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CECW-P

Water Resource Policies and Authorities
Operation and Maintenance of Improvements Carried Out by Non-Federal
Interests to Authorized Harbor or Inland Harbor Projects

FOR THE COMMANDER:

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COL, EN
Chief of Staff

Purpose. This regulation provides policy for implementation of Section 204(f) of the Public Law 99-662, Water Resources Development Act of 1986, as amended. Section 204(f) is codified in Section 2232(f), Title 33, United States Code. Section 204(f) authorizes the Secretary of the Army to be responsible for the operation and maintenance of improvements to a federally authorized harbor or inland harbor carried out by a non-federal interest, as defined in Section 2241, Title 33, United States Code, when certain conditions are met.

Applicability. This regulation applies to all Headquarters, United States Army Corps of Engineers elements, major subordinate commands, districts, laboratories, and all field operating agencies having Civil Works responsibilities.

Distribution Statement. Approved for public release; distribution is unlimited.

Proponent and Exception Authority. The proponent of this regulation is the Headquarters Civil Works Planning and Policy Division. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. Only the proponent of a publication or form may modify it by officially revising or rescinding it.

*This regulation supersedes ER 1165-2-211, dated 4 February 2016.

Summary of Change

ER 1165-2-211

Operation and Maintenance of Improvements Carried Out by Non-Federal Interests to Authorized Harbor or Inland Harbor Projects

This major revision, dated 16 December 2024:

- Updates the Chief of Staff signature block.
- Provides credit or reimbursement for discrete segments subject to conditions with an approved written agreement.
- Provides definition of discrete segment.
- Clarifies the project must be federally authorized.
- Clarifies that a project constructed under this authority is not required to obtain any federal permits or approvals that would not be required if the Secretary carried out the project or separable element unless significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation.
- Clarifies that the non-federal interest must comply with the same legal and technical requirements that would apply if the project were carried out by the Secretary including mitigation.
- Provides that the non-federal interest may request all relevant data and documentation except documentation the Secretary considers to be proprietary information.
- Adds the Secretary will maintain impartial decision making of the water resources development project.
- Adds that reimbursement is as long as appropriations are provided by Congress for this purpose.
- Clarifies this regulation applies to water resources development projects.
- Updates that the non-federal interest may not waive any requirements for labor rates defined in law.
- Adds that for the funds provided by the non-federal interests for studies, technical and engineering assistance will not be eligible for reimbursement.
- Clarifies that before the assumption of maintenance of the project, the Secretary must determine that project improvements are feasible, were constructed according to all permits and engineering and design standards, and the Secretary and the non-federal interest have an executed agreement.
- Adds that the Secretary may participate in the costs of a locally preferred plan.
- Clarifies that the study for a project with a cost of less than \$200,000,000 is not subject to independent peer review under section 2034(a)(3)(A)(i) of Water Resources Development Act of 2007.

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Glossary of Terms

1. Purpose

This regulation provides policy for implementation of Section 204(f) of the Public Law 99-662, Water Resources Development Act of 1986, as amended. Section 204(f) is codified in Section 2232(f), Title 33, United States Code. Section 204(f) authorizes the Secretary of the Army to be responsible for the operation and maintenance of improvements to a federally authorized harbor or inland harbor carried out by a non-federal interest, as defined in Section 2241, Title 33, United States Code, when certain conditions are met.

2. Distribution Statement

Approved for public release; distribution is unlimited.

3. References

See Appendix A.

4. Records management (recordkeeping) requirements

The records management requirement for all record numbers, associated forms, and reports required by this publication are addressed in the Army Records Retention Schedule. Detailed information for all related record numbers is located on the U.S. Army Corps of Engineers (USACE) Records Management Site <https://usace.dps.mil/sites/INTRA-CIOG6/SitePages/Records-Management.aspx>. If any record numbers, forms, and reports are not current, addressed, and/or published correctly, see DA Pam 25-403 for guidance.

5. Associated publications

Policy and/or procedures associated with this regulation are found in ER 1105-2-103, ER 1105-2-100, and ER 1165-2-209 regarding a Non-Federal Interest (NFI) undertaking a feasibility study, as authorized by Section 203 of Water Resources Develop Act (WRDA) of 1986, as amended. Policy is also provided in ER 1165-2-504 regarding NFIs constructing a water resources development project, as authorized by Section 204 of WRDA 1986, as amended.

