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Case: LERRD ≤25% TPC	Basic project	Credit Example 2, Compatible work, 30.0
Increase in Federal Costs	.....	[2] 18.75

[1] This portion of the compatible external work is not incorporated in the project costs because it would be a disadvantage to the project sponsor to do so (if included, the sponsor would become obligated for an additional 5% up-front cash contribution but without any savings in other local cooperation because there would be nothing left to give credit against).

[2] This is also the measure of the net savings to non-Federal interests by virtue of crediting.

6. *Combined integral and external works.* For cases where non-Federal interests have accomplished compatible work, some of which is integral with the project as authorized and some of which is outside the original scope (external), determination of the allowable credit is a two step process. Work that is integral to the project is credited first. This, C1, is accomplished in accordance with paragraph 4 above. If, after this step, there remain local cooperation requirements against which credit may be given, credit for compatible external work, C2, is determinable on the following basis.

a. LERRD ≤20% (TPC+C2)
C2=Value of compatible work up to 25% TPC–1.25C1

b. LERRD ≥20% (TPC+C2)
C2=Value of compatible work up to remaining LERRD

Note that total credit, C=C1+C2. Formula 6.a. is derived from C=C1+C2=20% (TPC+C2). An example of crediting in a case involving both kinds of compatible works is provided below. In this example non-Federal interests have accomplished $25.0 million in compatible work, $5.0 of which was integral with the project as authorized and $20.0 of which was external. The integral work is credited in the first step against the extra cash component of the original local cooperation requirements. TPC is unaffected; however, the target against which credit for the external work might be credited has been partially used up. The second step shows only the incremental effects of crediting external work. Using 6.a. the maximum credit that can be given for this work is $18.75 million. Although other non-Federal requirements are extinguished as a result of the credit for the external work, the non-Federal 5% cash contribution increases by $0.9375 million, say $0.94 (5% of $18.75). In the final step, the incremental effects of crediting the external work are added in with the values obtained in step 1.

Case: LERRD ≤20% (TPC+C2)	Basic project	Credit Example 3: Compatible work, [1] 25.0		
		Step 1	Step 2	Final
Non-Federal:				
5% Cash	5.0	5.0	0.94	5.94
LERRD	14.0	14.0	0.0	0.0
Extra cash (toward constr.)	6.0	1.0	0.0	0.0
Construction (actual)	.....	5.0	18.75	23.75
Subtotal	25.0	25.0	.....	29.69
Federal:				
Construction	75.0	75.0	0.06	75.06
LERRD	.....	.....	14.0	14.0
Subtotal	75.0	75.0	.....	89.06
TPC	100.0	100.0	.....	.....
Adjusted TPC	.....	.....	.....	118.75
Excess of Compatible Worth	.....	.....	1.25	1.25
Increase in Federal Costs	.....	.....	.....	14.06

[1] Compatible work consisting of 5.0 integral work credited in first step of calculations plus 20.0 external work credited, to the extent possible, in second step.

PART 241—FLOOD CONTROL COST-SHARING REQUIREMENTS UNDER THE ABILITY TO PAY PROVISION

Sec.

241.1 Purpose.
241.2 Applicability.
241.3 References.
241.4 General policy.
241.5 Procedures for estimating the alternative cost-share.
241.6 Deferred payments for certain qualifying projects.
241.7 Application of test.

AUTHORITY: Sec. 103(m), Pub. L. 99–662, 100 Stat. 4082 (33 U.S.C. 2201 *et seq.*), as amended by Sec. 201, Pub. L. 102–580, 106 Stat. 4797 (33 U.S.C. 2201 *et seq.*)

SOURCE: 54 FR 40581, Oct. 2, 1989, unless otherwise noted.

§ 241.1 Purpose.

This rule gives general instructions on the implementation of section 103(m) of the Water Resources Development Act of 1986, Public Law 99–662, as amended by section 201 of the Water Resources Development Act of 1992, Public Law 102–588, for application to flood control projects.

[60 FR 5133, Jan. 26, 1995]

§ 241.2 Applicability.

