



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
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WASHINGTON DC 20314-1000

Office of the Chief Counsel

June 25, 2010

MEMORANDUM FOR CHIEF, OPERATIONS & REGULATORY COMMUNITY OF
PRACTICE (ATTN: CECW-CO / MR. MIKE ENSCH)

SUBJECT: Leases and Cooperative Agreements with Cooperating Associations

1. References.

- a. 16 U.S.C. § 460d-3.
- b. Cooperative Agreement Between U.S. Army Corps of Engineers, Ft. Worth District, and the Our Lands & Waters Foundation, dated 8 October 2007.
- c. Amendment 1 to the Cooperative Agreement Between U.S. Army Corps of Engineers, Ft. Worth District, and the Our Lands & Waters Foundation, dated 23 July 2009.
- d. Lease to Nonprofit Organization for Cooperative Management of Hickory Creek Park, Lewisville Lake, Denton, Texas, dated 23 December 2008.
- e. 16 U.S.C. § 460d.
- f. Letter from Mr. Ronald C. Allen, Assistant Chief Counsel for Legislation, to Mr. Robert S. Wilkins, St. Louis District, dated 02 July 1976.
- g. ER 1130-2-441, Cooperating Associations Program, dated 01 March 1991.
- h. ER 405-1-12, Real Estate Handbook, dated 30 September 1994.
- i. EP 1130-2-500, Project Operations—Partners and Support, dated 01 June 2006.
- j. 33 U.S.C. §2328.

2. Background and Summary.

a. It is our understanding that the USACE recreational program has faced financial difficulties in recent years.¹ This owes to a combination of factors, including: a “no growth” freeze on budgets at USACE recreational facilities²; changing recreational requirements (*e.g.*,

¹ See Mr. Douglas Cox, USACE Regional Partnerships PM, PowerPoint Briefing: Partnership – U.S. Army Corps of Engineers Ft. Worth District, dated 11 November 2009.

² As used herein, the term “USACE recreational facilities” refers to any of the recreation sites discussed in 16 U.S.C. § 460d (discussing “public parks and recreational facilities at water resources development projects under

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changes to safety regulations, environmental regulations, etc.); general operational cost increases (e.g., increases in labor costs, repair costs, etc.) with little or no corresponding increase in operations and maintenance (“O&M”) budgets; and the application of 16 U.S.C. § 460d-3, which requires USACE to deposit any fees that it collects for the use of developed recreation sites and facilities into the Land and Water Conservation Act Fund (“LWCF”) at the U.S. Treasury rather than reinvesting them into the park where collected.³ See Ref. 1.a. (reproduced in full at Appendix 1). As a result, USACE Districts are apparently forced to choose between maintaining USACE recreational facilities in a declining manner until they are closed, reducing the number of recreational facilities and redirecting the available funds to the remaining sites, or developing creative financing approaches by attempting to leverage the various statutory authorities that allow partnership with non-Federal entities.⁴

b. Pursuing this third option, the Fort Worth District (“SWF”) created a new arrangement under which USACE jointly manages and operates USACE recreational facilities with non-profit cooperating associations (“CAs”). This arrangement, referred to herein as the SWF Arrangement, utilizes a cooperative agreement issued under the authority of 16 U.S.C. § 460d and 33 U.S.C. § 2328 and a lease issued under the authority of 16 U.S.C. § 460d. See Refs. 1.b., 1.c. (amending Ref. 1.b.), & 1.d.

c. Under the SWF Arrangement, the USACE District continues to budget for, receive, and expend Civil Works appropriated funds to maintain a USACE recreational facility. At the same time, the CA operates the USACE recreational facility and collects entrance fees, admission fees, and user fees from third parties. Through the addition of non-standard language into USACE’s model for leases under 16 U.S.C. § 460d (“Model CA Lease”), USACE allows the CA to retain up to 50 percent of these fees for its own administrative purposes. The CA must either reinvest the remainder into the USACE recreational facility, as directed or approved by USACE, or transfer it to the District Commander.⁵ This non-standard language therefore allows the USACE District to bypass the fee deposit requirement of 16 U.S.C. § 460d-3 and to direct the reinvestment of 50 percent or more of the fees back into the USACE recreational facility through the CA.

d. While we appreciate and understand the financial utility and benefit to the Government of the SWF Arrangement, we believe that it goes beyond the legal authorities presently in place. USACE effectively controls the use and disposition of the fees collected by the CA under the SWF Arrangement. Funds that are collected from third parties and then remain under a Federal agency’s constructive control, whether or not in the agency’s physical

the control of the Department of the Army”), 16 U.S.C. § 460d-3 (discussing “developed recreation sites and facilities”), and 33 U.S.C. § 2325 (discussing “water resources project for recreation”), which may include parks or other types of recreational facilities at USACE-controlled or -operated lakes, reservoirs, and other water resources projects.

³ Supra fn. 1 Slide 7.

⁴ Id. Slide 10.

⁵ Neither the lease nor cooperative agreement specify how the District Commander will process these receipts. However, under a standard lease executed under 16 U.S.C. § 460d, the District Commander would need to deposit these fees into the U.S. Treasury as miscellaneous receipts. See Ref. 1.e.

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possession, are considered Federal funds subject to the same restrictions and limitations as if they were collected and possessed by the agency itself.

e. Section 460d-3 of Title 16, United States Code, governs the collection of fees for the use of USACE recreational facilities and requires that all such fees be deposited into the LWCF. Because the fees collected by the CA are subject to USACE's constructive direction and control, these fees fall subject to the restrictions and requirements of Section 460d-3. We have identified no other statutory authority that permits any alternative use of these fees. Specifically, we have identified no authority under which USACE may permit the CA to retain any portion of the fees collected for the use of a USACE recreational facility.⁶ We have also identified no authority under which USACE may reinvest or direct, approve, or otherwise permit the expenditure or reinvestment of these fees by the CA into the USACE recreational facility.⁷ Accordingly, if a USACE District does not deposit these fees into the LWCF and/or if a District uses, directs, or authorizes the use of these fees for operation, maintenance, construction, or other types of reinvestment into the USACE recreational facility, this will violate 16 U.S.C. § 460d-3, deprive the LWCF of receipts specifically called for by Congress, and constitute an improper augmentation of the appropriations provided to the Corps for those same purposes.

