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

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Water Resources Policies and Authorities
IN-KIND CONTRIBUTION CREDIT PROVISIONS
OF SECTION 221(a)(4) OF THE FLOOD CONTROL ACT OF 1970, AS AMENDED

1. Purpose. This regulation provides guidance on the implementation of the in-kind contribution credit provisions of Section 221(a)(4) of the Flood Control Act of 1970, as further amended by Section 1018 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014) (42 U.S.C. 1962d-5b(a)(4)) (hereinafter referred to as "Section 221"). Section 221(a)(4) of the Flood Control Act of 1970, as amended, and Section 1018 of WRRDA 2014 are provided in Appendix A.

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

a. The Section 221 crediting provisions apply to the study, design, and construction of water resources development projects authorized in the Water Resources Development Act (WRDA) of 1986 or later laws, including projects initiated after November 16, 1986 without specific authorization in law. In addition, the crediting provisions apply to the correction of design deficiencies for projects authorized prior to WRDA of 1986. Finally, these provisions are also applicable to a project under an environmental infrastructure assistance program.

(1) For a project with a project partnership agreement (PPA) that was executed on or after November 8, 2007, such PPA may be amended to include work by the non-Federal sponsor that has not yet been initiated for credit toward any remaining non-Federal cost share under that agreement.

(2) Furthermore, in general, the crediting provisions of Section 221 will be used in lieu of Section 104 of WRDA 1986 and Section 215 of the Flood Control Act of 1968. However, any eligibility for credit under Section 104 of WRDA 1986 that was approved previously by the Secretary will be honored.

b. The authority for credit under Section 221 is in addition to any other authority to provide credit for in-kind contributions. Section 221 credit may be applied in lieu of other crediting provisions if requested by the non-Federal sponsor.

This regulation supersedes ER 1165-2-208, dated 17 February 2012.

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

4. Key Principles.

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

b. Types of In-Kind Contributions. The types of in-kind contributions eligible for credit include planning activities (including data collection and other services needed for a feasibility study); design related to construction; and construction (including management; mitigation; and construction materials and services).

c. Compliance with Applicable Federal Laws, Regulations, and Policies. Eligibility for credit is subject to the non-Federal sponsor complying with all 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; and 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 (42 U.S.C. 4321-4347) and other environmental laws and regulations.

d. In-Kind Memorandum of Understanding (MOU).

(1) Construction. Section 221 provides that any construction work that has not been carried out as of November 8, 2007 is eligible for credit only if the non-Federal sponsor executes an agreement with the Secretary prior to carrying out such work. For purposes of Section 221 crediting only, "carrying out" construction work means initiation of construction using the non-Federal sponsor's labor force or issuance of the notice to proceed for such construction if undertaken by contract. Therefore, in those cases where there is not yet an executed PPA, the non-Federal sponsor must execute an in-kind MOU with the Corps of Engineers prior to initiating construction or issuing the notice to proceed. Design work associated with that construction is eligible for credit as long as an in-kind MOU or PPA is executed prior to the construction being carried out. In addition, the construction carried out by the non-Federal sponsor is not considered as part of the future without project condition.

(a) Projects Specifically Authorized. For projects that are or will be specifically authorized for construction, an In-Kind MOU for construction may be executed once there is vertical team concurrence with the Tentatively Selected Plan (TSP) at the TSP Milestone. The TSP Milestone is the point at which there is vertical team concurrence on the plan that will be released in the

draft study report for public and agency review. Given the new SMART Planning Process, the TSP Milestone should occur much earlier in the planning process than what was previously achieved. Requests from non-Federal sponsors to execute an in-kind MOU for construction prior to the TSP Milestone will be considered on a case-by-case basis and must be approved by the Assistant Secretary of the Army (Civil Works). Since each project presents its own unique combination of circumstances, each request will require an individual evaluation that will include consideration of, but not limited to, the following criteria:

(i) Whether the proposed work is a modification of an existing Federal project;

(ii) Whether the proposed work will follow an existing levee alignment in the case of a flood risk management project;

(iii) Whether the proposed work balances and integrates the wise use of the flood plain to ensure public safety;

(iv) Whether the proposed work significantly reduces flood damage risk to human life, property or critical infrastructure; and

(iv) Whether the proposed work will likely be included in the final project recommendation.

