



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

CECW-P

MAY 06 2019

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Revised Implementation Guidance for Section 1152 of the Water Resources Development Act (WRDA) of 2018, Studies of Water Resources Development Projects by Non-Federal Interests

1. The Assistant Secretary of the Army, Civil Works approved on 2 May 2019 Section 1152 of WRDA 2018. The attached implementation guidance is posted for internal and external use on the U.S. Army Corps of Engineers official WRDA website: <http://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/>.
2. Please ensure wide dissemination of this guidance. Questions regarding this implementation guidance should be directed to the Headquarters POC, Ada Benavides, Senior Policy Advisor, Planning and Policy Division, at (202) 761-0415 or ada.benavides@usace.army.mil.

A handwritten signature in blue ink, appearing to read "J. Dalton".

JAMES C. DALTON, P.E.
Director of Civil Works

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DEPARTMENT OF THE ARMY
ASSISTANT SECRETARY OF THE ARMY
CIVIL WORKS
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WASHINGTON DC 20310-0108

MAY -2 2019

MEMORANDUM FOR THE COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Implementation Guidance for Section 1152 of the Water Resources Development Act of 2018, Studies of Water Resources Development Projects by Non-Federal Interests

1. Section 1152 of the Water Resources Development Act of 2018 (WRDA 2018) further amends Section 203 of the Water Resources Development Act of 1986 (WRDA 1986) (33 U.S.C. 2231), which authorizes non-Federal interests to undertake feasibility studies of water resources development projects for submission to the Secretary, to require that the study must be Federally authorized. In addition, it provides that the completion of a review by the Secretary of a submitted study may not be delayed as a result of consideration being given to changes in policy or priority with respect to project consideration. Further, it authorizes the Secretary to accept funds provided by non-Federal interests to carry out technical assistance related to any aspect of the feasibility study, and it also authorizes the Secretary to accept funds provided by non-Federal interests to undertake reviews, inspections, certifications, and other activities that are the responsibility of the Secretary in carrying out Section 203. It specifies that any funds provided by non-Federal interests under Section 203 are not eligible for credit or reimbursement. Finally, it provides that the Secretary shall ensure that the use of funds accepted from the non-Federal interests will not affect the impartial decision making of the Secretary, either substantively or procedurally, and the provision of technical assistance shall not be considered an approval or endorsement of the feasibility study and shall not affect the responsibilities of the Secretary under Section 203. Section 203 of WRDA 1986, as amended (33 U.S.C. 2231) and Section 1152 of WRDA 2018 are enclosed.

2. Section 203 of WRDA 1986, as amended, provides for the provision of technical assistance requested by a non-Federal interest undertaking a feasibility study if the non-Federal interest pays all costs of providing such assistance. Technical assistance in accordance with Section (e)(2) includes activities such as providing factual or technical information, running models, and providing information on how the U.S. Army Corps of Engineers (Corps) conducts its project formulation process. Technical assistance is not turnkey report preparation by the Corps or completion of components/chapters of the study. Nor does it include inherently governmental functions such as the National Environmental Policy Act or consulting with federal resource agencies under Section 7 of the Endangered Species Act, State Historic Preservation Officers under Section 106 of the National Historic Preservation Act, or Tribal consultation. The Corps may provide

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technical assistance in the development of environmental documents that can be used by the Assistant Secretary of the Army for Civil Works (ASA(CW)) in completing the Federal environmental compliance requirements. It is important to ensure that nothing in the provision of technical assistance by the Corps could be considered as an endorsement or approval of the non-Federal feasibility study or as affecting the impartial decision making of the ASA(CW), either substantively or procedurally. Once the ASA(CW) submits the report to Congress, no further technical assistance using Section 203(e) may be provided. Authority to approve the provision of technical assistance to include the scope of work, and the associated Memorandum of Agreement (MOA), is delegated to the Major Subordinate Command (MSC) Commander, with no further delegation authorized. Upon approval of an MOA, the MSC Commander may delegate the execution of the MOA to the appropriate District Commander. A template MOA is posted on the Corps Headquarters' agreements website.

