



DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
P.O. BOX 53277
LOS ANGELES, CALIFORNIA 90053

REPLY TO
ATTENTION OF

CESPL-CO-R

MEMORANDUM OF DECISION

6 January 2005

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

1. The purpose of this memorandum is to document my decision, as District Commander of the U.S. Army Corps of Engineers Los Angeles District, to accept and expend funds contributed by a non-Federal public entity, specifically the Port of Los Angeles, to expedite the evaluation of permit applications 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 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. The sunset clause for Section 214 of WRDA 2000 was extended to 30 September 2005 by Public Law 108-137, signed into law on 1 December 2003.

3. Headquarters, U.S. Army Corps of Engineers (“Headquarters”) provided guidance on acceptance and use of such funds in memoranda dated 17 July 2001 and 29 March 2004. 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.

4. The Los Angeles District published such a Public Notice on 23 December 2002. It contained an announcement of the Los Angeles District's preliminary intent to accept such funds from the Port of Los Angeles. 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 Los Angeles 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 decision-making;

d. The benefits non-Federal public agencies would receive from their funds;

e. Impacts we foresee to our regulatory program and to Department of the Army (DA) permit evaluations that are not subsidized by funds contributed by non-Federal public entities.

I have reviewed comments received in response to the initial public notice, and have made a determination regarding the District's acceptance and expenditure of the funds is in accordance with the provisions of WRDA 2000.

According to the Headquarters 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.

5. Comments from the general public consisted of an e-mail from one individual and a letter on behalf of several environmental/community groups. The relevant content of each communication is presented below. A bracketed number precedes each particular comment. My evaluation and response to each comment (similarly numbered) then follows.

The e-mail was submitted by Mr. Noel Park, President of the San Pedro and Peninsula Homeowners Coalition (SPPHC):

[1] We understand that the purpose of this request from the Port of Los Angeles is to allow the Port to fund a new position at the Corps of Engineers for the exclusive purpose of processing Port of Los Angeles development permits.

We are absolutely opposed to any such thing. We believe that this would create the appearance of a cozy relationship between the Port and the Corps which would be totally inappropriate. It is critically important to both the Corps, and the civilian communities whose environment and quality of life it is charged to protect, that the Corps maintain an arms length relationship, and the absolute appearance of an arms length relationship, with the entities whose permits it must approve.

This is especially true in light of current litigation involving the Port and the Corps around both the China Shipping project and the Pier 400 development. While we have always been at pains to acknowledge the professionalism of the Corps staff with whom

we have come into contact, now is not the time to cast any sort of doubt upon the ability of the Corps consider Port permits with totally professional impartiality.

[2] The Port of Los Angeles is making this request in order to expedite many future large projects, which they are currently contemplating. Several of our members are serving on the Port of Los Angeles' Port Community Advisory Committee (PCAC). Not one hint of any of these projects has been breathed to the PCAC. Indeed, we have been requesting for several months a report on the Port's rumored extension of the Pier 400 landfill. No such report has been forthcoming. In this climate of secrecy and distrust, please do not give the Impression that the US Army Corps of Engineers is a co-conspirator.

There is serious opposition in the San Pedro community to any further filling in of the waters of the Port for cargo terminal, or any other, development. If the Port attempts to ignore or defy these concerns, substantial future controversy, with the ever-present possibility of litigation will result. In such a climate, it can do no good for the image and reputation of the Corps to have entered into an even cozier relationship with the Port of Los Angeles.

Please do not approve this unfortunate change in your relationship with the Port of Los Angeles.

Corps response to [1] and [2]: The Port of Los Angeles does not control the Corps' regulatory process or its personnel. We think adequate safeguards are in place dealing with accounting, reviewing, reporting, and publicizing actions performed with these funds. We in fact believe that accepting the funds would improve regulatory oversight of the Port because it will allow dedicated staff to spend ample time contemplating current and future proposed actions. Due to limited resources, Corps staff time is often limited to what is currently proposed. Furthermore, our employees maintain a high degree of integrity. The Corps is committed to maintaining a very high degree of integrity for the regulatory program and will continue to ensure that review of all permit applications are conducted in an impartial manner. In reviewing Port of Los Angeles permit applications, Corps regulators do not function as proponents nor opponents of particular proposals. The overall mission of the regulatory program is to protect aquatic resources, regulate actions that may affect navigation and ensure that permit decisions are in compliance with applicable federal laws and regulations and not contrary to the public interest. Provision of funding on the part of the Port of Los Angeles to enable the Corps regulatory program (through added staff resources) to more expedite evaluation of permit applications will not change this fundamental mission.

