Testimony of
Jimmy Hague, Senior Water Policy Advisor for The Nature Conservancy
Regarding U.S. Army Corps of Engineers Project Partnership Agreements
Before the Committee on Environment and Public Works
U.S. Senate

November 29, 2023

Chair Carper, Ranking Member Capito and Members of the Committee, thank you for the opportunity to testify today. My name is Jimmy Hague, Senior Water Policy Advisor at The Nature Conservancy. The Nature Conservancy (TNC) is a global conservation organization dedicated to conserving the lands and waters on which all life depends. Guided by science, we create innovative, on-the-ground solutions to the world's toughest challenges so that nature and people can thrive together.

We tackle climate change, conserve lands, waters and oceans at an unprecedented scale, work to provide food and water sustainably, and help make cities more sustainable. Working in all 50 states and 79 countries and territories, we engage local communities, governments, the private sector, and other partners, including farmers, ranchers and other landowners to achieve effective and lasting conservation impact.

TNC and USACE Partnership for Water Conservation

We know we have years, not decades, to take on the interconnected crises of climate change and biodiversity loss. What we do between now and 2030 will determine whether we slow warming to 1.5 degrees Celsius—the level scientists agree will avoid the worst impacts of climate change.

Our actions will also determine whether we conserve enough land and water to slow the rapid acceleration of species loss. If we do both, we will be able to safeguard people from the disastrous effects of both of these crises.

At the Nature Conservancy (TNC) we have set six ambitious global conservation goals we aim to achieve by 2030. For example, by the end of the decade, our organization aims to conserve 1 million kilometers of rivers—enough to stretch 25 times around the globe—plus 30 million hectares of lakes and wetlands.

In the United States, the U.S. Army Corps of Engineers (USACE) is critical to achieving our goals for healthy and resilient rivers, lakes, and coasts. TNC has partnered extensively with USACE on that mission through dozens of projects across the country, contributing scientific expertise on the use, design, and evaluation of nature-based solutions, assisting with program

implementation and advocating for policy changes to modernize USACE procedures. Examples include:

Chesapeake Bay Oyster Restoration, Maryland and Virginia. A partnership composed of USACE, the National Oceanic and Atmospheric Administration, Maryland Department of National Resources, Virginia Marine Resources Commission, TNC, and many others has worked for more than a decade to restore oyster reefs in ten Chesapeake Bay tributaries by 2025. The partnership is on track to meet and exceed that goal, and in doing so has created the largest oyster reef restoration projects in the world and a global model for success.

Engineering With Nature Initiative. The USACE Engineering With Nature (EWN) initiative describes itself as "the intentional alignment of natural and engineering processes to efficiently and sustainably deliver economic, environmental, and social benefits through collaboration." The initiative started in 2010, and TNC has supported and participated in its work since its inception. For example, TNC scientists helped write EWN's International Guidelines on Natural and Nature-Based Features (NNBF) for Flood Risk Management, published in September 2021, and EWN's atlases showcasing EWN principles and practices in action which have included nature-based work TNC was involved in at Jekyll Island, Georgia; Mill River Dam in Taunton, Massachusetts; Puyallup River Revetment in Washington state; Howland Dam Fish Bypass in Maine; and Emiquon Water Management in Illinois. We have also conducted educational briefings on nature-based solutions with EWN leads and other partners for Congress and participated in the EWN podcast series.

Hamilton City Flood Damage Reduction and Ecosystem Restoration Project, Hamilton City, California. TNC worked with USACE and the non-federal project sponsor, Reclamation District 2140, on a multipurpose flood damage reduction and ecosystem restoration project in Hamilton City, California, located approximately 90 miles north of Sacramento adjacent to the west bank of the Sacramento River. It consists of (1) the construction of a 6.8-mile set-back levee to provide improved flood protection to the community and agricultural areas and (2) the reconnection of approximately 1,400 acres to the Sacramento River flood plain and restoration of the acreage into the native riparian habitat.

