



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

CECW-PB/CEMP-POD

**JUN 01 2010**

MEMORANDUM FOR COMMANDER, PACIFIC OCEAN DIVISION

SUBJECT: Implementation of Studies and Projects Under Section 116 of the Energy and Water Development and Related Agencies Appropriations Act, 2010, Public Law 111-85

1. Section 116 of the Energy and Water Development and Related Agencies Appropriations Act of 2010 (P.L. 111-85) provides authority for the Secretary of the Army to carry out structural and non-structural projects for storm damage prevention and reduction, coastal erosion, and ice and glacial damage in Alaska, including relocation of affected communities and construction of replacement facilities. The Act provides that the non-Federal cost share of any project carried out pursuant to Section 116 shall be no more than 35 percent and shall be subject to the ability of the non-Federal interest to pay, as determined in accordance with 33 U.S.C. 2213(m). A copy of Section 116 is enclosed.
2. At such time that funds are appropriated, the District will prepare a Project Management Plan and negotiate a Feasibility Cost Sharing Agreement (FCSA) for each project under consideration. No FCSA is required if the feasibility phase can be completed for \$100,000 or less, with those costs a full Federal expense. Any feasibility costs in excess of \$100,000 will be cost shared with the non-Federal sponsor at 50 percent Federal and 50 percent non-Federal. No funds in excess of the \$100,000 will be allocated to the project until a FCSA is executed.
  - (a) The Continuing Authorities Program (CAP) FCSA will be used as the basis for drafting a FCSA for a study conducted pursuant to this authority. Close coordination should be maintained through the vertical team in development of the initial study specific FCSA. Work will be initiated in HQUSACE on optional language to include in the FCSA to address the Section 116 authority. Until the necessary changes to the FCSA are approved, the Pacific Ocean Division (POD) Commander must forward to the POD Regional Integration Team (RIT) six hardcopies and an electronic copy of a FCSA package containing: a clean copy of the negotiated draft FCSA; a copy of the draft FCSA with the deviations from the model CAP FCSA along with detailed reasons for each deviation; Certificate of Legal Review signed by the District Counsel; current letter of intent from the non-Federal sponsor, and the non-Federal sponsor's signed Self-Certification of Financial Capability for Agreements. All documents requiring signature (Certificate of Legal Review, Letter of Intent, and the non-Federal sponsor's Self-Certification of Financial Capability) must be scanned so that required signatures are contained in the electronic file.

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The POD RIT will coordinate the necessary Headquarters US Army Corps of Engineers (HQUSACE) level review and HQUSACE will approve the FCSA.

(b) In accordance with the principles of Section 105(a) of WRDA 86, as amended, the non-Federal sponsor may be afforded credit toward its share of study costs for the value of in-kind contributions performed during the feasibility phase (that is after execution of the FCSA). Credit afforded is limited to value of the in-kind contributions that does not result in any reimbursement to the non-Federal sponsor, including consideration of costs incurred by the non-Federal sponsor for participation in the study coordination team and certain audit-related activities (see paragraph F-15.b.(2) of Appendix F of ER 1105-2-100).

3. Feasibility studies will be conducted in accordance with ER 1105-2-100. Each decision document will present the National Economic Development (NED) analysis for all viable alternatives and identify the NED Plan when alternatives exist with net positive NED benefits. If there is no NED Plan and/or the selection of a plan other than the NED Plan is based in part or whole on non-monetary units (Environmental Quality and/or Other Social Effects), then the selection will be supported by a cost effectiveness/incremental cost analysis consistent with established evaluation procedures (see ER 1105-2-100, Appendix E). The decision document will present the tradeoffs of impacts in the four accounts for the plans contained in the final array and describe in detail the compelling justification for any plan that is not the NED Plan. Non-monetary benefits that may be considered include such things as public health and safety; local and regional economic opportunities; and, social and cultural value to the community. For each project, a decision document will be prepared that identifies a recommended plan and complies with all applicable environmental laws, and regulations and policies. In addition, an ability to pay analysis will be conducted in accordance with existing Ability to Pay Guidance in the Final Amended Rule, Federal Register, (60 FR 5133), 26 January 1995.

