

# USACE Project Partnership Agreements: Problematic Provisions for Non-Federal Sponsors



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Cover photo by Matthew Elliott, featuring a navigation channel through Louisiana's coastal wetlands (cropped from original).

Project Partnership Agreements: Problematic Provisions for Non-Federal Sponsors.

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## I. Executive Summary

Cost-shared water resource development projects led by the U.S. Army Corps of Engineers (USACE or Corps) require an agreement in writing between USACE and the project's non-federal sponsor. Such an agreement, known as a Project Partnership Agreement (PPA), is crucial to the successful construction and operation of proposed water resource development projects across the country. Each project's PPA describes the scope of the project, the obligations of the parties, and the cost-sharing provisions. As such, it serves as a framework for the nature of the partnership throughout the course of the project's life.

For many project types, the authority to sign these agreements has been delegated to regional USACE commanders, who use "model" PPA templates that have been promulgated by USACE Headquarters. This report examines these model project partnership agreements, their role in the greater context of water resource development projects, and common obstacles the agreements pose for the non-federal partner. We identify particularly challenging provisions included within the model PPAs, the provisions' legal origins, and their actual and perceived impacts.

The partners' ability to enter into and implement these agreements is an important factor in the successful advancement of non-structural, natural, and nature-based solutions through the Corps' authorities. As with other project types, there is a "model" PPA for nonstructural flood risk management projects under the Continuing Authorities Program (CAP) pursuant to Section 205 of the Flood Control Act of 1948, as amended (33 U.S.C. 701s). The references to this particular model throughout our report reflect an intended focus on nature-based solutions, but it is important to note that the issues and lessons discussed here also apply to most, if not all, other model PPAs.

This report explores four key provisions in model PPAs that are reported to be problematic for non-federal project sponsors:

- "Hold and Save" Clause: The non-federal sponsor is required to hold and save USACE free from all damages resulting from the project unless the damage is due to the fault or negligence of the governor or its contractors.
- Operations & Maintenance: The non-federal sponsor is required to have full financial and operational responsibility for the operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) for the project for as long as the project remains authorized.
- Hazardous, Toxic, and Radioactive Waste (HTRW): The non-federal sponsor is responsible for all activities associated with hazardous, toxic, and radioactive waste at a project site.
- Lands, Easements, Rights-of-way, Relocations, and Disposal (LERRD) Costs: USACE requires the non-federal sponsor to acquire all LERRDs, even in situations where their cost exceeds the appropriate non-federal cost-share percentage.

While USACE has the authority to amend some of the identified issues using administrative updates, several of these challenges are rooted in statutory language. This report does not prescribe specific legislative solutions nor purport to advocate for or against specific pieces of legislation; rather, it is intended to illuminate the issue areas where a range of stakeholders—including local entities, states, non-profit organizations, USACE, and Congress— can engage in a collaborative, cooperative process to identify opportunities to overcome common PPA challenges.



*Wild Louisiana irises blooming at the edge of a navigation canal near Buras, LA.  
Photo by Matthew Elliott.*

## II. Water Resources Project Development Process

A general overview of the typical process for proposing, authorizing, and constructing water resources development projects provides important context for understanding the function and timing of the PPA. To that end, this section describes the general life cycle of individually authorized projects, as well as projects authorized at the programmatic level under laws establishing “continuing authorities.”

### a. Individually Authorized and Funded Projects

Individually authorized and funded projects typically move through four phases: (1) feasibility study, (2) preconstruction engineering and design, (3) construction, and (4) operation and maintenance. Each of these phases play distinct but vital roles in the successful implementation of a water resources project.

#### 1. Feasibility Study

Typically, a water resource development project begins with the congressional authorization of, and appropriations for, a feasibility study,<sup>1</sup> which follows a six-step process designed to investigate a water-related problem, determine whether there is a federal interest, and evaluate alternative solutions.<sup>2</sup> For the majority of projects, the cost of the feasibility study is shared equally between the non-federal sponsor and USACE.<sup>3</sup>

Pursuant to law, and known colloquially as the 3x3x3 rule,<sup>4</sup> USACE expected to complete the study within three years, at a federal cost under \$3 million, following review at the district,

#### Box 1: Feasibility Study Planning Framework

1. Identify problems and opportunities
2. Inventory and forecast conditions
3. Formulate alternatives
4. Evaluate alternatives
5. Compare alternatives
6. Recommend a plan

<sup>1</sup> The study must first be authorized by Congress, and then appropriations must be sought. Authorizations typically are included in biannual Water Resource Development Act (WRDA) legislation, while appropriations typically are passed in the annual Energy and Water Development appropriation acts. CONG. RSCH. SERV., R45185, ARMY CORPS OF ENGINEERS: WATER RESOURCE AUTHORIZATION AND PROJECT DELIVERY PROCESSES 10 (2019); see also CONG. RSCH. SERV., IN11810, U.S. ARMY CORPS OF ENGINEERS CIVIL WORKS: PRIMER AND RESOURCES (updated July 20, 2023).

<sup>2</sup> USACE is currently in the process of updating the agency’s planning procedures to reflect adoption of the Principles, Requirements & Guidelines. See generally Amy Reed et al., *A Watershed Moment in Federal Water Resource Development Policy*, ENV’T L. INST. (July 15, 2022), <https://www.eli.org/vibrant-environment-blog/watershed-moment-federal-water-resource-development-policy>; U.S. ARMY CORPS OF ENG’RS, PRINCIPLES AND REQUIREMENTS FOR FEDERAL INVESTMENTS IN WATER RESOURCES (2013).

<sup>3</sup> 33 U.S.C. § 2215(a)(1).

<sup>4</sup> Robert D. Kidd, *The Corps Feasibility Study – Finding a Balanced Solution*, U.S. ARMY CORPS OF ENG’RS, (Jan. 14, 2016), <https://www.usace.army.mil/Media/News-Archive/Story-Article-View/Article/643197/the-corps-feasibility-study-finding-a-balanced-solution/>.

division, and headquarters levels.<sup>5</sup> The finished study report, known as the Chief's Report, is sent to the congressional authorizing committees,<sup>6</sup> the Assistant Secretary of the Army for Civil Works, state and local officials, the study's non-federal sponsor(s), and the Office of Management and Budget.<sup>7</sup>

## 2. Preconstruction Engineering and Design

Subject to the availability of appropriations, the phase known as preconstruction engineering and design (PED) may begin after the Chief's Report has been submitted.<sup>8</sup> The PED phase typically consists of USACE finalizing project design, preparing construction plans, and drafting construction contracts.<sup>9</sup> Costs of PED are generally shared between the Corps and the non-federal partner in the same proportion as the statutorily-assigned cost-share arrangement for the construction phase (see below).<sup>10</sup> While the average duration of the PED phase is two years, it varies depending on project size and complexity.<sup>11</sup>

## 3. Construction

Before the parties can begin constructing the water resource project, construction must be authorized by Congress, appropriations must be secured,<sup>12</sup> and a PPA must be signed.<sup>13</sup> During this phase, the necessary land rights are acquired, and actual construction of the project takes place.<sup>14</sup>

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<sup>5</sup> 33 U.S.C. § 2282c(a); see also NAT'L ACAD. OF PUB. ADMIN., THE U.S. ARMY CORPS OF ENGINEERS: AN EVALUATION OF THE PROJECT PARTNERSHIP AGREEMENT PROCESS REPORT app. F (Nov. 2018).

<sup>6</sup> The congressional authorizing committees are the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives. 33 U.S.C. § 2282a(f)(2)(b).

<sup>7</sup> CONG. RSCH. SERV., R45185, ARMY CORPS OF ENGINEERS: WATER RESOURCE AUTHORIZATION AND PROJECT DELIVERY PROCESSES 11 (2019).

<sup>8</sup> 33 U.S.C. § 2287.

<sup>9</sup> CONG. RSCH. SERV., R45185, ARMY CORPS OF ENGINEERS: WATER RESOURCE AUTHORIZATION AND PROJECT DELIVERY PROCESSES 12 (2019).

<sup>10</sup> 33 U.S.C. § 2215(b), (c). Under narrow circumstances where the non-federal sponsor does not contribute half of the feasibility study costs, they are responsible for half of the planning and engineering costs. In either case, the design costs are shared according to the project purpose. *Id.*

<sup>11</sup> CONG. RSCH. SERV., R45185, ARMY CORPS OF ENGINEERS: WATER RESOURCE AUTHORIZATION AND PROJECT DELIVERY PROCESSES 12 (2019).

<sup>12</sup> *Id.* at 15. Construction requires its own authorization & appropriations, separate from the funds secured for the feasibility study.

<sup>13</sup> 42 U.S.C. § 1962d-5b(a)(1) (requiring a written partnership agreement between USACE and the non-federal sponsor to be entered into before construction can begin); *Planning Community Toolbox: Water Resource Project Delivery (Construction)*, U.S. ARMY CORPS OF ENG'RS, <https://planning.erd.c.dren.mil/toolbox/project.cfm?Step=4> (last visited Dec. 18, 2023) ("Once a project has secured federal funding, the study's non-federal sponsor and the Corps can sign a Project Partnership Agreement.").

<sup>14</sup> NAT'L ACAD. OF PUB. ADMIN., THE U.S. ARMY CORPS OF ENGINEERS: AN EVALUATION OF THE PROJECT PARTNERSHIP AGREEMENT PROCESS REPORT app. F (Nov. 2018).

