

FY 2015 Regulatory Annual Report for Section 1006(2)(e) of WRRDA

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 or natural gas 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. 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. Below is a summary of the annual reports received for fiscal year 2015 (FY 2015), written in accordance with Section 1006(2)(e) of the Water Resources Reform and Development Act of 2014 (WRRDA).

Current Status of Funding Agreements

For FY 2015, twenty-two USACE districts had active Regulatory funding agreements that amounted to \$8.48 million in accepted funds and expenditures of \$6.31 million. There were 8 new funding agreements this fiscal year, which included one State transportation department (Minnesota), two port authorities (South Carolina and Lake Charles, Louisiana), and the remainder were city or county level agencies. No agreements were executed with any public-utility companies or natural gas companies by the end of FY 2015; however, Headquarters, USACE (HQUSACE) is aware of a couple of districts that have begun work on an agreement with these types of entities. A full listing of active agreements and funds accepted and expended by agreement, in accordance with Section 1006(2)(e)(1)(A) of WRRDA, is included in Appendix A. Feedback received from the non-federal public entities was primarily positive, with many citing the ability to have a dedicated liaison within USACE for regular communication and relationship building as a primary benefit of the agreement. Some non-federal public entities see the ability to identify issues and make any necessary revisions early in the process as a key benefit. For example, the West Virginia Department of Transportation, Division of Highways (WVDOH) wrote that their USACE liaison, “has provided invaluable regulatory training to our personnel, consultants, and contractors. She has saved the WVDOH time and money by assisting us with identifying and resolving regulatory issues in the early stages of our projects.” The Port of Vancouver wrote, “Through use of the Corps funded position, we are able to identify project issues early and respond accordingly; helping to design project[s] that support economic development and avoid and minimize impacts to the environment.” Non-federal public entities also indicated that the benefits of their agreements are helping them meet their missions to deliver critical public infrastructure. The County of San Diego wrote, “Since the MOA [Section 214 agreement] has been in effect, a total of 55 public programs and infrastructure projects were permitted under the MOA including projects for bridges; flood control maintenance; roadway widening; intersection alignment; trails and pathways; vector control; and emergency road repairs. As a result, the Corps has supported the installation of public facilities valued in excess of \$150 million in public funds to benefit San Diego County residents.” The Ohio Department of Transportation (ODOT) had a similar perspective noting, “We are sure the USACE is aware of this, but without their dedication to permit delivery, ODOT would not have been able to deliver our SFY \$2.43 billion construction program and keep Ohio and its economy moving.”

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 departments (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. In these districts, consultation required under Section 106 of the National Historic Preservation Act can contribute to lengthy reviews. The archaeologist's support has been used to develop a programmatic agreement for Section 106 consultation for Caltrans' state-funded projects and has been facilitating smoother consultation with the State Historic Preservation Officers in the other two districts. Several districts (Savannah, New Orleans, St. Paul, Walla Walla, Omaha, New England, and Los Angeles) used funds to support training workshops for the non-federal public entity and its consultants. These training workshops covered varied topics including how to complete a permit application, basics of USACE's regulatory program, and technical field topics like wetland delineation and ordinary high water mark identification. A few districts (Vicksburg, Huntington, St. Paul, Sacramento, and Los Angeles) used funds to support the development of Regional General Permits (RGP) to cover activities typically conducted by the non-federal public entity such as road construction and maintenance or flood control maintenance activities. These RGPs provide an expedited review of certain minimally impacting activities for the non-federal entity. Further, the transportation RGP developed in St. Paul District can be used by any transportation entity that also conducts covered activities, providing a benefit to all applicants while encouraging minimization of impacts to aquatic resources. Lastly, the three districts in Pennsylvania (Baltimore, Philadelphia, and Pittsburgh) supported the Pennsylvania Department of Transportation's (PennDOT) public-private partnership for work on 500 bridges with their funding agreement. These districts provided the same expedited service to PennDOT's contractor as they do to PennDOT, helping expedite the review of these projects.

HQUSACE continues to monitor the impact of the funding agreements as a whole on the Regulatory Program through review of each district's annual report. Data demonstrating nationwide trends in the permit decisions made under funding agreements is enclosed as Appendix B. 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. Data in Appendix B 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.

Annual Reports and Guidance Compliance

HQUSACE issued new implementing guidance for funding agreements within the Regulatory Program in September 2015 (Appendix C). The new guidance was written to implement legal changes from Section 1006 of WRRDA, as well as clarify policy for funding agreements established under 23 U.S.C. Section 139(j). As part of the development of new guidance, HQUSACE critically evaluated the existing policy in the implementing guidance for potential improvement on efficiency and oversight. A notable change in the new guidance was the establishment of a HQ-level informational web page on Section 214 and Section 139(j) funding agreements, with the requirement that districts link to the HQUSACE web page.¹ Previously, each district that had an agreement was responsible for maintaining its own web page on funding agreements. While HQUSACE ensured that districts kept these web pages up to date, the amount of information on and location of each web page varied making it more challenging for the public to find information. In addition, internal monitoring of over 20 web pages was time consuming. Now there is a single web site with copies of each of the active agreements and relevant information on Section 214 and Section 139(j), making this information easier to access for the public and for HQUSACE to ensure it is kept current. The HQUSACE web page is located at:

