MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Revised Implementation Guidance for Section 1043(b) of the Water Resources Reform Development Act (WRRDA) of 2014, as Amended by Section 1137 of the Water Resources Act of 2018, Non-Federal Implementation Pilot Program

1. The Assistant Secretary of the Army, Civil Works revised and approved on 14 June 2019 Section 1043(b) of WRRDA 2014. The attached implementation guidance is posted for internal and external use on the U.S. Army Corps of Engineers official WRDA website: http://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/.

2. Please ensure wide dissemination of this guidance. Questions regarding this implementation guidance should be directed to the Headquarters POC, Ada Benavides, Senior Policy Advisor and WRDA Program Manager, at (202) 761-0415 or ada.benavides@usace.army.mil.

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

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

SUBJECT: Implementation Guidance for Section 1043(b) of the Water Resources Reform and Development Act of 2014, as amended by Section 1137 of the Water Resources Development Act of 2018, Non-Federal Implementation Pilot Program

1. Purpose. This memorandum provides implementation guidance to the U.S. Army Corps of Engineers (Corps) for carrying out Section 1043(b) of the Water Resources Reform and Development Act of 2014 (WRRDA 2014). If the Congress extends the authorization of Section 1043(b), which is set to expire on June 10, 2019, the Assistant Secretary of the Army for Civil Works (ASA(CW)) will issue further guidance for the selection and implementation of additional projects.

2. Background.
   a. Section 1043(b), as amended, establishes a pilot program to evaluate the cost-effectiveness and project delivery efficiency of allowing non-Federal interests to carry out authorized flood risk management, hurricane and storm damage reduction, coastal harbor and channel inland navigation and aquatic ecosystem restoration projects. The intent of the pilot program is to identify project delivery and cost-saving alternatives that reduce the backlog of authorized U.S. Army Civil Works projects; to evaluate the technical, financial, and organizational efficiencies of a non-Federal interest carrying out the design, execution, management, and construction of one or more projects; and, to evaluate alternatives for the decentralization of the project management, design, and construction for authorized water resources development projects. The authority to commence a section 1043(b) pilot project terminates, June 10, 2019, 5 years after the date of enactment of WRRDA 2014. To date, two projects have been identified for implementation.

   b. Section 1043(b) of WRRDA 2014, as amended, directs the Secretary to establish a pilot program of up to 20 authorized construction projects to evaluate the cost-effectiveness and project delivery efficiency of allowing non-Federal interests to undertake construction of authorized flood risk management, hurricane and storm damage reduction, coastal harbor and channel inland navigation, and aquatic ecosystem restoration projects or separable elements of a project, subject to several requirements. Section 1043(b) provides that all laws and regulations that would apply to the Secretary, if the Secretary were carrying out the project, shall apply to a non-Federal interest carrying out the project. In addition, it provides that nothing changes the cost sharing applicable prior to WRRDA 2014 to a project carried out under this authority. Section 1043(b) allows for the transfer of funds appropriated for the project,
as well as funds appropriated for the Section 1043(b) pilot program, to cover the Federal share of such construction, except that sufficient funds for the U.S. Army Corps of Engineers (Corps) to carry out its responsibilities related to the project and pilot program must be retained. Finally, it provides that authority to commence pilot projects under Section 1043(b) terminates on June 10, 2019. Section 1043(b) of WRRDA 2014, as amended, is enclosed.

3. Public Comment. For a 60 day period, beginning December 14, 2018, public input was sought on the development of implementation guidance for various provisions contained in U.S. Army Civil Works authorizations, including Section 1043 of WRRDA 2014. During this period, the Corps held a stakeholder session in Washington DC. The Corps received comments regarding the termination of Section 1043 and requests to work with the Corps in development of the guidance. Additionally, the Corps received a specific request to provide reasonable assurances regarding the provision of Federal funding to support construction of the entire project, if selected.

4. Section 1043(b), as amended, provides that in carrying out the pilot program, the Secretary will identify a total of not more than 20 projects, including:
   a. Not more than 12 projects authorized prior to June 10, 2014 that:
      (1) Have received Federal funds prior to June 10, 2014; or
      (2) For more than two consecutive fiscal years, have an unobligated funding balance for the project in the Corps Construction account; and
      (3) To the maximum extent practicable, are located in each of the Corps Major Subordinate Commands (MSC);
   b. Not more than three projects authorized prior to June 10, 2014 that have not received Federal funds in the period beginning on the date on which the project was authorized and ending on June 10, 2014; and
   c. Not more than five projects that have been authorized for construction after June 10, 2014.

5. Eligibility Requirements.
   a. Non-Federal Interest. Section 1043(b) provides the authority for non-Federal interests to carry out authorized flood risk management, hurricane and storm damage reduction, coastal harbor and channel inland navigation, and ecosystem restoration projects. Only entities that qualify as non-Federal interests are eligible to implement
SUBJECT: Implementation Guidance for Section 1043(b) of the Water Resources Reform and Development Act of 2014, as amended by Section 1137 of the Water Resources Development Act of 2018, Non-Federal Implementation Pilot Program

projects and separable elements under section 1043(b). Section 221 of the Flood Control Act of 1970, as amended (42 USC 1962d-5b) defines the term “non-Federal interest” to mean a legally constituted public body (including an Indian tribe and a tribal organization) or a nonprofit entity with the consent of the affected local government, that has the full authority and capability to perform the terms of the agreement, and to pay damages, if necessary, in case of failure to perform. In accordance with Corps guidance implementing Section 221, as amended, a nonprofit entity is eligible to act as the sole sponsor for the construction of an ecosystem restoration project; however, for construction of projects involving any purpose other than ecosystem restoration a nonprofit entity is eligible to act as a sponsor so long as a legally constituted public body (which includes a Federally recognized Indian tribe) also will act as sponsor for the project. See Appendix Two, TAB A.

b. Projects and Separable Elements.

(1) Section 1043(b) provides authority for the Corps to enter into a Project Partnership Agreement (PPA) with the non-Federal interest under which the non-Federal interest would have full project management and control for construction of the project, to include authorized projects in which construction has been initiated, but not completed, or a separable element of the project. Section 1043(b) authorizes project delivery by the non-Federal interest; it does not authorize any specific project. To be eligible for implementation under Section 1043(b), a project or separable element must be specifically authorized by Congress for construction by the Secretary for purposes of flood risk management, hurricane and storm damage reduction, coastal harbor and channel inland navigation, or aquatic ecosystem restoration. Projects and separable elements implemented under Section 1043(b) must be economically justified and environmentally acceptable based on Federal criteria. A non-Federal interest may submit a proposal to construct an authorized project, an identified separable element of an authorized project, or to complete the remaining construction of a project in which construction has been initiated but not completed. For projects in which no construction has been initiated new start approval will be required in accordance with policy. Upon approval by the ASA(CW), to transition a construction project started but not completed to a non-Federal interest under the Section 1043 authority, the existing PPA will be amended to remove all remaining work from the scope of the PPA and a new PPA will be executed with the non-Federal interest to cover the remaining work in accordance with the requirements of Section 1043. Amending an existing PPA to remove the remaining work from the scope of the PPA and the execution of a new
PPA with a non-Federal interest for the purpose of implementing the remaining work in accordance with the requirements of Section 1043 does not require an additional new start designation beyond any previously required and provided new start designation.

(2) Separable Element Defined. As defined in Section 103(f) of the Water Resources Development Act of 1986 (WRDA 1086) (33 U.S.C. 2213(f)) a separable element is a portion of a project which is physically separable from other portions of the project and which achieves hydrologic effects or produces economic benefits, which are separately identifiable from those produced by other portions of the project.

(3) Economic justification. In accordance with Corps policy, the Corps reports and maintains current estimates of project benefits, costs, and economic justification of all active funded projects and separable elements. See for example, Appendix Two, TAB B. Typical Corps economic analysis quantifies the effects of alternatives and optimizes the output of goods and services from a national perspective (the National Economic Development (NED) account). NED benefits are increases in the net value of the national output of goods and services, expressed in monetary units. Contributions to NED are the direct net benefits that accrue in the impact region and the rest of the nation. See Appendix Two, TAB C. Decision documents are required to include a plan for updating project benefits for future reporting and decision making. The economic update plan is required to be included in all Project Management Plans (PMP). The actions in the plan may be limited in that no major new analyses need be conducted but rather previous assumptions reviewed and updated with techniques such as surveys and sampling employed to develop a reasonable estimate of current project benefits provided no significant changes in the project, and the without project conditions have occurred. See Appendix Two, TAB B. Districts shall work with non-Federal interests to verify economic justification for the specific projects approved to be implemented under the authority of Section 1043, as amended.

(4) Environmentally acceptable. Authorized Corps projects must comply with all applicable Federal environmental statutes and regulations and with applicable State laws and regulations where the Federal government has clearly waived sovereign immunity. As a general matter, the feasibility reports for civil works projects should address applicable requirements, and a list of the most commonly applicable laws and policies can be found
in Exhibit G-8 of reference Engineer Regulation (ER) 1105-2-100 (See Appendix Two, TAB D). Even when there is no difference between the project recommended in the feasibility report and the proposed project, the appropriate District Commander must determine whether environmental circumstances have changed since the report was completed meriting further study. Districts shall work with non-Federal interests to identify legal requirements for specific projects approved to be implemented under the authority of section 1043(b), as amended.

(5) Exclusions. The following projects and separable elements will not generally be considered for implementation under Section 1043(b).

(a) Projects and separable elements that the Corps determines require additional investigation or reformulation to demonstrate feasibility, economic justification, or environmental acceptability are excluded. During preparation of the PMP with the non-Federal interest, the District Commander must analyze whether the project or separable element meets the requirements of applicable federal environmental statutes, to include the National Environmental Policy Act of 1970 (NEPA), is feasible, and is economically justified.

(b) Projects or separable elements involving modification of an existing Federally-owned dam structure operated by the Corps are excluded.

c. Maximum Project Cost. To be eligible for implementation under Section 1043(b), the estimated cost of the project or separable element at the time of selection must not exceed the maximum project cost limit established under Section 902 of WRDA 1986 (33 U.S.C. 2280) and calculated in accordance with Corps guidance. See Appendix, Two TAB E. Federal contributions towards a project or separable element constructed under Section 1043(b) shall not exceed the Federal share of the maximum project cost.

6. Program Funding of Projects or Separable Elements. While it is the intent of the ASA (CW) to approve projects or separable elements of eligible projects that can be fully funded to completion at the time of agreement execution, consideration will be given to all projects or separable elements, and project implementation will be subject to the availability of funds.

7. Program Requirements.
   a. Costs.
(1) Construction Costs. Construction costs are all costs incurred by the Corps and the non-Federal interest to design and construct the project or separable element that are cost-shared in accordance with section 101 of WRDA 1986, as amended (33 U.S.C. 2211) or Section 103 of WRDA 1986, as amended (33 U.S.C. 2213). Construction costs include the Corps' costs for administration and oversight; the Corps' costs related to preparing the PMP; the Corps' costs related to negotiating the PPA; the Corps' costs of any economic or environmental reviews carried out prior to the PPA; the non-Federal interest's direct and indirect costs related to engineering, design, construction, and supervision and administration that comply with the requirements of Subpart E of 2 C.F.R. Part 200; and the value of real property interests and relocations required for the project or separable element. Construction costs do not include any costs related to operation, maintenance, repair, rehabilitation, or replacement of the project or separable element.

(2) Other Federal Costs. Costs incurred by the Corps for participation in the Project Coordination Team are not included in the cost-shared construction costs, but they are included in the total project cost for purposes of determining whether the maximum authorized cost limit will be exceeded.

(3) Cost Share. In accordance with Section 1043(b)(4), the Federal share of construction costs will be determined using the applicable rules in Sections 101, 102, and 103 of WRDA 1986, 33 U.S.C. 2211-2213. Federal funds provided by the Corps may be used in conjunction with non-Federal funds to acquire lands, easements, and rights-of-way, perform relocations, and construct disposal area improvements required for projects and separable elements other than harbor navigation projects, provided such costs are approved in advance. For harbor navigation projects, Federal funds may not be used to acquire lands, easements, or rights-of-way or to perform relocations because such costs are not included in cost-shared construction costs under section 101 of WRDA 1986 (33 U.S.C. 2211).

(4) Costs Incurred Prior to the PPA. Costs incurred by the non-Federal interest prior to execution of the PPA, including costs to prepare the initial proposal, costs to prepare the PMP, and costs to negotiate the PPA are not eligible for inclusion in construction costs.
The costs of oversight activities performed by the Corps, including design review, review of project economics, environmental compliance review, auditing, permit evaluation, agreement development and negotiation, construction monitoring, inspection, and certifications, will be undertaken with Federal funds. These costs will be included in total project costs and considered in calculating the relative cost-sharing obligations of the Corps and the non-Federal interest.

Unallowable Costs. Costs incurred by the non-Federal interest that are not allowable for inclusion in construction costs include:

(a) The non-Federal interest's costs for participation in the Project Coordination Team;

(b) The non-Federal interest's costs related to audits;

(c) Any costs associated with technical assistance provided by the Corps at the non-Federal interest's request;

(d) The value of third party donations of goods and services;

(e) Costs associated with betterments; and

(f) Costs associated with items of local cooperation that are a prerequisite for Federal financial participation in the project (e.g., costs associated with local service facilities required for navigation harbor projects, costs associated with establishing sufficient conditions of public use and access for a projects that provides shoreline erosion control benefits).

b. Federal Compliance Requirements.

(1) Environmental Compliance. Civil works projects must comply with all applicable Federal environmental statutes and regulations and with applicable State laws and regulations where the Federal government has clearly waived sovereign immunity. As a general matter, the feasibility reports for civil works projects should address applicable requirements. A list of the most commonly applicable laws and policies can be found in Exhibit G-8 of ER 1105-2-100 (See Appendix Two, TAB D). District Commanders will work with non-Federal interests to identify additional environmental compliance actions necessary for construction. The non-Federal interest may request that the Corps provide technical assistance
in obtaining any permit necessary for the project. Districts may agree to this request, provided that the non-Federal interest shall provide funding, in advance, to cover the Corps’ anticipated costs for this assistance. Technical assistance includes engineering and design activities, as well as assistance in obtaining any necessary environmental compliance and permits related to construction of the project. District Commanders will negotiate a Memorandum of Agreement (MOA), to include a Scope of Work. Major Subordinate Command (MSC) Commanders are delegated the authority to approve the MOA, no further delegation is authorized. The MSC Commander may delegate execution of the MOA with the non-Federal interests to the District Commander.


(3) Non-Discrimination. Non-Federal interests must comply with all the requirements of applicable Federal non-discrimination 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 (see Appendix Two, TAB I); the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto (see Appendix Two, TAB I).

(4) Uniform Relocation Assistance and Real Property Acquisition Policies. Non-Federal interests must provide the assurances required by Sections 210 and 305 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 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 (see Appendix Two, TAB J).

(5) Items of Local Cooperation for Water Resources Development. Non-Federal interests must provide the items of local cooperation required for the project or separable element.

c. Reporting Requirements.
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(1) Progress Reporting. The non-Federal interest is responsible for oversight of the activities undertaken to design and construct the project or separable element. The non-Federal interest must monitor its activities to assure compliance with applicable Federal requirements and applicable laws and that performance expectations are being achieved. Section 1043(b) requires regular reporting to monitor and audit each project, to ensure that construction activities are carried out in compliance with approved plans, and to evaluate the technical, financial and organizational efficiencies of a non-Federal interest. The non-Federal interest must submit progress reports on a monthly basis that detail all work accomplished under the PPA for the project or separable element during the previous month. Documentation of onsite technical inspections and certified completion of construction data must be included in progress reports for construction activities. The non-Federal interest must inform the District Commander immediately if any of the conditions described in 2 CFR 200.328(d) become known.

(2) Financial Reporting. The non-Federal Interest must provide financial reports on a monthly basis in accordance with 2 CFR 200.327 using Standard Form 425.

(3) Real Property Reporting. The non-Federal interest is responsible for acquiring and retaining all real property interests determined to be required for the project or separable element by the Corps. A real property status report documenting ownership of the required real property interests must accompany all requests for District Commander approval of contract solicitations (see paragraph 7.d.(2) below).

(4) ASA (CW) Reporting.
(a) Beginning on September 30, 2019, and on each September 30th thereafter, District Commanders responsible for projects implemented under the pilot program must provide, through the appropriate MSC Commander, to Corps Headquarters, Chief of Planning, a report to include: 1) evaluation of the progress of non-Federal interests in meeting milestones in the detailed project schedules discussed below and 2) an assessment of the cost-effectiveness and project delivery efficiency of allowing the non-Federal interests to carry out the projects. The Chief of Planning will compile the information provided. By October 31 of each year, the Director of Civil Works (DCW) will submit a consolidated draft
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report with any recommendations to the ASA(CW) for review and action.

(b) Upon approval of the October 31, 2019 report by the ASA(CW), the ASA(CW) will transmit the report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives and make the report publicly available.

d. Oversight and Administration.

(1) In General. The District Commander will monitor the performance, financial, and property reports submitted by the non-Federal interest. Based upon the degree of risk associated with the project or separable element, the District Commander may also monitor performance through site visits.

(2) Prior Written Approval Requirements. In addition to costs and changes requiring prior written approval under 2 CFR Part 200, the District Commander’s written approval is required for all plans and specifications and contract solicitations. Non-Federal interests shall afford the District Commander the opportunity to review and comment on contract modifications, change orders, and claims that do not otherwise involve circumstances requiring prior written approval under 2 CFR Part 200. Changes in the scope of the project or separable element require prior approval by the MSC Commander, Headquarters, the ASA (CW), or potentially Congress, depending upon the specific changes. The District will identify the appropriate approval authority in accordance with the guidance in Appendix One, References 3 and 4. Changes to the real property interests identified by the Corps as being required for the project or separable element also require prior written approval from the responsible Department of the Army official in accordance with the procedures in paragraphs 12-9 and 12-10 of ER 405-1-12. See Appendix Two, TAB F. Review or approval of plans and specifications or other documents by the District Commander or other responsible Department of the Army official is for administrative purposes only and does not relieve the non-Federal interest of its responsibility to properly plan, design, build and effectively operate and maintain the project or separable element as required under law, regulations, permits, and good management practices. The Department of the Army is not responsible for increased costs resulting from defects in the plans, design drawings and specifications or other documents.
(3) Corrective Action. In the event the District Commander determines that the non-Federal interest has failed to meet its obligations, the District Commander may require the non-Federal interest to take specific corrective action, including, specific performance, or may take any other legally available remedy, and may withhold transferring any additional Federal funds or require repayment of Federal funds previously provided, until the corrective action is taken.

e. Payment. Periodic payments will be made in advance under the Section 1043(b) program. In accordance with 2 CFR 200.305 (see Appendix Two, TAB G) and subject to the availability of Federal funds, advance payments to the non-Federal interest will be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the non-Federal interest in carrying out the project or separable element. The timing and amount of advance payments will be as close as is administratively feasible to the actual disbursements by the non-Federal interest for direct project costs and the proportionate share of any allowable indirect costs. The non-Federal interest must make timely payment to contractors in accordance with the contract provisions.

f. Close Out. The PPA will include close out procedures that are consistent with 2 CFR 200.343 (see Appendix Two, TAB G) and procedures for post-close-out adjustments that are generally consistent with 2 CFR 200.344 (see Appendix Two, TAB G).

g. Termination. The PPA will include provisions allowing for termination of the agreement under the conditions described in 2 CFR 200.339 (see Appendix Two, TAB G).


a. In General. Non-Federal interests who are interested in constructing the project or separable element under the pilot program should submit a proposal to HQUSACE Attn: Director of Civil Works. The DCW will review all proposals and provide a recommendation to the ASA (CW) within 60 days of receiving a proposal. The ASA (CW) will make the final project selections.

b. Project Selection. The authority to commence a Section 1043(b) pilot project terminates June 10, 2019, 5 years after the date of enactment of WRRDA 2014. To date, the Administration has identified two projects for implementation. If the
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Congress extends the authorization of Section 1043(b), the ASA (CW) will issue further guidance for the selection and implementation of additional projects.

c. Proposal. Proposals must include the following information:

(1) Project Description. Proposals must include a description of the project or separable element proposed for implementation. The description must identify the authority for the project and the Report of the Chief of Engineers or other Corps decision document in which the responsible Department of the Army official determined the project to be feasible, economically justified, and environmentally acceptable. The description must also address anticipated changes, if any, in the design or scope of the authorized project.

(2) Implementation Schedule. Proposals must include a timeline for major activities related to design and construction of the project. Proposals should highlight any project delivery efficiencies anticipated to be realized through non-Federal implementation of the project or separable element.

(3) Budget. Proposals must include a financial plan for the project or separable element that includes both the Federal and non-Federal share of construction costs and conforms to the cost principles in Subpart E of 2 CFR Part 200. Costs associated with items of local cooperation that are a prerequisite to Federal financial participation in the project or separable element must also be included. Non-Federal funds should generally be applied to each expenditure based on the non-Federal proportionate share of expenditures during construction, which accounts for the value of real property interests the non-Federal interest contributes to the project. Financial plans should identify any cost savings anticipated to be realized through non-Federal implementation of the project or separable element.

(4) Readiness. If more than 3 years have elapsed since the last economic update prepared by the Corps for the project or separable element, inclusion of an economic update in the proposal should be considered to demonstrate readiness. Likewise, if more than 5 years have elapsed since the Finding of No Significant Impact or Record of Decision for the project or separable element, inclusion of an analysis completed by the District Commander demonstrating that there are no significant new circumstances or information relevant to environmental concerns bearing on the project or separable element or its impacts should be considered.
Non-Federal Capability. Proposals must include sufficient information to demonstrate that the applicant qualifies as a non-Federal interest eligible to implement the project or separable element. Proposal must also include information that demonstrates the non-Federal interest's technical and financial capability. Proposals must include information on the qualification of key personnel who will be responsible for the project or separable element and information on internal quality controls and accounting or book keeping procedures. In addition, the proposal must include examples of recent, relevant management experience and financial resources to demonstrate ability to successfully and satisfactorily carry out design and construction of the project or separable element of the same magnitude or greater than the proposed project. Proposals must also demonstrate the non-Federal interests' ability to maintain the financial management systems, internal controls, and written procedures described in 2 CFR 200.302, 2 CFR 200.303, and 2 CFR 200.305(b) (See Appendix Two, TAB G).

d. Selection. Selection will be based on a number of criteria, including economic justification, readiness, the non-Federal interest's technical and financial capability, and the potential to realize cost savings or project delivery efficiencies through non-Federal implementation. After the selection is completed and a draft notification letter has been provided by the Corps, the ASA (CW) will take steps necessary to obtain Administration clearance. Upon receiving clearance the ASA(CW) will provide written notification to the Authorization and Appropriations Committees of the selected projects.

e. Project Management Plan (PMP).

(1) Contents. Once a project has been selected for implementation under the pilot program, the responsible District Commander will coordinate preparation of a detailed PMP with the non-Federal interest. The PMP must outline the schedule, scope, outputs, budget, design, and construction resource requirements necessary for the non-Federal interest to implement the project or separable element. The PMP must incorporate activities necessary to ensure compliance with applicable engineering and design requirements (see generally Appendix One, references 1 and 2), and provide for a Type II Independent External Peer Review (IEPR) Safety Assurance Review if required by ER 1165-2-217. See Appendix Two, TAB H. The PMP must also account for costs the Corps will incur to perform oversight and administration activities.
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(2) Economic Justification and Environmental Acceptability. During preparation of the PMP, the District Commander will confirm that no additional analysis is necessary to demonstrate economic justification or environmental acceptability. If additional analysis is necessary, the District Commander will coordinate its preparation with the non-Federal interest.

f. Project Partnership Agreement. Upon completion of the PMP and any additional analyses necessary to demonstrate economic justification or environmentally acceptability, the District Commander will negotiate the agreement with the non-Federal interest. District Commanders may request MSC or Headquarters assistance in the development of draft agreements to be used in the negotiation. The negotiated PPA will be forwarded through the MSC Commander and Director of Civil Works to the ASA (CW) for final review and approval. The DCW will provide the draft PPA along with a recommendation to the ASA (CW) within 30 days of receipt of the document for ASA(CW) review and action.

g. Detailed Project Schedule. Section 1043(b)(3)(B) allows for the detailed project schedule to be finalized after execution of an agreement pursuant to Section 1043(b). To the extent the detailed project schedule results in the need for additional Federal funds or accelerates expenditures of Federal funds, such modifications require the approval of the District Commander.

h. Funding. Federal contributions under PPAs executed prior to Congress appropriating funds for the pilot program will be limited to the unobligated balance of Federal construction funds available for the project or separable element.

i. Technical Assistance. At the request of the non-Federal interest, the District Commander may provide technical assistance to a non-Federal interest carrying out construction under Section 1043(b) if the non-Federal interest pays all costs of such assistance upfront. Funds provided by the non-Federal interest for such technical assistance are not eligible for credit or repayment and are not included in the calculation of total project costs for cost sharing purposes. Technical assistance includes engineering and design activities, as well as assistance in obtaining any necessary environmental compliance and permits related to construction of the project.

9. This guidance shall be transmitted to the appropriate Corps Division and District Commanders and posted to the Corps WRDA website within five business days of
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receipt (written or electronic) from this office. Guidance shall be transmitted and posted as is and without additional guidance attached.
(https://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/)

10. Questions regarding this implementation guidance should 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.

Enclosure

R.D. James
Assistant Secretary of the Army
(Civil Works)

cf: MG Scott Spellmon, Deputy Commanding General, Civil and Emergency Operations
James Dalton, Director of Civil Works
Water Resources Reform and Development Act of 2014, Section 1043(b), as amended by Section 1137 of the Water Resources Development Act of 2018 - Non-Federal Implementation Pilot Program

(b) NON-FEDERAL PROJECT IMPLEMENTATION PILOT PROGRAM

(1) IN GENERAL. Not later than 180 days after the date of enactment of this Act, the Secretary shall establish and implement a pilot program to evaluate the cost-effectiveness and project delivery efficiency of allowing non-Federal interests to carry out flood risk management, hurricane and storm damage reduction, coastal harbor and channel inland navigation, and aquatic ecosystem restoration projects.

(2) PURPOSES. The purposes of the pilot program are:

(A) to identify project delivery and cost-saving alternatives that reduce the backlog of authorized Corps of Engineers projects;
(B) to evaluate the technical, financial, and organizational efficiencies of a non-Federal interest carrying out the design, execution, management, and construction of 1 or more projects; and
(C) to evaluate alternatives for the decentralization of the project management, design, and construction for authorized Corps of Engineers water resources projects.

(3) ADMINISTRATION.

(A) IN GENERAL. In carrying out the pilot program, the Secretary shall

(i) identify a total of not more than 20 projects for flood risk management, hurricane and storm damage reduction (including levees, floodwalls, flood control channels, and water control structures), coastal harbor and channels, inland navigation, and aquatic ecosystem restoration that have been authorized for construction, including

(I) not more than 12 projects that have been authorized for construction prior to the date of enactment of this Act and that

(aa)(AA) have received Federal funds prior to the date of enactment of this Act; or (BB) for more than 2 consecutive fiscal years, have an unobligated funding balance for that project in the Corps of Engineers construction account; and

(bb) to the maximum extent practicable, are located in each of the divisions of the Corps of Engineers;

(II) not more than 3 projects that have been authorized for construction prior to the date of enactment of this Act that have not received Federal funds in the period beginning on the date on which the project was authorized and ending on the date of enactment of this Act; and

(III) not more than 5 projects that have been authorized for construction, but did not receive the authorization prior to the date of enactment of this Act;
(ii) notify the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives on the identification of each project under the pilot program;

(iii) in collaboration with the non-Federal interest, develop a detailed project management plan for each identified project that outlines the scope, budget, design, and construction resource requirements necessary for the non-Federal interest to execute the project, or a separable element of the project;

(iv) on the request of the non-Federal interest, enter into a project partnership agreement with the non-Federal interest for the non-Federal interest to provide full project management control for construction of the project, or a separable element of the project, in accordance with plans approved by the Secretary;

(v) following execution of the project partnership agreement, transfer to the non-Federal interest to carry out construction of the project, or a separable element of the project

(I) if applicable, the balance of the unobligated amounts appropriated for the project, except that the Secretary shall retain sufficient amounts for the Corps of Engineers to carry out any responsibilities of the Corps of Engineers relating to the project and pilot program; and

(ii) additional amounts, as determined by the Secretary, from amounts made available under paragraph (B), except that the total amount transferred to the non-Federal interest shall not exceed the updated estimate of the Federal share of the cost of construction, including any required design; and

(vi) regularly monitor and audit each project being constructed by a non-Federal interest under this section to ensure that the construction activities are carried out in compliance with the plans approved by the Secretary and that the construction costs are reasonable.

(B) DETAILED PROJECT SCHEDULE. Not later than 180 days after entering into an agreement under subparagraph (A)(iv), each non-Federal interest, to the maximum extent practicable, shall submit to the Secretary a detailed project schedule, based on estimated funding levels, that lists all deadlines for each milestone in the construction of the project.

(C) TECHNICAL ASSISTANCE. On the request of a non-Federal interest, the Secretary may provide technical assistance to the non-Federal interest, if the non-Federal interest contracts with and compensates the Secretary for the technical assistance relating to

(i) any study, engineering activity, and design activity for construction carried out by the non-Federal interest under this subsection; and

(ii) expeditiously obtaining any permits necessary for the project.

(4) COST SHARE. Nothing in this subsection affects the cost-sharing requirement applicable on the day before the date of enactment of this Act to a project carried out under this subsection.
(5) REPORT.

(A) IN GENERAL. Not later than 3 years after the date of enactment of this Act, the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives and make publicly available a report detailing the results of the pilot program carried out under this subsection, including

(i) a description of the progress of non-Federal interests in meeting milestones in detailed project schedules developed pursuant to paragraph (2)(B); and

(ii) any recommendations of the Secretary concerning whether the program or any component of the program should be implemented on a national basis.

(B) UPDATE. Not later than 5 years after the date of enactment of this Act, the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives an update of the report described in subparagraph (A).

(C) FAILURE TO MEET DEADLINE. If the Secretary fails to submit a report by the required deadline under this paragraph, the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a detailed explanation of why the deadline was missed and a projected date for submission of the report.

(6) ADMINISTRATION. All laws and regulations that would apply to the Secretary if the Secretary were carrying out the project shall apply to a non-Federal interest carrying out a project under this subsection.

(7) TERMINATION OF AUTHORITY. The authority to commence a project under this subsection terminates on the date that is 5 years after the date of enactment of this Act.

(8) AUTHORIZATION OF APPROPRIATIONS. In addition to any amounts appropriated for a specific project, there is authorized to be appropriated to the Secretary to carry out the pilot program under this subsection, including the costs of administration of the Secretary, $25,000,000 for each of fiscal years 2019 through 2023.
Appendix One: References

1. Engineer Regulation 1110-2-1150, Engineering and Design for Civil Works Projects.

2. Engineer Regulation 1110-1-8155, Specifications.


5. Engineer Regulation 405-1-12, chapter 12, Real Estate Roles and Responsibilities for Civil Works: Cost Shared and Full Federal Projects.


10. Army Regulation 600-7, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army.


NOTE: References 1-4 and 7 are available online at https://www.publications.usace.army.mil/. References 8 and 11 are available online at https://www.govinfo.gov/help/cfr.
Appendix Two: Enclosures

TAB A – Definition of Non-Federal Interest (reference 6 of Appendix One)

TAB B – Economic Justification (paragraph D-4(b) of reference 4)

TAB C – National Economic Development (paragraph 2-2 of reference 4)

TAB D – Environmental Acceptability (Exhibit G-8 of reference 4)

TAB E – Maximum Project Cost (paragraph G-15 of reference 4)

TAB F – Real Estate (reference 5)

TAB G – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR Part 200 (specifically referenced sections)

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MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS


1. Section 2003(b) of WRDA 2007 amends Section 221(b) of the Flood Control Act of 1970 (hereinafter “Section 221”) (42 U.S.C. 1962d-5b(b)) to expand the definition of non-Federal interests eligible to act as the sponsor for a water resources project agreement to include Federally recognized Indian tribes and nonprofit entities with the consent of the affected local government. A copy of Section 221(b) as amended by Section 2003(b) of WRDA 2007 is attached.

