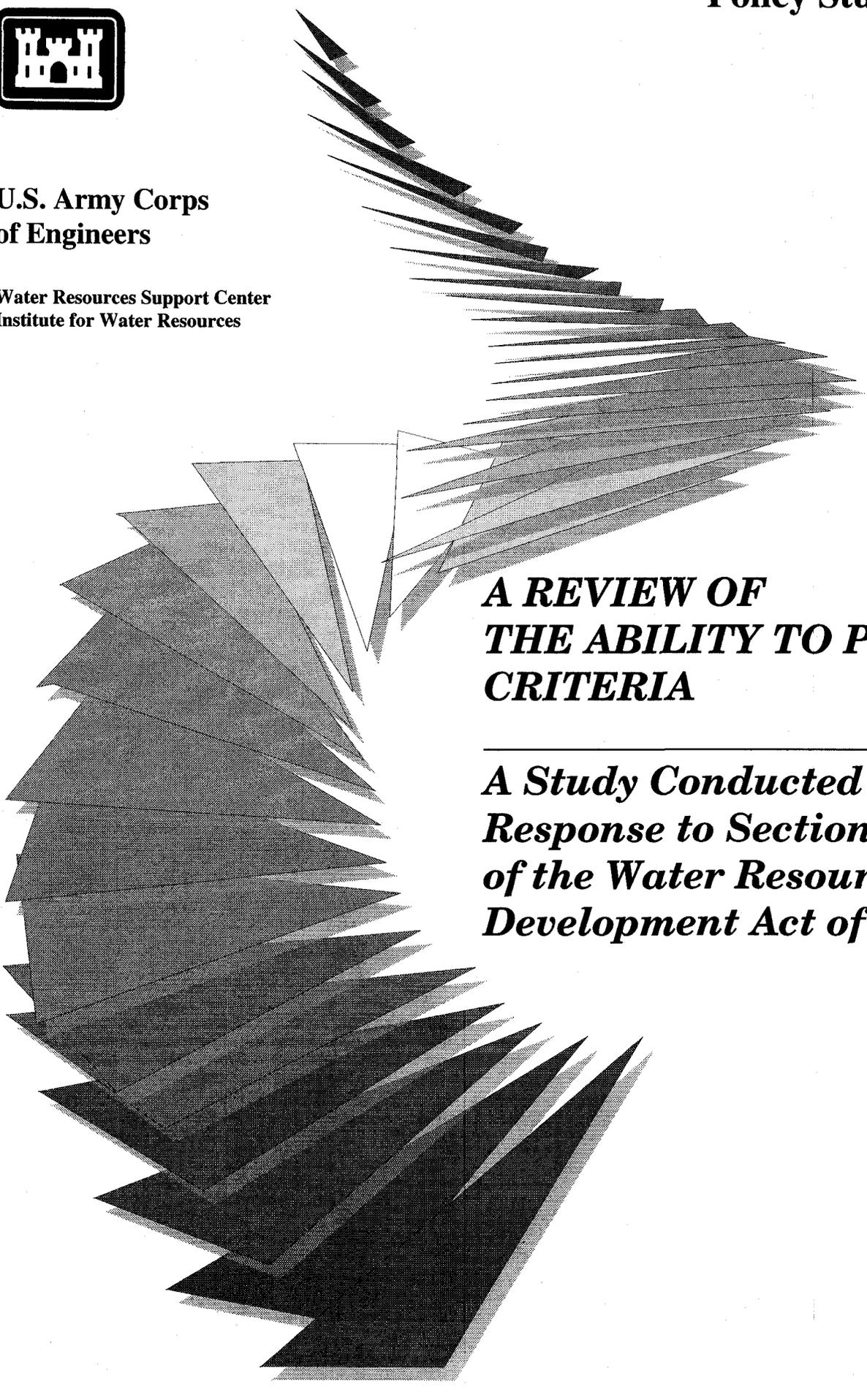




**U.S. Army Corps  
of Engineers**

**Water Resources Support Center  
Institute for Water Resources**

A large, abstract graphic composed of numerous overlapping, layered pages or documents. The pages are arranged in a fan-like shape, with the top edge curving upwards and the bottom edge curving downwards. The pages are shaded in various tones of gray, creating a sense of depth and movement. The overall effect is that of a thick stack of papers or a book being opened, with the pages fanning out.

***A REVIEW OF  
THE ABILITY TO PAY  
CRITERIA***

---

***A Study Conducted in  
Response to Section 202(b)  
of the Water Resources  
Development Act of 1996***

**U.S. Army Institute for Water Resources  
Policy and Special Studies Programs**

*The Corps of Engineers Institute for Water Resources (CEWRC-IWR) is part of the Water Resources Support Center in Alexandria Virginia. It was created in 1969 to analyze and anticipate changing water resources management conditions, and to develop planning methods and analytical tools to address economic, social, institutional, and environmental needs in water resources planning and policy. Since its inception, IWR has been a leader in the development of tools and strategies to plan and execute Corps water resources planning.*

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*Mr. Kyle E. Schilling  
Director, Institute for  
Water Resources  
703-428-8015*

*Department of the Army Corps of Engineers  
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# ***A REVIEW OF THE ABILITY TO PAY CRITERIA***

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A Study Conducted in Response to Section 202(b) of the  
Water Resources Development Act of 1996,  
Public Law 104-303, October 12, 1996

by

David J. Hill  
and  
Theodore M. Hillyer

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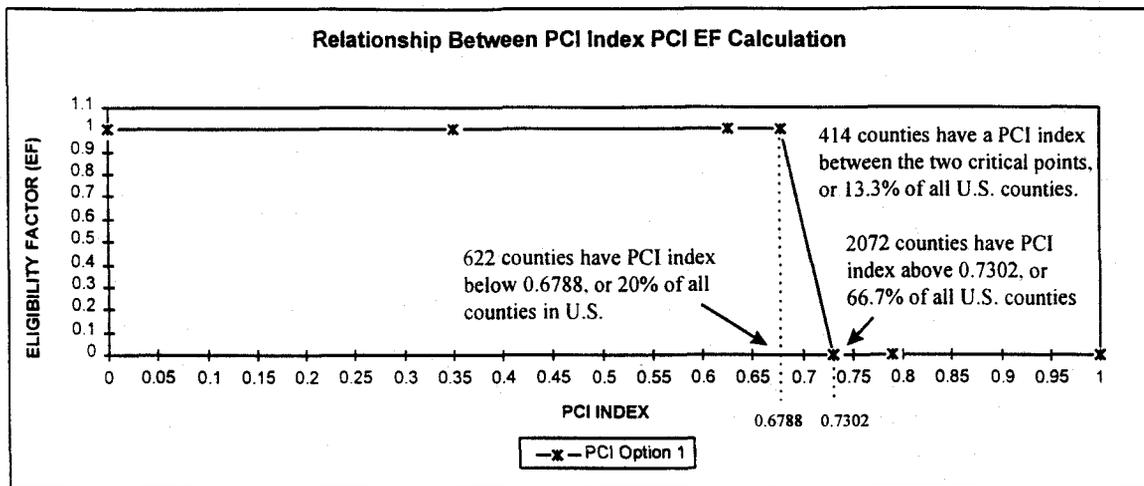
## **PREFACE AND ACKNOWLEDGMENTS:**

This report was produced as part of the Fiscal Year 1997 Policy Studies Program of the U.S. Army Corps of Engineer Institute for Water Resources. This program is administered by Eugene Z. Stakhiv, Chief, Policy and Special Studies Division, Institute for Water Resources (CEWRC-IWR-P). The main report was prepared by David J. Hill under the supervision of Michael R. Krouse, Chief, Technical Analysis and Research Division (CEWRC-IWR-R). Appendices B and C were prepared by Theodore M. Hillyer (CEWRC-IWR-P). The Director of IWR is Kyle E. Schilling.

The report presents the results of an exhaustive research effort focusing on the general form that an Ability to Pay Rule could take and the possible implications of such forms. The study worked within the guidelines established by Congress in Section 202(b) of Public Law 104-303 while recognizing earlier Ability to Pay Rule studies. As with any research effort, the goal of this study was to provide the necessary information for the development of specific policy. While this report provides a draft proposed rule, it is recognized that for implementation, such a rule needs to be reviewed through the Federal Register review process.

Instrumental in the development of this report was Mr. Harry M. Shoudy of the Policy Division, Directorate of Civil Works (CECW-AA). Mr. Shoudy, besides his editorial support, provided extensive technical oversight that was extremely valuable to the authors. Based on information developed for this study, Mr. Shoudy briefed the upper echelons of the Directorate of Civil Works, the Assistant Secretary of the Army (Civil Works), analysts at the Office of Management and Budget, and congressional staff. As questions and concerns were raised during these briefings, some of the subsequent analysis was directed to answer those concerns.

Figure 3: PCI Index and PCI EF



Note the inverse relationship between the PCI index and the PCI EF, as the value of the counties income increases relative to the nation, its PCI index increases, and the eligibility for reduction under the PCI test decreases. Essentially, the different PCI options simply change the two critical points and the slope of the line between these two points.

#### f. Per Capita Project Cost Criterion

For the county based non-Federal per capita project cost (PCPC) criterion, seven eligibility standards were considered. Full reduction standards were set at the \$100, \$150, \$200, and \$300 levels. In each of these four variations, full reductions of the 5 percent cash were granted for projects whose calculated county based non-Federal PCPC was at such a level or higher. In addition, three ranges for partial reductions were established at \$50, \$100, and \$150. These partial reductions were determined similarly to the method used in the partial reductions for the PCI eligibility standards. The partial reduction was calculated as a linear function taking on a value between zero and 100 percent, based on the relative position of where the county PCPC for the respective non-Federal sponsor falls between the established levels of PCPC equivalent with no reduction and full reduction for the appropriate PCPC eligibility standard. The seven PCPC eligibility standards are as follows:

PCPC Eligibility Standard No. 1. Full reduction of 5 percent cash if non-Federal PCPC exceeds \$200. Partial reduction if PCPC falls between \$50 and \$200.