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/Section214.aspx>

Another notable change in the guidance is reliance on the public portal for Regulatory's database, ORM2, for posting of final permit decisions made under funding agreements. Previously, districts maintained their own lists of final permit decisions on a monthly basis. The ORM2 public portal pulls this same data nationwide and updates on a daily basis. HQUSACE made this option available to districts in 2013, with many districts opting to link to the ORM2 public portal to satisfy the guidance requirement to post all final permit decisions (standard, nationwide, and general permits) made under these agreements. The new guidance relieves districts of the responsibility of individually posting their final permit decisions by providing a link to the ORM2 public portal on the HQ web page, allowing the public to access this data from a single web page in accordance with Section 1006(2)(d)(1)(B) of WRRDA. HQUSACE has instead focused the districts' efforts on ensuring that data entry into ORM2 is timely and accurate to support the appropriate data being served through the public portal. In accordance with Section 1006(2)(e)(1)(B) of WRRDA, a list of all final permit decisions made under a funding agreement, including impact and mitigation data, is enclosed as Appendix D.

While the new guidance was being developed, HQUSACE provided informal guidance to districts throughout the year to maintain compliance with the existing guidance memorandum while remaining adaptable to legal changes from WRRDA. For example, all districts were asked to send drafts of new agreements or renewal agreements to HQUSACE for a brief review before signature. This was to ensure that these agreements did not contain language or provisions that would conflict with legal changes from WRRDA or the policy direction of the new guidance under development. HQUSACE also hosted calls with districts and divisions each quarter to discuss the status of the new guidance and current issues in funding agreements and to answer questions. When the new guidance was released, HQUSACE offered four training sessions with divisions and districts on the content of the new guidance and the legal requirements of both Section 214 and Section 139(j).² The slide deck from the training session was also made available to all regulators through USACE internal distribution. Attendance was taken during these training sessions to ensure

¹ The HQ web page was also established for more efficient compliance with Section 1006(2)(d) of WRRDA

² Description of training offered in accordance with Section 1006(2)(e)(1)(C) of WRRDA.

that personnel that work with or under a funding agreement were adequately trained on the requirements of the statute and USACE implementing guidance.

Next Steps

Looking forward to FY 2016, HQUSACE intends to continue outreach to district and division offices to ensure they have a clear understanding of the changes in the new guidance. For example, HQUSACE gave a presentation on the new implementing guidance at a meeting of all Regulatory chiefs in November 2015. In addition, HQUSACE will reach out to external stakeholders, particularly those entities that may be eligible or already have an agreement to provide information on how changes in the new guidance may affect them. In particular, HQUSACE is discussing the new guidance with Federal Highway Administration (FHWA) because many FHWA Division offices are engaged with USACE district offices on funding agreements with State DOTs. HQUSACE will also continue to provide constructive comments to districts on the annual reports to support continual improvement in the quality and clarity of their reports.

With the continued interest in infrastructure project development, it is expected that the number of agreements and the number of participating districts will increase in FY 2016. Most notably, it is anticipated that agreements with natural gas companies and/or public-utility companies will be reached at some point within the fiscal year. HQUSACE is aware of several other agreements currently under development or executed in early FY 2016 with non-Federal public entities in Alaska, Florida, South Carolina, and California and transportation agencies within Texas, Kentucky, and North Carolina.

Conclusion

Regulatory continues to support its mission of effective and efficient decision making through the use of funding agreements. Entities that have funding agreements continue to be pleased with the performance of agreements, and new entities are exploring the possibility of funding agreements as new funding agreements are established each fiscal year. Since most of the projects reviewed under an agreement tend to be critical transportation and other infrastructure projects, the ability to establish these agreements is complementary to the Administration's initiative on modernizing the Federal review of infrastructure projects. In FY 2016, we anticipate these trends to continue, as well as initiation of implementation of the authority with public-utility and natural gas companies. Finally, HQUSACE will continue to monitor the implementation of the Section 214 authority to ensure appropriate use through effective oversight.

Enclosures

Appendix A – FY2015 list of agreements with funds accepted and expended

Appendix B – Nationwide review timeframe data

Appendix C – 2015 Implementing guidance for Section 1006 of WRRDA memorandum

Appendix D – List of permit actions reviewed under an agreement with impact and mitigation data

FY2015 Section 214/Transportation Agreement Rollup

Agreement	District	Funds accepted	Funds Expended	# of FTEs
Louisiana Dept. of Transportation and Development (LADOTD)	MVN	\$277,607	\$93,791	1
Lake Charles Harbor & Terminal District (LCHTD)	MVN	\$100,000	\$1,572	1
Mississippi DOT	MVK	\$168,440	\$142,720	1
Minnesota DOT - FHWA projects	MVP	\$180,698	\$113,950	1
Minnesota DOT - State projects	MVP	\$15,553	\$12,088	1
City of Roseville	SPK	\$0	\$2,804	0.03
Sacramento County Agencies	SPK	\$140,000	\$42,679	0.43
California DWR - Flood Management	SPK	\$0	\$13,315	0.13
Caltrans	SPK	\$104,683	\$67,509	0.68
Butte County, CA	SPK	\$11,000	\$15,198	0.15
Placer County, CA	SPK	\$97,000	\$35,082	0.35
California High Speed Rail Authority (CHRSA)	SPK	\$142,539	\$23,761	0.24
California DWR - Bay Delta Conservation Plan	SPK	\$100,755	\$109,423	1.09
California DWR - FloodSAFE Office	SPK	\$0	\$16,249	0.16
Port of Stockton	SPK	\$0	\$6,617	0.07
Solano County Water Agency	SPK	\$0	\$4,161	0.01
Caltrans	SPL	\$310,628	\$299,976	1.5
California High Speed Rail Authority (CHSRA)	SPL	\$312,968	\$20,205	0.1
Los Angeles County Sanitation District	SPL	\$0	\$0	0
Port of Los Angeles	SPL	\$160,000	\$75,599	0.4
Port of Long Beach	SPL	\$43,000	\$11,414	0.05
San Diego Public Works	SPL	\$0	\$13,898	0.07

