12 MAY 2000

CECW-PC

MEMORANDUM FOR Commander, Mississippi Valley Division

SUBJECT: Implementation Guidance for Section 509, Water Resources Development Act of 1999

The enclosed subject guidance is enclosed for your implementation. The guidance also addresses recommendations made in the *Report to Congress – An Evaluation of the Upper Mississippi River System Environmental Management Program, December 1998*, also known as the *Partnership Report*.

FOR THE COMMANDER:

/s/

Encl

JAMES F. JOHNSON
Chief, Planning Division
Office of the Deputy Commanding General
for Civil Works

CF:
CECS
CECW-AA
CECW-AR
CECW-BC
CECW-P
CECW-ZD
CEMVD-PM-E
CEMVR-PM – M
OASA(CW)

Return to: CECW-PC

CECW-PC
GUIDANCE FOR IMPLEMENTING CERTAIN PROVISIONS OF THE WATER RESOURCES DEVELOPMENT ACT OF 1999

SECTION: 509 - UPPER MISSISSIPPI RIVER ENVIRONMENTAL MANAGEMENT PROGRAM

CITATION: *(a) AUTHORIZED ACTIVITIES.--Section 1103(e) of the Water Resources Development Act of 1986 (33 U.S.C. 652(e)) is amended by striking "(e)(1)" and all that follows through the end of paragraph (1) and inserting the following:*

"(e) PROGRAM AUTHORITY.--

"(1) AUTHORITY.--

"(A) IN GENERAL.--The Secretary, in consultation with the Secretary of the Interior and the States of Illinois, Iowa, Minnesota, Missouri, and Wisconsin, may undertake, as identified in the master plan--

"(i) a program for the planning, construction, and evaluation of measures for fish and wildlife habitat rehabilitation and enhancement; and

"(ii) implementation of a long-term resource monitoring, computerized data inventory and analysis, and applied research program.

"(B) ADVISORY COMMITTEE.--In carrying out subparagraph (A)(i), the Secretary shall establish an independent technical advisory committee to review projects, monitoring plans, and habitat and natural resource needs assessments.".

(b) REPORTS.--Section 1103(e) of the Water Resources Development Act of 1986 (33 U.S.C. 652(e)) is amended by striking paragraph (2) and inserting the following:

"(2) REPORTS.--Not later than December 31, 2004, and not later than December 31 of every sixth year thereafter, the Secretary, in consultation with the Secretary of the Interior and the States of Illinois, Iowa, Minnesota, Missouri, and Wisconsin, shall submit to Congress a report that--

"(A) contains an evaluation of the programs described in paragraph (1);

"(B) describes the accomplishments of each of the programs;

"(C) provides updates of a systemic habitat needs assessment; and

"(D) identifies any needed adjustments in the authorization of the programs.".

(c) AUTHORIZATION OF APPROPRIATIONS.--Section 1103(e) of the Water Resources Development Act of 1986 (33 U.S.C. 652(e)) is amended--

(1) in paragraph (3)--

(A) by striking "(1)(A)" and inserting "(1)(A)(i)"; and

(B) by striking "Secretary not to exceed" and all that follows before the period at the end and inserting "Secretary $22,750,000 for fiscal year 1999 and each fiscal year thereafter";

(2) in paragraph (4)--

(A) by striking "(1)(B)" and inserting "(1)(A)(ii)"; and

(B) by striking "Secretary not to exceed" and all that follows before the period at the end and inserting "Secretary $10,420,000 for fiscal year 1999 and each fiscal year thereafter"; and

(3) by striking paragraph (5) and inserting the following:

"(5) AUTHORIZATION OF APPROPRIATIONS.--There is authorized to be appropriated to carry out paragraph (1)(A)(i) $350,000 for each of fiscal years 1999 through 2009.".

(d) TRANSFER OF AMOUNTS.--Section 1103(e) of the Water Resources Development Act of 1986 (33 U.S.C. 652(e)) is amended by striking paragraph (6) and inserting the following:

"(6) TRANSFER OF AMOUNTS.--For fiscal year 1999 and each fiscal year thereafter, the Secretary, in consultation with the Secretary of the Interior and the States of Illinois, Iowa, Minnesota, Missouri, and Wisconsin, may transfer not to exceed 20 percent of the amounts appropriated to carry out clause (i) or (ii) of paragraph (1)(A) to the amounts appropriated to carry out the other of those clauses.".

(e) COST SHARING.--Section 1103(e)(7)(A) of the Water Resources Development Act of 1986 (33 U.S.C. 652(e)(7)(A)) is amended by inserting before the period at the end the following: "and, in the case of any project requiring non-Federal cost sharing, the non-Federal share of the cost of the project shall be 35 percent".

(f) HABITAT NEEDS ASSESSMENT.--Section 1103(h)(2) of the Water Resources Development Act of 1986 (33 U.S.C.