⁶ The fees here discussed must be distinguished from the smaller subset of fees and other revenue that the CA collects from activities consistent with those listed in the applicable ERs—*e.g.*, fees or revenue gained from third parties for their participation in a special event hosted by the CA; fees for the use of a facility that was constructed and is operated by the CA, such as a gift shop; etc. While these activities or facilities may be physically located at or in a USACE recreational facility, the CA is not charging a fee “for the use of [USACE] developed recreation sites and facilities,” as used in 16 U.S.C. § 460d-3, but rather for the use of the CA-developed or -provided site, facility, or activity. As discussed *infra*, the fees and revenues collected from CA-hosted activities or CA-constructed, -operated, and -maintained facilities should not be considered USACE funds and are not viewed as subject to the LWCF deposit requirement of 16 U.S.C. § 460d-3.

The SWF Agreement does not distinguish between these latter, acceptable types of fees and revenues and the broader category of fees and revenues that the CA would collect and retain for their operation of the entire USACE recreational facility under the SWF Arrangement. To the extent that these are distinguishable, the CA may permissibly continue to retain and expend for its own purposes the fees and revenue collected from CA-hosted activities or CA-constructed, -operated, and -maintained facilities. This memorandum should not be construed to prohibit a CA from collecting, generating, retaining, or expending fees or revenue from activities that are consistent with those envisioned under the original CA program and listed in the applicable ERs.

⁷ As discussed *infra*, 33 U.S.C. § 2328 authorizes USACE to accept contributions of funds, materials, and services from CAs for the operation and maintenance of a USACE recreational facility. Under this authority, the CA may permissibly use the fees or revenues that it generates from CA-hosted activities or CA-constructed, -operated, and -maintained facilities, *see supra* fn. 6, to provide material, services, and funds for O&M of the USACE recreational facility. However, 33 U.S.C. § 2328 does not authorize construction at the USACE recreational facility. Also, 33 U.S.C. § 2328 requires that any funds provided by the CA under this authority be deposited into the “Contributions and Advances, Rivers and Harbors, Corps of Engineers” account at the U.S. Treasury. Such funds would then be used consistent with USACE authorities and procurement laws and regulations.

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3. Discussion.

a. Existing Legal Framework.

i. Under 16 U.S.C. § 460d, USACE has broad authority to grant leases or licenses for the use of USACE recreation sites. See Ref. 1.e. (reproduced in full at Appendix 2). Enacted in 1944 and amended over time, the statute authorizes the Chief of Engineers, under the supervision of the Secretary of the Army, to grant leases or licenses at USACE water resources development projects under such terms and conditions as the Secretary deems reasonable. The statute also authorizes leases to non-profit organizations at reduced or nominal consideration for public park and recreation purposes, in recognition of the public service rendered by the non-profit organization on the leased premises. All monies received by USACE for leases or other privileges under 16 U.S.C. § 460d must be deposited into the U.S. Treasury as miscellaneous receipts. Id.⁸

ii. Although the USACE cooperating associations program is not specifically mentioned in 16 U.S.C. § 460d, USACE concluded in a 1976 legal opinion that the statute “provide[s] ample authority for Corps cooperation with voluntary citizens’ associations to fulfill the purpose of the Corps projects.” Ref. 1.f. This broad authority to work with a CA was based on the statutory language authorizing the Chief of Engineers to “maintain and operate public recreational facilities at water resources development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests.” Id. Under the arrangement envisioned in the 1976 opinion, USACE would execute a license or a lease to a CA under the authority of 16 U.S.C. § 460d. The CA could then provide services or construct, operate, and maintain limited facilities at the USACE site, and could collect fees or other revenue from third parties who employ the CA’s services or use the CA’s facilities. Importantly, it must be noted that the 1975 opinion did not address the question of whether a CA could operate and charge fees for the use of a USACE-constructed, -provided and -maintained recreational facility.

iii. With regard to the fees or revenue collected by the CA under the concept envisioned in the 1976 opinion, the CA would only collect fees and generate revenue as a result of its own investment of resources or provision of services. For instance, the CA would generate revenue by selling items at a gift shop that the CA constructed, operated, and maintained, or by charging fees to participate in visitor activities offered by the CA. While the CA’s facilities or activities may have been physically located at the USACE recreational facility, the CA did not charge a fee or generate revenue “for the use of [USACE] developed recreation sites and facilities,” as used in 16 U.S.C. § 460d-3, but rather for the use of the CA-developed site, facility, or activity. The fees and other revenues collected by the CA were thus distinct from any

⁸ Where Congress has allowed any alternative use of the monies collected through the lease of a USACE recreational facility, it has done so through specific authorizing language. E.g. 33 U.S.C. § 701c-3 (directing that 75 percent of the monies received by USACE for leases of lands acquired for flood control, navigation, and allied purposes be repaid to the State in which such property is located).

