DEPARTMENT OF THE ARMY
U. S. Army Corps of Engineers
Washington, DC 20314-1000

CECW-PB

Regulation
No. 1165-2-208

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Water Resources Policies and Authorities
IN-KIND CONTRIBUTION CREDIT PROVISIONS
OF SECTION 221 OF THE FLOOD CONTROL ACT OF 1970, AS AMENDED

1. Purpose. This regulation provides guidance on the implementation of the in-kind contribution credit provisions of Section 221 of the Flood Control Act of 1970, as amended by Section 2003 of the Water Resources Development Act (WRDA) of 2007 (42 U.S.C. 1962d-5b) (hereinafter referred to as "Section 221"). The revised language of Section 221 is provided in Appendix A.

2. Distribution Statement. Approved for public release. Distribution is unlimited.

3. Applicability. This regulation applies to all HQUSACE elements, Major Subordinate Commands (MSCs), and district commands having Civil Works responsibility and is effective immediately.

a. The Section 221 crediting provisions apply to the study, design, and construction of Federally authorized water resources development projects authorized after November 16, 1986, including projects initiated after November 16, 1986 without specific authorization in law, except where a project or program specific provision of law otherwise provides for in-kind contribution credit.[1] For those projects with executed project partnership agreements (PPAs) on November 8, 2007, such PPAs may be amended to incorporate the Section 221 crediting provisions only if construction of the project had not been initiated as of that date.[2] Furthermore, the crediting provisions of Section 221 will be used in lieu of Section 104 of WRDA 1986 and Section 215 of the Flood Control Act of 1968. Additionally, Section 221 does not apply to environmental infrastructure assistance programs, as those programs do not involve the construction of Federally authorized water resources development projects and are governed by the specific crediting provisions associated with each program.

b. Section 221 will not be used to expand a program or project specific authority that specifically states in law the timing of performance of the in-kind contributions (e.g., work performed prior to the date of the partnership agreement); the form of in-kind contributions (e.g., costs of design work or costs of design and construction work); or the maximum amount of credit that can be afforded (e.g., not to exceed a specified dollar amount or up to a specified percentage of the non-Federal sponsor's share).

[1] Examples on the application of Section 221 can be viewed at www.Corpsplanning.us
[2] Construction is deemed to be initiated on the date of award of the first construction contract or the date the Government incurs the first financial obligations for construction using the Government's own forces, whichever occurs first.

4. Key Principles.

a. In General. Section 221 is a comprehensive authority applicable to Federally authorized water resources development studies and projects that addresses the affording of credit for the value of in-kind contributions provided by a non-Federal sponsor toward its required cash contribution (excluding the required 5 percent cash for structural flood damage reduction projects and the additional 10 percent cash payment required over 30 years for navigation projects) if those in-kind contributions are determined to be integral to the study or project.

b. Types of In-kind Contributions. The types of eligible in-kind contributions for which credit may be afforded include planning activities (including data collection and other services needed for the feasibility study); design related to construction; and construction (including data collection; management; mitigation; and materials, supplies or services related to construction).

c. In-kind Memorandum of Understanding (MOU).

(1) Section 221 provides that any work proposed to be provided as in-kind contributions by a non-Federal sponsor that has not been carried out by November 8, 2007 is eligible for credit only if the work is carried out after execution of an agreement with the Secretary. This requirement applies to any non-Federal work initiated after November 8, 2007 where a non-Federal sponsor awards a contract obligating non-Federal funds or the non-Federal sponsor commences work using its own labor force after November 8, 2007. Where there is an executed feasibility cost sharing agreement (FCSA), design agreement, or project partnership agreement, the non-Federal sponsor may provide in-kind contributions in accordance with the terms of the applicable agreement. In those cases where a non-Federal sponsor proposes to undertake planning work prior to execution of a FCSA or construction work, including the design associated with that work, prior to execution of a PPA, an in-kind MOU must be executed prior to the non-Federal sponsor carrying out such work.

