



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

CECW-P

FEB 02 2018

MEMORANDUM FOR DISTRIBUTION

SUBJECT: Implementation Guidance for Section 1021 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Crediting Authority for Federally Authorized Navigation Projects

1. Section 1021 of WRRDA 2014 was completed and signed on 1 February 2018. The implementation guidance is posted in the U.S. Army Corps of Engineers website: <http://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/>.
2. Questions regarding this implementation guidance should be directed to Sheryl Carrubba, Acting Chief, Navigation and Operations Branch, at (202) 761-8648 or Sheryl.A.Carrubba@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
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108**

FEB - 1 2018

**MEMORANDUM FOR COMMANDING GENERAL U.S. ARMY CORPS OF
ENGINEERS**

SUBJECT: Implementation Guidance for Section 1021 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Crediting Authority for Federally Authorized Navigation Projects

1. Section 1021 of WRRDA 2014 provides that a non-federal interest may carry out operation and maintenance (O&M) activities for an authorized navigation project and receive credit for the cost of those activities towards its share of construction costs of an unconstructed authorized element of the same project or another authorized navigation project, except such credit may not exceed 20 percent of the total costs of construction of the general navigation features of the project for which credit may be applied. It conditions the non-federal interest carrying out O&M activities on compliance with all federal laws and regulations applicable to such activities. Section 1021 is enclosed.
2. This guidance is applicable to all HQUSACE elements, major subordinate commands (MSC), and district commands having a Civil Works navigation responsibility.
 - a. A non-federal interest undertaking O&M activities under Section 1021 must meet the requirements of Section 221(b) of the Flood Control Act of 1970, as amended, applicable to non-federal sponsors for water resources development projects.
 - b. Materials, including equipment, used in carrying out the O&M activities must meet Corps of Engineers standards. Material handling, storage, and disposal must comply with provisions of EM 385-1-1, Safety and Health Requirements Manual. Materials used for O&M activities shall include a warranty that is transferable to the Corps of Engineers.
 - c. O&M activities carried out by a non-federal interest may not displace Corps of Engineers personnel. However, such O&M activities may supplement existing staff and may also include work that would not otherwise be accomplished because of Corps of Engineers funding or personnel limitations.

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d. Environmental compliance with all applicable laws must be completed before the non-federal interest undertakes O&M activities under Section 1021.

e. A non-federal interest carrying out approved O&M activities under Section 1021 does not involve 33 U.S.C. 408.

f. A non-federal interest is fully responsible for O&M activities it carries out under Section 1021.

3. Prior to the non-federal interest undertaking O&M activities for which credit is sought, the Assistant Secretary of the Army (Civil Works) (ASA(CW)) must approve the proposal and a Memorandum of Agreement for such work must be executed. The following procedures apply:

a. The non-federal interest must submit to the district commander a request letter and plan that provides the necessary details of the proposed O&M activities to be undertaken by the non-federal interest using its personnel and equipment. The plan must document in detail how use of the proposed O&M activities are in accordance with the operation and maintenance manual or related document that supports the operation and maintenance of the project. The plan will also document that the materials or services as part of the O&M activities to be provided by the non-federal interest meet the requirements of EM 385-1-1 and other relevant USACE regulations. The non-federal interest request letter and plan will include, at a minimum:

(1) Identification of the authorized navigation project and a detailed explanation of the proposed O&M activities.

(2) A description, and map, of the location within the project of the proposed O&M activities, and description of intended navigation benefits.

(3) If the proposed O&M activities include dredging, a description of the proposed dredged material placement site and location, including a map.

(4) The timing and method of the proposed maintenance dredging or other O&M activities.

(5) A listing of vehicles, vessels, machinery, or other specialized equipment to be used by the non-federal interest that comply with the requirements for inspection criteria, safety devices and operational aids, environmental considerations, operating rules, and guarding and safety devices.

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(6) A listing of qualified contractors or employees of the non-federal interest who are authorized to operate vessels, machinery or other specialized equipment. Employees or contractors for the non-federal interest must have the proper training, license, and/or experience to carry out the O&M activities.

(7) Security clearances for all contractors and employees for the non-federal interest must be validated, when appropriate, as determined by the district commander. Individuals may be legal aliens (permanent residents) or foreign exchange students. Any non-U.S. citizen must present his/her Visa (or passport if in the U.S. in tourist status from a visa-waiver country where visas are not required) or U.S. Permanent Resident Card INS Form 1-551 (formerly known as Alien Registration Receipt Card) for review and verification. Persons who have been convicted of a violent crime, sexual crime, arson, crime with a weapon, or sale or intent to distribute illegal drugs, or are an organized crime figure will not be utilized as volunteers. Persons awaiting trial or under indictment for any of the crimes listed above will not be utilized as a volunteer until the case has been resolved in the person's favor through the legal process. Use of civilian prison labor from the Federal Bureau of Prisons, and State and County Correctional Systems is beyond the scope of this authorization.

(8) An approved Accident Prevention Plan.

(9) The estimated cost of the O&M activities.

(10) The design, engineering plans, and specifications for the proposed O&M activities.

(11) Identification of the authorized navigation project, or separable element thereof to which credit will be applied.

b. The district will assess the adequacy of the information submitted by the non-federal interest to determine whether the proposed O&M activities meet the requirements of the applicable O&M manual, federal laws and regulations and navigation needs, and provides the intended navigation benefits. The O&M activities must be work that the Corps of Engineers otherwise would have undertaken as normal maintenance.

c. After confirming the adequacy and completeness of the information submitted, the district will transmit it, along with the division commander's recommendations, through the division, to the respective Headquarters (HQ) Regional Integration Team (RIT) for review and processing to the ASA(CW) for a decision.

