

Coalition Supporting Needed Changes to USACE Contracting for Project Partnership Agreements

December 17, 2021

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

Dear Chairman Carper and Ranking Member Capito:

The undersigned states and organizations have been trying for years to rectify two troublesome aspects of the contracts for non-federal partners associated with USACE Project Partnership Agreements (PPA)s. The Interstate Council on Water Policy and others wrote to the committee as WRDA 2020 was being developed and we once again bring your attention to additional language needed to improve the ability of non-federal partners to be active equals on Corps-partnered projects. In recent years, the Corps has redefined its PPAs, creating major challenges for nonfederal sponsors in executing those agreements that may preclude states and other potential non-federal sponsors from partnering with the Corps on critical water resource projects.

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 WRDA2022.**

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. By doing this, the burden is

placed on the non-federal sponsor to do major reconstruction or replacement with no financial support from the Corps at the end of the project's life. 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.

If we can provide additional specific language to rectify these shortcomings as WRDA 2022 is developed, please don't hesitate to contact Sue Lowry, Executive Director of the Interstate Council on Water Policy (sue@icwp.org) or any of the other signatory organizations.

Partner Signatories:

Association of Fish and Wildlife Agencies
Atlanta Regional Commission
Bayou Meto Water Management District
Delaware River Basin Commission
Great Lakes Commission
Interstate Commission on the Potomac River Basin
Interstate Council on Water Policy
National Association of Flood and Stormwater Management Agencies
Susquehanna River Basin Commission
The Nature Conservancy
Upper Mississippi River Basin Association