

Water Resource Policies and Authorities
CONSTRUCTION OF WATER RESOURCE DEVELOPMENT PROJECTS
BY NON-FEDERAL INTERESTS

1. Purpose. This Regulation provides policy guidance for implementation of Section 204 of the Water Resources Development Act (WRDA) of 1986, as amended by Section 1014(b) of the Water Resources Reform and Development Act (WRRDA) of 2014 and Section 1127 of the WRDA 2016 (33 United States Code (U.S.C.) 2232). Section 204 authorizes non-Federal interests to undertake construction of certain water resources development projects, with potential credit or reimbursement of the Federal share of that construction, subject to several requirements. Separate guidance is provided in Engineer Regulation (ER) 1165-2-209 regarding non-Federal interests undertaking a feasibility study under Section 203 of WRDA 1986, as amended, and in ER 1165-2-211 regarding operation and maintenance of improvements carried out by non-Federal interests under Section 204(f) of WRDA 1986, as amended.

2. Applicability. This regulation applies to all Headquarters, U.S. Army Corps of Engineers (HQUSACE) elements, Major Subordinate Commands (MSCs), Districts, laboratories and all field operating agencies having Civil Works responsibilities.

3. Distribution Statement. Approved for public release. Distribution is unlimited.

4. References.

a. Section 204 of WRDA 1986, as amended by Section 1014(b) of WRRDA 2014 and Section 1127 of WRDA 2016, (33 U.S.C. 2232) (See Appendix A).

b. ER 200-2-2 (33 Code of Federal Regulations (CFR) 230), Procedures for Implementing the National Environmental Policy Act.

c. ER 1105-2-100 , Planning Guidance Notebook.

d. ER 1110-1-8155, Specifications.

e. ER 1110-2-1150, Engineering and Design for Civil Works Projects.

*This regulation supersedes ER 1165-2-124, Construction of Harbor or Inland Harbor Projects by Non-Federal Interests, dated 1 October 1990 and ER 1165-2-120, Reimbursement For Advance Non-Federal Construction of Authorized Federal Harbor and Inland Harbor Projects, dated 15 June 1988.

f. CECW-P memorandum, dated 4 November 2015, subject: Implementation Guidance for Section 1020 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Transfer of Excess Credit.

5. General. Section 204 of WRDA 1986 was amended by Section 1014(b) of WRRDA 2014, which consolidated several authorities that allowed non-Federal interests to undertake construction of certain water resources development projects. Section 204 was further amended by Section 1127 of WRDA 2016 to allow the Secretary to provide credit or reimbursement for a discrete segment of a flood risk management project.

a. Section 204 provides that a water resource development project to be constructed by non-Federal interests under this authority must have a completed feasibility report and Chief's Report; a final feasibility report developed by non-Federal interests under Section 203 of WRDA 1986 that has been submitted by the Assistant Secretary of the Army (Civil Works) (ASA(CW)) to the Congress; or a final feasibility report for a water resources development and conservation and other purposes project that has been specifically authorized by the Congress to be carried out by the Secretary.

b. Section 204 provides that construction is subject to approval of the plans for the project, or separable element, by the Secretary, who must first determine whether the project, or separable element is feasible, i.e., technically feasible, economically justified, and environmentally acceptable. Further, Section 204 provides that construction is subject to any other conditions that the Secretary may require. It provides that prior to carrying out the project, the non-Federal interest must obtain any permit or approval required in connection with the project, or separable element, under Federal or State law and must ensure that a final environmental impact statement or environmental assessment, as appropriate, for the project, or separable element, has been filed.

