DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO CA 95814-2922

REPLY TO
ATTENTION OF

CESPK-RD (SPK 2012-00092) 14 June 2012

MEMORANDUM FOR THE RECORD

SUBJECT: Acceptance of Funds Contributed by the California Department of Water Resources, a Non-Federal Public Entity

1. References:

a. Section 214 of the Water Resources Development Act (WRDA) of 2000 (Public Law 106-541) as amended.

b. Memorandum, CECW-CO, Oct 1 2008, subject: Implementation Guidance for Section 2002 of the Water Resources Act of 2007 (Regulatory Program Funds Contributed by Non-Federal Entities).

2. The sunset clause for Section 214 of WRDA 2000 is 31 December 2016.

3. The purpose of this memorandum is to document my decision to enter into an agreement to accept and expend funds contributed by California Department of Water Resources (DWR), a non-Federal public entity, to expedite evaluation of Bay Delta Conservation Plan (BDCP) and BDCP related permit applications and processes under consideration of our Regulatory Division in accordance with Reference 1a.

4. Per Reference 1b, an initial public notice was circulated on 27 March 2012. Only one comment was received, from California Department of Transportation (Caltrans). Caltrans asked that they be included in any BDCP permit early consultations for actions which may potentially impact the state highway system. DWR is currently working with Caltrans on potentially relocating State Route 160 to make room for the new intake structures proposed as part of the BDCP.

5. The Regulatory Division recommends acceptance of funds from DWR.

6. I have carefully considered DWR's request and the recommendation of the Regulatory Division. I have determined that acceptance and expenditure of funds from DWR will not adversely impact impartial decision-making with respect to regulatory permit applications, either substantively or procedurally. The funding program will better serve the public interest through more cost-effective processing of permit applications, enhanced evaluation capability, and a streamlined permit processing system. Our capacity to evaluate permit applications from

applicants not party to this funding agreement will not be adversely affected. Accordingly, I find that acceptance and expenditure of funds from DWR is appropriate and is in accordance with the provisions of Section 214 of WRDA 2000.

7. DWR has already signed the Memorandum of Agreement (MOA). As per Office of Counsel guidance, I shall defer signing the MOA until I have first signed this Memorandum for Record (MFR) and an informational public notice has been issued to advise the public of my decision. After issuing the informational public notice, the Regulatory Division will then resubmit the MOA for my signature.

8. The point of contact is Mr. Michael Nepstad, Deputy Division Chief of my Regulatory Division, email Michael.g.nepstad@usace.army.mil, telephone 916-557-7262.

WILLIAM J. LEADY, P.E.
COL, EN
Commanding

3 Encls
1. MOA
2. PL 106-541
3. MEMO, 1 Oct 2008

Reference 1a.

including water resource assessment, community participation, planning, development, and management activities.

(c) COOPERATIVE AGREEMENTS.—A cooperative agreement entered into under this section shall not be considered to be, or treated as being, a cooperative agreement to which chapter 63 of title 31, United States Code, applies.

33 USC 2201 note.

SEC. 214. FUNDING TO PROCESS PERMITS.

(a) IN GENERAL.—In fiscal years 2001 through 2003, the Secretary, after public notice, may accept and expend funds contributed by non-Federal public entities to expedite the evaluation of permits under the jurisdiction of the Department of the Army.

(b) EFFECT ON PERMITTING.—In carrying out this section, the Secretary shall ensure that the use of funds accepted under subsection (a) will not impact impartial decisionmaking with respect to permits, either substantively or procedurally.

33 USC 2326c.

SEC. 215. DREDGED MATERIAL MARKETING AND RECYCLING.

(a) DREDGED MATERIAL MARKETING.—

Deadline.

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Secretary shall establish a program to allow the direct marketing of dredged material to public agencies and private entities.

(2) LIMITATIONS.—The Secretary shall not establish the program under paragraph (1) unless the Secretary determines that the program is in the interest of the United States and is economically justified, equitable, and environmentally acceptable.

(3) REGIONAL RESPONSIBILITY.—The program described in paragraph (1) may authorize each of the 8 division offices of the Corps of Engineers to market to public agencies and private entities any dredged material from projects under the jurisdiction of the regional office. Any revenues generated from any sale of dredged material to such entities shall be deposited in the United States Treasury.

Deadline.

(4) REPORTS.—Not later than 180 days after the date of enactment of this Act, and annually thereafter for a period of 4 years, the Secretary shall transmit to Congress a report on the program established under paragraph (1).

(5) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $2,000,000 for each fiscal year.

(b) DREDGED MATERIAL RECYCLING.—

(1) PILOT PROGRAM.—The Secretary shall conduct a pilot program to provide incentives for the removal of dredged material from confined disposal facilities associated with Corps of Engineer navigation projects for the purpose of recycling the dredged material and extending the life of the confined disposal facilities.

