

**APPENDIX I
AGREEMENTS**

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS

SUBJECT: Policy Guidance Letter (PGL) No. 47, Cost Sharing for Dredged Material Disposal Facilities and Dredged Material Disposal Facility Partnerships

1. Purpose. This Policy Guidance Letter (PGL) sets forth U.S. Army Corps of Engineers policy regarding the cost sharing for construction of dredged material disposal facilities associated with the construction and operation and maintenance of Federal navigation projects for harbors and inland harbors. This guidance supersedes previous guidance on this subject. The guidance applies to the construction of any land based or aquatic dredged material disposal facility for which a contract for construction of such facility was not awarded on or before 12 October 1996. This guidance is not applicable to dredged material disposal facilities associated with the construction and operation and maintenance of the inland navigation system including the Atlantic Intracoastal Waterway and the Gulf Intracoastal Waterway. Guidance is also provided on provision of capacity for non-Federal dredged material in dredged material disposal facilities and public-private partnerships for provision of dredged material disposal facilities.

2. Background. Prior to the enactment of the Water Resources Development Act of 1996 (WRDA 96) there was no consistent policy on required cost sharing for the construction of open-water, upland, and confined disposal facilities. Federal and non-Federal cost sharing responsibilities for dredged material disposal varied depending on when the project was authorized. In addition, cost sharing laws and policies favored open water disposal. In most cases, open water disposal costs were either cost shared (new projects) or borne by the Federal Government and reimbursed through the Harbor Maintenance Trust Fund (existing project maintenance) while land and diking costs for upland and confined disposal were largely non-Federal costs for both new and operating harbor projects. This inconsistency created an incentive for open water disposal and discouraged upland and confined disposal. This lack of consistent cost sharing policy became more critical with improved environmental testing procedures for dredged material and increased ability to identify contaminants. The increased information about the effects of dredged material disposal on the environment has led to a decrease in unconfined open water disposal and an increase in upland and confined disposal resulting in a shift in disposal costs from the Federal Government to the non-Federal sponsor. There is also a need for a comprehensive solution to dredged material management problems, including consideration of management of non-Federal dredged material.

3. Section 201 of the Water Resources Development Act of 1996. Section 201 of WRDA 96 addressed cost sharing for dredged material disposal facilities by amending Sections 101 and 214 of the Water Resources Development Act of 1986 (WRDA 86) to establish cost sharing for

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construction of all disposal facilities associated with Federal navigation projects, including disposal facilities for Federal project maintenance, and to establish that the Federal share of construction of disposal facilities for Federal project maintenance is reimbursable from the Harbor Maintenance Trust Fund. Sections 101 and 214 of WRDA 86 as further amended by WRDA 96 are enclosed. The basic provisions of the section are summarized as follows:

a. The costs of constructing land-based and aquatic dredged material disposal facilities associated with the construction, operation, and maintenance of all Federal navigation harbors and inland harbors shall be considered costs of constructing a general navigation feature (GNF) of the project and shall be shared in accordance with the procedures set forth in Section 101(a) of WRDA 86. Under section 101(a) cost sharing the non-Federal sponsor will pay during construction 10 percent of the cost of constructing a disposal facility for that portion of a project with depths not greater than 20 feet; 25 percent of the cost of constructing a disposal facility for that portion of a project with depths greater than 20 feet but not greater than 45 feet; or 50 percent of the cost of constructing a disposal facility for that portion of a project with depths greater than 45 feet. The non-Federal sponsor will also provide the lands, easements, rights-of-way and relocations necessary for the disposal facility. The non-Federal sponsor will also have to pay an additional 10 percent of the cost of constructing the disposal facility, as well as other GNF costs, over a period of not to exceed 30 years but with the value of lands, easements, rights-of-way and relocations credited against this additional 10 percent payment.

b. The Federal share of the costs of operation and maintenance of the disposal facility shall be determined in accordance with Section 101(b) of WRDA 86. Under section 101(b) the Federal share of the operation and maintenance costs will be 100 percent except for disposal facilities for projects in excess of 45 feet where the non-Federal sponsor will share in 50 percent of the incremental operation and maintenance costs.

c. The Federal share of construction of dredged material disposal facilities associated with the operation and maintenance of Federal harbor projects, Federal dredged material disposal facility operation and maintenance costs, Federal costs of dredging and disposal of contaminated sediments that are in or that affect the maintenance of a Federal navigation channel and Federal costs of mitigation for storm damage and environmental impacts resulting from Federal maintenance activity are eligible operation and maintenance costs under Section 210 of WRDA 86 and are reimbursed from the Harbor Maintenance Trust Fund.

d. To the extent practicable, funding requirements for navigation operation and maintenance dredging of commercial navigation harbors will be fully considered before Federal funds are obligated for construction of dredged material disposal facilities.

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e. To the extent practicable, funds for construction of dredged material disposal facilities will be equitably apportioned in accordance with regional needs.

f. The use of a dredged material disposal facility designed, constructed, managed or operated by a private entity is not precluded if, consistent with economic and environmental considerations, the use of such facility is the least-cost environmentally acceptable alternative.

g. The Secretary of the Army shall, upon request by the non-Federal sponsor, modify existing Project Cooperation Agreements to reflect the new cost sharing provisions for disposal facilities for which a contract for construction of such facility has not been awarded.

h. The cost sharing provisions shall not increase the non-Federal share of the construction, operation, or maintenance of -

(1) expanding any confined dredged material disposal facility which is operated by the U.S. Army Corps of Engineers and which is authorized for cost recovery through the collection of tolls;

(2) any confined dredged material disposal facility for which the Invitation for Bids for construction was issued prior to 12 October 1996; and

(3) expanding any confined dredged material disposal facility authorized by Section 123 of the River and Harbor Act of 1970, for which the capacity of the confined dredged material disposal facility was exceeded in less than six years.

4. Section 217 Water Resources Development of 1996. Section 217 of WRDA 96 addresses dredged material disposal facility partnerships. A copy of section 217 is enclosed. The basic provisions of the section are summarized as follows:

a. Additional Capacity. Provides that the Secretary of the Army at the request of a non-Federal interest may provide additional capacity at a dredged material disposal facility being constructed by the Secretary if the non-Federal interest pays during the period of construction all costs associated with the construction of the additional capacity. The non-Federal interest is authorized to cover the costs of the additional capacity through fees assessed to third parties for use of the non-Federal capacity in the disposal facility. The fee amount may be determined by the non-Federal interest.

b. Non-Federal Use of Disposal Facilities. Provides that the Secretary of the Army may permit the use of any dredged material disposal facility managed by the Secretary by a non-

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Federal interest if such use will not reduce the availability of the facility for project purposes and may impose fees to recover capital, operation and maintenance costs associated with such use. Notwithstanding Section 401(c) of the Federal Water Pollution Control Act, but subject to advance appropriations, any monies received through the collection of these fees shall be used by the Secretary for the operation and maintenance of the disposal facility from which the fees were collected.

c. Public -Private Partnerships. Provides that the Secretary of the Army may implement opportunities for public-private partnerships in the design, construction, management, or operation of dredged material disposal facilities in connection with construction or maintenance of Federal navigation projects. These public-private partnerships may be implemented through agreements with a non-Federal interest, a private entity, or both. Funds for the design, construction, management, or operation, of the dredged material disposal facility may be provided in whole or in part by the private entity. The Secretary of the Army may reimburse the private entity, subject to appropriations, for the disposal of dredged material in the facility through the payment of a disposal user fee. The user fee shall be sufficient to repay funds contributed by the private entity plus a reasonable return on investment. The Federal share of the fee shall be equal to the Federal percentage of the disposal facility cost in accordance with existing cost sharing requirements.

