

CECW-AG

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

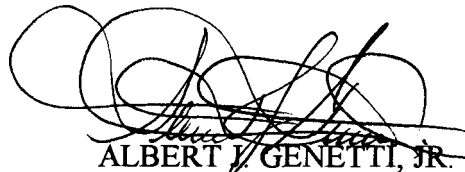
Regulation
No. 1165-2-30

30 October 1998

Water Resources Policies and Authorities
ACCEPTANCE AND RETURN OF REQUIRED, CONTRIBUTED, OR ADVANCED FUNDS

1. This change to ER 1165-2-30, 31 December 1997, changes/corrects the account into which "Other Non-Federal Funds" are to be deposited in accordance with public law and ER 37-2-10.
2. Accordingly, under Change 1 to ER 1165-2-30, page 4 has been revised where asterisked (paragraphs 8.c and 9.a).
3. File this change in front of the publication for reference purposes.

FOR THE COMMANDER:



ALBERT J. GENETTI, JR.
Major General, USA
Chief of Staff

CECW-AG

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No. 1165-2-30

31 December 1997

Water Resources Policies and Authorities
ACCEPTANCE AND RETURN OF REQUIRED, CONTRIBUTED, OR ADVANCED FUNDS

1. Purpose. This regulation compiles the existing authorities for acceptance and return of appropriate portions of required, contributed or advanced funds from private parties, states, and political subdivisions in connection with Civil Works projects, and establishes basic procedures controlling the acceptance and return of such funds.

2. Applicability. This regulation is applicable to all HQUSACE elements, major subordinate commands (MSC), districts, laboratories, and field operating activities (FOA) having Civil Works functions. Guidance for accepting funds required for feasibility studies and for the Continuing Authorities Program is provided by CECW-P.

3. References.

- a. 33 U.S.C. §§ 560, 561
- b. 33 U.S.C. §§ 701(h), 701(h)(1)
- c. P.L. 91-611
- d. P.L. 93-251
- e. P.L. 99-662
- f. House Report No. 93-796
- g. AR 335-15, Management Information Control System (USACE Suppl 1)
- h. ER 11-2-240, Civil Works Activities - Construction & Design
- i. ER 37-2-10, Accounting and Reporting Civil Works Activities
- j. ER 1150-2-301, Policies and Procedures
- k. ER 1165-2-18, Reimbursement for Non-Federal Participation in Civil Works Projects

4. Distribution. Approved for public release, distribution is unlimited.

This Regulation supersedes ER 1165-2-30, 15 September 1988.

5. Authorities for Acceptance of Funds.

a. Section 4, River and Harbor Act, approved 4 March 1915 (38 Stat. 1053; 33 U.S.C. § 560) provides, in part, that the Secretary of the Army is authorized to receive contributions of funds from private parties (which, by policy set forth in paragraph 10, means duly appointed public entities acting as sponsors), to be expended in connection with funds appropriated by the United States for any authorized work of public improvement of rivers and harbors whenever such work and expenditure may be considered by the Chief of Engineers as advantageous to the interest of navigation.

b. Civil Functions Appropriations Act, 1936, approved 19 July 1937 (50 Stat. 515, 518; 33 U.S.C. § 701(h)) contains provisions authorizing the Secretary of the Army to receive from states and political subdivisions, contributions of funds to be expended in connection with funds appropriated by the United States for any authorized flood control work whenever such work and expenditure may be considered by the Secretary of the Army on recommendations of the Chief of Engineers, as advantageous in the public interest. 33 U.S.C. 701(h)(1) precludes reimbursement of the allocable Federal share of costs of work undertaken with funds contributed under the authority of 33 U.S.C. 701(h). Consequently, credit for the amount contributed under 33 U.S.C. 701(h) toward any required non-Federal cost share is also precluded.

c. Section 11, River and Harbor Act, approved 3 March 1925 (43 Stat. 1197; 33 U.S.C. § 561) authorizes the Secretary of the Army, in his/her discretion, to accept and expend funds advanced by non-Federal interests for authorized river and harbor projects.

d. Public Law 857, 76th Congress 54 Statute 1176, 33 U.S.C. § 701(h)(1), authorizes the Secretary of the Army, in his/her discretion, to accept and expend funds advanced by non-Federal interests for authorized flood control projects.