The cost-share allocation for this project phase is determined by the purpose of the project.<sup>15</sup> The duration of the construction phase is highly dependent on the specific project;<sup>16</sup> as with the PED phase, the time required to complete construction will vary depending on the project's size, complexity, and available funding.

#### 4. Operation and Maintenance

For the majority of project purposes, including flood control projects with nonstructural, natural, or nature-based features, the non-federal sponsor is entirely responsible for a project's operation, maintenance, repair, replacement, and rehabilitation (OMRR&R) for as long as the project remains authorized.<sup>17</sup> Such activities must be conducted in accordance with the project purpose and the OMRR&R Manual provided to the non-federal sponsor by USACE.<sup>18</sup> This manual is developed individually for each project and is provided by USACE to the non-federal sponsor upon completion of construction.<sup>19</sup>

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<sup>15</sup> For flood control projects with nonstructural, natural, or nature-based features, the non-Federal sponsor is responsible for 35% of the project costs, while USACE is responsible for the remaining 65%. 33 U.S.C. § 2213(b)(1).

<sup>16</sup> CONG. RSCH. SERV., R45185, ARMY CORPS OF ENGINEERS: WATER RESOURCE AUTHORIZATION AND PROJECT DELIVERY PROCESSES tbl. 1 (2019).

<sup>17</sup> 33 U.S.C. § 2213 (j)(1)(a) (“[the agreement] shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to pay 100 percent of the operation, maintenance, and replacement and rehabilitation costs of the project”); see also CONG. RSCH. SERV., R45185, ARMY CORPS OF ENGINEERS: WATER RESOURCE AUTHORIZATION AND PROJECT DELIVERY PROCESSES tbl. 2 (2019) (giving an overview of O&M cost-shares based on project type).

<sup>18</sup> E.g., U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 5 (July 21, 2022).

<sup>19</sup> U.S. ARMY CORPS OF ENG'RS, ER 1105-2-100, PLANNING GUIDANCE NOTEBOOK F-19 (Apr. 22, 2000); see also U.S. ARMY CORPS OF ENG'RS, ER 1110-2-401, OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, AND REHABILITATION MANUAL FOR PROJECTS AND SEPARABLE ELEMENTS MANAGED BY PROJECT SPONSORS 3 (1994) (providing instructions for the preparation of operation & maintenance manuals).



**Tbl. 1: Standard Project Framework for an Individually Authorized and Funded Water Resources Project**

<b>Project Phase</b>	<b>Cost-Share</b>	<b>Time</b>	<b>Activities</b>
Congressional Authorization & Appropriations for Feasibility Study			
Feasibility Study	50% Fed/ 50% non-Fed	2-3 years	Corps evaluates project using its 6-step planning process
Preconstruction Engineering and Design	Prescribed by statute based on project purpose	2 years	Detailed project design and preparation of construction documents
Congressional Authorization & Appropriations for Construction			
<b>Project Partnership Agreement Signed</b>			
Construction	Prescribed by statute based on project purpose	Varies by project	LERRDs are acquired; construction takes place
Operation & Maintenance, Repair, and Replacement	100% non-Fed	Until project is deauthorized	Conduct OMRR&R responsibilities consistent with manual & project purpose

**b. Continuing Authorities Program (CAP)**

Congress has authorized nine programmatic work areas under which USACE can implement relatively small<sup>20</sup> projects without obtaining project-specific authorization from the legislature.<sup>21</sup> CAP activities take place in two phases: feasibility and implementation.<sup>22</sup> The feasibility phase accounts for planning activities such as the development of

<sup>20</sup> Congress has placed limits on per-project federal funding for projects authorized through the CAP program. Most project types have a federal limit of \$10 million. CONG. RSCH. SERV., IF11106, ARMY CORPS OF ENGINEERS: CONTINUING AUTHORITIES PROGRAMS 2 (updated March 15, 2023); see also DEP'T OF THE ARMY, EP 1105-2-58, CONTINUING AUTHORITIES PROGRAM 9-10 (Mar. 1, 2019).

<sup>21</sup> 33 U.S.C. § 400 (listing the CAP authorities) (Flood Control Act of 1946 § 14 (Streambank and shoreline erosion protection of public works and non-profit public services); River and Harbor Act of 1962 § 103 (Beach erosion and hurricane and storm damage reduction); River and Harbor Act of 1960 § 107 (Navigation improvements); River and Harbor Act of 1968 § 111 (Shore damage prevention or mitigation caused by Federal navigation projects); Water Resources Development Act of 1992 § 204 (Beneficial uses of dredged material); Flood Control Act of 1948 § 205 (Flood control); Water Resources Development Act of 1996 § 206 (Aquatic ecosystem restoration); Flood Control Act of 1954 § 208 (Removal of obstructions, clearing channels for flood control); Water Resources Development Act of 1986 § 1135 (Project modifications for improvement of the environment)).

<sup>22</sup> U.S. ARMY CORPS OF ENG'RS, CONTINUING AUTHORITIES PROGRAM FACT SHEET: PROJECT AUTHORITIES RELATED TO RESILIENCE 1 (2020).

alternative plans, environmental analyses, and initial design and cost estimates.<sup>23</sup> The first \$100,000 is federally funded, and additional feasibility costs are shared 50/50 with the non-Federal sponsor.<sup>24</sup> The implementation phase includes finalizing the design, securing permits, and actual construction, and costs are shared per the authorizing legislation of the project type.<sup>25</sup> The PPA is signed near the beginning of the implementation phase.<sup>26</sup> Projects developed the CAP program generally take three years from initiation to completion.<sup>27</sup>

**Tbl. 2: Standard Project Framework for a Water Resources Project Authorized Through Continuing Authorities Program**

Project Phase	Cost-Share	Activities
Feasibility	First \$100,000 federally funded, additional costs shared 50% Fed / 50% non-Fed	Develop and evaluate alternatives, environmental analysis, initial design & cost estimates
Implementation	Prescribed by statute based on project purpose	PPA signed; Design finalization, securing permits, actual construction
OMRR&R	Prescribed by statute based on project purpose	Conduct OMRR&R responsibilities consistent with manual & project purpose

<sup>23</sup> U.S. ARMY CORPS OF ENG'RS, ER 1105-2-100, PLANNING GUIDANCE NOTEBOOK app. F-13-F-18 (2000).

<sup>24</sup> *Id.* app. F-9.

<sup>25</sup> *Id.* In 2020, Congress authorized a pilot program for 20 CAP projects to be undertaken at full federal expense for small or economically disadvantaged communities. Water Resources Development Act of 2020, Pub. L. No. 116-260, § 165(a).

<sup>26</sup> *Id.* at F-17. Given the smaller nature of the projects, the negotiation process tends to be simpler, more straightforward, and less expensive.

<sup>27</sup> CONG. RSCH. SERV., IF11106, ARMY CORPS OF ENGINEERS: CONTINUING AUTHORITIES PROGRAMS 1 (updated March 15, 2023).

### III. Project Partnership Agreements

#### a. What is a PPA?

A contract referred to as a Project Partnership Agreement<sup>28</sup> is a legally binding agreement between the federal government (acting through USACE) and a non-federal sponsor to undertake an authorized water resources development project.<sup>29</sup> It describes the project, the obligations of the parties, and the cost-sharing requirements, in addition to various other provisions.<sup>30</sup> As noted previously, this agreement is a key milestone in the project life cycle and must be signed by both parties before construction can begin.<sup>31</sup>

#### **Box 1: Who qualifies as a non-federal sponsor?**

Originally, non-federal sponsors were defined as “a legally constituted public body with full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.”<sup>32</sup> This limited eligibility to state and local governments. However, this definition was expanded in WRDA 2007 to explicitly acknowledge Indian tribes and tribal organizations as public bodies and to allow qualifying non-government organizations to serve as non-federal sponsors “with the consent of the affected local government.”<sup>33</sup> The expanded definition continues to encompass the requirement that the non-federal entity can perform the agreement and pay damages in the event of its failure to do so.<sup>34</sup>

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<sup>28</sup> While “Project Partnership Agreement” is the current term used for this agreement, it has historically been known by other names. See, e.g., U.S. ARMY CORPS OF ENG’RS, ER 1105-2-100, PLANNING GUIDANCE NOTEBOOK (2000) (using the term “Project Cooperation Agreements”).

<sup>29</sup> *Project Partnership Agreements*, U.S. ARMY CORPS OF ENG’RS, <https://www.usace.army.mil/Missions/Civil-Works/Project-Partnership-Agreements/> (last visited Dec. 12, 2023).

<sup>30</sup> See, e.g., PROJECT PARTNERSHIP AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND THE STATE OF LOUISIANA, ACTING BY AND THROUGH THE COASTAL PROTECTION AND RESTORATION AUTHORITY BOARD OF LOUISIANA AND THE SEWERAGE AND WATER BOARD OF NEW ORLEANS FOR THE SOUTHEAST LOUISIANA, LOUISIANA PROJECT ALGIERS SUBBASIN PLAN (July 22, 2019).

<sup>31</sup> 42 U.S.C. § 1962d-5b(a)(1).

<sup>32</sup> Pub. L. No. 91-611, § 221(a), 82 Stat. 747 (1970).

