

February 12, 2019

The Honorable R.D. James
Assistant Secretary of the Army for Civil Works
108 Army Pentagon (3E446)
Washington, DC 20310-0108

Dear Assistant Secretary James,

The American Association of Port Authorities (AAPA) represents nearly 80 U.S. ports. This letter is in response to your December 14, 2018, press release seeking input by February 12, 2019, on the development of implementation guidance for various provisions of the Water Resources Development Act (WRDA) of 2018. As described therein, interested stakeholders are provided an opportunity to submit written comments to the U.S. Army Corps of Engineers for its consideration.

AAPA appreciates your efforts to expand communication opportunities for the WRDA implementation guidance process. We urge you to assure the Corps has dialogue with non- federal project sponsors, like ports, during the policy development process, per WRDA Section 1105, Non-Federal Engagement and Review.

AAPA's Harbors and Navigation Committee reviewed the WRDA provisions and is providing the enclosed recommendations. If additional information is needed, please contact Jim Walker, jwalker@aapa-ports.org or phone 703-254-7105.

We appreciate your leadership in efforts to streamline Corps processes, enhance the Corps product delivery and "turn dirt!"

Sincerely,



Kurt Nagle
AAPA President and CEO

cc: MG Scott Spellmon, Ada Benavides and David Leach

Section 1105, Non-Federal Engagement and Review. Section 1105(b)(1)(B) provides an opportunity for interested non- federal stakeholders to "engage" with the Corps on the development and issuance of guidance, which contemplates more than simply the submission of written comments. Even more significant, section 1105(c)(2) allows the Corps "to reach out to non- federal stakeholders and circulate drafts of implementation guidance. . . for informal input and recommendations." These two provisions, for which AAPA strongly advocated, clearly contemplate a more interactive process.

AAPA feels it is important to emphasize the Congressional intent per House Report 115-708, discussing Section 115 from H.R. 8, which was the provision enacted into law in the final bill, states:

"The Committee reemphasizes the need to engage with non- federal project sponsors and their associated representatives to coordinate and consult on implementation guidance. This bill directs the Corps to adopt an open process to gather input and initiate a dialogue with those non-federal sponsors who have a stake in how programs and activities are carried out. Hosting one-way communications through webinars and other non-participatory forums jeopardizes the necessary modifications and adjustments to the Corps programs and activities that are authorized in WRDAs. The Corps should work to ensure all non-federal project sponsor and relevant stakeholders voices are heard and incorporate those considerations and Congressional intent into final implementation guidance."

Ports serve as the cost-sharing non-federal sponsor for coastal navigation projects. As a partner in the planning, construction and maintenance of these projects, ports should be an active participant in efforts leading to development of policy on these projects.

Recommendation: Project sponsors should be given the opportunity to review and comment on draft guidance/policy ahead of it being issued. This is especially important on complex revisions, for example, Sections 1152 and 1153.

Section 1116, Dredged Material Management Plans (DMMP).

Recommendation 1: The implementation guidance should emphasize that scope, cost, and time to accomplish a DMMP needs to reflect what is needed to identify viable placement sites, with 3x3x3 compliance serving as the upper limit.

Recommendation 2: The Corps should establish criteria for the appropriate level of DMMP peer review that is commensurate with the proposed level of effort, differentiating between DMMPs and DMMP updates, as the latter should generally take less time and resources to accomplish.

Section 1130, Beneficial Use of Dredged Material. While not listed in the provisions for development of implementation guidance, AAPA members request the Corps clearly communicate the evaluation criteria used to evaluate the pilot program proposals so sponsors can consider them in developing their submission packages. Previous implementation guidance for WRDA 2016 Section 1122 (b) Project Selection establishes numerous submission requirements as well as documentation requirements for the USACE Regional Teams. However, a clear set of selection criteria to guide development of proposals by applicants is not provided.

Recommendation: A clear and succinct explanation of the criteria for selection of projects will result in better quality submissions in the second round of proposals established by Section 1130.

Section 1136, Credit or Reimbursement. This provision authorizes the federal cost share of coastal navigation projects that were constructed by the sponsor, or fully funded by the sponsor, to be eligible for credit towards a future project upon request by the non-federal sponsor. WRRDA 2014 originally established this alternative for flood damage reduction projects.

Recommendation: AAPA supports this action and requests quick issuance of implementation guidance for this Section.

Section 1152, Study of Water Resources Development Projects by Non-Federal Interests.

