Billing Code 3720-58

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 203

Emergency Employment of Army and Other Resources, Natural Disaster Procedures

AGENCY: U. S. Army Corps of Engineers, DoD.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is issuing this advance notice of proposed rulemaking (ANPR) to request public comment on potential revisions to its regulations. USACE is specifically requesting input on potential changes to policies related to disaster preparedness; eligibility criteria for rehabilitation assistance for flood control works; options to address complex natural resource challenges while mitigating impacts to threatened or endangered species; and non-structural alternative projects. Consideration of Water Resources Reform and Development Act of 2014 provisions regarding resiliency for hurricane or shore protection projects, Section 3022, and the inclusion of modifications for hurricane or shore protection projects, Section 3029, are not covered by this advanced notice of proposed rulemaking and may be addressed at a later date.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number COE-2015-0004, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: 33CFR203@usace.army.mil and include the docket number, COE-2015-0004, in the subject line of the message.

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

Hand Delivery / Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE-2015-0004. All comments received will be included in the public docket without change and may be made available on-line at http://www.regulations.gov, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your

comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov. All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey D. Jensen, Office of Homeland Security, Directorate of Contingency Operations, U.S. Army Corps of Engineers, at (703) 428-9068 or Jeffrey.D.Jensen@usace.army.mil.

SUPPLEMENTARY INFORMATION:

I. Background

A. Authority. Section 5 of the Flood Control Act of 1941, as amended, (33 U.S.C. 701n), commonly and hereinafter referred to as Public Law 84-99, authorizes an emergency fund to be expended at the discretion of the Chief of Engineers for: preparation for natural disasters; flood fighting and rescue operations; repair or restoration of flood control works threatened, damaged, or destroyed by flood, or nonstructural alternatives thereto; emergency protection of federally authorized hurricane or shore protection projects which are threatened, when such protection is warranted to protect against imminent and substantial loss to life and property; and repair and restoration of federally authorized hurricane and shore protection projects damaged or destroyed

by wind, wave, or water of other than ordinary nature. The law includes provision of emergency supplies of clean water when a contaminated source threatens the public health and welfare of a locality, and activities necessary to protect life and improved property from a threat resulting from a major flood or coastal storm. This law authorizes the Secretary of the Army (Secretary) to construct wells and to transport water within areas determined by the Secretary to be drought-distressed. The Secretary of the Army has delegated the authority vested in the Secretary under Public Law 84-99 through the Assistant Secretary of the Army (Civil Works) to the Chief of Engineers, subject to such further direction as the Secretary may provide.

B. Need for Revision. The Code of Federal Regulations, 33 CFR part 203, details administrative policies, guidance, and operating procedures for the Public Law 84-99 program and was last revised in 2003, 68 FR 19357-01, 21 April 2003. Since then, significant disasters, including Hurricane Sandy (2012), flooding on the Mississippi and Missouri Rivers (2008, 2011, and 2013) and Hurricane Katrina (2005), provided information regarding system performance and the need for improved system and community resilience that should be considered in formulating revised Pub. L. 84-99 rehabilitation policies. A more detailed understanding of the nature and severity of risk associated with flood control projects and the development of risk-informed decision making approaches and other technological advancements have influenced the outlook about how Pub. L. 84-99 activities could be implemented with a shift towards better alignment with USACE's Levee Safety and National Flood Risk Management Programs as well as the National Preparedness and Response Frameworks. Both of these USACE programs work with non-federal sponsors and stakeholders to assess, communicate and manage the risks to people, property, and the environment associated with levee systems and flood risks. Additionally, significant input from state and federal agencies, stakeholders, and other interested

parties regarding the challenges of satisfying USACE vegetation management guidelines in light of the needs of listed threatened and endangered species caused USACE to reevaluate using technical criteria to determine active status in the Pub. L. 84-99 Rehabilitation Program.

II. References

The following reference material is available on the Federal eRulemaking Portal at http://www.regulations.gov to assist the public in reviewing this ANPR and providing comments.

- 33 CFR part 203
- Engineer Regulation 500-1-1, "Civil Emergency Management Program", September 30, 2001
- Engineer Pamphlet 500-1-1, "Civil Emergency Management Program Procedures", September 30, 2001
- Engineering and Construction Bulletin, “Interim Risk Reduction Measures (IRRMs) for Levee Safety”, March 5, 2014
- HQUSACE memorandum, "Interim Policy Guidance for Eligibility Determinations", March 21, 2014
- HQUSACE memorandum, "Policy for Development and Implementation of System-Wide Improvement Frameworks (SWIFs)", November 29, 2011
- Levee Owner’s Manual for Non-Federal Flood Control Works, March 2006

III. General Information for the Advance Notice of Public Rulemaking

A. Does this Action Apply to Me? This action is directed to the public in general, but will be of particular interest to a wide variety of organizations, to include tribal, state, and local

emergency management agencies, water resource agencies, environmental and fish and wildlife management agencies and organizations, floodplain and levee safety managers, and non-federal interests (this term should be understood to include "non-federal sponsors" as used in 33 U.S.C 701n and as defined at 33 CFR 203.15) with flood control works and hurricane or shore protection projects.