652(h)(2)) is amended--

(1) by striking "(2) The Secretary" and inserting the following:

"(2) DETERMINATION.--

"(A) IN GENERAL.--The Secretary"; and

(2) by adding at the end the following:

"(B) REQUIREMENTS.--The Secretary shall--

"(i) complete the ongoing habitat needs assessment conducted under this paragraph not later than September 30, 2000; and

"(ii) include in each report under subsection (e)(2) the most recent habitat needs assessment conducted under this paragraph.".

(g) CONFORMING AMENDMENTS.--Section 1103 of the Water Resources Development Act of 1986 (33 U.S.C. 652) is amended--

(1) in subsection (e)(7)--

(A) in subparagraph (A), by striking "(1)(A)" and inserting "(1)(A)(i)"; and

(B) in subparagraph (B), by striking "paragraphs (1)(B) and (1)(C)" and inserting "paragraph (1)(A)(ii)"; and

(2) in subsection (f)(2)--

(A) by striking "(2)(A)" and inserting "(2)"; and

(B) by striking subparagraph (B).

SYNOPSIS: The Upper Mississippi River System - Environmental Management Program (EMP) is located on the river reaches having commercial navigation channels on the Mississippi River above Cairo, IL; Minnesota River, MN; Black River, WI; Saint Croix River, MN and WI; Illinois River and Waterway, IL; and Kaskaskia River, IL. Section 1103 of WRDA 86 authorized the EMP for ten years to (1) plan, construct and evaluate fish and wildlife habitat rehabilitation and enhancement projects, (2) perform long-term resource monitoring (LTRM), (3) develop a computer inventory and analysis system (CIA), and (4) develop recreation projects. The recreation authority was not implemented. Section 1103 defined reporting requirements, appropriation limits, and cost sharing requirements. Section 405 of WRDA 90 amended Section 1103(e) to extend the life of the EMP to fifteen years. Section 107 of WRDA 92 set criteria and limits for transferring funds within the EMP. Section 107 also required O&M costs for projects on Federal lands or lands owned or operated by a State or local government to be borne by the Federal, State or local agency responsible for managing fish and wildlife on such lands.

Section 509 further amends Section 1103(e) to: (1) add applied research, (2) establish an independent technical advisory committee, (3) extend the program life indefinitely, (4) require a program evaluation every six years, (5) raise funding limits, (6) require 35-percent non-Federal cost share, (7) establish a deadline for completing the habitat needs assessment, (8) require the latest habitat needs assessment to be submitted with each program evaluation, and (9) remove funding limits on recreation needs assessments.

The Federal and non-Federal partners in the EMP submitted various proposals to modify the EMP in the *Report to Congress -- An Evaluation of the Upper Mississippi River System Environmental Management Program, December 1998*, also known as the *Partnership Report*. The Chief of Engineers submitted his report on the *Partnership Report* to ASA(CW) on 03Feb99 with various recommendations, concurring with some, but not all, of the *Partnership Report* recommendations. The ASA(CW) submitted his report on the *Partnership Report* to Congress on 26Apr99 per Section 1103. The ASA(CW) transmittal recommended reauthorization of the EMP with various modifications. The ASA(CW) also concurred with many, but not all, of the recommendations by the Chief of Engineers and stated an intent to further evaluate other recommendations in the *Partnership Report* that can be addressed through policy. Section 509

addressed many of the recommendations in these three reports. The Section 509 modifications and the *Partnership Report* proposals are addressed in the numbered paragraphs below.

No language regarding the EMP appeared in the in FY 2000 Energy and Water Development Appropriations Act or in related house or committee reports, nor was any provided to the field in the FY 2000 Congressional Add VTC.

Authorization Modifications by Section 509 WRDA 99

1. Citation: "*The Secretary ... may undertake, as identified in the master plan ...(ii) implementation of a long-term resource monitoring, computerized data inventory and analysis, and applied research program.*" (Section 1103(e)(1)(A)(ii) WRDA86 as amended by Section 509 WRDA99)

Synopsis: Section 509 added applied research (AR) as an activity within the EMP and included it with the LTRM and CIA as a single program.

Analysis: The states wanted less data collection and more analysis, i.e., useful information. The USGS has been treating LTRM as solely data collection. The Partnership Report included AR in its recommendation that Congress combine LTRM and CIA into one program. Neither the Chief's Report nor the Division addressed AR specifically. The Chief's Report recommended combining CIA under the LTRM element. The OASA(CW) did not specifically address combining CIA under the LTRM element in the transmittal of the Chief's Report to Congress.

