



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

NOV 27 2001

CENWS-OD-RG

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 Seattle District, U.S. Army Corps of Engineers (Seattle District), to accept and expend funds contributed by non-Federal public entities, specifically the Ports of Seattle and Tacoma and the City of Seattle, to expedite the evaluation of 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). Section 214 of WRDA 2000 reads as follows:

(a) IN GENERAL.-In Fiscal Years 2001 through 2003, 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."

2. Headquarters, U.S. Army Corps of Engineers (Headquarters) provided guidance on acceptance and use of such funds in a memorandum dated July 17, 2001. 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:

- a. names of the participating non-Federal public entities,
- b. the Corps authority to accept and expend such funds,
- c. the reason for such contributions,
- d. how acceptance of the funds is expected to expedite the permit review process,
- e. what kinds of activities the funds would be expended on,

f. the procedures to be placed in effect to ensure the funds will not impact impartial decisionmaking.

3. The Seattle District published such a Public Notice on 24 August 2001. It contained an announcement of the Seattle District's preliminary intent to accept such funds from the City of Seattle, the Port of Seattle, and the Port of Tacoma. 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:

- a. how the Seattle District would expend the funds
- b. the kind of activities for which funds would be expended
- c. the procedures we will use to ensure that the funds will not impact impartial decisionmaking
- d. the benefits non-Federal public agencies would receive from their funds,
- e. impacts we foresee to our regulatory program and to DA permit evaluations that are not subsidized by funds contributed by non-Federal public entities.

The Seattle District would then 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. According to the guidance,

If the District Commander determines, after considering public comments, that the acceptance and expenditure of the funds is in compliance with the Act, the District Commander may accept and expend such funds. . . 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. A new public notice will be issued regarding the District Commander's decision.

Headquarters guidance also called 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 called for the establishment, at a minimum, of the following procedures:

- a. All final permit decisions for cases where these funds are used must be reviewed by at least one level above the decisionmaker, unless the decisionmaker is the District Commander.
- b. All final permit decisions for cases where these funds are used will be made available on the participating Corps District's Regulatory web page.

c. The Corps cannot eliminate any procedures or decisions that would normally be required for the type of project under consideration.

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

e. Funds will only be expended to expedite the final decision on the permit application. Funds will not be expended for the review of the decisionmaker'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 regulatory program employees before the decision is made.

4. Comments from the general public. From the general public, we received an e-mail, three letters, and a petition signed by 38 people. The content of each communication is presented below, nearly verbatim. Each particular comment is preceded by a bracketed number. Following each letter, e-mail, or petition will be the Seattle District's response to the comment preceded by the same bracketed number.

The e-mail came from John Vogel, an employee of the U.S. Coast Guard's Seattle office and an occasional point-of-contact when that agency has sought DA permits:

[1] We received the Special Public Notice concerning the acceptance of money from non-Federal public entities to expedite their permit processing. While this sounds initially reasonable, I have some concerns with it. I base it on my experience with the Washington Department of Ecology. They have a program where they will provide a "timely" review of independent cleanups, if they are paid \$1,000 to \$15,000. The way it works is that if you don't pay them, they will never review the cleanup. I consider this blackmail, and have refused to pay them. So, we don't receive those nice "no further action" letters, which look nice in the file, and are a good thing to have if you want to sell the property.

So my concern is that the WRDA 2000 payments will adversely affect those permit applicants who don't participate. I hope you can avoid that problem.

Seattle District response to [1]: While we are offering expedited action to these public entities, this process will also facilitate the remainder of our pending applications. We have made preliminary agreements with three public entities which maintain, on an ongoing basis, multiple active permit applications. The agreements, when complete, would let the participating agencies set priorities and receive some certainty of progress. The funds they supply would mostly go toward paying the hourly rates of the Regulatory employees working on expediting the participating entities' selected pending cases. This would incrementally reduce the pending caseload of the remainder of the regulatory employees. The normal Regulatory funds which would have paid their salaries would instead be used to hire additional staff at varying levels of experience who would work on the balance of the caseload. Applicants who are not participants in the program would not be penalized in the way this commentor calls "blackmail" because their cases would be processed by the remaining Regulatory staff augmented by the additional people we would hire with funds freed up by WRDA 214 participants.

In the first of the letters, Claudio Parazzoli of Normandy Park wrote:

“... It is UNACCEPTABLE to fast track (expedite) Army Corps of Engineers permits using temporary staff paid with Port of Seattle, Port of Tacoma, or Seattle City funding. It is clearly a conflict of interests worth a good law suit.”

[1] “It is common knowledge that it is risky to go up against the Port of Seattle. This proposal creates temporary employees, paid with Port funding, that are likely to be seeking additional employment in their field when funding expires September 2003.”

[2] “Even assuming you are able to find people of integrity, there will always be the perception in aggrieved communities that the Port of Seattle has an unfair advantage with this funding proposal.”

