CHAPTER 12
REAL ESTATE ROLES AND RESPONSIBILITIES FOR CIVIL WORKS: COST SHARED AND FULL FEDERAL PROJECTS

SECTION I. GENERAL

12-l. Purpose. This chapter sets forth the roles and responsibilities for real estate planning and land acquisition for cost shared and full Federal water resource projects.

12-2. Applicability. This chapter is applicable to all Headquarters, U.S. Army Corps of Engineers (HQUSACE) elements and all USACE commands having civil works real estate responsibilities. While it applies to all civil works projects - specifically authorized, continuing authority, full Federal or cost shared - the level of detail necessary to apply the requirements of this chapter will vary depending upon the scope and complexity of each project. Further, if there is a conflict between the crediting provisions of this chapter and the terms and conditions of a Project Cooperation Agreement (PCA), a Local Cooperation Agreement (LCA), or a Letter of Assurance executed prior to the effective date of this chapter, then the provisions of such PCA, LCA, or Letter shall govern. The provisions of this chapter supersede all conflicting provisions contained in Sections II, III, IV, VI, and VIII of Chapter 2 and any conflicting provisions of Chapter 5 of ER 405-1-12.

12-3. References. See Appendix 12-A.

12-4. Glossary. A glossary of the acronyms and abbreviations used in this chapter is included as Appendix 12-B.

12-5. Program and Project Management Process. It is HQUSACE policy that Real Estate participate fully in the Program and Project Management process. Real Estate involvement is continuous throughout the development and implementation of the project, although the level of involvement varies during the different phases. Real Estate staff fully supports the Project Manager (PM) in coordinating real estate activities with non-Federal interests. For further information regarding the Program and Project Management process, see ER 5-1-11, Program and Project Management.

SECTION II. REAL ESTATE PRINCIPLES AND GUIDELINES

12-6. General.

a. Under the Fifth Amendment to the U.S. Constitution, private property cannot be taken by the Federal government (Government) for authorized public purposes without the payment of just compensation. This same principle applies to States and political subdivisions thereof through the Fourteenth Amendment to the U.S. Constitution.

b. In addition to these constitutional provisions, general real estate acquisition policies for Federal and Federally funded projects, including cost shared water resource projects, are described in The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Public Law 100-17; and the Uniform Regulations contained in 49 C.F.R. Part 24 (hereinafter collectively referred to as “P.L. 91-646"). Except as otherwise allowed therein, P.L. 91-646 requires that an acquiring agency comply with the following basic policies among others:

(1) the acquiring agency must make every reasonable effort to acquire the real property expeditiously by negotiation;

(2) real property must be appraised before the initiation of negotiations with the landowner and the initial offer to the landowner shall not be less than the approved appraisal of the fair market value of the property to be acquired;

(3) lawful occupants of real property that will be acquired shall not be required to move unless he or she has received at least 90 days advance written notice of the earliest date by which he or she may be required to move;

(4) before requiring an owner to surrender possession of the real property, the acquiring agency must pay the agreed purchase price to the owner, or in the case of a condemnation, deposit with the court, for the benefit of the owner, an amount not less than the acquiring agency’s approved appraisal of the fair market value of such property, or the court award of compensation in the condemnation proceeding for the property;

(5) the acquiring agency must not advance the time of condemnation, or defer negotiations or condemnation or the deposit of funds with the court, or take any other coercive action in order to induce an agreement on the price to be paid for the property;

(6) if the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the acquiring agency must offer to acquire the uneconomic remnant along with the portion of the property needed for the project; and

(7) if the acquiring agency intends to acquire any interest in real property by exercise of the power of eminent domain, it must institute formal condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

12-7. Navigation Servitude

a. Definition. The navigation servitude is the dominant right of the Government under the Commerce Clause of the U.S. Constitution (U.S. CONST. art.I, §8,cl.3) to use, control and regulate the navigable waters of the United States and the submerged lands thereunder for various commerce-related purposes including navigation and flood control. In tidal areas, the servitude extends to all lands below the mean high water mark. In non-tidal areas, the servitude extends to all lands within the bed and banks of a navigable stream that lie below the ordinary high water mark.

b. Determination of Availability. The determination of the availability of the navigation servitude is a two-step process. First, the Government must determine whether the project feature serves a purpose which is in the aid of commerce. Such purposes recognized by the courts include navigation, flood control and hydro-electric power. If it is so determined, then the second step is to determine whether the land at issue is located below the mean or ordinary high water mark of a navigable watercourse.

c. Exercise of Navigation Servitude. As a general rule, the Government does not acquire interests in real property that it already possesses or over which its use or control is or can be legally exercised. Therefore, if the navigation servitude is found to be available as a result of application of the process described in subparagraph b of this paragraph, then the Government will generally exercise its rights thereunder and, to the extent of such rights, will not acquire a real property interest in the land to which the navigation servitude applies. Generally, it is the policy of the U.S. Army Corps of Engineers (USACE) to utilize the navigation servitude in all situations where available, whether or not the project is cost shared or full Federal.

12-8. Relocation of Facilities or Public Utilities.

a. Substitute Facility Doctrine. Generally, the criteria for just compensation is the fair market value of the property at the time of the taking. A generally accepted definition of “fair market value” is “the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy.” INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS (1992), at 3-4. Deviation from this criteria for measurement of just compensation has been required only when fair market value has been too difficult to ascertain or when its application would result in manifest injustice to the owner or to the public. In such cases,

the cost of constructing a substitute facility may be used as the measure of just compensation paid to the facility owner where a substitute facility is, in fact, necessary. The substitute facility should generally serve the owner in the same manner and reasonably as well as does the existing facility. Typically, the substitute facility doctrine is applied to acquisitions of public utilities, highways and certain other publicly owned facilities (e.g., schools, courthouses, etc.), railroads, and cemeteries.

b. Relocations. The substitute facility doctrine is the underpinning for the concept of relocations as applied to implementation of water resources projects by the Corps of Engineers. Thus, the term “relocation” generally means providing a functionally equivalent facility to the owner of an existing utility, cemetery, highway or other eligible public facility, and railroad when such action is authorized in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement (and attendant removal) of the affected facility or part thereof. For cost shared projects where it is the responsibility of a non-Federal sponsor to perform or assure the performance of relocations, this general definition must be modified as applied to railroad bridges (and approaches thereto) or as applied to bridges over navigable waters of the United States depending upon the authorized purposes of the specific project. For flood control projects, see Article I.G. of the Model PCA for Structural Flood Control approved March 1994; for commercial navigation projects at harbors or inland harbors, see Article I.J. of the Model PCA for Commercial Navigation Harbor Projects approved May 1996. In addition, the authorizing legislation for a project or any report referenced in that legislation may alter the definition of the term “relocation” as it applies to that project or may alter its applicability to a particular facility.

c. Necessary Findings. Before replacement, alteration or other modification to a facility can properly be categorized as a relocation, generally the following criteria must be satisfied:

(1) the project design requires that the existing facility be removed in whole, or in part, or that the project will negatively impact the ongoing function or operation of the facility;

(2) the owner of the facility has a compensable real property interest in the land on which the impacted portion of the facility is located;

(3) the facility serves a public purpose;

(4) the owner has a duty to replace the facility as a result of legal or factual necessity; and

(5) the fair market value of the interest that must be acquired due to project impact is too difficult to obtain; or payment of fair market value instead of providing a substitute facility would result in manifest injustice to the owner or to the public.

d. Attorney's Opinion of Compensability. Preparation of an Attorney's Opinion of Compensability is the principal process for determining the extent of the legal obligation to relocate a utility or public facility that will be impacted by the construction or operation of a project. For additional information on Attorney's Opinions of Compensability, see paragraphs 12-17 and 12-22 of this chapter.

12-9. Determining the Appropriate Interest to Acquire.

a. General. It is the policy of USACE to acquire, or to require a non-Federal sponsor to provide, the minimum interest in real property necessary to support a project. The interests described in the following paragraphs have been determined to represent the minimum interest generally required to support the described purposes or features and must be utilized unless otherwise approved as described in subparagraph e of this paragraph. Greater or lesser interests may be appropriate depending upon the purposes of a project or other circumstances relating to project requirements or a particular acquisition.

b. Fee Title. Generally, fee title is required for the following:

(1) dam sites;

(2) lock and dam sites;

(3) disposal and borrow areas required for future maintenance work;

(4) public access areas;

(5) recreation; and

(6) fish and wildlife mitigation lands, ecosystem restoration, and other environmental purposes. However, a lesser, or easement estate, may be appropriate based on the extent of interest required for the operation or requirements of a project.

(7) disposal areas located on fast land that are required for commercial navigation projects for a harbor or inland harbor.

c. Permanent Easements. Generally, permanent easements are required for the following:

(1) levees, floodwalls and other permanent structures;

(2) flowage areas;

(3) ponding areas for dry dams;

(4) channel rectification works and adequate access thereto;

(5) areas impacted by induced flooding where the impact rises to the level of a taking;

(6) roads;

(7) waterway improvements and the right to permanently flood areas needed for navigation pools;

(8) the construction and maintenance of aids to navigation (the location and extent of land required for aids to navigation shall be coordinated by the District Commander with the local Coast Guard District Commander at the time the land is being obtained).

d. Temporary Easements. Generally, temporary easements are required for the following:

(1) adequate access and work areas required during construction of the project;

(2) disposal areas for all projects other than commercial navigation projects for a harbor or inland harbor if needed only to support construction; and

(3) Borrow Areas. While a temporary easement is generally required to support borrowing of materials, it is noted that small amounts of borrow materials, or disposal capacity, may sometimes be supplied by the construction contractor through use of a readily available commercial site. If so determined by an analysis conducted by PM, Engineering, Real Estate and other District and non-Federal sponsor offices, and if no other constraints exist, the construction contract solicitation documents should clearly request bids therefor and provision of such materials or capacity by the construction contractor would be in the nature of a construction item not LERRD (lands, easements, rights-of-way, relocations, and dredged or excavated material disposal areas). In no instance, however, should a contractor be required to provide lands, easements or rights-of-way (LER) for the project in support of borrow or disposal.

e. Approval Authority. Unless approved as part of a Real Estate Plan (REP) contained in an approved decision document for the project, requests to deviate from application of the interests required by subparagraphs b., c., or d. of this paragraph, together with adequate justification, must be forwarded in writing through Division to HQUSACE (ATTN: CERE-AP) for coordination, review and approval.

