

The Consequences of the Assistant Secretary of the Army's Recent Decision to Not Grant Section 104 Credit

A. Introduction

Every municipality throughout the United States in the process of building, financing, or participating in a U.S. Army Corps of Engineers (USACE) flood damage reduction project lost a valuable tool based upon the May 5, 2011 decision by the Assistant Secretary for the Army (Civil works) (ASA) and as implemented by the USACE Director of Civil Works memorandum of May 19, 2011. The loss of this Congressionally authorized tool will result in greater risk to public safety, and higher costs to the United States for the completion of flood damage reduction projects that will have to be constructed regardless of whether Section 104 is reactivated or not.

In the last forty years, Congress has repeatedly recognized that the need for greater public safety often compels state and local governments to build portions of Federal flood damaged reduction projects before the Federal government is able to. Two examples are Section 104 of the Water Resources Development Act (WRDA) of 1986 and Section 221 of WRDA 1970 (as amended by Section 2003 of WRDA 2007). Both sections clearly illustrate Congressional intent that there are times, as part of the USACE civil works program, where state and local governments need to quickly finance and construct portions of flood damage reduction projects.

B. Discussion

The ASA's decision will delay projects and increase flood risk, and is counter to Congressional direction and intent. While those consequences could be acceptable if balanced against strong policy interests in favor of the actions, in this case no such strong policy interests exist and those interests that do exist can be addressed by more sustainable means.

1. Section 104 and Section 221 are complementary authorities; not competing authorities.

The May 5th letter from the ASA states that Section 221 is a more contemporary authority, implying that it should be used instead of Section 104. However, while the guidance on EC 1165-2-208 prohibits the use of the two authorities on the same project or separable element, the two authorities actually work best as complementary authorities depending upon the specific circumstances of the project. As discussed above, Section 221 has been implemented to apply to non-Federal construction activities initiated after a Chief's Report is signed until the end of project construction. In contrast, Section 104 applies from the time a reconnaissance study has been completed until the project is authorized. Other than the period of overlap between the Chief's Report and project authorization, Section 104 and Section 221 (as it is being implemented by USACE) actually apply to two separate time periods. This makes them useful as complementary authorities depending upon local need. This range of coverage by the two provisions of law is significant. Congress clearly recognized the importance of giving states and local communities the ability to finance and construct elements of projects in advance of the USACE while preserving the appropriate level of credit for the work.

In addition, the argument that Section 221 should be the exclusive crediting section because it applies to all water resources projects, while Section 104 only applies to flood damage reduction

projects, does not speak to the fact there are legitimate reasons to treat different kinds of projects differently. Unlike many water resources projects, flood damage reduction projects *always* promote public safety and ultimately lower potential Federal financial liability. This is the reason why, as described below, it makes sense to allow credit to begin early under Section 104 (after the reconnaissance study) as opposed to later under Section 221 (after a signed Chief's Report).

2. The decision will delay flood damage reduction projects.

The USACE's civil works program has become slower in recent years due to funding limitations and a more cumbersome regulatory process. It is not unusual for a USACE study to extend more than 10 years and some can easily go 20 years. Indeed, to address this unfortunate development, the USACE has introduced a new study paradigm designed to allow studies to be completed in 18 to 24 months. But until this new streamlined process is applied to all studies it is in everyone's interest for non-Federal partners to construct certain improvements to immediately reduce flood risk. These elements are likely to become elements of the flood damage reduction project to be later authorized by Congress. It is in the National interest to provide non-Federal partners with an incentive to construct these elements early and credit under Section 104 can do this. Finally, prompt construction can also help the national economy by infusing capital improvement dollars into infrastructure investments now. The recent decision however will cause some non-Federal partners to delay construction until *after* a Chief's Report because use of Section 104 has been discontinued. The State of California has recently expended hundreds of millions of public dollars to evaluate and repair critically damaged levees on an expedited basis, with a reasonable expectation that many of these expenditures will be eligible to be credited against future cost share. Much of the success of this effort will be rendered moot by changing this key element of the State's financial strategy. This does not promote public safety.

