

# Fast-Tracking Restoration: Addressing Resource Constraints in Federal Agencies



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In February 2017, ELI released a background paper on “Fast-Tracking ‘Good’ Restoration Projects in the Gulf of Mexico,” which focused on mechanisms that are available to fast-track restoration projects that are subject to federal environmental compliance requirements (e.g., review of environmental impacts under the National Environmental Policy Act). In that paper, we noted that constraints on federal agency resources may become a significant barrier to timely action. This analysis adds to that work, and focuses on how federal agencies may be able to supplement their internal budget and personnel resources in order to increase the efficiency of the compliance process.

In general, federal agencies can only expend funds allocated to them through the Congressional appropriations process.<sup>1</sup> Under some circumstances, however, federal agencies are allowed to accept outside funds or share personnel with other entities. Below we highlight some of these circumstances. Appropriately applied, these provisions may assist federal agencies overseeing Gulf restoration in addressing at least some of their resource constraints related to environmental compliance.

*NOTE: This analysis provides an overview. It is for informational purposes only and does not constitute legal advice. Readers should consult with a lawyer for up-to-date information related to specific factual situations.*

## **I. Non-Federal Funding**

Certain legal provisions allow government agencies to accept outside funds that can be used to expedite environmental compliance activities. We review two of these below: Section 214 of the Water Resources Development Act (WRDA) and Section 111 of the appropriations act covering the National Oceanic and Atmospheric Administration (NOAA).

### **A. Water Resources Development Act (WRDA), Section 214**

*Federal agencies covered: U.S. Army Corps of Engineers (Corps)*

Under Section 214 of WRDA, the Corps “may accept and expend funds contributed by a non-Federal public entity ... to expedite the evaluation of a permit of that entity ...

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<sup>1</sup> 2 Gov’t Accountability Office, Principles of Federal Appropriations Law (*GAO Redbook*) 6-162-63 (3d ed. 2004).

related to a project or activity for a public purpose under the [Corps'] jurisdiction."<sup>2</sup> For the Corps to accept funds under this provision:

- **The funds must come from a “non-Federal public entity”:** “[t]he term ‘non-federal public entity’ is limited to governmental agencies or governmental public authorities, including governments of federally recognized Indian Tribes.”<sup>3</sup> Note that Section 214 also allows funding from public-utility companies, natural gas companies, and railroad carriers, subject to additional restrictions, but this analysis only focuses on non-Federal public entities.<sup>4</sup>



Photo by ELI Gulf Team.

- **The project or activity for which the permit is sought must have a public purpose:** to illuminate the scope of this requirement, the Corps explains that “[m]any projects proposed by non-federal public entities such as roads, transit facilities, air and seaport improvements, public works, flood control structures,

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<sup>2</sup> 33 U.S.C. § 2352(a)(2). This provision was also discussed in a prior publication of the Environmental Law Institute, *Fast-Tracking “Good” Restoration Projects in the Gulf of Mexico* (Feb. 2017), available at <http://eli-ocean.org/wp-content/blogs.dir/2/files/Fast-Tracking-Combined-2.9.17.pdf>.

<sup>3</sup> U.S. Army Corps of Engineers, Memorandum from the Director of Civil Works to 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 (“2015 Implementation Guidance”), at 7 (Sept. 2, 2015).

<sup>4</sup> See 33 U.S.C. § 2352(a)(2)-(3).

parks, and other public facilities, are generally available for the general public's use and benefit, and serve a public purpose.”<sup>5</sup>

The Corps’ FY 2016 Annual Report indicates that funding agreements under Section 214 have allowed the agency “to hire additional... staff.” These staff members have been able to focus on activities related to specific permits, such as “review[ing] permit applications, permittee-responsible mitigation sites, mitigation bank sites, and in-lieu fee programs.”<sup>6</sup> In addition, staff have been able to focus on activities unrelated to specific permits, for example to participate in “regularly scheduled as well as impromptu coordination meetings with the funding entity.” They have also been able to focus on “programmatic efforts to improve the permitting process.”<sup>7</sup>

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### **WRDA Section 214: Funding to Expedite Permit Review in Seattle**

The Port of Seattle has entered into an agreement with the Corps under Section 214 in order “to expedite the evaluation of various Port permits.”<sup>8</sup> The funds are “mainly ... expended on the salaries and overhead of Corps Regulatory Project Managers performing expedited processing activities for the port.”<sup>9</sup> The activities of those employees include “application intake review, drawings correction, jurisdictional determinations, site visits, public notice preparation, preparation of correspondence, conduct of the public interest review, preparation of draft permit decision documents, and meetings with the Port.”<sup>10</sup>

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<sup>5</sup> 2015 Implementation Guidance, *at* 8.