2. Federally Recognized Indian Tribe. To be eligible to act as a sponsor, the tribe must be a Federally recognized Indian tribe; that is, any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).


   a. Organization. To be eligible to act as a sponsor, the nonprofit entity must be an organization incorporated under the applicable laws of the State in which it operates as a nonprofit organization, exempt from paying Federal income taxes under section 501 of the Internal Revenue Code (26 U.S.C. 501), and whose purposes include and are directly related to the purpose of the project.

   b. Consent of Affected Local Government. In addition, the affected local government must consent, in writing, to the nonprofit entity acting as sponsor for the study, design, or construction of the project. During the Reconnaissance Phase (for projects that will be specifically authorized) or the 100 percent Federally funded portion of the Feasibility Phase (for projects implemented under the Continuing Authority Program (CAP) and regional authorities), the district must identify, and coordinate with, the affected local government. Typically, the affected local government will be the smallest unit of government that has jurisdiction over the area impacted by the potential project. For larger or more complex projects, multiple jurisdictions may be involved and written consent must be obtained from the affected local government in each jurisdiction. The written consent must be received prior to processing the applicable agreement (Feasibility Cost Share Agreement, Design Agreement, or Project Partnership Agreement) for approval, with the date of the written consent(s) included in a Whereas clause in such applicable agreement.

c. Sponsorship by a Nonprofit Entity.

(1) A nonprofit entity is eligible to act as the sole sponsor for study, design, and construction of an ecosystem restoration project - such as specifically authorized ecosystem restoration projects; projects implemented under the CAP Sections 206, 1135, and 204 (those that provide ecosystem restoration benefits); Estuary Restoration Act projects; and any other regional authorities for implementation of critical restoration or ecosystem restoration projects.

(2) For study, design, and construction of projects involving any purpose other than ecosystem restoration, a nonprofit entity is eligible to act as a sponsor as long as a legally constituted public body (which includes a Federally recognized Indian tribe) also will act as a sponsor for the project. Where a nonprofit entity is one of the sponsors, the agreement must make clear that both sponsors are jointly and severally responsible and liable for the Hold and Save obligations. In addition, the agreement will require in all cases that the public body (alone or jointly with the nonprofit entity) is responsible for operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) of the project.

d. Sponsor Responsibilities. As with a legally constituted public body, any nonprofit entity that proposes to act as a sponsor must be able to demonstrate that it has the full legal and financial authority and capability to perform the terms of the agreement and to pay damages, if necessary, in the event of failure to perform. For agreements addressing construction of a project, the nonprofit entity must demonstrate the capability to satisfy a sponsor's responsibilities under the agreement, including payment of its required share of project costs; provision or performance of lands, easements, rights-of-way, relocations, and dredged or excavated material disposal areas for the project, as applicable; and performance, in perpetuity, of any non-Federal OMRR&R. In evaluating the nonprofit entity's authority and capability, the District should analyze the nonprofit entity's Articles of Incorporation and by-laws and, commensurate with the magnitude of the nonprofit entity's responsibilities for, and the nature of, the project, review any other documents and consider relevant factors bearing upon the nonprofit entity's ability to act successfully as a sponsor.
WRDA 2007 LANGUAGE

SEC. 221 (b) of the Flood Control Act of 1970, as amended by Section 2003 (b) of WRDA 2007, WRITTEN AGREEMENT REQUIREMENT FOR WATER RESOURCES PROJECTS.

(b) DEFINITION OF NON-FEDERAL INTEREST. - The term 'non-Federal interest' means -

(1) a legally constituted public body (including a federally recognized Indian tribe); or

(2) a nonprofit entity with the consent of the affected local government, that has full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.
(d) Prior approval for each application of such alternative procedures is obtained from HQUSACE (CECW-PD). Approval is less likely for procedures proposing use of the cost of an alternative or administratively established values as an estimate of benefits.

b. Current Estimates of Project Benefits. It is Corps policy to report and maintain current estimates of project benefits, costs, and economic justification of all active funded projects and separable elements beginning with the Report of the Chief of Engineers. The purpose of the policy is to provide reasonable estimates of economic justification to non-Federal sponsors, Congress and Federal decision makers throughout the project development process. An analysis is considered current if it was approved within 3 fiscal years of the pertinent decision date. As an example, in June 1996 budget submissions, the approval date of the document containing the most recent economic analysis could be no earlier than October 1992, since FY 1993 is three fiscal years prior to FY 1996 and October 1992 is the first month of FY 1993. If more than three fiscal years have elapsed since the release of the Report of the Chief of Engineers, an economic reevaluation must be the first item of work upon receipt of any funds intended to further project implementation.

(1) Dates and general guidance for decision requests. The pertinent dates for budgetary and investment decisions, along with guidance for various decision requests are specified below.

(a) New Start PED Budgeting. For all New Start PED funding requests the pertinent decision date is the submission of the budget request to HQUSACE. Benefit-to-cost ratios (BCR), which are required in support of budget requests, will be developed based on the latest approved

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a Identified by type
economic analysis, annualized at the specified discount rates. The current project costs should be
deflated to the same price level as in the latest approved economic analysis, annualized at the current
interest rate. The report and approval date of that analysis must be cited and should not be more
than three fiscal years old. If more than three fiscal years have elapsed since the release of the Report
of the Chief of Engineers, an economic reevaluation must be the first item of work upon receipt of
PED funds. Follow-on funding will be contingent upon approval of the economic reevaluation.

(b) Continuing PED Budget requests. For all continuing PED funding requests the pertinent
decision date is the Division submittal of the budget request to HQUSACE. The same methodology,
deflating costs to the date of the approved economic analysis and adjusting costs and benefits for the
budget year discount rate applying to New Start PED budget requests, should be used for continuing
PED funding requests. The three year requirement for updates is also applicable.

(c) New Construction Start Budgeting. For all New Start Construction funding requests for
projects and separable elements, the pertinent decision date is the submission of the Division budget
request to HQUSACE. The same BCR computation and reporting requirements and the three year
updating requirements previously discussed are applicable to New Construction Start Budgeting. If
the reevaluation uncovers major changes that could affect project formulation or sizing, additional
PED funds rather than construction funds should be requested to undertake a complete General
Reevaluation (GRR) level evaluation.

(d) Project Cooperation Agreements. For all PCA’s, the pertinent decision date is the
submission of the final PCA to ASA (CW) for approval. If more than three fiscal years have elapsed
since the approval date of the latest economic analysis, a reevaluation must be performed in
sufficient detail with supporting documentation to show the project remains justified. The
reevaluation may be presented in a Limited Reevaluation Report (LRR) which supplements the
project document cited in the PCA. Submission of the LRR to HQUSACE for approval must be
accomplished prior to submission of the draft PCA.

(e) Non-PCA Projects. The pertinent decision date for approval to initiate expenditures of
Construction General appropriations for projects which do not require a PCA, such as inland
navigation, is the submission date of the request to HQUSACE. The three fiscal year and
reevaluation requirements for PCA’s are also applicable to non-PCA projects.

(2). Definition of Last Approved Official Document. The approved official document for
the Feasibility Report is the Report of the Chief of Engineers. Other approved official documents
may include General (GRR) or Limited Reevaluation Reports (LRR). If other documents are to be
used as the basis for obtaining budgetary or implementation approval, they must be approved by
CECW.
(3) Plan for Economic Updates. Feasibility reports, General Reevaluation reports and other project decision (formulation) documents, shall include a plan for updating project benefits for future reporting and decision making. The economic update plan shall likewise be included in all Project Management Plans. The actions in the plan may be limited in that no major new analyses need be conducted but rather previous assumptions reviewed and updated with techniques such as surveys and sampling employed to develop a reasonable estimate of current project benefits provided no significant changes in without and/or with project conditions have occurred. However, in no event will simple indexing of overall benefits be acceptable. The plan shall include discussions of the data that will be required and the procedures that will be employed. Any rational set of procedures that result in a current analysis of benefits may be acceptable except procedures which amount solely to indexing of benefits. Examples of procedures that could be formulated during feasibility and other studies, and which could be useful in providing current analysis in the future are sampling and monitoring, partial benefit reanalysis, and limited indexing.

(a) Sampling or Monitoring. The focus of the effort should be on factors which are critical to project formulation and feasibility and are representative of the major benefit categories (i.e., inundation reduction benefits in a flood control project or transportation cost savings in a navigation project). For example, in a fully developed floodplain a sample of structures may be selected for development of replacement cost less depreciation of structure values using construction cost models. The values derived could then be used to represent values for the floodplain. For a navigation project, if feasibility depends critically on ships of given characteristics, a plan may be developed to monitor future use of these ships.

(b) Partial Benefit Reanalysis. This study will not have nearly the depth or breadth of a feasibility study. It could be informative regarding current benefits and may be accomplished at reasonable cost. For example, damage calculations at current prices for sampled structures provide valuable information on the current level of inundation reduction benefits.

(c) Limited Indexing. Use of generalized indices such as CWCCIS may be used for specific infrastructure benefit categories such as roads, bridges, and rail lines provided these benefit categories do not constitute a major portion of overall project benefits. Additionally, the reevaluation report must document that the infrastructure improvements are still present and used and are subject to comparable flood damages as in the latest report.

(4) Content of Limited Economic Reevaluation. Limited Reevaluation Reports (LRR) may be used to document the current economic evaluation of a project (or separable elements), or to report some other kinds of project changes.

(a) Scope and Documentation. The limited economic evaluation information submitted to HQUSACE for approval in a reevaluation document needs to be either complete within the
CHAPTER 2
Planning Principles

2-1. Introduction. The Corps of Engineers planning process is grounded in the economic and environmental Principles and Guidelines (P&G) promulgated in 1983 and set forth in different parts of this document. It is also grounded in the laws which apply to the Civil Works Program and to the Corps of Engineers missions. The P&G were set forth to provide for the formulation of reasonable plans responsive to National, State and local concerns. Likewise, the plans recommended for implementation, in general, are to reasonably maximize net national benefits. The Corps of Engineers planning process shall place specific emphasis on sound judgment; planners and other team members shall be guided by common sense in applying the policies and procedures contained herein. It also shall reflect a systematic and comprehensive treatment of watershed resources, including urban watershed resources. With regard to site-specific project studies, every effort should be made to assure that both economic and environmental value is added to watershed resources.

2-2. The Federal Objective

a. The Federal Objective. Principles and Guidelines state that the Federal objective of water and related land resources planning is to contribute to national economic development (NED) consistent with protecting the Nation's environment, in accordance with national environmental statutes, applicable executive orders, and other Federal planning requirements. The P&G use of the term objective should be distinguished from study planning objectives, which are more specific in terms of expected or desired outputs. The P&G's objective (Federal objective) may be considered more of a National goal. Water and related land resources project plans shall be formulated to alleviate problems and take advantage of opportunities in ways that contribute to study planning objectives and, consequently, to the Federal objective. Contributions to national economic development (NED outputs) are increases in the net value of the national output of goods and services, expressed in monetary units, and are the direct net benefits that accrue in the planning area and the rest of the Nation. Contributions to NED include increases in the net value of those goods and services that are marketed and also of those that may not be marketed. Protection of the Nation's environment is achieved when damage to the environment is eliminated or avoided and important cultural and natural aspects of our nation's heritage are preserved. Various environmental statutes and executive orders assist in ensuring that water resources planning is consistent with protection. The objectives and requirements of applicable laws and executive orders are considered throughout the planning process in order to meet the Federal objective.

b. Ecosystem Restoration. Ecosystem restoration is one of the primary missions of the Corps of Engineers Civil Works program. The Corps objective in ecosystem restoration planning is to contribute to national ecosystem restoration (NER). Contributions to national ecosystem restoration (NER outputs) are increases in the net quantity and/or quality of desired ecosystem resources. Measurement of NER is based on changes in ecological resource quality...
that the non-Federal sponsors shall, prior to implementation, agree to perform the required items of cooperation.

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<tr>
<th>Exhibit G-8. Federal Laws and Policies Applicable to all Recommended Plans</th>
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<tr>
<td><strong>Title of Public Law</strong></td>
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<tr>
<td>Abandoned Shipwreck Act of 1987</td>
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<td>American Indian Religious Freedom Act</td>
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<td>Agriculture and Food Act (Farmland Protection Policy Act) of 1981</td>
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<td>American Folklife Preservation Act of 1976, As Amended</td>
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<td>Anadromous Fish Conservation Act of 1965, As Amended</td>
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<td>Archeological and Historic Preservation Act of 1974, As Amended</td>
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<td>Bald Eagle Act of 1972</td>
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<td>Civil Rights Act of 1964 (Public Law 88-352)</td>
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<td>Clean Air Act of 1972, As Amended</td>
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<tr>
<td>Food Security Act of 1985 (Swampbuster)</td>
<td>16 USC 3811 et seq.</td>
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<td>Hazardous Substance Response Revenue Act of 1980, As Amended</td>
<td>26 USC 4611</td>
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<td>Historic and Archeological Data Preservation</td>
<td>16 USC 469</td>
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<td>Historic Sites Act of 1935</td>
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<td>Jones Act</td>
<td>46 USC 292</td>
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<td>Land and Water Conservation Fund Act of 1965</td>
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<td>Magnuson Fishery Conservation and Management Act</td>
<td>16 USC 1801</td>
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<td>Marine Mammal Protection Act of 1972, As Amended</td>
<td>16 USC 1361</td>
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<td>Marine Protection, Research and Sanctuaries Act of 1972</td>
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<td>Migratory Bird Conservation Act of 1928, As Amended</td>
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<td>National Environmental Policy Act of 1969, As Amended</td>
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<td>National Historic Preservation Act of 1966, As Amended</td>
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<td>National Historic Preservation Act Amendments of 1980</td>
<td>16 USC 469a</td>
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<td>Native American Graves Protection and Repatriation Act</td>
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<td>Native American Religious Freedom Act of 1978</td>
<td>16 USC 469a</td>
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<td>National Trails System Act</td>
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<td>Noise Control Act of 1972, As Amended</td>
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<td>Rehabilitation Act (1973)</td>
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<td>River and Harbor Act of 1888, Sect 11</td>
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<td>River and Harbor Act of 1899, Sections 9, 10, 13</td>
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<td>River and Harbor and Flood Control Act of 1962, Section 207</td>
<td>16 USC 460</td>
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<td>River and Harbor and Flood Control Act of 1970, Sections 122, 209</td>
<td>33 USC 426 et seq.</td>
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<td>Safe Drinking Water Act of 1974, As Amended</td>
<td>42 USC 300f</td>
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<td>Shipping Act</td>
<td>46 USC 883</td>
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<td>Submerged Lands Act of 1953</td>
<td>43 USC 1301 et seq.</td>
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<td>Superfund Amendments and Reauthorization Act of 1986</td>
<td>42 USC 9601</td>
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<td>Surface Mining Control and Reclamation Act of 1977</td>
<td>30 USC 1201-1328</td>
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<td>Toxic Substances Control Act of 1976</td>
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<td>Uniform Relocation and Assistance and Real Property Acquisition</td>
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<td>Policies Act of 1970, As Amended</td>
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<td>Utilization of Small Business</td>
<td>15 USC 631, 644</td>
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<td>Vietnam Veterans</td>
<td>38 USC 2012</td>
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<td>Water Resources Development Act of 1974, As Amended</td>
<td>88 Stat 12</td>
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<td>Water Resources Development Act of 1976, Section 150</td>
<td>90 Stat 2917</td>
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<td>Water Resources Development Act of 1986</td>
<td>33 USC 2201 et seq.</td>
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<td>Water Resources Development Act of 1988</td>
<td>33 USC 3301 note</td>
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<td>Water Resources Development Act of 1996</td>
<td>33 USC 3301 note</td>
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<td>Watershed Protection and Flood Control Act of 1954, As Amended</td>
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<td>Wild and Scenic Rivers Act of 1968, As Amended</td>
<td>16 USC 1271 et seq.</td>
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<td>Wilderness Act</td>
<td>16 USC 1131</td>
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<td>Walsh-Healy</td>
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### Executive Orders

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<tr>
<td>11593, Protection and Enhancement of the Cultural Environment, may 13, 1979</td>
<td>36 FR 8921; May 15, 1971</td>
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<td>11988, Floodplain Management, May 24, 1977</td>
<td>42 FR 26951; May 25, 1977</td>
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<td>11990, Protection of Wetlands</td>
<td>42 FR 26961; May 25, 1977</td>
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<td>11514, Protection and Enhancement of Environmental Quality, March 5, 1970, as amended by Executive Order 11991, May 24, 1977</td>
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<tr>
<td>12088, Federal Compliance with Pollution Control Standards, October 13, 1978</td>
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<tr>
<td>12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, February 11, 1994</td>
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### Other Federal Policies

- Council on Environmental Quality Memorandum of August 11, 1980: Analysis of Impacts on Prime and Unique Agricultural Lands in Implementing the National Environmental Policy Act
- Council on Environmental Quality Memorandum of August 10, 1980: Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory.
- Migratory Bird Treaties and other international agreements listed in TAB D
j. Reporting for Fish and Wildlife.

(1) General. Feasibility reports shall describe specific considerations given to fish and wildlife conservation and other environmental resources during the study. All factors which the reporting officer considered as contributing to the justification of the expenditures recommended for mitigation, conservation and restoration features shall be explicitly described. Specifically, the report shall:

(a) Describe fish and wildlife resource features included in the recommended plan, including the basis for justification, consistent with guidance set forth in this section;

(b) Include appropriate letters and reports furnished by the FWS/NMFS and State agencies;

(c) Describe recommendations furnished by the FWS/NMFS and affected States in compliance with the FWCA and Section 7 of the ESA, discuss specifically how each recommendation was addressed in appropriate alternative plans, and provide reasons for adoption or non-adoption of each recommendation;

(d) Include, as appropriate, provisions for monitoring mitigation features included in the recommended plan;

(e) Describe consideration given to the protection and conservation of wetland resources, including the establishment of wetlands in connection with recommended plans that include the disposal of dredged material, as set forth in ER 1165-2-27;

(f) Include the necessary letters of intent from agencies and non-Federal sponsors participating in fish and wildlife mitigation features; and,

(g) Describe how such features will be operated, managed and funded.

(2) Mitigation. Reports seeking authorization or approval of any water resources development project shall contain either a determination that such project will have negligible adverse impacts on fish and wildlife; or, a recommendation with a specific plan to mitigate fish and wildlife resource losses created by such project.
document, that sufficient uncertainty exists concerning impacts the recommended plan could
have on fish or wildlife resources to warrant further investigations and analysis during
postauthorization planning, engineering and design activities:

(2) Modification or supplementation of the authorized plans require the development of
a supplement to the FEIS;

(3) New information or factors are identified during postauthorization project activities
that appreciably change the extent to which the authorized project would or could impact upon
fish and wildlife resources beyond what was documented in the feasibility report;

(4) The authorized project contains major fish and wildlife mitigation or enhancement
features, and the further planning, siting, designing and construction of such features would
benefit from involving the FWS, NMFS or State resources agencies in these activities; or,

(5) District and Division professional staff determine that continued involvement of the
FWS, NMFS or State resources agencies during postauthorization project activities would better
assure public and agency acceptance of the water resources development project, including
authorized fish and wildlife features included in the project.

(6) The new or supplemented Section 2(b) report, planning aid letter, etc., shall
accompany the project document throughout the decision-making process.

(4) ESA Applicability. Section 7 of the ESA is applicable for any project, or unit
thereof, regardless of when the project was authorized or completed.


a. Determining the Section 902 Limit.

(1) The maximum project cost limit imposed by Section 902 is a numerical value
specified by law which must be computed in a legally supportable manner. It is not an estimate
of the current cost of the project. The limit on project cost must be computed including an
allowance for inflation through the construction period. This limit will then be compared to the
current project estimate including inflation through the construction period. For beach
nourishment projects authorized with an initial cost and a cost for future nourishment, there
are two limits. There is a limit on initial construction the same as other projects, and a limit on
total cumulative cost of nourishment.

(2) The authorized cost may be increased from the price level in the authorizing
document to include inflation. The construction component of the authorized cost will be updated to account for historical inflation using the Civil Works Construction Cost Index System (EM 1110-2-1304). The real estate component of the authorized cost will be updated to account for historical inflation based on changes to the Consumer Price Index, specifically, the unadjusted percentage changes reflected under the "Rent, residential" expenditure category.

(3) The maximum project cost includes the authorized cost (adjusted for inflation), the current cost of any studies, modifications, and action authorized by WRDA '86 or any later law, and 20 percent of the authorized cost (without adjustment for inflation). The cost of modifications required by law is to be kept separate and added to the other allowable costs. These three components equal the maximum project cost allowed by Section 902.

(4) Exhibit G-10 provides a detailed discussion of the method used to compute the maximum project cost allowed by Section 902. The method outlined in Exhibit G-10 for escalating the authorized cost to current price levels is based on the currently estimated project schedule which includes actual obligations to date. The Project Cost Fact Sheet in Exhibit G-11 should be used to display the Section 902 maximum cost limit and to compare the current project cost estimate to the maximum project cost limit. For projects involving beach nourishment, there are two limits. A maximum cost for the first placement, as well as a maximum cost for future nourishment will be computed following the procedure in Exhibit G-10.

b. Procedures When Cost Exceeds Limit. Upon determination that project cost estimates will exceed the maximum cost limitation, as determined in accordance with Exhibit G-10, work on the phase of the project underway at that time should continue until notification otherwise by HQUSACE, unless continuation of work will result in obligation of funds exceeding the authorized limitation. The determination of when to continue work on the project will be based generally on the criteria given in the matrix in Exhibit G-10. In general, work may continue on a separable element or a single contract if that unit of work will not incur obligations over the legal limitation. The intent will be to honor current PCA's and current contracts where possible. The computation sheets and the Project Cost Increase Fact Sheet will be submitted within 30 days after it is determined that the project cost exceeds the cost limit. When a firm estimate of the cost to complete the project is available, a report will be prepared and submitted.

<table>
<thead>
<tr>
<th>Exhibit G-10. Maximum Cost of Projects</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Background</strong></td>
</tr>
<tr>
<td>Section 902 allows for increases due to modifications which do not materially alter the scope or function of a project. Project modifications may encompass further engineering and design refinements to project features that are identified in project authorizing documents, as</td>
</tr>
</tbody>
</table>

G- 65
well as the construction of new project features that are not identified in authorizing documents. In most instances further engineering and design refinements will be necessary to construct project features that are only generally described in authorizing documents. In such cases the maximum cost of the project can be increased by up to 20 percent to pursue the engineering and design refinements. However, in those instances where no further engineering and design refinements are necessary to construct the improvements in the authorizing documents, the amount specified in the authorizing legislation will be the maximum cost of the project, except for other cost adjustments appropriate under the law.

The total project cost is the cost of all work associated with preconstruction engineering and design and construction, including real estate and appropriate credit provisions of Section 104 of the WRDA of 1986 and Section 215 of Public Law 90-483. The cost of the entire project as authorized will be the cost used for comparison. If, subsequent to authorization, it is determined that a separable increment of the project is no longer desired and will not be built, the cost of that separable element should be included as a part of the project cost when computing the maximum cost. If the authorization is for a modification to a project authorized prior to the WRDA of 1986, only the cost of the identified modification is subject to the limitation of Section 902.

Cost Increase Indexes. The construction component of the authorized cost will be updated to account for historical inflation using the Civil Works Construction Cost Index System (CWCCIS) in EM 1110-2-1304. The appropriate state index or average of two state indexes may be used. The same index method must be used for all subsequent adjustments to the authorized cost. The real estate component of the authorized cost will be updated to account for historical inflation based on changes to the Consumer Price Index as published monthly by the U.S. Department of Labor, Bureau of Labor Statistics, (BLS). Specifically, the unadjusted percentage changes reflected under the "Rent, residential" expenditure category from the tables containing the Consumer Price Index for All Urban Consumers: U.S. city average, will be used. For projects located in the metropolitan areas specifically identified in Table 17 of the BLS publication (Consumer Price Index for All Urban Consumers: Selected Areas), the percentage change reflected under the "Rent, residential" category will be the appropriate index. It is also permissible to use the index in Table 17 for a project proximate to, but not located in, a specifically identified area if, due to tangible market influences, it is more reasonable to do so. However, once a table is selected, it must be used for all subsequent adjustments to the authorized cost. Tables G-1 and G-2 provide worksheets for computing the historic cost increase indexes for both construction and real estate components of the authorized cost. Entries are needed from the date of the authorized cost to the current date. These tables will be added to each year as the current date becomes available. Use actual indexes from the referenced publications.

Project Cost Increase Computation. The steps to compute the maximum project cost are
Exhibit G-10. Maximum Cost of Projects

outlined below. The computation starts with the creation of a tabulation as in Table G-3. The table needs vertical columns for years starting with the year of the authorized estimate and continuing through the current year.

Maximum Cost Including Inflation Through Construction. Table G-4 would contain the computation of the maximum project cost, including inflation through the construction period.

Project Cost Limits for Beach Nourishment Projects. For all new project authorizations which include periodic nourishment as a part of project construction, the authorized cost will be given as an initial total cost, and an average annual cost for periodic beach nourishment over the life of the project. Projects thus authorized would be subject to two cost limits in accordance with Section 902. Projects authorized in P.L. 99-662 and in P.L. 100-676 are authorized at a single total cost. This cost, in most cases, includes an initial construction cost and the present worth of the cost of future nourishment. The present worth was computed at the appropriate Federal discount rate over a 50-year project life. For these projects, the cost number in the authorizing document will have to be examined to determine the amount which is for initial construction and the amount which is the present worth of future nourishment. These will then be used to compute two Section 902 limits.

1. The project first cost would be limited to the initial cost increased as allowable under Section 902. This would be a one time cost limitation like any other project, computed as discussed in the preceding paragraphs.

2. Total periodic nourishment cost would be limited by the total amount estimated for future nourishment, increased as allowable in accordance with this Appendix. The present worth amount for nourishment needs to be converted to a total cost over the life of the project. In general, the present worth computation is based on an average annual cost, which in turn is based on the estimated cost of each nourishment event divided by the years anticipated between events. The average annual cost (at the appropriate price level: Oct 97 or Oct 99) is to be multiplied by the years of project life. This cost is then used as the authorized cost of beach nourishment. It is the total cost to use in column f of Table G-3. In Table G-3, the current project cost would be the cost to date in the year it was expended, plus a current estimate of the nourishment required for the remainder of the project, at current price levels. The Section 902 limit would be computed using the procedure in the preceding paragraphs. The actual cost of each nourishment would be treated as a cost in the year in which it occurs. In this way, a cumulative record would be kept, and it would be readily apparent when total cost reaches the limit.

Project Cost Increase Fact Sheet. The Project Cost Increase Fact Sheet is a comparison of the project cost to the maximum project cost as limited by Section 902. The information in line 3 is from the computations described in the preceding paragraphs. The number in line 3e is the
Exhibit G-10. Maximum Cost of Projects

same as line 4 of Table G-4. Line 4 is the current total project cost estimate and must include all separable elements. This is the same as line 1b of Table G-4. It includes engineering and design, construction, supervision and administration, contract dispute settlements or awards, value of lands, easements and rights-of-way, utility and facility relocations, and dredged material disposal areas provided by the sponsor. This cost does not include costs for betterments, operation, repair, maintenance, replacement or rehabilitation. The current cost estimate may be the result of engineering and design studies, preparation of plans and specifications, or further adjustments to the project cost.

The Section 902 cost limit has been exceeded if the current estimate on line 4 exceeds the limit as shown on line 3e. The computation on line 5 allows a determination of the percentage of the current estimate increase over the authorized cost.

Cost Limitation Action Matrix. The matrix in Table G-5 will be used as a guide for determining what actions may be undertaken while waiting for new authorization for a project when the cost estimate exceeds the limit. The intent is to honor current PCAs and contracts to the extent possible.
Table G-1. CWCCIS Index(s)

<table>
<thead>
<tr>
<th>Date of Price Level, Authorized Estimate:</th>
<th>Total Allowed Inflation (g)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(b)</td>
</tr>
<tr>
<td>First Fiscal Year:</td>
<td></td>
</tr>
<tr>
<td>1st Quarter, 2nd Yr:</td>
<td></td>
</tr>
<tr>
<td>Second Fiscal Year:</td>
<td></td>
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<tr>
<td>1st Quarter, 3rd Yr:</td>
<td></td>
</tr>
<tr>
<td>Third Fiscal Year:</td>
<td></td>
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<tr>
<td>1st Quarter, 4th Yr:</td>
<td></td>
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<tr>
<td>Fourth Fiscal Year:</td>
<td></td>
</tr>
<tr>
<td>1st Quarter, 5th Yr:</td>
<td></td>
</tr>
<tr>
<td>Fifth Year:</td>
<td></td>
</tr>
</tbody>
</table>

Notes:

b. Enter the date of the authorized cost and the beginning date of following fiscal years.

c. These entries are the fiscal years.