5. Definition of Land Based and Aquatic Dredged Material Disposal Facilities.

a. General. Land based or aquatic disposal facilities are improvements necessary on lands, easements, or rights-of-way to enable the proper disposal of dredged or excavated material associated with the construction, operation, or maintenance of Federal navigation projects for harbors or inland harbors. Such facilities include but are not limited to:

(1) Retaining structures including dikes or embankments, whether upland or aquatic, including subaqueous dikes;

(2) Water control structures and de-watering facilities including weirs, culverts, spillboxes, de-watering pumps or pipes, stilling basins and monitoring features; and

(3) Excavated pits, whether upland or aquatic.

b. Dredged or Excavated Material Transportation and Placement. The costs of transportation of dredged or excavated material associated with the construction, operation, or maintenance of the Federal navigation project and the costs of placement of dredged or excavated material in the disposal facilities are not considered to be a part of land based or aquatic

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disposal facilities cost. These transportation and placement costs are either a part of general navigation features costs for new navigation projects or project modifications, or are operation and maintenance costs if associated with operation and maintenance dredging of a Federal navigation project. The costs of transportation and placement of dredged or excavated material used to construct the disposal facility, however, are considered part of the land based or aquatic disposal facilities cost.

c. Caps. A constructed (placed) cap of dredged or excavated material to isolate contaminated dredged material from the surrounding environment may or may not be considered a disposal facility depending on the source of the capping material. If the capping material is from a source other than material dredged from a Federal navigation channel, the costs of dredging or excavating the capping material, transportation of the capping material and placement of the capping material is considered a part of the disposal facilities construction costs. If the capping material results from excavation or dredging within the authorized limits of a Federal navigation project and would otherwise be considered new work dredging or needed for operation and maintenance, the costs are either general navigation feature costs for new navigation projects or modifications, or are operation and maintenance costs if associated with operation and maintenance dredging of a Federal navigation project. If the material is dredged from a Federal navigation channel and is not required as part of new project construction or operation and maintenance dredging, the transportation and placement is considered a part of the disposal facilities construction costs.

d. Construction of Disposal Facilities Versus Operation and Maintenance Activities. It is sometimes difficult to make a clear distinction between operation and maintenance activities and new construction disposal facilities. Recurring activities associated with management of a disposal facility such as operation of weirs and spillboxes, repair of dikes and embankments, maintenance of pumps and pipes, and vector control are clearly operation and maintenance activities. However, raising of dikes; excavation of ditches; installation of drains; excavation, transportation and placement of material from a disposal facility; and construction of similar improvements to facilitate the de-watering of dredged material and creation of additional capacity could either be considered operation and maintenance activities or construction of disposal facilities depending on the purpose, timing, intensity and cost of the activity. Where established management practices for an existing disposal facility include regularly recurring dike raising and/or dewatering activities associated with each maintenance dredging cycle or regular excavation, transportation and placement of material from the disposal facility to maintain disposal capacity, these measure will be considered operation and maintenance activities and not construction of disposal facilities and there will be no change in existing Federal and non-Federal financial responsibilities. Where there is the need for a new investment to create additional capacity in a disposal facility beyond the regularly recurring management activities (for example

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when an existing disposal facility has reach its capacity and requires a major dike raising or a significant new investment in dewatering improvements or where a facility has reached its capacity and major excavation, transportation and placement of material is needed to restore capacity), these investments will cost shared as construction of disposal facilities. Questions on classification of these activities will be considered on a case by case basis by HQUSACE.

e. Facilities for Other Purposes. Dredged or excavated material from a Federal navigation project can be used in the construction of a facility which not only serves as a disposal facility but also serves for another purpose, such as a parking lot or terminal facility. In these cases, the guidance in Policy Guidance Letter No. 17, Formulation and Cost Sharing for Harbor Projects that Include Land Creation, and ER 1105-2-100, paragraph 4-7d. will be followed, as applicable. The costs allocated to disposal facility costs will be shared as GNF costs and the costs allocated to the end use of the facility will be non-Federal costs. The operation and maintenance cost of these facilities constructed for another purpose are not GNF operation and maintenance costs and are a non-Federal responsibility. Classification of costs for these facilities will be considered by HQUSACE on a case by case basis.

6. Cost Sharing for Land Based and Aquatic Dredged Material Disposal Facilities for New Navigation Projects or Modifications. Construction costs for land based and aquatic dredged material disposal facilities for new navigation projects or modifications will be shared as GNF of the project under Section 101 of WRDA 86 as further amended by WRDA 96 . The non-Federal sponsor will provide the lands, easements, and rights-of-way, and perform relocations (LERR) for the construction of the land based and aquatic disposal facilities along with the LERR for the navigation project. The costs of deep-draft utility relocations necessary for construction of the disposal facilities (applicable only to disposal facilities for that portion of projects with depths greater than 45 feet) will be shared on a 50-50 basis between the non-Federal sponsor and the utility owner. The operation and maintenance costs for the disposal facility will be shared as GNF operation and maintenance costs are shared. That is, for projects with depths of 45 feet or less, the disposal facility operation and maintenance costs will be 100 percent Federal. For projects with depths in excess of 45 feet the costs of operation and maintenance of the disposal facility will be 100 percent Federal up to the level of such costs which would be incurred for a disposal facility for a project which had a depth of 45 feet. Incremental disposal facility operation and maintenance costs in excess of those operation and maintenance costs required for a disposal facility for a 45 foot project will be shared on a 50-50 basis between the Federal Government and the non-Federal sponsor. The disposal facility cost sharing will be reflected in the project cooperation agreement (PCA) for new navigation projects. The guidance in this paragraph also applies to the expansion or excavation of an existing disposal facility to accommodate dredged material for new navigation projects. The construction costs associated with the expansion or excavation will be shared as a GNF cost and the operation and maintenance costs responsibility

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for the expanded facility will be as defined in this paragraph regardless of the operation and maintenance responsibility in effect prior to the disposal area expansion. Proposals for continued non-Federal operation and maintenance of expanded disposal facilities with payments for the Federal share of operation and maintenance costs will be considered on a case-by-case basis by HQUSACE.

7. Cost Sharing for Land Based and Aquatic Dredged Material Disposal Facilities for Maintenance of Existing Federal Navigation Projects.

a. General. Section 101 of WRDA 86, as further amended by WRDA 96, provides that construction costs for disposal facilities that are necessary for the disposal of dredged material required for the operation and maintenance of a navigation project will be shared as general navigation features of the project. This applies to any disposal facility for which a construction contract was not awarded on or before 12 October 1996 and modifies any local cooperation requirements that applied to construction of these disposal facilities prior to passage of WRDA 96. The cost sharing requirements apply to construction of new disposal facilities and expansion of existing disposal facilities. Construction of disposal facilities at navigation projects without local cooperation requirements (no existing non-Federal sponsor) will require a cooperative cost sharing agreement with a non-Federal public body according to the provisions of Section 221 of the Flood Control Act of 1970.

b. New Disposal Facilities at Existing Projects.

(1) Construction Costs. Construction costs for new land based and aquatic dredged material disposal facilities required for operation and maintenance of Federal navigation projects will be shared as general navigation features of the project under Section 101 of WRDA 86, as further amended by WRDA 96. The non-Federal sponsor will provide the lands, easements, and rights-of-way, and perform relocations (LERR) for the construction of the land based and aquatic disposal facilities. Any costs for deep-draft utility relocations necessary for construction of the disposal facilities (applicable only to disposal facilities for that portion of projects with depths greater than 45 feet) will be shared on a 50-50 basis between the non-Federal sponsor and the utility owner.

(2) Dredging, Transportation and Placement Costs. The costs of dredging, transportation and placement of material into a disposal facility resulting from operation and maintenance of a Federal navigation channel is a 100 percent Federal operation and maintenance cost except for a project which has an authorized depth in excess of 45 feet. For a project with an authorized depth in excess of 45 feet, the costs of dredging, transportation and placement into a disposal facility will be 100 percent Federal up to the level of such costs which would be

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incurred if such project had a depth of 45 feet. Incremental dredging, transportation and placement costs in excess of those costs required for a 45 foot project costs will be shared on a 50-50 basis between the Federal Government and the non-Federal sponsor.

(3) Disposal Facility Operation and Maintenance Costs. The costs of operation and maintenance of disposal facilities for projects with depths of 45 feet or less are 100 percent Federal. For projects with depths in excess of 45 feet, the costs of operation and maintenance of the disposal facility will be 100 percent Federal up to the level of such costs which would be incurred for a disposal facility for a project which had a depth of 45 feet. Any incremental disposal facility operation and maintenance costs in excess of those operation and maintenance costs required for a disposal facility for a 45 foot project costs will be cost shared on a 50-50 basis between the Federal Government and the non-Federal sponsor.

(4) Multiple Project Disposal Facility. There is a foreseeable need to construct regional disposal facilities providing disposal for maintenance dredging from multiple Federal navigation projects. For projects being maintained that have widely varying depths and, therefore, different cost sharing percentages for GNF under Section 101 of WRDA 86 as further amended by WRDA 96, the costs of the disposal facility will be allocated to the projects being maintained based on the disposal capacity in the disposal facility needed for each project. The GNF cost sharing applicable to the depth of the project to be maintained will apply to the allocated disposal facility cost for that project. A sample cost sharing calculation for a multiple project disposal facility is provided in enclosure 4.

