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OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
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**MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF
ENGINEERS**

**SUBJECT: Report to Congress on Easements Related to Water Resources
Development Projects, Section 8235 of the Water Resources Development Act of 2022**

1. References:

a. Section 8235 of the Water Resources Development Act of 2022, Division H of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law 117-63 (2022);

b. Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213) (1986);

c. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601 et seq) (1970);

d. An Act to amend the act entitled "An Act authorizing Federal participation in the cost of protecting the shores of publicly owned property" approved August 13, 1946" (Public Law 79-727), Public Law 84-826 (33 U.S.C. 426e) (1956);

e. Section 5 of the Flood Control Act of 1941, as amended (33 U.S.C. 701n) (commonly referred to as "Public Law 84-99)

f. Real Estate Handbook, Engineer Regulation (ER) 405-1-12 (2014);

g. Federal Participation in Shore Protection, ER 1165-2-130 (1989); and

h. Real Estate Policy Guidance Letter No. 35, Approved List of Standard Estates (2023).

2. Issues Identified in a Recent Report to Congress:

a. Report to Congress: As required by Reference 1.a., the U.S. Army Corps of Engineers (USACE) prepared the attached Report to Congress on Easements Related to Water Resources Development Projects, dated February 2024, which my office submitted to Congress on 23 April 2024 (Report) (Attachment 1). The Report includes a review of the existing statutory, regulatory, and policy requirements and procedures related to the use of easements provided by non-Federal interests/sponsors in relation

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to the construction of flood risk management, Hurricane and Storm Damage Risk Reduction (HSDRR) also known as Coastal Storm Risk Management, and ecosystem restoration projects. The data that USACE Districts provided for the Report generally confirmed the consistent use of the Perpetual Beach Storm Damage Reduction Easement (PBSDRE) standard estate published in Reference 1.h. for HSDRR projects, except for anomalies found within the State of Florida.

b. Florida Anomalies: The USACE Jacksonville District previously accepted non-standard estates for some HSDRR projects in violation of well-established USACE policy, which has led to anomalies that exist in Florida today. As shown in the attached drawing (Attachment 2), six Florida projects were constructed with 50-year easements that include grants for a public beach, public access, and public use, however, these are not just 50-year projects. Civil works projects exist in perpetuity unless otherwise deauthorized. Additionally, twelve projects are currently not policy compliant due to missing PBSDRE easements.

3. Background Regarding the HSDRR Project PBSDRE Standard Estate:

a. Statutory and USACE Policy Requirements for HSDRR Projects: References 1.b., 1.d., and 1.f. through 1.h. highlight some of the statutory authorities and policy requirements concerning the estates in land required for USACE HSDRR projects.

b. The PBSDRE as a Minimum Estate in Land for HSDRR Projects: In accordance with Reference 1.b., a project's non-Federal sponsor must acquire all Lands, Easements, Rights-of-way, Relocations, and Disposal/borrow areas (LERRD) required to construct, operate, and maintain a USACE water resources project. USACE determines the minimum estates in land for the LERRD necessary to accomplish a given project's purposes. For a HSDRR project, USACE has determined the PBSDRE to be the minimum interest required. HSDRR projects provide erosion and storm surge risk management to landward facilities through the placement of project fill material and depend on periodic maintenance of the horizontal and vertical dimensions of the project's design. To maximize project benefits, the PBSDRE ensures access along the entire project length of beach for initial project construction, continued nourishments, operation and maintenance, and regular and emergency hurricane and storm event responses.

c. The PBSDRE and Submerged State Public Lands: The PBSDRE is generally located landward of a state's historically submerged public lands to accomplish the purposes of a Federal HSDRR project. For example, Florida Statute § 161.141 establishes an Erosion Control Line (ECL) at the Mean High Water Line (MHWL) — which is the average height of high waters over a period of time — as the boundary between the state sovereign lands and privately-owned upland properties. A PBSDRE is generally required landward of the ECL/MHWL to the landward limit of fill to achieve the Federal HSDRR projects' purposes in Florida, including ensuring that the public has long-term use and enjoyment of the public beach that was restored with public funds.

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d. Key components of the PBSRE include, but are not limited to:

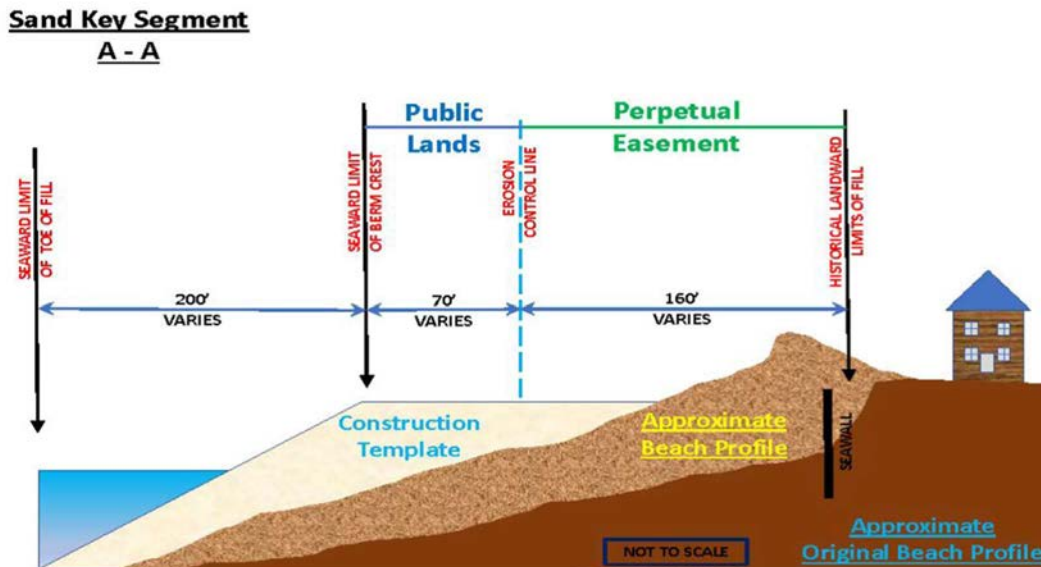
(1) A Public Beach with Public Use and Access:

(a) Law and Policy: Section 103(d) of the Water Resources Development Act of 1986, as amended, prohibits Federal (public) funding of benefits to privately owned shores where use is limited to private interests. Accordingly, public use and access must be afforded on those portions of private properties where Federal dollars are utilized for construction and renourishment of beaches. In accordance with current authorizing legislation, long-standing policy in Paragraph 6 of reference 1.g. provides that the USACE “undertak[es] shore protection projections where such projects best serve the public interest” and requires “the beaches involved must be open to the public.” This paragraph further provides that though the shores may be privately owned — “there must be a benefit that arises from public use.” The paragraph defines public use for beaches as “use by all on equal terms... [without] limit[ation] to a segment of the public.” Additionally, the paragraph states that unless the protection of privately owned beaches is incidental to protection of public beaches, they “must be open to all visitors.” This paragraph further describes factors affecting public use such as permissible beach fees and requirements for general public parking and reasonable public access to the beach every one-half mile.

(b) The below examples illustrate the public use and access requirements for a Florida HSDRR project:

(i) Public Use:

Figure 1.



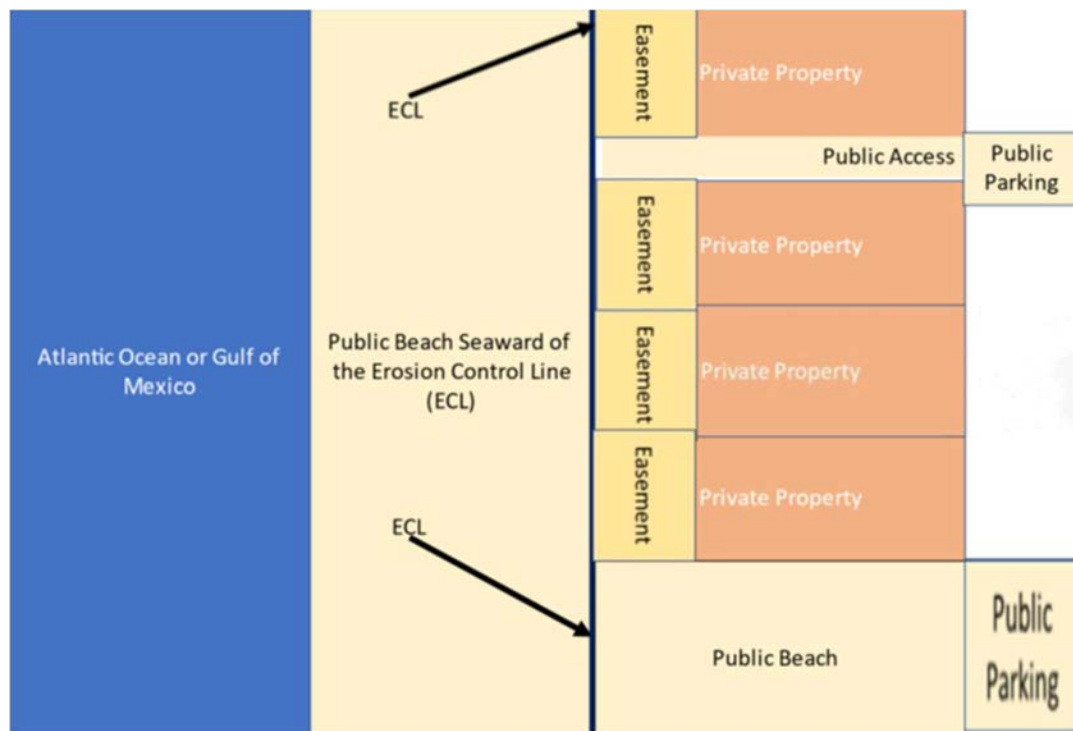
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In the example provided in Figure 1 above, the public would have the ability to use the public lands within the ECL (and MHWL) highlighted in blue and the perpetual easement (PBSDRE) area highlighted in green. Public use would include such activities as walking through these areas or daily beach recreation. The public does not have any rights by virtue of the PBSDRE outside of the PBSDRE's physical limits/boundaries. For example, the PBSDRE would not include the right to walk through, access, or otherwise use the private property landward of the PBSDRE, where the house is located in the figure above. In many instances, walking on the dunes is prohibited by local restrictions, and thus the dunes tend to provide a natural barrier between the public beach and the private property in many areas. The standard PBSDRE reserves to the private landowner the right to construct private overwalk structures to cross the dunes to access the beach and reserves all other rights and privileges to that landowner that do not interfere with the PBSDRE.