<sup>6</sup> U.S. Army Corps of Engineers, FY 2016 Regulatory Annual Report for Section 1006(2)(e) of WRRDA (“FY 2016 Annual Report”), at 1 (2016), *available at* <http://cdm16021.contentdm.oclc.org/utills/getfile/collection/p16021coll5/id/630/filename/631.pdf>.

<sup>7</sup> FY 2016 Annual Report, at 2-3. Note that these programmatic activities must remain tied to Section 214’s authorization to accept funding “to expedite the evaluation of a permit” application by the funding entity “related to a project or activity for a public purpose... .” 33 U.S.C. § 2352(a)(2).

<sup>8</sup> Amended Agreement Between the Port of Seattle and the Department of the Army (“Amended Seattle Agreement”), at 2 (July 6, 2007), *available at* <http://cdm16021.contentdm.oclc.org/utills/getfile/collection/p16021coll5/id/719>.

<sup>9</sup> FY 2016 Annual Report, at 2.

<sup>10</sup> *Id.* at 2-3.

As the Corps has noted, there are a number of benefits that flow from Section 214 funding agreements. This includes a decrease in permit review time: as noted in the FY 2016 report, “the average number of days a complete permit is in review before a permit decision is made is generally less for applicants with funding agreements as compared to those without funding agreements through the FY 2010 – FY 2016 time period.”<sup>11</sup> There are also other benefits, which include:

- “[I]mproved relationships between the [Corps and the permittee]”;<sup>12</sup>
- “[A]llow[ing] the dedicated [Corps] employee to develop expertise in the funding entity’s projects and processes, which translates to further efficiency improvements during the permit review process”;<sup>13</sup> and
- Enabling the Corps’ engagement earlier in the project development and permitting process, yielding efficiencies over the course of the process.<sup>14</sup>

Despite these benefits, there are also potential drawbacks. This includes the potential for a conflict of interest: having a permit applicant pay for the staff handling the permit application may generate a conflict of interest for those staff members and could fail to lead to an impartial outcome. Payments can also create the potential for the *appearance* of impropriety.

To help address these concerns, certain measures have been put in place. Every permit evaluation funded under Section 214 must be reviewed by an official whose activities are *not* funded by the permit applicant.<sup>15</sup> Section 214 also requires that the Corps “utilize the same procedures for decisions that would otherwise be required for the evaluation of permits for similar projects or activities not carried out using funds authorized under this section.”<sup>16</sup> In addition, there are a number of requirements that increase the transparency of the Section 214 decisionmaking process, including the publication of all decisions made under Section 214.<sup>17</sup> These safeguards are intended to maintain the impartiality of the permitting process. Our research did not, however,

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<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 33 U.S.C. § 2352(b)(2), (c).

<sup>16</sup> *Id.* § 2352(b)(2)(B).

<sup>17</sup> *Id.* § 2352(d).

locate any studies evaluating whether these provisions are in fact effective in ensuring impartiality.

**B. Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017, Section 111**

*Federal agencies covered: NOAA*

The 2017 appropriations act covering NOAA potentially provides a way for state and local governments, as well as other governmental entities, to contribute to the cost of NOAA’s activities related to permitting and other environmental compliance activities. Section 111 of the act allows NOAA to “receive and expend funds made available on a consensual basis from: a Federal agency, State or subdivision thereof, local government, tribal government, territory, or possession or any subdivisions thereof” in order “to carry out [its] responsibilities.”<sup>18</sup> These “responsibilities” include, among other activities, “permitting and related regulatory activities.”<sup>19</sup> A substantively identical