12-10. Determining the Appropriate Estate.

a. Meaning. The term “estate’ as used in this chapter means the written description of the type, nature, and extent of the real property interest that is required to support the construction, operation, or maintenance of a project.

b. Standard Estates. Standard estates approved for use in either full Federal or cost shared projects are contained in Chapter 5 of this regulation. Once the appropriate interest is determined through application of the requirements of paragraph 12-9 of this chapter, the corresponding standard estate must be used if it is among those listed in Chapter 5.

c. Non-Standard Estates. Where there is no corresponding standard estate for the interest to be required, or where changes to the corresponding standard estate (or previously approved non-standard estate) are desired, a non-standard estate must be drafted and approved. The District Chief of Real Estate may approve non-standard estates if they serve the intended project purpose, substantially conform with and do not materially deviate from the corresponding standard estate contained in Chapter 5, and do not increase the costs nor potential liability of the Government. Changing an estate from easement to fee, or vice versa, or altering an estate so as to affect project purposes, is not within the scope of the District's approval authority. For all non-standard estates not within the scope of District's approval authority, approval may be obtained either by placing the body of the non-standard estate in the REP of a feasibility report or other study decision document that is approved by HQUSACE, or by request for approval forwarded prior to use of such estate through Division to HQUSACE (ATTN: CERE-A) for appropriate coordination, review, and final determination.

d. Coordination with Non-Federal Sponsor. Because a non-Federal sponsor is generally responsible for acquiring lands, easements, and rights-of-way pursuant to state law and procedure, full coordination and consultation with the non-Federal sponsor must occur prior to the Government's determination of the interests and estates required for a cost shared project. These efforts should begin in the early stages of plan formulation and continue, as appropriate, to the conclusion of the acquisition process.

12-11. Rights-of-Entry.

a. General. Two types of rights-of-entry are typically obtained by the Government: construction and survey and exploration. Section VI of Chapter 5 of this regulation contains guidance on the use of rights-of-entry by the Government.

b. Forms. ENG Form 1258-R, Right-of-Entry for Survey and Exploration, and ENG Form 2803-R, Right-of-Entry for Construction, will be used when the Government obtains rights-of-entry for these purposes. These forms are included as Appendices 12-C and 12-D of this chapter.

c. Use of Rights-of-Entry by Non-Federal Sponsors. Non-Federal sponsors are not required to utilize the standard forms for obtaining rights-of-entry for cost shared projects. However, the District Chief of Real Estate must assure that any right-of-entry to be obtained for a project by a non-Federal sponsor is sufficient for the intended project purpose and that it does not subject the Government to risk or liability. For other topics related to the use of rights-of-entry for cost shared projects, see paragraph 12-26 (Certification of Availability) and paragraph 12-37a (credit issues) of this chapter.

12-12. Joint Land Acquisition Policy for Full Federal Reservoir Projects.

a. The Policy. The joint policy of the Department of the Interior and the Department of the Army governing the acquisition of land for full Federal reservoir projects was published in the Federal Register on 22 February 1962 in Volume 27 beginning at page 1734, and was again published on 2 July 1966 in Volume 31 beginning at page 9108. This policy statement recites, in part, that "[i]n so far as permitted by law, it is the policy of the Departments of the Interior and of the Army to acquire, as part of reservoir project construction, adequate interest in lands necessary for the realization of optimum values for all purposes including additional land areas to assure full realization of optimum present and future outdoor recreational and fish and wildlife potentials of each reservoir." The published policy also contains detailed provisions regarding the estates that are to be acquired in relationship to the reservoir's permanent features, storage pool, and other boundaries. For the full text of the published policy, see 32 C.F.R. §644.4. For implementing guidance, see Section IV of Chapter 2 of this regulation.

b. Applicability to Cost Shared Projects. Generally, the Joint Land Acquisition Policy will not apply to control the extent of land acquisition for cost shared reservoir projects, or to cost shared modifications to existing full Federal projects, where the lands, easements, and rights-of-way (LER) required to implement such project, or modification, must be provided by a non-Federal sponsor. Guidance will be provided by HQUSACE on a case-by-case basis in these circumstances.

SECTION III. PLANNING

12-13. Reconnaissance.

a. General. Before initiation of a feasibility study, USACE is generally required to perform, at Federal expense, a reconnaissance study of the water resources problem in order to identify potential solutions to such problem in sufficient detail to determine whether or not planning to develop a project should proceed to the preparation of a feasibility report.

b. Expedited Reconnaissance Study Phase. Beginning with all FY 97 new reconnaissance starts, an expedited reconnaissance study process applies that is more limited in scope than historical reconnaissance level efforts yet still addresses the requirements of Section 905(b) of the Water Resources Development Act of 1986 (WRDA 86), as amended. Four essential tasks must be accomplished:

(1) Determine that the water resource problem(s) warrant Federal participation;

(2) Define the Federal interest based on a preliminary appraisal consistent with Department of Army policies;

(3) Prepare a Project Study Plan (PSP); and

(4) Assess the level of interest and support from non-Federal entities in the identified potential solutions and cost sharing of feasibility phase and construction.

c. Level of Detail. While the study must include a preliminary analysis of the Federal interest, costs, benefits, environmental impacts, and an estimate of the costs of preparing the feasibility report, generally only existing, readily available data should be used. Generally, the study costs are not to exceed $100,000.

d. Real Estate’s Role. Detailed real estate information is not required. However, since cost estimates will typically include costs attributable to real estate requirements, Real Estate is responsible for providing the real estate cost estimate that will be used in the study and for providing the Real Estate Section or information contained in the analysis or report to the same level of detail as contained in the analysis or report generally. In addition, since a major focus of the reconnaissance process is preparation of the PSP, Real Estate is responsible for providing informed input into the PSP regarding a realistic real estate cost estimate, scope of work, schedules and other real estate matters and tasks. Accordingly, Real Estate representatives should attend and participate in reconnaissance phase meetings as necessary to perform these responsibilities. For cost shared projects, the District should consult with the non-Federal sponsor during the preparation of the Real Estate Section, the real estate cost estimate, and the PSP.

12-14. Feasibility - General. If it is determined that there is a Federal interest, and for cost shared projects that a non-Federal sponsor is willing to support additional study, a feasibility phase of study is initiated. For cost shared projects, a Feasibility Cost Sharing Agreement (FCSA) is executed between the Government and the non-Federal sponsor that requires study costs to be shared equally between the Government and the non-Federal sponsor. At least 50 percent of a non-Federal sponsor's share must be in cash and the remaining 50 percent of the non-Federal sponsor's share may be contributed as in-kind products or services.

12-15. Feasibility - Real Estate's Role

a. It is essential that the real estate requirements for a water resource project are adequately identified and that the estimated costs and schedule for land acquisition are accurately established before authorization. Therefore, a comprehensive Real Estate Plan (REP) to the Feasibility Report, General Reevaluation Report, Limited Reevaluation Report, Detailed Project Report, Special Project Report, or other decision document, is generally required for all water resource projects whether cost shared or full federal. The contents of the REP are described in paragraph 12-16c below.

b. To effectively contribute to the formulation of a project, Real Estate should participate with Planning, the PM and other District elements in discussions and meetings held during the feasibility phase, any Alternative Formulation Briefing (AFB) and the Feasibility Review Conference (FRC). The AFB and FRC in the feasibility phase are the principal mechanisms for resolution of identified policy or legal issues. Real Estate representatives should attend these meetings, as appropriate, and should review and comment on subsequent MFRs and PGMs.

c. For cost shared projects, real estate acquisition and performance of facility and utility relocations are major responsibilities of the non-Federal sponsor. Therefore, Real Estate should participate with Planning, PM and other District elements in the discussion of project requirements with the non-Federal sponsor. Further, Real Estate should initiate discussions with the non-Federal sponsor regarding acquisition policies and procedures, including compliance with P.L. 91-646, as amended, LERRD crediting procedures, and milestones for land acquisition. Real Estate must also regularly consult with the non-Federal sponsor throughout the feasibility phase as to the LER and facility/utility relocation requirements of the project as it proceeds to final formulation.

d. It is the responsibility of the District Chief of Real Estate to assure that the acquisition process is conducted in compliance with the requirements of P.L. 91-646. Accordingly, the feasibility phase work effort must be conducted so that schedules, assignments, and costs include these requirements. Since P.L. 91-646 requirements also attach to the acquisition of LER by non-Federal sponsors for cost shared projects (see paragraph 12-6.b of this chapter), it is the responsibility of the District Chief of Real Estate to monitor the non-Federal sponsor's acquisition program to assure its compliance with the requirements of P.L. 91-646. Accordingly, in addition to providing necessary advice and consultation during the feasibility phase on P.L. 91-646 process, procedures, and requirements, Real Estate must also advise the non-Federal sponsor that:

(1) P.L. 91-646 requirements apply to acquisition of real property that occur in anticipation of a Federal project including such acquisitions that occur prior to the execution of the PCA for the project;

(2) the non-Federal sponsor must maintain records that demonstrate compliance with the requirements of P.L. 91-646 including that landowners have been properly advised of their rights under the program and that evidence appropriate benefit determinations. These records must be maintained for a minimum of three years after the period of construction (as defined in the project PCA) and resolution of all relevant claims arising therefrom including P.L. 91-646 claims or appeals; and

(3) the non-Federal sponsor must have an appeals procedure for the prompt review of claims that it has allegedly failed to properly consider applications or provision of assistance under P.L. 91-646.

e. Project Management Plan (PMP). By the end of the feasibility phase, Real Estate should have a complete REP for inclusion in the Feasibility Report and a Baseline Cost Estimate for Real Estate for inclusion in the M-CACES cost estimate. Real Estate should ensure that the REP is provided to the PM for incorporation of real estate requirements and pertinent real estate data into the PMP. The PMP establishes the scope, schedule, budgets and technical performance requirements for the construction, operation, and management of the project.

