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United States Senate
Committee on Environment and Public Works
The Honorable John Barrasso, Chair
The Honorable Tom Carper, Ranking Member
Washington, D.C.

Dear Chairman Barrasso and Ranking Member Carper:

Membership of the Interstate Council on Water Policy (ICWP) includes state and interstate water resources management agencies, each who work closely with the US Army Corps of Engineers (Corps) in the efficient management of water resources in their respective states or interstate river basins. We request consideration of the following issues as a Water Resources Development Act is drafted for action in 2020. The ICWP has focused comments in four main areas:

1) Project Partnership Agreements:

Several ICWP members have been the Non-Federal Sponsor of many Corps projects that have provided numerous benefits to the citizens across the country. However, in recent years, the Corps has redefined its non-federal project partnership agreements (PPAs), creating major challenges for nonfederal sponsors in executing those agreements that may preclude states and non-profit entities from partnering with the Corps.

The Corps PPA does not outline a true partnership. Rather, it is a one-sided agreement in favor of the Corps that limits the influence of the non-federal sponsor on decisions. The non-federal sponsor typically has minimal input into the project design and implementation and yet is held responsible for 35 percent of any cost overruns, regardless of whom or what is responsible for those overruns.

Indemnification

Currently, the Corps requires that the non-federal cost share sponsor fully indemnify the federal government, based on Section 103(j)(1) and Section 101(j) of the 1986 Water Resources Development Act. Indemnifying the federal government is in direct conflict with states' constitution and laws. The Corps requires the non-federal sponsor to promise financial resources for an indeterminate liability that might occur at an unknown time, at an unknown cost, and for an unknown reason. This liability is beyond the extent permitted by the tort law of many states. Non-federal sponsors are required to execute the PPAs, with the liability clause, early in the planning stage and before the designs are complete. The Corps then takes full control of the land, design of the project, and agreements with the construction contractors. The Corps is also the only point-of-contact to the construction contractors. This results in a completely one-sided approach to project design, implementation, and assumption of risk that favors the federal government. **This one-sidedness needs to be rectified in WRDA2020. Additional supporting language is attached.**

Leader in Water Policy Information, Influence and Implementation

Operations, Maintenance, Repair, Rehabilitation, and Replacement

Historically, the Corps limited the non-federal sponsors' operations, maintenance, repair, rehabilitation, and replacement (OMRR&R) obligations to 50 years, which is the expected life of a constructed project. In 2012, the Corps changed its policy that requires non-federal sponsors to maintain responsibility for OMRR&R obligations in perpetuity. This shift has resulted in the loss of cost share partners at a time when the federal government is promoting its partnerships with the states and private entities.

PPAs are signed following completion of the feasibility study and before plans and specifications are developed. A project design is typically about 35 percent complete under a feasibility study with associated estimated O&M costs for a 50-year time period (not indefinitely.) Projects can change significantly between 35 percent design and completed design/construction. Final OMRR&R obligations are passed to the sponsor following project construction completion. Many variables can change during that time that are completely within the Corps' control while the nonfederal sponsors only has limited influence through comments.

The Corps' existing PPA approach is currently undefined and unworkable for sponsoring entities. Provisions are needed requiring the Corps to provide detailed estimates of OMRR&R costs in project agreements and to create a reasonable approach to terminating or renegotiating the non-federal sponsor's OMRR&R obligations.

2) Planning Assistance to States:

The Corps Planning Assistance to States (PAS) has provided much needed cost-sharing opportunities to further water planning in many ways. ICWP is concerned with the two components of the PAS not working the same regarding accepting in-kind services from the sponsoring entity. For Comprehensive Planning, the non-Federal share can be provided as work in kind or cash. However, for Technical Services, the non-Federal share must be provided as cash. Technical Services cost share could be provided as cash and/or work in kind, prior to WRDA 2007 (P.L. 110-114, 8 Nov 2007). WRDA 2007, Section 2013 included language that, when incorporated into Section 22, was interpreted to eliminate work in kind as technical services cost share. This difference is particularly burdensome for less affluent, non-Federal public bodies. Smaller communities are often the ones that would most benefit from Corps water resources support. Those communities tend to be cash poor and without operating capital that can be routed outside their budget. **Non-federal sponsor cost sharing requirements should be flexible and include the option to provide in-kind services for both Comprehensive Planning and Technical Services.**

3) Forecast Informed Reservoir Operations:

ICWP is supportive of expanding the concept of Forecast Informed Reservoir Operations to additional federally owned reservoirs in areas where hydrologically these forecasts can be made with enough precision to not increase safety concerns from flooding or other natural events. **ICWP supports conducting viability assessments on the use of forecast-informed reservoir operations at federal reservoirs. If those assessments show promise for improved management efficiency, three pilot projects should be authorized and located in different geographic locations across the U.S.**

4) Cost distributions to non-federal partners under Major Rehabilitation and Annual OMRR&R

Federal Reservoir, Major Rehabilitation costs utilized by the Corp are not consistent with the contract agreements. Many of our members are sponsors of USACE projects and do not feel they have an adequate nor appropriate role in determining which costs are listed under Work Category Codes as Major Rehabilitation. The contractual definition of Major Rehabilitation is defined as "significant, costly infrequent rehabilitation work" that "unduly distorting the Operation and

Maintenance, General budget.” When the Corps unilaterally determines which charges are significant, costly and distorts the O&M of the general budget, our members are faced with huge, unanticipated charges. Similarly, significant costs can be attributed to OMRR&R in any given year. **Non-federal sponsors should be afforded the ability to spread payment over several years for large increases in OMRR&R resulting from non-routine operations and maintenance (major capital expenditures for rehabilitation and replacement). Sponsors should have a role in determining which costs are considered Major Rehabilitation**

We look forward to working with the Committee to include these provisions in the WRDA2020 and ICWP wants to stress the importance of coordinating and communicating with states and interstate river commissions on these topics. ICWP members urge the committee to engage state water resource agencies on these topics in legislative development as well as the implementation both directly and through executive agency actions. Please don't hesitate to contact our Executive Director, Sue Lowry (sue.ICWP@gmail.com or 307-630-5804) if you have questions concerning these comments. Thank you for your consideration on these topics.

With best regards,



Amy Shallcross
ICWP Chair