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# 42 U.S. Code § 1962d-5b

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## Written agreement requirement for water resources projects

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### **(a) Cooperation of non-Federal interest**

#### **(1) In general**

After December 31, 1970, the construction of any water resources project, or an acceptable separable element thereof, by the Secretary of the Army, acting through the Chief of Engineers, or by a non-Federal interest where such interest will be reimbursed for such construction under any provision of law, shall not be commenced until each non-Federal interest has entered into a written partnership agreement with the Secretary (or, where appropriate, the district engineer for the district in which the project will be carried out) under which each party agrees to carry out its responsibilities and requirements for implementation or construction of the project or the appropriate element of the project, as the case may be; except that no such agreement shall be required if the Secretary determines that the administrative costs associated with negotiating, executing, or administering the agreement would exceed the amount of the contribution required from the non-Federal interest and are less than \$25,000.

#### **(2) Liquidated damages**

A partnership agreement described in paragraph (1) may include a provision for liquidated damages in the event of a failure of one or more parties to perform.

#### **(3) Obligation of future appropriations**

In any partnership agreement described in paragraph (1) and entered into by a State, or a body politic of the State which derives its powers from the State constitution, or a governmental entity created by the State legislature, the agreement may reflect that it does not obligate future appropriations for such performance and payment when obligating future appropriations would be inconsistent with constitutional or statutory limitations of the State or a political subdivision of the State.

#### **(4) Credit for in-kind contributions**

##### **(A) In general**

A partnership agreement described in paragraph (1) may provide with respect to a project that the Secretary shall credit toward the non-Federal share of the cost of the project, including a project implemented without specific authorization in law or a project under an environmental infrastructure assistance program, the value of in-kind contributions made by the non-Federal interest, including—

- (i) the costs of planning (including data collection), design, management, mitigation, construction, and construction services that are provided by the non-Federal interest for implementation of the project;
- (ii) the value of materials or services provided before execution of the partnership agreement, including efforts on constructed elements incorporated into the project; and
- (iii) the value of materials and services provided after execution of the partnership agreement.

##### **(B) Condition**

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The Secretary may credit an in-kind contribution under subparagraph (A) only if the Secretary determines that the material or service provided as an in-kind contribution is integral to the project.

### **(C) Work performed before partnership agreement**

#### **(i) Construction**

##### **(I) In general**

In any case in which the non-Federal interest is to receive credit under subparagraph (A) for the cost of construction carried out by the non-Federal interest before execution of a partnership agreement and that construction has not been carried out as of November 8, 2007, the Secretary and the non-Federal interest shall enter into an agreement under which the non-Federal interest shall carry out such work and shall do so prior to the non-Federal interest initiating construction or issuing a written notice to proceed for the construction.

##### **(II) Eligibility**

Construction that is carried out after the execution of an agreement to carry out work described in subclause (I) and any design activities that are required for that construction, even if the design activity is carried out prior to the execution of the agreement to carry out work, shall be eligible for credit.

#### **(ii) Planning**

##### **(I) In general**

In any case in which the non-Federal interest is to receive credit under subparagraph (A) for the cost of planning carried out by the non-Federal interest before execution of a feasibility cost-sharing agreement, the Secretary and the non-Federal interest shall enter into an agreement under which the non-Federal interest shall carry out such work and shall do so prior to the non-Federal interest initiating that planning.

##### **(II) Eligibility**

Planning that is carried out by the non-Federal interest after the execution of an agreement to carry out work described in subclause (I) shall be eligible for credit.

### **(D) Limitations**

Credit authorized under this paragraph for a project—

- (i) shall not exceed the non-Federal share of the cost of the project;
- (ii) shall not alter any other requirement that a non-Federal interest provide lands, easements, relocations, rights-of-way, or areas for disposal of dredged material for the project;
- (iii) shall not alter any requirement that a non-Federal interest pay a portion of the costs of construction of the project under sections 2211(a)(2) and 2213(a)(1)(A) of title 33; and
- (iv) shall not exceed the actual and reasonable costs of the materials, services, or other things provided by the non-Federal interest, as determined by the Secretary.

### **(E) Analysis of costs and benefits**

In the evaluation of the costs and benefits of a project, the Secretary shall not consider construction carried out by a non-Federal interest under this subsection as part of the future without project condition.

### **(F) Transfer of credit between separable elements of a project**

Credit for in-kind contributions provided by a non-Federal interest that are in excess of the non-Federal cost share for an authorized separable element of a project may be applied toward the non-Federal cost

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share for a different authorized separable element of the same project.

## **(G) Application of credit**

### **(i) In general**

To the extent that credit for in-kind contributions, as limited by subparagraph (D), and credit for required land, easements, rights-of-way, dredged material disposal areas, and relocations provided by the non-Federal interest exceed the non-Federal share of the cost of construction of a project other than a navigation project, the Secretary, subject to the availability of funds, shall enter into a reimbursement agreement with the non-Federal interest, which shall be in addition to a partnership agreement under subparagraph (A), to reimburse the difference to the non-Federal interest.

### **(ii) Priority**

If appropriated funds are insufficient to cover the full cost of all requested reimbursement agreements under clause (i), the Secretary shall enter into reimbursement agreements in the order in which requests for such agreements are received.

## **(H) Applicability**

### **(i) In general**

This paragraph shall apply to water resources projects authorized after November 16, 1986, including projects initiated after November 16, 1986, without specific authorization in law, and to water resources projects authorized prior to November 17, 1986, if correction of design deficiencies is necessary.

### **(ii) Authorization as addition to other authorizations**

The authority of the Secretary to provide credit for in-kind contributions pursuant to this paragraph shall be in addition to any other authorization to provide credit for in-kind contributions and shall not be construed as a limitation on such other authorization. The Secretary shall apply the provisions of this paragraph, in lieu of provisions under other crediting authority, only if so requested by the non-Federal interest.

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