Missouri River Levee Unit 536 Large-Scale Setback, Northwestern Missouri. TNC worked with USACE, the Atchison County Levee District (the non-federal project sponsor), and a team of other federal and state agency representatives to complete a complex, large-scale levee setback after floodwaters destroyed most of the left bank of Missouri River Levee Unit 536 in northwestern Missouri. Following the completion of construction in summer 2021, the rehabilitated levee restored flood protection to the community and reconnected over 1,400 acres of floodplain and wetlands along with high-value habitat for fish and wildlife.

Sustainable River Program. In 2002, TNC and USACE launched a collaborative effort to find more sustainable ways to manage USACE facilities to optimize benefits for people and nature. Now known as the Sustainable Rivers Program (SRP), this collaboration has grown from eight rivers in 2002 to 40 rivers in 2021 that encompass nearly 11,000 miles of waterways and include 89 reservoirs and their dams as well as 10 lock and dam systems.

SRP focuses on determining unique flow requirements for rivers and then creating operating plans for dams that incorporate environmental flows—scientific prescriptions for the timing, quantity and quality of water flow that must occur downstream and upstream of dams to sustain ecological functions and habitat for species. SRP is successful because it combines scientific expertise with a collaborative approach that engages stakeholders in reviewing and determining new flow patterns.

Upper Mississippi River Restoration Program (UMRR) and Navigation and Ecosystem Sustainability Program (NESP), Illinois, Iowa, Minnesota, Missouri and Wisconsin. UMRR supports coordinated habitat rehabilitation and enhancement projects and long-term resource monitoring for the upper Mississippi River system covering the states of Illinois, Iowa, Minnesota, Missouri and Wisconsin. Thirty years of successful partnership has completed more than 58 projects benefiting more than 107,000 acres of aquatic and floodplain habitat.

NESP is a dual-purpose program that allows USACE to address both navigation improvements at seven locks and dams and ecosystem restoration in an integrated approach along the upper Mississippi and Illinois rivers. NESP will improve conditions for fish and wildlife through the construction of dozens of projects for fish passage, modified dam operations, side channel reconnections and modifications to channel structures.

TNC partners with USACE and the affected states on both programs to ensure the upper Mississippi River system can be a healthy and vibrant ecosystem for future generations while supporting a strong economy for the region and nation.

The decades-long partnerships TNC has built with USACE have supported our common conservation goals across the country in the communities where we live and work through improved flood risk resilience, economic development, and environmental protection. Our partnership remains an essential part of TNC's plans to confront the biodiversity and climate crises in the United States and globally. And we look forward to working with USACE—from its leadership at the Pentagon and headquarters down to every USACE district—to achieve our shared goals that deliver clean water and healthy and resilient rivers, lakes, and coasts.

The Water Resources Development Act of 2024 and Cost-Sharing Agreements

TNC supports and appreciates your collective efforts to keep the Water Resources Development Act (WRDA) on a two-year cycle every Congress since 2014. The consistency and predictability of your WRDA process ensures that members of Congress and stakeholders can make timely adjustments to USACE programs while continuously processing the pipeline of navigation, flood control, ecosystem restoration and other projects that are critical to the nation's economy, well-being, and quality of life. This committee's commitment to investing in and modernizing our nation's water resources infrastructure in a bipartisan manner has also been critical to the success of the USACE-TNC partnership.

TNC applauds your commitment to producing bipartisan water resources legislation emphasizing nature-based solutions to current and future flood and storm risk reduction challenges as well as ecosystem restoration. In every WRDA since 2016, this committee has advanced legislation directing USACE to consider nature-based solutions in the project planning process, benefit-cost analysis, small-scale continuing authorities programs, flood control projects for disadvantaged communities, and regional studies. TNC continues to work with USACE to ensure these provisions are implemented consistent with congressional intent, and we urge you to monitor the agency's progress as part of your oversight.

