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

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CECW-P

Regulation
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Water Resource Policies and Authorities
OPERATION AND MAINTENANCE OF IMPROVEMENTS CARRIED OUT BY NON-FEDERAL INTERESTS TO AUTHORIZED HARBOR OR INLAND HARBOR PROJECTS

1. Purpose. This regulation provides policy guidance for implementation of Section 204(f) of the Water Resources Development Act (WRDA) of 1986, as amended by Section 1014(b) of the Water Resources Reform and Development Act (WRRDA) of 2014 (33 U.S.C. 2232(f)). Section 204(f) authorizes the Secretary of the Army to be responsible for the operation and maintenance of improvements to a federally authorized harbor or inland harbor carried out by a non-Federal interest when certain conditions are met. Separate guidance is provided in ER 1165-2-209 regarding non-Federal interests undertaking a feasibility study, as authorized by Section 203 of WRDA 1986, as amended by Section 1014(a) of WRRDA 2014, and in ER 1165-2-210 regarding non-Federal interests constructing a water resources development project, as authorized by Section 204 of WRDA 1986, as amended by Section 1014(b) of WRRDA 2014.

2. Applicability.

a. This regulation applies to all HQUSACE elements, major subordinate commands, districts, laboratories and all field operating agencies having Civil Works responsibilities. This regulation supersedes ER 1165-2-124, Construction of Harbor or Inland Harbor Projects by Non-Federal Interests, dated 1 October 1990 and ER 1165-2-120, Reimbursement For Advance Non-Federal Construction of Authorized Federal Harbor and Inland Harbor Projects, dated 15 June 1988.

b. This regulation and the referenced documents constitute the guidelines to assist non-Federal interests in preparation and submission of a report recommending assumption of maintenance of improvements carried out by a non-Federal interest to a federally authorized harbor or inland harbor, pursuant to Section 204(f).

3. References.

a. Section 204(f) of the WRDA 1986, as amended by Section 1014 of the Water Resources Reform and Development Act of 2014, (33 U.S.C. 2232(f)). Section 204(f), as amended, is enclosed as Appendix A.

b. ER 1105 -2-100, Planning Guidance Notebook.

c. ER 1165-2-209, Studies of Water Resources Development Projects by Non-Federal Interests.

d. ER 1165-2-210, Construction of Authorized Water Resource Development Projects by Non-Federal Interests.

e. ER 1110-2-1404, Hydraulic Design of Deep Draft Navigation Projects.

f. ER 1130-2-520, Navigation and Dredging Operations and Maintenance Policies.

g. 33 U.S.C. 408 (Section 408), Taking Possession of, Use of, or Injury to Harbor or River Improvements.

4. General Policy For Eligibility.

a. General. Section 204(f) authorizes the Secretary to be responsible, in accordance with Section 101(b) of the WRDA 1986, as amended, for operation and maintenance (O&M) of improvements carried out by non-Federal interests to a federally authorized harbor or inland harbor project when certain conditions are met. While the improvement must be to a federally authorized harbor or inland harbor project, Congressional authorization of the improvement itself is not required. Section 204(f) requires that before construction of the improvement, 1) the Secretary must determine that the improvement is economically justified, environmentally acceptable, and consistent with the purposes of Title II of WRDA 1986 and 2) the Secretary and the non-Federal interest must execute a written agreement relating to O&M of the improvement. Further, Section 204(f) requires the Secretary to certify that the improvement was constructed in accordance with applicable permits and appropriate engineering and design standards. Additionally, Section 204(f) requires that the Secretary does not find that O&M of the improvements is no longer economically justified and environmentally acceptable.

b. Secretary Approval. To remain eligible for Federal assumption of O&M of the improvement, the non-Federal interest cannot initiate construction until the Assistant Secretary of the Army (ASA(CW)) has determined that the improvements are feasible and consistent with the purposes of Title II of WRDA 1986 and the parties have executed a written agreement for O&M of the improvement. Prior to initiation of construction, the ASA(CW) must have reviewed and approved the economic justification, details of the project plans and design, arrangements for the execution of the work, and the environmental compliance documentation. This information will be provided in a Section 204(f) report developed by the non-Federal interest.

c. All information necessary for these determinations must be provided at non-Federal interest expense. If the proposed non-Federal improvement is covered in a recently approved Report of the Chief of Engineers, the Report of the Chief of Engineers may meet the

requirements for the analysis to support the Secretary's determinations. The non-Federal interest should coordinate with the local Corps district office to determine if the recent Report of the Chief of Engineers is sufficient and to determine if any additional requirements, such as Section 408 permission, need to be met to obtain ASA(CW) approval.

