

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS AND DISTRICT
COMMANDS

SUBJECT: Policy Guidance Letter No. 53 - Implementation of Section 211 of the Water Resources Development Act of 1996

1. **Purpose.** This memorandum provides policy guidance on Section 211 of the Water Resources Development Act (WRDA 96) of 1996, "Construction of Flood Control Projects by Non-Federal Interests." A copy of the Act language is enclosed for your information. Detailed guidance will be forthcoming in an Engineering Regulation (ER).

2. **Background.** Section 211 of WRDA 96 provides authority for non-Federal sponsors to undertake the design and construction of federally authorized flood control projects without Federal funding and to be eligible to be reimbursed an amount equal to the estimate of the Federal share, without interest (or inflation), of the design and construction cost of the project or separable element thereof. The Energy and Water Development Appropriations Act, 1998, provided additional guidance on the section 211 regarding notification of the Committees on Appropriations of the House and Senate and on scheduling of reimbursements.

3. **Applicability.** This guidance applies to all HQUSACE elements and major subordinate commands of the U.S. Army Corps of Engineers. 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 sponsor work under section 211 (e) will not be considered for the Continuing Authorities Program projects.

4. **Policy.**

a. General: It is Corps policy that reimbursement for the construction of any authorized flood control project undertaken by a non-Federal sponsor pursuant to section 211 is contingent upon approval by the Secretary of the plans for construction and the Secretary's determination, after a review of studies and design documents, that the project or separable element thereof, is economically justified and environmentally acceptable. This approval must be obtained after project authorization and prior to the initiation of construction of the work for which the reimbursement request will be made. Further, prior to initiating negotiations for a reimbursement agreement for the construction of any authorized project pursuant to Section 211 of WRDA 96, the Secretary of the Army must notify the Committees on Appropriations of the

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House and the Senate. This notification must include the estimated total commitment and the reimbursement requirements that the Administration intends to support in future budget submissions. Budgetary and programmatic priorities will be taken into account when reviewing plans submitted by non-Federal sponsors.

All projects pursued under the authority of section 211 must be planned, designed and constructed in accord with appropriate Federal laws and criteria, standards and policies, including the appropriate National Environmental Policy Act (NEPA) documentation, and construction must comply with all applicable Federal and State laws and regulations. The non-Federal sponsor will normally be required to develop the design, engineering plans and specifications for the construction it proposes to undertake. In addition, the non-Federal sponsor must conduct NEPA investigations, prepare appropriate NEPA documents, conduct all public and agency coordination, and obtain all necessary Federal and State permits. The Corps may undertake these efforts if funds are provided by the non-Federal sponsor and if such work does not delay the completion of other Corps assignments. Further, funds for activities undertaken by the Corps district offices which are necessary for the successful completion of a section 211 project or separable element, thereof, and construction of the sponsor proposed work including, but not limited to, design, review of project economics, environmental assessments, determination of lands, easements, rights-of-way and suitable borrow and dredged or excavated material disposal areas (LERRD's) requirements, auditing, permit evaluations, and inspections, must also be provided by the non-Federal sponsor.

The non-Federal sponsor must provide all LERRD's and shall perform or ensure performance of all relocations that the Corps determines are required for the construction, operation and maintenance of the project. The value of LERRD's provided by the non-Federal sponsor that are required for the project will be determined in accordance with standard valuation procedures as contained in the model Project Cooperation Agreement (PCA) for structural flood control projects. In addition, the non-Federal sponsor will be responsible for the operation, maintenance, repair, replacement and rehabilitation of the project in accordance with regulations or directions prescribed by the Corps and shall perform all other items of sponsor cooperation required by the project authorization.

In the development of a section 211 agreement, the normal procedures for processing and reviewing a PCA will be used. The decision document approved by the Secretary must be included as support for the section 211 agreement. Negotiations for proceeding with a project under section 211 are to be accomplished at the district level once approval to initiate the negotiations has been received.

b. Reimbursement pursuant to Section 211 (e) (1): Reimbursements pursuant to section 211 (e) (1) cannot occur until the flood control project, or separable element thereof,

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has been constructed. Reimbursements are subject to appropriations Acts. Any eligible reimbursable Federal share of costs associated with studies or design efforts conducted by non-Federal sponsors after authorization and prior to construction will be included in the final auditing of the total project costs upon completion of the construction of a project or separable element thereof. Any reimbursement desired by a non-Federal sponsor for studies or design it accomplished prior to authorization must be specifically identified and requested in the authorizing document.