6. Background

This regulation and the referenced documents constitute the guidelines to assist NFIs in preparation and submission of a report recommending assumption of maintenance of improvements carried out by an NFI to a federally authorized harbor or inland harbor, according to Section 204(f) of WRDA 1986. Throughout this regulation, these are referred to as “Section 204(f) studies.”

7. Roles and responsibilities

This section describes the roles and responsibilities of the parties involved in the development and approval of Section 204(f) studies.

a. The NFI is responsible for developing a Section 204(f) study that complies with all the requirements outlined in this regulation and submitting it for review to the U.S. Army Corps of Engineers (USACE) district office that would have responsibility for Operation and Maintenance (O&M) of the proposed project, if approved. The NFI is also responsible for obtaining any federal, Tribal, state, or local permits required for construction of the project.

b. The appropriate USACE district office is responsible for initial review of the project to determine if it meets the requirements under this regulation and then submitting it to the division office for concurrence. The division office is responsible for submitting the report to the Headquarters, USACE (HQUSACE) office for final USACE policy and legal compliance review.

c. The Assistant Secretary of the Army for Civil Works (ASA(CW)), acting for the Secretary of the Army, will receive the study from HQUSACE. The ASA(CW) will provide the final determination and approval if the Section 204(f) study and proposed project meets the requirements outlined in this regulation.

8. General policy for eligibility

a. General.

(1) Section 204(f) authorizes the Secretary of the Army (the Secretary) to be responsible, according to the provisions of 33 United States Code (USC) 2211a, for O&M of improvements carried out by a NFI to a federally authorized harbor or inland harbor project when certain conditions are met. While the improvement must be to a federally authorized harbor or inland harbor project, Congressional authorization of the improvement itself is not required.

(2) Section 204(f) requires that before construction of the improvement, the Secretary must determine that the improvement is environmentally acceptable, technically feasible, has benefits that exceed the costs, and is consistent with the purposes of Title II of WRDA 1986. Section 204(f) also requires the Secretary and the NFI to execute a written agreement relating to O&M of the improvement. Further, Section 204(f) requires the Secretary to certify that the improvement was constructed according to applicable permits and appropriate engineering and design standards.

(3) Additionally, Section 204(f) requires that the Secretary does not find that the project or separable element is no longer feasible. Finally, if a locally preferred plan deviates from the National Economic Development (NED) plan (economic value of the national output of goods and services) is implemented by the NFI, the Secretary will be responsible for O&M costs according to 33 USC 2211, including O&M costs in excess of

the costs of the NED plan, when the improvements otherwise meet the requirements in Section 204(f).

b. Secretary of the Army approval.

(1) To remain eligible for federal assumption of O&M of the improvement, the NFI cannot initiate construction until the ASA(CW) has determined that the improvements are feasible and consistent with the purposes of Title II of WRDA 1986, and the parties have executed a written agreement for O&M of the improvement. Prior to initiation of construction, the ASA(CW) must have reviewed and approved the justification, details of the project plans and design, arrangements for the execution of the work, and the environmental compliance documentation. This information will be provided in a Section 204(f) report developed by the NFI.

(2) All information necessary for these determinations must be provided at NFI expense. If the proposed non-federal improvement is covered in a recently approved Report of the Chief of Engineers, the Report of the Chief of Engineers may meet the requirements for the analysis to support the Secretary's determinations. The NFI should coordinate with the local USACE district office to determine if the recent Report of the Chief of Engineers is sufficient and to determine if any additional requirements, such as 33 USC 408 permission and federal regulatory permits, need to be met to obtain ASA(CW) approval.

c. Environmental acceptability.

