

Non-Federal Cost-Share Project Partnership Agreements

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Project Partnership Agreements (PPAs)

Legally binding documents
used by the Corps to enter into
contractual cost-share projects
with **non-federal sponsors**



Major challenges to PPA execution:

- **Indemnification**
- OMRR&R
- Donated goods



Indemnification

Section 101(j) and 103(j)(1) of WRDA 1986 –

“Any project...shall be initiated only after non-Federal interests have entered into binding agreements...**to hold and save the United States free from damages** to the construction or operation and maintenance of the project, *except for damages due to the fault or negligence of the United States or its contractors.*”

Violates state constitutions, tort law –

- Promise of financial resources at unknown time, unknown reason, unknown cost
- Obligation without appropriation

The major challenges:

- Indemnification
- **OMRR&R**
- Donated goods



OMRR&R

Section 103 (j)(1) of WRDA 1986 – “Any project...shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to pay **100 percent of the operation, maintenance, and replacement and rehabilitation costs of the project**, to pay the non-Federal share the costs of construction required by this section.”

- The law does not place time limit (historically Administration decision of 50 years), now **perpetuity**
- PPAs can include language that OMRR&R needs may change over time
 - However, counsel still cannot evaluate future obligations



OMRR&R

Section 1161 of WRDA 2016 – “The responsibility of a non-Federal interest for O&M of the nonstructural and nonmechanical elements of a project, or a component of a project, for ecosystem restoration shall cease **10 years after** the date on which the **Secretary makes a determination of success** under subsection ”



The major challenges:

- Indemnification
- OMRR&R
- **Donated goods**



Donated goods

Section 2003 of WRDA 2007

“Credit authorized...for a project shall not exceed the actual and reasonable costs of the materials, services, or other things provided by the non-Federal interest, as determined by the Secretary.”

- Corps argument: Reduction of total project costs still reduces cost-share contribution need



PPA Reform

Section 1013 of WRRDA 2014 –

”The Secretary shall contract with the National Academy of Public Administration to carry out a **comprehensive review of the process** for preparing, negotiating, and approving PPAs and the PPA template”



National Academy of Public Administration

Four Specific Tasks —

1. Examine the *process* for developing, negotiating, and approving PPAs
2. Assess recent changes in the *process*
3. Evaluate nonfederal sponsor and stakeholder input
4. Recommend improvements



National Academy of Public Administration

Recommendations to USACE —

1. Strengthen **capacity** for negotiation
2. Further **delegate authority** for review and approval
3. **Standardize** timeframes, milestones, performance metrics
4. Ensure **capacity** in USACE HQ to support PPA management
5. Create a strategy for **meaningful engagement** with nonfederal sponsors
6. **Prepare** nonfederal sponsors re expectations

National Academy of Public Administration

Recommendation to Congress —

1. Extend timeframes for new construction starts with nonfederal sponsors



National Academy of Public Administration

Nonfederal sponsor perspectives: PPAs are one-sided —

- Non-federal sponsors shoulder an unfair share of liability risk, considering little control over project
 - Many sign because risk of no project is greater than liability
 - Work arounds: state legislative fix, local governments, nonprofits
- OMRR&R in perpetuity
 - Actual costs unknown until after PPA executed, project design complete
- USACE not bound to future funding like non-federal sponsors
- Terms and conditions set by federal government

National Academy of Public Administration

Nonfederal sponsor perspectives —

- Deviation allowance
- Timelines
- Nonfederal input
 - Land and real estate agreements
 - Project termination
 - Construction contracts and management
 - USACE costs
 - Project design
 - Determination of completion
 - O&M

Nonfederal recommendations

- Modify the hold and save clause to a more **equitable, shared approach to liability** that does not extend beyond the liabilities that already exist under applicable constitutions and tort laws.



Nonfederal recommendations (cont.)

- Include language providing that **unanticipated costs** for project construction are subject to a) the state's future appropriations for the project or b) the nonprofit's availability of funds for the project.
 - In addition, construct projects in phases where appropriate to limit cost overruns.
- Provide greater **specificity regarding OMRR&R costs and requirements** in the PPAs rather than providing those requirements post-construction.

Nonfederal recommendations (cont.)

- The actual value of the donated goods can be very substantial and should be included in the nonprofit's cost-share contributions to the project.
 - Replace “costs” with “value”

“Credit authorized...for a project shall not exceed the actual and reasonable costs of the materials, services, or other things provided by the non-Federal interest, as determined by the Secretary.”

Concluding Remarks

- We extend our hand to **work with other non-federal sponsors** across the country to get these issues resolved.
- We understand that these agreements are in opposition to most states' constitutions and tort laws, tribal law, as well as nonprofit organizations abilities to execute.





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