

## **Water Resources Reform and Development Act of 2014**

### USACE Listening Session II

27 August 2014

Jan Rasgus: Good afternoon everyone and welcome to the Water Resources Reform and Development Act 2014 Listening Session. My name is Jan Rasgus. I'm a senior policy advisor with the US Army Corps of Engineers, Civil Works Planning and Policy Division. As most of you know, President Obama signed the Water Resources Reform and Development Act, WRRDA, of 2014, into law on June 10, 2014. WRRDA is the primary legislation by which the Congress authorizes the U.S. Army Corps of Engineers key civil works missions, including navigation, flood risk management and environment restoration. It is important to note that this is an authorization bill, not an appropriations bill.

The Corps is currently developing implementation guidance for the provisions listed in WRRDA 2014 in coordination with the Assistant Secretary of the Army for Civil Works. This guidance will provide the policies and procedures to be used in implementing the new law.

As part of this development, we have scheduled four listening sessions to hear from our stakeholders and the public regarding your comments, concerns and issues related to WRRDA 2014. We will take your comments into consideration as we prepare the implementation guidance.

Each of the listening sessions will cover a different collection of the more important general program and policy provisions of WRRDA. These policy provisions have been categorized into general theme areas so that these listening sessions can concentrate on two or more important theme areas or categories.

The conceptual framework for the listening sessions is as follows. We held our first session two weeks ago on August 13th, and at that session we covered the authorizations and backlog prevention, as well as project development and delivery, including those provisions that impact the Corps of Engineers planning program. The second session, which is today, will cover alternative financing, which include contributions and title five of the WRRDA, as well as those provisions dealing with credit.

Our next session on September 10th will cover levee safety and dam safety, as well as regulatory provisions, including section 408 and 404. The last session, on September 24th, will cover those provisions that allow for nonfederal implementation of Corps of Engineers projects, as well as water supply and reservoirs and navigation.

If you have a comment that does not fall into one of these theme areas, you may e-mail it to our e-mail, which is shown. For those of you who are on the webinar, you can see the e-mail there. It's [wrrda@usace.army.mil](mailto:wrrda@usace.army.mil), along with comments on any of the WRRDA provisions you wish to comment on.

Today's listening session will focus on several key WRRDA provisions that expand the Corps' authorities to accept contributed funds from nonfederal interests, provides additional opportunities for nonfederal interests to receive credit for work carried out by that nonfederal interest, and provides a new authority for the Corps to enter into agreements with nonfederal interests, including private entities, to finance the construction of water resources development projects. In addition, there are new authorities for the Corps, which affect Corps of Engineers recreational facilities.

You can see, for those again, on the webinar, you can see the list of those specific sections of the WRRDA that we are covering today.

Today's session will be recorded and transcribed, and these files will be made available on the Corps WRRDA website.

On behalf of the Army Corps of Engineers, we welcome your commentary and look forward to hearing from you.

I will now turn this over to Gene Pawlik with the Corps Public Affairs Office to review the ground rules for today's session.

Gene Pawlik: Hi. This is Gene Pawlik with the Army Corps of Engineers Public Affairs Office. Before I go into the ground rules, Collin, if you would, give instructions on how people can begin to key up with their comments.

Collin: Sure. Ladies and gentlemen, if you'd like to leave a comment today, you can do so by pressing star one on your telephone handset. You will be notified once your line is unmuted and pressing star one again will remove you from the queue. Also, if you're connected via voice over IP, you can use the raise hand button in the top left hand corner of your screen.

Gene Pawlik: All right. Thank you.

Just to go over the ground rules, and for those who are on the phone and perhaps not on the web, the slides that we have are available on our website, so there's not a lot of slide material on it, but if you wish to view it later, they are up on the Corps' website.

Speakers have three minutes as maximum time to present their comments. Once you get to approximately the two minute or two and a half minute point, if you're still commenting, I will break in and remind you that you have a minute or 30 seconds remaining. Again, this is a listening session. We're here to take your input. This is not a question and answer or a back and forth session. If needed, if you raise a point and somebody here would like to ask a clarifying question to make sure that we understand what you're talking about, we might need that, but this will not be a back and forth discussion.

When you do speak, please provide your name, and if you're representing an organization, the organization is applicable. Also be sure to tell us which of the provisions that you're specifically addressing. That will help us categorize all the comments afterwards.

As Jan mentioned, this is being recorded and comments will be posted to the website, so this will all be public information. Having said that, I think we are ready to begin.