(ii) Public Access:

Figure 2.



Separate from the PBSDRE, public access easements at designated locations periodically throughout the length of the project provide public access to the beach from public parking areas and public roads, as shown in the example in the Figure 2 above.

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(c) Rationale: The state's submerged lands below the ECL/MHWL, in combination with the PBSDRE and other estates for public parking and public access above the ECL/MHWL, ensure that the public will have long-term access, use, and enjoyment of the public beach that has been restored with public funds, as required by law and policy, while maintaining protections for private property interests.

(2) Public Ownership of the Entire Project Footprint:

(a) Operation of the Federal Project as Designed: Federal projects are designed and built to operate as an integrated engineered solution. Dune and beach systems are inherently natural systems and are a primary example of how USACE can work with nature to meet its mission. The USACE designs these natural systems understanding that they are dynamic, and the Federal project's efficacy will be reduced if there is not consistent and perpetual access to the entire project. Any missing PBSDRE in a project footprint can potentially result in the inability to adequately construct and maintain the dunes, berms, and other features. Moreover, the lack of access may prevent timely emergency repairs/renourishments after damaging coastal storms and allow storm surge and wave action past the line of defense during a hurricane or coastal storm. If the project cannot be operated as designed, areas that would have otherwise been protected by the Federal project could experience structural damage, significant flooding, and loss of life. These areas may include homes, businesses, and community services located further inland than the beachfront owners who provide the PBSDRE.

(b) Public Use: If a PBSDRE is missing, or an easement has expired or does not include public use rights, within the project footprint, this creates gaps where the public can only use the area seaward of the ECL/MHWL, which violates the legal requirement for public use and frustrates the Federal purpose to maximize public benefits.

(3) Perpetuity: According to USACE policy and practice, the Project Partnership Agreement (PPA) and decision documents typically reference a 50-year period of continuing construction in the form of "periodic nourishment," the placement of suitable beach berm material at appropriate intervals during the 50-year period after the initial construction of the Project. However, the PPAs executed between non-Federal sponsors and the Federal government — and obligations contained therein — are not limited to 50-years but remain in effect for so long as the Project remains authorized. The standard PBSDRE estate is permanent to fully achieve the authorized HSDRR project's purposes. By comparison, non-standard easements can expire, take time to be renewed, and may not be granted by successive owners, impacting project efficacy and the ability to meet the PPA's legal obligations.

(a) Operation, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R): The non-Federal sponsor's OMRR&R responsibilities continue after construction indefinitely until deauthorization, regardless of the Government's

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undertaking of a cycle for periodic nourishment, and therefore, USACE requires the PBSDRE to match this OMRR&R requirement. Moreover, without legal access to enter and perform work on the HSDRR project lands, USACE is unable to renourish the project under the existing project authorization or to restore the project to pre-storm conditions under Public Law 84-99.

(b) Public Use: The PBSDRE standard estate is perpetual, in part, because it ensures that the engineered beach above the ECL/MHWL that was provided for the community using Federal funds remains open to the public for use and enjoyment as set forth in paragraph 3.d.(1).

4. After reviewing the findings of the Report, the USACE policies in References 1.f. and 1.h. requiring the PBSDRE standard estate for Federal participation in HSDRR projects are legally and policy appropriate. However, the Army should demonstrate flexibility for situations created by inconsistent application of these policies and ensure clear communication with Congress in the future. Therefore, I authorize the following:

a. For the six projects identified as “constructed with 50-year easements” and the twelve projects identified as “not policy compliant” in Attachment 2, I authorize USACE, by exception, on a case-by-case basis, to certify real estate availability and proceed to construction with 50-year easements in lieu of the PBSDRE standard estate if the following requirements are met:

(1) The Chief’s Report, the accompanying reports of the District and Division Engineers, and PPA for the project do not specify that the PBSDRE standard estate is required;

(2) All applicable laws and all other applicable USACE policies are followed, including, but not limited to, the guarantee of a public beach, public access, public use, and access for any work necessary and incident to the construction, periodic nourishment, and OMRR&R of the project during the 50-year easement duration;

(3) USACE provides formal notice to the non-Federal sponsors that if any of the 50-year easements expire and are not extended on a given HSDRR project, USACE will be unable to renourish the project under the existing project authorizations, and/or restore the project to pre-storm conditions under Public Law 84-99. Under this scenario, the responsibility to renourish or restore the project will rest with the non-Federal sponsor or the State of Florida and;

(4) The non-Federal sponsor will be responsible at full non-Federal expense for acquiring easements for periodic nourishment of the project beyond the 50-year period, and such additional acquisitions are not creditable.

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b. To ensure clarity with Congress on the easement requirements associated with HSDRR projects, Chief's Reports signed after the date of this memorandum must disclose to Congress whenever PBSFRE estates are required for a HSDRR project.

c. The authority for exceptions provided in paragraph 4.a does not preclude USACE from adjusting the scope and boundary of a project's footprint to avoid areas where landowners are unwilling to provide the PBSFRE standard estate, provided that the remaining project still operates as an integrated engineered solution to manage coastal storm risk for a significant portion of the project area, as determined by the Chief of Engineers and consistent with the project's authorization.

5. My point of contact for this action is Christina Baysinger at (571) 733-0053 or christina.m.baysinger.civ@army.mil.

Encls, as

MICHAEL L. CONNOR
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(Civil Works)

**REPORT TO CONGRESS ON
EASEMENTS RELATED TO WATER RESOURCES
DEVELOPMENT PROJECTS**

February 2024

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REPORT TO CONGRESS ON EASEMENTS RELATED TO WATER RESOURCES DEVELOPMENT PROJECTS

I. Purpose

A. Report Requirement

Division H of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023— Title LXXXI—Water Resources Development Act of 2022 (PL 117-263), signed into law on December 23, 2022, contained the following language:

Section 8235 Report to Congress on Easements Related to Water Resources Development Projects.

(a) In General.—The Secretary shall conduct a review of the existing statutory, regulatory, and policy requirements and procedures related to the use, in relation to the construction of a project for flood risk management, hurricane and storm damage risk reduction, or ecosystem restoration, of covered easements that may be provided to the Secretary by non-Federal interests.

(b) Report To Congress.—Not later than 1 year after the date of enactment of this Act, the Secretary shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate a report containing the results of the review conducted under subsection (a), including—

(1) the findings of the Secretary relating to—

(A) the minimum rights in property that are necessary to construct, operate, or maintain projects for flood risk management, hurricane and storm damage risk reduction, or ecosystem restoration;

(B) whether increased use of covered easements in relation to such projects could promote greater participation from cooperating landowners in addressing local flooding or ecosystem restoration challenges; and

(C) whether such increased use could result in cost savings in the implementation of the projects, without any reduction in project benefits; and

(2) any recommendations of the Secretary relating to whether existing requirements or procedures related to such use of covered easements

Should be revised to reflect the results of the review.

(c) Definition.—In this section, the term “covered easement” means an easement or other similar interest that—

- (1) reserves for the Secretary rights in the property that are necessary to construct, operate, or maintain a water resources development project;
- (2) provides for appropriate public use of the property, and retains the right of continued use of the property by the owner of the property, to the extent such uses are consistent with purposes of the covered easement;
- (3) provides access to the property for oversight and inspection by the Secretary;
- (4) is permanently recorded; and
- (5) is enforceable under Federal and State law.

This report is submitted to fulfill the Section 8235 requirement.

B. Glossary of Terms.

Real Property. The land and structures that are permanently attached to the land.

Real Property Interest. The ownership rights that can be held in real property. Types of interests include but are not limited to fee, easement, subsurface mineral rights, and a leasehold.

Estate. The amount and kind of real property interests owned. Estates may be permanent or be for a specified term.

Fee Estate. Ownership of all or most of the rights in real property.

Easement. The legal right to use or enter another's real property without actually possessing the real property. An affirmative easement is the right to use another property for a specific purpose while a negative easement is the right to prevent another from performing an otherwise lawful activity on their own property.

1. Perpetual easement is a permanent right taken with no fixed maturity date. It generally "runs with the land" and binds future owners and successors in interest.
2. Temporary Easement – An easement with a specified term, e.g., five years.

Uneconomic remnant. The term uneconomic remnant means a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, and which the Agency has determined has little or no value or utility to the owner.

II. Review of Existing Statutory, Regulatory and Policy Requirements and Procedures

A. Principles, Requirements & Guidelines

Through 42 U.S.C. § 1962a-2(a) – Principles, standards, and procedures for Federal Projects, Congress directed the Water Resources Council to establish principles, standards, and procedures for Federal participants in the preparation of comprehensive regional or river basin plans and for the formulation and evaluation of Federal water and related land resources projects, including development of standards and criteria for economic evaluation of water resources projects.

The Principles and Requirements for Federal Investments in Water Resources, March 2013, consider the many competing demands for limited Federal resources, and express the intent that Federal investments in water resources as a whole should strive to maximize public benefits, with appropriate consideration of costs. Along with Interagency Guidelines, December 2014, these Principles, Requirements and Guidelines (PR&G) provide a framework for how the Federal government analyzes Federal investments that impact water resources in light of economic, environmental, and social impacts.

B. WRDA

The Water Resources Development Act (WRDA) is an important piece of legislation that is traditionally passed every two years to authorize U.S. Army Corps of Engineers (USACE) activities for flood control, navigation, and ecosystem restoration. WRDA is strictly authorizing legislation. The funding to implement authorized studies, projects, and activities is provided separately through the annual appropriations budgetary process. WRDA authorizes the Secretary of the Army, through the Assistant Secretary of the Army for Civil Works, to conduct studies, construct projects and research activities that can lead to the improvement of navigable channels, flood and storm damage reduction, and restoration of aquatic ecosystems, for example. Most USACE water resources projects require two Congressional authorizations: authority to study the feasibility of the project and authority to construct, operate, maintain, repair and replace (OMRR&R) the project. These water resource projects are generally not authorized for a term of years, but rather remain perpetually authorized unless or until Congress deauthorizes a project through additional legislation.

