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

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CECW-PC

Circular
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EXPIRES 30 SEPTEMBER 2010
Water Resources Policies and Authorities
IN-KIND CONTRIBUTION PROVISIONS OF SECTION 221

1. Purpose. This circular provides guidance on the in-kind contribution 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 (hereinafter "Section 221"; 42 U.S.C. 1962d-5b). The revised language of Section 221 is provided in Appendix A.

2. Applicability. This circular applies to all HQUSACE elements, Major Subordinate Commands (MSCs), and district commands having Civil Works responsibility.

a. Applicability of In-Kind Contribution Provisions: The in-kind contribution provisions of Section 221 discussed in this circular are applicable to water resources projects authorized after November 16, 1986, including projects initiated after November 16, 1986 without specific authorization in law if the Project Partnership Agreement (PPA - formerly known as a Project Cooperation Agreement or PCA) is executed after November 8, 2007, the date of enactment of WRDA 2007. For the purposes of this circular, projects initiated without specific authorization in law include the Continuing Authorities Program (CAP) authorities and regional authorities that do not require any additional authorization to implement a project (e.g., Section 542 of WRDA 2000 and Section 544 of WRDA 2000) but does not include the environmental infrastructure programs or projects. In addition, the in-kind contribution provisions of Section 221 discussed in this circular are applicable to projects and programs that specifically state in law that credit may be afforded in accordance with Section 221.

b. Non-Applicability of In-Kind Contribution Provisions: The in-kind contribution provisions of Section 221 discussed in this circular are not applicable to: (1) feasibility studies undertaken pursuant to Section 105(a) of WRDA 1986; (2) Planning Assistance to States undertaken pursuant to Section 22 of WRDA 1976; (3) Section 729 of WRDA 1986 Watershed Assessments; (4) any authorities that provide for a non-Federal sponsor to construct an entire project or separable element of a project with reimbursement of the Federal share to the non-Federal sponsor (e.g., Section 206 of WRDA 1992, Section 204 of WRDA 1986, and Section 211 of WRDA 1996); (5) any projects implemented under Section 219 of WRDA 1992 that do not specifically state in law that credit may be afforded in accordance with Section 221; (6) any work implemented under any of the regional environmental infrastructure programs that do not specifically state in law that credit may be afforded in accordance with Section 221 (e.g., Section 531 of WRDA 1996, Section 571 of WRDA 1999, and Section 595 of WRDA 1999); or (7) any project that has received approval of credit pursuant to either Section 104 of WRDA 1986 or Section 215 of the Flood Control Act (FCA) of 1968.

3. General Policy.

a. General. Section 221 provides a general authority to afford credit toward the non-Federal share of the costs of a project, or separable element of a project, for the value of in-kind contributions provided or performed before or after execution of the applicable cost sharing agreement (Design Agreement (DA) or PPA).

(1) Section 221 will not be used to expand a program or project specific authority for provision of in-kind contributions that specifically states in law the timing of performance of the in-kind contributions (e.g., work performed prior to date of 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). See Appendix B of this EC for examples.

(2) The in-kind contribution provisions of Section 221 will not be combined with the in-kind contribution provisions of Section 104 of WRDA 1986 or Section 215 of the FCA of 1968 for use on a project or separable element of a project. However, it is acceptable to use Section 104 or Section 215 for one separable element and then use Section 221 for a different separable element of the same project that is addressed in a separate PPA. Nevertheless, excess credit from one authority or separable element will not be applied to another project or separable element.

(3) The majority of the authorities for which the in-kind contribution provisions of Section 221 are not applicable (e.g. Section 105(a) of WRDA 1986, Section 22 of WRDA 1976, Section 729 of WRDA 1986, - see complete list in paragraph 2.b. above) contain their own provisions for in-kind contributions. For these authorities, the provision of in-kind contributions and affording of credit for such contributions (including any limitations on timing of performance, form of contribution, or maximum amount of credit) will continue to follow the implementation guidance issued for such authorities.

b. Form of In-Kind Contributions. The form of in-kind contributions that can be provided or performed are design (including data collection); management; mitigation; construction and construction services; and materials or services. Credit for planning work will not be afforded toward the non-Federal sponsor's share of the DA or PPA except for those projects that specifically state in law that credit may be afforded in accordance with Section 221 for the costs of planning work.