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

(2) Design. For projects that are or will be specifically authorized for construction, an In-Kind MOU for design may be executed after the TSP Milestone.

(3) Planning.

(a) Projects Specifically Authorized. For projects that are or will be specifically authorized for construction, Section 1002 of WRRDA 2014 eliminated the full Federal reconnaissance phase that used to be undertaken prior to execution of a feasibility cost sharing agreement (FCSA). In the past, a project management plan (PMP), which established the scope of the planning, including activities needed to carry out the study, was developed during this reconnaissance phase. Under the new single phase study process mandated by WRRDA 2014, the project management plan will not be developed until after execution of FCSA. As the PMP, including a determination of the scope of the study, will not be developed until after execution of the FCSA, no In-Kind MOU for planning is permitted. Following execution of the FCSA and development of the PMP, the provision of in-kind contributions is allowed under the FCSA.

(b) Continuing Authority Program. For projects implemented under the Continuing Authority Program or a regional authority that does not require additional authorization to implement the project, sections 905(c) and 105(a)(3) of WRDA 1986, as amended, provide that the first $100,000 of these studies is a Federal expense. Therefore, once a PMP has been developed and the MSC Commander has approved initiation of the feasibility study, an In-Kind MOU for planning may be executed.

(4) Any work undertaken by a non-Federal sponsor pursuant to an In-Kind MOU is at its own risk and responsibility. An In-Kind MOU provides no assurance that the non-Federal sponsor's work will be determined to be integral to the Federal project or that any construction undertaken by the non-Federal sponsor will be included as part of any ultimately recommended Federal project. Execution of an In-Kind MOU in no way obligates the Corps to enter into any future agreement for the project.

(5) In general, once a FCSA, design agreement, or PPA is executed, further use of In-Kind MOUs is not appropriate for inclusion of additional in-kind contributions under that FCSA, design agreement, or PPA, respectively. Special circumstances requiring expedited review and execution of an amendment to an executed agreement should be coordinated with the HQUSACE RIT.

(6) MSC Commanders may approve a District Engineer's execution of Model In-Kind MOUs for Construction or for Design, provided that the In-Kind MOUs do not include any deviations. Any proposed deviations must be submitted to HQUSACE for approval prior to execution. Models for the In-Kind MOU for construction, including design work, and for design work only are available at http://www.usace.army.mil/Missions/CivilWorks/ProjectPartnershipAgreements/model_other.aspx.

e. Integral Determinations.

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

(2) The approval of integral determinations is delegated to the MSC Commander. The approval authority delegated to the MSC Commander is subject to the full compliance of each

[1] The non-Federal Sponsor's costs of Coordination Team participation and audits are not in-kind contributions and are not included in "shared costs" for cost sharing purposes. Likewise, the Federal Government's cost of Coordination Team participation and audits are not included in "shared costs" for cost sharing purposes although these costs are included in calculating any limit on Federal participation. The costs of the non-Federal Sponsor's performance of investigations for hazardous substances are eligible for inclusion as a shared costs and for credit as an in-kind contribution and do not require a separate integral determination.

integral determination to law and policy and may not be further delegated within the MSC or to the District Commander. A separate integral determination is not required for planning activities included in the PMP, approved by the MSC Commander, as required for the study effort.

f. Determining the Amount of Credit.