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facilities provided or services rendered by USACE, and were not subject to USACE's actual or constructive control. Accordingly, although the 1976 legal opinion did not address this issue, it appears that the Office of the Chief Counsel did not view the fees collected or revenue generated by the CA as falling subject to the fee deposit requirements of 16 U.S.C. § 460d-3, which requires that any fees collected by USACE (or its agent) from third parties for the use of a USACE recreation site or facility be deposited into the LWCF at the U.S. Treasury. See Ref. 1.a. § 460d-3(b)(1).

iv. The approach endorsed by the 1976 Office of the Chief Counsel opinion was first incorporated into the USACE regulations through ER 1130-2-441. See Ref. 1.g. (superseded by Ref. 1.i). This regulation referenced various laws, including 16 U.S.C. § 460d, and various USACE regulations, including those for Real Estate, management of natural resources at Civil Works projects, visitor center programs, and interpretive services. The regulation defined CAs and cooperative agreements, noted that it is USACE policy to encourage CAs at USACE projects, and allowed USACE facilities to be provided to CAs at no cost, provided such use is incidental to the normal operation of the facility and contributes to the public. Based on the nature of the use of USACE land or facilities, the use of any necessary real estate would be permitted pursuant to a separate real estate document from the cooperating agreement (*e.g.*, a lease or license).

v. Paragraph 6.a. of ER 1130-2-441 listed the types of activities that may be performed by CAs. These activities aid operations-related natural resources management, interpretive, and visitor activities by:

- (1) Supporting special events, interpretive, educational or scientific activities, exhibits, and programs, including presentations and demonstrations which further public understanding and appreciation of the mission of the Corps, and/or a particular water resources development project;
- (2) Supporting natural resource management and/or public programs at or near Corps projects through conservation and education activities and special events; and also by providing scientific, logistical, maintenance and other support;
- (3) Acquiring display materials, historical objects, equipment, supplies, materials, goods, or other items, or services appropriate for management, operation, interpretive, educational and visitor service functions;
- (4) Providing services to visitors through the sale, production, promotion, and/or distribution of appropriate interpretive and educational items, such as publications, maps, visual aids, audio tapes, pamphlets, handicrafts, and other objects directly related to the recreation, scientific, interpretive, and educational goals and missions of a project, a group of projects, and/or the Corps as a whole; and

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- (5) Acting as a principal distribution medium for those educational and scientific publications of the government and trade which relate to the Corps and/or project mission, mandate, or management efforts and provide the public with inexpensive and technically accurate materials.

In addition, paragraph 6.c. of ER 1130-2-441 stated that a wide range of programs may be pursued under cooperative agreements, including: special event planning and sponsorship; habitat improvement; staff and volunteer training; scientific research; membership activities; archeological activities; trail construction and maintenance; interpretive programming; and support and technical assistance. Although this list of acceptable CA activities was not meant to be exhaustive, this regulation clearly envisioned that only activities of a similar scale or that resulted in similar enhancements beyond the baseline of O&M services as listed in the ER would be performed by the CA. The 1976 legal opinion did not endorse, and the ER did not approve, the wholesale joint use and management of an entire USACE recreational facility at a USACE water resources project site under the Cooperating Associations Program.

vi. This distinction was again reinforced in 1994 in the update to the Real Estate Handbook, ER 405-1-12. Ref. 1.h. para. 8-160.a. This publication lists “volunteers and sales of books and souvenirs” as examples of acceptable CA functions and describes the separate type of real estate instrument that may be required if the CA uses government facilities:

The association will be granted a license, easement or lease, as appropriate in accordance with this chapter for the proposed use of government owned property. For example, if the association provides volunteer tour guides without any fixed space, no outgrant is required. A short term “Festival” could be covered by a Special Event Permit. A lease would be required for exclusive use of a fixed area for a gift shop or book store in the visitor center, for a specified area such as a historic interpretative site where entrance or user fees will be charged, or a museum area housing association artifacts. A license would be appropriate where the association will hold seminars every third Monday night or for display cases if the contents belong to the association.

Id. para. 8-160.c. Again, this regulation discusses only activities and enhancement of a similar scale as those specifically listed in ER 1130-2-441—*e.g.*, the provision of tour guides, short term festivals, a fixed area for a gift shop, etc.—and not wholesale use or -management of the USACE-constructed and -maintained recreational facility. This regulation also makes clear that no user fees may be charged by the CA for the use of facilities developed in whole or in part with Federal funds if USACE is prohibited by law from charging a fee for those facilities. Id. Figure 8-C-7 para. 9 (“However, no user fees may be charged by the Lessee for use of facilities developed in whole or in part with federal funds if a user charge by the Corps of Engineers for the facility would be prohibited under law.”).

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vii. This focus on activities of a similar nature and scale as those listed in ER 1130-2-411 was then categorically reaffirmed through the issuance of ER 1130-2-500. While ER 1130-2-500 technically supersedes ER 1130-2-411, it lists the very same activities as ER 1130-2-411 that the CA may permissibly perform under the Cooperating Associations Program. See Ref. 1.i. Ch. 9. As with the previous regulations, ER 1130-2-500 does not approve the wholesale joint use and management of an entire USACE recreational facility at a USACE water resources project site under the Cooperating Associations Program. See id.

b. The SWF Arrangement.

i. The SWF Arrangement creates a joint management scheme for USACE recreational facilities. It involves two documents—a cooperative agreement (“SWF Cooperative Agreement”) and a lease under the authority of 16 U.S.C. §460d (“SWF Lease”).

ii. Under this arrangement, USACE budgets for, receives, and expends appropriated O&M funds to maintain the USACE recreational facilities. Ref. 1.c. para. 2.C. The costs financed by USACE with O&M funds include major and minor maintenance work and repairs, janitorial services, utility costs, and Park Rangers.

iii. Simultaneously, USACE grants a non-exclusive lease to the CA. This lease may be for only the recreation facilities on the USACE property or may extend to all of the property at the USACE water resources project. The SWF Lease generally follows the policies set forth above for the Model CA Lease, and includes a base term of five years with four possible extensions of five years each. However, the SWF Lease also includes three clauses not present in the Model CA Lease, including an “accounts, records, and receipts” clause, a “reinvestment of revenue” clause, and an “other partnership programs” clause. Ref. 1.d. paras. 34-36; see also Ref. 1.c. para. 3.C(4) (parallel SWF Cooperative Agreement provision to the SWF Lease “accounts, records, and receipts” clause), para. 3.B(9) (same regarding “reinvestment of revenue” clause), and Whereas Clause 6 (same regarding “other partnership programs” clause).

iv. Under the “accounts, records, and receipts” clause, the CA may use funds that it collects on the leased premises for the administration, maintenance, operation, and development of recreation facilities at the USACE lake where collected. Ref. 1.d. para. 34; Ref. 1.c. para. 3.C(4). Means by which the CA may earn these funds under this non-standard SWF Lease clause include, “but [are] not limited to, entrance, admission and user fees and rental or other consideration received from its concessionaires.” It is unclear whether the CA distinguishes the funds that it collects based on the source from which they were collected—for instance, whether the CA distinguishes between (a) the fees or revenues collected from third parties for their entrance, admission, participation, or use of a USACE facility for which USACE continues to receive and expend O&M dollars, and (b) the fees or revenues collected from third parties for their use of facilities or participation in activities akin to those specifically identified in the cooperating association regulations⁹—or whether the CA treats all of these fees and revenues as one gross receipt. Every five years, any funds not reinvested for the administration,

⁹ For a discussion this distinction, see supra fn. 6.