c. Reimbursement pursuant to Section 211 (e) (2) (A) (Specifically named projects): Reimbursement for those projects listed in section 211 (f) will be in accordance with section 211 (e) (2) (A). These special reimbursement rules expand the definition of the work for which the non-Federal sponsor will be reimbursed to include studies, planning, design and construction if such work is later recommended by the Chief of Engineers and approved by the Secretary. In addition, for the section 211 (f) projects, a non-Federal sponsor will be credited for the Federal share of any work carried out before completion of a reconnaissance study if such work is determined to be compatible with the project later recommended for construction. As required by section 211 (e) (2) (A) the reimbursement must be contained *in* (emphasis added) an Appropriations Act; that is, the reimbursement must be earmarked in law. Any eligible reimbursable Federal share of costs associated with studies, planning or design efforts will be included in the final auditing of the total project costs upon completion of the construction of a project or separable element thereof.

For the specifically named projects, consideration will be given to reimbursement on an incremental basis; that is, reimbursement will be recommended upon completion of the construction of a discrete segment of an economically justified and environmentally acceptable project or separable element, thereof, provided that the non-Federal sponsor has entered into a binding agreement with the Secretary and has committed to the construction of the total project or separable element thereof. A discrete segment is defined as a physical portion of the project, as described in design documents, that is environmentally acceptable, is complete, will not create a hazard, and functions independently so that the non-Federal sponsor can operate and maintain it in advance of completion of the total project or separable element thereof. Reimbursements will not be made unless and until the Secretary has determined that the construction for which reimbursement is requested is complete, is consistent with the authorization of the project and its overall economic justification, and has been performed in accordance with applicable permits and approved plans. Further, the agreement must contain a provision which will require the non-Federal sponsor to remit previously received reimbursements in the event that the non-Federal sponsor fails to complete the entire project or separable element thereof.

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d. Reimbursement for Flood Damage Prevention Measures at Morgan City and Berwick, Louisiana (Section 211(g)): Section 211 (g) of WRDA 96 provides that, for the purposes of section 211, flood damage prevention measures at or in the vicinity of Morgan City and Berwick, Louisiana, shall be treated as an authorized separable element of the Lower Atchafalaya Basin feature of the project for Flood Control, Mississippi River and Tributaries.

As such, this separable element may be designed and constructed by the non-Federal sponsor and considered for reimbursement subject to the law and to the policies established under section 211 (e) (1) as discussed in paragraph 4b, above.

5. Implementation. This guidance is effective immediately. Detailed guidance will be issued in an ER. In the event non-Federal sponsors wish to pursue construction of an authorized flood control project using section 211 prior to the issuance of the ER, the division program manager must contact HQUSACE, ATTN: CECW-AA.

FOR THE COMMANDER:

Encl

/s/
RUSSELL L. FUHRMAN
Major General, USA
Director of Civil Works

SEC. 211. CONSTRUCTION OF FLOOD CONTROL PROJECTS BY NON-FEDERAL INTERESTS.

(a) Authority.--Non-Federal interests are authorized to undertake flood control projects in the United States, subject to obtaining any permits required pursuant to Federal and State laws in advance of actual construction.

(b) Studies and Design Activities.--

(1) By non-federal interests.--A non-Federal interest may prepare, for review and approval by the Secretary, the necessary studies and design documents for any construction to be undertaken pursuant to subsection (a).

(2) By secretary.--Upon request of an appropriate non-Federal interest, the Secretary may undertake all necessary studies and design activities for any construction to be undertaken pursuant to subsection (a) and provide technical assistance in obtaining all necessary permits for such construction if the non-Federal interest contracts with the Secretary to provide to the United States funds for the studies and design activities during the period in which the studies and design activities will be conducted.

(c) Completion of Studies and Design Activities.--In the case of any study or design documents for a flood control project that were initiated before the date of the enactment of this Act, the Secretary may complete and transmit to the appropriate non-Federal interests the study or design documents or, upon the request of such non-Federal interests, terminate the study or design activities and transmit the partially completed study or design documents to such non-Federal interests for completion. Studies and design documents subject to this subsection shall be completed without regard to the requirements of subsection (b).

(d) Authority To Carry Out Improvement.--

(1) In general.--Any non-Federal interest that has received from the Secretary pursuant to subsection (b) or (c) a favorable recommendation to carry out a flood control project, or separable element of a flood control project, based on the results of completed studies and design documents for the project or element may carry out the project or element if a final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) has been filed for the project or element.