Implementation Guidance: As with the LTRM and CIA, proposed AR activities should be initiated only when the Division Commander is reasonably assured that the activities will provide value to this or related Corps projects in return for the Federal investment. Value should be measured in terms of improving the effectiveness of EMP or related projects, providing a basis for adaptive management decisions, aiding the development of alternatives when considering HREPs, and/or otherwise aiding the Corps decision process. Manage and budget the CIA and AR as components of the LTRM subprogram within the EMP.

2. Citation: *"(B) ADVISORY COMMITTEE.--In carrying out subparagraph (A)(i), the Secretary shall establish an independent technical advisory committee to review projects, monitoring plans, and habitat and natural resource needs assessments."* (Section 1103(e)(1)(B) WRDA86 as amended by Section 509 WRDA99)

Synopsis: Section 509 directs the Secretary to create an independent advisory committee.

Analysis: The creation of this committee was not addressed in the Partnership Report, Chief's Report, or the OASA(CW) transmittal of the Chief's Report to Congress. The Upper Mississippi River Basin Association (UMBRA), in a 22Sep99 letter to ASA(CW), said the states were not proponents of this provision and that EMP projects already receive sufficient independent review. UMBRA also expressed concerns about the committee adding bureaucracy, duplicating current responsibilities, and adding costs. UMBRA recommended that the EMP-CC be consulted regarding the role of any new advisory body. American Rivers, in a 30Nov99 letter to ASA(CW), recommended creation of the committee as legislated to:

- improve the scientific standards and natural resource outputs of the EMP;
- review constraints to innovative design;
- explore new alternatives to restore habitat;
- simulate natural processes where possible;

- include members who are
  - from the scientific community,
  - independent of the Federal and state partners, and
  - not necessarily knowledgeable of the Upper Mississippi River system;
- meet regularly;
- review past, current, and future HREPs, HNAs, and monitoring plans;
- utilize funds from the Corps for standard travel and per diem expenses, and to fund meetings; and
- advise the EMP partners regarding potential improvements to current methods.

American Rivers appears to be the proponent of this provision. CEMVD recommended that the Advisory Committee not be implemented due to the redundant nature of its duties.

Implementation Guidance: In as much as the Congress enacted this committee absent a recommendation from the Executive Branch, develop a proposal defining the role, membership, processes, logistic needs, and funding requirements for an independent advisory committee. The proposal should be developed in cooperation with the EMP-CC and with input from other interested parties. It should include a counsel opinion on conformance with the Federal Advisory Committee Act. The proposal should be forwarded to CECW-P for approval and coordination with OASA(CW) before implementation.

3. Citation: None, Section 509 WRDA99 deleted "*shall be carried out for ten years*" from Section 1103(e)(2) WRDA86.

Synopsis: This change reauthorizes the EMP as a continuing authority.

Analysis: The Partnership Report recommended reauthorizing the EMP as a continuing authority. The Chief's Report recommended extending the program for 10 years with further extension based on a future evaluation. OASA(CW) concurred with the Chief's report. Since the EMP is now reauthorized, future decisions will primarily concern the feasibility and acceptability of project elements, and availability of funds.

Implementation Guidance: Continue to implement the EMP so long as the outputs continue to justify the investment as determined by the most current program and project evaluations.

4. Citation: *"(2) REPORTS.--Not later than December 31, 2004, and not later than December 31 of every sixth year thereafter, the Secretary, in consultation with the Secretary of the Interior and the States of Illinois, Iowa, Minnesota, Missouri, and Wisconsin, shall submit to Congress a report that--*

"(A) contains an evaluation of the programs described in paragraph (1);
"(B) describes the accomplishments of each of the programs;
"(C) provides updates of a systemic habitat needs assessment; and
"(D) identifies any needed adjustments in the authorization of the programs."

(Section 1103(e)(2) WRDA86 as amended by Section 509 WRDA99)

Synopsis: Self explanatory.

Analysis: The Partnership Report recommended submitting evaluation reports to Congress every six years. The Chief's Report recommended evaluation reports in 2007 and 2012, each describing program accomplishments, progress in strengthening the partnership, and when the program will reach a point of diminishing returns. The OASA(CW)'s transmittal of the Chief's report to Congress did not specify the frequency of reports to Congress.

Implementation Guidance: Submit a report for HQUSACE approval and forwarding through OASA(CW) to Congress by 30Sep04 that evaluates the HREP program; the LTRM, CIA, and applied research program; and the HNA. The report should present the views of the

various EMP partners, including the States of Illinois, Iowa, Minnesota, Missouri, and Wisconsin; and the various participating agencies within the Department of the Interior; and other partners. The evaluations should present the accomplishments of each program, assess the remaining unmet needs, and describe any implemented or recommended program changes. Additional evaluations addressing the same items should be submitted every six years thereafter.

5. Citation: *"(3) For the purposes of carrying out paragraph "(1)(A)(i) of this subsection, there is authorized to be appropriated to the Secretary $22,750,000 for fiscal year 1999 and each fiscal year thereafter."* (Section 1103(e)(3) WRDA86 as amended by Section 509 WRDA99)

Synopsis: This change increased the funding limit for the HREPs portion of the EMP.