(1) Since the NFI will be required to obtain all necessary federal, Tribal, state, and local permits for construction of the improvement, environmental concerns may have been addressed adequately through the permitting process. The NFI may adopt, incorporate by reference, or utilize as appropriate, any previous USACE obtained environmental compliance documents, including PL 91-190, National Environmental Policy Act (NEPA)-related documents, to satisfy their permitting requirements. Consideration will be given to any need for further documentation to meet NEPA requirements. NEPA compliance should follow the process set forth in 40 Code of Federal Regulations (CFR) Parts 1500–1508, USACE procedures for implementing NEPA found in 33 CFR Part 230, and any additional USACE guidance.

(2) Documentation for Section 204(f) requests does not require the same level of analysis or documentation needed for planning studies and, therefore, Appendix A of 33 CFR Part 230 and other portions of Part 230 specific to planning studies do not apply.

d. Project justification. To find the proposed work justified, it must be demonstrated that:

(1) The improvement benefits must have been justified predominantly by commercial navigation benefits economics including transportation savings, job creation, navigation safety, national security, and sustainability of subsistence harbors according to 33 USC 2211a(b).

(2) Improvement benefits, to include economic justification, environmental, and social benefits, developed consistent with the standards contained in the Council for Environmental Quality Principles and Requirements for Federal Investments in Water Resources and the Interagency Guidelines, March 2013, exceed improvement costs, including construction and O&M costs.

(3) The proposed work does not have to be the NED plan, but improvement benefits must exceed improvement costs.

e. Consistency with federal policy. O&M of the improvement must be consistent with other federal policies, including but not limited to the following:

(1) The federal participation in navigation is limited to the navigable waters of the United States. Federal O&M is limited to general navigation features. General navigation features (GNF) and aids to navigation are described in Appendix E of ER 1105-2-100. These features include such things as channels, jetties, breakwaters, locks and dams, harbor entrance channels and associated protective works, dredged material disposal facilities, ice control structures, mitigation features (including associated lands), primary access channels to the harbor, basins, and anchorages that are needed for the transit of said channels.

(2) While facilities to serve vessels and commerce may be needed to achieve the benefits of a navigation project, O&M of these facilities are a responsibility of the NFI. Examples of such facilities, referred to as Local Service Facilities (LSFs), include piers, wharves and other waterfront structures and associated local access channels, berthing, mooring, and anchorage areas and related local dredged material placement capacity. LSFs are described further in Appendix E of ER 1105-2-100 and ER 1105-2-103. The cost of all LSFs that are constructed or otherwise modified for the proposed GNF constructed under authority granted by Section 204(f) to produce the claimed benefits must be included in determining whether benefits of the project exceed the costs.

(3) The project must be justified predominantly by commercial navigation benefits. However, there may be features of the proposed project that are intended for use by other than commercial navigation (such as recreational navigation). O&M of these features will be cost shared according to cost sharing for that feature; for example, O&M of features for recreation navigation is 100 percent non-federal.

(4) Navigation improvements to provide navigation access to privately owned facilities or to benefit a single privately owned facility (benefit of only one owner/user) are not eligible for O&M under Section 204(f).

(5) The NFI is encouraged to beneficially use dredged sediments from construction of the project to the extent practicable.

f. Dredged material management plan.

(1) The report and documentation submitted by the NFI must include a dredged material management plan (DMMP) covering a period of at least 20 years (20YR DMMP) and demonstrate that there is adequate disposal capacity to accommodate a minimum of 20 years of maintenance dredging of the proposed improvement considering the other applicable federal maintenance requirements such as the placement requirements for the existing federal project.

(2) Documentation should include an analysis of the potential use of dredged material suitable for beneficial use including identification of any hazardous, toxic, and radioactive waste.

(3) The NFI will be responsible for providing, at no cost to the Federal Government, dredged material placement facilities (DMPFs) with sufficient capacity for at least the initial 20 years of maintenance dredging of the improvement. The cost of future DMMP studies for continued maintenance of the improvement will be considered for funding following normal budgetary procedures.

