



CALIFORNIA CENTRAL VALLEY
FLOOD CONTROL
ASSOCIATION

<i>Executive Director</i>	MELINDA TERRY
<i>President</i>	MIKE HARDESTY
<i>Vice President</i>	LEWIS BAIR
<i>Treasurer (Acting)</i>	PETE GHELFI

Via Email: 33CFR203@usace.army.mil

April 14, 2015

U.S. Army Corps of Engineers,
ATTN: 33CFR203/CECW-HS/3D64
441 G Street NW
Washington DC 20314-1000

Re: Preliminary Scoping Comments on Notice of Advanced Rule Making – 33 CFR Part 203

Dear D.C. Headquarters:

The California Central Valley Flood Control Association (CCVFCA/Association) submits these preliminary comments on the future scope and direction of potential changes to implementation of the PL 84-99 program the U.S. Army Corps of Engineers (USACE/Corps) is considering. The Association is comprised of more than 75 public agency members with flood protection authority and responsibility, primarily representing reclamation districts, levee districts, cities, counties, joint powers agencies, and other special districts.

Some of these agencies are non-federal sponsors themselves while others act as local maintaining agencies under state law, assisting with the operation and maintenance of the federally authorized levees. As the local maintaining agencies for a large portion of the 1,600 miles of federally authorized levees in the California Central Valley (referred to under state law as the “State Plan of Flood Control” project levees) turned over by the USACE to the State in the 1950s, our members have been long-time and reliable partners of the Corps in reducing flood risk.

Authorized by PL 84-99, the USACE Emergency Operations Program is a significant factor in protecting California citizens from loss of life and property in flood disasters. For more than 40 years, the USACE, California Department of Water Resources, and local agencies have relied on this federal program as an important backstop for flood fighting assistance during a high-water event and for levee rehabilitation after flood damage occurs. Unfortunately, the USACE’s decision in recent years to more strictly implement several policies has made use of this PL 84-99 program unobtainable for some urban and rural areas of the Central Valley, a condition generating public safety concerns, and potential significant long-term costs and increased flood risks for the State, local agencies, and individuals.

We are therefore pleased to see that the USACE is considering modifications to the program and seeking early input on how new regulations might be structured to align the USACE's 21st Century goals with local flood risk reduction needs.

Background

USACE has authority under PL 84-99 for emergency management activities, Flood Control and Coastal Emergencies Act (FCCE) (33 U.S.C. 701n) (69 Stat. 186). PL 84-99 authorizes the Chief of Engineers, acting for the Secretary of the Army, to undertake a number of important activities, such as disaster preparedness, advance measures, emergency operations (flood response and post flood response), and rehabilitation of flood control works threatened or destroyed by flood. These activities fall under three areas of federal assistance that are particularly relevant to maintaining the Central Valley flood control system:

- **Preparedness:** The Flood Control and Coastal Emergency Act established an emergency fund for preparedness for emergency response to natural disasters; for flood fighting and rescue operations; and for rehabilitation of flood control structures. Funding for USACE emergency response under this authority is provided by Congress through the annual Energy and Water Development Appropriation Act. Disaster preparedness activities include coordination, planning, training, and conducting emergency response exercises with local, state and federal agencies.
- **Response Activities:** PL 84-99 allows the USACE to supplement State and local entities in flood fighting urban and other non-agricultural areas under certain conditions (Engineering Regulation 500-1-1 provides specific details). All flood fight efforts require a Project Cooperation Agreement signed by the public sponsor and a requirement for the sponsor to remove all flood fight material after the flood has receded. PL 84-99 also allows for advance measures assistance to prevent or reduce flood damage conditions of imminent threat of unusual flooding.
- **Rehabilitation:** Under the authority of PL 84-99, an eligible flood protection system can be rehabilitated if damaged by a flood event. The flood system is restored to its pre-disaster status at no cost to the Federal system owner, and at 20% cost to the eligible non-federal system owner. All systems considered eligible for PL 84-99 rehabilitation assistance have to be in the Rehabilitation and Inspection Program (RIP).

Whether or not a flood protection unit is in the RIP is the most important determination for the availability of PL 84-99 assistance. Systems considered eligible for PL 84-99 rehabilitation assistance must be in "Active" status in the RIP prior to the flood event. Status in the RIP is based on acceptable operation and maintenance by the public levee sponsor and is verified by levee inspections conducted by the USACE on a regular basis.

