The Use of Funding Agreements with the U.S. Army Corps of Engineers

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Section 214 of the Water Resources Development Act (WRDA) of 2000, as amended, allows the Secretary of the Army to accept and expend funds contributed by non-federal public entities and public-utility companies to expedite the permit evaluation process. Title 23 U.S.C. Section 139(j) also allows affected Federal agencies, such as the U.S. Army Corps of Engineers (USACE) to accept and expend funds from certain entities to expedite permit reviews. Section 139(j) also provides that the Secretary of Transportation may approve a request by a state to provide funds to affected federal agencies participating in the environmental review process to support activities that directly and meaningfully contribute to expediting and improving transportation project planning and delivery for projects in that state. USACE issued new implementing guidance for funding agreements within the Regulatory Program in September 2015. The new guidance was written to implement legal changes from Section 1006 of WRDA, as well as clarify policy for funding agreements established under Section 139(j).

Many projects proposed by non-federal public entities such as roads, transit facilities, air and seaport improvements, public works, flood control structures, parks, and other public facilities, are generally available for the general public's use and benefit, and serve a public purpose. Projects reviewed under a Section 214 agreement with a non-federal public entity may potentially be funded by private funds, or a mix of private and public funds. However, the non-federal public entity must be a proponent of the permit application; a permit, if granted, must be issued to a non-federal public entity; and the proposed single and complete project must have a public purpose. Examples include, but are not limited to, public-private partnerships (P3) to support construction of High Occupancy Vehicle lanes on an interstate highway or to support the maintenance or improvement of flood control structures.

However, it is not acceptable for private entities to provide funds to a non-federal public entity to expedite a private project. An example would be, but is not limited to, a residential developer providing funds to a city government that has a Section 214 agreement to expedite the review of a residential development. Districts have discretion in determining whether a single and complete project has a public purpose and therefore, may be reviewed under a Section 214 agreement with a non-federal public entity.

Currently, the term "non-federal public entity" is limited to governmental agencies or governmental public authorities, including governments of federally recognized Indian Tribes, i.e., any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior

acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 [25 U.S.C. § 479(a)]. Normally, applicant agencies or authorities would be entities such as: state, local, or Tribal transportation departments, Municipal Planning Organizations (MPO), port authorities, flood and storm water management agencies, and public infrastructure departments that have the desire to expedite the permitting process programmatically, or for a specific project. Private entities cannot be considered non-federal public entities.

Each year, each USACE district that has an active funding agreement within the Regulatory Program provides a report of the previous fiscal year on how the funding agreement has impacted the non-federal public entity and the public in general. Funds received through an agreement continue to be frequently used to hire additional staff to review permit applications (funding agreements supported approximately 53 full time equivalents (FTE) in FY 2015). However, funds were also used in other ways to provide service for the funding entity above and beyond what is capable in the Regulatory appropriation. For example, St. Paul District, Seattle District, Omaha District, and Charleston District worked with their State transportation department partners (Minnesota, Washington, Nebraska, and South Carolina, respectively) to develop standardized drawings and application information so that the transportation departments can submit more consistent and complete permit applications, allowing for a quicker review process. Sacramento District, Fort Worth District, and Seattle District also used funds to support a part-time archaeologist's work for the non-federal public entity, allowing section 106 reviews and approvals to be expedited. No funds provided by a federal agency to a non-federal public entity may be accepted by USACE under Section 214 unless the non-federal public entity forwards to USACE a written confirmation from the federal agency that the use of the funds to expedite the permit review process is acceptable.

The primary criteria for activities conducted in accordance with a Section 214 agreement is that the specific permit review process has to be shown to be expedited. Expediting the review process could include generally shorter review times as compared to typical review times prior to the agreement, facilitation of a smoother review process through improved coordination and communication, or the development or use of programmatic agreements or standard operating procedures. The expedited review cannot result in an adverse effect on the timeframes for review of other applications within the same district or agency, when considered collectively.

Also, Section 139(j) only allows for USACE to enter into agreements with state agencies. The U.S. Department of Transportation (USDOT) has additionally interpreted the statute as allowing tolling commissions and some Municipal Planning Organizations (MPOs) to be eligible to enter into a funding agreement. Section 139(j) agreements additionally require approval by the Secretary of Transportation, as state agencies are eligible to receive reimbursement with USDOT funds for these agreements. USDOT has delegated approval of funding agreements down to the division level of either the Federal Highways Administration (FHWA) or the Federal Transit Administration (FTA). As of yet, USDOT has not interpreted Section 139(j) as allowing other modal administrations (Federal Railroad Administration, Federal Aviation Administration, Maritime Administration) to support agreements with state agencies. Therefore, USACE districts may only enter into a Section 139(j) agreement with federal or state highway and/or transit agencies.

