

DRAFT

CECW-P

MEMORANDUM FOR DIVISION COMMANDERS

SUBJECT: Implementation Guidance for Dredged Material Disposal – Section 2005 of the Water Resources Development Act of 2007 (WRDA 2007)

1. Applicability. Section 2005 amends Section 217 of the Water Resources Development Act of 1996 (WRDA 96) (33 U.S.C 2326a). The amended Section 217 is enclosed. Section 217 as used in this guidance refers to Section 217 of WRDA 96 as amended by Section 2007 of WRDA 2007. The guidance in this memorandum amends guidance initially presented in Policy Guidance Letter 47, Cost Sharing for Dredged Material Disposal Facilities and Dredged Material Disposal Facility Partnerships, dated 3 April 1998, and partially incorporated in Appendix E of ER 1105-2-100. The specific guidance changes are:

a. Broadened Definition of Dredged Material Management Measures. Section 217 provides that the U.S. Army Corps of Engineers in managing the dredged material from a Federal water resources project or group of Federal water resources projects within a geographic area may enter into project partnership agreements with one or more non-Federal interests for the acquisition, design, construction, management, or operation of a dredged material processing, treatment, contaminant reduction, or disposal facility (including any facility used to demonstrate potential beneficial uses of dredged material which may include effective contamination reduction technologies). This clarifies that Federal participation in dredged material management facilities extends beyond just disposal facilities and can include processing, treatment, and contaminant reduction.

b. Performance. Section 217(c) provides that the actual performance of acquisition, design, construction, management, or operation of a cost –shared dredged material processing, treatment, contamination reduction or disposal facility may be accomplished by non-Federal interests.

c. Multiple Projects. Section 217(c) provides that a dredged material processing, treatment, contamination reduction, or disposal facility may manage dredged material from multiple Federal projects in the region with combined cost sharing among the multiple projects.

d. Payments. Section 217(c) provides that project partnership agreements may provide for payments by the Corps of Engineers for the Federal share of dredged material disposal or placement capacity for Federal projects at dredged material processing , treatment, contaminant reduction or disposal facilities constructed by non-Federal interests.

e. Credit for Funds. Section 217(c) provides that, subject to approval of the Secretary of the Army and subject to applicable laws and policies, a non-Federal interest that is the cost sharing sponsor for a Federal water resources project may receive credit for funds provided for the acquisition, design, construction, management, or operation of a dredged material processing, treatment, contaminant reduction, or disposal facility to the extent the facility is used to manage dredged material from the water resources project.

2. General. Section 2005 modifies Section 217 of WRDA 96 to provide expanded authority for partnerships with non-Federal interests in managing the material dredged from Federal water resources (primarily navigation) projects. Existing policy on disposal of dredged material from operation and maintenance or new construction of Federal navigation projects provides two primary alternative implementation and funding options. The first option is the construction of disposal facilities as a Federal cost-shared project. Disposal facilities for operation and maintenance dredging of completed navigation projects or for new work navigation projects are constructed by the Corps under the terms of project partnership agreements and cost-shared as General Navigation Features (GNF) under the provisions of Section 101 of the Water Resources Development Act (WRDA) of 1986, as amended by WRDA 96. The second option for provision of disposal facilities is the provision of disposal facilities by non-Federal public or private interests under the terms of Section 217 (d) (previously Section 217(c) before it was amended by Section 2005 of WRDA 2007). Under the provisions of Section 217(d) the Corps may enter into agreements with the non-Federal providers of disposal facilities and non-Federal sponsors to utilize the non-Federal public or private facility for disposal of dredged material from a Federal project and to pay a user fee or tipping fee for placement of the material at the disposal facility. The tipping fee is cost shared with the non-Federal sponsor of the Federal navigation project that is the source of the dredged material under the cost sharing established by Section 101 of WRDA 86, as amended. Section 217(c) authorizes a third option for dredged material disposal from Federal water resources projects. While the authority is not limited to navigation projects its most likely application will be to dredged material from operation and maintenance or new construction of Federal navigation projects and this guidance is written for that primary application. Under Section 217(c) the Corps can enter into project partnership agreements with non-Federal interests for the acquisition, design, construction, management, or operation of dredged material processing, treatment, contaminant reduction, or disposal facility for the disposal of dredged material from operation and maintenance or new work Federal navigation projects. Under the terms of the partnership agreement the Corps would pay the Federal share under Section 101 of WRDA 86, as amended, of the capacity for dredged material from the Federal navigation project provided in the processing, treatment, contaminant reduction or disposal facility. In a traditional disposal facility the non-Federal sponsor provides the land, easements, and rights-of-way (LERR), with appropriate cost sharing credit and the Corps designs and constructs the facility and the non-Federal sponsor pays the non-Federal share. Under the Section 217(c) approach the non-Federal sponsor acquires the LERR, designs and constructs the disposal facility, and operates the facility and the Corps pays the Federal

