

**Testimony of the Upper Mississippi River Basin Association
Regarding the U.S. Army Corps of Engineers’
Partnerships with Local Communities**

**Submitted to the
House of Representatives Committee on Oversight and Government Reform
Subcommittee on the Interior, Energy, and Environment**

March 6, 2018

Chair Farenthold, Ranking Member Paskett, and members of the Subcommittee, I appreciate today’s opportunity to talk with you all about our experiences working with the Corps of Engineers (Corps) and how we might improve our working relationships with the agency. The Upper Mississippi River Basin Association (UMRBA) was formed in 1981 by the Governors of Illinois, Iowa, Minnesota, Missouri, and Wisconsin to serve as a forum for coordinating river-related state programs and policies and for collaborating with federal agencies on regional issues. As such, UMRBA works closely with the Corps on a variety of programs and projects for which the Corps has responsibility. In addition, all five of UMRBA’s member states work directly with the Corps as non-federal cost share sponsors of construction projects.

Multi-Purpose Management

The Upper Mississippi River System is both a multi-billion dollar economic engine and a majestic, treasured ecosystem abundant with fish and wildlife – generating revenues in excess of \$584 billion annually and supporting over 1.86 million jobs in manufacturing, agriculture, tourism, recreation, navigation, and energy sectors. At the same time, the Upper Mississippi River also provides an irreplaceable water supply source for citizens and communities throughout the Midwest. Over 60 percent of America’s corn and soybean exports move through the Upper Mississippi, ensuring farmers’ competitiveness in the world market. Additionally, the Upper Mississippi supports a \$24.6 billion tourism and recreation industry built upon the serenity and adventure of the river’s landscape and abundant opportunities for fishing and hunting.

Recognizing the tremendous ecological and economical value of the Upper Mississippi to the region and nation, Congress declared in 1986 that the river is “a nationally significant ecosystem and a nationally significant commercial navigation system.” Congress has since remained committed to that vision, funding programs and projects in all federal agencies that aim to improve its economic and ecological health and resilience.

The Upper Mississippi is a highly complex and dynamic ecosystem that is foundational to the Midwest and national economy, but faces substantial challenges to its integrity and sustainability. Disruptions from flooding and sedimentation affect millions and degrade the river ecosystem. Managing the river system is also complex as any actions affect a wide range of economic, ecological, and social factors. Thoughtful and deliberative dialogue among federal, state, and local stakeholders is required to determine the most efficient, effective, and sustainable solutions.

For decades, UMRBA and its five member states have worked hand-in-hand with the Corps and our other federal partners as well as local communities, levee districts, industry, and conservation, labor, and commodity groups. Overall, the Corps has been a strong partner in the states' pursuit of integrated, balanced, adaptive, collaborative management of the Upper Mississippi. The three Corps Districts covering the Upper Mississippi basin (i.e., St. Paul, Rock Island, and St. Louis) have helped the states to foster a deeply-rooted culture of interagency partnership that has been critical in sustaining and enhancing the river's many economic, ecological, and social values.

Challenges driving the Corps' management of the river system seem to stem from budget and policy constraints that are outside of District staff control. While District staff have done a tremendous job of working within these constraints, the Upper Mississippi states are concerned with the Corps' ability to continue to maintain a safe and reliable navigation system, manage flood risk, and ensure a healthy ecosystem that can support the diverse community of native fish and wildlife species. Still, we have found that District staff are committed to working with river partners to find the best solutions under its agency's constraints as well as to any financial and policy constraints of its local partners.

Project Partnership Agreements

Of particular interest to the Upper Mississippi basin states are the existing terms of the Corps cost-share agreements for working with non-federal sponsors, namely project partnership agreements (PPAs). In advancing our shared commitment to multi-use management as described above, the states and Corps Districts work collaboratively to develop solutions through sound water resource projects. In addition, local communities and nonprofit organizations also serve as key partners in sponsoring water resource solutions constructed by the Corps.

However, the Corps requires that non-federal sponsors assume complete liability for the constructed projects (except for when fault or negligence is proven) and operations and maintenance responsibilities in perpetuity. These terms are simply not acceptable to many states, local communities, and nonprofit organizations. At a fundamental level, the terms conflict with many states' constitutions and tort law. The undefined terms and costs for liability and O&M are also unreasonable and unacceptable to the Corps local partners.

We are very encouraged that the Subcommittee is interested in hearing from the Corps' partners to understand our experiences and perspectives and to work on solutions that would allow the Corps to work more efficiently and effectively with us. Congress understands the Corps' PPA terms to be problematic. Section 1013 of the 2014 Water Resource and Reform Development Act (WRRDA) directed the Corps to contract with the National Academy of Public Administration to employ a comprehensive review of the preparation, negotiation, and approval of PPAs. However, no progress has been made and many important water resource projects have been stalled or withdrawn as a result.