Photo by ELI Gulf Team.

version of Section 111 is included in the FY 2018 appropriations bill covering NOAA that is now pending before Congress.<sup>20</sup>

Certain restrictions have been placed on the funds received under this provision: “[A]ll funds within [Section 111] and their corresponding uses are subject to section 505 of [the appropriations] Act.” Pursuant to Section 505, funds received under Section 111 that entail a “reprogramming of funds”

under certain defined circumstances trigger a requirement that the “House and Senate Committees on Appropriation [be] notified 15 days in advance of such reprogramming of funds.” Notification is required if, among other circumstances, a reprogramming “increases funds or personnel by any means for any project or activity for which funds

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<sup>18</sup> Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017, Pub. L. 115-31, Div. B, § 111, 131 Stat. 135, 192 (2017). The provision requires that such funds be segregated from general U.S. government funds in a separate account. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> H.R. 3354, 115th Cong., Div. C, tit. I, § 109 (2017).

have been denied or restricted.”<sup>21</sup> Notification is also required when a reprogramming “augments existing programs, projects or activities in excess of \$500,000 or 10 percent, whichever is less, or reduces by 10 percent funding for any program, project or activity, or numbers of personnel by 10 percent.”<sup>22</sup>

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## What is a “Program, Project, or Activity”?

With respect to federal government appropriations, the term “program, project, or activity” (PPA) is used to refer to an “element within a budget account.”<sup>23</sup> Budget accounts are specified by the language of an appropriations act. PPAs, in contrast, are not specified within the legislation itself, and it is necessary to look to outside documentation to define them. “For annually appropriated accounts, the Office of Management and Budget (OMB) and agencies identify PPAs by reference to committee reports and budget justifications.”<sup>24</sup>

For example, in FY 2017, there are multiple PPAs for the National Marine Fisheries Services under a single budget account, including four PPAs for the account “Protected Resources Science and Management”—(1) Marine Mammals, Sea Turtles and Other Species; (2) Species Recovery Grants; (3) Atlantic Salmon; and (4) Pacific Salmon.<sup>25</sup> Shifting funds between these PPAs constitutes reprogramming.

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<sup>21</sup> Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017, § 505(3), 131 Stat. at 220.

<sup>22</sup> *Id.* § 505(7).

<sup>23</sup> Gov’t Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, at 80 (2005).

<sup>24</sup> *Id.*; see also Office of Management and Budget, *Circular No. A-11: Preparation, Submission, and Execution of the Budget* (“OMB Circular No. A-11”), § 100, at 2 (July 2017).

<sup>25</sup> See H.R. Rep. No. 163–76, pt. 2, at H3366 (May 3, 2017); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017, “National Oceanic and Atmospheric Administration: Operations, Research, and Facilities,” 131 Stat. at 187-88.



While notification might at first glance appear to be a simple exercise in paperwork, it is far more complicated and may be a substantial hurdle to using Section 111. To start, the White House Office of Management and Budget must review and approve any such reprogramming request before the request is submitted to Congress.<sup>26</sup> In addition, while the language of the appropriations act only requires *notification* of the Congressional appropriations committees before such reprogramming of funds, the appropriations committees have indicated that the notification provision requires *prior approval* from those committees: “Any program, project or activity ... shall be construed as the position of the Congress and shall not be subject to reductions or reprogramming without *prior approval* of the [Appropriations] Committees.”<sup>27</sup>



Photo by Helen Rose Patterson, National Wildlife Federation (resized from original).

At the same time, under the policy of the Department of Commerce, which encompasses NOAA, “it is within the exclusive authority and discretion of [the Department of Commerce Office of Budget] whether any given action [triggering a reprogramming notification] should proceed” absent explicit approval from both houses of Congress.<sup>28</sup> Under this policy, “[t]here are very few cases where [the Office of Budget] and the Department [of Commerce] will proceed without Congressional Approval.”<sup>29</sup>

Altogether, these requirements could act as a significant deterrent to NOAA’s use of Section 111 to accept outside funds. Indeed, despite the fact that similar language has

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<sup>26</sup> OMB Circular No A-11, § 22.3; see also Department of Commerce, *Departmental Administrative Order (DAO) 203-13: Reprogramming and/or Transfer(s) of Budgetary and Personnel Resources (“DAO 203-13”)*, § 5.01 (Sept. 26, 2017), available at [http://www.osec.doc.gov/opog/dmp/daos/dao203\\_13.html](http://www.osec.doc.gov/opog/dmp/daos/dao203_13.html) (last visited Oct. 23, 2017).

