

undertake revisions to its NEPA regulations.

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### Signing Authority

This document of the Department of Energy was signed on November 8, 2022, by Samuel Walsh, General Counsel, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 9, 2022.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

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## DEPARTMENT OF DEFENSE

### Corps of Engineers, Department of the Army

#### 33 CFR Part 203

[Docket ID: COE-2021-0008]

RIN 0710-AA78

### Natural Disaster Procedures: Preparedness, Response, and Recovery Activities of the Corps of Engineers

**AGENCY:** U.S. Army Corps of Engineers (Corps), Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** The Corps is proposing to revise its natural disaster procedures under this part of the Code of Federal Regulations (CFR), which implements a section of the Flood Control Act of 1941, as amended. Revisions will incorporate advances in risk-informed decision-making approaches and disaster response lessons learned, as well as recent amendments to this section of the Flood Control Act of 1941.

**DATES:** Comments must be received on or before January 17, 2023.

**ADDRESSES:** You may submit comments, identified by docket number COE-2021-0008, using any of these methods:

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

2. *Email:* [33CFR203@usace.army.mil](mailto:33CFR203@usace.army.mil) and include the docket number, COE-2021-0008, in the subject line of the message.

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

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

**Instructions:** Direct your comments to docket number COE-2021-0008. The public docket will include all comments exactly as submitted and without change and may be made available online at <http://www.regulations.gov>. This will include any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information where disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [regulations.gov](http://www.regulations.gov) or email. The [regulations.gov](http://www.regulations.gov) website 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 email directly to the Corps without going through [regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment 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 <http://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. Willem H.A. Helms, Office of Homeland Security, Directorate of Civil Works, U.S. Army Corps of Engineers, at (202) 761-5909 or [willem.h.helms@usace.army.mil](mailto:willem.h.helms@usace.army.mil).

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#### Background

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 the Corps to undertake certain emergency management activities. Specifically, Public Law 84-99 authorizes an emergency fund to be expended in preparation for emergency response to any natural disaster, in flood fighting and rescue operations, or in the repair or restoration of any flood control work threatened or destroyed by flood. These activities may include the strengthening, raising, extending, realigning, or other modification thereof as may be necessary in the discretion of the Chief of Engineers for the adequate functioning of the work for flood control and subject to the condition that the Chief of Engineers may include modifications to the structure or project, or in implementation of nonstructural alternatives to the repair or restoration of such flood control work if requested by the non-Federal sponsor. The emergency fund may also be expended for use in the emergency protection of federally authorized hurricane or shore protection when in the discretion of the Chief of Engineers such protection is warranted to protect against imminent

and substantial loss to life and property. In addition, the emergency fund may be expended for the repair and restoration of any federally authorized hurricane or shore protective structure or project damaged or destroyed by wind, wave, or water action of other than an ordinary nature. Such repair and restoration must be completed to either the pre-storm level or the design level of risk reduction, whichever provides greater protection, when, in the discretion of the Chief of Engineers, such repair and restoration is warranted for the adequate functioning of the structure or project for hurricane or shore protection, subject to the condition that the Chief of Engineers may include modifications to the structure or project to address major deficiencies or implement nonstructural alternatives to the repair or restoration of the structure if requested by the non-Federal sponsor. The emergency fund may also be expended for emergency dredging for restoration of authorized project depths for Federal navigable channels and waterways made necessary by flood, drought, earthquake, or other natural disasters. In any case in which the Chief of Engineers is otherwise performing work under this section in an area for which the Governor of the affected State has requested a determination that an emergency exists or a declaration that a major disaster exists under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 *et seq.*], the Chief of Engineers is further authorized to perform on public and private lands and waters for a period of 10 days following the Governor's request any emergency work made necessary by such emergency or disaster. Such work must be essential for the preservation of life and property, including, but not limited to, channel clearance, emergency shore protection, clearance and removal of debris and wreckage endangering public health and safety, and temporary restoration of essential public facilities and services. The Chief of Engineers, in the exercise of his discretion, is further authorized to provide emergency supplies of clean water, on such terms as he determines to be advisable, to any locality which he finds is confronted with a source of contaminated water causing or likely to cause a substantial threat to the public health and welfare of the inhabitants of the locality.

The Corps' Public Law 84-99 Program is multi-faceted program that encompasses disaster preparedness, response and recovery activities in support of Federal, State, Tribal, and local stakeholders. The Corps' Public Law 84-99 Rehabilitation Program is a

voluntary disaster recovery program that provides for the rehabilitation (*e.g.*, repair) of damage to eligible Federal and non-Federal flood risk management projects damaged by flood or coastal storms.

The Corps and other Federal agencies can assist communities in assessing, communicating, and managing their flood risks and can help them prepare for and respond to a flood, hurricane, or other natural disaster. However, State, Tribal, and local governments, and those living and working behind a flood or coastal storm risk management project have the primary responsibility and role in this effort. The residual flood risk associated with their projects is a result of how those projects are expected to perform under a range of potential floods, and the consequences that would result from their failure during a flood.

The focus of this rulemaking is the Public Law 84-99 program. In addition to Public Law 84-99, the Corps has other authorities. For example, through its Planning Assistance to States program and its Flood Plain Management Services program, the Corps is able to assist a community to identify and evaluate options where the flood risk is increasing due to climate change. Similarly, through these planning and technical assistance programs, the Corps is able to encourage and facilitate a collaborative approach to address complex natural resources issues and Tribal treaty rights. However, the Corps generally does not perform this kind of work through the Public Law 84-99 program. The Corps also recognizes the importance of environmental justice. It applies this policy both in the Public Law 84-99 program and under its other authorities.

Part 203 of Title 33 of the CFR is the Corps' implementing regulation for Public Law 84-99 and was last promulgated in 2003 (68 FR 19357, April 21, 2003). Engineering Regulation 500-1-1 provides internal agency-specific procedures implementation guidance for implementing Public Law 84-99.

### General Information for the Proposed Rule

1. *Does this action apply to me?* This action is directed to the public in general, but will be of particular interest to a variety of organizations, to include legally constituted non-Federal public bodies responsible for operating and maintaining flood and coastal storm risk management projects (referred to as "non-Federal sponsors" in 33 U.S.C. 701n), State, Tribal, territorial, and local emergency management agencies, water

resources agencies, environmental agencies, fish and wildlife management agencies and organizations, and floodplain, dam, and levee safety managers. This proposed rule applies to many communities nationwide, including those with environmental justice interests, and commenters are encouraged to provide their views and inputs on environmental justice strategies related to this rulemaking effort.

### 2. *What should I consider as I prepare my comments for submission?*

Commenters not familiar with current policy should review the references section. These resources are available on the Federal eRulemaking portal at <http://www.regulations.gov>. For ease of comment review and consideration, commenters should consider referencing a specific section or paragraph of 33 CFR part 203. In addition to solicitation on the specific changes being proposed, the Corps solicits comments in general on other issues or concerns related to this part that commenters may wish to raise. For example, commenters may provide comments on how best to incorporate nature-based solutions into this program. For these comments, the commenter should 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 regulation.

### Need for Revision

This rule includes a proposed change in the focus of the Rehabilitation Program. The eligibility of a levee system for consideration for rehabilitation assistance after a flood was once based only on inspections conducted by the Corps. More recently, the Public Law 84-99 program has been transitioning to risk-informed eligibility determinations for projects, which are based on an evaluation of the non-Federal sponsor's overall risk management activities, including information developed through inspections. Additional changes are also proposed to effectively implement recent amendments to Public Law 84-99.

Since the last revision in 2003, significant disasters, including Hurricane Katrina (2005), Hurricane Sandy (2012), flooding on the Mississippi and Missouri Rivers (2008, 2011, and 2013), and Hurricanes Harvey, Irma, and Maria (2017) have provided a more detailed understanding of the nature and severity of the risks associated with coastal storms and floods. These significant events

provided information regarding project performance and the effects of climate change that the Corps has considered when formulating this rule update.

During Hurricane Katrina, the Federal response was found to be reactive once State and local governments had exhausted available response resources, and was not necessarily anticipatory. This rule update provides ability to lend expertise and gain a greater understanding of State, Tribal, and local needs and requirements in order to improve their ability to prepare for, respond, and recover from natural disasters. Lessons learned have also resulted in the “whole of community” principles outlined in the National Preparedness Goal and supporting frameworks and which are incorporated in this rule update.

Additionally, the maturation of risk-informed decision-making approaches and technological advancements from a purely standards-based perspective has influenced the outlook on how Public Law 84–99 activities should be implemented, with a shift towards better alignment with the Corps Levee Safety and National Flood Risk Management Programs. Risk-informed decision making uses an iterative process to reduce risk over time by identifying the areas of acceptable risk, monitoring the acceptable risk, and then devoting resources to manage the sources of unacceptable risk in priority order. The process begins by capturing activities and efforts within three overarching categories: risk assessment, risk management, and risk communications. Through this process, the Corps and non-Federal sponsors assess the flood risk to property, infrastructure, public safety, and the environment; and seek to reduce that risk in stages by addressing the highest priority flood risk management deficiencies first, and by working with elected officials and other risk managers to identify other priority areas for investment. Through risk communication, people living and working behind flood risk management projects also can make informed decisions regarding flood insurance, evacuation measures, flood proofing, and relocation. Risk assessment, risk management, and risk communication concepts are included in this proposed update.

Given these developments since the last revision in 2003, the Corps is proposing to repeal and replace part 203. The proposed revisions include updated eligibility criteria for rehabilitation assistance under Public Law 84–99. The proposed criteria are more risk-informed, with the intended

result of improved targeting of non-Federal sponsor investments.

In addition to the lessons learned identified previously and the evolution of Corps and national policy related to risk-informed decision making and disaster risk management, the proposed revisions reflect the enactment of the following statutes, which amended or otherwise affected the Public Law 84–99 program:

1. Subsection 3029(a) of the Water Resources Reform and Development Act of 2014 (WRRDA) (Pub. L. 113–121) grants the Chief of Engineers authority to restore eligible hurricane or shore protection works to the design level of risk reduction and, under certain circumstances, to make modifications to flood control and hurricane or shore protection works damaged during flood or coastal storms events, as well as the authority to implement nonstructural alternatives in the repair and restoration of hurricane or shore protection works if requested by the non-Federal sponsor.

2. Section 3011 of WRRDA 2014 mandates that a levee system shall remain eligible for rehabilitation assistance under Public Law 84–99 as long as the system’s non-Federal sponsors continue to make satisfactory progress, as determined by the Secretary of the Army, on an approved system wide improvement framework or letter of intent.

3. Section 1176 of the Water Resources Development Act of 2016 (WRDA) (Pub. L. 114–322, Title I) provides an express definition of “nonstructural alternatives,” as that term is used in Public Law 84–99, and authorizes the Chief of Engineers, under certain circumstances, to increase the level of risk reduction of flood control works when conducting repair or restoration activities to such works under Public Law 84–99.

4. Section 1160 of the Water Resources Development Act of 2018 (WRDA) (Pub. L. 115–270, Title I) provides the option of realignment to the kinds of modifications that can be made to flood control works; and changes the authorized level of restoration for coastal storm risk management (CSRMs) projects.

5. Section 1161 of the Water Resources Development Act of 2018 (WRDA) (Pub. L. 115–270, Title I), as amended by section 120 of the Water Resources Development Act of 2020 (Division AA, Pub. L. 116–260), authorizes the Chief of Engineers to repair or restore Federal and non-Federal flood risk management (FRM) projects and federally authorized CSRMs projects when the costs of the repair or restoration work exceed the benefits, if

the non-Federal sponsor agrees to pay, in cash or in-kind contributions, all costs in excess of the benefits of the repair or restoration work and the Secretary determines that the damage to the structure was not a result of negligent operation or maintenance and that repair of the project could benefit another Corps project.

### Overview of Proposed Changes

The section titles referred to in this section of the preamble reflect the titles in the proposed regulatory text which may be different than what is reflected in the currently codified regulatory text.

#### *Rulemaking Alternatives Considered*

1. No rule update: In this alternative, the Corps would follow status quo and continue to implement all changes through agency discretion and internal regulations. This alternative was not selected because the Public Law 84–99 amendments are very prescriptive and public rulemaking is necessary to ensure implementing policy will achieve its intended purpose as described in the proposed rule.

2. Repeal and replace only those provisions that pertain to the Public Law 84–99 Rehabilitation and Inspection Program: In this alternative, the Corps would issue a separate rule for the Public Law 84–99 Rehabilitation Program and would repeal the provisions in the current rule that affect that program. This alternative was not selected because it would result in two published rules for the Public Law 84–99 program. That could result in misunderstandings of program activities and inhibit transparency.

3. Repeal and replace all of the current rule (selected alternative): In this selected alternative, the Corps proposes to incorporate and integrate the current state of the practice of flood risk management principles and concepts through the provision of agency policy codified in a federal rule. The intended benefit is to encourage broader community flood risk management activities by non-Federal project sponsors specific to the flood risk management projects they operate and maintain and in coordination with the applicable communities. This rule alternative also consolidates recent Public Law 84–99 amendments into one comprehensive rule, ensuring the public has a clear understanding of the responsibilities and requirements.

#### *Proposed Changes to Each Section*

##### Subpart A—Introduction

Section 203.11 General. Minor editorial changes are proposed for

clarity to better describe the purpose of this section of the regulation and to reflect the requirements of Public Law 84–99, as amended (33 U.S.C. 701n). Editorial changes also are proposed for clarity and accuracy to better reflect the current authorities and activities of the Corps under Public Law 84–99, such as changing “flood control works” to the more appropriate “flood risk management projects.” In addition, two new subsections are proposed for “Form of Assistance” and “Availability of Assistance.” The “Form of Assistance” proposed text clarifies that direct assistance is only provided to responsible State, Tribal, territorial, and local interests rather than individuals and that the Corps generally does not transfer Federal funds for the non-Federal performance of assistance activities. The “Availability of Assistance” subsection proposed text clarifies that Public Law 84–99 assistance is only provided when similar assistance is not reasonably available from other Federal agencies.

Section 203.12 Definitions. To enhance transparency and common understanding, new definitions are proposed for coastal storm risk management projects; emergency repair, rehabilitation, and restoration; Federal coastal storm risk management project; Federal flood risk management projects; flood risk management projects; Tribal Nation; interim risk reduction measures (IRRM); Lands, Easement, Right-of-Way, Relocation, and Disposal/Borrow sites (LERRDs); levee segment; levee system; maintenance; non-Federal flood risk management project; nonstructural alternatives; operation; rehabilitation; repair; replacement; responsible State, Tribal, and local interests. In general, these are terms commonly used by the Corps. Updated definitions are proposed for Governor, to clarify that the Governor is the chief executive of a State; and non-Federal Sponsor, to clarify the applicable types of agreements. The current definition of Federal project, flood control project, hurricane shore protection project (HSPP), non-Federal project, repair and rehabilitation are proposed to be removed as the proposed new and updated definitions would supersede the content in those existing definitions to provide added granularity and clarity.

Section 203.13 Federally-recognized Tribal Nations and the Alaska Native corporations. Minor changes are proposed. There is an exception proposed for tribes regarding emergency water assistance as the statute defines such assistance is provided to States. The proposed exception is required to ensure emergency water assistance may

be provided to tribes, albeit indirectly through the States. In other Public Law 84–99 assistance areas, the Tribal Nations may submit requests for assistance directly to the Corps.

Section 203.14 Exceptions to policy. An “exception to policy” section is proposed in order to ensure flexibility when accomplishing activities, prescribed in this rule, with complex and/or unforeseen interdependencies.

#### Subpart B—Emergency Preparedness

Section 203.21 Emergency preparedness assistance. A new section is proposed to clarify the purpose of this assistance to Federal, State, Tribal, and local agencies Tribal, which is to help support their efforts to prepare for a specific identified storm or forecasted high water event that may lead to flooding. It also provides examples of types of emergency preparedness activities.

Section 203.22 Emergency preparedness responsibilities of non-Federal sponsors. This existing section is being renamed to use “emergency” rather than “disaster” to identify the broader set of circumstances and emergency nature of the preparedness responsibilities of non-Federal sponsors. It is also being renumbered to accommodate the new section proposed above.

Through experience gained in recent disasters, the Corps has learned that increased local preparedness capability is crucial to subsequent natural disaster response and recovery. Changes are proposed to improve local capability for disaster preparedness and planning, primarily through technical assistance in support of this goal. Preparedness planning and training are proposed to be listed as separate subsections for clarity and emphasis on the respective actions under the responsibility of the non-Federal sponsor. Floodplain management and interim risk reduction measures are recognized as a local responsibility in this proposed rule. The current subsection on the Corps Rehabilitation and Inspection Program (RIP) is proposed to be replaced by the “Emergency repair, rehabilitation, and restoration assistance” subsection to reflect the proposed transition to a risk-informed eligibility determination. The proposed subsection also clarifies the actions a non-Federal sponsor must undertake to maintain eligibility for the Public Law 84–99 Program.