(5) Federal and Non-Federal Disposal Facility. In accordance with Section 217 of WRDA 96, the Corps may enter into agreements to provide additional capacity in a disposal facility for non-Federal dredged or excavated material such as material from berthing areas, non-Federal navigation channels and marinas. Non-Federal interests must agree to pay all the costs associated with the non-Federal capacity. In these cases, the disposal capacity in the disposal facility will be allocated between the capacity required for the maintenance (or improvement as applicable) of the Federal project and the capacity required for the non-Federal dredged material. Non-Federal interests will pay the non-Federal share of the costs of the capacity attributed to the Federal project(s) plus 100 percent of the cost allocated to the non-Federal dredged material capacity. A similar allocation will be made for the operation and maintenance costs of the disposal facility. The operation and maintenance costs attributable to the Federal project capacity will be shared in accordance with paragraph 7.a.(3) and the operation and maintenance costs associated with the non-Federal capacity will be 100 percent non-Federal. In general, the operation and maintenance of Federal and non-Federal disposal facilities will be accomplished by the Corps with annual payments by non-Federal interests for the non-Federal share of operation and maintenance costs. Payments and fees collected from non-Federal interests will be used for

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the operation and maintenance of the disposal facility in accordance with Section 217 of WRDA 96. Non-Federal operation and maintenance of Federal and non-Federal disposal facilities with annual payments of the Federal share will be considered on a case-by-case basis by HQUSACE. Non-Federal interests may recover the costs assigned to the additional capacity through fees assessed on third parties whose dredged material is deposited at the facility and who enter into agreements with the non-Federal interest for the use of the facility. A sample cost sharing calculation for a Federal and non-Federal disposal facility is presented in enclosure 4.

c. Expansion of Existing Disposal Facilities at Existing Projects.

(1) General. The provisions of Section 101 of WRDA 86 as further amended by Section 201 of WRDA 96 regarding the construction and operation and maintenance of dredged material disposal facilities is applicable to disposal facilities for which a contract for construction of such facilities was not awarded on or before enactment of the WRDA 96 (12 October 1996). Therefore, the operation and maintenance responsibilities for disposal facilities that were constructed prior to WRDA 96, or under construction at the time WRDA 96 was enacted are not changed. If a non-Federal sponsor or the Federal Government has been assigned in law or by agreement the responsibility for operation and maintenance of a dredged material disposal facility constructed before the enactment of WRDA 96 or under construction at the time of WRDA 96 enactment, these operation and maintenance responsibilities remain in effect.

(2) Cost Sharing for Expansion of Existing Disposal Facilities at Existing Projects. Construction costs for expansion of the capacity of existing land based and aquatic dredged material disposal facilities for operation and maintenance of Federal navigation projects will be shared as general navigation features of the project under Section 101 of WRDA 86, as amended by WRDA 96. Expansion of the capacity of an existing disposal facility includes vertical expansion (raising of dikes), horizontal expansion (adding additional disposal area), excavation and dewatering to create additional capacity (see paragraph 5d.). The non-Federal sponsor will provide the lands, easements, and rights-of-way, and perform relocations (LERR) for the construction of the land based and aquatic disposal facilities. However, no cost sharing credit will be given for LERR previously provided for a Federal project. Any deep-draft utility relocations required for construction of the disposal facilities (applicable only to disposal facilities for that portion of projects with depths greater than 45 feet) will be shared on a 50-50 basis between the non-Federal sponsor and the utility owner. The guidance on dredging, transportation and placement costs, disposal facility operation and maintenance costs, multiple project disposal facilities, and Federal and non-Federal disposal facilities presented in paragraphs 7.b.(2) thru 7.(5) for new disposal facilities at existing projects also applies to the expansion of existing disposal facilities at existing projects. However, in cases where the disposal facility to be expanded is operated by the non-Federal sponsor, consideration will be given, on a case-by-case basis by

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HQUSACE, to continued operation and maintenance of the expanded disposal facility by the non-Federal sponsor with payment of the Federal share of the disposal facility operation and maintenance cost.

d. Non-Federal Use of Federal Disposal Facilities. Non-Federal interests may use a disposal facility under the jurisdiction of or managed by the Corps if it is determined that the capacity to be used by the non-Federal interest will not reduce the availability of the disposal facility for Federal navigation project purposes. The non-Federal interest must enter into an agreement to pay the capital costs associated with the capacity to be used and pay all operation and maintenance costs associated with their use of the facility. The calculation of the non-Federal share of the costs will be based on the capacity to be used by the non-Federal interests compared to the total capacity of the disposal facility. The capital costs to be recovered will be calculated based on the current costs of the capacity to be utilized. The payments by non-Federal interests will be used by the Corps, subject to the availability of appropriations, for operation and maintenance of the disposal facility from which the fees were collected. For non-Federal use of disposal facilities that were constructed under a project cooperation agreement with a non-Federal sponsor, the non-Federal sponsor will be reimbursed by the Federal Government from the non-Federal user payment. The non-Federal sponsor reimbursement will be based on the non-Federal sponsor contribution to the disposal facility.

8. Public-Private Partnerships Pursuant to Section 217(c). In considering alternatives for dredged material management from Federal harbors and channels, the use of a dredged material disposal facility designed, constructed (including the required land acquisition), managed, owned, or operated by a private entity may be considered if, consistent with economic and environmental considerations, the facility is the least-cost alternative. Such public-private partnerships could involve the use of existing facilities offering disposal services on an established fee schedule or solicited or unsolicited proposals to provide private disposal facilities under the terms of negotiated partnership agreements. Federal contracting and procurement laws and regulations, as appropriate, must be followed in soliciting such private disposal services. To be eligible for consideration for use a private disposal facility must be open to all on equal terms, have multiple use (two or more users) and charge all users the same disposal fee for comparable disposal service. The fees and /or costs for use of a private disposal facility will be shared with the non-Federal sponsor consistent with Section 101 of WRDA 86 as further amended by Section 201 of WRDA 96 and in accordance with the guidance in this PGL. Fees and costs attributed to the provision of the private land based or aquatic disposal facility will be shared as a GNF cost in accordance with paragraph 3.a.. A sample cost sharing calculation for a public-private partnership is presented in enclosure 4. All appropriate real estate interests for private entity constructed disposal facilities must be provided by the private entity. More complex public and private partnerships may also be considered which involve Federal, non-Federal and private

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funding of dredged material disposal facilities. These public-private agreements would be implemented through agreements which would require approval by HQUSACE and the Secretary of the Army. Any such agreement would follow the cost sharing principles outlined in this PGL. An issue that should be addressed in any agreement is indemnification of the Federal Government for any liability for incorrect operation of the disposal facility, placement of hazardous material in the facility by other entities and default by the private entity in the operation and maintenance of the facility.

9. Exceptions. Section 101(g) of WRDA 86, as amended by Section 201 of WRDA 96 provided that projects which met certain conditions would not have any increase in non-Federal costs. Those projects which meet these conditions are indicated below.

a. Craney Island, Norfolk Harbor, Virginia. Cost sharing for the operation and maintenance and any expansion of the Craney Island disposal area will continue to be in accordance with the authorizing legislation.

b. Confined Disposal Facility 10B, Cleveland Harbor, Ohio. The non-Federal sponsor responsibilities for the confined disposal facility will be in accordance with the assurance by the city of Cleveland executed on 2 August 1995.

c. Expansion of Confined Disposal Facility, Green Bay Harbor, Wisconsin. The non-Federal sponsor responsibilities for the expansion of the confined disposal facility will be in accordance with the local cooperation agreement executed on 21 June 1985.

10. Project Cooperation Agreements (PCAs) for Cost- Sharing of Dredged Material Disposal Facilities.

a. Model Project Cooperation Agreement for Commercial Navigation Harbor Projects and Separable Elements. A revised model agreement reflecting the changes in disposal facility cost sharing, and reflecting the Government's responsibility to construct and operate and maintain such facilities, is under development and will be furnished by a separate memorandum.

b. Model Project Cooperation Agreement for Construction of Dredged Material Disposal Facilities for Operation and Maintenance of Existing Navigation Harbor Projects. A model agreement for construction or expansion of disposal facilities for operation and maintenance of existing navigation projects is under development and will be furnished by a separate memorandum.

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c. Amendment of Existing PCAs Under Section 101(f) of WRDA 86 as Amended by WRDA 96. PCAs for navigation projects executed since the passage of WRDA 86 require the non-Federal sponsor to provide the disposal facilities for dredged or excavated material for the construction, operation or maintenance of the navigation project. The non-Federal responsibility under these agreements includes the construction and operation and maintenance of disposal facilities. At the request of the non-Federal sponsor, these PCAs shall be modified to provide for the construction and management of future disposal facilities needed for the operation and management of these projects in accordance with the amended cost sharing of Section 201 of WRDA 96. This amended cost sharing will only apply to disposal facilities for which a construction contract for such facilities was not awarded prior to 12 October 1996 and does not confer any authority to reimburse non-Federal sponsors for prior disposal facility costs or to assume Federal maintenance of completed disposal facilities. The non-Federal sponsor retains the responsibility to provide the LERR needed to construct these facilities. Any amendment will require approval by HQUSACE in accordance with existing guidance on PCA submission and approval.