e. Pursuant to the terms of relocation agreements, funds may be received from non-Federal interests, or the owners of the facilities being relocated, to cover the cost of betterments when accomplishment of such relocations is by Federal construction contract.

f. Section 40, Water Resources Development Act of 1974 (P.L. 93-251), provides general authority that cash contributions, required of non-Federal public bodies in connection with the construction of a Civil Works project and pursuant to the requirements of that project authorization, may be paid in annual installments during project construction.

g. Terms of project cooperation specified in project authorizations and in the Water Resources Development Act of 1986 (P.L. 99-662) for various navigation, local protection, and multiple purpose projects generally require cash contributions by non-Federal interests sponsoring these projects, separate from the provision of lands, easements, rights-

of-way, relocations and dredged or excavated material disposal areas (LERRD). Sections 204(b) and (c) of P.L. 99-662 provide general authority for accepting non-Federal funds when performing engineering, design and construction for water resource projects desired by non-Federal interests.

6. Terminology.

a. Where funds are contributed gratuitously (i.e., there is no requirement to contribute, no repayment, and no credit) pursuant to paragraphs 5.a and 5.b for the purpose of accomplishing a part of an authorized Federal project (i.e., a project which has been authorized by a Water Resources Development Act or similar Act, or authorized for planning and design by House and Senate Resolutions), such contributions will be referred to as "Contributed Funds."

b. When funds contributed pursuant to paragraphs 5.a and 5.b are for the purpose of constructing a special feature of an authorized Federal project desired by non-Federal interests, the amounts so contributed will be designated as "Contributed Funds, Other."

c. Funds received pursuant to paragraph 5.c and 5.d for the purpose of constructing part of an authorized Federal project, in the absence of associated Federal funding, will be called "Advanced Funds."

d. When funds are received pursuant to paragraph 5.e or from non-Federal interests for the purpose of acquiring lands, easements, and rights-of-way or performing relocations required to be provided by and which are the obligation of non-Federal interests pursuant to the terms of project cooperation agreements, or for design and/or construction of facilities physically related to the authorized Federal project and desired by the non-Federal sponsor, including betterments, such funds will be called "Other Non-Federal Funds."

e. Funds contributed pursuant to paragraphs 5.f and 5.g, will be titled "Required Contributed Funds."

7. Authorities for Return of Advanced Funds and Unused Portions of Contributed Funds.

a. The authorities cited in paragraphs 5.a and 5.b authorize the Secretary of the Army to return unused portions of contributions received thereunder after completion of the work.

b. The authorities cited in 5.c and 5.d authorize and direct the Secretary of the Army to repay, without interest, from appropriations provided by Congress, the funds advanced and expended under those authorizations. The Secretary of the Army is also authorized to return unused portions of the original advance after completion of the pertinent construction.

c. Provisions for return of unused portions of funds received under

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conditions outlined in paragraph 5.e, should be included in the relocation agreements specifying the work.

d. Except when otherwise provided in project authorizations, the return of excess contributions made pursuant to paragraphs 5.f and 5.g should be addressed in the Project Cooperation Agreement (PCA) under the terms of required non-Federal cooperation.

8. Actions for Acceptance.

a. Action by the Assistant Secretary of the Army (Civil Works) (ASA(CW)) is required prior to the acceptance of "Contributed Funds," "Contributed Funds, Other," and "Advanced Funds." The authority to accept "Advanced Funds" shall be exercised by District Commanders and Division Commanders only after prior approval by HQUSACE, the ASA(CW), the Office of Management and Budget (OMB), and notification of the Appropriations Committees of the Congress. The authority to accept "Contributed Funds," and "Contributed Funds, Other" in the amount of \$2,000,000 or less, however, may be exercised by District Commanders for certain actions under the Operation and Maintenance (O&M) program described in paragraph 10 below.

b. Unless specifically called for in the authorizing legislation, action by the ASA(CW) is not required for the acceptance of "Required Contributed Funds", beyond the execution of a PCA.

c. District Commanders are authorized to accept "Other Non-Federal Funds" pursuant to the terms of relocation agreements or agreements with non-Federal interests as provided for in PCAs. Such funds will be * deposited in the U.S. Treasury under Trust Fund Receipt Account symbol 96X8862, Rivers and Harbors Contributed and Advanced Funds, Corps of Engineers, in accordance with the provisions of paragraph 30-12.c(3), ER 37-2-10. Measures should be taken to assure that the comingling of funds * does not occur and that funds are accounted for separately.

