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U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECW-P

FEB 16 2018

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Section 1121 of the Water Resources Development Act of 2016 (WRDA 2016), Tribal Partnership Program

1. Section 1121 of WRDA 2016 was completed and signed on 5 February 2018. The implementation guidance is posted in the U.S. Army Corps of Engineers website: <http://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/>.
2. Questions regarding this implementation guidance should be directed to Lisa Morales, Program Manager, Programs Integration Division, at (202) 761-7664 or Lisa.T.Morales@usace.army.mil.

A handwritten signature in blue ink, appearing to read "J. Dalton".

JAMES C. DALTON, P.E.
Director of Civil Works

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DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
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FEB -5 2018

MEMORANDUM FOR COMMANDING GENERAL U.S. ARMY CORPS OF
ENGINEERS

SUBJECT: Implementation Guidance for Section 1031(a) of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), and for Section 1121 of the Water Resources Development Act of 2016 (WRDA 2016), Tribal Partnership Program

1. Section 203 of WRDA 2000, as amended (33 U.S.C. 2269), authorizes the Secretary to carry out the Tribal Partnership Program (the Program), consisting of water-related planning activities, and activities related to the study, design, and construction of water resources development projects, that substantially benefit federally-recognized Indian Tribes and that are located primarily within Indian country (including lands within the jurisdictional area of an Oklahoma Tribe) or in proximity to Alaska Native Villages. Authorized activities include: projects for flood damage reduction, environmental restoration and protection, and preservation of cultural and natural resources; watershed assessments and planning activities; letter reports; and other projects as the Secretary, in cooperation with Indian Tribes and the heads of other federal agencies, determines to be appropriate. The Secretary is also directed to consult with the Department of the Interior on any activity under the Program and to coordinate with Tribes, Department of the Interior and other federal agencies to consider their authorities in making recommendations. To meet this requirement, Districts, in collaboration with Tribal partners, shall implement appropriate coordination with the Department of Interior and other federal agencies during the study and document accordingly in the study report. The Program is currently authorized through fiscal year 2024. Section 203, as amended, as well as the language of the WRRDA 2014 and the WRDA 2016 amendments, is enclosed.

2. This guidance is issued primarily to implement the WRRDA 2014 and the WRDA 2016 amendments to Section 203.

a. Section 203 as originally enacted in WRDA 2000 provided that cost share agreements for such studies are subject to the ability of a Tribe to pay, as determined by the Secretary of the Army in accordance with procedures to be established by the Secretary. Section 1031(a) of WRRDA 2014 added a provision requiring the Secretary to issue guidance on such ability to pay procedures not later than 180 days after the date of enactment of WRRDA 2014 (June 10, 2014).

b. Section 1121 of WRDA 2016 further amended Section 203 to expand the planning activities that the Secretary may carry out, and to authorize the Secretary to

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undertake design and construction of a project formulated under the Program that the Secretary determines to be feasible if the federal share is not more than \$10,000,000. A project whose federal share exceeds \$10,000,000 may only be carried out upon further Congressional authorization.

3. Watershed assessments, non-feasibility planning activities, and letter reports without specific recommendations.

a. Guidance for conducting watershed assessments is provided in Implementation Guidance for Section 202 of WRDA 2000, dated May 29, 2001, and in Implementation Guidance for Section 2010 of WRDA 2007, dated March 7, 2008. Additional guidance for conducting watershed assessments is provided in the Planning Bulletin (PB) 2016-03. Watershed assessments will not require Congressional new start determinations, as these are undertaken under the Program authority and do not involve Congressional authorization of specific projects. The Model Agreement for Cost Shared Watershed and River Basin Assessments posted on the USACE Civil Works Agreements website should be used. Watershed assessments will be cost shared at 75 percent federal and 25 percent non-federal expense.

b. The Secretary is also authorized to carry out stand-alone water-related planning activities independent of watershed assessments. Examples would be Letter Reports containing real estate analyses of lands required for authorized Corps mitigation activities on behalf of federally-recognized Indian Tribes, or assessments of water-related hazardous and toxic waste sites. Water-related planning activities will not require new start determinations. Planning activities will be cost shared at 50 percent federal and 50 percent non-federal expense. The Model Agreements for Tribal Partnership Program Planning Activities to be posted on the Civil Works Agreements website should be used for such studies.