c. In-Kind MOUs. For in-kind contributions proposed to be provided or performed after November 8, 2007 but before execution of the applicable cost sharing agreement (DA or PPA) to be considered eligible for credit under Section 221, the Secretary and the non-Federal interest must enter into an In-Kind MOU prior to the non-Federal sponsor providing or performing such in-kind contributions. For

additional guidance on in-kind contributions provided or performed prior to execution of the applicable cost sharing agreement, see paragraph 4 of this EC.

d. Integral Determinations. For in-kind contributions to be eligible for credit, the Secretary must determine that the in-kind contributions are integral to the project. For additional guidance on procedures for performance of, and approval levels for, integral determinations, see paragraph 6 of this EC.

e. Performance of Design Activities as In-Kind Contributions. The non-Federal sponsor may provide or perform all or a portion of the design activities required for a project or separable element of a project (including data collection; management; and materials or services related to design) as in-kind contributions. Any design provided or performed 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.

(1) Performance of design activities as in-kind contributions for projects that are or will be specifically authorized:

(a) If the non-Federal sponsor proposes to provide or perform a portion of the design for a project, or separable element of a project, as in-kind contributions, a DA is required for such project or separable element. For any in-kind contributions provided or performed prior to execution of the DA to be considered eligible for credit, an In-Kind MOU must have been executed prior to the non-Federal sponsor providing or performing the in-kind contributions (see paragraph 4.a. of this EC).

- If the value of eligible in-kind contributions and other non-Federal contributions (participation in the Design Coordination Team and performance of non-Federal audits) is less than 25 percent of total design costs, the non-Federal sponsor must provide a contribution of funds so that the total of its contributions under the DA equals 25 percent of total design costs.

- If the value of eligible in-kind contributions and other non-Federal contributions (participation in the Design Coordination Team and performance of non-Federal audits) is greater than 25 percent 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 25 percent of total design costs) will be included in total project costs in the PPA. During negotiations of the DA, the district should remind the non-Federal sponsor of the limitations on the maximum amount of credit that may be afforded pursuant to the PPA (see paragraph 3.g. of this EC).

- Except as limited by the provisions of the PPA regarding the maximum amount of credit that may be afforded pursuant to the PPA, the full amount of total design costs, including the value of the in-kind contributions and other non-Federal contributions provided or performed by the non-Federal sponsor pursuant to the DA, will be included in total project costs upon execution of the PPA for the

project or separable element of the project. The value of the in-kind contributions provided or performed pursuant to the DA will be considered in the calculation of the amount of funds required to be provided by the non-Federal sponsor during the first year of construction to bring its share of total design costs to the same percentage as the project's construction cost sharing percentage.

(b) If the non-Federal sponsor proposes to provide or perform all of the design for a project, or separable element of a project, as in-kind contributions, a DA is required for such project or separable element.

- For any in-kind contributions performed prior to execution of the DA to be considered eligible for credit, an In-Kind MOU must have been executed prior to the non-Federal sponsor providing or performing the in-kind contributions (see paragraph 4.a. of this EC). During negotiations of the DA, the district should remind the non-Federal sponsor of the limitations on the maximum amount of credit that may be afforded pursuant to the PPA (see paragraph 3.g. of this EC).

- Except as limited by the provisions of the PPA regarding the maximum amount of credit that may be afforded pursuant to the PPA, the full amount of total design costs, including the value of the in-kind contributions and other non-Federal contributions provided or performed by the non-Federal sponsor pursuant to the DA, will be included in total project costs upon execution of the PPA for the project or separable element of the project. The value of the in-kind contributions provided or performed pursuant to the DA will be considered in the calculation of the amount of funds required to be provided by the non-Federal sponsor during the first year of construction to bring its share of total design costs to the same percentage as the project's construction cost sharing percentage.

(c) Because these are Federal projects, the Corps cannot abrogate responsibility to make determinations as to compliance with applicable environmental laws and regulations and the district must ensure compliance with such laws and regulations prior to requesting approval of a PPA to construct the project or separable element of the project. However, the district may utilize information provided by the non-Federal sponsor to ensure such compliance.

