



RESOLUTION

Adopted October 5, 2023

Support for U.S. Army Corps of Engineers Project Partnership Agreement Reform

Whereas, the need for ecosystem restoration and improvement projects, flood risk management projects, and maritime navigation projects is plentiful and desired in the Great Lakes basin and across the floodplains of the nation; and

Whereas, the U.S. Army Corps of Engineers (USACE) is responsible for the design, construction, and operation of many infrastructure projects in the United States, including ecosystem restoration and improvement, flood risk management, and maritime navigation; and

Whereas, most USACE ecosystem projects, flood risk management projects, and maritime navigation projects in the Great Lakes basin and across the nation require the participation of a nonfederal sponsor and, therefore, a Project Partnership Agreement (PPA), which defines cost share relationships and project terms including operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) responsibilities; and

Whereas, beginning with the Water Resources Development Act (WRDA) of 1986, nonfederal sponsors have been required to pay 100 percent of OMRR&R costs and to hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors; and

Whereas, prior to 2007, nonfederal sponsors were only required to agree to fund OMRR&R for 50 years; and

Whereas, following the issuance of a USACE policy memo in 2007, USACE has required nonfederal sponsors to accept OMRR&R responsibilities in perpetuity; and

Whereas, most states' constitutions and tort law do not allow for indemnifying a third party regardless of project type and whether structural or nonstructural measures are involved; and

Whereas, current USACE policy and processes related to PPAs present significant challenges to all categories of nonfederal sponsors, including the duration of project OMRR&R responsibilities, indemnification of the federal sponsor from liabilities related to the project, applicability of third-party contributions, and applicability of state permitting affect potential implementation of cost shared projects in the Great Lakes basin; and

Whereas, following congressional authorization and appropriation of funds for USACE projects, Great Lakes states and other nonfederal sponsors often face a binary decision to either take on unacceptable project liability or forego the project altogether; and

Whereas, under current USACE PPA provisions, USACE has sole discretion for decisions regarding project planning, design, construction contractor selection, construction management, and construction change orders; and

Whereas, under current USACE PPA provisions, the USACE only seeks to comply with federal laws and regulations, not necessarily applicable state or local laws and regulations; and

Whereas, under current USACE PPA provisions, USACE does not recognize or credit the value of materials and services donated to the project on behalf of the nonfederal sponsor, and contributed by nonfederal third parties, without charge; and

Whereas, the U.S. Congress is beginning its work on the Water Resources Development Act of 2024 (WRDA 2024) and the biennial WRDA process represents the primary authorizing legislation for civil works studies, projects, and programs carried out by the USACE; and

Whereas, WRDA 2024 presents the next opportunity for Congress to advance a true partnership approach to these agreements.

Therefore, Be It Resolved, that the Great Lakes Commission (GLC) urges the U.S. Congress to reform USACE PPA requirements in WRDA 2024, including:

- Limiting the obligation of the nonfederal sponsor for project OMRR&R responsibilities to not exceed either (a) the defined project life, or (b) 50 years from the date on which the project is completed, whichever is longer; and
- Requiring the nonfederal sponsor to only indemnify, save, and hold the federal government harmless at the same percentage as the nonfederal sponsor's share of construction costs, which would create a more balanced approach to liability; and
- Enabling the nonfederal sponsor to be granted cost share credit for the value of required project materials and services contributed a third party on behalf of the nonfederal sponsor; and
- Amending references to federal specific permitting requirements to include "all applicable permits."

*Adopted at the 2023 Annual Meeting of the Great Lakes Commission, October 3-5, 2023, held in Oregon, Ohio.
The resolution was passed unanimously.*