B. What Should I Consider As I Prepare My Comments for Submission? Commenters not familiar with current policy should review the references cited above available on the Federal eRulemaking Portal at http://www.regulations.gov. Comments should reference a specific paragraph or subparagraph of 33 CFR part 203 or one of the questions or issues in Section IV below. If the subject of the comment is not addressed in either the current CFR or the questions and issues below, then the commenter should clearly state the issue or concern, provide or reference any supporting documentation (e.g., reports, statistical data, and studies), and make a proposal or recommendation about how to improve the current policy.

C. What Is the Intent of USACE in this Rulemaking Effort? The intent of USACE is to revise and update 33 CFR part 203 so that it incorporates new information from recent storm events and better aligns with the current strategy of the USACE National Flood Risk Management Program and Levee Safety Program, while following these guiding principles:

1. Effective risk management and levee safety includes working with non-federal sponsors and stakeholders to assess, communicate, and manage life-safety risks.

2. Federal assistance under authority of Pub. L. 84-99 supplements tribal, state, and local efforts, and does not replace them.

3. Non-federal sponsors have primary responsibility for operations and maintenance (O&M) of flood control works and risk communication activities associated with their projects.

4. USACE will promote the use of a risk-informed decision making process to guide non-federal sponsors O&M activities and inspection activities for flood control projects.

5. USACE will encourage a collaborative approach to address complex natural resources issues, tribal treaty rights, and complex systemic deficiencies.

6. USACE will work to develop policies and procedures that maintain the benefits of any federal investment(s).

IV. Questions and Issues to Shape the Revision of 33 CFR Part 203. Summary of intended policy changes and questions on specific activities:

A. Preparedness.

1. Advance Measures. USACE may undertake emergency measures in advance of imminent threats of unusual flooding. The current eligibility criteria are listed in 33 CFR 203.72.

(a) USACE may perform Advance Measures prior to flooding or flood fighting activities to protect against loss of life and significant damages to urban areas and public facilities due to an imminent threat of unusual flooding. Advance Measures assistance may be technical and/or direct assistance. Technical assistance may include: providing personnel to inspect projects to identify problems and solutions and requirements for additional flood protection; provide existing hydraulic, hydrologic, structural and/or geotechnical analysis; provide existing information to local entities for use in evacuation or contingency flood fight plans. Typically direct assistance will be temporary in nature, using temporary construction standard and methods, technically feasible, designed to deal effectively with the specific threat, and capable of construction in time

to prevent projected damages. To be eligible for Advance Measures a public sponsor must agree to execute a cooperative agreement (CA), and, at no cost to USACE, when the operation is over, remove all temporary advance measures constructed by USACE or agree to upgrade the work to standards acceptable to USACE. In addition, the public sponsor is responsible for providing the traditional lands, easements, rights-of-way, relocations, and borrow and dredged or excavated materials disposal areas (LERRDs) necessary for the project, at its own expense, in accordance with the CA.

- Question 1: What (if any) additional types of Advance Measures assistance should be considered?

- Question 2: What (if any) additional eligibility or performance requirements should be considered generally for Advance Measures assistance?

(b) Permanent structures constructed as Advance Measures are currently cost shared at 75 percent federal and 25 percent local with the LERRDs necessary for the project provided at no cost to the federal government. However, flood control works constructed under other USACE authorities have a minimum cost share of 65 percent federal and 35 percent local with credit provided for the LERRDs necessary for the project. USACE is considering changing the cost share for permanent structures constructed as part of Advance Measures to be consistent with other authorities and to encourage non-federal interests to develop permanent structures through the standard USACE planning process for new projects so that full cost and benefit analyses can be conducted and appropriate public comments considered.

Question 3: Would changing the cost share serve as an effective incentive for promotion of the standard USACE planning process? If not, what other

incentives or requirements for using the standard USACE planning process for permanent construction should be considered?

B. Rehabilitation.

1. Eligibility for Rehabilitation Assistance. USACE is considering changing the criteria used to determine eligibility for rehabilitation assistance (commonly known as Active status under 33 CFR 203.41) for flood control projects from a strict, condition-based overall inspection rating of the project to a broader set of actions by non-federal sponsors such as emergency preparedness planning, flood risk communication, and implementation of risk-prioritized O&M activities. USACE is considering these changes to: 1) promote risk-informed, cost effective prioritization of risk management activities; 2) encourage community awareness of risks and promote a broad set of flood risk management activities to manage risk; 3) encourage dialogue and problem solving between USACE and non-federal sponsors, and 4) provide flexibility to align flood risk management activities with requirements to protect and restore natural resources.