(a) Minimum requirements for a decision document are: (1) a clear description of the recommended plan; (2) NED analysis; (3) a justification for deviation from the NED plan based upon the four Principles and Guidelines accounts as discussed in ER 1105-2-100; (4) documentation of compliance with appropriate Federal, State, and local environmental and regulatory requirements; (5) a description of the real estate required for the project and a Real Estate Plan, in accordance with Chapter 12 of ER 405-1-12; (6) District Real Estate certification that the non-Federal sponsor has the capability to acquire and provide the required real estate interests; (7) identification of the non-Federal sponsor's anticipated operation, maintenance, repair, replacement, and rehabilitation (OMRR&R) activities, including estimated costs; (8) the non-Federal sponsor's signed Self-Certification of Financial Capability for Decision Documents; (9) the feasibility level District Quality Control review, the Agency Technical Review certification, and a certified copy of any required Independent External Peer Review completed in accordance with EC 1165-2-209; and (10) District Counsel statement of legal sufficiency for the decision documentation and environmental

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compliance. The POD RIT will coordinate the necessary HQUSACE-level review and HQUSACE will approve the decision document.

(b) A Feasibility Scoping Meeting (FSM) will take place after preliminary plan formulation; preliminary evaluation and screening of alternatives; and any NEPA scoping meetings. The purpose of the FSM is to bring the vertical team, the non-Federal sponsor, and the resource agencies together to agree on the problems and solutions to be investigated and the scope of the analysis required.

(c) An Alternative Formulation Briefing (AFB) will take place after alternative plans have been formulated and prior to POD approval of release of the draft decision document for public review. The purpose of the AFB is to ensure that plans have been properly formulated, any legal and policy issues have been identified and resolution has been reached, and POD concurs with the plan that will likely proceed into the design and implementation phase.

(d) Additional milestones may be added at the discretion of the POD Commander.

4. The Design and Implementation phase includes all of the activities that would normally be included in the Preconstruction Engineering and Design (PED) and construction phases of specifically authorized projects. The Design and Implementation phase will be conducted under the provision of a Project Partnership Agreement (PPA) executed by the District Commander and the non-Federal sponsor upon approval of the PPA by the Assistance Secretary of the Army (Civil Works) (ASA(CW)).

(a) All costs incurred for this phase will be shared 65 percent Federal and 35 percent non-Federal with the non-Federal sponsor in accordance with the terms of the PPA. An initial \$100,000 will be allotted to the project to finance the Federal costs of negotiating the PPA and initiating design. No design may be initiated until the PPA is executed. The Federal costs to negotiate the PPA and initiate design will be included in total project costs and shared with the non-Federal sponsor pursuant to the terms of the PPA. No funds in excess of \$100,000 will be allotted to a project until the PPA is executed.

(b) The non-Federal sponsor share shall be 35 percent of total project costs during the Design and Implementation phase. In accordance with the terms of the PPA, the non-Federal sponsor must provide all lands, easements, rights-of-way, relocations, and dredged or excavated material disposal areas required for the project, participate in the Project Coordination Team, perform necessary non-Federal audits, and perform investigations necessary to identify the existence and extent of hazardous substances on all lands, easements, and rights-of-way required for the project. Operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) of the completed project is a 100% non-Federal responsibility. In addition to Providing cost sharing the non-Federal sponsor must meet the requirements of sponsorship specified in paragraph F-3.h. of Appendix F of ER 1105-2-100.

