

QUESTIONS AND ANSWERS

USE OF SECTION 104 AND SECTION 221 CREDIT

ER 1165-2-208, dated 17 February 2012, In-Kind Contribution Credit Provisions of Section 221 of the Flood Control Act of 1970, as amended, has been issued. It replaces EC 1165-2-208, dated 6 June 2008, In-Kind Contribution Provisions of Section 221. The new ER reflects the recent policy decision of the ASA(CW) to use the crediting provisions in Section 221 of the Flood Control Act of 1970, as amended by Section 2003 of WRDA 2007 (Section 221) in lieu of Section 104 of WRDA 1986 and Section 215 of the Flood Control Act of 1968. The Section 221 crediting provisions apply to the study, design, and construction of Federally authorized water resources development projects authorized after November 16, 1986, including projects initiated after November 16, 1986 without specific authorization in law, except where a project or program specific provision of law otherwise provides for in-kind contribution credit.

Question 1. What is the reason for no longer granting credit under Section 104 of the Water Resources Development Act (WRDA) of 1986?

Answer 1. A decision by a non-Federal sponsor to undertake construction work for which it hopes to be afforded credit toward the non-Federal share of a future Federal flood risk management project should be based on a reasonable likelihood that the work will be determined to be an integral part of the ultimately recommended Federal project. Allowing non-Federal sponsors to initiate work for potential credit at the end of the reconnaissance study, pursuant to Section 104, has encouraged them to pursue credit that may not be afforded and created expectations that the Corps cannot necessarily fulfill. Even more importantly, Federal processes should not inadvertently induce people to unknowingly place themselves and their livelihoods in harm's way. The potential risks to life and property should be understood before decisions are made that may encourage people and development to remain in or move into areas where the residual risks may be unacceptable.

Question 2. Why is Section 221 being used in lieu of Section 104?

Answer 2. Section 221 of the Flood Control Act of 1970, as amended by Section 2003 of WRDA 2007, (Section 221) is a comprehensive authority applicable to Federally authorized water resources development projects that provides for the affording of credit for non-Federal sponsor planning, design, and construction work if the work is determined to be integral to the project. Section 104 applies only to the construction of flood risk management projects. This change ensures consistent application across all Corps mission areas.

Question 3. At what point in time can non-Federal sponsors undertake construction and potentially receive credit in accordance under Section 221?

Answer 3. EC 1165-2-208 required a signed Chief's Report prior to the execution of an in-Kind MOU and initiation of non-Federal sponsor construction. This milestone was chosen because it formally defined the Federally recommended plan and, thus, provided a firm basis for determining whether the work was integral to the eventual Federal project and likely creditable. With the issuance of ER 1165-2-208, the milestone for the execution of an In-Kind MOU and initiation of non-Federal sponsor construction has been changed to the release of the draft feasibility report for public review, a point earlier in the feasibility study process. At the time the draft feasibility report is released, there is a reasonable likelihood that the tentatively selected plan will be the Federally recommended plan.

Question 4. Why can't an In-Kind MOU be executed upon completion of the reconnaissance study?

Answer 4. Since the passage of WRDA 1986, the Corps has used "expedited analyses" that do not provide information on likely alternatives that used to appear in traditional reconnaissance reports. An expedited analysis only establishes that a solution exists that is likely to warrant Federal participation, but it provides little or no information on the plan that is likely to be recommended as a Federal project or its features. As a result, these analyses provide no basis for determining whether proposed non-Federal sponsor construction would potentially be creditable.

Question 5. Will Section 104 eligibility requests previously approved by the Assistant Secretary of the Army (Civil Works) still be honored?

Answer 5. Yes, previously approved Section 104 eligibility requests will be honored.

Question 6. Will Lands, Easements, Relocations, Rights-of-Way and Areas for Disposal of Dredged Material (LERRDs) remain creditable?

Answer 6. Section 221 does not alter any responsibility of a non-Federal sponsor to provide or pay for LERRDs for a project, nor does it affect the affording of credit for such LERRDs. Any LERRDs required for a project, including LERRDs associated with in-kind contributions determined to be integral to the project, will continue to be credited as LERRDs.

Question 7. Can in-kind contributions be credited against LERRDs?

Answer 7. No, in-kind contributions can be credited only against the non-Federal cash contribution.

Question 8. What other key items have been included in ER 1165-2-208?

Answer 8. ER 1165- 2-208 provides for the following:

- (a) Following MSC Commander’s certification of the 905(b) report and execution of an In-Kind MOU for planning, a non-Federal sponsor may undertake planning work for potential credit;
- (b) Following release of the draft feasibility report for public review and execution of an In-Kind MOU for construction, a sponsor may undertake construction for potential credit;
- (c) The cost of design will be shared in the same percentage as the purpose(s) of such project;
- (d) Authority to approve execution of Model In-Kind MOUs is delegated to MSC Commanders;
- (e) Except for Integral Determinations involving construction work, which must be submitted to the ASA(CW), authority to approve Integral Determinations is delegated to MSC Commanders; and
- (f) Only in-kind contributions that have been determined to be integral to a study or project can be credited.

Question 9. Have you considered local interests concerns about the impact of these policy changes on their efforts?

Answer 9. We have carefully considered all the information that was provided to us by non-Federal sponsors. In addition, based upon concerns expressed by various local interests, options were evaluated to develop a policy that allows an objective analysis of the Federal interest in a project and increases the likelihood that work being undertaken by non-Federal interests will be determined to be integral to the Federally recommended plan and, thus, creditable.

Question 10. Will this policy delay the construction of flood damage reduction projects and result in greater risk to public safety?

Answer 10. This policy takes into account the need to ensure that all appropriate factors are appropriately evaluated prior to the construction of Federal projects so that the public is not put at greater risk due to the premature construction. Further, it is imperative that we complete feasibility studies more quickly.

Question 11. Will this policy affect cost sharing by limiting credit to in-kind contributions that are “integral” to the Federal project rather than “compatible” as allowed under the prior Section 104 policy?

Answer 11. In-kind contributions that are compatible with an authorized Federal project may not necessarily be required or needed for the Federal project and could have the effect of increasing the Federal cost. The new policy corrects that inconsistency and ensures that in-kind contributions for which credit is afforded are required for the project.