

NAFSMA Annual Meeting

July 10, 2018

Levees and Flood Protection

Karin Jacoby, P.E., Esq.

Husch Blackwell LLP



Overview

- President's proposal for reforming USACE-CW
- Owner/operators: Less help – more burdens
- Your voice?

What Are Some Current and Emerging Challenges for Project Owner / Operators?

- Continued Change
- Increased State/Local (decreased Federal) Responsibility / Accountability
- Decreased State/Local (increased Federal) Control/Decision-making
- Less Federal \$\$\$
- Growing O & M Funding Gap
- Federal Interagency Enforcement (not assistance)
- Expanding Federal Jurisdiction and more burdensome requirements



Overview

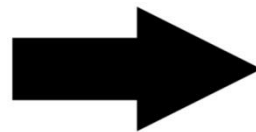
- President's proposal for reforming USACE-CW



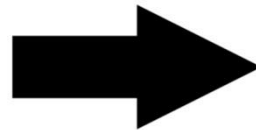
Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations



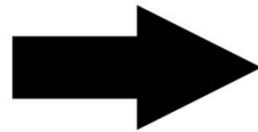
Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations



Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations



Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations



Recommendations for USACE-CW

- Merging USACE-CW with the Department of Transportation or the Department of Interior
- Three primary missions, and more
 - commercial (coastal and inland) navigation
 - flood control and storm damage reduction
 - aquatic ecosystem restoration

Commercial (coastal and inland) navigation

- Merge with the Department of Transportation
- Consolidation of landside and waterside port investments
- Leverage DOT infrastructure expertise
- Make DOT's maritime responsibilities analogous to its role in other transportation sectors

Flood control and storm damage reduction

- Merge (w/ ecosystem restoration) into the Department of Interior
- Integrate and better align water resources programs

BUT....

- Floods long-recognized as national security threat
- USACE has more than century defending against floods
- Since 1936 USACE tasked by Congress with helping communities reduce flood damages through local flood protection works
- Mission is not one that can be readily or effectively transferred to a department with neither a focus on defense and national security, nor on managing flood risk

Overview

- Owner/operators: Less help – more burdens



Less help - greater burden

- Continued Change
- Increased State/Local (decreased Federal) Responsibility / Accountability
- Decreased State/Local (increased Federal) Control/Decision-making
- Less Federal \$\$\$
- Growing O & M Funding Gap
- Federal Interagency Enforcement (not assistance)
- Expanding Federal Jurisdiction and more burdensome requirements

Section 408 and local flood protection

Authority, or not?

- RHA is independent authority, but it is not an unlimited authority
- Flood Control Acts (FCAs) came later and are more specific to local flood protection works
 - Recognize state and local rights and interests (i.e., non-Fed control)
 - Local sponsors choosing to partner with the Army Corps do so under authority of the FCAs and the implementing Federal Flood Control Regulations (circa 1936–44)
 - Conditions of cooperation pertaining to: a) land acquisition, b) liability, and c) adherence to prescribed regulations, require assurances be given
- Courts have held, in accordance with 33 CFR 209.300, the “prescribed regulations” to which a local sponsor must adhere, are the 33 CFR 208.10 Flood Control Regulations; except when, with approval of the Secretary, other requirements were identified at the time local sponsor “assurances” were given

Flood Control Regulations 33 CFR 208



Here to There

State / local law re: risk transfer, FP mgt.