12-16. Real Estate Plan.

a. General. A Real Estate Plan (REP) is the Real Estate work product that supports project plan formulation. It identifies and describes the lands, easements and rights-of-way (LER) required for the construction, operation and maintenance of a proposed project, including those required for relocations, borrow material, and dredged or excavated material disposal. The REP also identifies and describes the facility/utility relocations that are necessary to implement the project. Further, the REP describes the estimated LER value, together with the estimated administrative and incidental costs attributable to providing project LER, and the acquisition process (e.g., who will be acquiring, the types of ownerships, non-Federal sponsor's ability to acquire land) that will be required to support project implementation. For cost shared projects, the REP can be prepared by either USACE or non-Federal sponsor Real Estate personnel. Regardless of who prepares the REP, USACE and the non-Federal sponsor should fully coordinate and consult with each other throughout the drafting and approval process to ensure consistency with applicable Federal and state law, policy, and procedure and to ensure that the expressed conclusions and plans are implementable in a timely fashion. Due to variations among project purposes, state law, and non-Federal sponsors, each REP should be tailored to the particular facts and circumstances of the project at issue with full explanation provided where exceptions to policy are being proposed. The REP must be prepared to the same level of detail as, and be part of, the decision document which it supports (e.g. Feasibility Report, General Reevaluation Report (GRR), Detailed Project Report (DPR), etc).

b. Project Type & Applicability. A REP must be prepared in support of decision documents for all types of water resources projects whether full Federal or cost shared, specifically authorized or continuing authority. The level of detail required for each item described in subparagraph c below will vary depending on the scope and complexity of each project.

c. Scope & Content. The REP must include a discussion of the following significant topics, including sufficient description of the rationale supporting each conclusion presented:

(1) The purpose of the REP must be described in relation to the project document that it supports. For example, if the REP is in support of a GRR, it should state this fact together with a brief description of prior REPs prepared for the project with approval status and the relationship of the subject REP to such prior project REPs (e.g., separable element, next in sequence, supplement, replacement).

(2) For each project purpose and feature, a description of the LER required for the construction, operation and maintenance of the project including those required for relocations, borrow material and dredged or excavated material disposal. This information should include acreage, estates, number of tracts and ownerships, and estimated value. The total acreage will be broken down as to fee and the various types and duration of easements required. Information should also be included regarding the extent that

project LER is owned by private parties, by the non-Federal sponsor if applicable, and by other public entities. If the project will have more than one stage or phase, then the acreage will be further broken down by stage or phase consistent with the description of the project contained in the main report.

(3) For cost shared projects, a description of all LER required for the project that is already owned by the non-Federal sponsor, the acreage and interest owned, and whether the existing estates are sufficient and available for the project. Because unique aspects of state or local law may be involved, a sufficiency determination should be made by the Government only after full consultation with the non-Federal sponsor. The REP should also briefly discuss special value considerations or crediting principles that may be applicable to existing non-Federal sponsor ownerships(e.g., Federal appraisal rules, no credit for lands previously provided as an item of local cooperation; see paragraphs 12-37 and 12-38 of this chapter for additional information).

(4) Copies of proposed non-standard estates, if available, together with adequate justification therefor if approval of such estates is desired through approval of the decision document for the project.

(5) Whether there is an existing Federal project that lies fully or partially within the LER required for the project. If so, the REP must also briefly describe the existing project; the extent of overlap of the two projects; the identity of the sponsor, if any, of the existing project; whether the LER that supports the existing project was previously provided as an item of local cooperation for such project; the owner of the LER that supports the existing project; the nature of the estate(s) owned; and the sufficiency and availability of the existing estate(s) for the new project.

(6) Whether there is any Federally owned land included within the LER required for the project. If there is such land, the REP must also describe the purpose for which the land is required for the project; the identity of the managing agency for the land, the acreage and estate owned by the United States, and the acreage and estate required for the project; the views of the local representative of the managing Federal agency as to use for the project; and the acquisition plan for acquiring the required real property interests or other possessory rights. (Note: for interchange of national forest land, see 16 U.S.C. §505a).

(7) The extent, if any, that the LER required for the project lies below the ordinary high water mark, or the mean high water mark, as the case may be, of a navigable watercourse together with a brief discussion of whether the navigation servitude is available and will be exercised for project purposes. See paragraph 12-7 of this chapter for further discussion. Any proposed deviations from this policy or questions as to the availability of the navigation servitude should be identified as early as possible in the study phase and forwarded for resolution to CERE-AP who will coordinate with appropriate HQUSACE elements.

(8) A map clearly depicting the project area, the tracts required to support the project, significant utilities and facilities to be relocated, and any known or potential HTRW lands.

(9) A discussion of whether there will be flooding induced by the construction or the operation and maintenance of the project. If induced flooding is reasonably anticipated, the REP should briefly describe the nature and extent thereof and whether additional acquisition of LER must, or should, occur as a result. Where significant induced flooding is anticipated, or where otherwise required, a written analysis (i.e., a Physical Takings Analysis) separate from the REP should be prepared with the conclusions of such analysis included in the REP. The analysis should incorporate the facts relating to the depth, frequency, duration, and extent of the expected induced flooding; discuss such facts in relationship to relevant case law regarding physical invasion takings and just compensation payment requirements; and present a reasoned conclusion on whether the expected induced flooding would rise to the level of a taking for which just compensation would be owed.

(10) A Baseline Cost Estimate for Real Estate as described in paragraph 12-18 below.

(11) The relocation assistance benefits anticipated to be required in accordance with P.L. 91-646 including the number of persons, farms and businesses to be displaced and estimated costs. Further, it must describe the availability of replacement housing and any need for last resort housing benefits.

(12) A description of the present or anticipated mineral activity in the vicinity of the proposed project that may affect construction, operation, or maintenance of the project together with a recommendation, including rationale, regarding acquisition of mineral rights or interests including oil or gas. The REP should also discuss other subsurface minerals or timber harvesting activity if applicable.

(13) For cost shared projects, a thorough assessment of the non-Federal sponsor's legal and professional capability and experience to acquire and provide the LER for the construction, operation and maintenance of the project, including its condemnation authority and quick-take capability. The Capability Assessment checklist, included as Appendix 12-E to this chapter, must be completed and included as part of the REP. This paragraph should also indicate that the non Federal sponsor has been advised of P.L. 91-646 requirements and the requirements for documenting expenses for credit purposes. If it is proposed that the Government will acquire project LER on behalf of the non Federal sponsor, the REP must fully explain the reasons for the Government performing such work. See paragraph 12-34 for information regarding acquisition by the Government on behalf of a non-Federal sponsor.

(14) If application or enactment of zoning ordinances is proposed in lieu of, or to facilitate, acquisition in connection with the project, a discussion of the type of ordinance, its intended purpose, and whether application or enactment and enforcement of the ordinance will result in a taking of a real property interest for which compensation must be paid.

(15) A reasonable and detailed schedule of all land acquisition milestones, including LER certification. The dates reflected in the schedule must be agreed upon by Real Estate, the PM and the non-Federal sponsor, if any.

(16) A description of the facility or utility relocations that must be performed including information regarding the general nature of the impact to each facility or utility; the identity of the owners of the affected facilities and utilities; the purpose of the affected facilities and utilities; whether the owners have compensable real property interests in the land on which the impacted portion of the facility or utility is located; the conclusions reached in the Attorney's Opinion of Compensability prepared in support of the relocation determinations; whether special legal authority or direction affects relocation classification [for example, the project's authorizing legislation or reports referenced therein; Section 111 of the River and Harbor and Flood Control Act of 1958 (33 U.S.C. §633)]; and other information relevant to the proper identification and performance of relocations necessitated by construction, operation, or maintenance of the project. Each relocation determination must be supported by either a Preliminary or Final Attorney's Opinion of Compensability as described in paragraphs 12-17 and 12-22 of this chapter. In lieu of repeating general relocation information in the REP, specific citations to other report sections may be substituted for REP discussion to the extent that such sections provide the information required by this subparagraph and are consistent with the discussion that is contained in the REP.

(17) A concise discussion of the impacts on the real estate acquisition process and the LER value estimate due to known or suspected presence of contaminants that are located in, on, under, or adjacent to the LER required for the construction, operation or maintenance of the project including LER that is subject to the navigation servitude. See paragraph 12-37g of this chapter and Chapter 4 of this regulation for information on appraisal assumptions for contaminated lands. The discussion must include the status of the district's investigation for such contaminants, whether such contaminants are regulated under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §9601 et seq., (CERCLA); other Federal statutes [e.g., the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6921 et seq.(RCRA)]; or specified state law. In the alternative, the status of the districts investigation may be included by referencing to a specific report section that contains such information. The REP must also disclose whether clean-up or other response actions of non-CERCLA regulated material will be required to implement the project and, if the project is cost shared, who will be responsible for performing, and paying the costs of performing such work, as between the Government and the non-Federal sponsor.

(18) A discussion of known or anticipated support for, or opposition to, the project by landowners in the project area and any known or anticipated landowner concerns related to issues that could impact the acquisition process (e.g., selection of estates, willing seller provisions, amount of acreage).

(19) If applicable, a statement that the non-Federal sponsor has been notified in writing about the risks associated with acquiring land before the execution of the PCA and the Government's formal notice to proceed with acquisition. See paragraph 12-31 of this chapter for further information.

(20) A description of any other real estate issue relevant to planning, designing or implementing the project.

12-17. Preliminary Attorney's Opinions of Compensability.

a. Background. As described in paragraph 12-8 of this chapter, the provision of a functionally equivalent facility to the owner of an existing facility may be an appropriate form of just compensation for the acquisition of a real property interest. Also as described in such paragraph, the provision of the new or modified facility is called a relocation. Since relocation costs on one or more major facilities can increase project costs to a significant degree, and dramatically increase the performance and payment responsibilities of the non-Federal sponsor for a cost shared project, it is critical that informed decisions be made during project planning phases regarding the relocations that will be required as part of project implementation.

b. Attorney's Opinions of Compensability. Preparation of an Attorney's Opinion of Compensability is the principal process for determining the extent of the Government's or non-Federal sponsor's legal obligation to relocate a utility or public facility that will be impacted by construction or operation of a project. See paragraph 12-16c(16) of this chapter regarding the requirements to prepare an Attorney's Opinion of Compensability to support each relocation determination contained in an REP. For cost shared projects, analysis and full consideration of state law will generally be required in determining whether the owner of an impacted facility or utility has a compensable interest in real property. However, full consideration must also be provided as to Federal principles that apply to Federal projects such as the applicability and exercise of the navigation servitude and the existence and terms of Federally issued permits. Therefore, regardless of whether the Government or the non-Federal sponsor prepares the Attorney's Opinions of Compensability, full coordination and consultation must occur between the Government and non-Federal sponsor on this and other relocation issues.

c. Preliminary Attorney's Opinions of Compensability. The preparation of Attorney's Opinions of Compensability for the purposes of finally determining and performing necessary relocation items requires a large degree of certainty regarding project impact as well as significant time to properly investigate the underlying facts and form appropriate legal conclusions based on those facts and applicable law. See paragraph 12-22 of this chapter for extended discussion regarding Final Attorney's Opinions of Compensability. Since significant time may pass from a feasibility level study phase to performance of relocation items and since project impacts may not be fully understood during a feasibility level of study, a lesser degree of certainty and formality is required for Attorney's Opinions prepared for study purposes rather than for final determination and performance purposes. Therefore, to support relocation determinations for an REP, final opinions do not have to be prepared if, in lieu thereof, Preliminary Attorney's Opinions of Compensability have been prepared consistent with the following requirements:

(1) The level and formality of investigation generally, and the level of detail to be included in the preliminary opinion, must be commensurate with the significance of the relocation item(s) to project formulation and estimated project costs. Factors that must be considered include the amount

of the estimated cost of the particular relocation item as well as the significance of such costs as compared to estimated total project costs; the significance of the relocation as related to successful implementation of the proposed project; the significance of the relocation as related to acceptability of the proposed project by the non-Federal sponsor, other political entities that may be providing funding to the non-Federal sponsor, or the public in general; the size and complexity of the relocation; and other relevant factors.