c. Section 1121 of WRDA 2016 added paragraph (b)(3)(B), specifying that a report provided to a Tribe pursuant to a feasibility study may, but is not required to, contain a recommendation on a specific water resources development project. Depending on the wishes of the Tribal Sponsor, the study will be scoped at the outset to either result in a report recommending a project plan for design and construction, or in a more limited letter report describing an array of alternatives that are determined to be technically feasible and economically and environmentally justifiable. Such a report may be useful to a Tribe for future planning, or for coordination by the Tribe with the Department of the Interior or other federal agencies. Studies not intended to result in a recommendation will not require new start determinations. Such studies will be cost shared at 50 percent federal and 50 percent non-federal expense. The Model Agreement for Tribal Partnership Program Section 203(b)(3)(B) Studies to be posted on the Civil Works Agreements website should be used for such studies.

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4. Feasibility Studies for the Construction of Water Resources Development Projects or of Projects for the Preservation of Cultural and Natural Resources.

a. Section 203, as amended, contemplates feasibility studies for construction of water resources development projects (projects within the Corps' mission areas described in Engineer Regulation (ER) 1105-2-100, i.e., navigation, flood risk management, ecosystem restoration, storm risk management, water supply, hydroelectric power generation and recreation), as well as feasibility studies for construction of projects for the preservation of cultural and natural resources related to water resources development. Congress included projects for preservation of cultural and natural resources in Section 203 (b)(2)(A). Therefore, projects whose primary purpose is the preservation of cultural or natural resources related to water resources development will be considered policy compliant and budgetable. Planning alternatives for such projects will be justified under the Environmental Quality account or the Other Social Effects account as defined in ER 1105-2-100, rather than under the National Economic Development account. The evaluation of the alternatives to find the most effective plan should be performed by using cost effectiveness and incremental cost analysis, in accordance with ER 1105-2-100.

b. The Model Agreement for Cost Shared Feasibility Studies posted on the USACE Civil Works Agreements website should be used for Program feasibility studies, whether or not such studies are anticipated to result in a Chief's Report. Feasibility studies will not require new start determinations, as these are undertaken under Program authority and do not involve Congressional authorization of specific projects. Feasibility studies will be cost shared at 50 percent federal and 50 percent non-federal expense.

(i) Chief's Reports will be required for those Program feasibility studies wherein the Federal design and construction cost of the project is anticipated to exceed \$10,000,000, in order to request Congressional authorization. Such studies will be implemented in accordance with the guidance for Sections 1001 and 1002 of WRRDA 2014, and with the SMART planning process and milestones.

(ii) Section 203, as amended, authorizes the design and construction of projects whose federal design and construction cost is not more than \$10,000,000. The funding and time limitations contained in the guidance for Sections 1001 and 1002 of WRRDA 2014 will apply to studies for such projects. The MSC Commander may approve the resulting reports and recommended plans.

5. Model Design and Project Partnership Agreements for the Tribal Partnership Program to be posted on the Civil Works Agreements website should be used for design and construction, respectively, under the Program. In accordance with Section 203(d)(4)(B), design and construction costs will be shared as described in Sections 101 and 103 of WRDA 1986, as amended (33 U.S.C. 2211 and 2213), depending on the purpose of the project. The design and construction costs of projects for the

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preservation of cultural or natural resources will be shared in accordance with the cost sharing for flood risk management, storm risk management, or ecosystem restoration, depending on the causal factors necessitating the project. New start determinations will only be required in cases where project construction requires Congressional authorization. Each Project Partnership Agreement undertaken pursuant to a MSC approved report shall provide that costs will be closely monitored, and should an estimate indicate that federal design and construction costs are likely to exceed \$10,000,000, all work on the project will be suspended until HQUSACE determines whether the project should be terminated or Congressional authorization sought in order to complete it.

6. Credit shall be afforded toward the required non-federal share of study costs, or the non-Federal share of design or construction costs, for the cost of services, studies, supplies or other in-kind contributions provided by the Tribe.

