

<p>CECW-AG</p> <p>Engineer Regulation 1165-2-30 Change 1</p>	<p>Department of the Army U.S. Army Corps of Engineers Washington, DC 20314-1000</p>	<p>ER 1165-2-30 CH 1</p> <p>31 December 1997 (original) 30 October 1998 (change 1)</p>
	<p>Water Resources Policies and Authorities</p> <p>ACCEPTANCE AND RETURN OF REQUIRED, CONTRIBUTED, OR ADVANCED FUNDS</p>	
	<p>Distribution Restriction Statement Approved for public release; distribution is unlimited.</p>	

CECW-AG

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

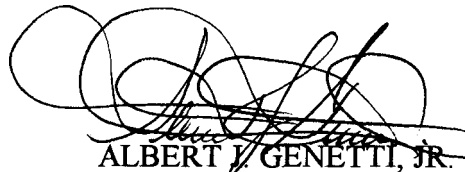
Regulation
No. 1165-2-30

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

Regulation
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

ER 1165-2-30
Change 1
30 Oct 98

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

ER 1165-2-30
31 Dec 97

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

APPENDIX A

MODEL MEMORANDUM OF AGREEMENT FOR ACCEPTANCE AND RETURN OF CONTRIBUTED
OR ADVANCED FUNDS FOR DESIGN, CONSTRUCTION, MAINTENANCE, OR OPERATION

MEMORANDUM OF AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND THE
[FULL NAME OF NON-FEDERAL CONTRIBUTOR]
FOR ACCEPTANCE AND RETURN OF [SELECT ONE: CONTRIBUTED/ADVANCED] FUNDS
FOR THE [SELECT ONE: DESIGN, CONSTRUCTION, MAINTENANCE, OR
OPERATION (OF THE _____ FEATURE)]
OF THE [FULL NAME OF PROJECT]

This MEMORANDUM OF AGREEMENT (hereinafter referred to as the "MOA"), entered into this _____ day of [MONTH], [YEAR], by and between the DEPARTMENT OF THE ARMY (hereinafter referred to as the "Government"), represented by the [SELECT ONE: [FOR ADVANCED FUNDS, OR CONTRIBUTED FUNDS IN THE AMOUNT EXCEEDING \$2 MILLION FOR ALL CATEGORIES OF WORK AND LESS THAN \$2 MILLION FOR CATEGORIES OF WORK NOT DELEGATED TO DISTRICT ENGINEERS - Assistant Secretary of the Army (Civil Works)], OR, [FOR CONTRIBUTED FUNDS IN THE AMOUNT OF \$2 MILLION OR LESS FOR CATEGORIES OF WORK DELEGATED TO DISTRICT ENGINEERS - U.S. Army Engineer for the [LOCATION OF DISTRICT] (hereinafter the "District Engineer")], and the [FULL NAME OF NON-FEDERAL SPONSOR] (hereinafter the "Contributor"), represented by the [TITLE OF THE PERSON SIGNING THE AGREEMENT].

WITNESSETH THAT:

WHEREAS, the [NAME OF THE AUTHORIZED FEDERAL NAVIGATION OR FLOOD CONTROL PROJECT] (hereinafter referred to as the "Project") was authorized by [CITE SECTION/SUBSECTION] of the [CITE PUBLIC LAW NAME AND NUMBER]; and

WHEREAS, the Water Resources Development Act of 1986 (Public Law 99-662) specifies the cost-sharing requirements applicable to the Project; and

[INCLUDE THE FOLLOWING PARAGRAPH ONLY FOR ADVANCED FUNDS: WHEREAS, the Contributor has expressed a desire to eventually serve as the Non-Federal Sponsor that will share in the costs of the project pursuant to Public Law 99-662; and]

WHEREAS, the Contributor considers it to be in its own interest to expedite the [SELECT ONE: DESIGN, CONSTRUCTION, MAINTENANCE, OR OPERATION] of the Project by voluntarily [contributing/advancing] funds

(hereinafter referred to as **[Contributed/Advanced]** funds) to be used by the Government for that purpose; and

[FOR CONTRIBUTION OF FUNDS FROM PRIVATE PARTIES FOR AUTHORIZED NAVIGATION PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 560, to accept contributed funds, to be expended in connection with Federally appropriated funds, for any authorized work of public improvement of rivers and harbors whenever such work and expenditure may be considered by the Chief of Engineers to be advantageous to the interests of navigation; **[OR]**

