



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECW-ZA

22-Jul-24

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Guidance for Nonstructural Project Planning and Implementation

1. References:

- a. ER 1105-2-100, Planning Guidance Notebook, 22 April 2000
- b. ER 1105-2-103, Policy for Conducting Civil Works Planning Studies, 7 December 2023
- c. ER 1165-2-504, Construction of Water Resource Development Projects by Non-Federal Interests, 12 July 2017
- d. Director's Policy Memorandum (DPM) 2019-02, Subject: Operationalizing Risk-Informed Decision Making in Project Management (Planning Phase), 2 July 2019
- e. ER 405-1-12, Real Estate Handbook, Chapter 12, 1 May 1998
- f. ER 405-1-11, Real Estate Acquisition, 28 Nov 2014
- g. ER 5-1-11, U.S. Army Corps of Engineers (USACE) Business Process, 31 July 2018
- h. ER 1110-2-1302, Civil Works Cost Engineering, 30 June 2016

2. Purpose. The purpose of this memorandum is to provide multi-disciplinary guidance for nonstructural planning and implementation of Flood Risk Management (FRM) and Coastal Storm Risk Management (CSRM) projects. This memorandum also includes guidance specific to nonstructural elevations (enclosures). A future ER will be issued that will also include detailed guidance for floodproofing, relocations, and acquisitions.

3. Background.

a. Section 73 of the Water Resources Development Act (WRDA) of 1974, as amended (33 United States Code [U.S.C.] 701b-11), requires USACE to consider nonstructural measures to reduce flood damages, and Sections 103(b) and 103(c)(5) of WRDA 1986 (33 U.S.C. 2213(b) and 2213(c)(5), respectively) provide specific cost-sharing for nonstructural FRM and CSRM projects. Due to a number of factors, including climate change and associated sea level rise, an emphasis on community flood resilience, and a greater recognition of the economic, social, and environmental impacts of flood events, the number of nonstructural projects approved and authorized in FRM and CSRM studies has significantly increased. As a result, there is a substantial need to develop and refine project delivery methods, increase design maturity and cost accuracy of recommended plans, and provide technical resources and assistance for project delivery teams (PDTs).

b. Implementation of nonstructural projects requires a different approach than the construction of structural projects. Depending on the capabilities of the non-federal interest (NFI), project-specific factors such as life safety concerns, presence of underserved communities, or risk levels in different geographic regions, each nonstructural project will require a detailed, specific implementation plan. The details of the implementation plan, including processes such as determining the eligibility of residential homeowners, are critical to successful implementation.

c. The USACE National Nonstructural Committee (NNC) has been instrumental in advancing knowledge and expertise for nonstructural project plan formulation and developing strategies for project implementation including measure design and construction. With the recent increase in the number and complexity of nonstructural projects and subsequent shift in focus of the USACE Civil Works program, the need to establish additional and consistent policy and processes within the enterprise is apparent. Consequently, the need to consolidate and focus expertise within the USACE enterprise, while simultaneously developing mechanisms to deliver training and tools, has become a priority.

4. Discussion.

a. This memorandum provides guidance for nonstructural project implementation under the FRM and CSRM mission areas. The guidance is multi-disciplinary and encompasses Planning and Policy, Real Estate, and Engineering and Construction. The consolidation of this guidance will eliminate the need for multiple guidance documents regarding nonstructural projects and will promote greater coordination between functional areas of PDTs. If any conflict with existing guidance is identified, the issue will be elevated to HQUSACE for resolution. Additional guidance will be forthcoming in an

ER that is under development. The future ER will include further guidance on nonstructural measures, such as dry and wet floodproofing, replacement, acquisition, and relocation.

b. This guidance memorandum requires identification of a project delivery strategy during the feasibility phase for implementation of nonstructural projects. Feasibility reports, including general reevaluation reports, CAP reports, and dam safety modification studies with nonstructural components, will include a detailed nonstructural implementation plan in both the draft and final report. At a minimum, the following sections and associated content will be included in the implementation plan for each type of nonstructural measure (elevation, dry floodproofing, wet floodproofing, acquisition, relocation, etc.):

- (1) Eligibility process;
- (2) Eligible project costs;
- (3) Project delivery strategy;
- (4) Real estate; and,
- (5) Operation, maintenance, repair, replacement, and rehabilitation (OMRR&R), as applicable.

b. If information is not available for the implementation plan in the draft report, that must be noted in the report. The notation must indicate whether that section is inapplicable to the specific study or if that information will be included in the final report.

c. Enclosure 1 includes an implementation plan template for nonstructural elevations. HQUSACE is developing specific implementation plan templates for other types of nonstructural measures that will be released when complete.

d. Additionally, this guidance requires feasibility reports to be proactive: reports must investigate local industry capable of supporting USACE project implementation for nonstructural features, and district leaders must keep industry informed as projects move to delivery. Lastly, this memorandum includes specific guidance for nonstructural elevation projects, including design maturity of feasibility-level costs and real estate requirements (enclosure).

5. Project Delivery Strategies. A project delivery strategy is defined as “a business plan that describes both USACE and NFI responsibilities regarding the design and construction services necessary for project implementation.” For example, two project

delivery strategies are available for use to construct nonstructural elevation projects: a "traditional" USACE-led construction approach, with the NFI providing funding or work-in-kind for its share of the project, and Section 204 of WRDA 1986, as amended (33 U.S.C. 2232), which authorizes NFI-led construction with reimbursement of the Federal share of the project.

a. Traditional approach. The traditional approach is USACE-led design and construction and will typically take one of two forms:

(1) Design-bid-build (D-B-B) delivery, where design and construction are sequential and contracted for or carried out separately, designed by either USACE District Engineers or architecture/engineering (A/E) firms, and then constructed, usually with firm-fixed-price construction contracts; or

(2) Design-build (D-B) delivery, where design and construction are combined in a single contract with a single contractor. Currently, USACE only has authority to use "Two-phase design-build" for Civil Works construction, which is a "design-build" method of construction contracting in which USACE selects a limited number of technically qualified offerors in Phase One to submit detailed price proposals in Phase Two.

b. Non-Federal Interest-led Construction. Section 204 of WRDA 1986 authorizes a NFI to carry out Federally-authorized water resources development projects, or separable elements thereof, with potential reimbursement of the Federal share of the project, subject to funding availability, or credit towards the NFI's share of other separable elements of the same project or of its share of other water resource development projects. ER 1165-2-504 is the current guidance for using Section 204 for project implementation. The NFI must request use of Section 204 (along with its plans for how it will implement the project) from the Assistant Secretary of the Army for Civil Works (ASA(CW)), who must first determine whether the NFI's proposal for constructing the project, or separable element, is technically feasible, economically justified, and environmentally acceptable. A Section 204 agreement is required to move forward with implementing the project under this approach. Currently, the agreement will be prepared by the HQUSACE Agreements Team. Further, this authority does not apply to CAP projects and may not be used for such.

c. Districts will identify the preferred project delivery strategy for nonstructural projects at the Tentatively Selected Plan (TSP) milestone. Additionally, the letter of support from the NFI is required to clearly indicate if Section 204 is identified as the potential project delivery strategy.

d. If a district wants to seek authority for an alternative project delivery method not following the traditional approach or NFI-led construction approach described above, close coordination and discussion must occur throughout the feasibility study phase with the MCX, once established, and HQUSACE.

6. **Project Partnership Agreements.** Until a model PPA is approved for projects that include nonstructural features, a request for drafting a project-specific PPA should be submitted through the appropriate Regional Integration Team to the HQUSACE Agreements Team, using the nonstructural PPA request worksheet. Along with the request worksheet, the PDT must define what activities must be accomplished to maintain maximum benefits and that description should be included in the Operation and Maintenance (O&M) Manual. The PDT must define when OMRR&R should begin, and at what intervals project inspections should occur.

7. **Local Industry Capacity.** Local industry capacity may have substantial effects on the ability of a district to construct a nonstructural project within estimated costs and timeframes. Districts with authorized projects to construct nonstructural projects or those that are conducting FRM or CSRM studies that could likely include nonstructural measures will assess the capacity of local industry to efficiently and successfully construct a project. Assessments should be factored into the study risk register, cost risk, and implementation plan. Districts are encouraged to hold "Industry Days" to establish open communication channels and inform the public of potential construction projects.