<sup>33</sup> 42 U.S.C. § 1962d-5b(b) (2007); see also U.S. ARMY CORPS OF ENG’RS, IMPLEMENTATION GUIDANCE FOR SECTION 2003(B) OF THE WATER RESOURCES DEVELOPMENT ACT OF 2007 – DEFINITION OF NON-FEDERAL INTEREST (Apr. 5, 2012) (memorandum for the Director of Civil Works).

<sup>34</sup> *Id.* (responsibilities include paying the required share of project costs, providing necessary LERRDs, and OMRR&R).

## b. Development of Model PPAs

Under the law generally requiring written agreements for projects, a PPA must be entered into on behalf of the United States by the Secretary of the Army.<sup>35</sup> In practice, many of the Secretary's statutory duties and authorities related to water resources have been delegated to the Assistant Secretary of Civil Works and to the leadership of the Corps' geographic sub-offices: the country is divided into eight "divisions" (formally "Major Subordinate Commands"), each of which includes a number of smaller "districts"; every district is headed by a "District Engineer" who reports to the respective Division Commander. Historically, the district offices were responsible for drafting their own partnership agreements, with each individual PPA document working its way up the chain of command for approval at each level. However, the last 10-15 years have seen more frequent WRDA bills and a corresponding increase in the number of projects that are ready for investment – leading to a need for more efficiency in the PPA process.

To facilitate more efficient PPA negotiation and signing, the Water Resources Development Act of 2007 directed the Secretary of the Army to delegate authority to District Engineers to:

- (a) Approve any PPA policy that has previously appeared in an agreement approved by the Secretary
- (b) Approve any PPA policy where the specific terms are "dictated by law or by a final feasibility study, final environmental impact statement, or other final decision document for a water resources project"
- (c) Approve any PPA that is in compliance with issued policies and guidelines
- (d) Sign any PPA unless the Secretary wishes to retain the prerogative to sign the PPA and notifies the District Engineer within 30 days of the project's authorization.<sup>36</sup>

The delegation of authority to approve these agreements has been effectuated primarily through the development of templates known as model PPAs. Seeing an opportunity to make the PPA process easier to understand, more clearly communicate the requirements for both USACE and non-federal sponsors, and to facilitate delegation to the field,<sup>37</sup> the Corps' Office of Counsel initiated the development of model PPA agreements to streamline implementation, achieve national consistency, ensure legal and policy compliance, and further the equitable treatment of project sponsors.<sup>38</sup> Once drafted, the model PPAs were each issued by the Secretary with implementation guidance providing that "the

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<sup>35</sup> 42 U.S.C. § 1962d-5b(a)(1).

<sup>36</sup> *Id.* § 1962d-5b(e).

<sup>37</sup> NAT'L ACAD. OF PUB. ADMIN., THE U.S. ARMY CORPS OF ENGINEERS: AN EVALUATION OF THE PROJECT PARTNERSHIP AGREEMENT PROCESS REPORT 23 (Nov. 2018).

<sup>38</sup> *Project Partnership Agreements*, U.S. ARMY CORPS OF ENG'RS, <https://www.usace.army.mil/Missions/Civil-Works/Project-Partnership-Agreements/> (last visited Dec. 12, 2023).

responsibility for review and approval of [a PPA] that does not deviate from the approved model is delegated to the [Division or MSC Commander].”<sup>39</sup>

There are currently 28 model PPAs that cover a wide array of project purposes, including ecosystem restoration and structural flood risk management.<sup>40</sup> There are also model PPAs for each project purpose under the Continuing Authorities Program, including nonstructural flood risk management.<sup>41</sup>

### **c. PPAs in Practice**

Once construction of a water resources project has been authorized and received appropriations, the non-federal sponsor and USACE begin preparing for the PPA by reviewing agreement models, consulting with their legal teams, and considering the specifics of the project.<sup>42</sup>

If a model PPA is adopted without any amendments (referred to as “deviations”), the PPA is reviewed by both the district and the division staff, and then ultimately approved by the Division Commander.<sup>43</sup> Review at the division level includes review by the division’s legal counsel to “ensure the model is appropriate for the project and that the PPA does not deviate from the model.”<sup>44</sup> The division shares comments with the district, and if any changes are necessary, the district will revise the agreement and resubmit it to the division.<sup>45</sup>

In cases where the non-federal sponsor disagrees with any provision of the relevant model PPA, they may request a deviation. If there is a deviation, it must be reviewed by the division to determine whether it is substantive or non-substantive.<sup>46</sup> If it is non-substantive, it may be approved by the Division Commander without higher level review.<sup>47</sup>

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<sup>39</sup> E.g., U.S. ARMY CORPS OF ENG’RS, SECTION 205 CONTINUING AUTHORITY STRUCTURAL FLOOD RISK MANAGEMENT PROJECTS – APPROVED MODEL PROJECT PARTNERSHIP AGREEMENT (PPA) (Feb. 3, 2017) (implementation guidance for structural flood risk projects, non-structural flood risk projects, and flood risk projects with both structural and non-structural elements).

<sup>40</sup> NAT’L ACAD. OF PUB. ADMIN., THE U.S. ARMY CORPS OF ENGINEERS: AN EVALUATION OF THE PROJECT PARTNERSHIP AGREEMENT PROCESS REPORT 2 (Nov. 2018). All model PPAs can be accessed at: <https://www.usace.army.mil/Missions/Civil-Works/Project-Partnership-Agreements/>.

<sup>41</sup> *Models for Continuing Authorities Program*, U.S. ARMY CORPS OF ENG’RS, [https://www.usace.army.mil/Missions/Civil-Works/Project-Partnership-Agreements/model\\_cap/](https://www.usace.army.mil/Missions/Civil-Works/Project-Partnership-Agreements/model_cap/) (last visited Dec. 26, 2023).

<sup>42</sup> NAT’L ACAD. OF PUB. ADMIN., THE U.S. ARMY CORPS OF ENGINEERS: AN EVALUATION OF THE PROJECT PARTNERSHIP AGREEMENT PROCESS REPORT 19 (Nov. 2018).

<sup>43</sup> *Id.* at 31.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 32.

<sup>46</sup> There is not a clear line for determining whether or not a deviation is substantive. Divisions frequently consult informally with USACE HQ’s Office of Counsel to make this determination. *Id.* at 31.

<sup>47</sup> *Id.*

If the deviation is identified as substantive (either by the district or the division), the PPA must undergo review by USACE Headquarters.<sup>48</sup> In this case, the division sends the proposed PPA, along with its comments, to the Regional Integration Team<sup>49</sup> at USACE Headquarters.<sup>50</sup> If the deviation involves policy issues, unique circumstances, or is controversial, it must also be reviewed by the Assistant Secretary of Civil Works (ASA(CW)).<sup>51</sup> Generally, once the PPA has been processed and review is complete, there will be a specific delegation of authority to the District Commander to execute the agreement.<sup>52</sup>

### **Box 2: Recommendations to Improve Relationship**

Various recommendations have been made for USACE to improve the collaborative nature of the project partner relationship. To help alleviate the perception by non-federal sponsors that the relationship is one-sided in favor of the federal government, some of the recommendations by independent entities include:

- USACE should initiate a strategy for meaningful engagement with non-federal sponsors at all the district, division, and headquarter levels.<sup>53</sup>
- USACE should better prepare non-federal sponsors' expectations for the PPA negotiation process.<sup>54</sup>

## **IV. Challenges Experienced by Non-Federal Sponsors in Signing PPAs**

There are a variety of challenges reported by non-federal sponsors when faced with signing a model PPA. This report discusses four key provisions of model PPAs that are especially problematic for non-federal sponsors to agree to.<sup>55</sup>

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<sup>48</sup> *Id.* at 32 (“Recently, ASA (CW) delegated authority for USACE headquarters to review and approve PPAs that include substantive deviations.”).

<sup>49</sup> *Id.* at 12. RITs are led as a collateral duty by HQs senior executives to facilitate PPA processing within USACE HQ. They interface with divisions and provide guidance on programs and projects. *Id.*

<sup>50</sup> *Id.* The Office of Water Policy Review conducts reviews of PPA packages. *Id.*

<sup>51</sup> *Id.* at 29.

<sup>52</sup> *Id.* at 32 (noting that it is very rare for the Secretary to actually participate in a signing).

<sup>53</sup> *Id.* at 55.

<sup>54</sup> *Id.*; See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-97, ARMY CORPS OF ENGINEERS: BETTER GUIDANCE COULD IMPROVE CORPS' INFORMATION ON WATER RESOURCES PROJECTS UNDERTAKEN BY NONFEDERAL SPONSORS (2016) (discussing a lack of guidance on the project implementation process).

<sup>55</sup> The list of issues presented in this report is non-exhaustive.

It is important to point out that despite the high level of financial and legal risk these provisions place on the non-federal sponsor, they often sign the agreement anyway because they believe that the opportunity to construct the project at a shared cost is too important to forfeit.<sup>56</sup> As such, using a measure of whether or not parties actually go through with the agreement does not provide an accurate picture of the practical or equitable success of these models.

### a. Hold and Save Clause

All non-federal sponsors are required to agree at the outset that USACE will not share in the liability for any future damages resulting from the project unless the damage is due to the fault or negligence of the federal government or its contractors. Every model PPA contains an identical “hold and save” clause, which reads: “The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.”<sup>57</sup>

This clause is an obstacle for many potential partners<sup>58</sup> because it requires the non-federal sponsors to agree to assume unknown—and potentially very high—levels of legal liability and financial risk.<sup>59</sup> Rather than allocate risk between the partners, the entire risk is borne by the non-federal sponsor.