#### Subpart C—Emergency Operations

Subpart C is proposed to be rearranged for clarity and to eliminate redundancies with the addition of a new section at § 203.33. Much of the content

remains the same as the current regulation other than the changes described below.

Section 203.31 General. The title of the section is proposed to be modified from the existing “Authority” to reflect that the section describes both the authority of the Corps and the responsibilities of non-Federal sponsors for Emergency Operations. Changes are also proposed in this section to remove duplicative information already found in the proposed renumbered §§ 203.32 and 203.33.

Section 203.31(b) is being proposed to modify the current regulation at § 203.31(a), which states that the Corps’ flood response measures are not appropriate for projects which protect strictly agricultural lands. The new subsection allows for the Corps, in some cases, to provide such measures for an FRM project that primarily reduces the flood risk to agricultural lands. This allows for Corps assistance to be provided in these limited situations and reflects the contribution of agricultural lands to the national economy.

Section 203.31(c) is proposed to establish the non-Federal sponsor’s role and responsibilities for certain Emergency Operations activities. These are not new responsibilities. Rather, the proposed changes serve to ensure understanding of the role and responsibilities of the non-Federal sponsor for those Emergency Operations activities.

Section 203.32 Flood response procedures. Language is proposed and intended to address coordination with other Federal agencies to ensure there is appropriate consideration of relevant statutes related to environmental and cultural resources taking into account the exigency of the circumstances. This proposed addition recognizes that environmental and cultural resource protection statutes are applicable to emergency actions and that coordination with other agencies at the time of or in advance of the emergency response may be necessary. The proposed language recognizes the importance of these statutory requirements and ensures appropriate compliance and coordination occurs. As proposed, Corps Districts should evaluate their emergency response portfolio in coordination with other relevant agencies (e.g., the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, or the applicable State Historic Preservation Office) and their response partners to determine whether programmatic compliance or establishment of common standard operating procedures in advance of any

emergency response may be appropriate.

Section 203.33 Post flood response procedures. Minor changes are proposed to simplify and clarify post flood response policy.

#### Subpart D—Rehabilitation Assistance for Flood Risk Management Projects Damaged by Flood

Changes to this subpart title are proposed to incorporate the more appropriate title “flood risk management projects” as opposed to the formerly used term “flood control works.” In addition, the coastal storms have been removed from the title as coastal storm risk management is now proposed to be discussed in the revised Subpart E—Emergency Repair, Rehabilitation, and Restoration Assistance for Federal Coastal Storm Risk Management (CSRMs) projects, to provide clarity in distinguishing between the FRM and CSRMs projects. Lastly, reference to the Corps’ Rehabilitation and Inspection Program is proposed to be removed from the title to reflect the change in focus of the program from the RIP to the risk-informed determinations.

As discussed previously, this proposed section introduces revised criteria for initial and continued eligibility in the Rehabilitation Program, modifications to existing flood risk management projects, and the System Wide Improvement Framework (SWIF). By incorporating lessons learned from recent disasters, the proposed changes will help non-Federal sponsors improve their flood risk management. Risk-informed decision making uses an iterative process to reduce risk over time by identifying the areas of acceptable risk, monitoring the acceptable risk, and then effectively devoting resources to manage the sources of unacceptable risk in priority order. The proposed changes in this subpart will transition from eligibility criteria for rehabilitation assistance based on an inspection to a risk-informed approach, primarily based on an evaluation of a broader set of non-Federal sponsor’s risk management activities.

The changes are necessary to encourage broad flood risk management actions, including establishing investment priorities at the local level based on risk and cost-effectiveness, and to achieve greater flexibility to protect and restore natural resources. The proposed changes also are intended to promote community discussion and engagement in a broader set of actions to help communities manage flood risk; and to encourage dialogue and problem solving.

Section 203.41 General. The current section is proposed to be completely replaced. The changes proposed in this section introduce the reframing of the current inspection-only program for eligibility determinations to the updated risk-informed determinations of the Rehabilitation Program. It outlines both the proposed initial and continuing eligibility criteria for Federal and non-Federal FRM projects to include the components required and process for obtaining an eligibility determination. These proposed changes provide clarity and transparency to the program.

Section 203.42 Initial eligibility assessment of non-Federal flood risk management projects. The current section is proposed to be retitled and completely replaced to be consistent with the proposed risk-informed approach. Therefore, the proposed language eliminates the current focus on an inspection-only approach to support the initial eligibility assessment (IEA) for non-Federal FRM projects in favor of the risk-informed approach based on a broader assessment. This section proposes to provide the process for the IEA and outlines the content of the required initial eligibility application. As proposed, IEAs would be primarily based on an evaluation of a broader set of non-Federal sponsor’s risk management activities through an initial eligibility application package and assessment for non-Federal Flood Risk Management Projects, as opposed to solely through a traditional inspection. However, the Corps will also conduct a site inspection as part of the IEA to supplement the application materials received. The application as proposed would require documentation of the level of risk reduction provided by the non-Federal FRM project and an assessment of the expected performance of the project, as well as documentation of maintenance status and identification of any deficiencies of the project. Much of the information required in the proposed application was already included in the current § 203.48 describing the inspection procedures for the Corps. With the focus now on a broader set of non-Federal sponsor’s risk management activities and a risk-informed decision-making approach, it is appropriate to incorporate these elements in the proposed application by a non-Federal sponsor rather than limit them to the Corps’ inspection procedures. Once completed, the assessment is proposed to be provided to the non-Federal sponsor of the non-Federal FRM project for awareness and transparency, and a record will also be maintained by the Corps. The results of

the assessment will determine initial eligibility for emergency repair, rehabilitation, and restoration assistance. The proposed eligibility criteria would ensure the non-Federal sponsor has sufficiently demonstrated its project meets the level of function necessary for inclusion in the Public Law 84–99 program, that the project will essentially function as designed and intended. The proposed regulation also provides for the non-Federal sponsor to provide additional information and request reconsideration of an assessment if it does not agree with the initial eligibility determination.

Federal flood risk management projects would be automatically granted initial eligibility in the Rehabilitation Program under the proposed language, based upon the provision of notice of construction completion, similar to the current initial eligibility pathway.

Section 203.43 Continuing eligibility assessment of Federal and non-Federal flood risk management projects. The current section is proposed to be completely retitled and replaced to be consistent with the proposed risk-informed approach, and therefore eliminates the focus on an inspection-only approach to support the continuing eligibility assessment (CEA) for Federal and non-Federal FRM projects. The proposed text in this section provides the procedures and content of required elements for a CEA. As proposed, the CEA would assess the non-Federal sponsor’s risk management activities through: implementation of its project Operation, Maintenance, and Inspection Activities; a review of emergency preparedness planning; and a review of public outreach activities accomplished to share FRM project condition and performance. Inspection information would be verified in accordance with their provided plan. The CEA also would include a review of the participation for the non-Federal sponsor in past inspections and assessments conducted by themselves or with the Corps. The CEA would identify changed project conditions that could impact project performance. The CEA would also verify that the criteria required for the IEA to maintain its eligibility are being met. The specific requirements for a favorable CEA determination would be defined in the project partnership agreement, O&M manual, or Levee Owner’s manual for non-Federal sponsors. The proposed criteria would demonstrate whether the non-Federal sponsor has continued to maintain the project to ensure it will essentially function as designed and intended, and also would include emergency planning and public

outreach to ensure it is adequately prepared for an emergency at the local level. The Corps believes that improved local preparedness capabilities are crucial to ensure natural disaster preparedness and planning.

A favorable CEA determination under § 203.43, or continued progress under an approved system-wide improvement framework under § 203.50, would be required for the non-Federal sponsor to retain its eligibility for emergency repair, rehabilitation, and restoration assistance, which is similar to the current practice.

Section 203.44 Emergency repair, rehabilitation, and restoration of Federal and non-Federal flood risk management projects. Minor changes are proposed. The section title is proposed to be modified for updating to the current terminology of FRM projects and to include both Federal and non-Federal projects. The proposed language provides the eligibility requirements for emergency repair, rehabilitation, and restoration activities, which are the same for Federal and non-Federal FRM projects. The proposed regulation eliminates inspection ratings, which are no longer proposed to be used to determine eligibility; instead, assessments of the previously described activities would be performed. Also, the proposed text provides that all applicable environmental compliance requirements must be satisfied to make clear that even these emergency activities must comply with relevant environmental statutes. In addition, the proposed rule describes the non-Federal sponsor's responsibility to provide a share of certain costs. Lastly, a new subsection is proposed which is moved from its current location at § 203.46 to clearly articulate the required economic justification and minimum threshold for construction costs for emergency repair, rehabilitation, and restoration efforts under the Public Law 84–99 program. An increase is proposed to the minimum repair cost for the rehabilitation of flood risk management projects from \$15,000 to \$50,000 and is necessary to warrant Federal involvement. Considerations in setting a minimum damage threshold include the Corps' cost to complete Project Information Reports, experience with the application of the existing minimum damage threshold, and feedback from non-Federal sponsors regarding their investments in operation and maintenance activities. These new clarifications ensure transparency for the non-Federal sponsor regarding the cost and economic justification requirements to qualify for consideration for assistance.

Section 203.45 Emergency repair, rehabilitation, and restoration of Federal flood risk management projects. This section in the current regulation has been combined into one section under proposed § 203.44. In addition, the exception found in the current regulation regarding certain conditions to cooperation agreements for Federal FRM projects has been relocated to § 203.114.

Section 203.46 Restrictions. This section is largely unchanged. The Corps will not generally provide emergency repair, rehabilitation, and restoration assistance under Public Law 84–99 to address damages by occurrences other than floods or coastal storms. However, other natural disasters may impact the structural integrity of a FRM project and trigger an emergency flooding situations. Those cases are proposed to be evaluated on a case-by-case basis.

Section 203.47 Modifications to flood risk management projects during rehabilitation. Changes are necessary to implement provisions for the authority under Subsection 3029(a) of WRRDA 2014 and Section 1176 of WRDA 2016, which authorize modification to flood risk management projects under certain conditions. This section proposes to prescribe how a non-Federal sponsor may request modification of an existing flood risk management project that is undergoing rehabilitation under Public Law 84–99 in order to address major deficiencies or in certain circumstances to increase the level of risk reduction or pump station capacity.

The proposed section (a) provides the criteria for when the Corps would consider requests for a modification to address major deficiencies. It also provides examples of allowable features of modifications to address major deficiencies, such as incorporating features to make the overall levee system more durable (e.g., low sills, riprap, and hardening features), constructing setback levees, or floodproofing.

The proposed section (b) provides allowances for consideration of a new set of modifications to increase the pre-flood level of risk reduction or pump station capacity. New criteria are also proposed for consideration under these types of modifications.

The proposed criteria in both subsections would ensure that the modifications are appropriate to undertake through the Public Law 84–99 program. This limitation will ensure the Corps can give priority to give priority to short-term emergency repairs and to the rehabilitation and restoration of projects that have sustained extensive damage. Where a non-Federal sponsor

wants to construct major modification of a flood or coastal storm risk management project after a flood or coastal storm, the Corps is able to provide technical and planning assistance outside of the Public Law 84–99 program.

In addition, a new section is proposed to outline the procedures for a request for modifications to ensure a consistent and transparent process. Also, new sections are proposed to clarify cost-sharing requirements with the non-Federal sponsor, to provide the requirement for modifications to be economically justified, and to clarify that modifications will not be undertaken under Public Law 84–99 to achieve a purpose that is not related to flood risk management, as those are outside the bounds of the intent of Public Law 84–99 program.

Section 203.48 Inspections and risk assessments for flood risk management projects. Editorial changes and removal of duplicative information are proposed. For example, inspection activities are now proposed to be prescribed in §§ 203.42 and 203.43 as a component of the broad set of non-Federal sponsor's risk management activities and requirements in the IEAs and CEAs and as such can be removed from this section. Much of the content as described in the current inspection procedures is now included in the IEA and CEA descriptions as part of the proposed risk-informed approach for information to be provided by the non-Federal sponsor.

Section 203.49 Levee Management Guide. The existing § 203.49 (Rehabilitation of hurricane and shore protection projects) is proposed to be removed in its entirety as the contents are now found in Subpart E. The existing § 203.50 content on non-structural alternatives is moved to the proposed Subpart F. The current § 203.51 is now moved and renumbered as this proposed section. Only minor changes are proposed for consistency with the proposed changes herein (e.g., referring to eligible projects as opposed to “active” projects under the inspection-only RIP).

Section 203.50 System-wide improvement framework. This proposed new section implements Section 3011 of WRRDA 2014, which provides that a levee system shall remain eligible for rehabilitation assistance under Public Law 84–99 as long as the system's non-Federal sponsor(s) continues to make satisfactory progress under an approved system-wide improvement framework (SWIF). As proposed, a SWIF is a plan developed by a non-Federal sponsor(s) and accepted by the Corps to conduct a

series of improvements to a levee system (or multiple levee systems within a watershed) to address system-wide deficiencies that are complex or time-consuming to correct.

The proposed changes ensure committed non-Federal sponsors have the opportunity to transition their levees over time to Corps standards. By using a SWIF, non-Federal sponsors can prioritize deficiencies to address the highest risk first to achieve system-wide risk reduction. In the requirements for a SWIF, the proposed rule recognizes that some non-Federal sponsors may also need to engage at the Federal, State, and local levels to address complex levee system issues in a more long-term, comprehensive approach to identify solutions that optimize resources; prioritize improvements and corrective actions based on risk; and coordinate overlapping or competing programs and requirements. The Corps also is proposing to expand the use of a SWIF to maintain the eligibility of these non-Federal sponsors where they are making progress to correct complex system-wide issues or to address a complex natural resources issue such as consultation/mitigation actions for resources subject to the Endangered Species Act or Tribal treaty rights.

#### Subpart E—Rehabilitation Assistance for Coastal Storm Risk Management (CSRМ) Projects

Subpart E is proposed to prescribe Rehabilitation Assistance activities specific to CSRМ projects formerly found in Subpart D of the 2003 version of 33 CFR part 203.

**Section 203.61 General.** Minor changes are proposed to the current § 203.49(a) to update the terminology from hurricane and shore protection projects to CSRМ projects. In addition, the proposed language states that the Corps may include modifications to a CSRМ project to address major deficiencies and describes the circumstances where nonstructural alternatives may be employed.

This proposed revised section clarifies that emergency repair, rehabilitation, and restoration assistance for Federal CSRМ projects generally is limited to the project's design profile template. However, at the request of the non-Federal sponsor, the Corps may evaluate restoration to a pre-storm profile as a restoration alternative where the pre-storm profile is greater than the design profile template and is deemed necessary to ensure adequate functioning of the project. The current regulation text states that the assistance is limited to the pre-storm condition

that allows for adequate functioning of the project.

This proposed language implements Subsection 3029(a) of WRRDA 2014, under which the Corps would be able to restore hurricane or shore protection works to the design level of risk reduction. As proposed, rehabilitation assistance for CSRМ projects generally is limited to the project's design profile, which is the level of restoration that will allow for the adequate functioning of the structure. The proposed language also implements Subsection 1160 of WRDA 2018, which allows consideration of restoration to the pre-storm profile, which is the profile that existed the day prior to the storm. In some circumstances, the pre-storm profile may be greater than the design profile and restoration to the pre-storm profile may be necessary to ensure adequate functioning of the project based on project-specific conditions, such as greater than anticipated erosion rates or as a result of climate change. The proposed language uses the project's design profile as the baseline profile for assistance, and also provides that the Corps may evaluate circumstances when the pre-storm profile may be more appropriate. In addition, if restoration to the pre-storm profile is not necessary to ensure adequate functioning of the project, the proposed language clarifies that the Corps may use Public Law 84–99 funds to restore a beach to its pre-storm profile only if the incremental costs above the costs to restore to the design profile are subject to the cost-sharing that would apply for periodic nourishment and the non-Federal sponsor requests the Corps to proceed on that basis. This would ensure the Corps does not default to and cover the costs for the restoration to the pre-storm profile where that exceeds what the Corps views as required for the adequate functioning of the project.

The proposed language also clarifies that an extraordinary storm is the event which triggers emergency repair, rehabilitation, and restoration assistance. A proposed definition for extraordinary storm is found in § 203.63.