(d) Only credit for design related activities (including data collection; management; and materials or services related to design) will be afforded toward a non-Federal sponsor's share of a DA. Credit for construction related activities (including actual construction; procurement of materials needed for construction; and acquisition or performance of lands, easements, rights-of-way, relocations, and dredged or excavated material disposal areas (LERRD)) will not be afforded toward a non-Federal sponsor's share of a DA.

(2) Performance of design activities as in-kind contributions for CAP authorities and regional authorities that do not require additional authorization to implement a project:

(a) If the 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 such project. For any in-kind contributions performed prior to execution of the PPA to be considered eligible for credit, an In-Kind MOU must have been executed prior to the non-Federal sponsor providing or performing the in-kind contributions (see paragraph 4.a. of this EC). During negotiations of the In-Kind MOU addressing the design work, the district should remind the non-Federal sponsor of the limitations on the maximum amount of credit that may be afforded pursuant to the PPA (see paragraph 3.g. of this EC).

(b) Because these are Federal projects, the Corps cannot abrogate responsibility to make determinations as to compliance with applicable environmental laws and regulations and the district must ensure compliance with such laws and regulations prior to issuing the solicitation for the first construction contract for the project or commencing construction of the project using the Government's own forces. However, the district may utilize information provided by the non-Federal sponsor to ensure such compliance.

f. New and Existing Cost Sharing Agreements.

(1) Credit cannot be afforded unless the applicable cost sharing agreement (DA or PPA) contains language regarding affording of credit for in-kind contributions. The DA and applicable PPA models will be revised to incorporate optional language regarding affording of credit for in-kind contributions.

(2) DA. An executed DA that does not include language regarding affording credit for in-kind contributions may be amended at the written request of the non-Federal sponsor to incorporate the credit for in-kind contribution provisions discussed in this EC if the design work that the non-Federal sponsor proposes to provide or perform as in-kind contributions had not been initiated as of the date of the non-Federal sponsor's written request. Such design work is deemed to be initiated on the date of the award of the Government contract for such design work or the date the Government incurred the first financial obligations for such design work using the Government's own forces, whichever occurred first. An executed DA will not be amended to address in-kind contributions that were provided or performed prior to execution of the amendment.

(3) PPA:

(a) A PPA executed on or before November 8, 2007 may be amended at the written request of the non-Federal sponsor to incorporate the credit for in-kind contribution provisions discussed in this EC if construction of the project or separable element described in such PPA had not been initiated as of November 8, 2007. Construction of the project or separable element described in the PPA is deemed

to be initiated on the date of the award of the first construction contract or the date the Government incurred the first financial obligations for construction using the Government's own forces, whichever occurred first.

(b) A PPA executed after November 8, 2007 that does not include language regarding affording credit for in-kind contributions may be amended at the written request of the non-Federal sponsor to incorporate the credit for in-kind contribution provisions discussed in this EC if the work that the non-Federal sponsor proposes to provide or perform as in-kind contributions had not been initiated as of the date of the non-Federal sponsor's written request. Such work is deemed to be initiated on the date of the award of the Government contract for such work or the date the Government incurred the first financial obligations for such work using the Government's own forces, whichever occurred first. The executed PPA will not be amended to address in-kind contributions that were provided or performed prior to execution of the amendment.

g. Determining Value and Affording Credit for In-Kind Contributions.

(1) The value of the in-kind contributions will be determined in accordance with the limitations and conditions contained in the applicable cost sharing agreement. For examples of the limitations and conditions to be used in determining the value of in-kind contributions, see Appendix C of this EC.

(2) Under the PPA, credit for in-kind contributions will be afforded only toward the non-Federal sponsor's required contribution of funds (cash requirement) for a project or separable element of a project. The provisions of the PPA for a project or separable element of a project will be used to determine the required contribution of funds 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 CAP Sections 14, 205, or 208); 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; or, 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.

(3) The maximum amount of credit that may be afforded is the amount of the non-Federal sponsor's required contribution of funds, or the value of the in-kind contributions, whichever is less.