7. Due to the amended language enacted in Section 1121, the ability to pay provision now applies to design and construction as well as to studies, watershed assessments, and planning activities carried out under the Program. The following procedures will apply to all agreements:

a. If the Indian Tribe has a per capita income less than the per capita income of two thirds of the counties in the United States, the non-federal share shall be reduced as follows:

(i) for a watershed assessment, non-feasibility planning activity or letter report described in paragraph 3 of this guidance, the non-federal share shall be reduced to 10 percent of shared agreement costs;

(ii) for a feasibility study described in paragraph 4. of this guidance, the non-federal share shall be reduced to the amount resulting from the application of a factor of 25 percent to the non-federal share after application of the Section 1156 waiver, as described in the Implementation Guidance for Section 1119 of WRDA 2016, dated May 11, 2017, by excluding up to \$455,000 from the shared study costs, multiplying the remaining amount by the 50 percent cost share for feasibility study costs, and applying the 25 percent factor to the result to obtain the non-federal share for the feasibility study; and

(iii) for construction of a project described in paragraph 5. of this guidance, the non-federal share shall be reduced to the amount resulting from the application of a factor of 25 percent to the non-federal share after application of the Section 1156 waiver, as described in the Implementation Guidance for Section 1119 of WRDA 2016, by deriving the baseline non-federal share using applicable cost sharing procedures, excluding up to \$455,000 of that amount, and applying the 25 percent factor to the result to obtain the non-federal share for project construction.

b. The number for the per capita income that is less than the per capita income of two-thirds of the counties in the United States shall be derived from the State and

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County Income Index Data in the most recent Economic Guidance Memorandum (EGM) issued by the Corps concerning ability to pay calculations. The EGM format specifies the time frame window, in calendar years, to which its data pertains. Using this time frame window, the per capita income of an Indian Tribe shall be derived from the U.S. Census Bureau's American Community Survey estimates for the same time frame for the appropriate Tribal Census Tracts, Tribal Block Groups, or Alaska Native Village Statistical Areas.

c. The non-federal 10 percent share or 25 percent share as described in subparagraph a. of this paragraph may be fulfilled by services, studies, supplies, or other in-kind contributions provided by the Tribe.

d. Any existing agreement entered into pursuant to Section 203 with an Indian Tribe qualifying under this guidance may be amended to incorporate an ability to pay provision, but only with regard to federal financial obligations not yet incurred as of the effective date of the amendment.

e. Template language for new agreements and to amend existing agreements for purposes of applying the ability to pay provision will be posted on the Civil Works Agreements website. The template language will include the procedure for applying the ability to pay provision after application of the Section 1156 cost sharing waiver in the relevant agreements. (It should be noted that the Section 1156 cost sharing waiver is not applicable to watershed assessments, non-feasibility planning activities, and letter reports described in paragraph 3 of this guidance. See Implementation Guidance for Section 1119 of WRDA 2016, paragraph 6).

8. Before enactment of WRDA 2016, all Program funds were budgeted and appropriated in the Investigations appropriations account because Section 203 was only a study authority. Because Section 203, as amended, now authorizes certain design and construction, a separate Program funding account within the Construction appropriation will be required as follows:

a. Feasibility studies resulting in projects whose federal design and construction cost is not more than \$10,000,000, and the resulting design and construction, as well as Program design and construction specifically authorized by Congress pursuant to a Chief's Report, will be budgeted in the Construction appropriation account; and

b. Watershed assessments, non-feasibility planning activities and letter reports described in paragraph 3. of this guidance, and feasibility studies for the construction of projects to be specifically authorized described in paragraph 4.b.(i) of this guidance, will be budgeted in the Investigations appropriation account.

9. This guidance supersedes the following guidance documents: Memorandum dated August 16, 2010, subject: "Delegated Review and Approval Authority for

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Reconnaissance Studies for Section 203 of WRDA 2000 Authority, Tribal Partnership Program"; Implementation Guidance for Section 2011 of WRDA 2007, dated May 16, 2008; Implementation Guidance for Section 203 of WRDA 2000, dated January 8, 2002; and Implementation Guidance for Sections 203(d)(1) and 204 of WRDA 2000, dated February 27, 2001, but only insofar as it relates to Section 203.