share. Section 217(c) also provides authority for a project partnership agreement for a dredged material processing, treatment, contaminant reduction, or disposal facility where the responsibilities for design, construction and operation and management are shared and the respective Federal and non-Federal cost shares and operation and maintenance responsibilities can be met through combinations of payment and performance except that under all circumstances responsibility for providing all necessary LERR associated with any facility will be non-Federal.

3. Policy.

A. Non-Federal Interests. The partnership agreements under Section 2005 are to be entered into with one or more non-Federal interests under Section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d-5b). The definition of non-Federal interests in Section 221, as amended by Section 2003 of WRDA 2007 is a legally constituted public body (including a Federally recognized Indian tribe) or a nonprofit entity with the consent of the affected local government. Therefore, unlike Section 203 (d), the authorities of Section 217(c) do not extend to for-profit private partners.

B. Federal Participation in Dredged Material Management Facilities. Federal participation in dredged material management facilities for Federal navigation projects under Section 217(c) and (d) are not limited to facilities where dredged material is permanently placed and can include Federal participation in facilities to process, treat, and reduce contaminants in dredged material prior to final placement. This is not new policy but a legislative clarification of policy already in place. For example, for the maintenance dredging of the Miami River, Florida, project, cost-sharing of disposal facilities under Section 101 of WRDA 86, as amended, extends to processing and dewatering of the material, including treatment of return water, and transportation and placement of the material in a commercial landfill, including payment of the landfill tipping fee.

C. Multiple Projects Including Cost Sharing Considerations. Facilities for dredged material processing, treatment, contamination reduction, or disposal may manage the dredged material from multiple Federal navigation projects in the geographic region of the dredged material management facility / facilities. The Federal and non-Federal cost-sharing participation in the facility/facilities would be based on an allocation of costs that considers the Section 101 of WRDA 96 cost sharing applicable to the project depth of the Federal projects generating the dredged material and the proportional utilization of the facility by each of the Federal projects. The Federal navigation projects utilizing a multiple project disposal facility may include projects without previous partnership agreements. This multiple project policy is not a new policy but has been reemphasized in Section 2005 modifications to Section 217.

D. Performance. Project partnership agreements under Section 217(c) may provide for actual performance of design, construction, operation, maintenance and management of a dredged material disposal facility by the Corps, the non-Federal interests or a combination of both parties. In all cases the non-Federal interests are

responsible for providing all necessary lands, easements, relocations and rights-of-way associated with any dredged material management facility. Project partnership agreements could provide for a combination of payments and credits by the parties.

E. Credits for Funds Previously Provided. Subject to approval of the Assistant Secretary of the Army for Civil Works (ASA(CW)), a non-Federal interests entering into a project partnership agreement for a dredged material management facility under Section 217(c) may receive credit for funds provided for the acquisition, design, construction, management or operation of a dredged material processing, treatment, contamination reduction, or disposal facility to the extent the facility is used to manage dredged material from the Federal navigation project. For example, a state may fund the construction of a regional dredged material rehandling facility for temporary storage and dewatering of dredged material with subsequent beneficial use of the material. If this rehandling facility is subsequently used in the management of dredged material from a Federal navigation project where the state is the non-Federal sponsor, to the extent the state funding of the rehandling had not been used in matching Federal funds, with the approval of the ASA(CW), an appropriate share of the funds could be credited against the state share of the dredged material management of the Federal project.

F. Existing Agreements. Nothing in Section 217(c) supersedes or modifies an agreement in effect on the 8 November 2007 between the Federal Government and any non-Federal interest for the cost-sharing, construction, and operation and maintenance of a water resources project.