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d. If ASA(CW) approves the non-federal interest's request, an MOA for such O&M activities must be executed prior to the non-federal interest undertaking the activities. The Headquarters will develop a model MOA for O&M activities under Section 1021. Once the model MOA is approved, responsibility for review and approval of an MOA that does not deviate from the approved model will be delegated to the division commanders. Division counsel concurrence that the agreement does not deviate from the model, and is appropriate for use for the particular proposal, is required prior to approval. Once the division commander approves the MOA, it may be executed by the district commander.

e. In undertaking the O&M activities, the non-federal interest must comply with all applicable federal laws and regulations applicable to such activities. In addition, the non-federal interest is responsible for obtaining all required permits, including any required state and local permits, prior to initiating the O&M activities.

(1) The requirements of the National Environmental Policy Act and all other applicable environmental statutes and executive orders must be satisfied. Dredging and other O&M activities in navigable waters by a non-federal interest will require permits from the Corps under the following authorities, as applicable: section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. A list of related laws that may apply to Corps permits is provided in 33 CFR 320.3. For Department of Army permits, the Corps district regulatory staff should use the environmental compliance documentation for the federal water resources project prepared by district planning staff that was approved by the district commander, if the documentation is up to date. If the maintenance dredging activity and other O&M activities in navigable waters will be performed by the non-federal sponsor (or its contractor) for that project, the maintenance dredging activity and other O&M activities in navigable waters is already covered by the federal water resources project authorization and a separate Department of the Army permit is not required.

(2) In addition, O&M activities carried out by the non-federal interest must comply with all applicable laws that would apply if activities were carried out by the Corps of Engineers. Applicable Federal laws and regulations may include, but are not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act); the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4630 and 4655) and the regulations contained in 49 CFR Part 24; Section 601 of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense

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Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto; Buy American Act (41 U.S.C. 8302); Clean Air Act (42 U.S.C. 7606; Clean Water Act (33 U.S.C. 1368); Jones Act (46 U.S.C. 55109); Shipping Act (46 U.S.C. 55109); Utilization of Small Business Act (15 U.S.C. 631, 644; and Equal Opportunity for Veterans Act (38 U.S.C. 4212). In addition, a list of related laws which may apply and must be satisfied when applicable, is set forth at 33 CFR Section 320.3. The district commander should be prepared to provide copies of language used by the Corps of Engineers in its standard contracts to serve as a guide for the non-federal interest in developing its own contract.

(3) If the existing real property interests are not sufficient for the performance of O&M activities under Section 1021, the non-federal interest will be required to undertake acquisition of additional real property interests in accordance with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24.

(4) Prior to commencement of maintenance dredging, if part of the O&M activities to be undertaken, the non-Federal interest shall conduct or obtain current hydrographic surveys to determine the existing conditions of the navigation channel, and to estimate the quantity of the material to be dredged.

(5) Following completion of the O&M activities, the non-federal interest must provide to the district commander all necessary documentation of the work performed, such as dredging quantities, location of dredging, location of dredged material placement site, and the actual costs incurred for the O&M activities. The non-federal interest will only receive credit for maintenance dredging performed within the constructed dimensions of the navigation project, which would include any approved advanced maintenance and allowable overdepth, or for other O&M activities within authorized dimensions or specified limits.

f. Any credit is subject to the district commander determining that the O&M activities have been performed in accordance with the terms of the MOA, applicable permits and the approved plans and specifications and further that the costs are reasonable, allocable, and allowable. Further, credit is limited to the lesser of the actual cost of the O&M activities or the estimated cost that the government would have incurred to perform such activities. No reimbursement of costs for the O&M activities is authorized by Section 1021.

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g. In order to apply credit toward the non-federal share of the construction of general navigation features of a project, or separable element, approved by the ASA(CW), the Project Partnership Agreement (PPA) must address the affording of the credit, including through an amendment of the PPA if the PPA is already executed. A PPA or PPA amendment providing for such credit will require approval by the Director of Civil Works. Credit afforded under Section 1021 may not exceed 20 percent of the total costs of construction of the general navigation features of the project to which the credit will be applied. Credit under Section 1021 has no effect on the requirement for a non-federal sponsor to provide Lands, Easements, Rights of Way, and Relocations; to pay an additional 10 percent of general navigation features costs; or to pay its share of O&M costs for deep draft navigation projects.

4. Questions regarding this implementation guidance may be directed to Gib Owen, Office of the Assistant Secretary of the Army for Civil Works at 703-695-4641 or gib.a.owen.civ@mail.mil. Technical questions can be directed to Chief, Navigation and Operations Branch at 202-761-8648



RYAN A. FISHER
Acting Assistant Secretary of the Army
Civil Works

Encl

Sec. 1021. Crediting Authority For Federally Authorized Navigation Projects.

A non-Federal interest may carry out operation and maintenance activities for an authorized navigation project, subject to the condition that the non-Federal interest complies with all Federal laws and regulations applicable to such operation and maintenance activities, and may receive credit for the costs incurred by the non-Federal interest in carrying out such activities towards the share of construction costs of that non-Federal interest for another element of the same project or another authorized navigation project, except that in no instance may such credit exceed 20 percent of the total costs associated with construction of the general navigation features of the project for which such credit may be applied pursuant to this section.