



**MODEL IN-KIND MEMORANDUM OF UNDERSTANDING (MOU)  
FOR  
NON-FEDERAL INTEREST CONSTRUCTION WORK  
PRIOR TO  
EXECUTION OF A PROJECT PARTNERSHIP AGREEMENT  
MAY 30, 2008  
(with updates as of APRIL 24, 2020)**

**APPLICABILITY AND INSTRUCTIONS:**

1. For a project for which a project partnership agreement will be executed, the attached model In-Kind MOU should be used if the non-Federal interest intends to provide construction (including design associated with that construction) pursuant to Section 221(a)(4) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(a)(4)) prior to execution of the project partnership agreement. If the non-Federal interest intends to provide design work only prior to execution of a design agreement, or a project partnership agreement covering both design and construction (such as for CAP projects), use the applicable model In-Kind MOU developed for that purpose.
2. Authority to approve an In-Kind MOU that does not deviate from the model In-Kind MOU has been delegated to the MSC Commander. Division Counsel concurrence that the In-Kind MOU does not deviate from the model is required prior to approval. In addition, authority to approve to approve non-substantive deviations to the model also has been delegated to the MSC Commander. Division Counsel concurrence that a deviation is non-substantive, with recommendation to approve the deviation, is required prior to approval by the MSC Commander. An In-Kind MOU with substantive deviations, including deviations involving policy issues, unique circumstances, or controversial matters, must be forwarded for MSC review and then transmitted to the appropriate HQUSACE RIT, with MSC Commander recommendations, for review and approval by the Director of Civil Works. The District Commander is authorized to execute the In-Kind MOU after its approval.
3. If there are multiple non-Federal interests, modify the In-Kind MOU to use the term “Non-Federal Interests” throughout and make the necessary modifications to change, as appropriate, verbs and pronouns from singular to plural.
4. Reminder: Make all required insertions; remove this cover page; remove the open and close brackets and any instructional text; and ensure the page numbers, spacing and page breaks throughout the In-Kind MOU are appropriate.
5. The Certificate of Authority and Certification Regarding Lobbying should be included as a part of the In-Kind MOU package. These certificates can be found on the Corps’ “Project Partnership Agreements” website under the “Forms” tab. Also, if a non-profit entity is serving as a Non-Federal Interest in accordance with ASA(CW) Memorandum, dated April 5, 2012, Subject: Implementation Guidance for Section 2003(b) of the Water Resources Development Act of 2007 - Definition of Non-Federal Interest, use the Certificate of Authority for a Non-Profit Entity as provided on the website mentioned above.

IN-KIND MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND THE  
**[FULL NAME OF NON-FEDERAL INTEREST]**  
FOR CONSTRUCTION WORK  
PRIOR TO EXECUTION OF  
A  
PROJECT PARTNERSHIP AGREEMENT  
FOR THE  
**[FULL NAME OF PROJECT]**

THIS IN-KIND MEMORANDUM OF UNDERSTANDING (hereinafter the “In-Kind MOU”) is entered into this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between the Department of the Army (hereinafter the “Government”), represented by the represented by the District Commander for **[Insert Name of USACE District, e.g., New Orleans District]** (hereinafter the “District Commander”) and the **[FULL NAME OF THE NON-FEDERAL INTEREST]** (hereinafter the “Non-Federal Interest”), represented by the **[INSERT TITLE]**.

WITNESSETH, THAT:

WHEREAS, Section 221(a)(4) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(a)(4)), provides that a cost sharing agreement may provide credit for the value of materials or services provided before the execution of such cost sharing agreement if the Secretary and the non-Federal interest enter into an In-Kind MOU under which the non-Federal interest shall carry out such work and only work carried out following the execution of such In-Kind MOU shall be eligible for credit;

WHEREAS, the Non-Federal Interest understands and acknowledges that any credit for eligible in-kind contributions will be afforded only toward the required non-Federal contribution of funds (i.e. cash contribution) under the Project Partnership Agreement for the project or separable element thereof **[INSERT THE FOLLOWING PHRASE IF THE PROJECT INCLUDES STRUCURAL FLOOD RISK MANAGEMENT FEATURES: “, except such credit will not be afforded toward the non-Federal requirement pursuant to the Project Partnership Agreement to pay a cash contribution equal to 5 percent of the construction costs allocated to structural flood risk management” OR IF THE PROJECT INCLUDES GENERAL NAVIGATION FEATURES: “, except such credit will not be afforded toward the non-Federal requirement pursuant to the Project Partnership Agreement to pay an additional 10 percent of construction costs over 30 years”];** and

WHEREAS, by letter dated **[Month Day, Year]**, the Non-Federal Interest stated its intent to provide certain construction work, including any design required for that construction work, (hereinafter the “Construction Work”, as defined in Paragraph 1 of this In-Kind MOU) prior to the execution of the Project Partnership Agreement for the **[FULL NAME OF**

**PROJECT] at [SPECIFIC LOCATION OF THE PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY].**

NOW, THEREFORE, the parties agree as follows:

1. The Non-Federal Interest shall provide the Construction Work in accordance with the terms and conditions of this In-Kind MOU and requirements of applicable Federal laws and implementing regulations. The Construction Work shall consist of **[describe the construction work the Non-Federal Interest will provide for the project, including any necessary engineering plans and specifications and other design activities that are required for that construction, even if the design activities are carried out prior to the execution of this In-Kind MOU]** as generally described in the letter from the Non-Federal Interest.

