DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

4 JUN 2001

CECC-G

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS

SUBJECT: Implementation Guidance for Section 201 of the Water Resources Development Act of 2000 (WRDA 2000) – Cooperation Agreements with Counties

1. Section 201 of WRDA 2000 amends Section 221(a) of the Flood Control Act of 1970, as amended (codified at 42 U.S.C. 1962d-5b(a)). The amendment allows a wider universe of non-Federal sponsors to sign Project Cooperation Agreements (PCA) that do not bind the non-Federal sponsors future appropriations, where constitutional or legislative provisions of the State or a political subdivision of the State prohibit such commitments. A copy of Section 201 is attached, as is an unofficial version of Section 221(a) as amended showing changes in strikeout and shadow text (note that the official changes to 42 U.S.C. 1962d-5b(a) will not be published for some time to come).

2. Before the enactment of Section 201, Section 221(a) only exempted those non-Federal sponsors from committing future appropriations where the non-Federal sponsor proposed to use state legislative appropriations, and state constitutional or statutory limitations prohibited these future obligations. Thus, if the non-Federal sponsor did not use state legislative appropriations and/or the legal prohibition against such future commitments was not contained in the state constitution or state statutes (e.g. a municipal charter), the exemption would not apply. For example, before enactment of Section 201 if a state constitutional prohibition prohibited any political sub-division of the state (e.g. a city) from committing any future appropriations, and the city proposed to use its own municipal funds raised by local taxes, a problem would arise. Under these circumstances, the Army could not have extended the exemption against committing future appropriations to that non-Federal sponsor. The city might not have been able to sign the agreement at all. Therefore, we could not have proceeded with construction of the project unless another sponsor was found that could commit the future appropriations, or that would properly qualify for the exclusion.

3. Section 201 has now changed this situation. Effective immediately, all non-Federal sponsors that are public bodies qualifying as political subdivisions of a state may make their commitment to fund a project, through a Project Cooperation Agreement, subject to future appropriations, provided that constitutional or statutory prohibitions exist to prevent their future commitment. Furthermore, although Section 201 strictly only applies to new Section 221 agreements (e.g. Project Cooperation Agreements), the Army will

extend the same principles to new Feasibility Cost Sharing Agreements and design agreements. Existing agreements will not be revised.

4. The fact that a greater set of non-Federal sponsors may make their commitments to projects subject to future appropriations does lend some concern that some non-Federal sponsors may not live up to their project commitments. Nothing in Section 221 excuses the non-Federal sponsors from fulfilling their funding obligations. Nor does it forgive any obligations for cost sharing that is incurred or may result from an early termination of the project. Furthermore, the non-Federal sponsor remains liable to use any legally available source of funds to pay its cost sharing obligations and to use its best efforts to obtain those funds. Finally, the Government reserves its rights to ensure that the non-Federal sponsor fulfills its commitments to the project that are required by law and by the terms of the Project Cooperation Agreement. Consequently, the District Commander's responsibility to ensure the adequacy of the non-Federal sponsor's financing plan now becomes even more important.

5. In keeping with this principle, we developed an alternate article on "Obligations of Future Appropriations" that is authorized for use in Project Cooperation Agreements instead of the prior clause found in most model agreements. This article articulates the Army's policy on implementation of Section 221. Where requested by the non-Federal sponsor, Districts may also use it in conjunction with a change in the language in the article titled "Indemnification." The revised articles and accompanying instructions are included as an Enclosure to this guidance memo.

6. Changes in all model agreements will be posted on the HQUSACE – Office of the Chief Counsel model agreement page on the internet at the earliest available opportunity. In the interim, you are authorized to include these changes immediately in all applicable agreements. Including this language will not be considered a deviation requiring HQUSACE or ASA(CW) review of the agreement solely because of the change. However, MSC and Districts are not authorized to make changes to the attached language without consultation with the HQUSACE PCA Team.

7. Please direct questions concerning this guidance to Howard Goldman, Senior Counsel for Civil Works (202-761-8544) or to Kim Smith, PCA Team Leader (202-761-4236).

FOR THE COMMANDER

HANS VAN WINKLE
for Major General, USA
Director of Civil Works

2 Enclosures

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SEC. 201. COOPERATION AGREEMENTS WITH COUNTIES.
Section 221(a) of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b(a)) is amended in the second sentence—
(1) by striking ''State legislative'';
(2) by striking ''State constitutional'' and inserting ''constitutional''; and
(3) by inserting before the period at the end the following: ''of the State or a political subdivision of the State''.

42 USC § 1962d-5b. Water resources projects; written agreement requirement

(a) Cooperation of non-Federal interest

After December 31, 1970, the construction of any water resources project, or an acceptable separable element thereof, by the Secretary of the Army, acting through the Chief of Engineers, or by a non-Federal interest where such interest will be reimbursed for such construction under the provisions of section 1962d-5a of this title or under any other provision of law, shall not be commenced until each non-Federal interest has entered into a written agreement with the Secretary of the Army to furnish its required cooperation for the project or the appropriate element of the project, as the case may be; except that no such agreement shall be required if the Secretary determines that the administrative costs associated with negotiating, executing, or administering the agreement would exceed the amount of the contribution required from the non-Federal interest and are less than $25,000. In any such agreement entered into by a State, or a body politic of the State which derives its powers from the State constitution, or a governmental entity created by the State legislature, the agreement may reflect that it does not obligate future ~~State legislative~~ appropriations for such performance and payment when obligating future appropriations would be inconsistent with ~~State~~ constitutional or statutory limitations **of the State or a political subdivision of the State**.

Enclosure 1

Note: Bracketed language is optional or substitute language

ARTICLE IX -INDEMNIFICATION

[Subject to the provisions of Article XX **[change this reference if the "Obligation of Future Appropriations" article is other than Article XX]** of this Agreement,] [T][t]he Non-Federal Sponsor shall hold and save the Government free from all damages arising from the construction, operation, maintenance, repair, replacement, and rehabilitation of the Project and any Project-related betterments, except for damages due to the fault or negligence of the Government or its contractors.

[Include Article XX only if the Non-Federal Sponsor is a State agency or a political sub-division of the State that derives its funds for the Project directly from appropriations and the Non-Federal Sponsor has constitutional or statutory limitations prohibiting it from committing future appropriations.]

ARTICLE XX - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the _____ of the _____ of _____, [where creating such an obligation would be inconsistent with _____ of the _____ of the _____].

B. The Non-Federal Sponsor intends to satisfy its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose, for each fiscal period, appropriations sufficient to cover the Non-Federal Sponsor's obligations under this Agreement for each year [biennium], and will use all reasonable and lawful means to secure the appropriations for that year [biennium] sufficient to make the payments necessary to fulfill its obligations hereunder. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to discharge these obligations can and will lawfully be appropriated and made available for this purpose. In the event the budget or other means of appropriations does not provide funds in sufficient amounts to discharge these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to satisfy its obligations hereunder, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.