<sup>27</sup> H.R. Rep. No. 163-76, pt. 2, at H3365 (emphasis added).

<sup>28</sup> DAO 203-13, § 5.03.

<sup>29</sup> *Id.*

appeared in a number of appropriations bills, we have been unable to find any examples of NOAA relying on this provision to accept outside funds for “permitting and related regulatory activities.” Nonetheless, the provision may yet prove to be a basis for accepting funds for these purposes in the future, particularly in circumstances where the notification requirements would not be triggered.

While it does not appear that this provision has been relied on in the environmental compliance context, it is worth noting that, unlike section 214 of WRDA, this provision does not include any language addressing impartiality. The types of safeguards included in section 214 of WRDA could be important in helping to ensure the integrity of environmental compliance activities if funds were to be accepted under section 111.

## II. Use of Personnel

There are also certain mechanisms that allow for intergovernmental transfer or loan of personnel engaged in environmental compliance activities. We address two here: the Intergovernmental Personnel Act and Section 111 of the appropriations act covering NOAA.

### A. Intergovernmental Personnel Act

*Federal agencies covered: all agencies*

Under the Intergovernmental Personnel Act, a federal agency may assign an employee to states, local governments, Native American tribal governments, institutions of higher education, and certain specified categories of “other” organizations.<sup>30</sup> Also under this statute, an employee of one of these non-Federal entities may be assigned to a federal agency.<sup>31</sup> Any assignment requires the consent of the employee to be assigned.<sup>32</sup>

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<sup>30</sup> 5 U.S.C. § 3372; *id.* § 3371(2)(c). The provision is inapplicable to the following types of federal employees: “a noncareer appointee, limited term appointee, or limited emergency appointee ... in the Senior Executive Service and an employee in a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.” *Id.* § 3372(a)(1). The term “other organization” is defined as an “organization representing member State or local governments,” “an association of State or local public officials,” “a nonprofit organization which has as one of its principal functions the offering of professional advisory, research, educational, or development services, or related services, to governments or universities concerned with public management,” or “a federally funded research and development center.” *Id.* § 3371(4); *see also* 5 C.F.R. § 334.102.

<sup>31</sup> 5 U.S.C. § 3372(a)(2).

The statute limits how long an employee can be assigned: an initial assignment is limited to two years, and may only be extended for up to two more years.<sup>33</sup> In addition, without an explicit waiver from the Office of Personnel Management, a federal employee may not be assigned under the Act for more than six years over the entire course of a career.<sup>34</sup>



Photo by ELI Gulf Team.

For the assignment of a federal employee to a non-federal entity state or local government, the Act allows – but does not require – the non-federal entity to reimburse the federal agency for part or all of that employee’s salary.<sup>35</sup> Any reimbursement is “credited to the appropriation of the Federal agency used for paying the travel and transportation expenses or pay.”<sup>36</sup> Alternatively, the non-federal entity may pay the employee directly.<sup>37</sup> In essence, the Act enables the federal government to assign an

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<sup>32</sup> *Id.* § 3372(a)(1); 5 C.F.R. § 334.106 (requiring written agreement among the employee, federal agency, and the partner entity).

<sup>33</sup> 5 U.S.C. § 3372(a). After a break of at least 12 months, an employee assigned for four years may receive another assignment. 5 C.F.R. § 334.104(c).

<sup>34</sup> *Id.* § 334.104(b).

<sup>35</sup> 5 U.S.C. § 3373(b); *id.* § 3372(e) (describing treatment of employees assigned to “other organizations” or institutions of higher education). Assignees from federal agencies are guaranteed a salary at least as high as their regular agency salary. *Id.* § 3373(c).

<sup>36</sup> *Id.*

<sup>37</sup> *See id.*

employee to a non-federal entity, like a state or local government, without expending any funds on the employee's salary or otherwise.