The topic of today's hearing sits at the confluence of those two trends: a regular WRDA cycle that is authorizing new projects for study and construction and significant policy changes designed to produce projects with multiple benefits for more resilient communities. To meet this demand, we need to minimize the barriers to non-federal project sponsors who are required to cost-share USACE projects.[1] In our experience working with USACE and local stakeholders on projects across the country, we have encountered many barriers contained within the cost-sharing agreements all non-federal sponsors must sign that are worth your consideration for improvement in WRDA 2024.

My testimony is based on TNC's experience working with USACE and non-federal sponsors as well as other anecdotal experience we have encountered from other local stakeholders.

Challenges with USACE Cost-Sharing Agreements

The project partnership agreement (PPA) is a legally binding agreement between USACE and a non-federal sponsor for the construction of a water resources project. It describes the project and the responsibilities of USACE and the non-federal sponsor in the cost-sharing and execution of work. PPAs are drafted and negotiated once a project has been authorized and funded. They must be signed by both parties before construction can begin. PPAs are required for individually

[1] Non-federal project sponsors, defined in statute as "non-Federal interest," can be "(1) a legally constituted public body (including an Indian tribe and a tribal organization (as those terms are defined in section 5304 of title 25)); 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." 42 U.S.C 1962d-5b

authorized and funded USACE projects as well as projects authorized and funded under the Continuing Authorities Program, environmental infrastructure and regional authorities.

Most of the barriers described in this testimony are limited to those in PPAs. However, managing project cost overruns is also problematic for the feasibility cost-sharing agreements (FCSA), which are cost-sharing agreements between USACE and the non-federal sponsor for the study and planning phase of a USACE project.

Indemnification

As required by sections 9 of WRDA 1974 (42 USC 1962d-15), and 103(j) of WRDA 1986 (33 USC 2213(j)), the non-federal sponsor of a USACE project must "hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors." This indemnification requirement forces the non-federal sponsors to assume complete and total liability for any damages caused by USACE-constructed projects (except for damages proved to be the fault or negligence of USACE). It represents an unbounded legal and financial risk to the non-federal sponsor. Given that USACE has ultimate authority for project planning, design and construction, this approach does not reflect an equitable allocation of liability risk and, in some cases, conflicts with state law.[2]

According to the Association of Fish and Wildlife Agencies, at least 21 states have conflicts between the indemnification requirement and state law (Figure 1). To work around these issues, some states have passed legislation to allow them to take on liability when entering into contracts with the federal government. Other states have local governments serve as the official non-federal sponsor, and these entities secure insurance and sign the PPAs.[3]

[2] Many states have a provision in their constitutions prohibiting an incurrence of an obligation without an encumbrance against an appropriation. Full indemnification conflicts with the law because it is a promise of an indeterminate amount of money for an indeterminate reason at an undetermined time in the future. States also often have tort law that specify their requirements and associated compensation and limit the extent to which states are responsible for others' actions, including their state personnel.

[3] National Academy of Public Administration, 2018. The U.S. Army Corps of Engineers: An Evaluation of the Project Partnership Agreement Process.