8. **Nonstructural Mandatory Center of Expertise.** HQUSACE Planning and Policy Division will coordinate within Civil Works functional areas to plan for and present the establishment of a Nonstructural MCX for a decision. The overarching intent of the MCX would be to: 1) consolidate existing technical expertise to facilitate efficient and effective delivery of technical and specialized services for nonstructural FRM and CSRM studies and projects; 2) review, coordinate, and improve the quality of USACE products and recommendations for the Nonstructural Program; and 3) provide a means for expanding technical competence within the Enterprise. Specific, mandatory services that the MCX would provide are as follows:

a. Support HQUSACE in the development of policy, guidance, and related products for nonstructural planning and implementation.

b. Coordinate and ensure alignment of the USACE nonstructural program with other Federal agencies, avoiding duplication of programs, while also establishing and maintaining strategic relationships with Tribal Nations and local and state agencies.

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c. Develop and disseminate knowledge across the enterprise through webinars, training, and instructional product development.

d. Work seamlessly with the FRM Planning Center of Expertise (FRM-PCX), CSRM-PCX, and Dam Safety Modification MCX to provide critical technical assistance and support to PDTs in the development of feasibility studies, CAP studies, dam safety modification studies, and other decision documents. The MCX will review draft and final nonstructural implementation plans, Director's Reports and Chief's Reports, real estate instruments, draft Project Partnership Agreements, and other relevant products.

e. Support organizational goals including coordinating effective USACE public engagement strategies for underserved communities, developing more effective and efficient implementation strategies and methods, and improving policies to achieve greater community resilience as part of the FRM and CSRM mission areas.

9. Additional Guidance for Nonstructural Elevations. The enclosures include detailed, multi-disciplinary guidance for nonstructural elevations. They provide written guidance for implementation plan development, cost engineering, operation and maintenance, and real estate. Additionally, other materials provided include standard language for a perpetual restrictive easement, sample deed restriction, and model participation agreement. The enclosures also include direction for responding to requests to modify nonstructural elevation projects.

10. Questions regarding this memorandum should be directed to Ray Wimbrough, Senior Policy Advisor, HQUSACE Planning and Policy Division, at 202-761-4056 or raymond.l.wimbrough@usace.army.mil.



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ENCLS

1. Nonstructural Implementation Plan Template for Elevations
2. Feasibility-level Costs for Nonstructural Elevation Projects
3. Real Estate Guidance for
4. Residential Nonstructural Elevation Measures
5. Excerpt of 49 CFR Part 24, SUBPART B - Real Property Acquisition
6. Perpetual Restrictive Easement for Residential (Elevation/Basement In-Fill)
7. Model Participation Agreement for Nonstructural Projects (Traditional Contracting Methods)
8. Sample Deed Restriction for Nonstructural Projects

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9. Operation and Maintenance for Nonstructural Elevations

10. Requests to Alter USACE Civil Works Projects

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Enclosure 1: Nonstructural Implementation Plan Template for Elevations

1. Nonstructural project description. The description of the nonstructural project will include the type of nonstructural measures (elevation, acquisition, relocation, dry floodproofing, wet floodproofing), the corresponding number of structures, and their locations. Additionally, the description will include whether the measure is voluntary or mandatory and the total construction timeframe for each type of measure (for example, ten years to elevate all structures).

2. Structure elevations.

a. This section will discuss elevation of the first floor (main floor) to a specific design height that has been determined individually for each structure. It will describe the communication that will occur with property owners in the project area. Additionally, this section will note which information will be further defined in the PED phase.

b. The section will also include language indicating the Government reserves the right to determine which measure(s) will be implemented at each eligible structure. Additionally, the language will indicate the total construction time for implementation of the structure elevations while noting that the timing and scale of the project is dependent on foundation type, participation rate, funding, and environmental conditions.

c. Any restrictions due to required elevation height will also be noted. The language will include discussion of the International Residential Code (IRC) as appropriate. The IRC governs the design of detached one- and two-family dwelling units. Provisions of the International Existing Building Code (IEBC) govern the evaluation on structural integrity of the unit to withstand wind load. The language will provide explanation of the maximum height allowable due to increased wind loads.

3. Project delivery strategy. Two fully developed project delivery strategies are available for use to construct nonstructural elevation projects: a “traditional” approach and construction by the non-Federal interest under the authority in Section 204 of WRDA 1986. These strategies are described below. This section of the implementation plan will identify the specific project delivery strategy proposed during the feasibility study, along with other details regarding agreements that are required, particularly for nonstructural projects being construction under the Section 204 authority.

a. USACE-Led. The traditional method of implementation is typically used by USACE to design and construct Civil Works projects. This method of implementation utilizes a Federal procurement process to obtain design and construction contractors for the various nonstructural measures. The Government will procure contracts that will allow a contractor to perform nonstructural measures on multiple structures through a

series of one or more design-build task orders. The contractor will also be responsible for eligible work associated with the elevation including the final design of the nonstructural measure, obtaining the required local, state, and Federal permits, and all necessary elements to complete construction to desired intent.

b. Non-Federal Interest-led. The approach under authorities of Section 204 of WRDA 1986 involves transferring responsibility to complete design and/or construction tasks typically completed by USACE to the NFI. In this scenario, USACE partners with the NFI to deliver the project and continues its involvement through a review capacity to ensure all required standards are being met prior to reimbursement. While the option is NFI led, it will be similar to USACE led but with USACE providing only oversight and no contracting nor procurement services. While rarely used, this option is allowed per WRDA 1986, as amended, and its use must be approved by the vertical team and by the Assistant Secretary of the Army Civil Works [ASA(CW)] based on an approved implementation plan.

4. Eligibility determination. This section will describe the preliminary eligibility process that was conducted for the feasibility phase. Additionally, the plan will detail the refinement of the criteria that will occur during PED, and then any final eligibility process that will be conducted during the Construction phase. The plan will include discussion of the following requirements at a minimum:

- a. Execution of a Participation Agreement.
- b. Temporary right of entry for property and structure investigations, including refusal of right of entry negating participation in a project.
- c. Title search and any other proof of ownership required.
- d. Evaluation criteria for eligibility:
 - (1) Engineering feasibility to elevate the structure;
 - (2) Condition of structure and need for repair or rehabilitation, which is sole responsibility of the property owner;
 - (3) Potential effects on threatened and endangered species and waters of the United States;
 - (4) HTRW or any other environmental concerns which must be removed and/or mitigated by the property owner to the level of satisfaction of the Government, prior to contract solicitation and at no cost to the Government; and,

(5) Any prior disaster assistance for elevation of the structure.

5. Eligible and ineligible project costs.

a. Eligible project costs. Indicate specific eligible project costs that address the following factors at a minimum: all elevations will require local permits prior to any onsite construction; only the costs of elevation and foundation retrofitting are eligible costs; no Federal funds will be used to restore, replace, or repair the structure; no additions to the habitable spaces of the structure will be permitted in the performance of the elevation work. Eligible project costs of structure elevation include design costs; costs of obtaining required permits (for example, zoning or land use approvals, environmental permits or required certifications, historic preservation approvals, and building permits), unless identified as an ineligible project cost. Eligible costs include:

(1) Administrative cost of the Non-Federal Interest to discuss project with owner and obtain signed real estate agreements;

(2) Structures attached to the main building;

(3) Raising of mechanical equipment;

(4) Utility connections that meet existing code;

(5) Vent construction for flood water entry and exit;

(6) Special access requirements and improvements;

(7) Tree removal and site restoration;

(8) Measures necessary to meet Federal statutes such as the Endangered Species Act and the National Historic Preservation Act;

(9) Temporary site protection measures during site work; and

(10) Allowable relocation assistance funds for displaced tenants in accordance with Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs of 1970, Public Law (PL) 91-646, 84 Stat. 1894 (42 USC 4601) (URA), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of PL 100-17, 101 Stat. 246-256.

b. Ineligible project costs. Indicate specific modifications, improvements, repairs, and other costs that cannot be included in the project and will be the sole responsibility

of the property owner. This section must indicate that USACE will not bring a non-conforming structure into compliance with current building code, housing code, and/or other applicable codes. Additionally, the project will not include elevation costs above the design first floor elevation.

6. Strategy for prioritization of implementation.

a. Clearly identify the strategy for prioritization of construction. The strategy may be refined during PED, particularly if additional information provides opportunities for cost efficiencies or issues with local contractor capacity. The strategy may include the following criteria:

- (1) Clustering or grouping to increase construction effectiveness and efficiency;
- (2) Support of underserved communities;
- (3) Contractor capacity and availability;
- (4) Local building permitting;
- (5) Environmental conditions;
- (6) Level of risk; and,
- (7) First come, first served.

b. The strategy will identify a reasonable amount of time for a property owner to enter into an agreement when offered the opportunity for elevation. The size of the construction area, mobilization costs, and any other appropriate factors will be considered; however, open-ended opportunities are unacceptable. The timeframe may be refined during PED or as necessary during construction. Construction will not be unreasonably deferred until a property owner elects to participate or until the period of construction ends. The strategy must also indicate that if substantial time is needed to repair/rehab a structure, it will not be included in the project.