Given Congress' and the Administration's preference for projects to be cost shared with non-federal sponsors over projects paid at full federal expense, it will be imperative to resolve the impediments to PPA execution so that important water resource projects can be implemented and taxpayer money is not wasted finding alternative solutions.

Indemnification

Currently, the Corps requires that the non-federal cost share sponsor fully indemnify the federal government, basing that requirement on Section 103(j)(1) and Section 101(j) of the 1986 Water Resources Development Act. The enclosed June 30, 2016 letter from Corps Director of Civil Works Steve Stockton explained that Congressional action is required to create a more shared approach to liability.

We believe that the following provision would resolve the legal challenges for states, local communities, and nonprofit organizations entering into cost share PPAs with the Corps by allowing for more shared approach to liability. While the language is specific to states, we understand that it would trigger the Corps to rewrite its liability provision in the cost-share agreements that it uses for local communities and nonprofit organizations.

Section X – Enabling State Sponsorship

Notwithstanding any other provision of law, no Federal requirement that a State indemnify the Federal government as a condition of carrying out a water resources development project shall apply if such requirement is incompatible with relevant State law.

Indemnifying the federal government is in direct conflict with states' constitution and laws for the following two reasons. One, the Corps requires the non-federal sponsor to essentially promise financial resources for an indeterminate liability that might occur at an unknown time, at an unknown cost, and for an unknown reason. For example, Minnesota's Constitution Article XI Section 1 states that no money may be paid out of the treasury except pursuant to an appropriation. In addition, Minnesota statute (i.e., §16A.15, subd.3 and §16A.138) does not allow the state to obligate funding without an encumbrance against an appropriation and do not allow for incurring any indebtedness of any nature on behalf of the state until an appropriation for it has been made by the legislature. Second, the Corps requires the non-federal sponsor to assume liability beyond the extent to which many states' tort law permits.

Non-federal sponsors are required to execute the PPAs, with the liability clause, early in the planning stage and before the designs are complete. The Corps then takes full control of the land, design of the project, and agreements with the construction contractors. The Corps is also the only point-of-contact to the construction contractors. This results in a completely one-sided approach to project design, implementation, and assumption of risk that favors the federal government.

Operations, Maintenance, Repair, Rehabilitation, and Replacement

Historically, the Corps limited the non-federal sponsors' operations, maintenance, repair, rehabilitation, and replacement (OMRR&R) obligations to 50 years, which is the expected life of a constructed project. In 2012, the Corps changed its policy that requires non-federal sponsors to maintain responsibility for OMRR&R obligations in perpetuity. This shift has resulted in the loss cost share partners at a time when the federal government is promoting its partnerships with the states and private entities.

The 2016 Water Infrastructure Improvements for the Nation (WIIN) Act attempted to bring some resolution to non-federal OMRR&R obligations. Section 1161 caps non-federal sponsors' OMRR&R obligations to 10 years following the Corps' determination that the project's physical features are functioning as intended. The decision process is integrated into existing adaptive management evaluations for individual projects. However, the non-federal sponsor remains dependent on the Corps as to when its O&M obligations are complete. It also does not provide the specificity needed for sponsors to estimate total project costs. Therefore, we are seeking the following provision to restore the 50-year cap as an option:

Section X – Completion of Ecosystem Restoration Projects

Section 1161 of the Water Infrastructure Improvements for the Nation Act of 2016 (33 U.S. C. 2330a) is amended by adding at the end of paragraph (e) “or at the end of 50 years if the Secretary fails to act within that timeframe.”

Donated Goods

We also understand that the Corps does not credit nonprofit organizations for the value of donated goods that are specifically provided for a project that it sponsors. This is because the transaction is completed before the project and therefore appears as \$0 in accounting. We believe that the addition of nonprofit organizations to sponsor Corps projects provides great opportunities to improve the nation's water resources and that the accounting policy should be resolved.



Kirsten Mickelsen, Executive Director
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JUN 30 2016

Mr. Dru Buntin
Upper Mississippi River Basin Association, Executive Director
415 Hamm Building
408 St. Peter Street
St. Paul, Minnesota 55102

Dear Mr. Buntin:

Thank you for your letter dated May 11, 2016, and your longstanding leadership involving a broad range of U.S. Army Corps of Engineers programs impacting the Upper Mississippi River. I am responding to your letter requesting information regarding statutory provisions that require the non-federal sponsor to be responsible for operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) of a project, that require indemnification, and that determine crediting for in-kind contributions.

