



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

CECW-EC

JUN 27 2017

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS

SUBJECT: Implementation Guidance for Section 1156(a)(2) of the Water Resources Development Act of 2016 (WRDA 2016), Contributed Funds

1. Section 1156(a)(2) of WRDA 2016, among other things, further amends Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408; referred to as Section 408) to authorize the Secretary to accept and expend funds received from non-federal public or private entities to evaluate requests under Section 408 for an alteration or permanent occupation or use of a work built by the United States. Enclosed is an excerpt from Section 408 that includes the Section 1156(a)(2) amendment. Note that separate implementation guidance will be issued addressing the other amendments made by Section 1156(a)(2).
2. In accordance with this guidance, district and division commanders may accept and expend funds from non-federal public or private entities to expedite the evaluation of Section 408 requests. The template agreement for the acceptance of funds for the evaluation of Section 408 requests will be posted to the USACE agreements website, under "Agreement Templates." The template agreement may be modified as appropriate to address case-specific circumstances. In addition, it may be modified to cover multiple Section 408 requests by a single requester. Following district counsel or division counsel review and concurrence that the negotiated agreement is acceptable, the district commander or division commander, respectively, may approve and sign the agreement.
3. The provision of funds for a Section 408 evaluation is voluntary, and all requestors will receive a fair and timely review of their Section 408 request regardless of whether they have contributed funds for the evaluation. Further, the acceptance and expenditure of funds will not impact impartial decision making at any level with respect to the evaluation and any final decision, either substantively or procedurally. The evaluation must comply with all applicable laws, regulations, and procedures.
4. In general, except as noted in paragraph 5, the funds can be used for all activities related to the evaluation of a Section 408 request, including pre-coordination and review activities.

CECW-EC

SUBJECT: Implementation Guidance for Section 1156(a)(2) of the Water resources Development Act of 2016 (WRDA 2016), Contributed Funds

5. Limitations.

a. In order to preserve impartial decision making, the funds cannot be used by the final decision maker for his or her review, recommendations, or decision concerning a Section 408 request.

b. The funds cannot be used for compliance and enforcement activities. Enforcement activities must be charged to the applicable appropriations account based on the USACE Civil Works project.

c. The funds cannot be used to cover the review of related Section 10/404/103 permit decisions.

d. The funds cannot be used for activities related to non-federal hydropower development.

e. The funds cannot be used to cover the administrative expenses incurred in processing a Covered Transaction (such as an easement, or a lease or a license of real property of the United States) under 10 U.S.C. 2695 or cost incurred for activities outlined in 30 U.S.C. 185(l). Costs associated with these administrative expenses will be recovered pursuant to 10 U.S.C. 2695 and 30 U.S.C. 185(l).

f. The funds cannot be used to prepare documents or products for the Section 408 requestor.

6. Authority under Section 408 is limited to the acceptance of funds from non-federal public and private entities. If the non-federal public or private entity is providing funds that it received from another federal agency, it must provide written confirmation from that federal agency that the funds are authorized to be used for the Section 408 evaluation.

7. In addition to the authority provided in Section 408, there are other authorities that allow for the acceptance and expenditure of funds for Section 408 evaluations, including Section 214 of the WRDA 2000, as amended (33 U.S.C. 2352) and 23 U.S.C. 139(j). Acceptance and expenditure of funds under these authorities remains permissible, as appropriate, for Section 408 reviews in accordance with EC 1165-2-216. In general, funds should be accepted under one authority only. In the event that funds will be accepted under more than one authority, separate agreements should be executed and there should be no duplication of activities to be funded between the agreements.

CECW-EC

SUBJECT: Implementation Guidance for Section 1156(a)(2) of the Water resources Development Act of 2016 (WRDA 2016), Contributed Funds

8. Accountability.

a. The funds accepted and expended under the authority of Section 408 must be accounted for to ensure that they are expended for their intended purpose. Receipt and expenditure of funds will be tracked by a separate account in the Corps of Engineers Financial Management System.

b. These funds shall be collected into 096R8862 receipt account under the Command Indicator Code of SC408 and 408 CCS. Each individual signed agreement will require the establishment of a cost share control record.

c. Section 408 coordinators must maintain copies of all funding agreements even after completion or closure.

d. Section 408 coordinators will be accountable for reporting to HQUSACE annually on the status of any active funding agreements within their area of responsibility. The status should include for each agreement the total funds accepted and expended within the applicable fiscal year and any Section 408 decisions rendered.

9. The guidance in this memorandum will be incorporated into the future revision of the Section 408 policy and procedures document.

10. Questions regarding this implementation guidance should be directed to Tammy Conforti, Special Assistant for Levee Safety, Engineering and Construction Division, at (202) 761-4649 or Tammy.Conforti@usace.army.mil.

Encl



JAMES C. DALTON, P.E.
Director of Civil Works

DISTRIBUTION
(see next page)

CECW-EC

SUBJECT: Implementation Guidance for Section 1156(a)(2) of the Water resources Development Act of 2016 (WRDA 2016), Contributed Funds

DISTRIBUTION:

COMMANDERS, REGIONAL BUSINESS AND PROGRAMS DIRECTORS,
GREAT LAKES AND OHIO RIVER DIVISION, CELRD

MISSISSIPPI VALLEY DIVISION, CEMVD

NORTH ATLANTIC DIVISION, CENAD

NORTHWESTERN DIVISION, CENWD

PACIFIC OCEAN DIVISION, CEPOD

SOUTH ATLANTIC DIVISION, CESAD

SOUTH PACIFIC DIVISION, CESP

SOUTHWESTERN DIVISION, CESWD

33 U.S.C. 408 Excerpt, with WRDA 2016 provision on contributed funds highlighted.

(a) Prohibitions and permissions. It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: Provided, That the Secretary of War [Secretary of the Army] may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: Provided further, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.

(b) Concurrent review.

(1) NEPA Review. . . .

(3) Contributed funds. The Secretary may accept and expend funds received from non-Federal public or private entities to evaluate under this section an alteration or permanent occupation or use of a work built by the United States.