(2) A separate opinion must be prepared for each significant relocation proposed. Smaller relocation items of similar categorization may be combined into one preliminary opinion so long as each item is individually identified in the opinion.

(3) Title evidence reflecting ownership of a specific real property interest is not generally required and, after consideration of the significance of the individual relocation as discussed in subparagraph c.(1) of this paragraph, the attorney preparing the preliminary opinion may rely on any credible evidence (e.g., deed copy, assertions by the purported owner as to its unconditional interest) in determining the facility owner and the nature of the underlying real property interest.

(4) The preliminary opinion must be in writing and must, at a minimum, include the following matters: the identity of the facility affected and its owner; the general nature of the project impact to the facility; the real property interest owned by the facility owner in the general location of the impact; whether project impact is such that the owner of the facility is entitled to payment of just compensation; whether the facility must be modified, or otherwise relocated, as a result of application of applicable legal principles of just compensation or whether the appropriate measure of just compensation is fair market value; and the applicable legal principles of just compensation applied in the opinion.

(5) Statements must be included in the REP that Preliminary Attorney's Opinions of Compensability have been prepared and used for the purpose of completing the study and that final opinions and final relocation determinations will later occur as required by paragraph 12-22 of this chapter.

(6) In addition to the statements required by subparagraph c.(5) of this paragraph, for all decision documents that will serve as the basis for Congressional authorization of the project, a statement substantially similar to the following must be included in the REP:

"ANY CONCLUSION OR CATEGORIZATION CONTAINED IN THIS REPORT THAT AN ITEM IS A UTILITY OR FACILITY RELOCATION TO BE PERFORMED BY THE NON-FEDERAL SPONSOR AS PART OF ITS LERRD RESPONSIBILITIES IS PRELIMINARY ONLY. THE GOVERNMENT WILL MAKE A FINAL DETERMINATION OF THE RELOCATIONS NECESSARY FOR THE CONSTRUCTION, OPERATION, OR MAINTENANCE OF THE PROJECT AFTER FURTHER ANALYSIS AND COMPLETION AND APPROVAL OF FINAL ATTORNEY'S OPINIONS OF COMPENSABILITY FOR EACH OF THE IMPACTED UTILITIES AND FACILITIES."

12-18. Baseline Cost Estimate for Real Estate.

a. General. A baseline cost estimate (BCE) for a project is the estimated total cost (for both the Government and the non-Federal sponsor, if applicable) to implement the project. It includes estimated costs for LERRD, planning & design, construction management, construction, contingencies, etc. The BCE is developed in accordance with ER 5-1-11, ER 37-2-10, ER 1110-2-1302 and the Civil Works Work Breakdown Structure (WBS), which provides the list of work activities/items to be included in the BCE.

b. Development of the Baseline Cost Estimate for Real Estate (BCERE). The BCERE includes the fair market value of the LER required for the construction, operation and maintenance of a proposed project, including those required for relocations, borrow material, and dredged or excavated material disposal; the costs of relocating displaced persons from homes, farms or business under P.L. 91-646, as amended; the incidental acquisition costs for both the Government and the non-Federal sponsor, if any; and estimated risk-based contingencies.

(1) The BCERE will be shown under Feature Code 01, Lands and Damages. The Gross Appraisal estimate developed for the REP in Feasibility (see Chapter 4 of this regulation) will be incorporated into the BCERE under Land Payments in the 01 account.

(2) If phased construction is proposed, costs for each construction phase should be separately identified in the BCERE. A list of all construction contracts, as determined during the feasibility phase, must be provided by the PM to Real Estate for use in developing the BCERE.

(3) Incidental acquisition costs for the Government or non-Federal sponsor may include those incurred for title work, appraisals, review of appraisals, coordination meetings, review of documents, review of P.L. 91-646 actions, legal support and other costs that are incidental to the acquisition of LER required for the project and that are otherwise reasonable, allocable and allowable. Government costs for staff monitoring and for reviewing, approving and crediting LER provided by a non-Federal sponsor are also included.

c. In developing the BCERE, the estimated values and costs are based upon financial costs attributable to market value not economic costs since the purpose of the estimate is to determine the total cost of implementing the project. It is noted, however, that cost estimates from Real Estate are also required in support of the economic analysis where the purpose is to estimate the economic costs of a project. Because the amount of these cost estimates may differ, it is important to clearly communicate as to the purpose and the application of all Real Estate cost estimates. For additional information on the distinction between financial and economic costs, see ER 1105-2-100, paragraph 6-149d and the NED Manual on National Economic Development Costs (IWR Report 93-R-12).

12-19. Real Estate Design Memorandum (REDM).

a. Historical Perspective. Historically, after enactment of construction authorization, an REDM was prepared to present a detailed description of the real estate requirements for the project including utility and public facility relocations. Approval of the REDM at HQUSACE also represented approval to initiate land acquisition for the project. Supplements to the approved REDM were generally approved by the Division Commander acting through the Chief of Real Estate.

b. Post WRDA '86. With the enactment of WRDA '86, the majority of new projects were required to be cost shared by a non-Federal interest and increased emphasis was placed on cost estimate accountability and on streamlining the feasibility study and project authorization processes. As a result, Real Estate's planning efforts and cost estimates were integrated into those required for formulation of the selected project plan for which construction authorization would be sought. Thus, the REP became the most frequently used Real Estate planning document rather than a separate REDM.

c. Continuing Usage. Even though an REP will generally be the required Real Estate planning document, there may be circumstances requiring the preparation and approval of an REDM. One example is where acquisition of real property by the Government is tantamount to implementation of the project and approval of a decision document is required prior to commencement of the acquisition effort (e.g., some fish and wildlife mitigation projects). In addition, an REDM may be appropriate when there is a new acquisition requirement for an existing project for which REDMs were previously utilized.

d. Contents. Where an REDM is required, preparation shall be in accordance with the requirements contained in paragraph 2-19 of Chapter 2 of this regulation.

e. Approval Authority.

(1) In those circumstances where an REDM must be prepared, HQUSACE approval is required when the purpose of the REDM is to gain initial approval for implementing a project, or a separable element thereof, or when the REDM is otherwise classified as a project decision document that must be reviewed and approved at HQUSACE. In these circumstances, six copies of the REDM must be forwarded to CERE-AP for coordination with CECW-AR and other involved offices. Division Commanders are authorized to approve all other REDMs but without the authority to redelegate approval authority to District Commanders.

(2) Where substantial departure from an approved REDM is deemed to be necessary or advisable, an REDM Supplement must be prepared by the District and must be approved by the office that had the approval authority for the REDM being supplemented.

(3) Where REDM approval authority is unclear, a written request for guidance, together with a recommendation must be forwarded to HQUSACE (ATTN: CERE-A) for determination.

SECTION IV. FINALIZING REAL ESTATE REQUIREMENTS

12-20. Project Boundaries. In preparing real estate acquisition boundaries, the following guidelines should be observed to the greatest extent possible:

a. Close blocking out will be accomplished in accordance with sound real estate practices.

b. For land acquired in fee, the blocked out final real estate acquisition line will be established in such manner as to minimize costs and cause the least disruption in the use of the remainder of the ownership.

c. Severance damages will be avoided to the greatest extent possible consistent with real estate requirements for the project. A remnant without access need not be acquired if the owner desires to retain the property and releases the Government or non Federal sponsor from damages for lack of access.

12-21. Full Federal Projects and Approval of Acquisition Lines. An approved REDM (see paragraph 12-19 of this chapter) contains maps depicting tentative acquisition lines that are, to some extent, irregular and located without full regard to their effect upon fringe tracts. It will, therefore, be necessary to establish final acquisition lines in accordance with sound real estate practices. Accordingly, fringe tracts must not be acquired until the final acquisition lines are approved by the Division Engineer in accordance with the submission and approval provisions contained in paragraphs 2-22 and 2-23 of Chapter 2 of this regulation.

12-22. Final Attorney's Opinions of Compensability.

a. Requirement. As provided in paragraph 12-17 of this chapter, a Preliminary Attorney's Opinion of Compensability may be prepared for the purpose of making a preliminary determination of whether a necessary utility or facility modification should be classified as a relocation in a REP. Regardless of whether a preliminary opinion or more formal work product was utilized for the purpose of preparing an REP, a Final Attorney's Opinion of Compensability must be prepared in writing for each proposed utility or facility relocation in accordance with the requirements contained below in this paragraph.

b. Timing.

(1) For cost shared projects where a non-Federal sponsor has the responsibility to perform or assure the performance of relocations, a Final Attorney's Opinion of Compensability must be prepared for each proposed relocation as follows:

(a) A Final Attorney's Opinion of Compensability must be prepared during Planning, Engineering and Design (PED) and prior to the execution of a PCA for the project for each relocation that has an estimated cost of $250,000

or more, including the value of additional real estate that may be required to perform the relocation, and for other relocations where determined by the District to be required due to the need for additional certainty or other reason.

(b) For all other relocations, a Final Attorney's Opinion of Compensability must be prepared in a timely manner prior to the Government's formal notice to the non-Federal sponsor of the relocations that it must perform, or for which it must assure performance, as determined by the Government to be necessary for construction, operation and maintenance of the project. See Article III.C. of the Model PCA for Structural Flood Control (March 1994) and see Article III.C. of the Model PCA for Commercial Navigation Harbor Projects (May 1996).

(2) For all other projects, a Final Attorney's Opinion of Compensability must be prepared for each proposed relocation prior to the Government entering into a relocation agreement with the owner of the utility or facility.

c. Contents. A Final Attorney's Opinion of Compensability must contain the following information:

(1) A complete record that adequately presents relevant factual and background information including the identity of the project, whether the Government or a non-Federal sponsor has the responsibility to perform or assure the performance of relocations for the project, a description of the utility or facility at issue, and the general nature of the impact to the utility or facility that is attributable to the construction, operation or maintenance of the project.

