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

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CECW-PB/CECW-LRD

MEMORANDUM FOR COMMANDER, Great Lakes and Ohio River Division (CELRD-PDS-P)

SUBJECT: Implementation Guidance for Section 3170 of the Water Resources Development Act of 2007 (WRDA 2007) – Lower Mud River, Milton, West Virginia

1. Authorization. Section 3170 of WRDA 2007 modifies prior authority provided in Section 580 of WRDA 1996 (P.L.104–303) and Section 340 of WRDA 2000 (P.L. 106–541) to authorize the Secretary to construct a project for flood control at Milton, West Virginia, substantially in accordance with the draft report of the Corps of Engineers dated May 2004, at an estimated total cost of $57,100,000, with an estimated Federal cost of $42,825,000 and an estimated non-Federal cost of $14,275,000. Copies of the three pertinent legislative provisions are enclosed for information.

2. Background.

a. Prior Authorizations. Section 580 of WRDA 1996 directed the Secretary to conduct a limited reevaluation of the Natural Resources Conservation Service (NRCS) watershed plan and authorized the Secretary to carry out the project. Section 340 of WRDA 2000 modified Section 580 to direct the Secretary to carry out the project. Huntington District (CELRH) executed a Design Agreement with the West Virginia Soil Conservation Agency on November 22, 1999, to cost-share the Limited Reevaluation Report and pre-construction engineering and design of channel improvements of the Lower Mud River at 75 percent Federal and 25 percent non-Federal. The reevaluation identified concerns related to the viability of the NRCS recommended plan, a channel modification project with 10-year level of protection. Upon coordination with LRD and the non-Federal sponsor, CELRH continued the study to reexamine an array of flood damage reduction alternatives under the existing design agreement. CELRH completed a draft report, the *Lower Mud River at Milton, West Virginia, Limited Re-evaluation Report and Environmental Impact Statement, Supplement 1.0, dated May 2004* (hereinafter the May 2004 Report), which recommended a levee and channel re-alignment plan with 250-year level of protection. Because the plan recommended for implementation in the May 2004 Report differed significantly from the NRCS recommended plan, LRD concluded that Section 580 and Section 340 did not provide sufficient construction authority to implement the plan recommended in the May 2004 Report.

b. Section 3170. Section 3170 of WRDA 2007 modified the project for flood control authorized by Section 580 and Section 340 and authorized the Secretary to construct the project substantially in accordance with the May 2004 Report. CELRH updated the May 2004 Report with Addendum 1-Agency Technical Review and Addendum 2-Updated Costs and Economics, and submitted it in March 2008 for concurrent HQ/LRD policy review and HQ approval.

3. Completion of Decision Document. The District will revise the May 2004 Report and Addenda 1 and 2, to resolve HQ policy review comments dated 19 May 2008, including identification of the NED plan, the Locally Preferred Plan, if applicable, and the appropriate cost-sharing based on the requirements of Section 103(a) of WRDA 1986, as amended (see paragraph 5 of this memorandum). The revised documents will identify the plan recommended in the May 2004 Report as the authorized plan. The content of, submission, and approval processes for the revised documents will follow the requirements and procedures identified for projects authorized without the benefit of a Secretary-approved feasibility-level report (see ER 1105-2-100 paragraphs 4-1.b(1) and (2); 4-1.c(6); G-2.d and e; and H-6.b). The approval authority for the revised documents is the Director of Civil Works HQUSACE (see ER 1165-2-502, paragraphs 6 and 7; and ER 1105-2-100 page 4-4 Table 4-1 and paragraph G-13.b). Once approved, this document and accompanying addenda will serve as the decision document supporting the Project Partnership Agreement (PPA) for the project.

