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

16 SEP 2008

CECW-SAD

MEMORANDUM FOR COMMANDER, South Atlantic Division (CESAD-PM)

SUBJECT: Implementation Guidance for Section 5062 of the Water Resources Development Act of 2007 (WRDA 2007) – FLORIDA KEYS WATER QUALITY IMPROVEMENTS

1. Section 109 of the Consolidated Appropriations Act of 2001 (P.L. 106-554; 114 Stat. 2763A-222) (Section 109) established the Florida Keys Water Quality Improvement Program (FKWQIP). Section 5062 of WRDA 2007 amends Section 109 to: provide authority for the Secretary to credit toward the non-Federal share of the cost of the project, in accordance with Section 221 of the Flood Control Act of 1970, the cost of construction work carried out by the non-Federal interest for the project before the date of the partnership agreement for the project; provide authority for the Secretary to credit the cost of land acquisition carried out by the non-Federal interest for projects carried out under FKWQIP; and specify that not more that $15,000,000 of the $100,000,000 authorized to be appropriated to the Government for the Section 109 program may be used to provide planning, design, and construction assistance to the Florida Keys Aqueduct Authority for a water treatment plant in Florida City, Florida. A copy of Section 5062 of WRDA 2007 and Section 109 of P.L. 106-554 as amended by Section 5062 of WRDA 2007 are enclosed for information.

2. Program implementation guidance for the FKWQIP was provided by CECW-SAD memorandum dated 13 December 2006, subject: Florida Keys Water Quality Improvements Program - Program Implementation Guidance. That guidance will continue to be used for projects implemented under this program, with the exception of the changes below. A copy of the original guidance (without attachments) is enclosed for information.

a. Paragraphs 5.b.(1) and (2) are replaced by the following:

Projects solely for the purpose of removing or remediating contamination related to any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. Sections 9601-9675] are not eligible for Federal assistance under this authority.

b. Paragraphs 5.c.(1) and (2) are replaced by the following:

The Government will provide technical and financial assistance for Section 109 projects as identified in a project specific Section 109 agreement. Federal technical assistance will be provided as set forth in the project specific Section 109 agreement. Federal financial assistance will be in the form of reimbursement, to the non-Federal sponsor, of

the Federal share of: (1) pre-Agreement planning and design work directly related to the construction undertaken pursuant to a Section 109 agreement; (2) pre-Agreement construction work performed on or before 8 November 2007; (3) pre-Agreement construction work performed after 8 November 2007 that was performed pursuant to an In-Kind MOU; (4) planning, design, and construction work performed after the effective date of the Section 109 agreement for such project; and (5) the value of lands, easements, rights-of-way, and relocations acquired by the non-Federal sponsor on or after 21 December 2000 specifically to support a FKWQIP project. The eligibility of pre-Agreement construction work for reimbursement is subject to the limitations set out in paragraph 4 of EC 1165-2-208 and paragraph 5.h. of this guidance, the costs will be subject to an audit, and the work must be determined to be integral to the project as set out in paragraph 6 of EC 1165-2-208 and paragraph 5.h. of this guidance. The actual amount of reimbursement will be determined in accordance with the terms and conditions of the project specific Section 109 agreement and will be subject to the availability of Federal funding and the limitation of Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103. The Government will process reimbursement payments based on invoices submitted by the non-Federal sponsor in accordance with the provisions of the Section 109 agreement.

c. Paragraph 5.e.(1) is replaced by the following:

