

October 5, 2023

The Honorable Tom Carper, Chair
The Honorable Shelley Moore Capito, Ranking Member
U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Carper and Ranking Member Capito:

Our coalition of 12 undersigned organizations either act as, or work with, non-Federal sponsors of many important U.S. Army Corps of Engineers (USACE) water resource projects that provide numerous benefits to communities nationwide. USACE Project Partnership Agreements (PPAs) are the legally binding documents between the Federal government and non-Federal project sponsors that set the terms and conditions for project construction and cost sharing. The widespread interest in the partnerships notwithstanding, the legal terms of the PPAs create major challenges for sponsors to partner with the agency and execute these vital projects.

We are collectively writing to you to respectfully request that the Senate Committee on Environment and Public Works provide USACE with specific direction and authority to rectify structural PPA inequities between the Federal government and non-Federal project sponsors via the Water Resources Development Act (WRDA) of 2024. The current structure of USACE PPAs require that non-federal sponsors assume: 1) complete liability for constructed projects (except for when fault or negligence is proven) and 2) operations, maintenance, repair, replacement, and rehabilitation (OMRR&R) for the project in perpetuity.

Congress can create a more equitable and reasonable approach to PPA non-Federal cost-share agreements via WRDA 2024 by:

1) Replacing the current blanket indemnification requirement with a more shared approach to liability

*Section 103(j) of WRDA 1986:*¹

“Any project to which this section applies...shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to...hold and save the United States free from damages...”

Indemnifying a third party (including the federal government) is in direct conflict with many states’ constitutions and laws as well as nonprofit organizations’ policies. In fact, 22 states (and counting) have a direct conflict with PPA requirements and their state laws (see map in Attachment 1). Many state constitutions preclude agencies from obligating funds without an

¹ Water Resources Development Act. PL 99-662. Sec. 103(j)(1) (1986).

encumbrance against an appropriation and do not allow for incurring any indebtedness of any nature on behalf of the state until an appropriation for it has been made by the legislature. Doing so requires the non-Federal party to promise financial resources for an indeterminate liability that might occur at an unknown time, at an unknown cost, and for an unknown reason.

Indemnification requires the assumption of liability beyond the extent to which many states' tort law permits. As a result, the unbounded risk that this clause creates for potential project sponsors impedes beneficial water resource projects from advancing. Removing or replacing blanket indemnification with a more shared approach to liability would better enable non-Federal partners to be active equals on USACE-partnered projects.

2) Establishing a defined endpoint on OMRR&R obligations

Section 103(j) of WRDA 1986:²

"Any project to which this section applies...shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to pay 100 percent of the operations, maintenance and replacement and rehabilitation costs of the project..."

Historically, USACE limited OMRR&R obligations to 50 years, which is the standard design life of a constructed project per the standing Principles and Guidelines. In 2012, USACE changed its policy to require that non-Federal sponsors maintain responsibility for OMRR&R obligations in perpetuity. This change in policy obligates non-Federal sponsors to undefined and perpetual OMRR&R obligations for the water resource project.

PPA reform is in the national interest and will increase opportunities to leverage non-Federal investments to achieve local, regional, and national water resource goals. We are committed to finding a PPA reform solution via WRDA 2024 that will enable project partners to more equitably engage on USACE projects and ensure that USACE meets its Federal obligations.

If you would like to learn about specific project examples impacted by PPA inequities, or if we can provide sample language that will help to rectify PPA shortcomings via WRDA 2024, please contact Beth Callaway, Executive Director of the Interstate Council on Water Policy (beth@icwp.org) or any of the undersigned organizations.

Partner signatories:

Association of Fish & Wildlife Agencies

National Audubon Society

Coastal States Organization

Delaware River Basin Commission

Great Lakes Commission

Interstate Commission on the Potomac River Basin

Interstate Council on Water Policy

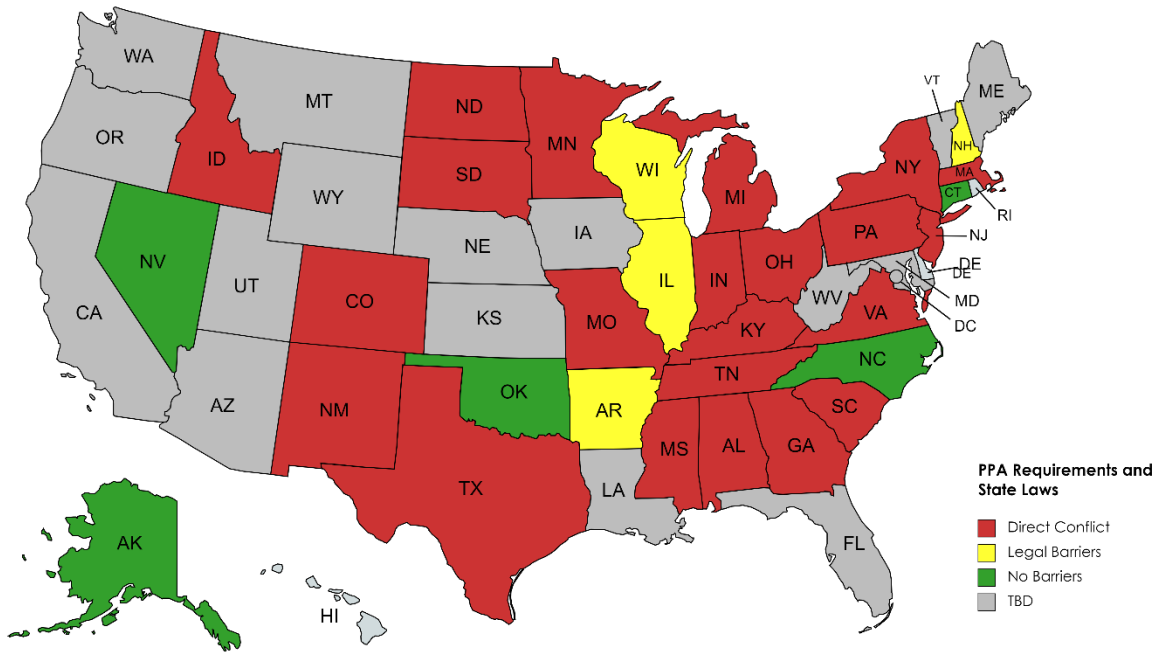
National Association of Flood and Stormwater Management Agencies

Susquehanna River Basin Commission

² Water Resources Development Act. PL 99-662. Sec. 103(j)(1) (1986).

The Nature Conservancy
Theodore Roosevelt Conservation Partnership
Upper Mississippi River Basin Association

Attachment 1: PPA Requirements and State Laws Map



Created with mapchart.net

Source:
Association of Fish & Wildlife Management Agencies. Member Survey. September 2023.