7. Real estate. Refer to section 3, Real Estate Guidance for Residential Nonstructural Elevation Measures, for detailed discussion regarding real estate requirements. The implementation plan will discuss the following:

a. Landowner and public meetings. Depending on the location and number of eligible structures identified in the project, indicate how many landowner and public meetings will be held.

b. Acquisition management. Discuss which entity will have the main responsibility to maintain the acquisition database and if known indicate what software will be utilized to track the information. USACE must still enter mandatory data fields in REMIS.

c. Owner application. Discuss the number of identified eligible structures and what percentage of structures are estimated to be owner-occupied. Include a statement that participation in this project is strictly voluntary and that the NFI will not utilize its authority of eminent domain should the owner choose not to participate. Include a statement that the owner applicant will be required to grant a temporary right-of-entry to USACE and the NFI to enter upon the property to conduct investigations during PED to determine final eligibility of the property for inclusion in the project. This section will inform the readers that should the investigations reveal HTRW on the property, the owner will need to remediate such contamination in order for the property to be approved for final eligibility.

d. Participation agreement. Discuss that once a structure has met final eligibility requirements and the Government has discussed the nonstructural measure design with the owner, the owner will sign a participation agreement which documents the nonstructural measure to be constructed and the cost associated with such; delineates the obligations of each party; documents property owner agreement to voluntarily participate in the nonstructural project; requires the owner to grant a temporary right of entry to the NFI, the USACE, and its assigns for the construction of the nonstructural measure; requires the owner to release the NFI from the obligation of informing him of the value of the perpetual restrictive easement; requires the owner to hold harmless the NFI for any damages arising from the nonstructural work ; and requires the owner to attest to his/her willingness to expend costs that may be necessary in connection with the construction of the nonstructural measure which are not eligible project costs such as betterments and costs associated with temporary relocation of residents of an owner-occupied residential structure.

e. Perpetual restrictive easement. State that the NFI will acquire a perpetual restrictive easement over that portion of the property wherein the residence is located. This easement will be recorded in the county clerk of court and will run with the land. The intent of the acquisition of the easement is to protect the project benefits for as long as the project is authorized or as long as the structure exists. The easement shall prohibit the conversion of any part of the structure, located below the lowest habitable finished floor for human habitation and the alteration of the structure in any way that impedes the movement of flood waters under the structure or negates the intent of the nonstructural measure implementation. The ground floor of an elevated residential structure can only be utilized for parking, storage, and access. It is recognized that property laws vary by state and that in some states a covenant running with the land has equal or greater enforcement capacity than an easement. If that is the case in the

jurisdiction wherein the project is located, the implementation plan may indicate that the NFI will impose a restrictive covenant over the property rather than acquire a restrictive easement and will explain why this deviation is necessary.

f. Relocation assistance. This section should estimate what percentage of the eligible structures are occupied by tenants. This section will discuss that tenants who are temporarily displaced due to structure elevation will be provided appropriate advisory services and relocation assistance in accordance with 49 CFR Part 24.

g. Non-Federal Interest Authorization for Entry and Certification of Real Estate Availability. Contrary to policy requirements in ER 405-1-12, Chapter 12, Certification of Real Estate Availability cannot occur prior to contract award for nonstructural design-build and design-bid-build contracts because the design specific to each structure will not be developed until after award of these contracts. This section will discuss that in accordance with the approval granted in this guidance, the Government will proceed with solicitation, evaluation of proposals, and award of contract for the nonstructural measures without Certification of Real Estate Availability. After acquisition and recordation of the Perpetual Restrictive Easement by the NFI, a notice or letter to proceed with elevation of each specific property may be issued to the contractor. In no case shall a contractor be permitted to initiate any construction activities on a structure until after the District Real Estate has certified non-Federal sponsor acquisition of the Perpetual Restrictive Easement for that property.

8. Operation and maintenance. Document the requirements in Section 8, Operation and Maintenance for Nonstructural Elevations. If known, details such as how the surveys will be tracked (GIS or shareable database) will be included. This section will discuss that enforcement of restrictive easements is the sole responsibility of the NFI. The NFI will prepare mass mailings to project participants every ten years providing notice that the structure on the property was elevated by USACE and providing a copy of the perpetual restrictive easement that was acquired. On a rotating schedule, every five years, the NFI will conduct physical inspections from the street of 10% of the structures that have participated in the project.

Enclosure 2: Feasibility-level Costs for Nonstructural Elevation Projects

1. During feasibility, cost estimates developed for nonstructural elevation projects will identify and utilize one or more typical structure that is proposed for elevation. The exact number of typical structures will reflect the size of the study area, the need for design maturity and cost accuracy, and the aggregation strategy used in plan formulation and evaluation.

2. A design plan set will be produced for each typical structure within the project and will be used for cost estimate preparation. The design cost for each typical structure must be applied as appropriate across the entire project. Included within the design plan set will be the following:

a. Exterior scope.

(1) Demolition. Includes removal and demolition of existing features such as stairs, existing landscaping, existing doors or access pathways, hardscape features such as sidewalk, foundations to include slab-on-grade, finished flooring, foundation walls, piers and footings, chimneys, outdoor enclosures such as showers and car ports, and any porch decking.

(2) Utilities. Includes removal, relocation, and hookup of any electrical, telecommunications, water, sewer, and gas services to the home. This must include any associated work required by the third-party utility provider and any associated costs included within their scope.

(3) Access. Includes updates to access the home such as elevated decking, stairwells, and surface hardscape such as sidewalks and landing pads. Finishes and material types such as pressure treated lumber or vinyl decking for any updated access will be included.

(4) Landscaping and grading. Include any updated landscaping and grading required due to disturbance from any construction activity.

(5) Foundations. Ensure that the size and type of existing foundation, which will affect construction time and cost, are included. Identify the type of foundation to be used to elevate the home. Includes the use of helical piles, timber piles, steel piles, concrete masonry unit blocks, or other pile types as appropriate. Special attention should be paid to slab-on-grade homes and how the work will be completed during construction in sequence with the elevation of the home. Include existing foundation type to inform estimator as to the methods that will be used to jack and elevate home.

(6) Chimneys. Identify and price elevating, to include temporary support and post-construction support. Note, the design scope must also include consideration of how the chimney is designed/constructed and tied into the structural frame.

(7) Fascia. Include any required elements such as siding that are needed to enclose the space that may be disturbed during construction.

b. Interior scope.

(1) Demolition. Includes removal of any internal features within the home such as floor joists or other elements.

(2) Utilities. Includes any new piping and/or connections required post-elevation.

(3) Chimneys. Note and include any required scope to address the chimney. If the elevation of chimney is excluded from the project, include removal as needed and patch and closure of any open areas.

(4) Finishes. Include replacement of any finished flooring disturbed or required as part of the elevation. Further, any wall finishes required due to eliminated doorways will be included.

3. Other items to consider during development of costs that are not captured within a sample design plan set include the following:

a. Preconstruction, engineering, and design tasks. Identify tasks that are required to be completed throughout the lifecycle of the project by discipline, including preconstruction, engineering, and design (PED). Items to capture within the cost estimate include, but are not limited to, Project Management Plan (PMP) and Project Partnership Agreement (PPA) execution, public outreach and meetings, execution of real estate documents such as rights-of-entry and restrictive easements, participation agreements with attached plans and specifications, development of scope of work documents to include plans and specs, establishing support contracts with AE and consulting firms, conducting market research, establishing construction contracts to include multiple award task order contracts if applicable, permitting, coordination with town officials and individual homeowners, developing cost estimates, execution of any required agreements, award of construction contracts, and any necessary environmental or historic property/cultural resources coordination.

b. Contractor capabilities. PDTs should consider implementation timelines that are based on market outreach, including "industry days" with local contractors. Industry

days can be utilized to garner interest and inform PDTs on expected implementation rates due to construction contractor capabilities.

c. Funding timelines. Teams must consider a funding timeline that is based on the expected funding stream from non-Federal and Federal budgets.

d. Project delivery strategy. The district will consider the strategy for design and scope of work development and if internal district resources can support the timeline or if the effort needs to be supplemented by another district or outside AE and consulting firms. The district should also consider how the contract for construction will be procured (D-B or D-B-B contract), as this will affect the PED design effort.

e. Execution breakdown. As part of the project delivery strategy, the district will consider how to prioritize construction by grouping or clustering homes for implementation. Prioritization will focus on optimizing construction, minimizing extensive mobilization and demobilization costs for the construction contractor, and driving higher industry participation. Other factors to consider are the support of underserved communities and environmental conditions.