The revised language also proposes to clarify that Federal CSRМ projects would not be eligible for assistance if the non-Federal sponsor has not established and maintained adequate conditions of public use and access. This language also clarifies the roles and responsibilities of the non-Federal sponsor to qualify for Corps assistance to ensure the Corps is only repairing, rehabilitating, or restoring. Restoration activities beyond the authorized design

profile or pre-storm condition (where determined appropriate) are considered beyond the scope of the Public Law 84–99 program.

The proposed language also clarifies conditions for Corps assistance on Federal CSRМ projects located completely or partially within a unit of the Coastal Barrier Resources System, focusing on whether or not an exception to a statutory limitation on Federal expenditures within the System has been provided.

**Section 203.62 Non-Federal sponsor responsibilities for CSRМ projects.** Clarification of non-Federal Sponsor roles and responsibilities are proposed in this new proposed section.

**Section 203.63 Emergency repair, rehabilitation, and restoration of Federal CSRМ projects.** This proposed section includes the proposed definition of “extraordinary storm,” which entails minor modifications to the existing definition found at § 203.49(b)(6). Proposed modifications include removing the specific category of storm or exceedance frequency required to meet the term, but retains a finding that an extraordinary storm event is the cause of the substantial damage to a Federal CSRМ project, such that it no longer provides significant risk reduction benefits. The key terms further proposed to be defined relate to the “duration or severity” and the “substantial damage” incurred. The Corps has found over the 18 years since the regulation was last promulgated that limiting the term of “duration or severity” to specific criteria of a particular category of storm event, for example, did not always correlate to the damage caused. For example, lower category repetitive storms within a short period of time may combine to have a greater effect than a single higher category storm. In addition, criteria are proposed for identifying when “substantial damage” has been incurred, some of which are carried forward from the current regulation with modifications to modernize costs. New criteria are also proposed with respect to “substantial damage”, based on the Corps' experience in implementing the program, such as where only hard structural features of the project were damaged. One new subsection is proposed to be consistent with other aspects of the program, by including a requirement for the rehabilitation to be economically justified. The proposed rule also clarifies that Corps assistance under the Public Law 84–99 program is available for a Federal CSRМ project only if an extraordinary storm significantly compromised the project's ability to provided risk reduction.

Section 203.64 Modifications to CSRM projects undergoing rehabilitation. The proposed changes implement Subsection 3029(a) of WRRDA 2014. This section prescribes how a non-Federal sponsor may request modification of an existing coastal storm risk management project as part of the emergency repair, rehabilitation, and restoration of the project under Public Law 84–99. As proposed, a modification is a work effort that consists of the addition of new features, elements, components, or items, or the upgrading of existing ones, which would improve the structural integrity of the project, but would not increase its level of risk reduction or have the effect of expanding the area for which the project is effective in reducing the coastal storm risk. The scope of modifications, as proposed, ensures the Corps can effectively perform short-term emergency repairs. This section maintains consistency, to the extent practicable, with previous discussions of modifications to FRM projects.

#### Subpart F—Nonstructural Alternatives to Rehabilitation of Flood Risk Management and Coastal Storm Risk Management Projects

The content for this proposed subpart is currently found in § 203.50 but is proposed to be included as a separate subpart for clarity and ease of reference. The separate subpart also allows for more focused discussion of the nonstructural alternatives (NSAs) and how they may be applied for both FRM and CSRM projects. This proposed subpart replaces the current subpart F for “Advanced Measures,” which is now proposed in subpart I.

Section 203.71 General. This proposed section implements Subsection 3029(a) of WRRDA 2014 and provides for the consideration of NSAs in lieu of the repair and restoration of projects. As proposed, the Corps may implement nonstructural alternatives to the rehabilitation, repair, or restoration of flood or coastal storm risk management projects at the request of the non-Federal sponsor, which may include efforts to restore or protect natural resources, including streams, rivers, floodplains, wetlands, or coasts, if those efforts are related to achieving a reduction in the flood or coastal storm risk. The proposed section carries forward the Corps’ existing policy regarding NSAs with minor changes.

A requirement for an amendment to the project partnership agreement (PPA) is proposed to be included. This ensures the PPA is updated to reflect the changes of including NSAs in the

project to ensure the PPA is consistent with the current state of the project.

Another proposed change is to include more specificity as to when exceptions to the limitation on Corps expenditures may be approved. The current regulation provides that the limitation may be waived when compelling reasons exist but does not provide examples or criteria of what such compelling reasons may be. The proposed regulatory text provides specific criteria for when such exceptions may be approved for improved public awareness and transparency in the process.

#### Subpart G—Emergency Drinking Water Assistance: Contaminated Water Source

The content for this proposed subpart is currently found in subpart E but is proposed to be moved to this subpart for organizational purposes as a result of edits made to other subparts. This proposed subpart replaces the current subpart G for “Local Interests/ Cooperation Agreements,” which is now proposed in subpart J. The subpart title is proposed to be renamed from the current “Emergency Waters Supplies: Contaminated Water Sources and Drought Assistance” to reflect the specific focus of this proposed subpart on the emergency drinking water assistance. The “Drought Assistance” topic is proposed to be covered in a new separate subpart at subpart H. This allows for improved clarity and discussion on these separate assistance efforts provided under the Public Law 84–99 program. The proposed subpart G carries forward the Corps’ existing policy regarding drinking water assistance in response to contaminated water sources with minor changes.

Section 203.81 General. Minor changes are proposed for improved readability. The duration of assistance is now proposed to be included in § 203.82 but maintains the current text with minor changes for clarity.

Section 203.82 Eligibility criteria and procedures. This proposed section proposes minor clarifying changes to the eligibility criteria and procedures contained in the existing subpart E. For example, a Tribal official, in addition to a Governor, may request assistance under this section. The proposed section also clarifies that a Cooperation Agreement (CA), as described in subpart J, is required for Corps assistance under this section.

#### Subpart H—Drought Assistance

The content for this proposed subpart is currently found in subpart E but is proposed to be moved to this subpart for organizational purposes as a result of

edits made to other subparts. This proposed subpart adds a new subpart to the CFR. The subpart title is proposed to be renamed from the current “Emergency Waters Supplies: Contaminated Water Sources and Drought Assistance” to reflect the specific focus of this proposed subpart on drought assistance. This allows for improved clarity and discussion on this distinct assistance effort provided under the Public Law 84–99 program. The proposed subpart H carries forward the Corps’ existing policy regarding drought assistance with minor changes.

Section 203.91 General. Minor changes are proposed for readability. In addition, the proposed language designates the Corps Deputy Commanding General for Civil and Emergency Operations as the official who designates a drought distressed area. The definitions included in the current regulation text at § 203.62 are proposed to be included in this section.

Section 203.92 Eligibility criteria and procedures. Editorial and clarifying changes are proposed. For example, a Tribal official may request assistance directly under this section, without a requirement to make this request through the Governor of the State in which the Tribal lands are located, as is currently provided in the existing regulation text. This proposed section also includes the contents of the written request, which now are provided in § 203.62. This section also proposes that a CA is required for Corps assistance, which is consistent with CA requirements proposed for other Corps assistance efforts provided under this program. In addition, this section proposes to provide clarity and transparency to the responsibilities of the non-Federal sponsor for drought assistance under this section.

#### Subpart I—Advance Measures

The content for this proposed subpart is currently found in subpart F but is proposed to be moved to this subpart for organizational purposes as a result of edits made to other subparts. This proposed subpart adds a new subpart to the CFR. The proposed subpart I carries forward the Corps’ existing policy regarding advance measures with minor changes.

Section 203.101 General. Minor clarifying changes are proposed. The primary proposed modification is to allow a Tribal official, in addition to a Governor, to request assistance under this section.

Section 203.102 Eligibility criteria and procedures. Minor changes are proposed for clarity and readability.

### Subpart J—Cooperation Agreements

The content for this proposed subpart is currently found in subpart G but is proposed to be moved to this subpart for organizational purposes as a result of edits made to other subparts. This proposed subpart adds a new subpart to the CFR. The proposed subpart J carries forward the Corps' existing policy regarding cooperation agreements with minor changes. The title is proposed to be modified from the current, "Local Interests/Cooperation Agreements" to only include "Cooperation Agreements" for clarity on the specific focus of this section on the cooperation agreements and to eliminate unnecessary text.

Section 203.111 General. Minor changes and removal of duplicative information are proposed for improved readability.

Section 203.112 Non-Federal sponsor requirements. Minor changes and additional non-Federal sponsor requirements are proposed regarding consideration of the non-Federal sponsor's prior performance capability. In addition, elements of local cooperation required for assistance provided under Subpart C are proposed.

Section 203.113 Funds and cost sharing. Minor changes are proposed for improved clarity. In addition and as proposed, assistance provided under Subpart I in which "permanent construction standards" are applied would be now subject to a 35 percent non-Federal cost share. Cost share requirements are also proposed when accomplishing modification activities to flood or coastal storm risk management projects under Subparts D and E. These proposed changes are consistent with the cost-sharing for this type of work under other Corps Civil Works authorities. The proposed changes also implement provisions for the authority under Subsection 1161(a) of WRDA 2018 in which a non-Federal sponsor may contribute funds for all costs in excess of benefits and subject to the conditions outlined in § 203.113 of this proposed rule. Subsection 1161(b) of WRDA 2018 is not addressed in this proposal due to the sunset provision of that authorization. Instead, the Corps will continue to implement this provision through existing guidance ("Implementation Guidance for Section 1161 of the Water Resources Development Act of 2018, Cost and Benefit Feasibility Assessment, dated 12 April 2019.)

Section 203.114 Project partnership agreements. Minor changes are proposed for improved clarity and readability.

Section 203.115 Procedures and responsibilities upon completion of Corps work. Minor changes are proposed for improved clarity and reability.

### Expected Benefits and Costs of Proposed Changes

Over time, cities and towns have developed behind levees and along our coasts, and the nature of the risk posed by the movement of water in a flood or storm in our rivers, lakes, and coasts has changed due to a variety of factors (e.g., more stormwater runoff due to development, building of upstream dams, and climate change). As such a standards-only-based approach (*i.e.*, focus on the condition of the levee or beach only) may not address some of the sources of unacceptable risk. For a programmatic perspective, of the nearly 6,600 miles of levees currently in the Rehabilitation Program, 4,850 miles are Federal levees (federally authorized and constructed, but locally owned, operated, and maintained) and 1,750 miles are non-Federal levees (locally constructed, and locally owned, operated, and maintained). Overall, the changes to this regulation will provide greater flexibility to the Federal government and non-Federal sponsors and improve the effectiveness of Federal and local investments in riverine and coastal projects. These proposed changes take advantage of our increased understanding of project risks, moving from an assessment of how the project is expected to perform to a focus on a broader set of actions to reduce risk through effective operation, maintenance, planning, and execution actions; and to improve emergency warning and evacuation, and the ability of communities and individuals to understand and manage project-related risks. Informed by more detailed understanding of risk for flood risk management projects, the Federal government and non-Federal sponsors are able to apply available resources to the risk management activities that most effectively reduce flood risk and avoid expenditures that have little risk reduction benefit.

Changes reflected in this proposed rule are aimed at encouraging and enabling emergency managers, local officials, and members of the public to identify risks where loss of life may occur, and to prepare for actions when needed to move people out of harm's way. Non-Federal sponsors may see an initial cost increase associated with documenting activities necessary for eligibility for the Rehabilitation program, however the assessment and risk management activities are activities

already required as non-Federal sponsors and will likely result in efficient use of available resources.

The Corps uses the funds appropriated in its Flood Control and Coastal Emergencies account to pay for most of its costs for the work covered by this rule. Over a recent 10-year period—from fiscal year (FY) 2012 through FY 2021—the Corps spent an average of roughly \$307 million per year from this account on the Public Law 84–99 program. The Corps uses most of this funding to repair damaged flood and coastal storm risk management projects.

The Corps also uses funds appropriated in its Operation and Maintenance account to pay a portion of the work used as data for eligibility determinations, outlined in this proposed rule. For example, the Corps spends an average of roughly \$30 million per year to inspect locally owned levee systems that the Congress has authorized as a Corps project.

We anticipate the costs to the Federal government to implement this program to remain roughly the same under the proposed rule.

### Incorporation of Public Comments

The Corps received input from State and Federal agencies, stakeholders, and other interested parties through the issuance of an Advanced Notice of Proposed Rulemaking (ANPR). The ANPR was published in the **Federal Register** on February 13, 2015 (80 FR 8014; **Federal Register** Document #2015–03033) soliciting public comment on specific policy revision concepts being considered for this proposed rulemaking. In response to the ANPR, we received 267 comments from 47 organizations and individuals. Of the 47 submissions, 23 were from non-Federal sponsors who contributed almost half (173) of all comments received. The remaining comments were received from eight individuals, five associations, four Tribal nation organizations, and four State government agencies. Overall, the comments were generally supportive of the policy revision concepts outlined in the ANPR and recognized the value of using risk-informed approaches for decision making. There was widespread support among commenters for continuing the System-wide Improvement Framework (SWIF) policy. Several commenters indicated some concerns about the proposed concepts and how they may impact non-Federal sponsors. Commenters noted that the collaboration and flexibility provided by this framework positively contributed to good decision making, however several said that the current two-year timeframe

under the current SWIF policy was too short. There was a perception among commenters that the Corps would be deemphasizing the role and use of inspections for eligibility determinations and commented that continuing these inspections was important. Other Federal agencies mentioned the need for compliance with all applicable statutes. We have carefully considered all of these comments in developing the proposed rule.

## References

For additional information, see the following references:

- 33 CFR part 203 (68 FR 19359)  
 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 (IRRM) for Levee Safety,” March 5, 2014  
 Levee Owner’s Manual for Non-Federal Flood Control Works, March 2006  
 Memorandum, CECW–HS, 29 November 2011, subject: Policy for Development and Implementation of System-Wide Improvement Frameworks (SWIFs)  
 Memorandum, CECW–HS, 21 March 2014, subject: Interim Policy for Determining Eligibility Status of Flood Risk Management (FRM) Projects for the Rehabilitation Program Pursuant to Public Law (P.L.) 84–99  
 Memorandum, CECW–HS, 30 May, 2017, Subject: Implementation Guidance for Section 3029(a)(2) of the Water Resources Reform and Development Act (WRRDA) of 2014, Emergency Response to Natural Disasters; Repair or Restoration of Coastal Storm Risk Management Projects to Design Level of Protection

## Procedural Requirements

a. *Review under the National Environmental Policy Act.* As required by the National Environmental Policy Act (NEPA), the Department of Army prepares appropriate environmental analysis for its activities affecting the quality of the human environment. We have preliminarily determined that this proposed revision to the regulation, if finalized, would not constitute a major Federal Action significantly affecting the quality of the human environment because the part 203 regulations require that the Corps conduct an action-specific NEPA analysis before undertaking any activities that could potentially affect the quality of the human environment. The draft Environmental Assessment to support this preliminary determination is available at <http://www.regulations.gov> for public comment. The preliminary

determination that an Environmental Impact Statement (EIS) will not be required for the promulgation of these regulations will be reviewed in consideration of the comments received.

b. *Unfunded Mandates Reform Act.* The Unfunded Mandates Reform Act does not apply to this proposed rule because this rule provides policy for emergency assistance at the request of any State, Tribal, local government, or non-Federal sponsor. The Corps has also found, under section 203 of the Act, that small governments will not be significantly and uniquely affected by this rulemaking.

c. *National Technology Transfer and Advancement Act.* This proposed rule does not involve technical standards and as such there is no anticipated requirements under this Act.

d. *Executive Order 12866.* Executive Order 12866 (58 FR 51735, October 4, 1993), 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, Tribal, or local 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.

This rule has been found to be a significant regulatory action, because it raises novel policy issues in how the Corps implements its Natural Disaster Procedures. Accordingly, the rule was submitted to the Office of Management and Budget (OMB) for review.

e. *Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).* This proposed rule does not impose any information collection requirements for which Office of Management and Budget (OMB) approval under the Paperwork Reduction Act is required.

f. *Executive Order 13132: Federalism.* This rule will not have substantial direct effects on the states, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

g. *Regulatory Flexibility Act.* The Regulatory Flexibility Act (RFA), as

amended (5 U.S.C. 601 *et seq.*) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of the proposed rule on small entities, a small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The U.S. Army Corps of Engineers certifies that this proposed revision to the regulation does not have a significant economic impact on a substantial number of small entities. The proposed modifications to the regulation, and the regulation as a whole, do not place any regulatory burdens on small entities or have a significant economic impact on such entities. The regulation merely provides a construct under which the Corps can provide limited forms of emergency assistance and project rehabilitation to State, local, and Tribal governments upon request from the same. Although small entities might benefit from such emergency assistance—just as large entities and private individuals might—the provision of such assistance under the regulation does not place any burden on small entities nor does it entail direct involvement by such entities.

h. *Congressional Review Act (5 U.S.C. 801 et seq.).* Pursuant to the Congressional Review Act, this proposed rule has not been designated a major rule, as defined by 5 U.S.C. 804(2). This proposed rule is not a “major rule” as defined by 5 U.S.C. 804(2), because it is not likely to result in: (1) An annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-

based enterprises in domestic and export markets.