c. In addition, Section 204 requires an executed agreement between the non-Federal interest and the Secretary prior to the initiation of construction. It provides that the Secretary may provide credit or reimbursement only if the project is authorized for construction by the Congress and the Secretary determines that the project, or separable element, was constructed in accordance with the approved plan, all applicable permits and approvals and conditions, and all Federal laws and regulations applicable to the construction of a water resources development project. It provides that the Secretary may apply credit toward the non-Federal share of authorized separable elements of the same project; or at the request of the non-Federal interest, toward the non-Federal share of a different water resources development project, subject to the requirements of Section 1020 of WRRDA 2014.

d. Section 204 requires that the Secretary provide written notification to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives if a non-Federal interest intends to construct a project, or separable element, under this authority. Previously, Congress had directed the

Secretary to provide written notification to the Appropriations Committees of both the Senate and House of Representatives prior to initiating negotiations for a reimbursement agreement for any project.

e. Section 204 authorizes the Secretary to undertake studies and engineering, and to provide technical assistance in obtaining permits, necessary for construction by a non-Federal interest under Section 204 if the non-Federal interest contracts with the Secretary to pay all costs of such studies, engineering, and technical assistance in the period during which the studies and engineering are being conducted.

f. Section 204 does not apply to projects implemented under the Continuing Authorities Program, which are not submitted to the Congress for authorization, or projects related to environmental infrastructure assistance projects, which are not water resources development projects within the primary mission programs of the Corps of Engineers and are not submitted to the Congress for authorization.

6. Procedures and Process.

a. A non-Federal interest intending to construct a water resources development project, or separable element, must notify the ASA(CW) in writing of their intent. The ASA(CW) will notify HQUSACE and advise the non-Federal interest of the Corps of Engineers District Office responsible for the geographic region in which the proposed project is located and the detailed information on the proposed work the non-Federal interest would be required to provide to the District. Upon receipt of the detailed information and subject to the availability of funds, the District Commander will assess whether or not the proposed work meets the criteria specified in Section 204 and paragraph 6.a. If the District Commander determines that the documentation provided by the non-Federal interest does not meet the requirements for review and processing of the proposal to the ASA(CW), the District Commander will, through the Major Subordinate Command (MSC) and appropriate HQUSACE Regional Integration Team (RIT), notify the ASA(CW) and formally return the proposal to the non-Federal interest with written documentation of the issues and concerns. The non-Federal interest may re-submit the proposal once the issues and concerns have been adequately addressed.

b. Once the District Commander determines that the proposal may be submitted for higher level review, the District will prepare a report that fully addresses the criteria and proposed findings and includes an executive summary which summarizes the District Commander's conclusions.

(1) As part of the information provided to the District Commander, the non-Federal interest must provide, at a minimum all engineering and design reports necessary to demonstrate the engineering adequacy of the proposed work, along with draft construction plans and specifications and a cost estimate. The plans must include the geospatial layout of the work, and graphical portrayal of all project components, including relevant sections and details. The

specifications must indicate material types, or salient features, as well as construction tolerances and acceptance criteria. The non-Federal interest must certify the quality and accuracy of the technical analyses and cost estimate. This certification should be done by documenting the quality control, quality assurance, and technical reviews that were conducted for the project documentation. The non-Federal interest must also document how the requirements for an independent (Safety Assurance) peer review of the project, under Section 2035 of WRDA 2007, were satisfied, if needed. If the District Commander determines the documentation provided by the non-Federal interest does not meet minimum requirements for review and processing of the proposal to the ASA(CW), the District Commander will, through the MSC and RIT, notify the ASA(CW) in writing and formally return the proposal to the non-Federal interest with written documentation of the issues and concerns.

(2) The District Commander must analyze whether the project, or separable element, meets the requirements of the National Environmental Policy Act and all other applicable environmental statutes and is economically justified based on appropriate Federal criteria. Even when there is no difference between the project recommended in the feasibility report and the proposed project, the District Commander must determine whether economic or environmental circumstances have changed since the report was completed.