10. Questions regarding this implementation guidance may be directed to Gib Owen, Office of the Assistant Secretary of the Army for Civil Works at gib.a.owen.civ@mail.mil or 703-695-4641. Technical questions may be directed to Lisa Morales, Senior Tribal Liaison, 202-761-7664 or lisa.t.morales@usace.army.mil



RYAN A. FISHER
Acting Assistant Secretary of the Army
(Civil Works)

Encl

Section 203 of the WRDA 2000, as amended (33 U.S.C. 2269)

TRIBAL PARTNERSHIP PROGRAM.

- (a) Definition of Indian tribe. In this section, the term "Indian tribe" has the meaning given the term in section 5304 of Title 25.
- (b) Program.
 - (1) In general. In cooperation with Indian tribes and the heads of other Federal agencies, the Secretary may carry out water-related planning activities, or activities relating to the study, design, and construction of water resources development projects, that
 - (A) will substantially benefit Indian tribes; and
 - (B) are located primarily within Indian country (as defined in section 1151 of title 18, United States Code, and including lands that are within the jurisdictional area of an Oklahoma Indian tribe, as determined by the Secretary of the Interior, and are recognized by the Secretary of the Interior as eligible for trust land status under part 151 of title 25, Code of Federal Regulations) or in proximity to Alaska Native villages.
 - (2) Authorized activities. An activity conducted under paragraph (1) may address
 - (A) projects for flood damage reduction, environmental restoration and protection, and preservation of cultural and natural resources;
 - (B) watershed assessments and planning activities; and
 - (C) such other projects as the Secretary, in cooperation with Indian tribes and the heads of other Federal agencies, determines to be appropriate.
 - (3) Feasibility study and reports.
 - (A) In general. On the request of an Indian tribe, the Secretary shall conduct a study on, and provide to the Indian tribe a report describing, the feasibility of a water resources development project described in paragraph (1).
 - (B) Recommendation. A report under subparagraph (A) may, but shall not be required to, contain a recommendation on a specific water resources development project.
 - (4) Design and construction.
 - (A) In general. The Secretary may carry out the design and construction of a water resources development project described in paragraph (1) that the Secretary determines is feasible if the Federal share of the cost of the project is not more than \$10,000,000.
 - (B) Specific authorization. If the Federal share of the cost of a project described in subparagraph (A) is more than \$ 10,000,000, the Secretary may only carry out the project if Congress enacts a law authorizing the Secretary to carry out the project.
- (c) Consultation and coordination with Secretary of the Interior.
 - (1) In general. In recognition of the unique role of the Secretary of the Interior concerning trust responsibilities with Indian tribes and in recognition of mutual trust responsibilities, the Secretary shall consult with the Secretary of the Interior concerning an activity conducted under subsection (b).
 - (2) Integration of activities. The Secretary shall

- (A) Integrate civil works activities of the Department of the Army with activities of the Department of the Interior to avoid conflicts, duplications of effort, or unanticipated adverse effects on Indian tribes; and
 - (B) Consider the authorities and programs of the Department of the Interior and other Federal agencies in any recommendations concerning an activity conducted under subsection (b).
- (d) Cost sharing.
- (1) Ability to pay.
 - (A) In general. Any cost-sharing agreement for an activity conducted under subsection (b) shall be subject to the ability of the non-Federal interest to pay.
 - (B) Use of procedures.
 - (i) In general. The ability of a non-Federal interest to pay shall be determined by the Secretary in accordance with procedures established by the Secretary.
 - (ii) Determination. Not later than 180 days after the date of enactment of this clause [enacted June 10, 2014], the Secretary shall issue guidance on the procedures described in clause (i).
 - (2) Credit. The Secretary may credit toward the non-Federal share of the costs of an activity conducted under subsection (b) the cost of services, studies, supplies, or other in-kind contributions provided by the non-Federal interest.
 - (3) Sovereign immunity. The Secretary shall not require an Indian tribe to waive the sovereign immunity of the Indian tribe as a condition to entering into a cost-sharing agreement under this subsection.
 - (4) Water resources development projects.
 - (A) In general. The non-Federal share of costs for the study of a water resources development project described in subsection (b)(1) shall be 50 percent.
 - (B) Other costs. The non-Federal share of costs of design and construction of a project described in subparagraph (A) shall be assigned to the appropriate project purposes described in sections 101 and 103 of the Water Resources Development Act of 1986 (33 U.S.C. 2211, 2213) and shared in the same percentages as the purposes to which the costs are assigned.
 - (5) Water-related planning activities.
 - (A) In general. The non-Federal share of costs of a watershed and river basin assessment conducted under subsection (b) shall be 25 percent.
 - (B) Other costs. The non-Federal share of costs of other water-related planning activities described in subsection (b)(1) shall be 50 percent.
- (e) Restrictions. The Secretary is authorized to carry out activities under this section for fiscal years 2015 through 2024.