The comment letter was submitted on behalf of Julie Masters, Senior Project Attorney, the Natural Resources Defense Council (NRDC); Scott Kuhn, Senior Staff Attorney, Communities for a Better Environment (CBE); Todd Campbell, Policy Director, Coalition for Clean Air (CCA); and Steve Fleischli, Executive Director, Santa Monica Baykeeper (SMB).

[1] On behalf of the Natural Resources Defense Council, Communities for a Better Environment, Coalition for Clean Air, Santa Monica Baykeeper, and our hundreds of thousands of members nationwide, thousands of whom reside in Southern California, we express our strong opposition to the Corps' proposal to accept funds from the Port of Los Angeles for the purpose of expediting the review of the Port's permit applications. In our view, the act of an applicant paying an otherwise independent public agency to "streamline" the review of its applications creates an unacceptable and irreconcilable conflict of interest. Further, we believe the fund outlined in the public notice violates both the Water Resources Development Act of 2000 and the Administrative Procedure Act.

[2] We are also concerned that the Army Corps and Port intend to go one step further and improperly use these funds for a "U.S. Army Corps of Engineers Regulatory Project Manager position" who's sole job would be to review Port of Los Angeles permit applications. It is clearly illegal for the Port (or any applicant agency) to control an Army Corps staff member, particularly one who reviews its permit applications. This is particularly true of a Project Manager with supervisory control over the entire process and, presumably, a voice in the ultimate permitting decision. Since the Port would fund this new position, it could withdraw that funding at any time if, for example, it were unhappy with the Project Manager's permit decisions. As a result, the Port would exercise ultimate control over whether its permits are approved. This proposal presents a host of other ethical and legal problems. [3] However, as the Corps has not given any public notice of this proposal, we will not comment in detail at this time. If the Corps does intend to use the Port's money to fund such a position, it must re-circulate the notice to allow for public comment on this specific proposal. Again, however, we strongly urge you not to consider such a proposal.

[4] As for the proposal outlined in the public notice, we are particularly concerned that the applicant in this case is the Port of Los Angeles. As you know, a unanimous three-judge panel of the California Court of Appeal recently held that the Port violated the California Environmental Quality Act in altogether failing to review the environmental impacts of a tremendous new 174-acre, two wharf container terminal (the China Shipping Project). China Shipping is just the latest in a string of unmitigated Port expansion projects. Indeed, the reasons given in the public notice of the need for this funding—that both the number of Port projects and concerns over environmental impacts, such as water quality parameters, air quality impacts, traffic and impacts to the marine environment, have significantly increased over the last five years—are *precisely* the reasons why these funds should *not* be accepted. The fact that the Port is growing at an unprecedented rate and causing rapidly increasing (and completely unmitigated) environmental impacts, should cause the Army Corps to undertake a *more*, not less, stringent and independent review of future Port projects to safeguard the

public interest. We are concerned that, ultimately, this money will simply become a "pay off" for an expedited rubber stamp. At the very least, it will create a public perception that it is.

[5] In addition, the "guidelines" and "safeguards" outlined in the public notice will not remedy these inherent problems. The Corps' proposed guidelines for the expenditure of these funds are ill defined. Moreover, the "safeguards" intended to ensure the Corps' independence are woefully inadequate.

First, the definition of what expenditures are "allowable" is incredibly vague, leaving use of the funds open to abuse. In fact, it appears that the funds can be used for anything other than the final review of a permit by a project manager's superior. Further, the fact that the funds apparently would not be used for overtime or *extra* work by experts and staff, leaves the impression that the Port will pay this money solely to skip ahead of other potential permittees or otherwise receive preferential treatment. Further, it is problematic that these funds would be spent on the salaries of "Regulatory Project Managers." At the very least, the use of Port funds should be limited to compensation for the work of staff members or consultants who have no oversight, managerial responsibilities, or input on permitting decisions.

