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February 19, 2010

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
House of Representatives

Subject: *Status of U.S. Army Corps of Engineers Efforts to Implement GAO's 2007 Recommendations Regarding Its Section 214 Authority*

Dear Mr. Chairman:

When cities, counties, or other nonfederal public entities propose public works projects that could degrade or damage federally regulated waters and wetlands, such as road construction and sewer line construction or maintenance, they must obtain a permit from the U.S. Army Corps of Engineers (Corps) before proceeding. Under authorities delegated to the Corps from Section 404 of the Clean Water Act,¹ the agency is responsible for regulating activities that may impact wetlands, streams, and other waters throughout much of the United States and it decides whether to allow such activities to occur. To obtain the Corps' approval, the nonfederal public entity, like any other property owner, must submit a permit application that contains a description of the proposed project, including its purpose and location, and other information the Corps needs to evaluate how the project will affect wetlands and other federally regulated waters. Once the Corps receives all of the required information from the applicant, the permit review process begins.

Some policymakers and others have expressed concerns that the Corps' permit process takes too long and has significantly delayed some public works projects. In 2000, the Congress included a provision in the Water Resources and Development Act (WRDA) to expedite permit processing for nonfederal public entities. Specifically, section 214 of the act authorizes the Secretary of the Army, after providing public notice, to accept and expend funds from nonfederal public entities—known as funding entities—to expedite the evaluation of permit applications that fall under the jurisdiction of the Department of the Army. As we reported in May 2007,² these funds

¹Section 404 of the Clean Water Act generally prohibits the discharge of dredged or fill material into waters of the United States without first obtaining a permit from the Corps.

²GAO, *Waters and Wetlands: Corps of Engineers Needs to Ensure That Permit Decisions Made Using Funds from Nonfederal Public Entities Are Transparent and Impartial*, [GAO-07-478](#) (Washington, D.C.: May 16, 2007).

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primarily go toward supporting the salaries of Corps program managers who will dedicate their efforts to reviewing the permit applications from funding entities. The act also requires the Secretary to ensure that the funds accepted will not impact impartial decision making with respect to permit approvals. The Secretary of the Army has delegated this authority to the Corps and, in turn, the Corps has delegated day-to-day responsibility for implementing the section 214 authority to its 38 districts, which have responsibility for processing permit applications.

In our May 2007 report, we reviewed Corps permitting activities using the WRDA section 214 authority. As a result of this review, we recommended that the Secretary of the Army direct the Corps of Engineers to take the following four actions:

- clarify the guidance that the districts must follow when evaluating permit applications under the section 214 authority,
- clarify the documentation that district officials must include in project files to justify and support their decisions,
- provide training to district officials to ensure that they are aware of the requirements that apply to permits processed under the section 214 authority, and
- develop an effective oversight approach that will ensure that the districts are following all the appropriate requirements when evaluating projects under the section 214 authority.

When we first reviewed the Corps implementation of the section 214 authority at the end of fiscal year 2006, four districts were using this authority and had executed agreements with 13 entities.³ At the end of fiscal year 2009, the program had expanded significantly and 17 districts were using this authority and had executed agreements with 36 entities. Total amount of expended funds through these agreements in fiscal year 2009 was almost \$4 million.⁴

The WRDA section 214 authority was originally set to expire at the end of fiscal year 2003; however, this temporary authority has been extended several times, most recently until December 2009. As the Congress considers whether to authorize continued use of this authority, you asked us to review the progress the Corps has made in implementing our May 2007 recommendations.

To assess the Corps' efforts to implement our recommendations, we reviewed the agency's policy and guidance documents, fiscal year 2008 and 2009 annual reports submitted to Corps headquarters by Corps districts that are using this authority, and recommendation status updates provided by the Corps to the DOD Inspector

³From December 2001 through September 2006, nonfederal public entities provided over \$2 million in section 214 funds to the four Corps districts with whom they had section 214 agreements.

⁴One of the 17 districts did not supply funding figures in its annual report. Four districts reported data for their state's fiscal year of July 2008 through June 2009.

General. In addition, we interviewed Corp regulatory program managers about steps taken to refine guidance, train district officials, and oversee participating districts' implementation of the WRDA section 214 authority.

We conducted our work from October 2009 to January 2010 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that this information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions in this product.