Subsection (c) 'Studies and Engineering' addresses a problem with the wording of Section 1126 of WRDA 2016 regarding the Corps providing technical assistance on non-federal sponsor-led studies. AAPA recommends the Corps make Section 1152 implementation guidance a top priority as there are a number of ongoing Section 203 studies that would immediately benefit from additional Corps involvement that is not currently being permitted under the Corps' Office of Counsel interpretation of the WRDA 2016 provisions.

It is our understanding that the changes to Section 203 contained in Section 1152 of WRDA 2018 were, in large part, intended to resolve a number of these concerns and allow for the widest possible range of assistance activities to be provided by the Corps under the REVIEW AND TECHNICAL ASSISTANCE provisions of Section 1152. It is in this context that the following recommendations are provided on Implementation Guidance for Section 1152.

Recommendation 1: The implementation guidance should clearly state the Corps of Engineers may accept funds from a non-Federal interest to perform any or all activities necessary to prepare a Section 203 Feasibility Study, at the request and discretion of the non-federal entity, the list of such activities to be developed by the non-federal interest and negotiated with the cognizant Corps District. Standard MOAs should be developed to allow agreements to be executed expeditiously at the Corps District level, without lengthy and time-consuming reviews at the Division or Headquarters level of the Corps of Engineers. Furthermore, a target timeframe

should be established (90-120 days) for development and execution of agreements, so that the commencement of Section 203 studies is not unduly delayed.

Recommendation 2: Technical Assistance be defined to mean any and all engineering, planning, economic, environmental activities that would be typically performed by the Corps of Engineers, if the Feasibility Study had been performed by the Corps under its own Investigations authority. This may also include NEPA processing to include Notice of Intent, Public Scoping Meetings, Agency Coordination, and filing the NEPA document in the Federal Register, and Receipt and Review of Public Comments.

Recommendation 3: Review Assistance be defined to mean any and all requested review activities, to include District review of technical work products prepared by the non-federal entity, agency technical reviews, reviews by Corps Centers of Expertise, including the Deep Draft Navigation Planning Center of Expertise, ERDC, the Cost Review Center in Walla Walla, among others, and also contracting for and coordinating Independent External Peer Reviews.

Recommendation 4: The no crediting/reimbursement limitation contained in e(3) LIMITATION applies ONLY to requested review activities, NOT to technical assistance on engineering, planning, economic or environmental studies that would have been conducted on a typical Corps Feasibility Study prepared by USACE. These technical assistance costs will remain creditable against the sponsor's share of construction costs (if the project is authorized by Congress for construction), as originally specified in Section 203 of WRDA 1986.

Section 1153, Construction of Water Resources Development Projects by Non-Federal Interests.

This provision amends Section 204 of WRDA 1986, which applied to both Construction and Operations and Maintenance (O&M) efforts.

Recommendation: O&M efforts should be considered as included in the scope in the Corps implementation guidance. Should the Corps conclude O&M is outside the scope of Section 1153, they should notify Congress and stakeholders, so we can advocate for clarification in the next WRDA legislation. In addition, please clarify that in (3) PERMIT EXCEPTION, subparagraph (B) that among the federal permits and approvals that would **not** be required includes an exemption from the non-federal entity having to obtain 33 USC, Section 408 approval.

Section 1166, Advanced Funds for Water Resources Development Studies and Projects.

AAPA encourages a broad interpretation of this clause to include Contributed, Advanced, and Accelerated funds in order to provide the flexibility needed for the maximum number of projects to move to construction and reduce the Corps' Civil Works backlog.

Recommendation: The guidance should encourage the Districts to accept and expend funds under this provision even if federal funds have not been appropriated. Further, use of this provision should not prevent a non-federal sponsor from also pursuing authority through other provisions to allow for credit or reimbursement toward the authorized federal cost share.

Clarification is also needed on the credit given the non-federal sponsor associated with removal of maintenance material in conjunction with a channel deepening or widening effort. Specifically, what mechanism exists for the non-federal entity that is implementing a deepening and/or widening effort under Section 204 to obtain credit or reimbursement if the federal navigation channel has not been maintained to its full authorized depth when the Section 204 project is approved for implementation by the Secretary.

WRRDA 2014 Section 1043(b) Non-Federal Implementation Pilot Program. Implementation guidance for this provision has not been issued and it has been revised by WRDA 2018 Section 1152, Study of Water Resources Development Projects by Non-Federal Interests and Section 1153, Construction of Water Resource Development Projects by Non-Federal Interests.

Recommendation: Stakeholders need to see a draft of proposed guidance that identifies how these clauses are linked in order that we may provide meaningful input. This is an example of the need for dialogue between the Corps and stakeholders recommended in response to Section 1105 above.