FY2015 Section 214/Transportation Agreement Rollup

San Diego Water Authority	SPL	\$0	\$221	0.01
SANDAG	SPL	\$200,000	\$114,983	0.6
San Diego Unified Port District	SPL	\$0	\$16,653	0.1
City of San Marcos	SPL	\$0	\$4,146	0.02
San Bernadino County Public Works	SPL	\$0	\$46,873	0.25
Orange County Transportation Authority (OCTA)	SPL	\$37,350	\$46,829	0.25
Orange County Flood Control District	SPL	\$0	\$43,000	0.22
Riverside County Flood Control & Water Conservation District	SPL	\$160,000	\$83,877	0.4
Coachella Valley Municipal Water District	SPL	\$0	\$16,109	0.08
San Diego Transportation and Storm Water Dept.	SPL	\$0	\$10,136	0.05
San Diego Public Utilities Dept.	SPL	\$0	\$1,117	0.01
Los Angeles County	SPL	\$0	\$35,000	0.18
Metropolitan Water District of Southern California	SPL	\$240,000	\$288	0.01
Pima County Regional Flood Control District & Transportation	SPL	\$165,888	\$140,514	0.9
Arizona DOT	SPL	\$113,875	\$159,200	1
San Francisco Public Utilities Commission (SFPUC)	SPN	\$0	\$31,510	1
Caltrans	SPN	\$0	\$7,274	0
California High Speed Rail Authority (CHSRA)	SPN	\$0	\$0	0
Solano County Water Agency	SPN	\$0	\$2,656	0
Georgia DOT	SAS	\$290,431	\$360,331	3
Florida DOT	SAJ	\$76,577	\$178,694	0.9
South Carolina DOT	SAC	\$465,000	\$397,079	3
South Carolina State Ports Authority	SAC	\$0	\$0	0

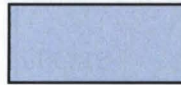
FY2015 Section 214/Transportation Agreement Rollup

Indiana DOT	LRL	\$285,800	\$300,849	2
Ohio DOT	LRH	\$540,000	\$487,211	3
West Virginia DOT	LRH	\$196,000	\$172,059	1
Pennsylvania DOT	LRP	\$192,000	\$172,194	1
Pennsylvania DOT	NAB	\$254,200	\$264,308	1.5
Maryland State Highway Administration (MDSHA)	NAB	\$180,000	\$204,578	2
Massachusetts DOT	NAE	\$0	\$113,793	1
Pennsylvania DOT	NAP	\$192,000	\$165,461	1
Oregon DOT	NWP	\$182,798	\$152,013	1
Port of Portland	NWP	\$40,403	\$35,400	0.25
Port of Kalama	NWP	\$10,373	\$13,279	0.25
Port of Longview	NWP	\$1,602	\$4,063	0.25
Port of Vancouver	NWP	\$2,546	\$7,825	0.25
Idaho Transportation Department (ITD)	NWW	\$197,451	\$172,556	1
Nebraska Division of Roads (NDOR)	NWO	\$759,827	\$211,072	2
North Dakota DOT	NWO	\$175,847	\$89,759	1
Northern Colorado Water Conservancy District	NWO	\$0	\$27,390	0.5
City of Seattle	NWS	\$30,000	\$27,720	1
City of Tacoma	NWS	\$50,000	\$7,632	0.5
Pierce County	NWS	\$20,000	\$40,290	0.5
Port of Seattle	NWS	\$22,500	\$34,092	0.5
Port of Tacoma	NWS	\$40,000	\$42,237	0.5
Snohomish County	NWS	\$100,000	\$22,603	1

FY2015 Section 214/Transportation Agreement Rollup

Washington State DOT	NWS	\$0	\$2,280	2.5
Harris County Flood Control District (HCFCD)	SWG	\$0	\$59,401	0.5
Harris County Engineering Department (HCED)	SWG	\$75,000	\$50,231	0.5
Port of Houston Authority	SWG	\$0	\$5,960	1
Arkansas Highway and Transportation Department (AHTD)	SWL	\$208,000	\$209,325	1
Oklahoma DOT	SWT	\$599,121	\$202,955	1
City of San Antonio (COSA)	SWF	\$7,649	\$3,333	0.05
North Central Texas Council of Governments (NCTCOG)	SWF	\$200,000	\$194,284	1