Determining the costs of Non-Federal Work (including Pre-Agreement Work). The costs eligible to be included in total project costs are: (1) pre-Agreement planning and design work; (2) pre-Agreement construction work performed on or before 8 November 2007; (3) pre-Agreement construction work performed after 8 November 2007 pursuant to an In-Kind MOU; (4) planning, design, and construction work performed after the effective date of the Section 109 agreement; and (5) the value of lands, easements, rights-of-way, and relocations required for the project that were acquired by the non-Federal sponsor on or after 21 December 2000. All costs of planning, design, and construction performed by the non-Federal sponsor will be subject to an audit to determine the reasonableness, allocability, and allowability of such costs and will be subject to the other conditions and limitations of the Section 109 agreement. In addition, the pre-Agreement construction work must be determined to be integral to the project as set out in paragraph 6 of EC 1165-2-208 and paragraph 5.h. of this guidance and is subject to the limitations on eligibility set out in paragraph 4 of EC 1165-2-208 and paragraph 5.h. of this guidance. Other non-Federal contributions eligible to be included in total project costs are the non-Federal sponsor's costs to participate in the Project Coordination Team, the costs of non-Federal audits, and the non-Federal sponsor's costs of investigations to identify the existence and extent of hazardous substances. All of these costs will be subject to an audit to determine the reasonableness, allocability, and allowability of such costs. Costs of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material and costs to remove or remediate CERCLA regulated substances are not eligible for cost sharing under this program, will not be included in total project costs, and will be a 100 percent non-Federal responsibility.

e. Paragraph 5.e.(2) is replaced with the following:

Lands, Easements, Rights-of-Way, Relocations, and Disposal Facilities (LERRD). The non-Federal sponsor will be responsible for providing all lands, easements, rights-of-way, relocations, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material (LERRD) the Government determines to be required or to be necessary for construction, operation, and maintenance of the project.

(a) For agreements executed on or after 8 November 2007, the non-Federal sponsor will be afforded credit, in accordance with the terms of the Section 109 agreement, for the fair market value of lands, easements, rights-of-way, and relocations (LERR) determined by the Government to be required for construction, operation, and maintenance of the project. Credit may not be afforded for LERR acquired or performed on or before 21 December 2000 - the date of establishment of the Florida Keys Water Quality Improvement Program. The appropriate statutory or judicially established definition of fair market value must be used, as defined in EC 405-1-04. The value of LERR included in total project costs shall not exceed 35 percent of total project costs. The Government will not afford credit toward the non-Federal sponsor's share for the project and will not provide any reimbursement for the value of LERR provided for the project by the non-Federal sponsor that exceeds 35 percent of total project costs.

(b) The Government will not include in total project costs any value of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material (D) provided for the project by the non-Federal sponsor; will not afford credit toward the non-Federal sponsor's share for the value of D provided for the project by the non-Federal sponsor; and will not provide any reimbursement for the value of D provided for the project by the non-Federal sponsor.

f. The following is added as a new Paragraph 5.h.

Section 221. Section 109, as amended, specifically states that credit may be afforded, in accordance with Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b), for construction carried out by the non-Federal interest before the date of the project partnership agreement. Engineering Circular No. 1165-2-208 In-Kind Contribution Provisions of Section 221 contains the guidance and procedures to be used to determine eligibility of such work. However, because Section 109 provides the Federal share in the form of reimbursement not all portions of EC 1165-2-208 are applicable. Only the guidance and procedures contained in paragraphs 4 and 6 of EC 1165-2-208 are applicable for Section 109. For Section 109 projects, the applicable milestone that must be met in Table 1 of EC 1165-2-208 is Signature of the Record of Decision for the Section 109 Program. The integral determination addressed in paragraph 6 of EC 1165-2-208 must be made prior to approval of the Section 109 agreement. The approval level for the integral determination for a Section 109 project shall be in accordance with the approval levels shown in Table 2 of EC 1165-2-208 for

CAP Authorities and Regional Authorities That Do Not Require Additional Authorization to Implement a Project. The actual value of the eligible construction work will be determined in accordance with the terms and conditions of the Section 109 agreement for the project.

g. Paragraph 6.e. is replaced by the following.

Cost Accounting. All Federal costs related to the project, including costs incurred prior to the execution of the Section 109 agreement will be included in the final cost of the project and shared in accordance with the terms and conditions of the Section 109 agreement. All non-Federal costs to be included in total project costs are subject to an audit to determine reasonableness, allocability, and allowability of such costs and are subject to all the other conditions and limitations of the Section 109 agreement.

