



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON DC 20314-1000

CECC-G

12 OCT 11

MEMORANDUM FOR Ms. Heather Burke, National Partnership Program Manager

SUBJECT: Draft Contributions and Recognition Plan

1. References.

- a. Memorandum from the Office of the Chief Counsel to Chief, Operations & Regulatory Community of Practice (ATTN: CECW-CO / Mr. Mike Ensich), Subject: Leases and Cooperative Agreements with Cooperating Associations, dated June 25, 2010.
- b. Memorandum from CECW-CO/CEMP-CR for Commanders, Major Subordinate Commands, Chiefs, Operations Divisions, Chiefs Real Estate Divisions, Subject: Guidance Pertaining to Real Estate Instruments and Cooperative Agreements with Cooperating Associations, dated March 15, 2011.
- c. Memorandum from the Office of the Chief Counsel to Chief, Operations & Regulatory Community of Practice et al., Subject: Leases and Cooperative Agreements with Cooperating Associations Follow-Up, dated April 7, 2011.

2. We have reviewed the Draft Contributions and Recognition Plan and have no legal objections. However, we advise that you pay careful attention to the recent USACE legal and policy guidance relating to 33 U.S.C. § 2328—one of the statutory authorities upon which the Contributions and Recognition Plan is based—in implementing the Plan.

3. Two points merit special consideration. First, many non-Federal entities (NFEs) make these contributions to fulfill their responsibilities under a lease or cooperating association agreement. Whenever a contribution under the Contributions and Recognition Plan will involve the execution of a lease, cooperating association agreement, license, or any other instrument that provides the NFE with either a property interest or right of entry onto Federal property, any such arrangement must comply with the legal and policy restrictions set forth in References 1.a.-c.

4. Second, while the underlying statutory authorities for the Contributions and Recognition Plan (33 U.S.C. § 2325 and § 2328) allow USACE to accept contributions of “funds, materials, and services” from NFEs, these authorities do not permit construction. See Ref. 1.a. at 3 fn. 7, 10 fn. 14. Construction is a term of art and is not included within the “funds, materials, and services” that USACE is permitted to receive under these authorities. The authority under which an NFE may perform construction at a USACE water resources development project is instead 16 U.S.C. § 460d. This distinction is important because the requirements for how USACE must process any funds that it receives from the use of a facility constructed under 16 U.S.C. § 460d

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are different from how USACE must process funds received through 33 U.S.C. § 2325 and § 2328. A detailed discussion of this distinction is set forth in References 1.a.-c.

5. If you have any questions or concerns, POC for this memorandum is the undersigned, available at (202) 761-8561.

/s/

STEPHAN D. RICE
CPT, JA
Assistant Counsel