PCPC Eligibility Standard No. 2. Full reduction of 5 percent cash if non-Federal PCPC exceeds \$150. Partial reduction if PCPC falls between \$50 and \$150.

PCPC Eligibility Standard No. 3. Full reduction of 5 percent cash if non-Federal PCPC exceeds \$100. Partial reduction if PCPC falls between \$50 and \$100.

PCPC Eligibility Standard No. 4. Full reduction of 5 percent cash if non-Federal PCPC exceeds \$200. Partial reduction if PCPC falls between \$100 and \$200.

PCPC Eligibility Standard No. 5. Full reduction of 5 percent cash if non-Federal PCPC exceeds \$200. Partial reduction if PCPC falls between \$150 and \$200.

PCPC Eligibility Standard No. 6. Full reduction of 5 percent cash if non-Federal PCPC exceeds \$300. Partial reduction if PCPC falls between \$150 and \$300.

PCPC Eligibility Standard No. 7. Full reduction of 5 percent cash if non-Federal PCPC exceeds \$300. Partial reduction if PCPC falls between \$100 and \$300.

Note that regardless of the application of any of either the PCI or the PCPC standards, the non-Federal sponsor must pay for the LERRD. That is, application of the standards is solely directed at the cash where the former test targets the cash in excess of the 5 percent minimum while the latter at the 5 percent minimum itself. Thus, it is possible as in the prior implemented ATP rule that all cash requirement may be waived.

#### **g. Generation of ATP Rule Options**

Matching all the possibilities of the four PCI eligibility standards to the seven PCPC eligibility standards generated twenty-eight ATP rule options. In addition, four other ATP rules options were created by eliminating the possibility for partial reductions. Thus, only full reductions were granted under each specific eligibility standard for each additional option. This was viewed as creating options that would only grant reductions to the most needy. These additional options were the following combination of PCI and PCPC eligibility standards:

- a1. Option 29. PCI: Lowest 20% counties, PCPC: >\$200.
- a2. Option 30. PCI: Lowest 20% counties, PCPC: >\$300.
- a3. Option 31. PCI: Lowest 10% counties, PCPC: >\$200.
- a4. Option 32. PCI: Lowest 10% counties, PCPC: >\$300.

Note that each of these more stringent options are subsets of the original twenty-eight options by excluding the possibility of eligibility for partial reduction. Thus, Option 32 would certainly be the minimum in terms of transfer of cost sharing from the Federal government to the non-Federal sponsor.

In sum, thirty-two ATP rule options were created and evaluated against the database of projects.

#### **h. Analysis of ATP Rule Options**

Each of the thirty-two ATP rule options were analyzed by applying the combination of the respective PCI and PCPC eligibility standards to the database of fifty-nine projects. The eligibility

**APPENDIX B**

**DRAFT ABILITY TO PAY RULE  
FOR THE FEDERAL REGISTER**

**D R A F T**

**BILLING CODE: 3710-92**

**DEPARTMENT OF DEFENSE**

Corps of Engineers, Department of the Army

33 CFR Part 241

Flood Control Cost-Sharing Requirements Under the Ability to Pay Provision

**AGENCY:** U.S. Army Corps of Engineers, DoD

**ACTION:** Proposed rule.

**SUMMARY:** The Department of the Army is proposing to amend the procedures in 32 CFR Part 241 for ability to pay determinations for flood control projects. The proposed amendment will establish an eligibility for reductions in the non-Federal cost using county per capita income and county per capita non-Federal project cost criterion. A final rule for flood control projects implementing section 103(m) of Public Law 99-662, 33 U.S.C. 2213m, was published in the Federal Register (60 FR 5133, Jan. 26, 1995). This proposed rule will amend these guidelines in accordance with the discretionary language in section 202(b) of Public Law 104-303, 33 U.S.C. 2213. The proposed rule applies only to flood control projects.

**DATES:** Submit comments on or before (Insert 30 days after date of publication in the FEDERAL REGISTER).

**ADDRESSES:** Address all comments concerning this proposed rule to Headquarters, U.S. Army Corps of Engineers, Attn: CECW-AA, Washington, D.C. 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. Harry Shoudy (202) 761-1977.

**SUPPLEMENTARY INFORMATION:** This notice and the draft Engineering Regulation which promulgates this rule (ER 1165- x-xxx) are available on the Army Corps of Engineers Homepage at: <http://www.usace.army.mil/inet/functions/cw/cecwa/cecwa.htm>. The draft Engineering Regulation provides the rule in its entirety, making it easier to read, while the draft rule in the Federal Register only covers changes to the existing rule.

**Summary of Legislation**

(a) History. Congress directed the Secretary of the Army (SA) to establish an ability to pay rule in PL 99-662, the Water Resources Development Act of 1986 (WRDA 86). The first ability to pay rule was published in the Federal Register (54 FR 40578, Oct. 2, 1989). Under the 1989 rule, the initial criterion for a reduction in the non-Federal share of project first cost was a benefits test.

Under this test, a project's benefit cost ratio was divided by 4 to establish a Benefits-Based Floor (BBF), or the minimum non-Federal cost share required. Therefore, if the benefit cost ratio is 1.6, any reductions under ability to pay could only apply to non-Federal costs in excess of 40 percent of the total project cost (1.6 divided by 4). In this example, if non-Federal project cost-sharing was already less than 40 percent, the sponsor would not be considered for an ability to pay reduction. Where the benefits test determines that a project is eligible for a reduction (greater than a 40 percent non-Federal share in this example), a second test was applied called the income test. The income test was used to determine the magnitude of the reduction. Under the income test, per capita incomes were calculated for each county and state where the project was located, and a combined per capita income index was calculated. If the combined per capita income (county income is given twice the weight of state income) places the project at or below the per capita income level for the bottom 20 percent of the counties in the nation, the project would get a full reduction of excess costs over the BBF. If the combined per capita income of the county within which the project would be located is between the bottom 20 to 33 1/3 percent of the counties in the nation, the project would get a partial reduction of excess costs over the BBF. For those combined indexes that fall between 20 to 33 1/3 percent, straight line interpretation was used to determine the percent reduction. Cost reductions could apply to either Lands, Easements, Rights of way, Relocations, or Disposal areas (LERRD) and/or cash contributions.

(b) Revisions to Rule. Congress directed a review of the existing rule in both PL 101-640, the Water Resource Development Act of 1990 (WRDA 90) and PL 102-580 (WRDA 92). In WRDA 90, Congress directed that the ability to pay provision should apply only to non-Federal cash contributions. However, before a new rule was finalized to implement this change, WRDA 92 was enacted. In WRDA 92, Congress reverted back to the WRDA 86 wording that did not limit the applicability to cash contributions only. As a result, a revised ability to pay rule was published in the Federal Register (60 FR 5133, Jan. 26, 1995). The 1995 rule maintained the two tests of the 1989 rule but added a third test designed to provide a reduction for unusually high non-Federal per capita cost projects. Reductions realized under this test were applied against the 5 percent cash requirement for projects with non-Federal cost-shares greater than 35 percent and per capita non-Federal project first costs greater than \$300. Projects would only receive a reduction under the high per capita cost test if the reduction is greater than that received under the benefits and income tests.

(c) 1996 Legislation. In section 202(b) of Public Law 104-303 (WRDA 96), Congress directed revisions to the ability to pay procedures and criteria. The regulation establishing the amended ability to pay rule was published in the Federal Register (-----). Pertinent provisions of section 202(b) follow.

(1) The ability to pay procedures currently in effect should continue to be used, however, such criteria and procedures shall be revised within one year after the date of enactment of PL 104-303 (October 12, 1996) to reflect the consideration of county per capita income and county per capita non-Federal project construction cost.

(2) The revisions may consider other criteria relating to the non-Federal interest's financial

ability to carry out its cost-sharing responsibilities, if it does not jeopardize qualification under the first two items.

(3) The revisions should not consider criteria (other than county per capita income and county per capita non-Federal construction cost) in effect on the day before the date of enactment of PL 104-303 (this mandates the use of county per capita income and county per capita non-Federal cost, and eliminates from the ability to pay rule the use of state per capita income and the BBF test).

(4) The amended rule may reduce the requirement that a non-Federal interest make a cash contribution for any project determined eligible (this limits the ability to pay reductions to cash only). Non-Federal sponsors are still required to provide LERRD.

(5) The amended rule shall apply to any project, or separable element thereof, for which a Project Cooperation Agreement (PCA) has been entered into after December 31, 1997.

(6) If requested by the non-Federal sponsor, a PCA executed on or before the date of enactment of PL 104-303 shall be amended to reflect the new ability to pay rule as long as a contract for construction has not been awarded on or before October 12, 1996.

(7) For projects authorized before October 12, 1996, if requested by the non-Federal sponsor, the criteria and procedures in effect on the day before enactment of PL 104-303 shall apply, i.e., the 1995 rule (60 FR 5133, Jan. 26, 1995).

### **Summary of Action**

This proposed rule amends the ability to pay determination for flood control projects to establish eligibility for reductions in the non-Federal cost-share using county Per Capita Income (PCI) data and county Per Capita Project Cost (PCPC) data (total non-Federal share of construction costs divided by the population of the county or counties included within the geographic location of the project). Under this amended rule, there can be a full reduction of the cash in excess of the required 5 percent cash contribution for those counties with a PCI falling in the lowest 10 percent of the counties in the nation and a partial reduction for those counties with a PCI between 10 percent and 50 percent. There can be a full reduction of the 5 percent cash contribution for those counties with a PCPC in excess of \$300, and a partial reduction for those counties with a PCPC between \$100 and \$300. Note that regardless of the application of either the PCI or PCPC cost criterion, the non-Federal sponsor must pay for the LERRD. That is, application of the standards is directed solely at cash contributions. While the PCI test targets the cash in excess of the 5 percent minimum cash contribution, the PCPC test targets the 5 percent minimum cash requirement itself. Thus, it is possible that all cash requirement may be waived but non-Federal sponsors are always required to provide LERRD.

