NATIONAL WATERWAYS CONFERENCE

Dedicated to a greater understanding of the widespread public benefits of our nation's water resources infrastructure.

Submitted by Email to: 33CFR203@usace.army.mil

February 16, 2023

The Honorable Michael L. Connor
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon, Room 3E446
Washington, D.C. 20310-0108

Re: Comments on the Proposed Rule: "Natural Disaster Procedures: Preparedness, Response, and Recovery Activities of the Corps of Engineers" (33 CFR Part 203) Docket No. COE–2021–0008

Dear Secretary Connor:

On behalf of the National Waterways Conference ("NWC"), and our partners the Mississippi Valley Flood Control Association ("MVFCA"), Missouri Levee and Drainage District Association ("MLDDA"), Fort Bend Economic Development Council Flood Management Committee ("FBEDC FMC"), Association of Levee Boards of Louisiana ("ALBL"), Floodplain Alliance for Insurance Reform ("FAIR"), and Upper Mississippi, Illinois & Missouri Rivers Association ("UMIMRA"), I am providing comments on the U.S. Army Corps of Engineers ("Corps") proposed rulemaking to revise the Corps' natural disaster procedures under Title 33, Part 203 of the Code of Federal Regulations (33 CFR Part 203), which implement Section 5 of the Flood Control Act of 1941, as amended (33 U.S.C. 701n), commonly referred to as "Public Law (PL) 84–99." Thank you for giving us an extension of the comment period to do so.

A. ABOUT THE NATIONAL WATERWAYS CONFERENCE AND OUR PARTNERS.

The NWC was established in 1960 and is dedicated to a greater understanding of the widespread public benefits of our Nation's water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation's water resources and their contribution to public safety, a competitive economy, national security, environmental quality, and energy conservation. The NWC's membership is diverse and includes the full spectrum of non-Federal water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, agricultural interests, industry and

regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments. Many of these members are non-Federal sponsors of Corps civil works projects, and own and maintain water resources infrastructure, including levees and other flood reduction structures, that would be directly impacted by the changes being proposed for the PL 84-99 natural disaster procedures rule.

The MVFCA was created in 1922 to promote the consensus homeowner, flood protection, and inland navigation interests of the seven-state region participating in Mississippi River Valley Flood Control and Navigation projects, including the States of Illinois, Missouri, Kentucky, Tennessee, Arkansas, Mississippi, and Louisiana. Since 1980, MVFCA has expanded to include the watershed states from St. Paul, MN to the Gulf of Mexico. The Association involves over 150 entities, including levee boards, drainage districts, municipalities, port and harbor commissions, state agencies, nonprofits, and businesses from the Mississippi River Watershed, a contiguous region that occupies 41% of the land area of the United States.

The MLDDA was established in the immediate aftermath of the Great Flood of 1993, the worst such U.S. disaster since the Great Mississippi Flood of 1927. Our membership, representing both rural and urban leveed areas, includes levee and drainage districts from areas throughout the Midwest, farming operations, industrial and commercial businesses, and individuals. We support these and other entities by working closely with Federal, state, and local agencies, as well as quasi-public and private organizations, toward improvement of conditions along the Missouri River and its tributaries.

The FBEDC FMC of Sugar Land, Texas, was established in 2021 because of concerns about the long-term systemic effects of the new National Flood Insurance (NFIP) pricing methodology, Risk Rating 2.0. Our organization includes public and private sector leaders who advocate for our regional flood protection network of 19 major levee and drainage systems. Over $20 billion in property investment and approximately 150,000 residents are protected by nearly 100 miles of levees and drainage infrastructure, nearly 27 percent of the total taxable value of Fort Bend County. Our accredited flood protection systems have been funded using only local dollars and more than $750 million has been invested for systems planning, design, construction, and upkeep. Exemplary floodplain management practices by the two largest cities in Fort Bend County, Sugar Land and Missouri City, have been recognized by the Federal Emergency

Management Agency (FEMA) with class 6 and class 7 Community Rating Service ratings, respectively.

The ALBL is made up of the State of Louisiana's 23 individual levee boards, and we work closely with Federal and state agencies to contain and manage floodwaters along our major waterways, from the northernmost reaches of Louisiana to the waters of the Gulf of Mexico. More than half of our precious land is in a flood plain, and 41 percent of the continental U.S. drains into the Mississippi River Basin. This creates a unique situation in our state, where flooding is a part of the history we share, and a part of the future we are working hard to control. Thanks to the constant diligence and monitoring by the state's 23 individual levee boards, rains very rarely have the disastrous results they once did for our state's citizens. "Without Flood Control, Nothing Else Matters."

The FAIR is a nonprofit, nonpartisan coalition started in 2009 to advocate for objective flood protection approaches using the best alternatives from multiple means to reduce catastrophic flooding in the United States. We are organized with local levee, drainage, and conservation districts to generate original analysis in furtherance of consensus, fact-based policy supporting public safety, economic development, and natural resource conservation.

The UMIMRA is a grassroots organization dedicated to improving flood protection and navigation in the Upper Mississippi River Valley. We represent levee and drainage districts, landowners, businesses, and communities affected by the Upper Mississippi River and its tributaries. The Upper Mississippi River watershed encompasses 118 million acres, which contains a total population of 13.4 million people. UMIMRA has 66 years of experience of representing those living, working, and investing in the Upper Mississippi River Basin.

