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29 May, 2020

United States House of Representatives  
Committee on Transportation and Infrastructure  
The Honorable Peter DeFazio, Chair  
The Honorable Sam Graves, Ranking Member  
Washington, D.C.

Dear Chairman DeFazio and Ranking Member Graves:

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 have reviewed the America's Water Infrastructure Act, recently passed by the Senate Environment and Public Works Committee. Should the House T & I Committee choose to work from that bill as you develop your Water Resources Development Act for 2020, we offer these sections of support as well as additional provisions crucial to our membership:

Provisions of AWIA which ICWP Supports:

- Section 1014-allowing Secretary the option to look at regional and local benefits in addition to benefits to the national economy.
- Section 1044, but only after resolving Corps' Project Partnership Agreements' provisions related to indemnification and perpetual O&M with improved language as described below.
- Section 1095 Selection of dredged material disposal method for certain purposes.
- Section 1503 Planning Assistance for States. Request additional language be added to align in-kind services per centages in PAS programs as described below.
- Section 1504 Forecast-informed reservoir operations.
- Section 1505 Study on data for water allocation, supply, and demand. Request NAS to get input from national water organizations prior to launching study.
- Section 2002 Increased funding for technical assistance.
- Section 2013 Water data sharing pilot program.

Could support with modification:

Section 1090 High water-low water preparedness. The states which border the inland waterway for which such an emergency condition would be determined must also be consulted, in addition to the Coast Guard.

Project Partnership Agreements additional language needed: 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.

***Leader in Water Policy Information, Influence and Implementation***

The Corps PPA does not outline a true partnership. Rather, it is a one-sided agreement in favor of the Corps that overburdens the sponsor in terms of liability and 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.**

### **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.

**The Corps' existing OMRR&R approach is currently undefined and unworkable for sponsoring entities. Provisions are needed requiring the PPA OMRR&R obligation to align with the expected life of the project.**

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.**

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.org](mailto:Sue@ICWP.org) or 307-630-5804) if you have questions concerning these comments. Thank you for your consideration on these topics.

With best regards,

A handwritten signature in black ink that reads "Amy L. Shallcross". The signature is written in a cursive, flowing style.

Amy L. Shallcross, P.E.  
ICWP Chair