Testimony of the Interstate Council on Water Policy
Regarding the
U.S. Army Corps of Engineers
Non-Federal Cost Share Project Partnership Agreements

Submitted to the
U.S. Senate
Committee on the Environment and Public Works

November 29, 2023

Good morning, Chair Carper, Ranking Member Capito, and distinguished Committee members. My colleagues and I are here to urge Congress to remove or modify unreasonable requirements that currently restrict or deter non-federal entities from participating as cost-share partners in implementing important water resource projects with the U.S. Army Corps of Engineers. We are grateful for today's opportunity to underscore the need to reform the Corps of Engineers' project partnership agreements, which govern the cost-share relationship between the non-federal sponsor and the federal government. We believe that a more equitable approach to these relationships will improve efficiencies in project delivery, improve partnership relationships, and stimulate the nation's ability to leverage non-federal resources.

My name is Kirsten Wallace. I am the Executive Director of the Upper Mississippi River Basin Association, commonly referred to by its acronym, UMRBA, which supports the states of Illinois, Iowa, Minnesota, Missouri, and Wisconsin in their interstate water resources planning and management of the Upper Mississippi River basin.

UMRBA is a long-standing member of the Interstate Council on Water Policy, and today, I am speaking on behalf of the Interstate Council on Water Policy and its members.

The Interstate Council on Water Policy was established in 1959, convening state and interstate water resource managers and planners from across the country. The Council evaluates policies affecting water resource management, develops solutions to commonly-held challenges, and works collaboratively with Congress and federal agencies to advance those solutions.

Many of the Council's members and partners – states, interstate organizations, local entities, nonprofit and private organizations – collaborate with the federal government through the Army Corps of Engineers. As our nation faces enormous challenges to our water resources, we are even more compelled to lean into our partnerships with the Corps – to optimize our resources, our networks, our knowledge, and our ability to shape a future of prosperity.

Our ability to partner with the Corps through cost-shared projects is challenged by the liability provisions that govern the partnership between the Corps and the non-federal sponsor. Project partnership agreements are legally binding documents that outline the responsibilities of non-federal cost-share partners and the federal government for water resource projects. The key impediments include requiring the non-federal sponsor to assume complete liability for constructed projects (except for when fault or

negligence is proven) and operations, maintenance, repair, replacement, and rehabilitation (OMRR&R) in perpetuity. This results in a completely one-sided approach to the assumption of risk that is unsustainable for non-federal sponsors to shoulder.

As a spokesperson for the Interstate Council on Water Policy, our members want to share with you our conclusions that these issues of liability affect cost-shared projects nation-wide and all of the Corps' mission areas, and that reforming project partnership agreements is in the national interest. The Association of Fish and Wildlife Agencies has created a map depicting the states for which their laws directly conflict with the liability provisions in the Corps' agreements or whether they have indirect legal barriers. As many as 22 states across the country reported having laws against assuming the risk legal obligations by the Corps. (See Attachment A)

The Interstate Council of Water Policy is joined by several interstate organizations who are also actively working with members of Congress and the Committee to explain the need for reforming the Corps' project partnership agreements given the regional and local impacts in their respective areas. These groups include the Association of Fish and Wildlife Agencies, National Association of Flood and Stormwater Management Agencies, Coastal States Organization, Delaware River Basin Commission, the Great Lakes Commission, the Interstate Commission on the Potomac River Basin, the Susquehanna River Basin Commission, the Upper Mississippi River Basin Association, the National Audubon Society, Ducks Unlimited, the Nature Conservancy, and the Theodore Roosevelt Conservation Partnership.

My colleague Jimmy Hague with The Nature Conservancy will speak to these issues from a nonprofit entity's perspective. And, my colleague, Bren Haase with the Louisiana Coastal Restoration and Protection Authority will speak to their experiences in implementing PPAs. I will speak generally to the issues affecting states nationally.

Indemnifying a third party (including the federal government) is in direct conflict with many states' constitutions and laws. It requires the non-federal party to promise financial resources for an indeterminate liability that might occur at an unknown time, at an unknown cost, and for an unknown reason. Many state constitutions preclude agencies from obligating funds without an encumbrance against an appropriation and do not allow for incurring any indebtedness of any nature on behalf of the state until an appropriation for it has been made by the legislature. In addition, indemnification requires a state to assume liability beyond the extent to which many states' tort law allows.

The current PPA terms legally obligate non-federal sponsors to undefined and unbounded operations, maintenance, repair, rehabilitation, and relocation for water resource projects. This is challenging for non-federal sponsors to legally assume because 1) the obligation extends well beyond the period of analysis or project life and 2) given the dynamic nature of the river ecosystem, ecosystem management needs will undoubtably change beyond the projects period of analysis. This policy essentially creates a permanent federal hold on non-federal property.

The liability terms are problematic for cost-share sponsors for all Corps mission areas – water supply, flood damage reduction, disaster recovery, and ecosystem restoration. Although agreements have been executed and signed in many areas, that does not mean they are not problematic for the non-federal sponsors. Sometimes non-federal entities – states, interstate organizations, local entities, or private organizations – will make the tough choice between securing federal resources to resolve a very important water resource problem over their own challenges in accepting the complete and total liability and assuming requirements in perpetuity for operations, maintenance, rehabilitation, repair, and replacement.

Sponsors for flood management projects and water supply projects often use their revenue source to partially offset the one-sided liability of the project terms and have to accept the consequences of being perpetually beholden to the federal government for the project structures. We must ask whether this is appropriate – is shifting the liability from the national tax base solely and completely to a smaller tax base appropriate – especially if the project is found to be in the national interest. And, who is that tax base? Is it equitable for the federal government to push the risk to the non-federal sponsor – whether a state, local government entity, or private organization? After a project reaches its design life, should the non-federal sponsor be required to seek further approvals from the federal government for what to do with the project structures?

Non-federal sponsors for ecosystem restoration projects often do not have an associated revenue source for the projects, so executing the agreements is much more problematic.

In 1986, Congress recognized the need for local sponsors to have greater financial and decision-making roles and established new cost-share formulas. My understanding is the federal government was risk adverse to implementing flood projects on non-federal lands, and Congress added a requirement that non-federal sponsors fully indemnify the Corps. Since then, we have gained substantial experience in these non-federal cost-sharing partnerships, and we better understand the implications to non-federal sponsors. We now are asking Congress to reform this provision to create a more equitable approach to sharing risk.

This request is not to free non-federal entities from liability but rather to have the Corps share in that liability.

We acknowledge and underscore the value of our relationships with our partners within the Corps who are working earnestly to advance important projects. These policies tear at the fabric of our partnership by creating unnecessary conflict and inefficient use of staff and other resources – ultimately delaying, and in many cases preventing, critically important benefits to the public.

In closing, my colleagues and I are here today to urge you to remove or modify unreasonable requirements that currently restrict or deter non-federal entities from participating as cost-share partners. We believe that reasonable and equitable partnership agreements will increase opportunities to leverage non-federal investments to achieve local, regional, and national water resource goals. We call upon Congress to revise the statutes for which the Corps is using to justify these provisions, and we offer our assistance to work with you in resolving the impasse.

As Congress and the federal government continue to prioritize non-federal cost-share projects, we believe that these challenges to PPA execution must be resolved so that existing and newly authorized projects to be successfully and efficiently implemented.

Attachment A
States Having Barriers to Executing U.S. Army Corps of Engineers Project Partnership Agreements