(4) 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.

h. Value of Eligible In-Kind Contributions Exceeds the Amount of Credit That Can Be Afforded. If the value of eligible in-kind contributions exceeds the amount of credit that can be afforded pursuant to the provisions of the PPA, only the value of in-kind contributions for which credit can be afforded should be included in total project costs. Excluding the value of in-kind contributions that exceeds the amount of credit that can be afforded will require a recalculation of total project costs. This will require several recalculations to ensure that the value of in-kind contributions included in total project costs does not exceed the amount of credit that can be afforded for in-kind contributions. In addition, the amount excluded will not be considered part of total project costs for the purposes of Section 902 of WRDA 1986 calculations.

i. Restriction on Reimbursement for and Sharing of In-Kind Contributions.

(1) In no event will a non-Federal sponsor be reimbursed for the value of in-kind contributions that exceeds the amount of credit that can be afforded.

(2) The value of in-kind contributions for a project, or separable element of a project, that exceeds the amount of credit that can be afforded for such project or separable element will not be applied toward another project or another separable element of the same project. For the purposes of this circular, a separable element is an element of the project that requires a separate investment (new start) decision regardless of whether the separable element is addressed in a separate PPA or an amendment to an existing PPA.

4. In-Kind Contributions Provided or Performed Prior to Execution of the Applicable Cost-Sharing Agreement.

a. In-kind contributions "carried out" after November 8, 2007: Section 221 provides that in-kind contributions not "carried out" as of the date of enactment of WRDA 2007 require an In-Kind MOU in order to be eligible for credit. In-kind contributions are deemed to not have been "carried out" by the date of enactment of WRDA 2007 if the non-Federal award of a contract (including non-Federal obligation of funds) or commencement of work using the non-Federal sponsor's forces, whichever is earlier, for such in-kind contributions occurs after November 8, 2007.

(1) The Secretary and the non-Federal sponsor must enter into an In-Kind MOU prior to the non-Federal sponsor providing or performing the in-kind contributions. Only those in-kind contributions provided or performed pursuant to an In-Kind MOU executed after the date of the applicable milestone shown in Table 1 below will be considered eligible for credit in accordance with the terms of the applicable cost sharing agreement. If the non-Federal sponsor awards a contract (including non-Federal obligation of funds) for in-kind contributions or commences work on in-kind contributions using the non-Federal sponsor's forces prior to execution of an In-Kind MOU, the in- kind contributions provided or performed pursuant to such contract or by the non-Federal sponsor's forces will not be considered eligible for credit.

TABLE 1 – ELIGIBILITY OF TYPES OF IN-KIND CONTRIBUTIONS AND TIMING OF EXECUTION OF IN-KIND MOU		
PROJECT THAT IS OR WILL BE SPECIFICALLY AUTHORIZED		
MILESTONE THAT MUST BE MET	AGREEMENT TOWARD WHICH CREDIT WILL BE AFFORDED	TYPE OF IN-KIND CONTRIBUTION THAT IS ELIGIBLE FOR CREDIT
Signature of DE Transmittal Letter for the Feasibility Report or Signature of Director of Civil Works Report (if authorized without Corps prepared feasibility study)	DA	Design type activities (including data collection; management; and materials or services related to design)
Signature of the Report of the Chief of Engineers or Signature of Director of Civil Works Report (if authorized without Corps prepared feasibility study)	PPA	Construction type activities (including data collection; management; mitigation; and materials or services related to construction)
CAP AUTHORITIES AND REGIONAL AUTHORITIES THAT DO NOT REQUIRE ADDITIONAL AUTHORIZATION TO IMPLEMENT A PROJECT		
MILESTONE THAT MUST BE MET	AGREEMENT TOWARD WHICH CREDIT WILL BE AFFORDED	TYPE OF IN-KIND CONTRIBUTION THAT IS ELIGIBLE FOR CREDIT
Approval of the decision document for project by appropriate authority	PPA	Design and/or Construction type activities (including data collection; management; mitigation; and materials or services related to design and construction)

(2) Execution of an In-Kind MOU in no way obligates the Corps to enter into any future agreement for the project or separable element of the project.

