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