(a) In the case of projects that are or will be specifically authorized, an in-kind MOU for planning may be executed after the MSC Commander certifies the Section 905(b) report and an in-kind MOU for construction may be executed after release of the draft feasibility report for public review.

(b) In the case of projects to be implemented under the Continuing Authority Program or a regional authority that does not require additional authorization to implement a project, an in-kind MOU for planning may be executed after the MSC Commander approves the initiation of the feasibility study and an in-kind MOU for design and implementation may be executed after the MSC Commander approves the decision document for the project.

(2) Any work undertaken by a non-Federal sponsor pursuant to an in-kind MOU is at its own risk and responsibility. Execution of an MOU provides no assurance that the Corps will complete the study or recommend a project for construction. It also provides no assurance that the sponsor's work will be determined to be integral to the Federal study or project, should one be recommended, or that any construction undertaken by the non-Federal sponsor will be included as part of any ultimately

recommended Federal project. Execution of an in-kind MOU in no way obligates the Corps to enter into any future agreement for the project.

(3) MSC Commanders may approve the execution of Model in-kind MOUs by District Engineers, provided that the MOUs do not include any deviations. Any proposed deviations must be submitted to HQUSACE for approval prior to execution. Models for the in-kind MOU for planning work and for construction, including design work, are available at www.Corpsplanning.us.

d. Integral Determinations.

(1) Section 221 provides that credit may be afforded only if the Secretary determines that a material or service provided as an in-kind contribution by a non-Federal sponsor is integral to the study or project. [3] To be integral to the study or project, the material or service must be part of the work that the Federal Government would otherwise have undertaken for the study or for construction of what is ultimately determined to be the Federal project. See Appendix C for additional guidance on criteria and procedures for processing integral determinations.

(2) The approval of integral determinations is delegated in certain circumstances.

(a) In the case of projects that are or will be specifically authorized, an integral determination that would afford credit towards an FCSA or DA may be approved by the MSC Commander. An integral determination that would afford credit towards a PPA must be approved by the ASA(CW).

(b) In the case of projects to be implemented under the Continuing Authority Program or a regional authority that does not require additional authorization to implement a project, an integral determination may be approved by the MSC Commander.

(c) The approval authority delegated above to the MSC Commander is subject to the full compliance of each integral determination to policy and may not be further delegated within the MSC or to the District Commander.

e. Lands, Easements, Relocations, Rights-of-Way, and Areas for Disposal of Dredged Material (LERRDs). Section 221 does not alter any other requirement for the non-Federal sponsor to provide and pay for LERRDs for a project. Any LERRDs associated with in-kind contributions determined to be integral to the project will be credited to the project as LERRDs. In the case of a navigation project, the LERRs will be creditable toward the requirement for the non-Federal sponsor to pay an additional 10 percent of the cost of the general navigation features.

[3] While considered in-kind contributions for which credit may be afforded toward the non-Federal sponsor's required cash contribution, eligible non-Federal costs of participation in Coordination Teams, performance of non-Federal audits, and performance of investigations for hazardous substances do not require an Integral Determination.

f. Determining the Amount of Credit.

(1) The amount of credit that may be afforded may not exceed the amount of actual costs incurred by the non-Federal sponsor for the in-kind contribution or the value of the in-kind contributions, whichever is less. The amount of credit for eligible in-kind contributions will be determined in accordance with the terms and conditions contained in the specific agreement for the study, design, or construction of a project. For examples of terms and conditions in determining the amount of credit for in-kind contributions, see Appendix B.

(2) In general, the amount of credit for in-kind contributions that can be afforded under a FCSA or a PPA is limited to the amount of the non-Federal sponsor's required cash contribution under that agreement.[4] As the costs of design under a Design Agreement (DA) are included in total project costs under a PPA, credit for in-kind contributions under a DA is carried over to the PPA, and the maximum of amount of credit for in-kind contributions under a PPA is limited to the non-Federal sponsor's required cash contribution under the PPA. In the case of a PPA, the required cash contribution is determined by subtracting from the non-Federal sponsor's required share of the project: (i) credit for the value of LERRDs and, (ii) in the case of structural flood damage reduction, the required 5 percent cash contribution. In addition, credit for in-kind contributions may not be afforded toward the requirement of the non-Federal sponsor to pay an additional 10 percent of the cost of the general navigation features in cash over a period not to exceed 30 years for a navigation project.

