DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET NW
WASHINGTON, D.C. 20314-1000

CECW-PB APR 2 2012

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Section 111 of the FY12 Energy and Water Development Appropriations Act, Contributed Funds

1. Section 111 of the Fiscal Year 2012 Energy and Water Development Appropriations Act (FY 12 E&WDAA) (Public Law 112-74, Division B) amends the contributed funds authority codified in 33 U.S.C. 701h. It expands this authority, which allows the U.S. Army Corps of Engineers to accept voluntarily contributed funds from States and political subdivisions, to include all water resources development project purposes. In addition, it expands the contributed funds authority to cover all phases of a project from study and design for authorized studies through construction and operation and maintenance for authorized projects. Further, it defines "States" as the several States, the District of Columbia, commonwealths, territories, and possessions of the United States, and Federally recognized Indian tribes. Finally, Section 111 requires Committee notification prior to the initiation of negotiations for the acceptance of contributed funds under 33 U.S.C. 701h. A copy of 33 U.S. C. 701h is enclosed.

2. Applicability. The guidance is applicable to all HQUSACE elements, major subordinate commands (MSC), districts, laboratories and field operating activities (FOA) having Civil Works functions. This guidance supersedes the guidance in ER 1165-2-30, Acceptance and Return of Required, Contributed or Advanced Funds, dated 30 October 1998, as it pertains to Contributed Funds and CECW-P Memorandum, Subject: Contributed Funds, dated 2 July 2007.

3. Policies.

a. Contributed Funds are those funds above any statutorily required non-Federal cost share provided voluntarily by a State, or political subdivision thereof, with no credit or repayment authorized for such funds. "States" means the several States, the District of Columbia, the commonwealths, territories, and possessions of the United States, and Federally recognized Tribes.

b. While 33 U.S.C. 560 provides separate contributed funds authority related to authorized navigation projects, 33 U.S.C. 701h is a comprehensive authority covering all project purposes that will be used for all proposals involving contributed funds, except for those proposals traditionally considered pursuant to section 203 of WRDA 1992 (33 U.S.C. 2325) and section 225 of WRDA 1992 (33 U.S.C. 2328). Proposals for the acceptance of contributions pursuant to

sections 203 and 225 of WRDA 1992 for environmental, recreation and natural resource management should continue to follow the guidance and procedures set forth in ER 1130-2-500.

c. The authority in 33 U.S.C. 701h allows for the acceptance and expenditure of contributed funds for the study, design, construction, and operation and maintenance of Federally authorized water resources development studies and projects, including studies and projects in the Continuing Authorities Program (CAP). It does not provide for the acceptance of contributed funds related to environmental infrastructure assistance.

d. 33 U.S.C. 701h provides for the acceptance of contributed funds to be expended "in connection with funds appropriated by the United States."

(1) General Rule: To meet the above requirement, there are two main points at which appropriated funds must have been provided: 1) initiation of the reconnaissance phase of a study with Investigations or Mississippi River &Tributaries (Investigations) (MR&T (I)) funds, and 2) initiation of project construction with Construction or Mississippi River and Tributaries (Construction) (MR&T (C)) funds. Once there has been the initial provision of Investigations or MR&T (I) funds, contributed funds may be accepted throughout the study and design of a project. Once there has been the initial provision of Construction or MR&T (C) funds, contributed funds may be accepted throughout the construction and operation and maintenance of a project.

(2) Special Cases:

(a) For a CAP project, once Federal funds have been provided to initiate the study, contributed funds may be accepted for further study, design, construction, and operation and maintenance of the project.

(b) For water supply storage reallocation studies, the following will apply:

(i) For studies that will be funded with Operation or Maintenance (O&M) or Mississippi River and Tributaries (MR&T (M)) funds only, contributed funds may be accepted even if Federal funds have not been provided for the study.

(ii) For studies initiated using O&M or MR&T (M) funds, after which it is determined that the study will continue on a cost shared basis using Investigations or MR&T (I) funds, Investigations or MR&T (I) funds must have been provided for the cost shared portion of the study before contributed funds may be accepted.

(iii) For studies that will be funded with Investigations or MR&T (I) funds only, Investigations or MR&T (I) funds must have been provided before contributed funds may be accepted.

(iv) Existing planning and budgetary guidance will be followed when determining whether to fund a water supply reallocation study under O&M, MR&T (M), Investigations or the MR&T (I) account.

e. The acceptance of contributed funds does not change the requirement that the study, design, construction, and operation and maintenance must be undertaken in accordance with Federal laws, regulations, and policies.

f. Federal participation in cost shared periodic renourishment of hurricane and storm damage reduction projects is limited to a maximum of 50 years. During this period of Federal participation, contributed funds may be accepted in addition to the non-Federal cost share to undertake periodic renourishment. At the end of the period of Federal participation, the non-Federal sponsor is solely responsible for any additional periodic renourishment as part of its operation and maintenance responsibilities although the Corps may undertake such work on behalf of the non-Federal sponsor if the non-Federal sponsor pays all costs of such work.

g. A Memorandum of Agreement (MOA) will be used for the acceptance of contributed funds in the following scenarios: (1) maintenance dredging for which there is no non-Federal cost share; (2) a water supply reallocation study for which there is no non-Federal cost share; (3) a cycle of cost shared periodic nourishment; and (4) any other proposal involving contributed funds where no non-Federal cost share is required. Except for a cycle of cost shared periodic renourishment for which an MOA will be used, when the proposal involves contributed funds that are in addition to a required non-Federal cost share, language regarding the contributed funds will be included in the cost sharing agreement for the work or in an amendment to such agreement if there is already an executed cost sharing agreement for the work. Model agreements covering different scenarios involving the acceptance of contributed funds are being developed and will be posted on the PPA web page as they are finalized.