(3) The non-Federal interest is required to obtain all applicable permits. If the proposed work consists of modifications to an existing Corps project that has not yet been authorized for construction, the non-Federal interest will also be required to obtain Section 408 permission (33 U.S.C 408) to alter the project (reference 4g provides specific guidance related to obtaining Section 408 permission). In its report, the District will identify the permits and permissions to be obtained by the non-Federal interest for construction of the project, or separable element.

(4) The District Commander's submittal will also include draft letters to the Authorization and Appropriation Committees providing notification of the non-Federal interest's intent to construct the project, or separable element, with potential credit or reimbursement for the Federal share of such construction.

(5) The District will identify in its report whether, if in lieu of reimbursement, the non-Federal interest seeks credit to be applied toward an authorized separable element of the same project or toward the non-Federal share of a different project. If the latter, the submittal will include information required under Section 1020 of WRRDA 2014 for the ASA(CW) to determine if a transfer of credit will be approved.

c. The District Commander will submit its report and the proposal of the non-Federal interest to the MSC Commander. Once the MSC Commander determines that they are sufficient to meet current Corps criteria, design standards, and review processes, these documents, along with the MSC Commander's recommendations, will be submitted to the appropriate RIT. HQUSACE will review the documents and submit them, along with recommendations, to the ASA(CW). The ASA(CW) will advise the non-Federal interest and HQUSACE whether the non-Federal

interest's proposal is approved, including any conditions on implementation of the project, or separable element.

d. After the plan is approved by the ASA(CW), the ASA(CW) will take steps necessary to obtain any Administration clearances. Once the project is cleared and ASA(CW) submits the notification letters to the Committees, the District Commander may develop an agreement with the non-Federal interest. The agreement will specify that any reimbursement is subject to specific appropriations by the Congress for that purpose. The District Commander will submit the draft agreement through the MSC to the HQUSACE RIT following procedures for processing Project Partnership Agreements. HQUSACE will review the draft agreement and, if concurred in, submit it to ASA(CW) for approval.

e. In undertaking construction, the non-Federal interest must follow current USACE construction standards and comply with all applicable Federal and state laws and regulations. Applicable Federal laws and regulations may include, but are not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act); the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4630 and 4655) and the regulations contained in 49 CFR Part 24; Section 601 of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11; the Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7; Buy American Act (41 U.S.C. 8302); Clean Air Act (42 U.S.C. 7606; Clean Water Act (33 U.S.C. 1368; Jones Act (46 U.S.C. 55109); Shipping Act (46 U.S.C. 55109); Utilization of Small Business Act (15 U.S.C. 631, 644; and Equal Opportunity for Veterans Act (38 U.S.C. 4212). In addition, a list of related laws which may apply and must be satisfied when applicable, is set forth at 33 CFR Section 320.3. The District Commander should be prepared to provide the non-Federal interest copies of language used by the Corps of Engineers in its standard contracts with construction contractors to serve as a guide for the non-Federal interest in developing its own contract.

f. To remain eligible for credit or reimbursement, the non-Federal interest may not initiate construction of the project, or separable element, until after execution of the approved agreement. If the work will be undertaken by contract, initiation of construction is award of the first construction contract for the project. In addition, prior to the Non-Federal interest awarding each contract for the project, the designs, detailed plans and specifications, and arrangements for carrying out the work under that contract must have been approved by the District Commander as meeting current Corps criteria, design standards, and review processes. Any proposed changes in approved designs, plans and specifications must also be reviewed and approved by the District Commander in advance of construction.

g. Engineer Regulation 1105-2-100 addresses necessary lands, easements, rights-of-way, relocations and dredged material placement areas required for water resources development

projects. The non-Federal interest should coordinate with the District to ensure that appropriate real estate interests for the project are acquired.

