

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
Washington, D.C. 20314-1000

CECW-RP

Regulation
No. 1165-2-120

15 June 1988

Water Resource Policies and Authorities:
REIMBURSEMENT FOR ADVANCE NON-FEDERAL CONSTRUCTION
OF AUTHORIZED FEDERAL HARBOR AND INLAND HARBOR IMPROVEMENTS

1. Purpose. This regulation gives general instructions on use of Section 204(e), Reimbursement, of the Water Resources Development Act of 1986, Public Law 99-662 (Appendix A) to reimburse a non-Federal interest for construction of an authorized Federal harbor or inland harbor improvement, or a separable element thereof. It establishes general policies, outlines procedures to be followed in reaching an agreement with an eligible non-Federal interest, and provides guidance on the provisions of such an agreement (a model agreement is included as Appendix B). All authorized harbor and inland harbor projects are subject to this Act and Regulation.

2. Applicability. This regulation applies to all HQUSACE elements and field operating activities of the Corps of Engineers having Civil Works responsibilities.

3. References.

a. Water Resources Development Act of 1986, P.L. 99-662 (Section 204(e), Reimbursement is attached as Appendix A to this regulation)

b. Section 107, P.L. 86-645

c. ER 200-2-2

d. ER 1105-2-10

e. ER 1110-2-1150

f. ER 1140-2-301

g. 33 CFR Section 320.3

h. Index of Contract Clauses, Construction- Inside the U.S., prepared by the Ohio River Division, ATTN: CEORD-CT

i. OMB Circular No. A-87

4. Definitions.

a. Harbor- The term harbor is defined in Section 214 P.L. 99-662 to mean any channel or harbor, or element thereof, in the United States, capable of being utilized in the transportation of commercial cargo in domestic or foreign waterborne commerce by commercial vessels. The term does not include an inland harbor; the Saint Lawrence Seaway; local access or berthing channels; channels or harbors constructed or maintained by nonpublic interests; and any portion of the Columbia River other than the channels on the downstream side of Bonneville lock and dam.

b. Inland Harbor- The term inland harbor is defined in Section 214, P.L. 99-662 to mean a navigation project which is used principally for the accommodation of commercial vessels and the receipt and shipment of waterborne cargoes on inland waters. The term does not include projects on the Great Lakes; projects that are subject to tidal influence; projects with authorized depths of greater than 20 feet; local access berthing channels; and projects constructed or maintained by nonpublic interests.

c. Non-Federal Interest- Section 214 of P.L. 99-662 defines non-Federal interest to have the same meaning that such term has under Section 221 of the Flood Control Act of 1970 and includes any interstate agency and port authority established under a compact entered into between two or more States with the consent of Congress under section 10 of Article I of the Constitution.

d. Separable Element- Section 103(f) of P.L. 99-662 defines Separable Element as a portion of a project (1) which is physically separable from other portions of the project; and (2) which (A) achieves hydrologic effects or (B) produces physical or economic benefits, which are separably identifiable from those produced from other portions of the project.

e. Usable Increment- Section 207, P.L. 99-662 permits construction of harbor or inland harbor projects in "usable increments". Since reimbursement under Section 204(e) requires economic justification and environmental acceptability, the terms "usable increment" and "separable element" will be considered to be synonymous for the purposes of this regulation.

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f. Authorized Federal Project- Only projects or separable elements of projects which have been specifically authorized by Congress will be considered eligible for reimbursement under this provision. Reimbursement of non-Federal work under Section 204(e) will not be considered for the Continuing Authorities Program of Section 107, P.L. 86-645 as amended.

5. General Policy.

a. In order for a project to be eligible for reimbursement under Section 204(e), certain findings must be made:

(1) The non-Federal interest must be proposing to construct the authorized project, or separable element thereof, or a variation of the authorized project, if the proposed changes are within the authority of the Secretary of the Army to make as post-authorization changes. Changes that exceed this authority cannot be approved for potential reimbursement without Congressional reauthorization.

(2) The project must be economically justified based on appropriate Federal criteria.

