

for the appropriate non-Federal share. Section 906(b) also permits acquisition of real estate interests at completed projects as necessary for the implementation of the mitigation measures, except that the Corps is prohibited from acquiring such interests by condemnation.²⁵ Section 906(b) does not authorize mitigation which does not address damages caused by a Corps project itself, nor does it authorize mitigation measures requiring the Corps to acquire significant real estate outside a project's footprint or mitigation measures to be performed far afield of a Corps project, regardless of whether they might be environmentally beneficial.

2.1.4 Authority to Study Structural Modifications For Further Recommendations to Congress for New Project Construction Authority

The Corps has authority under the Flood Control Act of 1970, Section 216 (33 U.S.C. §549a) to review completed navigation, flood control and water supply projects for the purpose of determining whether, due to significantly changed physical or economic conditions, project modifications are advisable to improve the quality of the environment. Englebright and Daguerre Point Dams are both navigation projects; therefore, this authority would allow the Corps to prepare a report to Congress regarding the need to modify the structures due to changed physical or economic conditions. Section 216 states:

The Secretary of the Army, acting through the Chief of Engineers, is authorized to review the operation of projects the construction of which has been completed and which were constructed by the Corps of Engineers in the interest of navigation, flood control, water supply, and related purposes, when found advisable due [*sic*] the significantly changed physical or economic conditions, and to report thereon to Congress with recommendations on the advisability of modifying the structures or their operation, and for improving the quality of the environment in the overall public interest.

The Corps has already taken the first steps in the process of conducting the review contemplated by Section 216. In 2005, the Corps completed an Initial Appraisal Report

²⁵ 33 U.S.C. 2283(b)(1)(A)

regarding the federal interest in improving fish passage facilities at Daguerre Point Dam. Since 2005, the Corps has sought funding approval to initiate a reconnaissance study to explore fish passage improvements, however, to date, Congress has not funded the reconnaissance study.

3.0 CORPS PROGRAMMATIC CONSTRUCTION AUTHORITIES

WRDA 1986 and the Water Resources Development Act of 1996 (“WRDA 1996”) (P.L. 104-303) provide ecosystem restoration authorities under which the Corps can study the feasibility of project modifications and later construct or implement the modification. WRDA 1986 contains a general provision prohibiting the Corps from undertaking a feasibility study for a water resources project unless a non-Federal entity has agreed to contribute 50% of the cost of the study.²⁶

Section 1135 of WRDA 1986 authorizes the Corps to study and construct modifications in the structures and operation of projects for the purpose of improving the quality of the environment. Specifically, Section 1135(a) states that the Secretary of the Army may:

...review water resources projects...to determine the need for modifications in the structures and operations of such project for the purpose of improving the quality of the environment in the public interest and to determine if the operation of such projects has contributed to the degradation of the quality of the environment.”²⁷

However, the Corps’ authority under Section 1135 has some constraints. Section 1135 imposes a \$5,000,000 per-project cap on Federal expenditures for “any single modification or measure” and requires a non-Federal entity to fund 25 percent of the cost of any such

²⁶ 33 U.S.C. 2215

²⁷ 33 U.S.C.2309a(a)

modifications.²⁸ Additionally, the non-Federal partner must agree to pay 100% of any operation and maintenance costs associated with a project modification under Section 1135.²⁹

Section 206 of WRDA1996 33 U.S.C. 2330, generally gives the Corps the authority to study, design and construct projects to restore and protect an aquatic ecosystem. ³⁰ Section 206 states that the Secretary of the Army may:

...carry out a project to restore and protect an aquatic ecosystem or estuary if the Secretary determine that the (i) project will improve the quality of the environment and is in the public interest; or (ii)will improve the element and features of an estuary...and is cost-effective.³¹

Similar to Section 1135, Section 206 has several built-in constraints. Section 206 limits federal expenditures to \$5,000,000 for “a project at any single locality”³² and requires that a non-Federal entity fund 35 percent of the total project cost.³³ Finally, the non-Federal partner must agree to pay 100% of any operation and maintenance costs associated with a project under Section 206.³⁴ These authorities, which require study, implementation and operation and maintenance cost share partners, contemplate construction, and may not be used for purely study purposes, or solely providing conservation services such as monitoring, collecting and transporting fish species.

²⁸ 33 U.S.C. 2309a(d)

²⁹ Engineer Regulation 1165-2-501

³⁰ 33 U.S.C. 2330

³¹ 33 U.S.C. 2330(a)(1)

³² 33 U.S.C. 2330(d)

³³ 33 U.S.C. 2330(b)(1)

³⁴ 33 U.S.C. 2330(c)(1)