Collectively, our organizations include more than 200 levee owner-operator members in more than 16 states, along with dozens of affiliated state, local, and private organizations.

B. BACKGROUND ON PROPOSED REVISIONS TO NATURAL DISASTER PROCEDURES RULES AT 33 CFR PART 203.

The Corps is proposing to revise its rules at 33 CFR Part 203, governing natural disaster procedures, implementing Section 5 of the Flood Control Act of 1941, as amended (33 U.S.C. 701n). (*See* 87 Fed. Reg. 68386 (Nov. 15, 2022).) The Corps originally set a deadline for comments from the public to be submitted by January 17, 2023 (*see id*.), but extended the

comment submission period by 30 days, to February 16, 2023. (*See* 88 Fed. Reg. 1340-41 (Jan. 10, 2023).)

The NWC is submitting to the Corps the following written comments in response to the Corps' request for comments on the proposed PL 84–99 natural disaster procedures rule. We appreciate this opportunity to share our views with the Corps and look forward to continued involvement in the discussion about reasonable and appropriate responsive emergency management measures and procedures under PL 84–99, in response to natural disasters.

C. COMMENTS ON PROPOSED REVISIONS TO NATURAL DISASTER PROCEDURES RULES AT 33 CFR PART 203.

There are several areas of concern that arose during our review of the proposed rule. We offer the following comments, which the Corps needs to address as it proceeds with revising and finalizing this proposed rule.

Our primary concern and the focus of these comments is that this rule proposes to incorporate "risk-informed decision-making" approaches and make other major changes to the disaster response procedures under the PL 84-99 program. The Corps does not clearly and specifically articulate what "risk-informed decision-making" is, how it is to be applied, or under what statutory authorities the Corps is promoting or mandating such risk-informed provisions, nor has the Corps peer reviewed, or solicited input from non-Federal sponsors and other stakeholders on, risk-informed decision-making approaches and definitions.

Additionally, many of the NWC's members have concerns that this proposal would transform the Congressionally intended purposes of the PL 84–99 program from what traditionally has been a program for responding to, and repairing or restoring damages from, past natural disasters caused by extreme events, into a supposedly risk-based planning program with a prospective focus that is aimed at preventing damages from potential future extreme events. This transformation would, in turn, let the Corps circumvent its responsibility for providing technical planning assistance to non-Federal sponsors seeking to improve their ability to prepare for, respond to, and recover from natural disasters, and thrust that burden on the non-Federal sponsors. There also are concerns about the availability and reliability of information that would be used for risk-informed decision-making.

While such a transformation of the program might be well-intentioned, Congress has not authorized it. Furthermore, such a transformation would dilute the effectiveness of the Corps and non-Federal sponsors in responding to natural disasters by imposing unfunded mandates, misallocating scarce resources, and causing adverse economic and other impacts on non-Federal sponsors and communities all around the Nation. As the non-Federal sponsors who fund and maintain levees and other flood control facilities all around the Nation, our members believe the Corps needs to be more transparent about the development, intended purposes, scope, and expected impacts, including net economic benefits, of transforming the PL 84-99 program in such a proposed way. Doing so will enable the Corps to produce a more robust and defensible program that better meets the needs of non-Federal sponsors and reflects the program's Congressional intent.

Our specific comments are provided below.

1) The Proposed Rule Is Inconsistent With the Intended "Emergency Response" Purposes of the PL 84–99 Program.

PL 84–99 (33 USC 701n) is the discretionary authority given to the Corps by Congress to act and react to emergencies caused by floods and certain other natural disasters. The statute authorizes the Corps to undertake certain emergency management activities in response to natural disasters, including flood fighting and rescue operations, emergency dredging for restoration of authorized project depths for Federal navigable channels and waterways, and the repair or restoration of flood control works threatened or destroyed by a flood. (*See* 33 USC 701n(a)(1).) The focus is on "emergency *response*." (*See id*. (emphasis added).)

However, as the Corps notes in the rule proposal, it is aiming "to advance risk-informed decision-making" and transition the Public Law 84–99 program to "risk-informed eligibility determinations for projects, which are based on an evaluation of the non-Federal sponsor's overall risk management activities." (*See* Corps Information Sheet, entitled "Updating Federal Regulation 33 CFR 203" (undated); 87 Fed. Reg. at 68387.)

The Corps may provide voluntary technical planning assistance, which could include "Applying a scalable, disciplined, and risk-informed process to advise" non-Federal sponsors seeking to improve their ability to prepare for, respond to, and recover from natural disasters (*see, e.g.,* "About Corps Planning," at https://planning.erdc.dren.mil/toolbox/guidance.cfm?Id=0&Option=Planning%20Fundamentals&Type=About), but the statute for the PL 84-99 program (33 USC

701n) does not provide the Corps with authority to pursue broader, prospectively-focused mandatory risk management activities or the authority to impose such risk management duties on local levee sponsors and the communities they protect as a condition of eligibility under the PL 84-99 program. In short, there is no authority under the PL 84-99 program that refers to or implies a non-Federal sponsor responsibility to adopt risk reduction measures to maintain eligibility for assistance.

The only eligibility requirement in PL 84-99 for non-Federal sponsors is meeting "maintenance and upkeep responsibilities that the Corps of Engineers requires of a non-Federal sponsor in order for the non-Federal sponsor to receive Federal assistance under this section." (*See* 33 USC 701n(c)(1).) Any eligibility requirements that the Corps is proposing to impose on non-Federal sponsors other than the maintenance and upkeep responsibilities specified in the current levee owner manuals go beyond the statute's eligibility requirements, and therefore are unauthorized by current law.