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

(2) The creditable amount is the lesser of the costs incurred by the non-Federal sponsor to obtain such materials or services; the market value of such materials or services as of the date that the non-Federal sponsor provides such materials or services for use in the study or project; or the Government's estimate of the cost for such work if it had been accomplished by the Government. This amount is not subject to interest charges or to adjustment to reflect changes in price levels between the time the in-kind contributions were completed and the time the amount is credited.

(3) Any in-kind contributions performed or paid for by the non-Federal sponsor using funds provided by another Federal agency (as well as any non-Federal matching share or contribution that was required by such Federal agency for such program or grant) are not eligible for credit unless the Federal agency providing the Federal portion of such funds verifies in writing that the funds are authorized to be used to carry out the study or project.

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

(5) In-kind contributions are subject to a review (for feasibility level and design activities) or on-site inspection (construction), as applicable, and certification by the Government that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies. The Government will not include in the costs to be shared under the

applicable cost sharing agreement or afford credit for any work the Government determines was not accomplished in a satisfactory manner or in accordance with applicable Federal laws, regulations, and policies.

(6) In general, the amount of credit for in-kind contributions that can be afforded under a FCSA or a PPA is limited to the amount of the non-Federal sponsor's cost share under that agreement. As the costs of design under a DA are included in total project costs under a PPA, credit for in-kind contributions under a DA is carried over to the PPA, and the maximum of amount of credit for in-kind contributions under a PPA is limited to the non-Federal sponsor's required cost share under the PPA. Credit for in-kind contributions may not be afforded toward the required 5 percent cash payment for structural flood damage reduction projects or the additional 10 percent cash payment for navigation projects.

(7) Credit for in-kind contributions for planning is limited to credit that can be afforded under a specific FCSA. In other words, excess credit may not be carried over to design or construction of the project. Credit for planning work by the non-Federal sponsor is limited to its 50 percent of planning costs and will be done in accordance with the PMP, under the terms and conditions in the FCSA.

(8) Credit for in-kind contributions provided by a non-Federal sponsor for the construction of a project, or separable element thereof, that are in excess of the non-Federal cost share for an authorized separable element of a project may be applied toward the non-federal cost share for a different authorized separable element of the same project. Additional Federal appropriations will be required to offset the application of any excess credit to another separable element.

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

(10) No reimbursements are authorized for in-kind contributions under Section 221 except as provided in paragraph 4 g., below.

g. Lands, Easements, Relocations, Rights-of-Way, and Areas for Disposal of Dredged Material (LERRDs). Section 221 does not alter any other requirement for the non-Federal sponsor to provide LERRDs for a project, and the non-Federal sponsor should coordinate with the District to ensure that appropriate real estate interests for the project are acquired. Any LERRDs associated with in-kind contributions determined to be integral to the project will be credited to the project as LERRDs except the LERRs needed for fish and wildlife mitigation. (The costs of LERRs needed for fish and wildlife mitigation are assigned to the project

purpose(s) causing the need for such mitigation and are subject to construction cost sharing established for that project purpose.) In addition, for a navigation project, LERRs are creditable only toward the requirement for the non-Federal sponsor to pay an additional 10 percent of the cost of the general navigation features.

(1) Previously, credit for in-kind contributions was afforded only toward the non-Federal sponsor's required cash contribution after consideration of the value of LERRDs provided by the non-Federal sponsor. WRRDA 2014 changes how credit for in-kind contributions is calculated. For projects other than navigation projects, to the extent that credit for LERRDs combined with credit for the value of in-kind contributions exceed the non-Federal share of the cost of a project, WRRDA 2014 provides that the Secretary, subject to the availability of funds, shall enter into a separate reimbursement agreement to reimburse the non-Federal sponsor for the difference between creditable LERRDs and in-kind contributions and the non-Federal cost share. Therefore, at the final accounting for the project, to the extent funds for the project remain available, the Secretary shall execute an agreement with the non-Federal sponsor for reimbursement of the difference.