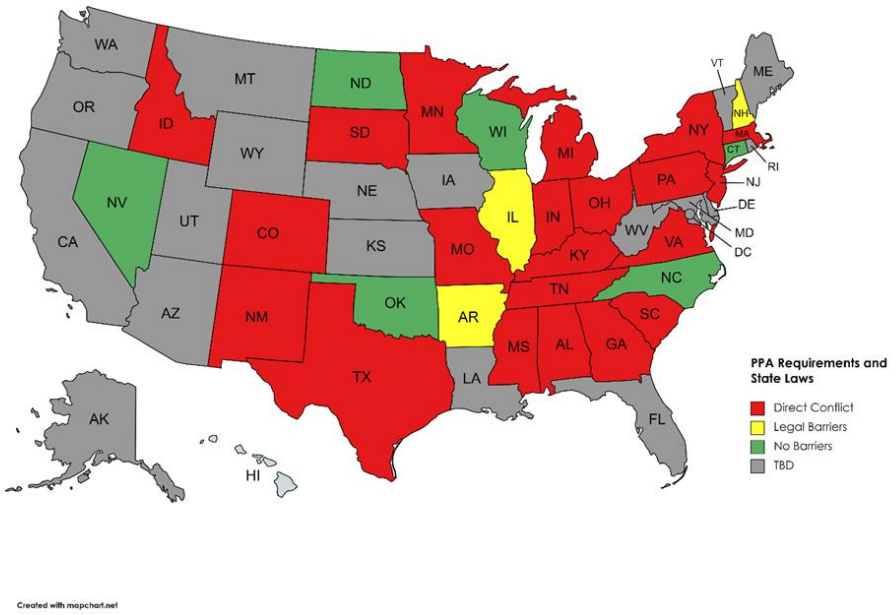

Figure 1. States with known conflicts between PPA indemnification requirements and state law. Association of Fish and Wildlife Agencies.

Cost-share and project cost overruns

Except for smaller projects conducted under the Continuing Authorities Programs, USACE projects can cost tens to hundreds of millions of dollars to construct. Also, given that USACE leads on project design and implementation, the non-federal sponsor has limited control over the ultimate project costs and timeline of project work. At a 35% construction cost share, non-federal sponsors must shoulder a significant financial burden to meet their match requirements. In addition, uncertainty about total project costs, budgeting and the timeline of a project can discourage potential non-federal sponsors from signing PPAs. If a project exceeds its congressionally authorized project cap, USACE must either cease work or seek an increased authorization through congressional action (i.e., a post-authorization change report (PACR)).

This action could take years to secure, causing or exacerbating delays in project completion which will drive up project costs further. The non-federal sponsor could choose to continue the project but, in doing so, would need to cover 100% of the costs if Congress does not increase the cost cap. Even with a successful PACR, the non-federal sponsor would have additional cost-share obligations under the new project cost cap that cannot be known at the time of signing the cost-sharing agreement. This uncertainty makes it difficult, if not impossible for the non-federal sponsor to estimate the financial burden they will be responsible for over the lifetime of a project when signing a cost-sharing agreement.

TNC has encountered cost-share and project cost overruns in the construction and feasibility phases of a project. Despite direction in WRDA 2014 for USACE to complete feasibility studies for $3 million or less, the FCSA will not specify an upper limit for the non-federal sponsor's cost-

share responsibility, which nominally should be $1.5 million at 50% cost-share for feasibility studies. Even with the relatively small project costs during the feasibility study compared to project construction, that level of uncertainty in a legally binding agreement with USACE can make the non-federal sponsor's participation challenging to finance.

Operations, maintenance, repair, rehabilitation, and replacement (OMRR&R)

As required by section 103(j) of WRDA 1986 (33 USC 2213(j)), the non-federal sponsor of a USACE project must agree to pay "100% of the operations, maintenance and replacement and rehabilitation costs of the project." The PPA does not put a time limit on the OMRR&R responsibility of the non-federal sponsor, and the details of the OMRR&R responsibility often are not finalized until after project construction is complete and USACE issues the OMRR&R Manual. This is well after the non-federal sponsor has legally committed in the PPA to pay for the OMRR&R in perpetuity.

The OMRR&R requirement can be particularly problematic to implement nature-based solutions. Many nature-based projects like coral reef, oyster reef and wetland restorations rely on natural processes and climatic conditions over which the non-federal sponsor has little control. Some of these projects, if successful, will achieve natural system functionality, requiring no additional OMRR&R beyond that of underlying easements and land ownership. However, in some instances where a project is damaged, it may not make sense to rebuild these projects in the same location as required in the PPA.

Credit for the use of donated materials

Section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d–5b) states that credit toward the non-federal sponsor's share of project costs "shall not exceed the actual and reasonable <u>costs</u> of the materials, services, or other things provided by the non-Federal interest, as determined by the Secretary." (emphasis added). In some instances, non-federal sponsors have received donations of materials from a third party to be applied to a USACE project. Because the donated materials came to the non-federal sponsor at no cost, USACE does not fully count them as part of the non-federal cost share, limiting the flexibility of the non-federal sponsor to partner with others in the community in order to meet its cost-share obligation.