WRDA provisions may also address water infrastructure policy and financing. Some USACE projects require cost-sharing with a non-federal sponsor (NFS). The Project Partnership Agreement (PPA) describes the authorized project and the responsibilities of the Government and the NFS in the cost sharing and execution of work and is a legally binding agreement. The PPA does not expire due to the perpetual nature of the authorized projects.

Among other responsibilities, the NFS is required to provide all lands, easements and rights of way and facility relocations (LERR) required to construct and OMRR&R the project. Because the required LERR is based on an engineered solution, once the construction footprint is set,

there is little or no flexibility to avoid properties within the footprint of the project improvements as it could result in loss of project benefits or other consequences such as increases in risk to life safety. The PPA requires the NFS to provide the LERR by whatever means necessary, including the use of eminent domain, even for ecosystem restoration projects. Therefore, most USACE projects are not voluntary for landowner participation. The LERR must be acquired and retained by the NFS in public ownership for uses compatible with the authorized purposes of the project. Generally, the NFS receives credit towards their project cost share for the market value of the LERR provided and for the NFS incidental costs associated with the acquisition of title after the PPA has been fully executed. Current USACE policy requires acquisition of the minimum interest in land necessary to support project requirements for as long as the project is authorized. The minimum interests in land are determined based on the real property rights needed to support construct activities and perform OMRR&R for the project during its authorization. Because the NFS is generally responsible for acquiring LERR pursuant to state law and procedure, full coordination and consultation with the NFS must occur prior to the Government's determination of the interests and estates required for a cost shared project. Coordination efforts should begin in the early stages of plan formulation and continue, as appropriate, to the conclusion of the acquisition process.

C. Standard Estates.

The term standard estate is used by USACE to refer to a series of different estates that have been approved for use to support USACE water resource project features and requirements to allow for both construction and OMRR&R. These estates have been written by a multi-disciplinary team of engineer, construction, environmental and legal experts. Prior to first publication, the standard estates were reviewed and approved by the Department of Justice Land Acquisition Section. The first standard estates were published as an appendix in Change 7 to Chapter 5 of the Real Estate Handbook, ER 405-1-12, in Feb 1979. Chapter 5 was superseded by ER 405-1-11 in November 2014. Because all exhibits were stripped from the ER during the 2014 publication process, the current standard estates have now been published in Real Estate Policy Guidance Letter (PGL) 35, dated 27 October 2023. New standard estates are added if required by new law or changes in mission requirements. Two new standard estates were approved in 2023 to better enable the beneficial use of dredged material. The Real Estate PGL is attached as Appendix A and reflects twenty-eight current standard estates.

The standard estates describe the real estate interests to be conveyed to the NFS or the Government for construction and OMRR&R of a variety of typical project features. The estates are written to include the grant of affirmative rights to the Government or NFS to perform project activities. They typically exclude rights not needed, such as mineral rights for example, and allow owners to retain all rights and privileges that may be used without interfering or abridging the rights acquired or the intended purpose of the project feature. These estates are typically acquired subject to public easements for railroads, highways and utilities except when those facilities require relocation to avoid interference with the federal project. Real property

interests needed only to support construction activities, like a contractor staging area, for example, may be temporary for a term of months or years to match the construction performance period. However, because the USACE projects are perpetually authorized unless or until Congress deauthorizes a project through additional legislation, most project features require a permanent real property interest to support both construction and operation of the project and any repair, rehabilitation or replacement required in the future to allow continued function and operation as designed, constructed and approved. The estate must provide for sufficient rights to allow use and control of the real property beyond the construction period to protect project operations and maintain the project benefits that justified the federal investment under the overarching PR&G. When a NFS or landowner proposes to change the standard estate language or requests a lesser estate be acquired, generally the risks increase for less control over the project lands and for possible third-party interference with project features and function. Public benefits may be compromised by outstanding private property rights and the Government's risk of liability may increase. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), as amended (42 U.S.C. 4601 et seq.) requires the fair and consistent treatment of property owners for Federal projects. The use of standard estates promotes consistency across the country for like projects, allowing for consistent treatment of landowners and the NFS. Use of the standard estates also minimizes the likelihood of legal challenges to the estates in terms of clear drafting and enforceability under real property laws. Use of these standard estates also promotes efficiency during project implementation because the USACE Districts are empowered to utilize these estates as written without any further approvals from any higher headquarters. Use of a non-standard estate or an estate less than that determined necessary by the Government requires higher headquarters approvals to ensure consistency and enforceability nationwide and should only be pursued in rare instances such as when the law prevents use of the standard estate. An example of this is when state lands are needed for the project and the project requirement is a fee estate, but the state law prohibits the state from conveying a fee estate because the lands are held in trust for the people of the state. In this case, using a lesser estate is justified and a non-standard estate may need to be drafted. ER 405-1-12, Chapter 12 requires use of a standard estate whenever possible as long as the estate accurately describes the rights necessary for the project features. However, Districts are empowered to make minor revisions to standard estate language as long as the changes are not substantive material deviations or deviations that increase the costs or liability of the Government.

Both law and public policy prefer easements drafted to convey positive affirmative rights to the grantee rather than those that impose negative restrictions against the underlying fee ownership. The latter negative easement is harder to enforce. Most USACE projects require positive easement rights to be conveyed to the NFS or Government, but they reserve to the underlying owner any use that will not interfere with project purpose or rights that are acquired for the project. Some easements contain both affirmative rights and restrictions. For example, the standard Flowage Easement allows the Government to overflow or flood the property and prohibits the underlying landowner from constructing structures for human habitation in the

easement area. In addition to the restriction on human habitation construction, this easement also restricts excavation and landfill within the easement area.

D. Non-Standard Estates (NSE)

When a non-standard estate is proposed, the estate must be drafted to address the specific project requirements or features for which it is needed. This is required because easements need to be specific to be legally enforceable and because we must acquire only the minimum rights necessary. Therefore, sufficient design must be available to support non-standard estate drafting. State law is also a consideration in drafting to assure ability to record and enforce under the real property laws of the state where the NFS must operate. The Uniform Act requires that land acquisition practices promote public confidence in Federal and federally assisted projects. To ensure that owners are treated fairly and consistently across all USACE civil works cost shared projects and to ensure that the proper estate is acquired to protect the federal investment and project benefits, non-standard estates are approved at the HQUSACE level. An interdisciplinary team reviews nonstandard estates and considers the impact on other USACE projects throughout the country. The objective is to acquire the minimum interest needed to construct, operate and maintain the project while reducing the risk of interference with the project operation and function by other parties holding real property interests left outstanding. Such interference could reduce the benefits that justified the federal investment and increase costs to the Government and NFS. Non-standard estate approval is typically limited to the project where the estate is to be used because the estates are project and fact specific and often owner specific as in the case of the fee land owned by the State. The drafting, negotiating, review and approval process for non-standard estates adds administrative costs and time to project execution and should only be utilized as a rare exception to the rule and not as a standard practice.

E. Minimum Interest.

In addition to the collection of standard estates discussed above, ER 405-1-12, Chapter 12, paragraph 12-9 describes the minimum interest required by policy to support the described project purposes or features. See Excerpts from Chapter 12 at Appendix B. The design, construction and OMRR&R requirements drive the decision on the minimum estate necessary. The selection of the minimum interest is not a matter of NFS or landowner preference and should not be based on whether or not a NFS wants to proceed with a condemnation. The NFS has committed to providing all required lands by whatever means necessary upon PPA execution. The minimum estate required is determined by USACE, with consideration to input from the NFS, based on the project requirements. The real property interests must support construction and OMRR&R requirements and end only when the Government and NFS obligations under the PPA end and the parties can walk away from the project because there is no longer a responsibility or requirement for construction or OMRR&R or when the project is deauthorized by Congress. For most USACE project, the PPA requires the NFS to provide the required estates by whatever means necessary, including condemnation. USACE must be careful to avoid partnering with cost-share partners who cannot or will not fulfill all of the PPA responsibilities

of the federal project. For example, condemnation may be required for ecosystem restoration (ER) projects, but HQUSACE is receiving requests for lesser estates and non-standard estates based on the rationale that the NFS does not have the authority to condemn any interest in land for ecosystem restoration purposes. If the requests are approved, this introduces risk to the projects since the minimum real estate rights will not be acquired and outstanding interests in other owners may interfere with the project purpose, function, operation or benefits while the project is authorized.

Fee title is required for fish and wildlife mitigation lands, recreation, ER, and other environmental purposes. ER projects are designed to restore aquatic habitat and typically entail work in wetland areas. Project features may include regrading of substrate, removal of invasive species of plants, planting native vegetation, and placing fencing or rock around the perimeter of the restoration area to contain soil or to reduce erosion. Each ER project is planned and designed to restore a specific ecosystem type and to support the species that inhabit that area. Typically, a fee estate is required for ecosystem restoration projects due to the variety of project features which are designed for the specific ecosystem, potential for habitat degradation, potential environmental threats, and the need to monitor, manage, and adapt the project (adaptive management) as necessary. Fee ownership allows the NFS or the USACE to manage and adapt the project at various intervals to help ensure viability. USACE policy allows for the possibility that a lesser, or easement estate, may be appropriate in certain ER projects based on the requirements for the construction and operation or requirements of the project. However, most ER projects require adaptive management with subsequent construction activities to facilitate habitat restoration and ensure project viability. At the time of project design, these adaptive management activities cannot be fully predicted given that they are dependent upon the type of habitat to be restored, the location of the property, the surrounding environment, and natural forces that will affect the area. These project requirements take virtually all rights from the owner and leave little to no economic use of the property. One reason fee is considered the minimum estate for these project features is because fee is needed to control the real property rights to protect the improvements and their function. In addition, an easement for these project features usually leaves the underlying owner with virtually no right of use and no remaining market value. The underlying owner would retain fee ownership and be subject to tax and the public use may also impose a hardship or liability to the fee owner. Generally, when a fee value is due as a result of the project, a fee estate should be acquired as a matter of policy. Also, the implementing guidelines of the Uniform Act require us to provide a written offer to acquire any uneconomic remnant.