d. Environmental Acceptability. Since the non-Federal interest will be required to obtain all necessary Federal, State, and local permits (Section10/404/103) for construction of the improvement, environmental concerns may have been addressed adequately through the permitting process. However, consideration will be given to any need for further documentation to meet National Environmental Policy Act (NEPA) requirements. NEPA compliance should follow the process set forth in 40 CFR Parts 1500-1508 and the USACE procedures for implementing NEPA found in 33 CFR Part 230. Documentation for Section 204(f) requests do not require the same level of analysis or documentation needed for planning studies and, therefore, Appendix A of 33 CFR Part 230 and other portions of Part 230 specific to planning studies do not apply.

e. Economic Justification. In order to find the proposed work economically justified, it must be demonstrated that:

(1) Improvement benefits, developed consistent with the economic standards contained in the Water Resources Council's Principles and Guidelines, exceed improvement costs, including construction and O&M costs. ER1105-2-100, Appendix E covers benefits evaluation procedures.

(2) The improvement must be justified entirely by commercial navigation benefits.

(3) Improvement O&M costs are no greater than the O&M costs of the improvement which reasonably maximizes net economic benefits (National Economic Development (NED) plan). Note that the proposed work does not have to be the NED plan, but improvement benefits must exceed improvement costs.

f. Consistent with Federal Policy. O&M of the improvement must be consistent with other Federal policies, including but not limited to the following:

(1) The Federal participation in navigation is limited to the navigable waters of the United States. Federal O&M is limited to general navigation features. General navigation features and aids to navigation are described in ER 1105-2-100, Appendix E, Section II. These features include such things as channels, jetties, breakwaters, locks and dams, harbor entrance channels and associated protective works, dredged material placement areas, mitigation features including associated lands, primary access channels to the harbor, basins, and anchorages that are needed for the transit of said channels.

(2) While facilities to serve vessels and commerce may be needed to achieve the benefits of a navigation project, O&M of these facilities are a responsibility of the non-Federal interest. Examples of such facilities include piers, wharves and other waterfront structures and associated local access channels, berthing, mooring, and anchorage areas and related local dredged material placement capacity. Local service facilities are described further in ER 1105-2-100, Appendix E Section II.

(3) The project must be justified entirely by commercial navigation benefits. However, there may be features of the proposed project which are intended for use by other than commercial navigation (such as recreational navigation). O&M of these features will be cost shared in accordance with cost sharing for that feature, e.g., O&M of features for recreation navigation is 100 percent non-Federal.

(4) Navigation improvements to provide navigation access to privately owned facilities or to benefit a single privately owned facility (benefit of only one owner/user) are not eligible for O&M under Section 204(f).

g. Dredged Material Management Plan (DMMP). The report and documentation submitted by the non-Federal interest must include a DMMP and demonstrate that there is adequate disposal capacity to accommodate at least 20 years of maintenance dredging of the proposed improvement considering the other applicable Federal maintenance requirements, such as the placement requirements for the existing Federal project. The non-Federal interest will be responsible for providing, at no cost to the Federal Government, dredged material placement facilities with sufficient capacity for at least the initial 20 years of maintenance dredging of the improvement. The cost of future dredged material management plan studies for continued maintenance of the improvement will be funded following normal budgetary procedures. Construction of dredged material placement facilities needed to accommodate dredging beyond the minimum 20-years of capacity that must be provided by the non-Federal interest will be cost shared in accordance with Section 101(b) of WRDA 1986, as amended (33 U.S.C. 2211(b)), following normal budgetary procedures. Guidance for development of a DMMP is included in ER 1105-2-100, Appendix E.

h. Section 408 Permission. Section 408 permission applies to the improvement proposed for construction by the non-Federal interests pursuant to Section 204(f). In general, the Section 204(f) report will not be submitted for approval by the ASA(CW) until after the request for the Section 408 permission and Section10/404/103 permits have been approved. The Section 204 (f) report prepared for ASA(CW) may also serve as the documentation to inform Section 408 permission decision. A copy of the most recent guidance for processing requests to alter Corps Civil Works projects pursuant to 33 U.S.C. 408 may be obtained from the local Corps district office.

i. Section 204(f) Report. The study which determines the relationship between improvement benefits and improvement costs will be the full responsibility of the non-Federal interest. A

report of study results will be provided to the appropriate Corps of Engineers District Commander for review and comment. In general, the Section 204(f) report will not be submitted for approval until the Section 408 permission and Section 10/404/103 permits have been approved. Once the District Commander is satisfied that the study adequately addresses the economic issues and environmental concerns, the Section 204(f) report, along with details of the proposed design, plans and specifications, and arrangements for execution of the work, will be forwarded to the Headquarters Regional Integration Team (RIT), through the Division. The Division will review the District's submittal prior to submitting the package to Headquarters. Upon completion of Headquarters review the Headquarters RIT will forward the Section 204(f) report along with details of proposed design, plans and specifications, and arrangements for prosecution of the work to ASA(CW) for decision.

j. Quality and Technical Accuracy.