h. The project must be constructed by non-Federal interests in accordance with applicable permits, current USACE design and construction standards, approved plans, and applicable laws and regulations. The District Commander will monitor construction to determine whether the project, or separable element, is carried out in compliance with the requirements of Section 204. Following completion of construction, the District Commander must certify the cost data and whether the project or separable element was completed in accordance with applicable permits and approved plans and the non-Federal interest will provide the District with as-built drawing showing the project as finally constructed. District funding for the Corps of Engineers activities associated with monitoring construction activities will be requested through the normal budgetary process. The District Commander will forward such certification through the MSC to the HQUSACE RIT. The HQUSACE RIT will transmit the certification to the ASA(CW).

i. The costs of activities undertaken by the Corps of Engineers District office under Section 204, including, but not limited to, design review, review of project economics, environmental assessment, auditing, permit evaluation, agreement development and negotiation, construction monitoring, inspection, and certifications, will be undertaken with Federal funds appropriated for these activities. These costs will be included in total project costs and considered in calculating the amount of eligible credit or reimbursement.

j. The amount eligible for credit or reimbursement is equal to the Federal share of the total costs of construction of the project, or separable element. Items considered in determining the total cost of construction include costs for preconstruction engineering and design, including the costs for obtaining all applicable permits, and for engineering and design during construction; creditable costs for providing real property interests and relocations except that for harbor and inland harbor projects, those costs are creditable only toward the non-Federal sponsor requirement to pay an additional 10 percent of the general navigation features; the non-Federal sponsor's creditable costs for construction, including supervision and administration; and the costs for District reviews, assessments, inspections, monitoring, certifications and other activities associated with the implementation of the project under Section 204. The creditable or reimbursable amount is limited to the lesser of the costs incurred by the non-Federal sponsor in constructing the project or the Government's estimate of the cost for such work if it had been accomplished by the Government. The non-Federal interest's costs must be reasonable, allowable, and allocable and are subject to audit.

k. No credit may be applied or reimbursement provided until the project has been authorized for construction. In addition, reimbursement will be provided for a project, or separable element, carried out by a non-Federal interest only if Congress has specifically appropriated funds for the reimbursement. Any credit or reimbursement will not include interest.

1. In general, no credit or reimbursement will be provided until construction of the project, or separable element, is completed. However, for a flood risk management project, credit or reimbursement may be afforded for completion of construction of a discrete segment of the project, subject to the following:

(1) A discrete segment is a physical portion of a flood risk management project, or separable element, that can be operated independently without creating a hazard in advance of final completion of the flood risk management project, or separable element.

(2) The non-Federal interest's flood risk management proposal, submitted to ASA(CW) following guidance in paragraph 6.a., will need to identify the discrete segments for which credit or reimbursement would be sought. In approving the overall plan, the ASA(CW) must have determined that the identified discrete segments are technically feasible and environmentally acceptable.

(3) The agreement developed for the flood risk management project will identify the discrete segment(s) to be carried out for the project; require the non-Federal interest to complete the flood risk management project, or separable element to which the discrete element is part; and identify a timeframe for such completion. The agreement will also provide that if the non-Federal interest fails to complete construction of the project, or separable element, the non-Federal interest will be required to remit any reimbursement received for a discrete segment of such project, or separable element.

(4) Credit or reimbursement for a discrete segment will not be made until construction of the discrete segment is complete and the District Commander determines that work is consistent with the authorization of the applicable flood risk management project, or separable element thereof, and plan approved by the ASA(CW). The creditable or reimbursable amount for the discrete segment is limited to the lesser of the costs incurred by the non-Federal sponsor in constructing the discrete segment or the Government's estimate of the cost for such work if it had been accomplished by the Government. The non-Federal interest's costs must be reasonable, allowable, and allocable and are subject to audit. Reimbursement for a discrete segment will be provided for a project, or separable element, only if Congress has specifically appropriated funds for the reimbursement. Any credit or reimbursement will not include interest.