This rule applies to all U.S. Army Corps of Engineers Headquarters (HQUSACE), elements and Major Subordinate Commands and District Commands of the Corps of Engineers having Civil Works Responsibilities.

[60 FR 5133, Jan. 26, 1995]

§ 241.3 References.

References cited in paragraphs (f) thru (i) may be obtained from USACE Pub. Depot, CEIM-SP-D, 2803, 52d Avenue, Hyattsville, MD 20781–1102. References cited in paragraphs (d) and (e) may be obtained from the National Information Services, 5285 Port Royal Road, Springfield, VA 22161. References (a), (b) and (c) may be reviewed in your local library or by writing your local Congressperson.

(a) Water Resources Development Act, 1986, Public Law 99–662, 100 Stat. 4082, 33 U.S.C. 2201 *et seq*.

(b) Water Resources Development Act 1992, Public Law 102–580, 106 Stat. 4797, 33 U.S.C. 2201 *et seq*.

(c) U.S. Water Resources Council, Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies, March 10, 1983.

(d) Office of Personnel Management, FPM Bulletin 591–30.

(e) Office of Personnel Management, FPM 591–32.

(f) U.S. Army Corps of Engineers, Engineer Regulation 1165–2–29.

(g) U.S. Army Corps of Engineers, Engineer Regulation 1165–2–121.

(h) U.S. Army Corps of Engineers, Engineer Regulation 1165–2–131.

(i) U.S. Army Corps of Engineers, Engineer Regulation 405–1–12.

[60 FR 5133, Jan. 26, 1995]

§ 241.4 General policy.

(a) Procedures described herein establish an ''ability to pay'' test which will be applied to all flood control projects. As a result of the application of the test, some projects will be cost-shared by the non-Federal interest at a lower level than the standard non-Federal share that would be required under the provisions of section 103 of Pub. L. 99–662, 33 U.S.C. 2213. The ''standard share'', as used herein, refers to the non-Federal share that would apply to the project before any ability to pay consideration.

(b) Section 103(m) requires that all cost-sharing agreements for flood control covered by the terms of section 103(a) or 103(b) be subject to the ability to pay test. The test must therefore be applied not only to projects specifically authorized by Congress, but to the continuing authority projects constructed under section 14 of the 1946 Flood Control Act (33 U.S.C. 701r), section 205 of the 1948 Flood Control Act (33 U.S.C. 701s), and section 208 of the 1954 Flood Control Act (33 U.S.C. 701g), all as amended.

(c) The ability to pay test shall be conducted independently of any analysis of a project sponsor's ability to finance its ultimate share of proposed project costs. The ability to finance is addressed in a statement of financial capability which considers current borrowing constraints, alternative sources of liquidity, etc. It is therefore much more narrowly defined than the ability to pay test, which considers the underlying resource base of the community as a whole. The ability to pay test shall not be used to affect project scope, or to change budgetary priorities among projects competing for scarce Federal funds.

(d) Any reductions in the level of non-Federal cost-sharing as a result of the application of this test will be applied to construction costs only. Operations, maintenance and rehabilitation responsibilities are unaffected by the ability to pay test.

(e) When projects are eligible for credits as outlined in ER 1165–2–29, reference § 241.3(e), the ability to pay test will be applied before any adjustments are made for credits. If the ability to pay test results in a lower non-Federal

share, the allowable amount of credits will be limited by the lower share.

(f) The test is based on the following principles:

(1) Since the standard non-Federal cost-share is substantilly less than full costs in every case, the ability to pay test should be structured so that reductions in the level of cost-sharing will be granted in only a limited number of cases of severe economic hardship.

(2) The test should depend not only on the economic circumstances within a project area, but also on the conditions of the state(s) in which the project area is located. Although states' policies with respect to supporting local interests on flood control projects are not uniform, the state represents a potential source of financial assistance which should be considered in the analysis.