Analysis: The Partnership Report recommended this increase. The Chief's Report and OASA(CW) recommendations to create tiers to implement and cost share HREP construction were not enacted. The current authorized limit is $13,000,000. The historical funding range is $401,000 to $10,958,000. The President's Budget for FY 2001 includes $12,464,000 for the development of HREP's. CEMVD has the capability to expend an additional 50 percent if the funds were available in FY 2001. The program could utilize the full $22,750,000 in FY 2002 if it is available.

Implementation Guidance: Funding up to $22,750,000 for HREP implementation, including transfers in FY 2000, may be requested under normal budget procedures.

6. *"(4) For the purposes of carrying out paragraph "(1)(A)(ii) of this subsection, there is authorized to be appropriated to the Secretary $10,420,000 for fiscal year 1999 and each fiscal year thereafter."* (Section 1103(e)(4) WRDA86 as amended by Section 509 WRDA99)

Synopsis: This change increased the funding limit for LTRM, CIA, and AR.

Analysis: The Partnership Report recommended an increase to $10,240,000. The Chief's Report and OASA(CW) recommended the same increase with a designation that the purpose is collection and analysis of data needed to accomplish Corps missions and projects. The current authorized limit is $5,955,000. The historical funding range is $110,000 to $6,300,000. The President's Budget for FY 2001 includes $5,546,000 for LTRM. CEMVD has the capability to expend an additional 50 percent if the funds were available in FY 2001. The program could utilize the full $10,420,000 in FY 2002 if it is available.

Implementation Guidance: Funding up to $10,420,000 for LTRM implementation, including transfers in FY 2000, may be requested under normal budget procedures.

7. Citation: *"(5) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out paragraph (1)(B) $350,000 for each of fiscal years 1999 through 2009."* (Section 1103(e)(5) WRDA86 as amended by Section 509 WRDA99 and Section 2, PL 106-109)

Synopsis: This provides authority to fund the independent technical advisory committee.

Analysis: The Partnership Report, Chief's Report, and OASA(CW) did not address the need for this funding.

Implementation Guidance: The proposal to be developed in response to paragraph 2 above should address funding needs for the independent technical advisory committee.

8. Citation: *"(6) TRANSFER OF AMOUNTS.--For fiscal year 1999 and each fiscal year thereafter, the Secretary, in consultation with the Secretary of the Interior and the States of Illinois, Iowa, Minnesota, Missouri, and Wisconsin, may transfer not to exceed 20 percent of the amounts appropriated to carry out clause (i) or (ii) of paragraph (1)(A) to the amounts*

appropriated to carry out the other of those clauses." (Section 1103(e)(6) WRDA86 as amended by Section 509 WRDA99)

Synopsis: This change eliminates the prescribed dollar limits to transfers of funds between the HREPs program and the program including LTRM, CIA, and AR. Transfers to the Advisory Committee were not authorized by this section.

Analysis: The Partnership Report, Chief's Report, and OASA(CW) did not address the need for this flexibility.

Implementation Guidance: Adhere to the new limit.

9. Citation: *"(7)(A) Notwithstanding the provisions of subsection (a)(2) of this section, the costs of each project carried out pursuant to paragraph (1)(A)(i) of this subsection shall be allocated between the Secretary and the appropriate non-Federal sponsor in accordance with the provisions of section 906(e) of this Act; except that the costs of operation and maintenance of projects located on Federal lands or lands owned or operated by a State or local government shall be borne by the Federal, State, or local agency that is responsible for management activities for fish and wildlife on such lands and, in the case of any project requiring non-Federal cost sharing, the non-Federal share of the cost of the project shall be 35 percent."* (Section 1103(e)(7)(A) WRDA86 as amended by Section 509 WRDA99)

Synopsis/Analysis: This changes the non-Federal cost share to 35 percent for planning, construction, and evaluation measures for fish and wildlife habitat rehabilitation and enhancement (HREPs) that require cost sharing. Up to 80 percent of the non-Federal cost share may be in the form of work-in-kind services when the conditions described below in paragraph 20 are met.

Implementation Guidance: The non-Federal share of costs for HREP development and implementation that require non-Federal cost sharing is 35 percent.

10. Citation: *"(B) REQUIREMENTS.--The Secretary shall--*

(i) complete the ongoing habitat needs assessment conducted under this paragraph not later than September 30, 2000; and

(ii) include in each report under subsection (e)(2) the most recent habitat needs assessment conducted under this paragraph."

(Section 1103(h)(2)(B) WRDA86 as amended by Section 509 WRDA99)

Synopsis: This change retained the requirement to complete the HNA by 30Sep00 and to include the latest HNA with the program evaluation due every sixth year beginning in 2004.