3. Section 5062 (2) specifies that not more than $15,000,000 of the $100,000,000 authorized to be appropriated to the Government for the Section 109 program may be used to provide planning, design, and construction assistance to the Florida Keys Aqueduct Authority for a water treatment plant in Florida City, Florida. Any assistance provided to the Florida Keys Aqueduct Authority for a water treatment plant in Florida City, Florida must comply with all applicable programmatic regulations and guidance issues for the FKWQIP, dated 13 December 2006, as modified above and the Federal share of such assistance shall not exceed $15,000,000.

4. The Section 109 program, which is similar to other environmental infrastructure assistance programs, does not comply with policy and funds shall not be included in the budget. No work or reimbursement may be undertaken under this authority until such time as funds are specifically appropriated by Congress for such purpose.

FOR THE COMMANDER:

3 Encls

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

ENCLOSURE 1

SEC. 5062. FLORIDA KEYS WATER QUALITY IMPROVEMENTS.
Section 109 of the Miscellaneous Appropriations Act, 2001 (enacted into law by Public Law 106–554) (114 Stat. 2763A–222) is amended—

(1) by adding at the end of subsection (e)(2) the following:
"(C) CREDIT FOR WORK PRIOR TO EXECUTION OF THE PARTNERSHIP AGREEMENT.—The Secretary shall credit toward the non-Federal share of the cost of the project—
"(i) in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), the cost of construction work carried out by the non-Federal interest for the project before the date of the partnership agreement for the project; and
"(ii) the cost of land acquisition carried out by the non-Federal interest for projects to be carried out under this section."; and

(2) in subsection (f) by striking "$100,000,000" and inserting "$100,000,000, of which not more than $15,000,000 may be used to provide planning, design, and construction assistance to the Florida Keys Aqueduct Authority for a water treatment plant, Florida City, Florida".

ENCLOSURE 2

Section 109 of Public Law 106–554, as Amended

SEC. 109. FLORIDA KEYS WATER QUALITY IMPROVEMENTS.

(a) IN GENERAL.—In coordination with the Florida Keys Aqueduct Authority, appropriate agencies of municipalities of Monroe County, Florida, and other appropriate public agencies of the State of Florida or Monroe County, the Secretary of the Army may provide technical and financial assistance to carry out projects for the planning, design, and construction of treatment works to improve water quality in the Florida Keys National Marine Sanctuary.

(b) CRITERIA FOR PROJECTS.—Before entering into a cooperation agreement to provide assistance with respect to a project under this section, the Secretary shall ensure that—

(1) the non-Federal sponsor has completed adequate planning and design activities, as applicable;

(2) the non-Federal sponsor has completed a financial plan identifying sources of non-Federal funding for the project;

(3) the project complies with—

(A) applicable growth management ordinances of Monroe County, Florida;

(B) applicable agreements between Monroe County, Florida, and the State of Florida to manage growth in Monroe County, Florida; and

(C) applicable water quality standards; and

(4) the project is consistent with the master wastewater and storm water plans for Monroe County, Florida.

(c) CONSIDERATION.—In selecting projects under subsection (a), the Secretary shall consider whether a project will have substantial water quality benefits relative to other projects under consideration.

(d) CONSULTATION.—In carrying out this section, the Secretary shall consult with—

(1) the Water Quality Steering Committee established under section 8(d)(2)(A) of the Florida Keys National Marine Sanctuary and Protection Act (106 Stat. 5054);

(2) the South Florida Ecosystem Restoration Task Force established by section 528(f) of the Water Resources Development Act of 1996 (110 Stat. 3771–3773);

(3) the Commission on the Everglades established by executive order of the Governor of the State of Florida; and

(4) other appropriate State and local government officials.

(e) NON-FEDERAL SHARE.—

(1) IN GENERAL.—The non-Federal share of the cost of a project carried out under this section shall be 35 percent.