(2) If funds remaining on a project are insufficient to provide full reimbursement under paragraph g.(1), the non-Federal sponsor may request reimbursement. The Secretary shall prioritize such requests, and enter into reimbursements agreements, in the order the requests were received, as funds become available for reimbursements.

5. Design. Design by the non-Federal sponsor must be performed in accordance with the requirements in ER 1110-2-1150, reviewed in accordance with ER 1110-1-12, and subject to the applicable peer review guidance. In accordance with section 105(c) of WRDA 1986, the costs of design shall be shared in the same percentages as the purposes of such project.

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

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

6. Construction.

a. To be eligible for credit, in-kind contributions prior to execution of the PPA must have been provided or performed after execution of an In-Kind MOU. Credit for in-kind contributions will not be afforded toward the non-Federal sponsor's requirement to provide in

cash 5 percent of the costs for structural flood damage reduction projects (either specifically authorized or implemented pursuant to Continuing Authority Program Sections 14, 205, or 208 projects); the non-Federal sponsor's requirement to pay for betterments or any other work performed by the Government on behalf of the non-Federal sponsor; the non-Federal sponsor's requirement to provide lands, easements, rights-of-way, relocations, or improvements to enable the disposal of dredged or excavated material required for the project or separable element of the project; or the non-Federal sponsor's additional payment of 10 percent of the cost of general navigation features for a navigation project.

b. The non-Federal sponsor may not initiate construction following execution of a PPA until the designs, detailed plans and specifications, and arrangements for such work have been approved by the Government. In addition, any proposed changes to approved designs and plans and specifications must be approved by the Government in advance of such construction. Upon completion of construction, the non-Federal sponsor will furnish to the Government a copy of all final as-built drawings.

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

FOR THE COMMANDER:

D. PETER HELMLINGER
COL, EN
Chief of Staff

2 Appendices
Appendix A – 42 U.S.C. 1962d-5b(a)(4)
Appendix B – Criteria and Procedures

APPENDIX A

Section 221(a)(4) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(a)(4))

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

(a) COOPERATION OF NON-FEDERAL INTEREST.-

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(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 or a project under an environmental infrastructure assistance program, 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.

(i) Construction.

(I) In general. In any case in which the non-Federal interest is to receive credit under subparagraph (A) for the cost of construction carried out by the non-Federal interest before execution of a partnership agreement and that construction has not been carried out as of November 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 shall do so prior to the non-Federal interest initiating construction or issuing a written notice to proceed for the construction.

(II) Eligibility. Construction that is carried out after the execution of an agreement to carry out work described in subclause (I) and any design activities that are required for that construction, even if the design activity is carried out prior to the execution of the agreement to carry out work, shall be eligible for credit.

(ii) Planning.

(I) In general. In any case in which the non-Federal interest is to receive credit under subparagraph (A) for the cost of planning carried out by the non-Federal interest

before execution of a feasibility cost-sharing agreement, the Secretary and the non-Federal interest
shall enter into an agreement under which the non-Federal interest shall carry out such work and shall do so prior to the non-Federal interest initiating that planning.

(II) Eligibility. Planning that is carried out by the non-Federal interest after the execution of an agreement to carry out work described in subclause (I) 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(a)(2) and 103(a)(1)(A) of the Water Resources Development Act of 1986 (33 U.S.C. 2211(a)(2); 33 U.S.C. 2213(a)(1)(A)) 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) Analysis of costs and benefits. In the evaluation of the costs and benefits of a project, the Secretary shall not consider construction carried out by a non-Federal interest under this subsection as part of the future without project condition.

(F) Transfer of credit between separable elements of a project. Credit for in-kind contributions provided by a non-Federal interest that are in excess of the non-Federal cost share for an authorized separable element of a project may be applied toward the non-Federal cost share for a different authorized separable element of the same project.

(G) Application of credit.