(4) Construction of DMPFs needed to accommodate dredging beyond the minimum 20 years of capacity that must be provided by the NFI will be cost shared according to 33 USC 2211(b), following normal budgetary procedures. Guidance for development of a 20YR DMMP is included in Appendix E of ER 1105-2-100 and ER 1105-2-103.

g. Section 408 permission and regulatory program authorizations. Section 408 permission applies to the improvement proposed for construction by the NFI per Section 204(f). In general, the Section 204(f) report will not be submitted for approval by the ASA(CW) until after the request for the Section 408 permission and Section 10/404/103 permits have been approved by USACE (Section 10 of the 30 Stat. 1151, Rivers and Harbors Act of 1899; Section 404 of the Clean Water Act of 1972, as amended; and Section 103 of the PL 92-532, Marine Protection, Research and Sanctuaries Act of 1972). The Section 204(f) report prepared for ASA(CW) may also serve as the documentation to inform the Section 408 permission decision. A copy of the most recent approved procedures for processing requests to alter USACE Civil Works projects per 33 USC 408 may be obtained from the local USACE district office.

h. Unavoidable impacts. The NFI must identify any impacts that cannot be avoided. The NFI must show that steps were taken to minimize impacts. Any required mitigation would be at 100 percent NFI cost.

i. Section 204(f) report.

(1) The study that determines the relationship between improvement benefits and improvement costs will be the full responsibility of the NFI. A report of the study results will be provided to the appropriate USACE District Commander for review and comment. Once the District Commander is satisfied that the study adequately addresses the economic issues and environmental concerns, the Section 204(f) report, along with details of the proposed design, plans and specifications, and arrangements

for execution of the work, will be forwarded to the Regional Integration Team, through the Division.

(2) The Division will review the district's submittal prior to submitting the package to HQUSACE. Upon completion of HQUSACE review, the Director of Civil Works will forward the Section 204(f) report along with details of proposed design, plans and specifications, and arrangements for prosecution of the work to ASA(CW) for decision.

j. Quality and technical accuracy.

(1) The NFI must certify the quality and technical accuracy of the study and report. This should be done by documenting the quality control, quality assurance, and technical reviews that were conducted for all information presented in the report. In addition, the NFI is required to undertake, at its own expense, any independent external peer review for a project with a cost greater than \$200,000,000. The NFI certification of quality and technical accuracy and any independent external peer review undertaken must be submitted along with the Section 204(f) report. A copy of the most recent Civil Works review guidance may be obtained from the local USACE district office.

(2) For studies that it undertakes, USACE requires use of models certified or approved by the appropriate Planning Center of Expertise and HQUSACE for one-time use. For studies undertaken by a NFI under Section 204(f), the report should specify whether the model used was approved or certified by USACE. An NFI may contact the local USACE district office to determine which planning models are currently certified or approved.

k. Agreement. In general, the ASA(CW) must determine that the proposed improvements are feasible and consistent with the purposes of Title II of WRDA 1986 prior to solicitation of the construction contract by the NFI. Approval of the ASA(CW) is required to grant an exception to policy to permit solicitation of the construction contract prior to completion of ASA(CW) review and decision on the proposal. In no case may the construction contract for the improvement be awarded prior to the required ASA(CW) approval of the improvement and execution of a written agreement for O&M. Award of the construction contract by the NFI constitutes initiation of construction. A model Section 204(f) agreement is posted on the USACE agreement website.

l. Construction and certification. The improvement constructed by the NFI must be constructed according to applicable permits, appropriate engineering and design standards, and plans approved by the Secretary.

(1) In constructing the improvement the NFI must comply with all the requirements of federal laws and implementing regulations, if applicable, including, but not limited to: Section 601 of the Civil Rights Act of 1964, as amended (42 USC 2000d), and the associated DoD Directive 5500.11; the Age Discrimination Act of 1975 (42 USC 6102); PL 93-112, Rehabilitation Act of 1973, as amended (29 USC 794), and the associated AR 600-7; 40 USC 3141–3148 and 40 USC 3701–3708 (labor standards originally enacted as the PL 71-798, Davis-Bacon Act, PL 87-581, Contract Work Hours and

Safety Standards Act, and PL 73-324, Copeland Anti-Kickback Act; and 40 CFR Parts 1500-1508 NEPA and other environmental laws.

(2) Construction monitoring and auditing activities to ensure the improvement or separable element of the improvement constructed by a NFI are carried out in compliance with the requirements of Section 204(f) will be performed by the appropriate USACE District Commander. The district must be provided the right to inspect the work and to enter, at reasonable times and in a reasonable manner, upon land that the NFI owns or controls for access to the improvement for such inspection.