The Corps points to recent statutory amendments to the PL 84-99 program to justify the changes in the proposed rule. (*See* 87 Fed. Reg. at 68387.) However, the statutory amendments cited by the Corps in its proposed rulemaking bear only on the central activity of executing repairs and rehabilitation of levees damaged by floods.

Congress has not made changes in the underlying statute that would indicate a Congressional intent to change the criteria for levee sponsors or owner eligibility to participate in the PL 84-99 program. Nor has Congress adopted any amendment that suggests an intent for the Corps to alter the eligibility criteria in the current natural disaster procedures rule. Nevertheless, the Corps appears to be moving from collaborating with non-Federal sponsors to enforcing new mandates on them. Adding any risk-reducing components to the evaluation of eligibility for PL 84-99 assistance, including adding any eligibility requirements other than the maintenance and upkeep responsibilities specified in the current levee owner manuals, go beyond the statute's eligibility requirements and therefore cannot be done by regulation; they must be done by legislation.

It should be noted that new risk assessment techniques such as semi-quantitative risk assessment and tolerable risk guidelines did not exist in 1996 when Congress enacted Subsection (c) of 33 USC 701n, which further indicates that risk assessment approaches were not contemplated by Congress in determining eligibility of non-Federal sponsors to receive

Federal assistance under the PL 84-99 program. Hence, risk assessment methods have no place in determining sponsor eligibility for rehabilitation and repair under the program.

Finally, there is no known demonstration that the risk-informed process being promoted by the Corps, including the proposed addition of risk-reducing components to the evaluation of eligibility for PL 84-99 assistance in this proposed rule, would produce any net beneficial safety improvements, so it is uncertain whether any of the hoped-for improvements in the program would even materialize under this proposed rule.

Recommendations: *The Corps' emergency response mission and focus under the PL 84-99 program is well established. The Corps does not have the authority through PL 84-99 (33 USC 701n) to impose broad floodplain management duties on levee sponsors and communities to be eligible to participate in the PL84-99 program, as the Corps is attempting to do in this proposed rule. As noted above, adding any risk-reducing components (including adding any eligibility requirements other than the maintenance and upkeep responsibilities specified in the current levee owner manuals) to the evaluation of eligibility for PL 84-99 assistance cannot be done by regulation; it must be done by legislation. Rather, the Corps should be providing technical planning assistance to non-Federal sponsors seeking to improve their ability to prepare for, respond to, and recover from natural disasters, instead of thrusting that responsibility and burden onto the non-Federal sponsors.*

Most of the funds appropriated under this program are in emergency supplemental appropriations acts approved in the aftermath of major disasters that have resulted in serious damage to levees and other flood control projects. Such appropriations fund rehabilitation and repairs to those projects that are aimed at safeguarding the health, safety, and welfare of the communities that local sponsors seek to protect from potential flooding. Their purpose is not focused on providing voluntary technical planning assistance to non-Federal sponsors seeking to improve their ability to prepare for, respond to, and recover from potential future natural disasters. Congress for decades has made emergency appropriations to the program, and not once in over eighty years has Congress suggested that the capacity to meet emergencies through the program be impeded by obstacles to eligibility like those now being proposed by the Corps in this new rule. The proposed rule is simply inconsistent with the focus of the PL 84-99 program on responding to emergencies.

The Corps needs to reevaluate the new approaches being promoted in the proposed rule and respect the Corps' limitations of authority under the PL 84-99 program by maintaining the

current "emergency response" purposes and focus of the program, and not expect levee districts and other non-Federal sponsors to police the floodplains they protect. As part of this, the Corps needs to remove, from the proposed rule, any provisions that would impose responsibilities on non-Federal sponsors to adopt risk reduction measures to maintain eligibility for assistance.

Eligibility in the PL 84-99 program should remain dependent on levee readiness and ability to protect the area and communities in its area of protection program. Tying eligibility to the proposed floodplain management responsibilities has nothing to do with the emergency nature of the program's purposes and with a levee's readiness and ability to perform. Again, the intent of the PL 84-99 program is to repair and rehabilitate levees and other flood control facilities damaged by floods. Congress has not changed the law to make these proposed floodplain duties part of the program.

2) <u>The Corps Does Not Clearly and Specifically Articulate What "Risk-Informed Decision-Making" Is</u>.

The Corps does not clearly and specifically articulate (either in this proposed rule, or in the Corps' other recent rulemaking or guidance development initiatives) what "risk-informed decision-making" is, how it is to be applied, or under what statutory authorities the Corps is promoting or mandating such risk-informed provisions. There are no objective criteria or standards for conducting "risk-informed decision-making" or determining what constitutes an adequate "risk-informed" decision.

Further, the Corps has not peer reviewed, or solicited input from non-Federal sponsors and other stakeholders on, risk-informed decision-making approaches and definitions. For example, the Corps' Engineering and Construction Bulletin entitled "Interim Approach for Risk-Informed Designs for Dam and Levee Projects" (ECB 2019-15), which is intended to provide interim guidance for incorporation of risk-informed design into ongoing and future projects across all phases of work, was never subjected to independent, external peer review.