4. As a part of the cost schedule risk analysis (CSRA), the following risks will be discussed, at minimum:

a. Scope maturity. Discussion on preliminary design assumptions that may change and scope definition. Unknown factors may exist such as environmental hazard mitigation or historic preservation concerns.

b. Contract acquisition strategy. Acquisition strategy will define how the work will be contracted out. The strategy can change as the scope matures. This will impact both cost and schedule.

c. Market conditions. Availability and interest from contractors to conduct this work in the timeline set forth may change. Competition with other projects both in the area and within the region regarding both labor and equipment should be considered. Material and fuel costs can also fluctuate over time.

d. Age of the structure and variations in the study area. Many of the structures, both residential and commercial, will be of different ages and variations. As the design progresses, the number and types of structures will likely change.

e. Design and construction management costs. PED costs as well as construction supervision and administration expenses may not be fully vetted, as project definition is not initially completely understood.

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f. Modifications during construction. Differing site conditions and other unknowns may arise during construction requiring changes to the design and/or construction.

g. Survey data and investigations. Existing survey data may be incomplete or insufficient. Additional investigations may result in changes to the design.

h. Funding. Review the funding stream and any shortages that may occur due to incremental funding or changing priorities both at the Federal and non-Federal level.

i. Internal resource capacity. Identify any internal resource issues such as nonstructural experience in critical disciplines, competing study/project efforts due to supplemental funding priorities, or other increases in workload.

j. State, local, or Tribal Nation concerns or issues. Identify state, local, or Tribal Nation concerns, such as regarding the timing of building permit issuance, inspection of properties/construction sites, Section 106 compliance.

k. Structure inventory uncertainty. There is a potential for changes from when the study was completed to the current inventory as there may be ownership changes, construction of new structures since the project authorization, other Government programs that provide nonstructural solutions, or incorrect information within existing structure databases that may have been used during feasibility.

l. Phasing. Discuss the outside effects such as homeowner participation changes that may inhibit ideal phasing initially proposed during feasibility stage.

5. A cost schedule risk analysis template for nonstructural projects is being produced to streamline and assist PDTs. The template will be made available for use as soon as it is complete and will be included in a future ER.

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Enclosure 3: Real Estate Guidance for Residential Nonstructural Elevation Measures

1. Impacts of voluntary participation on compensation and relocation assistance.

a. Reference Title 49 of the Code of Federal Regulations (CFR) Part 24 (49 CFR 24), whose purpose is to promulgate rules to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act, 42 USC 4601 et seq.). The Uniform Act governs the activities for acquisition of real property and real property rights for Federal and Federally-assisted projects. Subpart B, Paragraph 24.101(a)(2), Paragraph 24.101(b)(1)-(b)(5), and Appendix A of 49 CFR 24 provide guidance for projects which are atypical, do not involve the use of eminent domain authority, and allow owners within project alignments to voluntarily choose whether to participate in the project. These sections of 49 CFR Part 24 are enclosed for reference (Section 4).

b. Projects which meet all four conditions listed in 49 CFR 24.101(b)(1)(i)-(iv) are not required to follow the requirements of Subpart B, Real Property Acquisitions. Those conditions are as follow:

(1) No specific site or property needs to be acquired, although the Agency may limit its search for alternative sites to a general geographic area. Where an Agency wishes to purchase more than one site within a general geographic area on this basis, all owners are to be treated similarly. (See Appendix A to 49 CFR 24 and 49 CFR 24.101(b)(1)(i).)

(2) The property to be acquired is not part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired within specific time limits.

(3) The Agency will not acquire the property if negotiations fail to result in an amicable agreement, and the owner is so informed in writing.

(4) The Agency will inform the owner in writing of what it believes to be the market value of the property. (See Appendix A to 49 CFR 24, 49 CFR 24.101(b)(1)(iv) and 49 CFR 24.101(b)(2)(ii).)

c. USACE nonstructural measures meet the conditions of 49 CFR 24.101(b)(1)(i)-(iv) as follows:

(1) Projects identify structures in a community that may be eligible to participate in the project based on a set of pre-determined criteria. There is no requirement that a structure participate in the project.

(2) The eligible structures may be contiguous or may be located several miles apart. The project benefits are not dependent on all of the identified structures being elevated or floodproofed. Project benefits are attained based upon each individual structure participation.

(3) Participation by owners in elevation and floodproofing nonstructural projects is voluntary and the authority of eminent domain will not be exercised by the USACE nor by the NFI to force an owner to elevate or floodproof an eligible structure. This is communicated to owners of identified eligible structures when the notice of eligibility to participate in the project is determined.

(4) If the owner voluntarily chooses to participate in the nonstructural project, the NFI will acquire a perpetual restrictive easement to maintain maximum benefits. Because owners can choose to voluntarily participate in elevating or floodproofing nonstructural projects, they are not considered displaced persons and are not entitled to compensation for real estate interests acquired. The requirement to inform the owner of the estimated market value of the easement is addressed in paragraph 8 of Section 3, Real Estate Guidance for Residential Nonstructural Elevation Measures.

d. Although the agency is not bound to follow Subpart B of 49 CFR 24, the NFI will treat participating owners fairly and consistently and will conduct negotiations in an expeditious manner so as to facilitate completion of the project. If a residential structure participating in the project is occupied by a tenant, the tenant is entitled to receive relocation assistance, and the NFI will follow the applicable standards of 49 CFR 24.

2. Landowner and public meetings. The NFI, in coordination with USACE, will develop information for the public to inform property owners of the nonstructural project, including but not limited to, eligibility criteria, the application process, responsibilities of property owners to clear title, the requirement that property be free of hazardous, toxic, and radioactive waste (HTRW), and other key information about the project. USACE and/or the NFI must prepare and distribute written materials such as project information pamphlets, letters of invitation to participate, and public meeting notices.

3. Real estate acquisition management. Depending on the size of the project, implementation may require it to be subdivided into clusters to improve construction efficiency, address areas of higher life safety risk, or other reasons specific to the project. The inclusion of structures into a project cluster may depend upon the total number of structures eligible to participate in the nonstructural project, the location of the structures, the availability of qualified construction contractors, and other criteria specific to the project. Data regarding the real estate interest acquisition process will be maintained in a shareable database and regularly updated to depict the current stage of project completion. Whether the project is implemented by the NFI or USACE, records

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of properties that have been identified as eligible to participate in the nonstructural project must be maintained electronically in a shareable database that can be searchable to prevent future Federal projects or grant assistance programs from identifying the same structure as eligible for participation in nonstructural measures. The responsibility for maintaining this database falls on both the district Real Estate team and the NFI depending on which tasks are performed by each. Data that should be recorded and maintained includes structure property address, owner application date, date right-of-entry is granted for exploratory work, property condition/environmental survey completion date and whether the property was cleared environmentally, date easement recorded and recordation data, construction initiation date, date owner temporarily moves out of structure, construction completion date, and owner reoccupation date. This database may also be used to document project Operation & Maintenance activities as discussed in Enclosure 8. USACE must still enter mandatory data fields in REMIS.

4. Owner application process. The following is a general description of the process that will apply to willing owners of preliminarily eligible residential structures:

a. USACE will preliminarily identify eligible residential structures that may voluntarily participate in the nonstructural project.

b. The NFI will conduct a tract ownership data search to determine owners of eligible structures (tax assessment data is sufficient for this purpose).

c. The NFI will send the property owner a notice of eligibility to participate in the project. The notice will contain a description of the proposed project, the risks associated with the project, the intended benefit of the project, a description of the construction activities to be paid for as part of the Federal project, a statement that participation in this project is strictly voluntary and that the NFI will not utilize its authority of eminent domain should the owner choose not to participate, and a statement that should the owner choose to participate in the project, an easement will be imposed on the property which will prevent activities which could interfere with the project features. The language of the easement will be included with this notification so that the owner has an opportunity to discuss the property restrictions with the NFI prior to submitting an application to participate in the project (see Section 5 for a copy of the easement language).

d. Eligible residential property owners, who wish to participate in the nonstructural project, must complete and submit an application to the NFI, which will include a temporary right-of-entry to USACE and the NFI to enter upon the property to conduct investigations to determine final eligibility of the property for inclusion in the project (performing limited environmental testing and site assessments, evaluating the

condition of the structure, determining elevation requirements, verifying the current elevation). The right-of-entry for exploratory work is a separate document from the application. The NFI may use its own form or may follow the format of the Department of the Army Right-of-Entry for Investigations. The application must indicate that the owner will be provided with the findings of the environmental investigation. The application will include an acknowledgement by the owner that should HTRW be found on the property, the owner understands that until remediation of such contamination is completed, the property will not be eligible to participate in the project. The application will also include a certification by the owner that he/she has not received Federal funds in the form of a grant from an agency to construct floodproofing measures, or that he/she received Federal funds to floodproof the structure and that the funds were utilized for such work (this statement must include the amount of funds received, the type of work performed and date on which work was completed). The application will also include an acknowledgment by the owner that should they choose to participate in the project, they will grant a restrictive easement to the NFI that will prohibit activities that would interfere with the project features. A property owner may withdraw the application at any time prior to the execution of a Participation agreement by the property owner and the NFI. (See Section 5 for a description of the participation agreement.)

e. Together with the application, the property owner must submit a copy of the property deed including a plat map which delineates the location of the structure to be elevated within the property. Additionally, the property owner must provide tax assessor documentation that no taxes are due and payable on the property, as well as documentation from any holder of a mortgage that the mortgage is in good standing and that the mortgage holder does not object to the nonstructural project. The district should prepare a form that the owner can provide to the mortgage holder with project information and this attestation for signature.