Assignments under this Act have been used to help with environmental compliance activities. For example, agreements among NOAA and several State of Washington ports have supported the assignment of a National Marine Fisheries Service biologist to the Port of Tacoma to help conduct Endangered Species Act consultations, review proposed port projects, write biological opinions and other technical analyses, and assist in coordinating project mitigation at the participating state ports.<sup>38</sup> The Ports of Tacoma, Seattle, Bellingham, Olympia, and Vancouver all contributed to covering the costs of that staff member.<sup>39</sup> Port of Seattle staff concluded that “[p]ermit review of port-related projects [is] more efficient because of the regulatory and technical expertise of the USACE program managers and NOAA biologists who serve as liaisons.”<sup>40</sup> The Port staff also concluded that the Port’s “competitiveness is enhanced because [the Port] can set review priorities and access agency resources to achieve timely permit decision-making.”<sup>41</sup>

Despite the apparent success at the State of Washington ports, our research has not uncovered other assignments that have been used to help with environmental compliance. Given the paucity of other examples, it is difficult to assess how effective these assignments are as a general matter and whether they have raised any issues regarding the impartiality of agency staff. Nor are we aware of any studies that have examined these issues.

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<sup>38</sup> See Port of Seattle Memorandum, Commission Agenda Action Item #4h: Notification to Commission for Continuation of Interagency Agreements for Permitting Support Between Port of Seattle and 1) the U.S. Army Corp of Engineers (USACE) and 2) National Oceanic and Atmospheric Administration (NOAA) through Port of Tacoma (POT) (“Port of Seattle Agenda”), at 2 (Dec. 8, 2015), available at <https://meetings.portseattle.org>.

<sup>39</sup> See Master Interlocal Agreement 069505 for Federal Agency Permit Staffing Support by and between the Port of Tacoma and the Port of Olympia (Aug. 19, 2013); Master Interlocal Agreement 069227 for Federal Agency Permit Staffing Support by and between the Port of Tacoma and Port of Seattle (Jan. 4, 2011); Interlocal Agreement for Federal Agency Permit Staffing Support by and between the Port of Tacoma and Port of Vancouver (Sept. 30, 2010); Master Interlocal Agreement for Federal Agency Permit Staffing Support by and between the Port of Tacoma and the Port of Bellingham (Mar. 12, 2012).

<sup>40</sup> Port of Seattle Agenda, *supra* note 38, at 3. As noted in Section I, the USACE program managers are funded through WRDA Section 214, while the NOAA biologists are funded through an Intergovernmental Personnel Act agreement.

<sup>41</sup> *Id.*

## **B. Commerce, Justice, Science, and Related Agencies Appropriations Act, Section 111**

*Federal agencies covered: NOAA*

Under the current appropriations act covering NOAA, the agency is allowed to “use on a non-reimbursable basis ... personnel ... from: a Federal agency, State or subdivision thereof, local government, tribal government, territory, or possession or any subdivisions thereof” to fulfill its duties.<sup>42</sup> A substantively identical version of Section 111 is included in the FY 2018 appropriations bill covering NOAA now pending before Congress.<sup>43</sup> To the extent personnel from other governmental entities are used for environmental compliance activities, the “loan” of personnel could expedite these activities, at no cost to NOAA.

Note that this provision may be “subject to section 505 of [the appropriations] Act.” Section 505 is discussed in further detail above, along with potential safeguards that may need to be put in place if Section 111, which includes the personnel “loan” provision, were to be used for environmental compliance activities.

## **III. Miscellaneous Other Provisions**

Federal law includes other mechanisms for non-federal entities to support federal environmental compliance activities. We focus on two below: preparation of environmental review documents by contractors and assistance with training activities.

### **A. Contractor Preparation of Environmental Review Documents**

*Federal agencies covered: all agencies*

One way applicants for federal permits, approvals, or funding can supplement agency resources is by paying for a third-party contractor to prepare an Environmental Impact Statement (“EIS”), when one is required under the National Environmental Policy Act (“NEPA”). Certain safeguards have been put in place to ensure the integrity of the environmental compliance process when a contractor is used: while the applicant pays

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<sup>42</sup> Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017, § 111, 131 Stat. at 192.