TOTALS 23 \$8,477,109 \$6,314,653 52.99

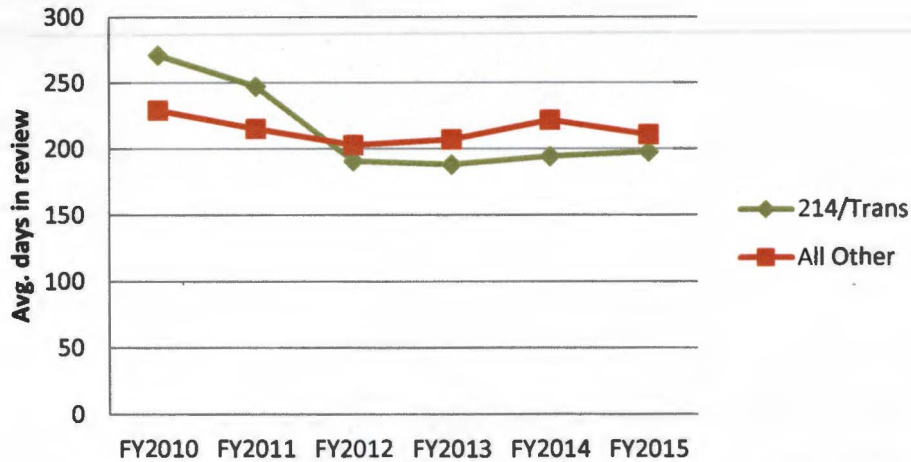


New agreement in FY2015

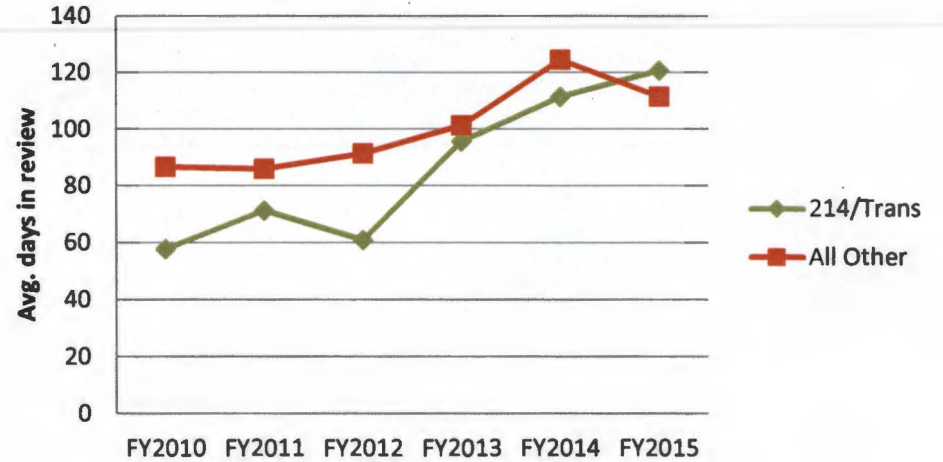


Agreement closed out in FY2015

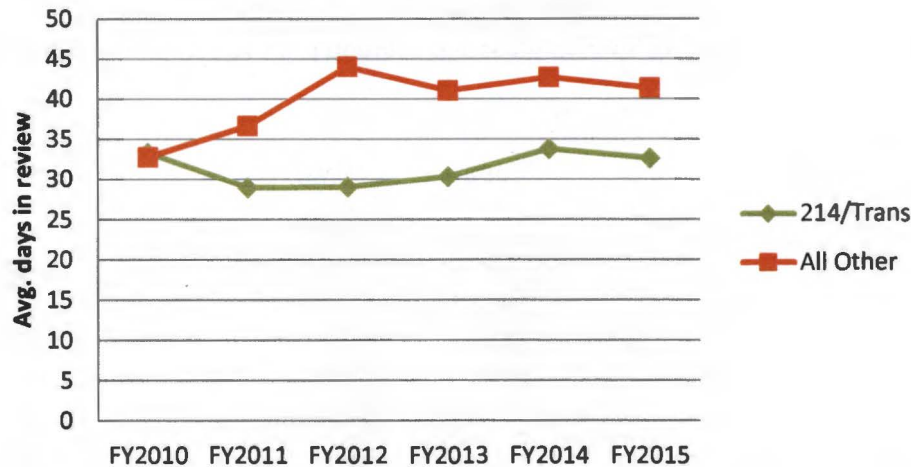
Standard Permits



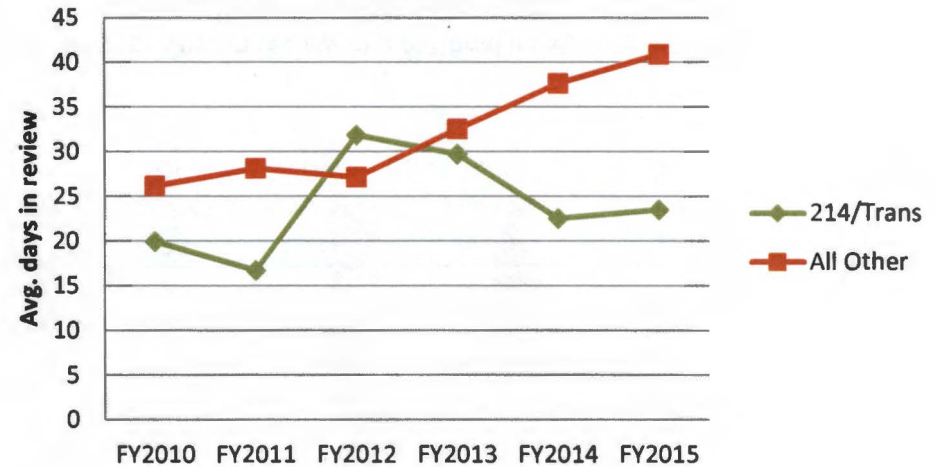
Letters of Permission



Nationwide Permits



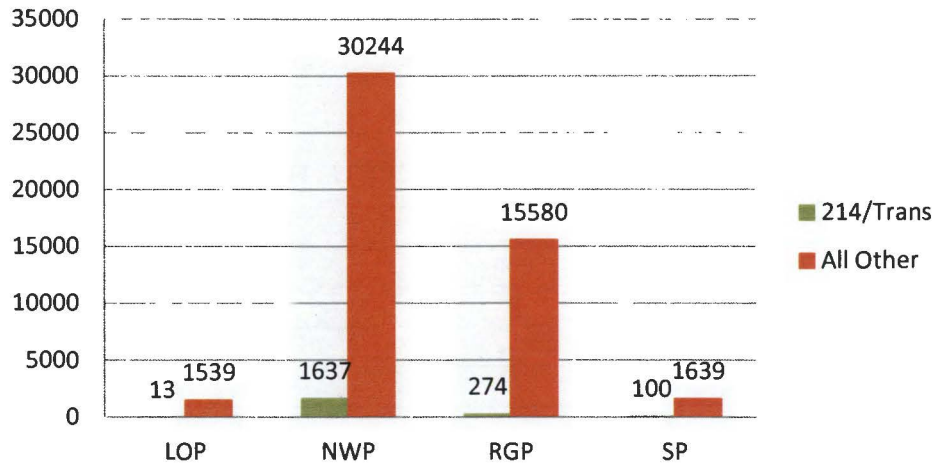
Regional General Permits



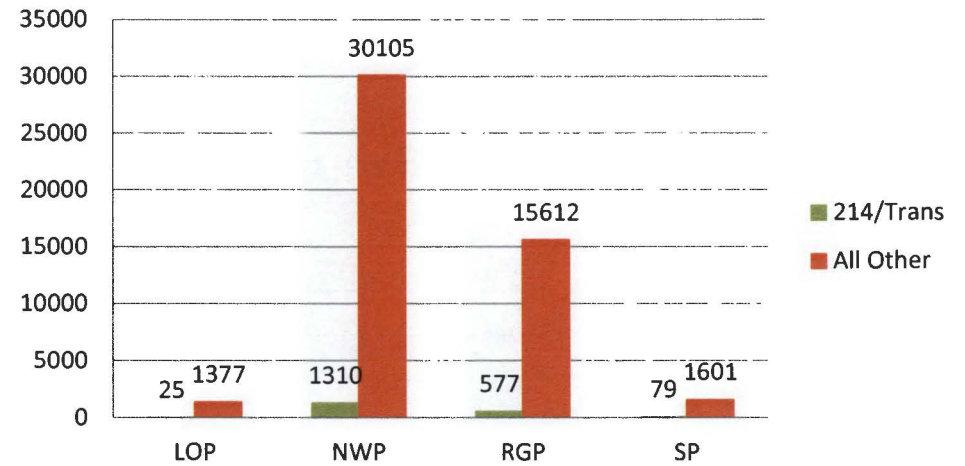
These charts represent the average days in review for all actions reviewed under a funding agreement compared to all other actions. Data was collected nationwide from the ORM database, and then separated by the four main types of permit actions: Nationwide Permits, General Permits, Standard Permits, and Letters of Permission¹. The trends in average days in review between Section 214/Transportation actions and other actions are generally similar.

¹ Data for FY2015 retrieved on November 3, 2015. Data for FY2013 and FY2014 retrieved on November 25, 2014. Data for FY2010-FY2012 retrieved on January 25, 2013

FY 2014 - Number of Actions



FY 2015 - Number of Actions



Bar graphs showing the total number of permit actions that were used to calculate the average days in review at a national level, used in the first set of graphs (FY2014 and FY2015)². The number of permit actions is labeled at the top of each column, as the columns for the Section 214/Transportation actions are not easy to see. These charts illustrate that permit actions reviewed under a funding agreement are a very small portion of the total permit actions reviewed by USACE each fiscal year. Because of the smaller number of actions being used to calculate the average days in review for funding agreements, one atypical permit application (for example, some agreements are solely to focus on a very controversial or complex, EIS-level application) has a greater potential to sway the average than it would for the average of all other actions.

² Data for FY2014 retrieved from ORM2 database on November 25, 2014 and data for FY2015 retrieved on November 3, 2015.



REPLY TO
ATTENTION OF

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

CECW-CO-R

SEP 02 2015

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS, AND
DISTRICT COMMANDS

SUBJECT: Updated Implementation Guidance for Section 1006 of the Water
Resources Reform and Development Act of 2014 and Guidance on the Use of Funding
Agreements within the Regulatory Program

1. References.

a. Section 214 of the Water Resources Development Act (WRDA) of 2000, as amended, codified at 33 U.S.C. § 2352.

b. Section 6002(j) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU) and Section 1307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), codified at 23 U.S.C. Section § 139(j).