[3] “The Washington Department of Ecology’s habit of reassigning people, such as Lisa Zimmer and Tom Luster, after they get up to speed on the complex Port of Seattle airport situation, reinforces the airport community’s perception that the Port of Seattle’s control of regulatory agency staffing is already too great.”

[4] “Newly assigned employees often take years before they can accurately weed through all the Port propaganda and semantics to find the real underlying data regarding the proposed deadly Sea-Tac third runway.”

[5] “Please don’t let the FAA or the Ports pressure the Corps into this funding proposal . . .”

Seattle District response to [1]: Regulatory Branch employees who will be utilized under this proposal may be permanent career employees, temporary employees, or contract employees. They would not be the decisionmakers, and the procedural safeguards built in to the Regulatory Program would prevent any employee from being put in a vulnerable position with participating public entities. If the WRDA 214 funding halted, it is our expectation that newly hired employees would be retained in the process of normal staff turnover.

[2] The perception of advantage gained by the Port of Seattle appears limited to a single case—the SeaTac Airport Third Runway. The Seattle District will not expend WRDA 2000 money funds to fund staff time spent for that project. The Port of Seattle currently has 13 other permit cases pending with the Seattle District, and not a single one has elicited public comment. They involve things like rebuilding a seawall at Fishermen’s Terminal, dredging at Pier 66, and repairs at several container wharves. It is those cases for which the program was designed or the seven cases pending for the city of Seattle, none of which have become controversial.

[3] The Seattle District does not reassign regulatory project managers away from controversial cases after they "get up to speed" and become involved in controversy. The Port of Seattle does not control the Corps' regulatory process or its personnel. The Department of Ecology's decision to reassign personnel is not relevant to the Corps' decisionmaking process.

[4] Newly hired regulatory staff will be paired with experienced regulators for any difficult or controversial cases.

[5] WRDA 2000 is an Act of Congress, signed by the President, and thus a fully enacted public law. It is not a creation of the FAA and no Ports are forcing us to adopt it.

John Keithan of Seattle, Washington, wrote the following:

[1] "The Public Notice allowing the Seattle District to accept and expend funds to expedite processing DA permit applications under the conditions of the Special Public Notice are most distressingly unfair and rife with opportunities for fiscal impropriety."

[2] "Admittedly there are occasional needs for permit expedited processing, yet the description of the proposed system are woefully incomplete with safeguards to those applicants who might wish to secure a place in line, defeat their schedules, eventually cost them more money [sic]."

"Surely there are much more equitable and controlling procedures possible that can assist concluding a solution to the needs for action when such action is required."

Seattle District response to [1] and [2]: We think adequate safeguards are in place dealing with accounting, reviewing, reporting, and publicizing actions performed with these funds. Review will be elevated one level above normal, the process will be limited to public entities, and strict accounting and public disclosure procedures have been established.

Stuart Weiss of Seattle, Washington, wrote the following:

[1] "People working on the outside funded project will know that they are specifically being paid to expedite the project. They probably have a time limit which might curtail their investigations, researching, calculations, etc. It is often suspected that consultants working for a client may have their judgment clouded by the wishes of the client paying them. There is no way the Secretary can insure an impartial study unless all the work is done in a regular manner using the Secretary's funding."

[2] "Please do not allow the U.S. Army Corps of Engineers integrity to be compromised by accepting outside funds for expedited permit processing."

Seattle District response: [1] Project managers in our Regulatory Program, regardless of the source of their funding, have a set pattern of information requirements, publicizing, policy interpretation, and documentation. Peer and supervisory review are constant elements at each step of the permitting process and are designed to prevent various forms of insufficiency. The system works now, and the enhanced review safeguards built in to this program will act to guarantee adherence to long-established policies and procedures. Especially effective should be the requirement for additional review by a person at least one level above the decisionmaker on all final permit decisions for cases where these funds are used.

[2] It is our belief that our employees maintain a high degree of integrity. This belief is not diminished by a temporary funding source and Corps of Engineers management, from Headquarters on down, is determined that it not be.

The 38-signature petition was a restatement of the Parazzoli letter with some added comments about the Washington Department of Ecology's handling of the Water Quality Certification on the Third Runway case. The Seattle District's comments to the Parazzoli letter apply here as well. We have no comments about the Washington Department of Ecology's handling of the Water Quality Certification for the Third Runway project.

5. After analyzing the comments received from the public, 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 City of Seattle, the Port of Seattle, and the Port of Tacoma 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.

6. Acceptance and expenditure of these funds is in accordance with Section 214 of WRDA 2000.

2 Encls

1. CECW-OR Memo,
17 July 2001
2. Seattle District Special
Public Notice, 24 August 2001



RALPH H. GRAVES
Colonel, Corps of Engineers
Commanding