11. Reimbursement From the Harbor Maintenance Trust Fund. Eligible operation and maintenance costs which are reimbursable from the Harbor Maintenance Trust Fund include Federal operations, maintenance, repair and rehabilitation, including (1) maintenance dredging reasonably necessary to maintain the width and nominal depth of any harbor or inland harbor; (2) the construction of dredged material disposal facilities that are necessary for the operation and maintenance of any harbor or inland harbor; (3) dredging and disposing of contaminated sediments that are in or that affect the maintenance of Federal navigation channels; (4) mitigating for impacts resulting from Federal navigation operation and maintenance activities ; and (5) operating and maintaining dredged material disposal facilities. Section 214 of WRDA 86, as amended by Section 201 of WRDA 96, provides that the costs of construction of dredged material disposal facilities that are necessary for the operation and maintenance of harbors and inland harbors are eligible for reimbursement from the Harbor Maintenance Trust Fund even though Section 101 of WRDA 1986, as amended by Section 201 of WRDA 96, provides that the costs of these disposal facilities will be shared as general navigation features of the project and the funding for the construction of these disposal facilities will be budgeted in the Construction, General account.

12. Development, Approval and Funding of Dredged Material Disposal Facilities.

a. New Navigation Projects or Modifications. The planning, formulation, engineering design, funding and construction of disposal facilities for new and modified navigation projects will be accomplished as an integral part of the navigation project development process. Navigation projects and project modifications formulated in feasibility studies and recommended

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in feasibility reports or other decision documents will include the disposal facilities required for the initial construction and subsequent maintenance of the navigation project including the identification of a plan for 50 years of project operation and maintenance with the plan for a minimum of 20 years of operation and maintenance developed to a feasibility level of detail. The PCA for the project will include a description of the disposal facilities required for project construction and initial maintenance. Funds for the construction of disposal facilities, including facilities needed for initial project maintenance, will be included in determining preconstruction engineering and design and construction funding requirements.

b. Land Based and Aquatic Dredged Material Disposal Facilities for Maintenance of Existing Federal Navigation Projects.

(1) Disposal facilities needs should be identified through dredged material management planning activities. Guidance on development, review, approval and implementation of Dredged Material Management Plans is contained in EC 1165-2-200. An advance copy of this Engineering Circular was distributed by CECW-A/CECW-O/CECW-P memorandum of 19 August 1994, subject: Implementation of Guidance on Dredged Material Management Plans (EC 1165-2-200, Advance Copy dated 21 July 1994).

(2) The dredged material disposal facilities that are proposed for Corps implementation including multiple project disposal facilities, joint Federal and non-Federal disposal facilities, Federal and private partnership disposal facilities and proposals for non-Federal use of existing Federal disposal facilities will be identified through dredged material disposal planning. Any required mitigation measures for the dredged material disposal facilities will be identified through the dredged material disposal planning and will be cost shared as a GNF cost of the disposal facility.

(3) A feasibility level decision document on the dredged material disposal facilities proposed for Corps implementation will be submitted to HQUSACE, CECW-AR for policy compliance review in accordance with the guidance for review of decision documents in EC 1165-2-203, Technical and Policy Compliance Review, dated 15 October 1996. This report could be a completed dredged material management plan or an interim report. Specific congressional authorization is not required for disposal facilities needed for operation and maintenance of authorized Federal navigation projects. The Operation, Construction and Readiness Division is the dredged material management functional program manager and is responsible for the decision document coordination and approval after HQUSACE policy compliance review is complete.

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(4) Based on report (decision document) approval, a construction start for the disposal facility will be sought through the budget process. The construction will be funded from the Construction, General account and reimbursed from the Harbor Maintenance Trust Fund.

(5) Based on report approval, preconstruction planning and design studies, including necessary environmental studies, will be continued using Operation and Maintenance, General, funding. These preconstruction planning and design costs will be subject to cost sharing as part of disposal facility costs and will be shared as part of the first year of construction costs under the terms of the PCA. Negotiation of a PCA, Federal/non-Federal /private agreement or agreement for non-Federal use of a Federal disposal facility, as applicable, will also be completed.

(6) The PCA, Federal/non-Federal/private agreement or agreement for non-Federal use of a Federal disposal facility will be submitted to HQUSACE, CECW-A for review and approval, including approval by the Assistant Secretary of the Army (Civil Works).

(7) The PCA will be executed and project construction initiated.

13. Permanent Guidance. The guidance in this PGL will be incorporated into permanent guidance as it is updated.

FOR THE COMMANDER:

4 Encls as

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RUSSELL L. FUHRMAN
Major General, USA
Director of Civil Works

**Section 101 of the Water Resources Development Act of 1986
as amended by Section 201 of the Water Resources Development Act of 1996**

SEC.101. HARBORS.

(a) CONSTRUCTION. -

(1) PAYMENTS DURING CONSTRUCTION. - The non-Federal interests for a navigation project for a harbor or inland harbor, or any separable element thereof, on which a contract for physical construction has not been awarded before the date of enactment of this Act shall pay, during the period of construction of the project, the following costs associated with general navigation features:

(A) 10 percent of the cost of construction of the portion of the project which has a depth not in excess of 20 feet; plus

(B) 25 percent of the cost of construction of the portion of the project which has a depth in excess of 20 feet but not in excess of 45 feet; plus

(C) 50 percent of the cost of construction of the portion of the project which has a depth in excess of 45 feet.

(2) ADDITIONAL 10 PERCENT PAYMENT OVER 30 YEARS. - The non-Federal interests for a project to which paragraph (1) applies shall pay an additional 10 percent of the cost of the general navigation features of the project in cash over a period not to exceed 30 years, at an interest rate determined pursuant to section 106. The value of lands, easements, rights-of-way, and relocations provided under paragraph (3) and the costs of relocations borne by the non-Federal interests under paragraph (4) shall be credited toward the payment required under this paragraph.

(3) LANDS, EASEMENTS, AND RIGHTS-OF-WAY. - The non-Federal interests for a project to which paragraph (1) applies shall provide the lands, easements, rights-of-way, and relocations (other than utility relocations under paragraph (4)), necessary for the project including any lands, easements, rights-of-way, and relocations (other than utility relocations accomplished under paragraph (4)) that are necessary for dredged material disposal facilities.

(4) UTILITY RELOCATIONS. - The non-Federal interests for a project to which paragraph (1) applies shall perform or assure the performance of all relocations of utilities necessary to carry out the project, except in the case of a project for a deep-draft harbor and in the case of a project constructed by non-Federal interests under section 204, one-half of the cost of each such relocation shall be borne by the owner of the facility being relocated and one-half of the cost of each such relocation shall be borne by the non-Federal interests.

(5) DREDGED MATERIAL DISPOSAL FACILITIES FOR PROJECT CONSTRUCTION. - In this subsection, the term "general navigation features" includes constructed land-based and aquatic dredged material disposal facilities that are necessary for the disposal of dredged material required for project construction and for which a contract for construction has not been awarded on or before the date of enactment of this paragraph.

(b) OPERATION AND MAINTENANCE. -

(1) **IN GENERAL.**- The Federal share of the cost of operation and maintenance of each navigation project for a harbor or inland harbor constructed by the Secretary pursuant to this Act or other law approved after the date of enactment of this Act shall be 100 percent, except that in the case of a project for a deep-draft harbor, the non-Federal interests shall be responsible for an amount equal to 50 percent of the excess of the cost of the operation and maintenance of such project over the cost which the Secretary determines would be incurred for operation and maintenance of such project if such project had a depth of 45 feet.

(2) **DREDGED MATERIAL DISPOSAL FACILITIES.** - The Federal share of the cost of constructing land-based and aquatic dredged material disposal facilities that are necessary for the disposal of dredged material required for the operation and maintenance of a project and for which a contract for construction has not been awarded on or before the date of enactment of this paragraph shall be determined in accordance with subsection (a). The Federal share of operating and maintaining such facilities shall be determined in accordance with paragraph (1).

(c) **EROSION OR SHOALING ATTRIBUTABLE TO FEDERAL NAVIGATION WORK.** - Costs of constructing projects or measures for the prevention or mitigation or erosion or shoaling damages attributable to Federal navigation works shall be shared in the same proportion as the cost sharing provisions applicable to the project causing such erosion or shoaling. The non-Federal interests for the project causing the erosion or shoaling shall agree to operate and maintain such measures.

(d) **NON-FEDERAL PAYMENTS DURING CONSTRUCTION.** - The amount of any non-Federal share of the cost of any navigation project for a harbor or inland harbor shall be paid to the Secretary. Amounts required to be paid during construction shall be paid on an annual basis during the period of construction, beginning not later than one year after construction is initiated.

(e) **AGREEMENT.** - Before initiation of construction of a project to which this section applies, the Secretary and the non-Federal interests shall enter into a cooperative agreement according to the provisions of section 221 of the Flood Control Act of 1970. The non-Federal interests shall agree to -

(1) provide to the Federal Government lands, easements, rights-of-way, including those necessary for dredged material disposal facilities, and to perform the necessary relocations required for construction, operation, and maintenance of such project;

(2) 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.

(3) provide to the Federal Government the non-Federal share of all other costs of construction of such project; and

(4) in the case of a deep-draft harbor, be responsible for the non-Federal share of operation and maintenance required by subsection (b) of this section.