(i) In general. To the extent that credit for in-kind contributions, as limited by subparagraph (D), and credit for required land, easements, rights-of-way, dredged material disposal areas, and relocations provided by the non-Federal interest exceed the non-Federal share of the cost of construction of a project other than a navigation project, the Secretary, subject to the availability of funds, shall enter into a reimbursement agreement with the non-Federal interest, which shall be in addition to a partnership agreement under subparagraph (A), to reimburse the difference to the non-Federal interest.

(ii) Priority. If appropriated funds are insufficient to cover the full cost of all requested reimbursement agreements under clause (i), the Secretary shall enter into reimbursement agreements in the order in which requests for such agreements are received."; and

(H) 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, and to water resources projects authorized prior to the date

of enactment of the Water Resources Development Act of 1986 (Public Law 99-662) [enacted June 10, 2014], if correction of design deficiencies is necessary.

(ii) Authorization as addition to other authorizations. The authority of the Secretary to provide credit for in-kind contributions pursuant to this paragraph shall be in addition to any other authorization to provide credit for in-kind contributions and shall not be construed as a limitation on such other authorization. The Secretary shall apply the provisions of this paragraph, in lieu of provisions under other crediting authority, only if so requested by the non-Federal interest.

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Section 1018 of the Water Resources Reform and Development Act of 2014

Sec. 1018. CREDIT FOR IN-KIND CONTRIBUTIONS.

(a) In General.--Section 221(a)(4) of the Flood Control Act of 1970 (42 U.S.C. 1962d-5b(a)(4)) is amended--

(1) in subparagraph (A), in the matter preceding clause (i), by inserting "or a project under an environmental infrastructure assistance program" after "law";

(2) in subparagraph (C) by striking "In any case" and all that follows through the period at the end and inserting the following:

"(i) CONSTRUCTION.--

"(I) In General.--In any case in which the non-Federal interest is to receive credit under subparagraph (A) for the cost of construction carried out by the non-Federal interest before execution of a partnership agreement and that construction has not been carried out as of November 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 shall do so prior to the non-Federal interest initiating construction or issuing a written notice to proceed for the construction.

"(II) Eligibility.--Construction that is carried out after the execution of an agreement to carry out work described in subclause (I) and any design activities that are required for that construction, even if the design activity is carried out prior to the execution of the agreement to carry out work, shall be eligible for credit.

"(ii) PLANNING.--

"(I) In General.--In any case in which the non-Federal interest is to receive credit under subparagraph (A) for the cost of planning carried out by the non-Federal interest before execution of a feasibility cost-sharing agreement, the Secretary and the non-Federal interest shall enter into an agreement under which the non-Federal interest shall carry out such work and shall do so prior to the non-Federal interest initiating that planning.

"(II) Eligibility.--Planning that is carried out by the non-Federal interest after the execution of an agreement to carry out work described in subclause (I) shall be eligible for credit.";

(3) in subparagraph (D)(iii) by striking "sections 101 and 103" and inserting "sections 101(a)(2) and 103(a)(1)(A) of the Water Resources Development Act of 1986 (33 U.S.C. 2211(a)(2); 33 U.S.C. 2213(a)(1)(A))";

(4) by redesignating subparagraph (E) as subparagraph (H);

(5) by inserting after subparagraph (D) the following:

"(E) Analysis of Costs and Benefits.--In the evaluation of the costs and benefits of a project, the Secretary shall not consider construction carried out by a non-Federal interest under this subsection as part of the future without project condition.

"(F) Transfer of Credit Between Separable Elements of a Project.--Credit for in-kind contributions provided by a non-Federal interest that are in excess of the non-Federal cost share for an authorized separable element of a project may be applied toward the non-Federal cost share for a different authorized separable element of the same project.

"(G) APPLICATION OF CREDIT.--

"(i) In General.--To the extent that credit for in-kind contributions, as limited by subparagraph (D), and credit for required land, easements, rights-of-way, dredged material disposal areas, and relocations provided by the non-Federal interest exceed the non-Federal share of the cost of construction of a project other than a navigation project, the Secretary, subject to the availability of funds, shall enter into a reimbursement agreement with the non-Federal interest, which shall be in addition to a partnership agreement under subparagraph (A), to reimburse the difference to the non-Federal interest.