WRRDA 2014 Amendment.

SEC. 1031. TRIBAL PARTNERSHIP PROGRAM.

(a) IN GENERAL. Section 203 of the Water Resources Development Act of 2000 (33 U.S.C. 269) is amended

(1) In subsection (d)(1)(B)

(A) by striking "The ability" and inserting the following: (i) IN GENERAL. The ability; and

(B) by adding at the end the following: (ii) DETERMINATION. Not later than 180 days after the date of enactment of this clause, the Secretary shall issue guidance on the procedures described in clause (i); and

(2) by striking subsection (e) and inserting the following: (e) RESTRICTIONS. The Secretary is authorized to carry out activities under this section for fiscal years 2015 through 2024.

WRDA 2016 Amendment.

SEC. 1121. TRIBAL PARTNERSHIP PROGRAM.

Section 203 of the Water Resources Development Act of 2000 (33 U.S.C. 2269) is amended

(1) in subsection (b)

(A) in paragraph (1), in the matter preceding subparagraph (A), by striking “the Secretary” and all that follows through “projects” and inserting “the Secretary may carry out water-related planning activities, or activities relating to the study, design, and construction of water resources development projects;

(B) in paragraph (2) by striking “(2) MATTERS TO BE STUDIED. A study” and inserting the following: (2) AUTHORIZED ACTIVITIES. An activity; and

(C) by adding at the end the following:

(3) FEASIBILITY STUDY AND REPORTS.

(A) IN GENERAL. On the request of an Indian tribe, the Secretary shall conduct a study on, and provide to the Indian tribe a report describing, the feasibility of a water resources development project described in paragraph (1).

(B) RECOMMENDATION. A report under subparagraph (A) may, but shall not be required to, contain a recommendation on a specific water resources development project.

(4) DESIGN AND CONSTRUCTION.

(A) IN GENERAL. The Secretary may carry out the design and construction of a water resources development project described in paragraph (1) that the Secretary determines is feasible if the Federal share of the cost of the project is not more than \$10,000,000.

(B) SPECIFIC AUTHORIZATION.—If the Federal share of the cost of a project described in subparagraph (A) is more than \$10,000,000, the Secretary may only carry out the project if Congress enacts a law authorizing the Secretary to carry out the project.;

(2) in subsection (c)

(A) in paragraph (1) by striking “studies” and inserting “an activity”; and

(B) in paragraph (2)(B) by striking “carrying out projects studied” and inserting “an activity conducted”; and (3) in subsection (d) (A) in paragraph (1)(A) by striking “a study” and inserting “an activity conducted”; and (B) by striking paragraph (2) and inserting the following:

(2) CREDIT. The Secretary may credit toward the non-Federal share of the costs of an activity conducted under subsection (b) the cost of services, studies, supplies, or other in-kind contributions provided by the non-Federal interest.

(3) SOVEREIGN IMMUNITY. The Secretary shall not require an Indian tribe to waive the sovereign immunity of the Indian tribe as a condition to entering into a cost-sharing agreement under this subsection.

(4) WATER RESOURCES DEVELOPMENT PROJECTS.

(A) IN GENERAL.—The non-Federal share of costs for the study of a water resources development project described in subsection (b)(1) shall be 50 percent.

(B) OTHER COSTS.—The non-Federal share of costs of design and construction of a project described in subparagraph (A) shall be assigned to the appropriate project purposes described in sections 101 and 103 of the Water Resources Development Act of 1986 (33 U.S.C. 2211, 2213) and shared in the same percentages as the purposes to which the costs are assigned.

(5) WATER-RELATED PLANNING ACTIVITIES.

(A) IN GENERAL. The non-Federal share of costs of a watershed and river basin assessment conducted under subsection (b) shall be 25 percent.

(B) OTHER COSTS. The non-Federal share of costs of other water-related planning activities described in subsection (b)(1) shall be 50 percent.