Using the USACE's Engineering Guide (Section E-4 of ER 500-1-1), an initial eligibility inspection is performed by the USACE at the time a unit comes into the program that determines whether or not the unit is "Active" in the Flood Control Works (FCW) Catalog and subsequently eligible for Public Law 84-99 rehabilitation assistance. Once "Active" status and program eligibility are initially declared, there are two types of Continuing Eligibility Inspections as part of the RIP: Routine and Periodic. The periodic inspections are done with the project sponsor and determine whether or not a project continues to be "Active" in the Flood Control Works (FCW) Catalog and remains eligible for Public Law 84-99 rehabilitation assistance. The

Maintenance Compliance Guide in Section E-5 of ER 500-1-1 is used to determine continued eligibility.

A FCW project is still considered active in the Catalog if rated “Acceptable” or “Minimally Acceptable” on its last inspection, and is therefore also eligible for Public Law 84-99 rehabilitation assistance, but is classified as inactive in the Catalog if rated “Unacceptable” on its last inspection. An inactive project is not eligible for Public Law 84-99 rehabilitation assistance, and no further levee inspections are performed until the sponsor provides notification by letter indicating that deficiencies previously identified have been corrected. A rating of acceptable is available if there are no unacceptable ratings on any of the rated items, and there are a significant majority of acceptable over minimally acceptable ratings.

Currently, many different factors combine to make it harder for project levees to remain rated as acceptable by the USACE, such as conglomerating various facilities together as a single “unit” in the Periodic Inspection Reports and the implementation of the USACE ETL on vegetation and encroachment management, so the Corps’ evaluation of potential program improvements is timely.

Proposed Rule Making

The USACE’s Federal Register listing provides twelve questions as “food for thought” to help commenters define the scope and direction the Corps should consider once the formal rulemaking effort is underway. Providing a response to question four is a good opportunity for CCVFCFA to offer thoughts on what items the Corps should evaluate to “determine if a non-federal sponsor is adequately operating and maintaining its flood control project.” Evaluating the overall risk-management program of non-federal sponsors and their local agency partners to determine PL 84-99 eligibility, rather than evaluating strict compliance with hyper-technical criteria is generally sound, but there is room for improvement. To start, many of the criteria currently used by the USACE are not essential for actually identifying where Federally-authorized levees have the highest risk of failure. For example, there are no documented levee failures in the Central Valley arising from not complying with the vegetation ETL, even though many of our levees do not meet ETL requirements. In contrast, many of the levee failures of the past 30 years have been caused by deep under-seepage, a condition largely unmeasured by USACE criteria. As a result, the highest risk to levee stability is not factored into the Corps’ current PL 84-99 eligibility determination. This disconnect between the Periodic Inspection Report criteria and the actual levee risk suggests that a holistic evaluation of the non-federal sponsor’s flood risk management system and levee maintenance program is a more appropriate metric for PL 84-99 eligibility.

Eligibility Metrics

There are many metrics for evaluating the adequacy of how a non-federal sponsor is maintaining and operating its flood control project, such as whether a robust regional risk management plan and implementation program has been adopted. The existence of a regional guide for constructing long-term system improvements while steadily investing in routine maintenance and addressing high risk deficiencies should be considered as a viable measurement tool for the Corps to use when considering the adequacy of project operations and management. In combination with a regional flood management plan, the following factors should be considered during the formal rulemaking process as criteria for determining non-federal PL 84-99 eligibility:

- *Division Authority* - The new rulemaking should consider moving away from one-size-fits-all nationwide standards for eligibility, toward a regional approach that recognizes the different characteristics and conditions of each project, as well as the best methods and tools for maximizing flood risk reduction benefits when operating and maintaining the flood protection project. CCVFCA believes that the Corps' MSCs (divisions) are best positioned for evaluating the adequacy of the plans, programs, and other tools due to their knowledge about the regional hydrologic conditions, the project as authorized, and the performance of non-federal sponsors in implementing their O&M responsibilities. Because the MSC understands the relevant levee risk factors most important in their region, but is removed enough to avoid being inappropriately influenced by the non-federal sponsors, the USACE's new regulations should allow them to render decisions regarding PL 84-99 eligibility.
- *Risk Management Plan* - The USACE should consider the robustness of, and compliance with, regional plans such as California's Central Valley Flood Protection Plan (CVFPP) and all of the flood management tools that are part of that plan. For example, under recently enacted law, State and local agencies partner to provide regular flood risk notifications to property owners and local agencies must enact flood safety plans. Significant effort has also gone into advance coordination of emergency response by non-federal sponsors, local levee maintaining agencies, counties, and the California Office of Emergency Services (OES). Consistent with the principles of the Corps' SWIF program, billions of State and local dollars have been and are being invested in levee maintenance and improvements, to attack the highest risk State Plan of Flood Control deficiencies first. Additionally, new and more stringent levee standards have also been adopted for the protection of urban areas, coupled with prohibitions on new development occurring in those urban areas until they have achieved the required 200-year level of flood protection.
- *Regional Standards* - In evaluating the non-federal sponsor's regional flood protection plan, the objectives within the plan should be tailored to the region's unique conditions and specific actions most appropriate for maximizing the reduction of flood risk in that area. For example, where a levee directly abuts a river providing habitat, compliance with vegetation standards should be a lower factor; where systems are subject to frequent changes from wet to dry, superficial cracking should be irrelevant; etc.
- *Effective Programs* - Elements constituting an adequate regional project operation and management strategy for O&M, but not limited to, that would warrant continued eligibility in PL 84-99 include: 1) Documentation by the non-federal sponsor of operations, existing conditions, and methods for addressing identified deficiencies in a specified timeline; 2) The existence of a robust evacuation plan developed in partnership with local emergency response and land use agencies; 3) Documentation of the O&M work accomplished by local maintaining agencies and identification of remaining deficiencies, along with proposed remedies for non-federal sponsor to supervise progress; 4) The existence of a multi-year capital outlay plan; etc.
- *Protection Levels* - The authorized purpose of the protection should be considered in terms of the level of flood protection necessary. Where levees protect urban areas, many factors and stronger-compliance with standards should be relevant; whereas this costly hyper-technical approach does not make as much sense for less populated or developed agricultural lands.