On November 9, 2009, we briefed your office on the preliminary results of our review. As agreed with our office, we subsequently updated our results to incorporate the most recent set of annual report submissions from the Corps districts that are using this authority. This letter summarizes the information presented in the briefing and from our additional review and officially transmits the updated briefing slides in the enclosure.

Corps Implementation of Our 2007 Recommendations

We believe that the Corps has implemented three of the four recommendations that we made in May 2007. For the one remaining recommendation, while the Corps has taken some steps, we believe that more action is needed for the agency to be fully responsive to our recommendation. Specifically, we found the following.

The Corps has implemented our recommendation to clarify the guidance that the districts must follow for section 214 permit applications. On October 1, 2008, the Corps issued revised guidance that improves on the prior guidance and addresses a number of the points we raised in our May 2007 report.

- The revised guidance includes a list of acceptable activities for which section 214 funds can be used and more explicitly describes the circumstances under which funds can be accepted. For example, the guidance now specifically states that funds can be accepted if (1) they will expedite permit processing for the funding entity, (2) the district can ensure decision making will be impartial and not affected by receipt of the funds, and (3) accepting the funds will not slow down evaluation of other permits.
- The section of the revised guidance related to accountability has been revised, and additional items that need to be tracked and reported to Corps headquarters on an annual basis are now delineated. Additional items include performance metrics for evaluating the effectiveness of the use of the funds and a statement certifying that all project managers funded under the section 214 authority are aware of and trained on the requirements contained in the guidance.

- The Corps also significantly expanded upon the requirements in the guidance related to impartial decisionmaking. Specifically, under the revised guidance, participating Corps districts are to ensure that all documents involved in the decision-making process, including the supporting documents and issued permit, are reviewed and approved by someone at least one level higher than the program manager who is funded by the authority. In addition, the guidance now requires that all final permit decisions need to be updated monthly on the district's Web page in an area separate from any other final actions and that the decision be clearly identifiable as being for projects funded through the WRDA section 214 authority.

The Corps has clarified the documentation that must be included in section 214 project files. We believe that the Corps has taken appropriate steps to ensure that the documentation that district officials include in project files will justify and support their permitting decisions. Specifically, the Corps has completed a checklist, or template, of the decision documents necessary to support its general, or nationwide, permitting process, and it tested this tool in some of its districts.⁵ In addition, the Corps recently completed a template for its standard permits decision-making process that includes additional elements necessary to document compliance with the National Environmental Policy Act and other relevant statutes and regulations. As part of its efforts to develop these decision document templates, the Corps completed an analysis of all national permitting processes in December 2008 and incorporated the results of this analysis into these templates to help ensure consistent and complete support documentation. A Corps official said that they intend to release these new templates for immediate use at an upcoming executive regulatory seminar and branch chief annual meeting. During these sessions, the official said that the templates will be discussed and instructions on their use provided.

The Corps has provided training on the section 214 authority. The Corps held training sessions in August 2007 and May 2008 at national conferences attended by all regulatory staff, during which the following topics relating to the section 214 authority were discussed and clarified: the revised guidance in draft form, expectations regarding impartial decision making and disclosure of decisions to the public, and the annual reporting process. Furthermore, discussion of the WRDA section 214 program was also included in the curriculum for a development course to help train new regulatory chiefs. As part of its dissemination efforts for the revised guidance, the Corps also sent a memo to regulatory chiefs across all Corps districts and divisions highlighting sections of the guidance where clarifications were made that could impact the districts' implementation of the section 214 authority. Among the items highlighted were the increased annual reporting requirements designed to

⁵The Corps issues a number of different permits, each with its own application and review process. General, or nationwide, permits are for projects that are likely to have only minimal impacts on water and wetland resources, and their review process is limited. In contrast, standard permits are issued for projects that could have substantial impacts on water and wetland resources; the review process for these permits is more extensive.

improve the Corps' ability to assess the program's impacts. In addition, Corps district commanders now need to affirm that their program managers who are funded through section 214 are fully aware of and trained on the relevant guidance.

The Corps has not fully implemented an effective oversight approach for the section 214 authority. Although the Corps has taken some steps to improve its oversight of the districts' implementation of the section 214 authority since our May 2007 report, we believe that the Corps has not yet fully implemented our recommendation. More specifically, the Corps has taken some positive steps by expanding the revised guidance with regard to impartial decision making and annual reporting and by enforcing the submission of the annual reports. Furthermore, the Corps has taken steps to ensure that the funds identified as being from WRDA section 214 sources are tracked and accounted for separately. However, the Corps' actions have fallen short in two significant oversight areas: (1) ensuring the quality and thoroughness of the annual reports and (2) improving the transparency of decision making to the public by clearly posting public notices of funding decisions on the district Web sites.