(3) Credit for in-kind contributions for planning is limited to credit that can be afforded under a specific FCSA. In other words, excess credit may not be carried over to design or construction of the project.

(4) Credit for construction of a project, or separable element thereof, is limited to credit toward all features of the project covered by a specific PPA. In other words, excess credit may not be transferred to features of the project not covered by the agreement or to other projects. If an agreement is amended to include additional features or work that requires a separate new start decision, credit may not be transferred to, or from, the features or additional work included by that amendment.

(5) If the value of eligible in-kind contributions exceeds the amount of credit that can be afforded pursuant to the provisions of a PPA (i.e., exceeds the required cash contribution for all features covered by that PPA), only the amount of credit afforded should be included in total project costs. Recalculation of total project costs will be required to exclude from total project costs the value of in-kind contributions that exceed the amount of credit that can be afforded. In addition, the amount excluded will not be considered part of total costs for the purposes of Section 902 of WRDA 1986 calculations.

(6) No reimbursements are authorized for in-kind contributions under Section 221.

[4] In the case of a Locally Preferred Plan (LPP) approved for implementation as the Federally authorized project, credit for in-kind contributions may be afforded toward the non-Federal share of the LPP which normally includes the requirement for the non-Federal sponsor to bear all of the incremental costs of the LPP.

5. Feasibility Studies.

a. Section 105(a) of WRDA 1986, as amended, allows a non-Federal sponsor to provide its cost share for a feasibility study through in-kind contributions. Section 221 expands this authority to allow the non-Federal sponsor to undertake planning work to be provided as in-kind contributions prior to execution of a FCSA, subject to execution of an MOU. The milestone that must be met for execution of an in-kind MOU for planning work is the MSC Commander's Certification of the Section 905(b) report or in the case of a CAP or Regional Authority study, the MSC Commander's concurrence to proceed into a feasibility study. Any credit for planning work by the non-Federal sponsor is limited to its 50 percent of planning costs, and such work must be accomplished in accordance with ER 1105-2-100 and other applicable planning regulations, including applicable peer review guidance.

b. The existing FCSA models include language regarding the affording of credit for in-kind contributions after execution of the FCSA. The models will be modified to address planning work undertaken pursuant to an in-kind MOU. In the interim, contact CECW-P for the appropriate FCSA deviation text and processing.

6. Design.

a. A non-Federal sponsor may provide all or a portion of the design activities required for a project or separable element of a project as in-kind contributions following execution of a DA with the Government that clearly delineates the design activities to be provided by the non-Federal sponsor. Any design provided by the sponsor shall be performed in accordance with the requirements in ER 1110-2-1150, reviewed in accordance with ER 1110-1-12, and subject to the applicable peer review guidance. In accordance with section 105(c) of WRDA 1986, the costs of design shall be shared in the same percentages as the purposes of such project.

(1) If the value of eligible in-kind contributions is less than the non-Federal sponsor's share of design costs, the non-Federal sponsor must contribute sufficient funds to equal its share of total design costs.

(2) If the value of eligible in-kind contributions is greater than the non-Federal sponsor's share of total design costs, then no contribution of funds under the DA from the non-Federal sponsor is required. The value of all of the non-Federal sponsor's eligible in-kind contributions (including those in excess of its share of total design costs) will be included in total project costs in the PPA. The maximum amount of credit that may be afforded pursuant to the PPA is limited to the non-Federal sponsor's required contribution of funds under that agreement.