(f) **CONSIDERATION OF FUNDING REQUIREMENTS AND EQUITABLE APPORTIONMENT.**- The Secretary shall ensure, to the extent practicable, that-

(1) funding requirements for operation and maintenance dredging of commercial navigation harbors are considered before Federal funds are obligated for payment of the Federal share of costs associated with the construction of dredged material disposal facilities in accordance with subsections (a) and (b);

(2) funds expended for such construction are apportioned equitably in accordance with regional needs; and

(3) use of a dredged material disposal facility designed, constructed, managed, or operated by a private entity is not precluded if, consistent with economic and environmental considerations, the facility is the least-cost alternative.

(f) (sic) AMENDMENT OF COOPERATION AGREEMENT. - If requested by the non-Federal interest, the Secretary shall amend a project cooperation agreement executed on or before the date of enactment of this Act to reflect the application of amendments made by this section to any project for which a contract for construction has not been awarded on or before this date.

(g) SAVINGS CLAUSE. - Nothing in this section (including the amendments made by this section) shall increase or result in the increase of, the non-Federal share of the costs of -

(1) expanding any confined dredged material disposal facility that is operated by the Secretary and that is authorized for cost recovery through the collection of tolls;

(2) any confined dredged material disposal facility for which the invitation for bids for construction was issued before the date of enactment of this Act; and

(3) expanding any confined dredged material disposal facility constructed under section 123 of the River and Harbor Act of 1970 (33 U.S.C. 1293a) if the capacity of the confined dredged material disposal facility was exceeded in less than 6 years.

**Section 214 of the Water Resources Development Act of 1986
as amended by Section 201 of the Water Resources Development Act of 1996**

SEC. 214. DEFINITIONS.

For purposes of this title -

(1) **DEEP-DRAFT HARBOR.** - The term "deep-draft harbor" means a harbor which is authorized to be constructed to a depth of more than 45 feet (other than a project which is authorized by section 202 of this title).

(2) **ELIGIBLE OPERATIONS AND MAINTENANCE.** - (A) Except as provided in subparagraph (B), the term "eligible operations and maintenance" means all Federal operations, maintenance, repair, and rehabilitation, including: (i) maintenance dredging reasonably necessary to maintain the width and nominal depth of any harbor or inland harbor; (ii) the construction of dredged material disposal facilities that are necessary for the operation and maintenance of any harbor or inland harbor; (iii) dredging and disposing of contaminated sediments that are in or that affect the maintenance of Federal navigation channels; (iv) mitigating for impacts resulting from Federal navigation operation and maintenance activities; and (v) operating and maintaining dredged material disposal facilities.

(B) As applied to the Saint Lawrence Seaway, the term "eligible operations and maintenance" means all operations, maintenance, repair, and rehabilitation, including maintenance dredging reasonably necessary to keep such Seaway or navigation improvements operated or maintained by the Saint Lawrence Seaway Development Corporation in operation and reasonable state of repair.

(C) The term "eligible operations and maintenance" does not include providing any lands, easements, or rights-of-way or performing relocations required for project operations and maintenance.

(3) **GENERAL CARGO HARBOR.** - The term "general cargo harbor" means a harbor for which a project is authorized by section 202 of this title and any other harbor which is authorized to be constructed to a depth of more than 20 feet but not more than 45 feet;

(4) **HARBOR.** - The term "harbor" means any channel or harbor, or element thereof, in the United States, capable of being utilized in the transportation of commercial cargo in domestic or foreign waterborne commerce by commercial vessels. The term does not include-

(A) an inland harbor;

(B) the Saint Lawrence Seaway;

(C) local access or berthing channels;

(D) channels or harbors constructed or maintained by nonpublic interests; and

(E) any portion of the Columbia River other than the channels on the downstream side of Bonneville lock and dam.

(5) **INLAND HARBOR** - The term "inland harbor" means a navigation project which is used principally for the accommodation of commercial vessels and the receipt and shipment of waterborne cargoes on inland waters. The term does not include -

(A) projects on the Great lakes;

(B) projects that are subject to tidal influence;

- (C) projects with authorized depths of greater than 20 feet;
- (D) local access or berthing channels; and
- (E) projects constructed or maintained by nonpublic interests.

(6) **NOMINAL DEPTH.**- The term "nominal depth" means, in relation to the stated depth for any navigation improvement project, such depth, including any greater depths which must be maintained for any harbor or inland harbor or element thereof included within such project in order to ensure the safe passage at mean low tide of any vessel requiring the stated depth.

(7) **NON-FEDERAL INTEREST.** - The term "non-Federal interest" has the meaning such term has under section 221 of the Flood Control Act of 1970 and includes any interstate agency and port authority established under a compact entered into between two or more States with the consent of Congress under section 10 of Article I of the Constitution.

(8) **UNITED STATES** - The term "United States" means all areas included within the territorial boundaries of the United States, including the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and any other territory or possession over which the United States exercises jurisdiction.

SEC. 217. DREDGED MATERIAL DISPOSAL FACILITY PARTNERSHIPS.

(a) ADDITIONAL CAPACITY. -

(1) **PROVIDED BY SECRETARY.** - At the request of a non-Federal interest with respect to a project, the Secretary may provide additional capacity at a dredged material disposal facility constructed by the Secretary beyond the capacity that would be required for project purposes if the non-Federal interest agrees to pay, during the period of construction, all costs associated with the construction of the additional capacity.

(2) **COST RECOVERY AUTHORITY.** - The non-Federal interest may recover the costs assigned to the additional capacity through fees assessed on third parties whose dredged material is deposited at the facility and who enter into agreements with the non-Federal interest for the use of the facility. The amount of such fees may be determined by the non-Federal interest.

(b) NON-FEDERAL USE OF DISPOSAL FACILITIES. -

(1) IN GENERAL. - The Secretary -

(A) may permit the use of any dredged material disposal facility under the jurisdiction of, or managed by, the Secretary by a non-Federal interest if the Secretary determines that such use will not reduce the availability of the facility for project purposes; and

(B) may impose fees to recover capital, operation, and maintenance costs associated with such use.

(2) **USE OF FEES.** - Notwithstanding section 401(c) of the Federal Water Pollution Control Act (33 U.S.C.13419(c)) but subject to advance appropriations, any monies received through collection of fees under this subsection shall be available to the Secretary, and shall be used by the Secretary, for the operation and maintenance of the disposal facility from which the fees were collected.

(c) PUBLIC-PRIVATE PARTNERSHIPS. -

(1) **IN GENERAL.** - The Secretary may carry out a program to evaluate and implement opportunities for public-private partnerships in the design, construction, management, or operation of dredged material disposal facilities in connection with construction or maintenance of Federal navigation projects. If a non-Federal interest is a sponsor of the project, the Secretary shall consult with the non-Federal interest in carrying out the program with respect to the project.

(2) PRIVATE FINANCING.-

(A) **AGREEMENTS.** - In carrying out this subsection, the Secretary may enter into an agreement with a non-Federal interest with respect to a project, a private entity, or both for the acquisition, design, construction, management, or operation of a dredged material disposal facility (including any facility used to demonstrate potential beneficial uses of dredged material) using funds provided in whole or in part by the private entity.

(B) **REIMBURSEMENT.** - If any funds provided by a private entity are used to carry out a project under this subsection, the Secretary may reimburse the private entity over a period of time agreed to by the parties to the agreement through the payment of subsequent use fees. Such fees may include the payment of a disposal or tipping fee for placement of suitable dredged material at the facility.

(C) AMOUNT OF FEES. User fees paid pursuant to subparagraph (B) shall be sufficient to repay funds contributed by the private entity plus a reasonable return on investment approved by the Secretary in cooperation with the non-Federal interest with respect to the project and the private entity.

(D) FEDERAL SHARE. - The Federal share of such fees shall be equal to the percentage of the total cost that would otherwise be borne by the Federal Government as required pursuant to existing cost-sharing requirements, including section 103 of the Water Resources Development Act of 1986 (33 U.S.C. 2213) and section 204 of the Water Resources Development Act of 1992 (33 U.S.C. 2325).

(E) BUDGET ACT COMPLIANCE. - Any spending authority (as defined in section 402(c)(2) of the Congressional Budget Act of 1974 (2 U.S.C. 651(c)(2))) authorized by this section shall be effective only to the extent and in such amounts as provided in appropriation Acts.