3. Adequate protections to address the ASA's concerns already exist.

The ASA has expressed concern that too many credits are being issued, creating unrealistic expectations, and leading to an irresponsible situation in an era when the Administration is dedicated to reducing the Federal budget. Electing to abolish this program however is the wrong approach to address this issue. A preliminary eligibility approval for Section 104 credit is not a guarantee of a later federal expenditure. Nor does it change the Federal cost of a project. Rather, a Section 104 "credit" is contingent, dependent upon many factors, including what project is eventually authorized, whether the work constructed is "compatible" with the project authorized, whether the cost of the work constructed is found to be reasonable, the exercise of discretion by the ASA, the appropriation of funds by Congress, and finally in the current Congressional environment upon whether the funds for the project are in the USACE workplan. To the extent the ASA is concerned about expenditures, the forum to address this concern is in the budgeting process and not during a preliminary determination of eligibility which is itself designed to promote public safety through swift construction of flood damage reduction elements.

Another concern raised by the ASA is in regard to the amount of credits being accumulated by some projects, such as the Yuba River Basin Project (Yuba County, California). This concern is not significant. Under USACE guidance a project may not use more credit than the non-Federal

cost share for the project, minus the 5% cash requirement, and non-Federal partners are well aware of this limitation. The ASA could address this concern by noting this limitation in all approvals of Section 104 credit.

The ASA has also suggested that Section 104 improperly drives the USACE planning process because non-Federal partners urge USACE districts to include locally constructed elements as part of the project to be authorized. This argument, however, ignores the fact that the non-Federal partners will seek to construct elements which are cost-justified, maximize economic development, and are likely to be part of the USACE's National Economic Development plan (NED). *In fact, it is not the construction of elements by the non-Federal partners that drives these elements to be part of the Corps' study, it is often the Corps' ongoing study that drives the non-Federal partners to construct these particular elements.* If the USACE planning process is working properly, the USACE and the non-Federal partners should reach the same conclusions regarding elements to be constructed. In addition, USACE policies do not require recommendation of the NED plan. They require that the NED plan be identified, but it is also acceptable to develop a Locally Preferred Plan (LPP). The final feasibility report and the Chief's Report can recommend construction of the LPP and the NED can then be used to establish the Federal cost share in the LPP. Thus, the concern raised is not a significant concern, especially in light of the potentially devastating effects of this decision.

Finally, in many cases the USACE will also review these projects, where the partners are seeking Section 104 credit, under 33 U.S.C. Section 408. This authority is applied by the USACE anytime a partner seeks to alter or modify a Federally authorized flood damage reduction project.¹ This review is a further reason why elements constructed by non-Federal partners will likely be compatible with USACE recommended alternatives; namely, because non-Federal partners know that their projects will be reviewed by the USACE applying USACE standards.

4. The decision may reduce the cost sharing ability of non-Federal partners.

As discussed above, the decision will result in some non-Federal partners delaying improvements until after a Chief's Report so that credit will be available. For the non-Federal partners that choose to proceed because of public safety risk, these partners will need to develop extra funding (to pay for the non-creditable improvements and to pay for the non-Federal share of the USACE project). The resources of the Federal government are limited; but state and local governments are similarly constrained. Thus, the ASA's policy risks that when the USACE finishes studying its project and Congress provides authorization the non-Federal partner will no longer have available resources to fund its portion of the project. This result would be devastating to public safety and would undermine the USACE's role.

5. The decision reduces the ability of non-Federal partners to perform creditable work at any time.

¹ The two authorities are further interconnected. A November 17, 2008 memorandum from USACE directed that where non-Federal partners seek to modify Federally-authorized levees and seek credit for the associated expenditures under Section 104, USACE review of the modification is to occur at USACE HQ under the "major 408" review procedure, rather than District review under the "minor 408" review procedure. This memorandum led many non-Federal partners to pursue a more time-consuming and costly USACE review process solely to obtain Section 104 credit – a form of credit now no longer available under the decision.