Activities conducted in accordance with a Section 139(j) agreement must directly and meaningfully contribute to expediting and improving transportation project planning and delivery within the given state. In addition, Section 139(j) restricts the state transportation agency to only provide funds for activities beyond USACE's normal and ordinary capabilities under its general appropriations. Because transportation project planning and delivery encompasses a variety of activities and reviews, participation in the transportation planning (pre-NEPA) process and streamlining initiatives such as NEPA/404 synchronization efforts are encouraged under Section 139(j) along with activities listed in Section 404and Section 408 reviews, so long as those activities result in review times that are less than the customary time necessary for such a review. FHWA has provided guidance that the development of programmatic agreements and initiatives satisfies the requirement to reduce time limits as long as the results of those efforts are designed to provide a reduction in review time. Section 139(j) puts the onus on FHWA and FTA to interpret allowable activities under the statute. USACE Districts shall consider FHWA or FTA's approval of a funding agreement as certification that the agreement is compliant with Section 139(j). However, the districts must consider whether a Section 139(j) agreement is also compliant with the standards above, prior to the district commander approving any such agreement. In summary, Section 139(j) agreements must meet FHWA/FTA's standards and USACE implementing guidance requirements to be acceptable.

FHWA or FTA may require documentation of the "customary time" necessary for a review and/or establishment of performance metrics for the agreement to demonstrate it is contributing to expediting and improving transportation project planning and delivery. Districts are encouraged to use ORM data and/or the national performance metrics to establish a baseline of review times within the district, and consider that information in development of any performance metrics for the agreement. Districts have discretion on the number and type of performance metrics within an agreement, including which milestones to use to determine time in review (receipt of application, date determined complete, etc.). When considering the quantity and content of any performance metrics for an agreement, the district must consider the potential effect of those metrics on performance management within the whole Regulatory Branch or Division. Districts must be cautious to not agree to any performance metrics that would be so onerous or stringent that achieving them comes at the cost of decreased performance for other applicants in the district.

A Section 139(j) agreement must also include a section or appendix which establishes projects and priorities to be addressed by the agreement. If the funding transportation agency does not know a list of projects and/or priorities at the time of the agreement, then the agreement should describe the process *to* identify or change projects and/or priorities.

USACE continues to monitor the impact of the funding agreements as a whole on the Regulatory Program through review of each district's annual report. These data, in addition to review of information from previous annual reports, show that while the number of agreements is growing steadily over time, the overall quantity of permit decisions is not significantly increasing. This trend may be attributed to the recent increase in the number of funding agreements that are focused solely on one or a small number of highly controversial or complex actions. For example, several agreements with

county or other municipal agencies within Sacramento and Los Angeles Districts have been established to expedite an interagency effort to develop a Habitat Conservation Plan (HCP) and/or an EIS to evaluate the impacts of large scale development plans. Along with these efforts, the respective USACE districts are developing regional general permits or letter of permission procedures to help expedite the review of future individual development actions consistent with the provisions of the HCP and/or EIS. Districts rarely have sufficient staff or resources within the normal appropriation to dedicate to these kinds of larger scale or up-front efforts to evaluate impacts more holistically and efficiently than on a project-by-project basis.

Funding agreements make these efforts possible but will likely only result in a small number of final decisions, resulting in minimal change to the number of decisions under funding agreements. Recent data also demonstrate that the total number of permit decisions made under funding agreements represents a small fraction of the total permit decisions made by the Regulatory Program within a fiscal year. Because the amount of workload from funding agreements is relatively small compared to the workload of all other applicants, expediting the review of those applications is not having a measurable adverse effect on review timeframes for other applicants. Line graphs show that the trends for average days in review by permit type for both Section 214/Transportation permit decisions and decisions for all other applicants are generally similar.

While private railroads and public rail districts with common carrier status do have the right of eminent domain, there is still a question as to their meeting the requirements outlined above for Section 214 agreements. It may be that for railroads (and the FRA) to clearly be able to participate in Section 214 agreements, future legislation may be needed to expand the coverage to specifically include them. Other important considerations include:

- whether a railroad would be willing to provide the commercially-sensitive information to determine their projected permitting needs (translated into regulatory staff labor) in one or more districts for a Section 214 funding agreement; and
- determining which USACE Districts to try to implement these agreements with, or where to spend the limited funds.

However, all regulatory agencies agree that in this era of streamlining and downsizing, a stronger partnership amongst other federal , state, and local agencies with more coordination and combining of resources will be essential in future infrastructure project permitting activities. The extension of this partnership to allow other parties such as railroads to fund additional agency resources for the sake of expediting permit reviews and approvals is a natural next step forward. Stay tuned….