(2) CREDIT.—

(A) IN GENERAL.—The Secretary may provide the non-Federal interest credit toward cash contributions required—

(i) before and during the construction of the project, for the costs of planning, engineering, and design, and for the construction management work that is performed by the non-Federal interest and that the Secretary determines is necessary to implement the project; and

(ii) during the construction of the project, for the construction that the non-Federal interest carries out on behalf of the Secretary and that the Secretary determines is necessary to carry out the project.

(B) TREATMENT OF CREDIT BETWEEN PROJECTS.—Any credit provided under this paragraph may be carried over between authorized projects.

C) CREDIT FOR WORK PRIOR TO EXECUTION OF THE PARTNERSHIP AGREEMENT.—The Secretary shall credit toward the non-Federal share of the cost of the project—

(i) in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), the cost of construction work carried out by the non-Federal interest for the project before the date of the partnership agreement for the project; and

(ii) the cost of land acquisition carried out by the non-Federal interest for projects to be carried out under this section.

(f) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section $100,000,000, of which not more than $15,000,000 may be used to provide planning, design, and construction assistance to the Florida Keys Aqueduct Authority for a water treatment plant, Florida City, Florida.
Such sums shall remain available until expended.

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

REPLY TO
ATTENTION OF:

DEC 13 2006

CECW-SAD

MEMORANDUM FOR DIVISION COMMANDER ATTN: CESAD-PD-C

SUBJECT: Florida Keys Water Quality Improvements Program – Program Implementation Guidance

1. Reference CESAJ-OC emails dated 15 June and 29 June 06, transmitting draft implementation guidance for the subject program.

2. The program implementation guidance for the subject program was approved by the Assistant Secretary of the Army (Civil Works) on 11 December 2006. A copy of the approved implementation guidance is enclosed.

3. If you have any questions, please contact Mr. Gary Hardesty, Program Manager, at (202) 761-4376.

Encl

M. K. Miles, P.E.
Acting Chief, South Atlantic Division
Regional Integration Team
Directorate of Civil Works

FLORIDA KEYS WATER QUALITY IMPROVEMENT PROGRAM

PROGRAM IMPLEMENTATION GUIDANCE

1. **PROGRAM OBJECTIVE**. The primary objective of this program is for the Secretary of the Army, in coordination with the Florida Keys Aqueduct Authority, appropriate agencies of the municipalities of Monroe County, Florida, and other appropriate public agencies of the State of Florida or Monroe County, to provide technical and financial assistance to non-Federal interests to carry out projects for the planning, design, and construction of treatment works to improve water quality in the Florida Keys National Marine Sanctuary. The program will be known as the "Florida Keys Water Quality Improvement Program (FKWQIP)" and/or the "Section 109 Program".

2. **AUTHORITY**. The Florida Keys Water Quality Improvement Program (FKWQIP) was authorized by Section 109 of the Consolidated Appropriations Act, 2001, Division B of Appendix D of Public Law 106-554, 114 STAT 2763A-221. The language of Section 109 is provided at Attachment 1.

3. **APPROPRIATIONS AND USE OF FUNDS**.

a. **General**. The cumulative Federal financial obligations under this program will not exceed the lesser of the following: the amount authorized to be appropriated or the actual appropriations. All assistance under this program will be by reimbursement of the Federal share to the non-Federal interests and will be subject to the requirements of Section 102 of the Energy and Water Development Appropriations Act for Fiscal Year 2006, Public Law 109-103.

b. **Fiscal Year 2002.** The Energy and Water Development Appropriations Act for Fiscal Year (FY) 2002 (Public Law 106-60) included funds totaling $500,000 for the Corps of Engineers to initiate the program. Congress did not provide any direction for use of the appropriated funds. The approved plan for implementing this congressional add documented in the CESAJ-PD-PN Fact sheet, dated 7 December 2001, and approved 1 March 2002 (Attachment 2) calls for the initial allocation of funds to be used to begin coordination activities with the potential non-Federal sponsor(s); prepare the Project Management Plan that will define the program scope, guidelines, schedule, and resources for implementation of the program; and develop a model agreement.