(1) The non-Federal interest must certify the quality and technical accuracy of the study and report. This should be done by documenting the quality control, quality assurance, and technical reviews that were conducted for all information presented in the report. In addition, the non-Federal interest is required to undertake, at its own expense, any independent external peer review (IEPR) that would have been required if the Government were doing the work. The non-Federal interest certification of quality and technical accuracy and any IEPR undertaken shall be submitted along with the Section 204(f) report. A copy of the most recent Civil Works review guidance may be obtained from the local Corps district office.

(2) Planning Model Quality Assurance. For studies that it undertakes, the Corps requires use of models certified or approved by the appropriate Planning Center of Expertise and Headquarters. For studies undertaken by non-Federal interests under Section 204(f), the report should specify whether the model used was approved or certified by the Corps. A non-Federal interest may contact the local Corps district office to determine which planning models are currently certified or approved.

k. Agreement. In general, the ASA(CW) must determine that the proposed improvements are feasible and consistent with the purposes of Title II of WRDA 1986 prior to solicitation of the construction contract by the non-Federal interest. Approval of ASA(CW) is required to grant an exception to policy to permit solicitation of the construction contract prior to completion of ASA(CW) review and decision on the proposal. However, in no case may the construction contract for the improvement be awarded prior to the required ASA(CW) approval of the improvement and execution of a written agreement for O&M, as award of the construction contract constitutes initiation of construction. When developed, a model agreement will be posted on the Corps agreement website.

l. Construction and Certification. The improvement constructed by the non-Federal interest must be constructed in accordance with applicable permits, appropriate engineering and design standards, and plans approved by the Secretary.

(1) In constructing the improvement the non-Federal interest must comply with all the requirements of applicable Federal laws and implementing regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto; 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, The Contract Work Hours and Safety Standards Act, The Copeland Anti-Kickback Act); and the National Environmental Policy Act and other environmental laws.

(2) Construction monitoring and auditing activities to ensure the improvement or separable element of the improvement constructed by a non-Federal interest are carried out in compliance with the requirements of Section 204(f) will be performed by the appropriate Corps District Commander. The District must be provided the right to inspect the work and to enter, at reasonable times and in a reasonable manner, upon land which the non-Federal interest owns or controls for access to the improvement for such inspection.

(3) The District Commander must be able to certify that the improvement or separable element was completed in accordance with applicable permits and appropriate engineering and design standards. The District Commander will forward such certification through the Division Commander to the Headquarters RIT. The Headquarters RIT will transmit the certification to the ASA(CW).

m. Cost Sharing for O&M.

(1) Commercial Navigation. Cost sharing will be in accordance with the terms of Section 101(b) of WRDA of 1986, as amended.

(a) For projects whose depths do not exceed 50 feet, the Federal Government will assume 100 percent of eligible O&M costs. All other costs, including lands, easements, and rights-of-way, are the responsibility of the non-Federal interest.

(b) When the project depth exceeds 50 feet, the non-Federal interest will be responsible for 50 percent of the incremental eligible O&M costs beyond that necessary to maintain a 50 foot project.

(2) Recreation Navigation. O&M costs for recreational features of a project shall be 100 percent non-Federal interest's responsibility.

n. Discontinuance of Maintenance. If at any time the ASA(CW) determines that the O&M of the harbor or inland harbor improvement is no longer economically justified or environmentally acceptable, responsibility for O&M shall cease except that the ASA(CW) may choose to maintain a lesser depth in lieu of completely discontinuing maintenance activities. The

appropriate Corps District Office will notify the non-Federal interest if maintenance of the improvement will be discontinued or if the improvement will be maintained at a lesser depth.

5. Studies and Engineering. Section 204(c) of WRDA 1986, as amended, authorizes the Secretary to undertake all necessary studies and engineering for any construction to be carried out by the non-Federal interest and to provide technical assistance in obtaining necessary permits for construction if the non-Federal interest provides all funds for such studies, engineering, or technical assistance. Assistance under this provision may include analysis for development of the section 204(f) report and in obtaining section 408 permissions. The provision of assistance pursuant to Section 204 (c) will require approval of the Division Commander and execution of a memorandum of agreement (MOA) following the format of Support for Others MOAs. The non-Federal interest must pay all costs of such assistance upfront.

6. Funding for Review and Construction Inspection Certification. Applicable project O&M funds may be used for the Corps district activities involved in review of the study, and inspection and certification of construction. If existing or sufficient O&M and maintenance funds are not available for these activities, funding will be requested through the normal budgetary process.