(2) Permits.--Any plan of improvement proposed to be implemented in accordance with this subsection shall be deemed to satisfy the requirements for obtaining the appropriate permits required under the Secretary's authority. Such permits shall be granted subject to the non-Federal interest's acceptance of the terms and conditions of such permits if the Secretary determines that the applicable regulatory criteria and procedures have been satisfied.

(3) Monitoring.--The Secretary shall monitor any project for which a permit is granted under this subsection in order to ensure that such project is constructed, operated, and maintained in accordance with the terms and conditions of such permit.

(e) Reimbursement.--

(1) General rule.--Subject to appropriations Acts, the Secretary may reimburse any

Enclosure

non-Federal interest an amount equal to the estimate of the Federal share, without interest, of the cost of any authorized flood control project, or separable element of a flood control project, constructed pursuant to this section--

(A) if, after authorization and before initiation of construction of the project or separable element, the Secretary approves the plans for construction of such project by the non-Federal interest; and

(B) if the Secretary finds, after a review of studies and design documents prepared pursuant to this section, that construction of the project or separable element is economically justified and environmentally acceptable.

(2) Special rules.--

(A) Reimbursement.--For work (including work associated with studies, planning, design, and construction) carried out by a non-Federal interest with respect to a project described in subsection (f), the Secretary shall, subject to amounts being made available in advance in appropriations Acts, reimburse, without interest, the non-Federal interest an amount equal to the estimated Federal share of the cost of such work if such work is later recommended by the Chief of Engineers and approved by the Secretary.

(B) Credit.--If the non-Federal interest for a project described in subsection (f) carries out work before completion of a reconnaissance study by the Secretary and if such work is determined by the Secretary to be compatible with the project later recommended by the Secretary, the Secretary shall credit the non-Federal interest for its share of the cost of the project for such work.

(3) Matters to be considered in reviewing plans.--In reviewing plans under this subsection, the Secretary shall consider budgetary and programmatic priorities and other factors that the Secretary considers appropriate.

(4) Monitoring.--The Secretary shall regularly monitor and audit any project for flood control approved for construction under this section by a non-Federal interest to ensure that such construction is in compliance with the plans approved by the Secretary and that the costs are reasonable.

(5) Limitation on reimbursements.--The Secretary may not make any reimbursement under this section until the Secretary determines that the work for which reimbursement is requested has been performed in accordance with applicable permits and approved plans.

(f) Specific Projects.--For the purpose of demonstrating the potential advantages and effectiveness of non-Federal implementation of flood control projects, the Secretary shall enter into agreements pursuant to this section with non-Federal interests for development of the following flood control projects by such interests:

(1) Berryessa Creek, California.--The Berryessa Creek element of the project for flood control, Coyote and Berryessa Creeks, California, authorized by section 101(a)(5) of the Water Resources Development Act of 1990 (104 Stat. 4606); except that, subject to the approval of the Secretary as provided by this section, the non-Federal interest may design and construct an alternative to such element.

(2) Los Angeles County Drainage Area, California.--The project for flood control, Los Angeles County Drainage Area, California, authorized by section 101(b) of the Water Resources Development Act of 1990 (104 Stat. 4611).

(3) Stockton Metropolitan Area, California.--The project for flood control, Stockton Metropolitan Area, California.

(4) Upper Guadalupe River, California.--The project for flood control, Upper Guadalupe River, California.

(5) Flamingo and Tropicana Washes, Nevada.--The project for flood control, Las Vegas Wash and Tributaries (Flamingo and Tropicana Washes), Nevada, authorized by section 101(13) of the Water Resources Development Act of 1992 (106 Stat. 4803).

(6) Brays Bayou, Texas.--Flood control components comprising the Brays Bayou element of the project for flood control, Buffalo Bayou and Tributaries, Texas, authorized by section 101(a)(21) of the Water Resources Development Act of 1990 (104 Stat. 4610); except that, subject to the approval of the Secretary as provided by this section, the non-Federal interest may design and construct an alternative to the diversion component of such element.

(7) Hunting Bayou, Texas.--The Hunting Bayou element of the project for flood control, Buffalo Bayou and Tributaries, Texas, authorized by such section; except that, subject to the approval of the Secretary as provided by this section, the non-Federal interest may design and construct an alternative to such element.

(8) White Oak Bayou, Texas.--The project for flood control, White Oak Bayou watershed, Texas.

(g) Treatment of Flood Damage Prevention Measures.--For the purposes of this section, flood damage prevention measures at or in the vicinity of Morgan City and Berwick, Louisiana, shall be treated as an authorized separable element of the Atchafalaya Basin feature of the project for flood control, Mississippi River and Tributaries.