(3) There are two model In-Kind MOUs: the first addresses design related activities and the second addresses construction related activities. Links to the model In-Kind MOUs can be found on the PPA web site at http://www.usace.army.mil/cw/cecw-p/pca/ccpca.htm. The authority to approve an In-Kind MOU, including any deviations thereto and the authority to execute such agreements, will follow the authorities and procedures outlined in the implementation memo for the In-Kind MOU models.

b. In-kind contributions "carried out" on or before November 8, 2007: In-kind contributions are deemed to have been "carried out" on or before the date of enactment of WRDA 2007 if the non-Federal award of a contract (including non-Federal obligation of funds) or commencement of work using the non-Federal sponsor's forces, whichever is earlier, for such in-kind contributions occurred on or before November 8, 2007. Such in-kind contributions are not subject to the requirement for an In-Kind MOU. Only in-kind contributions provided or performed after the date of the applicable milestone, shown in Table 1, will be considered eligible for credit in accordance with the terms of the applicable cost sharing agreement.

5. In-Kind Contributions Provided or Performed After Execution of the Applicable Cost-Sharing Agreement. In-kind contributions provided or performed after execution of the applicable cost sharing agreement will be provided or performed pursuant to the provisions of such agreement. An In-Kind MOU is not required if in-kind contributions are provided or performed after execution of an applicable cost sharing agreement that contains language regarding affording of credit for such in-kind contributions.

6. Determining if the In-Kind Contributions Are Integral to the Project. Only in-kind contributions determined to be integral to the project or separable element of the project will be considered eligible for credit pursuant to the provisions of the applicable cost sharing agreement. The requirements of this paragraph are limited to making the determination of whether the in-kind contributions are integral to the project. Determination of the actual value of the in-kind contributions and then 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.

a. Approval Level of Integral Determinations. Table 2 contains the approval level for integral determinations.

b. Timing of Integral Determinations.

(1) The integral determination must be completed prior to review and approval of the applicable cost sharing agreement toward which the credit will be afforded.

(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)). Note: The times recommended do not include time required for resolution by the district of any comments on the information provided in the letter report.

c. Procedures for Processing:

(1) The district will prepare a letter report that includes at a minimum: a description of the Federal project or separable element of which the in-kind contributions are a part 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 (see Appendix D of this EC); 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 also include in the letter report 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.

(2) For determinations to be made by the MSC Commander, the district will submit the letter report to the MSC District Support Team for action. The MSC District Support Team will perform the MSC review of the letter report. The MSC review team also will include members from the MSC Office of Counsel and from the MSC Planning 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 letter report, the MSC District Support Team shall prepare an Integral Determination memo for signature by the MSC Commander.

(3) For determinations to be made by ASA(CW), the district will submit the letter report to the appropriate HQUSACE RIT located in Washington D.C. 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 letter report 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, Policy and Policy Compliance Division; HQUSACE Office of Counsel; and the HQUSACE Planning CoP, HQUSACE

TABLE 2 – APPROVAL LEVEL FOR INTEGRAL DETERMINATIONS		
PROJECT THAT IS OR WILL BE SPECIFICALLY AUTHORIZED		
AGREEMENT TOWARD WHICH CREDIT WILL BE AFFORDED	TIMING OF PERFORMANCE OF IN-KIND CONTRIBUTIONS	APPROVAL LEVEL FOR INTEGRAL DETERMINATION
DA	PRIOR TO EXECUTION OF DA	MSC COMMANDER
DA	AFTER EXECUTION OF DA	MSC COMMANDER
PPA	PRIOR TO EXECUTION OF PPA (REGARDLESS OF PRIOR TO OR AFTER WRDA 2007)	ASA(CW)
PPA	AFTER EXECUTION OF PPA	ASA(CW)
CAP AUTHORITIES AND REGIONAL AUTHORITIES THAT DO NOT REQUIRE ADDITIONAL AUTHORIZATION TO IMPLEMENT A PROJECT		
AGREEMENT TOWARD WHICH CREDIT WILL BE AFFORDED	TIMING OF PERFORMANCE OF IN-KIND CONTRIBUTIONS	APPROVAL LEVEL FOR INTEGRAL DETERMINATION
PPA	PRIOR TO EXECUTION OF PPA (AND PRIOR TO WRDA 2007)	ASA(CW)
PPA	PRIOR TO EXECUTION OF PPA (AND AFTER WRDA 2007)	MSC COMMANDER
PPA	AFTER EXECUTION OF PPA	MSC COMMANDER

Engineering and Construction CoP, HQUSACE Real Estate CoP, and other CoPs as needed. After satisfactory resolution of all comments on the letter report, the appropriate HQUSACE RIT will forward the letter report to OASA(CW) with a recommendation for action. After review by OASA(CW), OASA(CW) will prepare an Integral Determination memo for signature by the ASA(CW).