7. Construction.

a. Credit for in-kind contributions will be afforded only toward the non-Federal sponsor's required cash contribution for a project or separable element of a project. To be eligible for credit, in-kind contributions prior to execution of the PPA must have been provided or performed after execution of an in-kind MOU. The provisions of the PPA will be used to determine the required cash contribution

for such project or separable element. Credit for in-kind contributions will not be afforded toward the non-Federal sponsor's requirement to provide in cash 5 percent of the costs for structural flood damage reduction projects (either specifically authorized or implemented pursuant to Continuing Authority Program Sections 14, 205, or 208 projects); the non-Federal sponsor's requirement to pay for betterments or any other work performed by the Government on behalf of the non-Federal sponsor; the non-Federal sponsor's requirement to provide lands, easements, rights-of-way, relocations, or improvements to enable the disposal of dredged or excavated material required for the project or separable element of the project; or the non-Federal sponsor's additional payment of 10 percent of the cost of general navigation features for a navigation project.

b. For those authorities that specify a limit on the amount of credit that can be afforded (e.g., not to exceed a specified dollar amount or up to a specified percentage of the non-Federal sponsor's share), the maximum amount of credit that may be afforded is the amount of the non-Federal sponsor's required contribution of funds, the value of the in-kind contributions, or the stated amount or percentage, whichever is less.

c. For CAP authorities and regional authorities that are implemented with a single agreement covering design and implementation, if a non-Federal sponsor proposes to provide or perform all or a portion of the design for a project as in-kind contributions, a PPA addressing both design and construction is required.

FOR THE COMMANDER:

DIONYSIOS ANNINOS
Colonel, Corps of Engineers
Chief of Staff

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APPENDIX A

Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b)

SEC. 221. WRITTEN AGREEMENT REQUIREMENT FOR WATER RESOURCES PROJECTS.

(a) COOPERATION OF NON-FEDERAL INTEREST.

(1) IN GENERAL. - After December 31, 1970, the construction of any water resources project, or an acceptable separable element thereof, by the Secretary of the Army, acting through the Chief of Engineers, or by a non-Federal interest where such interest will be reimbursed for such construction under any provision of law, shall not be commenced until each non-Federal interest has entered into a written partnership agreement with the Secretary (or, where appropriate, the district engineer for the district in which the project will be carried out) under which each party agrees to carry out its responsibilities and requirements for implementation or construction of the project or the appropriate element of the project, as the case may be; except that no such agreement shall be required if the Secretary determines that the administrative costs associated with negotiating, executing, or administering the agreement would exceed the amount of the contribution required from the non-Federal interest and are less than $25,000.

(2) LIQUIDATED DAMAGES. - A partnership agreement described in paragraph (1) may include a provision for liquidated damages in the event of a failure of one or more parties to perform.

(3) OBLIGATION OF FUTURE APPROPRIATIONS. - In any partnership agreement described in paragraph (1) and entered into by a State, or a body politic of the State which derives its powers from the State constitution, or a governmental entity created by the State legislature, the agreement may reflect that it does not obligate future appropriations for such performance and payment when obligating future appropriations would be inconsistent with constitutional or statutory limitations of the State or a political subdivision of the State.

(4) CREDIT FOR IN-KIND CONTRIBUTIONS. -

(A) IN GENERAL. - A partnership agreement described in paragraph (1) may provide with respect to a project that the Secretary shall credit toward the non-Federal share of the cost of the project, including a project implemented without specific authorization in law, the value of in-kind contributions made by the non-Federal interest, including –

(i) the costs of planning (including data collection), design, management, mitigation, construction, and construction services that are provided by the non-Federal interest for implementation of the project;

(ii) the value of materials or services provided before execution of the partnership agreement, including efforts on constructed elements incorporated into the project; and
(iii) the value of materials and services provided after execution of the partnership agreement.

(B) CONDITION. - The Secretary may credit an in-kind contribution under subparagraph (A) only if the Secretary determines that the material or service provided as an in-kind contribution is integral to the project.

(C) WORK PERFORMED BEFORE PARTNERSHIP AGREEMENT. - In any case in which the non-Federal interest is to receive credit under subparagraph (A)(ii) for the cost of work carried out by the non-Federal interest and such work has not been carried out as of the date of enactment of this subparagraph [enacted Nov. 8, 2007], the Secretary and the non-Federal interest shall enter into an agreement under which the non-Federal interest shall carry out such work, and only work carried out following the execution of the agreement shall be eligible for credit.