(a) In some cases, there will be no difference between the authorized project and the proposed project and authorization will be based on Secretarial approval of the Chief's Report which makes a positive finding with respect to project economics. This finding must nonetheless be reviewed to determine whether or not economic circumstances (costs, demand for the facility, etc.) have changed since the report was completed.

(b) If the non-Federal interest is proposing to build a separable element of the authorized project, it must be demonstrated that the separable element will produce positive net economic benefits.

(c) If a project has been conditionally authorized subject to a favorable report, the report must be completed before any agreement can be signed regarding potential reimbursement for non-Federal construction. Any construction before the report has been completed will not be eligible for reimbursement.

(d) If the proposed construction deviates from the authorized project but the proposed changes are within the authority of the Secretary of the Army to make as post-authorization changes, the project economics must be reevaluated in light of the likely changes in costs and any potential changes in benefits that are associated with the revised project.

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(3) The project or separable element, must be environmentally acceptable.

(a) Prior to construction, the requirements of the National Environmental Policy Act and all other appropriate environmental statutes and executive orders must be satisfied.

(b) Additionally, construction by a non-Federal interest will require the issuance of permits under the Clean Water Act, the Rivers and Harbors Act of 1899, and when applicable, the Marine Protection, Research and Sanctuaries Act. Any necessary State and local permits must also be obtained. The Secretary will not execute a 204(e) agreement until all required Department of the Army permits for the proposed project have been issued.

(c) All authorized mitigation for the project, or separable element thereof shall be consistent with Section 906(a) of P. L. 99-662.

(d) A list of related laws which may apply and must be satisfied when applicable, is set forth at 33 CFR Section 320.3.

(4) The Secretary must approve the plans of construction as outlined in a General Design Memorandum (GDM) or an equivalent document. In reviewing such plans, the Secretary shall consider budgetary and programmatic priorities, potential impacts on the cost of dredging projects nationwide, and other factors that the Secretary deems appropriate.

(5) The Secretary's execution of the 204(e) agreement represents approval of the plans of construction and the finding that the proposed project is economically justified and environmentally acceptable.

b. Projects will not be considered eligible for reimbursement unless they are primarily for commercial navigation. This means that 50 percent or more of the benefits to the project must be attributable to commercial navigation.

c. Any agreement between the Corps and a non-Federal interest pursuant to Section 204(e) will state clearly that Federal reimbursement is subject to the availability of appropriations for that purpose.

d. Only construction commenced after project authorization and execution of an agreement pursuant to this Regulation will be eligible for reimbursement.

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e. In undertaking construction, the non-Federal interest must agree to comply with all applicable Federal and state laws. The agreement between the Government and the non-Federal interest shall include provisions against contingent fees and officials benefiting in accordance with 10 U.S.C. Section 2306(b), 41 U.S.C. Section 254(a), and shall specifically state that in carrying out its obligations under the agreement, the non-Federal interest will comply with all applicable laws and regulations, including but not limited to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P. L. 91-646) and Section 601 of Title VI of the Civil Rights Act of 1964 (P. L. 88-352). In addition, the non-Federal interest shall agree to apply and include provisions consistent with the following statutes in its construction contracts:

- (1) Buy American, 41 U.S.C. Section 10a;
- (2) Clean Air Act, 42 U.S.C. Section 7606;
- (3) Clean Water Act, 33 U.S.C. Section 1368;
- (4) Contract Work Hours, 40 U.S.C. Section 327 et. seq;
- (5) Convict Labor, 18 U.S.C. Section 4082;
- (6) Copeland Anti-Kickback, 40 U.S.C. Section 276c;
- (7) Davis Bacon Act, 40 U.S.C. Section 276, et. seq;
- (8) Equal Opportunity, 42 U.S.C. Section 2000d;
- (9) Jones Act, 46 U.S.C. Section 292;
- (10) Rehabilitation Act (1973), 29 U.S.C. Section 794;
- (11) Shipping Act, 46 U.S.C. Section 883;
- (12) Utilization of Small Business, 15 U.S.C. Section 631, 644;
- (13) Vietnam Veterans, 38 U.S.C. Section 2012;
- (14) Walsh-Healey, 41 U.S.C. Section 35, et. seq.