- *Annual reporting.* Although districts were to submit annual reports describing their use of the section 214 authority since 2001, no districts had done so until 2008. Our review of the fiscal year 2008 and 2009 annual reports, each due by November 1 of the respective year, indicates that compliance with the reporting elements delineated in the revised guidance has been uneven across the districts. While almost all the districts complied with the requirements to include in the report the amount, type, and source of accepted and expended funds and an analysis of issues related to impartial decision making, few districts included performance metrics and an evaluation of the program's effectiveness. In addition, most districts confined their assessment of the degree to which funds expedited the permit review process to a brief qualitative discussion and only four districts attempted to compute the actual time it took to process permits to ensure that the program met the goal of expediting permit processing for funding entities without negatively impacting evaluation of other permit applications.
- *Transparency of decision making.* Under the Corps' revised guidance, all WRDA section 214 funding decisions are to be posted online "in an area separate from any other final actions, clearly identifiable as being for projects funded by this authority." However, our review of the participating districts' Web sites found that such postings were not clearly and consistently done. As of January 17, 2010, while we were able to locate section 214 agreements on the Web sites of 15 of the 17 districts, not all of these were in accordance with the guidance. Specifically, many were not in a separate area from other actions or clearly identifiable as being related to the section 214 authority.

Agency Comments

We provided the Corps with a draft of this report and obtained oral comments at a meeting with a Deputy Chief for Regulatory Programs. In commenting on the report, this official generally concurred with the conclusions reached and said that the Corps is taking additional steps to address the remaining recommendation to develop an effective oversight approach. Specifically, the official stated that starting with the fiscal year 2010 annual reporting cycle, the Corps will require that districts submit their reports using a standard template to ensure that each required element is being fully reported on. In addition, the Corps headquarters will be instituting quarterly calls with Corps division and district regulatory officials and section 214 WRDA program managers to discuss progress made in meeting section 214 performance measures, such as timeliness of the permit processing. This official also said headquarters will continue to work with district officials to ensure that information about WRDA section 214 agreements is posted clearly on the district Web sites and is easily accessible by the public. In addition to providing information about actions underway to address the recommendations, the Corps official also provided technical comments, which we incorporated as appropriate.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to interested congressional committees, the Corps, and other interested parties. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have questions about this report, please contact me at 202-512-3841 or mittala@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Elizabeth Erdmann (Assistant Director), Janice Ceperich, Nancy Crothers, Carol Kolarik, and Lisa Vojta.

Sincerely yours,



Ms. Anu K. Mittal
Director, Natural Resources
and Environment

Enclosure

WRDA Section 214 Update

**Briefing for House Transportation and
Infrastructure Committee
November 9, 2009
(updated January 14, 2010)**

Current Status of Section 214 Program- Positions, Agreements, Entities, and Funding

For each fiscal year, the number of fully funded positions, districts using the section 214 authority, and entities with agreements is as follows:

- FY2006 – 10 positions across 4 districts; 13 entities
 - FY2007 – 15 positions across 6 districts; 17 entities
 - FY2008 – 39 positions across 12 districts; 30 entities
 - FY2009 – 49 positions across 17 districts; 36 entities
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- Total amount of expended funds in FY2009 was almost \$4 million. (Figure excludes expenditures from 1 of the 17 districts that did not supply such figures in their annual reports. Four districts reported data for fiscal year of July 2008 through June 2009.)

GAO Recommendations in GAO-07-478

- To ensure that the permits processed under the section 214 authority comply with federal regulations and guidance, we recommended that the U.S. Army Corps of Engineers (Corps) take the following four actions:
 - (1) Clarify the guidance that the districts must follow when evaluating permit applications under section 214.
 - (2) Clarify the documentation that districts must include in project files to justify and support their decisions.
-

GAO Recommendations (continued)

- (3) Provide training to district officials to ensure that they are aware of the requirements that apply to permits processed under the section 214 authority.