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maintenance, operation, and development of recreation facilities are paid to the District Commander.¹⁰ Again, it is unclear whether the fees transferred to the District Commander includes entrance or admission fees that USACE would be prohibited from collecting itself.¹¹

v. Under the non-standard "reinvestment of revenue" clause of the SWF Lease, USACE permits the CA to divert up to 50 percent of the fees that it collects and revenues that it generates for its own "administrative purposes on or off the [USACE] premises where collected." Ref. 1.d. para. 35; Ref. 1.c. para. 3.B(9). The CA must use the remainder for maintenance, enhancement, development of facilities, interpretive services, or other management of the USACE lake where collected, as authorized or directed by USACE. This provision lists examples of acceptable uses for the remainder, including "maintenance, repair and replacement of existing facilities" and "planning, development, and construction of new facilities."

vi. Under the non-standard "other partnership programs" clause, of the SWF Lease, the CA may contribute funds, including cash, materials, personal property, equipment, or services, under the Contributions Program or the Challenge Cost-Share Program (now referred to as the Challenge Partnership Program). Ref. 1.d. para. 36. However, the lease provides that all contributed property, facilities, and improvements placed on Government lands under either of these programs becomes the property of the Government. Title to improvements made by the lessee that are not associated with either of these two programs remains vested in the CA under the terms of the lease. Under the terms of the lease, the CA must maintain improvements to the satisfaction of USACE and shall be removed at the expiration or termination of the lease.

¹⁰ The SWF Lease borrowed this provision (with two major distinctions) from the standard leases to states and non-state governmental agencies ("state and local") for public park and recreation purposes. (The provision is also a provision of the SWF Cooperative Agreement, Ref. 1.b., para. 6(c)(4). with a few minor deletions). Under these two standard leases, state and local agencies may utilize monies received from the operations conducted on the premises for the administration, maintenance, operation, and development of the leased premises (not the entire lake as in the SWF Arrangement). Any such money not utilized within a 5-year period must be returned to the District Engineer for deposit into the Treasury as miscellaneous receipts, as directed under 16 U.S.C. § 460d. State and local agencies must establish and maintain accurate records and are subject to audit by the District Engineer. The two standard leases do not have a condition allowing the deduction of membership fees from the monies to be returned to the premises.

State and local agencies are authorized to charge entrance and use fees; however, no user fees may be charged for the use of facilities developed in whole or in part with Federal funds if USACE is prohibited by law from charging fees for those facilities. State and local agencies are authorized to put monies received on the leased premises back into the leased premises. Under the auspices and funding of state and local agencies, recreation opportunities and facilities are provided to the public at no cost to the Federal government. The consideration under these leases is the operation and maintenance of the leased premises; no USACE O&M money is spent on these state and local agency leases (other than for compliance inspections).

¹¹ 16 U.S.C. § 460d-3 prohibits USACE from charging entrance or admission fees for USACE recreational facilities, and paragraph 3.B(8) of the SWF Cooperative agreements prohibits the CA from charging a fee or user charge "if a user charge by the Corps would be prohibited under law." This would appear to prohibit the CA from charging entrance or admission fees, or from transferring any such fees to the District Commander. At the same time, paragraph 3.C(4) of the SWF Cooperative Agreement specifically permits the CA to charge "entrance, admission, [and] user fees." Nothing in the SWF Cooperative Agreement or SWF Lease indicates that any such fees would be excluded from the fees transferred to the District Commander after five years.

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c. Authority and Fiscal Law Concerns Regarding the SWF Arrangement's Deviations from the Existing Legal Framework.

i. The non-standard clauses in the SWF Lease and the parallel provisions in the SWF Cooperative Agreement allow a District to indirectly expend funds through the CA in a way that is not specifically authorized by statute and in a way the District could not retain and directly spend them itself. For the reasons that follow, we believe this goes beyond the legal authorities that purportedly authorize this approach.

ii. Under 16 U.S.C. § 460d-3, USACE is prohibited from collecting entrance or admission fees at public recreation areas located at USACE lakes and reservoirs. Ref. 1.a. § 460d-3(a). Also, while USACE may collect fees for the use of developed recreation sites and facilities, such as campsites, beaches, and boat ramps, USACE may not retain or expend these fees. See id. § 460d-3(b)(1), (b)(4). Instead, all fees collected for the use of a developed USACE recreation site must be deposited into the LWCF at the U.S. Treasury. Id. § 460d-3(b)(4). Nothing in 16 U.S.C. § 460d-3 or elsewhere authorizes any other use of these fees.

iii. The SWF Arrangement presumes that these statutory restrictions and requirements apply only to fees directly collected by USACE, its agent, or an entity otherwise acting on USACE's behalf, and not to fees or revenues collected by the CA under the SWF Lease. Because the CA is an independent entity and is purportedly not serving as USACE's agent or on USACE's behalf, so the theory goes, the CA may charge any entrance or general admission fee to third parties entering USACE properties leased under the SWF Arrangement, and these entrance fees, admission fees, user fees, and any other revenue collected by the CA are not subject to the LWCF deposit requirements of 16 U.S.C. § 460d-3.¹² Instead, the only restriction on the CA's use of these fees and revenue under the SWF Arrangement is that they must comport with EP 1130-2-500, which specifically permits CAs to charge for activities and services and retain the revenues. See Ref. 1.i. para. 9-3.1. Proceeding with this theory, 33 U.S.C. § 2328—which permits the Secretary of the Army to accept contributions of funds, materials, and services from non-Federal public and private entities for the operation and maintenance of USACE recreation facilities—then allows the CA to reinvest what would then ostensibly be the CA's own funds (*i.e.*, the collected entrance, admission, user, and other such fees) for the continued operation, maintenance, repair, or replacement of the USACE recreation facilities.¹³ See Ref. 1.j. (reproduced in full at Appendix 3).