Deadline.

(2) REPORT.—Not later than 90 days after the date of completion of the pilot program, the Secretary shall transmit to Congress a report on the results of the program.

(3) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $2,000,000, except that not to exceed $1,000,000 may be expended with respect to any project.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

H. R. 6184

One Hundred Eleventh Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the fifth day of January, two thousand and ten

An Act

To amend the Water Resources Development Act of 2000 to extend and modify the program allowing the Secretary of the Army to accept and expend funds contributed by non-Federal public entities to expedite the evaluation of permits, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FUNDING TO PROCESS PERMITS.

Section 214 of the Water Resources Development Act of 2000 (33 U.S.C. 2201 note; 114 Stat. 2594; 117 Stat. 1836; 119 Stat. 2169; 120 Stat. 318; 120 Stat. 3197; 121 Stat. 1067; 123 Stat. 3478) is amended—

(1) by striking subsection (a) and inserting the following:

"(a) IN GENERAL.—The Secretary, after public notice, may accept and expend funds contributed by a non-Federal public entity to expedite the evaluation of a permit of that entity related to a project or activity for a public purpose under the jurisdiction of the Department of the Army.";

(2) by redesignating subsection (c) as subsection (e);

(3) by striking subsection (b) and inserting the following:

"(b) EFFECT ON PERMITTING.—

"(1) IN GENERAL.—In carrying out this section, the Secretary shall ensure that the use of funds accepted under subsection (a) will not impact impartial decisionmaking with respect to permits, either substantively or procedurally.

"(2) IMPARTIAL DECISIONMAKING.—In carrying out this section, the Secretary shall ensure that the evaluation of permits carried out using funds accepted under this section shall—

"(A) be reviewed by—

"(i) the District Commander, or the Commander's designee, of the Corps District in which the project or activity is located; or

"(ii) the Commander of the Corps Division in which the District is located if the evaluation of the permit is initially conducted by the District Commander; and

"(B) utilize the same procedures for decisions that would otherwise be required for the evaluation of permits for similar projects or activities not carried out using funds authorized under this section.

"(c) LIMITATION ON USE OF FUNDS.—None of the funds accepted under this section shall be used to carry out a review of the evaluation of permits required under subsection (b)(2)(A).

"(d) PUBLIC AVAILABILITY.—The Secretary shall ensure that all final permit decisions carried out using funds authorized under

this section are made available to the public, including on the Internet."; and

(4) in subsection (e) (as redesignated) by striking "2010" and inserting "2016".

SEC. 2. COMPLIANCE WITH STATUTORY PAY-AS-YOU-GO ACT OF 2010.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

reference 1b.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON, D.C. 20314-1000

OCT - 1 2008

CECW-CO

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS AND DISTRICT COMMANDS

SUBJECT: Implementation Guidance for Section 2002 of the Water Resources Act of 2007 (Regulatory Program Funds Contributed by Non-Federal Public Entities)

1. Section 214 of the Water Resources Development Act of 2000 (Public Law 106-541), as amended, provides;

(a) The Secretary, after public notice, may accept and expend funds contributed by non-Federal public entities to expedite the evaluation of permits under the jurisdiction of the Department of the Army.

(b) In carrying out this section, the Secretary shall ensure that the use of funds accepted under subsection (a) will not impact impartial decision making with respect to permits, either substantively or procedurally.

(c) The authority provided under this section shall be in effect from October 1, 2000, through December 31, 2009.

2. The Secretary of the Army delegated his authority to the Chief of Engineers and his authorized representatives to, after public notice, accept and expend funds contributed by non-Federal, public entities to expedite the evaluation of permits under the jurisdiction of the Department of the Army on 11 July 2001. District and Division Commanders are herby authorized to accept and expend funds contributed by non-Federal public entities subject to the limitations described in this guidance memorandum.

3. Initial Public Notice for Intent to Accept Funds. Prior to accepting and expending funds contributed by non-Federal public entities, the District must issue a public notice indicating: the non-Federal public entity providing such funds, the Corps authority to accept and expend such funds, the reason for such contributions, how acceptance of the funds is expected to expedite the permit review process, what types of activities the funds will be expended on, and what procedures will be in place to ensure that the funds will not impact impartial decision making.

Examples of acceptable activities that the funds may be expended on include, but are not limited to: technical writing, site visits, training, travel, field office set up costs, copying, coordination activities, additional personnel (including support/clerical staff), technical contracting, programmatic tool development and improvement, and acquisition of GIS data.