*i. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments.* Under Executive Order 13175, the Federal government may not issue a regulation that has substantial, direct effects on one or more Tribal Nation, on the relationship between the Federal government and Tribal Nation, or on the distribution of powers and responsibilities between the Federal government and Tribal Nations, and imposes substantial direct compliance costs on those communities, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance cost incurred by the Tribal Nation governments, or we consult with those governments. If complying by consulting, Executive Order 13175 requires us to provide the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of prior consultation with representatives of affected Tribal Nation governments, a summary of the nature of Tribal Nation concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13175 requires that agencies develop an effective process permitting elected officials and other representatives of Tribal Nation governments an opportunity to provide timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities. This proposed revision to the regulation, and the regulation as a whole, do not impose significant compliance costs on any Tribal Nation or otherwise have substantial direct effects on the same. The regulation merely provides a construct under which the Corps can provide limited forms of emergency assistance and project rehabilitation to State, Tribal, and local governments upon request from the same. Whether the Corps provides emergency assistance under the regulation is completely at the discretion of State, local and Tribal governments. When requested, and otherwise permissible, the Corps' provision of such services does not affect the distribution of power or responsibilities between the Federal government and Tribal Nations. In the event that Tribal Nations have concerns with the proposed regulation, they may submit them through the normal comment process or to request government-to-government consultation.

#### List of Subjects in 33 CFR Part 203

Disaster assistance, Flood control, Intergovernmental relations, Technical assistance, Water resources.

Approved by:

**Michael L. Connor,**  
*Assistant Secretary of the Army (Civil Works).*

Accordingly, for the reasons set out in the preamble, 33 CFR part 203 is proposed to be revised as follows:

#### **PART 203—NATURAL DISASTER PROCEDURES: PREPAREDNESS, RESPONSE, AND RECOVERY ACTIVITIES OF THE CORPS OF ENGINEERS**

Sec.

##### **Subpart A—Introduction**

- 203.11 General.
- 203.12 Definitions.
- 203.13 Federally-recognized Tribal Nations and the Alaska Native corporations.
- 203.14 Exceptions to policy.

##### **Subpart B—Emergency Preparedness**

- 203.21 Emergency preparedness assistance.
- 203.22 Emergency preparedness responsibilities of non-Federal sponsors.

##### **Subpart C—Emergency Operations**

- 203.31 General.
- 203.32 Flood response procedures.
- 203.33 Post flood response procedures.

##### **Subpart D—Emergency Repair, Rehabilitation, and Restoration Assistance for Flood Risk Management Projects Damaged by Flood**

- 203.41 General.
- 203.42 Initial eligibility assessment of non-Federal flood risk management projects.
- 203.43 Continuing eligibility assessment of Federal and non-Federal flood risk management projects.
- 203.44 Emergency repair, rehabilitation, and restoration of Federal and non-Federal flood risk management projects.
- 203.46 Restrictions.
- 203.47 Modifications to flood risk management projects undergoing emergency repair, rehabilitation, and restoration.
- 203.48 Inspections and risk assessments for flood risk management projects.
- 203.49 Levee guide.
- 203.50 System-wide improvement framework.

##### **Subpart E—Emergency Repair, Rehabilitation, and Restoration Assistance for Federal Coastal Storm Risk Management Projects**

- 203.61 General.
- 203.62 Non-Federal sponsor responsibilities for Federal CSRM projects.
- 203.63 Emergency repair, rehabilitation, and restoration of Federal CSRM projects.
- 203.64 Modifications to Federal CSRM projects undergoing emergency repair, rehabilitation, and restoration.

##### **Subpart F—Nonstructural Alternatives to Emergency Repair, Rehabilitation, and Restoration of Flood Risk Management and Federal Coastal Storm Risk Management Projects**

203.71 General.

##### **Subpart G—Emergency Drinking Water Assistance: Contaminated Water Source**

- 203.81 Authority and policy.
- 203.82 Eligibility criteria and procedures.

##### **Subpart H—Drought Assistance**

- 203.91 Authority and policy.
- 203.92 Eligibility criteria and procedures.

##### **Subpart I—Advance Measures**

- 203.101 General.
- 203.102 Eligibility criteria and procedures.

##### **Subpart J—Local Interests/Cooperation Agreements**

- 203.111 General.
- 203.112 Non-Federal sponsor requirements.
- 203.113 Funds and cost sharing.
- 203.114 Project partnership agreements.
- 203.115 Procedures and responsibilities upon completion of emergency repair, rehabilitation, and restoration work.

Authority: 33 U.S.C. 701n.

##### **Subpart A—Introduction**

###### **§ 203.11 General.**

(a) This part prescribes the regulations implementing the authority of the United States Army Corps of Engineers (Corps) to undertake natural disaster preparedness, response, and recovery pursuant to Public Law 84–99, as amended (33 U.S.C. 701n). In implementing this authority, the Corps sets priorities on a risk-informed basis.

(b) 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 risk management projects threatened, damaged, or destroyed by flood, and modifications or nonstructural alternatives thereto; emergency protection of federally authorized coastal storm risk management projects which are threatened, when such protection is warranted to protect against imminent and substantial loss of life and property; repair and restoration of federally authorized coastal storm risk management projects damaged or destroyed by wind, wave, or water of other than ordinary nature or modifications to the structure or project to address major deficiencies; for emergency dredging for restoration of authorized project depths for Federal navigable channels and waterways made necessary by flood, drought,

earthquake, or other natural disasters; and, for a period of 10 days subsequent to the end of a flood event, certain limited activities which are essential for the preservation of life and property, or to protect against significant threats to public health and welfare. The law also authorizes the Chief of Engineers to provide emergency supplies of clean water when a contaminated source threatens the public health and welfare of a locality and authorizes the Secretary of the Army to construct wells and transport water to areas determined to be drought distressed. For the purposes of provision of emergency supplies of clean water due to drought, the Secretary of the Army has delegated the authority vested in the Secretary under Public Law through the Assistant Secretary of the Army for Civil Works to the Chief of Engineers.

(c) *Form of assistance.* The Corps implements the authority provided in Public Law through the provision of direct assistance to responsible State, Tribal, and local interests. Direct assistance to individual homeowners, individual property owners, or individual businesses is not permitted. Except as provided in § 203.71(l)(9) of this part, the Corps does not transfer Federal funds to non-Federal sponsors or other responsible State, Tribal, or local interests for the non-Federal performance of assistance activities described in this part.

(d) *Availability of assistance.* Except as provided in § 203.91(b)(2) of this part, the provision of Public Law 84–99 assistance is predicated upon a finding that similar assistance is not reasonably available to responsible State, Tribal, and local interests from other Federal agencies.

#### § 203.12 Definitions.

The following definitions are applicable throughout this part:

*Coastal storm.* Hurricane and abnormal tide flooding.

*Coastal storm risk management (CSRMM) project.* A project designed, constructed, operated, and maintained to reduce the risk of damage to property and public infrastructure, and the risk of loss of life, from the non-riverine impacts of a coastal storm. These impacts generally result from a combination of wave action, storm surge, wind, and tidal effects during the storm. CSRMM projects include Coastal Storm Damage Reduction (CSDR) projects, Hurricane/Shore Protection Projects (HSPP's), shore protection projects, shore protection structures, periodic nourishment projects, and similar terms. A CSRMM project may include both structural measures (e.g.,

seawalls and jetties) and natural and nature-based features (e.g., dunes and beach berms).

*Emergency repair, rehabilitation, and restoration.* Activities to repair, rehabilitate, rebuild, or replace a project after it has been damaged by a flood or coastal storm. Such activities may include realigning segments of a FRM project in which substantial cross-sectional damage has occurred when the Corps determines that realignment would cost less or be more effective than an in-line repair.

*Federal coastal storm risk management (CSRMM) project.* A CSRMM project operated and maintained by a non-Federal sponsor that was designed and constructed by the Corps or the non-Federal sponsor under Federal erosion control or water resources development authorities. A CSRMM project, or portion of such a project, constructed by a non-Federal sponsor is considered a Federal CSRMM project only if the non-Federal sponsor carried out construction in compliance with applicable authorities for non-Federal construction of water resources development projects, such as section 204 of the Water Resources Development Act of 1986 (33 U.S.C. 2232) or section 221(a)(4) of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b(a)(4)).

*Federal flood risk management (FRM) project.* A flood risk management (FRM) project that was designed and constructed by the Corps or the non-Federal sponsor under Federal flood control or water resources development authorities. A FRM project, or portion of such a project, constructed by a non-Federal sponsor is considered a Federal FRM project only if the non-Federal sponsor carried out construction in compliance with applicable authorities for non-Federal construction of water resources development projects, such as section 204 of the Water Resources Development Act of 1986 (33 U.S.C. 2232) or section 221(a)(4) of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b(a)(4)).

*Flood risk management (FRM) project.* A project designed, constructed, operated, and maintained to reduce the risk of damage to property and public infrastructure, and the risk of loss of life, from flooding.

*Governor.* The chief executive of a State. All references to the “Governor” or “Governor of a State” in this part also refer to the Governors of United States commonwealths, territories, and possessions; and to the Mayor of Washington, DC.

*Tribal Nation (Federally recognized Indian tribe or Tribal organization).* An

Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5130.

*Interim risk reduction measure (IRRMM).* Actions that can be taken to reduce flood risks posed by a flood risk management project while long-term solutions are being pursued.

*Lands, easements, rights-of-way, relocations, and disposal/borrow sites (LERRDs).* For a project or other assistance activity, the required lands, easements, and rights-of-way, including those required for borrow or disposal of dredged or excavated material; facility and utility relocations; and improvements to land necessary to enable the disposal of dredged or excavated material.

*Levee segment.* A discrete physical portion of a levee system that is managed by a single non-Federal sponsor.

*Levee system.* A manmade barrier and ancillary drainage and conveyance facilities, managed by one or more non-Federal sponsors, that together function to reduce the risk that flood waters will inundate the leveed area during flood events.

*Maintenance.* Short-term activities, normally accomplished at least annually, such as vegetation management and control of burrowing animals; and longer-term activities, such as repair, replacement, or rehabilitation of the project and its structural components. All of these activities are necessary for the proper care and efficient operation of an FRM or CSRMM project.

*Non-Federal flood risk management (FRM) project.* A FRM project that is not a Federal FRM project. The term may include a project constructed by the Works Progress Administration; a project constructed by, or under a program administered by, a Federal agency other than the Corps; or a project constructed under Federal emergency disaster authorities, including Public Law 84–99 or the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121, *et seq.*) (hereinafter referred to as the Stafford Act).

*Non-Federal sponsor.* A legally constituted public body with full authority and capability to perform the terms of the applicable agreement with the Corps and to pay damages, if necessary, in the event of its failure to perform. For Federal CSRMM and Federal FRM projects, the applicable agreement is generally the Project Partnership

Agreement required by section 221(a)(1) of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b(a)(1)). For non-Federal FRM projects, the applicable agreement is the Cooperation Agreement for the provision of Public Law 84–99 assistance detailed in subpart J of this part. A non-Federal sponsor may be a State, county, city, town, federally recognized Tribal Nation or Tribal organization, Alaska Native corporation, any political subdivision of a State, or a group of States.

*Nonstructural alternative.* A measure or combination of measures that reduces human exposure or vulnerability to a flood or coastal storm without altering the nature or extent of the flooding. A nonstructural alternative may include efforts to restore or protect natural resources, including streams, rivers, floodplains, wetlands, or coasts, if those efforts will also reduce flood risk.

*Operation.* Activities that are necessary for the safe and efficient functioning of a project to produce the benefits set forth in the project authorization. Operation includes exercising closure structures, providing information about the condition of the project to the public, and risk communication efforts.

*Rehabilitation.* Activities that are necessary to bring a damaged or deteriorated project back to its original condition.

*Repair.* Activities of a routine or non-routine nature that are necessary periodically to maintain a project in a well-kept condition.

*Replacement.* Activities undertaken when the project, or a worn-out feature or component of the project, is replaced.

*Responsible state, tribal, and local interests.* Non-Federal sponsors and State executive agencies, Tribal organizations, and offices of political subdivisions of the State with responsibility for disaster preparedness and emergency management within their respective jurisdictions.

*Tribal official.* The elected or duly appointed official of a Tribal Nation that may request assistance on behalf of the Tribal Nation.

#### **§ 203.13 Federally-recognized Tribal Nations and the Alaska Native corporations.**

Except as provided in § 203.92(a), all requests for Public Law 84–99 assistance on Tribal lands held in trust by the United States, or on lands of the Alaska Natives, may be submitted to the Corps directly by the affected Federally recognized Tribal Nation or Alaska Native corporation, or through the appropriate regional representative of the Bureau of Indian Affairs, or through

the Governor of the State where such lands are located.

#### **§ 203.14 Exceptions to policy.**

Exceptions to any regulation or policy contained in this part may be requested by a non-Federal sponsor or responsible State, Tribal, or local interest. Exceptions must be requested in writing and will be reviewed and approved by the Corps Director, Contingency Operations and Office of Homeland Security.

### **Subpart B—Emergency Preparedness**

#### **§ 203.21 Emergency preparedness assistance.**

Public Law 84–99 authorizes an emergency fund for use in preparedness for emergency response to any natural disaster. The Corps may provide technical assistance to responsible State, Tribal, and local interests upon request to help support their efforts to prepare for a specific identified storm or forecasted high water event that may lead to flooding. Generally, the Corps will provide this technical assistance to support State, Tribal, and local efforts to inspect the condition of their FRM or Federal CSRMs projects within their respective jurisdictions before an approaching flood or coastal storm to identify potential areas of vulnerability, and for related flood fight preparedness and training activities related to the expected flooding. Emergency preparedness activities include coordination, planning, training and conducting exercises with other Federal agencies and responsible State, Tribal, and local interests. These activities are to both lend expertise and to gain a greater understanding of State, Tribal, and local needs and requirements in order to mitigate against natural disasters as well as reduce impacts from future floods or other identified hazards. Technical assistance to support specialized studies or to develop long-term options for managing flood risks is beyond the scope of this emergency preparedness assistance.

#### **§ 203.22 Emergency preparedness responsibilities of non-Federal sponsors.**

Assistance under Public Law 84–99 is intended to supplement the maximum efforts of responsible State, Tribal, and local interests. Assistance will not be provided when responsible State, Tribal, and local interests have made insufficient efforts to prepare for the flood event or other emergency, or when a request for assistance is based entirely on a lack of fiscal resources with which to respond to the flood event or other emergency. State, Tribal, and local

interests' responsibilities include the following:

(a) *Operation and maintenance of FRM and Federal CSRMs projects.* FRM and Federal CSRMs projects must be operated and maintained by non-Federal sponsors.

(b) *Preparedness planning.* Responsible State, Tribal, and local interests must ensure that appropriate and current plans are in place and ready to be implemented in the event of disaster. Considerations for these plans may include emergency operations procedures, updated contact information, identification of known problem areas that may need to be addressed, and public notification procedures.

(c) *Procurement/stockpiling.* Responsible State, Tribal, and local interests must procure and stockpile sandbags, pumps, and other materials or equipment that might be needed during flood or coastal storm events. The Corps will provide assistance when the resources of responsible State, Tribal, and local interests are exhausted. Local interests must request such materials from State assets prior to seeking Corps assistance.

(d) *Training.* Responsible State, Tribal, and local interests must train personnel to operate, maintain, and patrol FRM and Federal CSRMs projects during crisis situations (e.g., floods, storms, ice jam conditions).

(e) *Floodplain management.* Responsible State, Tribal, and local interests must develop and implement floodplain management plans that comply with federal, state, and local policy for management of activities in the floodplain intended to reduce loss of life, injuries, damage to property and other impacts associated with flooding.

(f) *Emergency repair, rehabilitation, and restoration assistance.* To be eligible for emergency repair, rehabilitation, and restoration assistance under Public Law 84–99, non-Federal sponsors of FRM and Federal CSRMs projects must take those actions necessary to maintain eligibility detailed in subparts D and E of this part.

(g) *IRRM.* Non-Federal sponsors are responsible for implementing IRMs.

### **Subpart C—Emergency Operations**

#### **§ 203.31 General.**

(a) Emergency operations assistance under Public Law 84–99 is intended to supplement the efforts of responsible State, Tribal, and local interests. Assistance is limited to temporary activities and measures necessary to meet the immediate threat and to preserve life and property. Assistance

may include Corps assumption of control over the management and coordination of emergency operations; however, legal liability remains with the responsible State, Tribal, or local interests. Emergency operations assistance under Public Law 84–99 consists of direct assistance during the flood response and post flood response phases.