The model agreement (Appendix B) includes references to these provisions. The District Commander should be prepared to show the non-Federal interest copies of language used by the Corps of Engineers in its standard contracts with construction contractors to serve as a guide for the non-Federal interest in developing its own contract

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language. Model contract clauses are available in the Index of Contract Clauses, Construction- Inside the U.S., prepared by the Ohio River Division, ATTN: CEORD-CT.

f. No reimbursement shall be made unless and until the Secretary has certified that the work for which reimbursement is requested is complete and has been performed in accordance with applicable permits and the approved plans.

g. The non-Federal interest will normally be required to develop the design, engineering plans, and specifications for the construction it proposes to undertake. Non-Federal engineering and overhead costs for the proposed construction by the non-Federal interest will be reimbursable and be made part of the reimbursement agreement. Subject to policies established in ER 1140-2-301, the District Commander may provide construction engineering services with funds advanced by the non-Federal interest if it is determined to be impractical for the non-Federal interest to obtain the services elsewhere and Corps personnel are available to do the work. The Federal share of such costs will be determined by application of the construction cost-sharing percentage specified in Section 101(a) of P.L. 99-662. In undertaking this work, the non-Federal interest assumes the risk that Federal appropriations for reimbursement may not be provided and that these costs will not be recovered.

h. Activities undertaken by the Corps of Engineers District and Division offices which are necessary for the successful execution of a 204(e) agreement and construction of the proposed work (design review, review of project economics, environmental assessment, auditing, permit evaluation, inspection, etc.) will be financed with Federal funds provided for these activities. All such expenses will be included in total project costs and will be offset against the amount of reimbursement owed as determined by the construction cost-sharing percentage specified in Section 101(a) of P.L. 99-662. The Corps will not undertake substantive design work, or economic or environmental analysis unless the non-Federal interests provides funds for such purposes and in the judgment of the Corps, the work requested will not substantially delay the completion of other Corps assignments.

i. If the non-Federal interest proposes to undertake construction of an authorized project after the Corps has started post authorization Pre-construction, Engineering and Design (PED) work, or completed a GDM, the Corps will make any completed plans and specifications available for use in obtaining permits and for construction purposes. The value of any PED work undertaken at Federal expense will be included in total

project costs and will be cost-shared in accordance with Section 101(a) of P.L. 99-662.

j. The non-Federal interest will provide at its own expense, the lands, easements, rights-of-way, relocations (other than utility and railroad and highway bridge relocations) and dredged material disposal areas necessary for the project. In addition, the agreement shall include any other local cooperation items required by the project authorization.

(1) In accordance with Section 101(a)(4), utility relocations will be borne one half by the owner of the utility and one half by the non-Federal interest. The non-Federal interest bears the full responsibility to perform or assure performance of all relocations or alterations of utilities.

(2) Payments by a non-Federal interest for relocation and alteration of highway and railroad bridges (which as a matter of policy are to be determined in accordance with the apportionment of cost principles of the Truman-Hobbs Act) are to be reimbursed with the cost-sharing formula specified in Section 101(a).

k. Operation and Maintenance (O&M)

(1) The Corps will agree to be responsible for its share of the O&M costs arising subsequent to construction. The Federal share will be 100 percent of the O&M costs if the project constructed by the non-Federal interest is either:

(a) the authorized project; or

(b) a modification of the authorized project that represents the National Economic Development (NED) plan; or

(c) a departure from the NED plan which has been approved by the Secretary.

(2) The non-Federal interest will be responsible for:

(a) the provision of any lands, including mitigation lands, easements, rights-of-way, or dredged material disposal areas and the cost of any relocations required for project O&M;

(b) 100 percent of the incremental O&M costs, when costs are in excess of the amount necessary to maintain the project described in Paragraph 5k(1)(a), (b), or (c); and

(c) when the project described in Paragraph 5k(1)(a), (b), or (c) exceeds a depth of 45 feet, 50 percent of the incremental O&M costs beyond that necessary to maintain a 45 foot project.