5. Investigations and final eligibility determinations.

a. Real Estate and the NFI will be provided a copy of the ASTM Phase I environmental site assessment (ESA) and asbestos investigation report. The property owner must be notified in writing of the results of the Phase I ESA.

b. If the Phase I ESA indicates the potential presence of HTRW on the property, the property owner must be notified in writing by the NFI that the property has been identified as potentially being contaminated with HTRW. The notice must also request the property owner execute a separate right-of-entry for the HTRW investigations and the performance of a Phase II ESA. In addition, the notice must advise the property owner that if contamination is found, the property will be removed from the nonstructural project until the contamination is remediated. The property owner must be notified in

writing of the results of the Phase II ESA. If the Phase II ESA identifies contamination, the property owner will be notified in writing of the remediation actions that are required to be performed and that the property will not be eligible to participate in the project until remediation has been completed.

c. Once the environmental and other structure integrity assessments have been completed, the NFI will conduct property title research, based upon state requirements, to confirm fee ownership and identify encumbrances on title. The property must have a clear chain of title (with the exception of mortgages and utility or access easements). Otherwise, the property owner will be responsible for clearing title defects prior to a final determination of eligibility.

d. A final determination that a structure is qualified to participate in the nonstructural project will be made by the USACE PDT after all inspections, investigations, assessments, title research, and all other work required to determine eligibility is complete.

6. Access to property for construction of the nonstructural measure. The owner will grant the NFI and its agents temporary access to the property to perform inspection and construction activities associated with the nonstructural measure. The access right is granted through the Participation Agreement which is discussed further in paragraph 9 of Section 3, Real Estate Guidance for Residential Nonstructural Elevation Measures.

7. Perpetual restrictive easement. The project is to acquire the minimum interest needed to construct, operate, and maintain the project. Construction of the nonstructural measure only impacts the residential structure; therefore, the NFI will acquire a perpetual restrictive easement over that portion of the property wherein the residence is located. The easement will not encumber the entirety of the property because the remainder of the property is not part of the Federal project. The intent of the acquisition of the easement is to protect the project measure and maintain the project benefits for as long as the project is authorized or as long as the structure exists which is a requirement of OMRR&R. The easement is written such that applicable restrictive language will be selected depending upon the specific nonstructural measure to be constructed. For structures elevated above 4 feet, the easement must prohibit the conversion of any part of the structure, located below the lowest habitable finished floor, for human habitation. Further, the easement must prohibit the alteration of the structure in any way that impedes the movement of flood waters under the structure or negates the intent of the nonstructural measure implementation. The ground floor of an elevated residential structure can only be utilized for parking, storage, and access. For structures which are elevated less than 4 feet or structures where the basements are filled-in, select the appropriate restrictive language. Section 5 contains the language of the easement to be acquired by the NFI.

a. It is the intent of this guidance to set forth this easement as the standard estate to be acquired for projects with nonstructural residential elevations and basement fill-in measures. If a district is located in an area where state law would require language variance or the project features are so significantly different that the language in this easement would not be appropriate, the district must submit a request through its MSC to HQUSACE Real Estate for approval of a non-standard estate. If the changes to the estate language are non-material, as described in ER 405-1-12, the District Real Estate Contracting Officer has the authority to approve the non-material deviation.

b. Although it is preferable that the NFI acquire the Perpetual Restrictive Easement, it is recognized that property laws vary by state and that in some states a covenant running with the land has equal or greater enforcement capacity than an easement. If the NFI acquires a restrictive covenant running with the land, in lieu of an easement, the terms and restrictions contained in the Perpetual Restrictive Easement must be included in the deed as the covenant restrictions placed on the property. The restrictive covenant must be in the form of a "Deed Restriction" with intent to run with the land, with reference to the property description, signed both by the property owner(s) and the NFI, and filed in the county land records.

8. Easement valuation requirements.

a. Due to the voluntary participation of owners in nonstructural projects, participating owners are not considered displaced persons and are not entitled to compensation for real property interests acquired to protect the integrity of the project feature. However, 49 CFR Appendix A, 49 CFR 24.101(b)(1)(iv), and 49 CFR 24.101(b)(2)(ii) indicate that even owners who voluntarily participate in Federally assisted projects are to be informed by the agency of the market value of the property to be acquired and that the value is to be determined by a reasonable method which does not have to be an appraisal. Because these transactions are between willing sellers and willing buyers, negotiations may result in an agreement for an amount that is less than the estimated value of the real property interest.

b. As a condition of voluntary participation in a nonstructural project, the owner will release the NFI from any requirement or obligation under the URA and its implementing regulations to be informed of the market value of the restrictive easement. USACE believes this to be a fair and efficient approach since the owner is not entitled to compensation, the design and construction work is specific to the owner's structure, and the owner is receiving a direct benefit as a result of the project measure being constructed at no cost to them. In essence, the owner is voluntarily granting the easement in exchange for the construction of the nonstructural measure.

c. There will be no valuation requirement for the perpetual restrictive easement to be acquired by the NFI. This policy applies both to a feasibility study and to a Congressionally authorized project.

9. Participation agreement and deed restriction.

a. Once a final determination is made that the structure is eligible to participate in the project and the owner has confirmed interest in continuing with the process and willingness to grant a restrictive easement to the NFI, the property owner and the NFI will sign a participation agreement (See Section 6). The purpose of the Participation Agreement is:

(1) To document the nonstructural measure to be constructed and the cost associated with such; to delineate the obligations of each party;

(2) To document property owner agreement to voluntarily participate in the nonstructural project;

(3) For the owner to grant a temporary right of entry to the NFI, USACE, and its assigns for the construction of the nonstructural measure;

(4) For the owner to release the NFI from the obligation of informing him of the value of the perpetual restrictive easement;

(5) For the owner to hold harmless the NFI for any damages arising from the construction activities of the nonstructural work;

(6) For the owner to attest to his/her willingness to expend costs that may be necessary in connection with the construction of the nonstructural measure which are not eligible project costs such as betterments and costs associated with temporary relocation of residents of an owner-occupied residential structure. The participation agreement may include a copy of the nonstructural measure plans and specifications.

b. Concurrent with the signing of the participation agreement, the NFI and the owner will sign a deed containing a Perpetual Restrictive Easement, or if required by state law a Restrictive Covenant Running with the Land. The easement or restrictive covenant will be acquired only over the portion of the property occupied by the residential structure and not over the entirety of the parcel. The deed will contain language that states that the easement or restrictive covenant will automatically terminate if the structure is destroyed by fire or natural disaster. The deed must include language which informs the property owner that the NFI has authority to enforce the terms of the easement or covenant and that should the property owner violate the terms

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of the easement or covenant, the NFI may institute legal proceedings to recover the funds expended by the Government to construct the nonstructural measure on the structure.

c. Whether the NFI acquires an easement or a restrictive covenant, the deed will be recorded by the NFI in the public land records of the county in which the property is located. A model deed is included in Section 7 which contains the language of the Restrictive Easement and other stipulations that should be imposed on the property. The NFI is not required to utilize this deed and may utilize a format that is customary to its jurisdiction. However, the terms of the Restrictive Easement and other stipulations must be included in the NFI's deed.

d. No property survey will be prepared for the real property acquisition. The deed restriction will reference and attach a copy of the property plat map which delineates the location of the structure and indicate that the restrictive easement or covenant is acquired only over that portion of the property where the structure is located and that the restrictions are imposed between the ground level and the first floor of the elevated structure.