(3) The District Commander must be able to certify that the improvement or separable element was completed according to applicable permits and appropriate engineering and design standards. The District Commander will forward such certification through the Division Commander to the Regional Integration Team. The Regional Integration Team will transmit the certification to the ASA(CW) upon request.

m. Cost sharing for operations and maintenance.

(1) Upon certification by the District Commander, cost sharing will be according to the terms of 33 USC 2211.

(a) For projects whose depths do not exceed 50 feet, the Federal Government will assume 100 percent of eligible O&M costs, to include eligible O&M costs for DMPFs that are required for continued O&M dredging of the project. All other costs, including lands, easements, and rights-of-way, are the responsibility of the NFI.

(b) When the project depth exceeds 50 feet, the NFI will be responsible for 50 percent of the incremental eligible O&M costs beyond that necessary to maintain a 50-foot project, to include O&M costs for DMPFs that are required for continued O&M dredging of the project.

(c) O&M costs, to include O&M costs for DMPFs that are required for continued O&M dredging of the project, for commercial navigation improvements that deviate from the NED plan, including when costs are more than the costs of the NED plan, will be the responsibility of the Secretary according to cost sharing set out in 33 USC 2211. Locally preferred plans will follow the budgetary funding process in paragraph 10.

(d) O&M required for any mitigation features will be a 100 percent NFI cost, since this O&M is solely associated with initial construction of the project, rather than future O&M dredging of the project.

(2) O&M costs for recreational features of a project are 100 percent an NFI responsibility.

n. Discontinuance of maintenance. If at any time the ASA(CW) determines that the O&M of the harbor or inland harbor improvement is no longer justified or environmentally acceptable, responsibility for O&M must cease except that the ASA(CW) may choose to maintain a lesser depth in lieu of completely discontinuing

maintenance activities. The appropriate USACE District Commander will notify the NFI if maintenance of the improvement will be discontinued or if the improvement will be maintained at a lesser depth.

9. Funding for review and construction inspection certification

Applicable project O&M funds may be used for the USACE district activities involved in review of the study and inspection and certification of construction. If existing or sufficient O&M funds are not available for these activities, funding will be requested through the normal budgetary process.

10. Funding for operations and maintenance

Approval by the ASA(CW) does not commit funding for the O&M of the improvements undertaken under Section 204(f). Funding will be subject to existing budgetary policy and will be considered along with other programs, projects, and activities through the annual budget process.

Appendix A

References

Unless otherwise indicated, all U.S. Army Corps of Engineers publications are available on the USACE website at <https://publications.usace.army.mil>. Army publications are available from the Army Publishing Directorate at <https://armypubs.army.mil/>. Public laws and referenced sections of U.S. Code (USC) and the Code of Federal Regulations (CFR) are available from the U.S. Government Publishing Office website at <https://www.govinfo.gov>.

AR 600-7

Unlawful Discrimination on the Basis of Disability in Programs and Activities Receiving Federal Financial Assistance from or Conducted By the Department of the Army

Council for Environmental Quality

Principles, Requirements and Interagency Guidelines for Federal Investments in Water Resources, March 2013 (Available at <https://planning.erdc.dren.mil>)

DA Pam 25-403

Army Guide to Recordkeeping

DoD Directive Number 5500.11

Nondiscrimination in Federally Assisted Programs

ER 1105-2-100

Planning Guidance Notebook

ER 1105-2-103

Policy for Conducting Civil Works Planning Studies

ER 1165-2-209

Studies of Water Resources Development Projects by Non-Federal Interests

ER 1165-2-504

Construction of Authorized Water Resource Development Projects by Non-Federal Interests

