



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

JUN 18 2010

CECW-PB

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS AND DISTRICT  
COMMANDS

SUBJECT: Implementation Guidance for Utilizing Section 214 of the Water Resources Development Act of 2000, as amended, to Accept Funding from Non-Federal Public Entities to Expedite the Evaluation of Permits pursuant to 33 U.S.C. 408.

1. References:

- a. 33 U.S.C. 408, Taking possession of, use of, or injury to harbor and river improvements.
- b. CECW-PB Memorandum for Major Subordinate Commands, Subject: Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineer Projects, 23 October 2006.
- c. CECW-PB Memorandum for See Distribution, Subject: Clarification Guidance on the Policy and Procedural Guidance for the Approval of Modifications and Alterations of Corps of Engineers Projects, 17 November 2008.
- d. Assistant Secretary of the Army (Civil Works) Memorandum for the Chief of Engineers, Subject: Delegation of Authority Pursuant to 33 U.S.C. 408, 16 April 2004.
- e. Chief of Engineers Memorandum for the Director of Civil Works, Subject: Delegation of Authority Pursuant to Section 408, 2 April 2009.
- f. CECW-PB Memorandum, Delegation of Authority to District Commanders to Approve Pursuant to 33 U.S. C. 408 Those Minor, Low Impact Modifications to Flood Protection Works Operated and Maintained by Non-Federal Sponsors Previously Considered under 33 C.F. R. 208.10(a) (5), 18 June 2010.

2. 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

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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, 2010.

3. The Corps has used the Section 214 authority to accept and expend funds for expediting Clean Water Act Section 404 (33 U.S.C. 1344) and/or Rivers and Harbors Act Section 10 (33 U.S.C. 403) permit applications in the Regulatory Program. In addition, it has been determined that it is appropriate to receive funding under that authority to expedite processing of permit application packages pursuant to 33 U.S.C. 408 ("Section 408"). Division and District Commanders are hereby authorized to accept and expend funds provided by non-Federal public entities, subject to the limitations described in this guidance memorandum.

4. Acceptable Uses of Funds. Examples of acceptable uses of funds provided by non-Federal public entities pursuant to Section 214 for the purpose of expediting the evaluation of submitted Section 408 permit applications include, but are not limited to: technical analyses and writing, Agency Technical Review, real estate evaluation, risk analysis, copying or other clerical/support tasks, acquisition of data, site visits, training, travel, coordination activities, additional personnel (including support/clerical staff), contracting for technical services (e.g., structural risk evaluation, geotechnical analysis, hydraulic and hydrological engineering review), and environmental documentation preparation and review.

a. Section 214 will not be used to accept and expend funds to cover administrative expenses related to real property, including the drafting, negotiating, or issuing of any necessary real estate instruments, where the provisions of 10 U.S.C. 2695, "Acceptance of funds to cover administrative expenses relating to real property transactions" (relating to real property under the control of the Secretaries of the military departments) is otherwise available for purposes of accepting and expending non-Federal funds.

b. No funds provided by a Federal agency to a non-Federal public entity, including funds provided by the Government to non-Federal public entities under the American Reinvestment and Recovery Act (P.L. 111-5), may be accepted by the Corps under Section 214 unless the non-Federal public entity forwards to the Corps a written confirmation from the Federal agency that the use of the funds to expedite the evaluation of Section 408 permit applications is authorized.

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5. Initial Public Notice for Intent to Accept Funds.

a. Prior to accepting and expending funds provided by non-Federal public entities, the Division or District shall issue a public notice, post the public notice in a clearly identified and easily accessible area (e.g., "Acceptance of Section 214 Funds for Expediting Section 408 Permit Applications") on its webpage, and distribute the notice to concerned agencies, organizations, and the interested public.

b. The public notice shall describe 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, what procedures will be in place to ensure that the funds will not impact the Division or District's impartial decision-making, and information on the impacts, if any, to the District's and Division's Section 408 permit application processing and evaluation that is not subsidized by funds provided by non-Federal public entities. Further, if Section 214 funds are also intended to be accepted or have been accepted to expedite the evaluation of permit applications under the Corps' Regulatory Program for the same project and/or by the same non-Federal public entity, such intention should be clearly stated in the public notice.

c. Provided that the purpose for accepting funds remains the same as that described in the initial public notice, a new public notice is not required in the event a Memorandum of Agreement (MOA), as defined in paragraph 6 below, is amended to extend the term of the agreement, to modify the list of priority projects identified in the MOA, or to adjust the terms of the annual advance payment contemplated under the MOA.