4. Procedures for Implementation.

a. In response to an inquiry from a potential contributor, a district may explain generally the policies and procedures for the acceptance of contributed funds and may provide a copy of a draft contributed funds agreement. However, the district may not initiate negotiations for the acceptance of contributed funds, because Section 111 of the FY 12 E&WDAA requires notification of the House and Senate Appropriations Committees, Subcommittees on Energy and Water Development (Committees) prior to the initiation of negotiations for the acceptance of contributed funds. Committee notification is provided by the ASA(CW) following clearance of the draft letters by the Office of Management and Budget in accordance with current CECW-I procedures for Committee notification. To initiate the Committee notification process, the

district must submit the following information through the MSC to the applicable HQUSACE Regional Integration Team (RIT):

(1) Draft Committee notification letters following the language and format in the sample letters for contributed funds posted on the PPA web page.

(2) A written letter from the contributor that specifies the amount it is offering; its understanding that the agreement will recognize that no repayment or credit for contributed funds is authorized; and its understanding that the agreement will provide that acceptance of such funds will not constitute or imply any commitment to budget or appropriate funds for the project in the future.

(3) The district's information paper which includes the project authorization history, the status of project implementation, including agreements and responsibilities for implementation, the proposed work relative to the authorized project as well as describes the contributor; the work to be performed with the contributed funds; the estimated cost of such work; the rationale on why accomplishment of such work is advantageous in the public interest; a discussion of any impact on other work in the district for which funds have been appropriated by Congress; and identify whether a model contributed funds agreement is applicable, and if so, which model.

(4) After receipt of the above information, the RIT will provide the information and draft Committee notification letters to CECW-IF for transmittal to ASA(CW) for review, coordination with OMB and Committee notification.

b. Following completion of Committee notification and acknowledgment, CECW-IF will notify the RIT. The RIT will then notify the MSC and district on whether or not the District can move forward with negotiations for acceptance of contributed funds.

c. Upon completion of such negotiations, if a model agreement will be used, the district will submit the request and draft agreement to the MSC Commander for approval. Any questions on whether the proposal and agreement is consistent with law or policy need to be raised to the RIT. The materials provided with a request for approval must include:

(1) The draft model agreement that will be used.

(2) Certificate of Legal Review signed by District Counsel specifying whether the use of the model agreement is appropriate and legally sufficient based on the facts of the particular contributed funds proposal; and

(3) Documentation that all necessary environmental coordination and documentation has been completed - see Section VIII.d. of the PPA Checklist for a list of necessary environmental coordination requirements.

d. Where there is no model agreement applicable to the particular contributed funds proposal, the district will submit the request and draft agreement through the MSC to the RIT for approval by the Director of Civil Works. The materials provided with the request must include:

(1) The draft agreement with a detailed explanation of deviations and the rationale for including them;

(2) Certificate of Legal Review signed by District Counsel specifying whether the agreement is appropriate and legally sufficient based on the facts of the particular contributed funds proposal; and

(3) Documentation that all necessary environmental coordination and documentation has been completed - see Section VIII.d. of the PPA Checklist for a list of necessary environmental coordination requirements.

5. After completing work undertaken with contributed funds, resolving any claims or appeals, and completing a final accounting, a district is authorized to refund any contributed funds not obligated.

6. Requests for the dredging of non-Federal berthing areas, channels, and slips do not involve the acceptance of contributed funds as that term is used in this memorandum. In addition, they are not subject to the requirement for Committee notification associated with the acceptance of contributed funds. Rather, these situations involve work that, while not part of the cost-shared Federal project, may be undertaken on behalf of the sponsor by the Corps during construction or maintenance of a Federal project if the non-Federal sponsor pays all the cost of such work. This type of work is referred to as "additional work" in project partnership agreements since 2004 and may be undertaken in accordance with the provisions regarding additional work in PPAs. A modification of an executed PPA to add provisions on additional work is considered a non-substantive deviation. As stated in the implementation memo for the Navigation Model, approval of amendments for non-substantive deviations is delegated to the MSC Commander and may not be further delegated.

7. This guidance will be incorporated into ER 1165-2-30 when it is updated.

FOR THE COMMANDER:

STEVEN L. STOCKTON, P.E.
Director of Civil Works

Encl

DISTRIBUTION (see pages 7 and 8)

33 U.S.C. § 701h, with section 111 of the FY 12 E&WDAA revisions

The Secretary of War [Secretary of the Army] is authorized to receive from States and political subdivisions thereof, such funds as may be contributed by them for work, which includes planning and design, to be expended in connection with funds appropriated by the United States for any authorized water resources development study or project whenever such work and expenditure may be considered by the Secretary of War [Secretary of the Army], on recommendation of the Chief of Engineers, as advantageous in the public interest, and the plans for any reservoir project may, in the discretion of the Secretary of War [Secretary of the Army], on recommendation of the Chief of Engineers, be modified to provide additional storage capacity for domestic water supply or other conservation storage, on condition that the cost of such increased storage capacity is contributed by local agencies and that the local agencies agree to utilize such additional storage capacity in a manner consistent with Federal uses and purposes: *Provided,* That when contributions made by States and political subdivisions thereof, are in excess of the actual cost of the work contemplated and properly chargeable to such contributions, such excess contributions may, with the approval of the Secretary of War [Secretary of the Army], be returned to the proper representatives of the contributing interests: *Provided further, That the term "States" means the several States, the District of Columbia, the commonwealths, territories, and possessions of the United States, and Federally recognized tribes.*[1]

[1] Section 111 of the FY 12 E&WDAA also requires that "The Secretary shall notify the appropriate committees of Congress prior to initiation of negotiations for accepting contributed funds under 33 U.S.C. 701h.

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