(2) A description of whether utility or facility modifications will occur in place or whether the current location of the utility or facility, or an identified part thereof, must be changed to facilitate construction, operation or maintenance of the project.

(3) A statement indicating whether the owner of the utility or facility has a duty to continue the operation of the utility or facility either as a matter of law or practical necessity.

(4) The attorney's opinion, supported by appropriate legal analysis, as to whether the owner of the utility or facility has a compensable interest in real property together with a description of such interest. Muniments of title must be utilized in reaching this conclusion and must be identified in the opinion.

(5) The attorney's opinion, supported by appropriate legal analysis, as to whether fair market value or payment based on the cost of providing a functionally equivalent facility is the proper measure of just compensation for the real property interest that must be acquired from the owner of the utility or facility. For all public facilities, the analysis supporting such opinion should include statements regarding whether it is of a type

commonly bought and sold on the open market, whether the fair market value thereof is ascertainable, and whether providing fair market value rather than a substitute facility would result in manifest injustice as that term is used in relevant case law. See, for example, *United States v. 50 Acres of Land,* 469 U.S. 24 (1984).

(6) As appropriate, citations to the legal authority of the owner of the affected utility or facility to vacate, abandon, or convey the necessary interests in real property or to accept the conveyance of a substitute facility.

d. Acquisition by Relocation Agreement or Condemnation. Utilities and public facilities are normally acquired through execution of a relocation agreement. The agreement includes the engineering details of the relocation work as well as a right-of-entry for construction and provisions regarding exchange of the required real property interests. After construction of the relocation is completed in accordance with the agreement, deeds are exchanged to convey to the Government, or the non-Federal sponsor as the case may be, the real property interest required to support the project and to convey to the utility or public facility owner an interest in any additional land that was required for the relocation. If a relocation agreement cannot be negotiated with the utility or public facility owner, condemnation may be necessary to obtain the required real property interest on that tract. Cemeteries are always acquired by condemnation through the filing of a complaint only (rather than a complaint with Declaration of Taking),

SECTION V. ACQUISITION ACTIVITIES

12-23. General. This section describes acquisition activities which apply to both full Federal and cost shared projects, unless otherwise noted.

12-24. Public Meetings.

a. General. The real estate activities of USACE or the non-Federal sponsor are extremely sensitive, since they can disrupt peoples lives through the acquisition of their homes, farms and businesses. Therefore, it is important to keep landowners and others having an interest in the land informed of the land acquisition program. Timely dissemination of accurate information about the acquisition program and process is intended to avoid rumors and to permit affected landowners to plan for the future.

b. Public meetings are required by Section 302 of the Land Acquisition Policy Act of 1960, Public Law 86-645 (33 U.S.C. 597). Within six months after the date Congress authorizes construction of a water resources project, USACE or the non-Federal sponsor must advise owners and occupants in and adjacent to the project area as to the requirements for, and probable timing of, the acquisition of lands for the project. Within a reasonable time after initial appropriations are made for land acquisition or construction, including relocations, USACE or the non-Federal sponsor shall conduct public

meetings at locations convenient to owners and tenants to be displaced by the project in order to advise them of the proposed plans for acquisition and to afford them an opportunity to comment. The Congressional delegation of the district or districts in which the project is located should be invited to attend. Normally, the public meetings should be scheduled prior to the commencement of the land acquisition program.

c. At a minimum, information regarding the following matters should be disseminated at the public meeting:

(1) factors considered in making the appraisals;

(2) desire to purchase property without going to court;

(3) legal right to submit to condemnation proceedings;

(4) payments for moving expenses or other losses not covered by appraised market value;

(5) occupancy during construction;

(6) removal of improvements;

(7) payments required from occupants of Government-acquired land;

(8) withdrawals by owners of deposits made in court by the Government or non-Federal sponsor;

(9) use of land by owner when easement is acquired; and

(10)all other information that will assist landowners and tenants in understanding USACE’s or non-Federal sponsor's real estate procedures such as acquisition schedules; the type of land interests to be acquired; the general policies that control land acquisition; approximate acquisition lines; and management of the project, etc.

d. Inquiries, comments of landowners and tenants, and problems developed at the landowners meetings should be recorded, video-taped, or, at least, a detailed written record should be made. The Division and CERE-AP should be informed as to the outcome of these meetings. Effective follow-up to supply any information not available at the meeting, or to consider any particular problems presented, is essential to realize the full advantage of the public relations program.

e. In addition to the foregoing, pamphlets containing this information and the information brochure explaining the benefits to landowners under P.L. 91-646 will be given wide distribution at approximately the same time the landowners meeting program is initiated. Copies will be furnished to the appropriate Congressional delegation.

12-25. Timing of Acquisition for Fish and Wildlife Mitigation and for Recreation.

a. Fish and Wildlife Mitigation. As required by Section 906(a) of WRDA 86, in the case of any water resources project which is authorized to be constructed before, on, or after 17 November, 1986, construction of which has not commenced as of such date, and which necessitates the mitigation of fish and wildlife losses, LER required to support mitigation must be acquired before commencement of construction of the project or it must be acquired concurrently with the LER required to support the basic project purpose, whichever the Secretary of the Army, or his designee, determines is appropriate.

b. Recreation. As required by Section 926(a) of WRDA 86, in the case of any water resources project which is authorized to be constructed before, on, or after 17 November 1986, construction of which has not commenced before such date, and which involves the acquisition of LER for recreation purposes, such LER must be acquired along with the acquisition of LER for the basic project purpose.

12-26. Certification of Availability of Real Estate for Solicitation of Construction Contracts.

a. For either a full Federal or cost shared project, prior to issuance of the solicitation for a construction contract that requires real property interests, the District Chief of Real Estate is required to certify in writing to the district element responsible for such solicitation that sufficient real property interests are available to support construction pursuant to the contract.

b. In making this certification, the District Chief of Real Estate may base his or her conclusion on examination and evaluation of such records as are appropriate under the circumstances including:

(1) if the project is cost shared, the non-Federal sponsor’s Authorization for Entry and Certificate of Authority (see paragraph 12-32 of this chapter and Appendix 12-F);

(2) copies of recorded deeds of conveyance;

(3) copies of Orders of Possession entered in eminent domain proceedings; or

(4) other documents deemed adequate by the Chief of Real Estate.

c. In exceptional circumstances, a right-of-entry that has been approved by the District Chief of Real Estate as sufficient for construction purposes may be utilized for the purpose of certifying the availability of real property interests that are required to support issuance of a solicitation and award of a construction contract. However, if a right-of-entry is used for this purpose, acquisition of any real property interest for the tract at issue that is required to support operation or maintenance must be finalized prior to completion of construction pursuant to such contract.

d. If sufficient real property interests are not available to support construction at the time of the request for the certification, the District Chief of Real Estate should advise the requesting office as to the status of the required acquisition effort together with his or her estimate of time required to complete acquisition and certify real property availability.

12-27. Solicitation of Construction Contracts Without Availability of Real Estate. Solicitations for construction contracts should not be publicized until the District Chief of Real Estate has certified in writing that sufficient real property interests are available to support construction in accordance with paragraph 12-26 of this chapter. A decision by Project Management to proceed contrary to this general policy should be made only after full risk assessment. Real Estate input should include the status of acquisition, identification of all activities that must occur to complete acquisition, realistic schedules for such activities, and advice on the probability of finalizing acquisition in a timely manner.

SECTION VI. LAND ACQUISITION AND RELOCATION PERFORMANCE FOR COST SHARED PROJECTS

12-28. General. This section describes general land acquisition processes and procedures applicable to cost shared projects.

12-29. LER and Relocations Required for the Project.

a. Determination of Requirements. Because the non-Federal sponsor generally must provide the LER and perform the facility/utility relocations required for the project and because acquisition and performance by the non-Federal sponsor will generally be in accordance with state law and procedure, it is important that District Real Estate - with Engineering and PM participation - and the non-Federal sponsor agree upon an acceptable process by which LER requirements can be developed through exchange of information and ongoing consultation. After consultation with the non-Federal sponsor, the Government shall determine the LER required for the construction, operation, and maintenance of the project, including those required for relocations, borrow materials, and dredged or excavated material disposal.

b. Distinction Between LER Required and LER Provided. After the Government determines what LER is required for the project, it generally is the responsibility of the non-Federal sponsor to provide those LER. See Sections 101(a) and 103(a) and (I) of WRDA 86. However, it is important to distinguish between LER “required” for the project and that which the non-Federal sponsor must “provide.” For example, although lands located within the navigation servitude may be “required”, the non-Federal sponsor should not be instructed to acquire and “provide” such land if it is otherwise available for project purposes through exercise of the navigation servitude rights by the Government. See paragraph 12-7 of this chapter for additional information regarding the navigation servitude. Further, Federal lands managed by USACE may be available for use by the project without the need for transfer to the non-Federal sponsor. As a third example, another Federal agency may be

authorized to allow USACE, but not a non-Federal entity, to use Federal land it manages for the project without payment of compensation or transfer of interest. Accordingly, in all such circumstances, although required for the project, the non-Federal sponsor would not be required to provide a real property interest regarding that land and its value therefore would not be included in total project costs and credit would not be afforded.

12-30. Notice to Proceed with Acquisition and Performance. Following execution of the PCA, the district must provide the non-Federal sponsor with general written descriptions, including maps as appropriate, of the LER and the facility/utility relocations that the Government has determined the non-Federal sponsor must provide and perform for the construction, operation, and maintenance of the project. The LER descriptions must include specific estate, acreage, location and schedule requirements in detail sufficient to enable the non-Federal sponsor to fulfill its obligations to provide the LER in a timely fashion. Similarly, the relocation descriptions must include sufficient detail so as to enable the non-Federal sponsor to perform its relocation responsibilities in a timely fashion. In addition, the district must provide the non-Federal sponsor with a written notice to proceed with acquisition of such LER and performance of such relocations.