9. Actions for Return.

a. Action by the ASA(CW) is required for the return (refund or repayment) of "Advanced Funds". Refunds should be contingent upon prior completion of relevant construction, planning or engineering and the remaining unexpended funds being excess or if agreement is reached by all parties concerned that initiation of work is no longer desirable. Repayment of "Advanced Funds" is contingent upon availability of project funds specifically for repayment. Returns will be made in accordance with * the provisions of paragraphs 3-5 and 30-12.c(4), ER 37-2-10, and only to the parties or agencies from whom the funds were received.

b. District Commanders are authorized to return unused portions of "Required Contributed Funds," "Contributed Funds," "Contributed Funds, Other," and "Other Non-Federal Funds" as a part of the final settlement of non-Federal cooperation requirements and relocation agreements.

10. "Contributed Funds" and "Contributed Funds, Other". Authorities for acceptance of "Contributed" or "Contributed, Other" funds contemplate the expenditure of contributed funds in connection with funds appropriated by the United States for authorized river and harbor, and flood control works. Funds cannot be accepted under these authorities until Federal funds have been appropriated for the work to which they relate or until specific Congressional Committee notification of accepting such funds without appropriation of Federal funds has been given. Situations involving the acceptance of such funds occur most often in new construction work, but may also arise in operation and maintenance work or in connection with any Civil Works activity for which flood control or rivers and harbors funds are appropriated. Although the acceptance of funds from private parties is allowed under the paragraph 5.a (navigation) authority, it is HQUSACE policy that funds shall only be accepted from duly constituted public entities acting as sponsors. Contributed funds will not be used to initiate new elements of Federal projects unless prior notification has been given to the Appropriations Committees of the Congress. Construction items which are not physically related to the work of the authorized Federal project will not be undertaken under a Federal contract. In cases where the Corps will accept funds in connection with O&M activities, the non-Federal interests requesting the work shall bear all additional costs of the work for which funds are accepted including any additional environmental compliance costs. In addition, dredged material management plans should include the non-Federal work for which acceptance of contributed funds are anticipated.

a. Requests for Acceptance of Funds Delegated to District Commander for Approval. Any request for acceptance of funds which meets all of the following requirements is delegated to the District Commander for approval:

(1) Federal funds have been appropriated for Federal project work to which the proposed non-Federal work relates;

(2) the non-Federal request is for \$2,000,000 or less;

(3) the non-Federal work is for the purpose of dredging non-Federal berthing areas and channels/slips or to dispose of dredged material in a beneficial manner (i.e., non-Federal beach nourishment or wetland development) under the following conditions:

(a) the contributed funds are not to be used to implement or maintain any portion of a Federal project for which a Federal contribution is authorized; and

(b) the proposed non-Federal work will be accomplished along with maintenance dredging of the Federal navigation project associated with the proposed non-Federal work;

(4) Federal accomplishment of the requested work is advantageous

to the interest of navigation or advantageous in the public interest;

(5) the Memorandum of Agreement (MOA) entered into by the District Commander is in accordance with the model provided in Appendix A with no deviations, and includes a Certificate of Legal Review signed by the District Counsel; and

(6) all necessary National Environmental Policy Act (NEPA) requirements have been completed and documented.

b. Requests for Acceptance of Funds Requiring ASA(CW) Approval.
All requests for acceptance of funds which do not meet the above requirements will be submitted to HQUSACE (CECW-A) for approval. The approval process depends on whether Federal funds have been appropriated for the Federal project to which the proposed non-Federal work will relate:

(1) If Federal funds have been appropriated for the Federal project to which the proposed non-Federal work will relate, the request will contain the following elements:

(a) Supporting Documentation. Supporting material will include an information paper which describes the contributor, requested work, estimated cost, contributors written offer, relation of the requested work to the Federal work under way or programmed, and justifies how Federal accomplishment of the requested work is advantageous to the interest of navigation or advantageous in the public interest.