### i. Legal Source of the Hold and Save Requirement

The governing statute provides explicitly that a PPA must “hold and save the United States free from damages due to construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors.”<sup>60</sup>

**Because the requirement is statutory, USACE does not have the authority to enter agreements without this term absent legislative action.**

However, there is a slight difference between the language of the statute and the corresponding language of the model PPAs. The language of the statute requires the non-Federal sponsor to hold and save USACE free from all damages that arise from the project’s

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<sup>56</sup> *Id.* at 52.

<sup>57</sup> *E.g.*, U.S. ARMY CORPS OF ENG’RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 15 (July 21, 2022).

<sup>58</sup> NAT’L ACAD. OF PUB. ADMIN., THE U.S. ARMY CORPS OF ENGINEERS: AN EVALUATION OF THE PROJECT PARTNERSHIP AGREEMENT PROCESS REPORT 25 (Nov. 2018) (noting that this clause is a common issue for potential non-federal sponsors).

<sup>59</sup> *Id.* at 53-54 (“Nonfederal sponsors believe they are asked to shoulder an unfair share of liability risk, considering they have little control over much of the project.”); Letter from Mark Dayton, then Governor of Minnesota, to Congressional Leaders Mitchell McConnell, Kevin McCarthy, Harry Reid, and Nancy Pelosi (Sept. 8, 2016) (“[the clause] requires the nonfederal sponsor to essentially promise financial resources for an indeterminate liability that might occur at an unknown time, at an unknown cost, and for an unknown reason.”).

<sup>60</sup> 33 U.S.C. § 2213(j)(1)(A) (the non-federal sponsor is also statutorily required to agree to provide the non-federal share and 100% of OMRR&R costs, as discussed *infra* Section IV.b).

“construction or operation and maintenance,”<sup>61</sup> while the language of the model PPAs is more expansive, also requiring indemnification for “design,” “repair,” “rehabilitation,” and “replacement.”<sup>62</sup>

## ii. State Constitutional Limitations

In addition to the legal and financial risks this clause poses for all non-federal sponsor types, it creates a unique obstacle for certain non-federal entities: in many states, the state government is constrained by a clause in the state constitution that prohibits obligating money from the state treasury without a corresponding appropriation.<sup>63</sup> In other words, the state’s executive branch cannot enter into an agreement to assume the risk of future financial liability because the legislature will not have approved the associated expenditure in advance.

In the event the Hold and Save Clause conflicts with the state’s constitution or laws, the model PPAs contain an optional amendment that provides:

“[N]othing therein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the [Insert name of the legislative body that makes the appropriations, e.g., legislature of the State of New York or the New York City Council] where creating such an obligation would be inconsistent with [Insert the specific citation to the constitutional or statutory limitation on committing future appropriations].”<sup>64</sup>

However, this language does not actually relieve the non-federal sponsor of their commitment to pay future damages, as the clause also provides that USACE “may exercise any legal rights it has to protect the Government’s interests.”<sup>65</sup> As such, the legal implications of this alternative clause for resolving such constitutional conflicts are unclear.

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<sup>61</sup> *Id.*

<sup>62</sup> *E.g.*, U.S. ARMY CORPS OF ENG’RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 15 (July 21, 2022).

<sup>63</sup> NAT’L ACAD. OF PUB. ADMIN., THE U.S. ARMY CORPS OF ENGINEERS: AN EVALUATION OF THE PROJECT PARTNERSHIP AGREEMENT PROCESS REPORT 53-54 (Nov. 2018). This issue has been recognized as far back as 1986, when Section 221(a) of the Flood Control Act of 1970 was amended to provide alternative language like the optional amendment provided for in the model PPAs because states were unable to enter into Local Cooperation Agreements. 42 U.S.C. § 1962d-5b(3) (1986); *see also* U.S. ARMY CORPS OF ENG’RS, ER 1165-2-131, LOCAL COOPERATION AGREEMENTS FOR NEW START CONSTRUCTION PROJECTS (1989). This issue is not unique to the Hold and Save Clause; it also applies to the OMRR&R responsibilities. *See infra* Section IV.b.iii.

<sup>64</sup> U.S. ARMY CORPS OF ENG’RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS A-1 (July 21, 2022) (Option 1: Not An Obligation of Future Appropriations).

<sup>65</sup> *Id.*



### **Box 3: Example -- Minnesota**

The Hold and Save Clause has led to the cancellation of at least one project in Minnesota.<sup>66</sup> Minnesota's constitution provides that no money may be paid out from the state treasury except pursuant to an appropriation.<sup>67</sup> Furthermore, state law does not allow the state to obligate funding without an encumbrance against an appropriation, nor does it allow for debt to be incurred until an appropriation has been made.<sup>68</sup>

For another project, the state was compelled to participate in the project through a third-party organization that didn't face the legal barriers to assuming the potential debts created by the PPA.<sup>69</sup> In the words of then-Governor Dayton, "it is nonsensical that provisions intended to limit the federal government's exposure have left the Corps with a cost-share partner that has far less fiscal capacity than the State of Minnesota."<sup>70</sup>

### **iii. Other Issues Related to Hold and Save**

The Hold and Save Clause serves to reduce the federal government's exposure to liability by passing it on to the non-federal sponsor.<sup>71</sup> While the federal government is generally protected by the doctrine of sovereign immunity, the Federal Tort Claims Act and the Tucker Act are two pieces of legislation that waive this immunity in the areas of tort law and constitutional law, respectively. Under the Hold and Save Clause, where claims may be brought against USACE, the non-federal sponsor can likely be required to indemnify the agency. As such, these two acts present a high level of risk for the non-federal sponsor.

#### **A. Federal Tort Claims Act**

Ordinarily, the federal government enjoys sovereign immunity, which is a legal doctrine providing that the government cannot be sued without its consent. However, in 1946, Congress passed the Federal Tort Claims Act (FTCA), which is one of the most generous

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<sup>66</sup> Letter from Mark Dayton, then Governor of Minnesota, to Congressional Leaders Mitchell McConnell, Kevin McCarthy, Harry Reid, and Nancy Pelosi (Sept. 8, 2016).

<sup>67</sup> MINN. CONST. art. XI, § 1.

<sup>68</sup> MINN. STAT. §§ 16A.15, 16A.138. The clause also requires the non-Federal sponsor to assume liability beyond what is permissible under MN's tort law. Letter from Mark Dayton, then Governor of Minnesota, to Congressional Leaders Mitchell McConnell, Kevin McCarthy, Harry Reid, and Nancy Pelosi (Sept. 8, 2016).

<sup>69</sup> Letter from Mark Dayton, then Governor of Minnesota, to Congressional Leaders Mitchell McConnell, Kevin McCarthy, Harry Reid, and Nancy Pelosi (Sept. 8, 2016).

<sup>70</sup> *Id.*

<sup>71</sup> 33 C.F.R. § 203.82(b).

“waivers” of sovereign immunity.<sup>72</sup> The FTCA authorizes private tort actions against the U.S., providing for “civil actions on claims against the United States, for money damages [...] for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”<sup>73</sup> The Act further provides that “[t]he United States shall be liable [...] in the same manner and to the same extent as a private individual under like circumstances.”<sup>74</sup>

The PPA includes an important exception to the liability imposed on the non-federal sponsor by the Hold and Save Clause: USACE retains liability for damages that arise as a result of its fault or negligence.<sup>75</sup> This language is likely a reflection of Congress’s commitment to applying much of the FTCA in the context of water resource development projects. Thus, there are many scenarios involving damages related to water infrastructure in which tort claims against the federal government would be permissible. However, the exception likely does not encompass *all* tort claims imaginable, as some “inherently dangerous” activities are governed by strict or absolute liability.<sup>76</sup> In addition, a determination as to whether the exemption applies in the first place must also be made, requiring the non-federal sponsor to invest resources in the issue even if they are not ultimately held responsible for the Corps’ negligent or wrongful act.

## B. Tucker Act

The Tucker Act is another significant piece of legislation that waives sovereign immunity for certain claims against the federal government.<sup>77</sup> Specifically, it exposes the government to claims involving damages that arise under the federal constitution.<sup>78</sup> Claims that are particularly relevant to water resource projects are takings claims under the Fifth Amendment, which provides that “private property [shall not] be taken for public use, without just compensation.”<sup>79</sup>

Flood damage is one area of potential takings liability that presents significant risk for water resources projects. In *Arkansas Game and Fish Commission v. United States*, the Supreme Court expanded circumstances under which a flood qualifies as a compensable taking.<sup>80</sup> In *Arkansas Game*, the Court addressed the question of whether temporary

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<sup>72</sup> 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-80 (originally enacted Ch. 753, Title IV, 60 Stat. 842 (Aug. 2, 1946)).

<sup>73</sup> 28 U.S.C. § 1346(b)(1).

<sup>74</sup> *Id.* § 2674.

<sup>75</sup> E.g., U.S. ARMY CORPS OF ENG’RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 15 (July 21, 2022).

<sup>76</sup> See Daniel Wallen, *The Federal Tort Claims Act – Absolute Liability, The Discretionary Function Exception, Sonic Booms; Laird v. Nelms*, 6(1) AKRON L.R. 105 (2015).

<sup>77</sup> Ch. 359, 24 Stat. 505 (Mar. 3, 1887) (currently codified as amended in scattered sections of 28 U.S.C.).