(D) LIMITATIONS.—Credit authorized under this paragraph for a project –
(i) shall not exceed the non-Federal share of the cost of the project;
(ii) shall not alter any other requirement that a non-Federal interest provide lands, easements, relocations, rights-of-way, or areas for disposal of dredged material for the project;
(iii) shall not alter any requirement that a non-Federal interest pay a portion of the costs of construction of the project under sections 101 and 103 of the Water Resources Development Act of 1986 (33 U.S.C. 2211; 33 U.S.C. 2213); and
(iv) shall not exceed the actual and reasonable costs of the materials, services, or other things provided by the non-Federal interest, as determined by the Secretary.

(E) APPLICABILITY. -
(i) IN GENERAL. - This paragraph shall apply to water resources projects authorized after November 16, 1986, including projects initiated after November 16, 1986, without specific authorization in law.[5]
(ii) LIMITATION. - In any case in which a specific provision of law provides for a non-Federal interest to receive credit toward the non-Federal share of the cost of a study for, or construction or operation and maintenance of, a water resources project, the specific provision of law shall apply instead of this paragraph.

(b) DEFINITION OF NON-FEDERAL INTEREST. - The term 'non-Federal interest' means –

(1) a legally constituted public body (including a federally recognized Indian tribe); or

[5] Section 2003(e) of WRDA 2007 provides that the amendments made to sections (a) and (b) of section 221 of the Flood Control Act of 1970 only apply to partnership agreements entered into after November 8, 2007, except that, at the request of a non-Federal sponsor for a project, a PPA for which construction of the project had not be initiated by such date may be amended for the purpose of incorporating such amendments.

(2) a nonprofit entity with the consent of the affected local government, that has full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.

(c) ENFORCEMENT; JURISDICTION. - Every agreement entered into pursuant to this section shall be enforceable in the appropriate district court of the United States.

(d) NONPERFORMANCE OF TERMS OF AGREEMENT BY NON-FEDERAL INTEREST; NOTICE; REASONABLE OPPORTUNITY FOR PERFORMANCE; PERFORMANCE BY CHIEF OF ENGINEERS. After commencement of construction of a project, the Chief of Engineers may undertake performance of those items of cooperation necessary to the functioning of the project for its purposes, if he has first notified the non-Federal interest of its failure to perform the terms of its agreement and has given such interest a reasonable time after such notification to so perform.

(e) DELEGATION OF AUTHORITY. - Not later than June 30, 2008, the Secretary shall issue policies and guidelines for partnership agreements that delegate to the district engineers, at a minimum-

(1) the authority to approve any policy in a partnership agreement that has appeared in an agreement previously approved by the Secretary;

(2) the authority to approve any policy in a partnership agreement the specific terms of which are dictated by law or by a final feasibility study, final environmental impact statement, or other final decision document for a water resources project;

(3) the authority to approve any partnership agreement that complies with the policies and guidelines issued by the Secretary; and

(4) the authority to sign any partnership agreement for any water resources project unless, within 30 days of the date of authorization of the project, the Secretary notifies the district engineer in which the project will be carried out that the Secretary wishes to retain the prerogative to sign the partnership agreement for that project.

(f) REPORT TO CONGRESS. - Not later than 2 years after the date of enactment of this subsection, and every year thereafter, the Secretary shall submit to Congress a report detailing the following:

(1) The number of partnership agreements signed by district engineers and the number of partnership agreements signed by the Secretary.

(2) For any partnership agreement signed by the Secretary, an explanation of why delegation to the district engineer was not appropriate.

(g) PUBLIC AVAILABILITY. - Not later than 120 days after the date of enactment of this subsection, the Chief of Engineers shall -

(1) ensure that each district engineer has made available to the public, including on the Internet, all partnership agreements entered into under this section within the preceding 10 years and all partnership agreements for water resources projects currently being carried out in that district; and

(2) make each partnership agreement entered into after such date of enactment available to the public, including on the Internet, not later than 7 days after the date on which such agreement is entered into.