<u>Previous PPA improvements by Congress</u>

Congress has already taken steps to address some of the barriers described above.

Use of other federal funds for cost-share match

In Section 8149 of WRDA 2022 (Use of other Federal funds), Congress amended an authority from WRDA 2007 to allow the non-federal sponsor for a water resources development study or project, a study or project under a Continuing Authority Program, or an environmental infrastructure study or project to use funds provided by another federal agency to satisfy the non-federal share of the cost of the study or project, if certain conditions are met. Specifically,

the federal agency that provides the funds must determine that "(1) the statutory authority for the funds provided by the Federal agency does not expressly prohibit the use of the funds for a study or project of the Corps of Engineers, and (2) the Federal agency that provides the funds determines that the study or project activities for which the funds will be used are otherwise eligible for funding under such statutory authority.'' (33 U.S.C. 2222)

This authority should give some relief to non-federal sponsors from the significant financial obligation to provide the cost-share match. It should be particularly beneficial to multi-purpose projects that meet the complementary needs of USACE and, for example, resource management agencies like the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service.

OMRR&R for some aspects of ecosystem restoration projects

There has been some recognition that non-federal sponsor responsibility for OMRR&R can be reduced in the case of nature-based ecosystem restoration projects. Section 1161 of the Water Infrastructure Improvements for the Nation Act of 2016 limits the "responsibility of a non-Federal interest for operation and maintenance of the nonstructural and nonmechanical elements of a project, or a component of a project, for ecosystem restoration" to "10 years after the date on which the Secretary makes a determination of [project] success" (33 U.S.C. 2330a). (It further states, "The Secretary is not responsible for the operation or maintenance of any components of a project concerning which a non-Federal interest is released from obligations under subsection (e).'') Implementation guidance for this provision of the WIIN Act provided additional detail regarding the definition of ecological success. At that point, no further monitoring by the non-federal sponsor is required.

While we are not aware of any projects that have used or plan to use this provision for projects initiated since the WIIN Act, it should provide some relief from the OMRR&R problems discussed above for the set of nonstructural and nonmechanical elements of an ecosystem restoration project. However, this provision remains tied to an uncertain point of time when "the Secretary makes a determination of [project] success." Also, we are concerned about the practicality of separating the OMRR&R responsibility for "nonstructural and nonmechanical elements of a project" from the structural elements when an ecosystem restoration project uses both, as well as whether USACE would consider natural and nature-based features to be nonstructural or nonmechanical.

National Academy of Public Administration PPA evaluation

Section 1013 of the Water Resources Reform and Development Act of 2014 directed the Secretary to contract with the National Academy of Public Administration (NAPA) to carry out a comprehensive review of the USACE PPA process and template. In addition to evaluating the process for preparing, negotiating and approving PPAs, NAPA was tasked with recommending

improvements based on feedback from non-federal sponsors. NAPA issued its report to the Secretary of the Army in November 2018.[4]

The NAPA report describes the PPA process and challenges well and summarizes many of the same concerns encountered by non-federal sponsors that are in my testimony. It included in its recommendations to the Secretary many changes to the PPA process that are worth tracking as part of your committee's oversight. However, it did not include in its recommendations concerns with the PPA that originate in statute, such as the indemnification, OMRR&R, and the credit for use of donated materials described above.

Non-Federal Interest Advisory Committee

Section 8150 of WRDA 2022 requires the Secretary to establish a Non-Federal Interest Advisory Committee, in accordance with the Federal Advisory Committee Act. This Committee is directed to provide the Secretary with advice and recommendations to ensure more effective and efficient delivery of water resources development projects, programs, and other assistance. Among its duties, the committee shall provide advice and make recommendations to strengthen "partnerships with non-Federal interests to advance water resources solutions." USACE has not established the Non-Federal Interest Advisory Committee yet.