Section 221 provides that the non-Federal partner must provide the lands, easements, rights of way, relocations, and dredge disposal sites (LERRDs) in addition to a minimum 5% cash payment and may not use credit to meet any of these obligations. This significantly limits the use of credit earned under Section 221. This can be demonstrated in a simple example:

Scenario 1 – Section 104:

A \$100 million flood damage reduction project has a non-Federal cost share of \$35 million. In this scenario, it is comprised of \$24 million in LERRDs and \$11 million in cash payments (\$5 million is the required minimum 5% non-Federal cash payment). Under Section 104, the non-Federal partner could apply for credit of up to \$30 million of design and construction work (the entire non-Federal cost share of \$35 million minus the \$5 million required cash payment) that could be counted toward the non-Federal cost share.

Scenario 2 – Section 221:

The same \$100 million flood damage reduction project has a non-Federal cost share of \$35 million. In this scenario, because credits may not be used for LERRDs or the minimum 5% cash requirement, the non-Federal partner could receive and apply credit for only \$6 million of design and construction work (the non-Federal cost share of \$35 million minus the \$24 million cost of LERRDs and the \$5 million required cash payment). Under Section 221 up to \$24 million less credit is available than under Section 104 and none of that creditable construction work can be performed prior to the Chief's Report.

Since non-Federal partners will be discouraged from accelerating construction on critical public safety projects, the decision to eliminate Section 104 as a tool for a non-Federal partner to provide its cost share, especially with the different rule regarding LERRDs, has the unintended effect of promoting USACE as the exclusive (or near-exclusive) builder of flood damage reduction projects. Thus, there are no Federal savings that result from this decision; only delayed construction, continued public safety risk, and potentially devastating flood damage liability with significant Federal, state, and local recovery costs. This change may also reduce the possibility of performing creditable work at any time by reducing the project's economic justification.

6. The decision contradicts Congressional direction and intent.

Congress enacted two separate authorities: Section 104 and Section 221. While Congress granted to the ASA authority to decide when and whether to use each provision, its direction was not for one of the authorities to be rejected forever. Indeed, it is an abuse of the law for the executive branch to choose to never exercise an authority granted to it, instead of evaluating the use of that authority on a case by case basis. The ASA's decision simply ignores Congressional direction and intent by not allowing the ASA to consider the factual circumstances applicable in each case. The ASA's decision also ignores that in enacting Section 104 Congress instructed the ASA to issue guidance through a public process in which public comment was considered. While this process occurred for the initial guidance, the ASA's recent decision was not in compliance with that guidance and no such equivalent process occurred for the recent decision to undo the effects of that guidance.

7. The decision adversely affects the feasibility of Federal projects.

If a non-Federal partner proceeds with construction of some project features during the feasibility study, there is a strong potential to affect the project's feasibility if that work is not considered to be part of the project. This concept is discussed in the guidance for Section 104, ER 1165-2-29, as follows:

This authority provides a basis for non-Federal interests to undertake local work to alleviate flood damages in the period preceding authorization of a Federal project with assurance that they will not adversely affect the project's economic feasibility. It provides local sponsors more flexibility in meeting their flood problems.

Also, if a non-Federal partner chooses to perform work during the feasibility phase and that work is not creditable, it can affect the without-project condition which serves as the basis for evaluating costs, benefits, and impacts – triggering the need to re-establish the without-project condition and much of the project feasibility work. This will delay the completion of the study and increase federal costs.

D. Requested Action

The ASA's decision has the unintended effect of undermining the ability and willingness of state and local governments capable of investing in flood damage reduction projects in advance of the USACE. The ASA should reevaluate Section 104 requests for any projects for which credit was requested as of May 5, 2011 and should continue to grant Section 104 credit until the ASA establishes a new crediting policy. As part of such consideration, the ASA must seek public input from local and state governments who have made plans in reliance of the previous administration of Section 104.

Any revised policy must assure credit can be granted for advance construction of projects at any stage after the reconnaissance study is initiated. The policy must also consider Congress's direction in Section 104 that the advance construction be creditable if the work is compatible with the authorized project. Finally, any revised policy must provide clarity and incentives for projects with significant lands, easements, rights of way, relocations, and dredge disposal sites.

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