As a result, it appears that "risk-informed decision-making" is only a vague, general concept that is aimed at giving the Corps greater ability and discretion to subjectively impose varying, and greater, requirements on non-Federal sponsors on a case-by-case basis, without regard for whether the Corps has the statutory authority to do so.

Recommendations: *Because there are no objective or externally peer-reviewed criteria, standards, or agency demonstrations of net beneficial use of "risk-informed decision-making" in this or other related flood control contexts, the Corps needs to remove from the proposed rule any provisions that would utilize a "risk-informed" decision process until such a process has been properly vetted, justified, and explained, consistent with the requirements of the Administrative Procedure Act, Information Quality Act, and relevant regulatory planning and review executives orders and guidance.*

In addition, the Corps needs a robust engagement with non-Federal sponsors and other stakeholders on risk-informed decision-making approaches and definitions. Otherwise, the definition of "risk-informed decision-making" is a moving target and in the eye of the beholder and is not truly achievable.

Then the Corps needs to start articulating, clearly and specifically to stakeholders, what "risk-informed decision-making" is, how it is to be applied in the context of the PL 84-99 program and in other related programs (e.g., the levee safety program), and under what particular statutory authorities the Corps is promoting or mandating "risk-informed decision-making."

3) The Rule Proposes to Unjustifiably Apply a Top-Down, Corps-Driven "Risk-Informed" Decision Process to the Evaluation of Maintenance and Upkeep Requirements and Determinations of Eligibility.

The Corps is proposing to, among other things, introduce a revised approach, with revised criteria, for initial and continued eligibility in the PL 84-99 rehabilitation program and modifications to existing flood risk management projects. (*See* 87 Fed. Reg. at 68388 and 68390.) The revised approach would involve a top-down, Corps-driven "risk-informed" decision-making process that "uses an iterative process to reduce risk over time by identifying the areas of acceptable risk, monitoring the acceptable risk, and then effectively devoting resources to manage the sources of unacceptable risk in priority order." (*See id*.)

The proposed changes would shift the program from having a focus on objective eligibility criteria for rehabilitation assistance based on an inspection and the performance of the subject project, to a more subjective "risk-informed" approach, primarily based on a subjective evaluation of a broader set of a non-Federal sponsor's risk management activities. (*See* 87 Fed. Reg. at 68390.) The Corps claims that, "by incorporating lessons learned from recent disasters,

the proposed changes will help non-Federal sponsors improve their flood risk management." (*See id*.)

This substantial shift in direction in the proposed rule not only would transform the program from having an "emergency response" focus towards broader, prospectively-focused mandatory risk management activities (as already noted above), but raises serious concerns that the Corps would give itself broad latitude to subjectively establish new and elaborate risk management criteria, which may be increased or decreased, depending on the Corps' subjective evaluation and characterization of levee-related flood risk and required reliability, non-Federal sponsors' preparedness planning, training, operation and maintenance activities, and floodplain management planning and regulation, and other factors. The Corps then could unilaterally apply those elaborate risk assessment methods and criteria to projects as a precondition of finding the emergency preparedness of non-Federal sponsors acceptable, regardless of affordability, net benefits, or societal willingness to pay.

As cost-share partners with the Federal government, non-Federal sponsors have a need -- and a right -- to reasonable expectations with regard to their eligibility for Federal assistance following a natural disaster. This proposed rule does <u>not</u> provide them with any certainty. Rather, the proposed rule creates more uncertainty for non-Federal sponsors by imposing opaque, internally developed risk-based requirements on those sponsors who already have pre-existing contracts with the Corps that contain no such requirements to adopt risk reduction measures.

The proposed rule would effectively have the Corps determining, using subjective criteria that are not transparent or readily repeatable, which non-Federal sponsors may (or not) utilize PL 84-99, and those areas that could (or not) be protected and to what level. While there could be some advantages to properly vetted, reliable risk-informed decision-making<u>, it is wholly inappropriate for any Federal agency to effectively be the sole determiner of whether a community is deserving of emergency repair, rehabilitation, and restoration assistance under the program</u>. Rather, there must be parity between the Corps and non-Federal sponsors in establishing and applying objective criteria and approaches under the program.

<u>Recommendations</u>: *The Corps needs to provide non-Federal sponsors with greater clarity and certainty with regard to their eligibility for Federal assistance following a natural disaster, including by developing clear, objective eligibility criteria, and eliminating the imposition of*

subjective risk-based requirements on them when, as here, the statute for the PL 84-99 program (33 USC 701n) does not provide the Corps with the authority to do so.

As part of this, the Corps needs to stop characterizing mandates in the proposed rule as voluntary, for example, where the Corps seeks to "encourage" broader community flood risk management activities by non-Federal project sponsors. (See, e.g., 87 Fed. Reg. at 68388.) The proposed requirements that levee owners must agree to or be denied assistance is coercive and cannot reasonably be described as voluntary.

In addition, the Corps needs to reevaluate the new "risk-informed" approaches it is promoting in the proposed rule, and needs to give non-Federal sponsors an equal role and say in determining whether a community is deserving of emergency repair, rehabilitation, and restoration assistance, and at what levels flood protections need to be maintained under the program. Decisions on what constitute acceptable levels of risk must not be made by the Corps on a top-down basis alone in a vacuum, but rather, need to be made jointly and cooperatively, using objective criteria and approaches, with the relevant non-Federal sponsors.