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(3) If, at any time subsequent to construction, the Secretary finds that the project is no longer economically justified or environmentally acceptable, the Federal government will no longer be responsible for O&M.

1. Reimbursement will be made without including any interest on the non-Federal or Federal expenditures necessary for completion of the work.

6. Procedures.

a. Non-Federal interests desiring reimbursement under Section 204(e) for constructing part or all of an authorized Federal project should confer with the District Commander and submit a written proposal. This proposal will form the basis for consulting as needed with the Division and HQUSACE, and for deciding whether to continue as described below.

b. The District Commander will assess whether or not the proposed project meets the criteria specified in paragraph 5 and prepare a report that presents the necessary findings. The full report containing all the findings will include an executive summary which summarizes the District's conclusions.

c. If necessary, the District Commander will prepare a separate post authorization change (PAC) report and appropriate environmental documentation. Guidance for determining the need to prepare a PAC report is contained in ER 1105-2-10. Guidance for determining the appropriate environmental document is contained in ER 200-2-2.

d. The design work will be the responsibility of the non-Federal interest and can be initiated at any time at the discretion of the non-Federal interest.

e. The non-Federal interest will be responsible for obtaining the necessary permits. In accordance with Section 204(c), if any studies of the proposed project were initiated prior to 17 November, 1986, these studies can be transmitted to the non-Federal interest for use in obtaining the permits. If necessary, the non-Federal interest may notify the District Commander in writing, of its intent to construct and to use the procedures outlined in Section 205 in order to obtain permits expeditiously. In general, the Planning Division will be responsible for performing the environmental review of projects and project modifications. The Regulatory Branch, Operations and Readiness Division, will issue any Department of Army permits necessary for construction of the project or modification, using the existing

record for the project prepared by the Planning Division and any additional information that may be necessary to complete the public interest review process, and will be responsible for enforcement of permit conditions.

f. The District Commander will be responsible for development of a draft agreement. The District Commander may consult with the non-Federal interest about the terms of the draft agreement after the District has reviewed the proposed work and concluded that there is a reasonable probability that the project will satisfy the necessary conditions for reimbursement. However, it must be understood, that no commitment can be made to the non-Federal interest until after the draft agreement has been reviewed and approved by the Assistant Secretary of the Army (Civil Works).

(1) Since certification will not be made until after completion of all the proposed work, it will not be necessary to include a statement of financial capability with the draft agreement.

(2) All agreements will be prepared for the signature of the Assistant Secretary of the Army (Civil Works).

g. The District Commander will submit 1) the proposal of the non-Federal interest; 2) the executive summary of the District Commander's report described in paragraph 6b above as a separate document; 3) a draft agreement; 4) the full report described in paragraph 6b above; 5) a copy of any Department of the Army permits; and 6) when necessary, a Post-Authorization Change (PAC) Notification Report to the Division Commander.

h. The Division Commander will review the documents and send them to HQUSACE in the manner described below:

(1) The Division Commander will process the full report in the same manner as General Design Memoranda for Corps projects, that is, in accordance with ER 1110-2-1150. If the proposed project exceeds \$10 million, the District Commander must certify that the project design is cost effective, as required by Section 911 of P. L. 99-662. The Division Commander's conclusions will be forwarded with the report, to HQUSACE (ATTN CECW-R) WASH DC 20314-1000.

(2) If a PAC report is required, it will be reviewed by the Division and submitted, with recommendations, to HQUSACE (ATTN: CECW-P) WASH DC 20314-1000.

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(3) The Division Commander will review documents 1, 2, 3, and 5 described in paragraph 6g above and submit them with recommendations, to HQUSACE in accordance with procedures established for processing Local Cooperation Agreements (LCA's) for Corps constructed projects.

i. HQUSACE will review the documents described in paragraph h above and will submit them with recommendations, to ASA(CW). CECW-R will be responsible for coordination and will prepare a single package for ASA(CW) consideration in accordance with existing HQUSACE LCA procedures.