Sec 404 / 10
NEPA to OHWM

1 – 2 years, \$\$, certainty



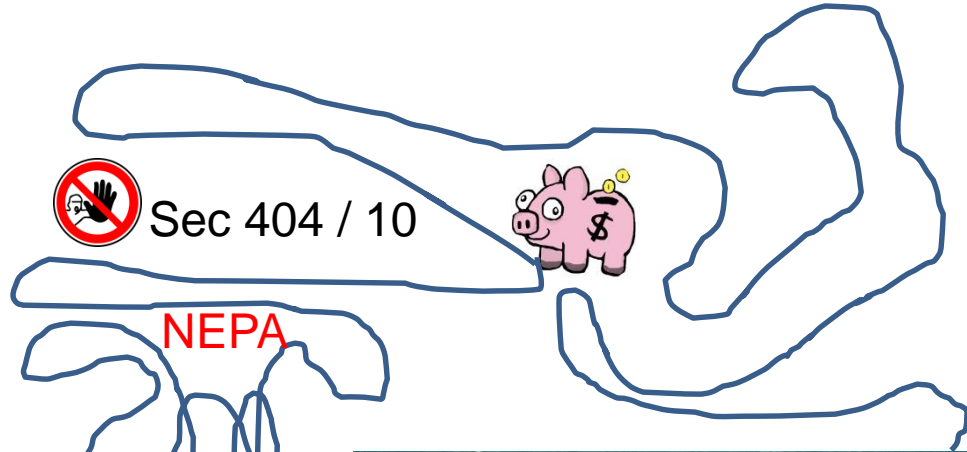
Local O/O plans to improve levee / FC project



DE 208.10 determination: “not adversely affecting” the project


Section 408

Anywhere to Nowhere



Local O/O
plans to
improve
levee / FC
project



Sec 214 - 

Sec 408 – “not injurious
to the public interest”
(w/ ESA consultation)



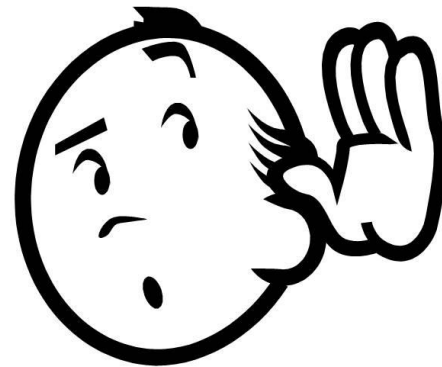
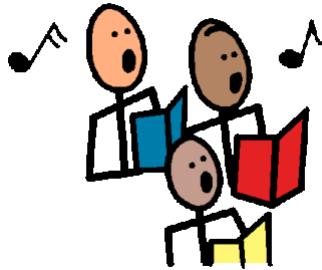
2 – 5 years + \$\$\$, maybe never

Section 408 v. Flood Control Regulations

- Section 10 Rivers and Harbors Act of 1899 (aka 408)
 - Navigation statute intended to protect commerce
 - Permission for alterations that are *not injurious to the public interest* (now being interpreted as a flood risk management authority)
 - Inconsistent and retroactive application
 - Long and costly review w/ little to no added value
- 33 CFR 208.10 Flood Control Regulations
 - Allows for improvement or alteration to flood control project
 - DE determination w/ no objection so long as project *not adversely affected*
 - O/O makes decision on whether to alter if not any Fed. \$, (if so, then may need to pursue as a project modification)

Overview

- Your voice?



CEQ issued an Advance Notice of Public Rulemaking (ANPR), comments due July 20th

<https://www.federalregister.gov/documents/2018/06/20/2018-13246/update-to-the-regulations-for-implementing-the-procedural-provisions-of-the-national-environmental>

- Scope of review
 - impact that may occur to the environment, and not impact of environment on projects
- Retroactive analysis
 - Limit because impact assessment and mitigation requirements are too subjective except in rare circumstances
- Definitions
 - “Major Federal Action”

Curtailing Federal Overreach

- President Donald Trump [U.S. Supreme Court](#) nominee, D.C. Circuit Judge Brett Kavanaugh
- Clerked for retiring Justice Kennedy
- Built a reputation on the court for fighting government overreach
- Stands out for administrative law opinions
- Expressed strong views about the separation of powers and executive overreach
- Shows Administration is serious about taming the 'administrative state'

HUSCH BLACKWELL

Thank You