4) The Proposed Rule Would Thwart the Purpose of the Program by Impeding the Ability of Non-Federal Sponsors to Respond to Emergencies, Repair Damaged Flood Control Projects, and Protect Their Communities from Potential Future Extreme Events.

According to the proposed rule, assistance will not be provided under the program when responsible non-Federal sponsors "have made insufficient efforts to prepare for the flood event or other emergency, or when a request for assistance is based entirely on a lack of fiscal resources with which to respond to the flood event or other emergency." (*See* 87 Fed. Reg. at 68398.)

The efforts and emergency preparedness responsibilities by which the eligibility of non-Federal sponsors would be judged by the Corps include their involvement in the operation and maintenance of flood and coastal storm risk management projects, conducting adequate preparedness planning, procuring and stockpiling adequate emergency response equipment, emergency response training, floodplain planning and management, providing emergency operations assistance, and implementing interim risk reduction measures to reduce flood risks. (*See* 87 Fed. Reg. at 68398.) Most of these mandated efforts and emergency preparedness responsibilities that the Corps is proposing in the new rule have traditionally been secondary to

local sponsors' primary responsibility of responding to natural disasters and protecting their communities through flood control preparedness and levee readiness.

When non-Federal sponsors are made ineligible under the PL 84-99 program, assistance will not be provided to them under the program, thereby impeding the non-Federal sponsors' ability to meet their primary responsibility of responding to natural disasters and protecting their communities from future extreme events. This is sort of like "cutting off one's nose to spite one's face," in that it further undermines the ability of non-Federal sponsors to be ready for and respond to disasters, thereby thwarting the clear Congressional purpose of establishing the PL 84-99 program.

Recommendations: *No non-Federal sponsor should be made ineligible unless the sponsor's conduct renders the levee or other flood control project less ready to protect the local community. That is why Congress prohibited eligibility where a sponsor fails to maintain a levee or other flood control structure. But never did Congress ever express an intent that a sponsor would be made ineligible to restore readiness to protect people unless it pursued other flood risk management activities not directly related to levee readiness. Again, such ineligibility is self-defeating and would irrationally subvert the purpose of the program.*

5) The Corps Needs to Clarify the Criteria and Information Needed for Non-Federal Sponsors to Satisfy the Eligibility Requirements in the Proposed Rule.

The proposed rule states that the Corps will conduct an initial eligibility assessment of non-Federal flood risk management projects, or a continuing eligibility assessment of Federal and non-Federal flood risk management projects, to determine eligibility for emergency repair, rehabilitation, and restoration assistance. (*See* 87 Fed. Reg. at 68400.) Non-Federal sponsors must prepare and submit an eligibility application for eligibility consideration. (*See id.*) The rule provides a number of general eligibility criteria, which non-Federal sponsors need to demonstrate compliance with, in their application. (*See id.*)

As already noted, under the proposed rule's new risk-informed approach, assistance will not be provided under the PL 84-99 program when responsible non-Federal sponsors have made "insufficient efforts" to prepare for the flood event or other emergency, or when a request for assistance is based entirely on "a lack of fiscal resources" with which to respond to the flood event or other emergency. (*See* 87 Fed. Reg. at 68398.)

The Corps briefly discusses and identifies, in only general terms, the sorts of efforts, emergency preparedness responsibilities, and documentation that non-Federal sponsors "may" need to satisfy in order to be eligible for assistance (*see, e.g.,* 87 Fed. Reg. at 68398 and 68401), but provides no specific details of what and how much information and level of detail would be required to satisfy each of the Corps' eligibility requirements.

Without any specific details or criteria, a non-Federal sponsor is going to be at the mercy of the Corps to subjectively judge what it thinks constitutes sufficient versus "insufficient efforts" and adequate versus "a lack of fiscal resources" on the part of the non-Federal sponsor. Consequently, many non-Federal sponsors are concerned about being subjected to inconsistencies and subjectivity in the requirements that would apply to them. Additionally, many non-Federal sponsors are concerned that the proposed new requirements would further slow things down, thereby resulting in increased delays in getting assistance and damaged facilities repaired, rehabilitated, rebuilt, or replaced so they can be ready for the next extreme event. Most critically, none of these non-maintenance and upkeep duties are in keeping with the statute.

Recommendation: *The Corps needs to preserve the existing specific, objective eligibility criteria for assistance under the program. To the extent the Corps refines such criteria, they must be specific, objective, and consistent, provide clear, detailed information that non-Federal sponsors could follow, and be limited to the statutory authority that Congress provided to the Corps for the program. Such criteria and information should be tailored, when appropriate, to unique regional conditions and specific actions most appropriate for maximizing the reduction of flood risk in that area. Criteria and information need to be applied uniformly and consistently across the program.*

To help ensure consistency and objectivity in the review of eligibility applications, such applications should be made in the form of a checklist of the required criteria. This way, applicants could perform a completeness check, whereby applicants confirm (such as through a self-certification) that they have completed all of the requirements identified in the list of eligibility criteria. Such an approach would help to minimize subjectivity in the review of applications.

The Corps also needs to reach out to non-Federal sponsors and give them an equal role and say in developing appropriate criteria and information for the program. Decisions on what constitute adequate and acceptable efforts and emergency preparedness responsibilities that

non-Federal sponsors would need to satisfy in order to be eligible for assistance must not be made by the Corps alone in a vacuum, but rather, need to be made jointly and cooperatively with the relevant non-Federal sponsors who, in most cases, are paying 100 percent of maintenance and upkeep costs.