Second, the procedures outlined in the public notice to "ensure that the funds will not impact impartial decision-making" are also insufficient. The strongest "safeguard" appears to be that "all permit decisions for cases where the funds are used must be reviewed by one level above the decision maker." This, however, will not remedy the inherent conflicts of interest and inevitable bias. By the time the impartial decision-maker reviews a project, the environmental documents would be completed (even if they technically remain in draft form) and the information they contain could be skewed or biased. Thus, even a completely impartial superior could unknowingly make a biased permit decision based on one-sided or otherwise inaccurate environmental information.

Third, though the Corps promises not to eliminate any *mandatory* procedures or decisions, we believe that the goal of "expediting" or "streamlining" Port permits would inevitably weigh against the Corps following *discretionary* procedures, such as holding a public hearing on a permit application, to the detriment of the public. Also, time concerns may impact the Corps' decision to prepare an environmental assessment ("EA") in lieu of an environmental impact statement ("EIS"). There is simply no way for the Corps to assure the public that these types of decisions will not be made.

Fourth, under this proposal the Port can actively influence the Corps' review process by "setting priorities." The setting of priorities clearly must be the job of the independent permitting authority alone. To the extent the Port has any ability

to control the process, we believe it causes an irreconcilable conflict of interest. In such a case, the Corps is no longer working in the *public* interest. Rather, if the Corps goes ahead with this funding program (which we urge you not to), any money should be placed in a fund, to be used by the Corps in its sole discretion in accordance with strict guidelines.

[6] Currently, there are no independent checks on the Port's expansion *other than Army Corps permit review*. We are already greatly concerned that the Corps has failed to exercise its independent judgment separate from the Port, as the China Shipping Project has highlighted. This new funding program would further erode the Army Corps' independence (and, at the very least, the perception of independence). We strongly urge you not to go forward with this proposal.

Corps response to [1]: The Port of Los Angeles does not control the Corps' regulatory process or its personnel. The Corps, not the Port, would select any additional Corps regulatory staff. Such staff would be supervised and evaluated by Corps regulatory program managers, not the Port. Section 214 of WRDA 2000 is an Act of Congress, signed by the President, and explicitly authorizes funding from non-federal public agencies (such as the Port of Los Angeles) to provide funds to the Corps for the purpose of adding staff to expedite review of permit applications.

[2]: The Port would not "control" any Corps regulatory staff member. The Port would be providing funds to supplement financial resources available to hire regulatory staff. The actual funding provided by the Port could be used by a single regulatory project manager or by more than one such individual (with each charging only a portion of their time to the Port funded account). However, all permit decisions on Port projects which were evaluated by Corps staff utilizing the Port funding for that evaluation must be approved by a Corps manager who is at least one level higher than the Corps staff/manager who would normally have the decision making authority. If WRDA funding were halted, the positions would not cease to exist; rather, personnel would simply be reassigned to review other permit applications. The regulatory program in the Los Angeles District typically hires 2-4 new project managers per year to backfill vacancies that occur as a result of normal turnover. If the Port decided to withdraw funding, the Corps would not need release an employee who had been previously supported by Port funding. The Corps could easily assimilate that individual to backfill normal vacancies that occur on a regular basis. Thus, there would be no illegal or inappropriate control by the Port over the Corps regulatory program. The Corps is confident that evaluations of permit applications from the Port would continue with a high degree of integrity with or without such funding. With the funding, though, those evaluations could occur in a more timely manner. Provision of these added resources to the Corps by the Port would benefit the Port by helping to minimize the expected decrease in service that is projected as a result of regulatory budgets not keeping pace with inflation, and a very rapidly increasing workload for Corps regulators to review Port of Los Angeles permit applications. The Port is planning to grow rapidly in the next few years and the level of environmental review required for Corps permit decisions has increased in recent years due to concerns over cumulative and indirect environmental effects of the Port's proposed projects. .