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d. These are the index numbers from the referenced publications and must all be expressed with the same base year (base year price equals 100).
e. This column equals the index at the beginning of the next year, divided by the index at the beginning of the year, minus one.
f. The cumulative inflation rate equals the index (column (d)) at the beginning of the year divided by the index of the first line of the table.
g. The allowed inflation rates equal the cumulative rate through the beginning of the FY (equals one for the first FY after project authorization) times one plus 1/2 of the rate of inflation for the FY. For the remaining balance, it equals the cumulative rate to the beginning of the next fiscal year.
h. These are the cumulative rates through the beginning of the FY. They are the amounts in column (f) one-half line above.
i. This is one plus 1/2 the rate of inflation during the fiscal year, 1+1/2x column (e).
j. The total inflation is the product of the last two entries.
k. The inflation rate for the remaining balance is the last entry in column (f).
### Table G-2 CPI Index(s)

<table>
<thead>
<tr>
<th>Date of Price Level, Authorized Estimate</th>
<th>b</th>
<th>c</th>
<th>d</th>
<th>e</th>
<th>f</th>
<th>g</th>
<th>h</th>
<th>i</th>
<th>j</th>
</tr>
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<tbody>
<tr>
<td>First Fiscal Year</td>
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<td>1st Quarter, 2nd Yr</td>
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<tr>
<td>Second Fiscal Year</td>
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<td>1st Quarter, 3rd Yr</td>
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<tr>
<td>Third Fiscal Year</td>
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<tr>
<td>1st Quarter, 4th Yr</td>
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<tr>
<td>1st Quarter, 5th Yr</td>
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<tr>
<td>Fifth Year</td>
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<td></td>
<td>X</td>
</tr>
</tbody>
</table>

**Total Allowed Inflation (g)**

<table>
<thead>
<tr>
<th>b</th>
<th>c</th>
<th>d</th>
<th>e</th>
<th>f</th>
<th>g</th>
<th>h</th>
<th>i</th>
<th>j</th>
</tr>
</thead>
<tbody>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Notes:

b. Enter the date of the authorized cost and the beginning date of following fiscal years.

c. These entries are the fiscal years.

d. These are the index numbers from the referenced publications and must all be expressed with the same base year (base year price equals 100).

e. This column equals the index at the beginning of the next year, divided by the index at the beginning of the year, minus one.

f. The cumulative inflation rate equals the index (column (d)) at the beginning of the year divided by the index of the first line of the table.

g. The allowed inflation rates equal the cumulative rate through the beginning of the FY (equals one for the first FY after project authorization) times one plus 1/2 of the rate of inflation for the FY. For the remaining balance, it equals the cumulative rate to the beginning of the next fiscal year.

h. These are the cumulative rates through the beginning of the FY. They are the amounts in column (f) one-half line above.

i. This is one plus 1/2 the rate of inflation during the fiscal year, 1+1/2x column (e).

j. The total inflation is the product of the last two entries.

k. The inflation rate for the remaining balance is the last entry in column (f).
Table G-3  Authorized Cost Increase Computation

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a)</td>
<td>(b)</td>
<td>(c)</td>
<td>(d)</td>
</tr>
<tr>
<td>99</td>
<td></td>
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<td>00</td>
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<tr>
<td></td>
<td>Balance to Complete</td>
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</tr>
<tr>
<td></td>
<td>Total</td>
<td></td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Notes:

a. The total of column (a) is the current working estimate of project cost at the current price level, less the cost of any modifications.
required by law. The entries for all years from authorization to the current year are the actual obligations made that year. The balance to complete is the remaining cost at current price levels.

b. Column (b) is the construction component of the cost in column (a).

c. Column (c) is the real estate component of column (a). Column (b) plus column (c) must equal column (a).

d. Column (d) is the percent distribution of the construction cost in column (b). It must total 100 percent.

e. Column (e) is the percent distribution of the real estate cost in column (c). It must total 100 percent.

f. The total of column (f) is the construction component of the authorized cost, from the authorizing legislation. The yearly entries are the distribution of the total by the percentage distributions in column (d).

g. The total of column (g) is the real estate component of the authorized cost. The yearly entries are the distribution of the total by the percentage distributions in column (e). The total of column (f) and the total of column (g) must equal the cost in the authorizing legislation.

h. The entries in column (h) are the amounts in column (f) increased by the appropriate inflation factor which is derived from the Corps of Engineers CWCCIS index. Table G-1 would contain a computation of appropriate construction inflation factors.

i. The entries in column (i) are the amounts in column (g) increased by the appropriate real estate inflation factor, which is derived from the CPI index. Table G-2 would contain a computation of the appropriate real estate inflation factors.
Table G-4  Maximum Cost Including Inflation Through Construction

**Line 1:**

a. **Current project estimate at current price levels:**

b. **Current project cost estimate, inflated through construction:**

c. **Ratio:** Line 1b / Line 1a

d. **Authorized cost at current price levels:**
   Columns (h) plus (f) from Table G-8.3

e. **Authorized cost, inflated through construction:**
   Line c x Line d

**Line 2:** **Cost of modifications required by law:**

**Line 3:** 20 percent of authorized cost:

\[ .20 \times (\text{Table G-8.3, Columns } (f) + (g)) \]

**Line 4:** **Maximum cost limited by Section 902:**

Line 1e + Line 2 + Line 3

**Notes:**

a. **Line 1a** is the current project cost estimate.
b. **Line 1b** requires the current project cost estimate including inflation through the construction period. This is required each year by the annual budget guidance EC. This cost estimate will be developed by the appropriate cost engineering element. The ratio of this inflated project estimate to the current project estimate is used to inflate the totals of column (h) and (i) from Table G-1 to determine the authorized cost including inflation through the construction period.

c. **Line 1c** is the ratio of the current estimate including inflation through construction to the current estimate.

d. **Line 1d** is the authorized cost at current prices. It is the total of columns (h) and (i) from Table G-1.

e. **Line 1e** is the authorized cost including inflation through construction. It is computed as the authorized cost at current price levels times the ratio on line 1c.

f. **Line 2** is the cost of any modifications required by law. This is the total cost and includes actual obligations and future obligations including inflation through construction.

g. **Line 3** is 20 percent of the cost specified in the authorizing legislation. The authorized cost is the total of columns (f) and (g) in Table G-8.1.

h. **Line 4** is the maximum project cost, including inflation through the construction period, allowed by Section 902. It is the total of lines 1e, 2, and 3.
Exhibit G-11. Project Cost Increase Fact Sheet

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Name of Project</strong></td>
<td></td>
</tr>
<tr>
<td><strong>2. Section and Law That Authorized or Modified the Project:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>3. Section 902 Limit on Project Cost:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>a. Authorized project cost (W/Price level)</td>
</tr>
<tr>
<td></td>
<td>b. Price level increases from date of authorized cost: *</td>
</tr>
<tr>
<td></td>
<td>c. Current cost of modifications</td>
</tr>
<tr>
<td></td>
<td>required by law: **</td>
</tr>
<tr>
<td></td>
<td>d. 20% of line 3a:</td>
</tr>
<tr>
<td></td>
<td>e. Maximum project cost limited by Section 902:</td>
</tr>
<tr>
<td><strong>4. Current Project Cost Including Inflation Through Construction:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>5. Computation of Percentage Increase:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>a. Current estimate: (Line 4)</td>
</tr>
<tr>
<td></td>
<td>b. Less total of lines 3a, b, and c:</td>
</tr>
<tr>
<td></td>
<td>c. Subtotal:</td>
</tr>
<tr>
<td></td>
<td>d. Percent increase: (line 5c/3a)</td>
</tr>
<tr>
<td><strong>6. Explain cost indexes used in 3b; whether national or regional for real estate, and single state or two state average for construction.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>7. Explain increases in 3c; Legislation requiring the modification, and how accommodated.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>8. Explain reasons for cost changes other than inflation.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>9. Explain any changes in benefits and provide current BCR.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>10. Provide detailed explanation of the status of the project.</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>* Line 1e from Table G-4, less the authorized cost.</td>
</tr>
<tr>
<td><strong>This includes cost of external credit under Section 104 of WRDA ’86, for example. (Integral Section 104 credit is included in the authorized project cost on line 3a.) (See ER 1165-2-29).</strong></td>
<td></td>
</tr>
<tr>
<td><strong>LINE 1b from Table G-4.</strong></td>
<td></td>
</tr>
</tbody>
</table>
Table G-5 Section 902 Cost Limitation Action Matrix

**IMPLEMENTATION STATUS AT TIME ESTIMATED TOTAL COSTS EXCEED SEC 902 LIMIT**

<table>
<thead>
<tr>
<th>PRIOR TO EXECUTION OF THE PCA</th>
<th>PCA EXECUTED, BUT NO CONTRACTS AWARDED</th>
<th>ONE OR MORE CONTRACTS AWARDED, FUTURE CONTRACTS/FUTURE PCA'S</th>
<th>UNDER CONSTRUCTION LAST CONTRACT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. PROJECTS THAT HAVE ONE PCA, AND ONE CONTRACT</td>
<td>1/</td>
<td>1/</td>
<td>N.A.</td>
</tr>
<tr>
<td>2. PROJECTS THAT HAVE ONE PCA, AND MULTIPLE CONTRACTS</td>
<td>1/</td>
<td>1/</td>
<td>2/</td>
</tr>
<tr>
<td>3. PROJECTS THAT HAVE MULTIPLE PCAS AND MULTIPLE CONTRACTS</td>
<td>1/</td>
<td>1/</td>
<td>2/</td>
</tr>
</tbody>
</table>

1. Await new legislation before proceeding with executing the PCA or award of the first contract if a PCA has already been approved.
2. Continue implementation of the project until implementation of the next PCA increment (or award of the next contract when the last PCA increment is already under construction) would require funds in excess of the 902 limit. Submit legislation to permit the authorization committees to consider inclusion of the legislative proposal in a biennial WRDA in time to prevent a break in project implementation whenever possible.
3. If completion of the current contract(s) would require funds in excess of the 902 limit, conclude current contract activities in the most practical and cost effective manner consistent with public safety and to minimize any obligations that exceed the 902 limit.
CHAPTER 12
REAL ESTATE ROLES AND RESPONSIBILITIES FOR CIVIL WORKS:
COST SHARED AND FULL FEDERAL PROJECTS

SECTION I. GENERAL

12-1. Purpose. This chapter sets forth the roles and responsibilities for real estate planning and land acquisition for cost shared and full Federal water resource projects.

12-2. Applicability. This chapter is applicable to all Headquarters, U.S. Army Corps of Engineers (HQUSACE) elements and all USACE commands having civil works real estate responsibilities. While it applies to all civil works projects - specifically authorized, continuing authority, full Federal or cost shared - the level of detail necessary to apply the requirements of this chapter will vary depending upon the scope and complexity of each project. Further, if there is a conflict between the crediting provisions of this chapter and the terms and conditions of a Project Cooperation Agreement (PCA), a Local Cooperation Agreement (LCA), or a Letter of Assurance executed prior to the effective date of this chapter, then the provisions of such PCA, LCA, or Letter shall govern. The provisions of this chapter supersede all conflicting provisions contained in Sections II, III, IV, VI, and VIII of Chapter 2 and any conflicting provisions of Chapter 5 of ER 405-1-12.

12-3. References. See Appendix 12-A.

12-4. Glossary. A glossary of the acronyms and abbreviations used in this chapter is included as Appendix 12-B.

12-5. Program and Project Management Process. It is HQUSACE policy that Real Estate participate fully in the Program and Project Management process. Real Estate involvement is continuous throughout the development and implementation of the project, although the level of involvement varies during the different phases. Real Estate staff fully supports the Project Manager (PM) in coordinating real estate activities with non-Federal interests. For further information regarding the Program and Project Management process, see ER 5-1-11, Program and Project Management.

a. Under the Fifth Amendment to the U.S. Constitution, private property cannot be taken by the Federal government (Government) for authorized public purposes without the payment of just compensation. The same principle applies to States and political subdivisions thereof through the Fourteenth Amendment to the U.S. Constitution.

b. In addition to these constitutional provisions, general real estate acquisition policies for Federal and Federally funded projects, including cost shared water resource projects, are described in The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Public Law 100-17; and the Uniform Regulations contained in 49 C.F.R. Part 24 (hereinafter collectively referred to as "P.L. 91-646"). Except as otherwise allowed therein, P.L. 91-646 requires that an acquiring agency comply with the following basic policies among others:

1. The acquiring agency must make every reasonable effort to acquire the real property expeditiously by negotiation;

2. Real property must be appraised before the initiation of negotiations with the landowner and the initial offer to the landowner shall not be less than the approved appraisal of the fair market value of the property to be acquired;

3. Lawful occupants of real property that will be acquired shall not be required to move unless he or she has received at least 90 days advance written notice of the earliest date by which he or she may be required to move;

4. Before requiring an owner to surrender possession of the real property, the acquiring agency must pay the agreed purchase price to the owner, or in the case of condemnation, deposit with the court, for the benefit of the owner, an amount not less than the acquiring agency’s approved appraisal of the fair market value of such property, or the court award of compensation in the condemnation proceeding for the property;

5. The acquiring agency must not advance the time of condemnation, or defer negotiations or condemnation or the deposit of funds with the court, or take any other coercive action in order to induce an agreement on the price to be paid for the property;

6. If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the acquiring agency must offer to acquire the uneconomic remnant along with the portion of the property needed for the project; and
(7) if the acquiring agency intends to acquire any interest in real property by exercise of the power of eminent domain, it must institute formal condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

12-7. **Navigation Servitude**

a. Definition. The navigation servitude is the dominant right of the Government under the Commerce Clause of the U.S. Constitution (U.S. CONST. art.I, §8,cl.3) to use, control and regulate the navigable waters of the United States and the submerged lands thereunder for various commerce-related purposes including navigation and flood control. In tidal areas, the servitude extends to all lands below the mean high water mark. In non-tidal areas, the servitude extends to all lands within the bed and banks of a navigable stream that lie below the ordinary high water mark.

b. Determination of Availability. The determination of the availability of the navigation servitude is a two-step process. First, the Government must determine whether the project feature serves a purpose which is in the aid of commerce. Such purposes recognized by the courts include navigation, flood control and hydro-electric power. If it is so determined, then the second step is to determine whether the land at issue is located below the mean or ordinary high water mark of a navigable watercourse.

c. Exercise of Navigation Servitude. As a general rule, the Government does not acquire interests in real property that it already possesses or over which its use or control is or can be legally exercised. Therefore, if the navigation servitude is found to be available as a result of application of the process described in subparagraph b of this paragraph, then the Government will generally exercise its rights thereunder and, to the extent of such rights, will not acquire a real property interest in the land to which the navigation servitude applies. Generally, it is the policy of the U.S. Army Corps of Engineers (USACE) to utilize the navigation servitude in all situations where available, whether or not the project is cost shared or full Federal.

12-8. **Relocation of Facilities or Public Utilities.**

a. Substitute Facility Doctrine. Generally, the criteria for just compensation is the fair market value of the property at the time of the taking. A generally accepted definition of "fair market value" is "the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS (1992), at 3-4. Deviation from this criteria for measurement of just compensation has been required only when fair market value has been too difficult to ascertain or when its application would result in manifest injustice to the owner or to the public. In such cases,
the cost of constructing a substitute facility may be used as the measure of just compensation paid to the facility owner where a substitute facility is, in fact, necessary. The substitute facility should generally serve the owner in the same manner and reasonably as well as does the existing facility. Typically, the substitute facility doctrine is applied to acquisitions of public utilities, highways and certain other publicly owned facilities (e.g., schools, courthouses, etc.), railroads, and cemeteries.

b. Relocations. The substitute facility doctrine is the underpinning for the concept of relocations as applied to implementation of water resources projects by the Corps of Engineers. Thus, the term “relocation” generally means providing a functionally equivalent facility to the owner of an existing utility, cemetery, highway or other eligible public facility, and railroad when such action is authorized in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement (and attendant removal) of the affected facility or part thereof. For cost shared projects where it is the responsibility of a non-Federal sponsor to perform or assure the performance of relocations, this general definition must be modified as applied to railroad bridges (and approaches thereto) or as applied to bridges over navigable waters of the United States depending upon the authorized purposes of the specific project. For flood control projects, see Article I.G. of the Model PCA for Structural Flood Control approved March 1994; for commercial navigation projects at harbors or inland harbors, see Article I.J. of the Model PCA for Commercial Navigation Harbor Projects approved May 1996. In addition, the authorizing legislation for a project or any report referenced in that legislation may alter the definition of the term “relocation” as it applies to that project or may alter its applicability to a particular facility.

c. Necessary Findings. Before replacement, alteration or other modification to a facility can properly be categorized as a relocation, generally the following criteria must be satisfied:

(1) the project design requires that the existing facility be removed in whole, or in part, or that the project will negatively impact the ongoing function or operation of the facility;

(2) the owner of the facility has a compensable real property interest in the land on which the impacted portion of the facility is located;

(3) the facility serves a public purpose;

(4) the owner has a duty to replace the facility as a result of legal or factual necessity; and

(5) the fair market value of the interest that must be acquired due to project impact is too difficult to obtain; or payment of fair market value instead of providing a substitute facility would result in manifest injustice to the owner or to the public.
d. Attorney’s Opinion of Compensability. Preparation of an Attorney’s Opinion of Compensability is the principal process for determining the extent of the legal obligation to relocate a utility or public facility that will be impacted by the construction or operation of a project. For additional information on Attorney’s Opinions of Compensability, see paragraphs 12-17 and 12-22 of this chapter.

12-9. Determining the Appropriate Interest to Acquire.

a. General. It is the policy of USACE to acquire, or to require a non-Federal sponsor to provide, the minimum interest in real property necessary to support a project. The interests described in the following paragraphs have been determined to represent the minimum interest generally required to support the described purposes or features and must be utilized unless otherwise approved as described in subparagraph e of this paragraph. Greater or lesser interests may be appropriate depending upon the purposes of a project or other circumstances relating to project requirements or a particular acquisition.

b. Fee Title. Generally, fee title is required for the following:

(1) dam sites;
(2) lock and dam sites;
(3) disposal and borrow areas required for future maintenance work;
(4) public access areas;
(5) recreation; and
(6) fish and wildlife mitigation lands, ecosystem restoration, and other environmental purposes. However, a lesser, or easement estate, may be appropriate based on the extent of interest required for the operation or requirements of a project.

(7) disposal areas located on fast land that are required for commercial navigation projects for a harbor or inland harbor.

c. Permanent Easements. Generally, permanent easements are required for the following:

(1) levees, floodwalls and other permanent structures;
(2) flowage areas;
(3) ponding areas for dry dams;
(4) channel rectification works and adequate access thereto;
(5) areas impacted by induced flooding where the impact rises to the level of a taking;

(6) roads;

(7) waterway improvements and the right to permanently flood areas needed for navigation pools;

(8) the construction and maintenance of aids to navigation (the location and extent of land required for aids to navigation shall be coordinated by the District Commander with the local Coast Guard District Commander at the time the land is being obtained).

d. Temporary Easements. Generally, temporary easements are required for the following:

(1) adequate access and work areas required during construction of the project;

(2) disposal areas for all projects other than commercial navigation projects for a harbor or inland harbor if needed only to support construction; and

(3) Borrow Areas. While a temporary easement is generally required to support borrowing of materials, it is noted that small amounts of borrow materials, or disposal capacity, may sometimes be supplied by the construction contractor through use of a readily available commercial site. If so determined by an analysis conducted by PM, Engineering, Real Estate and other District and non-Federal sponsor offices, and if no other constraints exist, the construction contract solicitation documents should clearly request bids therefor and provision of such materials or capacity by the construction contractor would be in the nature of a construction item not LERRD (lands, easements, rights-of-way, relocations, and dredged or excavated material disposal areas). In no instance, however, should a contractor be required to provide lands, easements or rights-of-way (LER) for the project in support of borrow or disposal.

e. Approval Authority. Unless approved as part of a Real Estate Plan (REP) contained in an approved decision document for the project, requests to deviate from application of the interests required by subparagraphs b., c., or d. of this paragraph, together with adequate justification, must be forwarded in writing through Division to HQUSACE (ATTN: CERE-AP) for coordination, review and approval.

12-10. Determining the Appropriate Estate.

a. Meaning. The term "estate" as used in this chapter means the written description of the type, nature, and extent of the real property interest that is required to support the construction, operation, or maintenance of a project.
b. Standard Estates. Standard estates approved for use in either full Federal or cost shared projects are contained in Chapter 5 of this regulation. Once the appropriate interest is determined through application of the requirements of paragraph 12-9 of this chapter, the corresponding standard estate must be used if it is among those listed in Chapter 5.

c. Non-Standard Estates. Where there is no corresponding standard estate for the interest to be required, or where changes to the corresponding standard estate (or previously approved non-standard estate) are desired, a non-standard estate must be drafted and approved. The District Chief of Real Estate may approve non-standard estates if they serve the intended project purpose, substantially conform with and do not materially deviate from the corresponding standard estate contained in Chapter 5, and do not increase the costs nor potential liability of the Government. Changing an estate from easement to fee, or vice versa, or altering an estate so as to affect project purposes, is not within the scope of the District's approval authority. For all non-standard estates not within the scope of District's approval authority, approval may be obtained either by placing the body of the non-standard estate in the REP of a feasibility report or other study decision document that is approved by HQUSACE, or by request for approval forwarded prior to use of such estate through Division to HQUSACE (ATTN: CERE-A) for appropriate coordination, review, and final determination.

d. Coordination with Non-Federal Sponsor. Because a non-Federal sponsor is generally responsible for acquiring lands, easements, and rights-of-way pursuant to state law and procedure, full coordination and consultation with the non-Federal sponsor must occur prior to the Government's determination of the interests and estates required for a cost shared project. These efforts should begin in the early stages of plan formulation and continue, as appropriate, to the conclusion of the acquisition process.


a. General. Two types of rights-of-entry are typically obtained by the Government: construction and survey and exploration. Section VI of Chapter 5 of this regulation contains guidance on the use of rights-of-entry by the Government.

b. Forms. ENG Form 1258-R, Right-of-Entry for Survey and Exploration, and ENG Form 2803-R, Right-of-Entry for Construction, will be used when the Government obtains rights-of-entry for these purposes. These forms are included as Appendices 12-C and 12-D of this chapter.

c. Use of Rights-of-Entry by Non-Federal Sponsors. Non-Federal sponsors are not required to utilize the standard forms for obtaining rights-of-entry for cost shared projects. However, the District Chief of Real Estate must assure that any right-of-entry to be obtained for a project by a non-Federal sponsor is sufficient for the intended project purpose and that it does not subject the Government to risk or liability. For other topics related to the use of rights-of-entry for cost shared projects, see paragraph 12-26 (Certification of Availability) and paragraph 12-37a (credit issues) of this chapter.
Joint Land Acquisition Policy for Full Federal Reservoir Projects.

a. The Policy. The joint policy of the Department of the Interior and the Department of the Army governing the acquisition of land for full Federal reservoir projects was published in the Federal Register on 22 February 1962 in Volume 27 beginning at page 1734, and was again published on 2 July 1966 in Volume 31 beginning at page 9108. This policy statement recites, in part, that "(i)n so far as permitted by law, it is the policy of the Departments of the Interior and of the Army to acquire, as part of reservoir project construction, adequate interest in lands necessary for the realization of optimum values for all purposes including additional land areas to assure full realization of optimum present and future outdoor recreational and fish and wildlife potentials of each reservoir." The published policy also contains detailed provisions regarding the estates that are to be acquired in relationship to the reservoir's permanent features, storage pool, and other boundaries. For the full text of the published policy, see 32 C.F.R. §644.4. For implementing guidance, see Section IV of Chapter 2 of this regulation.

b. Applicability to Cost Shared Projects. Generally, the Joint Land Acquisition Policy will not apply to control the extent of land acquisition for cost shared reservoir projects, or to cost shared modifications to existing full Federal projects, where the lands, easements, and rights-of-way (LER) required to implement such project, or modification, must be provided by a non-Federal sponsor. Guidance will be provided by HQUSACE on a case-by-case basis in these circumstances.

SECTION III. PLANNING


a. General. Before initiation of a feasibility study, USACE is generally required to perform, at Federal expense, a reconnaissance study of the water resources problem in order to identify potential solutions to such problem in sufficient detail to determine whether or not planning to develop a project should proceed to the preparation of a feasibility report.

b. Expedited Reconnaissance Study Phase. Beginning with all FY 97 new reconnaissance starts, an expedited reconnaissance study process applies that is more limited in scope than historical reconnaissance level efforts yet still addresses the requirements of Section 905(b) of the Water Resources Development Act of 1986 (WRDA 86), as amended. Four essential tasks must be accomplished:

1. Determine that the water resource problem(s) warrant Federal participation;

2. Define the Federal interest based on a preliminary appraisal consistent with Department of Army policies;

3. Prepare a Project Study Plan (PSP); and

4. Assess the level of interest and support from non-Federal entities in the identified potential solutions and cost sharing of feasibility phase and construction.
c. Level of Detail. While the study must include a preliminary analysis of the Federal interest, costs, benefits, environmental impacts, and an estimate of the costs of preparing the feasibility report, generally only existing, readily available data should be used. Generally, the study costs are not to exceed $100,000.

d. Real Estate's Role. Detailed real estate information is not required. However, since cost estimates will typically include costs attributable to real estate requirements, Real Estate is responsible for providing the real estate cost estimate that will be used in the study and for providing the Real Estate Section or information contained in the analysis or report to the same level of detail as contained in the analysis or report generally. In addition, since a major focus of the reconnaissance process is preparation of the PSP, Real Estate is responsible for providing informed input into the PSP regarding a realistic real estate cost estimate, scope of work, schedules and other real estate matters and tasks. Accordingly, Real Estate representatives should attend and participate in reconnaissance phase meetings as necessary to perform these responsibilities. For cost shared projects, the District should consult with the non-Federal sponsor during the preparation of the Real Estate Section, the real estate cost estimate, and the PSP.

12-14. Feasibility - General. If it is determined that there is a Federal interest, and for cost shared projects that a non-Federal sponsor is willing to support additional study, a feasibility phase of study is initiated. For cost shared projects, a Feasibility Cost Sharing Agreement (FCSA) is executed between the Government and the non-Federal sponsor that requires study costs to be shared equally between the Government and the non-Federal sponsor. At least 50 percent of a non-Federal sponsor's share must be in cash and the remaining 50 percent of the non-Federal sponsor's share may be contributed as in-kind products or services.

12-15. Feasibility - Real Estate's Role

a. It is essential that the real estate requirements for a water resource project are adequately identified and that the estimated costs and schedule for land acquisition are accurately established before authorization. Therefore, a comprehensive Real Estate Plan (REP) to the Feasibility Report, General Reevaluation Report, Limited Reevaluation Report, Detailed Project Report, Special Project Report, or other decision document, is generally required for all water resource projects whether cost shared or full Federal. The contents of the REP are described in paragraph 12-16c below.

b. To effectively contribute to the formulation of a project, Real Estate should participate with Planning, the PM and other District elements in discussions and meetings held during the feasibility phase, any Alternative Formulation Briefing (AFB) and the Feasibility Review Conference (FRC). The AFB and FRC in the feasibility phase are the principal mechanisms for resolution of identified policy or legal issues. Real Estate representatives should attend these meetings, as appropriate, and should review and comment on subsequent MFRs and PGMs.
c. For cost shared projects, real estate acquisition and performance of facility and utility relocations are major responsibilities of the non-Federal sponsor. Therefore, Real Estate should participate with Planning, PM and other District elements in the discussion of project requirements with the non-Federal sponsor. Further, Real Estate should initiate discussions with the non-Federal sponsor regarding acquisition policies and procedures, including compliance with P.L. 91-646, as amended, LERRD crediting procedures, and milestones for land acquisition. Real Estate must also regularly consult with the non-Federal sponsor throughout the feasibility phase as to the LER and facility/utility relocation requirements of the project as it proceeds to final formulation.

d. It is the responsibility of the District Chief of Real Estate to assure that the acquisition process is conducted in compliance with the requirements of P.L. 91-646. Accordingly, the feasibility phase work effort must be conducted so that schedules, assignments, and costs include these requirements. Since P.L. 91-646 requirements also attach to the acquisition of LER by non-Federal sponsors for cost shared projects (see paragraph 12-6.b of this chapter), it is the responsibility of the District Chief of Real Estate to monitor the non-Federal sponsor’s acquisition program to assure its compliance with the requirements of P.L. 91-646. Accordingly, in addition to providing necessary advice and consultation during the feasibility phase on P.L. 91-646 process, procedures, and requirements, Real Estate must also advise the non-Federal sponsor that:

(1) P.L. 91-646 requirements apply to acquisition of real property that occur in anticipation of a Federal project including such acquisitions that occur prior to the execution of the PCA for the project;

(2) the non-Federal sponsor must maintain records that demonstrate compliance with the requirements of P.L. 91-646 including that landowners have been properly advised of their rights under the program and that evidence appropriate benefit determinations. These records must be maintained for a minimum of three years after the period of construction (as defined in the project PCA) and resolution of all relevant claims arising therefrom including P.L. 91-646 claims or appeals; and

(3) the non-Federal sponsor must have an appeals procedure for the prompt review of claims that it has allegedly failed to properly consider applications or provision of assistance under P.L. 91-646.

e. Project Management Plan (PMP). By the end of the feasibility phase, Real Estate should have a complete REP for inclusion in the Feasibility Report and a Baseline Cost Estimate for Real Estate for inclusion in the M-CACES cost estimate. Real Estate should ensure that the REP is provided to the PM for incorporation of real estate requirements and pertinent real estate data into the PMP. The PMP establishes the scope, schedule, budgets and technical performance requirements for the construction, operation, and management of the project.
12-16. Real Estate Plan.

a. General. A Real Estate Plan (REP) is the Real Estate work product that supports project plan formulation. It identifies and describes the lands, easements and rights-of-way (LER) required for the construction, operation and maintenance of a proposed project, including those required for relocations, borrow material, and dredged or excavated material disposal. The REP also identifies and describes the facility/utility relocations that are necessary to implement the project. Further, the REP describes the estimated LER value, together with the estimated administrative and incidental costs attributable to providing project LER, and the acquisition process (e.g., who will be acquiring, the types of ownerships, non-Federal sponsor's ability to acquire land) that will be required to support project implementation. For cost shared projects, the REP can be prepared by either USACE or non-Federal sponsor Real Estate personnel. Regardless of who prepares the REP, USACE and the non-Federal sponsor should fully coordinate and consult with each other throughout the drafting and approval process to ensure consistency with applicable Federal and state law, policy, and procedure and to ensure that the expressed conclusions and plans are implementable in a timely fashion. Due to variations among project purposes, state law, and non-Federal sponsors, each REP should be tailored to the particular facts and circumstances of the project at issue with full explanation provided where exceptions to policy are being proposed. The REP must be prepared to the same level of detail as, and be part of, the decision document which it supports (e.g., Feasibility Report, General Reevaluation Report (GRR), Detailed Project Report (DPR), etc).

b. Project Type & Applicability. A REP must be prepared in support of decision documents for all types of water resources projects whether full Federal or cost shared, specifically authorized or continuing authority. The level of detail required for each item described in subparagraph c below will vary depending on the scope and complexity of each project.

c. Scope & Content. The REP must include a discussion of the following significant topics, including sufficient description of the rationale supporting each conclusion presented:

(1) The purpose of the REP must be described in relation to the project document that it supports. For example, if the REP is in support of a GRR, it should state this fact together with a brief description of prior REPs prepared for the project with approval status and the relationship of the subject REP to such prior project REPs (e.g., separable element, next in sequence, supplement, replacement).

(2) For each project purpose and feature, a description of the LER required for the construction, operation and maintenance of the project including those required for relocations, borrow material and dredged or excavated material disposal. This information should include acreage, estates, number of tracts and ownerships, and estimated value. The total acreage will be broken down as to fee and the various types and duration of easements required. Information should also be included regarding the extent that
project LER is owned by private parties, by the non-Federal sponsor if applicable, and by other public entities. If the project will have more than one stage or phase, then the acreage will be further broken down by stage or phase consistent with the description of the project contained in the main report.

(3) For cost shared projects, a description of all LER required for the project that is already owned by the non-Federal sponsor, the acreage and interest owned, and whether the existing estates are sufficient and available for the project. Because unique aspects of state or local law may be involved, a sufficiency determination should be made by the Government only after full consultation with the non-Federal sponsor. The REP should also briefly discuss special value considerations or crediting principles that may be applicable to existing non-Federal sponsor ownerships (e.g., Federal appraisal rules, no credit for lands previously provided as an item of local cooperation; see paragraphs 12-37 and 12-38 of this chapter for additional information).

(4) Copies of proposed non-standard estates, if available, together with adequate justification therefor if approval of such estates is desired through approval of the decision document for the project.

(5) Whether there is an existing Federal project that lies fully or partially within the LER required for the project. If so, the REP must also briefly describe the existing project; the extent of overlap of the two projects; the identity of the sponsor, if any, of the existing project; whether the LER that supports the existing project was previously provided as an item of local cooperation for such project; the owner of the LER that supports the existing project; the nature of the estate(s) owned; and the sufficiency and availability of the existing estate(s) for the new project.

(6) Whether there is any Federally owned land included within the LER required for the project. If there is such land, the REP must also describe the purpose for which the land is required for the project; the identity of the managing agency for the land, the acreage and estate owned by the United States, and the acreage and estate required for the project; the views of the local representative of the managing Federal agency as to use for the project; and the acquisition plan for acquiring the required real property interests or other possessory rights. (Note: for interchange of national forest land, see 16 U.S.C. §505a).

(7) The extent, if any, that the LER required for the project lies below the ordinary high water mark, or the mean high water mark, as the case may be, of a navigable watercourse together with a brief discussion of whether the navigation servitude is available and will be exercised for project purposes. See paragraph 12-7 of this chapter for further discussion. Any proposed deviations from this policy or questions as to the availability of the navigation servitude should be identified as early as possible in the study phase and forwarded for resolution to CERE-AP who will coordinate with appropriate HQUSACE elements.

(8) A map clearly depicting the project area, the tracts required to support the project, significant utilities and facilities to be relocated, and any known or potential HTW lands.
(9) A discussion of whether there will be flooding induced by the construction or the operation and maintenance of the project. If induced flooding is reasonably anticipated, the REP should briefly describe the nature and extent thereof and whether additional acquisition of LER must, or should, occur as a result. Where significant induced flooding is anticipated, or where otherwise required, a written analysis (i.e., a Physical Takings Analysis) separate from the REP should be prepared with the conclusions of such analysis included in the REP. The analysis should incorporate the facts relating to the depth, frequency, duration, and extent of the expected induced flooding; discuss such facts in relationship to relevant case law regarding physical invasion takings and just compensation payment requirements; and present a reasoned conclusion on whether the expected induced flooding would rise to the level of a taking for which just compensation would be owed.

(10) A Baseline Cost Estimate for Real Estate as described in paragraph 12-18 below.

(11) The relocation assistance benefits anticipated to be required in accordance with P.L. 91-646 including the number of persons, farms and businesses to be displaced and estimated costs. Further, it must describe the availability of replacement housing and any need for last resort housing benefits.

(12) A description of the present or anticipated mineral activity in the vicinity of the proposed project that may affect construction, operation, or maintenance of the project together with a recommendation, including rationale, regarding acquisition of mineral rights or interests including oil or gas. The REP should also discuss other subsurface minerals or timber harvesting activity if applicable.