2. The Non-Federal Interest shall keep books, records, documents, and other documentation of costs and expenses incurred for the Construction Work in accordance with this In-Kind MOU. The value of the Construction Work shall be equivalent to the costs, documented to the satisfaction of the Government, that the Non-Federal Interest incurred to provide the Construction Work. Such costs may include, but are not necessarily be limited to: engineering and design, and construction costs, including real estate, economic and environmental analyses and evaluation costs; supervision and administration costs; and documented incidental costs associated with providing the Construction Work, but shall not include any costs associated with betterments, as determined by the Government. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Interest's employees.

3. The Non-Federal Interest understands that eligibility for credit for the Construction Work is subject to:

a. A determination by the Division Commander for **[Insert Name of USACE Division, e.g., Mississippi Valley Division]** that the Construction Work is integral to the project;

b. The Non-Federal Interest completing or assuring completion of all necessary environmental coordination and obtaining all applicable Federal, State, and local permits prior to initiating construction of the Construction Work;

c. The Non-Federal Interest's compliance with Sections 210 and 305 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4630 and 4655), and Section 24.4 of the Uniform Regulations contained in 49 C.F.R. Part 24, and assurance that (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under Sections 4622, 4623 and 4624 of Title 42 of the U.S. Code; (2) relocation assistance programs offering the services described in Section 4625 of Title 42 of the U.S. Code shall be provided to such displaced persons; (3) within a reasonable period of time prior to displacement, comparable replacement dwellings will be available to displaced persons in accordance with Section 4625(c)(3) of Title 42 of the U.S. Code; (4) in acquiring real property,

the Non-Federal Interest will be guided, to the greatest extent practicable under State law, by the land acquisition policies in Section 4651 and the provision of Section 4652 of Title 42 of the U.S. Code; and (5) property owners will be paid or reimbursed for necessary expenses as specified in Sections 4653 and 4654 of Title 42 of the U.S. Code;

d. The Non-Federal Interest's compliance with applicable Federal labor laws covering non-Federal construction and relocations, including, but not limited to, 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, and the Copeland Anti-Kickback Act);

e. Review and verification, including on-site inspection, as applicable, by the Government that the Construction Work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies; and

f. An audit by the Government to determine the reasonableness, allocability, and allowability of such costs.

4. The Non-Federal Interest understands further that:

a. No interest charges or adjustment will be applied to the costs incurred for the Construction Work to reflect changes in price levels;

b. Federal program funds may not be used to meet any of its obligations under this In-Kind MOU unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor;

c. Only the costs of the Construction Work that do not exceed the Government's estimate of the cost of such work if the work had been accomplished by the Government are eligible for credit;

d. No credit will be provided for the value of Construction Work obtained at no cost to the Non-Federal Interest or for the cost of construction initiated prior to the effective date of this In-Kind MOU;

e. Any costs incurred for the clean-up of hazardous material regulated by the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"; 42 U.S.C. 9601–9675), that may exist in, on, or under lands, easements, or rights-of-way required for the Construction Work are a Non-Federal Interest responsibility and no credit shall be afforded for such clean-up costs. In addition, the Non-Federal Interest understands that as between the Government and the Non-Federal Interest, the Non-Federal Interest shall be considered the operator of the Construction Work for the purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Interest shall operate, maintain, repair, replace, and rehabilitate the Construction Work in a manner that will not cause liability to arise under CERCLA;

f. Crediting for the costs of the Construction Work may be withheld, in whole or in part, as a result of the Non-Federal Interest's failure to comply with the terms of this In-Kind MOU; and

g. Credit may be afforded only if a Project Partnership Agreement is executed subsequently by the Government and the Non-Federal Interest.

5. In the exercise of their respective rights and obligations under this In-Kind MOU, the Government and the Non-Federal Interest each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

6. Execution of this In-Kind MOU does not constitute, represent, or imply any Federal assurance or commitment regarding approval of the project or execution of any future agreement that may include provisions for affording credit for Construction Work undertaken under this In-Kind MOU. In addition, execution of this In-Kind MOU in no way prevents the Government from modifying the project even if it results in the Construction Work provided by the Non-Federal Interest no longer being an integral part of the project.

7. Nothing herein shall constitute, represent, or imply any commitment to budget or appropriate funds for the project in the future; and nothing herein shall represent, or give rise to, any duty, obligation, or responsibility for the United States. Any activity undertaken by the Non-Federal Interest for the Construction Work is solely at the Non-Federal Interest's own risk and responsibility.

8. Notices.

a. Any notice, request, demand, or other communication required or permitted to be given under this In-Kind MOU shall be deemed to have been duly given if in writing and delivered personally or mailed by registered or certified mail, with return receipt, as follows:

If to the Non-Federal Interest:

**[RECIPIENT'S TITLE & ADDRESS]**

If to the Government:

**[RECIPIENT'S TITLE & ADDRESS]**

b. A party may change the recipient or address to which such communications are to be directed by giving written notice to the other party in the manner provided in this paragraph.

9. This In-Kind MOU may be modified or amended only by written, mutual agreement of the parties.

IN WITNESS WHEREOF, the parties hereto have executed this In-Kind MOU, which shall become effective upon the date it is signed by the District Commander.

DEPARTMENT OF THE ARMY

**[FULL NAME OF NON-FEDERAL INTEREST]**

BY: \_\_\_\_\_  
**[INSERT TYPED NAME]**  
**[Insert Rank], U.S. Army**  
District Commander

BY: \_\_\_\_\_  
**[INSERT TYPED NAME]**  
**[Insert Full Title]**

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_