12-31. Acquisition Prior to PCA Execution. Although it should not be encouraged by the district, there may be instances when the non-Federal sponsor chooses to acquire land it anticipates will be required for the project prior to the execution of the PCA or prior to the Government's formal notice to proceed with acquisition after PCA execution. The district must formally advise the non-Federal sponsor in writing of the risks associated with acquisition under such circumstances and that the non-Federal sponsor assumes full and sole responsibility for any and all costs, responsibility, or liability arising out of the acquisition effort. Generally, these risks include, but may not be limited to, the following:

(1) Congress may not appropriate funds to construct the proposed project;

(2) the proposed project may otherwise not be funded or approved for construction;

(3) a PCA mutually agreeable to the non-Federal sponsor and the Government may not be executed and implemented;

(4) the non-Federal sponsor may incur liability and expense by virtue of its ownership of contaminated lands, or interests therein, whether such liability should arise out of local, state, or Federal laws or regulations including liability arising out of CERCLA, as amended;

(5) the non-Federal sponsor may acquire interests or estates that are later determined by the Government to be inappropriate, insufficient, or otherwise not required for the project;

(6) the non-Federal sponsor may initially acquire insufficient or excessive real property acreage which may result in additional negotiations and/or benefit payments under P.L. 91-646 as well as the payment of additional fair market value to affected landowners which could have been avoided by delaying acquisition until after PCA execution and the Government's notice to commence acquisition and performance of LERRD; and

(7) the non-Federal sponsor may incur costs or expenses in connection with its decision to acquire or perform LERRD in advance of the executed PCA and the Government's notice to proceed which may not be creditable under the provisions of Public Law 99-662 or the PCA.

12-32. Authorization for Entry for Construction. After the non-Federal sponsor completes its acquisition effort and prior to issuance of the solicitation for each construction contract, an informed, authorized, and accountable official of the non-Federal sponsor must execute and provide the district a written Authorization for Entry to all LER that the Government determined the non-Federal sponsor must provide for that contract. The authorization form must also recite that the non-Federal sponsor is vested with sufficient title and interest in such LER. Further, the non-Federal sponsor must also provide the district with a Certificate of Authority that recites that the official signing the Authorization for Entry form on behalf of the non-Federal sponsor has the authority to furnish such right to the Government. A sample Authorization for Entry with Certificate of Authority form is attached as Appendix 12-F of this chapter.

12-33. Completion of Acquisition by the Non-Federal Sponsor. Prior to the end of the period of construction, as that period is defined in the project PCA, the non-Federal sponsor must complete acquisition, perform or ensure performance of all facility/utility relocations, and provide all LER that the Government required of the non-Federal sponsor as described in the written descriptions discussed above in paragraph 12-30. As typically required as an item of cooperation and expressed in the project PCA, the non-Federal sponsor must ensure for so long as the project remains authorized that the LER that the Government determined to be required for the operation and maintenance of the project and that were provided by the non-Federal sponsor are retained in public ownership for uses compatible with the project. In addition, the non-Federal sponsor must provide the Government with a right to enter, at reasonable times and in a reasonable manner, upon property that the non-Federal sponsor owns or controls for access to the project for purposes of inspection, and if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the project. Typically, this right is provided to the Government in the PCA and no separate written form is therefore required. Management of project LER by the non-Federal sponsor cannot interfere with this right.

12-34. Government Acquisition of LER and Performance of Relocations on Behalf of Non-Federal Sponsors.

a. As discussed in paragraph 12-29 of this chapter, the provisions of WRDA '86, as amended, assigned to non-Federal sponsors the responsibility of providing the lands, easements and rights-of-way and of performing the facility/utility relocations required for cost shared projects. Thus, it is not only the costs of the project that are shared with the Government, but the performance responsibilities are also shared including the risks that attach thereto. Accordingly, if a non-Federal sponsor has the capability to acquire and provide LER and to perform the relocations required for the project in a reasonable and timely fashion, performance responsibility should remain with the non-Federal sponsor.

b. However, there may be circumstances where a non-Federal sponsor cannot acquire LER required for the project in a timely fashion and requests the Government to acquire LER on its behalf. In such event, the decision to acquire LER on behalf of the non-Federal sponsor lies within the sole discretion of the Government.

c. So long as no tract to be acquired is known or suspected to be contaminated with CERCLA regulated materials, not more than five Federal condemnation actions are anticipated, and the district has sufficient available resources to perform in a timely fashion while completing its other real estate missions, the District Commander, acting through the District Chief of Real Estate, may agree to a non-Federal sponsor's written request for the Government to acquire LER on behalf of that non-Federal sponsor under one or more of the following circumstances:

(1) the non-Federal sponsor lacks the professional capability to acquire LER required for the project and cannot reasonably obtain contract services from sources other than the Government;

(2) although the non-Federal sponsor has sufficient general acquisition authority, it lacks legal authority to acquire particular tracts and its request to the Government is limited to acquisition of such tracts; or

(3) the non-Federal sponsor lacks "quick-take" authority and reasonable acquisition schedules therefore cannot be met (see 40 U.S.C. §258a regarding the Government's quick-take authority).

d. Written request for the Government to acquire LER on behalf of a non-Federal sponsor under all circumstances other than as described in subparagraph c of this paragraph must be forwarded by the District, through Division, to HQUSACE (ATTN: CERE-A) for coordination and decision. Each written request must be accompanied by written justification and recommendation.

e. Acquisition by the Government on behalf of non-Federal sponsors will be conducted in accordance with Federal law, policies, practices and procedures, including those contained in Chapters 4 and 5 of this regulation. The value of LER acquired by the Government, including incidental and administrative costs, will be based on actual costs incurred by the Government. See Section VII below on Credits for LERRD.

f. Condemnation.

(1) The Secretary of the Army may cause condemnation proceedings to be instituted in Federal court in the name of the United States on behalf of a non-Federal sponsor for acquisition of real estate interests required for the project. General project authority will be cited as the authority of the United States to acquire title in its name and to reconvey title to the non-Federal sponsor at the conclusion of the condemnation proceeding.

(2) Whenever condemnation is proposed, condemnation assemblies will be prepared and forwarded through Division to CERE-AP for processing in the manner prescribed by Chapter 5 of this regulation. The non-Federal sponsor must furnish such sums of money to the District Chief of Real Estate as are necessary to pay any award that may be made in any such condemnation proceedings, including any awards made pursuant to the Equal Access to Justice Act (Public Law 96-481, title II, October 21, 1980, 94 Stat. 2325, as amended; 5 U.S.C. §504, 15 U.S.C §634b, 28 U.S.C. §2412, 42 U.S.C. §1988). In addition, the non-Federal sponsor must pay such legal and administrative costs and expenses of USACE and the Department of Justice (DOJ) as may be required that are incident to filing and prosecuting the proceedings. District Chiefs of Real Estate will determine the amounts needed to assure continued availability of sufficient funds for processing and trying each case. Such funds will be made available by the sponsor prior to the commencement of work by the Government. Further, the non-Federal sponsor must promptly pay any deficiency and interest beyond the original amount furnished should any such deficiency and interest occur, as well as additional amounts that may be required during the course of the proceedings.

g. If the Government approves a request of a non-Federal sponsor to acquire LER on its behalf, the Government and the non-Federal sponsor must agree in writing on the applicable terms and conditions which must include that the non-Federal sponsor will pay to the Government all estimated acquisition costs (including administrative costs) in advance of the actual work being performed and including that either party may terminate the agreement by first providing 60 days notice in writing to such effect. Moreover, all terms and conditions must be consistent with those contained in the PCA for the project. Where only a small number of tracts are to be acquired with no complex appraisal or acquisition issues contemplated, a formal Memorandum of Agreement (MOA) is not required. However, care must be exercised to otherwise reduce the terms and conditions of the agreement to writing. For all other circumstances, a written MOA must be entered into prior to the Government’s commencement of acquisition services. Until such time that a Model MOA for this purpose is approved and distributed for use, a draft MOA must be forwarded to HQUSACE (ATTN: CERE-AP) for coordination, review, and approval prior to execution by either the district or the non-Federal sponsor.

h. In the event that a non-Federal sponsor requests in writing that the Government perform facility/utility relocations necessary for the project on behalf of the non-Federal sponsor, the decision to perform such relocations lies within the sole discretion of the Government. If the Government elects to perform the services requested, or any portion thereof, the terms and

conditions must be in writing and be consistent with the provisions of the PCA for the project. The non-Federal sponsor remains responsible for all costs of the relocations work and must pay the Government in advance of the Government incurring costs for performance of such work. For elaboration on performance of relocations on behalf of the non-Federal sponsor, see ER 1165-2-131, LOCAL COOPERATION AGREEMENTS FOR NEW START CONSTRUCTION PROJECTS.

SECTION VII. CREDITS FOR LANDS, EASEMENTS AND RIGHTS-OF-WAY AND RELOCATIONS FOR COST SHARED PROJECTS

12-35. General.

a. Title I of WRDA 86 describes the general cost sharing responsibilities of non-Federal sponsors for many types of civil works water resources projects. As discussed in paragraph 12-29 of this chapter, such responsibilities include that a non-Federal sponsor must provide the LER and must perform or ensure the performance of relocations required for the project. As described in Sections 103(a) and (I) of WRDA 86 for flood control and other purposes and as described in Section 101(a) of WRDA 86, as amended, for harbor or inland harbor commercial navigation projects, the non-Federal sponsor is entitled to credit against its share of project costs for the value of LER it provides and the value of relocations that are required for the project. Generally, the amount of credit afforded will directly effect the amount of the non-Federal sponsor’s cash contribution otherwise required for construction of the project.

b. Generally, for the purpose of determining the amount of credit to be afforded, the value of LER is the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, that the non-Federal sponsor provided for the project as required by the Government. Generally, the fair market value is determined by, or is based upon, an appraisal prepared by a qualified appraiser. A more detailed description of the valuation and crediting process, including exceptions to this general rule, is presented in the following paragraphs of this section. In addition, the specific requirements relating to valuation and crediting contained in the executed PCA for a project must also be reviewed and applied.

c. Generally, for the purpose of determining the amount of credit to be afforded, the value of facility/utility relocations other than a highway is the portion of relocation costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items. For a relocation of a highway, the value is the portion of relocation costs necessary to accomplish the relocation in accordance with the design standard that the state where the highway is located would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items. For elaboration on policies pertaining to credits for relocations, see ER 1165-2-131, LOCAL COOPERATION AGREEMENTS FOR NEW START CONSTRUCTION PROJECTS.

d. In reviewing requests for credit from the non-Federal sponsor, Real Estate must be aware of its fiscal responsibilities to both the non-Federal sponsor and the Government. In order to provide for uniform and consistent treatment of non-Federal sponsors concerning the crediting of LER for cost shared projects, procedures in this section should be followed to the greatest extent practicable. Requests for deviation from the policies described in this section, or requests for guidance on unique or unusual categories of LER credit claims not addressed herein, should be forwarded through Division to HQUSACE, (ATTN: CERE-AP), for appropriate coordination and final determination.

12-36. Value of Lands, Easements, and Rights-of-Way (LER).

a. Date of Valuation.

(1) The fair market value of LER owned by the non-Federal sponsor on the effective date of the PCA for the project is the fair market value of the real property interests as of the date the non-Federal sponsor provides the Government with authorization for entry thereto for construction purposes.