<sup>78</sup> 28 U.S.C. § 1491(a)(1).

<sup>79</sup> U.S. CONST. amend. V.

<sup>80</sup> 568 U.S. 23 (2012).

flooding could give rise to a takings claim and found that claims for temporary flooding may be compensable.<sup>81</sup> Claims under this cause of action, known as inverse condemnations, do not generally require a showing of fault or negligence.<sup>82</sup> As such, the non-federal sponsor may not be able to assert the exception included in the Hold and Save Clause, thus requiring them to bear responsibility for the claim.

### C. Construction Incidentals

One example of damages for which the non-federal sponsor has been held responsible are construction incidentals that result from pile-driving, an activity which, in its normal course, often results in damage to neighboring property.<sup>83</sup> Rather than consider these damages costs of construction, which would allow the costs to be shared between USACE and the non-federal sponsor, USACE finds them to be covered by the Hold and Save Clause, and as such the non-federal sponsor is solely responsible.<sup>84</sup> In Louisiana, where this example has taken place, pile-driving is considered an ultra-hazardous activity, and as such is governed by absolute liability.<sup>85</sup> This further demonstrates how, under the Hold and Save Clause, activities that are covered by strict theories of liability are not excluded from the non-federal sponsor's responsibility by the "fault or negligence" exception.

### iv. Other Agency Approaches

The inclusion of a clause addressing how liability will be shared between the parties is standard across federal agencies, but their specific approaches vary.

The Department of Energy's Model Cooperative Agreement takes an approach similar to the model PPAs by requiring the recipient to indemnify the agency for any sort of claim arising out damage to people, property, or the environment that results from the project, "except to the extent that such liability results from the direct fault or negligence of DOE officers, agents or employees."<sup>86</sup> This generally places liability on the partner, while carving out a limited exception where the DOE maintains responsibility.

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<sup>81</sup> *Id.* at 32-34, 38-40 (factors to consider include the length of time and severity of the intrusion, the character of the land, the owner's reasonable expectation for land use, and the degree to which the flooding was intentional or foreseeable).

<sup>82</sup> See Shelley Ross Saxon, *Paying for Disasters*, 68(3) KANSAS L.R. 413, 431-39 (2020).

<sup>83</sup> USACE *Project Partnership Agreements: Hearing Before the Committee on Environment & Public Works*, 118<sup>th</sup> Cong. (2023) (statement of Bren Haase, Executive Assistant to the Governor for Coastal Activities, State of Louisiana).

<sup>84</sup> *Id.*

<sup>85</sup> LA. CIV. CODE ANN. art. 667 (defining an ultrahazardous activity as pile driving or blasting with explosives). Absolute liability imposes liability without fault. The party will be held liable regardless of whether they knew of the risk or exercised reasonable care. *Id.*

<sup>86</sup> U.S. DEP'T OF ENERGY, MODEL COOPERATIVE AGREEMENT 9 (July 6, 2016) ("The Recipient shall indemnify DOE and its officers, agents, or employees for any and all liability, including litigation expenses and attorneys' fees, arising from suits, actions, or claims of any character for death, bodily injury, or loss of or damage to property

On the other hand, the National Park Service’s Partner Design & Construction Agreement provides that the project partner agrees to hold harmless and indemnify the U.S. against any and all claims that arise out of “the activities of the Partner and its officers, employees, agents, contractors, and subcontractors.”<sup>87</sup> Under this approach, the partner maintains liability for their own actions but does not have to take on liability for the actions of the National Park Service. Additionally, this model agreement specifically calls out the Federal Tort Claims Act, noting that “to the extent authorized by applicable federal law, including the Federal Tort Claims Act, [...], the NPS will be liable for the negligent or other wrongful acts o[r] omissions of its officers or employees.”<sup>88</sup>

## **b. Operation and Maintenance Responsibility**

Most<sup>89</sup> non-federal sponsors are required to agree to maintain full financial and operational responsibility for the operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) for the project so long as the project remains authorized.<sup>90</sup>

The model PPA language provides that “the non-Federal sponsor, at no cost to the Government, shall operate, maintain, repair, rehabilitate, and replace the Project.”<sup>91</sup> These OMRR&R activities must be conducted in accordance with the OMRR&R Manual, which is prepared by USACE individually for each project.<sup>92</sup> In addition, the non-federal sponsor’s activities must be consistent with the project’s purpose and applicable Federal laws and regulations.<sup>93</sup> If the non-federal sponsor fails to fulfill these obligations, USACE may step in

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or to the environment, resulting from the project, except to the extent that such liability results from the direct fault or negligence of DOE officers, agents or employees, or to the extent such liability may be covered by applicable allowable costs provisions.”).

<sup>87</sup> NAT’L PARK SERV., RM 21, DESIGN AND CONSTRUCTION AGREEMENT TEMPLATE V.2 13-14 (July 3, 2018) (“The Partner assumes liability for and does hereby agree to hold harmless and indemnify the United States of America, its agents and employees from and against any and all claims, losses, damages, costs, judgments, or other liability of any kind whatsoever arising out of or relating to the activities of the Partner and its officers, employees, agents, contractors, and subcontractors under this Agreement. This indemnification will survive the termination or expiration of this Agreement.”).

<sup>88</sup> *Id.* at 14.

<sup>89</sup> See CONG. RSCH. SERV., R45185, ARMY CORPS OF ENGINEERS: WATER RESOURCE AUTHORIZATION AND PROJECT DELIVERY PROCESSES tbl. 2 (2019) (giving an overview of O&M cost-shares based on project type).

<sup>90</sup> “Repair is considered to entail those activities of a routine nature that maintain the project in a well kept condition. Replacement covers those activities taken when a worn-out element or portion thereof is replaced. Rehabilitation refers to a set of activities as necessary to bring a deteriorated project back to its original condition.” U.S. ARMY CORPS OF ENG’RS, ER 1110-2-401, OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, AND REHABILITATION MANUAL FOR PROJECTS AND SEPARABLE ELEMENTS MANAGED BY PROJECT SPONSORS 3 (1994).

<sup>91</sup> E.g., U.S. ARMY CORPS OF ENG’RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 4-5 (July 21, 2022).

<sup>92</sup> *Id.* at 5; see U.S. ARMY CORPS OF ENGINEERS, ER 1110-2-401, OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, AND REHABILITATION MANUAL FOR PROJECTS AND SEPARABLE ELEMENTS MANAGED BY PROJECT SPONSORS (1994) (providing instructions for the preparation of OMRR&R manuals). Additional guidance for OMRR&R for flood damage reduction and shore protection projects can be found at 33 CFR Part 208.10 and ER 1110-2-2902, respectively.

<sup>93</sup> E.g., U.S. ARMY CORPS OF ENG’RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 5 (July 21, 2022).

at their own discretion.<sup>94</sup> In addition, the model PPAs note that nothing precludes USACE from pursuing other remedies to guarantee performance.<sup>95</sup>

This responsibility is problematic not only because the burden lies solely on the non-federal sponsor, but also because the obligation potentially extends past the useful life of the project. The OMRR&R responsibility continues so long as the project remains authorized, and most projects do not have deauthorization built into their lifecycle. As such, individualized deauthorization must be secured through Congress.<sup>96</sup>

Another problem posed by the OMRR&R framework is that the manual, which determines the activities the non-federal sponsor is responsible for, is not developed and given to the non-federal sponsor until construction is complete.<sup>97</sup> Therefore, the non-federal sponsor is required to agree at PPA signing to future responsibilities that have not yet been determined.

### i. Legal Source of Requirement

This obligation is a statutory requirement: “Any project [...] shall be initiated only after non-Federal interests have entered into binding agreements [...] to pay 100 percent of the operation, maintenance, and replacement and rehabilitation costs of the projects.”<sup>98</sup>

**Because the requirement is statutory, USACE does not have the authority to enter agreements without this term absent further legislative action.**

### ii. Period of Time OMRR&R Obligation is in Effect

Today, the OMRR&R obligation is typically understood as continuing into “perpetuity,” a term which was utilized in 2012 Corps guidance published in response to the expansion of non-federal sponsor types. That guidance provides that “for agreements addressing construction of a project, the nonprofit entity must demonstrate the capability to satisfy a sponsor’s responsibilities under the agreement, including [...] performance, in *perpetuity*, of any non-Federal OMRR&R.”<sup>99</sup> However, the word “perpetuity” does not appear in the statute itself, nor has it appeared again in subsequent USACE guidance.

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<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.*

<sup>96</sup> See CONG. RSCH. SERV., IF11700, WATER RESOURCES DEVELOPMENT ACT OF 2020 2 (updated Jan. 5, 2021) (discussing congressional activity around deauthorization).

<sup>97</sup> U.S. ARMY CORPS OF ENG’RS, ER 1105-2-100, PLANNING GUIDANCE NOTEBOOK F-19 (Apr. 22, 2000).

<sup>98</sup> 33 U.S.C. § 2213(j)(1)(A).

<sup>99</sup> U.S. ARMY CORPS OF ENG’RS, IMPLEMENTATION GUIDANCE FOR SECTION 2003(B) OF THE WATER RESOURCES DEVELOPMENT ACT OF 2007 - DEFINITION OF NON-FEDERAL INTEREST (Apr. 5, 2012) (memorandum for the Director of Civil Works) (emphasis added).