Collin, if we have folks queued up, if you would go ahead and introduce the first one and, again, for all, we have three minutes maximum time to make your input.

Melissa Samet: Hi. Good afternoon, my name is Melissa Samet. I'm the Senior Water Resources Counsel for the National Wildlife Federation. My comments today generally apply to Title V, but they also apply to any situation where contributions are made for planning in construction from private entities.

I just wanted to start off by saying the National Wildlife Federation does recognize the value of public-private partnerships when they are properly devised to protect the environment and other important public interests. On the inland waterway systems in particular, we believe that requirements for larger industry contributions are particularly appropriate, including for operations and maintenance activities which are currently funded 100% by the federal taxpayers.

I wanted to highlight three requirements that we think actually must be included in Title V implementing guidance to ensure that public-private partnerships will be in the public interest. The first is that the implementing guidance must make it clear that public-private partnerships will be available to fund only those types

of projects that are, in fact, appropriate for federal investments. The process should not be turned into a super charged permitting process where private investment goals and objectives drive both the planning process and the investment of federal taxpayer dollars. Private investments and the goals of obtaining a return on private investments must not be allowed to trump public interest in environmental protection. We think that's absolutely critical.

Second, is that we believe the implementing guidance must make it clear that public-private partnership projects have to comply fully with all federal environmental laws in the national water resources planning policy that was established by section 2031 of WRRDA 2007. Fundamentally, federal environmental laws require that such projects will avoid adverse environmental impacts to the maximum extent possible, and to mitigate unavoidable damage. The national water policy further requires that all federal water projects protect and restore the functions of natural systems and mitigate any unavoidable damage. When the new Principles and Requirements are finalized and the Corps is allowed to use them, these should also be applied, of course, to public-private partnership projects. To help ensure that projects are in the public interest and satisfies the federal law, we believe that they should be required to use both nonstructural and/or restoration measures where such measures are practicable and will solve a water resources problem. We think that those solutions should be presumed to be available and capable of being done, i.e, practicable, unless they're clearly demonstrated otherwise. These types of approaches can be both very effective. They provide a host of other benefits, environmental and public safety and health benefits, and they're often far less costly than traditional structural projects.

Those are the three points we wanted to highlight, so thank you very much for the opportunity to participate.

Jennifer Hecker: Okay, this is Jennifer Hecker; I'm the Director of Natural Resource Policy for the Conservancy of Southwest Florida. Our comment is with regards to section 1014 regarding the study and construction of project by nonfederal interests, which details the work that's going to be carried out under that section shall be eligible for credit or reimbursement for the federal share. We'd like to see specific details on how the potential for reimbursement under this section will be captured in the budget process, and also, for the purposes of balancing cost-share needs. We feel it's unclear if any of those reimbursements go towards the federal or the nonfederal side of the cost-share ledger, so we'd like that clarified, please.

Daniel Payton: Hello, this is Daniel Payton calling from Western States Power Corporation. We're an organization that was formed in 1995 to assist with maintenance, repairs and replacements, in the Omaha District with the Corps of Engineers

facilities on the main stem of the Missouri River. Since that time, we've provided over \$110 million in financing toward those ends, and we feel we have a constructive partnership right now. We're concerned about implementation of some of the contributions by a nonfederal interest and the reimbursement in terms of the program that we currently have set up, which is working very well.

We believe that some of the proposals, and we don't have all the details yet, may impose an unacceptable risk to the existing users in terms of the reimbursable functions and what the impacts would be, and an unacceptable risk from the point of view that those that may be providing the financing will be without risk because they'll be eligible for an income stream from the reimbursable customers.

We're also concerned about the loss of regional and local focus because some of the financing may go out on a national basis and the people that are most affected by this program may not have enough input to be able to voice their concerns about rate increases or about mission creep or any types of new construction that may be blended with replacements or repairs that we fully support.

We have a concern about private partnerships with people who don't have an intimate involvement with the projects. That's all I have.

Steve Fitzgerald: This is Steve Fitzgerald with Harris County Flood Control District, also representing NAFSMA, and I'm going to talk about three sections.

The first one, section 1022, credit in lieu of reimbursement. I'd like to request that when you write the implementation guidance that you consider the completion of discrete segments within the work, as opposed to completing the entire project, as qualifying for credits. That's just a request, if you can see that it can be done within the wording that's here in the law.

The next one is section 1024, authority to accept and use materials and services. That's referring to repairs and restoring water resource development projects after an emergency. The request for that is, I think it's a good law, but we just ask that you minimize the number of steps and time that it may take for the Secretary to approve the materials or services that a nonfederal public entity provides. I could see this turning, possibly, into something that could take a long time, and I'm just recommending that you put in a procedure or process that keeps that down to a minimum, because after something gets damaged or destroyed, time is usually of the essence.