Analysis: The Partnership Report also proposed that the HNA be completed, that it include quantitative objectives for habitat conditions, and that it provide an improved framework for habitat project selection, design, and evaluation. The Chief's Report stated that EMP funds will be used to develop and maintain an HNA to serve as the primary guide for project selection. OASA(CW) concurred with the Chief's Report. CEMVD indicated that the District will complete the HNA by 30Sep00. The requirement to submit the latest HNA with each evaluation every sixth year implies that the HNA will be redone or updated periodically.

Implementation Guidance: Submit two copies of the HNA to CECW-P upon completion for information and coordination with OASA(CW).

Other Proposed Policy Changes

The following section includes other policy changes proposed in the Partnership Report or by CEMVD that were not address by Section 509.

11. Proposal: *"To gain additional project implementation efficiencies, the U.S. Army Corps of Engineers, Headquarters should delegate approval authority for those projects with an estimated construction cost of $5 million or less to the Division level."* (Partnership Report, page 7-5)

Analysis: Authority to approve the construction of proposed HREPs with an estimated construction cost of $2,000,000 or less was delegated to the CENCD and CEMVD Commanders in a 07Dec93 memorandum from CECW-P as approved by ASA(CW) on 02Dec93 memorandum. The delegation of approval, which is still in effect, applies to proposals that clearly fall within policy parameters established in previous decisions. It also applies only to specific types of justified, in-water work. Any potential project not clearly meeting these criteria required approval by ASA(CW). An annual status review summary was required for submittal to ASA(CW).

CEMVD has also recommended that the delegated authority be increased to $5,000,000. This would include fact sheet and Definite Project Report approvals. CEMVD stated that it is experienced with EMP projects, is responsible for developing and managing the EMP budget, and would work within budgetary constraints to provide a program that efficiently uses available funds and addresses the region's habitat needs. Projects within the delegated authority would include features that clearly fit within current policy. Innovative or demonstration type work would still be approved by HQUSACE. CEMVD stated it is capable of recognizing policy issues that need consultation with higher authority.

Basing the cost limit on the Federal cost share rather than the total cost is consistent with the management of the Continuing Authorities Program, which was used as a model for the EMP, and may provide a minor enticement for non-Federal cost sharing.

Implementation Guidance: The Commander, CEMVD, may approve the construction of HREPs with an estimated Federal cost of less than $5 million. The various requirements cited in the 07Dec93 memorandum remain in effect.

12. Proposal: *"To reduce habitat project review and approval time and therefore implementation costs, the U. S. Army Corps of Engineers, Mississippi Valley Division should delegate approval authority for those projects with an estimated construction cost of $1 million or less to the District level."* (Partnership Report, page 7-5)

Analysis: CEMVD also recommended that construction approval authority be delegated to Districts for projects with estimated construction costs less than $1,000,000. There is no current delegation of approval authority for EMP projects to the Districts. CEMVD stated that projects under $1,000,000 are typically routine and not controversial and that District staffs are very familiar and experienced with these projects. Funding implications would continue to be coordinated with CEMVD. Typical projects in this category include backwater and side-channel dredging and erosion protection.

Project recommendations to initiate planning and to construct a particular plan, regardless of cost, should be reviewed and approved at least one command level higher than the implementing office to ensure that the action is appropriate under law, policy and current administration priorities. This provides a check and balance to prevent potential waste, fraud and abuse. However, if the plan developed for construction has essentially the same features, scale, and outputs as the plan described in the approved fact sheet, then further review by

higher authority would be arguably redundant and unnecessary.

Implementation Guidance: The Commander, CEMVD, may delegate the authority to approve construction of any EMP HREPs with an estimated construction cost of $1,000,000 or less to the District Commander provided that the plan to be constructed has essentially the same features, scale, and outputs as the plan described in an approved fact sheet.

13. Proposal: *"The Corps of Engineers, Headquarters should review and, if necessary, modify current policies and guidance to ensure that HREPs can include obtaining real estate interests from willing sellers when and where such actions are determined to be consistent with and supportive of program goals and objectives. Any new or revised policy and guidance should include a provision for the government to reimburse the local sponsor for all lands, easements, rights-of-way, relocations, and disposal sites (LERRDs) cost in excess of 25% of the total project cost."* (Partnership Report, page 7-5)

Analysis: CEMVD recommended that project sponsors be allowed credit for lands purchased prior to signing the Project Cooperation Agreement (PCA). The current EMP policy only allows credit for lands purchased after signing the PCA. CEMVD stated that this policy change would make EMP consistent with other Corps programs and would encourage development of more projects on non-federal lands, broadening the program. CEMVD further recommended that when the value of LERRDs exceeds the 35 percent cost share, the Federal government would reimburse the difference to the sponsor. (CEMVD-PM-E 1st End, 18Jan00 (CEMVR-PM, 28Dec99), Subject: WRDA 99 Implementation Guidance Recommendations for the Environmental Management program (EMP))