[3]: The Corps circulated a public notice describing the proposed acceptance of funds on December 23, 2002. The comments provided in this letter were in direct response to this PN.

[4]: This comment is predicated on the assumption that by accepting funds from the Port, the Corps will apply a less stringent and less independent review of Port permit applications. With the various safeguards to be put in place (e.g., raising the decision making authority on Port projects reviewed by Port-funded Corps staff, publishing on the Corps regulatory web site all such permit decision documents, etc.) and with the continuous commitment to implement the regulatory program in a fair and unbiased manner, there will be no decline in the quality of the Corps permit decision making standards. If anything changes in this regard, greater review would be applied than if the Corps had fewer staff resources to review the Port's permit applications. The Corps is aware that perception of the Port by some members of the community is not positive. In recent years, the Corps has worked very hard to demonstrate that the regulatory program functions as a "honest broker" in the review of Port permit applications. We believe that the public has come to recognize and appreciate the Corps fair and impartial application of federal laws and regulations in reviewing Port permit applications. The Corps is committed to ensuring that Port funding would not adversely influence how the regulatory program is implemented.

[5]: Adequate safeguards have been identified for accounting, reviewing, reporting, and publicizing actions performed with these funds. Permit decision making authority will be elevated one level above normal and strict accounting and public disclosure procedures have been established. Funds provided by the Port would be used in much the same way Congressional appropriated funds are now. That is, they would be available to pay for staff labor costs and associated costs such as normal employee benefits (e.g., health insurance) and normal Corps overhead expenses (e.g., rent, utilities, equipment). Certainly with these funds, Port permit applications would be able to be reviewed by the Corps more expeditiously than without the funding, but this would not result in more delays and a decline in service to other "non-funding" permit applicants as the same level of congressional funding would still be available to review permit applications from that pool of applicants. The requirement that Corps regulatory supervisors not utilize the Port funds would help to ensure impartial decision-making. Regulatory program supervisors closely monitor all employees and do not tolerate preparation of biased or one-sided environmental information. In any event, because the added staff, which would result from Port funding, would know that their positions with the Corps are secure (due to the normal level of staff turnover) even if the Port were to withdraw funding, the likelihood of such biased and unprofessional work products would be minimal. The Corps will not allow the provision of Port funding to alter the manner in which discretionary aspects of the regulatory program are applied (e.g., public hearings). Decisions on whether or not to hold a public hearing or whether or not to prepare an Environmental Impact Statement rather than an Environmental Assessment are made based on case specific factors every time. The Port will not influence these determinations. The Corps takes great pride in maintaining the highest degree of integrity in its regulatory program and has worked very hard to improve public participation in the regulatory process. In recent years the Corps has made a practice of providing Spanish translation services at public hearings, we have required an unprecedented number of EISs, and we have held an

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unprecedented number of public hearings and meetings in relation to our regulatory oversight of Port projects. The Corps has every intention of continuing to implement the regulatory program in an open and impartial manner that assures a high level of public participation. Federal laws and regulations, not the Port of Los Angeles, specify when an EIS must be prepared. The ability of the Port to establish "priorities" would only extend to relative priorities among their own permit applications that are to be evaluated using the funds they provide to the Corps. Thus, this designation of priorities would in no way adversely affect the Corps regulatory program with respect to the permit applications received from other entities. Only the groups of permit applications from the Port for which they desire expedited review (i.e., review afforded by their funding) would be at issue in any such prioritization. Again, such designation does not mean that those projects receive less stringent review. Rather, it provides the Corps with an understanding as to which of the Port's projects they consider priority for review before other Port projects.

[6]: The Corps understands that many community and interest groups view the Corps as an important "independent check" on the Port's expansion. The Corps is aware of the importance of its role and intends to maintain the highest level of independence and integrity. The Corps actions over the past two years since the release of the public notice requesting public input on the proposal to accept Port funds demonstrate the Corps commitment to its independent role.

6. 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 Port of Los Angeles would 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.

7. Acceptance and expenditure of these funds are in accordance with Section 214 of WRDA 2000, as amended by Public Law 108-137.


ALEX C. DORNSTAUDER
COL, EN
Commanding