Structural flood risk management (FRM) projects typically entail the construction of levees and floodwalls, pump stations to extract water from low lying areas, retention ponds to hold water runoff, deepening of rivers and channels or concrete lining channels to allow for faster water evacuation, and clearing of channels to remove vegetation and debris to allow for better flow of water. These project features are perpetual requirements to support operation and maintenance of the projects to serve their intended purpose for as long as authorized. The real property rights required are usually permanent levee or channel improvement easements and could be fee for a retention ponds or similar feature. Outside of fee requirements for dams and reservoirs, USACE has developed standard easements for most all FRM project features to allow construction and OMRR&R.

Hurricane and storm damage risk reduction projects or coastal storm risk management (CSRMM) projects typically involve the construction of a combination of features such as levees and floodwalls, pump stations to extract water from low lying areas, construction of breakwaters in tidal areas, beach nourishment and construction of sand dunes. The standard estates required for CSRMM projects are generally permanent easements for floodwalls and surge barriers, and other permanent features including public access. These project features are intended to remain in existence in perpetuity through initial construction, renourishment, OMRR&R and for emergency repairs after storm damage.

In general, for CSRMM cost shared projects in which the Corps partners with a non-federal sponsor, the federal investment is justified through avoidance of damages to structures and contents over a 50-year period of economic analysis. While a fifty-year period of economic analysis may be used to plan for federal participation in the project, this period should not be confused with the project authorization period of time. Projects are generally authorized until deauthorized, meaning perpetual easements are required for the non-federal sponsor to operate, maintain, monitor, repair, replace, and rehabilitate the completed project in perpetuity. Terms such as economic period of analysis or economic life, initial construction period or service life all reference periods of time relevant to plan formulation, benefit cost ratio calculations and periods of certain cost share responsibilities like initial construction. These periods of time are not relevant to determination of the duration of the supporting real property interests. The duration of required real property interests is tied to when the USACE and NFS obligations for construction and OMRR&R end under the PPA. Generally, PPA terms do not expire and define a time when the PPA parties can walk away from a project because there is no longer any responsibility or requirement for construction or OMRR&R. The USACE projects are intended to last in perpetuity through proper OMRR&R, subject to availability of funding. The end to a project purpose and thus the end of the need for the supporting real estate interests only occurs if Congress deauthorizes a project or project purpose through additional legislation.

III. Analysis and Findings

USACE does not have metrics or milestones related to the use of non-standard estates and their impacts on project delivery schedules, market value costs, administrative costs to acquire, or costs to draft, negotiate terms and obtain approval of non-standard estates. As discussed above, USACE policy discourages the use of non-standard estates, emphasizing they should be the exception to the rule. The requirements driver for determining the minimum interest necessary or the required estate for a project or project feature is not what the estate will cost, or the willingness of the owner to grant it, or the time required to obtain the estate, but rather what property rights need to be owned to support project construction and OMRR&R and to protect the project benefits for the authorized project so that the project will function as authorized by Congress. As a result, the analysis that follows is based largely on anecdotal information and the personal experience of the responders from various districts and divisions within USACE. The project information collected from the districts and divisions ranges over the last 10 to 20 years.

Unless subject to specific authorization that would cause deviation from the general life cycle of a civil works project, during its lifetime, a civil works project may pass through basic phases to

include feasibility, pre-construction engineering and design, real estate acquisition, construction, and operation and maintenance. The project information collected for this report is limited in that the data originated from projects in all phases, and in some instances, from cancelled projects or planned projects that have not been constructed. Data from projects that have been constructed and turned over to a NFS for operation and maintenance yield the largest aggregation of comprehensive information, but limiting the report to those projects reduces the data available. Schedule and cost data from project management tools used for civil works projects do not presently track cost savings or other efficiencies, if any, gained from the use of a NSE or a lesser estate. Nor do the metrics track the risks realized by NFS during OMRR&R to enforce non-standard or lesser estates acquired or costs to prevent or cure encroachments or litigation risks realized. The disparate management tools utilized by different functional areas locally and across the USACE enterprise track cost, schedule, processes, and critical paths for the phases of a civil works project. While the duration and completion of real estate acquisition and certification by a NFS is a milestone and trackable metric in project management, the data does not differentiate between NFS acquisition of a NSE, lesser estate, or NFS acquisition of a standard estate.

A. FRM.

The standard estates required for FRM projects are generally fee and permanent easements, depending upon the particular features designed to achieve project benefits. Responses provided by USACE Districts indicate that standard estates and the approved minimum estates are utilized in the vast majority of FRM projects across the country. In these structural projects meant to reduce flood damages to property and protect life, health and safety of the public, our NFS cost share partners generally have clear authority to condemn real property interests, if needed. In the rare instance, when we have been asked to deviate from a fee estate to a non-standard easement, it generally is because the underlying owner of the required lands is the state or a tribal ownership precluded by law from conveying their fee interest. No evidence was provided of any cost savings in these cases because the market value of the easement is often similar to the value of a fee estate due to the extent of the easement restrictions on the land. The examples available show using a lesser non-standard easement estate instead of a fee estate in these cases is binary in nature, meaning USACE either approves of a non-standard estate or the project feature on state or tribal lands has to be eliminated. Due to the engineered solution and selection and authorization of a recommended plan, eliminating or moving project features usually leads to a non-viable project and termination of the project prior to construction.

B. Hurricane and Coastal Storm Damage Risk Reduction (HSDRR)

These project types are limited to a smaller portion of the USACE project portfolio due to geography. The standard permanent easement estates required for HSDRR features like floodwalls and surge barriers do not seem to be the source of any issues for our NFS and the standard required estate language is being utilized for these features. The information gathered also indicates no requests or approvals have been made for use of a non-standard estate instead of the HSDRR perpetual beach storm damage easement within the last ten years or more. This is

exclusive of recent requests for HSDRR projects in the state of Florida where a waiver of the requirement to use the minimum interest permanent beach storm damage easement estate was recently requested of HQUSACE, but not granted. Our research indicates that the standard permanent beach storm damage easement estate is being utilized across the USACE enterprise for HSDRR projects constructed during the time period reviewed.

1. **Public Use.** The recent challenges that have come to light in implementation of HSDRR projects in Florida requires further discussion, first with regard to public use and access. Many private owners object to granting public use of a portion of the beach within the federal project limits. Section 103(d) of the Water Resources Development Act (WRDA) of 1986, as amended, prohibits Federal (public) funding of benefits to privately-owned shores where use is limited to private interests. Accordingly, public use and access must be afforded on those portions of private properties where federal dollars are utilized for construction and renourishment of beaches. The Corps published standard perpetual beach nourishment and dune easements for HSDRR projects in 1995 that were combined the following year into one perpetual beach storm damage reduction easement requiring public access. This is still the minimum real estate interest required today and being acquired by most NFS including some in the State of Florida. USACE has historically accepted temporary easements in certain Florida projects in lieu of the standard permanent easement, but this was not in compliance with the policy established in 1995 concerning the minimum estate. Current authorizing legislation and long-standing policy provides that the Corps “undertak[e] shore protection projects where such projects best serve the public interest” and requires “the beaches involved must be open to the public.” See ER 1165-2-1130, Federal Participation in Shore Protection, Para. 6, Program Policies. Though the shores may be privately owned, “there must be a benefit that arises from public use.” ER 1165-2-130 defines public use for beaches in Public Use, Para.6.h as “use by all on equal terms. . . [without] limit[ation] to a segment of the public.” Unless the protection of privately-owned beaches is incidental to protection of public beaches, they “must be open to all visitors.” Para. 6h. of the ER further describes factors affecting public use such as permissible beach fees and requirements for general public parking and reasonable public access to the beach every one-half mile. The lesser and non-standard estate, formulated as a temporary easement, either includes a right to construct and perform OMRR&R, but does not include a right of public use at all, or the right of public use is only for a limited time after which public use would not be assured. The private fee land subject to public use and access is defined in the easement deed and limited in application to the lands described in the legal description. In Florida, this would typically include the portion of the private property landward of the Erosion Control Line and extending to the Landward Limit of Fill. The standard easement reserves to the fee owner the right to construct dune overwalk structures and reserves all other rights and privileges to the underlying private owner that do not interfere with the easement granted. The public would have lateral access in the easement area for public recreational use. Also, the standard HSDRR easement is required for project performance as designed. The perpetual easements within an authorized project’s footprint ensure access along the entire project length for initial project construction, continued nourishments, operations and maintenance, and regular and emergency

hurricane and storm event responses to maintain maximum project benefits. A beach nourishment project depends on periodic maintenance of the horizontal and vertical dimensions of the project's design. Without perpetual easements, the project could not be adequately maintained as necessary, which in turn could increase risk to structures and potentially life safety. Temporary easements would also present significant problems if the need for emergency renourishment after a damaging coastal storm event was required under Public Law 84-99, the discretionary authority given to the Corps of Engineers by Congress to act and react to emergencies caused by floods, contaminated water sources, droughts, or dam failures. In this case, easements may not be available for immediate access and repair resulting in a non-functioning project providing minimal risk reduction and benefit to the public. It has been suggested that temporary easements should be permitted if the NFS pays 100% of the costs for work both above and below the Erosion Control Line (ECL) for beach segments where the standard minimum estate was not acquired. This would result in intermittent gaps in the project limits because temporary rights expire, take time to be renewed, and may not be granted by successive owners. Such gaps may prevent timely renourishment of emergency repairs and allow storm surge and wave action past the line of defense during a hurricane or coastal storm, potentially leading to structure damage, significant flooding, and loss of life, impacting areas that would otherwise be protected by the federal project. This would also result in gaps of public access along the waterfront beach if a temporary easement has expired or does not include public use rights. The public would have to traverse these intermittent tracts on the seaward side of the ECL, frustrating the federal purpose to maximize public benefits. The Federal projects are designed and built to operate as an integrated engineered solution and the efficacy of the Federal project will be reduced if there is not consistent and perpetual access to the project. For these reasons, we do not recommend changing the current policy or the minimum standard estate necessary for these projects.