A 30Nov94 memorandum from CECW-P to the Commander, CENCD, approved land acquisition as an additional measure to the list of criteria for which approval authority was previously delegated on 07Dec93, subject to the following criteria:

- Land acquisition must be for the primary purpose of fish and wildlife preservation or restoration;
- Land acquisition must be incrementally cost efficient relative to other alternatives that could be applied on existing lands;
- A habitat project that includes land acquisition must have a non-fed sponsor to acquire the land, share construction costs, and assume responsibility for all O&M for fish and wildlife activities on such land;
- Such a project or any portion there of that requires land acquisition would be cost shared;
- The cost sharing would include credit for LERRD applied to the non-Federal sponsor's cost share;
- If the LERRD value exceeds the non-Federal cost share, the sponsor may be reimbursed the difference;
- Lands to be included in a national wildlife refuge would be acquired under existing USFWS programs and authorities. This does not preclude construction of habitat measures on land purchased separately by the USFWS;
- Land acquisition for its own sake is not appropriate. Any land acquired must include active construction and/or operation and maintenance measures to improve the value of the fish and wildlife habitat over its value in its current condition.
- No more than ten percent of the total allowable funds for HREPs may be used for land acquisition.
- Any potential project not clearly meeting this criteria is subject to ASA(CW) approval.

The 30Nov94 memorandum was based on ASA(CW)'s 31Oct94 memorandum to CECW. Neither memorandum specifically addressed lands acquired prior to execution of the PCA. A

13Oct95 memorandum from CECW-PC to CENCD stated, "Credit may not be given, against the non-Federal share of the costs of an HREP, for LER that are already part of an existing fish and wildlife refuge being rehabilitated or enhanced by the HREP." The supporting rationale cited consistency with Section 14, Continuing Authority Program (CAP) guidance. Paragraph 4-3.g. of EC 1105-2-211 (15Feb96) indicates that this guidance is unique to Section 14 projects and does not apply to other CAP authorities or the Section 1135 or 204 projects.

Paragraph 12.c., ER 1165-2-131, Guidance for Local Cooperation Agreements for New Start Construction Projects, 15Apr89, states that, for lands the sponsor already owns, the sponsor will receive credit based on the fair market value as of the date of award of the first construction contract.

EC 1105-2-214, Project Modifications for Improvement of the Environment and Aquatic Ecosystem Restoration, 30Sep97, does not preclude credit for lands already owned by the sponsor that are needed for Section 1135 and Section 204 projects.

ER 1165-2-501, Water Resources Policies and Authorities - Civil Works Ecosystem Restoration Policy, 30Sep99, refers to Section VII of Chapter 12 of ER 405-I-12 for crediting LERRD to be provided by the non-Federal sponsor for ecosystem restoration projects. ER 1165-2-501 also refers to EP 1165-2-501 for additional policy information.

Paragraph 17.e., EP 1165-2-501, Water Resources Policies and Authorities - Ecosystem Restoration – Supporting Policy Information, 30Sep99, states, "*For crediting and total project cost calculation purposes, the value for LERRD required to be provided or performed by the non-Federal sponsor for the ecosystem restoration project shall be determined in accordance with the terms of the PCA for the project, Section VII of Chapter 12 of ER 405-1-12, and other applicable guidance.*

(1) Generally, the non-Federal sponsor will be afforded credit against its share of project costs for the value of lands, easements, and rights-of-way it provides, and the value of relocations it performs, that are required for the project as determined by the government. A detailed description of the valuation and crediting process -- including principles regarding the appraisal process, appropriate dates of valuation, and stipulating value and credit amounts in the PCA—is contained in Chapter 12 of ER 405-1-12.

(2) Not withstanding the general policy discussed above regarding affording of credit, the non-Federal sponsor will not be afforded LERRD credit (and the value will not be included in total project costs for the purposes of cost sharing) in the following circumstances:

(a) for LERRD that has been provided previously as an item of cooperation for another Federal project;

(b) for LERRD that is provided using Federal funds unless the Federal granting agency verifies in writing that credit therefor is expressly authorized by statute;

(c) for Federal lands provided for project use (except for reasonable incidental costs) unless the non-Federal sponsor paid fair market value to the Federal managing agency for the required real property interest; and

(d) for lands that are available to the project through proper exercise of the government's navigation servitude rights."

Paragraph 12.35.b of ER 405-1-12 states, "Generally, for the purpose of determining the amount of credit to be afforded, the value of LER is the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, that the non-Federal sponsor provided for the project as required by the Government." Paragraph 12.36.a.(1) states, "The fair market value of LER owned by the non-Federal sponsor on the effective date of the PCA for the project is the fair market value of the real property interests as of the date the non-Federal sponsor provides the Government with authorization for entry thereto for construction purposes."