10. Relocation assistance.

a. Because owners can choose to voluntarily participate in projects with nonstructural measures, at this time they do not meet the definition of displaced persons and are not entitled to receive relocation assistance for costs associated with temporarily moving from their primary residence during structure elevation. HQUSACE is evaluating the impact of additional costs of relocation assistance on project viability in order to determine whether owner-occupants who voluntarily participate in nonstructural projects could be reimbursed for some costs associated with temporary relocations under the administrative settlement process. Until such determination is made, owner-occupants who participate in nonstructural projects will not be reimbursed for costs associated with temporary relocations.

b. Tenants who reside in structures being elevated may be eligible for certain benefits in accordance with the Uniform Act and 49 CFR 24. Temporary relocation should not extend beyond one year before the person is returned to his or her previous unit or location. Any residential tenant who has been temporarily relocated for more than one year must be offered all permanent relocation assistance which may not be reduced by the amount of any temporary relocation assistance previously provided. Tenants will be provided appropriate advisory services, including reasonable advance written notice of the following:

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- (1) Date and approximate duration of the temporary relocation;
- (2) Addresses of suitable decent, safe, and sanitary dwellings available for the temporary period;
- (3) Provisions of reimbursement for all reasonable out of pocket expenses incurred in connection with the temporary relocation including increased cost of renting replacement housing;
- (4) All temporary housing costs must be approved in advance in writing by the NFI.

11. Non-Federal Interest Authorization for Entry and Certification of Real Estate Availability .

a. Construction of nonstructural project measures differ significantly from typical USACE projects and require not only the voluntary participation of property owners but also their concurrence to the unique nonstructural measure designed for their structure. Whether a district utilizes a design-build or design-bid-build acquisition strategy for nonstructural project measures, it is not reasonable to expect that an owner would sign the deed granting the NFI the perpetual restrictive easement without first having been provided the design for the nonstructural measure to be constructed on their structure. Contrary to policy requirements in ER 405-1-12, Chapter 12, Certification of Real Estate Availability cannot occur prior to contract award for nonstructural design-build and design-bid-build contracts. Approval is hereby granted to deviate from ER 405-1-12, Chapter 12 and to proceed with solicitation, evaluation of proposals, and award of contract for the nonstructural measures without Certification of Real Estate Availability. After acquisition and recordation of the Perpetual Restrictive Easement, a notice or letter to proceed with elevation of each specific property may be issued to the contractor. In no case will a contractor be permitted to initiate any construction activities on a structure until after District Real Estate has certified NFI acquisition of the Perpetual Restrictive Easement for that property.

b. Once the NFI and the owner have signed the participation agreement and the deed acquiring the easement, the NFI may issue Authorization for Entry (AFE) for that particular structure. The NFI and the district will decide in advance whether the NFI is to provide AFE for each individual structure or for a cluster of structures in a given construction contract.

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12. Credit or reimbursement to the Non-Federal Interest for land, easements, and relocations provided to the project. Within 6 months of project cluster construction completion, the NFI will submit a LERR credit/reimbursement package, as applicable, that includes all costs incidental to acquisition of title to real property rights necessary to construct and operate and maintain the nonstructural measure. The district and the NFI will develop a plan for the submission of credit packages so that the process does not become unduly burdensome to the district or the NFI. For projects which are reimbursable, and presuming there are Federal funds available for reimbursement, the package would ideally encompass the information for a minimum of 20 structures unless construction of elevation measures has been completed on fewer than 20 structures during a fiscal year. This is to reduce the administrative efforts associated with issuing reimbursements to the NFI. Districts will follow established procedures for review of NFI credit and reimbursement packages and guidelines set in Chapter 12 of ER 405-1-12, ER 1165-2-18, and ER 1165-2-29 as applicable.

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Enclosure 4: Excerpt of 49 CFR Part 24, SUBPART B - Real Property Acquisition

24.101 Applicability of acquisition requirements.

(a) *Direct Federal program or project.*

(1) The requirements of this subpart apply to any acquisition of real property for a direct Federal program or project, except acquisition for a program or project that is undertaken by the Tennessee Valley Authority or the Rural Utilities Service. (See appendix A, § 24.101(a).)

(2) If a Federal Agency (except for the Tennessee Valley Authority or the Rural Utilities Service) will not acquire a property because negotiations fail to result in an agreement, the owner of the property shall be so informed in writing. Owners of such properties are not displaced persons, (see §§ 24.2(a)(9)(ii)(E) or (H)), and as such, are not entitled to relocation assistance benefits. However, tenants on such properties may be eligible for relocation assistance benefits. (See § 24.2(a)(9)).

(b) *Programs and projects receiving Federal financial assistance.* The requirements of this subpart apply to any acquisition of real property for programs and projects where there is Federal financial assistance in any part of project costs except for the acquisitions described in paragraphs (b)(1) through (5) of this section. The relocation assistance provisions in this part are applicable to any tenants that must move as a result of an acquisition described in paragraphs (b)(1) through (5) of this section. Such tenants are considered displaced persons. (See § 24.2(a)(9).)

(1) The requirements of Subpart B do not apply to acquisitions that meet all of the following conditions in paragraphs (b)(1)(i) through (iv):

(i) No specific site or property needs to be acquired, although the Agency may limit its search for alternative sites to a general geographic area. Where an Agency wishes to purchase more than one site within a general geographic area on this basis, all owners are to be treated similarly. (See appendix A, § 24.101(b)(1)(i).)

(ii) The property to be acquired is not part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired within specific time limits.

(iii) The Agency will not acquire the property if negotiations fail to result in an amicable agreement, and the owner is so informed in writing.

(iv) The Agency will inform the owner in writing of what it believes to be the market value of the property. (See appendix A, § 24.101(b)(1)(iv) and (2)(ii).)

(2) Acquisitions for programs or projects undertaken by an Agency or person that receives Federal financial assistance but does not have authority to acquire property by eminent domain, provided that such Agency or person shall:

(i) Prior to making an offer for the property, clearly advise the owner that it is unable to acquire the property if negotiations fail to result in an agreement; and

(ii) Inform the owner in writing of what it believes to be the market value of the property. (See appendix A, § 24.101(b)(1)(iv) and (2)(ii).)

(3) The acquisition of real property from a Federal Agency, State, or State Agency, if the Agency desiring to make the purchase does not have authority to acquire the property through condemnation.

(4) The acquisition of real property by a cooperative from a person who, as a condition of membership in the cooperative, has agreed to provide without charge any real property that is needed by the cooperative.

(5) Acquisition for a program or project that receives Federal financial assistance from the Tennessee Valley Authority or the Rural Utilities Service.

(c) Less-than-full-fee interest in real property.

(1) The provisions of this subpart apply when acquiring fee title subject to retention of a life estate or a life use; to acquisition by leasing where the lease term, including option(s) for extension, is 50 years or more; and to the acquisition of permanent and/or temporary easements necessary for the project. However, the Agency may apply these regulations to any less-than-full-fee acquisition that, in its judgment, should be covered.

(2) The provisions of this subpart do not apply to temporary easements or permits needed solely to perform work intended exclusively for the benefit of the property owner, which work may not be done if agreement cannot be reached.

(d) Federally-assisted projects. For projects receiving Federal financial assistance, the provisions of §§ 24.102, 24.103, 24.104, and 24.105 apply to the greatest extent practicable under State law. (See § 24.4(a).)

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Appendix A to Part 24 – Additional Information

Subpart B – Real Property Acquisition

Section 24.101(b)(1)(i). The term "general geographic area" is used to clarify that the "geographic area" is not to be construed to be a small, limited area.

Section 24.101(b)(1)(iv) and (2)(ii).

These sections provide that, for programs and projects receiving Federal financial assistance described in §§ 24.101(b)(1) and (2), Agencies are to inform the owner(s) in writing of the Agency's estimate of the fair market value for the property to be acquired.

While this part does not require an appraisal for these transactions, Agencies may still decide that an appraisal is necessary to support their determination of the market value of these properties, and, in any event, Agencies must have some reasonable basis for their determination of market value. In addition, some of the concepts inherent in Federal Program appraisal practice are appropriate for these estimates. It would be appropriate for Agencies to adhere to project influence restrictions, as well as guard against discredited "public interest value" valuation concepts.

After an Agency has established an amount it believes to be the market value of the property and has notified the owner of this amount in writing, an Agency may negotiate freely with the owner in order to reach agreement. Since these transactions are voluntary, accomplished by a willing buyer and a willing seller, negotiations may result in agreement for the amount of the original estimate, an amount exceeding it, or for a lesser amount. Although not required by the regulations, it would be entirely appropriate for Agencies to apply the administrative settlement concept and procedures in § 24.102(i) to negotiate amounts that exceed the original estimate of market value. Agencies shall not take any coercive action in order to reach agreement on the price to be paid for the property.