c. **Fiscal Year 2004.** The Energy and Water Development Appropriations Act for Fiscal Year (FY) 2004 (Public Law 108-137) included funds totaling $500,000 for the Corps of Engineers. The Conference Report included language requesting that the Administration include funds for this program in future funding requests and recommended the possibility of including it as a part of the Everglades Restoration program effort. The 2004 Consolidated Appropriations Act (Public Law 101-199) included additional funds totaling $2,000,000. The plan for implementing this congressional add was documented in the CESAJ-DP-E Fact sheet, dated 15 April 2004. The Fact Sheet calls for the initial allocation of funds to be used to prepare appropriate National Environmental Policy Act documentation for implementation of the first priority project, the Key Colony Beach Sanitary Sewer Rehabilitation project, execute a PCA, and provide financial and technical assistance to Monroe County in support of their design and construction activities on the project.

d. **Fiscal Year 2005.** The Energy and Water Development Appropriations Act for Fiscal Year (FY) 2005 (Public Law 108-447) included funds totaling $2,250,000 for the Corps of Engineers. The Conference Report included language requesting that the Administration implement the work in coordination with the ongoing Everglades Restoration program effort. Administration policy on the program, which did not support future funding, was established with the FY 2002 congressional add. A fact sheet was not required to be prepared and no guidance was provided on use of the funds this FY.

e. **Fiscal Year 2006.** The Energy and Water Development Appropriations Act for Fiscal Year (FY) 2006 (Public Law 109-103) included funds totaling $2,000,000 for the Corps of Engineers. Directive language was not provided in the Act or the Conference Report. A fact sheet was not required to be prepared and no guidance was provided on use of the funds this FY.

4. **PROGRAM AND PROJECT MANAGEMENT.**

a. **Program Management Activities.** USACE activities necessary to effectively manage the implementation of the Section 109 program include the preparation of a Program Management Plan, program management, and reporting.

(1) Program Management Plan. The purpose of the Program Management Plan (PgMP) is to establish the framework for implementation of projects under the authority of Section 109. Development of the PgMP will involve coordination with other Federal, State, regional, and local agencies and a review of existing information to identify the type and magnitude of water quality problems in the program area and to develop a list of potential design and construction assistance projects. The PgMP will establish the procedures for nomination of projects and criteria for prioritization and selection of specific projects for implementation. Prioritization criteria should be based on appropriate factors such as the benefits of the project (e.g.; water quality benefits), economic and environmental conditions in the project area, relationship of the project to Federal and State compliance requirements, and readiness of the project. The PgMP will be updated over the life of the program as necessary. The PgMP and future updates will be provided to the South Atlantic Division (CESAD) for approval. The Division Commander is authorized to approve the PgMP and future updates. This authority may not be further delegated. A copy of the PgMP and future updates will be provided to the Office of the Assistant Secretary of the Army (Civil Works) (OASA(CW)) and Corps Headquarters (CECW-SAD) for information.

(2) Program Management. Program management activities are those actions leading up to the negotiation of a Section 109 agreement for each specific project and post execution management. Program management involves coordination with non-Federal interests to identify (i.e., nominate) specific projects and review and selection of projects for development of negotiated agreements and supporting documentation. Project nomination, review, and selection will follow the procedures established in the PgMP. Projects selected in any fiscal year are subject to the availability of funds and should reflect any direction received from Congress via the Appropriations Committees. Post execution management will consist of preparing program wide summaries of actual and projected Federal expenditures and non-Federal sponsor reimbursements. Cash flows will be scheduled and coordinated with CESAD and CECW-SAD for Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103, non-Federal sponsor reimbursement planning. This information will be used to manage the sequencing and timing of projects to produce the program within the appropriation authorization limit.

(3). Funding. Funding for USACE program management activities will be within available Federal appropriations for the Section 109 program and will be allocated to specific projects and shared in accordance with the terms of the agreement for such project.

b. **Project Management Activities.** USACE project management activities are those actions necessary to develop supporting documentation and to negotiate, execute, and carry out the terms of agreements for specific Section 109 projects. All USACE project management costs for a specific project will be included in total project cost for that project and will be shared in accordance with the terms of the agreement for such project.