(1) *Flood response.* Flood response assistance may include the provision of technical advice and assistance, performance of flood fighting activities, the procurement and issuance of flood fighting supplies and equipment (e.g., sandbags, lumber, polyethylene sheeting, and pumps), the lending of Federally owned equipment, performance of rescue operations, and installation of temporary emergency measures to strengthen FRM and Federal CSRSM projects where no other federal emergency flood fighting authority exists. Assistance may be provided using emergency contracting procedures.

(2) *Post flood response.* Post flood response assistance may include the provision of technical advice and assistance; cleaning of drainage channels, bridge openings, or structures blocked by debris deposited during a flood event, when the immediate threat of flooding of or damage to public facilities has not abated; removal of debris blockages of critical water supply intakes and sewer outfalls; clearance of the minimum amounts of debris necessary to reopen critical transportation routes or public facilities and services; and other activities intended to reduce the risk of imminent loss of life or significant damage to public property, or to protect against significant threats to public health and welfare. The Corps may use its Public Law 84–99 authority to furnish post flood response assistance for a period not to exceed 10 days from the date of the request of the Governor or Tribal official to the Federal Emergency Management Agency (FEMA) for an emergency or disaster declaration under authority of the Stafford Act.

(3) *Rescue Operations.* The Corps may assist in rescue operations during flood response. Any Corps equipment and personnel used in the operation should be directed by a local official such as a law enforcement officer, or Tribal/State/city/county officials duly appointed to conduct rescue operations.

(b) *Agricultural lands.* Emergency operations assistance may be provided to a FRM project currently enrolled in the Rehabilitation Program detailed in subpart D of this part that primarily reduces the flood risk to agricultural

lands only if the Corps determines that such assistance is justified based on a finding that, in the absence of Corps assistance, the project is likely to sustain significant damage as a result of the flood event, and such damage poses a significant risk to life safety or is likely to result in significant economic losses.

(c) *Non-Federal responsibilities during emergency operations.* (1) During emergency operations, responsible State, Tribal, and local interests must commit their available resources, to include work force, supplies, equipment, and funds, to flood response and post flood response activities.

(2) Non-Federal sponsors must furnish formal written assurances of local cooperation and legal liability for emergency operations assistance related to FRM and Federal CSRSM projects by entering into Cooperation Agreements (CAs), as detailed in subpart J of this part, if such assurances were not provided in an agreement entered into under section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b).

(3) After the risk of flooding from a flood event or coastal storm has abated, the non-Federal sponsor for a FRM or Federal CSRSM project is responsible for removing temporary improvements installed by the Corps at the flood response stage under Public Law 84–99 authority. This includes the removal and disposal of used sandbags.

(4) Removal of ice jams is a non-Federal responsibility. In ice jam situations, the Corps may provide technical advice and assistance with flood fight operations. The Corps will not perform or provide advice on ice jam blasting operations.

(5) Responsible State, Tribal, and local interests must promptly return any equipment loaned to such interests by the Corps immediately after emergency operations conclude. Responsible State, Tribal, and local interests must properly maintain the equipment while it is in their custody, and fund the cost of any repairs determined by the Corps to be necessary upon the equipment's return to Federal custody.

(6) Responsible State, Tribal, and local interests must replace expendable supplies provided by the Corps or reimburse the Corps for the value of such supplies. Unused expendable supplies must be returned to the Corps promptly after emergency operations conclude.

#### § 203.32 Flood response procedures.

(a) *Requesting flood response assistance.* Requests for Corps flood response assistance should be in writing from the responsible State, Tribal, or local official, or his or her authorized

representative, to the responsible Corps district commander. When time does not permit a written request, a verbal request from the responsible State, Tribal, or local official will be accepted.

(b) *Coordination.* The Corps will coordinate all flood response assistance with the Tribal or State Emergency Management Agency or equivalent and will coordinate with other Federal agencies on an emergency basis to ensure there is appropriate consideration of environmental and cultural resources considering the exigency of the circumstances if there has not been coordination in advance of the emergency response.

(c) *Termination of Corps flood response assistance.* Corps flood response assistance will be terminated when the flood waters recede below bank full or storm surge associated with a coastal storm has ended, absent a short-term threat (e.g., a significant storm front expected to arrive within a day or two) likely to cause additional flooding.

(d) *Loan or issue of supplies and equipment and Reimbursement Waiver Criteria for Issued Expendable Supplies.* Corps supplies issued, or equipment loaned, to responsible State, Tribal, and local interests for use in supplementing their flood response operations must be hand receipted to the receiving agency. The responsible Corps district commander may waive the obligation of responsible State, Tribal, and local interests to replace or pay for expendable supplies if a Stafford Act Presidential disaster declaration has been made for the affected locality or the responsible State, Tribal, or local interests have issued over 500,000 sandbags from their own supplies in the applicable calendar year. All unused expendable supplies will be returned to the Corps when the operation is terminated.

#### § 203.33 Post flood response procedures.

(a) *Requesting post flood response assistance.* A written request to the responsible Corps district commander from the Governor or Tribal official, or authorized representative thereof, is required to receive Corps post flood response assistance. The written request will include verification that the Federal Emergency Management Agency (FEMA) has been requested to make an emergency or disaster declaration; a statement that the assistance required is beyond the State's or Tribal Nation's capability; specific damage locations; and the extent of Corps assistance required to supplement State or Tribal Nation efforts.

(b) *Coordination.* The Corps will coordinate all post flood response assistance with the Tribal Nation or State Emergency Management Agency or equivalent and will coordinate with other Federal agencies on an emergency basis to ensure there is appropriate consideration of environmental and cultural resources considering the exigency of the circumstances if there has not been coordination in advance of the emergency response.

(c) *Duration of post flood response assistance.* The Corps may furnish post flood response assistance for a period not to exceed 10 days (the statutory limitation) from the date of the Governor's request to the Federal Emergency Management Agency for an emergency or disaster declaration under authority of the Stafford Act. After a request has triggered the 10-day period, a subsequent request for additional assistance resulting from the same flood or coastal storm event will not extend the 10-day period or trigger a new 10-day period.

#### **Subpart D—Emergency Repair, Rehabilitation, and Restoration Assistance for Flood Risk Management Projects Damaged by Flood**

##### **§ 203.41 General.**

(a) Public Law 84–99 authorizes emergency repair, rehabilitation, and restoration of FRM projects damaged in a flood. The Rehabilitation Program implements this authority.

(b) The Corps will conduct an Initial Eligibility Assessment (IEA) of non-Federal FRM projects, and a Continuing Eligibility Assessment (CEA) of Federal and non-Federal FRM projects, to determine eligibility for emergency repair, rehabilitation, and restoration assistance.

(c) *Initial eligibility criteria.* The following criteria are required for initial eligibility:

(1) *Federal FRM projects.* A completed Federal FRM project, or completed functional portion thereof, is granted initial eligibility for emergency repair, rehabilitation, and restoration assistance upon the provision of the written notice of completion of construction by the responsible Corps district commander to the non-Federal sponsor.

(2) *Non-Federal FRM projects.* The following initial eligibility requirements must be met in order for a non-Federal FRM project to be considered eligible for emergency repair, rehabilitation, and restoration assistance:

(i) Project must have a non-Federal sponsor as defined in § 203.14.

(ii) Project may not provide exclusive benefits to an individual homeowner, property owner, or a business (to include an individual agricultural business or farming operation).

(iii) Non-Federal sponsor must prepare and submit an initial eligibility application provided by the Corps for eligibility consideration.

(iv) Project satisfies the initial eligibility assessment requirements outlined in § 203.42 to verify and document the level of risk reduction provided by the FRM project and the status of maintenance of the project.

(d) *Continuing eligibility criteria.* Non-Federal sponsors of Federal and non-Federal FRM projects must conduct the following flood risk management activities to maintain eligibility for emergency repair, rehabilitation, and restoration assistance:

(1) Documentation that outlines the operation, maintenance, and inspection activities taken by the non-Federal sponsor to effectively operate and maintain the FRM project. The documentation will include the following information:

(i) Identification of the project (or segment of a project). This should include the name of the project; the name of the non-Federal sponsor; a brief description of the project and its components; a brief discussion of the population and infrastructure relying on the project for flood risk reduction; and a map showing the project alignment and area benefitted by the project.

(ii) Documentation of inspections conducted by the non-Federal sponsor since the last inspection of the project by the Corps.

(iii) A schedule and summary of operation and maintenance activities performed since the last inspection of the project by the Corps.

(2) Develop, maintain, and exercise an emergency plan. The non-Federal sponsor of a FRM project must develop and exercise an emergency plan that outlines the planned preparedness activities and coordination actions taken by the non-Federal sponsor to effectively prepare for and manage the project during flood emergencies. If there is an existing emergency preparedness plan for the jurisdiction that covers the project area, the non-Federal sponsor's preparedness plan actions may be incorporated in these jurisdictional plans. In such cases, a separate emergency plan developed by the non-Federal sponsor is not necessary. The emergency plan will include the following information:

(i) Roles and responsibilities of the project personnel as they relate to preparedness, response, and recovery

associated with the project during emergency flood operations.

(ii) Levels of emergency activation and the actions being taken at these various activation levels to ensure operations of the project during flood emergencies.

(iii) Sharing Information.

Communications and notification procedures to ensure that public officials and the public impacted by the projects are aware of FRM project condition and performance for the purpose of evacuation planning and land-use planning.

(iv) Flood activation process to include notification procedures and warnings.

(v) Evacuation notification process, emergency training and exercises.

(vi) Emergency equipment and supplies that are maintained or required during flood emergencies.

(3) Develop and implement public outreach activities to provide information regarding the FRM project's condition and risks to appropriate public officials and stakeholders of the project. The non-Federal sponsor's activities must ensure that public officials and decision-makers are aware of and informed about the condition of the FRM project and the risks associated with the project, project inspection and risk assessment results are available to appropriate public officials and stakeholders, and public outreach activities are included in the Emergency Preparedness Plan prepared by the non-Federal sponsor under paragraph (d)(2) of this section.

(4) Actively participate in project inspections and assessments conducted by the Corps as outlined in § 203.48. Non-Federal sponsors of levee segments and systems must also participate in Corps Levee Safety Program activities including, but not limited to, risk assessments, coordination with FEMA, and risk communication activities.

(5) Project satisfies the continuing eligibility assessment requirements outlined in § 203.43 to determine if the FRM project maintains minimum engineering and maintenance criteria for continued eligibility.

(e) *Modifications.* Public Law 84–99 provides authority to undertake certain modifications to FRM projects undergoing emergency repair, rehabilitation, and restoration. A modification is a work effort that is the addition of new features, elements, components, or items, or the upgrading of existing ones. Subject to certain conditions, the Corps will consider requests from non-Federal sponsors for modifications to address major deficiencies or to increase the design

level of risk reduction or pump station capacity. Policy, procedures, and requirements for modifications are described in more detail in § 203.47.

(f) *System-wide improvement framework (SWIF)*. A SWIF may be developed to facilitate interagency collaboration to address complete levee system deficiencies and encourage the establishment of interagency teams to jointly identify and implement regionally appropriate, science-based solutions and tools to reduce risk associated with levees or levee systems while ensuring compliance with other Federal laws, such as the Endangered Species Act, as appropriate. Non-Federal sponsors will maintain or regain eligibility in the Rehabilitation Program while they are developing and implementing a SWIF. Policy, procedures, and requirements for a SWIF are described in more detail in § 203.50.

**§ 203.42 Initial eligibility assessment of non-Federal flood risk management projects.**

(a) The Corps will conduct an Initial Eligibility Assessment (IEA), including an onsite inspection, to verify project information, determine if a project meets the definition of a non-Federal FRM project and minimum engineering and maintenance criteria to ensure that the project is capable of providing reliable flood risk reduction, and determine the Federal interest in future emergency repair, rehabilitation, and restoration of the project. A non-Federal FRM project that is determined to meet the initial eligibility requirements will be eligible for rehabilitation assistance beginning on the date the responsible Corps district commander notifies the non-Federal sponsor of the project in writing of the determination. To be initially considered for rehabilitation assistance, the non-Federal sponsor for a non-Federal FRM project must submit an initial eligibility application.

(b) *Contents*. The initial eligibility application must include:

(1) Documentation of the level of risk reduction provided by the non-Federal FRM project that is expressed in terms of an exceedance frequency (e.g., a 20% chance of a levee being overtopped in any given year).

(2) The most recent inspection results provided by the non-Federal sponsor.

(3) Documentation of the status of maintenance, to include recent maintenance activities, and identification of deficiencies that compromise the ability of the non-Federal FRM project to provide the designed level of risk reduction.

(c) *Level of detail*. The level of detail required in the initial eligibility application and on-site inspection will be commensurate with the complexity of the non-Federal FRM project, the potential for catastrophic failure of the project to cause significant loss of life, the potential for significant economic losses, and other special circumstances that may apply.

(d) *Assessment results*. Information on the results of an IEA will be furnished in writing to the non-Federal sponsor of the non-Federal FRM project and will be maintained in Corps district offices.

(1) The responsible Corps district commander will inform the non-Federal sponsor in writing of the IEA determination. If the project meets the IEA criteria, the project will be eligible for emergency repair, rehabilitation, and restoration assistance. If the project does not meet the IEA criteria, the project will not be eligible for emergency repair, rehabilitation, and restoration assistance. The Corps will provide a summary of the IEA criteria that resulted in the decision.

(2) If the non-Federal sponsor does not agree with the initial Corps eligibility assessment, the non-Federal sponsor may choose, at its own expense, to provide additional information relative to the eligibility criteria and request a reconsideration of the Corps determination.

**§ 203.43 Continuing eligibility assessment of Federal and non-Federal flood risk management projects.**

(a) Continuing Eligibility Assessments (CEA) for Federal and non-Federal FRM projects are conducted periodically to ensure that projects continue to meet Corps initial eligibility criteria outlined in § 203.42 and the continuing eligibility criteria outlined in this section. A CEA assesses the non-Federal sponsor's implementation of its project operation, maintenance, and inspection activities; emergency planning; and sharing information about FRM project condition and performance. A CEA also seeks to detect changed project conditions that could impact project performance. An acceptable CEA determination is required to retain eligibility for emergency repair, rehabilitation, and restoration assistance.

(b) *Contents*. Continuing eligibility assessment consists of:

(1) Verification that initial eligibility criteria outlined in § 203.42 continue to be met.

(2) A review of the operation, maintenance, and inspection activities. The Corps will verify that the non-Federal sponsor is using a risk-informed

approach to prioritizing operation and maintenance activities and is regularly inspecting the project. The Corps will identify changes in project condition and/or consequences associated with the non-performance of the project.

(3) A review of emergency plan and associated activities. The Corps will verify the emergency plan is regularly updated and exercised.

(4) A review of information sharing/outreach activities accomplished about FRM project condition and performance.

(5) A review of participation in project inspections and assessments conducted by non-Federal sponsor and/or the Corps.

(c) *Assessment Results*. Information on the results of a CEA will be furnished in writing to the non-Federal sponsor of the Federal or non-Federal FRM project and will be maintained in Corps district offices.

(1) The responsible Corps district commander will inform the non-Federal sponsor in writing of the CEA determination. If the project meets the CEA criteria the project will retain eligibility for emergency repair, rehabilitation, and restoration assistance. If the project does not meet the CEA criteria the project will no longer be eligible for emergency repair, rehabilitation, and restoration assistance. The Corps will provide a summary of the CEA criteria that resulted in the decision.

(2) The Corps will inform the non-Federal sponsor of the Corps' determination of the project's ability to reliably provide a level of risk reduction and the maintenance that must be accomplished to provide that level of risk reduction for the non-Federal sponsor's information and use in understanding risk and planning future maintenance activities.

(3) If the results of a Corps eligibility assessment are not acceptable to the non-Federal sponsor, the non-Federal sponsor may choose, at its own expense, to provide additional information relative to the eligibility criteria and request a reconsideration of the Corps determination.

(d) *Regaining eligibility*. A Federal or non-Federal FRM project determined by the Corps to not meet continuing eligibility requirements will remain ineligible for emergency repair, rehabilitation, and restoration assistance until such time as the continuing eligibility criteria are met. Follow-up inspections can be made by the Corps to monitor progress in correcting deficiencies when warranted.