G. Base Plan (Federal Standard). Nothing in the amendment to Section 217 changes the requirement that Federal participation in a dredged material management and disposal plan as a GNF for operation and maintenance or a new work navigation general navigation feature is limited to the plan necessary to carry out the dredging for construction, operation or maintenance of an authorized Federal navigation project in the most cost -effective way consistent with economic, engineering, and environmental criteria.

H. Beneficial Use. As noted in paragraph 4.G a dredged material processing, treatment, contaminant reduction, or disposal facility (including any facility used to demonstrate potential beneficial uses of dredged material which may include effective contaminant reduction technologies) will be eligible for funding and Federal cost sharing as a GNF if it is the Federal Standard or Base Plan. If the dredged material management facility/plan is not the Base Plan but beneficially uses dredged material for structural or non-structural flood control, hurricane and storm damage reduction, or environmental protection and restoration it can be considered for Federal participation under the beneficial use authorities of Section 204 of the WRDA 92, as amended by Section 2037 of WRDA 2007.

4. Implementation. Dredged Material Management Plans for Federal navigation projects or groups of Federal navigation projects and feasibility studies for navigation improvements will consider dredged material processing, treatment, contaminant reduction, or disposal facilities provided in partnership with non-Federal interests under the authority of Section 217 of WRDA 86, as amended by Section 2005 of WRDA 2007, in evaluating dredged material placement alternatives.

5. Permanent Guidance. The guidance in this memorandum will be incorporated into the permanent guidance of ER 1105-2-100 as the ER is updated.

Stockton

SEC. 217 DREDGED MATERIAL DISPOSAL FACILITY PARTNERSHIPS

(a) ADDITIONAL CAPACITY.-

(1) **PROVIDED BY THE SECRETARY.-**At the request of a non-Federal interest with respect to a project, the Secretary may provide additional capacity at a dredged material disposal facility constructed by the Secretary beyond the capacity that would be required for project purposes if the non-Federal interest agrees to pay, during the period of construction, all costs associated with the construction of the additional capacity.

(2) **COST RECOVERY AUTHORITY.-** The non-Federal interest may recover the costs assigned to the additional capacity through fees assessed on third parties whose dredged material is deposited at the facility and who enter into agreements with the non-Federal interest for the use of the facility. The amount of such fees may be determined by the non-Federal interest.

(b) NON-FEDERAL USE OF DISPOSAL FACILITIES.-

(1) IN GENERAL.-The Secretary-

(A) may permit the use of any dredged material disposal facility under the jurisdiction of, or managed by, the Secretary by a non-Federal interest if the Secretary determines that such use will not reduce the availability of the facility for project purposes; and

(B) may impose fees to recover capital, operation, and maintenance costs associated with such use.

(2) **USE OF FEES.-** Notwithstanding section 401(c) of the Federal Water Pollution Control Act (33 U.S.C. 1341(c)) but subject to advance appropriations, any monies received through collection of fees under this subsection shall be available to the Secretary, and shall be used by the Secretary, for the operation and maintenance of the disposal facility from which the fees were collected.

(c) DREDGED MATERIAL FACILITY

(1) **IN GENERAL-** The Secretary may enter into a partnership agreement under section 221 of the Flood Control Act of 1970 (42 U.S.C. 1962d-5b) with one or more non-Federal interests with respect to a water resources project, or group of water resources projects within a geographic region, if appropriate, for the acquisition, design, construction, management, or operation of a dredged material processing ,treatment, contaminant reduction, or disposal facility (including any facility used to demonstrate potential beneficial uses of dredged material, which may include effective sediment contaminant reduction technologies) using funds provided in whole or in part by the Federal Government.

(2) PERFORMANCE.- One or more of the parties to a partnership agreement under this subsection may perform the acquisition, design, construction, management, or operation of a dredged material processing, treatment, contaminant reduction, or disposal facility.

(3) MULTIPLE PROJECTS.- If appropriate, the Secretary may combine portions of separate water resources projects with appropriate combined cost-sharing among the various water resources projects in a partnership agreement for a facility under this subsection if the facility serves to manage dredged material from multiple water resources projects located in the geographic region of the facility.

