarification on whether the Corps intends to implement these provisions now or whether it must await additional appropriations. Similarly, we request clarification on how the Corps will treat amounts appropriated for specific projects that may be included in the pilot programs. We also urge the Corps to use a public and transparent process for the selection of the projects under this pilot program.

**Water Supply and Reservoirs**

**Section 1045** – This section requires the Secretary, in consultation with the Federal Energy Regulatory Commission, to initiate an assessment, within 180 days, of the drought conditions on Corps’ managed lakes that are affected by FERC-licensed reservoirs. We would encourage the Corps to consult with the impacted stakeholders and non-federal sponsors to allow them to provide an accurate assessment of the conditions at the various reservoirs, including the impact on the authorized purposes. In particular, given that this assessment is directed to FERC-licensed reservoirs, we would urge consultation with hydropower producers on the methods used to evaluate hydropower impacts system-wide.

**Section 1046** – As the Corps seeks to implement this section, it is important to bear in mind certain bedrock principles governing federal water supply issues, as summarized in the NWC fact-sheet entitled, “Water Supply Storage and Reallocation Principles,” available on our website at [http://waterways.org/2014/05/28/water-supply/](http://waterways.org/2014/05/28/water-supply/). Those principles include the following:

- Water rights are determined by the states, and water supply is generally the responsibility of state and local governments.

- The Corps may provide storage space in its reservoirs in accordance with federal law, which provides that the Corps is entitled to receive compensation for the use of reservoir storage for water supply. The terms and conditions of the storage allocation are typically set forth in a contract between the Corps and the nonfederal stakeholder.

- Water management serves multiple purposes, including navigation, flood risk management and damage reduction, water supply, water quality, conservation, hydroelectric power generation and recreation.

- Decisions pertaining to the reallocation of storage within an existing reservoir should be founded upon principles of cost-benefit analysis and other societal goals. Reallocations to a new purpose, where allowed under applicable laws, should provide greater benefits compared to existing purposes. In addition, adverse impacts to the existing reservoir stakeholders should be mitigated by the beneficiary of the reallocation.
In making decisions related to reallocation of storage within existing reservoirs, the sunk costs associated with original construction should be addressed in accordance with sound economic and equitable principles.

**Section 1046(a)** – This provision, though titled “Dam Optimization,” does not provide the Corps with any new powers or authority to alter reservoir operations nor does it change any authorized purposes for Corps reservoirs or dams. This subsection simply directs the Corps to conduct the assessments/reports identified in subparagraphs (a)(2)(A) and (a)(2)(B), and to enter “interagency agreements” and “cooperative agreements with non-Federal entities” for these purposes. As explained by Senator John Cornyn at the time of enactment of WRRDA, section 1046(a) “does not change the authorized purposes of any Corps dam or reservoir, and the Secretary may only carry out recommendations and activities pursuant to existing law.” Chairman Boxer and Ranking Member Vitter of the Senate Environment and Public Works Committee both agreed with Senator Cornyn’s interpretation of section 1046(a).¹ Notably, the original Senate-passed WRDA bill would have provided the Corps with expansive authority to “optimize” the use of federal reservoirs, but that language was not included in the final version enacted into law. We believe that omission was both purposeful and appropriate.

**Section 1046(b)** – This subsection requires the Corps to provide advance information to non-federal interests that contribute funds for Corps water projects. This information will be helpful to these non-federal interests as they plan for their required contributions to O&M costs. As such, we would encourage the Corps’ guidance to be clear and directive with regard to providing this information at the earliest possible opportunity. It should also require the Corps to provide notice to non-federal interests when any provided estimates are subsequently determined to be significantly different.

**Section 1046(d)** – This subsection amends the Water Supply Act of 1958 to allow the Corps, for a short period of less than 13 months (from December 7, 2014, until January 1, 2016), to “accept from a State or local interest a plan for the utilization of allocated water storage for future use….” If the State or local interest complies with subsection (d)(1), it may request “a release to the United States of any right of the State or local interest to future water storage under this Act that was allocated for future use water supply prior to November 17, 1986.” The Corps, then, makes a recommendation as to whether a release of rights should occur. If the Corps recommends releasing future water storage rights, “the Secretary shall include that recommendation in the annual plan submitted under section 7001 of [WRRDA of 2014].” Again, it is noteworthy that this subsection does not change existing limitations or authorities under the Water Supply Act, nor does it “authorize the Secretary to release a State or local interest from a contractual obligation unless specifically authorized by Congress.” We would also encourage the Corps, to the extent it recommends against releasing future water storage rights in response to a plan submitted by a state or local interest, to include any such determinations in the appendix to the annual report submitted under WRRDA section 7001.

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Navigation

Our ports and waterways serve as the backbone of the nation’s transportation system, ensuring domestic and international trade opportunities, and low-cost, environmentally sound movement of goods. More than 600 million tons of cargo – including agricultural products, petroleum, chemicals, coal, iron, steel, and other raw materials – move on the waterways at a cost that is typically 2 to 3 times lower than other modes of transportation, translating into an annual savings of $7 billion for America’s economy. In addition, 13 million jobs and $4 trillion in economic activity are dependent on properly maintained ports and harbors. To that end, we support the reforms to the inland waterways project delivery process and the targeted goals to ensure the efficient use of the Harbor Maintenance Trust Fund.

Section 2002 – This section implements the reforms to the project delivery process, as set forth in the Capital Development Plan endorsed by the Inland Waterways Users Board. Subsection (c) permits the Secretary to carry out pilot projects to evaluate new processes and procedures. We would encourage the Corps to identify, at the earliest practicable time, the criteria that will be used in selecting the pilot projects under this section and to solicit input from the inland waterways stakeholders when developing the criteria.

Sections 2004 and 2005 – With respect to the studies called for in Section 2004, we would encourage the Secretary to utilize as transparent a process as is permissible in carrying out the required consultation with water resources stakeholders. Similarly, we would suggest that the roundtable required in Section 2005 be held in an open forum.

Section 2006 – We would urge the Administration to fund the Olmsted project at not less than $150 million annually until the project is completed, as recommended by this section.

Section 2008 – In carrying out the assessment of the operation and maintenance needs of both the Atlantic Intracoastal Waterway and the Gulf Intracoastal Waterway, we encourage the Corps to seek input from the stakeholders in both regions to allow for an informed evaluation, taking into consideration local challenges and opportunities, including projections for increased traffic and usage, as well as funding levels to provide for the safe and efficient use of the respective systems.

Sections 2101 and 2102 – We urge the Administration to include in its forthcoming budget requests the targeted budget amounts from the Harbor Maintenance Trust Fund to ensure the proper maintenance of the nation’s ports and harbors. In addition, we support the allocation of not less than 10% to emerging harbors, as well as consideration of the Great Lakes as a single, comprehensive system.

Section 2107 – In carrying out a review permitted under this section, we urge the Corps to take a broader view of the economic importance of projects beyond mere tonnage statistics. As enumerated in this section, the Corps could consider as economic justification for investment factors such as projected economic benefits, including transportation savings and job creation, along with navigation safety, national security, and sustainability of subsistence harbors.