[FOR CONTRIBUTION OF FUNDS FROM STATES AND POLITICAL SUBDIVISIONS FOR AUTHORIZED FLOOD CONTROL PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 701(h), to accept contributed funds, to be expended in connection with Federally appropriated funds, 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 to be advantageous in the public interest; **[OR]**

[FOR ADVANCED FUNDS FROM LOCAL INTERESTS FOR AUTHORIZED NAVIGATION PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 561, to accept and expend advanced funds; **[OR]**

[FOR ADVANCED FUNDS FROM LOCAL INTERESTS FOR AUTHORIZED FLOOD CONTROL PROJECTS] WHEREAS, the Government is authorized pursuant to 33 U.S.C. 701(h)(1), to accept and expend advanced funds; **[OR]**

[FOR CONTRIBUTION OF FUNDS REQUIRED OF NON-FEDERAL PUBLIC BODIES FOR AUTHORIZED PROJECTS] WHEREAS, the Government is authorized pursuant to 42 U.S.C. Section 1962d-5c (Section 40 of Public Law 93-251), to accept and expend cash contributions paid in annual installments during project construction; **[OR]**

[FOR CONTRIBUTION OF FUNDS REQUIRED OF NON-FEDERAL BODIES FOR PERFORMING ENGINEERING AND DESIGN OF AUTHORIZED WATER RESOURCE PROJECTS DESIRED BY NON-FEDERAL PUBLIC BODIES]. WHEREAS, the Government is authorized under 33 U.S.C. Section 2232 (Sections 204(b) and (c) of Public Law 99-662), to accept and expend cash contributions;

[FOR ACCEPTANCE OF CONTRIBUTED FUNDS AND CONTRIBUTED FUNDS, OTHER, IN THE AMOUNT OF \$2,000,000 OR LESS, WHERE FEDERAL FUNDS HAVE BEEN APPROPRIATED FOR FEDERAL PROJECT WORK TO WHICH THE PROPOSED NON-FEDERAL WORK RELATES, AND 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: (1) 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 (2) THE PROPOSED NON-FEDERAL WORK WILL BE ACCOMPLISHED AS PART OF THE MAINTENANCE DREDGING OF THE FEDERAL NAVIGATION PROJECT ASSOCIATED WITH THE PROPOSED NON-FEDERAL WORK]. WHEREAS, the District Engineer, **[LOCATION OF DISTRICT]**, is authorized under authority delegated by the Secretary of the Army/Assistant Secretary of the Army for Civil Works to accept

(Contributed Funds/Contributed Funds,Other) in the amount of \$2,000,000 or less for work dealing with non-Federal requests for dredging non-Federal berthing areas and channels/slips or to dispose of dredged material in a beneficial manner (i.e., non-Federal beach nourishment and wetland development), where Federal funds have been appropriated for Federal project work to which the proposed non-Federal work relates, under the following conditions: (1) 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 (2) the proposed non-Federal work will be accomplished as part of the maintenance dredging of the Federal navigation project associated with the proposed non-Federal work; and to execute MOAs associated therewith;

NOW, THEREFORE, the Government and Contributor agree as follows:

1. Subject to any necessary appropriation, the Contributor shall contribute to the Government the following sums, in cash: **[ITEMIZE AND SPECIFY THE CASH AMOUNT(S)]**.

2. The contributions specified in paragraph 1 above shall be made as follows: **[ITEMIZE AND SPECIFY THE TERMS/TIMING OF THE PAYMENT(S); FOR INSTANCE, THE FOLLOWING OFFERS THE NON-FEDERAL SPONSOR TWO MECHANISMS FROM WHICH TO CHOOSE IN DECIDING HOW TO PROVIDE ITS CASH CONTRIBUTION TO THE FEDERAL GOVERNMENT. THE NON-FEDERAL SPONSOR SHOULD INDICATE ITS CHOICE DURING THE COURSE OF NEGOTIATING THE AGREEMENT. THE MOA SHOULD REFLECT ONLY ONE MECHANISM.]** [1] provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, **[APPROPRIATE USACE DISTRICT]**" to the District Engineer. [2] verify to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor **[ESCROW AGREEMENTS MUST FOLLOW THE MODEL IN APPENDIX B, AS EXPLAINED IN PARAGRAPH 12 OF THIS ER AND IN ER 37-2-10, OR BE FORWARDED TO HQUSACE FOR REVIEW]**.