4. Cost-sharing of Feasibility-Level Studies. In accordance with the clarification of Army policy expressed in the ASA(CW) letter dated 18 August 2004; ER 1105-2-100 Appendix G page G-1 paragraph G-2.d and G-2.e.; and annual Budget EC's issued since at least FY 2000, the study efforts, report documents, and cost-sharing of feasibility-level studies must follow the two-step process required for projects authorized without the benefit of a Secretary-approved feasibility-level report. The initial evaluation of the NRCS plan was appropriately cost-shared 75 percent Federal and 25 percent non-Federal under the 1999 Design Agreement, but should have culminated in a short, limited re-evaluation report stating that the NRCS plan was not viable and that feasibility-level studies were needed to identify a feasible plan. The costs of feasibility-level studies, beginning with the decision to reexamine and reformulate other alternatives should have been shared 50 percent Federal and 50 percent non-Federal. In accordance with the ASA(CW) August 2004 letter, an amendment to the 1999 Design Agreement will be executed so that costs for all feasibility-level studies are shared 50/50. Within 30 days of the date of this implementation guidance, CELRH will submit a white paper to LRD and HQ identifying the completed and remaining feasibility-level study activities; the estimated or actual costs for each activity; the sponsor's total contributions for such activities to date; and a proposed payment schedule for the sponsor's share of costs of feasibility-level studies that were incurred prior to execution of the amendment. HQ will provide draft language to amend the design agreement. The amendment will be approved by the Director of Civil Works HQUSACE. CELRH will expend, after the date of this implementation guidance, no more than $75,000 on the project until the amendment is executed. After execution of the amendment, costs for any feasibility level studies will be shared 50 percent Federal and 50 percent non-Federal as they are incurred. All design level work will continue to be shared 75 percent Federal and 25 percent non-Federal. Once the amendment is executed, CELRH will record the payments by the sponsor to pay the sponsor's share of costs of feasibility-level studies incurred prior to execution of the amendment in the sponsor's advance account associated with the project. As the sponsor's payments are received, CELRH will transfer costs originally charged to the project's Federal account to the sponsor's advance account thus bringing the project back in compliance and restoring Federal funds that may be available for the project or for reprogramming.

5. Cost Sharing of Design and Construction. Section 3170 of WRDA 2007 contained an estimated cost breakdown that reflected 75 percent Federal/25 percent non-Federal cost-sharing for project construction. However, Section 2008(c) of WRDA 2007 states that such Federal and non-Federal cost estimates are "for information purposes only and shall not be interpreted as affecting the cost-sharing responsibilities established by law." Because the plan described in the May 2004 Report was authorized for construction in WRDA 2007, the increased minimum cost-sharing percentage required by Section 202(a) of WRDA 1996 applies. Accordingly, the non-Federal cost-share for design and construction of the NED Plan for the project will be a minimum of 35 percent to a maximum of 50 percent with 5 percent provided as cash, pursuant to the cost-sharing specified for structural flood risk management projects by Section 103(a) of WRDA 1986, as amended by Section 202(a) of WRDA 1996. Further, if a Locally Preferred Plan is implemented, the non-Federal sponsor is responsible for 100 percent of the costs of the Locally Preferred Plan that are in excess of the costs of the NED Plan (ER 1105-2-100 paragraph E-3.c.(5)).

6. Upon approval of the decision document by the Director of Civil Works, existing funds may be utilized to complete design activities pursuant to the amended Design Agreement. No construction work or execution of a PPA will be undertaken on this project until funds are appropriated by Congress.

FOR THE COMMANDER:

Theodore A. Brown

Encl

THEODORE A. BROWN
Chief, Planning and Policy Division
Directorate of Civil Works

AUTHORIZING LEGISLATION

WRDA 1996

SEC. 580. LOWER MUD RIVER, MILTON, WEST VIRGINIA.
The Secretary shall conduct a limited reevaluation of the watershed plan and the environmental impact statement prepared for the Lower Mud River, Milton, West Virginia, by the Natural Resources Conservation Service pursuant to the Watershed Protection and Flood Prevention Act (16 U.S.C. 1001 et seq.) and may carry out the project.

WRDA 2000

SEC. 340. LOWER MUD RIVER, MILTON, WEST VIRGINIA.
The project for flood damage reduction, Lower Mud River, Milton, West Virginia, authorized by section 580 of the Water Resources Development Act of 1996 (110 Stat. 3790), is modified to direct the Secretary to carry out the project.

WRDA 2007

SEC. 3170. LOWER MUD RIVER, MILTON, WEST VIRGINIA.
The project for flood control at Milton, West Virginia, authorized by section 580 of the Water Resources Development Act of 1996 (110 Stat. 3790) and modified by section 340 of the Water Resources Development Act of 2000 (114 Stat. 2612), is modified to authorize the Secretary to construct the project substantially in accordance with the draft report of the Corps of Engineers dated May 2004, at an estimated total cost of $57,100,000, with an estimated Federal cost of $42,825,000 and an estimated non-Federal cost of $14,275,000.