### **Analysis of Alternatives**

(a) **Projects.** In order to evaluate various ability to pay rule options, a list of Corps of Engineers projects was developed. This list included all authorized projects from 1986 through 1996. Over 450 projects were initially considered. However, projects that had been constructed or were that were under construction, and those projects that have been deauthorized were excluded from the list. As data collection continued, more projects with problematic data or situations were

also removed from the list. This process eliminated all but 59 projects. For these remaining projects, which comprised the final data base, current cost estimates were obtained. This data base of projects was used as a representative population of potential future projects to assess budgetary impacts, non-Federal impacts, options for eligibility criteria, and the potential number of projects that might qualify under the amended ability to pay rule. Although the new cost-sharing percentages identified in section 202(a) of Public Law 104-303 (35 percent non-Federal) are not applicable to these projects, the non-Federal costs computed under PL 104-303 cost sharing was calculated and compared against non-Federal costs computed under Public Law 99-662 cost sharing (25 percent non-Federal) to assess the impacts of varying cost sharing on future projects. Combined, all projects evaluated had an estimated cost of almost \$2.2 billion.

(b) Per Capita Income Criterion. The county Per Capita Income (PCI) criterion, applies to a reduction in the cash in excess of the required minimum 5 percent cash. Four eligibility standards or options, were considered. Full reductions were considered for counties within the lowest 10 and 20 percent of the counties in the United States, while partial reductions were considered for the lowest 33 1/3 and 50 percent of the counties. It should be noted that the bottom 50 percent of the counties, when counties are arrayed in order by per capita income, only represent approximately 20 percent of the U.S. population. That is, the lowest 50 percent of the counties, or the lowest 1554 counties, contain less than 20 percent of the population of the United States. The PCI criterion is considered to be the more representative of the two criteria noted in Public Law 104-303 for assessing a county's need for reductions under ability to pay. The following four PCI eligibility standards were identified for evaluation purposes.

(1) Counties with PCI in the bottom 20 percent of the counties in the nation would receive a full reduction of the cash in excess of the 5 percent requirement. Counties with PCI between the bottom 20 percent and the bottom 33 1/3 percent would receive a partial reduction of the cash in excess of the minimum 5 percent.

(2) Counties with PCI in the bottom 20 percent of the counties in the nation would receive a full reduction of the cash in excess of the 5 percent requirement. Counties with PCI between the bottom 20 percent and the bottom 50 percent would receive a partial reduction of the cash in excess of the minimum 5 percent. This option extends the eligibility for a partial reduction to the lowest 50 percent of the counties, or 20 percent of the population.

(3) Counties with PCI in the bottom 10 percent of the counties in the nation would receive a full reduction of the cash in excess of the 5 percent requirement. Counties with PCI between the bottom 10 percent and the bottom 33 1/3 percent would receive a partial reduction of the cash in excess of the minimum 5 percent. This option is more stringent than the previous two, by allowing only the lowest 10 percent of the counties to be eligible for a reduction of the cash in excess of the 5 percent minimum.

(4) Counties with PCI in the bottom 10 percent of the counties in the nation would receive a full reduction of the cash in excess of the 5 percent requirement. Counties with PCI between the bottom 10 percent and the bottom 50 percent would receive a partial reduction of the cash in excess of the minimum 5 percent. This option maintains the stringent eligibility for a full reduction to the

lowest 10 percent of the counties while extending eligibility for partial reduction to the lowest 50 percent of the counties.

Note the following two aspects to each of these options. First, these PCI options only relate to reductions of the cash in excess of the 5 percent minimum requirement needed to achieve the minimum non-Federal cost share required by law. However, meeting the eligibility criteria may not necessarily amount to a reduction in non-Federal project costs. As an example, if the non-Federal sponsor is paying the minimum 5 percent cash requirement, plus providing lands, easements, rights-of-way, relocations, and disposal areas, and both these contributions equal or exceed the minimum non-Federal cost share required by law, there is no excess cash contribution, and no reduction in non-Federal costs can be provided even though the sponsor may qualify based on the county PCI. Second, partial reductions are calculated as a linear function taking on a value of between zero and 100 percent of the full reduction based on the relative position of where the county PCI falls between the set indexed PCI level equivalent with no reduction and full reduction.

(c) Per Capita Project Cost Criterion. The county Per Capita Project Cost (PCPC) criterion applies to a reduction in the required minimum 5 percent cash contribution. Seven eligibility standards or options were considered. Full reductions were considered at the \$100, \$150, \$200, and \$300 per capita levels, while three ranges for partial reductions were established at \$50, \$100, and \$150 levels. The seven PCPC eligibility standards are as follows:

- (1) Full reduction of 5 percent cash if non-Federal PCPC exceeds \$200 and a partial reduction if PCPC falls between \$50 and \$200;
- (2) Full reduction of 5 percent cash if non-Federal PCPC exceeds \$150 and a partial reduction if PCPC falls between \$50 and \$150;
- (3) Full reduction of 5 percent cash if non-Federal PCPC exceeds \$100 and a partial reduction if PCPC falls between \$50 and \$100;
- (4) Full reduction of 5 percent cash if non-Federal PCPC exceeds \$200 and a partial reduction if PCPC falls between \$100 and \$200;
- (5) Full reduction of 5 percent cash if non-Federal PCPC exceeds \$200 and a partial reduction if PCPC falls between \$150 and \$200;
- (6) Full reduction of 5 percent cash if non-Federal PCPC exceeds \$300 and a partial reduction if PCPC falls between \$150 and \$300;
- (7) Full reduction of 5 percent cash if non-Federal PCPC exceeds \$300 and a partial reduction if PCPC falls between \$100 and \$300.

Note that the partial reductions are determined similarly to the method used in the partial reductions for the PCI eligibility standards. The partial reductions are calculated as a linear function taking on a value between zero and 100 percent of the full reduction, based on the relative position of where the county PCPC falls between the established levels of PCPC equivalent with no reduction and full reduction.

(d) Generation of ATP Rule Options. Matching all the possibilities of the four PCI options to the seven PCPC options generated twenty-eight Ability to Pay (ATP) options. In addition, four

other ATP options were created by eliminating the opportunity for partial reductions. In summary, thirty-two ATP options were created and evaluated against the database of projects.

(e) Analysis of ATP Options. Each of the thirty-two ATP options were analyzed by applying the combination of the respective PCI and PCPC eligibility standards to the database of fifty-nine projects. The eligibility of each project under each option was determined. Then reductions in the non-Federal cost for each project under each option were calculated. The following statistics, concerning application of each option were calculated and used to evaluate the ATP options relative to one another:

- (1) Number of projects qualifying for a reduction (PCI test, PCPC test, Total);
- (2) Number of projects receiving a reduction (PCI test, PCPC test, Total). Recall that since the PCI test is used to reduce the amount of non-Federal cash in excess of the required 5 percent cash contribution, some projects may qualify but not actually receive a reduction because there is no cash over 5 percent;
- (3) Amount of reduction in non-Federal project costs (PCI test, PCPC test, Total);
- (4) The distribution of non-Federal cost reduction across the projects receiving a reduction;
- (5) The average non-Federal cost reduction per project (PCI test, PCPC test, Total);
- (6) The aggregate non-Federal cost share of all the projects in the database, the aggregate Federal cost share, and the difference in aggregate cost shares due to imposition of the respective ATP option.

Note that for comparison purposes, this process was performed twice; once when all cost shares between the Federal government and the non-Federal sponsor were in a 65%-35% metric, representing the new standard cost sharing rule of WRDA 96, and a second time in a 75%-25% metric, representing the old standard cost sharing rule of WRDA 86.

(f) Selected Option. The ATP option selected was the one that provides reductions for the maximum number of projects per dollar expended. The combination of PCI and PCPC options that achieve this goal is the PCI option that provides for full reduction of the cash in excess of the required 5 percent cash contribution for those counties with a PCI falling in the lowest 10 percent of the counties in the nation and a partial reduction for those counties with a PCI falling between 10 percent and 50 percent, and the PCPC option that grants full reduction of the 5 percent cash contribution for those counties with a PCPC cost in excess of \$300 and partial reduction for those counties with a PCPC between \$100 and \$300.

## **PROCEDURAL REQUIREMENTS**

### Executive Order (E.O.) 12866

The Secretary of the Army has determined that this proposed revision is not a “major” rule within the meaning of Executive Order (E.O.) 12866. If approved, this revision will not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State, or local governmental

agencies; or (3) have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of a United States-based enterprise to compete with foreign-based enterprise in domestic or export markets.

Regulatory Flexibility Act

This proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Collection of Information

This proposed rule contains no collection of information under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Executive Order 12612

The Corps has analyzed this proposed rule under principles and criteria in E.O. 12612 and has determined that this proposed rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12630

The Corps has determined that this proposed rule does not have "significant" taking implications. The proposed rule does not pertain to taking of private property interests, nor does it impact private property.

NEPA Statement

The Corps has determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

Unfunded Mandates Act of 1995

This proposed rule imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

**LIST OF SUBJECTS IN 33 CFR PART 241**

Community facilities, Flood control, Intergovernmental relations, Water resources.

For purposes set out in the preamble, 33 CFR Part 241 is amended as follows:

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

1. Amend the table of contents by deleting §§ 241.6 and 241.7 and adding the following:  
§ 241.6 Application of ability to pay.

§ 241.7 Amendment of the project cooperation agreement.

§ 241.8 Non-Federal option.

2. The authority citation is continued to read as follows:

AUTHORITY: as amended by Sec 202, Pub. L. 104-303, 110 Stat. 3673 (33 U.S.C. 2201 et seq.).

3. Revise §§ 241.1 and 241.2 to read as follows:

**§ 241.1 Purpose.**

This rule gives general instructions on the implementation of section 103(m) of the Water Resources Development Act of 1986, Pub. L. 99-662, as amended by section 201 of the Water Resources Development Act of 1992, Pub. L. 102-588 and by section 202(b) of the Water Resources Development Act of 1996, Pub. L. 104-303, for application to flood control projects, or separable elements thereof.