A survey of various pre-2012 PPAs demonstrates that the prevailing language of that time was “as long as the project remains authorized.”<sup>100</sup> However, newer model PPAs and signed agreements do not contain any reference to the time period that the non-federal sponsor must conduct OMRR&R activities.<sup>101</sup> Given the default understanding that OMRR&R responsibility continues until the project is deauthorized, the lack of a definitive time period articulated in the PPA raises the possibility that the obligation could extend indefinitely, even past the useful life of the project.<sup>102</sup> The term “useful project life” has been suggested as a workable alternative, as it is the term used during project planning as the timeframe for evaluating a project’s costs and benefits.<sup>103</sup>

#### **Box 4: Ecosystem Restoration**

The one circumstance under which Congress has provided for an abbreviated OMRR&R period is for nonstructural and nonmechanical elements of ecosystem restoration projects, where the OMRR&R responsibility concludes 10 years after the project has determined to be successful.<sup>104</sup> Congress passed this limitation as part WRDA 2016, and it remains the only articulated temporal limitation on OMRR&R responsibilities throughout USACE’s portfolio of project types.

### **iii. Constitutional Limitations**

Similar to how the Hold and Save Clause places an unknown, indefinite obligation on the non-federal sponsor, the OMRR&R requirement does so as well. Where states are constitutionally or statutorily limited in their ability to obligate future funding without secured appropriations, the requirement to conduct long-term OMRR&R activities presents a serious issue. As discussed in Section IV.a.ii, parties may use the optional PPA amendment that provides the agreement does not constitute an obligation of future

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<sup>100</sup> See, e.g., PROJECT COOPERATION AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND THE CITY OF MONTEVIDEO, MINNESOTA FOR DESIGN AND CONSTRUCTION OF THE MONTEVIDEO MINNESOTA SECTION 205 FLOOD CONTROL PROJECT 21 (Aug. 17, 2007).

<sup>101</sup> See, e.g. PROJECT PARTNERSHIP AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND VILLAGE OF COLFAX, WISCONSIN FOR COLFAX WASTEWATER TREATMENT LAGOONS SECTION 14 (July 3, 2019).

<sup>102</sup> USACE *Project Partnership Agreements: Hearing Before the Committee on Environment & Public Works*, 118<sup>th</sup> Cong. (2023) (statements of Jimmy Hague, Senior Water Policy Advisor, The Nature Conservancy, and Bren Haase, Executive Assistant to the Governor for Coastal Activities, State of Louisiana).

<sup>103</sup> *Id.* (statement of Bren Haase, Executive Assistant to the Governor for Coastal Activities, State of Louisiana).

<sup>104</sup> 33 U.S.C. § 2230a(e); U.S. ARMY CORPS OF ENG’RS, IMPLEMENTATION GUIDANCE FOR SECTION 1161 OF THE WATER RESOURCES DEVELOPMENT ACT OF 2016 (WRDA 2016), COMPLETION OF ECOSYSTEM RESTORATION PROJECTS (Oct. 19, 2017).

appropriations.<sup>105</sup> However, the legal implications of including this statement remain unclear, and it may not fully resolve the constitutional obstacle.

### **c. Hazardous, Toxic, and Radioactive Waste Liability**

Non-federal sponsors are required to maintain responsibility for all activities associated with hazardous, toxic, and radioactive waste (HTRW) at a project site, as the model PPAs provide that the non-federal sponsor is “fully responsible” for all activities and costs incurred to investigate, study, clean up, or otherwise respond to any HTRW.<sup>106</sup> This includes any obligation that may arise under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>107</sup>

Each model PPA contains an identical instruction, which provides that, “In accordance with Department of the Army policy, the Government is prohibited from undertaking [HTRW] work on the non-Federal sponsor's behalf. This prohibition also applies to undertaking this work as additional work requested by the non-Federal sponsor or as betterments. As between the Government and the non-Federal sponsor, the non-Federal sponsor is fully responsible for the performance and costs of required HTRW cleanup and response in, on, or under any real property interests required for the project.”<sup>108</sup> These costs do not qualify as non-federal contributions to the project, nor are they included in calculating total project costs.<sup>109</sup>

In addition to the instruction, each PPA contains an article entirely focused on HTRW.<sup>110</sup> That article states that the non-Federal sponsor is responsible for undertaking investigations to identify HTRW, and it provides instruction on how to provide notice in case of HTRW discovery and how to proceed with the project in the event it is discovered.<sup>111</sup> Further, it provides that if HTRW is discovered and either the non-Federal sponsor does not properly respond or the non-Federal sponsor and USACE cannot come to an agreement as to how to proceed, USACE may suspend or terminate construction.<sup>112</sup>

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<sup>105</sup> U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS A-1 (July 21, 2022) (Option 1: Not An Obligation of Future Appropriations).

<sup>106</sup> *E.g.*, *Id.* (Applicability and Instructions).

<sup>107</sup> *E.g.*, *Id.* at 2 (defining HTRW as “hazardous, toxic, and radioactive wastes, which includes any material listed as a ‘hazardous substance’ (42 U.S.C. 9601(14)) regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter ‘CERCLA’) (42 U.S.C. 9601-9675) and any other regulated material”).

<sup>108</sup> *E.g.*, *Id.* (Applicability and Instructions).

<sup>109</sup> DEP'T OF THE ARMY, OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL WORKS, MODEL AGREEMENTS – CHANGES TO HAZARDOUS, TOXIC, AND RADIOACTIVE WASTE (HTRW) LANGUAGE 1 (Jul. 13, 2021) (memorandum for distribution).

<sup>110</sup> *E.g.*, U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 8-9 (July 21, 2022).

<sup>111</sup> *E.g.*, *Id.*

<sup>112</sup> *E.g.*, *Id.* at 9.

## i. Requirement Rooted in Agency Guidance

There is no statute requiring USACE to place this HTRW responsibility on the non-federal sponsor when entering a partnership agreement. Instead, it is a history of USACE administrative guidance that establishes that the responsibility for HTRW lies with the non-federal sponsor.

In 1992, the Corps published ER 1165-2-132, which provides that Civil Works project funds may not be employed in HTRW-related activities except as otherwise provided for in policy or law.<sup>113</sup> This regulation defines HTRW as hazardous substances regulated under CERCLA,<sup>114</sup> stating that construction in areas where such substances are present “should be avoided where practicable.”<sup>115</sup> It provides that this should be achieved by including a “phased and documented review” in the plan for each project.<sup>116</sup> With regard to cost-sharing, the policy provides that the cost of identification should be shared according to the phase of the project the identification activities occur,<sup>117</sup> whereas the development and execution of response actions will be 100% non-federal cost.<sup>118</sup>

Recently published updates to the Planning Guidance Notebook reiterate this same framework. Under this new guidance, while USACE “will not participate” in HTRW clean-up, the parties “will share the costs of assessing the nature and extent of such materials within the project area during planning studies.”<sup>119</sup>

The Planning Guidance Notebook also provides additional insight into the policy as it applies to lightly contaminated properties. Despite the qualifier that contaminated areas should be avoided where practicable,<sup>120</sup> the Planning Guidance Notebook provides that

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<sup>113</sup> U.S. ARMY CORPS OF ENG'RS, ER 1165-2-132, HAZARDOUS, TOXIC AND RADIOACTIVE WASTE (HTRW) GUIDANCE FOR CIVIL WORKS PROJECTS 3 (June 26, 1992).

<sup>114</sup> *Id.* at 1 (“Except for dredged material and sediments beneath navigable waters proposed for dredging, for purposes of this guidance, HTRW includes any material listed as a ‘hazardous substance’ under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq (CERCLA). (See 42 U.S.C. 9601(14).) Hazardous substances regulated under CERCLA include ‘hazardous wastes’ under Sec. 3001 of the Resource Conservation and Recovery Act, 42 U.S.C. 6921 et seq; ‘hazardous substances’ identified under Section 311 of the Clean Air Act, 33 U.S.C. 1321, ‘toxic pollutants’ designated under Section 307 of the Clean Water Act, 33 U.S.C. 1317, ‘hazardous air pollutants’ designated under Section 112 of the Clean Air Act, 42 U.S.C. 7412; and ‘imminently hazardous chemical substances or mixtures’ on which EPA has taken action under Section 7 of the Toxic Substance Control Act, 15 U.S.C. 2606; these do not include petroleum or natural gas unless already included in the above categories. (See 42 U.S.C. 9601(14).)”).

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Id.* at 4.

<sup>117</sup> *Id.* at 3.

<sup>118</sup> *Id.* at 4.

<sup>119</sup> U.S. ARMY CORPS OF ENG'RS, ER 1105-2-103, PLANNING POLICY FOR CONDUCTING CIVIL WORKS PLANNING STUDIES 14 (Nov. 7, 2023). This regulation supersedes ER 1105-2-100, Chapters 1, 2, and 2, dated Apr. 22, 2000, but it does not replace ER 1165-2-132. *Id.* (“Policies related to hazardous, toxic and radioactive wastes are in ER 1165-2-132.”).

<sup>120</sup> U.S. ARMY CORPS OF ENG'RS, ER 1105-2-100, PLANNING GUIDANCE NOTEBOOK E-10 (Apr. 22, 2000).