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(c) The current approved Section 206 single purpose model PPA should be used as the basis to draft PPAs for projects being implemented pursuant to Section 116. The model may be modified to delete references to monitoring that are not pertinent to storm damage prevention and reduction, coastal erosion, and ice and glacial damage. Close coordination should be maintained through the vertical team in development of the initial project specific design and implementation PPA. Work will be initiated in HQ on a model PPA for the Section 116 program. Until a model PPA is approved and approval and execution authority is delegated, the POD Commander shall forward to the POD RIT six hardcopies and an electronic copy of a PPA package containing: a clean copy of the negotiated draft agreement; a copy of the draft agreement with the deviations from the Section 206 model PPA indicated by redline/strikeout along with detailed reasons for each deviation; Certificate of Legal Review signed by the District Counsel; PPA Checklist (the PPA Checklist should be adapted and used); Federal/non-Federal Funds Allocation Table; and the non-Federal sponsor's signed Self-Certification of Financial Capability for Agreements. All documents requiring signature (PPA checklist, Certificate of Legal Review, and the non-Federal sponsor's Self-Certification of Financial Capability) must be scanned so that required signatures are contained in the electronic file. The POD RIT will coordinate the necessary HQ-level review and submission of the PPA to ASA(CW) for approval.

(d) Section 2003(a)(4) of WRDA 2007 established that a PPA may provide credit toward the non-Federal share of the cost of a project for the value of in-kind contributions provided or performed by non-Federal interests. The guidance and procedures contained in Engineering Circular No. 1165-2-208 (In-Kind Contribution Provisions of Section 221) should be used to determine eligibility of credit for such in-kind contributions. The actual value of the in-kind contributions will be determined in accordance with the terms and conditions of the PPA for the project.

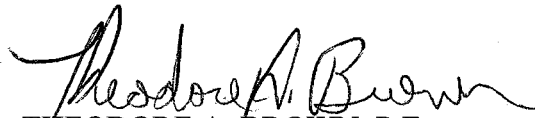
5. On March 11, 2009, Section 117 of the Energy and Water Development Appropriations Act, 2005 (Division C of the Consolidated Appropriations Act, 2005, Public Law 108-447) (hereinafter "Section 117") was repealed. At the time of the repeal, a number of POA projects were underway using Section 117 as the authority for full Federal funding of costs associated with those projects. With limited exceptions, Section 117's repeal barred further full Federal funding of these projects, requiring their prompt termination. In proposing the initiation of new work on these projects under Section 116, the District shall follow all requirements of this guidance, except for the four Alaska Coastal Erosion projects (Unalakleet Shoreline Erosion, Kivilina Shoreline Erosion, Shishmaref Shoreline Erosion, and Newtok Shoreline Erosion) that were under construction at the time of repeal of Section 117. Subject to the availability of funds and amendment of existing PPAs to reflect the cost sharing requirements for work pursuant to Section 116, the Alaska District may proceed under the Section 116 authority to enter into construction contracts or modification of the existing construction contract to complete the four named projects as defined by their respective Decision Documents. For each of these four named projects, the POD Commander shall forward to the POD RIT for HQ-level review and

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submission to ASA(CW) for approval a PPA amendment package that follows the requirements set out in paragraph 4(c), except that instead of deviations from the Section 206 model, the package will include the previously executed Section 117 agreement with proposed changes indicated by redline/strikeout.

FOR THE COMMANDER:



THEODORE A. BROWN, P.E.  
Chief, Planning and Policy Division  
Directorate of Civil Works

Enclosure

Section 116 of the Energy and Water Development and Related Agencies Appropriations Act, 2010, Public Law 111-85, Title I states: *“The Secretary of the Army is authorized to carry out structural and non-structural projects for storm damage prevention and reduction, coastal erosion, and ice and glacial damage in Alaska, including relocation of affected communities and construction of replacement facilities: Provided, That the non-Federal share of any project carried out pursuant to this section shall be no more than 35 percent of the total cost of the project and shall be subject to the ability of the non-Federal interest to pay, as determined in accordance with 33 U.S.C. 2213(m).”*