Each of the proposed factors discussed above, and many more as identified by the MSCs, will allow USACE to evaluate the non-federal sponsor's overall approach and effectiveness in flood risk management, and hence allow USACE to make wise decisions on PL 84-99 eligibility.

Additional Guiding Principles

The February public circular outlines and seeks input on five guiding principles the USACE plans to use in developing new PL 84-99 implementation policies. These goals are certainly supportable. However, CCVFCA offers three important additional principles with brief explanations of should be be incorporated into the formal rulemaking process:

- 1) *USACE's policies should recognize the entire flood project system as authorized, and not simply the hydraulic basin in question, when calculating the benefit-cost ratios necessary to receive program assistance.*

In California's Central Valley the majority of authorized levees were part of the Sacramento River Flood Control Project or the San Joaquin River Flood Control Project. Each of these projects included hundreds of miles of authorized levees that together were designed to provide protection to both urban and rural basins across 19 counties from Red Bluff down to Fresno. For each of these authorized projects, the entire system of levees and overflow bypasses were designed to work as a whole, safely and efficiently channeling water from each end of the valley out to the ocean. Unfortunately, for many years the USACE has made decisions about PL 84-99 eligibility by examining the benefit-cost ratio of the required levee rehabilitation work by considering the benefits to only the hydrologic basin protected by the levee, rather than factoring in the importance each project segment plays in the functionality of the entire system as designed.¹ The USACE's current benefit-cost methodology may appear to be risk-informed, but it falls short in the case of California's State Plan of Flood Control facilities because the calculation ignores the interconnectedness between the various flood protection components that existed at the time the Central Valley projects were designed and authorized to function as a whole system. This fundamental tenet still exists today. The CCVFCA understands and supports risk-based decision-making however, we also strongly believe that it must be a deliberative process that addresses the way in which the

¹ This same issue was noticed by Congress as far back as 1997 in Conference Report 105-271:

"The conferees are concerned that funding provided by PL 105-18, the Emergency Supplemental Appropriations Act of 1997, is not being vigorously applied to necessary repairs and projects resulting from the disaster events of 1996 and 1997 because of an overly restrictive interpretation of PL 84-99 by the Corps of Engineers.

For example, the Corps of Engineers has determined that many of the levees in the Sacramento and San Joaquin River Basins, California, which were affected by this year's catastrophic flood, are ineligible for repair and rehabilitation with Flood Control and Coastal Emergency funds due to conditions which are considered to have existed before the flood. In addition, some projects have been rejected by not considering the economic benefits to the system as a whole.

Problems across the country are similar, where the Corps has ruled projects ineligible that may be within the scope of the statute and are likely to prevent even greater expenditures should there be future disasters. The problem is particularly acute because of the unknown effects of the impending El Nino weather system and the imminent threat that it poses to many areas of the country.

The conferees are committed to ensuring that the people and their homes, schools, and economic livelihoods, as well as critical infrastructure, are protected against future floods and direct the Corps of Engineers to perform an immediate reassessment of all projects considered for funding under PL 105-18 where PL 84-99 funding has been denied. Every effort should be made to make use of the previously-appropriated emergency funds for any and all authorized purposes within the entire reading of the statute."

system was authorized when calculating the benefits. We therefore request that you add this goal to the list of guiding principles that will drive your formal rulemaking.

