Comments in Response to the August 27, 2014 Webinar
by the U.S. Army Corps of Engineers on the
Water Resources Reform and Development Act of 2014

Category/Session II
Alternative Financing – Contributions, Alternative Financing – Title V, Credits

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We appreciate the opportunity to participate in the webinars the Corps has scheduled to receive feedback from its water resources partners and stakeholders as it develops guidance to implement the WRRDA. In addition to offering our views during the webinars, we intend to submit written comments after each webinar responsive to the particular statutory sections referred to in each session. As this process moves forward, we may seek to revise or extend these comments, particularly as we learn more about the Corps’ views of particular provisions of this important legislation, as well as the views that may be suggested to the Corps by other stakeholders.

General Comments

WRRDA provides non-federal sponsors with new opportunities to be more actively engaged in the development of these projects, especially as it relates to the advancement and non-federal implementation of projects, along with receiving credit for non-federal contributions. These provisions are important, especially to communities across the nation that have been left with partially completed projects. Since much of the non-Federal investment occurs at the beginning of a project, or separable element thereof, without the authorized Federal investment such an approach is needed to avoid sunk investment for which no benefits could be derived.

The provisions in WRRDA offer an opportunity for non-Federal leadership and allow for the development of innovative means to address regional variations in water resources projects. We encourage the Corps to develop guidance that will enable non-Federal sponsors and that will also foster an environment that leads to the generation of many new ideas and approaches to be used in meeting and sharing the challenge of managing the nation’s water resources. We recommend that any guidance developed to implement these provisions not be overly prescriptive, but instead provide a framework for cooperation among stakeholders and partners to allow for the establishment of shared goals to be achieved by operating within set parameters. Such guidance ought to encourage, rather than stifle, collaboration, innovation and integration in managing water resources.

ALTERNATIVE FINANCING – CONTRIBUTIONS

Section 1017 – Acceptance of contributed funds to increase lock operations

We encourage the Secretary to move forward in an expeditious manner to establish the pilot program to allow the acceptance and expenditure of funds contributed by non-federal interests to increase the hours of lock operations along the waterways. Many local communities have been detrimentally impacted by the reduction of service hours at locks and seek to use this new
authority to keep their locks open for recreational boating and fishing. Given the significant economic importance of such activities, we encourage prompt implementation of this authority.

Section 1024 - Authority to Accept and Use Materials and Services

We recommend that the Secretary consult with non-federal interests to develop guidance to determine how and under what circumstances the Army may accept and use materials and services to repair, restore, or replace a project that has been damaged or destroyed as a result of an emergency. We further urge that any requirements be established as soon as practicable to enable non-federal interests to have a plan in place prior to an emergency, so that they can provide the needed materials and services to help correct or expedite a solution to a catastrophic failure as soon as possible. Such guidance must also provide for flexibility to respond to damages sustained during an emergency event. In recognition of the devastating impact to national and state economies that could result from an unintended shut down of any portion of a water resources project, and the resulting necessity to respond expeditiously, we urge the Secretary to delegate the authority under this provision to the District Engineer.

ALTERNATIVE FINANCING – TITLE V

Section 5014 - Water Infrastructure Public-Private Partnership Pilot Program

P3s are generating new models for sharing the costs and risks associated with nearly all phases of a project, including design, build and operation, and they can also address project ownership. As the Corps proceeds with implementation of this section we urge use of a transparent process in selecting the pilot projects and ask that consideration be given to maximizing the opportunity for innovation that can be derived from the private sector. The approach to managing project risks, including identification and acceptance / assignment, is an essential component to a successful P3 endeavor. Sharing the challenge of water resources project implementation should also involve sharing the risk, and to do so it must first be understood, including the risk of no action or delayed action. This pilot P3 program is also an opportunity to further explore how meaningful collaboration among diverse interests can lead to a successful multipurpose project with widespread support. Selection preference should be given to those projects that provide a model that can be adapted and adopted by others seeking to embark on P3s.

In identifying procedural requirements that pose an impediment to implementation of P3s, consideration should be given to removing limitations on the use of tax financed debt.

In part, because P3s may be a viable means to attaining the much needed investment in our nation’s water resources, and also due to the requirement that Congress be given a report describing the results of this pilot program in less than three years, we look forward to early development of the implementation guidance for this provision. Several of our members have expressed interest in making use of this provision, and welcome the chance to engage in a robust dialogue with the Corps and others, including industry, shippers, operators and more, to help identify revenue streams and structures that can be used to capture those to advance P3s.
Title V, Subtitle C (Innovative Financing Pilot Projects)

With respect to WIFIA, reimbursement should be allowed on an incremental basis throughout the execution of the project.

CREDITS

General comments applicable to all enumerated sections pertaining to credits

We recommend that the guidance provide clarification as to how the term “credits” will be used for the purposes of recognizing non-Federal contributions to advance projects using authorities that allow for implementation of project, or separable and discrete elements thereof, by non-Federal sponsors. It would appear that there are three separate definitions whose definitions vary based on application. In order to address the resulting confusion and frustration, we request that the guidance establish one definition that can be used to support non-Federal implementation of important water resources projects, including, among others, those for navigation and flood damage reduction, which together provide for national prosperity and community resilience.

Sec. 1018 - Credit for In-Kind Contributions

In carrying out the requirement in Section 1018(d) for public and stakeholder participation prior to the issuance of any new or revised guidance, regulations, guidelines, or subsequent updates, we urge the Secretary to utilize as transparent and open a process as possible. In the first instance, this section requires consultation with affected non-federal interests, rather than mere notice, indicating congressional intent for there to be significant involvement by local sponsors and other non-Federal interests, a recognition that credit for in-kind contributions is an important tool in implementing water resources projects, especially in a time of limited federal appropriations.

In addition, this section requires the publication of proposed guidelines with an opportunity to comment. We encourage the Secretary to use a process akin to a notice-and-comment type of proceeding as set forth in the Administrative Procedure Act (5 U.S.C. § 551).