The statutory requirements regarding indemnification and responsibility for OMRR&R reflect Congress' longstanding division of responsibilities for implementation of water resources development projects, and help to ensure that the significant federal investment required for the construction of such projects is sustained. These requirements were reaffirmed in the Water Resources Development Act of 1986 (WRDA 86).

Section 103(j)(1) of WRDA 86 requires that prior to initiation of a water resources development project, a non-federal sponsor must enter into a binding agreement to pay 100 percent of the OMRR&R costs of a project, other than a navigation project. The law does not place a time limit on this requirement for OMRR&R, which applies to ecosystem restoration projects as well as to flood risk management and other water resources development projects. In developing the operation and maintenance manual for individual projects, the Corps can recognize that the requirements of OMRR&R for a project may change over time.

In addition, Section 103(j)(1) and Section 101(j) of WRDA 86 require that in this binding agreement, the non-federal sponsor must agree to hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors. Please note the exception to indemnification for damages due to the fault or negligence of the United States or its contractors.

Finally, Section 2003 of WRDA 2007 amended Section 221 of the Flood Control Act of 1970 to authorize credit for in-kind contributions. This law provides that credit afforded for in-kind contributions is limited to "the actual and reasonable costs of the materials, services, or other things provided by the non-federal interest." Where materials, services, or other things are donated by a third party, the non-federal sponsor incurs no cost and thus is not eligible for credit under Section 221. It should be noted that Section 203 of WRDA 1992 does allow for parties other than the non-federal sponsor to contribute cash, funds, materials, and services toward implementation of an ecosystem restoration project. Such donations would reduce the total project cost of a project, thereby benefitting both the Federal Government and the non-federal sponsor with a lower project cost and lower cost share amounts.

These statutory requirements are reflected in the Project Partnership Agreements, the binding agreements required prior to initiation of water resources development projects. Changes to these requirements would require legislative action, as they are statutory. Given the longstanding nature of the requirements and the important interests they serve, the Corps would want to engage in detailed discussions with your staff to find the best way to address your concerns without negatively impacting the Civil Works program.

Thank you for your interest in the Corps Civil Works program. If you have additional questions or concerns, please contact me or your staff may contact Mr. Joseph Redican, Deputy Chief, Mississippi Valley Division Integration Team, at (202) 761-4523.

A handwritten signature in black ink, appearing to read "S. L. Stockton". The signature is fluid and cursive, with the first and last names being more prominent than the middle initial.

STEVEN L. STOCKTON, P.E.
Director of Civil Works


**Committee on Oversight and Government Reform
Witness Disclosure Requirement — “Truth in Testimony”**

Pursuant to House Rule XI, clause 2(g)(5) and Committee Rule 16(a), non-governmental witnesses are required to provide the Committee with the information requested below in advance of testifying before the Committee. You may attach additional sheets if you need more space.

Name: **Kirsten Mickelsen**

1. Please list any entity you are representing in your testimony before the Committee and briefly describe your relationship with each entity.					
Name of Entity	Your relationship with the entity				
Upper Mississippi River Basin Association	Executive Director				
2. Please list any federal grants or contracts (including subgrants or subcontracts) you or the entity or entities listed above have received since January 1, 2015, that are related to the subject of the hearing.					
Recipient of the grant or contact (you or entity above)	Grant or Contract Name	Agency	Program	Source	Amount
Upper Mississippi River Basin Association	W912EK18C0005	U.S. Army Corps of Engineers	Upper Mississippi River Restoration		Up to \$106,000 annually
Upper Mississippi River Basin Association	EP-13-5-000140	Environmental Protection Agency	Oil Pollution Act		\$150,000 annually
Upper Mississippi River Basin Association	P16AC00215	National Park Service	St. Croix National Scenic River		\$99,993.45 one-time
3. Please list any payments or contracts (including subcontracts) you or the entity or entities listed above have received since January 1, 2015 from a foreign government, that are related to the subject of the hearing.					
Recipient of the grant or contact (you or entity above)	Grant or Contract Name	Agency	Program	Source	Amount

I certify that the information above and attached is true and correct to the best of my knowledge.

Signature 

Date: March 2, 2018

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Kirsten Mickelsen is the Executive Director for the Upper Mississippi River Basin Association. The Association is a 5-state interstate organization formed by the Governors of Illinois, Iowa, Minnesota, Missouri, and Wisconsin to coordinate the states' river-related programs and policies and work with federal agencies that have river responsibilities. In her position, Mickelsen develops regional positions, advocates the states' collective interests before Congress and the federal agencies, and facilitates and fosters interagency coordination, cooperation, and communication.