The policy for EMP to not allow credit for lands already managed for fish and wildlife purposes is not applied to other ecosystem restoration projects and authorities; i.e., it is inconsistent with broader policy applications. The Section 14 program, the basis for this policy, has little in common with ecosystem and aquatic restoration. Section 14 projects provide emergency protection to public facilities in order to perpetuate their current function with minimal or no alteration of the facilities, and no increase in outputs. The EMP and other restoration projects often alter the land use and increase outputs for lands previously used for fish and wildlife. An HREP is not justified without an incremental increase in outputs. As part of a Federal project, future land use conversion is restricted.

Implementation Guidance: The 13Oct95 guidance is rescinded. Refer to ER 405-1-12 for policy concerning credit for lands provided by a sponsor. The 30Nov94 guidance remains effective. Paragraph 3.e. of the 30Nov94 memorandum states that if the value of the LERRD exceeds 25 percent (now 35 percent) of the total project cost, the Federal government would reimburse the difference to the non-Federal sponsor. Other real estate policy issues of concern to the EMP-CC should be evaluated and, if warranted, proposed changes may be forwarded to CECW-P for review, coordination with OASA(CW) and approval.

14. Proposal: *"The Corps of Engineers, Headquarters should modify EMP policies and guidance to allow the inclusion of upland sediment controls as part of HREPs in cases where sediment from the local watershed is directly affecting the project area and upland sediment control is a cost-effective measure for achieving project objectives."* (Partnership Report, page 7-5)

Analysis: CEMVD recommended that upland sediment components be included when they provide direct benefits to the riverine project under consideration and when they are the most effective and efficient means of achieving floodplain results. Such measures would not include non-site-specific watershed land conservation practices. The Swan Lake and Batchtown HREPs successfully demonstrated this type of action. This policy clarification would allow the Corps, the Natural Resources Conservation Service (NRCS), and non-Federal sponsors to reduce river sediment problems and address the source of the problems together.

Upland sediment controls should be included in HREPs when they are the most effective means of restoring the ecology. They should not be included in the project cost if they are reasonably implementable under an existing NRCS program.

Implementation Guidance: Upland sediment controls may be included in HREPs when they are the most effective means of restoring the riverine and floodplain ecology under consideration and they are not likely to be implemented by the NRCS.

15. Proposal: *"The U.S. Army Corps of Engineers, St. Paul, Rock Island, and St. Louis Districts should continue the physical, chemical & biological monitoring of pre- and post-project conditions. Integration of project-specific monitoring with the systemic monitoring activities of the LTRM should be enhanced. Biological response monitoring of selected habitat restoration, protection, and enhancement measures is essential to evaluating the ecological and cost effectiveness of the HREP program element and should continue to be supported."* (Partnership Report, page 7-5)

Analysis: CEMVD indicated that the LTRMP was restructured to meet the goals provided in a HQUSACE memorandum dated 8 February 1999. CEMVD recently provided the USGS funds to execute parts of that program. The funds provided to USGS are tied directly to scopes of works that have definite products with firm costs and schedules. After final implementation guidance is provided for the EMP a new Memorandum of Agreement between the Department of Army and the Department of the Interior will be drafted. The Chief, in a 03Feb99 letter to the

Secretary of the Interior, recommended cooperation in developing a business plan to help protect the Environmental Management Technical Center (EMTC) from budget impacts while progressing towards self-sufficiency.

Pending a response from the Secretary of the Interior to the Chief's 03Feb99 letter, no additional guidance is necessary.

Implementation Guidance: Continue to implement the LTRMP subject to the availability of funds.

16. Proposal: *"Future EMP efforts to restore, protect, and enhance UMRS habitat should continue to include an appropriate mix of large-scale actions, which are compatible with other river system purposes, such as pool-scale water level management modifications, and smaller projects affecting limited areas. The U.S. Army Corps of Engineers, St. Paul, Rock Island, and St. Louis Districts should continue to place increasing emphasis on using natural river processes and innovative measures in the design and construction of habitat projects."* (Partnership Report, page 7-6)

Analysis: The Commander, CEMVD, has sufficient authority to study large and small scale projects. No additional guidance is necessary.

Implementation Guidance: The reports to Congress prepared pursuant to Section 509(b)(2) shall evaluate the emphasis placed on using natural river processes and innovative measures in the design and construction of habitat projects.

17. Proposal: *"A concerted effort by the U.S. Army Corps of Engineers, Mississippi Valley Division and Headquarters should be undertaken to identify factors (e.g., project life design requirements, definitions of project failure, and experimental design) that may currently be limiting program innovation. Subsequently, any potentially constraining policies and guidance should be reviewed and, if necessary, modified."* (Partnership Report, page 7-6)

Analysis: CEMVD should work with the EMP-CC to identify any unnecessary constraints.