6. Basis for Acceptance of Funds. Following the review of the comments received in response to the public notice, the Division or District Commander will determine if accepting funds will expedite the processing of Section 408 permit applications for the funding entity, provided that the Division and/or the District put in place measures to ensure impartial evaluation and decision-making and provide that accepting these funds will not unduly delay completion of other work. If the Division or 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 Division or District Commander's decision. The Division or District shall post the informational

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public notice on its webpage in the same, easily identifiable and accessible area used for the first public notice, and distribute the notice to concerned agencies, organizations, and the interested public. Prior to accepting any monies, the Division or District shall enter into a Memorandum of Agreement (MOA) with the funding entity. At a minimum, the MOA must include a scope of work and itemized budget estimate, address the provision of additional funds, if needed, as well as the return of unused funds, and must identify the total annual cost for each federal fiscal year covered by the term of the MOA. The itemized budget estimate must include identification of personnel, hourly rates, indirect labor costs, estimated hours of work, and travel costs related to the MOA scope of work.

7. Accountability. The funds must be accounted for to ensure that they are expended for their intended purpose. Each District entering into a Section 214 MOA shall establish a separate account to track receipt and expenditure of the funds in the Corps of Engineers Financial Management System. Corps personnel accomplishing the technical and administrative tasks required to expedite the evaluation of the Section 408 permit applications covered by the MOA will charge their time against a specific account when working on those permit applications. Within 30 calendar days of the conclusion of each fiscal year, Division Commanders will provide to the appropriate Regional Integration Team 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 which defines and demonstrates 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 personnel are aware of and appropriately trained on the requirements contained in this guidance memorandum; and a letter from the funding entity detailing its level of satisfaction with the District's performance under the MOA. CECW-P will compile the reports received by the Regional Integration Teams and prepare a national level program analysis. An information copy of the reports and analysis will be provided to the Office of the Assistant Secretary of the Army (Civil Works) within 60 days of the conclusion of each fiscal year.

8. Non-Federal Public Entity. Non-Federal public entities are limited to governmental agencies, including the governments of Indian Tribes as defined in Section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(b)). Typical applicant agencies may include: flood risk management districts, water conservation agencies, storm water management agencies, transportation departments, hydropower agencies, and port authorities that have the desire to expedite the permitting process programmatically, or for a specific project. The non-Federal public entity seeking expedited permit review under Section 408 need not be the non-Federal sponsor of the Federally authorized project. Private entities are not allowed to provide funding pursuant to Section 214.

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9. Impartial Decision-making. Section 214 requires that the Government ensure that the use of funds accepted under that statute does not impact impartial decision-making, necessitating the development of procedures in addition to those otherwise applicable to the consideration and evaluation of Section 404 or 408 permit applications. (One such requirement applicable to all Section 404 or 408 permit applications is that if contracts are used to develop decision documents, such decision documents must be drafts only, and must be reviewed and adopted by the Corps before any decision or recommendation is made.) The Director of Civil Works determines whether a Section 408 permit application will be approved or disapproved, except for permit decisions for those minor, low impact modifications to flood protection works delegated to the District Commander by reference 1.f. To ensure impartial decision-making throughout consideration of a permit application, the following procedures shall be followed:

a. In cases where the approval authority is at the level of the Director of Civil Works, and the District has accepted Section 214 funds, the District, through the Division, must provide sufficient information to assure the decision-maker that the acceptance and expenditure of funds by the District under Section 214 have not affected the District's or the Division's evaluation of the Section 408 permit applications, either substantially or procedurally. Draft technical documents or draft decision documents resulting from the use of Section 214 funds must be reviewed and signed by an unfunded reviewer (i.e., a reviewer not be funded by funds received under Section 214 for that permit application) prior to consideration by the Division or District Commander. No funds received under Section 214 shall be used for the Division Commander's or the District Commander's consideration and recommendation concerning a Section 408 permit application. Further, each Section 408 permit application package submitted to the Director of Civil Works for decision will include a letter report describing the procedures implemented to ensure the evaluation was impartial and in compliance with this guidance, including: (1) the initial public notice, any comments received, the memorandum documenting the Division or District Commander's decision to accept funds under Section 214, and the informational public notice of the Division or District Commander's decision; (2) the Section 214 MOA entered into by the Division or District and the non-Federal public entity to accept and expend funds; (3) an accounting of the amount, type, and source of funds accepted and expended; and (4) a qualitative assessment of how the use of the funds expedited the permit review process. When a final permit decision has been made at the Director of Civil Works level, that decision will be made publicly available on the originating District's webpage in an area clearly identifiable as being for projects funded through this authority.

b. In cases where the approval authority is at the level of the District Commander and the District has accepted Section 214 funds, the District Commander must ensure that the acceptance and expenditure of these funds will not impact the District's impartial decision-making with respect to evaluating Section 408 permit applications, either substantially or procedurally. Draft

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technical documents or draft decision documents resulting from the use of Section 214 funds must be reviewed and signed by an unfunded reviewer prior to consideration by the District Commander. No funds received under Section 214 shall be used for the District Commander's consideration and final decision on approval or disapproval of a Section 408 permit application. When a final permit decision has been made by the District Commander, the decision will be made publicly available on the District's webpage in an area clearly identifiable as being for projects funded through this authority.

10. 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.

FOR THE COMMANDER:

A handwritten signature in black ink, appearing to read 'S. L. Stockton', written in a cursive style.

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