iv. Under the proper circumstances, this theory would be correct. If the admission fees and recreation user fees were truly the exclusive property of the CA, collected by the CA under valid legal authority, then they would not be subject to the LWCF deposit requirements of 16 U.S.C. § 460d-3. The CA could also permissibly reinvest these fees for the

¹² See CESWF-OC, White Paper: Authorities for Cooperating Agreements Entered Into Between the US Army Corps of Engineers Forth Worth District and Cooperating Associations, at *3, dated 23 February 2010.

¹³ See CECC-SWD, Subject: SWF White Paper on Cooperative Provisions of Lease and Cooperative Agreement – Lake Lewisville, at *3-4.

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continued operation and maintenance of the USACE recreational facility under 33 U.S.C. § 2328.¹⁴ See id.

v. However, with specific regard to the SWF Arrangement, this theory presupposes that the fees are the property of the CA and that the CA may thus use and expend the fees as it chooses. In our view, they are not. Per the terms of the SWF Cooperative Agreement and the SWF Lease, USACE directs how the CA shall dispose of the fees, mandates that the CA use at least half of the fees to pay expenses that USACE would otherwise pay with appropriated funds or return the fees to USACE, and requires that the CA obtain USACE approval both in calculating revenues and in making the required expenditures. For example:

- “Monies received by the Foundation from operations conducted on the premises shall be utilized by the Foundation (with Corps approval) to fulfill its obligations under this Cooperative Agreement.” Ref. 1.c. para. 3.B(9).
- “The Foundation may use a maximum of 50% of net revenue collected (net revenue include[s] collections after deducting NRRS overhead / revenue adjustments, Gate Attendant contract costs (commensurable to Corps contract costs and as approved by the Corps) . . . and other required costs as determined by the Corps) on Corps property for Foundation administrative purposes on or off the Lake premises where collected.” Ref. 1.c. para. 3.B(9)a.
- “Any funds remaining from revenue collection on Corps property after paying for Foundation administrative purposes up to the 50% limit provided above shall be utilized for maintenance, enhancement, interpretative programs, and/or other management of the Lake where collected, as authorized by the Corps.” Ref. 1.c. para. 3.B(9)b.
- “All remaining funds must be utilized for maintenance, enhancement, interpretative services, and/or other management of the Lake area where collected.” Ref. 1.d. para. 35.

It is clear from these excerpts that USACE retains constructive control over the use and disposition of the entrance, admission, user, and other such fees, even when in the CA’s possession; USACE requires that at least half of these funds be reinvested into the recreational facility, exercises direction and approval authority over how these funds shall be reinvested, and then uses the funds for expenses that are already partially financed or would otherwise be financed with the District’s appropriated funds.¹⁵

¹⁴ While the CA may use these fees to perform operations and maintenance work under the authority of 33 U.S.C. § 2328, this provision does not authorize construction. The CA may only use the fees to perform construction work at the USACE recreational facility under the authority of 16 U.S.C. § 460d. However, if the CA performs construction under this authority, all monies received by the United States or falling subject to USACE’s constructive control and disposition through the use of such facility must be deposited into miscellaneous receipts per 16 U.S.C. § 460d.

¹⁵ To the extent that these provisions roughly mirror the terms of previous, acceptable cooperative agreements and/or leases, the key difference is the control that USACE exerts over the use and disposition of the funds under the

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vi. The Comptroller General has found that when a Federal agency “effectively control[s] the use and disposition” of funds that were collected and held by a third party and then directs that the funds be used to pay agency costs that would otherwise be paid from the agency’s appropriations, those funds “would clearly be money for the Government . . . in spite of the fact that [the agency] would not receive the money directly.” See Maritime Administration – Disposition of Funds Recovered from Private Party Damage to Government Building, B-287738 (May 16, 2002) (internal quotations omitted). Accordingly, the admission fees, entrance fees, recreation user fees, and other such fees¹⁶ collected by the CA under the SWF Arrangement must be treated as USACE funds, and in our view are thus subject to all of the restrictions and requirements of 16 U.S.C. § 460d-3—including the prohibition against the collection of admission or entrance fees and the requirement that any fees collected under the authority of 16 U.S.C. § 460d-3 be deposited into the LWCF.

vii. USACE may not indirectly collect or expend fees through the CA in a way that USACE could not do so itself. Given that these fees will ultimately fall subject to USACE’s constructive control and disposition under the SWF Arrangement, the CA therefore may not collect admission or entrance fees for the use of USACE recreational facilities without running afoul of the clear statutory prohibition against the collection of such fees in 16 U.S.C. § 460d-3. See Ref. 1.a. (prohibiting the collection of fees for entrance or admission to a USACE recreational facility), Ref. 1.d. para. 34 (permitting the collection of entrance or admission fees for USACE recreational facilities). Nor may the CA reinvest these fees for the continued administration, maintenance, construction, operation, or development of the USACE recreational facility. In our view, the continued reinvestment of what should probably be treated as USACE funds into the USACE recreational facility violates 16 U.S.C. § 460d-3, deprives the LWCF of deposits mandated by Congress, and constitutes an impermissible augmentation of USACE appropriations.

viii. A recent Comptroller General decision is instructive. In that case, a private party damaged property belonging to the U.S. Maritime Administration (MARAD). See B-287738, supra. Under the miscellaneous receipts statute, 31 U.S.C. 3302(b), MARAD would be required to deposit any damages that it received from the private party into the miscellaneous receipts account at the U.S. Treasury. MARAD questioned whether it could bypass this requirement by having the private party pay the damages into an escrow account from which MARAD’s repair contractor could finance its costs, reasoning that the miscellaneous receipts statute would not apply because MARAD would never have actual possession of the funds.

ix. The Comptroller General rejected this approach. The Comptroller General first found that because MARAD directed and authorized the use and disposition of these funds, they must be viewed as MARAD funds regardless of whether they were in MARAD’s physical

SWF Arrangement. As emphasized above, the SWF Arrangement contains numerous provisions under which the CA may spend the funds that it collects only as authorized and/or directed by USACE. USACE exerts no similar control over the funds collected by the CA under previous, acceptable cooperative agreements and/or leases.