**§ 203.44 Emergency repair, rehabilitation, and restoration of Federal and non-Federal flood risk management projects.**

(a) *Eligibility for emergency repair, rehabilitation, and restoration assistance.* An FRM project is eligible for emergency repair, rehabilitation, and restoration assistance if the project has received a favorable determination on the IEA and subsequent CEAs, the damage was caused by the flood event, the work is economically justified, and the work is not otherwise prohibited by subpart D. The Corps will comply with all applicable environmental compliance requirements prior to any emergency repair, rehabilitation, or restoration of the project.

(b) *Work at non-Federal sponsor expense.* The Rehabilitation Program will cost share the work required to restore the non-Federal FRM project to its pre-flood event condition, as documented in the most recent inspection, as well as any costs necessary to comply with environmental requirements in accordance with cost share provisions in § 203.113. If deficient or deferred project maintenance is outstanding when damage to an FRM project occurs, then the deficient and deferred maintenance will be accomplished by or at the expense of the non-Federal sponsor. At the earliest opportunity prior to commencement of emergency repair, rehabilitation, and restoration work, the responsible Corps district commander will inform the non-Federal sponsor in writing of any work that must be accomplished at non-Federal sponsor expense.

(c) *Nonconforming works.* The Corps will not provide emergency repair, rehabilitation, and restoration assistance for any non-Federal FRM project constructed or modified without the appropriate Federal, State, Tribal, and local permits, or waivers thereof.

(d) *Cooperation agreements.* A Cooperation Agreement is required in accordance with subpart J.

(e) *Economic justification.* Except as provided in § 203.113(c) of this part, the emergency repair, rehabilitation, and restoration effort must be economically justified and the construction cost of the work, excluding the cost of LERRDs, must exceed \$50,000. Construction costs greater than \$50,000 do not preclude the Corps from making a determination that the required work is a maintenance responsibility of the non-Federal sponsor, and not eligible for emergency repair, rehabilitation, and restoration assistance.

**§ 203.46 Restrictions.**

(a) *Eligibility restricted to flood risk management projects.* Structures built primarily for the purposes of channel alignment, navigation, recreation, fish and wildlife enhancement, land reclamation, habitat restoration, drainage, bank protection, or erosion protection, are generally ineligible for Public Law 84–99 emergency repair, rehabilitation, and restoration assistance.

(b) *Non-flood related emergency repair, rehabilitation, and restoration.* The Corps will not generally provide emergency repair, rehabilitation, and restoration assistance under Public Law 84–99 to address damages by occurrences other than floods or coastal storms. However, there may be instances when other natural disasters may impact the structural integrity of a FRM project. In these instances, the provision of assistance will be evaluated on a case-by-case basis.

**§ 203.47 Modifications to flood risk management projects undergoing emergency repair, rehabilitation, and restoration.**

(a) *Modifications to address major deficiencies.* (1) Modifications to address a major deficiency that also would increase the level of risk reduction provided prior to the most recent flood or floods are beyond the scope of this subsection and must be evaluated under paragraph (b) of this section. Where the modification would not increase the level of risk reduction provided prior to the most recent flood or floods, the Corps will consider requests by the non-Federal sponsor for a modification to address major deficiencies as part of the emergency repair, rehabilitation, and restoration of the project under Public Law 84–99 based on one or more of the following criteria:

(i) The modification is expected to significantly decrease the risk of loss of life and property damage.

(ii) The modification is expected to decrease the risk of loss of life, the risk of damage to property and public infrastructure, or the total life-cycle flood response, post flood response, and rehabilitation costs for the project.

(iii) The modification is necessary to preserve the structural integrity or otherwise reduce the risk of failure of the existing project in a flood.

(iv) The modification is the most cost-effective means of complying with substantive environmental requirements such as the Endangered Species Act.

(2) *Allowable features of modifications.* Modifications to address major deficiencies may include:

(i) Incorporating features to make the overall levee system more durable, such as low sills, riprap, hardening features, and similar measures.

(ii) Incorporating landscaping features that promote safety and/or preserve natural protective features.

(iii) Constructing set back levees.

(iv) Constructing relief wells, if deemed an engineering necessity.

(v) Installing cutoff walls and stability or seepage berms to address seepage issues.

(vi) Floodproofing or otherwise reducing the risk of damage to essential project facilities in a flood.

(b) *Modifications to increase the design level of risk reduction or pump station capacity.* The Corps will consider requests by the non-Federal sponsor for modification of a FRM project to increase the design level of risk reduction, or to increase pump station capacity, as part of the emergency repair, rehabilitation, and restoration of that project under Public Law 84–99 if all of the following criteria are satisfied:

(1) The Corps previously provided emergency repair, rehabilitation, and restoration assistance for that FRM project, or the flood response or post flood response assistance that the Corps provided to that area related to that project, at least twice in any 10-year period preceding the requested modification.

(2) The requested modification is expected to significantly decrease the risk of loss of life, the risk of damage to property and public infrastructure, or the total life-cycle flood response, post flood response, and rehabilitation costs for the project.

(3) The Corps has sufficient staffing and resources to accommodate the requested modification without adversely impacting the timeline for the provision of emergency repair, rehabilitation, and restoration assistance for other FRM projects in that Corps district's other areas of responsibility.

(4) The requested modification is unlikely to result in a significant transfer of flood risk to areas outside the area protected by the project, and the non-Federal sponsor agrees to pay all costs associated with mitigating any transfer of flood risk determined to result from the requested modification.

(c) *Requests for modifications.* The non-Federal sponsor for a FRM project must submit a request in writing to the responsible Corps district commander for consideration of modifications to address major deficiencies or to increase the design level of risk reduction or pump station capacity. The modification request must be provided

by the non-Federal sponsor concurrently with a request to determine repair eligibility as outlined in § 203.44 or § 203.45. The request must describe the modification and its purpose. Requests for modifications will require the approval of the Corps Director, Contingency Operations and Office of Homeland Security.

(d) *Cost sharing for modifications.* The non-Federal sponsor for the FRM project must fund all costs associated with a modification that the Corps determines to exceed the cost of emergency repair, rehabilitation, and restoration.

(e) *Economic justification.* Both the emergency repair, rehabilitation, and restoration work and the incremental cost of the modifications must be economically justified.

(f) *Timeline for modifications.* Requested modifications must be carried out within three years once the emergency repair, rehabilitation, and restoration of the project under Public Law 84–99 has begun.

(g) *Limitations of modifications.* The Corps will not consider modifications of a FRM project under Public Law 84–99 to improve the condition of the project beyond its pre-flood condition, or to achieve a purpose that is not related to flood risk management. The Corps also will not consider modifications to a project under Public Law 84–99 that would have the effect of extending the length of a FRM project beyond its current footprint.

#### **§ 203.48 Inspections and risk assessments for flood risk management projects.**

The Corps will continue to conduct inspections and risk assessments of all Federal and non-Federal FRM projects eligible for emergency repair, rehabilitation, and restoration assistance. The primary purpose of the inspections and risk assessments is to assess and communicate the physical condition of the FRM project based on observations; to verify the adequacy of operation and maintenance; and to inform the non-Federal sponsors in the development and execution of their operation, maintenance, and inspection plan, emergency preparedness plan, and public outreach activities. Additionally, inspections are performed to verify that non-Federal sponsors of Federal FRM projects are fulfilling their responsibilities in accordance with Title 33—Navigation and Navigable Waters; Chapter II—Corps of Engineers, Department of the Army (33 CFR part 208) requirements and project partnership/cooperation agreements.

#### **§ 203.49 Levee guide.**

(a) Section 202(f) of the Water Resources Development Act of 1996 (33 U.S.C. 701n(c)) directs the Corps to provide a levee manual (guide) to the non-Federal sponsor of any project determined to be eligible for emergency repair, rehabilitation, and restoration assistance.

(b)(1) *Eligible non-Federal flood risk management projects.* The Corps will provide a levee guide to non-Federal sponsors of non-Federal FRM projects determined to be eligible for emergency repair, rehabilitation, and restoration assistance. The levee guide will include the criteria that must be met to gain and maintain eligibility in the rehabilitation program. Upon written request, the Corps will also provide a levee guide to the non-Federal sponsor of a non-Federal FRM project for which eligibility for assistance has not yet been evaluated to aid the non-Federal sponsor in preparing for an initial eligibility assessment.

(c) *Procedural requirements.* The Corps will provide a levee guide to the non-Federal sponsor of a non-Federal FRM project during scheduled initial and continued eligibility assessments, or upon written request from a non-Federal sponsor to the responsible Corps district commander.

#### **§ 203.50 System-wide improvement framework.**

(a) A system-wide improvement framework (SWIF) is a plan developed by the non-Federal sponsors of a levee system or systems and accepted by the Corps to maintain eligibility for emergency repair, rehabilitation, and restoration assistance while conducting a series of improvements to the levee system (or multiple levee systems within a watershed) to address system-wide deficiencies that are complex or time-consuming to correct.

(b) *SWIF process.* The SWIF process is available to non-Federal sponsors of levee systems facing system-wide deficiencies as a way to facilitate the development of solutions to satisfy multiple requirements that apply to their levee systems while allowing the non-Federal sponsors participating in the SWIF process to remain eligible for emergency repair, rehabilitation, and restoration assistance while addressing the deficiencies. The SWIF can be used to address deficiencies or issues that cannot be addressed through routine corrective actions, including:

(1) A reduction in the level of risk reduction of a FRM project below the minimum basic eligibility criteria due to changed conditions.

(2) Improvements that involve multiple levee systems.

(3) Additional time or coordination is needed to adequately address complex considerations to ensure life safety.

(4) Additional time or coordination is needed to address a complex natural resource issue such as consultation/mitigation actions for resources subject to the Endangered Species Act.

(5) Additional time or coordination is needed to observe and protect the rights of Tribal Nations pursuant to treaty and statute.

#### **Subpart E—Emergency Repair, Rehabilitation, and Restoration Assistance for Federal Coastal Storm Risk Management Projects**

##### **§ 203.61 General.**

(a) The Chief of Engineers is authorized to repair and restore Federal coastal storm risk management (CSR) projects damaged or destroyed by wind, wave, or water action of other than an ordinary nature to either the pre-storm level or to their design profile, whichever provides greater risk reduction, when, in the discretion of the Chief of Engineers, such repair and restoration is required for the adequate functioning of the structure or project for hurricane or shore protection. Further, the Chief of Engineers may include modifications to these projects to address major deficiencies. Finally, the Chief of Engineers may implement nonstructural alternatives to the repair or restoration of the project if requested by the non-Federal sponsor.

(1) Emergency repair, rehabilitation, and restoration assistance for Federal CSR projects generally is limited to the project's design profile, which is the level of restoration that will allow for the adequate functioning of the project. In some circumstances, the pre-storm profile, which is the profile that existed the day prior to the storm, may be greater than the design profile, and restoration to the pre-storm profile may be necessary to ensure adequate functioning of the project based on project-specific conditions, such as much greater than anticipated erosion rates. Accordingly, at the request of the non-Federal sponsor for a Federal CSR project, the responsible Corps district will evaluate restoration to the pre-storm profile as an additional restoration alternative. If the evaluation demonstrates that restoration to the pre-storm profile is not necessary to ensure adequate functioning of the project, restoration to the pre-storm profile may only proceed if the incremental costs above the costs to restore to the design profile are subject to the cost-sharing

that would apply for periodic nourishment. In these cases, a cost allocation between emergency repair, rehabilitation, and restoration assistance and periodic nourishment will be based on the necessary material volumes.

(2) To be considered for emergency repair, rehabilitation, and restoration assistance, a Federal CSRM project must be substantially damaged by wind, wave, or water action of other than an ordinary nature, commonly known as an extraordinary storm. The determination of whether a storm qualifies as extraordinary will be made by the Corps Deputy Commanding General of Civil and Emergency Operations, who may delegate this authority to the Corps Director, Contingency Operations and Office of Homeland Security. Criteria for the extraordinary storm and substantial damage determinations are outlined in § 203.63.

(3) For Federal CSRM projects that include a beach, the Corps will provide emergency repair, rehabilitation, and restoration assistance only to the extent that the non-Federal sponsor has established and maintained adequate conditions of public use and access for the beach. The Corps will undertake emergency repair, rehabilitation, and restoration of a segment or reach of a Federal CSRM project that includes a beach for which the non-Federal sponsor has not established or maintained adequate conditions of public use and access only if the non-Federal sponsor pays all costs allocated by the Corps to emergency repair, rehabilitation, and restoration of the segment or reach.

(4) For Federal CSRM projects located completely or partially within a unit of the Coastal Barrier Resources System, the Corps will provide emergency repair, rehabilitation, and restoration assistance only to the extent that the project, or segment or reach of the project located within the System, qualifies for an exception under section 6 of the Coastal Barrier Resources Act (16 U.S.C. 3505) from the Act's prohibition on federal expenditures within the System (16 U.S.C. 3504). The Corps will undertake emergency repair, rehabilitation, and restoration of a segment or reach of a project located within the System that does not qualify for an exception only if the non-Federal sponsor pays all costs allocated by the Corps to emergency repair, rehabilitation, and restoration of that segment or reach.

**§ 203.62 Non-Federal sponsor responsibilities for Federal CSRM projects.**

The non-Federal sponsor for a Federal CSRM project is responsible for

complying with the Project Partnership Agreement, Project Cooperation Agreement (PCA), Local Cooperation Agreement (LCA), or similar document including any project specific O&M manuals. The non-Federal sponsor must provide to the Corps an accurate beach survey of the project on at least an annual basis, unless this survey requirement is otherwise provided for by other project authority.

**§ 203.63 Emergency repair, rehabilitation, and restoration of Federal CSRM projects.**

(a) *Extraordinary storm.* Emergency repair, rehabilitation, and restoration assistance is only available for Federal CSRM projects after an extraordinary storm event. An extraordinary storm is a storm that, due to duration or severity, causes substantial damage to a Federal CSRM project such that it no longer provides significant risk reduction benefits. Wave or water action of other than an ordinary nature caused by a geological event such as an earthquake, volcano, or tsunami may be determined to be an extraordinary storm. A determination of an extraordinary storm requires a finding both of “duration or severity” and of “significant amount of damage” incurred in accordance with the following criteria:

(1) *Duration or severity.* “Duration or severity” may include but is not limited to the following characteristics of the event: storm surge, total water elevation, significant wave height, significant wave period, local sustained winds, wave direction, wave power or storm duration, which individually or collectively have exceeded the 90% cumulative distribution function value, as determined by analysis of regional historic storm characteristics for the project; or a storm that is larger than or equal to the design storm of the project, if a design storm has been identified; or a storm that is larger than or equal to a comparable standard identified in the project authority or design documents. “Duration or severity” may include repetitive storms within a single hurricane season or over a comparable short period of time where their combined effect meet these characteristics.

(2) *Substantial damage.* Substantial damage may have occurred when one or more of the following criteria are satisfied:

(i) The cost of the construction effort to effect repair of the Federal CSRM project for damages caused by the storm (exclusive of dredge mobilization and demobilization costs) exceeds two million dollars and is greater than 10 percent of the original costs required to construct the initial CSRM project

template (expressed in current-day dollars) of the Federal CSRM project.

(ii) The cost of the construction effort to effect repair of the Federal CSRM project for damages caused by the storm (exclusive of dredge mobilization and demobilization costs) exceeds eight million dollars.

(iii) More than 50 percent of the planned or historically placed sand for nourishment efforts for the Federal CSRM project is lost in a single season because of one or more extraordinary storms, which each meet the criteria for duration or severity.

(iv) Only hard structural features of the project are damaged.

(b) *Project function compromised.* Emergency repair, rehabilitation, and restoration assistance is available for a Federal CSRM project following an extraordinary storm only if the damage sustained by the project significantly compromises the project's ability to provide risk reduction.

(c) Work at non-Federal sponsor expense. The Rehabilitation Program will cost share the work required to restore the CSRM project to its design profile, as documented in the most recent inspection, as well as any costs necessary to comply with environmental requirements in accordance with cost share provisions in § 203.113. If deficient or deferred project maintenance is outstanding when damage to an CSRM project occurs, then the deficient and deferred maintenance will be accomplished by or at the expense of the non-Federal sponsor. At the earliest opportunity prior to commencement of emergency repair, rehabilitation, and restoration work, the responsible Corps district commander will inform the non-Federal sponsor in writing of any work that must be accomplished at non-Federal sponsor expense.

(d) *Economic justification.* The rehabilitation of the Federal CSRM project must be economically justified.

**§ 203.64 Modifications to Federal CSRM projects undergoing emergency repair, rehabilitation, and restoration.**

Public Law 84–99 provides authority to include modifications to Federal CSRM projects as part of the emergency repair, rehabilitation, and restoration under Public Law 84–99. The Corps will consider modifications proposed by the non-Federal sponsor to address a major deficiency of a Federal CSRM project that has been damaged by the effects of wind, wave, or water action of other than ordinary nature is limited to those modifications that address major deficiencies determined necessary to restore the adequate functioning of the

structure. Modifications that expand the area protected by a project, or that alter the design profile in a manner that substantially change the nature or magnitude of the project's benefits are beyond the scope of Public Law 84–99 assistance.