5. **APPLICABLE POLICY**. Projects implemented under the Section 109 Program will be developed consistent with the following requirements:

a. **Project Purposes.** Section 109 authorizes Federal assistance to carry out projects for planning, design, and construction of treatment works to improve water quality in the Florida Keys National Marine Sanctuary.

b. **Restrictions of Program Eligibility.**

(1) Projects where the construction was initiated prior to execution of a Section 109 agreement for such work are not eligible for Federal assistance under this authority.

(2) Projects solely for the purpose of removing or remediating contamination related to any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. Sections 9601-9675] are not eligible for Federal assistance under this authority.

c. **Form of Federal Assistance.**

(1) The Government will provide technical and financial assistance for Section 109 projects as identified in a project specific Section 109 agreement. Federal financial assistance will be in the form of reimbursement, to the non-Federal sponsor, of the Federal share of the pre-Agreement planning and design work (performed prior to the effective date of the agreement) and the design and construction work performed after the effective date of the agreement for such project. Such reimbursement will be determined in accordance with the terms and conditions of the project specific Section 109 agreement and will be subject to the availability of Federal funding and the limitation of Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103. The Government will process reimbursement payments based on invoices submitted by the non-Federal sponsor in accordance with the provisions of the Section 109 agreement.

(2) The amount of reimbursement of planning and design work performed prior to the effective date of a Section 109 agreement is limited to that portion of the costs of such work that is directly related to the construction work being undertaken pursuant to a Section 109 agreement.

d. **Limits on Reimbursements.**

(1) Financial assistance provided under Section 109 is limited by the requirements of Section 102 of the Energy and Water Development Appropriations Act for Fiscal Year 2006, Public Law 109-103. While the general principles and procedures for implementing Section 102, identified in Headquarters guidance (Memorandum, CECW-B/CECW-A, 30 May 2000, subject: Implementation of Section 102 of the Energy and Water Development Appropriations Act, 2000, Public Law 106-60), are still applicable, the limits identified in this guidance memorandum have been modified by Section 102 of the Energy and Water Development Appropriations Act for Fiscal Year 2006, Public Law 109-103. Reimbursements for all applicable general authorities and under specific project authorities, including Section 109, cannot

exceed $100,000,000 in each fiscal year. Headquarters Programs Integration Division should be consulted for procedures for reporting and managing all USACE projects subject to Section 102.

(2) If the Government suspends its performance responsibilities, including reimbursement, under a Section 109 agreement due to insufficient funding or the Section 102 limitation, the sponsor, at its sole discretion, may continue work on the project. However, the sponsor should understand that if they continue to work on the project during the period of suspension of the Government's performance responsibilities, such work performed must comply with the conditions of the Section 109 agreement to be eligible for inclusion in total project costs and any reimbursement of the Federal share of such work once the Government has resumed its performance responsibilities.

e. **Cost Sharing**. The non-Federal sponsor share of a Section 109 project is 35 percent of total project costs.

(1) Determining the Costs of Non-Federal Work (including Pre-Agreement Planning and Design Work). The costs to be included in total project costs for the pre-Agreement planning and design work and the design and construction work incurred by the non-Federal sponsor after the effective date of the Section 109 agreement will be subject to an audit to determine the reasonableness, allocability, and allowability of such costs and also will be subject to the other conditions and limitations of the Section 109 agreement. Other non-Federal contributions eligible to be included in total project costs are the non-Federal sponsor's costs to participate in the Project Coordination Team, the costs of non-Federal audits, and the non-Federal sponsor's costs of investigations to identify the existence and extent of hazardous substances. All of these costs will be subject to an audit to determine the reasonableness, allocability, and allowability of such costs. However, costs to remove or remediate CERCLA regulated substances are not eligible for cost sharing under this program, will not be included in total project costs, and will be treated as a 100 percent non-Federal responsibility.