Furthermore, the Corps also needs to prepare internal guidance and undertake training of their staff on eligibility requirements, as well as a common understanding of criteria requirements. If for any reason a non-Federal sponsor is deemed "ineligible," the Corps should allow a period of time where the Corps reaches out to them and gives them a grace period to revise the application. Additionally, it is recommended that the Corps have an appeal mechanism for non-Federal sponsors to challenge applicability decisions.

6) <u>The Proposed Rule Would Undermine the Readiness of Flood Control Projects, Misallocate Scarce Resources, and Impose Unfunded Mandates on Non-Federal Sponsors</u>.

To make non-Federal sponsors ineligible under the PL 84-99 program, based on a supposed failure to conduct preparedness planning and carry out evacuation plans imposed on them, is misguided.

State and local governments are the first line of defense in disasters and, as such, have the authority and responsibility to develop and communicate emergency and evacuation plans for communities, which plan for a wide variety of circumstances beyond just flooding. Non-Federal sponsors work with those state and local governments when they are developing their plans, but non-Federal sponsors are a contributor to, and <u>not</u> the approver of, those plans. To require non-Federal sponsors to develop a plan separate from the state and local governments' plans is counterintuitive, and further, <u>subordinates</u> the non-Federal sponsors' duties of flood control preparedness and levee readiness to activities that make no direct contribution to the flood control and levee readiness that Congress intended. Moreover, it effectively, and unwisely, "raises the bar" for eligibility as it increases the burden on non-Federal sponsors, both in effort to prepare and assumed responsibility.

Levee or other non-Federal sponsors operate with limited staff and funding to ensure that their flood control systems will be ready to protect people when the next flood comes. Forcing such sponsors to perform extraneous risk management functions unnecessarily imposes trade-offs as diverting staff and funding to new purposes imagined by the Corps will inevitably reduce the attention and resources devoted to the condition of their flood control facilities. They cannot

expect or rely on the Corps to pay for such added requirements, so mitigating the adverse effects of these trade-offs can only be achieved if the affected communities divert precious resources from other important community needs. Such diversions amount to unfunded mandates that are not within the intent of the program.

The proposed rule attempts to justify the imposition of risk management functions and associated additional costs on non-Federal sponsors by asserting that "Informed by more detailed understanding of risk for flood risk management projects, the Federal government and non-Federal sponsors are able to apply available resources to the risk management activities that most effectively reduce flood risk and avoid expenditures that have little risk reduction benefit." (*See* 87 Fed. Reg. at 68394.) Precisely what expenses are supposedly being avoided are not stated and are unclear, but again, what is being proposed would constitute an unfunded mandate on non-Federal sponsors that choose to seek assistance from the Corps under the program.

Recommendations: *Non-Federal sponsors should not be made ineligible unless the sponsor's conduct renders the levee or other flood control project less ready to protect. The Corps needs to reevaluate the new approaches being promoted in the proposed rule, including the emergency preparedness responsibilities by which the eligibility of non-Federal sponsors will be judged by the Corps, and eliminate burdensome requirements that divert precious resources and impose unfunded mandates on non-Federal sponsors.*

Because emergency preparedness, notification, exercise and evacuation planning, and related activities rely heavily upon coordination and collaboration with local cities, counties, the state, and other Federal agencies, the Corps needs to take a more proactive role and help non-Federal sponsors build relationships with other local emergency managers to ensure proper coordination and response to flooding events. Emergency response is a process that requires unified understanding and strong relationships. Risk communication also needs to be consistent and shared across appropriate agencies and populations. As such, the Corps also needs to help non-Federal sponsors partner with their local, county, regional, and/or state government entities in risk communication planning and risk language adoption. The Corps should not thrust the responsibility and burden of these sorts of activities entirely on non-Federal sponsors, as seems to be happening in the proposed rule.

7) The Rule Would Force Non-Federal Sponsors to Assume Duties Outside Their Legal Charters, Core Competencies, and Project Authorities, and Expose Them to Liability.

The burden of assuring safe, reliable levees and related infrastructure falls jointly on non-Federal sponsors and the Corps. This is so because one or the other has designed, built, and performs operation and maintenance of the project itself, and not the entirety of the levee-protected flood plain. Most non-Federal project sponsors, notwithstanding their outsized contribution to improved life safety and flood damage reduction, navigation, and economic development in lowland areas, are not sovereign over the levee-protected areas. Local sponsors possess neither the resources nor the legal authority to administer prudent use and management of properties that are beyond their projects.

The important responsibility of flood plain risk management activities, such as floodplain land use planning, management, and regulation, building standards, emergency response planning and training, ordering evacuations, and other nonstructural hazard mitigation tasks and approaches, are within the purview of state or municipal governments. In most cases, those local regulatory agencies are not the same as the owner-operators of the flood control projects.

When executed as intended, these separate and distinct missions of flood control and flood plain risk management can serve as the tandem components of successful, economic flood protection. Non-Federal sponsors and the communities they help to protect can benefit from increased cooperation with the Corps, but that will happen only if agency roles, responsibilities, and requirements are clear, justified, and achievable.