2. Florida

The primary difference between the States implementing these projects in partnership with USACE is the state law definitions of the lands held in trust for public use and access along the beachfront. Most states define the boundary between public rights and private rights as mean high tide. However, several states like Texas and New Jersey have extended the public use trust lands to include recreational use of the dry sandy beach, generally up to the line of vegetation. Florida has ongoing disputes between hotels and private landowners over the boundary between public and private lands, even since the State set the ECL process. This has seemingly made it harder to establish lateral public access along Florida beaches and may explain the resistant to the federal projects requiring adequate public access, parking and recreational use. Nevertheless, we have not found anything unique to Florida that would require a change to how these HSDRR projects carried out by USACE.

C. Ecosystem Restoration

ER projects are the most challenging in the USACE portfolio right now in terms of matching project requirements to a standard estate. As discussed above, a standard fee estate is the minimum interest required by USACE policy for ecosystem restoration projects. The fee owner controls all or most of the property rights and therefore can assure the project function and benefits required for the federal investment. Public use equals public ownership. The NFS is required by the PPA to hold the property interest with benefits accruing to the public, not to private property owners. Fee supports all construction and operation, maintenance, repair, replacement, and rehabilitation (OMRR&R) requirements. In some cases, the costs of the real property rights to be acquired for the project in an easement may equal the value of the fee interest so fee should be acquired. ER projects generally require adaptive management and other OMRR&R activities.

A permanent easement may be considered appropriate for an ER project in certain circumstances. Easements present more risk to the project function and benefits because drafting of the estate requires clearly listing all the affirmative rights the Government requires for construction and OMRR&R and determining what rights, if any, may remain with the underlying fee owner that will not interfere with the project function and benefits for so long as the project is authorized. Easements introduce the risk of the underlying fee owner violating the terms of the easement, whether deliberate or due to unclear drafting of the instrument. The easement granting language must be explicit to be legally enforceable to protect the federal investment and project benefits. Determinations need to be made, if public use is required, for proper drafting. Easements are more appropriate for isolated small tracts of land. Easements present risks from outstanding interests like mineral rights. In some states, certain types of easements may be subject to a requirement to re-record in the land records to ensure enforceability every so many years.

And, in addition to the above factors, our research shows many NFS indicate they are either unwilling or unable to condemn lands for an ER purpose alone because this type of project typically does not protect public property or enhance public safety. And yet, our USACE PPA requires the NFS to provide the LERR by whatever means necessary. There is no exception in the PPA for a NFS when condemnation is required. These projects are not formulated or authorized based on willing sellers only. The NFS is required to deliver all LERR in order for the project to function as designed even if the landowners are not cooperative. The growing number of NFS with no intention of using their eminent domain authority is incongruent with achieving compliance with USACE civil works and real estate policy on ER projects.

The research provided by the districts indicates that NFS have more difficulty purchasing fee land without condemnation in areas with historically high property values. Additionally, in these high property value areas, the real estate acquisition costs can be a significant portion of the total project costs, even up to a third of the total projects cost in one instance. Quantifiable evidence

from the districts indicates there may be a cost savings in market value and administrative costs if a NFS utilizes a non-standard permanent easement estate instead of fee for ecosystem restoration projects. However, this is dependent upon the verbiage in the non-standard estate and how it is valued in the appraisal. The Government and NFS have an obligation under the Uniform Act and Army policy to offer landowners the amount of the highest approved appraisal in exchange for the real property interests being acquired.

Significant and consistent anecdotal information from USACE Districts and NFS indicates strong preferences for permanent easements instead of fee because of landowner sentiment and the NFS unwillingness to use condemnation for ER purposes. However, because the easements are project fact specific and need to be tailored to each project's features and requirements, it is not feasible to draft a one size fits all standard easement estate for ER projects.

In one reported instance, a project reported difficulty with acquiring fee over tribal allotment lands. Tribal allotment lands have unique ownership structures and management processes and often fee cannot be conveyed nor can perpetual easements be conveyed. Information provided indicates that in some instances, project formulation was altered to avoid tribal allotment lands because of the encumbrance complications, and this resulted in a reduced footprint for the project and reduced restoration benefits as well.

IV. Summary and Recommendations

The data provided by the USACE Districts for this report confirms the consistent use of the standard estates published in the attached Real Estate PGL 35 for FRM and HSDRR projects. The data indicates that in almost every project reported of these types other than the Florida HSDRR projects, the standard estates were employed in accordance with current policy, resulting in the best-case scenario to reduce risk and liability to the Government and NFS, to successfully accomplish construction, OMRR&R, and to protect the benefits to be achieved by the project and meet our commitments to Congress and the public. Non-standard estates were only utilized in the rare instance when projects included features or measures for which there was no standard estate, or the landowner did not have the legal authority to convey the standard estate. In these instances, the districts utilized USACE established processes for obtaining approval of the non-standard estates. Nominal cost savings were reported where acquisition of easements was approved rather than a fee estate. We do not recommend any revision to current policy or procedure for these two types of projects. The information collected validates current USACE policy and procedures for these project types.

The information collected from the USACE districts for this report reflects a high number of projects/NFS requesting use of a non-standard easement in lieu of fee for ER projects. Many of the NFS are reportedly reluctant to use condemnation to acquire property rights from landowners unwilling to convey fee for this project purpose. NFS avoidance of condemnation often cited political and financial concerns. A NFS can choose whether to partner with USACE or not to accomplish a proposed project. In several instances, Districts reported that a NFS chose

not to partner with USACE, particularly for ER projects. We do not have sufficient information to conclude there would be a greater number of purchases from landowners with the use of a lesser estate like a non-standard easement instead of fee. No data was provided attributing utilization of a non-standard easement estate with less condemnations.

For ER projects, the data indicates that on a case-by-case basis, some cost savings may be realized for lower market values of easements as compared to fee without any known reduction in benefits. No information was submitted on the administrative costs to obtain approval of a non-standard estate for ER.

We cannot currently quantify the risks associated with the use of permanent easements in lieu of fee for ER projects. While we have constructed some ER projects based on permanent easements, we do not know to what extent the projects will incur encroachments or interference from others with ownership interests or what enforcement actions the NFS may have to engage in over the life of the authorized project. USACE does not usually have first-hand knowledge of these types of issues since the NFS has the responsibility for OMRR&R. We are dependent upon our NFS to bring any of these challenges to our attention.

The volume of approved ER NSEs is an indicator that the existing requirements, processes, and procedures are flexible enough and functioning to consider the unique project requirements and to approve non-standard easements for ER projects where justified. A fee estate is still advised to be the minimum estate necessary in most ER projects. Internally, USACE is reviewing possible courses of action to refine the non-standard estate approval process to achieve greater review efficiencies and to train more personnel on the factors and drafting skills needed to prepare these project specific estates. In addition, USACE needs to ensure each NFS understands their partnership responsibility to provide all required lands, even if condemnation is required, pursuant to the PPA. We do not recommend a change to the existing policy requirements for ER projects.

V. References

33 U.S. Code § 2213

Engineer Regulation 1105-2-100, Planning Guidance Notebook

Engineer Regulation 405-1-12, Chapter 12 Real Estate Roles and Responsibilities for Civil Works: Cost Shared and Full Federal Projects

Engineer Circular 405-1-11, Exhibit 5-29 Standard Estates

Engineer Pamphlet 1165-2-1, Digest of Water Resources Policies and Authorities

Engineering Pamphlet 1105-2-61, Planning – Feasibility and Post-Authorization Study Procedures and Report Processing Requirements

Real Estate Policy Guidance Letter 35

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), as amended and found at 42 U.S.C. 4601 et seq.

The Water Resources Development Act (WRDA) of 1986 (Public Law 99-662) as amended (33 U.S.C. § 2213(d))

Appendix A: Real Estate Policy Guidance Letter 35



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CEMP-CR (405)

27 October 2023

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Real Estate Policy Guidance Letter No. 35, Approved List of Standard Estates

1. References:

a. ER 405-1-12, Chapter 12, Real Estate Roles and Responsibilities for Civil Works: Cost Shared and Full Federal Projects, Change 31, 1 May 98

b. ER 405-1-11, Real Estate Acquisition, 28 November 2014

c. Memorandum, CECW-P, 17 April 2019, subject: Revised Implementation Guidance for Section 1115 of the Water Resources Development Act (WRDA) of 2018, Property Acquisition (Enclosure 1).

2. As outlined in Reference 1.a., it is the policy of USACE to acquire, or to require a non-Federal sponsor to provide, the minimum interest in real property necessary to construct, operate and maintain a project. Standard estates approved and published by HQUSACE, for use in full Federal or cost-shared projects, are attached to this memorandum (Enclosure 2) and will remain in full force and effect as model estates unless superseded or rescinded by the Director of Real Estate. Once the appropriate interests needed for the project are determined through application of the requirements found on paragraph 12-9 of ER 405-1-12 Chapter 12, the corresponding standard estate from the list enclosed must be used.

3. In the event that a project feature is unique and requires interests which cannot be satisfied by a standard estate or a lesser estate is proposed, the District must submit a policy deviation request to the Director of Real Estate, with a copy to the RIT, requesting approval of a lesser or non-standard estate. Districts should refer to Paragraph 12-10 of Reference 1.a and Paragraph 3-18 of Reference 1.b to determine whether a proposed wording change is within District authority to approve. Non-standard estates are project specific, driven by individual project requirements. Drafting and approval of non-standard estates generally prolongs project delivery timelines and increases administrative costs of projects. Therefore, non-standard estates should only be proposed when absolutely necessary.