(3) The alternative level of cost-sharing determined under the ability to pay principle should be governed in part by project benefits. If, as a result of the project, local beneficiaries receive more income, or are required to use fewer resources on flood damage repair or replacement, or on flood insurance, a portion of these resources should be available to pay for the non-Federal share, even in those cases where an analysis of current economic conditions indicates that there are relatively limited resources in the project area and its state.

(4) Since project benefits represent availability of resources in the future, but not the present, project sponsors should be permitted to defer a certain percentage of the non-Federal share whenever current economic circumstances suggest that non-Federal resources may be limited.

(g) The Non-Federal interest may, at its discretion, waive the application of the ability to pay test. In this case, the Non-Federal interest shall be considered to have the ability to pay the standard cost-share and no further economic inquiry will be required.

§241.5 Procedures for estimating the alternative cost-share.

(a) *Step one, the benefits test.* Determine the maximum possible reduction in the level of non-Federal cost-sharing for any project.

(1) Calculate the ratio of flood control benefits (developed using the Water Resources Council's *Principles and Guidelines*—ref. §241.3(b)) to flood control costs for the project based on the discount rate which the Corps is currently using to evaluate projects. Costs include operations and maintenance as well as first costs. Divide the result by four. For example, if the project's (or separable element's) benefit-cost ratio is 1.2:1, the factor for this project equals 0.3. If a project has been authorized for construction without a benefit-cost ratio calculated in accordance with the Principles and Guidelines, determination of the ratio is a prerequisite for consideration under the ability to pay provision.

(2) If the factor determined in §241.5(a)(1), when expressed as a percentage, is greater than the standard level of cost-sharing, the standard level will apply.

(3) If the factor determined in §241.5(a)(1), when expressed as a percentage, is less than the standard level of cost-sharing, projects may be eligible for either a reduction in the non-Federal share to this ''benefits based floor'' (BBF), or for a partial reduction to a share between the standard level and the BBF, as determined by the procedures in step two, §243.5. In no case however, will the non-Federal cost-share be less than five percent.

(b) *Step two, the income test.* Projects may qualify for the full amount of the reduction in cost-sharing calculated in Step one, or for some fraction of the reduction in cost-sharing, depending on a measure of the current economic resources of the project area and of the state or states in which the project is located.

(1) To assure consistency, the calculations in §241.5(b) (2) and (3) will be performed by HQUSACE and distributed to all FOA's via Engineering Circulars. The information will be updated and distributed to HQUSACE and to the field as soon as new data are available. The procedures may be verified for any single county or state using the sources cited.

(2) For each of the three latest calendar years for which information is available, determine the level of per capita personal income in the state in

which the project beneficiaries are located, and compare this to the national average of per capita personal income. Source: Dept. of Commerce, Bureau of Economic Analysis, as published yearly in the April *Survey of Current Business*. (If the project beneficiaries are located in Alaska or Hawaii, divide the per capita personal income figure by one plus the percentage used in the Federal Government's cost of living pay differential for Federal workers who purchase local retail and who use private housing, employed in Anchorage, AK or Oahu, HI as contained in References § 241.3(c) and (d).) Determine the state's per capita personal income as an index number in comparision to the national average (U.S.=100), and calculate the three year average of the state's index number.

(3) For each of the three latest calendar years for which information is available, determine the level of per capita personal income in the county where the project beneficiaries are located (the ''project area''), and compare this to the national average of per capita personal income. Source: Dept. of Commerce, Bureau of Economic Analysis, as published yearly in the April *Survey of Current Business*. (If the project beneficiaries are located in Alaska or Hawaii, divide the county's per capita personal income figure by one plus the percentage used in the Federal Government's cost of living pay differential for Federal workers who purchase local retail and who use private housing, employed in Anchorage, AK or Oahu, HI.) Calculate the index for the county's per capita personal income to the national average (U.S.=100), and calculate the three year average of the county's index number.

(4) When the project area, as determined by the location of the project's beneficiaries, includes more than one county, calculate a composite project area index by taking a weighted average of the county index numbers, the weights being equal to the relative levels of benefits received in each county. When the project area includes more than one state, the state index for the project should be calculated using the same weighting technique.