(13) For cost shared projects, a thorough assessment of the non-Federal sponsor's legal and professional capability and experience to acquire and provide the LER for the construction, operation and maintenance of the project, including its condemnation authority and quick-take capability. The Capability Assessment checklist, included as Appendix 12-R to this chapter, must be completed and included as part of the REP. This paragraph should also indicate that the non Federal sponsor has been advised of P.L. 91-646 requirements and the requirements for documenting expenses for credit purposes. If it is proposed that the Government will acquire project LER on behalf of the non Federal sponsor, the REP must fully explain the reasons for the Government performing such work. See paragraph 12-34 for information regarding acquisition by the Government on behalf of a non-Federal sponsor.

(14) If application or enactment of zoning ordinances is proposed in lieu of, or to facilitate, acquisition in connection with the project, a discussion of the type of ordinance, its intended purpose, and whether application or enactment and enforcement of the ordinance will result in a taking of a real property interest for which compensation must be paid.

(15) A reasonable and detailed schedule of all land acquisition milestones, including LER certification. The dates reflected in the schedule must be agreed upon by Real Estate, the PM and the non-Federal sponsor, if any.
(15) A description of the facility or utility relocations that must be performed including information regarding the general nature of the impact to each facility or utility; the identity of the owners of the affected facilities and utilities; the purpose of the affected facilities and utilities; whether the owners have compensable real property interests in the land on which the impacted portion of the facility or utility is located; the conclusions reached in the Attorney's Opinion of Compensability prepared in support of the relocation determinations; whether special legal authority or direction affects relocation classification (for example, the project's authorizing legislation or reports referenced therein; Section 111 of the River and Harbor and Flood Control Act of 1958 (33 U.S.C. §633)); and other information relevant to the proper identification and performance of relocations necessitated by construction, operation, or maintenance of the project. Each relocation determination must be supported by either a Preliminary or Final Attorney's Opinion of Compensability as described in paragraphs 12-17 and 12-22 of this chapter. In lieu of repeating general relocation information in the REP, specific citations to other report sections may be substituted for REP discussion to the extent that such sections provide the information required by this subparagraph and are consistent with the discussion that is contained in the REP.

(17) A concise discussion of the impacts on the real estate acquisition process and the LER value estimate due to known or suspected presence of contaminants that are located in, on, under, or adjacent to the LER required for the construction, operation or maintenance of the project including LER that is subject to the navigation servitude. See paragraph 12-37g of this chapter and Chapter 4 of this regulation for information on appraisal assumptions for contaminated lands. The discussion must include the status of the district's investigation for such contaminants, whether such contaminants are regulated under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§9601 et seq. (CERCLA); other Federal statutes [e.g., the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§6921 et seq. (RCRA)]; or specified state law. In the alternative, the status of the district's investigation may be included by referencing to a specific report section that contains such information. The REP must also disclose whether clean-up or other response actions of non-CERCLA regulated material will be required to implement the project and, if the project is cost shared, who will be responsible for performing, and paying the costs of performing such work, as between the Government and the non-Federal sponsor.

(18) A discussion of known or anticipated support for, or opposition to, the project by landowners in the project area and any known or anticipated landowner concerns related to issues that could impact the acquisition process (e.g., selection of estates, willing seller provisions, amount of acreage).

(19) If applicable, a statement that the non-Federal sponsor has been notified in writing about the risks associated with acquiring land before the execution of the PCA and the Government's formal notice to proceed with acquisition. See paragraph 12-31 of this chapter for further information.

(20) A description of any other real estate issue relevant to planning, designing or implementing the project.

12-14
12-17. Preliminary Attorney's Opinions of Compensability.

a. Background. As described in paragraph 12-8 of this chapter, the provision of a functionally equivalent facility to the owner of an existing facility may be an appropriate form of just compensation for the acquisition of a real property interest. Also as described in such paragraph, the provision of the new or modified facility is called a relocation. Since relocation costs on one or more major facilities can increase project costs to a significant degree, and dramatically increase the performance and payment responsibilities of the non-Federal sponsor for a cost shared project, it is critical that informed decisions be made during project planning phases regarding the relocations that will be required as part of project implementation.

b. Attorney's Opinions of Compensability. Preparation of an Attorney's Opinion of Compensability is the principal process for determining the extent of the Government's or non-Federal sponsor's legal obligation to relocate a utility or public facility that will be impacted by construction or operation of a project. See paragraph 12-16c(16) of this chapter regarding the requirements to prepare an Attorney's Opinion of Compensability to support each relocation determination contained in an REP. For cost shared projects, analysis and full consideration of state law will generally be required in determining whether the owner of an impacted facility or utility has a compensable interest in real property. However, full consideration must also be provided as to Federal principles that apply to Federal projects such as the applicability and exercise of the navigation servitude and the existence and terms of Federally issued permits. Therefore, regardless of whether the Government or the non-Federal sponsor prepares the Attorney's Opinions of Compensability, full coordination and consultation must occur between the Government and non-Federal sponsor on this and other relocation issues.

c. Preliminary Attorney's Opinions of Compensability. The preparation of Attorney's Opinions of Compensability for the purposes of finally determining and performing necessary relocation items requires a large degree of certainty regarding project impact as well as significant time to properly investigate the underlying facts and form appropriate legal conclusions based on those facts and applicable law. See paragraph 12-22 of this chapter for extended discussion regarding Final Attorney's Opinions of Compensability. Since significant time may pass from a feasibility level study phase to performance of relocation items and since project impacts may not be fully understood during a feasibility level of study, a lesser degree of certainty and formality is required for Attorney's Opinions prepared for study purposes rather than for final determination and performance purposes. Therefore, to support relocation determinations for an REP, final opinions do not have to be prepared if, in lieu thereof, Preliminary Attorney's Opinions of Compensability have been prepared consistent with the following requirements:

(1) The level and formality of investigation generally, and the level of detail to be included in the preliminary opinion, must be commensurate with the significance of the relocation item(s) to project formulation and estimated project costs. Factors that must be considered include the amount
of the estimated cost of the particular relocation item as well as the
significance of such costs as compared to estimated total project costs;
the significance of the relocation as related to successful implementation
of the proposed project; the significance of the relocation as related to
acceptability of the proposed project by the non-Federal sponsor, other
political entities that may be providing funding to the non-Federal sponsor,
or the public in general; the size and complexity of the relocation; and other
relevant factors.

(2) A separate opinion must be prepared for each significant relocation
proposed. Smaller relocation items of similar categorization may be combined
into one preliminary opinion so long as each item is individually identified
in the opinion.

(3) Title evidence reflecting ownership of a specific real property
interest is not generally required and, after consideration of the
significance of the individual relocation as discussed in subparagraph c.(1)
of this paragraph, the attorney preparing the preliminary opinion may rely on
any credible evidence (e.g., deed copy, assertions by the purported owner as
to its unconditional interest) in determining the facility owner and the
nature of the underlying real property interest.

(4) The preliminary opinion must be in writing and must, at a minimum,
include the following matters: the identity of the facility affected and its
owner; the general nature of the project impact to the facility; the real
property interest owned by the facility owner in the general location of the
impact; whether project impact is such that the owner of the facility is
entitled to payment of just compensation; whether the facility must be
modified, or otherwise relocated, as a result of application of applicable
legal principles of just compensation or whether the appropriate measure of
just compensation is fair market value; and the applicable legal principles
of just compensation applied in the opinion.

(5) Statements must be included in the REP that Preliminary Attorney's
Opinions of Compensability have been prepared and used for the purpose of
completing the study and that final opinions and final relocation
determinations will later occur as required by paragraph 12-22 of this
chapter.

(6) In addition to the statements required by subparagraph c.(5) of
this paragraph, for all decision documents that will serve as the basis for
Congressional authorization of the project, a statement substantially similar
to the following must be included in the REP:

"ANY CONCLUSION OR CATEGORIZATION CONTAINED IN THIS REPORT THAT AN ITEM
IS A UTILITY OR FACILITY RELOCATION TO BE PERFORMED BY THE NON-FEDERAL SPONSOR
AS PART OF ITS LERED RESPONSIBILITIES IS PRELIMINARY ONLY. THE GOVERNMENT WILL
MAKE A FINAL DETERMINATION OF THE RELOCATIONS NECESSARY FOR THE CONSTRUCTION,
OPERATION, OR MAINTENANCE OF THE PROJECT AFTER FURTHER ANALYSIS AND COMPLETION
AND APPROVAL OF FINAL ATTORNEY'S OPINIONS OF COMPENSABILITY FOR EACH OF THE
IMPACTED UTILITIES AND FACILITIES."

12-16
12-18. **Baseline Cost Estimate for Real Estate.**

a. General. A baseline cost estimate (BCE) for a project is the estimated total cost (for both the Government and the non-Federal sponsor, if applicable) to implement the project. It includes estimated costs for LERRD, planning & design, construction management, construction, contingencies, etc. The BCE is developed in accordance with ER 5-1-11, ER 37-2-10, ER 1110-2-1302 and the Civil Works Work Breakdown Structure (WBS), which provides the list of work activities/items to be included in the BCE.

b. Development of the Baseline Cost Estimate for Real Estate (BCERE). The BCERE includes the fair market value of the LER required for the construction, operation and maintenance of a proposed project, including those required for relocations, borrow material, and dredged or excavated material disposal; the costs of relocating displaced persons from homes, farms or business under P.L. 91-646, as amended; the incidental acquisition costs for both the Government and the non-Federal sponsor, if any; and estimated risk-based contingencies.

(1) The BCERE will be shown under Feature Code 01, Lands and Damages. The Gross Appraisal estimate developed for the REP in Feasibility (see Chapter 4 of this regulation) will be incorporated into the BCERE under Land Payments in the 01 account.

(2) If phased construction is proposed, costs for each construction phase should be separately identified in the BCERE. A list of all construction contracts, as determined during the feasibility phase, must be provided by the PM to Real Estate for use in developing the BCERE.

(3) Incidental acquisition costs for the Government or non-Federal sponsor may include those incurred for title work, appraisals, coordination meetings, review of documents, review of P.L. 91-646 actions, legal support and other costs that are incidental to the acquisition of LER required for the project and that are otherwise reasonable, allocable and allowable. Government costs for staff monitoring and for reviewing, approving and crediting LER provided by a non-Federal sponsor are also included.

c. In developing the BCERE, the estimated values and costs are based upon financial costs attributable to market value not economic costs since the purpose of the estimate is to determine the total cost of implementing the project. It is noted, however, that cost estimates from Real Estate are also required in support of the economic analysis where the purpose is to estimate the economic costs of a project. Because the amount of these cost estimates may differ, it is important to clearly communicate as to the purpose and the application of all Real Estate cost estimates. For additional information on the distinction between financial and economic costs, see ER 1105-2-100, paragraph 6-149d and the NED Manual on National Economic Development Costs (IMR Report 93-R-12).

   a. Historical Perspective. Historically, after enactment of
construction authorization, an REDM was prepared to present a detailed
description of the real estate requirements for the project including utility
and public facility relocations. Approval of the REDM at HQUSACE also
represented approval to initiate land acquisition for the project.
Supplements to the approved REDM were generally approved by the Division
Commander acting through the Chief of Real Estate.

   b. Post WRDA '86. With the enactment of WRDA '86, the majority of
new projects were required to be cost shared by a non-Federal interest and
increased emphasis was placed on cost estimate accountability and on
streamlining the feasibility study and project authorization processes. As a
result, Real Estate's planning efforts and cost estimates were integrated into
tales required for formulation of the selected project plan for which
construction authorization would be sought. Thus, the REP became the most
frequently used Real Estate planning document rather than a separate REDM.

   c. Continuing Usage. Even though an REP will generally be the
required Real Estate planning document, there may be circumstances requiring
the preparation and approval of an REDM. One example is where acquisition of
real property by the Government is tantamount to implementation of the project
and approval of a decision document is required prior to commencement of the
acquisition effort (e.g., some fish and wildlife mitigation projects). In
addition, an REDM may be appropriate when there is a new acquisition
requirement for an existing project for which REDMs were previously utilized.

   d. Contents. Where an REDM is required, preparation shall be in
accordance with the requirements contained in paragraph 2-19 of Chapter 2 of
this regulation.

   e. Approval Authority.

   (1) In those circumstances where an REDM must be prepared, HQUSACE
approval is required when the purpose of the REDM is to gain initial approval
for implementing a project, or a separable element thereof, or when the REDM
is otherwise classified as a project decision document that must be reviewed
and approved at HQUSACE. In these circumstances, six copies of the REDM must
be forwarded to CERB-AP for coordination with CECW-AR and other involved
offices. Division Commanders are authorized to approve all other REDMs but
without the authority to redelegate approval authority to District Commanders.

   (2) Where substantial departure from an approved REDM is deemed to be
necessary or advisable, an REDM Supplement must be prepared by the District
and must be approved by the office that had the approval authority for the
REDM being supplemented.

   (3) Where REDM approval authority is unclear, a written request for
guidance, together with a recommendation must be forwarded to HQUSACE (ATTN:
CERB-A) for determination.

12-18
SECTION IV. FINALIZING REAL ESTATE REQUIREMENTS

12-20. **Project Boundaries.** In preparing real estate acquisition boundaries, the following guidelines should be observed to the greatest extent possible:

   a. Close blocking out will be accomplished in accordance with sound real estate practices.

   b. For land acquired in fee, the blocked out final real estate acquisition line will be established in such manner as to minimize costs and cause the least disruption in the use of the remainder of the ownership.

   c. Severance damages will be avoided to the greatest extent possible consistent with real estate requirements for the project. A remnant without access need not be acquired if the owner desires to retain the property and releases the Government or non-Federal sponsor from damages for lack of access.

12-21. **Full Federal Projects and Approval of Acquisition Lines.** An approved REDM (see paragraph 12-19 of this chapter) contains maps depicting tentative acquisition lines that are, to some extent, irregular and located without full regard to their effect upon fringe tracts. It will, therefore, be necessary to establish final acquisition lines in accordance with sound real estate practices. Accordingly, fringe tracts must not be acquired until the final acquisition lines are approved by the Division Engineer in accordance with the submission and approval provisions contained in paragraphs 2-22 and 2-23 of Chapter 2 of this regulation.

12-22. **Final Attorney's Opinions of Compensability.**

   a. **Requirement.** As provided in paragraph 12-17 of this chapter, a Preliminary Attorney's Opinion of Compensability may be prepared for the purpose of making a preliminary determination of whether a necessary utility or facility modification should be classified as a relocation in a REP. Regardless of whether a preliminary opinion or more formal work product was utilized for the purpose of preparing an REP, a Final Attorney's Opinion of Compensability must be prepared in writing for each proposed utility or facility relocation in accordance with the requirements contained below in this paragraph.

   b. **Timing.**

      (1) For cost shared projects where a non-Federal sponsor has the responsibility to perform or assure the performance of relocations, a Final Attorney's Opinion of Compensability must be prepared for each proposed relocation as follows:

      (a) A Final Attorney's Opinion of Compensability must be prepared during Planning, Engineering and Design (PED) and prior to the execution of a PCA for the project for each relocation that has an estimated cost of $250,000...
or more, including the value of additional real estate that may be required
to perform the relocation, and for other relocations where determined by the
District to be required due to the need for additional certainty or other
reason.

(b) For all other relocations, a Final Attorney's Opinion of
Compensability must be prepared in a timely manner prior to the Government's
formal notice to the non-Federal sponsor of the relocations that it must
perform, or for which it must assure performance, as determined by the
Government to be necessary for construction, operation and maintenance of
the project. See Article III.C. of the Model PCA for Structural Flood Control
(March 1994) and see Article III.C. of the Model PCA for Commercial Navigation
Harbor Projects (May 1996).

(2) For all other projects, a Final Attorney's Opinion of
Compensability must be prepared for each proposed relocation prior to the
Government entering into a relocation agreement with the owner of the utility
or facility.

c. Contents. A Final Attorney's Opinion of Compensability must
contain the following information:

(1) A complete record that adequately presents relevant factual and
background information including the identity of the project, whether the
Government or a non-Federal sponsor has the responsibility to perform or
assure the performance of relocations for the project, a description of the
utility or facility at issue, and the general nature of the impact to the
utility or facility that is attributable to the construction, operation or
maintenance of the project.

(2) A description of whether utility or facility modifications will
occur in place or whether the current location of the utility or facility, or
an identified part thereof, must be changed to facilitate construction,
operation or maintenance of the project.

(3) A statement indicating whether the owner of the utility or facility
has a duty to continue the operation of the utility or facility either as a
matter of law or practical necessity.

(4) The attorney’s opinion, supported by appropriate legal analysis, as
to whether the owner of the utility or facility has a compensable interest in
real property together with a description of such interest. Muniments of
title must be utilized in reaching this conclusion and must be identified in
the opinion.

(5) The attorney’s opinion, supported by appropriate legal analysis, as
to whether fair market value or payment based on the cost of providing a
functionally equivalent facility is the proper measure of just compensation
for the real property interest that must be acquired from the owner of
the utility or facility. For all public facilities, the analysis supporting
such opinion should include statements regarding whether it is of a type
c0Dm1 only bought and sold on the open market, whether the fair market value thereof is ascertainable, and whether providing fair market value rather than a substitute facility would result in manifest injustice as that term is used in relevant case law. See, for example, United States v. 50 Acres of Land, 469 U.S. 24 (1984).

(6) As appropriate, citations to the legal authority of the owner of the affected utility or facility to vacate, abandon, or convey the necessary interests in real property or to accept the conveyance of a substitute facility.

d. Acquisition by Relocation Agreement or Condemnation. Utilities and public facilities are normally acquired through execution of a relocation agreement. The agreement includes the engineering details of the relocation work as well as a right-of-entry for construction and provisions regarding exchange of the required real property interests. After construction of the relocation is completed in accordance with the agreement, deeds are exchanged to convey to the Government, or the non-Federal sponsor as the case may be, the real property interest required to support the project and to convey to the utility or public facility owner an interest in any additional land that was required for the relocation. If a relocation agreement cannot be negotiated with the utility or public facility owner, condemnation may be necessary to obtain the required real property interest on that tract. Cemeteries are always acquired by condemnation through the filing of a complaint only (rather than a complaint with Declaration of Taking).

SECTION V. ACQUISITION ACTIVITIES

12-23. General. This section describes acquisition activities which apply to both full Federal and cost shared projects, unless otherwise noted.


a. General. The real estate activities of USACE or the non-Federal sponsor are extremely sensitive, since they can disrupt peoples lives through the acquisition of their homes, farms and businesses. Therefore, it is important to keep landowners and others having an interest in the land informed of the land acquisition program. Timely dissemination of accurate information about the acquisition program and process is intended to avoid rumors and to permit affected landowners to plan for the future.

b. Public meetings are required by Section 302 of the Land Acquisition Policy Act of 1960, Public Law 86-545 (33 U.S.C. 597). Within six months after the date Congress authorizes construction of a water resources project, USACE or the non-Federal sponsor must advise owners and occupants in and adjacent to the project area as to the requirements for, and probable timing of, the acquisition of lands for the project. Within a reasonable time after initial appropriations are made for land acquisition or construction, including relocations, USACE or the non-Federal sponsor shall conduct public
meetings at locations convenient to owners and tenants to be displaced by the project in order to advise them of the proposed plans for acquisition and to afford them an opportunity to comment. The Congressional delegation of the district or districts in which the project is located should be invited to attend. Normally, the public meetings should be scheduled prior to the commencement of the land acquisition program.

c. At a minimum, information regarding the following matters should be disseminated at the public meeting:

(1) factors considered in making the appraisals;
(2) desire to purchase property without going to court;
(3) legal right to submit to condemnation proceedings;
(4) payments for moving expenses or other losses not covered by appraised market value;
(5) occupancy during construction;
(6) removal of improvements;
(7) payments required from occupants of Government-acquired land;
(8) withdrawals by owners of deposits made in court by the Government or non-Federal sponsor;
(9) use of land by owner when easement is acquired; and
(10) all other information that will assist landowners and tenants in understanding USACE's or non-Federal sponsor's real estate procedures such as acquisition schedules; the type of land interests to be acquired; the general policies that control land acquisition; approximate acquisition lines; and management of the project, etc.

d. Inquiries, comments of landowners and tenants, and problems developed at the landowners meetings should be recorded, video-taped, or, at least, a detailed written record should be made. The Division and CERF-AP should be informed as to the outcome of these meetings. Effective follow-up to supply any information not available at the meeting, or to consider any particular problems presented, is essential to realize the full advantage of the public relations program.

e. In addition to the foregoing, pamphlets containing this information and the information brochure explaining the benefits to landowners under P.L. 91-646 will be given wide distribution at approximately the same time the landowners meeting program is initiated. Copies will be furnished to the appropriate Congressional delegation.

a. Fish and Wildlife Mitigation. As required by Section 906(a) of WRDA 86, in the case of any water resources project which is authorized to be constructed before, on, or after 17 November, 1986, construction of which has not commenced as of such date, and which necessitates the mitigation of fish and wildlife losses, LER required to support mitigation must be acquired before commencement of construction of the project or it must be acquired concurrently with the LER required to support the basic project purpose, whichever the Secretary of the Army, or his designee, determines is appropriate.

b. Recreation. As required by Section 926(a) of WRDA 86, in the case of any water resources project which is authorized to be constructed before, on, or after 17 November 1986, construction of which has not commenced before such date, and which involves the acquisition of LER for recreation purposes, such LER must be acquired along with the acquisition of LER for the basic project purpose.


a. For either a full Federal or cost shared project, prior to issuance of the solicitation for a construction contract that requires real property interests, the District Chief of Real Estate is required to certify in writing to the district element responsible for such solicitation that sufficient real property interests are available to support construction pursuant to the contract.

b. In making this certification, the District Chief of Real Estate may base his or her conclusion on examination and evaluation of such records as are appropriate under the circumstances including:

(1) if the project is cost shared, the non-Federal sponsor’s Authorization for Entry and Certificate of Authority (see paragraph 12-32 of this chapter and Appendix 12-F);

(2) copies of recorded deeds of conveyance;

(3) copies of Orders of Possession entered in eminent domain proceedings; or

(4) other documents deemed adequate by the Chief of Real Estate.

c. In exceptional circumstances, a right-of-entry that has been approved by the District Chief of Real Estate as sufficient for construction purposes may be utilized for the purpose of certifying the availability of real property interests that are required to support issuance of a solicitation and award of a construction contract. However, if a right-of-entry is used for this purpose, acquisition of any real property interest for the tract at issue that is required to support operation or maintenance must be finalized prior to completion of construction pursuant to such contract.
d. If sufficient real property interests are not available to support construction at the time of the request for the certification, the District Chief of Real Estate should advise the requesting office as to the status of the required acquisition effort together with his or her estimate of time required to complete acquisition and certify real property availability.

12-27. Solicitation of Construction Contracts Without Availability of Real Estate. Solicitations for construction contracts should not be publicized until the District Chief of Real Estate has certified in writing that sufficient real property interests are available to support construction in accordance with paragraph 12-26 of this chapter. A decision by Project Management to proceed contrary to this general policy should be made only after full risk assessment. Real Estate input should include the status of acquisition, identification of all activities that must occur to complete acquisition, realistic schedules for such activities, and advice on the probability of finalizing acquisition in a timely manner.

SECTION VI. LAND ACQUISITION AND RELOCATION PERFORMANCE FOR COST SHARED PROJECTS

12-28. General. This section describes general land acquisition processes and procedures applicable to cost shared projects.

12-29. LER and Relocations Required for the Project.

a. Determination of Requirements. Because the non-Federal sponsor generally must provide the LER and perform the facility/utility relocations required for the project and because acquisition and performance by the non-Federal sponsor will generally be in accordance with state law and procedure, it is important that District Real Estate - with Engineering and PM participation - and the non-Federal sponsor agree upon an acceptable process by which LER requirements can be developed through exchange of information and ongoing consultation. After consultation with the non-Federal sponsor, the Government shall determine the LER required for the construction, operation, and maintenance of the project, including those required for relocations, borrow materials, and dredged or excavated material disposal.

b. Distinction Between LER Required and LER Provided. After the Government determines what LER is required for the project, it generally is the responsibility of the non-Federal sponsor to provide those LER. See Sections 101(a) and 103(a) and (I) of WRDA 86. However, it is important to distinguish between LER "required" for the project and that which the non-Federal sponsor must "provide." For example, although lands located within the navigation servitude may be "required", the non-Federal sponsor should not be instructed to acquire and "provide" such land if it is otherwise available for project purposes through exercise of the navigation servitude rights by the Government. See paragraph 12-7 of this chapter for additional information regarding the navigation servitude. Further, Federal lands managed by USACE may be available for use by the project without the need for transfer to the non-Federal sponsor. As a third example, another Federal agency may be
authorized to allow USACE, but not a non-Federal entity, to use Federal land it manages for the project without payment of compensation or transfer of interest. Accordingly, in all such circumstances, although required for the project, the non-Federal sponsor would not be required to provide a real property interest regarding that land and its value therefore would not be included in total project costs and credit would not be afforded.

12-30. Notice to Proceed with Acquisition and Performance. Following execution of the PCA, the district must provide the non-Federal sponsor with general written descriptions, including maps as appropriate, of the LER and the facility/utility relocations that the Government has determined the non-Federal sponsor must provide and perform for the construction, operation, and maintenance of the project. The LER descriptions must include specific estate, acreage, location and schedule requirements in detail sufficient to enable the non-Federal sponsor to fulfill its obligations to provide the LER in a timely fashion. Similarly, the relocation descriptions must include sufficient detail so as to enable the non-Federal sponsor to perform its relocation responsibilities in a timely fashion. In addition, the district must provide the non-Federal sponsor with a written notice to proceed with acquisition of such LER and performance of such relocations.

12-31. Acquisition Prior to PCA Execution. Although it should not be encouraged by the district, there may be instances when the non-Federal sponsor chooses to acquire land it anticipates will be required for the project prior to the execution of the PCA or prior to the Government’s formal notice to proceed with acquisition after PCA execution. The district must formally advise the non-Federal sponsor in writing of the risks associated with acquisition under such circumstances and that the non-Federal sponsor assumes full and sole responsibility for any and all costs, responsibility, or liability arising out of the acquisition effort. Generally, these risks include, but may not be limited to, the following:

(1) Congress may not appropriate funds to construct the proposed project;

(2) the proposed project may otherwise not be funded or approved for construction;

(3) a PCA mutually agreeable to the non-Federal sponsor and the Government may not be executed and implemented;

(4) the non-Federal sponsor may incur liability and expense by virtue of its ownership of contaminated lands, or interests therein, whether such liability should arise out of local, state, or Federal laws or regulations including liability arising out of CERCLA, as amended;

(5) the non-Federal sponsor may acquire interests or estates that are later determined by the Government to be inappropriate, insufficient, or otherwise not required for the project;
(6) the non-Federal sponsor may initially acquire insufficient or excessive real property acreage which may result in additional negotiations and/or benefit payments under P.L. 91-646 as well as the payment of additional fair market value to affected landowners which could have been avoided by delaying acquisition until after PCA execution and the Government's notice to commence acquisition and performance of LERRD; and

(7) the non-Federal sponsor may incur costs or expenses in connection with its decision to acquire or perform LERRD in advance of the executed PCA and the Government's notice to proceed which may not be creditable under the provisions of Public Law 99-662 or the PCA.

12-32. Authorization for Entry for Construction. After the non-Federal sponsor completes its acquisition effort and prior to issuance of the solicitation for each construction contract, an informed, authorized, and accountable official of the non-Federal sponsor must execute and provide the district a written Authorization for Entry to all LER that the Government determined the non-Federal sponsor must provide for that contract. The authorization form must also recite that the non-Federal sponsor is vested with sufficient title and interest in such LER. Further, the non-Federal sponsor must also provide the district with a Certificate of Authority that recites that the official signing the Authorization for Entry form on behalf of the non-Federal sponsor has the authority to furnish such right to the Government. A sample Authorization for Entry with Certificate of Authority form is attached as Appendix 12-F of this chapter.

12-33. Completion of Acquisition by the Non-Federal Sponsor. Prior to the end of the period of construction, as that period is defined in the project PCA, the non-Federal sponsor must complete acquisition, perform or ensure performance of all facility/utility relocations, and provide all LER that the Government required of the non-Federal sponsor as described in the written descriptions discussed above in paragraph 12-30. As typically required as an item of cooperation and expressed in the project PCA, the non-Federal sponsor must ensure for so long as the project remains authorized that the LER that the Government determined to be required for the operation and maintenance of the project and that were provided by the non-Federal sponsor are retained in public ownership for uses compatible with the project. In addition, the non-Federal sponsor must provide the Government with a right to enter, at reasonable times and in a reasonable manner, upon property that the non-Federal sponsor owns or controls for access to the project for purposes of inspection, and if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the project. Typically, this right is provided to the Government in the PCA and no separate written form is therefore required. Management of project LER by the non-Federal sponsor cannot interfere with this right.
12-34. Government Acquisition of LER and Performance of Relocations on Behalf of Non-Federal Sponsors.

a. As discussed in paragraph 12-29 of this chapter, the provisions of WRDA '86, as amended, assigned to non-Federal sponsors the responsibility of providing the lands, easements and rights-of-way and of performing the facility/utility relocations required for cost shared projects. Thus, it is not only the costs of the project that are shared with the Government, but the performance responsibilities are also shared including the risks that attach thereto. Accordingly, if a non-Federal sponsor has the capability to acquire and provide LER and to perform the relocations required for the project in a reasonable and timely fashion, performance responsibility should remain with the non-Federal sponsor.

b. However, there may be circumstances where a non-Federal sponsor cannot acquire LER required for the project in a timely fashion and requests the Government to acquire LER on its behalf. In such event, the decision to acquire LER on behalf of the non-Federal sponsor lies within the sole discretion of the Government.

c. So long as no tract to be acquired is known or suspected to be contaminated with CERCLA regulated materials, not more than five Federal condemnation actions are anticipated, and the district has sufficient available resources to perform in a timely fashion while completing its other real estate missions, the District Commander, acting through the District Chief of Real Estate, may agree to a non-Federal sponsor's written request for the Government to acquire LER on behalf of that non-Federal sponsor under one or more of the following circumstances:

1. the non-Federal sponsor lacks the professional capability to acquire LER required for the project and cannot reasonably obtain contract services from sources other than the Government;

2. although the non-Federal sponsor has sufficient general acquisition authority, it lacks legal authority to acquire particular tracts and its request to the Government is limited to acquisition of such tracts; or

3. the non-Federal sponsor lacks "quick-take" authority and reasonable acquisition schedules therefore cannot be met (see 40 U.S.C. §258a regarding the Government's quick-take authority).

d. Written request for the Government to acquire LER on behalf of a non-Federal sponsor under all circumstances other than as described in subparagraph c of this paragraph must be forwarded by the District, through Division, to HQSACE (ATTN: CERE-A) for coordination and decision. Each written request must be accompanied by written justification and recommendation.

e. Acquisition by the Government on behalf of non-Federal sponsors will be conducted in accordance with Federal law, policies, practices and procedures, including those contained in Chapters 4 and 5 of this regulation. The value of LER acquired by the Government, including incidental and administrative costs, will be based on actual costs incurred by the Government. See Section VII below on Credits for LERRD.
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f. Condemnation.

(1) The Secretary of the Army may cause condemnation proceedings to be instituted in Federal court in the name of the United States on behalf of a non-Federal sponsor for acquisition of real estate interests required for the project. General project authority will be cited as the authority of the United States to acquire title in its name and to reconvey title to the non-Federal sponsor at the conclusion of the condemnation proceeding.