2. Purpose and Applicability. This document supersedes and rescinds the memorandum from the Director of Civil Works issued on 14 August 2015 entitled, "Implementation Guidance for Section 1006 of the Water Resources Reform and Development Act of 2014 and Guidance on the Use of Funding Agreements within the Regulatory Program." The purpose of this memorandum is to provide guidance to Regulatory offices within districts on the establishment, management, and oversight of funding agreements under the main statutory authorities that allow the Corps to accept and expend funds to expedite the permit review process, as well as incorporate changes as a result of Section 1006 of the Water Resources Reform and Development Act of 2014 (WRRDA). This document is applicable to all current and proposed funding agreements with Regulatory under any one or more of the following statutory authorities: (i) 33 U.S.C. § 2352, Section 214 of the Water Resources Development Act (WRDA) of 2000, as amended (Section 214); or (ii) 23 U.S.C. § 139(j) (Section 139(j)) added to Title 23 of the United States Code by Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU). This document is additionally applicable to those agreements that are still valid, but were originally established under the repealed Section 1309 of the Transportation Equity Act for the 21st Century (TEA-21).

3. Background.

a. Section 214 provides that the Secretary of the Army, after public notice, may accept and expend funds contributed by a non-federal public entity, public-utility

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company, or natural gas company to expedite the permit review process. The authority to accept and expend funds from non-federal public entities does not expire, unless modified by law. The authority to accept and expend funds from public-utility companies and natural gas companies expires on 10 June 2021, unless otherwise extended or revoked by law. The full legislative text is enclosed in Appendix A.

b. Section 139(j) 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. The full legislative text is enclosed in Appendix A.

c. By memorandum dated 29 June 2015, the Secretary of the Army delegated his authority to the Assistant Secretary of the Army for Civil Works (ASA(CW)). This authority has been redelegated by memorandum dated 1 July 2015, to the Chief of Engineers and his authorized representatives to, after public notice, accept and expend funds contributed by non-federal public entities, public-utility companies, or natural gas companies to expedite the evaluation of permits under the jurisdiction of the Department of the Army. The Chief of Engineers redelegated this authority to district and division commanders by memorandum dated 3 August 2015. The Administrative Assistant to the Secretary of the Army was provided copies of these delegations on 3 August 2015. These delegations of authority shall remain in effect until 10 June 2021.

d. Although not a limitation on the authority of any official that has been delegated the authority indicated in 3.c., in those cases where a proposed action or decision regarding the acceptance of funds contributed by non-federal public entities, natural gas companies, or public-utility companies represents a change in precedent or policy; is of significant White House, Congressional, Department of the Army or public interest; or has been, or should be of interest or concern to the ASA(CW) or the Secretary of the Army for any reason; the following procedure should be followed:

(1) Prior to making a decision on whether to accept and expends funds under Section 214 or rendering a permit decision under a Section 214 agreement, the district shall notify their Major Subordinate Command (MSC) Regulatory Program Manager and the HQ Regulatory Section 214/Transportation Program Manager of the circumstances of the action or decision.

(2) The HQ Regulatory Section 214/Transportation Program Manager will determine if briefing of Army is required in accordance with the delegation requirements,

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and arrange an informational briefing, as necessary. Should a briefing be required, the district will hold the decision of concern in abeyance until the briefing is completed.

4. Guidance for All Agreements within the Regulatory Program.

a. Accountability. Funds accepted under any of the statutory authorities 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 in accordance with the current fiscal year budget execution guidance.

Any district that has accepted and/or expended funds under any of the statutory authorities in a fiscal year must provide an annual report on the funding agreement(s) to CECW-CO-R. Annual reports must include the following:

- (1) A list of all active funding agreements during the subject fiscal year;
- (2) An accounting only for the subject fiscal year of the total funds accepted and total funds expended per agreement;
- (3) A list of all permit decisions issued under a funding agreement along with impact and mitigation data. Districts should use the "WRRDA Summary Report" function in ORM to get these data;
- (4) A list of all employees that charged time to any agreement and verification that all employees have completed mandatory training on this guidance;
- (5) A qualitative description of how the agreement expedited the review for the funding entity. This should include any major accomplishments including development of programmatic tools or agreements, cross-agency training or outreach efforts, or major permit decisions during the subject fiscal year; and
- (6) A quantitative description of how the agreement expedited the review for the funding entity. For agreements that include review of multiple permit applications, this should include a comparison of review timeframes by type of permit for the funding entity as compared to other applicants within the same district, as well as any performance metrics established for the agreement. Districts have discretion on the parameters to compare, which may include average days in review and/or percentage of actions meeting performance metrics. For projects in which Regulatory is the lead agency under the National Environmental Policy Act (NEPA) for an Environmental Impact Statement (EIS), a discussion of the timeframes between the major NEPA steps

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such as notice of intent (NOI), scoping, draft EIS, final EIS, and record of decision (ROD), should be discussed.

Districts shall use the template document in Appendix B for preparing the annual report. Annual reports must be reviewed by the MSC Regulatory Program Manager, and then be provided to the HQ Regulatory Section 214/Transportation Program Manager within 30 days of the conclusion of each fiscal year. HQUSACE will compile the reports received and provide a combined annual report to ASA(CW). The ASA(CW) will submit the combined annual report to the Congressional committees within 90 days of the conclusion of each fiscal year. HQUSACE will maintain copies of the combined annual reports on the HQUSACE website for the most recent 5 years.

b. Impartial Decision Making. Maintaining impartiality in decision making is of utmost importance under any funding agreement. Division and district commanders must ensure that the acceptance and expenditure of funds from external entities will not impact impartial decision making with respect to application review and any final permit decision, either substantively or procedurally. At a minimum, all districts with funding agreements will comply with the following standards:

(1) The review must comply with all applicable laws and regulations. Any procedures or decisions that would otherwise be required for a specific type of project or review under consideration cannot be eliminated. However, process improvements that are developed under a funding agreement are encouraged to be applied widely, when applicable, for all members of the regulated public to benefit.