3. In the event that the Contributor contributes more or less than the amount listed in paragraph 1 above, or makes its contributions earlier or later than the dates listed in paragraph 1 above, this MOA shall apply to whatever funds are contributed by the Contributor to the Government pursuant to this MOA; however, the Government shall not obligate any contributed funds before they are received and available.

4. The Government shall use all **[Contributed/Advanced]** funds for **[SELECT ONE: design, construction, maintenance or operation]** of the Project, except with regard to excess **[Contributed/Advanced]** funds which are addressed in paragraph 7 of this MOA. **[FOR ACCEPTANCE OF FUNDS IN CONNECTION WITH O&M ACTIVITIES:** The Contributor shall bear all additional costs of the work for which funds are accepted including any additional environmental compliance costs].

5. The Government shall provide the Contributor with quarterly accountings of its expenditures of **[Contributed/Advanced]** funds for **[SELECT ONE: design, construction, maintenance or operation]**. The first such accounting shall be provided within 30 days after the final day of the first complete Government fiscal year quarter following receipt of the **[Contributed/Advanced]** funds, and subsequent accountings shall be provided within 30 days after the final day of each succeeding quarter until the **[Contributed/Advanced]** funds are completely expended or the Government concludes **[SELECT ONE: design, construction, maintenance or operation]** on the Project.

[USE THE FOLLOWING TWO PARAGRAPHS FOR CONTRIBUTED FUNDS:

6. Unless directed in law, the Government shall not reimburse the Contributor for contributed funds expended by the Government.

7. The Government shall not credit the Contributor for the contributed funds so as to reduce the cash contribution that otherwise would be required of the Contributor pursuant to any Project Cooperation Agreement entered into by the Government and Contributor (or a legal entity empowered to act on behalf of the Contributor) governing the construction of all or part of the Project.] **[OR]**

[USE THE FOLLOWING TWO PARAGRAPHS FOR ADVANCED FUNDS:

6. If and only if the Government and the Contributor (or a legal entity empowered to act on behalf of the Contributor) enter into a Project Cooperation Agreement governing the construction of all or part of the Project, the Government shall credit the Contributor for the advanced funds so as to reduce the cash contribution that otherwise would be required of the Contributor pursuant to the Project Cooperation Agreement.

7. The Government shall not reimburse the Contributor for advanced funds expended by the Government unless funds for that purpose are appropriated.]

8. The Government, subject to the availability of funds and subject to the approval by the Secretary of the Army, shall return to the Contributor **[contributed/advanced]** funds not expended by the Government.

9. Nothing herein shall constitute, or be deemed to constitute, an obligation of future appropriations by the United States.

10. Nothing herein shall constitute, or be deemed to constitute, an assurance or promise of the Government to take any action whatsoever with respect to the project, including but not limited to the following actions: entering into a Project Cooperation Agreement with the Contributor; constructing the Project; including the Project in the Government's budget; or completing the **[SELECT ONE: design, construction, maintenance, or operation]** of the Project.

11. Before any party to this MOA may bring suit in any court concerning an issue relating to this MOA, such party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties.

12. The Contributor shall hold and save the Government free from all damages arising from the design, construction, operation, maintenance, repair, replacement, and rehabilitation of the Project and any Project-related betterments, except for damages due to the fault or negligence of the Government or its contractors.

13. Federal and State Laws. In the exercise of their respective rights and obligations under this MOA, the Contributor and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to, Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto, as well as Army Regulations 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

14. Relationship of Parties. In the exercise of their respective rights and obligations under this MOA, the Government and the Contributor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

15. Officials Not to Benefit. No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this MOA, or to any benefit that may arise therefrom.

16. Notices.

a. Any notice, request, demand, or other communication required or permitted to be given under this MOA shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Contributor: **[FULL ADDRESS]**

If to the Government: **[FULL ADDRESS]**

b. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this paragraph.

c. Any notice, request, demand, or other communication made pursuant to this paragraph shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven days after it is mailed.