(b) Draft MOA and Associated Documentation. The request package should include six copies each of the MOA drafted for ASA(CW) signature in accordance with the model MOA provided in Appendix A, a list of deviations from the model MOA and reasons for the deviations, a Certificate of Legal Review signed by the District Counsel, and documentation that all necessary NEPA requirements have been completed.

(2) If no Federal funds have been appropriated for the Federal project to which the proposed non-Federal work will relate, OMB must approve the request. In addition, the Chairpersons of the Appropriations Committees must be notified prior to negotiating the MOA with the contributor. In this case, approval to negotiate will be obtained by submitting a request to HQUSACE (CECW-B) that includes the information specified in paragraph 10.b(1)(a) together with draft letters to OMB and the Chairpersons of the Appropriations Committees notifying them of the Corps intent to enter into negotiation of a MOA for acceptance of contributed funds. The request package will also provide the total commitment and the annual requirements that the Administration proposes to support in future budget submissions. After OMB approval and notification of the Appropriations Committees, HQUSACE will provide approval to negotiate the MOA. Subsequent to negotiation of the MOA, the negotiated draft MOA and supporting documentation specified in paragraph 10.b(1)(b) will be submitted to HQUSACE (CECW-AR) for review and approval.

11. "Advanced Funds".

a. Acceptance of advances from non-Federal interests usually involves the initiation of construction of a new project or the advance of a project element scheduled for future years. Corps policy is not to accept advances for work that is inconsistent with Administration policy or budget priorities. In addition, negotiation of MOAs for acceptance of advances will not be initiated unless ASA(CW) and OMB have approved and the Appropriations Committees of the Congress have been notified. Non-Federal interests or individuals proposing advances will be informed that although authority for acceptance of such funds is provided in the above cited Acts, the Corps must secure the approval of the ASA(CW) and notify the Appropriations Committees as a matter of policy.

b. Once the District Commander becomes aware that non-Federal interests are proposing such an advance of funds, he or she will request approval from HQUSACE (CECW-B) through the Division Commander and provide an information/justification package similar to that described in paragraph 10.b(1)(a) together with draft letters to OMB and the Chairpersons of the Appropriations Committees notifying them of the Corps intent to enter into negotiation of a MOA for acceptance of advanced funds. The notifications shall include the total commitment and the annual requirements that the Administration proposes to support in future budget submissions. After OMB approves the request and the Appropriations Committees have been notified, HQUSACE will provide approval to negotiate the MOA. Subsequent to negotiation of the MOA, the negotiated draft MOA and supporting documentation specified in paragraph 10.b(1)(b) will be submitted to HQUSACE (CECW-AR) for review. (Reports Control Symbol (RCS) exempt: AR 335-15, paragraph 5-2g).

12. Engineering and Design (E&D) and Supervision and Administration (S&A) Costs. Charges made against "Advanced", "Contributed," and "Contributed, Other" funds shall include an appropriate share of E&D and S&A costs applicable to the contracts under which the work is performed. This principle shall also be applied to "Required Contributed Funds" when such a contribution is made on the basis of a percentage of the cost of a unit or some feature of a project. Such accounting is not required if the authorization calls for a specific lump sum cash contribution.

13. Time and Manner of Payment.

a. Payment During Work. Unless otherwise specifically provided in the authorization documents, contributions will be received during the period of Engineering and Design or Construction of the project to which they apply. The authorization may allow project construction to proceed in separable or sequential increments. The following paragraphs explain procedures for carrying out the financial requirements when large contributions and lengthy construction periods are involved.

(1) In the event the project is programmed for accomplishment over an extended period of time, consideration will be given to the

establishment of an escrow arrangement consisting of cash or negotiable securities so that non-Federal sponsors will not forego interest on such funds in the period pending its use on the project. When the authorization provides for contributions on the basis of "when and as constructed" or "when and as required," consideration should be given to such an escrow arrangement in order to insure that sufficient non-Federal funds will be available to complete a usable unit of the project. For situations which require a cash deposit, the District Commander in discussions with non-Federal interests, will call attention to the fact that escrow deposits of any non-Federal interest funds will be considered the same as a cash deposit. Non-Federal interests can then determine which method is to their financial advantage, keeping in mind that the sponsor must verify to the satisfaction of the Federal Government that it has deposited the requisite amount in an acceptable escrow account in an amount sufficient to meet its obligation. The Federal Government must have the money available at the time it is necessary to issue a solicitation or obligate funds for work to be done. Questions on the appropriateness of such individual escrow agreements should be addressed to HQUSACE (CECW-A). A model escrow agreement drafted for the District Commander's signature, is attached as Appendix B. The escrow agreement should be forwarded to HQUSACE (CECC-J) for review and approval if deviations from the model are anticipated.