 - (4) Develop an effective oversight approach that will ensure that the districts are following all the appropriate requirements when evaluating projects under the section 214 authority.
-

Status - Recommendation 1: Clarify guidance

- The Corps has implemented this recommendation.
 - The Corps issued revised guidance on October 1, 2008. A section by section review demonstrates an improvement over prior guidance in a number of significant ways:
 - Expanded list of acceptable activities for funding.
 - Additional language making it clear that the Corps can accept funds if (1) they expedite processing of permits, (2) the district can ensure impartial decision making, and (3) accepting funds will not slow evaluation of other permits.
 - Clarified the conditions a private entity can be involved in with regard to submissions under a funded agreement.
-

Status - Recommendation 1 (continued)

- Most significant changes made to “Accountability” and “Impartiality” sections of the guidance
 - Accountability - expanded list of items that need to be included in annual reports. Now includes performance metrics used to evaluate effectiveness of fund usage and a statement certifying that all funded project managers are aware of and trained on 214 guidance.
 - Impartiality - significantly expanded this section, including clarification that (1) all decision documents and permits must be reviewed and signed by a manager one-level-above reviewer, and (2) final permit decisions need to be updated monthly on the district’s Web page in an area that is separate from other final actions and clearly identifiable as section 214 authority.
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Status - Recommendation 2: Clarify documentation to support decisions

- The Corps has implemented this recommendation.
- The Corps completed a checklist/template of documentation necessary to support
 - nationwide permits and has tested it in the Northwestern Division, and
 - standard permits, including additional elements required to demonstrate compliance with the National Environmental Policy Act and other statutes.
- Templates will be released for use by all districts in February 2010.
- Both templates are the result of a district-level analysis completed in 2008, which helped ensure the development of consistent and complete support documentation for all major permit categories, according to the Corps.

Status - Recommendation 3: Provide training on section 214 authority

- The Corps has largely implemented this recommendation.
 - A training session was held in August 2007 at the National Regulatory Conference for all Corps regulatory staff. According to the Corps, during the session,
 - draft revised guidance was discussed,
 - expectations regarding impartial decision making and disclosure of decisions to public was discussed, and
 - the annual reporting process was clarified.
 - Also, a training session on applicable section 214 guidance and draft revised guidance was held at the National Regulatory Conference in May 2008 and at the pilot class of a new regulatory chiefs development course. According to the Corps, the training focused on the guidance, implementation, and performance related to the section 214 program.
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Status - Recommendation 3 (continued)

- E-mail announcement to all regulatory chiefs on October 1, 2008, announcing and disseminating revised section 214 guidance. Message highlighted sections of the guidance where clarifications were made that could impact the districts' implementation of the program, such as
 - Increased upward reporting requirements to improve their ability to assess the program's impacts,
 - Expanded impartial decision-making section to define procedures and review requirements, and
 - Reaffirmation that all regulatory chiefs with funded section 214 positions will be required to certify that funded program managers are appropriately trained on guidance.
-

Status - Recommendation 4: Develop Oversight Approach for 214 Authority

- This recommendation has not yet been fully implemented.
- The Corps has taken some valuable steps, such as
 - Expanding the section of guidance that relates to impartial decision making was expanded to be more explicit about who needs to review documentation and permit decisions,
 - Enforcing since FY2008, the requirement for all districts with section 214 agreements to submit annual reports to Headquarters, and
 - Clarifying through a July 2008 memo to all regulatory chiefs the accounting codes to be used to track reimbursable funds. A funding code was specifically identified for section 214 funding sources.

Status - Recommendation 4 (continued)

- However, we also found uneven compliance by the 17 districts with agreements with the reporting requirements in the guidance for the FY2009 reports submitted to Headquarters.
 - While almost all districts complied with the requirements to include the amount, type, and source of accepted and expended funds and an analysis of issues related to impartial decision making, few districts included performance metrics and an evaluation of the program's effectiveness.
 - Only 4 districts computed the actual time it took to process permits to ensure that the program met the goal of expediting permit processing for funding entities without negatively impacting evaluation of other permit application.
-

Status - Recommendation 4 (continued)

- According to the Corps, HQ's Regulatory Office conducts quarterly checks on District Web sites to ensure that section 214 agreements are clearly posted in accordance with the guidance.
 - Our review on January 15, 2010, did not find this to be consistently the case. We found agreements for 15 of the 17 District sites, but not all would be qualified as being "in an area separate from any other final actions, clearly identifiable as being for projects funded by this authority" as the guidance states.

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