¹⁶ But see supra fn. 6 (discussing the smaller subset of fees that the CA may permissibly collect and which are not subject to the LWCF deposit requirement).

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possession. The Comptroller General then observed that Congress appropriates funds to MARAD for operations and maintenance work, including the type of repair work to be undertaken on MARAD's damaged property. In those situations where Congress has permitted an agency to accept additional third party funds for this repair work, it has done so through clear statutory language. Absent such authority, to credit those funds "to the agency operating account would constitute an unlawful augmentation of the agency's appropriation." The Comptroller General thus concluded that because the funds were MARAD funds and, as proposed by MARAD, would be used to finance costs that MARAD would otherwise pay from its operating budget, this proposed use would both violate the miscellaneous receipts statute and constitute an unlawful augmentation of MARAD's operating budget.

x. The same rationale applies here. As described above, because USACE exercises such control over the use and disposition of these fees, they must be viewed as USACE funds regardless of whether they are in USACE's possession. Just as Congress appropriated operating funds to MARAD to conduct its repair work, it appropriates funds to USACE to conduct operations and maintenance work and perform construction at USACE recreational facilities. Similarly, while Congress has provided statutory authority allowing USACE or its agent to collect recreation user fees from third parties at USACE recreational facilities, Congress has directed that these funds be deposited into the LWCF—just as Congress directed that MARAD's damages be deposited into miscellaneous receipts. Congress has not elsewhere authorized USACE to directly or indirectly retain or expend these fees. Accordingly, just as in the MARAD case, the use of these fee-generated USACE funds for operations, maintenance, or construction work at USACE recreational facilities would violate 16 U.S.C. § 460d-3 and constitute an unlawful augmentation of the relevant USACE District's budget.

xi. It has been suggested that 16 U.S.C. § 460d and 33 U.S.C. § 2328 allow the CA to reinvest the fees into the USACE recreational area, and that such reinvestment therefore does not constitute an unlawful augmentation of the District's budget.¹⁷ As applied to the SWF Arrangement, this is incorrect. Admittedly, 16 U.S.C. § 460d specifically authorizes the CA to maintain and operate USACE-constructed, -maintained, and -operated recreational facilities. Moreover, 33 U.S.C. § 2328 specifically authorizes USACE to accept funds, materials, and services from non-Federal entities ("NFE") for the shared operation and maintenance of a USACE park. However, these authorities only apply to the extent that the funds provided by the CA for the operation and maintenance costs actually belong to the CA. As discussed above, the fees collected under the SWF Arrangement should not be viewed as CA funds; they should be viewed as USACE funds. Neither statute authorizes USACE to direct the expenditure (through the CA's directed reinvestment) of funds that (i) already belong to the Government by virtue of USACE's constructive control over them, (ii) were essentially held in escrow by the NFE, and (iii) should therefore have been deposited into the LWCF. In other words, 16 U.S.C. § 460d and 33 U.S.C. § 2328 authorize USACE to accept contributions of NFE

¹⁷ See SWD Legal Opinion, *supra* fn. 13 ("Given these cases, it would be somewhat difficult to conclude that the funds collected by the cooperative association are not monies collected by the government even though there is no case precisely on point. However, these cases do not apply if there is special authority for the agency to accept and use the funds.").

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funds for operation and maintenance costs; they do not authorize an NFE to collect, hold, and spend USACE's own funds in a way that USACE could not collect, hold, and spend them itself, as is the case under the SWF Arrangement.

xii. It has also been observed that the CA has "considerable discretion" over the portion of the admission fees and recreation user fees that the CA retains for its own "administrative purposes." It has thus been suggested that USACE does not have constructive control over this portion of the fees, and that at least this portion of the fees should not be viewed as USACE funds subject to the above discussion.¹⁸ However, the CA only has discretion over this portion of the fees because USACE affords it such discretion under the SWF Lease. See Ref. 1.d. para. 35. Indeed, the provision of the SWF Lease that allows the CA to retain up to 50 percent of the fees only has meaning if these fees actually belonged to USACE, and not to the CA, when first collected by the CA; otherwise, if the fees did originally belong to the CA, then the CA would be free to simply retain and expend the fees as it sees fit without the need to spell this out in the SWF Lease. The fact that USACE allows the CA to retain and expend a portion of these funds for the CA's own administrative purposes therefore does not render the funds any less subject to USACE's constructive control and direction.

xiii. Further, even if we were to view the fees as belonging to the CA at the time of collection, rather than viewing them as USACE funds by virtue of USACE's constructive control, this arrangement would still need to be supported by some statutory authority. We have identified no authority under which USACE may allow the CA to (i) operate a USACE recreational facility for which USACE continues to receive and expend appropriated funds, (ii) collect fees from third party users of that recreational facility, and (iii) then treat any portion of those fees as its own.

xiv. To the extent that previous cooperative agreements may have allowed CAs to generate revenue from the use of a USACE constructed and maintained facility, such previous uses are vastly different from that proposed under the SWF Arrangement. First, as discussed above, the Cooperating Association Program has consistently focused on activities of a similar scale and scope as the defined enhancements in the ERs, not wholesale operation of a USACE recreational facility. To our knowledge, there is no precedent or authority allowing a CA to operate an entire USACE recreational facility, collect fees from third parties for the use of that USACE recreational facility, treat any portion of those collected fees as its own, or expend any portion of the fees as directed by USACE.

xv. Second, the nature and use of the property involved distinguishes these previous cooperative agreements from the SWF Arrangement. USACE has historically allowed CAs to retain and expend fees and other revenue that the CAs collected in return for providing visitor services at the USACE park or by operating facilities that the CA constructed, operates, and maintains at the USACE park. Indeed, this was envisioned at the start of the Cooperating Association Program through the allowance of such activities as CA bookstores and gift shops. See Ref. 1.f. However, while these activities or facilities may have been physically located at or

¹⁸ CESWF-OC White Paper, supra fn. 11, at *3.