The last one is on section 5014, the water infrastructure public-private partnership pilot program, has to do with the payment to the nonfederal interest

for the federal share of the project. I realize the law says completion of all work under the agreement before issuing the payment, but I believe that, for this to be successful, in some cases, for some projects, if there's any way to figure out how to reimburse on an incremental basis to the nonfederal interests or to allow smaller portions of projects to be put under contracts instead of the entire project so that it could be bid off in smaller chunks financially and over time.

That's the conclusion of my comments. Thanks.

David Yarbrough: Hey, good afternoon. My name is David Yarbrough. I'm a member of National Waterways Conference. I would like to direct my comments to section 1024. In recognition of the devastating impact to the individual states and the nation's economy that would result from an unintended shutdown of any portion of the Inland Waterway System, the intent of Congress in section 1024 is to allow stakeholders, working in partnership with the Corps of Engineers, to step in on an emergency basis and to provide resources which can help implement or expedite a solution to a catastrophic failure, with the goal of reestablishing navigational capabilities as soon as possible. Sort of like the caller before me, our concern, since restoring commerce and minimizing time of closure is crucial, is that it is critically important that the Secretary delegate the authority for determining such an emergency to the District level of the Corps of Engineers.

Further, the Corps needs to work with stakeholders as the guidance is developed how and under what circumstances such materials and services could be provided in the event of an emergency contemplated under this section. It's critical the stakeholders have the ability to develop work plans in advance in order to be ready to act quickly, and implement the authority under this section, as needed.

I thank you for your time. This concludes my comments.

Olivia Dorothy: Hi. Good afternoon. My name's Olivia Dorothy, and I'm with American Rivers. My comments, they are general, and pertain mostly to Title V and section 5014. American Rivers agrees that the private sector should contribute more towards infrastructure, especially on the inland waterways where 90% of the cost of the infrastructure's operations, maintenance, and construction are paid by the general taxpayer. However, the Corps needs to develop implementation guidance that ensures the infrastructure built under the new public-private partnerships protect and restores the environment as cost-effective and as in the public's best interest, applying the 2007 water resources planning policy, obtaining privately funded water resources development project.

The Corps should not allow private investors to choose any project per investment, only those projects that have been vetted through project planning and meet the requirements that protect and restore the natural function, the function of natural systems, and the public's interest should be eligible for financing.

Specifically, we are particularly concerned about proposing a lock on the Mississippi River, an example that may be representative of potential problems, as the private-public partnerships move forward and is implemented. There's been a tremendous push recently to start construction of new locks, despite a mandate to install nonstructural and small scale measures, followed up by studies to evaluate the need for new locks after these alternatives have been in effect. Implementation guidance must be developed to ensure private investments do not incentivize expensive new construction where cheaper and more environmentally friendly alternatives are available.

Secondly, benefit cost ratios should not be used as a full determining factor when choosing water resources development alternatives. We understand that it's pretty likely that these ratios will continue to play a role within new planning guidelines whenever finalized for determining cost-effectiveness and public interest. Implementation guidelines need to explain how cost benefit requirements within the current and anticipated Principles and Guidelines apply to private investments.

Going back to our new locks example on the Mississippi River, the Corps cost benefit analysis for those structures was one to 0.2 under the existing traffic conditions, and it's not unreasonable to assume that the same cost and effect ratio would apply to a project regardless of whether the investment comes from the public or private sector. If investment for return is less than the cost, we are really concerned about steps the private sector will take to recuperate their investment.

As we saw in Chicago when Mayor Daley privatized the parking meters, it resulted in the highest parking rates in the nation when the private sector sought to recuperate their investment. Those implementation guidelines need to mandate the development of clear explanations of how the private sector intends to recuperate their investments, and especially if the project is anticipated to return less than the investment, to ensure the new infrastructure doesn't become irrelevant as the cost recuperation occurs.

Karin Jacoby: Hello, this is Karin Jacoby with the National Waterways Conference. I have two comments. The first is with respect to the pilot program, and in there it states that the section 1043, it states the level of authorization is the \$25 million a year,

and adding to that, authorization of funds under the pilot program to include any funds appropriated to a specific project.

We would ask that the implementation guidance clarify whether it's the Corps' intent to actually provide those funds, appropriated to a specific project to the sponsors in order to advance the local sponsor implementation, and whether there will be different requirements, oversight and reporting, on those funds, than the pilot funds money, the \$25 million a year.