(5) Calculate an ''Eligibility Factor'' for the project according to the following formula:

$$EF = a - b_1 \times (\text{state factor}) - b_2 \times (\text{area factor}).$$

If EF is one or more, the project is eligible for the full reduction in cost-share to the benefits based floor. If EF is zero or less, the project is not eligible for a reduction. If EF is between zero and one, the non-Federal cost-share will be reduced proportionately to an amount which is greater than the BBF but less than the standard non-Federal cost-share in accordance with the procedures described in paragraph § 241.5(c) of this part. The values of a, b_1 and b_2 will be determined by HQUSACE. The parameter values will be based on the latest available data and set so that 20 percent of counties have an EF of 1.0 or more, while 66.7 percent have an EF of 0 or less. These values will be adjusted periodically as new information becomes available. Changes will be published in Engineering Circulars. The values will be set so that $b_2=2\times b_1$, giving local income twice the weight of state income.

(6) Since estimates (available from the Bureau of Economic Analysis) of per capita personal income for Puerto Rico, Guam and other U.S. territories are well below the national average, the eligibility factor for projects in these areas is administratively established to be equal to 1.

(7) For flood control projects sponsored by Native American tribes or villages, the EF shall be calculated using information on tribe or village income as a replacement factor for both the area and state factor (that is multiply the replacement income factor by both b_1 and b_2 and subtract each from a in the equation in § 241.5(b)(5)). The replacement factor will be tribe or village income as a percentage of the national average for the equivalent definition of income (for example a Tribe's median family income as a percentage of the median family income for all U.S. families). The data should be the latest available information. It is acceptable, but not required that the data be obtained from the Bureau of the Census, *American Indians, Eskimos and Aleuts on Identified Reservations and*

in Historic Areas of Oklahoma (Excluding Urbanized Areas), part 1, Table 10, or *General Social and Economic Characteristics—United States Summary (1980)*, Table 252. Since both sources contain information for Native Americans living on reservations, rather than all Tribe or Village members, the sources should be used only when appropriate, or when no better information is available.

(c) *Application of the Ability to Pay Formula to the Basic Cost-sharing Provisions of Section 103.* If a flood control project has a BBF which is less than the standard cost-share and an EF which is greater than zero, the non-Federal cost-share will be reduced. The alternative non-Federal share will be calculated and reported to the nearest one tenth of one percent. The actual reduction is determined by applying the ability to pay formula to the basic flood control cost-sharing provisions of section 103 of Pub. L. 99–662, 33 U.S.C. 2213, as follows:

(1) When EF ≥ 1, non-Federal cost-share = BBF

(2) For structural projects covered by section 103(a), when 0 < EF < 1:

(i) If LERRD equals or exceeds 45 percent:

non-Federal cost-share = 50 − EF × (50 − BBF)

(ii) If LERRD exceeds 20 percent but is less than 45 percent:

non-Federal cost-share = (LERRD + 5) − ER × [(LERRD + 5) − BBF]

(iii) If LERRD is less than 20 percent:

non-Federal cost-share = 25 − EF × (25 − BBF)

(3) For non-structural projects covered by section 103(b), when 0 < EF < 1:

non-Federal cost-share = 25 − EF × (25 − BBF)

(4) In no case however, can the non-Federal share be less than five percent, even if the calculation made in §241.5(c) (1), (2), or (3) results in a smaller number.

(5) NOTE: LERRD equals the costs of lands, easements, rights-of-way, relocations, and dredged material disposal areas expressed as a percentage of total project costs. The BBF and numerical terms in the equations above are also expressed as percentages.

(d) Additional consideration for high cost projects. For any project where the normal non-Federal share exceeds 35 percent, and the per capita non-Federal cost (*i.e.*, normal non-Federal share of total construction costs divided by the population in the sponsor's geographic jurisdiction) exceeds $300, the non-Federal share under the ability to pay provision will be either LERRD's (*i.e.*, no cash requirement) or 35 percent, whichever is greater. If LERRD's exceed 50 percent, the non-Federal share remains at 50 percent. Projects which qualify under the benefits and income tests will receive the reduction under the high cost criteria only if the high cost criteria results in a greater reduction in the non-Federal cost share.