The proposed rule, however, fails us in these respects. The proposed rule plays havoc with these distinct missions, responsibilities, and orderly progress by advancing a misguided approach at the worst possible time. In the face of dynamic flood risks attributable to our growing infrastructure gap and shifting demographic, development, and climatic forces, this proposal would have us divert our attention away from vital infrastructure by imposing remote flood plain planning and emergency management duties on non-Federal sponsors.

Imposing these other planning and management activities on these non-Federal sponsors falls far outside the limited state authorities conferred on most of the special purpose political subdivisions that own and operate levees and other flood control facilities. These activities also fall substantially outside the agreements that the local sponsors signed and the obligations that were envisioned within the specific Congressional project authorizations that apply. In many cases, the obligations of levee owners and operators have been understood in the context of agreements that they entered into for membership in the PL 84-99 program.

As a result, the proposed rule places unreasonable burdens on non-Federal sponsors, both financially and legally. Complying with the proposed burdens would take money away from other more important responsibilities of sponsors, and would further undermine our gains and risk future success by muddling the rational division of resources, labor, and core competencies among intergovernmental authorities. Every dollar and manhour spent by the Corps and local sponsors on residual risk mitigation in the flood plain is a dollar and manhour not spent on improving project performance and preventing catastrophic project failure.

With scare resources, sponsors cannot afford to properly maintain and manage levees, since their budgets to do so shrink with the proposed new requirements. Because non-Federal sponsors have limited state authority as political subdivisions, they may be prevented from implementing the burdensome changes proposed in the rule. Requiring non-Federal sponsors to develop emergency management plans, regulate and police floodplains, and perform other emergency planning and management activities are all outside non-Federal sponsors' authority, and forcing non-Federal sponsors to do so could expose them to liability. We should instead encourage non-Federal project sponsors to work steadfastly with the Corps in diligent pursuit of the essential flood protection project gains that are achievable through economic design, construction, and maintenance improvements.

In short, many of the wholly new and novel duties that the Corps would impose on non-Federal sponsors are not within their state statutory authorities or areas of expertise, and therefore would divert time, personnel, and money away from the original intent of the PL 84-99 program of sustaining levees and other flood control facilities in readiness for the next flood, and could expose them to liability.

Recommendations: *Eroding the objectives and efficient execution of the PL 84-99 program to repair damaged levees and appurtenant infrastructure is contrary to the intent of the statute. The Corps needs to reevaluate the new approaches being promoted in the proposed rule, including the emergency preparedness responsibilities by which the eligibility of non-Federal sponsors will be judged by the Corps, and eliminate burdensome requirements that divert precious resources and impose mandates on non-Federal sponsors that are outside their legal charters, agreements that they entered into for membership in the PL 84-99 program, core competencies, and project authorities.*

8) Increasing Burdens on Non-Federal Sponsors Threatens Continued Participation in the

PL 84–99 Program, with Potentially Disastrous Consequences.

In enacting PL 84-99, Congress had the expectation that the Corps and non-Federal sponsors could work together productively to keep the Nation's levees and other flood control facilities in ready condition to protect communities. For decades that expectation was exceeded to the great benefit of the communities who depend on the flood control facilities.

Unfortunately, the proposed rule threatens to become the latest in a series of burdens that non-Federal sponsors must bear to remain in this program, as well as others. With the additional responsibilities and burdens being placed on sponsors, many levee owners and operators are finding it difficult to justify the high costs and find the legal authority to comply with the Corps' additional mandates. These trends, along with the high cost associated with Federal repair contracts, make it difficult for non-Federal sponsors to meet their cost-share and other obligations of local cooperation. As a result, the continued addition of more and more responsibilities and burdens being placed on sponsors may cause many to leave the program.

In some instances, sponsors can get the repairs done on their own at less cost than their share of the Federal contract cost-share. In other instances, the PL 84-99 program appears less and less helpful and more costly and difficult to comply with than what some non-Federal sponsors believe it is worth. Some non-Federal sponsors have contemplated pulling out of the program, but recognize that, in doing so, would create broader problems for all levees and for the overall flood control system because all levees and other components are linked together, and no chain is stronger than its weakest link. If one levee leaves the program, that has potentially negative implications and disastrous consequences for neighboring levees in the system. Reconstruction should be to pre-storm levee heights and tied into upstream and downstream conditions.

Recommendations: *The Corps needs to take a more holistic view of the flood control systems around the Nation and examine the impacts that each new requirement in the proposed rule would have on those flood control systems as a whole, as well as on each individual piece. As part of this, the Corps needs to eliminate unnecessary complexity and challenges for levee owners to continue in the PL 84-99 partnership. Failure to do so means our Nation's levees and flood control systems will be less ready for the next flood event, the consequences of which could be disastrous.*

9) Proposed Increases to the Minimum Repair Cost for the Rehabilitation of Flood Risk Management Projects and Non-Federal Cost Share Would Add Still Additional Burdens on Non-Federal Sponsors.

The Corps is proposing an increase to the minimum repair cost for the rehabilitation of flood risk management projects from $15,000 to $50,000 in order to have Federal involvement. (*See* 87 Fed. Reg. at 68391.) This increased cost threshold would decrease the total amount of projects that are eligible for the program, but would add still an additional cost burden on non-Federal sponsors because these smaller repairs under the threshold would still be required and the non-Federal sponsor would be left to finance them.