(a) *Principal purposes of modifications.* If economically justified, a Federal CSRM project undergoing emergency repair, rehabilitation, and restoration under Public Law 84–99 may be modified at the request of the non-Federal sponsor. A modification consists of the addition of new features, elements, components, or items, or the upgrading of existing ones, which would improve the structural integrity of the project. The Corps will consider requests for such a modification of a Federal CSRM project to address major deficiencies based on one or more of the following criteria:

(1) The modification is expected to significantly decrease the risk of loss of life and property damage without expanding the area protected or substantially changing the nature or magnitude of the project's benefits (e.g., armoring).

(2) The modification is expected to decrease total Corps life-cycle rehabilitation costs (to include flood fight costs) for the project.

(3) The modification is necessary to preserve the structural integrity of the existing project.

(4) The modification is the most cost-effective means of complying with substantive environmental requirements such as the Endangered Species Act.

(b) *Allowable features of modifications.* Modifications to address major deficiencies may include:

(1) Adjusting the project's sand volume and distribution within the authorized profile features (dunes, storm berm, and beach) to address project performance deficiencies.

(2) Adjusting nourishment sediment size and type or sand sources.

(3) Strengthening or improving hard or hardened features of the project.

(c) *Cost sharing of modifications.* The non-Federal sponsor for the Federal CSRM project must fund all costs associated with a modification that the Corps determines to exceed the cost of emergency repair, rehabilitation, and restoration. Costs assigned to emergency repair, rehabilitation, and restoration will be funded by the Corps. Cost sharing requirements are described in more detail in § 203.113.

(d) *Requests for modifications.* The non-Federal sponsor for a Federal CSRM project must submit a request in writing to the responsible Corps district commander for consideration of

modifications to address major deficiencies. The modification request must be submitted by the non-Federal sponsor concurrently with a request to determine repair eligibility as outlined in § 203.63. The request must include a description of the major deficiencies that the modification is intended to correct. Requests for modifications will require the approval of the Corps Director, Contingency Operations and Office of Homeland Security.

(e) *Limitations of modifications.* The Corps will not consider modifications of a Federal CSRM project under Public Law 84–99 to improve the condition of the project beyond its pre-storm condition, or to achieve a purpose that is not related to coastal storm risk management.

#### **Subpart F—Nonstructural Alternatives to Emergency Repair, Rehabilitation, and Restoration of Flood Risk Management and Federal Coastal Storm Risk Management Projects**

##### **§ 203.71 General.**

(a) Under Public Law 84–99, the Chief of Engineers is authorized, when requested by the non-Federal sponsor, to implement nonstructural alternatives to the emergency repair, rehabilitation, and restoration of FRM projects and Federal CSRM projects damaged by floods or coastal storms.

(1) The option of implementing a nonstructural alternative project (NSAP) in lieu of structural emergency repair, rehabilitation, and restoration is available only to non-Federal sponsors of FRM or Federal CSRM projects eligible for emergency repair, rehabilitation, and restoration assistance in accordance with this part, and only upon the written request of the non-Federal sponsor.

(2) *A sponsor is required for implementation of an NSAP.* The NSAP sponsor must be either a non-Federal sponsor, as defined in § 203.14, or another Federal agency with sufficient authority to jointly fund implementation of the NSAP and assume the responsibilities described in paragraph (d) of this section.

(3) The Corps shall not be responsible for the operation, maintenance, or management of any NSAP implemented under this section.

(4) Implementation of a nonstructural alternative for a Federal FRM project or Federal CSRM project requires an amendment to the project partnership agreement for the project. The Corps Director, Contingency Operations and Office of Homeland Security, will approve such amendments.

(5) The criteria for evaluating a proposed NSAP include:

(i) Reduction of overall risk of loss of life and future flood damages, including to areas that may be upstream or downstream of the project.

(ii) Floodplain restoration.

(iii) Provision or restoration of floodways.

(iv) Habitat restoration, when incidental to the principal purpose of reducing vulnerability to a flood or coastal storm event.

(6) The Corps may, in its sole discretion, reject any request for an NSAP that would:

(i) Increase future Federal costs or economic damages;

(ii) Have a significant adverse impact on the integrity, stability, or level of risk reduction of adjacent or nearby flood risk management projects; or

(iii) Lead to an increased risk of loss of life or property during flood events.

(c) *Corps expenditures.* Exclusive of the costs of investigation, report preparation, engineering and design work, and related costs, Corps expenditures for implementation of an NSAP are limited to the lesser of the Federal share of emergency repair, rehabilitation, and restoration construction costs of the project were the FRM or Federal CSRM project to be structurally rehabilitated in accordance with subparts D or E of this part, or the Federal share of computed benefits which would be derived from such structural rehabilitation. The Corps Director, Contingency Operations and Office of Homeland Security, may approve exceptions to the limitations on Corps expenditures when the following criteria are met:

(1) The costs of the NSAP are economically justified.

(2) The costs of the NSAP are reasonable in comparison to the estimated total life-cycle Corps flood response, post flood response, and rehabilitation costs for the FRM or Federal CSRM project.

(3) Implementation of the NSAP will significantly reduce the risk of life loss and property damage in the area protected by the FRM or Federal CSRM project.

(d) *Responsibilities of the NSAP sponsor.* Responsibilities of the sponsor for the NSAP include:

(1) Operate and maintain the NSAP.

(2) Provide, or arrange for and obtain, all funding required to implement the NSAP in excess of the limitation established in paragraph (c) of this section.

(3) Acquire or provide all LERRDs required to implement the NSAP or, if the Corps elects to perform acquisition

or relocations, accept the transfer of ownership of, or jurisdiction over, any lands or interests in land acquired by the Corps.

(e) *Federal agency acting as NSAP sponsor.* If another Federal agency serves as the NSAP sponsor, an interagency agreement between the Corps and the Federal agency serving as the NSAP sponsor is required, in accordance with paragraph (l) of this section.

(f) *Responsibilities of the non-Federal sponsor for a non-Federal flood risk management project, Federal flood risk management project, and/or Federal Coastal Storm Risk Management project (FRM/CSRM) requesting implementation of a NSAP.*

(1) The non-Federal sponsor for a FRM or CSRM project must request the Corps undertake a NSAP in lieu of emergency repair, rehabilitation, and restoration of the FRM or CSRM project, in accordance with the sponsor's applicable laws, ordinances, rules, and regulations.

(2) If not also the NSAP non-Federal sponsor, the non-Federal sponsor for the FRM or CSRM project must:

(i) Divest itself of responsibility to operate and maintain the FRM or CSRM project involved in the NSAP.

(ii) Provide to the NSAP sponsor such lands or interests in lands as it may have which the Corps determines are necessary to implement the NSAP.

(g) *Allowable Public Law 84-99 expenses for NSAPs.* Some of the allowable expenses relative to implementing a NSAP reflect:

(1) Acquisition of land or interests in land.

(2) Removal of structures, including manufactured homes, for salvage or reuse purposes.

(3) Demolition and removal of structures, including utility connections and related items.

(4) Debris removal and debris reduction.

(5) Removal, protection, and relocation of highways, roads, utilities, cemeteries, and railroads.

(6) Construction to promote, enhance, control, or modify water flows into, out of, through, or around the nonstructural project area.

(7) Nonstructural habitat restoration, to include select planting of native and desirable plant species, native species nesting site enhancements, etc.

(8) Total or partial removal or razing of existing reaches of a levee, to include removal of bank protection features and/or riprap.

(9) Flood proofing or otherwise reducing the risk of flood related damages to essential public facilities within the non-structural project area.

(10) Supervision, administrative, and contract administration costs of other expenses allowed in this paragraph.

(h) *Time limitation.* Corps participation in development and implementation of an NSAP may cease, at the sole discretion of the Corps, three years after the date of approval of emergency repair, rehabilitation, and restoration of the damaged FRM or CSRM project or the date of receipt of the non-Federal sponsor's written request for an NSAP, whichever is earlier, if insufficient progress is being made to develop and implement the NSAP for reasons beyond the control of the Corps. In such circumstances, the Corps may, at its sole discretion, deny the emergency repair, rehabilitation, and restoration assistance that the non-Federal sponsor would have received for the damaged project in the absence of the proposed NSA.

(i) *Participation and involvement of other Federal, State, Tribal, local, and private interests.* Nothing in this section shall be construed to limit the participation of other Federal, State, Tribal, local, and private interests in the development, implementation, or future operation and maintenance of an NSAP under this section, subject to the limitations of such participating interest's authorities and regulations.

(j) *Future assistance.* After transfer of responsibility for all future operation, maintenance, repair, replacement, and rehabilitation of a NSAP to the NSAP non-Federal sponsor or the lead Federal agency, flood-related assistance pursuant to Public Law 84-99 will not be provided for the area for which the FRM or Federal CSRM project was effective in reducing the risk of flood or storm damages, except for rescue operations provided in accordance with § 203.31(a)(3). As an exception, on a case-by-case basis, levees repaired or set back as part of the implementation of an NSAP may be considered for future flood-related assistance by the Corps Director, Contingency Operations and Office of Homeland Security.

(k) *Environmental considerations.* NSAPs are subject to the same environmental requirements, restrictions, and limitations as are structural rehabilitation projects.

(l) *Requirement for cooperation agreement (CA) or Interagency Agreement.* (1) In order to clearly define the obligations of the Corps and of the non-Federal sponsor of a NSAP, a CA with the non-Federal sponsor is required. CA provisions for a NSAP are addressed in paragraphs (l)(2) through (l)(9) of this section. When another Federal agency serves as the NSAP sponsor, an interagency agreement

between the Corps and the Federal agency is required. The provisions of the interagency agreement will be similar to, and consistent with, requirements detailed in paragraphs (l)(2) through (l)(9) of this section, with appropriate modifications based on the other Federal agency's authorized expenditures and programs.

(2) In addition to the responsibilities described in paragraph (d) of this section, the CA will require the non-Federal sponsor of the NSAP or, in the case of a NSAP sponsored by another Federal agency, the non-Federal sponsor of the FRM or CSRM project requesting implementation of the NSAP, to hold and save the United States free from damages due to the project, except for damages due to the fault or negligence of the United States or its contractor.

(3) The CA will provide that the Corps will assume up to 100 percent of the costs of implementing a NSAP, subject to the limitations set forth in paragraph (c) of this section.

(4) The CA may allow the non-Federal sponsor for a NSAP to use funding from other Federal agencies to fulfill its sponsor responsibilities, but only if the Federal agency providing the funding determines in writing that use of the funds for such purposes is specifically authorized by law.

(5) The CA will allow the non-Federal sponsor for a NSAP to elect to assume responsibility for a larger percentage of eligible costs for the NSAP than the maximum provided for in this section.

(6) The CA will include the prohibition of future assistance described in paragraph (j) of this section.

(7) The CA will include acknowledgment of, and a statement of planned adherence to, Executive Order 11988, Floodplain Management, 3 CFR part 117 (1977 Compilation), or as it may be revised in the future, by the NSAP non-Federal sponsor.

(8) The CA will require the non-Federal sponsor for the NSAP to place legal restrictions on lands formerly protected by the FRM or Federal CSRM project that will preclude future use and development of such lands in a fashion incompatible with the purposes of the NSAP.

(9) In the event the Corps does not elect to perform real property acquisition for a NSAP, the CA will provide for reimbursement of the costs incurred by the non-Federal sponsor to acquire lands or interests in land that are required for the NSAP, subject to the limitations set forth in paragraph (c) of this section. The Corps will not reimburse the non-Federal sponsor of a NSAP for the value of lands or interests

in land required for the NSAP that are publicly owned on the effective date of the CA, unless the lands or interests in land were acquired by the non-Federal sponsor for purposes of implementing a NSAP after the date of the flood or coastal storm event that damaged the eligible FRM or Federal CSR project.

### Subpart G—Emergency Drinking Water Assistance: Contaminated Water Source

#### § 203.81 Authority and policy.

(a) *Authority.* The Chief of Engineers is authorized to provide emergency supplies of clean water to any locality confronted with a source of contaminated water causing, or likely to cause, a substantial threat to the public health and welfare of the inhabitants of the locality.

(b) *Policy.* (1) Any locality faced with a threat to public health and welfare from a contaminated source of drinking water is eligible for assistance.

(2) Eligibility for assistance will be based on one or more of the following factors:

(i) Exceedance of the maximum contaminant level for a contaminant, as established by the Environmental Protection Agency pursuant to the Safe Drinking Water Act (see 40 CFR part 141).

(ii) The water supply has been identified as a source of illness by a Federal, State, or Tribal public health official. The specific contaminant does not have to be identified.

(iii) An emergency (*e.g.*, a flood or chemical spill) has occurred that has resulted in one of the following:

(A) One or more contaminants entering the source on a sufficient scale to endanger health.

(B) Inoperability of the equipment necessary to remove known contaminants.

(iv) The presence of a contaminant is indicated based on other information available.

(3) Corps assistance will be scaled to provide the minimum amount of water required to maintain the health and welfare requirements of the affected population. The quantity of water and the means of distribution will be at the discretion of the responsible Corps district commander, who will consider the needs of the individual situation, the needs of the affected community, and the cost-effectiveness of providing water by various methods.

(4) If a locality has multiple sources of water, assistance will be furnished only to the extent that the remaining sources, with reasonable conservation measures, cannot provide adequate supplies of drinking water.

(5) Loss of water supply is not a basis for assistance under this authority.

(6) Water will not be furnished for commercial processes, except as incidental to the use of existing distribution systems. This does not prohibit the furnishing of water for drinking by employees and on-site customers. Water for preparing retail meals and similar personal needs may be provided to the extent it would be furnished to individuals.

(7) The permanent restoration of a safe supply of drinking water is the responsibility of local interests.

(8) State, Tribal, and local governments must make full use of their own resources, including National Guard capabilities.

#### § 203.82 Eligibility criteria and procedures.

(a) *Written request.* The Governor or his/her authorized representative or the responsible Tribal official must submit a written request for assistance to the responsible Corps district commander. Requests must provide the following information:

(1) Describe the State/Tribal/local efforts undertaken. Indicate if all reasonably available resources have been committed.

(2) Identify the specific needs of the locality, and what is being requested from the Corps.

(3) Identify additional commitments to be accomplished by the State or Tribal Nation, to include the entity or agency responsible for development of the permanent resolution.

(4) Identify the non-Federal project sponsor.

(b) *Cooperation agreement.* Corps assistance requires a non-Federal sponsor to enter in a Cooperation Agreement (CA) subject to subpart J of this part. This agreement must cover specified services and responsibilities of each party, and provision of a firm schedule for the non-Federal sponsor to provide normal supplies of water.

(c) *Duration of assistance.* Corps assistance is generally limited to 30 days. Extension of this 30-day period requires execution of an amendment to the CA between the non-Federal sponsor and the Corps.

(d) *Non-Federal sponsor responsibilities.* Non-Federal sponsors are responsible for:

(1) Restoration of the routine supply of clean drinking water, including correcting any situations that cause contamination.

(2) Adhering to the CA.

(3) Implementation of reasonable water conservation measures.

(4) Operating, fueling, and maintaining any leased or loaned equipment.

(5) Removing and returning leased or loaned equipment in a fully maintained condition to the Corps within a reasonable timeframe after the assistance period in the CA has expired.

### Subpart H—Drought Assistance

#### § 203.91 Authority and policy.

(a) *Authority.* The Chief of Engineers, acting for the Secretary of the Army, has the authority under certain conditions to construct wells for farmers, ranchers, and political subdivisions, and to transport water to political subdivisions, within areas determined to be drought-distressed.

(b) *Policy.* (1) Corps assistance to provide emergency water supplies will only be considered when eligible applicants have exhausted reasonable means for securing necessary water supplies, including assistance and support from other Federal agencies.

(2) Before Corps assistance is considered under this authority, the applicability of other Federal assistance authorities must be evaluated. If these programs cannot provide the needed assistance, then maximum coordination should be made with appropriate agencies in implementing Corps assistance.

(c) *Definitions applicable to this subpart.* (1) *Construction.* Initial construction, reconstruction, or repair.

(2) *Drought-distressed area.* An area that the Corps Deputy Commanding General for Civil and Emergency Operations has determined, due to drought conditions, to have an inadequate water supply that is causing, or is likely to cause, a substantial threat to the health and welfare of the inhabitants of the impacted area, including the threat of damage or loss of property.

(3) *Eligible applicant.* Any rancher, farmer, or political subdivision within a designated drought-distressed area that is experiencing an inadequate supply of water due to drought.