(2) When an agency requesting the construction of a betterment with "Other Non-Federal Funds" is prohibited by law from making direct payments in advance of performance of work, an amount representing the estimated cost of such betterment may be deposited in accordance with guidance for establishing escrow accounts provided in ER 37-2-10. The escrow agreement may be arranged either as a cash deposit or a deposit of negotiable security, but must be accomplished so that payments will be made to the Federal Government within a reasonable period of time, upon demand, but in all instances prior to the Federal Government's obligation of any funds for the project. The escrow agreement should be forwarded to HQUSACE (CECC-J) for review and approval.

(3) Section 40, WRDA of 1974, (P.L. 93-251) and the WRDA of 1986 (P.L. 99-662) expressly allow Federal construction prior to full payment being made, by annual installments during construction. This will ease the financial burden on non-Federal public bodies of a single large payment prior to the start of project construction. Contributions must still be received prior to obligating the Federal Government for the work to which the contribution pertains. The extended payment method (i.e., pay-as-you-go) may be used for project construction which requires more than one year. Subject to limitations stated under this paragraph, the extended payment provisions will be used whenever requested by non-Federal interests. Non-Federal government sponsors should be advised of the extended payment provisions during preconstruction planning. Non-Federal sponsors will then have time to consider the use or non-use of extended payments. The status of coordination should be addressed in the decision document.

(4) The extended payments procedure may only be used when all of

the following criteria are met:

(a) The project authorization specifies the non-Federal contribution be paid in cash ("Required Contributed Funds").

(b) The contributor is a non-Federal public body. Private entities, occasionally a required contributor, are not eligible.

(c) The performance period of project construction (excluding seasonal landscape work) is scheduled to exceed one fiscal year.

(d) The project was not under construction on or before 7 March 1974.

(e) The funding mechanism specified in the Project Cooperation Agreement (PCA) is an escrow or other acceptable account (see ER 37-2-10 for guidance on establishing escrow accounts).

b. Payment Prior to Work. Contributions must be received prior to starting the phase of the project to which the contribution pertains. The sponsor must verify to the satisfaction of the Federal Government that it has deposited the required amount in an acceptable escrow account in an amount sufficient to meet its obligation. However, the contribution may be paid in annual installments, not necessarily equal, with each installment adjusted to reflect equitably the pertinent work scheduled to be performed in the coming years. The timings of such payments are reflected in approved Project Cooperation Agreements. Pertinent work is interpreted as that work upon which the required contribution is based. Pertinent work could be the project-as-a-whole, or all of some special item (feature, facility, construction method) whose construction might not begin until several years after the start of other project work. Some examples are given below:

(1) When the required cash contribution is a fixed percentage of total project costs, contributions must be received in sufficient amounts to maintain the proper proportion of Federal and non-Federal funds to total project obligations and expenditures.

(2) When the required cash contribution is a lump sum amount based upon a particular item of work (e.g., moveable panel floodwall in lieu of fixed concrete floodwall), and this item of work is to be done during the third year of project construction under either the initial construction contract or a subsequent contract, the contribution must be received so that the funds can be obligated at the beginning of the third year in the case of a continuing contract, or in the third year at the award of a new contract.

c. Retroactivity. Plans for the use of non-Federal contributed funds and the associated construction schedules may be modified together with the associated agreement, if necessary, to provide for extended payments if requested by the contributor, and if otherwise in accordance with guidance under this paragraph. However, existing plans and their

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associated agreements may not be modified if it would require the return of contributed funds already received by the Federal Government.

FOR THE COMMANDER:

A handwritten signature in cursive script, appearing to read "Otis Williams".

2 Appendices
APP A - Model MOA
APP B - Model Escrow Agreement

OTIS WILLIAMS
Colonel, Corps of Engineers
Chief of Staff