(2) In cases where funds are used, all final permit decisions and decision documents (e.g., decision document, and/or permit instrument, if applicable), including all reporting nationwide, general, regional general, and state programmatic general permit verifications, must be reviewed and approved in writing by a responsible official, at least one level above the decision maker. For the purposes of this guidance, the permit decision maker is the person that has been delegated signature authority. The one-level-above review additionally must be a position that is not partially or fully funded by the same funding entity. For example, if the decision maker is a Regulatory Section Chief, then the one-level-above reviewer may be the Regulatory Chief or Deputy Chief. Team leaders are appropriate one-level-above reviewers provided signature authority has been delegated to the project manager level. In accordance with national Regulatory policy and guidance, districts are encouraged to delegate signature authority to the lowest appropriate level.

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(3) Instruments for mitigation banks or in-lieu-fee programs developed for an entity with a funding agreement must be signed by a Regulatory Branch/Division Chief, an equivalent, or a higher level position that is not funded by any funding agreement.

(4) All preliminary jurisdictional determinations and any approved jurisdictional determinations where funds are used must have documentation that a non-funded regulator conducted a review of the determination. This review does not need to be a field review, but is intended to maintain impartiality in the decision. For those approved jurisdictional determinations that require coordination with EPA, additional internal review is not required.

(5) Districts have primary responsibility to ensure that ORM data entry is timely and accurate so that all final permit decisions, including all nationwide, general, regional general, and state programmatic general permit verifications, made for projects where funds are used, are posted on the HQUSACE ORM2 public portal. Districts shall ensure that a link to the HQUSACE ORM2 public portal is provided on their Regulatory web pages.

(6) Funds from agreements will not be used for enforcement activities. However, funds from these agreements may be used for compliance activities including monitoring of mitigation sites and compliance inspections. If the district determines that a permittee has violated the terms or conditions of the permit and that the violation is sufficiently serious to require an enforcement action, funds provided under the agreement must not be used to address the enforcement action. Enforcement activities must be charged to Regulatory's appropriated funds in accordance with the most recent budget execution guidance.

c. Public Notice and Decision. Prior to accepting funds contributed by non-federal public entities, natural gas companies, or public-utility companies, the district must issue a public notice clearly indicating the following: the name of the funding entity, the statutory 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 funds will not impact impartial decision making. The public notice must also include information on the impacts of the proposed funding agreement on the district's Regulatory program and if there are any expected impacts on the timeframes for evaluation of applications for the general public within that district.

Following the review of the comments received in response to the public notice, the District Commander will determine if the acceptance and expenditure of funds is

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appropriate in consideration of the requirements under the applicable statutory authority, if the district will be able to preserve impartial decision making, and if the acceptance and expenditure of funds will not adversely affect review timeframes for the general public. A final draft of a funding agreement must be completed to inform the District Commander's decision. This decision, as well as consideration of all public comments received from the public notice, shall be documented in a Memorandum for the Record (MFR). Upon execution of the MFR, an informational public notice will be issued indicating the District Commander's decision. If the decision is to accept funds, those funds may only be accepted after execution of the MFR, execution of the agreement, and issuance of the informational public notice.

An updated analysis based on the abovementioned requirements shall be conducted and documented in a MFR each time a funding agreement is renewed or substantively modified. An example of a substantial modification would be modifying a funding agreement to provide funding for reviews under 33 U.S.C. § 408 (Section 408). Issuance of a new public notice is not required for renewal or modification of a funding agreement if the purpose of the agreement remains the same. Upon execution of any new, modified, or renewed funding agreement, the District shall forward a signed copy of the agreement to the HQ Regulatory Section 214/Transportation Program Manager. HQUSACE will maintain a copy of all active agreements on the HQUSACE website (see subparagraph 3(e)).

d. Acceptable Activities. Prior to expending funds on any activity, the district must determine that the activity contributes to meeting the specific purpose of the appropriate statutory authority as listed below. Acceptable activities should be discussed with the funding entity and documented in the agreement. 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, acquisition of Geographic Information System (GIS) data, pre-application conferences, and participation in the transportation planning process or other early coordination activities such as NEPA/404 synchronization procedures. Funds may also be used to contract discrete tasks to inform decisions or conduct administrative actions. For contracts used to develop decision documents or NEPA documentation, such documents must be directed by USACE to be submitted as draft, and be reviewed and adopted by the USACE before a permit decision can be made. Funds are not to be used to continue activities for the funding entity, should a lapse of appropriations result in shutdown furlough for the Regulatory Program. Any exception to this policy may be requested from HQUSACE in extreme circumstances, but may be denied.

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e. Transparency. HQUSACE will maintain a web page on the use of these authorities. Districts must provide all copies of active funding agreements to HQ Regulatory upon execution or renewal to support this effort. Districts additionally are responsible for timely and accurate ORM data entry for actions reviewed under funding agreements, to ensure actions posted through the ORM2 public portal and provided in the annual report have received appropriate quality assurance/quality control (QA/QC). The HQ Regulatory web page will include:

- (1) The statutory text of both Section 214 and Section 139(j);
- (2) A clearly marked link to the ORM2 public portal;
- (3) Copies of all active funding agreements;
- (4) Copies of the most recent decision document templates;
- (5) Copies of combined annual reports for the most recent 5 years developed in accordance with Section 4.a. of this guidance; and
- (6) A copy of this implementing guidance.