Then, my second comment, is on section 1014, and there with respect to construction, this provision replaces section 204 of the Water Resources Development Act of '86 that addressed construction, specifically on harbor projects by nonfederal interests, and it's under Title II of the Harbor Development. There's some question as to whether this provision applies to projects other than harbors, because section 1014 also appeals previous authorities for instruction by nonfederal interest of shoreline protection and flood control projects. The apparent intent is for section 1014 to take the place of those, however, we would like that clarified in the implementation guidance.

That's all I have. Thank you.

Scott Wilson: This is Scott Wilson from the Santa Clara Valley Water District in Santa Clara County, California. I would like to address section 5028, a subsection of 5014. Based on WIFIA language, the Santa Clara Valley Water District and other agencies may not benefit from WIFIA financing due to the limitation of using tax exempt debt, given that WIFIA only provides 49% for major infrastructure projects. We would like to see this addressed administratively in the guidance.

Thank you.

Matt Girard: Hi this is Matt Girard with the Plenary Group. The Plenary Group is a long term equity investor, concessionaire. Across North America we've got about \$18 billion worth of public assets under our long term management. A couple comments from the private sector side. One is, a comment on a previous commenter, which is on the point of project selection. From the private sector side, we completely agree. The project selection should be completely run and mandated from the public sector side for putting that project out for procurement to the private sector, so we agree with that.

In terms of environmental concerns, once again, we completely agree that environmental concerns and the permitting process are paramount in the process. I would highly recommend that any permitting, if it's done before a project, it's procurement as well as clearly defining what those environmental

requirements are, so all the bidders are on the same page, in terms of what they're bidding.

A couple of general comments regarding center of excellence, and these are all regarding Title V of the 5014. In terms of center of excellence, highly recommend the corporate center of excellence before procuring any P3 projects. You get a couple benefits there. One is you get to read the knowledge base as well as the experiences of other agencies that have done P3s, which I think is key. Also, when you do use project selection and procurement type selection, I think having that center of excellence having value for money, expertise, in terms of they're able to gauge, you know, P3 procurement versus other types of procurements you may put forth, before getting into a project selection type.

That's all.

Mark Smith: Hi, this is Mark Smith. I'm with The Nature Conservancy. I have three comments. I know that the WRRDA bill is expensive and part of the issue's going to be sequencing of which guidance comes out, so a lot of my comments have to do with the prioritization by which you will go about issuing guidance and so I just have three comments to make.

The first is on section 5014, on the public-private partnerships and the 15 pilot projects. I think guidance on how those will be selected should come out early, and not only how they'll be selected, but the role for other participants in that process, but obviously both the private sector that may be investing in them, but other partners, as well, so that we can make sure that those pilots are really representative of all the different types of work and how they'll be carried out, and which ones have the best chance of success. We encourage that guidance come out sooner rather than later, or at least advice on how you're going to select those pilot projects.

My second comment is regarding the sections on crediting, sections 1018 through 1022, and I think that there is a lot of interest in how those sections are going to work, including the transfer of excess credit and the credit for in-kind contributions, so we encourage the Corps to work on those guidance and get some clarity about how those new sections can be used early in the process, because I think there's a lot of work that's ongoing that might benefit from the guidance so that we can take advantage of those provisions.

Then, finally, regarding Title V, subtitle C, the innovative financing of projects. Again, I think, prioritizing how the types and projects that will be allowed and the eligibility for those projects is going to be key to having those sections or that subtitle used, and we encourage that guidance to come out so people can really understand what types of projects will be able to take advantage of those

financings and which ones does that financing work for, and which ones may it be less appropriate for.

With that, I will conclude my comments. Thank you for taking the time to have these sessions.

Kirsten Mickelsen: Hi my name is Kirsten Mickelsen, representing the Upper Mississippi River Basin Association. We represent the five states that border the upper Mississippi River, and I want to thank you for an opportunity to comment.

The states are supportive of WRRDA and are encouraged by it. We think it's timely. The governors' just released a joint letter in support of the navigation ecosystem sustainability program, and we think that WRRDA provides an opportunity to move that forward.

One comment that I'll make is that we hope the implementation guidance will be an opportunity to resolve indemnification issues that prevent some states and nongovernmental partners from entering into cost-share agreements. Beyond that, my comments are going to focus on P3s.