<sup>43</sup> Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, Pub. L. 114-113, Div. B, § 111, 129 Stat. 2242, 2296 (2016); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2018, H.R. 3354, 115th Cong., Div. C, § 109 (2017).

for the contractor, the agency must choose the contractor,<sup>44</sup> and is mandated to “furnish guidance and participate in the preparation and [to] independently evaluate the statement prior to its approval and take responsibility for its scope and contents.”<sup>45</sup> In order to further ensure the integrity of the process, policies and procedures have also been established that restrict and guide communications between a contractor and the permit applicant.<sup>46</sup>



Photo by Helen Rose Patterson, National Wildlife Federation (cropped from original).

There are potential downsides to the use of third-party contractors. For example, some have argued that the use of third-party contractors has created conflicts of interest.<sup>47</sup> In

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<sup>44</sup> 40 C.F.R. § 1506.5(c); Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981), *as amended*, 51 Fed. Reg. 15,618 (Apr. 25, 1986) (withdrawing guidance on Question 20).

<sup>45</sup> 40 C.F.R. § 1506.5(c); *see also id.* § 6.604(g) (EPA regulations for use of third-party agreements); 33 C.F.R. Part 325, Appendix B (USACE third-party agreement regulations).

<sup>46</sup> *See, e.g.*, Louisiana Coastal Protection and Restoration Authority, Request for Proposal: Environmental Consulting Services, Mid-Barataria Sediment Diversion, Third-Party Environmental Impact Statement, Attachment 6 – Scope of Work (Memorandum of Understanding) (“Mid-Barataria RFP”), at 107 (Oct. 12, 2016), available at [http://coastal.la.gov/wp-content/uploads/2016/11/2503-16-23.MID-BARATARA-EIS-RFP.FINAL\\_.pdf](http://coastal.la.gov/wp-content/uploads/2016/11/2503-16-23.MID-BARATARA-EIS-RFP.FINAL_.pdf).

<sup>47</sup> *See, e.g.*, Tony Davis, *Conflict of interest taints power-line plan, critics say*, *Ariz. Daily Star*, Mar. 19, 2016, available at [http://tucson.com/news/local/conflict-of-interest-taints-power-line-plan-critics-say/article\\_6b93d32d-2c10-57f0-aec1-af2a9956135e.html](http://tucson.com/news/local/conflict-of-interest-taints-power-line-plan-critics-say/article_6b93d32d-2c10-57f0-aec1-af2a9956135e.html) (claim of conflict of interest regarding power line project); Robert R. Kuehn, *Bias in Environmental Agency Decision*

addition, two NEPA consultants have argued that “[g]overnment officials responsible for NEPA compliance often improperly delegate and task inherently governmental functions to contractors, such as the definition of the need for action, objectives, scope of decisions, array of alternatives and issues important for important decisions, and other procedural requirements.”<sup>48</sup> To combat this problem, they urge federal agencies to define governmental functions, and contractors and project proponents to ensure that they are not encroaching on governmental functions.<sup>49</sup> This is key in ensuring that agency officials retain control of the decisionmaking process.

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### Third-Party Contracting Is the Default for the Corps

For permits under the jurisdiction of the Army Corps of Engineers, the Corps has specified that “third-party contracting is the primary method for preparing all or part of [the] project-specific EISs.”<sup>50</sup> Further, pursuant to guidance issued by the Corps, even “[p]rogrammatic EISs may involve a third party contract.”<sup>51</sup> However, the Corps acknowledged that “a programmatic EIS will still have a substantial portion of the effort conducted and funded by the Corps.”<sup>52</sup> Nonetheless, it has instructed district-level Corps officials to “identify applicant[] groups [and other government entities] to cost share in the effort.”<sup>53</sup>

As with an EIS, an agency may allow applicants to pay for a third-party contractor for an Environmental Assessment (“EA”).<sup>54</sup> There is also another option: an agency may

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*Making*, 45 Lewis & Clark L. Rev. 957, 959, n.6 (2015) (describing claims of conflict of interest regarding Keystone XL pipeline).