[54 FR 40581, Oct. 2, 1989, as amended at 60 FR 5134, Jan. 26, 1995]

§241.6 Deferred payments for certain qualifying projects.

(a) Whenever a project's Eligibility Factor exceeds zero, the project sponsor will be permitted to defer a portion of its share of flood control costs. The maximum allowable amount deferred equals the total non-Federal share less (for structural projects) five percent of total project costs and less (for all projects) any amounts for LERRD paid for or acquired by the sponsor prior to the time the PCA is signed. If for example, the non-Federal share of a structural project = 35.0 percent (after the ability to pay adjustment, if any) of which 10 percent is LERRD already paid for by the local sponsor, the maximum allowable amount to be deferred = 20 percent of project flood control costs (35 less the 5 percent cash requirements, less the 10 percent LERRD already acquired). Deferred payments at the option of the sponsor will be allowed regardless of the outcome of the benefits test described in §241.5(a) whenever the Eligibility Factor exceeds zero.

(b) When EF ≥ 1, the project sponsor may defer as much as the maximum allowable amount as described in §241.6(a).

(c) When 0 < EF < 1, the sponsor may defer a fraction of the maximum allowable amount described in § 241.6(a), where the fraction equals the Eligibility Factor expressed to three decimal places. Continuing the example described in § 241.6(a), if EF = .712, total allowed deferral equals .712 × 20 percent = 14.2 percent of total project costs.

(d) The deferred payment can be made in equal installments over any period of time selected by the non-Federal sponsor, provided that all repayments are made between the end of construction and thirty years thereafter. The amount repaid shall include interest during the repayment period as well as interest for the appropriate portion of the construction period for any amounts deferred prior to the end of construction. The rate of interest shall be determined in accordance with the provisions of section 106 of Pub. L. 99–662, 33 U.S.C. 2216.

[54 FR 40581, Oct. 2, 1989, as amended at 60 FR 5134, Jan. 26, 1995]

§ 241.7 Application of test.

(a) A preliminary ability to pay test will be applied during the study phase of any proposed project. If the ability to pay cost-share is lower than the standard share, the revised estimated cost-share will be used for budgetary and other planning purposes.

(b) The official application of the ability to pay test will be made at the time the Project Cooperation Agreement (PCA) between the Corps of Engineers and the Non-Federal sponsor is signed. For structural flood control projects, the standard level of cost-sharing will not be known until the end of the project (since the standard level as specified in section 103(a), 33 U.S.C. 2213, includes LERRD). In this case, if the Eligibility Factor is greater than zero but less than one, the ability to pay non-Federal share will be determined using estimated costs.

(c) The PCA for all projects subject to the ability to pay test will include a ''whereas'' clause indicating the results of the test. If the project is eligible for a lower non-Federal share:

(1) The revised share will be specified in the PCA (there will be no recalculation of this share once the PCA is signed).

(2) An exhibit attached to the Project Cooperation Agreement (PCA) will include the Benefits Based Floor (BBF) determined in § 241.5(a): the Eligibility Factor (EF) determined in § 241.5(b): If the Eligibility Factor is greater than zero but less than one, the estimated standard non-Federal share; the formula used in determining the ability to pay share as described in § 241.5(c)(1) through (c)(4); and a display of the non-Federal cost share under the high cost criteria described in § 241.5(d).

(d) If at the time of project completion, the standard non-Federal share based on actual costs is less than the ability to pay share specified in the PCA, the standard share will apply.

(e) *For structural projects.* (1) If the standard LERRD plus cash requirement exceeds the ability to pay cost-share, the Federal Government will make any necessary adjustments in expenditures in the following order: First, paying any cash requirement in excess of five percent of total project costs (if any) that would, under standard cost-sharing, have been the responsibility of the non-Federal sponsor; second, making payments for LERRD; and third, providing for reimbursement at the end of construction. Federal payments for LERRD will be made only after the non-Federal payment for LERRD reaches a percentage of total project costs equal to the ability to pay non-Federal cost-share less the five percent cash requirement. If such arrangements are necessary, the PCA should be prepared to reflect agreement on the best manner available for acquisition of those LERRD over the limiting percentage, or for reimbursing the sponsor upon completion of construction.