Question 4: What should USACE evaluate to determine if a non-federal sponsor is adequately operating and maintaining its flood control project? What should be considered adequate operations and management for eligibility purposes?

Question 5: How should USACE evaluate a non-federal sponsor's emergency preparedness, notification, evacuation planning and exercise plan and activities to determine if they are adequate? What should USACE evaluate? What should be considered adequate?

Question 6: How should USACE evaluate a non-federal sponsor's risk communications plan and activities for informing local officials, residents, and business owners about risks associated with the potential failure of the flood control project (e.g., a levee breach)?

Question 7: Are there other criteria that USACE should consider using to determine eligibility for rehabilitation assistance that would assist and encourage non-federal sponsors and flood-prone communities to reduce their risks from flooding?

2. Improving Collaboration to Address Complicated Natural Resources Challenges and System-Wide Repairs. USACE intends to incorporate the System Wide Improvement Framework (SWIF) policy into 33 CFR part 203. The SWIF allows non-federal sponsors (currently, of levees and floodwalls only) to retain eligibility for rehabilitation assistance while actively conducting longer-term, system-wide improvement activities that are beyond the scope of usual O&M activities. This includes activities related to complex, serious or systemic deficiencies, addressing complex natural resources challenges such as threatened or endangered species, undocumented encroachments, and tribal treaty rights, all of which require additional time and coordination beyond what is normally allowed under current policy. The purpose is to ensure the imperatives of public safety, tribal rights, and environmental principles are met while still reducing the risk from floods.

Question 8: What improvements to the existing SWIF policy should be made?

Question 9: Currently, the SWIF policy has only been used for levee projects. Should the SWIF concept be applied to other types of flood control projects like channels? If so, for what purposes and using what criteria?

Question 10: If the eligibility for rehabilitation assistance moves away from a standards-based inspection criteria and moves toward an activities-based approach (as is considered in Section B.1 above), what role should the SWIF policy play? Under what circumstances would development of a SWIF be useful to non-federal sponsors?

3. Mitigating Impacts to Threatened or Endangered Species and Tribal Treaty Rights During Project Rehabilitation. USACE is considering allowing additional types of features and approaches that can be incorporated into rehabilitation efforts to minimize or address impacts to threatened and endangered species and impacts on tribal treaty rights. Features currently being considered include planting berms, set back levees, and overbuilt sections.

Question 11: Are there other types of features and approaches that USACE should allow during rehabilitation efforts to minimize or address impacts on threatened and endangered species and tribal treaty rights while still providing the intended benefits of the flood control projects and reducing the risk of loss of life and significant economic damages?

4. Early identification of Nonstructural Alternative Projects (NSAPs). USACE currently has the authority to undertake a nonstructural alternative project in lieu of a structural rehabilitation effort at the request of the non-federal sponsor and in accordance with 33 CFR Section 203.50. However, 15 years of experience shows that NSAPs can be difficult to implement in the immediate aftermath of a flood. Challenges to NSAP implementation include difficulties in obtaining easements, land transfers, and municipal permits, as well as legal limitations of some non-federal sponsors, and a lack of public awareness. USACE is considering how to enable non-federal interests to identify viable NSAPs prior to a flood event so that the non-federal sponsors may be able to effectively implement as viable NSAPS an alternative to structural rehabilitation efforts after a flood event.

Question 12: What advance planning activities could USACE undertake with non-federal interests to enable non-federal interests to consider NSAPs as viable alternatives to structural rehabilitation efforts if the project is damaged in a future flood event?

Question 13: How can the current NSAP policy be improved?

V. Statutory and Executive Order Reviews

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), USACE must determine whether a regulatory action is "significant" and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

After consideration of Executive Orders 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993) and 13563, entitled ''Improving Regulation and Regulatory Review'' (76 FR 3821, January 21, 2011), this advance notice of proposed rulemaking has been determined to be not significant for the purposes of Executive Order 12866.

Because this document does not impose or propose any requirements, and instead seeks comments and suggestions for USACE to consider in possibly developing a subsequent proposed rule, the various other review requirements that apply when an agency imposes requirements do

not apply to this action. Nevertheless, as part of your comments on this ANPR, you may include any comments or information that could help the Agency to assess the potential impact of a subsequent regulatory action on small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.); to consider human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994); or to consider potential impacts to state and local governments or tribal governments. USACE will consider such comments during the development of any subsequent rulemaking.

Dated: February 9, 2015.

Karen Durham-Aguilera,
Director of Contingency Operations/
Homeland Security.

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