(2) Lands, Easements, Rights-of-Way, Relocations, and Disposal Facilities (LERRD). The non-Federal sponsor, at no cost to the Government, will be responsible for providing all LERRD that are required for construction, operation, and maintenance of the project. The Government will not include any value of LERRD for the project in total project costs, will not afford credit toward the non-Federal sponsor's share for the value of LERRD for the project, and will not provide any reimbursement for the value of LERRD provided for the project by the non-Federal sponsor.

(3) Operation, Maintenance, Repair, Replacement, and Rehabilitation (OMRR&R). The non-Federal sponsor will perform and be responsible for 100 percent of the costs of OMRR&R associated with a completed construction project.

(4) Betterments. Betterments are defined as a difference in the design or construction of an element of the project that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the design or construction of that element. The non-Federal sponsor is responsible for all costs due to betterments, including costs associated with obtaining the necessary LERRD and permits; and no costs associated with betterments will be eligible for reimbursement.

(5) Use of Federal Funds. If non-Federal interests used, or plan to use, funds from another Federal agency to perform work for which Federal assistance under Section 109 is proposed, the non-Federal interest must first obtain a letter from the Federal agency providing the Federal portion of such funds that verifies in writing that expenditure of such funds toward the non-Federal share of the project is expressly authorized by Federal law.

f. **Technical Analyses.** The investigations to be conducted will be determined jointly by the Government and the non-Federal sponsor and will include sufficient engineering, environmental, and financial analyses and public involvement activities necessary to implement the project in compliance with applicable Federal and state laws.

(1) Engineering Analysis.

(a) Projects should utilize readily available technology and industry-accepted design and construction practices.

(b) ETL-2-361, Life Cycle Design and Performance of Structures for Local Flood Protection dated 31 January 1994, (paragraph A-2b, "Technical Criteria") states
" . . . [T]he Corps of Engineers has issued design criteria for Civil Works. These criteria are intended to ensure reliable designs for high risk projects such as local flood protection, flood control dams, and major navigation projects. ...[T]hese criteria are more stringent than related to commercial criteria." Corps criteria are waived for projects that are not high risk in nature, as defined in ETL 1110-2-361.

(c) Corps civil works cost estimating requirements, defined in ER 1110-2-1302 (Civil Works Cost Engineering), will not be applied to projects where the design and cost estimate has been substantially completed by others.

(2) Environmental Compliance. Sufficient analysis, coordination, and documentation will be accomplished to comply with applicable Federal environmental laws, statutes, and Executive Orders and to provide a basis for obtaining the necessary permits and licenses for project implementation. Using information developed by the non-Federal sponsor, the Government will develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision in accordance with the National Environmental Policy Act (NEPA) of 1969. The non-Federal sponsor is responsible for obtaining all necessary permits and licenses.

(3) Financial Analysis. Each non-Federal sponsor must prepare a financing plan, evidencing its ability to assure financing of the project commensurate with the Federal commitment and the district will prepare an assessment of the non-Federal sponsor's financial capability consistent with the principles established in ER 1105-2-100, Appendix D, paragraph D.

g. **Project Scope.** Projects may either be new construction or rehabilitation of an existing facility, provided that 1) the facility was not originally built with the aid of Federal funds, or 2) if built with Federal funds, then rehabilitation at 100 percent non-Federal expense was not a condition of the receipt of Federal funds. Experience with other regional assistance programs reveals that, for many projects, the non-Federal interests may have already secured most of the funding for a larger (such as county wide) project and are seeking Federal assistance for the remaining portion which may constitute less than 65 percent of the costs of the entire project. Because Section 109 authorizes the provision of assistance, the concepts of separable element(s) or functional portion(s) that are utilized to determine the acceptable scope for a specifically authorized project have been deleted. The scope of a Section 109 project should be considered a useful portion and may consist of one piece of a larger project (such as providing 5,000 LF of pipeline that will connect an existing or new treatment plant with residences). Therefore, the project description in Article I.A. of the agreement would be limited to only that work that would be implemented and shared pursuant to Section 109.