j. The District Commander will be notified, through the Division Commander of any changes in the draft agreement that may be required. The District and Division Commanders' coordinating responsibilities will continue through the signing of the approved agreement by the non-Federal interest and the Assistant Secretary. Procedures for obtaining signatures shall be identical to those for LCA's of Corps constructed projects.

k. No construction shall commence under a Section 204(e) agreement until the designs, detailed plans and specifications, and arrangements for the prosecution of the work have been approved by the District Commander. Proposed changes in approved designs, plans and specifications must also be reviewed and approved by the District Commander in advance of construction. The non-Federal interest may pursue the work described in the Section 204(e) agreement with its own work forces or by contract. The non-Federal interest shall secure competitive bids, by advertising, for all work to be performed by contract, and shall award to the lowest cost responsible bidder. In the event the non-Federal interest prosecutes the work by contract, all bids received and the proposed provisions of any contract shall be subject to review by the Government prior to award.

l. The District Commander will approve appraisals necessary for establishing the fair market value of lands, easements and rights-of-way used in construction and conduct periodic and final inspections and review.

m. The District Commander will certify the cost data and that performance has been in accordance with applicable permits and approved plans.

7. Nature and Amount of Reimbursement.

a. The amount eligible for reimbursement shall equal the Federal share of the total costs of construction of general navigation facilities assigned to commercial navigation. These costs equal

expenditures made by the non-Federal interest for work that would have been accomplished if the general navigation features had been constructed by the Corps of Engineers (including PED), plus amounts expended by the Corps of Engineers which were necessary for successful execution of a 204(e) agreement and completion of the proposed work. Eligible costs include actual construction costs; continuing planning, engineering, and design costs incurred after project authorization; costs of review of proposed plans to assure conformity to the requirements for reimbursement under Section 204(e); costs of relocation of highway and railroad bridges; supervision and administrative costs; inspection and auditing costs; and costs of contract dispute settlements or awards. Eligible costs do not include the value of lands easements, rights-of-way, and dredged material disposal areas, relocations, dredging of non-Federal public or private channels and berthing areas, and aids to navigation.

b. For projects authorized in P.L. 99-662, estimated total costs as specified in P.L. 99-662 shall be the maximum cost of the project, except that this amount may be increased by the Secretary for modifications which do not materially alter the scope or functions of the project as authorized, but not by more than 20 percent of the total cost estimated for the project. There shall however, be automatic increases to allow costs to reflect inflationary changes in construction costs and to cover the costs of additional studies, modifications, or actions authorized by P.L. 99-662 or required by changes in Federal law.

c. The non-Federal interest will be reimbursed an amount equal to the total cost of construction of general navigation facilities assigned to commercial navigation, less the amount of non-Federal cost-sharing that would be required by sections 101(a)(1) and 101(a)(2), except that eligible Federal expenses made before reimbursement will be offset against this amount. The non-Federal cost-share requirement of Section 101(a)(2) equals 10 percent of the costs of construction of general navigation facilities less credits for "LERRD", lands, easements, rights-of-way including dredged material disposal areas and relocations and alterations (other than those for utilities and railroad and highway bridges). There will be no adjustment in the amount of reimbursement because the non-Federal interest could have paid a portion of the non-Federal share over time, pursuant to Section 101(a)(2).

d. The value of lands, easements rights-of-way including dredged material disposal area (LERD) to be used in determining the non-Federal contribution required by Section 101(a)(2) shall be derived in the following manner:

(1) Credit for LERD shall be the fair market value at the time the LERD's are incorporated into project construction. The fair market value shall be determined by an appraisal to be obtained by the non-Federal interest. The appraisal will be prepared by an independent and qualified appraiser who is acceptable to both the non-Federal interest and the Federal Government. The Federal Government shall review and approve the appraisal. The model 204(e) agreement provides specific guidance on crediting LERD's (Appendix B, Article 8a).

(2) For LERD acquired by the non-Federal interest within the five year period prior to the date the agreement is signed, or any time after the agreement is signed, the value of the credit shall include the actual associated costs of acquisition (e.g. closing and title costs such as appraisal costs., survey costs, attorney's fees, mapping costs) plus reasonable, allocable and allowable indirect costs that can be shown to be necessary to the accomplishment of the non-Federal responsibilities for the project. The non-Federal interest shall also receive credit for any relocation assistance payments made in accordance with P.L. 91-646.