(2) The fair market value of LER acquired by the non-Federal sponsor after the effective date of the PCA for the project is the fair market value of the real property interests at the time the interests are acquired.

(3) For LER owned by the non-Federal sponsor on the effective date of the PCA for the project that are required for the construction of work by the non-Federal sponsor that is authorized under Section 104 of WRDA 86, as amended, the fair market value is the value of the real property interests as of the date the non-Federal sponsor awards the first construction contract for the Section 104 work, or, if the non-Federal sponsor performs the construction with its own labor, the date that the non-Federal sponsor begins construction of the Section 104 work. The same principles apply to construction efforts by the non-Federal sponsor approved pursuant to authorities other than Section 104 including Section 215 of the Flood Control Act of 1968, as amended, Section 204 of WRDA 86, as amended, and Section 211 of WRDA 96.

b. General Valuation Procedure. For each real property interest, the non-Federal sponsor must obtain an appraisal that is prepared by a qualified appraiser who is acceptable to the Government. See Chapter 4 of this regulation. The appraisal must be prepared in accordance with applicable rules of just compensation, as specified by the Government. The fair market value of the real property interest is the amount set forth in the non-Federal sponsor’s appraisal if that appraisal is approved by the Government. In the event that such appraisal is not approved by the Government, the non-Federal sponsor may obtain a second appraisal, and the fair market value is the amount set forth in the second appraisal if that appraisal is approved by the Government. In the event that the Government does not approve the non-Federal sponsor’s second appraisal, or the non-Federal sponsor does not choose to obtain a second appraisal, or otherwise fails to provide the second appraisal in a timely fashion, the Government must obtain an appraisal and the fair market value is the amount set forth in the Government’s appraisal if such

appraisal is approved by the non-Federal sponsor. In the event that the non-Federal sponsor does not approve the Government's appraisal, the Government, after consultation with the non-Federal sponsor, shall consider the Government's and the non-Federal sponsor's appraisals and determine an amount based thereon which shall be deemed to be the fair market value.

c. Applicable Rules of Just Compensation. Although State rules will typically control the appraisal process for acquisition and crediting purposes by a non-Federal sponsor, application of Federal rules of just compensation may be required as a matter of policy for crediting purposes. For discussion on this issue, see paragraph 12-37.c of this chapter; and Chapter 4, Appraisal, of this regulation. Also see 33 U.S.C. §595 regarding the Federal special benefits rule and 33 U.S.C. §595.a regarding the Federal rule for partial takings of lands adjacent to navigable waters.

d. Payments Exceeding Approved Appraised Amount.

(1) Approval Process. If the amount paid or proposed to be paid by the non-Federal sponsor to a landowner for the real property interest exceeds the amount determined pursuant to subparagraph b of this paragraph to be fair market value, the Government, at the request of the non-Federal sponsor, must consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the non-Federal sponsor, may approve in writing an amount greater than the amount determined pursuant to subparagraph b of this paragraph but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the non-Federal sponsor, but no less than the amount determined pursuant to subparagraph b of this paragraph. See 49 C.F.R. §24.102(I) regarding administrative settlements as a part of the acquisition process.

(2) Approval Authority. Division Commanders and their Chiefs of Real Estate and District Commanders and their Chiefs of Real Estate can determine fair market value in accordance with subparagraph d.(1) of this paragraph up to the amounts and percentages set forth in their respective written delegations of authority for acceptance of offers to sell for Federal acquisitions. A copy of the general written delegation of authority to divisions is included as Appendix 12-G to this chapter. If a division has redelegated a portion of its delegated authority as authorized in Appendix 12-G, its districts will have a written redelegation of authority that describes the extent of its approval authority for acceptance of offers for Federal acquisitions. For determinations that exceed the amount of delegated or redelegated authority, a request must be submitted by the district, together with recommendation, to the division, or through division to CERE-A as the case may be, for determination.

(3) Redelegation to Non-Federal Sponsors. U.S. Army District Commanders and their Chiefs of Real Estate may redelegate their authority provided by subparagraph d.(2) of this paragraph, in whole or in part, to a non-Federal sponsor as follows:

(a) Factors that should be weighed in determining whether to exercise this discretionary authority include the experience, qualifications, and overall professional capability of the non-Federal sponsor as well as the nature and extent of the relationship established between the non-Federal sponsor and the district including the Chief of Real Estate.

(b) Redelegated approval authority cannot exceed the amounts or percentages that are contained in the specific written redelegation of authority for acceptance of offers to sell for Federal acquisitions that has been provided to that U.S. Army District Commander and Chief of Real Estate from its respective U.S. Army Division Commander and Chief of Real Estate.

(c) Limits to and conditions of redelegated authority as established by the District Chief of Real Estate must be fully discussed with the responsible non-Federal sponsor representative and the nature and extent of the redelegated authority must be reduced to writing prior to its application.

(d) Redelegation to non-Federal sponsors is intended to expedite the acquisition process where, during negotiations with a landowner, a non-Federal sponsor desires credit assurances for proposed payments to a landowner in excess of the amount set forth in the non-Federal sponsor’s appraisal that has previously been approved by the Government. Accordingly, redelegated authority to non-Federal sponsors does not apply to value determinations where acquisition has been completed on the subject tract.

e. Valuation Procedure for Condemnations.

(1) For LER acquired through condemnation proceedings instituted after the effective date of the PCA for the project, the non-Federal sponsor must, prior to instituting such proceedings, submit to the Government notification in writing of its intent to institute the proceedings together with an appraisal of the specific real property interests to be acquired.

(2) After receipt of the written notice and appraisal, the Government has 60 days to review the appraisal. If the Government has previously approved the appraisal by application of the process discussed in subparagraph b of this paragraph, or provides written approval of, or takes no action on, the appraisal within this 60-day period, the non-Federal sponsor must use the amount set forth in the appraisal as the estimate of just compensation for the purpose of instituting its eminent domain proceeding.

(3) If the Government provides written disapproval of the appraisal to the non-Federal sponsor within the 60-day period, the Government and non-Federal sponsor must consult in good faith to promptly resolve the issues or areas of disagreement identified in the Government’s written disapproval. If, after good faith consultation, the Government and the non-Federal sponsor agree as to an appropriate amount, then the non-Federal sponsor must use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. However, if, after good faith consultation, no agreement can be reached as to an appropriate amount, then the non-Federal sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

(4) Fair market value for LER acquired by eminent domain proceedings in accordance with the above procedures shall be either the amount of the court award for the real property interests taken to the extent that the Government determined such interests are required for the construction, operation, and maintenance of the project or the amount of any stipulated settlement or portion thereof that the Government approves in writing. To the greatest extent practicable, the Government and the non-Federal sponsor should consult and cooperate prior to a settlement conference in an effort to reach advance agreement on an amount, or range of amounts, for which the non-Federal sponsor would be entitled to credit if settlement was reached during that conference in such amount, or within such range.

(5) U.S. Army Division Commanders and their Chiefs of Real Estate and U.S. Army District Commanders and their Chiefs of Real Estate can determine fair market value by approving stipulated settlements in condemnation actions initiated by the non-Federal sponsor in accordance with subparagraph e.(4) of this paragraph up to the amounts set forth in their respective written delegations of authority for approval of settlement offers in Federal condemnation actions. A copy of the general written delegation of authority to divisions is included as Appendix 12-G. If a division has redelegated a portion of its delegated authority as authorized in Appendix 12-G, its districts will have a written redelegation of authority that describes the extent of its approval authority for settlement offers in Federal condemnation actions. For stipulated settlement amounts that exceed the amount of delegated or redelegated authority, a request for determination must be submitted by the district, together with recommendation, to the division, or through division to CERE-A as the case may be, for determination.

(6) For LER acquired by a non-Federal sponsor through condemnation proceedings instituted prior to the effective date of the PCA for the project, the valuation procedures discussed in subparagraphs b and d of this paragraph will apply once the PCA is executed.

f. Incidental Costs.

(1) For LER acquired by a non-Federal sponsor within a five-year period preceding the effective date of the PCA for the project, or at any time after the effective date of that PCA, the value of the real property interests also will include the documented incidental costs of acquiring such interests, as determined by the Government, subject to an audit to determine the reasonableness, allocability, and allowability of costs. See OMB Circular A-87, Cost Principles for State and Local Governments for applicable principles. These incidental costs include, but are not necessarily limited to, closing and title costs, appraisal costs, survey costs, attorney’s fees, plat maps and mapping costs, as well as the actual amounts expended for payment of P.L. 91-646 relocation assistance benefits as required for compliance with law and implementing regulations.

(2) These incidental costs may also include payments made for personal property, loss of business or good will, or other payments, that are generally recognized as compensable, and required to be paid, by applicable State law due to the acquisition of a real property interest required for the project as

determined by the Government. Credit requests for payments made for personal property, loss of business or good will, or other payments, must be submitted with sufficient documentation, as determined by the Government, to show that the non-Federal sponsor was required to make payment therefor under State law.

(3) Credit afforded for incidental costs shall not include any amount that is excluded from credit eligibility by application of the policies expressed in paragraphs 12-37c and 12-38 of this chapter.