**§ 241.2 Applicability.**

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

4. Amend § 241.3, to revise the introductory language, delete paragraphs (c) through (e), add new paragraph (c), renumber paragraphs (f) through (i) as (d) through (g), and add citations to paragraphs (d) through (g) to read as follows:

**§ 241.3 References.**

References cited in paragraphs (a) through (c) of this section may be reviewed in your local library. References in paragraphs (d) through (g) of this section may be obtained from USACE Pub. Depot, CEIM-SP-D, 2803, 52nd Avenue, Hyattsville, MD 20781-1102.

\*\*\*\*\*

(c) Water Resources Development Act, 1996, Pub. L. 104-303, 110 Stat. 3673 (33 U.S.C. 2201 et. seq.).

(d) \*\*\* “General Credit for Flood Control.”

(e) \*\*\* “Flood Control Cost-Sharing Requirements under the Ability-to-Pay Provisions - Section 103(m) of Pub. L 99-662.”

(f) \*\*\* “Local Cooperation Agreements for New Start Construction Projects.”

(g) \*\*\* “Real Estate Handbook.”

5. Amend § 241.4, to redesignate paragraph (a) to (b) and revise all after the first sentence, redesignate paragraph (b) to (c) and revise the first sentence, redesignate paragraph (c) to (d) and revise the first and last sentences, redesignate paragraph (e) to (h) and revise the first sentence,

redesignate paragraph (g) to (i) and delete the second sentence, and insert new paragraphs (a), (e), (f), (g), and (j) through (n) to read as follows.

**§ 241.4 General policy.**

(a) The ability to pay test is designed to provide for reductions in the standard non-Federal cost-share for projects that place a financial burden on the non-Federal sponsor of the project. The amended rule permits a reduction for projects located in counties with a per capita income in the lowest 50 percent of the counties in the nation. The ability to pay test uses county per capita income as the indicator of the economic well being in the project area and county per capita non-Federal project first cost as a measure of the level of expense of the project to the project area.

(b) \*\*\* As a result of the application of the test, some projects will be cost-shared by the non-Federal interest at a lower level than the standard non-Federal share that would otherwise be required under the provisions of section 103 of Pub.L. 99-662 (33 U.S.C. 2213), as amended by section 202(a) of Pub. L. 104-303 (33 U.S.C. 2213). For structural projects authorized after Pub. L. 104-303 the standard non-Federal share of costs is a minimum of 35 percent and a maximum of 50 percent of the costs assigned to flood control. For these projects, the 35 percent minimum includes the LERRD required for flood control, a required 5 percent cash contribution, plus any additional cash needed to reach the 35 percent. For non-structural projects authorized after Pub. L. 104-303, the standard non-Federal share is 35 percent of the cost of the flood control measures. For these projects, the non-Federal sponsor is also required to provide LERRD but is not required to contribute the minimum 5 percent cash required for structural projects. If the LERRD exceed 35 percent, the excess cost becomes a Federal cost. If the LERRD are less than 35 percent, then a cash contribution is required to reach the 35 percent level.

(c) Section 103(m) of Pub. L. 99-662, as amended, requires that all cost-sharing agreements for flood control covered by the terms of section 103(a) or 103(b) of the law be subject to the ability to pay test. \*\*\*

(d) The ability to pay test shall be independent of any analysis of a project sponsor's ability to finance its ultimate share of project costs. \*\*\* The ability to pay test shall not be used to affect plan formulation, project scope, or to change budgetary priorities among projects competing for Federal funds.

(e) Any reductions in the level of non-Federal cost-sharing as a result of the application of this test will only be applied to the non-Federal cash contribution based on the total project construction costs. Non-Federal sponsors are required to provide LERRD.

(f) Non-Federal Operations, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R) responsibilities are unaffected by the ability to pay test.

(g) In applying the ability to pay test, the non-Federal share will not be reduced below 5 percent. The minimum contribution of 5 percent may be satisfied either through LERRD, a cash contribution, or a combination of LERRD and cash.

(h) When a project is eligible for credits as outlined in ER 1165-2-29, ref.

§ 241.3(d), the ability to pay test will be applied before any adjustments are made for credits. \*\*\*

(i) \*\*\*\*\*

(j) If in applying the Per Capita Income (PCI) and Per Capita Project Cost (PCPC) tests, the total non-Federal cost reduction for the project is less than \$10,000 for a specifically authorized project, or is less than \$3,000 for a continuing authority project, then the non-Federal project cost-share is not adjusted.

(k) Notwithstanding the previous paragraphs of this section, there is no requirement for non-Federal cost-sharing (cash and the value of lands, easements, rights-of-way, relocations, and suitable borrow and dredged or excavated material disposal areas that would normally be provided by the non-Federal sponsor) or a PCA when the administrative costs of negotiating, executing, or administering the PCA would exceed the non-Federal share of the project costs and are less than \$25,000 after applying the ability to pay reductions (section 221(a) of Pub. L. 91-611, as amended by section 220 of Pub. L. 104-303) (42 U.S.C. 1962d-5b(a)). Section 220 should not be interpreted to relieve the non-Federal sponsor of providing other items of local cooperation as required by law, regulation, and policy (e.g., hold and save; operate, maintain, repair, replace, or rehabilitate; Comprehensive Environmental Response, Compensation and Liability Act, etc.). Assurance to provide the required items of local cooperation would still be needed, but they would not have to be provided via a two-party agreement.

(l) Section 202(b)(3) of Pub. L. 104-303 (33 U.S.C. 2213) provides the discretionary authority to consider additional criteria relating to the non-Federal interest's financial ability to carry out its cost-sharing responsibilities, to the extent that the application of such criteria does not eliminate areas from eligibility for a reduction in the non-Federal share as determined by per capita income data and per capita non-Federal construction cost data. Based on this discretionary authority, the policy is that when projects have qualified for reductions, under both the per capita income and the per capita project cost ability to pay tests, the Secretary of the Army (SA) has the discretion to further reduce non-Federal costs if they are not already receiving a full reduction. This further reduction applies only to the non-Federal cash contribution and may be considered for those projects located in areas of national emphasis, for example, "American Heritage Rivers," "Brownfields" and "Enterprise Communities." In addition, the SA also has the discretion to grant up to a full reduction in the cash contribution in other unusual circumstances based on depressed economic conditions in the project area or the financial need of the sponsor. Where the sponsor is a different entity than a county or counties in which the project would be located, the per capita income and financial need of that sponsor may be considered in granting up to a full reduction if the county or counties have qualified for some reductions under both the PCI and the PCPC tests.

(m) In accordance with section 1156 of Pub. L. 99-662 (33 U.S.C. 2310), cost sharing requirements up to \$200,000 are waived for all studies and projects for the territories to include American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands. Cost sharing reductions under the ability to pay for these territories will only apply if the reductions are greater than the reduction provided under section 1156.

(n) For multipurpose projects, reductions under ability to pay only apply to the flood control component of the project. Therefore, appropriate allocations between purposes must be done before application of reductions under the ability to pay rule.

6. Revise § 241.5 to read as follows:

**§ 241.5 Procedures for estimating the alternative cost-share.**

(a) Step 1. County Per Capita Income Test.

(1) Projects may qualify for a reduction of cash in excess of the required 5 percent cash contribution, or for some fraction of this value, depending on a measure of county Per Capita Income (PCI) of the county or counties in which the project is to be located in relation to other counties in the United States. Counties with a PCI that is in the lowest 10 percent of the counties in the nation would qualify for a full reduction.

(2) To assure consistency, PCI data will be obtained by HQUSACE and distributed to all FOAs as new data become available. These PCI data will be supplied for counties or county equivalents such as independent cities, based upon the area distinctions defined by the U.S. Department of Commerce, Bureau of Economic Analysis for which per capita income estimates are calculated. The latest distributed data provided by HQUSACE shall be used until revised data are distributed. If the District Engineer's Report has already been provided to HQUSACE, revisions to the data can be made during preparation of the Chief of Engineer's Report at the Washington level.

(3) The PCI may be verified for any single county or county equivalent using the following procedures. For each of the three latest calendar years, determine the level of per capita income in the county, counties, or county equivalent where the project is to be located (the "project area"), and compare this to the national average of per capita income (U.S.=100). Source: U.S. Department of Commerce, Bureau of Economic Analysis as published yearly in the April Survey of Current Business.

(4) Calculate a Per Capita Income Eligibility Factor (PCI EF) for the project according to the following formula:

$$\text{PCI EF} = a - b \times (\text{project area factor}).$$

If the PCI EF is greater than or equal to one, the project is eligible for the full reduction of cash in excess of 5 percent. If the PCI EF is zero or less, the project is not eligible for a reduction of the cash in excess of 5 percent. If the PCI EF is between zero and one, the non-Federal cost share will be reduced by value of the PCI EF multiplied by the amount of cash in excess of 5 percent. For example, suppose for a given project that the cash in excess of 5 percent is \$100,000:

PCI EF  $\geq$  1, non-Federal share is reduced by \$100,000;

PCI EF  $\leq$  0, non-Federal share is not reduced;

0 < PCI EF < 1, non-Federal share is reduced by (PCI EF) X (\$100,000).

The values of the parameters *a* and *b* will be determined by HQUSACE and distributed to all FOAs. The parameter values will be based on the latest available data and set so that 10 percent of counties have a PCI EF of 1.0 or more (this currently represents counties with 2.6 percent of the population and 1.5 percent of the income of the United States), 40 percent of counties have a PCI EF between 1.0 and 0.0 (this currently represents counties with 14.5 percent of the population and 10.5 percent of the income of the United States), and 50 percent of the counties will have a PCI EF of 0.0 or less (this currently represent counties with 82.9 percent of the population and 88.0 percent of the income of the United States). Values will be adjusted periodically as new information becomes available.

(5) For projects to be located in two or more counties, cash required from the sponsor that is in addition to the 5 percent cash requirement will be allocated to each county relative to the percentage of the anticipated total project flood damage reduction benefits to be realized in each county. Note that this allocation is solely for the purpose of determining any qualification for cost reduction and not to suggest an allocation for non-Federal costs. The excess cash allocated to each county is then multiplied by the PCI EF for that county to arrive at the county's ability to pay cost reduction. These county cost reductions will be based on the individual qualification of each county consistent with the procedures identified in § 241.5(a)(4). The county cost reduction's are added together to arrive at the sponsors actual non-Federal cost reductions under the PCI test. This procedure is different from the past procedure of calculating a composite project area index by calculating a weighted average of each county's index numbers with the weights being equal to the percentage of flood damage reduction benefits received in each county. In the new procedure, those counties that would qualify for a reduction will no longer be penalized by being combined with those counties that would not qualify for a reduction. Under the new procedure, the project sponsor will receive some reduction under the ability to pay rule if any county within the project area qualifies for a reduction.