(2) The non-Federal sponsor will be required to provide a cash payment equal to the minimum of five percent of estimated project costs, regardless of the outcome of the ability to pay test, unless any or all of the five percent cash requirement is waived by application of the high cost criteria described in § 241.5(d). The project sponsor shall make cash payments during construction at a rate such that the amount of non-Federal payments in each year, as a percentage of total non-Federal cash payments, equals the

amount of Federal expenditures (including sunk pre-construction engineering and design costs as a first year Federal construction expenditure) as a percentage of total Federal expenditures. Total Federal expenditures include cash payments for construction and if necessary (due to ability to pay considerations), for LERRD, and for reimbursement to the non-Federal sponsor. Total Federal expenditures for the purpose of this calculation, do not include expenditures which allow the non-Federal sponsor to defer payment of the non-Federal share under the provisions of this rule.

(f) For non-structural projects, reductions in the non-Federal cost-share as a result of the ability to pay test will not affect the procedures for determining the non-Federal and Federal payment schedules. For non-structural projects, no specific cash payments during construction are required by law.

[54 FR 40581, Oct. 2, 1989, as amended at 60 FR 5134, Jan. 26, 1995]

PART 242—FLOOD PLAIN MANAGEMENT SERVICES PROGRAM ESTABLISHMENT OF FEES FOR COST RECOVERY

Sec.
242.1 Purpose.
242.2 Applicability.
242.3 References.
242.4 Definitions.
242.5 General.
242.6 Fee schedule.

AUTHORITY: Section 321 of Pub. L. 101–640, 74 Stat. 500 (33 U.S.C. 709a).

SOURCE: 56 FR 54712, Oct. 22, 1991, unless otherwise noted.

§ 242.1 Purpose.

This part gives general instructions on the implementation of section 321 of Public Law 101–640, 74 Stat. 500 (33 U.S.C. 709a) as it applies to the use of a Fee Schedule for recovering the cost of providing Flood Plain Management Services to Federal agencies and private persons.

§ 242.2 Applicability.

This part applies to all HQUSACE elements, Major Subordinate Commands, and District Commands of the Corps of Engineers having Civil Works responsibilities.

§ 242.3 References.

The references in paragraphs (b) and (c) of this section may be obtained from USACE Pub. Depot, CEIM-SP-D, 2803 52d Avenue, Hyattsville, MD 20781–1102.

(a) Section 321, Public Law 101–640, 74 Stat. 500 (33 U.S.C. 709a).

(b) Corps of Engineers Engineering Regulation 1105–2–100, Planning Guidance Notebook.

(c) Corps of Engineers Engineering Pamphlet 37–1–4, Cost of Doing Business.

§ 242.4 Definitions.

As used in this part:

Private persons means all entities in the private sector, including but not limited to individuals, private institutions, sole proprietorships, partnerships, and corporations.

Total cost means total labor charges which include adjustments for benefits, administrative overhead, and technical indirect costs. These terms are described in the reference in § 242.3 (c).

§ 242.5 General.

(a) The Corps of Engineers Flood Plain Management Services Program provides a wide range of flood plain and related assistance upon request. Depending on the complexity of the request, either a nonnegotiated Fee Schedule or a negotiated agreement will be used to recover the cost of services provided to Federal agencies and private persons. This part involves only the nonnegotiated Fee Schedule.

(b) State, regional, or local governments or other non-Federal public agencies will be provided Flood Plain Management Services without charge.

§ 242.6 Fee schedule.

(a) *General.* The Fee Schedule described in this section will be used to recover the cost for Flood Plain Management Services requiring more than ten minutes and up to one work day to provide. The Fee Schedule has been designed to minimize administrative costs and to allow the flexibility needed to recover the approximate total