(4) The Integral Determination memo will state whether the work identified in the letter report, 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. The date of the integral determination and the title of the official making the integral determination will be included in a Whereas clause addressing the integral determination in the applicable cost sharing agreement.

7. Implementation: This circular is effective immediately. Districts and MSCs should inform CECW-PC of any problems with the implementation of the guidance in this circular.

FOR THE COMMANDER:

ALEX C. DORNSTAUDER
COL, EN
Executive Director of Civil Works

4 Appendices
Appendix A - Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b)
Appendix B - Application Examples
Appendix C - Limitations and Conditions to be Used in Determining the Value of In-Kind Contributions
Appendix D – Criteria for In-Kind Contribution Integral Determinations

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.

(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

(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 enforcible 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

Application Examples

Step 1: Determine that program or project specific authority meets applicability requirements in paragraph 2 of this EC. If yes, proceed to step 2. If no, follow guidance for in-kind contributions provisions for applicable authority.
STEP 2: Determine how to apply in-kind contribution provisions of Section 221 based on following examples.
Note: Only Act language addressing in-kind contributions for each example is shown. Further, the additional limitation on the amount of credit that may be afforded (as shown below) is in addition to the limitation that the credit may be afforded only toward the non-Federal sponsor's required contributions of funds for the project or separable element.

Example 1:
No language in program or project specific authority addressing in-kind contributions.

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating design unless design was initiated on or before 11/8/07
Credit for construction prior to PPA: Yes- In-Kind MOU required before initiating construction unless construction was initiated on or before 11/8/07
Credit for design after DA or PPA: Yes
Credit for construction after PPA: Yes
Any additional limitation on amount of credit that may be afforded: None
Explanation: There is no text addressing in-kind contributions so Section 221 provides a general authority for in-kind contributions (both design and construction prior to and after execution of the applicable cost sharing agreement).

Example 2:
The non-Federal interest may provide up to 50 percent of the non-Federal share in the form of services, materials, supplies, or other in-kind contributions.

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating design unless design was initiated on or before 11/8/07
Credit for construction prior to PPA: Yes- In-Kind MOU required before initiating construction unless construction was initiated on or before 11/8/07
Credit for design after DA or PPA: Yes
Credit for construction after PPA: Yes

Any additional limitation on amount of credit that may be afforded: Yes – credit afforded cannot exceed 50% of non-Federal share of project
Explanation: Text addressing in-kind contributions provides general authority for in-kind contributions (both design and construction prior to and after execution of the applicable cost sharing agreement). The text "up to 50 percent" adds an additional limitation on the maximum amount of credit that may be afforded.

Example 3:
The non-Federal interest shall receive credit for the reasonable costs of design work carried out by the non-Federal interest before the date of execution of a project cooperation agreement for the critical restoration project, if the Secretary finds that the design work is integral to the project.
The non-Federal interest may provide the non-Federal share in the form of services, materials, supplies, or other in-kind contributions.

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating design unless design was initiated on or before 11/8/07
Credit for construction prior to PPA: No
Credit for design after DA or PPA: Yes
Credit for construction after PPA: Yes
Any additional limitation on amount of credit that may be afforded: None
Explanation: The second sentence provides a general authority for in-kind contributions (both design and construction prior to and after execution of the applicable cost sharing agreement). However, the first sentence limits eligibility of credit for in-kind contributions performed prior to execution of the applicable cost sharing agreement to design.

Example 4:
The Secretary shall credit, in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), toward the non-Federal share of the cost of the project not to exceed $3,000,000 for the cost of planning and design work carried out by the non-Federal interest for the project before the date of the partnership agreement for the project.