(6) For flood control projects located in Puerto Rico, Guam and other U.S. territories, the per capita income of each territory will be used in determining its qualification for a reduction under the PCI test. HQUSACE will use the latest per capita income information (available from the U.S. Department of Commerce, Bureau of Economic Analysis). However, where there is more up to date information for a territory, that information may be used if officially provided by the government of the territory. FOA's should provide these data, along with supporting documentation, to HQUSACE (ATTN: CECW-PD).

(7) For flood control projects located in and sponsored by Native American reservations, the PCI EF shall be calculated using information obtained from the Bureau of the Census, 1990 Census of Population, American Indian and Alaska Native Areas, Social and Economic Characteristics. For other Native American tribes or villages for which national published data is not available, use the county per capita income in which the tribe or village is located.

(b) Step 2. County Per Capita Non-Federal Cost of Construction Test.

(1) In addition to any reductions under the PCI test, projects may also qualify for a reduction of the full amount of the required 5 percent cash contribution, or for some fraction of this amount depending on a measure of the non-Federal share of construction costs.

(2) Since current county population data are readily available, FOA's will determine the population of the county or counties where the project is to be located for the latest calendar year for which information is available. Source: U.S. Department of Commerce, Bureau of Economic Analysis, as published yearly in the April Survey of Current Business.

(3) Using the population for the project area, divide the total non-Federal cost of construction (based on the fully funded cost estimate) by this population to calculate the non-Federal Per Capita Project Cost (PCPC). Note that the non-Federal cost used in this calculation should reflect any cost share reductions resulting from the application of the county per capita income test.

That is, the application of the county per capita project cost test must follow the application of the county per capita income test and includes those reductions.

(4) Calculate a Per Capita Project Cost Eligibility Factor (PCPC EF) for the project according to the following formula:

$$\text{PCPC EF} = c + d X \text{ (non-Federal per capita project cost).}$$

If the PCPC EF is greater than or equal to one, the project will receive a full reduction of the 5 percent cash. If the PCPC EF is zero or less, the project will not receive any reduction of the 5 percent cash. If the PCPC EF is between zero and one, the non-Federal cost share will be reduced by the value of the PCPC EF multiplied by the amount of the 5 percent cash. The values of the parameters  $c$  and  $d$  will be determined by HQUSACE. The parameter values will initially be set so that projects whose non-Federal per capita project cost equals or exceeds \$300 will have a PCPC EF of 1.0 or more, and such that projects whose non-Federal per capita project cost is greater than \$100 and less than \$300 will have a PCPC EF between 0.0 and 1.0. Projects whose non-Federal per capita project cost is \$100 or less will have a PCPC EF of 0.0 or less. These parameter values will be adjusted as necessary by HQUSACE to account for inflation.

(5) For flood control projects located in Puerto Rico, Guam, and other U.S. territories, the population of each (available from the Bureau of Economic Analysis) will be used in the calculation of non-Federal per capita project cost to determine its qualification for a reduction under the PCPC test. However, where there is more up to date information for a territory, that information may be used if officially provided by the government of the territory. FOA's should provide these data, along with supporting documentation, to HQUSACE (ATTN: CECW-PD).

(6) For flood control projects located in and sponsored by Native American reservations, the PCPC EF shall be calculated using information obtained from the Bureau of the Census, 1990 Census of Population, American Indian and Alaska Native Areas, General Population Characteristics. For other Native American tribes or villages for which national published data are not available, use the county population statistics in which the tribe or village is located.

(c) Special Circumstances. For projects that meet the requirements of § 241.4(1), sponsors may request that the SA give consideration for a full reduction in the cash contribution. The request shall include documentation of the basis for such special consideration. FOA's shall forward requests for further reductions to HQUSACE (ATTN: CECW-A). In addition to data provided by the non-Federal sponsor to support the request, such requests shall include an evaluation of such data and division and district recommendations.

7. Delete § 241.6.

8. Revise § 241.7, to read as follows:

**§ 241.6 Application of ability to pay.**

(a) A preliminary ability to pay test will be applied during the feasibility study phase of any proposed flood control project. If the non-Federal cost share under the ability to pay rule is lower than the standard share, it will be used for budgetary and other planning purposes. The

preliminary ability to pay test should be applied at the draft report stage and will be evaluated as part of any Washington level policy review meetings on the project. Any requests for additional reductions in the non-Federal share (see § 241.5(c), Special Circumstances) should be made at this time.

(b) Both standard and reduced (ability to pay) non-Federal cost sharing will be displayed in the District Engineer's Report. The Chief of Engineers will recommend a reduced share if appropriate. The SA will recommend reduced non-Federal cost sharing to the Congress in accordance with the criteria and procedures as described in this rule.

(c) The final ability to pay test will be made at the time the PCA between the Department of the Army and the non-Federal sponsor is signed. The document supporting the PCA will present the PCI EF, the PCPC EF, the formulas used in determining these values as described in this rule, the standard non-Federal cost share, and the non-Federal cost share calculated under the ability to pay rule. For structural flood control projects, the standard level of cost-sharing will not be known until the end of the project (since the standard level as specified in section 103(a) of Pub. L. 99-662 (33 U.S.C. 2213) includes LERRD). In this case, the ability to pay the non-Federal share will be determined using estimated costs.

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

(1) The revised non-Federal share will be specified in the PCA (while the dollar value may change, there will be no recalculation of this percentage share once the PCA is signed).

(2) An exhibit will be attached to the PCA which will summarize the appropriate factors and formula contained in the approved supporting document.

(e) A final accounting of the actual non-Federal costs will occur after the project is constructed and project costs have been fully identified. If at that time, the standard non-Federal share based on actual costs is less than the ability to pay share specified in the PCA, the standard share will apply.

(f) Structural Projects.

(1) Based on the ability to pay tests performed in accordance with this rule, (see § 241.5) the non-Federal cash reductions are estimated and the resulting non-Federal cost-share is determined.

(2) Notwithstanding the reductions in cash from applying the ability to pay procedures, (see paragraph (f)(1) of this section) each non-Federal sponsor is required to provide LERRD and must pay 5 percent of total project flood control costs. For structural projects, 50 percent is the maximum non-Federal cost share.

(g) Non-Structural Projects.

(1) This procedure is only to be applied if these projects are indeed separate projects unto themselves and not part of a structural project solution. If the latter is true, then for purposes of ability to pay reductions, the costs associated with these project features should be included under the costs of the structural project solution when the structural ability to pay test is applied.

(2) As with structural projects, any reductions in the non-Federal cost share resulting from the application of the ability to pay test is to the non-Federal cash contribution. That is, the non-

Federal sponsor must provide LERRD. However, unlike structural projects, the maximum non-Federal cost share for non-structural projects is 35 percent.

(3) Relocation and Evacuation Projects (where structures are to be physically removed from the flood plain). Calculate the PCI EF following procedures in § 241.5(a). If the resulting PCI EF is greater than or equal to one, indicating a full reduction, all cash required is eliminated. If the PCI EF is between zero and one, that percentage of the cash required is eliminated. If the PCI EF is less than or equal to zero, then no cash is reduced under the county per capita income test for non-structural projects. If the non-Federal sponsor still has a cash requirement after application of the county per capita income test, follow the procedures in § 241.5(b) concerning application of the county per capita non-Federal project cost test for calculating the PCPC EF. Once again, the per capita income test is to be applied before the per capita project cost test so that any reductions in the non-Federal cost share resulting from the first test are accounted for in the application of the second test. If the PCPC EF is greater than or equal to one, all remaining cash is eliminated. If the PCPC EF is between zero and one, that percentage of the remaining cash is eliminated. If the PCPC EF is less than or equal to zero, there is no reduction of cash under this test.

(4) Non-Structural Projects other than Relocation and Evacuation Projects. Reductions under the PCI EF procedure are to be applied against all cash that is in excess of that cash that represents 5 percent of the cost of the project. While there is no statutory requirement for the 5 percent cash contribution for non-structural projects as there is for structural flood control projects, a minimum 5 percent cost share requirement is necessary to maintain consistency with structural project consideration under the ability to pay rule. That is, if the PCI EF is greater than or equal to one, all of the cash except that cash that represents 5 percent of the cost of the project is eliminated. If the PCI EF is greater than zero but less than one, that percentage of the cash in excess of 5 percent is eliminated. If the PCI EF is less than or equal to zero, then none of that cash is eliminated. After applying the county per capita income test, apply the county per capita non-Federal project cost test taking into account any cost reduction from the income test when calculating the PCPC EF. Reductions from the PCPC test are to be applied to the remaining cash that represents 5 percent of the cost of the project. If the PCPC EF is greater than or equal to one, all of that cash is eliminated. If the PCPC EF is greater than zero but less than one, that percentage of that cash is reduced. If the PCPC EF is less than or equal to zero, none of the cash that represents 5 percent of the cost of the project is reduced.

(5) Notwithstanding the reductions in cash from applying the ability to pay procedures outlined in paragraphs (g)(3) and (g)(4) of this section, each non-Federal sponsor must pay a minimum of 5 percent of the total project cost.

9. Add §§ 241.7 and 241.8 to read as follows:

**§ 241.7 Amendment of the project cooperation agreement.**

a. If requested by the non-Federal sponsor, a PCA executed on or before the date of enactment of Pub. L. 104-303 (33 U.S.C. 2201) October 12, 1996 for any project for which a contract for construction has not been awarded on or before October 12, 1996, shall be amended to

reflect the application of the ability to pay rule as outlined in the rule. Any request for an amendment of a PCA must occur within 90 days of the publishing of the final rule in the Federal Register. If possible, amendments should occur prior to awarding a contract for construction.

b. Project cooperation agreements that are signed after December 31, 1997, but prior to publishing of the final rule, will include a provision that allows for modification of the PCA to provide flexibility for application of this ability to pay rule. If possible, amendments should occur prior to awarding a contract for construction. Any request for an amendment must occur within 90 days of the publishing of the final rule in the Federal Register.