In addition, the Corps is proposing an increase to certain non-Federal cost shares, including a cost share increase from 25 percent to 35 percent, for assistance provided in which "permanent construction standards" are applied or when accomplishing modification activities to flood or coastal storm risk management projects. (*See* 87 Fed. Reg. at 68394.) A larger cost share would shift the cost burden onto non-Federal sponsors, which in turn may be shifted onto the local property owners, many of which are individual homeowners and/or small business owners.

Overall, the proposed changes appear to benefit the Corps by pushing more responsibilities and associated costs from the Corps to non-Federal sponsors. The Corps acknowledges that non-Federal sponsors "may see an initial cost increase associated with documenting activities necessary for eligibility for the rehabilitation program," while "the costs to the Federal government to implement this program to remain roughly the same under the proposed rule." (*See* 87 Fed. Reg. at 68394 ("Expected Benefits and Costs of Proposed Changes").)

Recommendations: *The Corps should reassess the impact on non-Federal sponsors of increasing the cost threshold and non-Federal cost shares, and consider ways of lowering them.*

10) Extreme Weather Events Do Not Justify Altering the Eligibility Criteria for the PL 84-99 Program.

PL 84-99 program eligibility should have nothing to do with the frequency or intensity of weather events. An increase in the frequency and intensity of extreme weather events does not alter the underlying principles that should govern the PL 84-99 program, and therefore does not provide a justification for altering the eligibility criteria for the program.

Levees and other flood control facilities need to be ready and able to protect regardless of the weather condition or intensity of the event. Levees and other flood control facilities provide protection under all conditions and the principles of flood control do not change with the weather. Eligibility should be dependent on a facility's readiness and ability to perform. Extreme weather events only emphasize the need to repair levees and other flood control facilities more quickly and efficiently to provide protection from the next extreme event.

Recommendations: *The program's focus should continue to be on the repair and rehabilitation of flood control facilities and keeping levees ready to protect against the next flood event. Those principles ought to be the same regardless of the frequency and intensity of weather events. To the extent that extreme weather is more frequent and intense, such changes elevate the urgency of meeting the fundamental purpose of ensuring a flood-damaged levee will be ready when the next flood strikes, making it all that much more important to not divert scarce resources from that objective or otherwise impede the ability of non-Federal sponsors to make flood control facility repairs.*

The future occurrence of extreme events is uncertain. In the worst-case scenario, the nation faces growing flood threats. Regardless of whether the future is going to look more like the past, or more with the occurrence of worst-case scenarios, it is unwise to assume that communities will accept retreat from the flood protection that has successfully defended them in the past. Our flood-protected communities and their elected leaders expect the Corps and non-Federal sponsors to help protect them, not "write them up." Our communities will not believe we can just regulate or "pass-fail" levees to improve resilience. Infrastructure that performs has been and will remain an expectation.

11) The Corps Is Improperly Certifying the Proposed Rule Under the Regulatory Flexibility Act.

The Unified Agenda posting for the proposed PL 84-99 rulemaking states that small entities will not be affected, and that a regulatory flexibility analysis is not required under the Regulatory Flexibility Act (5 U.S.C. §601 et seq.)("RFA").

The NWC believes that the Corps is improperly certifying the proposed PL 84-99 rulemaking under the RFA because the rule would likely have direct, significant impacts on a substantial number of small entities. The Corps claims that the proposed rule would not have a significant economic impact on a substantial number of small entities because the "proposed

modifications to the regulation, and the regulation as a whole, do not place any regulatory burdens on small entities or have a significant economic impact on such entities." (*See* 87 Fed. Reg. at 68395.)

Many stakeholders, including local levee or flood control districts, affected by the PL 84-99 program and this proposed rule are small, local, or regional government or other entities, which are considered "small entities" under the RFA. These small entity non-Federal sponsors would be required to meet the numerous requirements and conditions for eligibility that are proposed in the rule and discussed in the above comments. The proposed rule would impose costs directly on these small entities, and those costs would be significant for a substantial number of them.

In light of these numerous requirements and conditions for eligibility that are proposed in the rule, it is inaccurate and misleading for the Corps to suggest that the proposed rule "merely provides a construct under which the Corps can provide limited forms of emergency assistance and project rehabilitation to [non-Federal entities] upon request from the same," and the provision of assistance under the proposed rule "does not place any burden on small entities nor does it entail direct involvement by such entities." (*See* 87 Fed. Reg. at 68395.)

Recommendation: *Because the proposed rule will likely impose significant impacts on a substantial number of small entities, the Corps should hold the proposed rulemaking in abeyance for further development as the Corps considers alternative approaches for reducing impacts on small entities. This should include notification and outreach to small entities, conducting open meetings or public hearings concerning the rule for small entities, and soliciting and receiving comments over computer networks in accordance with the RFA prior to preparing anything further for a rule on this issue.*

The Corps is not facing any specific legal deadlines for this rulemaking (see Reginfo.gov entry for RIN: 0710-AA78, at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0710-AA78 ("Legal Deadline: None")), so there is no credible reason why the Corps should not hold the proposed rulemaking in abeyance for further development as the Corps considers alternative approaches for reducing impacts on small entities. Doing so would make for a better rule, as envisioned by the RFA.

Thank you for the opportunity to provide comments on the proposed rule, and hope that the Corps will address our comments as it proceeds with this rulemaking process. NWC and its

partners look forward to continued involvement in the discussion about reasonable and appropriate responsive emergency management measures and procedures under the PL 84–99 program.

For more information or questions, please contact me at (202) 203-4795 or by email at julie@waterways.org.

Sincerely,

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