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating planning and design unless planning and design was initiated on or before 11/8/07
Credit for construction prior to PPA: No
Credit for design after DA or PPA: No
Credit for construction after PPA: No
Any additional limitation on amount of credit that may be afforded: Yes – credit afforded cannot exceed $3,000,000
Explanation: The general authority for in-kind contributions provided by Section 221 is limited to credit for planning and design costs performed prior to the date of (execution of) the applicable cost sharing agreement with a further limit that the

maximum amount of credit that may be afforded cannot exceed $3,000,000. Credit is afforded for planning costs in this example because the authority specifically states in law that credit shall be afforded for planning costs.

Example 5:
A specific project is modified — to direct the Secretary to credit, in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), toward the non-Federal share of the cost of the project the cost of work carried out by the non-Federal interest for the project before the date of the partnership agreement for the project.

Credit for design prior to DA or PPA: No
Credit for construction prior to PPA: Yes - In-Kind MOU required before initiating construction unless construction was initiated on or before 11/8/07
Credit for design after DA or PPA: No
Credit for construction after PPA: No
Any additional limitation on amount of credit that may be afforded: None
Explanation: The general authority for in-kind contributions provided by Section 221 is limited to credit for costs of work (we equate work with construction only) performed prior to the date of (execution of) the applicable cost sharing agreement.

Example 6:
A specific project is modified to authorize the non-Federal interest to provide, in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C.1962d–5b), any portion of the non-Federal share of the cost of the project in the form of in-kind services and materials.

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating design unless design was initiated on or before 11/8/07
Credit for construction prior to PPA: Yes - In-Kind MOU required before initiating construction unless construction was initiated on or before 11/8/07
Credit for design after DA or PPA: Yes
Credit for construction work after PPA: Yes
Any additional limitation on amount of credit that may be afforded: None
Explanation: The general authority for in-kind contributions provided by Section 221 is applicable to project (both design and construction prior to and after execution of the applicable cost sharing agreement) with no additional limitations on maximum amount of credit that may be afforded.

Example 7:
A project is modified to direct the Secretary to credit, in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), toward the non-Federal share of the cost of the project the cost of design and

construction work carried out by the non-Federal interest for the project before the date of the partnership agreement for the project

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating design unless design was initiated on or before 11/8/07
Credit for construction prior to PPA: Yes - In-Kind MOU required before initiating construction unless construction was initiated on or before 11/8/07
Credit for design after DA or PPA: No
Credit for construction after PPA: No
Any additional limitation on amount of credit that may be afforded: None
Explanation: The general authority for in-kind contributions provided by Section 221 is limited to credit for costs of design and construction performed prior to the date of (execution of) the applicable cost sharing agreement.

Example 8:
A project is modified to authorize the Secretary to credit, in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), toward the non-Federal share of the cost of the project the cost of design and construction work carried out by the non-Federal interest for the project.

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating design unless design was initiated on or before 11/8/07
Credit for construction prior to PPA: Yes - In-Kind MOU required before initiating construction unless construction was initiated on or before 11/8/07
Credit for design after DA or PPA: Yes
Credit for construction after PPA: Yes
Any additional limitation on amount of credit that may be afforded: None
Explanation: The general authority for in-kind contributions provided by Section 221 is applicable (both design and construction prior to and after execution of the applicable cost sharing agreement) with no additional limitations on timing of performance of work or maximum amount of credit that may be afforded.

Example 9:
The Federal share of the cost of a project under this section — shall be 75 percent; and may be provided in the form of grants or reimbursements of project costs. The Secretary shall credit, in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), toward the non-Federal share of the cost of the project the cost of design work carried out by the non-Federal interest for the project before the date of the partnership agreement for the project.