**§ 241.8 Non-Federal option.**

In accordance with section 202(b)(2)(c) of Pub. L. 104-303, for projects authorized before October 12, 1996 the non-Federal sponsor may request that the 1995 ability to pay rule (60 FR 5133, Jan. 26, 1995) be used in lieu of the procedure prescribed in this regulation. Such requests will be honored.

**Gregory D. Showalter**  
*Army Federal Register Liaison Officer.*

**DRAFT**

**APPENDIX C**

**DRAFT ABILITY TO PAY RULE  
FOR AN ENGINEER REGULATION**

**DRAFT**  
DEPARTMENT OF THE ARMY  
U.S. Army Corps of Engineers  
Washington, D.C. 20314-1000

CECW-AA  
Draft Regulation  
No. 1165-X-XXX

Water Resources Policies and Authorities  
**FLOOD CONTROL COST-SHARING REQUIREMENTS UNDER THE  
ABILITY TO PAY PROVISION - SECTION 202(b) OF PL104-303**

1. **Purpose.** This regulation gives general instructions on the implementation of Section 202(b) of Public Law (PL) 104-303, the Water Resources Development Act of 1996 (33 U.S.C. 2201 et seq.), as it applies to flood control projects.
2. **Applicability.** This regulation applies to any flood control project, or separable element thereof, with respect to which the Secretary of the Army and the non-Federal sponsor enter into a project cooperation agreement after December 31, 1997. In addition, it applies to all U.S. Army Corps of Engineers Headquarters (HQUSACE) elements and Major Subordinate Commands and District Commands of the Corps of Engineers having Civil Works Responsibilities (FOAs).
3. **References.**
  - a. Water Resources Development Act, 1986, PL 99-662, 100 Stat. 4082 (33 U.S.C. 2201 et seq.).
  - b. Water Resources Development Act, 1992, PL 102-580, 106 Stat. 4797 (33 U.S.C. 2201 et seq.).
  - c. Water Resources Development Act, 1996, PL 104-303, 110 Stat. 3673 (33 U.S.C. 2201 et. seq.).
  - d. U.S. Army Corps of Engineers, Engineer Regulation 1165-2-29, "General Credit for Flood Control."
  - e. U.S. Army Corps of Engineers, Engineer Regulation 1165-2-121, "Flood Control Cost-Sharing Requirements under the Ability-to-Pay Provisions - Section 103(m) of PL 99-662."
  - f. U.S. Army Corps of Engineers, Engineer Regulation 1165-2-131, "Local Cooperation Agreements for New Start Construction Projects."
  - g. U.S. Army Corps of Engineers, Engineer Regulation 405-1-12, "Real Estate Handbook."

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draft 20 April 1998

4. Background.

a. History. Congress directed the Secretary of the Army (SA) to establish an ability to pay rule in PL 99-662 (reference 3a). The first ability to pay rule was published in the Federal Register (54 FR 40578, Oct. 2, 1989). Under the 1989 rule, the initial criterion for a reduction in the non-Federal share of project first cost was a benefits test. Under this test, a project's benefit cost ratio was divided by 4 to establish a Benefits-Based Floor (BBF), or the minimum non-Federal cost share required. Therefore, if the benefit cost ratio is 1.6, any reductions under ability to pay could only apply to non-Federal costs in excess of 40 percent of the total project cost (1.6 divided by 4). In this example, if non-Federal project cost-sharing was already less than 40 percent, the sponsor would not be considered for an ability to pay reduction. Where the benefits test determines that a project is eligible for a reduction (greater than a 40 percent non-Federal share in this example), a second test was applied called the income test. The income test was used to determine the magnitude of the reduction. Under the income test, per capita incomes were calculated for each county and state where the project was located, and a combined per capita income index was calculated. If the combined per capita income (county income is given twice the weight of state income) places the project at or below the per capita income level for the bottom 20 percent of the counties in the nation, the project would get a full reduction of excess costs over the BBF. If the combined per capita income of the county within which the project would be located is between the bottom 20 to 33 1/3 percent of the counties in the nation, the project would get a partial reduction of excess costs over the BBF. For those combined indexes that fall between 20 to 33 1/3 percent, straight line interpretation was used to determine the percent reduction. Cost reductions could apply to either Lands, Easements, Rights of way, Relocations, or Disposal areas (LERRD) and/or cash contributions.

b. Revisions to Rule. Congress directed a review of the existing rule in both PL 101-640, the Water Resource Development Act of 1990 (WRDA 90) and PL 102-580 (WRDA 92) (reference 3b). In WRDA 90, Congress directed that the ability to pay provision should apply only to non-Federal cash contributions. However, before a new rule was finalized to implement this change, WRDA 92 was enacted. In WRDA 92, Congress reverted back to the WRDA 86 wording that did not limit the applicability to cash contributions only. As a result, a revised ability to pay rule was published in the Federal Register (60 FR 5133, Jan. 26, 1995). The 1995 rule maintained the two tests of the 1989 rule but added a third test designed to provide a reduction for unusually high non-Federal per capita cost projects. Reductions realized under this test were applied against the 5 percent cash requirement for projects with non-Federal cost-shares greater than 35 percent and per capita non-Federal project first costs greater than \$300. Projects would only receive a reduction under the high per capita cost test if the reduction is greater than that received under the benefits and income tests.

c. 1996 Legislation. In section 202(b) of Public Law 104-303 (WRDA 96) (reference 3c), Congress directed revisions to the ability to pay procedures and criteria. The regulation establishing the amended ability to pay rule was published in the Federal Register (-----  
-----). Pertinent provisions of section 202(b) follow.

(1) The ability to pay procedures currently in effect should continue to be used, however, such criteria and procedures shall be revised within one year after the date of enactment of PL 104-303 (October 12, 1996) to reflect the consideration of county per capita income and county per capita non-Federal project construction cost.

(2) The revisions may consider other criteria relating to the non-Federal interest's financial ability to carry out its cost-sharing responsibilities, if it does not jeopardize qualification under the first two items.

(3) The revisions should not consider criteria (other than county per capita income and county per capita non-Federal construction cost) in effect on the day before the date of enactment of PL 104-303 (this mandates the use of county per capita income and county per capita non-Federal cost, and eliminates from the ability to pay rule the use of state per capita income and the BBF test).

(4) The amended rule may reduce the requirement that a non-Federal interest make a cash contribution for any project determined eligible (this limits the ability to pay reductions to cash only). Non-Federal sponsors are still required to provide LERRD.

(5) The amended rule shall apply to any project, or separable element thereof, for which a Project Cooperation Agreement (PCA) has been entered into after December 31, 1997.

(6) If requested by the non-Federal sponsor, a PCA executed on or before the date of enactment of PL 104-303 shall be amended to reflect the new ability to pay rule as long as a contract for construction has not been awarded on or before October 12, 1996.

(7) For projects authorized before October 12, 1996, if requested by the non-Federal sponsor, the criteria and procedures in effect on the day before enactment of PL 104-303 shall apply, i.e., the 1995 rule (60 FR 5133, Jan. 26, 1995).

## 5. General Policy.

a. The ability to pay test is designed to provide for reductions in the standard non-Federal cost-share for projects that place a financial burden on the non-Federal sponsor of the project. The amended rule permits a reduction for projects located in counties with a per capita income in the lowest 50 percent of the counties in the nation. The ability to pay test uses county per capita income as the indicator of the economic well being in the project area and county per capita non-Federal project first cost as a measure of the level of expense of the project to the project area.

b. Procedures described herein establish an ability to pay test which will be applied to all flood control projects. As a result of the application of the test, some projects will be cost-shared by the non-Federal interest at a lower level than the standard non-Federal share that would otherwise be required under the provisions of Section 103 of PL 99-662 (33 U.S.C. 2213), as

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amended by Section 202(a) of PL 104-303 (33 U.S.C. 2213). For structural projects authorized after PL 104-303 the standard non-Federal share of costs is a minimum of 35 percent and a maximum of 50 percent of the costs assigned to flood control. For these projects, the 35 percent minimum includes the LERRD required for flood control, a required 5 percent cash contribution, plus any additional cash needed to reach the 35 percent. For non-structural projects authorized after PL 104-303, the standard non-Federal share is 35 percent of the cost of the flood control measures. For these projects, the non-Federal sponsor is also required to provide LERRD but is not required to contribute the minimum 5 percent cash required for structural projects. If the LERRD exceed 35 percent, the excess cost becomes a Federal cost. If the LERRD are less than 35 percent, then a cash contribution is required to reach the 35 percent level.

c. Section 103(m) of PL 99-662 (33 U.S.C. 2213), as amended, requires that all cost-sharing agreements for flood control projects covered by the terms of Sections 103(a) or 103(b) of the law be subject to the ability to pay test. The test must, therefore, be applied not only to projects specifically authorized by Congress, but to the continuing authorities projects constructed under Section 14 of the 1946 Flood Control Act (33 U.S.C. 701r), Section 205 of the 1948 Flood Control Act (33 U.S.C. 701s), and Section 208 of the 1954 Flood Control Act (33 U.S.C. 701g), all as amended.