PL 71-798

Davis-Bacon Act

PL 73-324

Copeland Anti-Kickback Act

PL 87-581

Contract Work Hours and Safety Standards Act

PL 88-352

Civil Rights Act of 1964

PL 91-190

National Environmental Policy Act of 1969

PL 92-532

Marine Protection, Research and Sanctuaries Act of 1972

PL 93-112

Rehabilitation Act of 1973

PL 94-135

Age Discrimination Act of 1975

PL 99-662

Water Resources Development Act of 1986

29 USC 794

Nondiscrimination under Federal grants and programs

30 Stat. 1151

Rivers and Harbors Appropriation Act of 1899

33 CFR Part 230

Procedures for Implementing NEPA

33 USC 408

Taking possession of, use of, or injury to harbor or river improvements

33 USC 2211

Harbors

33 USC 2232

Construction of water resources development projects by non-federal interests

33 USC 2241

Definitions

40 CFR Parts 1500–1508

National Environmental Policy Act Implementing Regulations

40 USC 3141–3418

Wage rate requirements

42 USC 2000d

Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

42 USC 6102

Prohibition of discrimination

Glossary of Terms

Term	Definition
ARIMS	Army Records Information Management System
ASA(CW)	Assistant Secretary of the Army for Civil Works
CECW-P	Headquarters Civil Works Planning and Policy Division
CFR	Code of Federal Regulations
CW	Civil Works
DMMP	Dredged Material Management Plan
DMPF	Dredged Material Placement Facility
ER	Engineer Regulation
GNF	General Navigation Features
HQUSACE	Headquarters, U.S. Army Corps of Engineers
LSF	Local service facility
NED	National Economic Development
NEPA	National Environmental Policy Act
NFI	Non-Federal Interest
O&M	Operation and Maintenance
PL	Public Law
RRS-A	Records Retention Schedule—Army
USACE	U.S. Army Corps of Engineers
USC	United States Code
WRDA	Water Resources Development Act
YR	year

20YR DMMP

Dredged material management planning for all federal harbor projects is conducted by USACE to ensure that maintenance dredging activities are performed in an environmentally acceptable manner, use sound engineering techniques, and are economically warranted, and that sufficient placement areas are available for at least the next 20 years. These plans address dredging needs, placement capabilities, capacities of placement areas, environmental compliance requirements, potential for beneficial usage of dredged material, and indicators of continued economic justification. DMMPs must be updated periodically to identify any potentially changed conditions. The DMMP also establishes the Base Plan or Federal Standard for management of material at the project.

Assistant Secretary of the Army for Civil Works

The ASA(CW) establishes policy direction and provides supervision of the DA functions relating to all aspects of USACE's Civil Works program.

Code of Federal Regulations

The CFR is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the Federal Government.

Dredged Material Placement Facility

A DMPF is an engineered structure for the containment of dredged material. They may be constructed as upland sites, nearshore sites with one or more sides in water (sometimes called intertidal sites), or island containment areas. DMPFs are necessary for the management of dredged material required for project construction or operation and vary considerably in size, dike type, and method of filling.

General Navigation Features

GNFs are necessary features for the physical movement of vessels, often based on the design vessel, and are the foundation for the formulation of measures and alternatives.

Local Service Facility

The Local Service Facility for a navigation project are those lands, easements, rights-of-way, and relocations for infrastructure components that are the full cost responsibility of the non-federal partner.

National Economic Development

The NED account displays changes in the economic value of the national output of goods and services.

National Environmental Policy Act

Originally signed into law in 1970, the NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions and to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach. Federal regulations (40 CFR Parts 1500–1508) and other guidance issued by the Council on Environmental Quality address the procedural provisions of NEPA and the administration of the NEPA process, including the preparation of environmental impact statements.

Non-Federal Interest

The term NFI means (1) a legally constituted public body (including an Indian tribe and a tribal organization [as those terms are defined in section 5304 of title 25]); or (2) a nonprofit entity, with the consent of the affected local government, that has full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform. The term includes any interstate agency and port authority established under a compact between two or more States with the consent of Congress under section 10 of Article I of the Constitution. (33 USC 2241)

Operations and Maintenance

For USACE projects, activities that are conducted by a non-federal partner or USACE to support the function of a constructed water resources development project.

United States Code

The consolidation and codification, by subject matter, of the general and permanent laws of the United States.

Water Resources Development Act

USACE's primary authorizing legislation. This comprehensive legislative package is typically passed every two years and may include both Congressional policy direction and authorization for USACE water resources activities including studies, projects, programs, and research activities.