(4) SPECIFIED FEDERAL FUNDING SOURCES AND COST SHARING. –

(A) SPECIFIED FEDERAL FUNDING.- A partnership agreement with respect to a facility under this subsection shall specify-

(i) the Federal funding sources and combined cost-sharing when applicable to multiple water resources projects; and

(ii) the responsibilities and risks of each of the parties relating to present and future dredged material managed by the facility.

(B) MANGEMENT OF SEDIMENTS.-

(i) IN GENERAL.- A partnership agreement under this subsection may include the management of sediments from the maintenance dredging of Federal water resources projects that do not have partnership agreements.

(ii) PAYMENTS.- A partnership agreement under this subsection may allow the non-Federal interest to receive reimbursable payments from the Federal Government for commitments made by the non-Federal interest for disposal or placement capacity at dredged material processing, treatment, contaminant reduction or disposal facilities.

(C) CREDIT.- A partnership agreement under this subsection may allow costs incurred by the non-Federal interest before execution of the partnership agreement to be credited in accordance with section 221 of the Flood Control Act of 1970 (42 U.S.C 1962d-5b).

(5) CREDIT.-

(A) EFFECT ON EXISTING AGREEMENTS.- Nothing in this subsection supersedes or modifies an agreement in effect on the date of enactment of this paragraph between the Federal Government and any non-Federal interest for the cost-sharing, construction, and operation and maintenance of a water resources project.

(B) CREDIT FOR FUNDS. – Subject to the approval of the Secretary and in accordance with law (including regulations and policies) in effect on the date of enactment of this paragraph, a non-Federal interest for a water resources project may receive credit for funds provided for the acquisition, design, construction, management, or operation of a dredged material processing, treatment, contaminant reduction, or disposal facility to the extent the facility is used to manage dredged material from the project.

(C) NON-FEDERAL INTEREST RESPONSIBILITIES.-A non-Federal interest entering into a partnership agreement under this subsection for a facility shall-

(i) be responsible for providing all necessary lands, easements, relocations, and rights-of-way associated with the facility; and

(ii) receive credit toward the non-Federal share of the cost of the project with respect to which the agreement is being entered into for those items.

(d) PUBLIC PRIVATE PARTNERSHIPS.-

(1) IN GENERAL. – The Secretary may carry out a program to evaluate and implement opportunities for public-private partnerships in the design, construction, management, or operation and maintenance of dredged material processing, treatment, contaminant reduction or disposal facilities in connection with construction or maintenance of Federal navigation projects. If a non-Federal interest is a sponsor of the project, the Secretary shall consult with the non-Federal interest in carrying out the program with respect to the project.

(2) PRIVATE FINANCING.-

(A) AGREEMENTS. - In carrying out this subsection, the Secretary may enter into an agreement with a non-Federal interest with respect to a project, a private entity, or both for the acquisition, design, construction, management, or operation and maintenance of a dredged material processing, treatment, contaminant reduction, or disposal facility (including any facility used to demonstrate potential beneficial uses of

dredged material) using funds provided in whole or in part by the private entity.

(B) REIMBURSEMENT. – If any funds provided by a private entity are used to carry out a project under this subsection, the Secretary may reimburse the private entity over a period of time agreed to by the parties to the agreement through the payment of subsequent user fees. Such fees may include the payment of a disposal or tipping fee for placement of suitable dredged material at the facility.

(C) AMOUNT OF FEES. – User fees paid pursuant to subparagraph (B) shall be sufficient to repay funds contributed by the private entity plus a reasonable return on investment approved by the Secretary in cooperation with the non-Federal interest with respect to the project and the private entity.

(D) FEDERAL SHARE.- The Federal share of such fees shall be equal to the percentage of the total cost that would otherwise be borne by the Federal Government as required pursuant to existing cost-sharing requirements including section 103 of the Water Resources Development Act of 1986 (33 U.S.C. 2213) and section 204 of the Water Resources Development Act of 1992 (33 U.S.C 2325).

(E) BUDGET ACT COMPLIANCE.- Any sending authority (as defined in section 401(c) (2) of the Congressional Budget Act of 1974 (2 U.S.C. 651(c) (2)) authorized by this section shall be effective only to such extent and in such amounts as are provided in appropriation Acts.