4. If you have questions, please coordinate with Mr. John Wilburn at 202-761-5553.

FOR THE COMMANDER:

2 Encls

PAULA JOHNSON-MUIC
Director of Real Estate

1. Memorandum CECW-P 17 April 2019
2. Approved Standard Estates

DISTRIBUTION:
COMMANDERS,
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MISSISSIPPI VALLEY DIVISION (CEMVD)
NORTH ATLANTIC DIVISION (CENAD)
NORTHWESTERN DIVISION (CENWD)
PACIFIC OCEAN DIVISION (CEPOD)
SOUTH ATLANTIC DIVISION (CESAD)
SOUTH PACIFIC DIVISION (CESPD)
SOUTHWESTERN DIVISION (CESWD)

ENCLOSURE 1



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECW-P

APR 17 2019

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Revised Implementation Guidance for Section 1115 of the Water Resources Development Act (WRDA) of 2018, Property Acquisition

1. The Assistant Secretary of the Army, Civil Works approved on 12 April 2019 Section 1115 of WRDA 2018. The attached implementation guidance is posted for internal and external use on the U.S. Army Corps of Engineers official WRDA website:
<http://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/>.
2. Please ensure wide dissemination of this guidance. Questions regarding this implementation guidance should be directed to the Headquarters POC, Theodore Nettles, Realty Specialist, Real Estate Community of Practice, at (202) 761-5542 or theodore.l.nettles@usace.army.mil.

A handwritten signature in blue ink, appearing to read "J. Dalton".

JAMES C. DALTON, P.E.
Director of Civil Works

DISTRIBUTION:

COMMANDERS, REGIONAL BUSINESS AND PROGRAMS DIRECTORS
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PACIFIC OCEAN DIVISION, CEPOD
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SOUTH PACIFIC DIVISION, CESP
SOUTHWESTERN DIVISION, CESWD



DEPARTMENT OF THE ARMY
ASSISTANT SECRETARY OF THE ARMY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

APR 12 2019

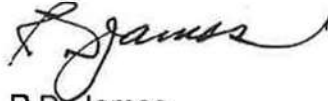
MEMORANDUM FOR THE COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Implementation Guidance for Section 1115, Water Resources Development Act of 2018, Property Acquisition

1. Section 1115 of the Water Resources Development Act of 2018 (WRDA 2018) directs that the Secretary shall first consider the minimum interest in real property necessary to support the water resources development project for which such interest is acquired. The Secretary shall consider, with respect to a State, the procedures that the State uses to acquire, or require the acquisition of, interests in land. Section 1115 of WRDA 2018 is enclosed.
2. It is the policy of U.S. Army Corps of Engineers (Corps), as provided in Engineer Regulation 405-1-12, Chapter 12, Paragraph 12-9, Determining the Appropriate Interest to Acquire, to acquire, or to require a non-Federal sponsor to provide, the minimum interest in real property necessary to support a project. Paragraphs 12-9 b-d provide guidance on which types of interests are to be used to support specific project types, with leeway provided that greater or lesser interests may be appropriate depending upon the purposes of a project or other circumstances relating to project requirements or a particular acquisition. The Corps will continue to follow Real Estate policy, as stated in ER 405-1-12.
3. In general, a non-Federal sponsor must have the authority and full capability under state law to acquire the interests identified in paragraph 12-9 of ER 405-1-12 as required for the project to enter into studies and projects with the Corps. State or local statutory restrictions on a non-Federal sponsor's capability alone will not be sufficient to justify deviation from the interests identified in paragraph 12-9 of ER 405-1-12. State procedures must comply with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, P.L. 91-646, and the implementing regulations found in Part 24 of Title 49 of the Code of Federal Regulations.
4. This guidance shall be transmitted to the appropriate Corps Division and District Commanders and posted to the Corps' WRDA website within five business days of receipt (written or electronic) from this office. Guidance shall be transmitted and posted as is and without additional guidance attached.

SUBJECT: Implementation Guidance for Section 1115, Water Resources Development Act of 2018, Property Acquisition

5. Questions regarding this implementation guidance should be directed to Gib Owen, Office of the Assistant Secretary of the Army for Civil Works at gib.a.owen.civ@mail.mil or 703-695-4641.



Enclosure

R.D. James
Assistant Secretary of the Army
(Civil Works)

cf: MG Scott Spellmon, Deputy Commanding General, Civil and Emergency Operations
James Dalton, Director of Civil Works

Water Resources Development Act of 2018, Section 1115. Property Acquisition

(a) **IN GENERAL.** In acquiring an interest in land, or requiring a non-Federal interest to acquire an interest in land, the Secretary shall, in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, first consider the minimum interest in real property necessary to support the water resources development project for which such interest is acquired.

(b) **DETERMINATION.** In determining an interest in land under subsection (a), the Secretary shall first consider a temporary easement or other interest designed to reduce the overall cost of the water resources development project for which such interest is acquired, reduce the time to complete such project, and minimize conflict with property owners related to such project.

(c) **PROCEDURES USED IN STATE.** In carrying out subsection (a), the Secretary shall consider, with respect to a State, the procedures that the State uses to acquire, or require the acquisition of, interests in land, to the extent that such procedures are generally consistent with the goals of a project or action.

(ENCLOSURE 2)

APPROVED STANDARD ESTATES

For cost shared projects, where the estate uses the term "operation and maintenance", use the term "operation, maintenance, repair, replacement and rehabilitation".

In any estate, enumerate the tract numbers only where two or more different estates are acquired in the same deed, complaint or declaration of taking. This applies to all approved estates listed. The estate recited in an exhibit of a complaint and in paragraph 3 of the declaration of taking will be double spaced. Estates in deeds are single spaced and indented or attached as an Exhibit and incorporated by reference.

1. FEE.

The fee simple title to (the land described in Schedule A) (Tract Nos.____, ____ and ____), subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines. ¹

2. FEE EXCEPTING AND SUBORDINATING SUBSURFACE MINERALS.

The fee simple title to (the land described in Schedule A) (Tract Nos. ____ , ____ and ____), subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; excepting and excluding from the taking all (coal) (oil and gas) in and under said land and all appurtenant rights used in connection with the exploration, development, production and removal of said (coal) (oil and gas), including any existing structures and improvements; provided, however, that the said (coal) (oil and gas) and appurtenant rights so excepted and excluded are hereby subordinated to the prior right of the United States to flood and submerge the land as may be necessary in the construction, operation and maintenance of the project; provided further that any exploration or development of said (coal) (oil and gas) in and under said land shall be subject to Federal and State laws with respect to pollution of waters of the reservoir, and provided that the type and location of any structure, improvement and appurtenance thereto now existing or to be erected or constructed on said land in connection with the exploration and/or development of said (coal) (oil and gas) shall be subject to the prior written approval of the District Commander, U.S. Army Engineer District, _____, or his/her duly authorized representative. ²

3. FEE EXCLUDING MINERALS (With Restriction on Use of the Surface).

¹ Where an outstanding interest in the subsurface mineral estate is part of a block ownership which is to be excluded from the taking, the following clause will be added IAW ER 405-1-11, 3-18g.(4): "excepting and excluding from the taking all interests in the (coal) (oil and gas) which are outstanding in parties other than the surface owners and all appurtenant rights for the exploration, development and removal of said (coal) (oil and gas) so excluded."

² See footnote 1

The fee simple title to the land, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; excepting and excluding all (coal) (oil and gas), in and under said land and all appurtenant rights for the exploration, development, production and removal of said (coal) (oil and gas), but without the right to enter upon or over the surface of said land for the for the purpose of exploration, development, production and removal therefrom of said (coal) (oil and gas).

4. FEE EXCLUDING MINERALS (With Restriction on Use of the Surface and Subordination to the Right to Flood).

The fee simple title to (the land described in Schedule A) (Tract Nos. ____, ____, and ____), subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; excepting and excluding from the taking all (coal) (oil and gas) in and under said land and all appurtenant rights for the exploration, development, production and removal of said (coal) (oil and gas), but without the right to enter upon or over the surface of said land for the purpose of exploration, development, production and removal therefrom said (coal) (oil and gas); provided, however, that the said (coal) (oil and gas) and appurtenant rights so excepted and excluded are subordinated to the prior right of the United States to flood and submerge the land in connection with the operation and maintenance of the _____ project.

5. FLOWAGE EASEMENT (Permanent Flooding).

The perpetual right, power, privilege and easement permanently to overflow, flood and submerge (the land described in Schedule A) Tract Nos. _____, _____ and _____), (and to maintain mosquito control,) in connection with the operation and maintenance of the project as authorized by the Act of Congress approved _____, and the continuing right to clear and remove brush, debris and natural obstructions which, in the opinion of the representative of the United States in charge of the project, may be detrimental to the project, together with all right, title and interest in and to the timber, structures and improvements situate on the land ³ (excepting _____, (here identify those structures not designed for human habitation which the District Engineer determines may remain on the land)); provided that no structures for human habitation shall be constructed or maintained on the land, that no other structures shall be constructed or maintained on the land except as may be approved in writing by the representative of the United States in charge of the project, and that no excavation shall be conducted and no landfill placed on the land without such approval as to the location and method of excavation and/or placement of landfill; ⁴ the above estate is taken

³ Any structures existing in areas that will be allowed to remain must be evaluated using the same criteria that would be used to grant permission for a new structure to be placed in the easement, in coordination with the operational office.

⁴ If sand and gravel or other quarriable material is in the easement area and the excavation thereof will not interfere with the operation of the project, the following clause will be added: "excepting that excavation for the purpose of quarrying (sand) (gravel) (etc.) shall be permitted, subject only to such approval as to the placement of overburden, if any, in connection with such excavation;"

subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with the use of the project for the purposes authorized by Congress or abridging the rights and easement hereby acquired; provided further that any use of the land shall be subject to Federal and State laws with respect to pollution.

