

CENWP-OD-G
April 19, 2012

MEMORANDUM OF DECISION

SUBJECT: Regulatory Program Funds Contributed by Non-Federal Public Entities

1. The purpose of this memorandum is to document the decision by the Portland District, U.S. Army Corps of Engineers (Portland District), to accept and expend funds contributed by a non-Federal public entity, the Port of Longview (Port). Such funds would be used to expedite the evaluation of Department of the Army permit applications from the Port under consideration of our Regulatory Branch. The funding would be accepted and expended in accordance with Section 214 of the *Water Resources Development Act of 2000* (WRDA 2000, Public Law No. 106-541). Section 214 of WRDA 2000 reads as follows:

(a) IN GENERAL.-The Secretary (of the Army), 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.”

Section 114 of the Energy and Water Development Appropriations Act 2004 (EWDA 2004; Public Law 108-137) extended this authority and states: “Section 114. Section 214(a) of Public Law 106-541 is amended by striking ‘2003’ and inserting ‘2005’.”

Public Law 109-99 was signed into law on November 11, 2005, extending the sunset clause for Section 214 of the WRDA 2000 to March 31, 2006.

Public Law 109-209 was signed into law on March 24, 2006, extending the sunset clause now in Section 214(c) of the WRDA 2000 to December 31, 2006.

Public Law 109-434 was signed into law on December 20, 2006, extending the sunset clause for Section 214 of the WRDA 2000 to December 31, 2008.

Public Law 110-114 was signed into law on November 8, 2007, extending the sunset clause for Section 214 of the WRDA 2000 to December 31, 2009.

WHEREAS, Public Law 111-120 was signed into law on December 22, 2009 extending the sunset clause for Section 214 of the WRDA 2000 to December 31, 2010;

WHEREAS, Public Law 111-315 was signed into law on December 18, 2010 extending the sunset clause for Section 214 of the WRDA 2000 to December 31, 2016;

2. Headquarters, U.S. Army Corps of Engineers (Headquarters) provided guidance on acceptance and use of such funds in a memorandum dated October 1, 2008 (Enclosure 1). That guidance included instructions to circulate an initial public notice that would explain the newly authorized funding mechanism and provide information on the following specific areas: names of the participating non-Federal public entities, 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 kinds of activities the funds would be expended on, and the procedures to be placed in effect to ensure the funds will not impact impartial decision-making.
3. The Portland District published such a Public Notice on December 30, 2011 (Enclosure 2). It contained an announcement of the Portland District's preliminary intent to accept such funds from the Port of Longview. The public notice contained the actual text of Section 214, described conventional funding, defined non-Federal public entities, and presented information on the following subjects: how the Portland District would expend the funds, the kind of activities for which funds would be expended, the procedures the Portland District will use to ensure that the funds will not impact impartial decision-making, the benefits non-Federal public agencies would receive from their funds, and the foreseen impacts to the regulatory program and to DA permit evaluations that are not subsidized by funds contributed by non-Federal public entities. The notice also indicated Portland District would review comments received in response to the initial public notice, and determine if the District's acceptance and expenditure of the funds is in accordance with the provisions of WRDA 2000.
4. Headquarters guidance also calls for strict accounting of expended funds, upward reporting procedures, and careful assessment of how the use of the funds will have expedited the permit review process or given rise to issues regarding impartial decisionmaking. To ensure that the acceptance and expenditure of these funds will not impact impartial decisionmaking, the Headquarters guidance calls for the establishment, at a minimum, of the following procedures:
 - 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 and 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.
5. Comments from the general public. No comments were received in response to the December 30, 2011, public notice.
6. It is my decision that adoption of the procedures described elsewhere in this memorandum and in the public notice and the subsequent acceptance and expenditure of funds from the Port of Longview will not impact impartial decisionmaking with respect to permits, 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 all permit actions will be incrementally increased with the presence of additional regulatory personnel.
7. Acceptance and expenditure of these funds is in accordance with Section 214 of the WRDA 2000.

John W. Eisenhauer, P.E.
Colonel, Corps of Engineers
District Commander

Enclosures:

- 1. CECW-CO Memo, 1 October 2008
- 2. Portland District Special Public Notice, 30 December 2011

CENWP-OD-G

SUBJECT: Regulatory Program Funds Contributed by Non-Federal Entities

MFR: The purpose of this memorandum is to document the decision by the Portland District to accept and expend funds contributed by the Port of Longview to expedite the evaluation of their respective permits under consideration of our Regulatory Branch. The funding would be accepted and expended in accordance with Section 214 of the *Water Resources Development Act of 2000* (WRDA 2000, Public Law No. 106-541). A copy of this memorandum will be placed on the Portland District's Regulatory web page.