(h) EFFECTIVE DATE. - This section shall not apply to any project the construction of which was commenced before January 1, 1972, or to the assurances for future demands required by the Water Supply Act of 1958, as amended [43 U.S.C. 390b].

APPENDIX B

Determining the Amount of Credit for In-kind Contributions

B-1. Section 221 provides that any work proposed to be provided as in-kind contributions by a non-Federal sponsor that has not been carried out by November 8, 2007 is eligible for credit only if carried out after execution of an agreement with the Secretary. This requirement applies to any non-Federal work initiated after November 8, 2007 where a non-Federal sponsor awards a contract obligating non-Federal funds or the non-Federal sponsor commences work using its own labor force after November 8, 2007. Where there is an executed feasibility cost sharing agreement (FCSA), design agreement, or project partnership agreement, the non-Federal sponsor may provide in-kind contributions in accordance with the terms of the applicable agreement. In those cases where a non-Federal sponsor proposes to undertake planning work prior to execution of a FCSA or construction work, including the design associated with that work, prior to execution of a PPA, an in-kind MOU must be executed prior to the non-Federal sponsor carrying out such work. See paragraph 3.c. of this regulation for the milestones that must be met prior to execution of an in-kind MOU.

B-2. Only in-kind contributions determined by the Government to be integral to the project are eligible for credit. See Appendix C for additional guidance on preparation and processing of Integral Determinations.

B-3. After execution of the applicable FCSA, DA, or PPA, the non-Federal sponsor will submit to the Government (not less frequently than every 6 months) credit request(s) for eligible in-kind contributions under that agreement. The credit requests will contain the following: (a) a written certification by the non-Federal sponsor to the Government that specifies the payments have been made to contractors, suppliers, or employees for in-kind contributions in accordance with the provisions of the applicable cost sharing agreement; (b) copies of all relevant invoices and evidence of such payments; (c) written identification of costs that have been paid with funds or grants provided by a Federal agency as well as any non-Federal matching share or contribution that was required by such Federal agency for such program or grant; and (d) a written request for credit of a specific amount not in excess of such specified payments. Failure to provide sufficient documentation supporting the credit request will result in a denial of credit in accordance with the terms of the applicable cost sharing agreement.

B-4. Acceptance by the Government of proposed in-kind contributions will be subject to a review (for feasibility level and design activities) or on-site inspection (construction), as applicable, and certification by the Government that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies. The Government will not include in the costs to be shared under the applicable cost sharing agreement or afford credit for any work the Government determines was not accomplished in a satisfactory manner or in accordance with applicable Federal laws, regulations, and policies.

B-5. The amount of in-kind contributions that may be eligible for inclusion in the costs to be shared under the applicable cost sharing agreement will be subject to an audit by the Government to determine the reasonableness, allocability, and allowability of such amount.

B-6. The amount of in-kind contributions (material or services) that may be eligible for inclusion in the costs to be shared under the applicable cost sharing agreement will be the costs incurred by the non-Federal sponsor to obtain such materials or services and provide them to the Government for use in the study or project, or the market value of such materials or services as of the date that the non-Federal sponsor provides such materials or services for use in the study or project, whichever is less.

B-7. The Government will not include in the costs to be shared under the applicable cost sharing agreement any amount of in-kind contributions that exceed the Government's estimate for such work if such work had been accomplished by the Government.

B-8. The amount of in-kind contributions that may be eligible for inclusion in the costs to be shared under the applicable cost sharing agreement are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the in-kind contributions were completed and the time the amount is included in the costs to be shared and credit afforded.

B-9. The Government will not include in the costs to be shared under the applicable cost sharing agreement any amount of in-kind contributions paid by the non-Federal sponsor using funds or grants provided by a Federal agency (as well as any non-Federal matching share or contribution that was required by such Federal agency for such program or grant) unless the Federal agency providing the Federal portion of such funds verifies in writing that the funds are authorized to be used to carry out the study or project.