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Enclosure 5: Perpetual Restrictive Easement for Residential (Elevation/Basement In-Fill)

A perpetual and assignable easement for the establishment, maintenance, operation and use of a restricted area in, on, over and across only that portion of land occupied by a residential structure(s) as described (in Schedule C or Exhibit A), said residential structure(s) to be elevated in connection with the construction, operation, maintenance, repair, replacement, and rehabilitation of the (Project Name and Authorization), consisting of the right to *(prohibit human habitation between the ground level and the first floor of the elevated structure, to prohibit construction or placement of any enclosure or permanent obstruction or impairment of the flow of water between the ground level and the first floor of the elevated structure, and to prohibit other uses of the elevated structure or the land that would impair, contravene, or interfere with the integrity of the elevated structure)* *(to prohibit the enclosure of flood vents to the infilled basement); (together with the right of ingress and egress, with advanced owner notification, over and across other portions of the property for the purpose of inspecting and monitoring the residential structure and project measures located on said land, and for the purpose of enforcing the rights, land use restrictions, and prohibitions set forth herein);* reserving to the grantor(s), heirs, successors and assigns, all such rights and privileges as may be used without interfering with or abridging the rights, easement, and restrictions hereby acquired, including the right to *(utilize the area between the ground level and the elevated structure for parking and storage;)* to demolish and rebuild the structure with a first floor elevation that is three (3) feet above the community Base Flood Elevation requirement; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired.

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Enclosure 6: Model Participation Agreement for Nonstructural Projects (Traditional Contracting Methods)

This model agreement is for nonstructural projects wherein construction of nonstructural measures will be performed through traditional contracting methods whereby the USACE contracts with the design, bid, build contractor. If a different project delivery method is used, this agreement will need modifications for appropriate language.

PARTICIPATION AGREEMENT
BETWEEN
(NON-FEDERAL INTEREST NAME)
AND
(OWNER NAME)

THIS AGREEMENT is entered into this ____ day of _____, _____, by and between **[OWNER NAME(S)]** (hereinafter "Owner") and the **[NON-FEDERAL INTEREST'S NAME]** (hereinafter the "[City, State, County, or other]"), represented by **[NAME AND TITLE]**.

WHEREAS, construction of the **[Insert Full Name of the Project]** (hereinafter the "Project") was authorized by **[Insert cite]**;

WHEREAS, the [City, State, County, or other] and the U.S. Army Corps of Engineers (hereinafter "USACE") entered into a project partnership agreement, dated [Month, date, year of PPA] (hereinafter the "PPA"), for implementation of the Project;

WHEREAS, pursuant to the PPA, the [City, State, County, or other] must provide required land, easements, relocations, and rights of way for Project construction and to operate and maintain the Project for so long as the Project is authorized;

WHEREAS, Owner has a sufficient interest in a certain parcel of land and the structures situated thereon located at [property address], acquired by Owner by deed

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recorded in Book _____, Page _____ on [Month, Date, Year], in
[Name of County/Parish] [Insert either County/Parish, as applicable] (hereinafter the
"Property");

WHEREAS, Owner desires to voluntarily participate in and receive the benefits of
the Project and voluntarily executes this instrument to grant access to the [City, State,
County, or other], its agents, assigns, including USACE, and their contractors to perform
inspection and construction activities on the Property to reduce the risk of incurring
damages from a ____ year flood event.

NOW, THEREFORE, THIS AGREEMENT AND GRANT is made and entered into
by and between the Owner and the [City, State, County, or other] in consideration of the
mutual agreement hereinafter set forth:

1. Owner hereby grants to the [City, State, County, or other], its agents, assigns,
including USACE, and their contractors temporary access on [his/her/theirs/its]
Property to perform inspection and construction activities on the Property to
include the following and described in more detail in the attached Plans and
Specifications (Exhibit A): [briefly describe the structure(s) to be floodproof and the
floodproofing work to be done on the structures and property—in-fill the basement
and install flood vents, elevate the structure ____ feet on piles, walls, cinder blocks]
(hereinafter the "Nonstructural Measures").
2. The [City, State, County, or other] and the Owner agree that design and
construction of the Nonstructural Measures on the Property will be at no cost to

the Owner, except as provided below in paragraphs 3 and 6. Design and construction costs are estimated to be \$_____ and provision of this benefit by the Project is subject to the availability of [City, State, County, or other] and USACE funds. The work shall be performed by a licensed contractor in accordance with the approved plans and specifications made a part hereof and attached hereto. The [City, State, County, or other] will advise the Owner of the projected construction start and completion dates.

3. Owner agrees to pay for and be responsible for any desired modifications or betterments in excess of the Plans and Specifications. The modifications or betterments must be reviewed and approved by the [City, State, County, or other] at least sixty (60) days prior to scheduled construction start date to ensure that such modifications will not impact the suitability and functionality of the Nonstructural Measures.
4. The Owner agrees to grant to the [City, State, County, or other], prior to construction and by separate instrument a Perpetual Restrictive [Easement/Covenant] to be recorded and run with the title to the land. Said Perpetual Restrictive [Easement/Covenant] will permanently encumber the portion of the Property occupied by the structure(s) receiving the Nonstructural Measures and will prohibit any use or alteration of the structure that would impede or negate the function of the constructed Nonstructural Measures or that would interfere with the integrity of the completed Nonstructural Measures. The Owner acknowledges

that because [he/she/they/it] [is/are] a voluntarily participant in the Project, without any coercion or threat of condemnation from the [City, State, County, or other], and because the design and construction work is specific to Owner's structure(s) on the Property and for Owner's sole benefit, provided at no cost to Owner other than that described in paragraphs 3 and 6, the [City, State, County, or other] does not intend to pay Owner additional compensation for any loss in market value to the property as a result of the Perpetual Restrictive [Easement/Covenant]. Based on the foregoing, Owner hereby agrees to release the [City, State, County, or other], its agents and assigns, including USACE of any obligation to establish a market value of the Perpetual Restrictive [Easement/Covenant] and to inform Owner of such value.

5. Owner shall not convey to any third party, real property interests in or on said Property and structure(s) or create any new liens thereon during the period of time between recordation of this Agreement and the physical completion of said Nonstructural Measures.
6. Owner agrees to temporarily relocate from the structure(s) receiving the Nonstructural Measures upon receipt of a written 30-day notice from the [City, State, County, or other]. The duration of the temporary relocation will be during construction of the Nonstructural Measures and until the Owner is provided written notice by the [City, State, County, or other] that it is safe to reoccupy the structure. The temporary period is estimated to be for (___ calendar days). The Owner

agrees that it will be [his/her/their/its] sole responsibility to find suitable temporary residence for structure occupants and to bear full costs of the temporary relocation. If the structure is occupied by tenants considered displaced persons under the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted programs of 1970 (42 U.S.C. 4601, *et al.*), the tenants will be relocated by the [City, State, County, or other] in accordance with the requirements thereof and all regulations issued thereto.

7. The Owner, for [himself/herself/themselves/its] and [his/her/their/its] heirs and assigns, hereby warrants and agrees that [he/she/they/it] will forever hold and save harmless the [City, State, County, or other], its agents and assigns from any damages or injuries resulting either directly or indirectly from the inspection and construction activities during the term of this agreement, excluding any negligence by the Owner or its agents and assigns;
8. The obligations of the [City, State, County, or other] under this agreement are contingent upon the Owner obtaining, as may be acceptable to the [City, State, County, or other], the consent of any lienholder to the terms of this Agreement and of the Perpetual Restrictive [Easement/Covenant]. Owner must cooperate with any other title curative work necessary to accomplish construction of the Nonstructural Measures and to grant the Perpetual Restrictive [Easement/Covenant], as may be required by the [City, State, County, or other].
9. The grant of access hereunder to the [City, State, County, or other], its agents,

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assigns, to include the USACE, and their contractors to perform inspection activities and to construct the Nonstructural Measures on the Property will terminate upon written notice by the [City, State, County, or other] to the Owner that all work is complete.

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IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date of acceptance hereof by the (City, State, County, or other).

Witness

Owner

Witness

Owner

ACKNOWLEDGEMENT

STATE OF _____

COUNTY OF _____

On this ____ day of _____, 20__, before me personally appeared, _____ (Owners), who executed the foregoing instrument as their free act and deed.

(Seal)

NOTARY PUBLIC

My Commission Expires:

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ACCEPTED:

Witness

(Non-Federal Interest Name)

Witness

By:

(Name, Title)

ACKNOWLEDGEMENT

STATE OF _____

COUNTY _____

On this _____ day of _____, _____, personally appeared _____ (name of NFI Officer), (title), (NFI Agency Name), known to me to be the person described in the foregoing Agreement and acknowledged that he/she executed the same in the capacity therein stated and for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

(Seal)

NOTARY PUBLIC

My Commission Expires:

***May need to add additional certificate that NFI official is authorized to commit entity in this Agreement.*

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Enclosure 7: Sample Deed Restriction for Nonstructural Projects

This sample serves as a guide for Non-Federal Interests (NFI) who acquire real estate interests for nonstructural projects. The NFI is not required to utilize this model, but language contained herein such as the perpetual easement estate and the restrictions to run with the land must be included in the deed executed by the NFI. Districts should ensure this deed and easement language are compliant with the laws and regulations of the state in which the instrument will be recorded.