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in a USACE recreational facility, the CA did not charge a fee or generate revenue “for the use of [USACE] developed recreation sites and facilities,” as used in 16 U.S.C. § 460d-3, but rather for the use of the CA-developed site, facility, or activity.¹⁹ The revenues generated by the CAs through these activities were thus the result of the CA’s own provision of funds and services, and not of the taxpayers’ investment in the USACE recreational facility.

xvi. The same is not true of the SWF Arrangement. It is our understanding that under the SWF Arrangement, the CA generates the bulk of its revenue by charging a fee “for the use of [USACE] developed recreation sites and facilities.” For instance, the SWF Arrangement requires USACE to use appropriated funds to maintain a USACE-constructed boat ramp or campground, but then allows the CA to operate the boat ramp or campground, charge fees from the users (either in the form of a user fee, a “gate fee” for access to the ramp or campground, or by other means), and retain a portion of these fees as its own. By the plain language of 16 U.S.C. § 460d-3, these funds must be deposited into the LWCF.

xvii. Moreover, while previous cooperating agreements allowed the CA to realize earnings only from its own investment, the SWF Arrangement allows the CA to also realize the earnings from the taxpayers’ continued investment of funds into the USACE recreational facility. We have identified no legal authority for this arrangement. The only legal authority that speaks to the collection of fees for the use of a USACE recreational area is 16 U.S.C. § 460d-3. This provision vests authority to collect recreation user fees at USACE recreational areas in the Secretary of the Army, acting through the Chief of Engineers, and sets strict requirements on how these fees will then be processed. *See* Ref. 1.a. Nowhere does this provision authorize a CA to collect, retain, or reinvest fees at a USACE-constructed and -funded site or authorize the Secretary of the Army or Chief of Engineers to delegate such authority outside of the Federal government to the non-Federal CA. *See id.* Given (i) the presence of a specific statute discussing who may collect fees for the use of a USACE recreational area and the manner in which these fees must then be processed and (ii) the absence of a specific statute authorizing the SWF Arrangement, we must presume that 16 U.S.C. § 460d-3 occupies the field with regard to the fees generated from a USACE recreational facility that was constructed by USACE and is maintained by USACE with appropriated funds.²⁰

xviii. For these reasons, it is our view that the CA may not charge admission or entrance fees for entrance into the USACE recreational facility. It is our further view that the CA also may not reinvest these USACE funds for the continued administration, maintenance, operation, construction, or development of the USACE recreational facility. Absent corrective legislation or certain modifications to the agreements, the continued reinvestment of the admission fees and recreation user fees into the USACE recreational facility violates 16 U.S.C. § 460d-3, deprives the LWCF of Congressionally mandated deposits, and constitutes an impermissible augmentation of the USACE budget.

¹⁹ *See supra* fn. 6.

²⁰ As compared to a recreational facility that has been fully leased or out-granted to a non-Federal entity, as discussed in *supra* fn. 11, and for which USACE neither receives nor exercises constructive control over the funds generated as a result of this lease.

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4. Necessary Actions to Correct the Authority and Fiscal Flaws with the SWF Arrangement.

a. USACE may only pursue leases and cooperative agreements within the existing legal authorities or by seeking legislation that would specifically permit the SWF Arrangement.

b. It is our understanding that several USACE Districts have already executed cooperative agreements and leases generally employing the SWF Arrangement. However, we have not received information as to how these cooperative agreements and leases are specifically structured, the types of fees collected by the CAs, how the Districts and CAs process the fees, and other information critical to determining the legal acceptability of these arrangements. We therefore recommend that each District that has entered into cooperative agreements and leases following approach of the SWF Arrangement carefully review the District's agreements and leases to ensure that they are consistent with the principles set forth in this opinion.

c. To the extent that any District has entered into a cooperative agreement or lease that is inconsistent with this opinion, we believe that these agreements and leases must be revised or terminated. Should the CA wish to continue its relationship with USACE following termination of an existing cooperative agreement or lease, we recommend that the relevant District execute a new cooperative agreement and lease or license for activities of a similar scale and scope as those listed in—and consistent with the authority and fiscal restrictions described in—paragraph 3.a., supra. Under any such successor lease or license and agreement, the CA may collect, retain, and expend fees and other revenue only as permitted by 16 U.S.C. § 460d, 33 U.S.C. § 2328, and USACE's implementing regulations. See supra fn.6. Any fees collected by USACE or over which USACE exercises authority or control must be deposited into the LWCF. We stand ready to assist your office and these Districts in revising these agreements and leases to bring them into accordance with the advice provided herein.

d. It is our further understanding that at least one Congressional representative has submitted a request to USACE for a legislative drafting service that, if enacted, would provide a firm statutory basis for the SWF Arrangement. We will provide a legislative proposal next week that will respond to this request and which, if enacted, would provide a statutory authority for the SWF Arrangement. As described above, however, we lack information on how other Districts might have implemented the SWF Arrangement or other arrangements. Accordingly, this legislative proposal may not resolve the legal issues for the arrangements entered into by other Districts. We have therefore requested information from the Operations and Regulatory Community of Practice regarding the partnership arrangements employed elsewhere in USACE so we may craft a follow-on legislative proposal if necessary.

