



Upper
Mississippi River
Basin Association

ILLINOIS, IOWA, MINNESOTA, MISSOURI, WISCONSIN

February 3, 2016

The Honorable James M. Inhofe
The Honorable Barbara Boxer
U.S. Senate
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable William Shuster
The Honorable Peter A. DeFazio
U.S. House of Representatives
Committee on Transportation and Infrastructure
2165 Rayburn House Office Building
Washington, D.C. 20515-6256

Dear Senator Inhofe, Representative Shuster, Senator Boxer, and Representative DeFazio:

We are very pleased to understand that you are beginning to formulate the 2016 Water Resources Development Act (WRDA). This legislation offers an important opportunity to address challenges in implementing U.S. Army Corps of Engineers' (Corps) water resource projects that require Congressional action to resolve.

In recent years, the Corps has redefined its non-federal project partnership cost share agreements (PPAs) and created two major challenges for non-federal cost share sponsors to execute the agreements. First, the Corps has taken a more restrictive approach on the indemnification provisions in the agreements that is inconsistent with states' constitution and statute and nonprofit organizations' policies. Second, the Corps now legally binds non-federal sponsors to undefined and unbounded operations and maintenance obligations on ecosystem restoration projects. On behalf of the five Upper Mississippi River basin states, I am writing to express the states' mutual concerns regarding their ability to execute agreements on the Corps' ecosystem restoration projects. Our states are eager to work with Congress and the Administration to resolve these challenges in the 2016 WRDA. Challenges related to PPAs not only affect the states, but local governments and nonprofit organizations as well. This is a national issue affecting cost-share projects throughout the country.

The Upper Mississippi River basin states have explored challenges regarding PPA execution in the context of the Corps' Upper Mississippi River Restoration (UMRR) program, with Corps Division and District leadership and candidate nonprofit partners, namely The Nature Conservancy and Audubon. We found that the problematic PPA provisions present pressing implications for constructing important fish and wildlife habitat projects in areas of critical restoration need, preventing the program from advancing its ecological goals for the river. We suggest that members' consider addressing these PPA provisions in the 2016 WRDA by modifying these requirements as they relate to ecosystem restoration projects. Ecosystem restoration projects involve a broad public benefit, are relatively inexpensive to construct compared to other Corps missions, and do not pose a significant threat to life or property.

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The Upper Mississippi River basin states and candidate nonprofit cost share sponsors suggest the following modifications to the current PPA model in order to allow them to cost share on UMRR habitat projects:

1. Modify the hold and save clause to a more equitable, shared approach to liability that does not extend beyond the liabilities that already exist under applicable constitutions and laws.
2. Include language providing that unanticipated costs for project construction are subject to a) the state's future appropriations for the project or b) the nonprofit's availability of funds for the project. In addition, construct projects in phases when appropriate to limit cost overruns.
3. Provide greater specificity regarding OMRR&R costs and requirements in the PPAs, rather than providing those requirements post-construction. PPA provisions related to OMRR&R should include:
 - a. A defined end-term that is based on the expected useful life of the project's construction features.
 - b. Language providing that unanticipated costs are subject to i) the state's future appropriations for the project or ii) the nonprofit's availability of funds for the project.
 - c. Adaptive management provisions to address risk and uncertainty regarding project outcomes and the need and ability to perform OMRR&R obligations depending on whether the project features perform as intended.

We were hopeful that Section 1013 of the 2014 Water Resources and Reform Development Act (WRRDA), requiring the National Academy of Public Administration to evaluate the PPAs, would result in the needed language modifications. However, there has been no progress to this effect and therefore we are respectfully suggesting that these solutions be included in the 2016 WRDA.

As Congress and the federal government continue to prioritize non-federal cost shared projects, we believe that these challenges to PPA execution must be resolved in order for existing and newly authorized projects to be successfully and efficiently implemented. Thank you for your consideration of the Upper Mississippi River basin states' shared perspectives on this critical legislation. We appreciate Congress' substantial efforts in enacting a 2016 water resources act that will allow the nation to better address its critical water-related management needs.

Please do not hesitate to contact me if you have any questions or would like to discuss the Upper Mississippi River basin states' positions in further detail.

Sincerely,



Dru Buntin
Executive Director
Upper Mississippi River Basin Association

cc: Staff of Senate Committee on Environment and Public Works
Staff of House Transportation and Infrastructure Committee
Staff of House Subcommittee on Water Resources and Environment