(2) Whenever condemnation is proposed, condemnation assemblies will be prepared and forwarded through Division to CERE-AP for processing in the manner prescribed by Chapter 5 of this regulation. The non-Federal sponsor must furnish such sums of money to the District Chief of Real Estate as are necessary to pay any award that may be made in any such condemnation proceedings, including any awards made pursuant to the Equal Access to Justice Act (Public Law 96-481, title II, October 21, 1980, 94 Stat. 2325, as amended; 5 U.S.C. §504, 15 U.S.C. §634b, 28 U.S.C. §2412, 42 U.S.C. §1988). In addition, the non-Federal sponsor must pay such legal and administrative costs and expenses of USACE and the Department of Justice (DOJ) as may be required that are incident to filing and prosecuting the proceedings. District Chiefs of Real Estate will determine the amounts needed to assure continued availability of sufficient funds for processing and trying each case. Such funds will be made available by the sponsor prior to the commencement of work by the Government. Further, the non-Federal sponsor must promptly pay any deficiency and interest beyond the original amount furnished should any such deficiency and interest occur, as well as additional amounts that may be required during the course of the proceedings.

g. If the Government approves a request of a non-Federal sponsor to acquire LER on its behalf, the Government and the non-Federal sponsor must agree in writing on the applicable terms and conditions which must include that the non-Federal sponsor will pay to the Government all estimated acquisition costs (including administrative costs) in advance of the actual work being performed and including that either party may terminate the agreement by first providing 60 days notice in writing to such effect. Moreover, all terms and conditions must be consistent with those contained in the PCA for the project. Where only a small number of tracts are to be acquired with no complex appraisal or acquisition issues contemplated, a formal Memorandum of Agreement (MOA) is not required. However, care must be exercised to otherwise reduce the terms and conditions of the agreement to writing. For all other circumstances, a written MOA must be entered into prior to the Government's commencement of acquisition services. Until such time that a Model MOA for this purpose is approved and distributed for use, a draft MOA must be forwarded to HQUSACE (ATTN: CERE-AP) for coordination, review, and approval prior to execution by either the district or the non-Federal sponsor.

h. In the event that a non-Federal sponsor requests in writing that the Government perform facility/utility relocations necessary for the project on behalf of the non-Federal sponsor, the decision to perform such relocations lies within the sole discretion of the Government. If the Government elects to perform the services requested, or any portion thereof, the terms and
conditions must be in writing and be consistent with the provisions of the PCA for the project. The non-Federal sponsor remains responsible for all costs of the relocations work and must pay the Government in advance of the Government incurring costs for performance of such work. For elaboration on performance of relocations on behalf of the non-Federal sponsor, see ER 1165-2-131, LOCAL COOPERATION AGREEMENTS FOR NEW START CONSTRUCTION PROJECTS.

SECTION VII. CREDITS FOR LANDS, EASEMENTS AND RIGHTS-OF-WAY AND RELOCATIONS FOR COST SHARED PROJECTS

12-35. General.

a. Title I of WRDA 86 describes the general cost sharing responsibilities of non-Federal sponsors for many types of civil works water resources projects. As discussed in paragraph 12-29 of this chapter, such responsibilities include that a non-Federal sponsor must provide the LER and must perform or ensure the performance of relocations required for the project. As described in Sections 103(a) and (I) of WRDA 86 for flood control and other purposes and as described in Section 101(a) of WRDA 86, as amended, for harbor or inland harbor commercial navigation projects, the non-Federal sponsor is entitled to credit against its share of project costs for the value of LER it provides and the value of relocations that are required for the project. Generally, the amount of credit afforded will directly effect the amount of the non-Federal sponsor's cash contribution otherwise required for construction of the project.

b. Generally, for the purpose of determining the amount of credit to be afforded, the value of LER is the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, that the non-Federal sponsor provided for the project as required by the Government. Generally, the fair market value is determined by, or is based upon, an appraisal prepared by a qualified appraiser. A more detailed description of the valuation and crediting process, including exceptions to this general rule, is presented in the following paragraphs of this section. In addition, the specific requirements relating to valuation and crediting contained in the executed PCA for a project must also be reviewed and applied.

c. Generally, for the purpose of determining the amount of credit to be afforded, the value of facility/utility relocations other than a highway is the portion of relocation costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items. For a relocation of a highway, the value is the portion of relocation costs necessary to accomplish the relocation in accordance with the design standard that the state where the highway is located would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items. For elaboration on policies pertaining to credits for relocations, see ER 1165-2-131, LOCAL COOPERATION AGREEMENTS FOR NEW START CONSTRUCTION PROJECTS.
d. In reviewing requests for credit from the non-Federal sponsor, Real Estate must be aware of its fiscal responsibilities to both the non-Federal sponsor and the Government. In order to provide for uniform and consistent treatment of non-Federal sponsors concerning the crediting of LER for cost shared projects, procedures in this section should be followed to the greatest extent practicable. Requests for deviation from the policies described in this section, or requests for guidance on unique or unusual categories of LER credit claims not addressed herein, should be forwarded through Division to HQUSACE, (ATTN: CERE-AP), for appropriate coordination and final determination.


a. Date of Valuation.

(1) The fair market value of LER owned by the non-Federal sponsor on the effective date of the PCA for the project is the fair market value of the real property interests as of the date the non-Federal sponsor provides the Government with authorization for entry thereto for construction purposes.

(2) The fair market value of LER acquired by the non-Federal sponsor after the effective date of the PCA for the project is the fair market value of the real property interests at the time the interests are acquired.

(3) For LER owned by the non-Federal sponsor on the effective date of the PCA for the project that are required for the construction of work by the non-Federal sponsor that is authorized under Section 104 of WRDA 86, as amended, the fair market value is the value of the real property interests as of the date the non-Federal sponsor awards the first construction contract for the Section 104 work, or, if the non-Federal sponsor performs the construction with its own labor, the date that the non-Federal sponsor begins construction of the Section 104 work. The same principles apply to construction efforts by the non-Federal sponsor approved pursuant to authorities other than Section 104 including Section 215 of the Flood Control Act of 1968, as amended, Section 204 of WRDA 86, as amended, and Section 211 of WRDA 96.

b. General Valuation Procedure. For each real property interest, the non-Federal sponsor must obtain an appraisal that is prepared by a qualified appraiser who is acceptable to the Government. See Chapter 4 of this regulation. The appraisal must be prepared in accordance with applicable rules of just compensation, as specified by the Government. The fair market value of the real property interest is the amount set forth in the non-Federal sponsor’s appraisal if that appraisal is approved by the Government. In the event that such appraisal is not approved by the Government, the non-Federal sponsor may obtain a second appraisal, and the fair market value is the amount set forth in the second appraisal if that appraisal is approved by the Government. In the event that the Government does not approve the non-Federal sponsor’s second appraisal, or the non-Federal sponsor does not choose to obtain a second appraisal, or otherwise fails to provide the second appraisal in a timely fashion, the Government must obtain an appraisal and the fair market value is the amount set forth in the Government’s appraisal if such
appraisal is approved by the non-Federal sponsor. In the event that the non-
Federal sponsor does not approve the Government's appraisal, the Government,
after consultation with the non-Federal sponsor, shall consider the
Government's and the non-Federal sponsor's appraisals and determine an amount
based thereon which shall be deemed to be the fair market value.

c. Applicable Rules of Just Compensation. Although State rules will
typically control the appraisal process for acquisition and crediting purposes
by a non-Federal sponsor, application of Federal rules of just compensation
may be required as a matter of policy for crediting purposes. For discussion
on this issue, see paragraph 12-37.c of this chapter; and Chapter 4,
Appraisal, of this regulation. Also see 33 U.S.C. §595 regarding the Federal
special benefits rule and 33 U.S.C. §595.a regarding the Federal rule for
partial takings of lands adjacent to navigable waters.

d. Payments Exceeding Approved Appraised Amount.

(1) Approval Process. If the amount paid or proposed to be paid by
the non-Federal sponsor to a landowner for the real property interest exceeds
the amount determined pursuant to subparagraph b of this paragraph to be fair
market value, the Government, at the request of the non-Federal sponsor, must
consider all factors relevant to determining fair market value and, in its
sole discretion, after consultation with the non-Federal sponsor, may
approve in writing an amount greater than the amount determined pursuant to
subparagraph b of this paragraph but not to exceed the amount actually paid
or proposed to be paid. If the Government approves such an amount, the fair
market value shall be the lesser of the approved amount or the amount paid
by the non-Federal sponsor, but no less than the amount determined pursuant
to subparagraph b of this paragraph. See 49 C.F.R. §24.102(1) regarding
administrative settlements as a part of the acquisition process.

(2) Approval Authority. Division Commanders and their Chiefs of Real
Estate and District Commanders and their Chiefs of Real Estate can determine
fair market value in accordance with subparagraph d.(1) of this paragraph up
to the amounts and percentages set forth in their respective written
delocations of authority for acceptance of offers to sell for Federal
acquisitions. A copy of the general written delegation of authority to
divisions is included as Appendix 12-G to this chapter. If a division has
redelegated a portion of its delegated authority as authorized in Appendix 12-
G, its districts will have a written redelegation of authority that describes
the extent of its approval authority for acceptance of offers for Federal
acquisitions. For determinations that exceed the amount of delegated or
redelegated authority, a request must be submitted by the district, together
with recommendation, to the division, or through division to CSRE-A as the
case may be, for determination.

(3) Redelegation to Non-Federal Sponsors. U.S. Army District
Commanders and their Chiefs of Real Estate may redelegate their authority
provided by subparagraph d.(2) of this paragraph, in whole or in part, to
a non-Federal sponsor as follows:
(a) Factors that should be weighed in determining whether to exercise this discretionary authority include the experience, qualifications, and overall professional capability of the non-Federal sponsor as well as the nature and extent of the relationship established between the non-Federal sponsor and the district including the Chief of Real Estate.

(b) Redelegated approval authority cannot exceed the amounts or percentages that are contained in the specific written redelegation of authority for acceptance of offers to sell for Federal acquisitions that has been provided to that U.S. Army District Commander and Chief of Real Estate from its respective U.S. Army Division Commander and Chief of Real Estate.

(c) Limits to and conditions of redelegated authority as established by the District Chief of Real Estate must be fully discussed with the responsible non-Federal sponsor representative and the nature and extent of the redelegated authority must be reduced to writing prior to its application.

(d) Redelegation to non-Federal sponsors is intended to expedite the acquisition process where, during negotiations with a landowner, a non-Federal sponsor desires credit assurances for proposed payments to a landowner in excess of the amount set forth in the non-Federal sponsor's appraisal that has previously been approved by the Government. Accordingly, redelegated authority to non-Federal sponsors does not apply to value determinations where acquisition has been completed on the subject tract.

e. Valuation Procedure for Condemnations.

(1) For LER acquired through condemnation proceedings instituted after the effective date of the PCA for the project, the non-Federal sponsor must, prior to instituting such proceedings, submit to the Government notification in writing of its intent to institute the proceedings together with an appraisal of the specific real property interests to be acquired.

(2) After receipt of the written notice and appraisal, the Government has 60 days to review the appraisal. If the Government has previously approved the appraisal by application of the process discussed in subparagraph b of this paragraph, or provides written approval of, or takes no action on, the appraisal within this 60-day period, the non-Federal sponsor must use the amount set forth in the appraisal as the estimate of just compensation for the purpose of instituting its eminent domain proceeding.

(3) If the Government provides written disapproval of the appraisal to the non-Federal sponsor within the 60-day period, the Government and non-Federal sponsor must consult in good faith to promptly resolve the issues or areas of disagreement identified in the Government's written disapproval. If, after good faith consultation, the Government and the non-Federal sponsor agree as to an appropriate amount, then the non-Federal sponsor must use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. However, if, after good faith consultation, no agreement can be reached as to an appropriate amount, then the non-Federal sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.
(4) Fair market value for LER acquired by eminent domain proceedings in accordance with the above procedures shall be either the amount of the court award for the real property interests taken to the extent that the Government determined such interests are required for the construction, operation, and maintenance of the project or the amount of any stipulated settlement or portion thereof that the Government approves in writing. To the greatest extent practicable, the Government and the non-Federal sponsor should consult and cooperate prior to a settlement conference in an effort to reach advance agreement on an amount, or range of amounts, for which the non-Federal sponsor would be entitled to credit if settlement was reached during that conference in such amount, or within such range.

(5) U.S. Army Division Commanders and their Chiefs of Real Estate and U.S. Army District Commanders and their Chiefs of Real Estate can determine fair market value by approving stipulated settlements in condemnation actions initiated by the non-Federal sponsor in accordance with subparagraph e. (4) of this paragraph up to the amounts set forth in their respective written delegations of authority for approval of settlement offers in Federal condemnation actions. A copy of the general written delegation of authority to divisions is included as Appendix 12-G. If a division has redelegated a portion of its delegated authority as authorized in Appendix 12-G, its districts will have a written redelegation of authority that describes the extent of its approval authority for settlement offers in Federal condemnation actions. For stipulated settlement amounts that exceed the amount of delegated or redelegated authority, a request for determination must be submitted by the district, together with recommendation, to the division, or through division to CERE-A as the case may be, for determination.

(6) For LER acquired by a non-Federal sponsor through condemnation proceedings instituted prior to the effective date of the PCA for the project, the valuation procedures discussed in subparagraphs b and d of this paragraph will apply once the PCA is executed.

g. Incidental Costs.

(1) For LER acquired by a non-Federal sponsor within a five-year period preceding the effective date of the PCA for the project, or at any time after the effective date of that PCA, the value of the real property interests also will include the documented incidental costs of acquiring such interests, as determined by the Government, subject to an audit to determine the reasonableness, allocability, and allowability of costs. See OMB Circular A-87, Cost Principles for State and Local Governments for applicable principles. These incidental costs include, but are not necessarily limited to, closing and title costs, appraisal costs, survey costs, attorney’s fees, plat maps and mapping costs, as well as the actual amounts expended for payment of P.L. 91-646 relocation assistance benefits as required for compliance with law and implementing regulations.

(2) These incidental costs may also include payments made for personal property, loss of business or good will, or other payments, that are generally recognized as compensable, and required to be paid, by applicable State law due to the acquisition of a real property interest required for the project as
determined by the Government. Credit requests for payments made for personal property, loss of business or good will, or other payments, must be submitted with sufficient documentation, as determined by the Government, to show that the non-Federal sponsor was required to make payment therefor under State law.

(3) Credit afforded for incidental costs shall not include any amount that is excluded from credit eligibility by application of the policies expressed in paragraphs 12-37c and 12-38 of this chapter.

12-37. Special Considerations.

a. Rights-of-Entry. Generally, a right-of-entry is not an interest in real property and has no market value. Therefore, no credit can be afforded for a market value of a right-of-entry for construction provided by a non-Federal sponsor. However, costs incurred by the non-Federal sponsor in the process of obtaining the right-of-entry may be treated as incidental costs and credited when the real property interest required for that tract is later acquired by the non-Federal sponsor. In the rare event that the Government has determined that a formal real property interest is not required and that a right-of-entry is sufficient, the District Chief of Real Estate may approve a credit amount for a right-of-entry as based upon the reasonable, allocable, and allowable costs incurred by the non-Federal sponsor in obtaining the right-of-entry.

b. Donations by Non-Federal Sponsor. Although a non-Federal sponsor may want to provide LER without claiming credit therefor, the value of all LER required for the project that must be provided by the non-Federal sponsor must be included as a part of project costs with credit afforded in such amount except as otherwise stated in paragraph 12-38 of this chapter.

c. Application of Federal Appraisal Principles. In addition to when the Government acquires LER on behalf of the non-Federal sponsor as discussed in paragraph 12-34 of this chapter, Federal appraisal principles must be applied to determine market value for crediting purposes in the following circumstances:

(1) For LER owned by the non-Federal sponsor prior to the date of Congressional authorization of a specifically authorized project or prior to the date of the Division Commander's approval of the project for continuing authority projects; and

(2) For Shore Protection Projects, lands subject to shore erosion that are required for project purposes and that must be provided by the non-Federal sponsor must be appraised for crediting purposes considering special benefits in accordance with relevant Federal statutes and Department of Justice regulations. For private land holdings, the non-Federal sponsor must receive credit for the LER value, if any, that results from application of this special benefits analysis. For public land holdings, any credit amount proposed must first be approved by HQUSACE through a request forwarded, through Division, to HQUSACE (ATTN: CERE). For additional discussion, see Memorandum from the Director of Civil Works, Revision to Policy Guidance Letter No. 11, Credit for Lands, Easements, and Rights-of-Way (LER) at Shore Protection Projects, dated 21 April 1989.
d. Informal Value Estimates. As provided in 49 CFR Part 24.102(c), an appraisal is not required for acquisition purposes if (1) the landowner is donating the property and releases the acquiring agency from this obligation, or (2) the acquiring agency determines that an acquisition appraisal is unnecessary because the valuation problem is uncomplicated and the fair market value is estimated at $2500 or less, based on a review of available data. Where no acquisition appraisal has been prepared by the non-Federal sponsor pursuant to either of these circumstances, and where the value estimate does not exceed $2500, the non-Federal sponsor may submit, and the District Chief of Real Estate may approve, the non-Federal sponsor's informal value documentation and conclusions for the purpose of affording credit. Upon approval, the informal value documentation submitted shall be considered to be an appraisal for the limited purpose of compliance with the appraisal requirements in the PCA for the tract at issue. For all other tracts, credit appraisals must be submitted with approval authority commensurate with delegated authority amounts for appraisal approvals generally.

e. Multi-Purpose Projects. Where a project will be constructed to serve more than one authorized purpose, it is important that the LER requirements for each purpose are clearly identified so that the respective values can be properly assigned among the purposes with appropriate credit afforded toward the non-Federal sponsor's share of the costs of each project purpose. This is particularly important when the purposes have different cost sharing formulas or when there are different non-Federal sponsors for construction and Operation, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R) of the project purposes. For example, if the LER required for a flood control project consists of standard permanent levee easements, those interests must be so identified, valued, and assigned to the basic flood control project purpose. Additional estates on the same tracts that are required to support recreation must be separately identified with the incremental additional values assigned to the recreation project purpose. In no event can the value for the flood control easement combined with that of the additional interest required to support recreation on the same tract exceed the fee value for that tract. Once the values have been properly assigned among purposes, those values will be included in total project costs for the respective purposes and credit will be afforded in such amounts. For additional discussion, see CECW Policy Guidance Letters No. 30, Recreation Cost Sharing Credit For Increased Real Estate Interest for Recreation Development at Non-Reservoir Projects, dated 6 December 1991 and 36, Recreation Development at (Non-Lake) Structural Flood Control and Harbor Projects, dated 21 October 1992.

f. Impact of Project Changes. Where a non-Federal sponsor acquires an interest in real property after PCA execution and receipt of the Government's written notice to proceed with acquisition but subsequent project changes (e.g. design change) eliminate the need for such interest, the amount of credit afforded (or to be afforded as the case may be) must be reduced in accordance with consistent with the following principles:
(1) If the acquired real property interest has a market value, credit and total project costs must be reduced by the lesser of the market value of the interest credited to the sponsor or the reasonable sales proceeds received by the non-Federal sponsor if such interest is sold to a third party in a timely fashion in an arms length transaction.

(2) Credit must still be afforded for the amount of the approved incidental costs of acquiring such interest pursuant to the terms of the FCA (including P.L. 91-646 benefit payments) as well as for the documented incidental costs, if any, of selling such interest subject to an audit to determine reasonableness, allocability and allowability.

(3) Application of these principles are not intended to penalize a non-Federal sponsor for acquiring real property as requested by the Government. Accordingly, it is acknowledged that many estates acquired by non-Federal sponsors for USACE projects have no market value (e.g. levee easements, temporary construction easements). In such cases the credit reduction principles are not applicable. It is further acknowledged that application of these principles may not under all circumstances produce an acceptable result as it relates to credit reduction. In such cases, and pursuant to a request by the non-Federal sponsor, a written request for deviation from application of such principles together with a full explanation of the circumstances and a recommendation for decision should be transmitted through division to CERE-AP for appropriate coordination, consideration and decision.

g. Hazardous, Toxic, and Radioactive Wastes (HTRW). As used in ER 1165-2-132, HAZARDOUS, TOXIC, AND RADIOACTIVE WASTE (HTRW) GUIDANCE FOR CIVIL WORKS PROJECTS, and as used in this chapter, the term “hazardous, toxic, and radioactive waste”, or "HTRW", means any material listed as a “hazardous substance” under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§9601 et seq. (CERCLA). See 42 U.S.C. §9601(14). For crediting purposes, LER required for the project that is contaminated with CERCLA regulated materials shall be appraised with the assumption that the lands are no longer contaminated; that is, that an appropriate response action has occurred. Notwithstanding that an appropriate response action has been completed, the market value of the tract may be lessened due to the stigma that arises from its history of contamination. See Chapter 4, Appraisal, of this regulation; Real Estate Policy Guidance Letter No.1--Appraisal of Lands Containing Hazardous and Toxic Wastes, dated 19 November 1990; and Project Management Guidance Letter No.8--Appraisal of Lands Containing Hazardous & Toxic Wastes on Local Cooperation Projects, dated 5 November 1990.

h. Other Contaminants. The policy explained above in subparagraph g is limited to LER contaminated with CERCLA regulated materials. For crediting purposes, LER required for the project that is contaminated with materials not regulated by CERCLA shall be appraised for crediting purposes as it exists on the applicable date of valuation.
12-38. **Exceptions to LER Credit.** As a matter of policy, a non-Federal sponsor will not be afforded credit for the following categories of LER required for a project. Further, for projects that include LER value as a part of shared total project costs, the value amount that is non-creditable must be excluded from total project costs. Requests for exceptions to this policy together with persuasive rationale must be forwarded through Division HQ-USACE (ATTN: CBRB-AP) for coordination and final determination.

a. Previously Provided as an Item of Cooperation. The non-Federal sponsor shall not receive credit for the value of any LER, including incidental costs, that have been provided previously as an item of cooperation for another Federal project.

b. Federal Funds. The non-Federal sponsor shall not receive credit for the value of LER, including incidental costs, to the extent that they were provided using Federal funds unless the Federal granting agency verifies in writing that such credit is expressly authorized by statute.

c. Federal Lands. The non-Federal sponsor shall not receive credit for the value of LER acquired from Federal agencies if the acquisition of same was accomplished at no cost other than incidental costs. However, credit may be afforded for the non-Federal sponsor's documented incidental costs of acquiring such interests subject to an audit to determine reasonableness, allocability, and allowability. USACE will cooperate and, where possible, facilitate the non-Federal sponsor's effort to secure land for project use that is managed by a Federal agency.

d. Excessive Interests. Except as otherwise provided in paragraph 12-36f of this chapter, if the non-Federal sponsor acquires LER in excess of the requirements of the project as determined by the Government, only the value of the acreage or interest required to support the project as determined by the Government shall be eligible for credit.

e. Section 14 Projects. The valuation of LER for crediting purposes for continuing authority projects constructed pursuant to Section 14 of the Flood Control Act of 1946, as amended 33 U.S.C. §701r, is the same as for other projects except for cases in which the required LER is part of the tract of land that includes the facility or structure being protected. In such cases, the non-Federal sponsor shall not receive credit for the value of LER it provides that:

1. are part of the tract of land on which the facility or structure to be protected is located; and

2. are owned by either the non-Federal-sponsor or the owner of the facility or structure when the PCA for the project is executed.

f. Navigation Servitude. In no event shall credit be afforded for lands that are available to the project through exercise of the navigation servitude.

g. Contingencies. In no event shall credit be afforded for contingency values designated in reconnaissance estimates, Gross Appraisals, M-CACES cost estimates, or other planning estimates of LER values.
12-39. Stipulating to Credit Amount in PCA.

a. Section 14 Projects. Where the cost of appraising LER that is eligible for credit for a Section 14 continuing authority project is estimated to exceed the market value of such interest, or interests, the non-Federal sponsor and Government may stipulate in the PCA for the project that the value of, and the credit amount for, the required interest, or interests, that are to be provided by the non-Federal sponsor is zero thereby avoiding the necessity and expense of the appraisal for such interest or interests. It must be noted, however, that use of such a stipulation is a deviation from Model PCA provisions and additional PCA approval may therefore be required.

b. Other Circumstances. Other than as discussed above, all proposals for stipulating to value and credit amounts in the PCA for some or all LER required for the project that must be provided by the non-Federal sponsor will be considered on a case-by-case basis. Such proposals must be agreed to by the non-Federal sponsor and must be submitted in writing together with justification to HQUSACE (ATTN: CERE-AP) for coordination and approval. Proposals for all stipulations in an amount greater than $2500 must be based upon an appraisal approved by the Government that has been prepared in accordance with Chapter 4 of this regulation. Generally, submittal and approval of the proposal must occur prior to submittal of the draft PCA to CECW-AR for review so as to not delay PCA processing and approval.


a. Timing of Credit Requests.

(1) Market Value of LER. To facilitate affording of credit for the market value of LER in a timely manner, the non-Federal sponsor should submit its credit request with supporting documents within 180 days after it provides the Government authorization for entry for such LER.

(2) Incidental Costs. For all other creditable items associated with the acquisition of LER, such as P.L. 91-646 relocation assistance payments or other documented acquisition costs, the non-Federal sponsor should submit its credit request with supporting documentation as soon as practicable but not less than on an annual basis.

(3) Reasonable Effort To Comply. Although these time frames for submission of credit requests may not be achievable in all events due to complexities in negotiations, condemnations, or other reasons, reasonable compliance efforts should be made so that project costs are appropriately and timely apportioned between the parties consistent with PCA accounting provisions and sound fiscal procedures.

b. Credits and Project Accounting Records. After Real Estate has preliminarily approved a LER credit amount in accordance with delegated authority policies, this amount should be reviewed and discussed with the PM. Real Estate should make available to the PM all information necessary for the PM to review the non-Federal sponsor's credit request. Once the LER credits are finally approved, it is the PM's responsibility to assure that credit amounts are recorded in project accounting records.
c. No Credit Request. If a non-Federal sponsor does not submit a credit request, or sufficient documentation therefor in a timely manner, the District Chief of Real Estate should document actions taken in trying to obtain the credit request or documentation and provide such information to the PM for further action.
§ 200.302 Financial management.

Effective: December 26, 2013

Currentness

(a) Each state must expend and account for the Federal award in accordance with state laws and procedures for expending and accounting for the state's own funds. In addition, the state's and the other non-Federal entity's financial management systems, including records documenting compliance with Federal statutes, regulations, and the terms and conditions of the Federal award, must be sufficient to permit the preparation of reports required by general and program-specific terms and conditions; and the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award. See also § 200.450 Lobbying.

(b) The financial management system of each non-Federal entity must provide for the following (see also §§ 200.333 Retention requirements for records, 200.334 Requests for transfer of records, 200.335 Methods for collection, transmission and storage of information, 200.336 Access to records, and 200.337 Restrictions on public access to records):

(1) Identification, in its accounts, of all Federal awards received and expended and the Federal programs under which they were received. Federal program and Federal award identification must include, as applicable, the CFDA title and number, Federal award identification number and year, name of the Federal agency, and name of the pass-through entity, if any.

(2) Accurate, current, and complete disclosure of the financial results of each Federal award or program in accordance with the reporting requirements set forth in §§ 200.327 Financial reporting and 200.328 Monitoring and reporting program performance. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient must not be required to establish an accrual accounting system. This recipient may develop accrual data for its reports on the basis of an analysis of the documentation on hand. Similarly, a pass-through entity must not require a subrecipient to establish an accrual accounting system and must allow the subrecipient to develop accrual data for its reports on the basis of an analysis of the documentation on hand.

(3) Records that identify adequately the source and application of funds for federally-funded activities. These records must contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, expenditures, income and interest and be supported by source documentation.
(4) Effective control over, and accountability for, all funds, property, and other assets. The non-Federal entity must adequately safeguard all assets and assure that they are used solely for authorized purposes. See § 200.303 Internal controls.

(5) Comparison of expenditures with budget amounts for each Federal award.

(6) Written procedures to implement the requirements of § 200.305 Payment.

(7) Written procedures for determining the allowability of costs in accordance with Subpart E—Cost Principles of this part and the terms and conditions of the Federal award.

AUTHORITY: 31 U.S.C. 503

Current through April 12, 2019; 84 FR 14887.
§ 200.303 Internal controls.

2 C.F.R. § 200.303

§ 200.303 Internal controls.

Effective: December 26, 2014

The non-Federal entity must:

(a) Establish and maintain effective internal control over the Federal award that provides reasonable assurance that the non-Federal entity is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should be in compliance with guidance in "Standards for Internal Control in the Federal Government" issued by the Comptroller General of the United States or the "Internal Control Integrated Framework", issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(b) Comply with Federal statutes, regulations, and the terms and conditions of the Federal awards.

(c) Evaluate and monitor the non-Federal entity's compliance with statutes, regulations and the terms and conditions of Federal awards.

(d) Take prompt action when instances of noncompliance are identified including noncompliance identified in audit findings.

(e) Take reasonable measures to safeguard protected personally identifiable information and other information the Federal awarding agency or pass-through entity designates as sensitive or the non-Federal entity considers sensitive consistent with applicable Federal, state, local, and tribal laws regarding privacy and obligations of confidentiality.

Credits

[79 FR 75883, Dec. 19, 2014]

AUTHORITY: 31 U.S.C. 503
§ 200.303 Internal controls. 2 C.F.R. § 200.303

Current through April 12, 2019; 84 FR 14887.
§ 200.305 Payment.


(b) For non-Federal entities other than states, payments methods must minimize the time elapsing between the transfer of funds from the United States Treasury or the pass-through entity and the disbursement by the non-Federal entity whether the payment is made by electronic funds transfer, or issuance or redemption of checks, warrants, or payment by other means. See also § 200.302 Financial management paragraph (b)(6). Except as noted elsewhere in this part, Federal agencies must require recipients to use only OMB-approved standard governmentwide information collection requests to request payment.

(1) The non-Federal entity must be paid in advance, provided it maintains or demonstrates the willingness to maintain both written procedures that minimize the time elapsing between the transfer of funds and disbursement by the non-Federal entity, and financial management systems that meet the standards for fund control and accountability as established in this part. Advance payments to a non-Federal entity must be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the non-Federal entity in carrying out the purpose of the approved program or project. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the non-Federal entity for direct program or project costs and the proportionate share of any allowable indirect costs. The non-Federal entity must make timely payment to contractors in accordance with the contract provisions.

(2) Whenever possible, advance payments must be consolidated to cover anticipated cash needs for all Federal awards made by the Federal awarding agency to the recipient.

(i) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer and must comply with applicable guidance in 31 C.F.R. part 208.
(ii) Non-Federal entities must be authorized to submit requests for advance payments and reimbursements at least monthly when electronic fund transfers are not used, and as often as they like when electronic transfers are used, in accordance with the provisions of the Electronic Fund Transfer Act (15 U.S.C. 1693–1693r).

(3) Reimbursement is the preferred method when the requirements in paragraph (b) cannot be met, when the Federal awarding agency sets a specific condition per § 200.207 Specific conditions, or when the non-Federal entity requests payment by reimbursement. This method may be used on any Federal award for construction, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal award constitutes a minor portion of the project. When the reimbursement method is used, the Federal awarding agency or pass-through entity must make payment within 30 calendar days after receipt of the billing, unless the Federal awarding agency or pass-through entity reasonably believes the request to be improper.

(4) If the non-Federal entity cannot meet the criteria for advance payments and the Federal awarding agency or pass-through entity has determined that reimbursement is not feasible because the non-Federal entity lacks sufficient working capital, the Federal awarding agency or pass-through entity may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency or pass-through entity must advance cash payments to the non-Federal entity to cover its estimated disbursement needs for an initial period generally geared to the non-Federal entity’s disbursing cycle. Thereafter, the Federal awarding agency or pass-through entity must reimburse the non-Federal entity for its actual cash disbursements. Use of the working capital advance method of payment requires that the pass-through entity provide timely advance payments to any subrecipients in order to meet the subrecipient’s actual cash disbursements. The working capital advance method of payment must not be used by the pass-through entity if the reason for using this method is the unwillingness or inability of the pass-through entity to provide timely advance payments to the subrecipient to meet the subrecipient’s actual cash disbursements.

(5) Use of resources before requesting cash advance payments. To the extent available, the non-Federal entity must disburse funds available from program income (including repayments to a revolving fund), rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(6) Unless otherwise required by Federal statutes, payments for allowable costs by non-Federal entities must not be withheld at any time during the period of performance unless the conditions of §§ 200.207 Specific conditions, Subpart D—Post Federal Award Requirements of this part, 200.338 Remedies for Noncompliance, or one or more of the following applies:

(i) The non-Federal entity has failed to comply with the project objectives, Federal statutes, regulations, or the terms and conditions of the Federal award.