COST SHARING EXAMPLES

Example 1. Multi-Project Disposal Facility. The base disposal plan for maintenance of three Federal navigation projects is a multi-project confined disposal facility (CDF) at an upland site with a cost of \$50 million consisting of \$48 million in facility costs (diking and de-watering facilities) and \$2 million in costs for lands, easements, rights-of-way and relocations. The CDF has a capacity of 10 million cubic yards which is the combined 20 year maintenance dredging disposal need for the three Federal projects. Project A has a depth of 18 feet and requires 2 million cubic yards (20 percent) of the capacity in the CDF. Project B has a depth of 40 feet and requires 3 million cubic yards (30 percent) of the capacity in the CDF. Project C has a depth of 50 feet and requires 5 million cubic yards (50 percent) of the capacity in the CDF. The cost sharing for construction of this CDF would be as follows:

	<u>Federal</u>	<u>Non-Federal</u>
<u>Project A</u>		
Disposal Facilities (During Construction)	\$8,640,000	\$ 960,000
(Federal = \$48 m. X 20% (capacity) X 90% Fed.share)		
(Non- Fed.= \$48m. X 20% (capacity) X 10% non.-Fed. share)		
LERR (\$2m. X 20% (capacity)		400,000
Disposal Facilities (Over Up To 30 Years)	(960,000)	960,000
(Non-Fed. =\$48 X 20% (capacity) X 10% non-Fed. share)		
Credit for LERR Against 10% Over Time	<u>400,000</u>	<u>(400,000)</u>
Subtotal Project A	\$8,080,000	\$1,920,000
<u>Project B</u>		
Disposal Facilities (During Construction)	\$10,800,000	\$3,600,000
(Federal = \$48 m. X 30% (capacity) X 75% Fed.share)		
(Non- Fed.= \$48m. X 30% (capacity) X 25% non.-Fed. share)		
LERR (\$2m. X 30% (capacity)		600,000
Disposal Facilities (Over Up To 30 Years)	(1,440,000)	1,440,000
(Non-Fed. =\$48 X 30% (capacity) X 10% non-Fed. share)		
Credit for LERR Against 10% Over Time	<u>600,000</u>	<u>(600,000)</u>
Subtotal Project B	\$9,960,000	\$5,040,000

	<u>Federal</u>	<u>Non-Federal</u>
<u>Project C</u>		
Disposal Facilities (During Construction) (Federal = \$48 m. X 50% (capacity) X 50% Fed.share) (Non- Fed.= \$48m. X 50% (capacity) X 50% non.-Fed. share)	\$12,000,000	\$12,000,000
LERR (\$2m. X 50% (capacity))		1,000,000
Disposal Facilities (Over Up To 30 Years) (Non-Fed. =\$48 X 50% (capacity) X 10% non-Fed. share)	(2,400,000)	2,400,000
Credit for LERR Against 10% Over Time	<u>1,000,000</u>	<u>(1,000,000)</u>
Subtotal Project C	\$10,600,000	\$14,400,000
Total Confined Disposal Facility	\$28,640,000	\$21,360,000

Example 2. Federal Navigation Project and Non-Federal Dredging Disposal Facility. The base plan for maintenance of a Federal navigation project with a depth of 40 feet is a CDF at an upland site with a capacity of 5 million cubic yards. The non-Federal sponsor for the Federal project wishes to provide an additional capacity of 5 million cubic yards in the CDF to accommodate non-Federal berthing area dredging. The total cost of the 10 million cubic yard facility is \$50 million consisting of \$48 million in facility costs (diking and de-watering facilities) and \$2 million in costs for lands, easements, rights-of-way and relocations. The cost-sharing for construction of this CDF would be as follows:

	<u>Federal</u>	<u>Non-Federal</u>
<u>Federal Project</u>		
Disposal Facilities (During Construction) (Federal = \$48 m. X 50% (capacity) X 75% Fed.share) (Non- Fed.= \$48m. X 50% (capacity) X 25% non.-Fed. share)	\$18,000,000	\$ 6,000,000
LERR (\$2m. X 50% (capacity))		1,000,000
Disposal Facilities (Over Up To 30 Years) 2,400,000 (Non-Fed. =\$48 X 50% (capacity) X 10% non-Fed. share)	(2,400,000)	
Credit for LERR Against 10% Over Time	<u>1,000,000</u>	<u>(1,000,000)</u>
Subtotal Federal Project	\$16,600,000	\$ 8,400,000
<u>Non-Federal Dredging</u>		
Disposal Facilities (\$48 m. X 50% (capacity) X 100% non-Fed. share)	\$ 0	\$24,000,000
LERR 1,000,000 (\$2 m. X 50% (capacity) X 100% non-Fed. share)	0	
Subtotal Non-Federal Dredging \$25,000,000	\$ 0	
Total Confined Disposal Facility	\$16,600,000	\$33,400,000

Example 3. Public Private Partnership. The base plan for maintenance of a Federal navigation project with a depth of 40 feet is disposal in a private upland disposal facility. The fee for disposal in the private facility is \$8 per cubic yard and the agreement with the private disposal facility operator calls for disposal of 1 million cubic yards of material in the private disposal facility. The private return on investment is included in the per cubic yard charges. The cost-sharing for use of this private disposal facility be as follows:

	<u>Federal</u>	<u>Non-Federal</u>
Disposal Facilities (Initial) (Federal = \$8/cu .yd.X 75% Fed.share) (Non- Fed.= \$8/cu. yd. X 25% non.-Fed. share)	\$6.00/cu.yd.	\$2.00/cu.yd.
Disposal Facilities (Over Up To 30 Years) (Non-Fed. =\$8 cu.yd X 10% non-Fed. share)	(.80/cu.yd.)	0.80/cu. yd
Total Fee	\$5.20/cu. yd	\$2.80/cu. yd.
Total Cost \$2,800,000	\$5,200,000	

CECW-AA (CELRD-GL-ET-G CELRE-PP-PM/16 Feb 1999) (11-2-240g) 2nd End Mr.
Worthington/vw/(202) 761-1184
SUBJECT: Section 217 Agreement for Bay Port CDF

HQ, U.S. Army Corps of Engineers, Washington, D.C. 20314-1000

29 APR 1999

FOR Deputy Commander, Great Lakes and Ohio River Division

1. The concept of Section 217(c) of the Water Resources Development Act of 1996 (WRDA 96) is to allow the U.S. Army Corps of Engineers to enter into agreements with non-Federal interests or private entities to obtain dredged material disposal services for the construction or operation and maintenance of Federal projects. The disposal facilities made available for Federal project disposal under the terms of Section 217(c) agreements are not part of Federal navigation projects like cost shared disposal facilities constructed under the terms of Section 101 of the Water Resources Development Act of 1986 as amended by Section 201 WRDA 96. Under Section 217(c) we are negotiating an appropriate user or tipping fee in most cases on a per cubic yard basis for use of a disposal facility constructed and operated and maintained by a non-Federal or private entity, in this case Brown County. In negotiating an appropriate tipping fee we must consider the cost incurred by Brown County in acquisition, design, construction and operation and management of the disposal facility plus a reasonable return on investment. As a matter of policy the disposal or tipping fee negotiated for the Corps use of the Bay Port facility must be the same as Brown County would charge another user under similar conditions of service. Also, under the requirements of Section 217(c) the disposal or tipping fee must be shared with the non-Federal sponsor of the Federal navigation project in accordance with the cost sharing of Section 101 of WRDA 86 as modified by Section 201 of WRDA 96 unless other cost sharing applies as provided in Section 201(g) of WRDA 96.

2. Guidance on the specific issues raised is as follows:

- a. Cost Sharing. We have reviewed the material provided and have concluded that the cost sharing of Section 123 of the River and Harbor Act of 1970 would apply to the disposal or tipping fee for the Bay Port CDF. Therefore, the disposal or tipping fee would be 100 percent Federal. Under Section 201(g) of WRDA 96, the cost sharing changes made in Section 201 would not increase, or result in the increase of, the non-Federal share of the costs of "expanding any confined dredged material disposal facility constructed under section 123 of the River and Harbor Act of 1970 (33 U.S.C. 1293a) if the capacity of the confined dredged material disposal facility was exceeded in less than 6 years". While this provision was originally intended to allow for the expansion of the Renard Island CDF under the terms of the 21 June 1985 local cooperation agreement, we believe it also applies to the proposed Brown County expansion of the Bay Port CDF. From the information furnished, the capacity provided at the Bay Port CDF from features constructed in 1997 under the authority of Section 123 was fully utilized within 3 years making the proposed Brown County expansion eligible for Section

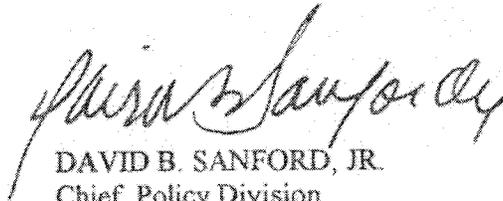
123 cost sharing under Section 201(g) of WRDA 96. Our position is that this is a one-time exception to the "standard" cost sharing of Section 101 of WRDA 86 as modified by Section 201 of WRDA 96 and applies only to the capacity provided under the agreement under negotiation. Beyond the current proposal, any future Section 217(c) agreement for disposal capacity would provide for "standard" cost sharing of the disposal or tipping fee not Section 123 cost sharing.