Brownfields<sup>121</sup> may be included in preliminary plans if the LERRD is integral to resolving the issue at hand.<sup>122</sup> Additionally, if there are non-CERCLA materials or CERCLA materials that are small and easily manageable, the sites may be included in the project, and remediation costs would be shared as project costs.<sup>123</sup> However, if CERCLA-level clean-up is required, the site should be removed from the plans.<sup>124</sup>

## ii. Discrepancies Between Past USACE Guidance and Current Model PPAs

The model PPAs allocate broader HTRW responsibilities to the non-federal sponsor than the USACE guidance documents discussed above. As such, under the current model PPAs, the non-federal sponsor must agree to terms stricter than what underlying USACE guidance would require of them.

### A. Identification & Investigation

ER 1165-2-132 and the Planning Guidance Notebook generally provide that the Army Corps shall have no responsibility for clean-up activities.<sup>125</sup> However, they do not include prohibitions on involvement with *identification or investigation* activities. Rather, these guidance documents provide that these activities are to be cost-shared as per the project phase the activities take place during.<sup>126</sup> The model PPAs are not aligned with these guidance documents, as they place responsibility for identification and investigation activities solely on the non-federal sponsor.

### B. Permissible Clean-up Activities

The Planning Guidance Notebook identifies permissible USACE HTRW activities that are not noted in the model PPAs.<sup>127</sup> It explicitly notes the acceptability of including Brownfields and properties with CERCLA materials that are “small and easily manageable” within construction plans.<sup>128</sup> However, there is no mention of these exceptions in the model PPAs.

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<sup>121</sup> *Id.* at E-11 (“Brownfields are abandoned or under-utilized properties that are perceived to be or, at worst, are lightly contaminated.”); see also 42 U.S.C. § 9601(39) (“The term ‘brownfield site’ means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”).

<sup>122</sup> U.S. ARMY CORPS OF ENG’RS, ER 1105-2-100, PLANNING GUIDANCE NOTEBOOK E-11 (Apr. 22, 2000).

<sup>123</sup> *Id.* This exception is not noted in the model PPAs.

<sup>124</sup> *Id.*

<sup>125</sup> U.S. ARMY CORPS OF ENG’RS, ER 1105-2-103, PLANNING POLICY FOR CONDUCTING CIVIL WORKS PLANNING STUDIES 14 (Nov. 7, 2023); U.S. ARMY CORPS OF ENG’RS, ER 1165-2-132, HAZARDOUS, TOXIC AND RADIOACTIVE WASTE (HTRW) GUIDANCE FOR CIVIL WORKS PROJECTS 4 (June 26, 1992).

<sup>126</sup> U.S. ARMY CORPS OF ENG’RS, ER 1105-2-103, PLANNING POLICY FOR CONDUCTING CIVIL WORKS PLANNING STUDIES 14 (Nov. 7, 2023); U.S. ARMY CORPS OF ENG’RS, ER 1165-2-132, HAZARDOUS, TOXIC AND RADIOACTIVE WASTE (HTRW) GUIDANCE FOR CIVIL WORKS PROJECTS 3 (June 26, 1992).

<sup>127</sup> U.S. ARMY CORPS OF ENG’RS, ER 1105-2-100, PLANNING GUIDANCE NOTEBOOK E-11 (Apr. 22, 2000).

<sup>128</sup> *Id.*

### iii. Other Agency Approaches

Given the unique nature of the partnership between USACE and non-federal partners, there are no direct comparisons between USACE water resource development projects and work done by other federal agencies. However, when it comes to understanding how agencies take on risk associated with HTRW, analogizing between public works may provide useful insight into alternative approaches.

For example, the Department of Agriculture (USDA) has established policies for minimizing the acquisition of contaminated properties and reducing potential liability attached to such a transaction.<sup>129</sup> USDA policy requires the agency to avoid unreasonable environmental liability when acquiring real property by first ensuring that the previous owner has performed their due diligence and provided for clean-up.<sup>130</sup> Secondly, USDA must satisfy the requirements of the “innocent landowner” and “bona fide prospective purchaser” defenses under CERCLA.<sup>131</sup>

#### Box 5: CERCLA Defenses

There are three types of “innocent landowners”: (1) purchases who had no knowledge of contamination and no reason to know of the contamination, (2) governments who acquired the land through any involuntary transfer or eminent domain, and (3) inheritors.<sup>132</sup>

To qualify as a “bona fide prospective purchaser,” a landowner must meet certain threshold criteria that include the performance of “all appropriate inquiries” before acquiring the property.<sup>133</sup>

When acquiring real property, the U.S. Forest Service, located within USDA, uses purchase forms that contain an indemnification provision that shields the agency from CERCLA liability in the event that potential contaminants are identified.<sup>134</sup> However, if all appropriate inquiries for purposes of establishing a bona fide prospective purchaser defense are satisfied and the evaluation determines there is no threat on the property, the purchasing party may request to waive the indemnity provision.<sup>135</sup> Including such a

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<sup>129</sup> See U.S. DEP’T OF AGRIC., DM 5600-001, ENVIRONMENTAL POLLUTION PREVENTION, CONTROL, AND ABATEMENT MANUAL (Nov. 18, 2004).

<sup>130</sup> *Id.* at 71.

<sup>131</sup> *Id.* at 72.

<sup>132</sup> 42 U.S.C. § 9601(35)(a).

<sup>133</sup> *Id.* § 9601(40)(B)(ii). If a landowner could potentially qualify as an innocent landowner because they had no knowledge of the contamination, they are also required to demonstrate that they carried out “all appropriate inquiries.” *Id.* § 9601(35)(a)(B)(i).

<sup>134</sup> FOREST SERVICE HANDBOOK 5409.13, LAND ACQUISITION HANDBOOK, CH. 10: LAND PURCHASE, U.S. FOREST SERVICE 26 (Apr. 26, 2018).

<sup>135</sup> *Id.*

provision in the model PPAs that reflects this principle by allowing for shared HTRW liability where appropriate preparatory work has been done may provide a more equitable distribution of the risks posed by HTRW.

#### **d. Lands, Easements, Rights-of-way, Relocations, and Disposal (LERRD) Costs**

Existing legislation does not comprehensively address the question of who bears responsibility for LERRD acquisition when the total cost of the required LERRDs exceeds the non-federal sponsor's share under the appropriate cost-sharing provision. With a lack of clear statutory direction, USACE has interpreted it favor of the agency, generally requiring the non-federal sponsor to acquire all LERRDs even if their cost exceeds 35% of project costs.

The statutory framework provides two guiding principles, with little direction as to what to do when they conflict. First, the non-federal sponsor is required to provide a specific proportion of the project's costs but may not be required to provide value in excess of that amount. The cost-share percentage the non-federal sponsor is required to bear is determined by the project type.<sup>136</sup> Importantly, if the anticipated non-federal costs are expected to exceed 35%, "any additional costs shall be a Federal responsibility and shall be contributed during construction as part of the Federal share."<sup>137</sup> Second, the non-federal sponsor is required to provide "all" LERRDs, "except to the extent limited by any provision of this section."<sup>138</sup> This limitation, however, is not recognized in either USACE guidance or the model PPAs.

For flood projects with non-structural, natural, or nature-based features, the most recent implementation guidance provides that the non-federal sponsor is required to provide the LERRDs necessary for construction, but if that value is estimated to exceed 35%, they will not be required to contribute any cash.<sup>139</sup> Further, the policy reiterates that if the estimated value of the LERRDs, in combination with the estimated value of any in-kind contributions, exceeds 35%, any additional costs will be a federal responsibility.<sup>140</sup> However, rather than instructing USACE to acquire the property, the policy provides that "in such cases, subject to the availability of funds, the Corps will reimburse the non-Federal interest [...] on a

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<sup>136</sup> 33 U.S.C. § 2213(b)(1) ("The non-Federal share of the cost of nonstructural flood control measures shall be 35% of the cost of such measures.")

<sup>137</sup> *Id.* § 2213(b)(2) (costs are calculated as "the costs of [LERRDs] for the project, in combination with other costs contributed by the non-Federal interests").

<sup>138</sup> *Id.* § 2213(h)(i).

<sup>139</sup> DEP'T OF THE ARMY, OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL WORKS, MEMORANDUM ON IMPLEMENTATION GUIDANCE FOR SECTION 115 OF THE WATER RESOURCES DEVELOPMENT ACT OF 2020, FLOOD PROTECTION PROJECTS 2 (Sept. 17, 2021) (memorandum for Commanding General, U.S. Army Corps of Engineers).

<sup>140</sup> *Id.*

regular, recurring basis [...] after the determination that the non-Federal interest's contributions have exceeded the estimated amount of the non-Federal share."<sup>141</sup>

A similar approach is taken in ER 1165-2-18, which provides that to the extent the non-federal sponsor's costs are credited against their LERRDs responsibility, an "equivalent financial responsibility" for those LERRDs shifts to the federal government.<sup>142</sup> However, it clarifies that "ordinarily," the non-federal sponsor will still be expected to acquire the LERRDs and will then be reimbursed to the extent that a federal responsibility was created.<sup>143</sup>

The model PPAs reflect the basic statutory requirements that the non-federal sponsors shall contribute the appropriate cost-share percentage and provide the necessary LERRDs, but they follow the approach of USACE guidance in failing to recognize a strict limitation on the non-federal sponsor's contribution as the statute requires.<sup>144</sup> The PPAs also provide that if the estimated value of acquired LERRDs exceeds 35%, "the Government, in its sole discretion, may acquire any of the remaining may acquire any of the remaining real property interests, construct any of the remaining placement area improvements, or perform any of the remaining relocations with the cost of such work included as a part of the Government's cost of construction."<sup>145</sup>

**i. Option 6: Reimbursements during construction for costs of real property interests, placement area improvements, and relocations projected to exceed the non-federal cost share**

The model PPA for nonstructural, natural, or nature-based flood risk projects provides an alternative option that the parties can agree to in place of the above language.<sup>146</sup> This option permits the agreement to include language to allow reimbursements on a rolling basis prior to the completion of the project if the non-federal sponsor's LERRD costs are estimated to exceed 35%.<sup>147</sup> However, the agreement provides that this reimbursement is subject to the availability of funds and is made at the government's sole discretion.<sup>148</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> U.S. ARMY CORPS OF ENG'RS, ER 1165-2-18, REIMBURSEMENT FOR NON-FEDERAL PARTICIPATION IN CIVIL WORKS PROJECTS (Feb. 1, 1989).