12-37. Special Considerations.

a. Rights-of-Entry. Generally, a right-of-entry is not an interest in real property and has no market value. Therefore, no credit can be afforded for a market value of a right-of entry for construction provided by a non-Federal sponsor. However, costs incurred by the non-Federal sponsor in the process of obtaining the right-of-entry may be treated as incidental costs and credited when the real property interest required for that tract is later acquired by the non-Federal sponsor. In the rare event that the Government has determined that a formal real property interest is not required and that a right-of-entry is sufficient, the District Chief of Real Estate may approve a credit amount for a right-of-entry as based upon the reasonable, allocable, and allowable costs incurred by the non-Federal sponsor in obtaining the right-of-entry.

b. Donations by Non-Federal Sponsor. Although a non-Federal sponsor may want to provide LER without claiming credit therefor, the value of all LER required for the project that must be provided by the non-Federal sponsor must be included as a part of project costs with credit afforded in such amount except as otherwise stated in paragraph 12-38 of this chapter.

c. Application of Federal Appraisal Principles. In addition to when the Government acquires LER on behalf of the non-Federal sponsor as discussed in paragraph 12-34 of this chapter, Federal appraisal principles must be applied to determine market value for crediting purposes in the following circumstances:

(1) For LER owned by the non-Federal sponsor prior to the date of Congressional authorization of a specifically authorized project or prior to the date of the Division Commander’s approval of the project for continuing authority projects; and

(2) For Shore Protection Projects, lands subject to shore erosion that are required for project purposes and that must be provided by the non-Federal sponsor must be appraised for crediting purposes considering special benefits in accordance with relevant Federal statutes and Department of Justice regulations. For private land holdings, the non-Federal sponsor must receive credit for the LER value, if any, that results from application of this special benefits analysis. For public land holdings, any credit amount proposed must first be approved by HQUSACE through a request forwarded, through Division, to HQUSACE (ATTN: CERE). For additional discussion, see Memorandum from the Director of Civil Works, Revision to Policy Guidance Letter No. 11, Credit for Lands, Easements, and Rights-of-Way (LER) at Shore Protection Projects, dated 21 April 1989.

d. Informal Value Estimates. As provided in 49 CFR Part 24.102(c), an appraisal is not required for acquisition purposes if (1) the landowner is donating the property and releases the acquiring agency from this obligation, or (2) the acquiring agency determines that an acquisition appraisal is unnecessary because the valuation problem is uncomplicated and the fair market value is estimated at $2500 or less, based on a review of available data. Where no acquisition appraisal has been prepared by the non-Federal sponsor pursuant to either of these circumstances, and where the value estimate does not exceed $2500, the non-Federal sponsor may submit, and the District Chief of Real Estate may approve, the non-Federal sponsor's informal value documentation and conclusions for the purpose of affording credit. Upon approval, the informal value documentation submitted shall be considered to be an appraisal for the limited purpose of compliance with the appraisal requirements in the PCA for the tract at issue. For all other tracts, credit appraisals must be submitted with approval authority commensurate with delegated authority amounts for appraisal approvals generally.

e. Multi-Purpose Projects. Where a project will be constructed to serve more than one authorized purpose, it is important that the LER requirements for each purpose are clearly identified so that the respective values can be properly assigned among the purposes with appropriate credit afforded toward the non-Federal sponsor's share of the costs of each project purpose. This is particularly important when the purposes have different cost sharing formulas or when there are different non-Federal sponsors for construction and Operation, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R) of the project purposes. For example, if the LER required for a flood control project consists of standard permanent levee easements, those interests must be so identified, valued, and assigned to the basic flood control project purpose. Additional estates on the same tracts that are required to support recreation must be separately identified with the incremental additional values assigned to the recreation project purpose. In no event can the value for the flood control easement combined with that of the additional interest required to support recreation on the same tract exceed the fee value for that tract. Once the values have been properly assigned among purposes, those values will be included in total project costs for the respective purposes and credit will be afforded in such amounts. For additional discussion, see CECW Policy Guidance Letters No. 30, Recreation Cost Sharing Credit For Increased Real Estate Interest for Recreation Development at Non-Reservoir Projects, dated 6 December 1991 and 36, Recreation Development at (Non-Lake) Structural Flood Control and Harbor Projects, dated 21 October 1992.

f. Impact of Project Changes. Where a non-Federal sponsor acquires an interest in real property after PCA execution and receipt of the Government's written notice to proceed with acquisition but subsequent project changes (e.g. design change) eliminate the need for such interest, the amount of credit afforded (or to be afforded as the case may be) must be reduced in accordance with consistent with the following principles:

(1) If the acquired real property interest has a market value, credit and total project costs must be reduced by the lesser of the market value of the interest credited to the sponsor or the reasonable sales proceeds received by the non-Federal sponsor if such interest is sold to a third party in a timely fashion in an arms length transaction.

(2) Credit must still be afforded for the amount of the approved incidental costs of acquiring such interest pursuant to the terms of the PCA (including P.L. 91-646 benefit payments) as well as for the documented incidental costs, if any, of selling such interest subject to an audit to determine reasonableness, allocability and allowability.

(3) Application of these principles are not intended to penalize a non-Federal sponsor for acquiring real property as requested by the Government. Accordingly, it is acknowledged that many estates acquired by non-Federal sponsors for USACE projects have no market value (e.g. levee easements, temporary construction easements). In such cases the credit reduction principles are not applicable. It is further acknowledged that application of these principles may not under all circumstances produce an acceptable result as it relates to credit reduction. In such cases, and pursuant to a request by the non-Federal sponsor, a written request for deviation from application of such principles together with a full explanation of the circumstances and a recommendation for decision should be transmitted through division to CERE-AP for appropriate coordination, consideration and decision.

g. Hazardous, Toxic, and Radioactive Wastes (HTRW). As used in ER 1165-2-132, HAZARDOUS, TOXIC, AND RADIOACTIVE WASTE (HTRW) GUIDANCE FOR CIVIL WORKS PROJECTS, and as used in this chapter, the term “hazardous, toxic, and radioactive waste”, or “HTRW”, means any material listed as a “hazardous substance” under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §9601 et seq. (CERCLA). See 42 U.S.C. §9601(14). For crediting purposes, LER required for the project that is contaminated with CERCLA regulated materials shall be appraised with the assumption that the lands are no longer contaminated; that is, that an appropriate response action has occurred. Notwithstanding that an appropriate response action has been completed, the market value of the tract may be lessened due to the stigma that arises from its history of contamination. See Chapter 4, Appraisal, of this regulation; Real Estate Policy Guidance Letter No.1--Appraisal of Lands Containing Hazardous and Toxic Wastes, dated 19 November 1990; and Project Management Guidance Letter No.8--Appraisal of Lands Containing Hazardous & Toxic Wastes on Local Cooperation Projects, dated 5 November 1990.

h. Other Contaminants. The policy explained above in subparagraph g is limited to LER contaminated with CERCLA regulated materials. For crediting purposes, LER required for the project that is contaminated with materials not regulated by CERCLA shall be appraised for crediting purposes as it exists on the applicable date of valuation.

12-38. Exceptions to LER Credit. As a matter of policy, a non-Federal sponsor will not be afforded credit for the following categories of LER required for a project. Further, for projects that include LER value as a part of shared total project costs, the value amount that is non-creditable must be excluded from total project costs. Requests for exceptions to this policy together with persuasive rationale must be forwarded through Division to HQUSACE (ATTN: CERE-AP) for coordination and final determination.

a. Previously Provided as an Item of Cooperation. The non-Federal sponsor shall not receive credit for the value of any LER, including incidental costs, that have been provided previously as an item of cooperation for another Federal project.

b. Federal Funds. The non-Federal sponsor shall not receive credit for the value of LER, including incidental costs, to the extent that they were provided using Federal funds unless the Federal granting agency verifies in writing that such credit is expressly authorized by statute.

c. Federal Lands. The non-Federal sponsor shall not receive credit for the value of LER acquired from Federal agencies if the acquisition of same was accomplished at no cost other than incidental costs. However, credit may be afforded for the non-Federal sponsor's documented incidental costs of acquiring such interests subject to an audit to determine reasonableness, allocability, and allowability. USACE will cooperate and, where possible, facilitate the non-Federal sponsor's effort to secure land for project use that is managed by a Federal agency.

d. Excessive Interests. Except as otherwise provided in paragraph 12-36f of this chapter, if the non-Federal sponsor acquires LER in excess of the requirements of the project as determined by the Government, only the value of the acreage or interest required to support the project as determined by the Government shall be eligible for credit.

e. Section 14 Projects. The valuation of LER for crediting purposes for continuing authority projects constructed pursuant to Section 14 of the Flood Control Act of 1946, as amended, 33 U.S.C. §701r, is the same as for other projects except for cases in which the required LER is part of the tract of land that includes the facility or structure being protected. In such cases, the non-Federal sponsor shall not receive credit for the value of LER it provides that:

(1) are part of the tract of land on which the facility or structure to be protected is located; and

(2) are owned by either the non-Federal-sponsor or the owner of the facility or structure when the PCA for the project is executed.

f. Navigation Servitude. In no event shall credit be afforded for lands that are available to the project through exercise of the navigation servitude.

g. Contingencies. In no event shall credit be afforded for contingency values designated in reconnaissance estimates, Gross Appraisals, M-CACES cost estimates, or other planning estimates of LER values.

12-39. Stipulating to Credit Amount in PCA.

a. Section 14 Projects. Where the cost of appraising LER that is eligible for credit for a Section 14 continuing authority project is estimated to exceed the market value of such interest, or interests, the non-Federal sponsor and Government may stipulate in the PCA for the project that the value of, and the credit amount for, the required interest, or interests, that are to be provided by the non-Federal sponsor is zero thereby avoiding the necessity and expense of the appraisal for such interest or interests. It must be noted, however, that use of such a stipulation is a deviation from Model PCA provisions and additional PCA approval may therefore be required.

b. Other Circumstances. Other than as discussed above, all proposals for stipulating to value and credit amounts in the PCA for some or all LER required for the project that must be provided by the non-Federal sponsor will be considered on a case-by-case basis. Such proposals must be agreed to by the non-Federal sponsor and must be submitted in writing together with justification to HQUSACE (ATTN: CERE-AP) for coordination and approval. Proposals for all stipulations in an amount greater than $2500 must be based upon an appraisal approved by the Government that has been prepared in accordance with Chapter 4 of this regulation. Generally, submittal and approval of the proposal must occur prior to submittal of the draft PCA to CECW-AR for review so as to not delay PCA processing and approval.

12-40. Process and Procedures.

a. Timing of Credit Requests.

(1) Market Value of LER. To facilitate affording of credit for the market value of LER in a timely manner, the non-Federal sponsor should submit its credit request with supporting documents within 180 days after it provides the Government authorization for entry for such LER.

(2) Incidental Costs. For all other creditable items associated with the acquisition of LER, such as P.L. 91-646 relocation assistance payments or other documented acquisition costs, the non-Federal sponsor should submit its credit request with supporting documentation as soon as practicable but not less than on an annual basis.

(3) Reasonable Effort To Comply. Although these time frames for submission of credit requests may not be achievable in all events due to complexities in negotiations, condemnations, or other reasons, reasonable compliance efforts should be made so that project costs are appropriately and timely apportioned between the parties consistent with PCA accounting provisions and sound fiscal procedures.

b. Credits and Project Accounting Records. After Real Estate has preliminarily approved a LER credit amount in accordance with delegated authority policies, this amount should be reviewed and discussed with the PM. Real Estate should make available to the PM all information necessary for the PM to review the non-Federal sponsor's credit request. Once the LER credits are finally approved, it is the PM's responsibility to assure that credit amounts are recorded in project accounting records.

c. No Credit Request. If a non-Federal sponsor does not submit a credit request, or sufficient documentation therefor in a timely manner, the District Chief of Real Estate should document actions taken in trying to obtain the credit request or documentation and provide such information to the PM for further action.