B-10. The non-Federal sponsor will not commence the construction portion of in-kind contributions to be provided or performed after execution of a PPA until the designs, detailed plans and specifications, and arrangements for the prosecution of such work have been approved by the Government. In addition, changes proposed by the non-Federal sponsor to approved designs and plans and specifications must be approved by the Government in advance of the related construction. Upon completion of the in-kind contributions provided or performed after execution of a PPA, the non-Federal sponsor will furnish to the Government a copy of all final as-built drawings for the construction portion of the in-kind contributions.

B-11. The construction portion of the in-kind contributions must satisfy all applicable environmental compliance requirements (e.g. National Environmental Policy Act and obtaining all applicable Federal, State, and local permits).

B-12. In the performance of the construction portion of the in-kind contributions, the non-Federal sponsor must comply with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*),

the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*), and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). The amount of the construction portion of in-kind contributions will be excluded from the costs to be shared under the PPA, by the Government, in whole or in part, if the non-Federal sponsor fails to comply with its obligations under these laws.

APPENDIX C

Criteria and Procedures for In-kind Contribution Integral Determinations

C-1. Determining if In-kind Contributions Are Integral to the Study/Project. Establishing and allowing credit is a two step process whereby: 1) eligibility is determined by performing the integral determination, and 2) actual affording of credit is accomplished by audit of the non-Federal work by the District Engineer under the terms of either the FCSA or PPA as appropriate. The Government must determine that the in-kind contributions are integral to the study or project for those contributions to be considered eligible for credit.

a. Approval Level of Integral Determinations. Paragraph 3.d. of this regulation specifies the approval level for integral determinations. This authority may not be further delegated.

b. Timing of Integral Determinations.

(1) The integral determination must be completed immediately prior to review and approval of the applicable cost sharing agreement (FCSA, DA, PPA) toward which the credit would be afforded. The integral determination is not required prior to entering into an in-kind MOU.

(2) For those determinations to be made by the MSC Commander, include at least 30 days in the project schedule for processing at the MSC. For those determinations to be made by the ASA(CW), include at least 60 days in the project schedule for Washington level processing (30 days at HQUSACE and 30 days at OASA(CW)). These times are recommended for scheduling purposes and should be extended if processing, either at the MSC or Washington level, identifies significant issues for resolution.

c. Procedures for Processing.

(1) For a feasibility study, in-kind contributions, such as planning activities including data collection and other services, must be part of the approved Project Management Plan in order for those contributions to be eligible for credit.

(2) The District will prepare an Integral Determination Report (IDR) for design and construction work that includes at a minimum the information contained in the following paragraphs. A suggested format for an IDR can be found at www.Corpsplanning.us. The IDR shall contain a description of the activities required to perform the design or construction, as applicable, of the Federal project or separable element in sufficient detail to allow a comparison with the description of the proposed in-kind contributions; a detailed description of the work items proposed to be provided or performed as in-kind contributions; a discussion of how each work item proposed to be provided or performed as an in-kind contribution is integral to the project; an estimate of the costs of each work item proposed to be provided or performed as an in-kind contribution; the estimated amount of credit to be afforded for each work item proposed to be provided or performed as an in-kind contribution; and a district

recommendation identifying which of the proposed in-kind contributions should be considered integral to the project. If the in-kind contributions were provided or performed prior to execution of the applicable cost sharing agreement, then also include in the IDR the results of the review or inspection, as applicable, and certification by the District Commander that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies; and documentation of satisfactory environmental compliance for the construction portion of the in-kind contributions.

(3) For integral determinations to be made by the MSC Commander, the district will submit the IDR to the MSC District Support Team for action. The MSC District Support Team will perform the MSC review of the IDR. The MSC review team also will include members from the MSC Office of Counsel and from the MSC Planning Community of Practice (CoP), MSC Engineering and Construction CoP, MSC Real Estate CoP, and other CoPs, as needed. In addition, if the proposed in-kind contributions consist of design or construction of dams, levees, or bridges, the MSC review team must include the MSC Dam, Levee, or Bridge Safety Officer. After satisfactory resolution of all comments on the IDR and a determination that the IDR complies with all applicable policy, the MSC District Support Team shall prepare an Integral Determination memo for signature by the MSC Commander. If the IDR does not or cannot be modified to comply with policy, then the MSC should contact the HQUSACE RIT to facilitate the resolution of the policy concerns.