- b. Value of Land. The acquisition cost of the land must be considered in determining the appropriate disposal or tipping fee. The acquisition of the land is part of the cost to Brown County to provide the disposal capacity. The fact that all or part of this land may have been previously owned by the City of Green Bay and was made available for disposal as part of a Federal project is not relevant since as noted in paragraph 1, Section 217(c) is about obtaining dredged material disposal services not about the construction of features of Federal projects.
- c. Operation and Maintenance. Under a Section 217(c) concept we are entering into an agreement to pay a disposal or tipping fee for use of a disposal facility designed, constructed and maintained by a non-Federal or private entity. We have no maintenance responsibility for that facility so the design of that facility and whether lower initial construction costs may have been traded-off against higher operation and maintenance is not relevant to us except as it impacts the disposal or tipping fee. The Brown County's operation and maintenance costs must be considered in negotiating the appropriate tipping fee. However, under the Section 217(c) agreement we should only be agreeing to pay a certain tipping fee or disposal fee for an estimated quantity of material and that disposal or tipping fee should include an appropriate portion of the operation and maintenance costs of the facility. We assume no maintenance responsibility for the facility either temporary or perpetual. Our responsibility only extends to paying the Federal share of the fee that includes an appropriate share of the maintenance costs of the project.
- d. Return of Investment. Under Section 217(c)(2) (C) the user fee shall be sufficient to repay funds contributed by the private entity plus a reasonable return on investment approved by the Secretary. Reasonable return on investment is a difficult concept when applied to a non-Federal public body. However, we believe it is reasonable that in negotiating the appropriate disposal or tipping fee Brown County receive some consideration for the fact that presumably they will be advancing funds for disposal capacity that will not be reimbursed through tipping fees for a number of years. If Brown County has outstanding debt, even if not specifically attributable to these facilities, the debt service that would have been paid on that portion of the facilities financed from non-Federal sources, that is the amount not financed with Federal grants, may be an appropriate proxy for return on investment. The fact that a portion of this money is from the State of Wisconsin Department of Transportation and is provided to the County without interest does not alter the fact that it is non-Federal money that it is invested in providing disposal capacity that will not yield an immediate return. The EPA

grant is another matter however the information provided indicates that the EPA funds were used for cell 5 and only cells 2 and 4 are covered in the agreement making the EPA grant irrelevant to computing the tipping fee. The appropriate recognition of return on investment should be an area of negotiation but we don't believe a position that no consideration will be given is appropriate. The issue of Brown County repaying the State of Wisconsin is a matter to be worked out between the County and the State. The proposal that Brown County repay to the Wisconsin Department of Transportation a portion of the disposal or tipping fees received from the Corps appears to be an equitable way of addressing this issue.

3. We applaud your efforts in this innovative and creative partnership.

FOR THE COMMANDER:



DAVID B. SANFORD, JR.
Chief, Policy Division
Directorate of Civil Works

MEMORANDUM OF AGREEMENT
BETWEEN
THE U.S. ARMY ENGINEER DISTRICT, DETROIT
AND
BROWN COUNTY, WISCONSIN

FOR CALCULATION OF TIPPING FEES FOR USE OF THE
BAY PORT DREDGED MATERIAL DISPOSAL FACILITY
GREEN BAY HARBOR, WISCONSIN

THIS Memorandum of Agreement (MOA) is entered into this 4th day of June, 2001, by and between the U.S. Army Engineer District, Detroit (hereinafter the "Government"), represented by the District Engineer, and Brown County, Wisconsin (hereinafter "Brown County") represented by the Brown County Executive.

WITNESSETH, THAT:

WHEREAS, the Green Bay Harbor Project at Green Bay, Wisconsin (hereinafter the "Project") is authorized by the Rivers and Harbor Act of 1866; and

WHEREAS, the Bay Port confined dredged material disposal facility (hereinafter the "Bay Port Facility") was constructed in 1978 under the authority of Section 123 of the River and Harbor Act of 1970, Public Law 91-611, as amended, (hereinafter the "Section 123") to contain Project dredged material; and

WHEREAS, Section 201 of the Water Resources Development Act of 1996, Public Law 104-303, provides that nothing in Section 201 shall increase, or result in an increase of, the non-Federal share of the costs of expanding any confined dredged material disposal facility constructed under Section 123 if the capacity of the confined dredged material disposal facility was exceeded in less than six years; and

WHEREAS, the capacity of the Bay Port Facility was exceeded in less than six years, and Brown County implemented an expansion of the Bay Port Facility (hereinafter the "Facility Expansion" as defined in Article I. A. of this MOA) with funds contributed by non-Federal interests; and

WHEREAS, Section 201 of the Water Resources Development Act of 1996, Public Law 104-303, provides that the Secretary of the Army shall ensure that use of a confined dredged material disposal facility designed, constructed, managed, or operated by a private entity is not precluded if, consistent with economic and environmental considerations, the facility is the least-cost alternative for disposal of material from a Federal project; and

WHEREAS, Section 217(c) of the Water Resources Development Act of 1996, Public Law 104-303, provides that the Government may carry out a program to evaluate and implement opportunities for public-private partnerships in the design, construction, management, or operation of dredged material disposal facilities in connection with construction or maintenance of Federal navigation projects and these public-private partnerships may be implemented through agreements with a non-Federal interest, a private entity, or both: the Government may reimburse the private entity, subject to appropriations, for the disposal of dredged material in such a facility through the payment of a subsequent use fee sufficient to repay funds contributed by the private entity plus a reasonable return on investment and the Government's share of the fee shall be equal to the percentage of the total cost of the facility that would otherwise be borne by the Government; and

WHEREAS, the Government identified the Facility Expansion, in the Draft Dredged Material Management Plan for the Project approved by the Deputy Director, Programs Division, Great Lakes and Ohio River Division, on January 24, 2000 (hereinafter the "DMMP"), as the least-cost alternative, consistent with economic and environmental considerations, for placement of dredged material from the Project over the projected 20-year material placement period provided for in the DMMP; and

WHEREAS, by letter of March 31, 1997, the Department of Natural Resources of the State of Wisconsin approved Brown County's Plan of Operation for the Bay Port Facility and found that the Facility Expansion, as designed, would provide for satisfactory disposal of dredged material; and

WHEREAS, during future operation and maintenance dredging of Green Bay Harbor, the Government and Brown County may make use of the Bay Port Facility for the disposal of dredged material; and

WHEREAS, the Government and Brown County hereby agree upon a method for establishing a tipping fee for the disposal of such dredged material; and

WHEREAS, the Government and Brown County have the full authority and capability to perform in accordance with the terms of this MOA.

NOW, THEREFORE, the Government and Brown County agree as follows:

ARTICLE I - DEFINITIONS

For purposes of this MOA the following definitions shall apply:

A. The term "Facility Expansion" shall mean the expansion of the Bay Port Facility, comprising approximately 110 acres of the 120 acres owned by Brown County at this location, and consisting of six cells (2, 4, 5, 6, 7, and 8) varying in size from 10 to 23

acres to enable the proper disposal of 2,271,610 cubic yards of dry dredged material as generally described in the DMMP approved by the Deputy Director, Programs Division, Great Lakes and Ohio River Division, on January 24, 2000.

B. The term "tipping fee" shall mean the adjusted total costs of the Facility Expansion (as determined in Article II. C. of this MOA) divided by the current design capacity of dry dredge material.

C. The term "total costs of the Facility Expansion Construction" shall mean all reasonable, allocable, and allowable costs incurred by Brown County directly related to acquisition, design, construction and closure of the Facility Expansion. Subject to the provisions of this MOA, the term shall include, but is not necessarily limited to: preconstruction engineering and design costs; engineering and design costs during construction; the costs of investigations to identify the existence and extent of hazardous substances; actual construction costs of the Facility Expansion; supervision and administration costs; costs of contract dispute settlements or awards; costs of audits; the value of any lands, easements, and rights-of-way as determined in accordance with Article II. M. of this MOA; and the cost of final closure of the facility. The term shall not include the cost of constructing Cell 5, which were paid by the United States Environmental Protection Agency.

D. The term "total costs of the Facility Expansion Operations and Maintenance" shall mean all reasonable, allocable, and allowable costs incurred by Brown County related to the operation and maintenance of the Facility Expansion. Subject to the provisions of this MOA, the term shall include, but is not necessarily limited to: engineering and design costs; the costs of investigations to identify the existence and extent of hazardous substances; actual operations and maintenance costs of the Facility Expansion; supervision and administration costs; costs of contract dispute settlements or awards; and costs of audits.

E. The term "current design capacity" shall mean 2,271,610 cubic yards of dry dredge material.

F. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

G. The term "District Engineer" shall mean the Commander for the U.S. Army Engineer District, Detroit.

H. The term "interest rate for time value adjustment" shall mean the interest rate for time value adjustment calculated using the Federal discount rate published by Headquarters, U.S. Army Corps of Engineers in an Economic Guidance Memorandum applicable to the then current fiscal year in which disposal is proposed by the Government.

I. The term "wet dredge" material is the material removed from the channel by the independent contractor specified in Article II. D. of this MOA. Wet dredge material will be measured in accordance with the measures clause in the contract.

