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U.S. Army Corps of Engineers,
ATTN: Ms. Amy Frantz, CEW-P, U.S.
Army Corps of Engineers, 3F91, 441 G
St. NW, Washington, DC 20314

Submitted electronically via email: WRDA2022@usace.army.mil re: Docket ID No. COE-2023-0002

Dear Ms. Frantz:

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 supported the recent passage of Water Resources Development Act (WRDA) 2022 and offer the following considerations as the Corps develops its implementation guidance.

ICWP has long advocated for the need to improve the ability of non-federal partners to be active equals on Corps-partnered projects. Our members have requested that Congress rectify two one-sided aspects of the contracts for non-federal partners associated with Corps Project Partnership Agreements (PPAs). Neither of these issues were addressed in WRDA 2022.

We request that USACE make administrative adjustments to its PPA policies as outlined below and to address these changes in the agency's WRDA 2022 guidance:

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 WRDA 2022 implementation.**

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. 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.**

WRDA is one of the most significant bipartisan pieces of water resources legislation that greenlights federal projects to serve interests of all Americans. If you have any questions regarding these comments, please contact me at: Beth@icwp.org or 307-772-1999. Thank you for the opportunity to provide our input.

Regards,



Beth Callaway
ICWP Executive Director

CC:

The Honorable Mark Kelly, Chair -- Senate Environment & Public Works Transportation and Infrastructure subcommittee
The Honorable Kevin Cramer, Ranking Member -- Senate Environment & Public Works Transportation and Infrastructure subcommittee
The Honorable David Rouzer, Chair -- House Transportation & Infrastructure, Water Resources and Environment subcommittee
The Honorable Grace Napolitano, Ranking Member -- House Transportation & Infrastructure, Water Resources and Environment subcommittee
Robyn Colosimo, Director for Policy and Legislation to the Assistant Secretary of the Army (Civil Works)
Joe Manous, Director of Institute for Water Resources, US Army Corps of Engineers