(4) For determinations to be made by ASA(CW), the district will submit the IDR to the appropriate HQUSACE RIT for action, with a copy to the MSC District Support Team. A review manager from the appropriate HQUSACE RIT will be appointed to lead the review team for the IDR and serve as the team's point of contact. Any coordination with the vertical team will generally be conducted through the review manager. The HQUSACE review team will include members from the HQUSACE Office of Water Project Review, HQUSACE Office of Counsel, HQUSACE Planning CoP, HQUSACE Engineering and Construction CoP, HQUSACE Real Estate CoP, and other CoPs as needed. After satisfactory resolution of all comments on the IDR, the appropriate HQUSACE RIT will forward the IDR to OASA(CW) with a recommendation for action, and will include the District and MCS submittal memoranda and any review documentation. After review by OASA(CW), OASA(CW) will prepare an Integral Determination memo for signature by the ASA(CW).

(5) The Integral Determination approval memo will state whether the work identified in the IDR, or a portion thereof, has been determined to be integral to the project. In addition, the memo should state that determination of the actual value of the in-kind contributions and affording credit for such amount will be accomplished by the Government in accordance with the limitations, conditions, and terms of the applicable cost sharing agreement.

C-2. <u>The following may be accepted as integral</u>:

a. The proposed in-kind contributions are a part of the Federal project.

b. The proposed in-kind contributions consist of work that the Government would have otherwise provided or performed for the project, except for performance of activities that are inherent Government responsibilities (see paragraph C-3 below). Examples of activities that are acceptable in-kind contributions: performance of design of all or a portion of the Federal project, including data collection related to design work; demolition of buildings on lands required for the project; performance of design or construction related studies for historic preservation activities; performance of cost shared monitoring and adaptive management; and construction of a portion of the project.

c. For proposed in-kind contributions performed prior to execution of the applicable cost sharing agreement, the in-kind contributions have been reviewed or inspected, as applicable, and certified by the Government that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies.

d. For any proposed in-kind contributions proposed to be performed after execution of the PPA, the plans and specifications will be approved by the District Commander prior to initiation of the construction work.

e. For materials provided for use in construction work managed by the Government, the materials meet the minimum Government requirements for materials and any substitute materials have been determined to be a functional equivalent in accordance with policies governing contractor substitution of materials.

C-3. The following will not be accepted as integral:

a. The proposed in-kind contributions are not part of the Federal project.

b. The proposed in-kind contributions consist of performance of activities that are inherent Government responsibilities (e.g., management of Government contracts; performance of District Quality Review, Agency Technical Review, Independent External Peer Review, or Policy Compliance Review; determining if Value Engineering evaluations are acceptable; determining the LERRD required for the project or separable element of the project; determining the value of LERRD for crediting purposes; or making determinations as to compliance with applicable environmental laws and regulations).

c. The proposed in-kind contributions are features or obligations that are a 100 percent non-Federal sponsor responsibility (e.g., purposes of land reclamation, local drainage, to protect against land or bank erosion, and/or the removal of hazardous, toxic, or radioactive wastes; local service facilities; betterments; acquisition and performance of LERRD, except for the provision of dredged or excavated material disposal facilities for commercial navigation projects; and performance of OMRR&R;

d. The proposed in-kind contributions have or will create a hazard to human life or property.

e. The proposed in-kind contributions have been determined to be environmentally unacceptable.

f. For proposed in-kind contributions performed prior to execution of the applicable cost sharing agreement, after review or inspection, as applicable, the Government cannot certify the proposed in-kind contributions were accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies.

g. For proposed in-kind contributions performed prior to execution of the applicable cost sharing agreement, the non-Federal sponsor has not performed the necessary operation, maintenance, repair, rehabilitation, or replacement.