While WRRDA provides tremendous potential for improving infrastructure through a P3, there's relatively little knowledge of how a P3 would work on a waterway, especially on a lock and dam system that runs along state borders. We believe that P3s are a tremendous opportunity. We would just like to sort through how to implement those. We believe that a robust, thoughtful dialogue is needed to move conceptual ideas of how a P3 might work to more detailed applications, and we would encourage that these discussions involve an array of stakeholders, including industry shippers and operators.

One of the questions that we have is, and we want to caution against, that P3s are used to supplant federal funding, and instead we need to use them to supplement their investment on the waterways. One question would be, to fund a P3, would there be a governor's model needed, a financing authority? Who would be in charge? What would be the geographic scope? How would that be governed? What would be the funding revenue mechanism? How would that be structured and then who would pay? Would that revenue be sufficient and predictable enough to attract investment? Who would be the private investor? What risk would a private investor have to assume? What risk would the states and localities have to assume? Would the reliability of the navigation system be ensured to provide reasonable risk? What might be the process and forum to explore these and other implementation questions that are needed to address this, especially if a project is systemic in nature and has a larger geographic scope?

Thank you.

David Peterson: Yes, this is David Peterson, Deputy General Counsel for Louisiana Coastal Protection and Restoration Authority. My comments are in reference to section 1019, clarification for in-kind crediting authority under section 7007, WRRDA 7007.

The comment has got to do with the implementation provision of that section requires that no later than 90 days after the enactment of the Act, the Secretary, in coordination with any relevant agency in the state of Louisiana, shall establish a process by which to carry out the amendment made by subsection A2. At this point in time, the Corps has not communicated with the state of Louisiana, particularly CPRA, which is the nonfederal and single state entity for projects in Louisiana regarding this, and according to our timeline, the 90 days in which there's supposed to a plan in place would run out on September 8, 2014. We wanted to note our concerns that we have not yet heard from the Corps with regard to that cost crediting issue with regard to projects in Louisiana.

Thank you.

Martha Musgrove: This is Martha Musgrove. I'm calling on behalf of the Florida Wildlife Federation, it's a member of the organization known as the Everglades Coalition, regarding section 1018, credit for in-kind contributions. I want to note that the Everglades Restoration Comprehensive Plan was adopted both by Congress and by the state legislature in 2000. It is a 30 year plan, and there's been a number of projects that have been authorized, and a number of previously authorized presidential projects that had to be completed before then. Both the state and the local agency, South Florida Water Management District, have invested a large amount of money in acquiring the land, and then sometimes in freighting the construction costs for various projects.

We would like to make sure that the guidance developed for implementing this not only clarifies, but authorizes and commits to the return of that investment. Some of the work has been done in kind upon the pledge of the federal government to be provided reimbursement. Other of it has involved cash. We think these credits should be honored and that they should be easily achieved, easily determined as to how much will be appropriated and supported.

I think that pretty much sums it up.

Richard Mudge: My name is Richard Mudge. I'm with this firm called Compass Transportation and Technology. I want to talk about the WIFIA program under title five. I'm shooting at a look at the USDOT's WIFIA program as general lessons learned from that. Over the years, that process can become lengthy for people to

develop applications and expenses, and I encourage you to try to find and develop a process that recognizes the direct or indirect costs for applications. One thing you may want to do is to look at some of the states' DOTs that had their own infrastructure banks, and in many cases those were simpler to operate. There may be some lessons you all learn from that.

Thank you.

Charles Landry: I'm Charles Landry from the Western Riverside County Regional Conservation Authority. This comment is referencing section five, subtitle C, innovative financing pilot projects. We want to emphasize we used to use the accessibility of credit for organizations like ours that provide cost-effectiveness and advance mitigation for projects. We administer a MSHCP, mitigation species habitat conservation plan, which expedites all infrastructure, including water projects for our permittees.

That's it.

Gene Pawlick: All right, well, we'll go ahead and turn it back over to Jan Rasgus to make concluding remarks.

Jan Rasgus: Again, as a reminder, the recording and transcript from today's session will be made available on the Corps' WRRDA website. There will be two more listening sessions. The details regarding these sessions can be found on that Corps website, as well. Again, if you're on the webinar, I think that one of the next slides will show you what that link is. Again, you can go to that link and find information from the last session, as well as probably next week, we'll have this session posted.

Again, thank you for your comments today. You can also submit comments via e-mail to us, to our [wrrda@usace.army.mil](mailto:wrrda@usace.army.mil) e-mail address. Again, we will take all of your comments that we've received into consideration as we develop the implementation guidance.

Thank you again for your participation in today's listening session.

This concludes today's session.