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

e. Any reductions in the level of non-Federal cost-sharing realized as a result of the application of this test will only be applied to the non-Federal cash contributions based on the total project construction costs. Non-Federal sponsors are required to provide LERRD.

f. Non-Federal Operations, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R) responsibilities are unaffected by the ability to pay test.

g. In applying the ability to pay test, the non-Federal share will not be reduced below 5 percent. The minimum contribution of 5 percent may be satisfied either through LERRD, a cash contribution, or a combination of LERRD and cash.

h. When a project is eligible for credits as outlined in ER 1165-2-29, (reference paragraph 3d), the ability to pay test will be applied before any adjustments are made for credits. If the ability to pay test results in a lower non-Federal share, the allowable amount of credits will be limited by the lower share.

i. The non-Federal interest may, at its discretion, waive the application of the ability to pay test.

j. If in applying the Per Capita Income (PCI) and Per Capita Project Cost (PCPC) tests, the total non-Federal cost reduction for the project is less than \$10,000 for a specifically authorized project, or is less than \$3,000 for a continuing authority project, then the non-Federal project cost-share is not adjusted.

k. Notwithstanding the previous paragraphs of this section, there is no requirement for non-Federal cost-sharing (cash and the value of lands, easements, rights-of-way, relocations, and suitable borrow and dredged or excavated material disposal areas that would normally be provided by the non-Federal sponsor) or a PCA when the administrative costs of negotiating, executing, or administering the PCA would exceed the non-Federal share of the project costs and are less than \$25,000 after applying the ability to pay reductions (Section 221(a) of PL 91-611, as amended by Section 220 of PL 104-303) (42 U.S.C. 1962d-5b(a)). Section 220 should not be interpreted to relieve the non-Federal sponsor of providing other items of local cooperation as required by law, regulation, and policy (e.g., hold and save; operate, maintain, repair, replace, or rehabilitate; Comprehensive Environmental Response, Compensation and Liability Act, etc.). Assurance to provide the required items of local cooperation would still be needed, but they would not have to be provided via a two-party agreement.

l. Section 202(b)(3) of PL 104-303 (33 U.S.C. 2213) provides the discretionary authority to consider additional criteria relating to the non-Federal interest's financial ability to carry out its cost-sharing responsibilities, to the extent that the application of such criteria does not eliminate areas from eligibility for a reduction in the non-Federal share as determined by per capita income data and per capita non-Federal construction cost data. Based on this discretionary authority, the policy is that when projects have qualified for reductions, under both the per capita income and the per capita project cost ability to pay tests, the SA has the discretion to further reduce non-Federal costs if they are not already receiving a full reduction. This further reduction applies only to the non-Federal cash contribution and may be considered for those projects located in areas of national emphasis, for example, "American Heritage Rivers," "Brownfields" and "Enterprise Communities." In addition, the SA also has the discretion to grant up to a full reduction in the cash contribution in other unusual circumstances based on depressed economic conditions in the project area or the financial need of the sponsor. Where the sponsor is a different entity than a county or counties in which the project would be located, the per capita income and financial need of that sponsor may be considered in granting up to a full reduction if the county or counties have qualified for some reductions under both the PCI and the PCPC tests (see following paragraph 6).

m. In accordance with Section 1156 of PL 99-662 (33 U.S.C. 2310), cost sharing requirements up to \$200,000 are waived for all studies and projects for the territories to include American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands. Cost sharing reductions under the ability to pay for these territories will only apply if the reductions are greater than the reduction provided under Section 1156.

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n. For multipurpose projects, reductions under ability to pay only apply to the flood control component of the project. Therefore, appropriate allocations between purposes must be done before application of reductions under the ability to pay rule.

6. Procedures for Estimating the Alternative Cost-Share.

a. Step 1, County Per Capita Income Test.

(1) Projects may qualify for a reduction of cash in excess of the required 5 percent cash contribution, or for some fraction of this value, depending on a measure of county Per Capita Income (PCI) of the county or counties in which the project is to be located in relation to other counties in the United States. Counties with a PCI that is in the lowest 10 percent of the counties in the nation would qualify for a full reduction.

(2) To assure consistency, PCI data will be obtained by HQUSACE and distributed to all FOAs as new data become available. These PCI data will be supplied for counties or county equivalents such as independent cities, based upon the area distinctions defined by the U.S. Department of Commerce, Bureau of Economic Analysis for which per capita income estimates are calculated. The latest distributed data provided by HQUSACE shall be used until revised data are distributed. If the District Engineer's Report has already been provided to HQ, revisions to the data can be made during preparation of the Chief of Engineer's Report at the Washington level.

(3) The PCI may be verified for any single county or county equivalent using the following procedures. For each of the three latest calendar years, determine the level of per capita income in the county, counties, or county equivalent where the project is to be located (the "project area"), and compare this to the national average of per capita income (U.S.=100). Source: U.S. Department of Commerce, Bureau of Economic Analysis as published yearly in the April Survey of Current Business.

(4) Calculate a Per Capita Income Eligibility Factor (PCI EF) for the project according to the following formula:

$$\text{PCI EF} = a - b \times (\text{project area factor}).$$

If the PCI EF is greater than or equal to one, the project is eligible for the full reduction of cash in excess of 5 percent. If the PCI EF is zero or less, the project is not eligible for a reduction of the cash in excess of 5 percent. If the PCI EF is between zero and one, the non-Federal cost share will be reduced by value of the PCI EF multiplied by the amount of cash in excess of 5 percent. For example, suppose for a given project that the cash in excess of 5 percent is \$100,000:

PCI EF  $\geq$  1, non-Federal share is reduced by \$100,000;

PCI EF  $\leq$  0, non-Federal share is not reduced;

0 < PCI EF < 1, non-Federal share is reduced by (PCI EF) X (\$100,000).

The values of the parameters *a* and *b* will be determined by HQUSACE and distributed to all FOAs. The parameter values will be based on the latest available data and set so that 10 percent of counties have a PCI EF of 1.0 or more (this currently represents counties with 2.6 percent of

the population and 1.5 percent of the income of the United States), 40 percent of counties have a PCI EF between 1.0 and 0.0 (this currently represents counties with 14.5 percent of the population and 10.5 percent of the income of the United States), and 50 percent of the counties will have a PCI EF of 0.0 or less (this currently represent counties with 82.9 percent of the population and 88.0 percent of the income of the United States). Values will be adjusted periodically as new information becomes available.

(5) For projects to be located in two or more counties, cash required from the sponsor that is in addition to the 5 percent cash requirement will be allocated to each county relative to the percentage of the anticipated total project flood damage reduction benefits to be realized in each county. Note that this allocation is solely for the purpose of determining any qualification for cost reduction and not to suggest an allocation for non-Federal costs. The excess cash allocated to each county is then multiplied by the PCI EF for that county to arrive at the county's ability to pay cost reduction. These county cost reductions will be based on the individual qualification of each county consistent with the procedures identified in paragraph 6a(4). The county cost reduction's are added together to arrive at the sponsors actual non-Federal cost reductions under the PCI test. This procedure is different from the past procedure of calculating a composite project area index by calculating a weighted average of each county's index numbers with the weights being equal to the percentage of flood damage reduction benefits received in each county. In the new procedure, those counties that would qualify for a reduction will no longer be penalized by being combined with those counties that would not qualify for a reduction. Under the new procedure, the project sponsor will receive some reduction under the ability to pay rule if any county within the project area qualifies for a reduction.

(6) For flood control projects located in Puerto Rico, Guam and other U.S. territories, the per capita income of each territory will be used in determining its qualification for a reduction under the PCI test. HQUSACE will use the latest per capita income information (available from the U.S. Department of Commerce, Bureau of Economic Analysis). However, where there is more up to date information for a territory, that information may be used if officially provided by the government of the territory. FOA's should provide these data, along with supporting documentation, to HQUSACE (ATTN: CECW-PD).

(7) For flood control projects located in and sponsored by Native American reservations, the PCI EF shall be calculated using information obtained from the Bureau of the Census, 1990 Census of Population, American Indian and Alaska Native Areas, Social and Economic Characteristics. For other Native American tribes or villages for which national published data is not available, use the county per capita income in which the tribe or village is located.

b. Step 2. County Per Capita Non-Federal Cost of Construction Test.

(1) In addition to any reductions under the PCI test, projects may also qualify for a reduction of the full amount of the required 5 percent cash contribution, or for some fraction of this amount depending on a measure of the non-Federal share of construction costs.

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(2) Since current county population data are readily available, FOA's will determine the population of the county or counties where the project is to be located for the latest calendar year for which information is available. Source: U.S. Department of Commerce, Bureau of Economic Analysis, as published yearly in the April Survey of Current Business.

(3) Using the population for the project area, divide the total non-Federal cost of construction (based on the fully funded cost estimate) by this population to calculate the non-Federal Per Capita Project Cost (PCPC). Note that the non-Federal cost used in this calculation should reflect any cost share reductions resulting from the application of the county per capita income test. That is, the application of the county per capita project cost test must follow the application of the county per capita income test and includes those reductions.

(4) Calculate a Per Capita Project Cost Eligibility Factor (PCPC EF) for the project according to the following formula:

$$\text{PCPC EF} = c + d X \text{ (non-Federal per capita project cost).}$$

If the PCPC EF is greater than or equal to one, the project will receive a full reduction of the 5 percent cash. If the PCPC EF is zero or less, the project will not receive any reduction of the 5 percent cash. If the PCPC EF is between zero and one, the non-Federal cost share will be reduced by the value of the PCPC EF multiplied by the amount of the 5 percent cash. The values of the parameters  $c$  and  $d$  will be determined by HQUSACE. The parameter values will initially be set so that projects whose non-Federal per capita project cost equals or exceeds \$300 will have a PCPC EF of 1.0 or more, and such that projects whose non-Federal per capita project cost is greater than \$100 and less than \$300 will have a PCPC EF between 0.0 and 1.0. Projects whose non-Federal per capita project cost is \$100 or less will have a PCPC EF of 0.0 or less. These parameter values will be adjusted as necessary by HQUSACE to account for inflation.

(5) For flood control projects located in Puerto Rico, Guam, and other U.S. territories, the population of each (available from the Bureau of Economic Analysis) will be used in the calculation of non-Federal per capita project cost to determine its qualification for a reduction under the PCPC test. However, where there is more up to date information for a territory, that information may be used if officially provided by the government of the territory. FOA's should provide these data, along with supporting documentation, to HQUSACE (ATTN: CECW-PD).

