

AAPA WRDA Requests – February 2018

The following WRDA revisions are requested in expedite efficient and effective delivery of navigation channel improvements and project maintenance:

- 1. Mandatory HMT spending.** AAPA has established an approach for mandatory use of full annual HMT revenues, tax collections plus interest on the trust fund surplus. An explanation chart is provided. This ‘solves the problem’ for the HMT, enabling dedicated use of revenues for harbor use and not to offset other Federal spending.
- 2. Define Qualifying Funding for Backlog Prevention.** WRRDA 2014 established that Congressional authorization for construction expires if construction funds are not received within 7 years. Less than half of the 15 coastal navigation channel improvement projects authorized in WRRDA 2014 and WRDA 2016 have received construction funding. Ports seek WRDA language that Preliminary Engineering and Design funding counts as construction funding.
- 3. Benefit-to-Cost Ratio (BCR) for Locally Preferred Plan (LPP).** A navigation project’s BCR is based on the National Economic Development (NED) plan benefits unless there is a Locally Preferred Plan (LPP), wherein the sponsor pays 100% of the additional cost between the NED and LPP. The LPP is used in the project authorization report and new construction start decisions, which is significantly lower than the NED number. AAPA requests that these reports and decisions be based on the NED plan, since this is the extent of the federal government’s cost-shared investment.
- 4. Utility Relocations for Channel Improvement Projects.** The Corps issued a utility relocation policy in 2017 that updates policy issued in 1995. The policy changes increase project sponsor cost, efforts and time. AAPA seeks two changes resulting from the Corps 2017 policy revision: (1) return to cost sharing *public* utility relocations per the prior 1995 guidance, rather than all relocations; and (2) delete the requirement for a letter from the governor, before the Corps will use Navigational Servitude to force owners to relocate these pipelines.
- 5. Scope/schedule discussions.** WRRDA 2014 Section 1001. Expedite the study process by authorizing the Corps to participate in study scope and schedule discussions as a prelude to the Sponsor and Corps signing a Feasibility Cost Share Agreement. Currently there is hesitancy for a non-federal sponsor to sign an agreement obligating them to pay up to \$3 million without an agreement on scope and schedule.
- 6. Define Feasibility Study Start/Stop Milestones.** WRRDA 2014 Section 1001. The goal is to more clearly establish successful Feasibility Study completion within the 3-year Congressional requirement. Recommendation is to start upon signing the Feasibility Cost Share agreement and stop when the Record of Decision is signed.

- 7. Technical Assistance.** Section 1126 of WRDA 2016. AAPA's initial issue language the Corps said it needed to enable the port/project sponsor to fund the Corps to the 'HarborSym' economics model for feasibility studies conducted by the non-federal sponsor. The Corps now says it has no legal basis for providing technical support services on a study that has not been authorized by Congress. This is adversely impacting studies currently underway. The Corps' Planning Assistance to States program could possibly serve as a model to provide this technical assistance.
- 8. Clarification of Corps Section 408 reviews.** Under [Section 408](#), permission of the Corps is required for a proposed activity that would modify, among other things, "any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States." This language was originally enacted in the Rivers and Harbors Act of 1899 to protect engineered structures built by the Corps that serve particular functions, such as erosion control (sea walls), water retention (dikes, levees), and vessel access (piers). Over time, however, the Corps has expanded its regulatory authority beyond the limits of the statute. The Corps now requires a review of any proposal for a physical modification or structure within the boundary of a Corps project, even if it has no bearing at all on navigation or flood control. That has resulted in an overlay of additional administrative procedure, unnecessary cost, and regulatory uncertainty. This amendment reinforces the original intent of the Rivers and Harbors Act by focusing the Corps on actual navigation and flood control assets, allowing them to devote their full attention and resources to important safety evaluations and the expedited review and execution of project modification requests. Draft legislative language provided - it was Rep Brian Babin (R-TX) Amendment 73 in WRDA 2016.
- 9. Expand authorized use of contributed funds to expedite permit evaluations.** WRRDA 2014 Section 1006 enabled the Corps to accept funds to expedite permit review process. The critical path in the permit review and issuance process has become timely response from environmental resource agencies. Expanding the authorized use of contributed funds to be used for other agency environmental reviews, with the express concurrence by the contributor, would expedite the required reviews. This could be established as a test case, similar to the initial Corps permit contributed funds authorization. Note: This is a different approach than established in WRRDA Section 1005 subparagraph (h)(5) Financial Penalty Provisions, for which implementation guidance has not been issued by the Corps.
- 10. Dredged Material Placement Facilities.** Clarifies that minor placement facility dike work is an authorized federal Operations and Maintenance expense under 33 USC Section 2241. The Corps narrowly interprets the existing provision such that if an effort is not clearly specified in this list, it is not eligible.
- 11. Dredged Material Disposal Facility Partnerships.** Clarifies that cost basis that the project sponsor pays for dredged material capacity is the actual construction cost and not market value.
- 12. Streamline the planning and maintenance processes by considering "assumed for maintenance work" to be the same as "authorized" projects.** Numerous channels in the U.S. constructed or modified by non-federal entities have been 'assumed for maintenance'

by the Corps of Engineers. Currently, channels which have been assumed for maintenance are not considered “authorized” projects and as a result, may not be eligible or qualify for repairs, follow-on planning activities, and may be administered differently than an “authorized” channel. This proposal eliminates the 'distinction without a difference' that currently exists and allows local officials and the Corps of Engineers to provide solutions and improvements for the entire project site through a more streamlined process. Draft legislative language provided – it was Rep. Brian Babin (R-TX) Amendment 90 in WRDA 2016.

13. Restructure the 10% Lands, Easements, Rights-of-Way and Relocations (LERR)

Repayment. Cost sharing for navigation projects varies with the project depth plus an additional 10% for LERR that the non-federal Sponsor can pay back over 30 years. This 10% surcharge can be discounted by the value of LERR contributions to the project. AAPA recommends this 10% surcharge be consolidated into the cost share percentages, for example 75% federal and 25% non-federal plus 10% would become 65% federal and 35% non-federal with the LERR credited against the 35% cost share. Ports report financial and public perception issues with using locally obtained funds to make payments to the U.S. General Treasury to cover the unrelated 10% fee/surcharge. The proposed restructuring provides that the local funds are up front for the project’s construction, reduces the Government’s costs and brings navigation projects to be in line with other authorities such as flood damage reduction and environmental restoration.

14. Enabling P3 Opportunities. AAPA participated in development of the American Society of Civil Engineers (ASCE) report, “Alternative Financing and Delivery of Waterways Infrastructure”. The report identifies recommendations for addressing how some alternative financing and delivery issues might be resolved. AAPA recommends the following recommendations be addressed in WRDA legislation as they are applicable to Corps navigation projects:

- a. Address the budget scoring issue where the entire project construction cost is deducted from Year One of the federal agency budget.
- b. USACE needs the authority to enter into long-term contracts.
- c. Projects need to be allowed to use the environmental clearance process for federal projects, known as federal sovereignty.

15. Nominal Depth. Corrects the dredging datum to the current ‘mean lower low water’ rather than the obsolete ‘mean low tide’ in 33 USC Section 2241.