(ii) The non-Federal entity is delinquent in a debt to the United States as defined in OMB Guidance A–129, “Policies for Federal Credit Programs and Non–Tax Receivables.” Under such conditions, the Federal awarding agency or pass-through entity may, upon reasonable notice, inform the non-Federal entity that payments must not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal government is liquidated.
(iii) A payment withheld for failure to comply with Federal award conditions, but without suspension of the Federal award, must be released to the non–Federal entity upon subsequent compliance. When a Federal award is suspended, payment adjustments will be made in accordance with § 200.342 Effects of suspension and termination.

(iv) A payment must not be made to a non–Federal entity for amounts that are withheld by the non–Federal entity from payment to contractors to assure satisfactory completion of work. A payment must be made when the non–Federal entity actually disburses the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(7) Standards governing the use of banks and other institutions as depositories of advance payments under Federal awards are as follows.

(i) The Federal awarding agency and pass-through entity must not require separate depository accounts for funds provided to a non–Federal entity or establish any eligibility requirements for depositories for funds provided to the non–Federal entity. However, the non–Federal entity must be able to account for the receipt, obligation and expenditure of funds.

(ii) Advance payments of Federal funds must be deposited and maintained in insured accounts whenever possible.

(8) The non–Federal entity must maintain advance payments of Federal awards in interest-bearing accounts, unless the following apply.

(i) The non–Federal entity receives less than $120,000 in Federal awards per year.

(ii) The best reasonably available interest-bearing account would not be expected to earn interest in excess of $500 per year on Federal cash balances.

(iii) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non–Federal cash resources.

(iv) A foreign government or banking system prohibits or precludes interest-bearing accounts.

(9) Interest earned amounts up to $500 per year may be retained by the non–Federal entity for administrative expense. Any additional interest earned on Federal advance payments deposited in interest-bearing accounts must be remitted annually to the Department of Health and Human Services Payment Management System (PMS) through an electronic medium using either Automated Clearing House (ACH) network or a Fedwire Funds Service payment. Remittances must include pertinent information of the payee and nature of payment in the memo area (often referred to as “addenda records” by Financial Institutions) as that will assist in the timely posting of interest earned on federal funds. Pertinent details include the Payee Account Number (PAN) if the payment originated from PMS, or Agency information if the payment originated from ASAP, NSF or another federal agency payment system. The remittance must be submitted as follows:

TAB G
(i) For ACH Returns:
Routing Number: 051036706
Account number: 303000
Bank Name and Location: Credit Gateway—ACH Receiver St. Paul, MN

(ii) For Fedwire Returns*: 
Routing Number: 021030004
Account number: 75010501
Bank Name and Location: Federal Reserve Bank Treas NYC/Funds Transfer Division New York, NY

(* Please note organization initiating payment is likely to incur a charge from your Financial Institution for this type of payment)

(iii) For International ACH Returns:
Beneficiary Account: Federal Reserve Bank of New York/ITS (FRBNY/ITS)
Bank: Citibank N.A. (New York)
Swift Code: CITIUS33
Account Number: 36838868
Bank Address: 388 Greenwich Street, New York, NY 10013 USA
Payment Details (Line 70): Agency
Name (abbreviated when possible) and ALC Agency POC: Michelle Haney, (301) 492–5065

(iv) For recipients that do not have electronic remittance capability, please make check** payable to: “The Department of Health and Human Services.”

Mail Check to Treasury approved lockbox:
HHS Program Support Center, P.O. Box 530231, Atlanta, GA 30353–0231

(** Please allow 4–6 weeks for processing of a payment by check to be applied to the appropriate PMS account)

(v) Any additional information/instructions may be found on the PMS Web site at http://www.dpm.psc.gov/.
§ 200.305 Payment. 2 C.F.R. § 200.305

Credits

AUTHORITY: 31 U.S.C. 503

Current through April 12, 2019; 84 FR 14887.
§ 200.343 Closeout., 2 C.F.R. § 200.343

2 C.F.R. § 200.343

§ 200.343 Closeout.

Effective: December 26, 2014

Currentness

The Federal awarding agency or pass-through entity will close-out the Federal award when it determines that all applicable administrative actions and all required work of the Federal award have been completed by the non-Federal entity. This section specifies the actions the non-Federal entity and Federal awarding agency or pass-through entity must take to complete this process at the end of the period of performance.

(a) The non-Federal entity must submit, no later than 90 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. The Federal awarding agency or pass-through entity may approve extensions when requested by the non-Federal entity.

(b) Unless the Federal awarding agency or pass-through entity authorizes an extension, a non-Federal entity must liquidate all obligations incurred under the Federal award not later than 90 calendar days after the end date of the period of performance as specified in the terms and conditions of the Federal award.

(c) The Federal awarding agency or pass-through entity must make prompt payments to the non-Federal entity for allowable reimbursable costs under the Federal award being closed out.

(d) The non-Federal entity must promptly refund any balances of unobligated cash that the Federal awarding agency or pass-through entity paid in advance or paid and that are not authorized to be retained by the non-Federal entity for use in other projects. See OMB Circular A-129 and see § 200.345 Collection of amounts due, for requirements regarding unreturned amounts that become delinquent debts.

(e) Consistent with the terms and conditions of the Federal award, the Federal awarding agency or pass-through entity must make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.
§ 200.343 Closeout., 2 C.F.R. § 200.343

(f) The non-Federal entity must account for any real and personal property acquired with Federal funds or received from the Federal government in accordance with §§ 200.310 Insurance coverage through 200.316 Property trust relationship and 200.329 Reporting on real property.

(g) The Federal awarding agency or pass-through entity should complete all closeout actions for Federal awards no later than one year after receipt and acceptance of all required final reports.

Credits

[79 FR 75885, Dec. 19, 2014]

AUTHORITY: 31 U.S.C. 503

Current through April 12, 2019; 84 FR 14887.

(a) The Federal award may be terminated in whole or in part as follows:

(1) By the Federal awarding agency or pass-through entity, if a non-Federal entity fails to comply with the terms and conditions of a Federal award;

(2) By the Federal awarding agency or pass-through entity for cause;

(3) By the Federal awarding agency or pass-through entity with the consent of the non-Federal entity, in which case the two parties must agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated; or

(4) By the non-Federal entity upon sending to the Federal awarding agency or pass-through entity written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency or pass-through entity determines in the case of partial termination that the reduced or modified portion of the Federal award or subaward will not accomplish the purposes for which the Federal award was made, the Federal awarding agency or pass-through entity may terminate the Federal award in its entirety.

(b) When a Federal awarding agency terminates a Federal award prior to the end of the period of performance due to the non-Federal entity's material failure to comply with the Federal award terms and conditions, the Federal awarding agency must report the termination to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS).

(1) The information required under paragraph (b) of this section is not to be reported to designated integrity and performance system until the non-Federal entity either—

(i) Has exhausted its opportunities to object or challenge the decision, see § 200.341 Opportunities to object, hearings and appeals, or

(ii) Has not, within 30 calendar days after being notified of the termination, informed the Federal awarding agency that it intends to appeal the Federal awarding agency's decision to terminate.

(2) If a Federal awarding agency, after entering information into the designated integrity and performance system about a termination, subsequently:

(i) Learns that any of that information is erroneous, the Federal awarding agency must correct the information in the system within three business days;

(ii) Obtains an update to that information that could be helpful to other Federal awarding agencies, the Federal awarding agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(3) Federal awarding agencies shall not post any information that will be made publicly available in the non-public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the non-Federal entity asserts within seven calendar days to the Federal awarding agency who posted the information that some of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, the Federal awarding agency who posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

(c) When a Federal award is terminated or partially terminated, both the Federal awarding agency or pass-through entity and the non-Federal entity remain responsible for compliance with the requirements in §§ 200.343 Closeout and 200.344 Post-closeout adjustments and continuing responsibilities.

Credits

[80 FR 43309, July 22, 2015; 80 FR 45395, July 30, 2015]

AUTHORITY: 31 U.S.C. 503

Current through April 12, 2019; 84 FR 14887.

End of Document
§ 200.344 Post-closeout adjustments and continuing responsibilities., 2 C.F.R. § 200.344

(a) The closeout of a Federal award does not affect any of the following:

(1) The right of the Federal awarding agency or pass-through entity to disallow costs and recover funds on the basis of a later audit or other review. The Federal awarding agency or pass-through entity must make any cost disallowance determination and notify the non-Federal entity within the record retention period.

(2) The obligation of the non-Federal entity to return any funds due as a result of later refunds, corrections, or other transactions including final indirect cost rate adjustments.

(3) Audit requirements in Subpart F—Audit Requirements of this part.

(4) Property management and disposition requirements in Subpart D—Post Federal Award Requirements of this part, §§ 200.310 Insurance Coverage through 200.316 Property trust relationship.

(5) Records retention as required in Subpart D—Post Federal Award Requirements of this part, §§ 200.333 Retention requirements for records through 200.337 Restrictions on public access to records.

(b) After closeout of the Federal award, a relationship created under the Federal award may be modified or ended in whole or in part with the consent of the Federal awarding agency or pass-through entity and the non-Federal entity, provided the responsibilities of the non-Federal entity referred to in paragraph (a) of this section, including those for property management as applicable, are considered and provisions made for continuing responsibilities of the non-Federal entity, as appropriate.

Credits
[79 FR 75885, Dec. 19, 2014]
AUTHORITY: 31 U.S.C. 503

Current through April 12, 2019; 84 FR 14887.
submit the Agency Response to the Congressional committees. In order to make the tight timeline, the letter will be transmitted electronically and will include a pdf of the Agency Response. The Agency Response will be posted to the USACE public website within three days of completion of the Agency Response.

(4) Type I IEPR Information in the Final Decision Document. For project studies that undergo Type I IEPR, the Final Type I IEPR Report and Agency Response will be included in an appendix to the final decision document. For project studies that are excluded from Type I IEPR, the exclusion decision and rationale will be included in the decision document for the project study.

(5) Annual Report. By 1 November each year, each MSC will provide HQUSACE, through their respective RIT, a summary of the Type I IEPRs undertaken by the MSC during the previous fiscal year. HQUSACE Planning (CECW-P) will consolidate the summaries received by the RITs and will provide the Administrator of the Office of Information and Regulatory Affairs in OMB with a consolidated summary of USACE Type I IEPRs by 15 December of each year. Annual summaries of Type I IEPRs will include:

(a) The number of Type I IEPRs conducted subject to this Circular and the authorities under which each Type I IEPR was conducted.

(b) The number of times alternative procedures were invoked.

(c) The number of times exclusions or deferrals were invoked (and in the case of deferrals, the length of time elapsed between the deferral and the Type I IEPR).

(d) Any decision to appoint a reviewer under any exception to the applicable independence or conflict of interest standards of the OMB Peer Review Bulletin, including determinations by the Secretary of Defense per Section III (3)(c) of the OMB Peer Review Bulletin.

(e) The number of Type I IEPR panels that were conducted in public and the number that allowed public comment.

(f) The number of public comments provided on each Civil Works RP.

(g) The number of peer reviewers that were recommended by professional societies.

12. Type II IEPR Safety Assurance Review (SAR).

a. A Type II IEPR (SAR) will be conducted on design and construction activities for any project where potential hazards pose a significant threat to human life (public safety). This applies to new projects and to the major repair, rehabilitation, replacement, or modification of existing facilities.
b. The requirement for Type II IEPR is based upon Section 2035 of WRDA 2007, Section 3028 of WRRDA 2014, the OMB Peer Review Bulletin, and other USACE policy considerations.

c. External panels will conduct reviews of the design and construction activities prior to the initiation of physical construction and periodically thereafter until construction activities are completed. The reviews must consider the adequacy, appropriateness, and acceptability of the design and construction activities in assuring public health, safety, and welfare.

d. The RMO for a SAR is the RMC. Panel members will be selected using the NAS policy for selecting reviewers. See Paragraph 12.m. for further discussion of panels.

e. Type II IEPRs are exempted by Section 3028 of WRRDA 2014 from the Federal Advisory Committee Act.

f. A Type II IEPR (SAR) will be conducted on design and construction activities for any project where potential hazards pose a significant threat to human life. The District Chief of Engineering, as the Engineer-In-Responsible-Charge, will assess whether the threat is significant and document that in the RP. A recommendation to not conduct a SAR will also be documented in the RP and will (like any RP recommendation) have the endorsement of the RMO prior to approval of the RP. This applies to new projects and to the major repair, rehabilitation, replacement, or modification of existing facilities. External panels will review the design and construction activities prior to initiation of physical construction and periodically thereafter until construction activities are completed. Because design is initiated in the decision document phase, the SAR is incorporated into the Type I IEPR (see Paragraph 11.d.(1)(a). This section provides guidance for reviews conducted on design and construction activities performed after the approval of a decision document. The reviews must be on a regular schedule sufficient to inform the Chief of Engineers on the adequacy, appropriateness, and acceptability of the design and construction activities for the purpose of assuring that good science, sound engineering, and public health, safety, and welfare are the most important factors that determine a project's outcome.

g. When a Type II IEPR is included in the project's approved RP, the District Chief of Engineering, as the Engineer-In-Responsible-Charge, is responsible for ensuring the Type II IEPR is conducted consistent with this Circular, and will fully coordinate with the Chief of Construction, the Chief of Operations, and the project manager through the PED and construction phases. The project manager will coordinate with the RMO to develop the review requirements and include them in the RP. The default RMO for flood risk management projects and SAR is the USACE Risk Management Center (RMC). The Type II IEPR (SAR) will be coordinated through the RMC, whether it is performed through contract acquisition or by another government agency. If the RMC and MSC agree that a SAR does not need to be conducted, the MSC may assume RMO responsibilities for the implementation phase. Any such a transfer of
responsibility should be mutually agreed upon and mindful of all the remaining phases of the project.

h. Risk-Informed Decision. For any design and construction activities that are justified by life safety or for which the failure of the project would pose a significant threat to human life a Type II IEPR (SAR) is required. A recommendation for an exclusion from this requirement must be documented in the RP with a thorough discussion of why there are no potential failure modes for the project that would pose a significant threat to human life. A project is determined to have a “significant threat to human life” if at any time during the construction or operation, failure could result in a substantial life safety concern. The consequences of failure and the population at risk are paramount for the SAR determination. Existing risk information, including risk assessments, should be used to facilitate and inform this determination.

1. The following are examples where a SAR should be seriously considered if a significant life safety risk is identified:

(a) Major rehabilitation of a deficiency for a hurricane and storm damage risk reduction or flood risk management project for a densely populated area.

(b) Modifications to the line of flood risk reduction.

(c) Modifications that could introduce new failure modes or lead to progression of existing failure modes that could result in the potential for loss of life.

2. In the case of a coastal storm risk management project, the expected impact of project-feature failures on loss of life must be assessed to make the SAR determination. This criteria is not all-inclusive; reasonable conclusions need to be drawn and each project requires an assessment by the District Chief of Engineering.

3. Decisions concerning what is “significant” loss of life cannot be reduced to a simple number; it is a combination of the consequences and the likelihood of failure. Not all projects or modifications to projects rise to the level of concern that the Chief of Engineers would determine the project would benefit from a SAR. Appropriate USACE risk assessments for the project previously performed should be utilized in this determination. For comparison, the following situations that might pose significant threat to human life provide contrasting examples—one that typically would and one that typically would not be determined to pose such risk. Note that these are only examples and an individual assessment of whether a SAR is needed must be made for each item of work.

(a) A new dam above a community would require a SAR. However, if the offices within an existing dam are being renovated and the work will not affect the dam operation, that project would not require a SAR.
(b) A levee section being replaced next to an adjacent residential area would require a SAR. However, an agricultural levee being raised a few inches to account for settlement would not require a SAR.

(c) A new set of spillway gates for a high hazard potential dam would require a SAR. However, if a single gate out of six gates for an intake structure is being replaced in-kind and results of its failure would be contained within the downstream safe channel capacity, the project would not require a SAR.

(d) A new hydro-electric generator unit replacing an existing unit for a high-lift navigation dam would require a SAR. However, if a new miter gate is being replaced on a low-lift navigation lock where failure of the gate would not cause flooding to exceed the flood stage, the project would not require a SAR.

(e) A new Water Control Manual (WCM) that was put in place due to a water reallocation reducing flood control storage would require a SAR because it introduces new failure modes. However, a minor modification to the WCM not involving concern for life safety would not require a SAR.

(f) A new coastal protection system including berms for a community would require a SAR. However, a beach re-nourishment project that does not affect life safety does not require a SAR.

(g) Repairs for a slide on a dam crest (for a dam with a potential for life loss) being that are performed with emergency funding when there is time to wait until the low-flow season to make the correction will require a SAR. However, where time is of the essence to save the dam, a SAR is not required, allowing for maximum expediency.

(h) A temporary cofferdam that will serve part of the levee alignment for a levee with potential for life loss would require a SAR. However, a temporary cofferdam for which breach would not pose a life safety risk (albeit the workers inside are vulnerable) does not rise to the level that SAR is required.

(i) For a new U-framed flood relief channel that is built in a congested city that has steep flow gradients and is designed with super-critical flows to lessen impact on available real estate, would require a SAR since failure of the wall could cause blockage and flood the city. However, a new concrete lined flood relief channel that is built below grade with a gentle flow gradient would not require a SAR.

(j) For a 33 USC 408 (Section 408) request to place new utilities across the toe of a dam and across the spillway, such that these modifications introduce new failure modes, a SAR will be required. However, if the Section 408 requester is building a hydropower project on a low-head navigation project, it would not require a SAR.

i. Other factors to consider for deciding whether to conduct a Type II review of a project or project components are:
(1) The project involves the use of innovative materials or techniques and the engineering is based on novel methods, presents complex challenges for interpretations, contains precedent-setting methods or models, or presents conclusions that are likely to change prevailing practices.

(2) The project design requires redundancy, resiliency, and robustness.

(a) Redundancy is the duplication of critical components of a system with the intention of increasing reliability of the system, usually in the case of a backup or fail-safe.

(b) Resiliency. Resiliency is the ability to avoid, minimize, withstand, and recover from the effects of adversity, whether natural or manmade, under all circumstances of use.

(c) Robustness. Robustness is the ability of a system to continue to operate correctly across a wide range of operational conditions (the wider the range of conditions, the more robust the system), with minimal damage, alteration, or loss of functionality; and to fail gracefully outside of that range.

(3) The project has unique construction sequencing or a reduced or overlapping design construction schedule; for example, significant project features accomplished using the Design-Build or Early Contractor Involvement delivery systems.

j. RPs. As detailed in Paragraph 7, the RP will include the reason for a SAR or an explanation as to why a SAR is not required. The MSC Commander’s approval of the RP is required to assure that the plan is in compliance with the principles of this guidance and the MSC’s Quality Management Plan and that all elements of the command have agreed to the review approach. The RP must define the appropriate level of review.

k. Timing of Reviews. At a minimum, the SAR team will perform reviews and site visits consistent with milestones identified in the RP. Milestones to consider for a SAR are at the midpoint and final design in the Design Documentation Report; at the completion of the plans, specifications, and cost estimate; at the midpoint of construction for a particular contract, prior to final inspection, or at any critical design or construction decision milestones. The SAR panel may recommend to the RMO additional or alternate milestones. The MSC should approve these recommendations when they are warranted and reasonable. The SAR is an extension (not a replacement) of the ATR requirements outlined in ER 1110-1-12, Quality Management (or successor document); however, the intent of the SAR is to complement the ATR and to avoid impacts to program schedules and cost. The SAR is a strategic level review and reasonable effort should be made to avoid having the SAR duplicate the ATR.
1. Guidelines for Developing the Scope of Work or "Charge".

   (1) The SAR review will cover the design and construction phase of the project as outlined below. Reference Paragraph 11.g.(5) for guidelines for developing the "Charge".

   (2) The RP should establish a milestone schedule aligned with critical features of the project design and construction. The SAR should complement the ATR and focus on unique features and changes from the assumptions made and conditions that formed the basis for the design during the decision document phase.

   (3) SAR panels should be able to evaluate whether the interpretations of analysis and conclusions based on analysis are reasonable. In terms of both usefulness of results and credibility, review panels should be given the flexibility to bring important issues to the attention of decision makers. However, review panels should be instructed to not make a recommendation on whether a particular alternative should be implemented, as the Chief of Engineers is ultimately responsible for the final decision. External panels may, however, offer their opinions as to whether there are sufficient analyses upon which to base a recommendation. All SARs should have these basic Charge questions:

   (a) Are there any critical design considerations missing?

   (b) Is the overall direction of the project appropriate?

   (c) Is there anything the panel would like USACE to consider?

   (4) Decision Phase. For the decision document phase, the review requirements are defined in Paragraph 11 in the Type I IEPR.

   (5) Design or PED Phase. For the design or PED phase, at a minimum the SAR will address the following questions:

   (a) Do the assumptions made in the decision document phase for hazards remain valid through the completion of design as more knowledge is gained and the state-of-the-art evolves?

   (b) Do the project features and/or components effectively work as a system?

   (c) Is the QC/QA effort appropriate?

   (d) For those unique projects authorized and appropriated or approved without a decision document and in the PED or design phase, the SAR will address the review requirements defined in Paragraph 11 in the Type I IEPR.
(6) For the construction phase, at a minimum the SAR will address the following questions:

(a) Do the assumptions made during design remain valid through construction as additional knowledge is gained and the state of the art evolves?

(b) For O&M manuals, will requirements listed in the manual adequately maintain the conditions assumed during design and validated during construction; and will the project monitoring adequately reveal any deviations from assumptions made for performance?

m. Requirements for Establishing Type II IEPR Panels.

(1) RMO Responsibilities.

(a) The RMO is responsible for establishing panels consistent with this Circular.

(b) The RMO will define the required competencies for each of the panel members, insuring a balance of perspectives, and may specify a particular expertise as the team lead. The RMO can recommend candidates for consideration.

(2) Review teams can be led by and composed of other government employees (non-USACE).

(3) Review teams can be led by and composed of contractors.

(a) A contractor can be used to carry out these panels, including selecting members for the Type II IEPR panel. Unlike Type I IEPRs, competition for Type II IEPR contractors may not be limited to OEOs. The solicitation for such a contract should include the minimum professional requirements for panel members, but should not be so narrowly written that only specific persons may be selected.

(b) Due to potential organizational conflicts of interest and the potential for contractors to have access to other contractors' information, contracting officers must be particularly aware of potential conflicts of interest and avoid or mitigate them according to Federal Acquisition Regulations Part 9 when procuring Type II IEPR panel services. Solicitations must include nondisclosure agreements and language analogous to that found in the Army Source Selection Supplement (AS3) for contractors who assist in evaluations of proposals to ensure that contractor information is protected from disclosure by reviewing contractors. If an existing contract is considered for use, the Contracting Officer must determine that this work would be in scope of the contract scope and determine, if non-disclosure agreements and organizational conflict of interest language is not included in the contract, whether they could be added to the contract as an in-scope modification before the existing contract may be used for a Type II IEPR panel.

(4) Guidance for the contractor (or USACE) for establishing review teams.
(a) If the panel meetings will be closed to the public, then the contractor should establish a process for members of the public to apply for membership on the panel. The contractor, however, is not under any obligation to select any of these public applicants.

(b) The RMO and other USACE officials may approve the panel members selected by the contractor, but should not participate in the vetting or selection of members. Moreover, USACE officials should not veto or disapprove of a selected panel member unless the selected panel member does not meet the objective criteria for panel members provided to the contractor.

(c) The contractor will be required in the solicitation and instructions to apply the National Academy of Sciences policy for selecting reviewers to ensure the panel members have no conflict of interest with the project being reviewed. The following website provides academy guidance for assessing composition and the appropriate forms for prospective panel members in General Scientific and Technical Studies: http://www.nationalacademies.org/coi/index.html. The contractor will also develop criteria for determining if review panels are properly balanced, as defined by criteria in the contract, both in terms of professional expertise as well as in points of view on the study or project at hand. If necessary, the contractor will remove and replace panel members during a review if a conflict arises.

(d) In developing a solicitation package for Type II IEPR services, the District should consider the following from Review Procedures for Water Resources Project Planning (NRC et al. 2002). All potential reviewers carry professional and personal biases, and it is important that these biases be disclosed when reviewers are considered and selected. The contractor leading the review will determine which biases, if any, will disqualify prospective reviewers. It should also develop criteria for determining if review panels are properly balanced, both in terms of professional expertise as well as in points of view on the study or project at hand. There is also a challenge of selecting review panels that are viewed as credible and balanced, but that also have adequate knowledge of USACE’s often highly complex guidance and analytical methods. The most important considerations in selecting reviewers are the credentials of the reviewers (which include affiliations as well as expertise) and the absence of conflict of interest. Note that WRDA 2007 requires the panel members to be “distinguished experts in engineering, hydrology, or other appropriate disciplines.”

(e) The contractor will be responsible for adjusting the panel membership to maintain the skill set necessary as the project progresses and the need for different expertise arises.

(f) USACE officials may attend panel meetings, but may not participate in the management or control of the group; USACE cannot be a voting member of the group, may not direct activities at the meetings, and may not develop the agenda for the meetings.

(g) USACE officials must refrain from participating in the development of any reports or final work product of the group.
(h) The peer review panel can take the form of a panel of consultants, but the members are limited to reviewing and commenting on the work being done by others. The peer review work can be concurrent with ongoing work, be interactive as needed, and provide real-time over-the-shoulder input. Timely input on the appropriateness of hazard analyses, models and methods of analysis used, and the assumptions made is critical to maintaining project schedules.

(i) At a minimum, one member is required, but the number of panel members will be appropriate for the risk, size, and complexity of the project. Composition of the panel can change depending on the need of the particular phase of review.

(j) Reviewers' Compensation. Type II IEPR Reviewers will be paid labor and any necessary travel and per diem expenses according to their contract with the RMO, NAS, or OEO.

n. Panel Responsibilities. The panel of experts established for a review for a project will do all the following.

(1) Conduct the review for the subject project in a timely manner, according to the schedule.

(2) Follow the “Charge,” but when deemed appropriate by the team lead, request other products relevant to the project and the purpose of the review.

(3) Receive from USACE and consider any public written and oral comments provided on the project.

(4) Provide timely written and oral comments throughout the development of the project, as requested.

(5) Assure the review avoids replicating an ATR and focuses on the questions in the “Charge,” but the SAR panel can recommend to the RMO additional or alternate questions for consideration.

(6) Offer any lessons learned to improve the planning or design, or the review process.

(7) Submit reports consistent with the RP milestones.

(8) The team panel lead will be responsible for ensuring that all review panel comments entered into the report as team comments represent the group, are non-attributable to individuals and, when there is lack of consensus, note the nature of non-concurrence and reasons for it.

o. Record of Review. The review team will prepare a review report. A suggested report outline is: an introduction; the composition of the review team; a summary of the review during design; a summary of the review during construction; any lessons learned in both the process and/or design and construction; and appendices for conflict of disclosure forms, comments to
include any appendices for supporting analyses, and assessments of the adequacy and acceptability of the methods, models, and analyses used. All comments in the report will be finalized by the panel prior to their release to USACE for each RP milestone.

p. District Responsibilities to Complete the SAR Report.

(1) The home district Chief of Engineering is responsible for coordinating with the RMO, attending review meetings with the SAR review panel, communicating with the agency or contractor selecting the panel members, and coordinating the approval of the final report with the MSC Chief of Business Technical Division.

(2) After receiving a report on a project from the peer review panel, the district Chief of Engineering, with full coordination with the district Chiefs of Construction and Operations, will consider all comments contained in the report and prepare a written response for all comments and note concurrence and subsequent action or non-concurrence with an explanation. The district Chief of Engineering will submit each panel’s report and the district’s responses to the RMO and MSC Chief of Business Technical Division for their review and concurrence. However, only the final phase panel report is presented to the MSC Commander for approval. After MSC Commander approval, the final report and responses will be made available to the public on the district’s website within 60 days of the district receiving the report.

13. Special Cases.

a. Non-Federal Activities. Special cases exist where non-Federal interests undertake the study, design or construction of a USACE authorized project or a modification to an existing USACE project. Authorities for such actions include, but are not limited to, 33 USC 408, Sections 203 and 204 of WRDA 1986, Section 206 of WRDA 1992, and Section 211 of WRDA 1996. All non-Federal activities must meet current USACE design and construction standards.

(1) The district will review these activities to define the review requirements as outlined in this Circular in order to obtain USACE approval for the non-Federal activity.

(a) For alterations to existing USACE projects per 33 USC 408, see EC 1165-2-216 (or latest guidance) for review requirements.

(b) For other non-Federal activities that do not have specific guidance for review requirements, the home district should evaluate the activity, the authority for which the activity is authorized, and any USACE decision requirements to determine the appropriate review requirements. The resulting RP will be developed by the home district and approved by the home MSC Commander. When a non-Federal interest undertakes a study, design, or implementation of a Federal project, or requests permission to alter a Federal project, the non-Federal interest is required to undertake, at its own expense, any IEPR that the Government determines would have been required if the Government were doing the work. The district Chief
SUBJECT: Nondiscrimination in Federally Assisted Programs


1. PURPOSE

The purpose of this Directive is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from any component of the Department of Defense.

2. DEFINITIONS

2.1. Component means the Office of the Secretary of a Military Department or a Defense Agency.

2.2. Responsible Department official means the Secretary of Defense or other official of the Department of Defense or component thereof who by law or by delegation has the principal responsibility within the Department or component, for the administration of the law extending such assistance.

2.3. The term United States means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

2.4. The term Federal financial assistance includes:
2.4.1. Grants and loans of Federal funds;
2.4.2. The grant or donation of Federal property and interests in property;
2.4.3. The detail of Federal personnel;
2.4.4. The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and
2.4.5. Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

2.5. The term program includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals, or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions that must be met in order to receive the Federal financial assistance and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

2.6. The term facility includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

2.7. The term recipient means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

2.8. The term primary recipient means any recipient who is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

2.9. The term applicant means one who submits an application, request, or plan required to be approved by a responsible Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request or plan.
3. APPLICABILITY

This Directive applies to any program for which Federal financial assistance is authorized under a law administered by any component of the Department of Defense, including the Federally assisted programs and activities listed in enclosure 1 of this Directive. This Directive applies to money paid, property transferred, or other Federal financial assistance extended under any such program after January 7, 1965 pursuant to an application approved prior to such date. This Directive does not apply to:

3.1. Any Federal financial assistance by way of insurance guaranty contracts;

3.2. Money paid, property transferred, or other assistance extended under any such program, before January 7, 1965;

3.3. Any assistance to any individual who is the ultimate beneficiary under any such program; or

3.4. Any employment practice, under any such program, of any employer, employment agency, or labor organization, except as noted in subparagraph 4.2.5., below. The fact that a program or activity is not listed in enclosure 1 shall not mean, if Title VI of the Act is otherwise applicable, that such program is not covered. Other programs under statutes now in force or hereinafter enacted may be added to this list by notice published in the Federal Register.

4. POLICY

4.1. General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this Directive applies.

4.2. Specific Discriminatory Actions Prohibited

4.2.1. A recipient under any program to which this Directive applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

4.2.1.1. Deny an individual any service, financial aid, or other benefit provided under the program;

4.2.1.2. Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

4.2.1.3. In determining the site or location of facilities, make selections with the purpose of excluding individuals from, denying them the benefits of, or subjecting them to discrimination.
discrimination under any program to which this Directive applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this Directive;

4.2.1.4. Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

4.2.1.5. Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

4.2.1.6. Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition that individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

4.2.1.7. Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program.

4.2.1.8. Deny a person the opportunity to participate as a member of a planning or advisory body that is an integral part of the program.

4.2.2. A recipient, in determining the types of services, financial aid, or other benefits, or facilities that will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

4.2.3. As used in this section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

4.2.4.

4.2.4.1. In administering a program regarding that the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
4.2.4.2. Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions that resulted in limiting participation by persons of a particular race, color, or national origin.

4.2.5. Where a primary objective of the Federal financial assistance is not to provide employment, but nevertheless discrimination on the grounds of race, color or national origin in the employment practices of the recipient or other persons subject to this Directive tends, on the grounds of race, color or national origin of the intended beneficiaries, to exclude intended beneficiaries from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this Directive applies, the recipient or other persons subject to this Directive are prohibited from (directly or through contractual or other arrangements) subjecting an individual to discrimination on the grounds of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising; employment, layoff or termination; upgrading, demotion or transfer; rates of pay or other forms of compensation; and use of facilities), to the extent necessary to ensure equality of opportunity to, and nondiscriminatory treatment of the beneficiaries. Any action taken by a DoD Component pursuant to this provision with respect to a State or local agency subject to the Standards for a Merit System of Personnel Administration, 45 C.F.R. 70, shall be consistent with those standards and shall be coordinated with the United States Civil Service Commission.