(6) For flood control projects located in and sponsored by Native American reservations, the PCPC EF shall be calculated using information obtained from the Bureau of the Census, 1990 Census of Population, American Indian and Alaska Native Areas, General Population Characteristics. For other Native American tribes or villages for which national published data are not available, use the county population statistics in which the tribe or village is located.

c. Special Circumstances. For projects that meet the requirements of paragraph 5(1), sponsors may request that the SA give consideration for a full reduction in the cash contribution. The request shall include documentation of the basis for such special consideration. FOA's shall forward requests for further reductions to HQUSACE (ATTN: CECW-A). In addition to data

provided by the non-Federal sponsor to support the request, such requests shall include an evaluation of such data and division and district recommendations.

7. Application of Ability to Pay.

a. A preliminary ability to pay test will be applied during the feasibility study phase of any proposed flood control project. If the non-Federal cost share under the ability to pay rule is lower than the standard share, it will be used for budgetary and other planning purposes. The preliminary ability to pay test should be applied at the draft report stage and will be evaluated as part of any Washington level policy review meetings on the project. Any requests for additional reductions in the non-Federal share (Special Circumstances) should be made at this time.

b. Both standard and reduced (ability to pay) non-Federal cost sharing will be displayed in the District Engineer's Report. The Chief of Engineers will recommend a reduced share if appropriate. The SA will recommend reduced non-Federal cost sharing to the Congress in accordance with the criteria and procedures as described in this rule.

c. The final ability to pay test will be made at the time the PCA between the Department of the Army and the non-Federal sponsor is signed. The document supporting the PCA will present the PCI EF, the PCPC EF, the formulas used in determining these values as described in this regulation, the standard non-Federal cost share, and the non-Federal cost share calculated under the ability to pay rule. For structural flood control projects, the standard level of cost-sharing will not be known until the end of the project (since the standard level as specified in Section 103(a) of PL 99-662 (33 U.S.C. 2213) includes LERRD). In this case, the ability to pay the non-Federal share will be determined using estimated costs.

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

(1) The revised non-Federal share will be specified in the PCA (while the dollar value may change, there will be no recalculation of this percentage share once the PCA is signed).

(2) An exhibit will be attached to the PCA which will summarize the appropriate factors and formula contained in the approved supporting document.

e. A final accounting of the actual non-Federal costs will occur after the project is constructed and project costs have been fully identified. If at that time, the standard non-Federal share based on actual costs is less than the ability to pay share specified in the PCA, the standard share will apply.

f. Structural Projects.

(1) Based on the ability to pay tests performed in accordance with this regulation, (see paragraph 6) the non-Federal cash reductions are estimated and the resulting non-Federal cost-share is determined.

(2) Notwithstanding the reductions in cash from applying the ability to pay procedures, (see above paragraph 7(f)(1)) each non-Federal sponsor is required to provide LERRD and must

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pay 5 percent of total project flood control costs. For structural projects, 50 percent is the maximum non-Federal cost share.

g. Non-Structural Projects,

(1) This procedure is only to be applied if these projects are indeed separate projects unto themselves and not part of a structural project solution. If the latter is true, then for purposes of ability to pay reductions, the costs associated with these project features should be included under the costs of the structural project solution when the structural ability to pay test is applied.

(2) As with structural projects, any reductions in the non-Federal cost share resulting from the application of the ability to pay test is to the non-Federal cash contribution. That is, the non-Federal sponsor must provide LERRD. However, unlike structural projects, the maximum non-Federal cost share for non-structural projects is 35 percent.

(3) Relocation and Evacuation Projects (where structures are to be physically removed from the flood plain). Calculate the PCI EF following procedures in paragraph 6a. If the resulting PCI EF is greater than or equal to one, indicating a full reduction, all cash required is eliminated. If the PCI EF is between zero and one, that percentage of the cash required is eliminated. If the PCI EF is less than or equal to zero, then no cash is reduced under the county per capita income test for non-structural projects. If the non-Federal sponsor still has a cash requirement after application of the county per capita income test, follow the procedures in paragraph 6b concerning application of the county per capita non-Federal project cost test for calculating the PCPC EF. Once again, the per capita income test is to be applied before the per capita project cost test so that any reductions in the non-Federal cost share resulting from the first test are accounted for in the application of the second test. If the PCPC EF is greater than or equal to one, all remaining cash is eliminated. If the PCPC EF is between zero and one, that percentage of the remaining cash is eliminated. If the PCPC EF is less than or equal to zero, there is no reduction of cash under this test.

(4) Non-Structural Projects other than Relocation and Evacuation Projects. Reductions under the PCI EF procedure are to be applied against all cash that is in excess of that cash that represents 5 percent of the cost of the project. While there is no statutory requirement for the 5 percent cash contribution for non-structural projects as there is for structural flood control projects, a minimum 5 percent cost share requirement is necessary to maintain consistency with structural project consideration under the ability to pay rule. That is, if the PCI EF is greater than or equal to one, all of the cash except that cash that represents 5 percent of the cost of the project is eliminated. If the PCI EF is greater than zero but less than one, that percentage of the cash in excess of 5 percent is eliminated. If the PCI EF is less than or equal to zero, then none of that cash is eliminated. After applying the county per capita income test, apply the county per capita non-Federal project cost test taking into account any cost reduction from the income test when calculating the PCPC EF. Reductions from the PCPC test are to be applied to the remaining cash that represents 5 percent of the cost of the project. If the PCPC EF is greater than or equal to one, all of that cash is eliminated. If the PCPC EF is greater than zero but less than one, that

percentage of that cash is reduced. If the PCPC EF is less than or equal to zero, none of the cash that represents 5 percent of the cost of the project is reduced.

(5) Notwithstanding the reductions in cash from applying the ability to pay procedures (see above paragraphs 7g(3) and 7g(4)), each non-Federal sponsor must pay a minimum of 5 percent of the total project cost.

8. Amendment of the Project Cooperation Agreement.

a. If requested by the non-Federal sponsor, a PCA executed on or before the date of enactment of PL 104-303 (33 U.S.C. 2201) October 12, 1996 for any project for which a contract for construction has not been awarded on or before October 12, 1996, shall be amended to reflect the application of the ability to pay rule as outlined in the regulation. Any request for an amendment of a PCA must occur within 90 days of the publishing of the final rule in the Federal Register. If possible, amendments should occur prior to awarding a contract for construction.

b. Project cooperation agreements that are signed after December 31, 1997, but prior to publishing of the final rule, will include a provision that allows for modification of the PCA to provide flexibility for application of this ability to pay rule. If possible, amendments should occur prior to awarding a contract for construction. Any request for an amendment must occur within 90 days of the publishing of the final rule in the Federal Register.

9. Non-Federal Option. In accordance with Section 202(b)(2)(c) of PL 104-303, for projects authorized before October 12, 1996 the non-Federal sponsor may request that the 1995 ability to pay rule (60 FR 5133, Jan. 26, 1995) be used in lieu of the procedure prescribed in this regulation. Such requests will be honored.

FOR THE COMMANDER

Robert W. Burkhardt  
Colonel, Corps of Engineers  
Executive Director of Civil Works

1 Appendix  
App A - Section 202(b) of Public Law 104-303

**DRAFT**

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APPENDIX A  
Section 202(b) of Public Law 104-303  
The Water Resources Development Act of 1996

**SEC. 202 FLOOD CONTROL POLICY.**

(b) ABILITY TO PAY.---

(1) IN GENERAL.--- Section 103(m) of such Act (33 U.S.C. 2213(m)) is amended to read as follows:

“(m) ABILITY TO PAY.---

“(1) IN GENERAL.--- Any cost-sharing agreement under this section for flood control or agricultural water supply shall be subject to the ability of a non-Federal interest to pay.

“(2) CRITERIA AND PROCEDURES.--- The ability of a non-Federal interest to pay shall be determined by the Secretary in accordance with criteria and procedures in effect on the day before the date of the enactment of the Water Resources Development Act of 1996; except that such criteria and procedures shall be revised within 1 year after such date of enactment to reflect the requirements of paragraph (3).

“(3) REVISION OF CRITERIA AND PROCEDURES.--- In revising criteria and procedures pursuant to paragraph (2), the Secretary---

“(A) shall consider---

“(i) per capita income data for the county or counties in which the project is to be located; and

“(ii) the per capita non-Federal cost of construction of the project for the county or counties in which the project is to be located;

“(B) shall not consider criteria (other than criteria described in subparagraph (A)) in effect on the day before the date of the enactment of the Water Resources Development Act of 1996; and

“(C) may consider additional criteria relating to the non-Federal interest’s financial ability to carry out its cost-sharing responsibilities, to the extent that the application of such criteria does not eliminate areas from eligibility for a reduction in the non-Federal share as determined under subparagraph (A).

“(4) NON-FEDERAL SHARE.--- Notwithstanding subsection (a), the Secretary may reduce the requirement that a non-Federal interest make a cash contribution for any project that is determined to be eligible for a reduction in the non-Federal share under criteria and procedures in effect under paragraphs (1), (2), and (3).”.

(2) APPLICABILITY.---

(A) GENERALLY.--- Subject to subparagraph (C), the amendment made by paragraph (1) shall apply to any project, or separable element thereof, with respect to which the Secretary and the non-Federal interest enter into a project cooperation agreement after December 31, 1997.

(B) AMENDMENT OF COOPERATION AGREEMENT.--- If requested by the non-Federal interest, the Secretary shall amend a project cooperation agreement executed on or before the date of the enactment of the Act to reflect the application of the amendment made by paragraph (1) to any project for which a contract for construction has not been awarded on or before such date of enactment.

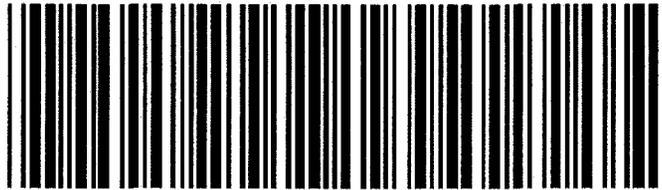
(C) NON-FEDERAL OPTION.--- If requested by the non-Federal interest, the Secretary shall apply the criteria and procedures established pursuant to section 103(m) of the Water Resources Development Act of 1986 as in effect on the day before the date of the enactment of this Act for projects that are authorized before the date of the enactment of this Act.

*Approved October 12, 1996*



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