3. Section 203 of WRDA 1986, as amended, authorizes the Secretary to accept funds provided by non-Federal interests to undertake reviews, inspections, certifications, and other activities that are the responsibility of the Secretary in carrying out Section 203. To avoid any perception of endorsement or approval of the non-Federal interest feasibility study, the Corps may accept funds from the non-Federal interest to undertake reviews and other responsibilities of the Secretary, including inherently Federal governmental functions, only after the feasibility study has been submitted to the ASA(CW) for review under Section 203.

a. Completion of Federal environmental compliance requirements are inherently Federal governmental functions that must be performed by the Federal government when it is determined that there is a Federal action triggering such compliance. The non-Federal interest cannot complete inherently Federal governmental functions although the non-Federal interest's feasibility study may include information that can be used by the ASA(CW) in completing the Federal environmental compliance requirements. In addition, there may be state or local requirements that the non-Federal interest may perform for its own activity that will expedite subsequent Federal compliance.

b. After the non-Federal feasibility study report is submitted to the ASA(CW), the ASA(CW) may provide the report to the appropriate Regional Integration Team (RIT), Corps Headquarters who will coordinate the Headquarters' policy review and comments. The Headquarters team will have no more than 30 days after receipt of the report from the ASA(CW) to complete their initial review of the study. It is expected that the Office of the ASA(CW) team and Headquarters' team will coordinate often during this time to ensure an efficient and effective review. In addition, the ASA(CW) may direct the Corps to undertake actions related to environmental compliance prior to the ASA(CW) transmitting the non-Federal interest feasibility study to Congress. Actions to review the report or to undertake environmental compliance requirements are subject to the availability of Federal funds or funds offered by the non-Federal interest in accordance with Section 203(e)(1) to undertake reviews, inspections, certifications, and other activities that are the responsibility of the Secretary in carrying out Section 203.

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c. The ASA(CW) will determine whether to use Federal funds, if available, or funds offered by the non-Federal interest to review the non-Federal feasibility study report or to undertake environmental compliance requirements, or a combination of funding. If the ASA(CW) determines that non-Federal interest funds may be accepted for reviews or completion of environmental compliance requirements, the appropriate District Commander will negotiate with the non-Federal interest to develop the MOA. The MSC Commander will complete a review of the draft MOA within 15 days of receipt. The MSC Commander is authorized to approve the MOA for the acceptance of funds, with no further delegation authorized. Upon approval of an MOA, the MSC Commander may delegate the execution of the MOA to the appropriate District Commander. A template MOA will be developed and posted on the Headquarters' agreements website. Once the ASA(CW) submits the report to Congress, non-Federal funds may no longer be accepted under Section 203(e) to undertake any further review of the report or completion of environmental compliance requirements.

4. As specified in Section 203, funds provided by non-Federal interests pursuant to Section 203 are not be eligible for credit towards the construction of the proposed non-Federal interest project, nor any other Corps Water Resources Development study or project or for reimbursement.

5. The Director of Civil Works will ensure that the required updates are made to Engineer Regulation 1165-2-209. A draft of the updated Engineer Regulation will be submitted to the ASA(CW) for review and action within 90 days of issuance of this guidance.

6. This guidance shall be transmitted to the appropriate Corps Division and District Commanders and posted to the Corps' WRDA website within five business days of receipt (written or electronic) from this office. Guidance shall be transmitted and posted as is and without additional guidance attached.

7. Questions regarding this implementation guidance should be directed to Andrea Walker, Office of the Assistant Secretary of the Army for Civil Works, at andrea.e.walker.civ@mail.mil or 202-761-0027.

Enclosure



R.D. James
Assistant Secretary of the Army
(Civil Works)

cf: MG Scott Spellmon, Deputy Commanding General, Civil and Emergency Operations
James Dalton, Director of Civil Works

Section 1152 of WRDA 2018. STUDY OF WATER RESOURCES DEVELOPMENT PROJECTS BY NON-FEDERAL INTERESTS.

Section 203 of the Water Resources Development Act of 1986 (33 U.S.C. 2231) is amended

(1) in subsection (a)(1), by inserting "federally authorized" before "feasibility study";

(2) by amending subsection (c) to read as follows:

(c) SUBMISSION TO CONGRESS

(1) REVIEW AND SUBMISSION OF STUDIES TO CONGRESS.