4.2.6. The enumeration of specific forms of prohibited discrimination, in this paragraph does not limit the generality of the prohibition in paragraph 4.1. of this section.

5. RESPONSIBILITIES

5.1. The Assistant Secretary of Defense (Manpower and Reserve Affairs) shall be responsible for ensuring that the policies of this Directive are effectuated throughout the Department of Defense. He may review from time to time as he deems necessary the implementation of these policies by the components of the Department of Defense.

5.2. The Secretary of each Military Department is responsible for implementing this Directive with respect to programs and activities receiving financial assistance from his Military Department; and the Assistant Secretary of Defense (Manpower and Reserve Affairs) is responsible for similarly implementing this Directive with respect to all other components of the Department of Defense. Each may designate official(s) to fulfill this responsibility in accordance with paragraph 2.2. of this Directive.

5.3. The Assistant Secretary of Defense (Manpower and Reserve Affairs) or, after consultation with the Assistant Secretary of Defense (Manpower and Reserve Affairs), the Secretary of each Military Department or other responsible Department official designated by the Assistant Secretary of Defense (Manpower and Reserve Affairs) may assign to officials of other Departments or Agencies of the Government, with the consent of such Departments or Agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this
Directive (other than responsibility for final decision as provided in section 11.), including the achievement of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this Directive to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action had been taken by the responsible official of this Agency.

6. ASSURANCES REQUIRED

6.1. General

6.1.1. Every application for Federal financial assistance to carry out a program to which this Directive applies, except a program to which paragraph 6.2. applies and every application for Federal financial assistance to provide a facility shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this Directive.

6.1.2. In the case where the Federal financial assistance is to provide or is in the form of personal property, or real property or interest therein or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services and benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. In any case in which Federal financial assistance is extended without an application having been made, such extension shall be subject to the same assurances as if an application had been made. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions that give the United States a right to seek its judicial enforcement.

6.1.3. In the case of real property, structures or improvements thereon, or interests therein, which was acquired through a program of Federal financial assistance, or in the case where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government, the instrument effecting or recording the transfer, shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. Where no transfer of property is involved, but property is improved under a program of Federal financial assistance, the recipient shall agree to include such a covenant in any subsequent transfer of such property.
Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the program under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective. In programs receiving Federal financial assistance in the form, or for the acquisition of real property or an interest in real property, to the extent that rights to space on, over, or under any such property are included as part of the program receiving such assistance, the nondiscrimination requirements of this Directive shall extend to any facility located wholly or in part in such space.

6.1.4. The assurance required in the case of a transfer of surplus personal property shall be inserted in a written agreement by and between the Department of Defense component concerned and the recipient.

6.2. Continuing State Programs. Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this Directive applies shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application:

6.2.1. Contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this Directive; and

6.2.2. Provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this Directive. In cases of continuing State programs in which applications are not made, the extension of Federal financial assistance shall be subject to the same conditions under this paragraph as if applications had been made.

6.3. Assurances from Institutions

6.3.1. In the case of Federal financial assistance to an institution of higher education, the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

6.3.2. The assurance required with respect to an institution of higher education, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students of the institution or to the opportunity to
participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

6.4. Elementary and Secondary Schools. The requirement of paragraph 6.1., 6.2., or 6.3., above, with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system:

6.4.1. Is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order; or

6.4.2. Submits a plan for the desegregation of such school or school system that the responsible official of the Department of Health, Education and Welfare determines is adequate to accomplish the purposes of the Act and this Directive, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the said Department officer may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purpose of the Act or this Directive within the earliest practicable time. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of said order.

7. COMPLIANCE INFORMATION

7.1. Cooperation and Assistance. Each responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this Directive and shall provide assistance and guidance to recipients to help them comply voluntarily with this Directive.

7.2. Compliance Reports. Each recipient shall keep such records and submit to the responsible Department official timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this Directive. In general, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit
such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations imposed pursuant to this Directive.

7.3. **Access to Sources of Information.** Each recipient shall permit access by the responsible Department official during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this Directive. Where any information required of a recipient is in the exclusive possession of any other institution or person and this institution or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

7.4. **Information to Beneficiaries and Participants.** Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this Directive and its applicability to the program under which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this Directive.

8. **CONDUCT OF INVESTIGATIONS**

8.1. **Periodic Compliance Reviews.** The responsible Department official or his designee(s) shall from time to time review the practices of recipients to determine whether they are complying with this Directive.

8.2. **Complaints.** Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this Directive may by himself or by a representative file with the responsible Department official a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official.

8.3. **Investigations.** The responsible Department official will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this Directive. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this Directive occurred, and other factors relevant to a determination of whether the recipient has failed to comply with this Directive.

8.4. **Resolution of Matters**

8.4.1. If an investigation pursuant to paragraph 8.3. indicates a failure to comply with this Directive, the responsible Department official will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided in section 9. of this Directive.

TAB I
8.4.2. If an investigation does not warrant action pursuant to subparagraph 8.4.1., the responsible Department official will so inform the recipient and the complainant, if any, in writing.

8.5. Intimidatory or Retaliatory Acts Prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this Directive, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Directive. The identity of complainants shall not be disclosed except when necessary to carry out the purposes of this Directive, including the conduct of any investigation, hearing or judicial proceeding arising thereunder.

9. PROCEDURE FOR EFFECTING COMPLIANCE

9.1. General. If there appears to be a failure or threatened failure to comply with this Directive, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this Directive may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law as determined by the responsible Department official. Such other means may include, but are not limited to:

9.1.1. A reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking; and

9.1.2. Any applicable proceedings under State or local law.

9.2. Noncompliance with Section 6. If an applicant fails or refuses to furnish an assurance required under section 6, or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph 9.3. of this section. The component of the Department of Defense concerned shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the component shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefore approved prior to the effective date of this Directive.

9.3. Termination of or Refusal to Grant or to Continue Federal Financial Assistance. Except as provided in paragraph 9.2, no order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until:

9.3.1. The responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means;
9.3.2. There has been an express finding, after opportunity for a hearing (as provided in section 10 of this Directive), of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this Directive;

9.3.3. The action has been approved by the Secretary of Defense pursuant to section 11 of this Directive; and

9.3.4. The expiration of 30 days after the Secretary of Defense has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

9.4. Other Means Authorized by Law. No action to affect compliance by any other means authorized by law shall be taken until:

9.4.1. The responsible Department official has determined that compliance cannot be secured by voluntary means;

9.4.2. The action has been approved by the Assistant Secretary of Defense (Manpower and Reserve Affairs);

9.4.3. The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

9.4.4. The expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with this Directive and to take such corrective action as may be appropriate.

10. HEARINGS

10.1. Opportunity for Hearing. Whenever an opportunity for a hearing is required by section 9 of this Directive, reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either:

10.1.1. Fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing; or
10.1.2. Advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be notified of the time and place of hearing. An applicant or recipient may waive a hearing and submit written information and argument. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under Section 602 of the Act and paragraph 9.3. of this Directive and consent to the making of a decision on the basis of such information as is available.

10.2. Time and Place of Hearing. Hearings shall be held at the offices of the responsible component of the Department of Defense in Washington, DC at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the component requires that another place be selected. Hearings shall be held before the responsible Department official or, at his discretion, before a hearing examiner designated by him.

10.3. Hearing Examiner. The examiner shall be a field grade officer or civilian employee above the grade of GS-12 (or the equivalent) who shall be a person admitted to practice law before a Federal court or the highest court of a State.

10.4. Right to Counsel. In all proceedings under this section, the applicant or recipient and the responsible component of the Department shall have the right to be represented by counsel.

10.5. Procedures

10.5.1. The recipient shall receive an open hearing at which he or his counsel may examine any witnesses present. Both the responsible Department official and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

10.5.2. Technical rules of evidence shall not apply to hearings conducted pursuant to this Directive, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

10.6. Consolidated or Joint Hearings. In cases in which the same or related facts are asserted to constitute noncompliance with this Directive with respect to two or more programs to which this Directive applies, or noncompliance with this Directive and the regulations of one or more other Federal Departments or Agencies issued under Title VI of the Act, the Assistant
Secretary of Defense (Manpower and Reserve Affairs), the Secretary of a Military Department, or other responsible Department official designated by the Assistant Secretary of Defense (Manpower and Reserve Affairs) after consultation with the Assistant Secretary of Defense (Manpower and Reserve Affairs) may, by agreement with such other Departments or Agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of appropriate procedures not inconsistent with this Directive. Final decisions in such cases, insofar as this Directive is concerned, shall be made in accordance with section 11.

11. DECISIONS AND NOTICES

11.1. Decision by Person Other Than the Responsible Department Official. If the hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the responsible Department official for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient. Where the initial decision is made by the hearing examiner the applicant or recipient may within 30 days of the mailing of such notice of initial decision file with the responsible Department official his exceptions to the initial decision, with his reasons therefor. In the absence of exceptions, the responsible Department official may on his own motion within 45 days after the initial decision serve on the applicant or recipient a notice that he will review the decision. Upon the filing of such exceptions or of such notice of review the responsible Department official shall review the initial decision and issue his own decision thereon including the reasons therefore. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the responsible Department official.

11.2. Decisions on Record or Review by the Responsible Department Official. Whenever a record is certified to the responsible Department official for decision or he reviews the decision of a hearing examiner pursuant to paragraph 11.1. or whenever the responsible Department official conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with him briefs or other written statements of its contentions, and a copy of the final decision of the responsible Department official shall be given in writing to the applicant or recipient and to the complainant, if any.

11.3. Decisions on Record Where a Hearing is Waived. Whenever a hearing is waived pursuant to paragraph 10.1., a decision shall be made by the responsible Department official on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

11.4. Rulings Required. Each decision of a hearing officer or responsible Department official shall set forth his ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this Directive with which it is found that the applicant or recipient has failed to comply.
11.5. Approval by the Secretary of Defense. Any final decision of a responsible
Department official which provides for the suspension or termination of, or the refusal to grant or
continue Federal financial assistance, or the imposition of any other sanction available under this
Directive or the Act, shall promptly be transmitted to the Secretary of Defense, who may
approve such decision, may vacate it, or remit or mitigate any sanction imposed.

11.6. Contents of Orders. The final decision may provide for suspension or termination of,
or refusal to grant or continue Federal financial assistance, in whole or in part, under the program
involved, and may contain such terms, conditions, and other provisions as are consistent with
and will effectuate the purposes of the Act and this Directive, including provisions designed to
assure that no Federal financial assistance will thereafter be extended under such program to the
applicant or recipient determined by such decision to be in default in its performance of an
assurance given by it pursuant to this Directive, or to have otherwise failed to comply with this
Directive, unless and until it corrects its noncompliance and satisfies the responsible Department
official that it will fully comply with this Directive.

11.7. Post-termination Proceedings

11.7.1. An applicant or recipient adversely affected by an order issued under
paragraph 11.6. shall be restored to full eligibility to receive Federal financial assistance if it
satisfies the terms and conditions of that order for such eligibility or it brings itself into
compliance with this Directive and provides reasonable assurance that it will fully comply with
this Directive.

11.7.2. Any applicant or recipient adversely affected by an order entered pursuant to
paragraph 11.6., above, may at any time request the responsible Department official to restore
fully its eligibility to receive Federal financial assistance. Any such request shall be supported
by information showing that the applicant or recipient has met the requirements of subparagraph
11.7.1., above. If the responsible Department official determines that those requirements have
been satisfied, he shall restore such eligibility.

11.7.3. If the responsible Department official denies any such request, the applicant or
recipient may submit a request for a hearing in writing, specifying why it believes such official
to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the
record, in accordance with rules of procedure issued by the responsible Department official. The
applicant or recipient will be restored to such eligibility if it proves at such a hearing that it
satisfied the requirements of subparagraph 11.7.1., above. While proceedings under this
paragraph are pending, the sanctions imposed by the order issued under paragraph 11.6. shall
remain in effect.

12. JUDICIAL REVIEW

Action taken pursuant to Section 602 of the Act is subject to judicial review as provided in
Section 603 of the Act.
13. **EFFECT ON OTHER ISSUANCES**

13.1. All issuances heretofore issued by any officer of the Department of Defense or its components that impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this Directive applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of such assistance under such program for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this Directive, except that nothing in this Directive shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this Directive.

13.2. Nothing in this Directive, however, shall be deemed to supersede any of the following (including future amendments thereof):

13.2.1. Executive Orders 10925, 11114, and 11246 and issuances thereunder;

13.2.2. The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health, Education and Welfare, and of Labor, 28 F.R. 734; or

13.2.3. Executive Order 11063 and issuances thereunder, or any other issuances, insofar as such Order or issuances prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this Directive is inapplicable, or prohibit discrimination on any other ground.

14. **IMPLEMENTATION**

The Secretary of each Military Department shall submit regulations implementing this Directive to the Assistant Secretary of Defense (Manpower and Reserve Affairs).

15. **SUMMARY OF CHANGE 1.**

The changes to this issuance are administrative and update organizational titles and references for accuracy.
16. EFFECTIVE DATE AND CANCELLATION

This Directive shall become effective on the 30th day following the date of its publication in the Federal Register. DoD Directive 5500.11, December 28, 1964 is superseded and canceled.

Deputy Secretary of Defense

Enclosures - 1
E1. Federal Financial Assistance to Which This Directive Applies
E1. ENCLOSURE 1

FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS DIRECTIVE APPLIES

E1.1. The Army and Air National Guard (Title 32, United States Code).

E1.1.2. Various programs involving loan or other disposition of surplus property (various
general and specialized statutory provisions including: 40 United States Code 483, 484, 512; 49
United States Code 1101-1119; 10 United States Code 2541, 2542, 2543, 2572, 2662, 7308,
7541, 7542, 7545, 7546, 7547).

E1.1.3. National Program for Promotion of Rifle Practice (10 United States Code 4307 and
annual Department of Defense Appropriation Act).


E1.1.5. Office of Civil Defense assistance to programs of adult education in civil defense
subjects (50 United States Code App. 2281(e), (f)).

E1.1.6. Office of Civil Defense radiological instruments grants (50 United States Code
App. 2281(h)).

E1.1.7. Office of Civil Defense program (with Public Health Service) for development of
instructional materials on medical self-help (50 United States Code App. 2281(e), (f)).

E1.1.8. Office of Civil Defense university extension programs for civil defense instructor
training (50 United States Code App. 2281(e)).

E1.1.9. Office of Civil Defense programs for survival supplies and equipment, survival
training, emergency operating center construction, and personnel and administrative expenses
(50 United States Code App. 2281(i), 2285).

E1.1.10. Office of Civil Defense Shelter Provisioning Program (50 United States Code
App. 2281(h)).

E1.1.11. Office of Civil Defense assistance to students attending Office of Civil Defense
schools (50 United States Code App. 2281(e)).

E1.1.12. Office of Civil Defense loans of equipment or materials from OCD stockpiles for
civil defense, including local disaster purposes (50 United States Code App. 2281).

E1.1.13. Navy Science Cruiser Program (Sec Nav Instruction 5720. 19A).

TAB I

17 ENCLOSED 1

E1.1.15. Research grants made under the authority of Public Law 85-934 (42 U.S.C. 1892).

E1.1.16. Contracts with nonprofit institutions of higher education or with nonprofit organizations whose primary purpose is the conduct of scientific research, wherein title to equipment purchased with funds under such contracts may be vested in such institutions or organizations under the authority of Public Law 85-934 (42 U.S.C. 1891).

E1.1.17. Army Corps of Engineers participation in cooperative investigations and studies concerning erosion of shores of coastal and lake waters (33 United States Code 426).

E1.1.18. Army Corps of Engineers assistance in the construction of works for the restoration and protection of shores and beaches (33 United States Code 426 e-h).


E1.1.20. Payment to States of proceeds of lands acquired by the United States for flood control, navigation, and allied purposes (33 United States Code 701-c-3).

E1.1.21. Grants of easements without consideration, or at a nominal or reduced consideration, on lands under the control of the Department of the Army at water resource development projects. (33 United States Code 558c and 702 d-1; 10 United States Code 2668 and 2669; 43 United States Code 961; 40 United States Code 319).


E1.1.23. Emergency bank protection works constructed by the Army Corps of Engineers for protection of highways, bridge approaches, and public works (33 United States Code 701t).


Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army
SUMMARY of CHANGE

AR 600-7
Nondiscrimination on the Basis
of Handicap in Programs and
Activities Assisted or Conducted
by the Department of the Army

This is a transitional reprint of this publication which places it in the new UPDATE format. Any previously published permanent numbered changes have been incorporated into the text.
Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army

This UPDATE issue is a reprint of the original form of this regulation that was published on 15 November 1983. Since that time, no changes have been issued to amend the original.

Summary. This regulation implements DOD Directive 1020.1. It defines policies and procedures for implementing the Army's nondiscrimination programs and their command responsibilities; it also covers complaint, findings, compliance sanctions, and hearings involved in discriminatory practices.

Applicability.

a. This regulation applies to active Army and US Army Reserve units that are disbursing Federal financial assistance to, and conducting, programs and activities that affect handicapped persons in the United States and that are covered by this regulation.

b. This regulation also applies to recipients of Federal financial assistance disbursed by DA and to programs and activities that receive or benefit from this assistance, insofar as these recipients, programs, or activities affect handicapped persons in the United States.

c. This regulation does not apply to the Army National Guard.

Impact on New Manning System. This regulation does not contain information that affects the New Manning System.

Supplementation. Supplementation of this regulation is prohibited unless prior approval is obtained from ASA(MRA), SAMR, WASH DC 20310.

Interim changes. Interim changes to this regulation are not official unless they are authenticated by The Adjutant General. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. The propo nent agency of this regulation is the office of the Assistant Secretary of the Army (Manpower and Reserve Affairs). Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to HQDA (SAMR-SFREA), WASH DC 20310.

Distribution. To be distributed in accordance with Special List.

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Glossary
Chapter 1
Introduction

Section I
General

1-1. Purpose
This regulation prescribes policy and procedures for prohibiting discrimination based on handicap in Department of the Army (DA) programs and activities that are—

a. Receiving Federal financial assistance disbursed by DA.

b. Conducted by DA.

1-2. References
a. Required publications are listed below.


(2) DODD 1020.1 (Non-discrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense). Cited in the summary statement.


(4) Manual EM 1110-1-103 (Office of the Chief of Engineers) (Design for the Physically Handicapped). Cited in paragraphs 3-2a(1) to 3-3, and 10-1. This publication is available from the Office of the Chief of Engineers Publications Depot, 890 South Picket St., ALEX VA 22304; (703) 274-7771.

(5) AR 600-23 (Non-discrimination in Federally Assisted Programs). Cited in paragraph 6-1b.

b. Related publications are listed below.

(A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.)

(1) DODI 5000.22 (Guide to Estimating Reporting Costs).


1-3. Explanation of abbreviations and terms
Abbreviations and special terms used in this regulation are explained in the glossary.

1-4. Policy
The Army’s policy is that no qualified handicapped person will be subjected to discrimination on the basis of handicap in any program or activity that receives or benefits from Federal financial assistance disbursed by DA. (Guidelines for determining actions that discriminate against handicapped persons in the United States are discussed in chap 2, sec II.)

Section II
Responsibilities

1-5. Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA(M&RA))

The ASA(M&RA) or designee has overall DA responsibility to monitor compliance with this regulation. The ASA(M&RA) or designee will—

a. Coordinate efforts Army-wide to enforce provisions of this regulation.

b. Assist in developing standards and procedures set forth in chapter 2, section 1, and chapters 4 and 5.

c. Assist in Army-wide efforts in implementing this regulation.

1-6. Deputy for Civilian Personnel Policy and Equal Opportunity (DCPPE&EO), Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs)

The DCCPPE&EO will—

a. Ensure compliance with this regulation.

b. Receive and investigate complaints filed under this regulation.

c. Otherwise manage Army-wide responsibilities under this regulation, through direction from the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs).

1-7. Heads of Army Installations and activities

Heads of Army installations and activities will—

a. Cooperate fully with the ASA(M&RA) or designee in carrying out responsibilities prescribed by this regulation. This cooperation will include timely furnishing to the ASA(M&RA) or designee of required reports and information.

b. Assign sufficient personnel to implement and insure effective enforcement of provisions of this regulation.

c. Ensure that provisions of this regulation are carried out.

1-8. Equal employment opportunity (EEO) officers

EEO officers will—

a. Act as advisors to commanders of installations and activities to which they are assigned.

Chapter 2
Discriminatory Practices

Section I
Types of Programs and Activities
Subject to This Regulation

2-1. General coverage

Existing programs and activities that are assisted or conducted Army-wide and that are subject to this regulation (but do not appear in paras 2-2 and 2-3) are covered; even though they are not listed. Activities must report new programs and activities that are subject to this regulation to the ASA(M&RA) or designee within 15 calendar days of their creation or funding.

2-2. Federal programs

Federal financial assistance programs subject to this regulation and their enabling legislation, are listed below.

a. Various programs involving the loan or other disposition of surplus, obsolete, or unclaimed property (sec 483, 484, and 512, title 40, United States Code (1976), sec 1101 and 1107, title 49, United States Code (1976); sec 2541, 2544, 2571, 2576, 2662, 7308, 7541, 7542, 7545, 7546, and 7547, title 10, United States Code (1976 and supp IV 1980)).


c. Federal grants and cooperative agreements (sec 501-509, title 41, United States Code (supp III 1979)).

d. Army Corps of Engineers participation in cooperative investigations and studies concerning erosion of shores of coastal and lake waters (sec 426, title 33, United States Code (1976) and supp III 1979).

e. Army Corps of Engineers assistance in construction of works for restoration and protection of shores (sect 426-e, title 33, United States Code (1976)).

f. Construction and operation of public parks and recreational facilities in water resource development projects under DA administrative jurisdiction (sec 460d, title 16, United States Code (1976)).

g. Payment to States of lease receipts from lands acquired by the United States for flood control, navigation, and allied purposes (sec 701c-1, title 33, United States Code (1976)).

h. Grants of easements without consideration, or at nominal or reduced consideration, on land under DA control at water resource development projects (sec 558c and 702d-1, title 33, United States Code (1976); sec 2658 and 2699, title 10, United States Code (1976); sec 561, title 43, United States Code (1976); and sec 319, title 40, United States Code (1976)).
2-3. Programs and activities that affect handicapped persons.

All programs and activities conducted by DA that affect handicapped persons in the United States are subject to this regulation. These programs and activities are included as listed below:

a. Programs and activities conducted by DA that affect handicapped persons in the United States are subject to this regulation. These programs and activities are included as listed below:
   a. Programs and activities conducted by DA that affect handicapped persons in the United States are subject to this regulation. These programs and activities are included as listed below:

b. Programs and activities conducted by DA that affect handicapped persons in the United States are subject to this regulation. These programs and activities are included as listed below:

2-4. General prohibitions against discrimination

A. No qualified handicapped person will be denied the benefits or services of any program or activity that is conducted by DA or that receives or benefits from Federal financial assistance: and activities.

b. Deny a qualified handicapped person the opportunity to take part in or benefit from the aid, benefit, or service.

c. This section may not be interpreted to prohibit exclusion of the following:

(1) Persons who are not handicapped from benefits, programs, and activities limited by Federal statute or executive order.

(2) One class of handicapped persons from a program or activity limited by Federal statute or executive order to a different class of handicapped persons.
e. Leaves of absence, sick leave, or any other leave.

f. Fringe benefits available by virtue of employment, whether or not administered by the recipient.

g. Selection and financial support for training; these criteria include apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence for training.

h. Programs and activities sponsored by the employer; these include social and recreational programs.

i. Any other term, condition, or privilege of employment.

Chapter 3
Program Accessibility

Section I
Accessibility

3-1. General requirements

Because the facilities of a recipient or DA component are inaccessible to or not usable by handicapped persons, no qualified handicapped person will be denied the benefits of, or be excluded from taking part in, or be subjected otherwise to discrimination under any program or activity—

a. That receives or benefits from Federal assistance disturbed by DA.

b. Conducted by DA.

3-2. Existing facilities

a. A recipient or DA component will operate programs or activities so that they are readily accessible to and usable by handicapped persons. However, this does not necessarily require a recipient or DA component to make each of its existing facilities or every part usable by handicapped persons.

(1) Guidance in determining accessibility of facilities is discussed in Office of the Chief of Engineers Manual EM 1110-1-103.

(2) Inquires on specific accessibility design problems should be addressed to the ASA(M&RA) or designer.

b. Structural changes necessary to make programs or activities in existing facilities accessible to the extent required by paragraph 3-1 will be made as discussed below.

(1) Such changes will be made as soon as practicable, but no later than 2 years after the effective date of this regulation. However, DA components concerned may extend this period of time if the following conditions apply:

(a) The program or activity is a particular mode of transportation (such as a subway station) that can be made accessible only through extraordinarily expensive structural changes to, or replacement of, existing facilities.

(b) Other accessible modes of transportation are available.

This extension will be for a reasonable and definite period; this period will be determined after consultation with the ASA(M&RA) or designer.

(2) The recipient or DA component will develop a transition plan containing steps necessary to complete the changes. This plan will be developed—

(a) With the assistance of interested persons or organizations.

(b) Within a period of time to be established in each DA component's guidelines.

(3) The recipient or DA component will make a copy of the transition plan available for public inspection. At a minimum, the plan will include the information listed below.

(3) Identity of physical obstacles in the facilities that limit accessibility to handicapped persons.

(b) Description in detail of the methods that will be used to make the facilities accessible.

(3) Specific schedule for taking steps necessary to achieve full accessibility; if the time period is longer than 1 year, steps will be identified that will be taken during each of the transition years.

(c) Indication of the person responsible for implementing the transition plan; this indication will include last name, first name, and middle initial.

(3) A recipient or DA component may comply with paragraph 3-2 through the means listed below.

(a) Acquisition or redesign of equipment, such as TDDs or other telephonic devices for the deaf.

(b) Specific schedule for taking steps necessary to achieve full accessibility; if the time period is longer than 1 year, steps will be identified that will be taken during each of the transition periods.

(c) Specific schedule for taking steps necessary to achieve full accessibility; if the time period is longer than 1 year, steps will be identified that will be taken during each of the transition periods.

(3) The recipient or DA component's program will include the information listed above.

(3) The recipient or DA component will make the changes necessary to make the facilities accessible.

Section II
Specific Accessibility

3-3. New construction

New facilities and alterations to existing facilities will be designed and constructed to be accessible and usable by handicapped persons. (See Office of the Chief of Engineers Manual EM 1110-1-103.) Inquiries about specific accessibility design problems should be addressed to the ASA(M&RA) or designer.

3-4. Reasonable accommodation

a. A recipient or DA component will make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee. An exception is if the recipient or DA component demonstrates to the ASA(M&RA) or designer that the accommodation would impose undue hardship on operation of the program.

b. "Reasonable accommodation" includes the following:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons.

(2) Job restructuring.

(3) Part-time or modified work schedules.

(4) Acquisition or modification of equipment or devices, such as TDDs or other telephonic instruments.

(5) Provision of readers or certified sign-language interpreters.

c. In determining whether an accommodation would impose undue hardship on operation of a recipient's or DA component's program, the ASA(M&RA) or designer will consider the following factors, at a minimum:

(1) Overall size of the recipient's or DA component's installation or activity's program or activity; examples are number of employees, number and type of facilities, and size of budget.

(2) Size of the recipient's or DA installation or activity's operations; "operation" here will include composition and structure of the recipient's or DA component's installation or activity work force.

(3) Nature and cost of accommodation needed.

d. A recipient or DA component installation or activity may not deny employment opportunity to a qualified handicapped employee or applicant for employment; this is true if the basis for the denial is the need to make reasonable accommodation to physical or mental limitations of the employee or applicant.

Section III
Historic Properties

2. In the case of historic properties, program accessibility will mean that, when viewed in their entirety programs are usable by handicapped persons. (See the glossary for explanation of the term historic property.) Because the primary benefit of historic properties is the experience of the property itself, priority will be given to those methods of achieving program accessibility that make the historic property physically accessible to handicapped persons.

AR 600–7 • UPDATE
3-8. Military museums
a. When military museums are involved, program accessibility will mean that the following are accessible and usable by handicapped persons:
(1) Exhibits.
(2) Displays.
(3) Tours.
(4) Lectures.
(5) Circulating or traveling exhibits.
(6) Other programs.
(b) Methods of making museum programs accessible are discussed below. Commanders of DA installations and activities are encouraged to use "Museum and Handicapped Students: Guidelines for Educators," This is published by the National Air and Space Museum, Smithsonian Institution, WASH DC 20560; it is available through that address.
(1) Deaf and hearing-impaired persons, by:
(a) Training museum staff in sign-language.
(b) Providing qualified sign-language interpreters to accompany deaf or hearing-impaired visitors.
(c) Insuring that clear, concise language is used on all museum signs and display labels.
(d) Providing amplification devices.
(e) Providing printed scripts for films, videos, lectures, and tours.
(2) Blind and visually impaired persons, by:
(a) Providing museum catalogs in large-print editions printed on braille.
(b) Providing cassette tapes, records, or discs for museum tours or exhibits.
(c) Providing readers to accompany blind or visually impaired visitors.
(d) Providing large-print and braille display cards at exhibits.
(e) Providing raised-line maps of museum buildings.
(f) Using raised-line drawings, reproductions, or models of large exhibits for tactile experiences, when touching of exhibits is prohibited.
(g) Placing large-print and braille signs to identify galleries, elevators, restrooms, and other service areas.
(h) Permitting guide dogs in all museum facilities.
(i) Other physically impaired persons, by:
(a) Lowering display cases.
(b) Spacing exhibits to make movement easier.
(c) Using ramps in galleries.
(d) Increasing lighting in exhibit area, to ease viewing from a distance.
(e) Providing places to sit in exhibit areas.
(f) Making restrooms accessible.
(g) Using large-print exhibit display cards to ease reading from a distance.
(h) Sensitizing museum staff members to consider the needs of handicapped visitors when organizing exhibits.
(i) Recipients may not take part in a contractual or other relationship that subjects qualified handicapped applicants or employees to discrimination prohibited by this section. These include relationships with—
(1) Employment and referral agencies.
(2) Labor unions.
(3) Organizations providing or administering fringe benefits to employees of the recipient.
(4) Organizations providing training and apprenticeship programs.
d. Recipients will make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee; an exception is if the recipient can demonstrate that the accommodation would impose undue hardship on the operation of the program. "Reasonable accommodation" here includes, but is not limited to, providing—
(1) Ramps.
(2) Accessible restrooms and drinking fountains.
(3) Interpreters for deaf employees.
(4) Readers for blind employees.
(5) Amplified telephones.
(6) TDAs such as teletypewriters (TTYs) or telephone writers.
(7) Tactile signs on elevators.
e. Recipients—
(1) May not use employment tests or criteria that discriminate against handicapped persons.
(2) Will insure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.
(3) May not conduct a preemployment medical examination or make a preemployment inquiry about—
(a) Whether an applicant is a handicapped person.
(b) The nature or severity of a handicap.
(4) May make, however, a preemployment inquiry into an applicant's ability to perform job-related functions.
(f. Recipients may invite applicants for employment to indicate whether and to what extent they are handicapped, when the recipient is taking—
(1) Remedial action to correct effects of past discrimination.
(2) Voluntary action, to overcome affects of conditions that have resulted in limited participation by handicapped persons.
g. Material in f above pertains only if the recipient makes clear to the applicants that—
(1) The information is intended for use solely in connection with the recipient's—
(a) Remedial action obligations.
(b) Voluntary affirmative action efforts.
(2) The information—
(a) Is being requested on a voluntary basis.
(b) Will be kept confidential (as provided in l below).
(c) Will not subject the applicants to any adverse treatment, if refused.
(d) Will be used only under this regulation.
h. Nothing in this section will prohibit a recipient from conditioning an offer of employment or the results of a medical examination conducted before the employee’s entrance on duty, if—

(1) All entering employees are subjected to such an examination, regardless of handicap.