Implementation Guidance: Forward any unnecessary constraints that are beyond your authority to implement, with proposals for policy or legislative changes to provide relief, to CECW-P for review and approval. Each proposal should fully describe the constraint, its impact, alternative solutions and their impacts and costs, and a recommendation for a specific policy change or legislation.

18. Proposal: *"The Corps of Engineers, Mississippi Valley Division should facilitate development of charters, within the constraints imposed by Federal law, for the EMP-CC and LTRMP Analysis Team."* (Partnership Report, page 7-6)

Analysis: CEMVD has sufficient authority to develop charters for the EMP-CC and LTRMP Analysis Team.

Implementation Guidance: Develop and implement charters for the EMP-CC and LTRMP Analysis Team, as needed.

19. Proposal: *"The Corps of Engineers, St. Paul, Rock Island, and St. Louis Districts should increase the level of public involvement in the planning and implementation of the UMRS-EMP. Efforts should be taken to inform the public about habitat project purposes (resource management goals and objectives), expected outputs, and actual performance. In addition, opportunities to support public education that increases general understanding of the UMR ecosystem and management challenges should be pursued."* (Partnership Report, page 7-6)

Analysis: CEMVD has sufficient authority to implement this proposal with no further guidance. CEMVD should work with the EMP-CC to determine if any changes in the level of

public involvement are necessary.

Implementation Guidance: Develop and implement a plan to increase the level of public involvement for planning and implementing the EMP. The public involvement strategy should seek to improve the regional understanding of both the Upper Mississippi River ecosystem and the EMP, including its goals, objectives, expected outputs, and actual performance. Coordinate development of the public involvement plan with the EMP-CC. Provide the public involvement plan within six months to CECW-P for information and coordination with ASA(CW).

20. Proposal: *"... (a) That up to 80% of the 25% non-Federal cost share of an HREP may be in the form of in-kind services, including a facility, supply, or service or lands (LERRDs credits) that is necessary to carry out the project. This would be similar to other habitat restoration programs such as Section 1135 of the WRDA of 1986, Project Modifications for the Improvement of the Environment, as amended by Section 204(d) of the WRDA of 1996."* (Partnership Report, page 8-2)

Analysis: Section 221 of WRDA99 amended Section 906(e) of WRDA86 to include credit for in-kind services. Section 1103(e)(7)(A) governs cost sharing for EMP by reference to Section 906(e) of WRDA86. Section 1103(e)(7)(A), as amended by Section 509, now specifies that the non-Federal share of the costs of the projects that require non-Federal cost sharing to be 35 percent. Section 906(e), as amended by Section 221, now provides that not more than 80 percent of the non-Federal share of first costs for projects for the enhancement of fish and wildlife resources "*may be satisfied through in-kind contributions, including facilities, supplies, and services that are necessary to carry out the enhancement project.*"

Implementation Guidance: In accordance with Section 221, up to 80 percent of the non-Federal cost share may be in the form of in-kind services, when the following conditions are met:

(1) The work and/or services are necessary for the Federal project;
(2) The in-kind work and/or services reduce the project time and cost requirements;
(3) The Corps retains final authority to determine the value and acceptability of in-kind work and services; and,
(4) The scope, value and necessity of the in-kind work and/or services are agreed upon between the sponsor and the Corps, and approved by ASA(CW) prior to the execution of the work.

21. Proposal: *"... (b) That, subject to the availability of funds, non-Federal interests may be reimbursed for the Federal share, without interest, of studies, design documents, and implementation costs of approved HREPs."* (Partnership Report, page 8-2)

Analysis: Neither the Chief's Report nor the OASA(CW) transmittal of the Chief's Report to Congress addressed reimbursement. Sufficient authority exists to reimburse non-Federal sponsors for work, including work-in-kind, as defined in a PCA and performed after the PCA is executed. The proposal would allow a non-Federal sponsor to unilaterally plan, design, and construct a project before seeking reimbursement for 100 percent of the planning and design, and 65 percent of the construction. This is contrary to long-standing Administration policy because it would reduce the EMP to a grant program and diminish the value added by the Corps, including cost and quality controls. The Partnership Report cited Section 211 of WRDA96 as a precedent for reimbursable work. Section 211 applies only to flood control projects, not ecosystem restoration, and has only been applied where specifically directed by law. Similarly, Sections 203 and 204 of WRDA86 apply only to navigation projects, not ecosystem restoration, and have only been applied where specifically directed by law. No such authority exists for ecosystem restoration.

Implementation Guidance: Advise the EMP-CC that the Corps of Engineers lacks the authority to reimburse non-Federal entities for studies, design documents, and construction for ecosystem restoration projects. Offer to provide legislative drafting services as needed by the EMP-CC.