7. Operation and Maintenance (O&M). In general, the non-Federal interest is responsible for O&M of water resources development projects. The non-Federal interest must prepare an O&M manual addressing the O&M requirements for District review and approval. For authorized harbor or inland harbor projects, the Corps of Engineers will be responsible for the costs of O&M as specified in Section 101(b) of WRDA 1986, as amended. If a non-Federal interest constructs a harbor or inland harbor project prior to Congressional authorization, the non-Federal interest will be responsible for O&M unless the ASA(CW) has approved Federal assumption of maintenance under Section 204(f) of WRDA 1986, as amended. ER 1165-2-211 addresses the policy and process requirements for Section 204(f).

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8. Studies and Engineering. Section 204(c) authorizes the Secretary to undertake all necessary studies and engineering for any construction to be carried out by the non-Federal interest and to provide technical assistance in obtaining necessary permits for construction if the non-Federal interest contracts with the Secretary to furnish funds for the studies, engineering, or technical assistance. The provision of assistance under Section 204(c) will require approval of the MSC Commander and execution of a memorandum of agreement (MOA) similar to Support for Others MOAs, with the non-Federal interest agreeing to pay all costs of such studies or assistance upfront.

FOR THE COMMANDER:

Appendix
A - Section 204, as amended



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APPENDIX A

Section 204 of the Water Resources Development Act of 1986,
as amended by Section 1014(b) of the Water Resources Reform
and Development Act of 2014 and Section 1127 of the Water Infrastructure Improvements
for the Nation Act of 2016 (33 U.S.C. § 2232)

**SECTION 204. CONSTRUCTION OF WATER RESOURCES DEVELOPMENT PROJECTS
BY NON-FEDERAL INTERESTS**

(a) **WATER RESOURCES DEVELOPMENT PROJECT DEFINED** - In this section, the term "water resources development project" means a project recommendation that results from-

- (1) a feasibility report, as such term is defined in section 2282d(f) of this title;
- (2) a completed feasibility study developed under section 2231 of this title; or
- (3) a final feasibility study for water resources development and conservation and other purposes that is specifically authorized by Congress to be carried out by the Secretary.

(b) **AUTHORITY**

(1) **IN GENERAL** - A non-Federal interest may carry out a water resources development project, or separable element thereof-

(A) in accordance with a plan approved by the Secretary for the project or separable element; and

(B) subject to any conditions that the Secretary may require, including any conditions specified under section 2231(c)(3) of this title.

(2) **CONDITIONS** - Before carrying out a water resources development project, or separable element thereof, under this section, a non-Federal interest shall-

(A) obtain any permit or approval required in connection with the project or separable element under Federal or State law; and

(B) ensure that a final environmental impact statement or environmental assessment, as appropriate, for the project or separable element has been filed.

(c) **STUDIES AND ENGINEERING** - When requested by an appropriate non-Federal interest, the Secretary may undertake all necessary studies and engineering for any construction to be undertaken under subsection (b), and provide technical assistance in obtaining all necessary permits for the construction, if the non-Federal interest contracts with the Secretary to furnish the United States funds for the studies, engineering, or technical assistance in the period during which the studies and engineering are being conducted.

(d) **CREDIT OR REIMBURSEMENT**

(1) **GENERAL RULE** - Subject to paragraph (3), a project or separable element of a project carried out by a non-Federal interest under this section shall be eligible for credit or reimbursement for the Federal share of work carried out on a project or separable element of a project if-

