NAFSMA Annual Meeting
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Levees and Flood Protection
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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
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Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations

**Benefits of Reorganization**

- Refocus Structures around Mission and Customers
- Enhance Management Accountability
- Prioritize Limited Resources and Eliminate Unnecessary Activities
- Improve Communications and Coordination
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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

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Less help - greater burden

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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

DE 208.10 determination: “not adversely affecting” the project

Local O/O plans to improve levee / FC project

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

Sec 404 / 10 NEPA to OHWM

1 – 2 years, $\$, certainty

Here to There
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)

Sec 404 / 10

NEPA

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


• 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'
Thank You