Solutions

Building on this record of past PPA improvements, there are several options available that will make it easier for potential non-federal sponsors to overcome PPA barriers and to partner with USACE. Some solutions require you to revisit WRDA legislation, since the USACE has little ability to make adjustments administratively. For example, to relieve some non-federal sponsor concerns over indemnification, changes could be made to the "hold and save" clause by either eliminating it or replacing it with a standard that allows for a more shared approach to liability between USACE and the non-federal sponsor.

Based on our discussions with USACE, the agency believes it does not have the discretion to give credit toward the non-federal sponsor's share of the project over the cost of materials the non-federal sponsor provides. However, minor changes to the Flood Control Act of 1970 would bring USACE's crediting of donated materials in line with the rest of the Act's focus on the value of contributions from the non-federal sponsor rather than the costs. This change would incentivize maximum non-federal contributions to project costs, create added flexibility for non-federal sponsors, and better leverage federal investments in USACE projects.

There are also ways to give non-federal sponsors greater certainty about their financial burden with respect to managing project cost overruns and assuming OMRR&R responsibility. For instance, USACE could include binding project cost caps in the cost-share agreements (FCSA and PPA) negotiated with the non-federal sponsors as well as a process to work with the non-

[4] National Academy of Public Administration, 2018. The U.S. Army Corps of Engineers: An Evaluation of the Project Partnership Agreement Process.

federal sponsor on cost overruns that does not require the non-federal sponsor to cost-share any and all overruns. A process like this would help incentivize entities to become non-federal sponsors. It would also minimize project delays caused by project stops and starts that drive up project costs.

The important change included in the WIIN Act of 2016 and the accompanying implementation guidance described above helped to resolve some of the OMRR&R challenges faced by non-federal sponsors of ecosystem restoration projects. However, we recommend a review of where and how this provision is being used and explore ways to expand its 10-year limit on OMRR&R to structural elements of ecosystem restoration projects as well as whether it could be extended to other project types.

Similarly, we recommend you monitor the implementation and use of the WRDA 2022 authority for a non-federal sponsor to use other federal funds for its cost-share match. USACE needs to ensure all potential project sponsors are aware of this authority.

With all these proposed solutions we recognize it could be difficult to apply a new standard to all USACE water resources projects. All USACE projects are unique and vary widely given local conditions and stakeholder needs. Therefore, one solution might be to apply some of these changes on a project-by-project basis or to direct USACE to conduct pilot projects testing new standards based on specific criteria. For instance, projects at existing USACE facilities, on federal land, or modifications to inland waterway navigation projects (where USACE was solely responsible for design, construction, and operation of the original project) may be more amenable to easing or eliminating the demands on non-federal sponsors for indemnification, OMRR&R, or cost-sharing. Also, as the WIIN Act of 2016 acknowledged, it may be more feasible to limit the non-federal sponsor's obligations in a PPA for an ecosystem restoration project than other project types.

Lastly, the National Academy of Public Administration (NAPA) report provides many options to pursue process reforms and other non-statutory reforms to the USACE PPA process and to monitor implementation of those recommendations by the committee. In addition, the Non-Federal Interest Advisory Committee could be a venue to examine other potential solutions. To stand up that committee, Congress may need to make the necessary appropriations so USACE can establish it as quickly as possible.

Conclusion

By reforming the cost-share agreements in WRDA 2024, more power would be unleashed to potential local sponsors across the country to partner with USACE in order to expedite project delivery and the multiple benefits of USACE projects. With the new project authorizations from recent WRDA legislation and the infusion of funds to USACE from the Infrastructure Investment and Jobs Act, for example, there is significant demand for non-federal sponsors who can enter into cost-share agreements. However, the current rigidity of PPAs has proven challenging for many non-federal sponsors, especially since it was developed for grey infrastructure and is a

relatively poor fit for environmental restoration projects and nature-based solutions. I urge you to focus on solutions to the challenges described in this testimony as you are writing WRDA 2024.

Thank you, Chair Carper, Ranking Member Capito, and Members of the Committee, for the opportunity to provide this testimony.