(A) before initiation of construction of the project or separable element-

- (i) the Secretary approves the plans for construction of the project or separable element of the project by the non-Federal interest;
 - (ii) the Secretary determines, before approval of the plans, that the project or separable element of the project is feasible; and
 - (iii) the non-Federal interest enters into a written agreement with the Secretary under section 1962d-5b of title 42, including an agreement to pay the non-Federal share, if any, of the cost of operation and maintenance of the project; and
- (B) the Secretary determines that all Federal laws and regulations applicable to the construction of a water resources development project, and any conditions identified under subsection (b)(1)(B), were complied with by the non-Federal interest during construction of the project or separable element of the project.
- (2) APPLICATION OF CREDIT - The Secretary may apply credit toward-
- (A) the non-Federal share of authorized separable elements of the same project; or
 - (B) subject to the requirements of this section and section 2223 of this title, at the request of the non-Federal interest, the non-Federal share of a different water resources development project.
- (3) REQUIREMENTS - The Secretary may only apply credit or provide reimbursement under paragraph (1) if-
- (A) Congress has authorized construction of the project or separable element of the project; and
 - (B) the Secretary certifies that the project has been constructed in accordance with-
 - (i) all applicable permits or approvals; and
 - (ii) this section.
- (4) MONITORING - The Secretary shall regularly monitor and audit any water resources development project, or separable element of a water resources development project, constructed by a non-Federal interest under this section to ensure that-
- (A) the construction is carried out in compliance with the requirements of this section; and
 - (B) the costs of the construction are reasonable.
- (5) DISCRETE SEGMENTS
- (A) IN GENERAL - The Secretary may authorize credit or reimbursement under this subsection for a discrete segment of a flood damage reduction project, or separable element thereof, before final completion of the project or separable element if-
- (i) except as provided in clause (ii), the Secretary determines that the discrete segment satisfies the requirements of paragraphs (1) through (4) in the same manner as the project or separable element; and
 - (ii) notwithstanding paragraph (1)(A)(ii), the Secretary determines, before the approval of the plans under paragraph (1)(A)(i), that the discrete segment is technically feasible and environmentally acceptable.
- (B) DETERMINATION - Credit or reimbursement may not be made available to a non-Federal interest pursuant to this paragraph until the Secretary determines that-
- (i) the construction of the discrete segment for which credit or reimbursement is requested is complete; and

(ii) the construction is consistent with the authorization of the applicable flood damage reduction project, or separable element thereof, and the plans approved under paragraph (1)(A)(i).

(C) WRITTEN AGREEMENT

(i) In general - As part of the written agreement required under paragraph (1)(A)(iii), a non-Federal interest to be eligible for credit or reimbursement under this paragraph shall-
(I) identify any discrete segment that the non-Federal interest may carry out; and
(II) agree to the completion of the flood damage reduction project, or separable element thereof, with respect to which the discrete segment is a part and establish a timeframe for such completion.

(ii) REMITTANCE - If a non-Federal interest fails to complete a flood damage reduction project, or separable element thereof, that it agreed to complete under clause (i)(II), the non-Federal interest shall remit any reimbursements received under this paragraph for a discrete segment of such project or separable element.

(D) DISCRETE SEGMENT DEFINED - In this paragraph, the term "discrete segment" means a physical portion of a flood damage reduction project, or separable element thereof-

(i) described by a non-Federal interest in a written agreement required under paragraph (1)(A)(iii); and

(ii) that the non-Federal interest can operate and maintain, independently and without creating a hazard, in advance of final completion of the flood damage reduction project, or separable element thereof.

(e) NOTIFICATION OF COMMITTEES - If a non-Federal interest notifies the Secretary that the non-Federal interest intends to carry out a project, or separable element thereof, under this section, the Secretary shall provide written notice to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives concerning the intent of the non-Federal interest.

(f) OPERATION AND MAINTENANCE - Whenever a non-Federal interest carries out improvements to a federally authorized harbor or inland harbor, the Secretary shall be responsible for operation and maintenance in accordance with section 2211(b) of this title if-

(1) before construction of the improvements-

(A) the Secretary determines that the improvements are feasible and consistent with the purposes of this subchapter; and

(B) the Secretary and the non-Federal interest execute a written agreement relating to operation and maintenance of the improvements;

(2) the Secretary certifies that the project or separable element of the project is constructed in accordance with applicable permits and appropriate engineering and design standards; and

(3) the Secretary does not find that the project or separable element is no longer feasible.