"(ii) Priority.--If appropriated funds are insufficient to cover the full cost of all requested reimbursement agreements under clause (i), the Secretary shall enter into reimbursement agreements in the order in which requests for such agreements are received."; and

(6) in subparagraph (H) (as redesignated by paragraph (4))--

(A) in clause (i) by inserting ", and to water resources projects authorized prior to the date of enactment of the Water Resources Development Act of 1986 (Public Law 99-662), if correction of design deficiencies is necessary" before the period at the end; and

(B) by striking clause (ii) and inserting the following:

"(ii) Authorization As Addition to Other Authorizations.--The authority of the Secretary to provide credit for in-kind contributions pursuant to this paragraph shall be in addition to any other authorization to provide credit for in-kind contributions and shall not be construed as a limitation on such other authorization. The Secretary shall apply the provisions of this paragraph, in lieu of provisions under other crediting authority, only if so requested by the non-Federal interest.".

(b) Applicability.--Section 2003(e) of the Water Resources Development Act of 2007 (42 U.S.C. 1962d-5b note) is amended--

(1) by inserting ", or construction of design deficiency corrections on the project," after "construction on the project"; and

(2) by inserting ", or under which construction of the project has not been completed and the work to be performed by the non-Federal interests has not been carried out and is creditable only toward any remaining non-Federal cost share," after "has not been initiated".

(c) Effective Date.--The amendments made by subsections (a) and (b) take effect on November 8, 2007.

(d) Guidelines.--

(1) In General.-- Not later than 1 year after the date of enactment of this Act, the Secretary shall update any guidance or regulations for carrying out section 221(a)(4) of the Flood Control Act of 1970 (42 U.S.C. 1962d-5b(a)(4)) (as amended by subsection (a)) that are in existence on the date of enactment of this Act or issue new guidelines, as determined to be appropriate by the Secretary.

(2) Inclusions.-- Any guidance, regulations, or guidelines updated or issued under paragraph (1) shall include, at a minimum--

(A) the milestone for executing an in-kind memorandum of understanding for construction by a non-Federal interest;

(B) criteria and procedures for evaluating a request to execute an in-kind memorandum of understanding for construction by a non-Federal interest that is earlier than the milestone under subparagraph (A) for that execution; and

(C) criteria and procedures for determining whether work carried out by a non-Federal interest is integral to a project.

(3) Public and Stakeholder Participation.-- Before issuing any new or revised guidance, regulations, or guidelines or any subsequent updates to those documents, the Secretary shall--

(A) consult with affected non-Federal interests;

(B) publish the proposed guidelines developed under this subsection in the Federal Register; and

(C) provide the public with an opportunity to comment on the proposed guidelines.

(e) Other Credit.--Nothing in section 221(a)(4) of the Flood Control Act of 1970 (42 U.S.C. 1962d-5b(a)(4)) (as amended by subsection (a)) affects any eligibility for credit under section 104 of the Water Resources Development of 1986 (33 U.S.C. 2214) that was approved by the Secretary prior to the date of enactment of this Act.

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APPENDIX B

Criteria and Procedures for In-Kind Contribution Integral Determinations

B-1. Determining if In-Kind Contributions Are Integral to the Study/Project. Establishing and allowing credit is a two-step process whereby: 1) eligibility for credit is determined based on whether the in-kind contribution is integral to the study or project, and 2) actual affording of credit is accomplished based on an audit of the non-Federal work by the District Engineer under the terms of the FCSA, DA, or PPA, as appropriate. The level of analysis to determine if work is integral to the project is scalable. For instance, work accomplished by the non-Federal sponsor on its own under an In-Kind MOU must be fully analyzed to determine whether it is integral to the project, i.e., work that the Government otherwise would have performed for the project. In general, for work that will be accomplished after execution of a DA or PPA, it will be clearer what work is required for the project and therefore integral to the project; furthermore, the Government will be approving plans and specifications prior to the work being undertaken by the non-Federal sponsor.

a. Approval Level of Integral Determinations. Under the terms of Paragraph 4.e. of this regulation, approval of integral determinations is delegated to the MSC Commander. This authority may not be further delegated.

b. Timing of Integral Determinations.