Districts that have an active funding agreement must also provide a link to the HQ Regulatory informational web page mentioned above.

f. Submittals Under Section 408. Regulatory funding agreements that additionally cover the review of a modification to a Federal project under Section 408 must comply with Engineer Circular (EC) 1165-2-216 and its appendices, unless superseded by more recent guidance.

5. Agreements Only Citing Section 214.

a. Pursuant to Section 214, the Secretary of the Army may accept and expend funds contributed by the following entities to expedite the evaluation of permit applications: (i) a non-Federal public entity who is seeking authorization for projects for a public purpose; (ii) a public-utility company as defined in Section 1006 of WRRDA; and (iii) a natural gas company as defined by Section 1006 of WRRDA. The authority to accept and expend funds from public-utility companies or natural gas companies expires on 10 June 2021 unless otherwise modified by law.

b. Non-Federal Public Entities and Projects for a Public Purpose.

(1) 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

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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.

(2) 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. 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.

(3) 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.

(4) Agreements with municipal electric or gas authorities that meet the definition of non-federal public entity and the definition of public-utility company or natural gas company are not subject to the 10 June 2021 expiration date of the authority for public-utility and natural gas companies, because they meet the definition of non-federal public entity.

c. Public-Utility Companies. Section 214 additionally allows for agreements to be established with a "public-utility company." Public-utility companies include the following two subcategories: (1) electric utility companies, which are companies that own or operate facilities used for the generation, transmission, or distribution of electric energy for sale; and (2) gas utility companies, which are companies that own or operate facilities used for distribution at retail of natural or manufactured gas for heat, light, or

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power (other than the distribution only in enclosed portable containers or distribution to tenants or employees of the company operating such facilities for their own use and not for resale). These companies are subject to federal regulation outside of USACE authorities, dating from the 1930's, because Congress determined that such companies affected the public interest. Projects involving facilities for the generation, transmission, or distribution of electric energy for sale; and facilities used for distribution at retail of natural or manufactured gas for heat, light, or power are appropriate for use with Section 214. Any exceptions to this policy should be coordinated with HQUSACE.

d. Natural Gas Companies. Section 214 also allows for agreements to be entered into with a natural gas company. A natural gas company is a company engaged in the transportation of natural gas in intrastate or interstate commerce or the sale of such gas in interstate commerce for resale. The transportation of natural gas in interstate commerce is subject to federal regulation outside of USACE authorities, dating from the 1930's, because Congress determined that such activities affected the public interest. Projects reviewed under a Section 214 agreement with a natural gas company may include projects involving the transportation and/or distribution of natural gas (inclusive of gas gathering lines, feeder lines, transmission pipelines, and distribution pipelines) and any attendant storage facilities. Any exceptions to this policy should be coordinated with HQUSACE.

e. Energy exploration and production activities, such as drilling, hydrofracturing, or mining, are not to be reviewed under Section 214 agreements with public-utility companies or natural gas companies, because these activities do not involve the generation, transmission, or distribution of electric energy; or the transportation and/or distribution of natural gas.

f. Activities conducted in accordance with a Section 214 agreement must expedite the permit review process. 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, when considered collectively.

g. 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.

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6. Agreements Citing Section 139(j).

a. 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. The USDOT has delegated approval of funding agreements down to the division level of either Federal Highways Administration (FHWA) or the Federal Transit Administration (FTA). The 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, districts may only enter into a Section 139(j) agreement with highway and/or transit agencies.

b. 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 4.d. above and 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. Districts shall consider FHWA or FTA's approval of a funding agreement as certification that the agreement is compliant with Section 139(j). However, districts must consider whether a Section 139(j) agreement is also compliant with the standards in paragraph 4, 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.

c. 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

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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.

d. 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.

7. Agreements Citing Both Statutory Authorities. There is no legal need to cite both statutory authorities in a funding agreement. Districts should cite only Section 214 of WRDA 2000, or cite only Section 139(j) in any new or renewal of agreements. For those older agreements that do cite both statutory authorities, districts should consult with their non-federal public entity to decide which authority to use, and which requirements apply until renewal of that agreement.

8. This guidance is effective immediately. This document supersedes and rescinds the memorandum from the Director of Civil Works issued on 14 August 2015 entitled, "Implementation Guidance for Section 1006 of the Water Resources Reform and Development Act of 2014 and Guidance on the Use of Funding Agreements within the Regulatory Program;" the memorandum from the Director of Civil Works issued on 1 October 2008 entitled, "Implementation Guidance for Section 2002 of the Water Resources Act of 2007 (Regulatory Funds Contributed by Non-Federal Public Entities);" the memorandum from the Chief of Operations and Regulatory issued on 21 July 2010 entitled, "Annual Reporting for Regulatory Section 214 Funding Agreements with Non-Federal Public Entities;" and the memorandum from the Director of Civil Works issued 23 March 1999 entitled, "Transportation Equity Act and Federal-Aid Highway Funding Proposals." This guidance remains in effect as long as any of the aforementioned statutory authorities remain in effect.

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9. POC for this action is Ms. Lauren Diaz, Regulatory Program Manager, at 202-761-4663, or Lauren.B.Diaz@usace.army.mil.

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