Not later than 180 days after the date of receipt of a feasibility study of a project under subsection (a)(1), the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report that describes

(A) the results of the Secretary's review of the study under subsection (b), including a determination of whether the project is feasible;

(B) any recommendations the Secretary may have concerning the plan or design of the project; and

(C) any conditions the Secretary may require for construction of the project.

(2) **LIMITATION.** The completion of the review by the Secretary of a feasibility study that has been submitted under subsection (a)(1) may not be delayed as a result of consideration being given to changes in policy or priority with respect to project consideration; and

(3) by amending subsection (e) to read as follows:

(e) REVIEW AND TECHNICAL ASSISTANCE.

(1) **REVIEW.** The Secretary may accept and expend funds provided by non-Federal interests to undertake reviews, inspections, certifications, and other activities that are the responsibility of the Secretary in carrying out this section.

(2) **TECHNICAL ASSISTANCE.** At the request of a non-Federal interest, the Secretary shall provide to the non-Federal interest technical assistance relating to any aspect of a feasibility study if the non-Federal interest contracts with the Secretary to pay all costs of providing such technical assistance.

(3) **LIMITATION.** Funds provided by non-Federal interests under this subsection shall not be eligible for credit under subsection (d) or reimbursement.

(4) **IMPARTIAL DECISIONMAKING.** In carrying out this section, the Secretary shall ensure that the use of funds accepted from a non-Federal interest will not affect the impartial decision-making of the Secretary, either substantively or procedurally.

(5) SAVINGS PROVISION. The provision of technical assistance by the Secretary under paragraph (2)

(A) shall not be considered to be an approval or endorsement of the feasibility study; and

(B) shall not affect the responsibilities of the Secretary under subsections (b) and (c).

Section 203 of the Water Resources Development Act of 1986, as amended (33 U.S.C. §2231)

Section 203. Study of water resources development projects by non-Federal interests.

(a) Submission to Secretary.

(1) In general. A non-Federal interest may undertake a federally authorized feasibility study of a proposed water resources development project and submit the study to the Secretary.

(2) Guidelines. To assist non-Federal interests, the Secretary, as soon as practicable, shall issue guidelines for feasibility studies of water resources development projects to provide sufficient information for the formulation of the studies.

(b) Review by Secretary. The Secretary shall review each feasibility study received under subsection (a)(1) for the purpose of determining whether or not the study, and the process under which the study was developed, each comply with federal laws and regulations applicable to feasibility studies of water resources development projects.

(c) Submission to Congress.

(1) Review and Submission of Studies to Congress. Not later than 180 days after the date of receipt of a feasibility study of a project under subsection (a)(1), the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report that describes

(A) the results of the Secretary's review of the study under subsection (b), including a determination of whether the project is feasible;

(B) any recommendations the Secretary may have concerning the plan or design of the project; and

(C) any conditions the Secretary may require for construction of the project.

(2) Limitation. The completion of the review by the Secretary of a feasibility study that has been submitted under subsection (a)(1) may not be delayed as a result of consideration being given to changes in policy or priority with respect to project consideration.

(d) Credit. If a project for which a feasibility study has been submitted under subsection (a)(1) is authorized by a federal law enacted after the date of the submission to Congress under subsection (c), the Secretary shall credit toward the non-Federal share of the cost of construction of the project an amount equal to the portion of the cost of developing the study that would have been the responsibility of the United States if the study had been developed by the Secretary.

(e) Review and Technical Assistance.

(1) Review. The Secretary may accept and expend funds provided by non-Federal interests to undertake reviews, inspections, certifications, and other activities that are the responsibility of the Secretary in carrying out this section.

(2) Technical Assistance. At the request of a non-Federal interest, the Secretary shall provide to the non-Federal interest technical assistance relating to any aspect of a feasibility study if the non-Federal interest contracts with the Secretary to pay all costs of providing such technical assistance.

(3) Limitation. Funds provided by non-Federal interests under this subsection shall not be eligible for credit under subsection (d) or reimbursement.

(4) Impartial Decision making. In carrying out this section, the Secretary shall ensure that the use of funds accepted from a non-Federal interest will not affect the impartial decision making of the Secretary, either substantively or procedurally.

(5) Savings Provision. The provision of technical assistance by the Secretary under paragraph (2) -

(A) shall not be considered to be an approval or endorsement of the feasibility study; and

(B) shall not affect the responsibilities of the Secretary under subsections (b) and (c).