(3) In the event of an involuntary acquisition, where the court award or stipulated settlement (which has received Federal Government approval) is determined prior to the final accounting, the amount of such award or stipulated settlement shall be the value given for LERD credit.

(4) If the non-Federal interest finds that it will have to pay in excess of the appraised fair market value, the non-Federal interest may be entitled to a credit for this excess amount if it has received the prior approval of the District Commander of its offer to purchase such land.

(5) There may be other circumstances in which the fair market value at the time of incorporation into the project does not reflect the non-Federal interest's actual contribution of LERD. For example, where the non-Federal interest has acquired improved land, but demolishes the improvements prior to incorporating the land into the project, the fair market value formula would not account for the cost to the non-Federal interest of the improvements but rather, only the value of the underlying land. These cases will be the exception rather than the rule and the decision to use an alternative crediting provision will be on a case by case basis. In such cases, the value of the LERD will be the sum of: a) actual purchase price paid by the sponsor, plus b) associated acquisition costs (e.g., title and closing costs such as appraisal costs, survey costs, attorney's fees and mapping costs)

provided these costs are reasonable, allocable and allowable.

e. The cost of relocations and alterations used in determining the non-Federal contribution required by Section 101(a)(2) will be based on the actual costs to the non-Federal interest. The model 204(e) agreement provides guidance for determining the amounts which can be credited (Appendix B, Article 8b).

8. Agreements.

Agreements under Section 204(e) should follow the format presented in Appendix B. Each agreement shall:

a. Fully describe the work to be accomplished by the non-Federal interest and specify the manner in which it will be carried out.

b. Provide for the necessary review and approval of designs, plans, and specifications, by the District and Division Commanders.

c. Provide for examination and review and approval of proposed contracts and for inspection of the work by the District Commander for conformance with the terms of the agreement.

d. Specify that reimbursement by the Federal Government will be in accordance with the cost-sharing requirements of P.L. 99-662 and that all Pre-construction Engineering and Design work by either party will be included in the total project costs to be cost-shared. If the improvement proposed by the non-Federal interest includes work that will not become part of the Federal project, the means of determining the part eligible for reimbursement will be fully defined.

e. State that such reimbursement shall depend upon the availability of appropriated funds applicable to the project and shall not take precedence over other pending projects of higher priority.

f. Specify that reimbursement for non-Federal construction shall apply only to that work undertaken after execution of the agreement.

g. State that costs for which reimbursement is sought will be audited in accordance with OMB Circular A-87.

h. When applicable, state that no reimbursement will be made if total project costs, computed after bid opening, exceed the

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limits described in paragraph 7b, unless the limit is modified by law.

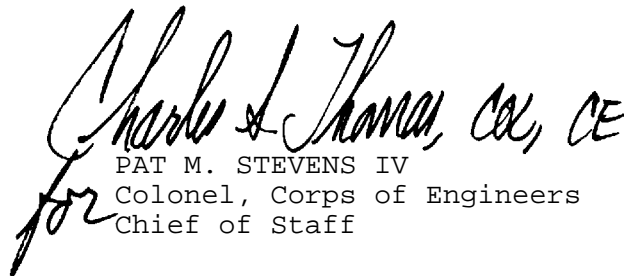
i. Specify that the work will be performed in compliance with applicable Federal laws (see paragraph 5e).

j. State that reimbursement is dependent upon certification by the Secretary of the Army that the work accomplished is complete and has been performed in accordance with applicable permits and approved plans.

k. State the time allowed for completion of construction. A reasonable time shall be allowed.

l. Expire at a specified time after the date of execution if the non-Federal interest has not started the construction contemplated by the agreement. The specified time will be mutually agreed to by the negotiating parties.

FOR THE COMMANDER:


PAT M. STEVENS IV
for Colonel, Corps of Engineers
Chief of Staff

Encl

Appendix A- Section 204(e), P.L. 99-662

Appendix B- Model Agreement under Section 204(e)