J. The term "dry dredge material" is the material placed in its final compacted state in the Facility Expansion. For the purposes of this agreement, the volume of the dry dredge material is equal to 69% of the volume of the wet dredge material.

ARTICLE II - GENERAL PROVISIONS

A. Subject to paragraph J. of this Article, Brown County may allow the Government to use capacity in the Facility Expansion, as available, for placement of dredged material under the following terms and conditions.

- 1. The Government's use of the Facility Expansion shall be on an as needed basis.
- 2. Nothing in this MOA, however, is to be interpreted as requiring Brown County to accept or reserve space in the Facility Expansion for placement of dredged material by the Government.
- 3. Conversely, nothing in this MOA is to be interpreted as requiring the Government to place dredged material in the Facility Expansion.
- 4. Brown County may allow both private entities and other Federal and non-Federal interests to use the Facility Expansion for placement of suitable dredged material.

B. The Government, at the start of each fiscal year, shall notify Brown County of the estimated cubic yardage of dredged material to be placed at the Facility Expansion during that fiscal year. Within 30 days of such notice Brown County shall provide the Government a written statement indicating availability of space to accommodate all or a portion of the estimated volume of dredged material.

C. By January of each fiscal year in which Brown County indicates availability to accept all or a portion of material proposed for disposal by the Government, Brown County shall provide the Government with its projections, by fiscal year, of the total costs of the Facility Expansion Construction and total costs of Facility Expansion Operation and Maintenance, including actual costs incurred in past fiscal years; and Brown County's projections, by fiscal year, of the total costs of the Facility Expansion Construction and total costs of Facility Expansion Operation and Maintenance. The sum of such projected costs shall hereinafter be referred to as the "adjusted total costs of the Facility Expansion". Actual costs shall be subject to audit to determine reasonableness, allocability, and allowability of costs.

D. The Government shall include the information relating to the use of the Facility Expansion and the applicable tipping fee in its solicitation provided to all bidders and shall include such information in any resulting contract. Upon each use of the Facility Expansion for placement of dredged material after the effective date of this MOA, the Government shall require its independent contractor to pay the tipping fee directly to Brown County in accordance with the contract between the Government and its independent contractor and the relevant provisions of the Federal Acquisition Regulation (FAR).

E. The tipping fee shall be computed in accordance with this paragraph and paid in accordance with paragraph II. D. The tipping fee to be paid per cubic yard of material for each disposal event shall be computed by dividing the adjusted total costs of the Facility Expansion (as determined in paragraph C. of this Article) by the current design capacity. The number as computed above will then be adjusted from dry dredge material to wet dredge material. The tipping fee per cubic yard charged to the Government shall not be higher than the lowest use tipping per cubic yard charged to any other user of the Facility Expansion for comparable disposal service. The tipping fee per cubic yard of material for disposal proposed by the Government in fiscal year 2001 is estimated to be \$5.88 (dollars per cubic yard of wet dredge material). Such amounts are estimates and are not to be construed as the total financial responsibility of the Government.

F. The actual amount of cubic yards placed in the Facility Expansion shall be measured by the Government's pre-dredging and after-dredging surveys, implementing the same methodology used to determine actual quantities for the dredging contract. Such surveys will be provided to Brown County. The Government has the right to monitor the placement of dredged material in the Facility Expansion and to ensure the accurate determination of the amount of material placed in the facility.

G. Brown County shall have no obligation to pay costs for dredging or excavating material from the Project and transporting the dredged material to the Facility Expansion.

H. The Government shall, after placement of dredged material in the Facility Expansion, abandon all right, title, and interest in the material.

I. This MOA shall not be construed as authorizing the Government to assume any of the responsibilities placed on Brown County or another non-Federal interest.

J. The Government shall periodically (not to exceed 5 years) test the material proposed to be dredged and forward the test results to Brown County for disposal approval or disapproval prior to placement of the dredged material in the Facility Expansion. The character of the dredged material excavated over the past fifteen years contains polychlorinated biphenols, and testing of the material by the Government during the past fifteen years reveals the maximum level to be thirty-three parts per million (hereinafter the "ppm") with the maximum level over the past five years being five ppm. If Brown County expects to disapprove of placement of any dredged material in the

Facility Expansion, such disapproval shall be considered under paragraph O. of this Article.

K. Brown County hereby authorizes the Government and its contractors to enter, at reasonable times and in a reasonable manner, upon property that Brown County now or hereafter owns or controls for access to the Facility Expansion for the purposes of inspection of the Facility Expansion and placement of dredged material. Nothing contained herein, however, shall convey to the Government any interest in real property owned or controlled by Brown County.

L. The Government agrees to instruct its employees and contractors to secure the facility upon exiting the area after use.

M. The District Engineer and Brown County shall stipulate the value of lands, easements, and rights-of-way that Brown County has provided for the construction, operation, and maintenance of the Facility Expansion. Such value shall be included in total costs of the Facility Expansion. For the purposes of this MOA, the stipulated value of lands, easements, and rights-of-way provided for the construction, operation, and maintenance of the Facility Expansion is \$560,000.

N. Brown County shall provide the Government with copies of all records, reports, and other documents provided to the State of Wisconsin, other Federal agencies, or other entities pertaining to the Facility Expansion. In addition, Brown County shall provide the Government an annual report identifying the private entities and other Federal and non-Federal interests using the Facility Expansion and reporting the amount and type of material these users placed in the Facility Expansion.

O. The Government and Brown County shall meet periodically to discuss the use of the Facility Expansion and other such matters as may be necessary. Any disputes that arise shall be resolved at the lowest level necessary. If unresolved, such disputes shall be resolved by the District Engineer and the Brown County Executive. As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay 50 percent of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

P. The Government and Brown County shall renegotiate the tipping fee at least once every five years, or more frequently if requested by either party. Negotiations for recalculation of the tipping fee will be initiated in the January prior to the dredging season to which they are to apply. Both parties agree to make a good faith effort to set a new fee prior to advertising the next dredging contract. Fees calculated in accordance with this paragraph will include adjustments for variations between actual costs and prior estimates.

Q. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits of the tipping fee in addition to any audit that Brown County is required to conduct under the Single Audit Act. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations.

R. In implementing this MOA, the Government and Brown County shall comply with all applicable Federal, state and local laws and regulations.

S. In the exercise of their respective rights and obligations under this MOA, the Government and Brown County each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

T. As between the Government and Brown County, Brown County shall be considered the operator of the Facility Expansion for purposes of CERCLA liability. This does not restrict Brown County's right to pursue any non-Federal potential responsible party regarding any CERCLA liability. To the maximum extent practicable, the Government and Brown County shall perform their responsibilities under this MOA in a manner that will not cause liability to arise under CERCLA.

U. Any notice, request or other communication shall be addressed as follows:

If to the Brown County Executive:

Brown County Executive
305 Walnut Street
Green Bay, Wisconsin 54305-3600

If to the Government:

District Engineer
P. O. Box 1027
Detroit, Michigan 48231-1027

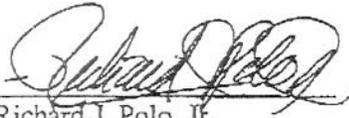
Each party shall advise the other of any change in address.

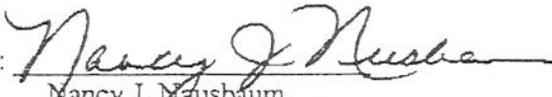
V. This MOA may be modified or amended only by written, mutual agreement of the parties. Either party may terminate this MOA upon thirty days written notice.

IN WITNESS WHEREOF, the parties hereto have executed this MOA, which shall become effective upon the last date signed below.

DEPARTMENT OF THE ARMY

BROWN COUNTY EXECUTIVE

BY: 
Richard J. Polo, Jr.
Lieutenant Colonel, U. S. Army
District Engineer

BY: 
Nancy J. Mausbaum
Brown County Executive

DATE: 4 June 2001

DATE: 4 June 2001

CERTIFICATE OF AUTHORITY

I, ^{KENNETH J.}
BUKOWSKI, do hereby certify that I am the principal legal officer of Brown County, Wisconsin, that Brown County, Wisconsin is a legally constituted public body with full authority and legal capability to perform the terms of this Memorandum of Agreement between the Department of the Army and Brown County, Wisconsin in connection with the Calculation of Tipping Fees for Use of the Bay Port Dredged Material Disposal Facility, Green Bay Harbor, Wisconsin, and that the persons who have executed this Agreement on behalf of Brown County, Wisconsin have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
4th day of June 2001.


[TYPED NAME] Kenneth J. Bukowski
[TITLE IN FULL] Corporation Counsel

[NOTE: THE PERSON SIGNING THE CERTIFICATE OF AUTHORITY CAN NOT BE THE SIGNATORY TO THE AGREEMENT. THE PERSON SIGNING THE CERTIFICATE OF AUTHORITY IS CERTIFYING THAT THE SIGNATORY TO THE AGREEMENT HAS THE AUTHORITY TO SIGN FOR BROWN COUNTY.]