Credit for design prior to DA or PPA: Yes - In-Kind MOU required before initiating design unless design was initiated on or before 11/8/07
Credit for construction prior to PPA: No
Credit for design after DA or PPA: Yes
Credit for construction after PPA: Yes

Any additional limitation on amount of credit that may be afforded: None
Explanation: This example is one of the Environmental Infrastructure authorities authorized in WRDA 2007 that provides design and construction assistance for water-related environmental infrastructure projects. These authorities contain unique language that allows for the Federal share to be provided in the form of reimbursement – the non-Federal sponsor can construct the entire project with reimbursement of the Federal share. This language also provides the authority for the non-Federal sponsor to get credit (and reimbursement of) design and construction performed after execution of the agreement. The second sentence limits the credit that can be provided prior to the date of (execution of) the applicable cost sharing agreement to design costs. In addition, the reference in the second sentence to Section 221 pulls in the requirement of a Section 221 In-Kind MOU for any design work done prior to execution of the applicable cost sharing agreement.

APPENDIX C

Limitations and Conditions to be Used in Determining the Value of In-Kind Contributions

The Government will determine and include in total design costs or total project costs, as applicable, the value of in-kind contributions, subject to the conditions and limitations contained in the applicable cost sharing agreement. The general limitations and conditions are listed below:

1. In-kind contributions provided or performed prior to execution of the applicable cost sharing agreement will be subject to the following limitations:

(a) For in-kind contributions initiated after November 8, 2007, only those in-kind contributions provided or performed pursuant to an In-Kind MOU executed after the date of the applicable milestone shown in Table 1 of this EC will be considered eligible for credit. Further, only in-kind contributions initiated after execution of the applicable In-Kind MOU will be considered eligible for credit.

(b) For in-kind contributions carried out prior to November 8, 2007, only in-kind contributions initiated after the date of the applicable milestone, shown in Table 1 of this EC, will be considered eligible for credit.

(c) In-kind contributions are deemed initiated on the date of the non-Federal award of the contract (including non-Federal obligation of funds) or commencement of work using the non-Federal sponsor's forces, whichever is earlier, for such in-kind contributions.

2. Only in-kind contributions determined by the Government to be integral to the project will be considered eligible for credit. For procedures and guidelines on determining if the in-kind contributions are integral to the project, see paragraph 6 of this EC.

3. Acceptance by the Government of in-kind contributions will be subject to a review or on-site inspection, 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.

4. The construction portion of the in-kind contributions must satisfy all applicable environmental compliance requirements (e.g. NEPA and obtaining all applicable Federal, State, and local permits).

5. 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. Changes proposed by the non-Federal sponsor to approved designs and plans and

specifications also 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.

6. The value of in-kind contributions that may be eligible for inclusion in total design costs or total project costs, as applicable, will be subject to an audit by the Government to determine the reasonableness, allocability, and allowability of such value.

7. The value of in-kind contributions that may be eligible for inclusion in total design costs or total project costs, as applicable, 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 value is included in total design costs or total project costs, as applicable and credit afforded.

8. The Government will not include in total design costs or total project costs, as applicable, any value of in-kind contributions paid by the non-Federal sponsor using Federal program funds unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law. Federal program funds are both the 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.

9. The Government shall not include in total design costs or total project costs, as applicable, any value of in-kind contributions in excess of the Government's estimate of such work had the work been accomplished by the Government.

10. 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 value of the construction portion of in-kind contributions may be excluded from total project costs by the Government, in whole or in part, as a result of the non-Federal sponsor's failure to comply with its obligations under these laws.

11. The value of materials provided by the non-Federal sponsor will be the costs incurred by the non-Federal sponsor for such materials, or the market value of such materials as of the date that the non-Federal sponsor provides such materials for use in the project, whichever is less.

APPENDIX D

Criteria for In-Kind Contribution Integral Determinations

The following may be accepted as integral:

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

2. 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 2 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.

3. 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.

4. 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.

5. 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.

The following will not be accepted as integral:

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

2. 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 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).

3. 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; local service facilities; betterments; acquisition and performance of LERRD, except for commercial navigation projects; performance of OMRR&R; performance of non-Federal audits; performance of investigations to determine existence and extent of hazardous substances; and participation in the Design or Project Coordination Teams). Performance of non-Federal audits; performance of investigations to determine existence and extent of hazardous substances; and participation in the Design or Project Coordination Teams are considered "other non-Federal contributions" and are accounted for and credited for in the DA and PPA separate from in-kind contributions.

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

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

6. 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.

7. 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.