(2) The results of such an examination are used only under this regulation.

i. Information obtained under this section concerning medical condition or history of applicants will be collected and maintained on separate forms; those forms will be collected and maintained on separate forms; those forms will be accorded confidentiality as medical records, with the following exceptions:

(1) Supervisors and managers may be informed about—

(a) Restrictions on work or duties of handicapped persons.

(b) Necessary accommodations.

(2) First aid and safety personnel may be informed, when appropriate, if a handicapped condition might require emergency treatment.

(3) Government officials investigating compliance with this regulation will be provided relevant information on request.

Chapter 4 Complaints and Findings

Section I Complaints

4-2. Filing a complaint

a. A person who feels that he or she, or any group or class of persons, has been discriminated against on the basis of handicap can individually or through a representative file a complaint of discrimination within 60 calendar days of the alleged discriminatory incident. The EEO officer will have the authority to reject the complaint if it is not received in the EEO office within 60 days.

b. The complaint must be—

(1) Filed in writing.

(2) Signed by the complainant or the complainant’s authorized representative.

(3) Submitted to the EEO officer having operating or servicing responsibility at the site or location where the alleged discriminatory incident occurred.

i. Complaints may be filed directly with the ASD(MRA&L) if the—

(1) Incident occurred on an Army post, camp, or station.

(2) Program or project was conducted by DA.

(3) A copy of each complaint received by a local servicing EEO officer or designee will be forwarded by the EEO officer to HQDA(SAMR-GEFGR), WASH DC 20310 and ASD(MRA&L EO/SP), WASH DC 20310 within 10 calendar days after receipt. The reporting requirement has been assigned OMB No. 0704-0162.

ii. The complaint must indicate how and by whom the complainant was discriminated against. The case will be closed after 30 days if the complainant does not provide the information listed below.

(1) When the discriminatory incident occurred.

(2) Name, address, telephone number, and other pertinent data about the complainant.

(3) Full description of what actually transpired.

(4) Specific request to have the incident investigated.

(5) What the complainant views as proper corrective action to alleviate future occurrences.

4-3. Investigating a complaint

a. Thirty calendar days will be allowed for investigation by any of the following:

(1) The local servicing EEO officer.

(2) The person designated by the local servicing EEO officer to conduct the investigation.

(3) The individual designated at the ASD(MRA&L) level.

b. Investigations by recipients will be conducted under the following procedures:

(1) Commander of a DA installation or activity may require or permit recipients to investigate complaints alleging violation of this regulation by—

(a) Assuring that the recipient investigates the complaints under standards, procedures, and requirements prescribed by this regulation.

(b) Requiring the recipient to submit a written report of each complaint and investigation to the DA installation or activity.

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(c) Retaining a review responsibility over the investigation and disposition of each complaint.

(4) Ensuring that each complaint investigation is completed within 180 calendar days of receipt of the complaint by the proper DA installation or activity; an exception is an extension of time granted for good cause by the ASA(MRA) or designee.

(5) Requiring the recipient to maintain a log of all complaints filed against the recipient.

(2) DA installations or activities that require or permit complaint investigations to be conducted by recipients will review recipient complaint investigations under this regulation.

(1) Establishing for each complaint filed.

(2) Keeping the EEO officer for 3 years.

(3) The will be acknowledged within 10 calendar days of receipt by the EEO officer. Should the EEO officer determine that a complaint will be investigated, the following will be forwarded to the person designated to conduct the investigation (if other than the EEO officer):

(1) A copy of the letter of acknowledgement.

(2) Other relevant information.

(3) The local EEO officer or the person designated at the ASD(MRA&L) level has the ultimate responsibility to assure that the person designated to investigate the alleged discriminatory incident obtains information documentation, and statements necessary to investigate the complaint properly and adequately.

a. The investigative process will be completed within 30 calendar days after acknowledging receipt of complaint. A finding will be rendered by the commander or designee within 10 calendar days after the close of the investigation. The commander or designee can accept, reject, or modify the finding.

b. Withdrawal of complaint should be accepted only when the letter of withdrawal contains clear information suggesting that the complainant made the decision to withdraw on his or her own volition, without undue influence from the agency or recipient.

4-4. Information requirements

a. Installation EEO officers will maintain a log of all complaints filed with the EEO office. They will also notify (telephonically or by mail) the major Army command (MACOM) EEO office to assure that a simultaneous log is maintained. The log should include—

(1) Name and address of the complainant.

(2) Recipient’s name and address (if applicable).

(3) Basis for the complaint.

(4) Current status.

b. MACOM EEO officers will submit the following reports to HQDA (SAMR-CFP&EEO), Room 1E615. The
Section II

Findings

4-6. Written notification of findings
a. The complainant will receive written notification outlining the finding from the installation commander or the EEO officer within 14 calendar days after the 30th day or close of investigation, whichever comes first. This notification must indicate whether or not discrimination or other violation occurred. If no discrimination is found, the complainant will be notified in writing and informed of avenues of redress.

4-6 Finding of alleged discrimination or noncompliance
a. With a finding of discrimination, the EEO officer will recommend corrective action to the installation commander concerned or to the recipient.
b. When the investigation reveals that discrimination or a violation of this regulation has occurred, the EEO officer will issue a written notification outlining:
   (1) The violation.
   (2) Recommended corrective action.
   (3) Suspect date for completion of corrective action.
c. Written notification and recommended corrective action will be forwarded to the commander or recipient (if applicable) within 14 calendar days after completion of the investigation. Copies will be sent to HQDA (SAMR-OEPGR), WASH DC 20310 and the complainant. Also, each DA installation or activity commander will submit a narrative report by memorandum to the ASD(MRA&L) or designee when the DA installation or activity commander notifies an applicant or recipient that noncompliance with this regulation is indicated. The report, which has been assigned RCS DD-M(Ar) 1597, will include the following information:
   (1) Recipient's name (last name, first, and middle initial), if this refers to a person.
   (2) Address (street address, city, state, and ZIP Code).
   (3) The date (year, month, day).
   (4) Nature of the finding.
   (5) Name of the applicable federally assisted program or activity.

d. Complainant.

e. HQDA (SAMR-OEPGR), WASH DC 20310

4-8. Appeal of finding
a. If a complainant is dissatisfied with a local finding, he or she may appeal to HQDA (SAMR-OEPGR), WASH DC 20310 within 30 calendar days of receipt of the written notification that—
   (1) Sets forth the finding.
   (2) Informs the complainant of the right to further appeal.
b. The appeal to HQDA is—
   (1) Automatic, if the complainant is dissatisfied with the local finding.
   (2) Not constrained by any criteria other than time.
c. If the complainant is further dissatisfied with the HQDA decision, he or she may appeal to the ASD(MRA&L) (ATTN: Office, Deputy Assistant Secretary of Defense (EO/SP), Room 33134, The Pentagon, WASH DC 20310. An appeal to ASD(MRA&L) must be based on one of the following reasons:
   (1) New and material evidence is available that was not readily available when the previous decision was issued.
   (2) The previous decision involves—
      (a) An erroneous interpretation of law or regulation.
      (b) A misapplication of established policy.
   (3) The previous decision is of—
      (a) Precedential nature involving new or unreviewed policy considerations that may have an affect beyond the actual case at hand.
      (b) Such an exceptional nature as to merit the personal attention of the ASD(MRA&L).
   d. If the complainant is still dissatisfied with the finding or decision after the administrative process has been exhausted, he or she may file a civil action in a US District Court.
   e. An extension of the time limits for filing may be granted by the EEO officer or appropriate ASD that he or she was prevented from the timely filing of an appeal for the following reasons:
      (1) Not notified of the time limit.
      (2) Experienced circumstances beyond his or her control.
      (3) A precessing the complainant was filed within 180 calendar days, the complainant may file a civil action in a US District Court. This civil action may be filed without going through the administrative.

Chapter 5

Assurances

5-1. Required assurances
a. All recipients will file written assurances in their programs or activities will be conducted under this regulation. Recipients who are now receiving assistance from DA will have 6 months from the date of publication of this regulation to fill out and return the assurance form. New recipients must sign the assurance form prior to receiving assistance. The sample form is at appendix A. If a recipient fails to provide an assurance that conforms to the requirements of this section, the DA installation or activity commander will attempt to gain compliance under paragraphs 5-3, 5-4, and 5-5. If this does not hold true, the program or activity commanders will continue the assistance, while proceedings required by paragraphs 6-6, 6-7, and 6-8, and chapters 7, 8, and 9 are pending.
b. The DA installation or activity commander will—
   (1) Advise each recipient of the—
      (a) Required elements of the assurance.
      (b) Extent to which those receiving assistance from the recipients will be required to execute similar assurances, with respect to each program or activity.
   (2) Ensure that each assurance does the following:
      (a) Obligates the recipient to advise the DA installation or activity commander of receipt of complaints that allege discrimination against handicapped persons.
      (b) Obliges the recipient to collect and provide items of information that the DA installation or activity commander requires.
      (c) IS made applicable to any Federal financial assistance that might be disturbed by a DA installation or activity without submission of a new application.
      (d) Obliges the recipient, when the financial assistance is in the form of property, for the period during which the property is used under a financial assistance agreement, or possessed by the recipient.
      (e) Includes a provision recognizing that the US Government has the right to seek judicial enforcement of section 504 of the Rehabilitation Act of 1973 (as amended) and this regulation.

5-2. Self-evaluation and consultation with interested persons and organizations
a. Commanders of DA installations or activities will require recipients to conduct a self-evaluation with the assistance of interested persons; these interested persons will include handicapped persons or organizations that represent them. The self-evaluation will be conducted within 6 months of either of the following:
   (1) The effective date of this regulation.
   (2) First receiving Federal financial assistance disbursed by DA.
   When appropriate, commanders of DA installations or activities also will require recipients to consult at least annually with these interested persons.
b. In conducting the self-evaluation, each recipient will—
   (1) Evaluate effects of policies and practices for compliance with—
      (a) This regulation.
      (b) Applicable supplementary guidelines.

TAB I
When responsibility for approving applications for Federal financial assistance disbursed by DA is assigned to a DA installation or activity personnel in such offices will be designated to perform the functions described in chapters 6, 7, 8, 5, and 10.

5-5. Access to records and facilities
a. Each recipient will permit access to premises by DA officials during normal business hours; this access will be especially relevant when it is necessary for conducting on-site compliance reviews or complaint investigations. These officials will be allowed to:
   (1) Photograph facilities.
   (2) Inspect and copy books, records, accounts, and other material relevant to determining the recipient’s compliance with this regulation.
   (3) Distributing memoranda or other written communications.
   (4) Requesting recipients periodically to submit reports of compliance with this regulation.
   (5) Taking other steps as necessary to determine the recipient’s compliance.

5-6. Staff responsibilities
All DA determinations of receipt compliance with this regulation will be subject to reviews by the ASA(M&A) or designee.

Chapter 6
Compliance

6–1. General
Commanders of DA installations or activities will—
 a. Establish and maintain effective programs of post-approval reviews.
 b. Conduct postapproval reviews of each recipient periodically and in accordance with the procedures prescribed in this regulation.

6-2. Desk audit application review
Before approving an application for Federal financial assistance, DA installations and activity commanders will make written determinations of whether the recipient is in compliance with this regulation. This determination will be based on a review of the recipient’s history of discrimination and other data submitted by the recipient.

6-3. Preapproval on-site reviews
a. When a desk audit application review conducted under paragraph 6–2 indicates that the recipient might not be in compliance with this regulation, the DA installation or activity commander may conduct a preapproval on-site review at the recipient’s facilities before approving the disbursement of Federal financial assistance to the recipient.

6-4. Postapproval reviews
Commanders of DA installations and activities will—
 a. Establish and maintain effective programs of post-approval reviews.
 b. Conduct postapproval reviews of each recipient periodically and in accordance with the procedures prescribed in this regulation.

6-5. Extensions
A commander of a DA installation or activity will complete a review within 180 calendar days of the recipient’s initiation. An exception will be if an extension of time is granted by the ASA(M&A) or designee for good cause. This regulation will be one of the following:
 a. Find the recipient to be in compliance; the recipient then will be notified of this finding.
 b. Notify the recipient and the ASA(M&A) or designee of a finding of probable noncompliance under paragraph 6-7.
Section II
Effective Compliance

6-8. Violations

a. When a compliance review or complaint investigation indicates that a recipient has violated this regulation or the assurance executed under paragraph 5-1, the responsible DA installation or activity commander or the ASA(M&RA) or designee will attempt to effect compliance under paragraphs 6-7 and 6-8. The inability of a DA installation or activity commander to comply with any time frame prescribed in this regulation does not relieve a recipient of the responsibility for compliance with this regulation.

b. The DA installation or activity commander may require (when necessary to overcome the effects of discrimination in violation of this regulation) a recipient to take remedial action, with respect to handicapped persons who:
   (1) Are no longer participants in the recipient's program or activity, but who were participants in the program or activity when such discrimination occurred.
   (2) Would have been participants in the recipient's program or activity had the discrimination not occurred.
   (3) Are presently in the recipient's program or activity but not receiving full benefits or equal and integrated treatment within the program or activity.

6-7. Written notice of violation

After evaluating the investigative report, the commander of the DA installation or activity will issue to the recipient (under para 5-1) and to the ASA(M&RA) or designee a written notice that—

a. Describes the apparent violation and corrective actions necessary to achieve compliance.

b. Extends an offer to meet informally with the recipient.

b. Informs the recipient that failure to respond to the notice within 15 calendar days of its receipt will result in initiation of enforcement procedures described in chapters 8, 9, and 10.

6-8. Attempting to achieve voluntary compliance by recipients

a. If a DA installation or activity commander issues a notice under paragraph 6-7, the commander will attempt to—
   (1) Meet the recipient.
   (2) Persuade the recipient to take steps necessary to achieve compliance with this regulation.
   (3) If a recipient agrees to take remedial steps to achieve compliance, the DA installation or activity commander will require that the agreement:
      (1) Be in writing.
      (2) Be signed by the head of the DA installation or activity concerned or designee.
      (3) Be signed by the principal official of the recipient.
   (4) Specify action necessary to achieve compliance.
   (5) Be made available to the public on request.
   (6) Be subject to the approval of the ASA(M&RA) or designee.

b. If satisfaction of requirement, or a written agreement, has not been achieved within 60 calendar days of the recipient's receipt of the notice issued under paragraphs 6-7, the DA installation or activity commander will—
   (1) Notify the ASA(M&RA) or designee.
   (2) State the reasons for failure to reach satisfactory adjustments, or written agreement.

   a. The commander of the DA installation or activity will initiate the enforcement actions prescribed in chapters 8, 9, and 10, if one of the following applies:
      (1) The recipient does not respond to a notice under paragraph 6-7, within 15 calendar days, if receipt of the notice and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response.
      (2) The DA installation or activity commander or the ASA(M&RA) determines at any time within 90 days after the recipient receives a notice (under para 6-7) that, despite reasonable efforts, the recipient is not likely to comply and voluntarily.
   e. If under d above, the DA installation or activity commander initiates enforcement action, attempts to persuade the recipient to comply voluntarily will be continued.

6-8. Attempting to achieve voluntary compliance by recipients

b. If a DA installation or activity commander issues a notice under paragraph 6-7, the commander will attempt to—
   (1) Meet the recipient.
   (2) Persuade the recipient to take steps necessary to achieve compliance with this regulation.
   (3) If a recipient agrees to take remedial steps to achieve compliance, the DA installation or activity commander will require that the agreement:
      (1) Be in writing.
      (2) Be signed by the head of the DA installation or activity concerned or designee.
      (3) Be signed by the principal official of the recipient.
   (4) Specify action necessary to achieve compliance.
   (5) Be made available to the public on request.
   (6) Be subject to the approval of the ASA(M&RA) or designee.

b. If satisfaction of requirement, or a written agreement, has not been achieved within 60 calendar days of the recipient's receipt of the notice issued under paragraphs 6-7, the DA installation or activity commander will—
   (1) Notify the ASA(M&RA) or designee.
   (2) State the reasons for failure to reach satisfactory adjustments, or written agreement.

   a. The commander of the DA installation or activity will initiate the enforcement actions prescribed in chapters 8, 9, and 10, if one of the following applies:
      (1) The recipient does not respond to a notice under paragraph 6-7, within 15 calendar days, if receipt of the notice and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response.
      (2) The DA installation or activity commander or the ASA(M&RA) determines at any time within 90 days after the recipient receives a notice (under para 6-7) that, despite reasonable efforts, the recipient is not likely to comply and voluntarily.
   e. If under d above, the DA installation or activity commander initiates enforcement action, attempts to persuade the recipient to comply voluntarily will be continued.

Chapter 7
Implying Sanctions

7-1. Sanctions available

If a commander of a DA installation or activity has taken action under paragraphs 6-7 and 6-8, the commander may, by order, do the actions listed below. (These actions are subject to para 7-2 and 7-3.)

a. Terminate, suspend, or refuse to grant or continue assistance to the recipient.
   b. Refer the case to the Department of Justice for initiation of enforcement proceedings at a Federal, State, or local level.
   c. Pursue remedies under State or local law.
   d. Impose other sanctions on consultation with the ASA(M&RA) or designee.

7-2. Terminating, suspending, or refusing to grant or continue assistance

A commander of a DA installation or activity may not terminate, suspend, or refuse to grant or continue Federal financial assistance, unless—

a. Such action has been approved by the Secretary of Defense.
   b. The commander has given the recipient an opportunity for a hearing (under procedures outlined in chap 8) and a finding of noncompliance has resulted.
   c. Thirty calendar days have expired since the Secretary of Defense has filed a written report with the congressional committees that have jurisdiction over the program or activity in which the violation of this regulation exists. This report will describe the violation and action to be taken.
   d. Such action affects only the particular activity or program (or portion thereof) of the recipient where the violation exists.

7-3. Other sanctions

A commander of a DA installation or activity may not impose the sanctions provisions outlined in paragraphs 7-2c and d, unless—

a. The commander has given the recipient an opportunity for a hearing (under chap 8); a finding of noncompliance has resulted.
   b. The action has been approved by the Secretary of Defense.
   c. Ten calendar days have elapsed since the mailing of a notice informing the recipient of the—
      (1) Continuing failure to comply with this regulation.
      (2) Action necessary to achieve compliance.
   d. Sanction to be imposed.
   e. During these 10 calendar days, the DA installation or activity command has made additional efforts to persuade the recipient to comply.

Chapter 8
Hearings, Decisions, and Notices

Section I
Hearings

6-1. Reasonable notice

a. When a hearing is required by this regulation, reasonable notice will be given to the affected applicant or recipient by registered or certified mail; return receipt for this registered or certified mail will be requested. This notice will advise the applicant or recipient of the—
   (1) Proposed action to be taken.
   (2) Specific provisions under which the proposed action is to be taken.
   (3) Matters of fact of law asserted as the basis for this action.
   b. This notice also will provide for one of the following:
      (1) Fix a date not less than 20 days after the date of the notice. The applicant or recipient may request of the responsible DA official that the matter be scheduled for hearing within this time frame.
      (2) Advise the applicant or recipient that the matter in question has been set for hearing at a stated place and time. This time and place—
         (a) Will be reasonable.
         (b) Will be subject to change for cause.
         (c) The complainant, if any, will be advised of the time and place of the hearing.
      d. An applicant or recipient may waive a hearing, and submit written information and argument instead. Failure of an applicant or recipient to request a hearing under
this paragraph, or to appear at a hearing for which a date has been set, will be deemed—
(1) A waiver of the right to a hearing under this regulation.
(2) Consent to the making of a decision on the basis of such information that is available.

8-2. Time and place of hearing
Hearings will be held at the DA installation or activity, at a time fixed by the responsible DA official; an exception will be if this official determines that the convenience of the applicant or recipient requires that another place be selected. Hearings will be held before the responsible DA official or, at the official’s discretion, before a hearing examiner designated by the official.

8-3. Hearing examiner
The hearing examiner will be a field grade official or civilian employee above the grade of GS-12 (or the equivalent); the examiner also will be a person admitted to practice law before a Federal court or the highest court of a State, Territory, Commonwealth, or the District of Columbia.

8-4. Right to counsel
In all proceedings under this chapter, the applicant or recipient and the responsible DA installation or activity commander will have the right to be represented by counsel.

8-5. Procedures
a. The recipient will receive an open hearing, at which he or she or his or her counsel may examine any witnesses present. Both the responsible DA official and the applicant or recipient will be entitled to introduce all relevant evidence on the issues at the outset of or during the hearing as—
(1) Stated in the notice for hearing
(2) Determined by the officer conducting the hearing.

b. Technical rules of evidence will not apply to hearings conducted under this regulation. But rules or principles designed to assure production of the most credible evidence available will be applied where reasonably necessary by the officer conducting the hearing. These rules or principles also will be designed to subject testimony to test by cross-examination.

c. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for record will be open to examination by the parties. Opportunity will be given to refute facts and arguments advanced on either side of the issues.

d. A transcript of the oral evidence will be made; an exception would be as to the extent the substance of the oral evidence is stipulated for the record.

e. All decisions will be based on the hearing record. Written findings will be made.

8-6. Consolidated or joint hearing
In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this regulation applies, or noncompliance with this regulation and the regulations of one or more other Federal departments or agencies issued under section 504 of the Rehabilitation Act of 1973 (as amended), the ASD(MR&A), the Secretary of a Military Department, or other responsible DA official designated by the ASD(MR&A) after consultation with the ASD(MR&A) may, by agreement with such other departments or agencies as applicable, provide for the following:

a. Conduct of consolidated or joint hearings.

b. The application to such hearings.

c. Application to such hearings to appropriate procedures consistent with this regulation. (Final decisions in such cases will be made under chap. 9.)

Section II
Decisions and Notices

8-7. Decision by a person other than the responsible DA official
a. If the hearing is held by a hearing examiner, the hearing examiner will either make an initial decision or certify the entire record; an initial decision may be made if the examiner is so authorized. The record will include the hearing examiner’s recommended findings and proposed decision to the responsible DA official for a final decision. A copy of this initial decision or certification will be mailed to the applicant or recipient.

b. When the initial decision is made by the hearing examiner, the applicant or recipient may file with the responsible DA official his or her exceptions to the initial decision; reasons for the exception will be attached. This filing will be within 30 days of the mailing of such notice of initial decision.

c. In the absence of exceptions, the responsible DA official may, on his own motion, within 45 days after the initial decision, serve on the applicant or recipient a notice that the official will review the decision.

d. On filing of exceptions or notice of review, the responsible DA official will—
(1) Review the initial decision.
(2) Issue his or her own decision, including the reasons.

c. In the absence of exceptions or notice of review, the initial decision will constitute the final decision of the responsible DA official.

8-8. Decisions on records or review by the responsible DA official
a. The applicant or recipient will be given reasonable opportunity to file briefs or other written statements of contentions to the responsible DA official when the responsible DA official does any of the following actions:

(1) Has the record certified to him or her for decision.
9-2. Restoration of eligibility
The responsible DA official will restore such eligibility immediately if the official determines that the recipient—

a. Has supplied information that demonstrates that the recipient has satisfied terms and conditions of the order entered under chapter 8, section II.

b. Is complying with this regulation.

c. Has provided reasonable assurance of continued compliance with this regulation.

9-3. Denial of eligibility
If the responsible DA official denies a request for restoration of eligibility, the recipient may submit a written request for a hearing; this written statement must state why the recipient believes the responsible DA official erred in denying the request. Following such a written request, the recipient will be given an expedited hearing, under rules of procedure issued by the responsible DA official; this hearing will determine whether requirements described in paragraph 9-2 have been met. While these proceedings are pending, sanction imposed by the order issued under chapter 8, section II will remain in effect.

Chapter 10
Coordination with Sections 502 and 503 of the Rehabilitation Act of 1973 (As Amended)

10-1. Developing accessibility
Commanders of DA installations or activities will use DOD 4270.1-M and Office of the Chief of Engineers Manual EM 1110-1-103 in developing requirements for accessibility of facilities. If issues with respect to section 502 of the Rehabilitation Act of 1973, as amended, that are not covered by this regulation are encountered, the ASD(MR&A&L) or designee may be consulted. If necessary, the ASD(MR&A&L) or designee will consult with the Architectural and Transportation Barriers Compliance Board in resolving these problems. This board can be contacted at 330 C St. SW, Room 1010, WASH DC 20202; (202) 475-2700 or (202) 245-1591.

10-2. Direct consultation
Commanders of DA installations and activities may advise recipients to consult directly with the Architectural and Transportation Barriers Compliance Board in developing accessibility criteria.

10-3. Coordination of enforcement actions
Commanders will—

a. Coordinate enforcement actions relating to the accessibility of facilities with the Architectural and Transportation Barriers Compliance Board.

b. Notify the ASD(MR&A&L) or designee of this coordination.

10-4. Section 503
The commander will coordinate enforcement actions with the nearest Regional Office of Federal Contract Compliance Programs of the Department of Labor if the conditions discussed below apply. The DA installation or activity commander will notify the ASD(MR&A&L) of this coordination.

a. If a recipient also is a Federal contractor subject to—

(1) Section 503 of the Rehabilitation Act of 1973, as amended.

(2) The regulations under (1) above (sec 60-741, title 41, Code of Federal Regulations).

b. If DA installation or activity commander has reason to believe that the recipient is in violation.

10-5. Employment
DA components that conduct Federal programs or activities covered by this regulation and involve employment of civilian persons to conduct such programs or activities must comply with—


Appendix A

Format for Assurance of Compliance with the Department of the Army Under Section 504 of the Rehabilitation Act of 1973 (As Amended)

(Name of Recipient)

(Address)

(City or County) (State and ZIP Code)

Hereby agrees that he or she will comply with:


c. Section 119 of Public Law 95-602, “Rehabilitation Comprehensive Services, and Development Disabilities Amendments of 1978” November 6, 1978 (sec 794, Note 39, United States Code) (supp III 1979), all requirements imposed by or pursuant to this regulation of the DA and in accordance with Section 504 of the Rehabilitation Act of 1973 (as amended), DA will prohibit discrimination based on handicap in programs and activities receiving Federal financial assistance disbursed by DA and in programs and activities conducted by DA; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any personal property or real property, or interest therein, or structure thereon is provided or improved with the aid of Federal financial assistance extended to the applicant or recipient by DA or if such assistance is in the form of personal property or real property, or interest therein, or structure thereon is provided or improved with the aid of Federal financial assistance extended to the applicant or recipient by DA, or if such assistance is in the form of personal property or real property, or interest therein or structure thereon, then this assurance shall obligate the applicant or recipient or in the case of any transfer such as property, any transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for the period during which it retains ownership or possession of the property whichever is longer. In all other cases, this assurance shall obligate the applicant or recipient for the period during which the Federal financial assistance is extended to it by DA.

DA representatives will be allowed to visit recipient facilities. They will inspect the facilities to ensure that there are no barriers to impede the handicap’s accessibility in either programs or activities. THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the applicant or recipient by DA, including installment payments after such date on account of arrangements for Federal financial aid which were approved such date. The applicant or recipient recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the applicant or recipient, its successors, transferees, and assigns, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the applicant or recipient.

(Date) (Applicant or Recipient)

("By" name, title, and signature of authorized official)
Glossary

Section I
Abbreviations
ASA(M&RA)
Assistant Secretary of the Army (Manpower and Reserve Affairs)
ASD(M&AL)
Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)
DA
Department of the Army
DCPRAEEO
Deputy for Civilian Personnel Policy and Equal Opportunity
EEO
equal employment opportunity
HQDA
Headquarters, Department of the Army
MACOM
major Army command
TDD
telephone devices for the deaf
TTY
telepunchwriter

Section II
Terms
Facility
All, or any portion of, buildings, structures, equipment, roads, walls, parking lots, or other real or personal property; any interest in such property.

Federal financial assistance
Grant, loan, contract (other than a procurement contract or a contract of insurance or guarantee), or other arrangement by which the Federal Government provides, or otherwise makes available, assistance in the forms listed below:

a. Funds.
b. Services performed by Federal personnel; these include technical assistance, counseling, training, and provision of statistical or expert information.
c. Real and personal property; interest in or use of such property. This interest or use includes—

(1) Transfers or leases of such property for less than fair market value or for reduced consideration.
(2) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

Handicapped person
a. Person who—

(1) Has a physical or mental impairment that substantially limits one or more major life activities.
(2) Has a record of such an impairment.
(3) Is regarded as having such an impairment.

b. For purposes of this regulation (as it relates to employment programs of recipients) this term does not include an individual—

(1) Who is an alcohol or drug abuser.
(2) Whose current use of alcohol or drugs prevents him or her from performing the duties of the job in question.
(3) Whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others.

c. As used in this regulation, this term includes the following:

(1) Physical or mental impairment that include the following:

a. (a) Physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, muscular-skeletal and special sense organs; respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic, and lymphatic, skin, and endocrine.

(b) Mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) Such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, and muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, drug abuse, and alcoholism.

(2) Impairment of major life activities that include the following: functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(1) Has a record of impairment, such as the following: history of, or has been misclassified as having, mental or physical impairment that substantially limits one or more major life activities.

(4) Is regarded as having an impairment, such as any of the following:

(a) Physical or mental impairment that does not substantially limit major life activities, but treated by a recipient or DA as constituting such a limitation.

(b) Physical or mental impairment that substantially limits major life activities only as a result of attitudes of others toward such impairment.

(5) Has none of the impairments defined in (1) through (4) above, but is treated by a recipient or the DA as having such an impairment.

Historic properties
Properties listed or eligible for listing in the National Register of Historic Places.

Qualified handicapped person
Handicapped person who with respect to—

a. Employment, can perform the essential functions of the job in question with reasonable accommodation.

b. Services, meets the essential eligibility requirements for receiving the services in question.

Recipient
a. State or political subdivision or instrumentality thereof.

b. Public or private agency, institution, organization, or other entity.

c. Person who receives Federal financial assistance directly or through another recipient, this person includes successor, assignee, or transferee of a recipient, but not the ultimate beneficiary of the assistance.

d. Persons and entities applying to be recipients.

Substantial impairment
Significant loss of the integrity of finished materials; design quality, or special characteristic resulting from a permanent alteration.
§ 24.4 Assurances, monitoring and corrective action., 49 C.F.R. § 24.4

TAB J

Code of Federal Regulations
Title 49. Transportation
Subtitle A. Office of the Secretary of Transportation
Part 24. Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs (Refs & Annos)
Subpart A. General

§ 24.4 Assurances, monitoring and corrective action.

Currentness

(a) Assurances.

(1) Before a Federal Agency may approve any grant to, or contract, or agreement with, a State Agency under which Federal financial assistance will be made available for a project which results in real property acquisition or displacement that is subject to the Uniform Act, the State Agency must provide appropriate assurances that it will comply with the Uniform Act and this part. A displacing Agency’s assurances shall be in accordance with section 210 of the Uniform Act. An acquiring Agency’s assurances shall be in accordance with section 305 of the Uniform Act and must contain specific reference to any State law which the Agency believes provides an exception to §§ 301 or 302 of the Uniform Act. If, in the judgment of the Federal Agency, Uniform Act compliance will be served, a State Agency may provide these assurances at one time to cover all subsequent federally-assisted programs or projects. An Agency, which both acquires real property and displaces persons, may combine its section 210 and section 305 assurances in one document.

(2) If a Federal Agency or State Agency provides Federal financial assistance to a “person” causing displacement, such Federal or State Agency is responsible for ensuring compliance with the requirements of this part, notwithstanding the person’s contractual obligation to the grantee to comply.

(3) As an alternative to the assurance requirement described in paragraph (a)(1) of this section, a Federal Agency may provide Federal financial assistance to a State Agency after it has accepted a certification by such State Agency in accordance with the requirements in subpart G of this part.

(b) Monitoring and corrective action. The Federal Agency will monitor compliance with this part, and the State Agency shall take whatever corrective action is necessary to comply with the Uniform Act and this part. The Federal Agency may also apply sanctions in accordance with applicable program regulations. (Also see § 24.603. of this part).

(c) Prevention of fraud, waste, and mismanagement. The Agency shall take appropriate measures to carry out this part in a manner that minimizes fraud, waste, and mismanagement.


TAB J
§ 24.4 Assurances, monitoring and corrective action., 49 C.F.R. § 24.4

Current through April 18, 2019: 84 FR 16216.

End of Document