17. Confidentiality. To the extent permitted by the laws

ER 1165-2-30
31 Dec 97

governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

IN WITNESS WHEREOF, the parties have executed this MOA as of the day, month, and year first above written.

THE DEPARTMENT OF THE ARMY

[THE CONTRIBUTOR]

BY: _____

BY: _____

[DISTRICT ENGINEER
FOR CONTRIBUTED FUNDS WITHIN
LIMITS OF DELEGATED AUTHORITY]

[NAME AND TITLE OF AUTHORIZED
REPRESENTATIVE OF CONTRIBUTOR]

[ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS) FOR ADVANCED FUNDS,
AND FOR CONTRIBUTED FUNDS NOT
WITHIN LIMITS DELEGATED TO
DISTRICT ENGINEERS]

CERTIFICATE OF AUTHORITY

I, _____, do hereby certify that I am the principal legal officer of the **[FULL NAME OF NON-FEDERAL SPONSOR]**, that the **[FULL NAME OF NON-FEDERAL SPONSOR]** is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the **[FULL NAME OF NON-FEDERAL SPONSOR]** in connection with the **[FULL NAME OF "PROJECT"]**, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the **[FULL NAME OF NON-FEDERAL SPONSOR]** have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 19____.

[SIGNATURE]

[TYPED NAME]

[TITLE IN FULL]

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

[SIGNATURE OF MOA SIGNATORY]

[TYPED NAME]

[TITLE IN FULL]

DATE: _____

APPENDIX B

MODEL ESCROW AGREEMENT

ESCROW AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[NAME OF NON-FEDERAL SPONSOR]
AND
[NAME OF BANK]

This AGREEMENT, is entered into this [DAY] day of [MONTH], [YEAR], by and between the Department of the Army (hereinafter referred to as the "Government"), represented by the District Engineer, U.S. Army Engineer District, [NAME], the [NAME OF NON-FEDERAL SPONSOR] (hereinafter referred to as the "Non-Federal Sponsor"), represented by the [TITLE OF REPRESENTATIVE], and the [NAME OF BANK] (hereinafter referred to as the "Bank"), represented by the [TITLE OF REPRESENTATIVE] .

WITNESSETH THAT:

WHEREAS, on [DAY, MONTH, YEAR], the Non-Federal Sponsor and the Government entered into a Project Cooperation Agreement for the construction of [NAME OF PROJECT OR SEPARABLE ELEMENT]; and

WHEREAS, pursuant to the Project Cooperation Agreement the Non-Federal Sponsor is required to contribute, over the term of construction of the project, a cash contribution calculated in accordance with said agreement; and

WHEREAS, the Non-Federal Sponsor and the Government have agreed that the required contribution may be deposited into an escrow account and held therein until the Government withdraws the funds in accordance with the Project Cooperation Agreement; and

WHEREAS, the Bank has agreed to serve as depository for the escrow account and to accept appointment as escrow agent;

NOW, THEREFORE, the parties do hereby agree as follows:

1. The Bank is hereby appointed as the escrow agent for the Non-Federal Sponsor and is designated the depository for the monies delivered by the Non-Federal Sponsor pursuant to the aforementioned Project Cooperation Agreement. The Bank shall establish an "[NAME OF PROJECT OR SEPARABLE ELEMENT]" (hereinafter referred to as the "Escrow Account") into which shall be deposited the funds delivered by the Non-Federal Sponsor.

2. In accordance with the method of payment provisions of the Project Cooperation Agreement, the Non-Federal Sponsor shall absolutely and irrevocably deliver to the Bank the funds ["required to be provided" OR "to be contributed" OR "to be advanced"] to the Government during the ["planning, engineering and design" OR "construction" OR "operation and maintenance"] period.

3. The funds held in the Escrow Account shall earn interest at such rate as the Bank and the Non-Federal Sponsor may mutually agree upon. To the extent the Non-Federal Sponsor authorizes the Bank to invest the funds in any instrument other than an interest-bearing account, savings certificate, or certificate of deposit of the Bank itself, such investment shall be only in direct obligations of the Government of the United States of America or in obligations of agencies or entities that are guaranteed by the Government of the United States of America. Any instrument must be subject to redemption on or prior to the dates the funds will be needed by the Government. Interest on the funds deposited shall accrue and belong to the Non-Federal Sponsor, and shall be payable to the Non-Federal Sponsor subject to such terms and conditions as the Bank and the Non-Federal Sponsor may mutually agree upon.

