



December 17, 2021

The Honorable Tom Carper  
The Honorable Shelley Moore Capito  
U.S. Senate  
Committee on Environment and Public Works  
410 Dirksen Senate Office Building  
Washington, D.C. 20510

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

Dear Senators Carper and Moore Capito and Representatives DeFazio and Graves:

As Congress develops its priorities for the Water Resources Development Act (WRDA) of 2022, I am writing to respectfully request the inclusion of a provision to reform the U.S. Army Corps of Engineers' (Corps') project partnership agreements (PPAs). UMRBA is the Governor-established forum for interstate water resource planning and management on the Upper Mississippi River System, representing its member states of Illinois, Iowa, Minnesota, Missouri, and Wisconsin. Formed in 1981, UMRBA represents its member states' common water resource interests and works collaboratively with Upper Mississippi federal and state agencies as well as other non-federal partners. In advancing our shared commitment to multi-use management, the states and Corps work collaboratively to develop solutions through sound water resource projects. In addition, local communities and nonprofit organizations also serve as key partners in sponsoring water resource solutions constructed by the Corps. However, implementing the solutions that involve the states or other non-federal entities serving as cost-share sponsors is impeded, or is dramatically slowed, by the terms required in the cost-share project partnership agreements (PPAs).

The key impediments include the terms requiring the non-federal sponsor to assume complete liability for constructed projects (except for when fault or negligence is proven) and operations, maintenance, repair, replacement, and rehabilitation (OMRR&R) in perpetuity. These terms are simply not reasonable and are not acceptable to many states, local communities, and nonprofit organizations. At a fundamental level, the current PPA terms conflict with many states' constitutions and tort law.

The issues of greatest interest to UMRBA are:

- 1) *Indemnification* – The Corps requires that non-federal sponsors indemnify the federal government for all damages except for fault or negligence. Indemnifying a third party (including the federal government) is in direct conflict with many states' constitutions and laws. It requires the non-federal party to promise financial resources for an indeterminate liability that might occur at an unknown time, at an unknown cost, and for an unknown reason. Many state constitutions preclude agencies from obligating funds without an encumbrance against an appropriation and do not allow for incurring any indebtedness of any nature on behalf of the state until an appropriation for it has been made by the legislature. In addition, indemnification requires a state to assume liability beyond the extent to which many states' tort law permits. Non-federal sponsors are required to execute the PPAs with the liability clause early in the planning stage and before the designs are complete. The Corps takes full control of the land, design of the project, and agreements with the construction contractors. The Corps is also the only point-of-contact to the construction contractors. This results in a completely one-sided approach to project design, implementation, and assumption of risk that favors the federal government.

**Requested solution:**

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) *Operations, Maintenance, Repair, Replacement, and Rehabilitation* – The current PPAs legally obligate non-federal sponsors to undefined and unbounded operations, maintenance, repair, replacement, and rehabilitation (OMRR&R) obligations for the water resource project. Essentially, this requires maintaining the project features as prescribed in O&M manuals forever. That is unreasonable, particularly in dynamic coastal and riverine systems. Historically, the Corps required OMRR&R obligations for 50 years to match the expected life of a constructed project. The Corps changed this policy in 2012 and now requires non-federal sponsors to perform OMRR&R obligations in perpetuity. This shift has resulted in the loss of interested cost share partners at a time when the federal government is promoting its partnerships with the states and private entities.

The 2016 Water Infrastructure Improvements for the Nation (WIIN) Act attempted to bring some resolution to non-federal OMRR&R obligations. Section 1161 caps non-federal sponsors' OMRR&R obligations to 10 years following USACE's determination that the project's physical features are functioning as intended.

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The decision process is integrated into existing adaptive management evaluations for individual projects. However, the non-federal sponsor remains dependent on the Corps as to when its O&M obligations are complete. It also does not provide the specificity needed for sponsors to estimate total project costs.

**Requested solution:**

Restore the 50-year cap on non-federal sponsors' legal requirement to perform OMRR&R requirements or provide a defined end-term that is based on the expected useful life of the project's construction features.

Thank you for your consideration of this request. Please do not hesitate to contact me at 651-224-2880 or [kwallace@umrba.org](mailto:kwallace@umrba.org) if you have questions or would like to discuss UMRBA's position in further detail.

Sincerely,



Kirsten Wallace  
Executive Director  
Upper Mississippi River Basin Association

cc: Upper Mississippi River Delegation