(4) *Farmer or rancher.* An individual who realizes at least one-third of his or her gross annual income from agricultural sources and is recognized in the community as a farmer or rancher. A farming partnership, corporation, or similar entity engaged in farming or ranching, which receives its majority income from such activity, is also considered to be a farmer or rancher, and thus an eligible applicant.

(5) *Political subdivision.* A city, town, borough, county, parish, district, association, or other public body created by, or pursuant to, State law, having jurisdiction over the water supply of such public body.

(6) *Reasonable cost.* In connection with the Corps construction of a well, means the lesser of:

(i) The cost of the Corps to construct a well in accordance with these regulations, exclusive of:

(A) The cost of transporting equipment used in the construction of wells.

(B) The cost of investigation and report preparation to determine the suitability to construct a well.

(ii) The cost to a private business of constructing such a well.

(7) *State.* Any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Northern Marianas Islands, American Samoa, and the Trust Territory of the Pacific Islands.

#### § 203.92 Eligibility criteria and procedures.

(a) *Written request.* The Governor or his/her authorized representative must submit a request for assistance in writing to the responsible Corps district commander. Tribal Nations may request assistance through the Governor of the State where affected Tribal lands are located. Requests must provide the following information:

(1) Describe the State, Tribal, and local efforts undertaken. Indicate if all reasonably available resources have been committed.

(2) Identify the specific needs of the locality, and what is being requested from the Corps.

(3) Identify additional commitments to be accomplished by the State or Tribe, to include the entity or agency responsible for development of the permanent resolution.

(4) Identify the non-Federal project sponsor.

(b) *Cooperation agreement.* Corps assistance requires a non-Federal sponsor to enter into a Cooperation Agreement (CA) subject to subpart J of this part. This agreement must cover specified services and responsibilities of each party, and provision of a firm schedule for local interests to provide normal supplies of water.

(c) *Duration of assistance.* Corps assistance is generally limited to 90 days. Extension of this 90-day period requires execution of an amendment to the CA between the non-Federal sponsor and the Corps.

(d) *Non-Federal sponsor responsibilities.* Non-Federal sponsors are responsible for:

(1) Adhering to the CA.

(2) Implementation of reasonable water conservation measures.

(3) Operating, fueling, and maintaining any leased or loaned equipment.

(4) Removing and returning leased or loaned equipment in a fully maintained condition to the Corps within a reasonable timeframe after the situation is resolved.

(e) *Well construction.* Assistance to an eligible applicant for the construction of a well may be provided only on a cost-reimbursable basis. Equipment owned by the United States will be utilized to the maximum extent possible in exercising the authority to drill wells, but only when commercial firms cannot provide comparable service within the time needed to prevent the applicant from suffering significantly increased hardships from the effects of an inadequate water supply. Assistance may be provided when:

(1) It is in response to a written request by a farmer, rancher, or political subdivision for construction of a well under Public Law 84–99.

(2) The applicant is located within an area that has been determined to be drought-distressed.

(3) The determination has been made that:

(i) The applicant, because of the drought, has an inadequate supply of water.

(ii) An adequate supply of water can be made available to the applicant through the construction of a well.

(iii) As a result of the drought, a private business could not construct the well within a reasonable time.

(4) The applicant has secured the necessary funding for well construction from commercial or other sources or has entered into a contract to pay to the United States the reasonable cost of such construction with interest over a period of years, not to exceed 30, as the Assistant Secretary of the Army, Civil Works, deems appropriate.

(5) The applicant has obtained all necessary Federal, State and local permits.

(f) *Transport of water.*

(1) Assistance may be provided when:

(i) It is in response to a written request by a political subdivision for transportation of water; and

(ii) The applicant is located within an area that has been determined to be drought-distressed.

(2) Transportation of water by vehicles, small diameter pipeline, or other means as determined by the Corps will be at 100-percent Federal cost.

(3) Corps assistance will be provided only in connection with water needed for human consumption. Assistance will not be provided for livestock, irrigation for crop production, recreation, commercial, or industrial processing under this authority.

(4) Corps assistance will not include the purchase of water, or the cost of

loading or discharging the water into or from any Government conveyance, to include Government-leased conveyance.

(5) Equipment owned by the United States will be utilized to the maximum extent possible in exercising the authority to transport water, consistent with lowest total Federal cost.

### Subpart I—Advance Measures

#### § 203.101 General.

Advance measures consist of those activities performed prior to flooding or flood fighting activities to protect and mitigate against loss of life and significant damages to urban areas, public facilities, flood and coastal storm risk management systems or critical infrastructure due to an imminent threat of unusual flooding.

(a) *Emergency work.* Emergency work under this authority will be considered when requested by the Governor of a State or a Tribal official confronted with an imminent threat of unusual flooding. Corps assistance will be scaled to complement the maximum efforts of responsible State, Tribal, and local interests. Projects will be designed for the specific threat and temporary in nature.

(b) *Contingency planning.* The Corps will consider providing contingency planning assistance for advance measures when requested by the Governor of a State or Tribal official. Contingency planning assistance consists of technical assistance and contingency planning activities to supplement responsible State, Tribal, and local interests in their efforts to plan for, and protect and mitigate against, loss of life and significant damages.

(c) *Definitions.* (1) *Imminent threat.* A subjective statistical evaluation of how quickly a threat scenario can develop, and how likely that threat is to develop in each geographical location. Implicit in the timing aspect can be considerations of available time (e.g., when the next flood or storm event is likely to occur), season (e.g., a snowpack that will melt in the coming spring runoff), or of known cyclical activities. An imminent threat does not exist when a request for advance measures identifies threats that can be addressed through the water resources development project planning process.

(2) *Unusual flooding.* A subjective determination that considers the potential for a flood or coastal storm event to cause flooding that approaches an area's flood of record or is otherwise catastrophic and that results in significant damage and disruption of the

normal functioning of a community for an extended period of time.

**§ 203.102 Eligibility criteria and procedures.**

(a) *Advance measures assistance.* (1) *Qualifying conditions.* An imminent threat of unusual flooding must exist before the Corps will approve advance measures. The threat may be established by National Weather Service predictions, or by Corps determinations of a threat unusual flooding due to specific adverse and unusual conditions. The threat must be clearly defined to the extent that it is readily apparent that damages will be incurred if preventive action is not taken immediately.

(2) *Written request.* The Governor or Tribal official must submit a request for advance measures assistance in writing to the responsible Corps district commander. All requests must include the following information:

(i) Describe the efforts undertaken by non-Federal sponsors and responsible State, Tribal, and local interests. Verify that all available resources have been committed.

(ii) Identify the specific needs and describe the advance measures assistance requested to address those needs.

(iii) Identify additional commitments to be accomplished by non-Federal sponsors or responsible State, Tribal, and local interests.

(iv) Identify the non-Federal sponsor for the requested advance measures.

(3) *Feasibility.* Advance measures must be temporary in nature, technically feasible, designed to deal effectively and efficiently with the specific threat, and capable of construction in time to prevent anticipated damages. A permanent standard of construction may be considered in certain circumstances in which a specific threat exists in a multi-year scenario such as wildfire burn scars and subsequent denuded landscapes and/or cyclical high lake level events on the Great Lakes.

(4) *Economic justification.* Advance measures must be economically justified.

(5) *Cooperation Agreement.* The requirements of subpart J of this part apply to the CA for advance measures. The non-Federal project sponsor must remove temporary works constructed by the Corps when the operation is over, at no cost to the Corps.

(b) *Contingency planning efforts for potential advance measures activities.* Occasionally weather phenomena occur which produce a much higher than normal probability or threat of flooding

which may be predicted several months in advance of occurrence or significant impact. Impacts on specific locations may be unpredictable, but regional impacts may have a high likelihood of occurrence. In such situations, the Corps may provide technical and contingency planning assistance to responsible State, Tribal, and local interests, commensurate with the predicted weather phenomena, based on written requests for assistance from responsible State, Tribal, and local interests. Specific proposed advance measures resulting from such planning efforts must be addressed as specified in paragraph (a) of this section.

**Subpart J—Local Interests/Cooperation Agreements**

**§ 203.111 General.**

The Corps and the non-Federal sponsor will sign a Cooperation Agreement (CA) whenever assistance (other than short-term technical assistance) is furnished. A CA does not require approval by HQUSACE unless they contain special or unusual conditions.

**§ 203.112 Non-Federal sponsor requirements.**

It is Corps policy that the provision of assistance under Public Law 84–99 will, insofar as feasible, require a non-Federal sponsor to provide, without cost to the United States, all LERRDs necessary for the assistance activities; hold and save the United States free from damages due to the assistance activities, exclusive of damages due to the fault or negligence of the United States or its contractor; and operate and maintain, in a manner satisfactory to the Corps, any works constructed by the Corps after completion. If any permanent works are constructed, then the non-Federal sponsor is required to operate and maintain the works in accordance with requirements determined by the Corps. In determining whether a non-Federal sponsor is capable of fulfilling the non-Federal obligations for a project, the Corps will consider the non-Federal sponsor's performance capability, taking into account any shortcomings in meeting prior commitments with Federal entities, including but not limited to past experiences with the Corps and any instances when the non-Federal sponsor has been listed as excluded or disqualified from receiving Federal assistance.

(a) *Provision of LERRDs.* This item requires the non-Federal sponsor to provide LERRDs by acquiring all privately owned lands, easements, and rights-of-way required for the assistance

activities; authorizing the Corps and its contractors to enter onto all lands, easements, and rights-of-way required for the assistance activities for purposes of carrying out the assistance activities; performing all facility and utility relocations required for the assistance activities; and constructing all improvements to land required to enable the disposal of dredged or excavated material for the assistance activities. The Corps will not generally credit the value of LERRDs provided by the non-Federal sponsor towards any required non-Federal cash contribution for an assistance activity. If more advantageous to the Federal government, the Corps, at the discretion of the responsible district commander, may assume responsibility for the provision of borrow and disposal areas required for an assistance activity. The scope and duration of easements and rights-of-way required for an assistance activity will be determined by the responsible district commander based on a review of the requirements for the assistance activity. Requirements that continue for as long as a non-Federal FRM project, or other public work constructed by the Corps or benefited by an assistance activity, remains operational generally warrant the provision of permanent easements and rights-of-way.

(b) *Hold and save clause.* This obligation serves as legal protection for the United States. Where land required for an assistance activity is under tenancy, both the property owner and the tenant should acknowledge the non-Federal sponsor's signed CA.

(c) *Operate and maintain clause.* This obligation protects the investment of Federal resources by requiring the non-Federal sponsor for an assistance activity to operate and maintain non-Federal FRM projects and other public works constructed by the Corps or benefited by the provision of assistance by the Corps. This obligation extends to all interrelated features of the non-Federal FRM project or other public work benefited by the provision of assistance by the Corps.

(d) *Removal of temporary works.* The non-Federal sponsor is responsible for the removal of all temporary flood risk management structures and similar works constructed or installed by the Corps during the provision of flood response, post flood response, advance measures, or other assistance. This includes the removal of sandbags. The non-Federal sponsor must initiate action to remove the temporary works within 30 days after the flood threat has passed.

(e) *Equipment.* The non-Federal sponsor must operate, fuel, and

maintain any leased or loaned equipment, and return the leased or loaned equipment in a fully maintained condition to the Corps within a reasonable timeframe after the emergency situation is resolved.

(f) *Adequacy of local cooperation.* In determining the adequacy of the pledge of local cooperation, responsible district commander must consider the non-Federal sponsor's performance capability, considering any shortcomings in meeting prior commitments. Non-Federal sponsors should make provisions to establish and provide resources for a "Contingency Fund" to meet future maintenance requirements if apparent inadequacies of protective works indicate maintenance costs will be unusually high. Non-Federal sponsors should make provisions to establish and provide resources for a "Capital Improvement Fund" to meet future costs of capital improvement projects such as replacement of culverts in levees, pump station equipment, etc.

(g) *Eligibility under other federal programs.* The CA must be worded to allow the non-Federal sponsor to accept funding from other Federal programs to meet non-Federal obligations. For example, removal of temporary works will be without cost to the Corps under Public Law 84–99 assistance but may not be at no cost to the United States. Use of another Federal agency's funds is contingent upon that agency providing the Corps a written determination that such usage is specifically authorized by law.

#### **§ 203.113 Funds and cost sharing.**

In addition to the standard non-Federal obligations for an assistance activity that requires execution of a CA, non-Federal contributions to the assistance activity may be in the form of cash or in-kind contributions. The final terms agreed upon will be documented in writing and made a part of the CA before commencement of the assistance activity.

(a) *Provision of in-kind contributions.* The non-Federal sponsor may minimize the amount of any required non-Federal cash contribution for an assistance activity by providing materials or services in-kind. In-kind contributions are generally subject to the requirements in 2 CFR 200.306, Cost sharing or matching. In-kind contributions for assistance activities may be in the form of labor, equipment, supplies, and/or services. Only in-kind contributions identified in a CA and carried out after execution of a CA are eligible to be accepted as part of the non-Federal share of the cost of an assistance

activity. In-kind contributions do not include the provision of LERRDs.

(b) *Cost sharing.* (1) The Corps may assume up to 100 percent of eligible costs for emergency repair, rehabilitation, and restoration of a Federal FRM or Federal CSRSM project and up to 80 percent of eligible costs for emergency repair, rehabilitation, and restoration of a non-Federal FRM project.

(2) The non-Federal sponsor may elect to assume responsibility for a larger percentage of eligible costs for emergency repair, rehabilitation, and restoration of Federal or non-Federal FRM projects or Federal CSRSM projects.

(3) The non-Federal sponsor will fund the cost to implement modifications of a FRM or Federal CSRSM project. The cost to implement the modification is the difference between the cost to repair the project to its pre-flood event condition and the cost to repair the project with the requested modification.

(4) The Corps will normally provide 100 percent of the cost of advance measures. However, for those projects where a permanent construction standard (vice a temporary standard) is used, the non-Federal sponsor will normally be required to provide 35 percent of the total project cost.

(5) All costs for LERRDs and costs to repair, rehabilitate, or replace project components or features that the Corps has determined do not meet Corps guidelines are the responsibility of the non-Federal sponsor and will not be accepted as part of any required non-Federal cost share.

(6) The Corps will determine the dollar value of any in-kind contributions provided by the non-Federal sponsor.

(c) *Payment of Costs in Excess of Benefits for Emergency Repair, Rehabilitation, and Restoration Assistance.* The Corps may carry out emergency repair, rehabilitation, and restoration of a FRM or Federal CSRSM project that is not economically justified if the non-Federal sponsor provide funds or in-kind contributions in an amount sufficient to result in a benefit cost ratio of unity or higher for the emergency repair, rehabilitation, and restoration activities. All of the following criteria must be satisfied:

(1) The non-Federal sponsor is willing to provide the necessary funds or in-kind contributions.

(2) Deferred maintenance, deficient maintenance, or negligent operation did not contribute to the damage.

(3) The proposed rehabilitation effort could benefit another water resources development project constructed by the Corps.

#### **§ 203.114 Project partnership agreements.**

(a) Prior to the provision of assistance for, or at the location of, a Federal FRM or Federal CSRSM project, the Corps will review the existing Project Partnership Agreement (PPA), Project Cooperation Agreement (PCA) or Local Cooperation Agreement (LCA) to determine if the PPA, PCA or LCA sufficiently protects the interests of the United States and the non-Federal sponsor.

(b) If the existing PPA, PCA, or LCA is sufficient, in lieu of executing a CA, the responsible Corps district commander will notify the non-Federal sponsor in writing of the determination. The notification will identify any known cost share requirements and the requirements contained in § 203.112. The notification will also advise the non-Federal sponsor that the terms of the executed PPA, specifically including the hold and save clause and the operation, maintenance, repair, replacement, and rehabilitation obligation, remain in full effect and apply as well to the work that will be undertaken pursuant to Public Law 84–99. Prior to the provision of assistance, the non-Federal sponsor must confirm in writing these responsibilities and acknowledge that it will be providing all required LERRDs.

(c) If the responsible Corps district commander determines that the existing PPA, PCA, or LCA is insufficient to protect the interests of the United States and the non-Federal sponsor, the non-Federal sponsor must execute a CA in accordance with this subpart.

#### **§ 203.115 Procedures and responsibilities upon completion of emergency repair, rehabilitation, and restoration work.**

The non-Federal sponsor is responsible for the future operation, maintenance, repair, replacement, and rehabilitation of all emergency repair, rehabilitation, and restoration work carried out by the Corps under Public Law 84–99.

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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

[EPA–R09–OAR–2022–0837; FRL–10294–01–R9]

### **Air Plan Approval; California; Ventura County Air Pollution Control District**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.