<sup>143</sup> *Id.*

<sup>144</sup> *E.g.*, U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 3-4 (July 21, 2022).

<sup>145</sup> *Id.* at 3.

<sup>146</sup> This alternative option is not available for structural elements of flood control projects. It is unique to projects with nonstructural, natural, or nature-based features. *See* U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM STRUCTURAL FLOOD RISK MANAGEMENT PROJECTS (Jan. 18, 2017) (with updates as of June 6, 2023).

<sup>147</sup> U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS A-7 (July 21, 2022) (Option 6: Reimbursements during construction for costs of real property interests, placement area improvements, and relocations projected to exceed the non-Federal cost share).

<sup>148</sup> *Id.* at A-8.

USACE has the statutory authority necessary to provide reimbursements for non-federal sponsors when it is in the public interest.<sup>149</sup> However, there are strict budgetary restrictions on USACE's ability to exercise this authority,<sup>150</sup> and further limitations are imposed through Corps' guidance and regulations.<sup>151</sup> For the short term, it is clear that LERRD costs in excess of the non-federal sponsor's share will not be refunded, as USACE's Civil Works Direct Annual Execution Program Guidance provides that there will be "no reimbursement [...] or refunds for or the financing of lands, easements, rights-of-way, relocations (LERRD's), or dredged or excavated material disposal areas LERRD's when the LERRD values drive the non-federal contributions above the non-federal required cost share."<sup>152</sup>

In addition, various model PPAs specifically include a 'whereas' clause providing that "the Non-Federal Sponsor has waived reimbursement for the value of real property interests and relocations that exceeds 35 percent of construction costs."<sup>153</sup>

#### **Box 6: USACE Civil Works Reimbursement Policy**

ER 1165-2-18 sets forth USACE policy for reimbursement for non-federal participation in Civil Works projects more generally.<sup>154</sup> However, noting the limited allotment of funds authorized for reimbursement, this regulation places significant limitations on reimbursement eligibility by outlining five eligibility criteria: (1) the work, even if the Federal Government does not complete the authorized project, will be separately useful or will be an integral part of a larger non-Federal undertaking that is separately useful; (2) the work done by the non-Federal entity will not create a potential hazard, (3) approval of the proposal will be in the general public interest; (4) only work commenced after project authorization and execution of an agreement pursuant to this regulation will be eligible for reimbursement, and (5) proposed reimbursement will not exceed what the District Engineer

<sup>149</sup> 42 U.S.C. § 1962d-5a. The language of this statute also raises concerns that reimbursement may only be made to states or local governments, and it is unclear whether it may also be applied to other types of non-federal sponsor entities.

<sup>150</sup> *Id.* ("The amount of Federal reimbursement, including reductions in contributions, for a single project shall not exceed \$5,000,000 or 1 percent of the total project cost, whichever is greater; except that the amount of actual Federal reimbursement, including reductions in contributions, for such project may not exceed \$7,000,000 in any fiscal year.")

<sup>151</sup> See Box 6: USACE Civil Works Reimbursement Policy.

<sup>152</sup> CIVIL WORKS DIRECT ANNUAL EXECUTION PROGRAM GUIDANCE, ENGINEER CIRCULAR NO. 11-2-228, U.S. ARMY CORPS OF ENGINEERS 8 (Apr. 3, 2023) (expires Mar. 31, 2025). This policy is consistent with the predecessor guidance document. U.S. ARMY CORPS OF ENG'RS, ENGINEER CIRCULAR NO. 11-2-221, CIVIL WORKS DIRECT EXECUTION ANNUAL PROGRAM GUIDANCE (Dec. 31, 2019) (expired Sept. 30, 2022).

<sup>153</sup> U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SPECIFICALLY AUTHORIZED ECOSYSTEM RESTORATION PROJECTS 1 (Jan. 18, 2017) (with updates as of April 4, 2022).

<sup>154</sup> U.S. ARMY CORPS OF ENG'RS, ER 1165-2-18, REIMBURSEMENT FOR NON-FEDERAL PARTICIPATION IN CIVIL WORKS PROJECTS (Feb. 1, 1989).

considers a reasonable estimate of the cost.<sup>155</sup> Additionally, the regulation provides that the Corps' reimbursement authority will not be considered for the Continuing Authorities Program.<sup>156</sup>

The regulation codified at 33 C.F.R. 209.345 is identical in many ways to the language of the engineering regulation. However, rather than excluding all projects under the CAP program, it says that reimbursement is not applicable to small projects authorized under 33 U.S.C. 577 (Small river and harbor improvement projects), 33 U.S.C. 701s (Small flood control projects), 33 U.S.C. 426g (Storm and hurricane restoration and impact minimization program), and 33 U.S.C. 701r (Protection of highways, bridge approaches, lighthouses, public works, and nonprofit public services).

## ii. Discretion

The discretion assumed by USACE, whether that be either in LERRDs acquisition or reimbursement, is not aligned with the statutory requirement that costs in excess of 35% “shall” be the Corps' responsibility. Both the model PPA as-is and with Option 6 provide for discretion on the part of the Corps, either for the acquisition of the remaining LERRDs or reimbursement of LERRDs costs in excess of 35%. Under the standard model, with no provision for reimbursement, the Corps has discretion as to whether or not to acquire the remaining LERRDs necessary for the project.<sup>157</sup> This leaves a project vulnerable to being reduced in size, left incomplete, or terminated. However, with the inclusion of the reimbursement provision, the reimbursement is subject to the availability of funds and is made at the government's sole discretion. While this option provides more security that the project will be finished in its entirety if the non-federal sponsor has the resources necessary, it also requires them to shoulder that financial obligation with the risk that it may never be reimbursed.

## V. Constitutional Limitations on USACE

As an executive agency, USACE is limited by the federal constitution and, as such, may not act where it has not been granted authority by Congress. Specifically with regards to financial obligations, the constitution provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>158</sup> This clause serves to restrict the Executive branch's spending autonomy by placing spending authority “firmly in

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<sup>155</sup> *Id.* at 2.

<sup>156</sup> *Id.* at 4.

<sup>157</sup> U.S. ARMY CORPS OF ENG'RS, MODEL AGREEMENT FOR SECTION 205 – CONTINUING AUTHORITIES PROGRAM NONSTRUCTURAL OR NATURAL OR NATURE-BASED FLOOD RISK MANAGEMENT PROJECTS 3 (July 21, 2022).

<sup>158</sup> U.S. CONST. art. 1, § 9, cl. 7. This mirrors many of the constitutional restrictions states face when attempting to enter a PPA. See *supra* Section IV.a.ii.

the hands of Congress.”<sup>159</sup> Thus, in the absence of congressional authorization, USACE is limited in its ability to commit itself to future obligations, both financial and legal.<sup>160</sup>

As such, when it comes to both the Hold and Save Clause as well as the OMRR&R responsibility, USACE is limited by both (a) the governing statutes that require the non-federal sponsor to bear these obligations, and (b) this constitutional principle, which may prohibit USACE from taking on these responsibilities in an absence of congressional direction.

## VI. Conclusion

PPAs are integral to the success of water resource development projects, as they provide the foundation for the relationship between USACE and the non-federal sponsor through the project’s lifecycle. However, the model PPAs created by USACE for its cost-shared projects include provisions that are often problematic for non-federal sponsors to agree to, as they place an inordinate burden on the non-federal sponsor. Ensuring that the parties are true partners in the process is key to the successful implementation of water resource projects, and equitable agreement terms play a crucial role in fostering that relationship.

While USACE has the authority to address some of the issues identified here on its own initiative using administrative measures, there are also many places where congressional action would be requisite to make changes. As such, a multi-faceted approach is needed to improve the PPA process and models. That will require a wide variety of stakeholders to engage in the process, including but not limited to local and NGO sponsors, state governments, USACE, and Congress. Together, these parties can work to ensure that signed PPAs adequately balance risks and responsibilities between local sponsors and the USACE to effectively implement the water resource projects that are so important for our local communities and the nation as a whole.

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<sup>159</sup> *Am. Fed’n of Gov’t Emps., AFL-CIO, Local 1647 v. Fed. Lab. Rel. Auth.*, 388 F.3d 405 (3rd Cir. App. 2008).

<sup>160</sup> This principle is further supplemented by the Anti-Deficiency Act, which prohibits federal employees from authorizing “an expenditure or obligation exceeding an amount available in an appropriation for fund for the expenditure or obligation.” 31 U.S.C. § 1341.



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