5. Conclusion.

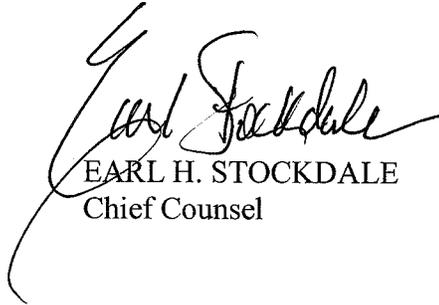
a. Because USACE effectively controls the use and disposition of the entrance, admission, user, and other such fees collected by the CA, we believe that these fees must be treated as USACE funds. We have identified no authority under which USACE may permit the CA to charge, retain, and expend for its own administrative purposes these fees collected at a USACE recreational facility. Further, we have identified no legal authority under which

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USACE may reinvest—either directly or indirectly through the CA—recreation user fees into the USACE recreational facility. All such fees must instead be deposited into the LWCF. A District's failure to deposit these fees into the LWCF and/or use of these fees for operation, maintenance, construction, or other types of reinvestment into the USACE recreational facility violates 16 U.S.C. § 460d-3, deprives the LWCF of Congressionally mandated deposits, and constitutes an improper augmentation of the appropriations provided to the District for those same purposes. Each USACE District should therefore review its cooperative agreements and leases to ensure they are consistent with the principles set forth in this agreement. To the extent that a District has entered into a cooperative agreement or lease that is inconsistent with this opinion, we believe that these agreements and leases must be revised or terminated.

b. If you have any questions or concerns, you may contact me at (202) 761-0018, CPT Steve Rice at (202) 761-8561.



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Chief Counsel

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Appendix 1

16 U.S.C. § 460d-3.

(a) Prohibition on admissions fees. No entrance or admission fees shall be collected after March 31, 1970, by any officer or employee of the United States at public recreation areas located at lakes and reservoirs under the jurisdiction of the Corps of Engineers, United States Army.

(b) Fees for use of developed recreation sites and facilities.

(1) Establishment and collection.

Notwithstanding section 4601-6a(b) of this title, the Secretary of the Army is authorized, subject to paragraphs (2) and (3), to establish and collect fees for the use of developed recreation sites and facilities, including campsites, swimming beaches, and boat launching ramps but excluding a site or facility which includes only a boat launch ramp and a courtesy dock.

(2) Exemption of certain facilities.

The Secretary shall not establish or collect fees under this subsection for the use or provision of drinking water, wayside exhibits, roads, scenic drives, overlook sites, picnic tables, toilet facilities, surface water areas, undeveloped or lightly developed shoreland, or general visitor information.

(3) Per vehicle limit.

The fee under this subsection for use of a site or facility (other than an overnight camping site or facility or any other site or facility at which a fee is charged for use of the site or facility as of August 10, 1993) for persons entering the site or facility by private, noncommercial vehicle transporting not more than 8 persons (including the driver) shall not exceed \$3 per day per vehicle. Such maximum amount may be adjusted annually by the Secretary for changes in the Consumer Price Index of All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

(4) Deposit into Treasury account.

All fees collected under this subsection shall be deposited into the Treasury account for the Corps of Engineers established by section 4601-6a(i) of this title and, subject to the availability of appropriations, shall be used for the purposes specified in section 4601-6a(i)(3) (!1) of this title at the water resources development project at which the fees were collected.

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Appendix 2

16 U.S.C. § 460d.

The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests.

The Secretary of the Army is also authorized to grant leases of lands, including structures or facilities thereon, at water resource development projects for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest: Provided, That leases to nonprofit organizations for recreational purposes may be granted at reduced or nominal considerations in recognition of the public service to be rendered in utilizing the leased premises: Provided further, That preference shall be given to Federal, State, or local governmental agencies, and licenses or leases where appropriate, may be granted without monetary considerations, to such agencies for the use of all or any portion of a project area for any public purpose, when the Secretary of the Army determines such action to be in the public interest, and for such periods of time and upon such conditions as he may find advisable: And provided further, That in any such lease or license to a Federal, State, or local governmental agency which involves lands to be utilized for the development and conservation of fish and wildlife, forests, and other natural resources, the licensee or lessee may be authorized to cut timber and harvest crops as may be necessary to further such beneficial uses and to collect and utilize the proceeds of any sales of timber and crops in the development, conservation, maintenance, and utilization of such lands.

Any balance of proceeds not so utilized shall be paid to the United States at such time or times as the Secretary of the Army may determine appropriate.

The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary, including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, or litter of any kind at such water resource development projects, either into the waters of such projects or onto any land federally owned and administered by the Chief of Engineers.

Any violation of such rules and regulations shall be punished by a fine of not more than \$500 or imprisonment for not more than six months, or both. Any persons charged with the violation of such rules and regulations may be tried and sentenced in accordance with the provisions of section 3401 of title 18. All persons designated by the Chief of Engineers for that purpose shall

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have the authority to issue a citation for violation of the regulations adopted by the Secretary of the Army, requiring the appearance of any person charged with violation to appear before the United States magistrate judge, within whose jurisdiction the water resource development project is located, for trial; and upon sworn information of any competent person any United States magistrate judge in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said regulations.

No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.

All moneys received by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

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Appendix 3

33 U.S.C. § 2328.

(a) In general.

The Secretary is authorized to develop and implement a program to share the cost of managing recreation facilities and natural resources at water resource development projects under the Secretary's jurisdiction.

(b) Cooperative agreements.

To implement the program under this section, the Secretary is authorized to enter into cooperative agreements with non-Federal public and private entities to provide for operation and management of recreation facilities and natural resources at civil works projects under the Secretary's jurisdiction where such facilities and resources are being maintained at complete Federal expense.

(c) Contributions.

For purposes of carrying out this section the Secretary may accept contributions of funds, materials, and services from non-Federal public and private entities. Any funds received by the Secretary under this section shall be deposited into the account in the Treasury of the United States entitled "Contributions and Advances, Rivers and Harbors, Corps of Engineers (8862)" and shall be available until expended to carry out the purposes of this section.