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US Army Corps of Engineers Ends Section 104 Approvals

On numerous occasions Congress has recognized that public safety sometimes compels state and local governments to act before the Federal government is able to. One such example is Section 104 of the Water Resources Development Act (WRDA) of 1986 which allows non-Federal partners to construct portions of flood damage reduction projects in advance of the completion of Federal studies. Section 104 is a beneficial tool for two primary reasons: 1) it allows non-Federal partners the ability to take immediate actions to address and minimize known public safety risks, and 2) it preserves the ability to have these local costs counted as part of the local share once the Federal project is authorized. In other words, it allows non-Federal partners to provide their cost share early, to the benefit of public safety, and without adding any Federal cost to the project.

However, the Assistant Secretary of the Army for Civil Works (ASA) recently decided to no longer approve Section 104 applications. Instead, the ASA is directing non-Federal partners to use Section 221 of the Flood Control Act of 1970, as amended by Section 2003 of WRDA 2007, which does not provide the same level of assistance to non-Federal partners as Section 104. This has created a great deal of unnecessary uncertainty within communities with high levels of flood risk. The ASA's decision was made without consulting non-Federal partners and raises the following concerns:

- **Section 104 and 221 are intended to be complementary not alternative authorities;**
- **The ASA's decision will cause a delay in flood damage reduction projects and public safety improvements;**
- **Adequate protections to address the ASA's concerns regarding Section 104 approvals already exist;**
- **The ASA's decision may reduce the cost sharing ability of non-Federal sponsors;**
- **The ASA's decision reduces the ability of non-Federal sponsors to perform creditable work at any time;**
- **The ASA's decision contradicts Congressional direction and intent, and;**
- **The ASA's decision adversely affects the feasibility of Federal projects.**

The ASA's decision will undermine all of those non-Federal partners that are investing in flood damage reduction projects in advance of the Corps. Non-Federal partners have raised billions of dollars for flood damage reduction projects and are partnering with the Corps on dozens of studies. For example, at least five projects are affected just within the South Pacific Division alone: the West Sacramento General Reevaluation Report, the Lower San Joaquin Feasibility Study, the Yuba River Basin Study, the San Juan Creek Feasibility Study, and the Westminster Feasibility Study. These non-Federal sponsors seek to fund studies and construction in partnership with the Corps, but also seek to minimize flood risk as soon as possible by implementing some improvements in advance of the Corps and seeking credit for those improvements. The ASA's decision undermines that plan and hurts public safety. Should a flood event hit prior to implementation of the Corps project, the national cost of recovery will far exceed the costs to quickly implement these projects and grant credit against future work.

For these reasons, the ASA should reevaluate Section 104 requests for any requests made before May 5, 2011 and should continue to grant Section 104 credit until the ASA considers a new policy on crediting. As part of such consideration, the ASA must seek public input from non-Federal partners who have made plans in reliance of the ASA's previous administration of Section 104.

Any revised policy must assure credit can be granted for advance construction of projects at any stage after the reconnaissance study is initiated. The policy must also consider Congress's direction in Section 104 that the advance construction be creditable if the work is compatible with the authorized project. Finally, any revised policy must provide clarity and incentives for projects with significant lands, easements, rights of way, relocations, and disposal sites.