7. Funding for O&M. Funding for the O&M of the improvements undertaken pursuant to Section 204(f) will be subject to existing budgetary policy and will need to compete for funding during the annual budget process.

Appendix A - Section 204, as amended

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Appendix A

Section 204 of the Water Resources Development Act of 1986, as amended by Section 1014(b) of the Water Resources Reform and Development Act of 2014 (33 U.S.C. § 2232(f)

SEC. 204. CONSTRUCTION OF WATER RESOURCES DEVELOPMENT PROJECTS BY NON-FEDERAL INTERESTS.

(a) WATER RESOURCES DEVELOPMENT PROJECT DEFINED.—In this section, the term 'water resources development project' means a project recommendation that results from—

(1) a feasibility report, as such term is defined in section 7001(f) of the Water Resources Reform and Development Act of 2014;

(2) a completed feasibility study developed under section 203; or

(3) a final feasibility study for water resources development and conservation and other purposes that is specifically authorized by Congress to be carried out by the Secretary.

(b) AUTHORITY.—

(1) IN GENERAL.—A non-Federal interest may carry out a water resources development project, or separable element thereof—

(A) in accordance with a plan approved by the Secretary for the project or separable element; and

(B) subject to any conditions that the Secretary may require, including any conditions specified under section 203(c)(3).

(2) CONDITIONS.—Before carrying out a water resources development project, or separable element thereof, under this section, a non-Federal interest shall—

(A) obtain any permit or approval required in connection with the project or separable element under Federal or State law; and

(B) ensure that a final environmental impact statement or environmental assessment, as appropriate, for the project or separable element has been filed.

(c) STUDIES AND ENGINEERING.—When requested by an appropriate non-Federal interest, the Secretary may undertake all necessary studies and engineering for any construction to be undertaken under subsection (b), and provide technical assistance in obtaining all necessary permits for the construction, if the non-Federal interest contracts with the Secretary to furnish the United States funds for the studies, engineering, or technical assistance in the period during which the studies and engineering are being conducted.

(d) CREDIT OR REIMBURSEMENT.—

(1) GENERAL RULE.—Subject to paragraph (3), a project or separable element of a project carried out by a non-Federal interest under this section shall be eligible for credit or reimbursement for the Federal share of work carried out on a project or separable element of a project if—

(A) before initiation of construction of the project or separable element—

(i) the Secretary approves the plans for construction of the project or separable element of the project by the non-Federal interest;

(ii) the Secretary determines, before approval of the plans, that the project or separable element of the project is feasible; and

(iii) the non-Federal interest enters into a written agreement with the Secretary under section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b), including an agreement to pay the non-Federal share, if any, of the cost of operation and maintenance of the project; and

(B) the Secretary determines that all Federal laws and regulations applicable to the construction of a water resources development project, and any conditions identified under subsection (b)(1)(B), were complied with by the non-Federal interest during construction of the project or separable element of the project.

(2) APPLICATION OF CREDIT.—The Secretary may apply credit toward—

(A) the non-Federal share of authorized separable elements of the same project; or

(B) subject to the requirements of this section and section 1020 of the Water Resources Reform and Development Act of 2014, at the request of the non-Federal interest, the non-Federal share of a different water resources development project.

(3) REQUIREMENTS.—The Secretary may only apply credit or provide reimbursement under paragraph (1) if—

(A) Congress has authorized construction of the project or separable element of the project; and

(B) the Secretary certifies that the project has been constructed in accordance with—

(i) all applicable permits or approvals; and

(ii) this section.

''(4) MONITORING.—The Secretary shall regularly monitor and audit any water resources development project, or separable element of a water resources development project, constructed by a non-Federal interest under this section to ensure that—

(A) the construction is carried out in compliance with the requirements of this section; and

(B) the costs of the construction are reasonable.

(e) NOTIFICATION OF COMMITTEES.—If a non-Federal interest notifies the Secretary that the non-Federal interest intends to carry out a project, or separable element thereof, under this section, the Secretary shall provide written notice to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives concerning the intent of the non-Federal interest.

(f) OPERATION AND MAINTENANCE.—Whenever a non-Federal interest carries out improvements to a federally authorized harbor or inland harbor, the Secretary shall be responsible for operation and maintenance in accordance with section 101(b) if—

(1) before construction of the improvements—

(A) the Secretary determines that the improvements are feasible and consistent with the purposes of this title; and

(B) the Secretary and the non-Federal interest execute a written agreement relating to operation and maintenance of the improvements;

(2) the Secretary certifies that the project or separable element of the project is constructed in accordance with applicable permits and appropriate engineering and design standards; and

(3) the Secretary does not find that the project or separable element is no longer feasible.