2) Non-federal sponsors, local maintaining agencies, and the communities they protect have acted for decades in reliance of the PL 84-99 program. Therefore, any change to that program must be made gradually to allow non-federal sponsors to either modify their future actions or develop alternatives.

Levee work can require significant amounts of time-consuming permitting that should be factored into any new USACE policies. Whether a non-federal sponsor chooses to remain in RIP or be removed, either way, a longer-term, holistic approach is necessary to assure alternative recovery solutions are in place. Should USACE elect to make PL 84-99 assistance either more or less accessible, it is essential that non-federal sponsors be given a reasonable amount of time to prepare and adjust through a phased implementation. This would be consistent with SWIF policies that provide an avenue for local maintaining agencies to temporarily remain in the program to develop a detailed plan with milestones with their commitment to address deficient items requiring more time to correct. In contrast, if a local maintaining agency does not wish to remain in the RIP program, the non-federal sponsor will also need some time to prepare for a world in which the USACE is not available to provide previously expected rehabilitation of those project levees. In either case, a transition period or phased implementation is essential, and should be a driving principle in the rulemaking as well.

3) The PL 84-99 program should be implemented so as to provide assistance to non-federal sponsors, levee maintaining agencies, and the communities that they protect while encouraging local partners to take a risk-based approach to any deficiencies.

The USACE SWIF program has been a positive addition to the RIP, allowing the opportunity to improve the levees over time, prioritize the highest risk deficiencies first, and most importantly, recognize regional differences. While many Central Valley maintaining agencies have elected to not submit a LOI for a SWIF to the non-federal sponsor to submit to the USACE, the SWIF nonetheless remains a viable option for some levee maintainers and should be retained.

Policy Changes

Finally, the February Circular also identifies “highlights of specific policy changes being considered.” Two of those highlights are reprinted here with CCVFCA’s associated comments on both:

“Revising Eligibility for Rehabilitation Program. Consider changes to eligibility criteria for rehabilitation assistance from a strict condition-based assessment to a set of requirements that encourage flood risk management activities such as emergency preparedness planning, risk communication and prioritizing maintenance activities based on risk. Overall system rating will no longer be the determining factor for eligibility. However, USACE will continue to conduct inspections and risk assessments and provide results to non-federal sponsors. Inspection results should guide operations and maintenance activities, identify potential problem areas early, and provide information for sponsors to use when prioritizing and sequencing risk management activities.”

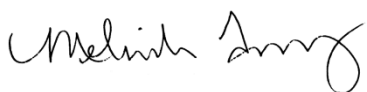
- The Association generally agrees with this new direction, but encourages further enhancement and refinement in accordance with our suggestions provided in this letter, particularly steering the PL 84-99 program criteria and decision-making toward a more regional approach. While the CCVFCA understands the need for USACE to have national standards, those standards do not always make sense in all geographies and climates. For example, while a levee in the Central Valley could be deemed out of compliance for necessary O&M due to the length of grasses, that technical “violation” can be caused by the local weather patterns and the inability to grow sod on the levee. Thus, looking at the adequacy of a region’s overall risk management strategy, implementation, and effectiveness in terms of O&M is a more sensible approach that maximizes flood protection based on local geographic conditions, hydrologic characteristics, and project design.

“Improving Collaboration to Address Complicated Natural Resources Challenges and System-Wide Repairs. Formally incorporate System-Wide Improvement Framework tenets, which allow sponsors to retain eligibility for rehabilitation assistance while conducting longer-term, system-wide improvement activities beyond usual operations and maintenance. This includes activities related to addressing complex natural resources challenges or treaties with tribes that require additional time and coordination. The purpose is to ensure the imperatives of public safety, Tribal Treaty Rights, and environmental requirements are adequately met.”

- As noted above, CCVFCA supports the continuation of SWIFs as a viable tool for segments of the State Plan of Flood Control system to maintain “active” status and eligibility in PL 84-99. Interest for more of the rural segments in the Central Valley and Delta to remain in PL 84-99 could be incentivized if the rulemaking process looks for ways to allow a more long-term, comprehensive approach to identify solutions and optimize resources; incorporate “worst first” to optimize risk reduction benefits; allow for regional eligibility standards and decision-making at the Division level; recognize different levels of protection based on lands served; and maximize efficiency and effectiveness by coordinating overlapping or competing programs and requirements.

The CCVFCA appreciates the opportunity to submit these preliminary scoping comments regarding future modifications to the regulations governing the PL 84-99 program. We also look forward to participating as a commenter once actual language has been proposed as part of the formal rulemaking process.

Sincerely,



Melinda Terry
Executive Director