Funds may also be used to hire contract staff. Since the process of accepting funds may have the effect of giving priority to the evaluation of projects proposed by public entities, the Public Notice should include information on the impacts to the District's regulatory program and permit evaluations that are not subsidized by funds contributed by non-Federal public sponsors. A new public notice is not required if the non-Federal public entity is changing the amount of funds previously furnished, provided that the purpose remains the same. This possibility should be clearly stated in the initial public notice.

4. Basis for Acceptance of Funds. Following the review of the comments received in response to the public notice, the District Commander will determine if accepting funds will expedite processing of permits for the funding entity, if the District can put in place measures to ensure impartial decision making, and if accepting these funds will not slow down evaluation of other permits. If the District Commander determines, after considering public comments, that the acceptance and expenditure of the funds is appropriate, the funds may be accepted and expended. Funds will be accepted only if the public interest is better served through cost-effectiveness, enhanced evaluation capability, streamlined permit processing, or other appropriate justification. An informational public notice will be issued regarding the District Commander's decision.

5. Accountability. The funds must be accounted for to ensure they are expended for the intended purpose. District Commanders will establish separate accounts to track the acceptance and expenditure of the funds. Within 30 days of the conclusion of each fiscal year, Division Commanders will provide to CECW-CO, for review, letter reports documenting the acceptance and expenditure of funds; an accounting of the amount, type, and source of funds accepted and spent; copies of any public notices published within that fiscal year, any comments received with responses given; a quantitative and qualitative assessment of how the use of the funds expedited the permit review process; an analysis of any issues regarding impartial decision making; a copy of the performance metrics used by the District to evaluate the effectiveness of the use of funds; a statement certifying that all funded project managers are aware of and appropriately trained on the requirements contained in this guidance memorandum; and a letter from the funding entity detailing their level of satisfaction with the District's performance under the agreement. CECW-CO will compile the reports received and provide an information copy to the OASA (CW) within 60 days of the conclusion of each fiscal year.

6. Non-Federal Public Entity. Non-Federal public entities are limited to governmental agencies, including tribal governments of Indian Tribes as defined in Section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(b). Normally, applicant agencies would be entities such as: state, local, or Tribal transportation departments, port authorities, flood and storm water management agencies, economic development agencies, and housing agencies that have the desire to expedite the permitting process programmatically, or

for a specific project. Private entities are prohibited from entering into agreements with Districts. Permit applications from private entities for infrastructure projects paid for by private funds, or a mix of private and public funds, such as roads and utility trunk lines, but designed and built to benefit the public may be considered by non-Federal entities for submission to the Corps for processing under a funded agreement. However, it remains the District Commander's decision whether or not such applications will be processed by a funded position or to have such an application be processed by Corps-funded regulators. Applications from private entities for private projects will not be considered or accepted for processing under a funded agreement.

7. Impartial Decision making. Division and District Commanders must insure that the acceptance and expenditure of these funds will not impact impartial decision making with respect to permit review and final permit decisions, either substantially or procedurally. At a minimum, District will comply with the following standards.

For the purposes of this guidance, the decision maker is the person with signature authority.

a. In cases where funds are used, all final permit decisions, including all reporting nationwide, general, and regional permit verifications, must be reviewed and signed by at least one level above the decision maker, unless the decision maker is the District Commander. For example, if the decision maker is the Chief, Regulatory Branch, then the reviewer would be the Chief, Operations Division. Team leaders are appropriate one-level-above reviewers provided signature authority has been delegated to the project manager level. In accordance with all national policy and guidance, Districts are encouraged to delegate signature authority to the lowest appropriate level.

b. All documents involved in the decision making process (e.g. decision document and permit instrument, if applicable) must be reviewed and signed by the one-level-above reviewer as defined above.

c. All jurisdictional determinations made on projects where funds are used must have documentation that a non-funded, Regulator reviewed and agreed with the determination (e.g. peer review). This review does not need to be a field review.

d. All final permit decisions, including all reporting nationwide, general, and regional permit verifications, for cases where these funds are used will be made available and updated monthly on the District's web page in an area separate from any other final actions, clearly identifiable as being for projects funded by through this authority.

e. Any procedures or decisions that would otherwise be required for a specific type of project or permit under consideration cannot be eliminated; however, process improvements that are developed can be shared in order for all members of the regulated public to benefit.

f. The Corps must comply with all applicable laws and regulations.

g. Funds will not be expended for the review of the decision maker's decision. If contracts are used to develop decision documents, such decision documents must be drafts only and be reviewed and adopted by the Corps before the permit decision is made.

h. Funds will not be used for enforcement activities. Funding may be used for compliance activities including monitoring of mitigation sites.

8. This guidance is effective immediately and will remain in effect as long as the authority to accept and expend funds from non-Federal public entities is valid. That authority currently expires on 31 December 2009, unless otherwise extended by Congress.

FOR THE COMMANDER:

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