6. PROCEDURES FOR IMPLEMENTATION.

a. **Selection of Projects**. Selection of projects will be in accordance with the procedures and guidelines identified in the PgMP.

b. **Performance Responsibilities.**

(1) The Government will provide technical and financial assistance for Section 109 projects as identified in a project specific Section 109 agreement. Federal financial assistance will be in the form of reimbursement, to the non-Federal sponsor, of the Federal share of the Section 109 project. Further, Section 109 Program oversight activities, completion of all necessary environmental documentation and coordination, and processing of agreements will be the responsibility of the Government.

(2) The non-Federal sponsor will perform the remaining planning, design, and construction work for the Section 109 project.

c. **Agreements.**

(1) A model agreement will be used as a basis for developing the project-specific agreements to be executed by the Government and the non-Federal sponsor prior to providing assistance under this program. Headquarters will provide a draft model agreement for partial cost-reimbursement of planning, design, and construction performed by non-Federal interests and draft implementation procedures for the review, approval, and execution of project-specific agreements. Until the draft model is approved, agreements must be forwarded to HQUSACE for review and approval by the Office of the Assistant Secretary of the Army (Civil Works). The submittal should include six packages with each containing: draft agreement; list of deviations and detailed reasons for the deviations from the draft model, Certificate of Legal Review signed by District Counsel; Checklist (use checklist for specifically authorized projects); District Assessment of Sponsor's Financial Capability signed by District Engineer; Federal/Non-Federal Funds allocation Table; and Scope of Work.

(2) The Section 109 agreement may be executed prior to completion of all necessary environmental documentation and coordination. However, the construction portion of the work may not begin until all applicable environmental laws and regulations have been complied with.

d. **Products and Approvals.**

(1) Design Portion. For the design portion of the project, the end product should be a set of plans and specifications suitable for the advertisement and award of a construction contract for the identified project. The design portion of the project will also produce documentation of the engineering, economic, environmental, and institutional analyses and public involvement activities necessary to implement the project. Requirements include preparation of either an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision for NEPA compliance and obtaining the appropriate permits required to initiate project construction. Districts are responsible for assuring the technical and legal adequacy of all design portion products. The Division Commander is authorized to approve all design products and may delegate this authority to the District Commander.

(2) Construction Portion. The non-Federal sponsor is responsible for development and approval of all products pertaining to the performance of work (whether performed under contract awarded by the non-Federal sponsor or by non-Federal sponsor personnel) and will provide the Government an opportunity to review such products. The non-Federal sponsor will also prepare and furnish to the Government for

review a proposed Operation, Maintenance, Repair, Rehabilitation and Replacement (OMRR&R) Manual. The Division Commander is authorized to approve all construction products and may delegate this authority to the District Commander. Federal inspection and approval of completed work will be required and the non-Federal sponsor will be encouraged to make the site available to Federal inspectors to advance the final approvals leading to reimbursement.

e. **Cost Accounting**. All Federal costs related to the project, incurred prior to execution of the Section 109 agreement, for such items as developing supporting documentation, and negotiating the Section 109 agreement will be included in total project costs and shared in accordance with the terms of the agreement. As long as a Section 109 agreement is executed prior to the initiation of construction, non-Federal costs for pre-Agreement planning and design incurred prior to the execution of such agreement will be included in total project costs, subject to an audit to determine reasonableness, allocability, and allowability of such costs, and will be shared in accordance with the terms of such agreement. All Federal and non-Federal costs incurred subsequent to execution of the agreement, except the costs of LERRD, betterments, OMRR&R, and dispute resolution, will be included in total project costs and shared in accordance with the terms and conditions of the agreement.

Attachments

1. Section 109 Consolidated Appropriations Act, 2001
2. CESAJ-PD-PN VTC Fiscal Year 2002 Fact Sheet, dated 7 December 2001, and approved 1 March 2002
3. CESAJ-DP-E VTC Fiscal Year 2004 Fact Sheet, dated 15 April 2004