6. FLOWAGE EASEMENT (Occasional Flooding).

The perpetual right, power, privilege and easement occasionally to overflow, flood and submerge (the land described in Schedule A) (Tract Nos. _____, _____ and _____), (and to maintain mosquito control,) in connection with the operation and maintenance of the project as authorized by the Act of Congress approved _____, together with all right, title and interest in and to the structure; and improvements now situated on the land, except fencing ⁵(and also excepting _____ (here identify those structures not designed for human habitation which the District Engineer determines may remain on the land)) ⁶; provided that no structures for human habitation shall be constructed or maintained on the land, that no other structures shall be constructed or maintained on the land except as may be approved in writing by the representative of the United States in charge of the project, and that no excavation shall be conducted and no landfill placed on the land without such approval as to the location and method of excavation and/or placement of landfill; ⁷ the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with the use of the project for the purposes authorized by Congress or abridging the rights and easement hereby acquired; provided further that any use of the land shall be subject to Federal and State laws with respect to pollution.

7. FLOWAGE EASEMENT (Portions of Land to be Subjected to Permanent Inundation and Portions to be Subjected to Occasional Flooding).

The perpetual right, power, privilege and easement in, upon, over and across (the land described in Schedule "A") (Tract Nos. _____, _____ and _____) for the purposes set forth below:

⁵ See footnote 3.

⁶ Where substantial residential structures exist in areas subject to very infrequent flooding, and will not interfere with project operations, the following clause may be substituted, however, leaving these structures in place must be evaluated using the same criteria that would be used to grant permission for a new residential structure to be placed in the easement: Insert "(and also excepting the structure(s) now existing on the land, described as _____, which may be maintained on the land provided that portion of the structure(s) located below elevation _____ feet, mean sea level, shall be utilized for human habitation to the extent that sleeping accommodations will be maintained therein)". The next clause would then be modified to read "provided that no other structures for"

⁷ See footnote 4

a. Permanently to overflow, flood and submerge the land lying below elevation _____, (and to maintain mosquito control,) in connection with the operation and maintenance of the project for the purposes as authorized by the Act of Congress approved _____, together with all right, title and interest in and to the timber and the continuing right to clear and remove any brush, debris and natural obstructions which, in the opinion of the representative of the United States in charge of the project may be detrimental to the project.

b. Occasionally to overflow, flood and submerge the land lying above elevation _____, (and to maintain mosquito control,) in connection with the operation and maintenance of said project.

Together with all right, title and interest in and to the structures and improvements now situated on the land, except fencing above elevation _____ (and also excepting _____, (here identify those structures not designed for human habitation which the District Engineer determines may remain on the land))⁸ provided that no structures for human habitation shall be constructed or maintained on the land, that no other structures shall be constructed or maintained on the land except as may be approved in writing by the representative of the United States in charge of the project, and that no excavation shall be conducted and no landfill placed on the land without such approval as to the location and method of excavation and/or placement of landfill;⁹ the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with the use of the project for the purposes authorized by Congress or abridging the rights and easement hereby acquired; provided further that any use of the land shall be subject to Federal and State laws with respect to pollution.

8. CHANNEL IMPROVEMENT EASEMENT.

A perpetual and assignable right and easement to construct, operate, and maintain channel improvement works on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____) for the purposes as authorized by the Act of Congress approved _____, including the right to clear, cut, fell, remove and dispose of any and all timber, trees, underbrush, buildings, improvements and/or other obstructions therefrom; to excavate: dredge, cut away, and remove any or all of said land and to place thereon dredge or spoil material; and for such other purposes as may be required in connection with said work of improvement; reserving, however, to the owners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

⁸ see footnote 3

⁹ see footnote 4

9. FLOOD PROTECTION LEVEE EASEMENT.

A perpetual and assignable right and easement in (the land described in Schedule A) (Tract Nos, _____, _____ and _____) to construct, maintain, repair, operate, patrol and replace a flood protection (levee) (floodwall) (gate closure) (sandbag closure), including all appurtenances thereto; reserving, however, to the owners, their heirs and assigns, all such rights and privileges in the land as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

10. DRAINAGE DITCH EASEMENT.

A perpetual and assignable easement and right-of-way in, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____) to construct, maintain, repair, operate, patrol and replace a drainage ditch, reserving, however, to the owners, their heirs and assigns, all such rights and privileges in the land as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

11. ROAD EASEMENT.

A (perpetual [exclusive] [non-exclusive]and assignable) (temporary) easement and right-of-way in, on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____) for the location, construction, operation, maintenance, alteration replacement of (a) road(s) and appurtenances thereto; together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions and other vegetation, structures, or obstacles within the limits of the right-of-way; (reserving, however, to the owners, their heirs and assigns, the right to cross over or under the right-of-way as access to their adjoining land at the locations indicated in Schedule B);¹⁰ subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

12. RAILROAD EASEMENT.

A perpetual and assignable easement and right-of-way in, on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____) for the location, construction, operation, maintenance alteration and replacement of a railroad and appurtenances thereto; together with the right to trim, cut, fell and remove therefrom all

¹⁰ *The parenthetical clause maybe deleted, where necessary; however, the use of this reservation may substantially reduce the liability of the Government through reduction of severance damages and consideration of special benefits; therefore, its deletion should be fully justified. Also, access may be restricted to designated points as in Estate No. 12.*

trees, underbrush, obstructions, and other vegetation, structures, or obstacles within the limits of the right-of-way; (reserving, however, to the landowners, their heirs and assigns, the right to cross over or under the right-of-way as access to their adjoining land at the locations indicated in Schedule B;)¹¹ subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

13. UTILITY AND/OR PIPELINE EASEMENT.

A perpetual and assignable easement and right-of-way in, on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____), for the location, construction, operation, maintenance, alteration; repair and patrol of (overhead) (underground) (specifically name type of utility or pipeline); together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions and other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

14. BORROW EASEMENT.

A perpetual and assignable right and easement to clear, borrow, excavate and remove soil, dirt, and other materials from (the land described in Schedule A) (Tract Nos. _____, _____ and _____);¹² subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges in said land as may be used without interfering with or abridging the rights and easement hereby acquired.

15. TEMPORARY WORK AREA EASEMENT.

A temporary easement and right-of-way in, on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____), for a period not to exceed _____, beginning with date possession of the land is granted to the United States, for use by the United States, its representatives, agents, and contractors as a (borrow area) (work area), including the right to (borrow and/or deposit fill, spoil and waste material thereon) (move, store and remove equipment and supplies, and erect and remove temporary structures on the land and to perform any other work necessary and incident to the construction of the _____ Project, together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions, and any other

¹¹ *The use of this reservation clause may substantially reduce the liability of the Government through reduction of severance damages.*

¹² *The easement estate may be limited as to time, depending upon project requirements.*

vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

16. TEMPORARY EASEMENT FOR EXPLORATION.

A temporary easement in, on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____), for a period not to exceed _____, beginning with date possession of the land is granted to the United States, for use by the United States, its representatives, agents, and contractors, to survey, appraise, conduct test borings, and conduct other exploratory work necessary to the design of a public works project; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however to existing easements for public roads and highways, public utilities, railroads and pipelines.

17. LEASEHOLD ESTATE.

A term for years ending _____, extendible for yearly periods thereafter, at the election of the United States, until _____, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof, together with the right to remove, within a reasonable time after the expiration of the term taken, or any extension thereof, any and all improvements and structures heretofore or hereafter placed thereon by or for the United States; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.¹³

18. EXTINGUISHMENT OF RIGHTS IN CEMETERY OR EXTINGUISHMENT OF MINERAL RIGHTS.

All outstanding rights, title and interest in (the land described in Schedule A) (Tract Nos. _____, _____ and _____), subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

19. RESTRICTIVE EASEMENT.

A perpetual and assignable easement for the establishment, maintenance, operation and use for a (restricted) (safety) area in, on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____), consisting of the right to prohibit human habitation; the right to remove buildings presently or hereafter being used for human habitation; the right to prohibit gatherings of more than twenty-five (25) persons;

¹³ *Leasehold estate is for condemnation.*

the right to post signs indicating the nature and extent of the Government's control; and the right of ingress and egress over and across said land for the purpose of exercising the rights set forth herein; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired.

20. RIGHT OF ENTRY FOR SURVEY AND EXPLORATION.

An assignable easement, in, on, over and across the land described in Exhibit "A" for a period of () months beginning with the date possession of the land is granted to the United States, consisting of the right of the United States, its representative, agents, contractors and assigns to enter upon said land to survey, stake out, appraise, make borings; and conduct tests and other exploratory work necessary to the design of a public works project; together with the right to trim, cut, fell, and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles as required in connection with said work; subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowner(s), their heirs, executors, administrators, successors and assigns, all such right, title, interest and privilege as may be used and enjoyed without interfering with or abridging the rights and easement hereby acquired.

21. BANK PROTECTION EASEMENT.

A perpetual and assignable easement and right-of-way in, on, over and across the land hereinafter described for the location, construction, operation, maintenance, alteration, repair, rehabilitation and replacement of a bank protection works, and for the placement of stone, riprap and other materials for the protection of the bank against erosion; together with the continuing right to trim, cut, fell, remove and dispose therefrom all trees, underbrush, obstructions, and other vegetation; and to remove and dispose of structures or obstructions within the limits of the right-of-way; and to place thereon dredged, excavated or other fill material, to shape and grade said land to desired slopes and contour, and to prevent erosion by structural and vegetative methods and to do any other work necessary and incident to the project; together with the right of ingress and egress for such work; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however to existing easements for public roads and highways, public utilities, railroads and pipelines.