(1) In general, the integral determination should be completed immediately prior to review and approval of a DA or PPA, or amendment as applicable, that provides for the affording of credit. The integral determination for planning efforts is accomplished as part of the development of the PMP.

(2) Include at least 30 days in the project schedule for processing at the MSC of the Integral Determinations by the MSC Commander. These times are recommended for scheduling purposes and should be extended if processing identifies significant issues requiring resolution.

c. Procedures for Processing.

(1) For a feasibility study, planning activities, including data collection, must be included in the approved Project Management Plan in order for those contributions to be eligible for credit.

(2) The District will prepare an Integral Determination Report (IDR) for design and construction work that includes at a minimum the information contained in the following paragraphs. A suggested format for an IDR can be found at http://www.usace.army.mil/Missions/CivilWorks/ProjectPartnershipAgreements/model_other.aspx

The IDR should contain a description of the activities required to perform the design or construction, as applicable, of the Federal project or separable element in sufficient detail to allow a comparison with the description of the proposed in-kind contributions; a detailed description of the work items proposed to be provided or performed as in-kind contributions; a discussion of how each work item proposed to be provided or performed as an in-kind contribution is integral to the project; an estimate of the costs of each work item proposed to be provided or performed as an in-kind contribution; the estimated amount of credit to be afforded for each work item proposed to be provided or performed as an in-kind contribution; and a District Commander recommendation identifying which of the proposed in-kind contributions should be considered integral to the project. If the in-kind contributions were provided or performed prior to execution of the applicable cost sharing agreement, then also include in the IDR the results of the review or inspection, as applicable, and certification by the District Commander on whether the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies; and documentation of satisfactory environmental compliance for the construction portion of the in-kind contributions.

(3) The district will submit the IDR to the MSC District Support Team for action. The MSC District Support Team will perform the MSC review of the IDR. The MSC review team also will include members from the MSC Office of Counsel and from the MSC Planning Community of Practice (CoP), MSC Engineering and Construction CoP, MSC Real Estate CoP, and other CoPs, as needed. In addition, if the proposed in-kind contributions consist of design or construction of dams, levees, or bridges, the MSC review team must include the MSC Dam, Levee, or Bridge Safety Officer. After satisfactory resolution of all comments on the IDR and a determination that the IDR complies with all applicable law and policy, the MSC District Support Team shall prepare an Integral Determination memo for approval and signature by the MSC Commander.

(4) The Integral Determination approval memo will state whether the work identified in the IDR, or a portion thereof, has been determined to be integral to the project. In addition, the memo should state that the 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.

B-2. Considerations in determining whether the work is integral and creditable: 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 inherently governmental responsibilities (see paragraph B-3 below). Examples of activities that are acceptable in-kind contributions: performance of design of all or a portion of the Federal project, including data collection related to design work; demolition of buildings on lands required for the project; performance of design or construction related studies for historic preservation activities except data recovery; performance of cost shared monitoring and adaptive management; and construction of a portion of the project.

a. 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.

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

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

d. The non-Federal sponsor should coordinate with the District to ensure that appropriate real estate interests to support the in-kind contributions and project are acquired.

B-3. The following will not be accepted as in-kind contributions:

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

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

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

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

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

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

g. For proposed in-kind contributions performed prior to execution of the applicable cost sharing agreement, the non-Federal sponsor has not performed the necessary OMRR&R, resulting in the work no longer functioning as needed for the project.