DEED RESTRICTION

KNOW ALL MEN BY THESE PRESENTS that on the date, at the place and before the undersigned witnesses and Notary Public(s), duly commissioned and qualified in and for the County and State indicated, personally came and appeared:

OWNER, individually, a person of the full age of majority domiciled in the County of _____, State of _____, who stated under oath that she/he is (*marital status*) and that her/his mailing address is _____;

OWNER, individually, a person of the full age of majority domiciled in the County of _____, State of _____, who stated under oath that she/he is (*marital status*) and that her/his mailing address is _____;

(hereinafter referred to as "Vendors"), who declared that they grant, bargain, sell, convey, transfer, assign and deliver, with all legal warranties and with full substitution and subrogation in and to all rights and actions of warranty which said Vendors have or may have against all preceding owners and vendors, unto:

(*NFI*), represented herein by, (*name of agent and title*), whose mailing address is _____

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(herein referred to as "Vendee"), in connection with the U.S. Army Corps of Engineers' (*Project Name, County, State*) a perpetual restrictive easement over a portion of the property located at (*property address*), acquired by the VENDORS by deed recorded in Book____, Page ____, Entry # ____ on (*date*), in (*County/State*), whose property description is attached hereto and made a part hereof:

Perpetual Restrictive Easement for Residential (Elevation/Basement In-Fill)

A perpetual and assignable easement for the establishment, maintenance, operation and use of a restricted area in, on, over and across only that portion of land occupied by a residential structure(s) as described (in Schedule C or Exhibit A), said residential structure(s) to be elevated in connection with the construction, operation, maintenance, repair, replacement, and rehabilitation of the (*Project Name and Authorization*), consisting of the right to (*prohibit human habitation between the ground level and the first floor of the elevated structure, to prohibit construction or placement of any enclosure or permanent obstruction or impairment of the flow of water between the ground level and the first floor of the elevated structure, and to prohibit other uses of the elevated structure or the land that would impair, contravene, or interfere with the integrity of the elevated structure*) (*to prohibit the enclosure of flood vents to the infilled basement*); (*together with the right of ingress and egress, with advanced owner notification, over and across other portions of the property for the purpose of inspecting and monitoring the residential structure and project measures located on said land, and for the purpose of enforcing the rights, land use restrictions, and prohibitions set forth herein*); reserving to the grantor(s), heirs, successors and assigns, all such rights and privileges as may be used without interfering with or abridging the rights, easement, and restrictions hereby acquired, including the right to (*utilize the area between the ground level and the elevated structure for parking and storage*); to demolish and rebuild the structure with a first floor elevation that is three (3) feet above the community Base Flood Elevation requirement; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired.

AND IT IS FURTHER AGREED AND UNDERSTOOD by and between the parties hereto that the VENDOR choosing to voluntarily participate in the (*Project Name*) and having granted the right to the (*NFI*) to (*describe the floodproofing measures*) at no cost to the VENDOR, the VENDOR agrees for itself, its successors and assigns, forever, that this Deed is made and accepted upon the following stipulations, which stipulations shall be binding upon and enforceable against the VENDOR, its successors and assigns, in perpetuity or until such time as the structure no longer exists or the project is de-authorized by Congress; and that the notices, stipulations, and restrictions set forth herein are a binding condition on the Property herein described and shall be deemed to run with the land in perpetuity:

1. *For structures which are elevated 4 feet or more above base flood elevation -*
Owner will not enclose the areas below the base flood elevation and those areas will only be used for the parking of vehicles, limited storage, and/or access to the structure;
2. *For structures which are elevated less than 4 feet above base flood elevation*
- All enclosed areas below the base flood elevation must be equipped with vents permitting the automatic entry and exit of flood water.
3. No mechanical, electrical, or plumbing devices associated with the structure will be installed below the base flood elevation.

4. The (NFI) will monitor adherence to the conditions of the Perpetual Restrictive Easement and the aforementioned stipulations through physical inspection of the property from the public street. However, should the structure not be visible from the street due to fences, vegetation or any other obstruction, the (NFI) shall have the right to enter the parcel after providing reasonable notice to the VENDOR in order to assess adherence to the terms of the easement.
5. These stipulations shall be enforceable, at law or in equity, by the (NFI), and the VENDOR(S) agree that the (NFI) may demand repayment of the cost of construction or may institute legal action against the VENDOR to recover the cost of construction if the VENDOR fails to abide by the conditions of the Perpetual Restrictive Easement and the aforementioned stipulations.
6. Alterations to the area below the elevated structure which do not violate the terms of the perpetual restrictive easement are not subject to 33 USC 408 and do not require the owner to obtain a Section 408 permit.

VENDOR(S) warrants that the land and structure over which these rights and easement are conveyed are owned by VENDOR(S) in fee, and that any and all state, county and city taxes, up to and including the taxes due and eligible in the year _____ are paid with all subsequent ad valorem taxes to be paid by VENDOR when same become due and payable.

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Mortgage and conveyance certificates are waived and the parties hereto release and relieve the undersigned notary(ies) and the attorney closing this transaction from any and all liability and/or responsibility in connection with the non-production thereof and the preparation and execution of this Deed Restriction.

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THUS DONE AND SIGNED on the ____ day of _____, 20__

in the presences of the two undersigned and competent witnesses, who hereunto
signed their names with said VENDOR.

Witness _____ Owner

Witness _____ Owner

ACKNOWLEDGEMENT

STATE OF _____

COUNTY OF _____

On this ____ day of _____, 20__, before me personally appeared,
_____(Owners), who executed the foregoing
instrument as their free act and deed.

(Seal)

NOTARY PUBLIC

My Commission Expires:

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ACCEPTED:

Witness (Non-Federal Interest Name)

Witness (Name, Title)

ACKNOWLEDGEMENT

STATE OF _____

COUNTY _____

On this _____ day of _____, _____, personally appeared _____ (name of NFI Officer), (title), (NFI Agency Name), known to me to be the person described in the foregoing Agreement and acknowledged that he/she executed the same in the capacity therein stated and for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

(Seal)

NOTARY PUBLIC

My Commission Expires:

***May need to add additional certificate that NFI official is authorized to commit entity in this Agreement.*

Enclosure 8: Operation and Maintenance for Nonstructural Elevations

1. Once a Notice of Construction Completion has been issued, the NFI's obligations for operation and maintenance for the subject structure commences. USACE will have no operation and maintenance responsibilities. Enforcement of restrictive easements is the sole responsibility of the NFI. The NFI will prepare mass mailings to project participants every ten years providing notice that the structure on the property was elevated by the USACE and notice of the easement encumbering the property and the restrictions thereon. On a rotating schedule, every five years, the NFI will conduct physical inspections from the street of 10 percent of the structures that have participated in the project. For those structures which are situated on large acreage parcels where the structure is not visible from the street, the NFI may notify the owner of the inspection and obtain concurrence to enter the property. When available, the NFI will also make efficient use of monitoring that is already being conducted by local cities or counties, Federal Emergency Management Agency, or state agencies. The inspections will determine among other things, that no part of the structure located below the level of the lowest habitable finished floor has been converted to living area for human habitation or occupancy, or otherwise altered in any manner which would impede the movement of waters beneath the structure.
2. The NFI will utilize GIS or a sharable database to track surveys and violations. The NFI may use existing tracking tools or those from local, state, or Federal agencies if they exist. The NFI will provide updates to the executing USACE district every five years after surveys have been completed.
3. If a potential violation of the terms of the easement is discovered, the NFI will coordinate with the local government, as appropriate. Notification will also be provided to the Federal Emergency Management Agency regional office. Resolution may be deferred to a local government if there are sufficient mechanisms for enforcement and resolution; however, the NFI will still issue a notice of violation and will inform the property owner that the issue must be resolved with the local government or legal action may be taken to recover the funds expended by the Federal Government. While this is a NFI responsibility, the Government, in its sole discretion, always retains the right to step in to operate and maintain the project, which does not relieve the NFI of its obligations or preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance under a project's agreement.

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Enclosure 9: Requests to Alter USACE Civil Works Nonstructural Elevation Projects

EC 1165-2-220, dated 10 September 2018, guides the process to request permission to alter a USACE Civil Works project. The EC is applicable to any activity that occurs on real property that the Federal Government has acquired for the USACE project or that the NFI has provided for the USACE project under the terms of the PPA. Therefore, construction activities which do not violate the terms of the easement of elevated residences will not be subject to the requirements of EC 1165-2-220.