22. TEMPORARY WELL AND PIPELINE EASEMENT

A temporary and assignable easement in, on, over and across (the land described in Schedule "A") (Tract Nos.____, _____, and _____) for a period not to exceed

_____, beginning (date)(with the date possession is granted to the United States in this proceeding {or date of deed}), and terminating (date), (with the earlier of the completion of the remediation or the filing in the local land records by the representative of the United States in charge of the Project of a notice of termination,) to locate, construct, operate, maintain, repair, replace, and/or remove (a) (monitoring) (injection) (extraction) well(s), pipeline(s) and appurtenances thereto; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

23. TEMPORARY OR PERPETUAL WELL EASEMENT.

A (perpetual and assignable)(temporary) easement and right-of-way in, on, over and across (the land described in Schedule A)(Tract Nos. ____, ____, and ____) (for a period not of ____ years beginning with (date) (the date this instrument is accepted by the United States)(the date possession of the land is granted to the United States) for use by the United States, its representatives, agents and contractors for the construction, operation, maintenance, alteration, repair, monitoring and removal of (monitoring)(injection)(extraction) wells, pipelines and appurtenant facilities and to perform any other work necessary in connection with the _____ Project, together with the continuing right to trim, cut, fell and remove therefrom all trees, underbrush, other vegetation, structures or obstructions within the limits of the rights-of-way, reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

24. ROCK ANCHOR EASEMENT.

A perpetual and assignable right and easement to construct, operate and maintain underground anchors or tie-backs under and through Tract Nos. ____, ____, and ____, where needed, as part of the _____ Project, with such anchors or tie-backs installed from (name of stream or river) located at a minimum, ____ feet below ground level; limited, however, to such rights and easement hereby acquired as may be used without disturbing the surface of the land and without interfering with or abridging the surface owner's right to use the surface of the land except to the extent the surface owner's use does not include removal, excavating or constructing around the anchor or tie-back; subject however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

25. SNAGGING AND CLEARING EASEMENT.

A perpetual and assignable right and easement on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____,) for the purposes of occasionally conducting snagging and clearing operations along the banks of the

_____, including the right to trim, cut, fell, remove and dispose of any and all trees, brush, obstacles or other vegetation, except trees having a diameter-exceeding 8 inches measured at _____ height; reserving, however, to the landowners, their heirs and assigns all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

26. PERPETUAL BEACH STORM DAMAGE REDUCTION EASEMENT

A perpetual and assignable easement and right-of-way in, on, over and across (the land described in Schedule A) (Tract No. _____) for use by the (Project Sponsor), its representatives, agents, contractors, and assigns, to construct; preserve; patrol; operate; maintain; repair; rehabilitate; and replace; a public beach [a dune system] and other erosion control and storm damage reduction measures together with appurtenances thereto, including the right to deposit sand; to accomplish any alterations of contours on said land; to construct berms [and dunes]; to nourish and renourish periodically; to move, store and remove equipment and supplies; to erect and remove temporary structures; and to perform any other work necessary and incident to the construction, periodic renourishment and maintenance of the (Project Name), together with the right of public use and access; [to plant vegetation on said dunes and berms; to erect, maintain and remove silt screens and sand fences; to facilitate preservation of dunes and vegetation through the limitation of access to dune areas;] to trim, cut, fell, and remove from said land all trees, underbrush, debris, obstructions, and any other vegetation, structures and obstacles within the limits of the easement (except_____); [reserving, however, to the grantor(s), (his) (her) (its) (their) (heirs), successors and assigns, the right to construct dune overwalk structures in accordance with any applicable Federal, State or local laws or regulations, provided that such structures shall not violate the integrity of the dune in shape, dimension or function, and that prior approval of the plans and specifications for such structures is obtained from the (designated representative of the Project Sponsor) and provided further that such structures are subordinate to the construction, operation, maintenance, repair, rehabilitation and replacement of the project; and further] reserving to the grantor(s), (his) (her) (its) (their) (heirs), successors and assigns all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby acquired; subject however to existing easements for public roads and highways, public utilities, railroads and pipelines.

27. STANDARD TEMPORARY WORK AREA EASEMENT (Imminent Channel Closure Emergency).

A temporary easement and right-of-way in, on, over and across (the land described in Schedule A) (Tracts Nos. _____, _____ and _____), for a period of [enter months to

match dredge contract period of performance not to exceed five years], beginning with ("the date of this instrument" *for purchases*) ("the date possession of the land is granted to the United States" *for condemnations*), for use by the United States, its representatives, agents, and contractors as a work area, including the right to deposit fill, spoil and waste material thereon, move, store and remove equipment and supplies, and to perform any other work necessary and incident to the use of the land for placement of dredged material from the [*name of the federal navigation project channel and include river miles or stationing if possible*], together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines. ¹⁴

28. STANDARD TEMPORARY WORK AREA EASEMENT (Beneficial Use By Others).

A temporary easement and right-of-way in, on, over and across (the land described in Schedule A) (Tracts Nos. _____, _____ and _____), for a period of [*enter months of easement term not to exceed five (5) years*], beginning with ("the date of this instrument" *for purchases*) ("the date possession of the land is granted to the United States" *for condemnations*), for use by the United States, its representatives, agents, and contractors as a dredged material placement area, including the right to deposit dredged material thereon, move, store and remove equipment and supplies, and to perform any other work necessary and incident to the use of the land for placement of dredged material from the [*name the federal navigation channel and include river miles or stationing*], together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines. ¹⁵

¹⁴ Example has been drafted to include only those affirmative rights from the standard estate required to support placement of dredged material. This is a lesser estate (exception to fee) approved for use in the case of imminent channel closure emergency events per CEMP-CR Memo dated 23 May 2023.

¹⁵ Example has been drafted to include only those affirmative rights from the standard estate required to support placement of dredged material for beneficial use by others. This is a lesser estate (exception to fee) approved for use in the case of upland placement for beneficial use by others per CEMP-CR Memo dated 23 May 2023.

Appendix B: Page Excerpts from Chapter 12, ER 405-1-12

12-9. Determining the Appropriate Interest to Acquire.

a. General. It is the policy of USACE to acquire, or to require a non-Federal sponsor to provide, the minimum interest in real property necessary to support a project. The interests described in the following paragraphs have been determined to represent the minimum interest generally required to support the described purposes or features and must be utilized unless otherwise approved as described in subparagraph e of this paragraph. Greater or lesser interests may be appropriate depending upon the purposes of a project or other circumstances relating to project requirements or a particular acquisition.

b. Fee Title. Generally, fee title is required for the following:

- (1) dam sites;
- (2) lock and dam sites;
- (3) disposal and borrow areas required for future maintenance work;
- (4) public access areas;
- (5) recreation; and
- (6) fish and wildlife mitigation lands, ecosystem restoration, and other environmental purposes. However, a lesser, or easement estate, may be appropriate based on the extent of interest required for the operation or requirements of a project.
- (7) disposal areas located on fast land that are required for commercial navigation projects for a harbor or inland harbor.

c. Permanent Easements. Generally, permanent easements are required for the following:

- (1) levees, floodwalls and other permanent structures;
- (2) flowage areas;
- (3) ponding areas for dry dams;
- (4) channel rectification works and adequate access thereto;
- (5) areas impacted by induced flooding where the impact rises to the level of a taking;
- (6) roads;
- (7) waterway improvements and the right to permanently flood areas needed for navigation pools;
- (8) the construction and maintenance of aids to navigation (the location and extent of land required for aids to navigation shall be coordinated by the District Commander with the local Coast Guard District Commander at the time the land is being obtained).

d. Temporary Easements. Generally, temporary easements are required for the following:

- (1) adequate access and work areas required during construction of the project;
- (2) disposal areas for all projects other than commercial navigation projects for a harbor or inland harbor if needed only to support construction; and
- (3) Borrow Areas. While a temporary easement is generally required to

support borrowing of materials, it is noted that small amounts of borrow materials, or disposal capacity, may sometimes be supplied by the construction contractor through use of a readily available commercial site. If so determined by an analysis conducted by PM, Engineering, Real Estate and other District and non-Federal sponsor offices, and if no other constraints exist, the construction contract solicitation documents should clearly request bids therefor and provision of such materials or capacity by the construction contractor would be in the nature of a construction item not LERRD (lands, easements, rights-of-way, relocations, and dredged or excavated material disposal areas). In no instance, however, should a contractor be required to provide lands, easements or rights-of-way (LER) for the project in support of borrow or disposal.

e. Approval Authority. Unless approved as part of a Real Estate Plan (REP) contained in an approved decision document for the project, requests to deviate from application of the interests required by subparagraphs b., c., or d. of this paragraph, together with adequate justification, must be forwarded in writing through Division to HQUSACE (ATTN: CERE-AP) for coordination, review and approval.

12-10. Determining the Appropriate Estate.

a. Meaning. The term "estate" as used in this chapter means the written description of the type, nature, and extent of the real property interest that is required to support the construction, operation, or maintenance of a project.

b. Standard Estates. Standard estates approved for use in either full Federal or cost shared projects are contained in Chapter 5 of this regulation. Once the appropriate interest is determined through application of the requirements of paragraph 12-9 of this chapter, the corresponding standard estate must be used if it is among those listed in Chapter 5.

c. Non-Standard Estates. Where there is no corresponding standard estate for the interest to be required, or where changes to the corresponding standard estate (or previously approved non-standard estate) are desired, a non-standard estate must be drafted and approved. The District Chief of Real Estate may approve non-standard estates if they serve the intended project purpose, substantially conform with and do not materially deviate from the corresponding standard estate contained in Chapter 5, and do not increase the costs nor potential liability of the Government. Changing an estate from easement to fee, or vice versa, or altering an estate so as to affect project purposes, is not within the scope of the District's approval authority. For all non-standard estates not within the scope of District's approval authority, approval may be obtained either by placing the body of the nonstandard estate in the REP of a feasibility report or other study decision document that is approved by HQUSACE, or by request for approval forwarded prior to use of such estate through Division to HQUSACE (ATTN: CERE-A) for appropriate coordination, review, and final determination.

d. Coordination with Non-Federal Sponsor. Because a non-Federal sponsor is generally responsible for acquiring lands, easements, and rights of-way pursuant to state law and procedure, full coordination and consultation with the non-Federal sponsor must occur prior to the Government's determination of the interests and estates required for a cost shared project. These efforts should begin in the early stages of plan formulation and continue, as appropriate, to the conclusion of the acquisition process.

COASTAL PORTFOLIO JACKSONVILLE DISTRICT U.S. ARMY CORPS OF ENGINEERS

LEGEND

Flood Risk Management

- 27 - Constructed CSRM Segments
- 9 - Policy Compliant
- 12 - Not Policy Compliant
- 6 - Constructed with 50-year easements
- 0 - Potentially not Policy Compliant
- 3 - Authorized un-constructed CSRM Projects