4. The Government, acting pursuant to the terms of the Project Cooperation Agreement, shall have the sole and unrestricted right to draw upon all or any part of the funds deposited in the Escrow Account. A written demand for withdrawal shall be made to the Bank by the District Engineer, U.S. Army Engineer District, [NAME], or his or her duly authorized representative, with a copy of said demand provided to the Non-Federal Sponsor. Within ten (10) days of receipt of the demand, the Bank shall pay to the Government the amount requested to the extent such amount does not exceed the balance available in the Escrow Account. All payments shall be in the form of bank drafts payable to the "Finance and Accounting Officer, [NAME OF DISTRICT], and shall be mailed or otherwise delivered to the Government as specified below in paragraph 9.

5. The fee to be paid to the Bank for the services provided hereunder shall be as the Bank and the Non-Federal Sponsor may mutually agree. Any fee paid to the Bank shall be the sole responsibility of the Non-Federal Sponsor. The Bank shall have no right to deduct monies from the principal amount deposited in the Escrow Account to pay for its services. In the event the Non-Federal Sponsor fails to make payment to the Bank for its services, all claims for such payment shall be made directly against the Local Sponsor. The Government shall not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the Escrow Account.

6. Account statements shall be rendered by the Bank to the Non-Federal Sponsor and the Government once monthly, and shall show deposits, disbursements, and balance, and the dates thereof.

7. At such time that the Government, in its sole discretion, shall

determine that it shall make no further demands for withdrawal from the Escrow Account upon the Bank, the District Engineer, U.S. Army Engineer District, [NAME], or his or her duly authorized representative, shall provide notice of its determination to the Bank. Upon receipt of such notice, the Bank shall prepare a final accounting showing all transactions relating to the Escrow Account, provide said accounting to the Non-Federal Sponsor and the Government at the addresses shown in paragraph 9, and pay over the balance remaining to the Non-Federal Sponsor. Upon receipt of signed Certification by the Government that no further demand for payment of money will be made, the Bank shall complete a final accounting and other obligations required under this Agreement, and pay over the balance remaining to the Non-Federal Sponsor.

8. It is understood and agreed that the Bank shall not be liable or responsible to ascertain the terms or conditions of any provision of the aforementioned Project Cooperation Agreement between the Non-Federal Sponsor and the Government. It is further understood and agreed that if any controversy arises between the Government and the Non-Federal Sponsor, or with any other party with respect to the subject matter of this Agreement, the Bank is authorized, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government in accordance with the terms of this Agreement.

9. All notices, statements, or payments specified in this Agreement shall be deemed to have been duly given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage-prepaid), registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

[ADDRESS]

If to the Government:

Commander
U.S. Army Engineer District, [NAME]
[ADDRESS]

If to the Bank:

[ADDRESS]

10. Nothing in this Agreement shall be considered as vesting title to the funds deposited in the Bank except as Trustee for the Non-Federal Sponsor and the Government for the purpose set forth herein. Title to said funds shall not vest in the Government until payment to the Government is made as provided herein.

11. This Agreement shall take effect upon the initial deposit of funds into the Escrow Account by the Non-Federal Sponsor and shall

ER 1165-2-30
31 Dec 97

continue in full force until the notice specified in paragraph 7 hereof is received by the Bank and any balance remaining is returned to the Non-Federal Sponsor, unless earlier terminated by the written mutual agreement of the Government, Non-Federal Sponsor and the Bank.

12. This agreement may not be amended except by written modification signed by the parties hereto.

IN WITNESS WHEREOF, the Government, Non-Federal Sponsor, and the Bank have executed this Agreement on the date, month, and year first above written.

The Department of the Army

ATTEST: _____

BY: [SIGNATURE]
 [TYPED NAME]
 District Engineer
 U.S. Army Engineer District, [NAME]

The **[NAME OF NON-FEDERAL SPONSOR]**

ATTEST: _____

BY: _____
 [TYPED NAME]
 [TITLE]

The **[NAME OF BANK]**

ATTEST: _____

BY: _____
 [TYPED NAME]
 [TITLE]