DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

APR - 5 2012

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: Implementation Guidance for Section 2003(b) of the Water Resources Development Act of 2007 – Definition of Non-Federal Interest

1. Section 2003(b) of WRDA 2007 amends Section 221(b) of the Flood Control Act of 1970 (hereinafter "Section 221") (42 U.S.C. 1962d-5b(b)) to expand the definition of non-Federal interests eligible to act as the sponsor for a water resources project agreement to include Federally recognized Indian tribes and nonprofit entities with the consent of the affected local government. A copy of Section 221(b) as amended by Section 2003(b) of WRDA 2007 is attached.

2. Federally Recognized Indian Tribe. To be eligible to act as a sponsor, the tribe must be a Federally recognized Indian tribe; that is, any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

3. Nonprofit Entity.

a. Organization. To be eligible to act as a sponsor, the nonprofit entity must be an organization incorporated under the applicable laws of the State in which it operates as a nonprofit organization, exempt from paying Federal income taxes under section 501 of the Internal Revenue Code (26 U.S.C. 501), and whose purposes include and are directly related to the purpose of the project.

b. Consent of Affected Local Government. In addition, the affected local government must consent, in writing, to the nonprofit entity acting as sponsor for the study, design, or construction of the project. During the Reconnaissance Phase (for projects that will be specifically authorized) or the 100 percent Federally funded portion of the Feasibility Phase (for projects implemented under the Continuing Authority Program (CAP) and regional authorities), the district must identify, and coordinate with, the affected local government. Typically, the affected local government will be the smallest unit of government that has jurisdiction over the area impacted by the potential project. For larger or more complex projects, multiple jurisdictions may be involved and written consent must be obtained from the affected local government in each jurisdiction. The written consent must be received prior to processing the applicable agreement (Feasibility Cost Share Agreement, Design Agreement, or Project Partnership Agreement) for approval, with the date of the written consent(s) included in a Whereas clause in such applicable agreement.

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c. Sponsorship by a Nonprofit Entity.

(1) A nonprofit entity is eligible to act as the sole sponsor for study, design, and construction of an ecosystem restoration project - such as specifically authorized ecosystem restoration projects; projects implemented under the CAP Sections 206, 1135, and 204 (those that provide ecosystem restoration benefits); Estuary Restoration Act projects; and any other regional authorities for implementation of critical restoration or ecosystem restoration projects.

(2) For study, design, and construction of projects involving any purpose other than ecosystem restoration, a nonprofit entity is eligible to act as a sponsor as long as a legally constituted public body (which includes a Federally recognized Indian tribe) also will act as a sponsor for the project. Where a nonprofit entity is one of the sponsors, the agreement must make clear that both sponsors are jointly and severally responsible and liable for the Hold and Save obligations. In addition, the agreement will require in all cases that the public body (alone or jointly with the nonprofit entity) is responsible for operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) of the project.

d. Sponsor Responsibilities. As with a legally constituted public body, any nonprofit entity that proposes to act as a sponsor must be able to demonstrate that it has the full legal and financial authority and capability to perform the terms of the agreement and to pay damages, if necessary, in the event of failure to perform. For agreements addressing construction of a project, the nonprofit entity must demonstrate the capability to satisfy a sponsor's responsibilities under the agreement, including payment of its required share of project costs; provision or performance of lands, easements, rights-of-way, relocations, and dredged or excavated material disposal areas for the project, as applicable; and performance, in perpetuity, of any non-Federal OMRR&R. In evaluating the nonprofit entity's authority and capability, the District should analyze the nonprofit entity's Articles of Incorporation and by-laws and, commensurate with the magnitude of the nonprofit entity's responsibilities for, and the nature of, the project, review any other documents and consider relevant factors bearing upon the nonprofit entity's ability to act successfully as a sponsor.

Jo-Ellen Darcy

Attch

Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)

WRDA 2007 LANGUAGE

SEC. 221 (b) of the Flood Control Act of 1970, as amended by Section 2003 (b) of WRDA 2007, WRITTEN AGREEMENT REQUIREMENT FOR WATER RESOURCES PROJECTS.

(b) DEFINITION OF NON-FEDERAL INTEREST. - The term 'non-Federal interest' means –

(1) a legally constituted public body (including a federally recognized Indian tribe); or

(2) a nonprofit entity with the consent of the affected local government,

that has full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.