<sup>48</sup> Judith Lee and Robert Cunningham, *Demystifying NEPA to Speed the Review and Permitting of Energy Generation and Transmission and Other Projects and Programs*, 43 Env'tl. L. Rep. 10,331, 10,335 (2013).

<sup>49</sup> *Id.*

<sup>50</sup> U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-08 Environmental Impact Statements – Third Party Contracting, at 2 (Dec. 7, 2005).

<sup>51</sup> *Id.*

<sup>52</sup> U.S. Army Corps of Engineers, Memorandum from the Director of Civil Works to Major Subordinate Commanders and District Commanders, Subject: Guidance on Environmental Impact Statement Preparation, Corps Regulatory Program, at 2 (Dec. 17, 1997).

<sup>53</sup> *Id.*

<sup>54</sup> 40 C.F.R. § 6.303 (EPA regulations regarding use of third-party contractor for preparation of either an EA or an EIS).

choose to have the permit applicant prepare a draft EA instead of preparing one itself. If an agency chooses to do so, the agency is still required to “make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.”<sup>55</sup>

Like with EISs, the use of third-party contractors could potentially create a conflict of interest. Given this, one commentator has advocated for applying “the same level of protection for the objectivity and integrity of the EA/[Finding of No Significant Impact] process as is required for the EIS process.”<sup>56</sup> These EIS protections include the selection of the contractor by the federal agency, federal guidance, and mandatory disclosures by the contractor.<sup>57</sup>

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<sup>55</sup> *Id.* § 1506.5(b); *see also id.* § 6.300(b)-(c) (EPA regulation allowing preparing of draft EA by applicant).

<sup>56</sup> Roger P. Hansen, Theodore A. Wolff, and Lance N. McCold, *The Conflict of Interest Problem in EIS Preparation*, at 9 (May 8, 1997), available at <https://www.osti.gov/scitech/servlets/purl/474882>.

<sup>57</sup> *See id.* at 6 (citing 40 C.F.R. § 1506.5(c)).



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## Contractor Is Preparing EIS for Mid-Barataria Sediment Diversion

In 2013, the Corps issued a Notice of Intent to prepare an EIS for the Mid-Barataria Sediment Diversion in connection with the Louisiana Coastal Protection and Restoration Authority’s (“CPRA’s”) permit application and permission request under the Clean Water Act and the Rivers and Harbors Act.<sup>58</sup> After the CPRA issued a Request for Proposals seeking a third-party contractor for the EIS, Gulf Engineers & Consultants (GEC) was retained.<sup>59</sup> GEC’s tasks include “researching, obtaining, compiling, and reviewing the necessary data, analyses, documentation, literature, technical publications and previous environmental studies or reports and findings; conducting fieldwork and preparing technical studies in support of the EIS; assisting [the Corps]



Photo by ELI Gulf Team.

with public meetings/hearings; and preparing the NEPA documents... .”<sup>60</sup>

The agreement between the CPRA, the Corps, and GEC includes provisions to prevent undue influence by CPRA over the contractor, including limits on communication between CPRA and the contractor.<sup>61</sup> To further avoid a conflict of interest, GEC was required to execute a disclosure statement “specifying that [it] ha[s] no financial or other interest in the outcome of the project” before it could work on the EIS.<sup>62</sup>

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<sup>58</sup> Notice of Intent To Prepare EIS for the Mid-Barataria Sediment Diversion, 78 Fed. Reg. 61,843 (Oct. 4, 2013). The notice of intent was subsequently supplemented. *See* Supplemental Notice of Intent To Prepare a Draft EIS for the Proposed Mid-Barataria Sediment Diversion, 82 Fed. Reg. 19361 (Apr. 27, 2017).

<sup>59</sup> State of Louisiana Coastal Protection and Restoration Authority, *Third-Party Environmental Impact Statement Contractor Selected for Mid-Barataria Sediment Diversion* (Press Release), at 1 (Jan. 4, 2017), *available at* [http://coastal.la.gov/wp-content/uploads/2017/01/EIS-Mid-Barataria-01\\_04\\_2017.pdf](http://coastal.la.gov/wp-content/uploads/2017/01/EIS-Mid-Barataria-01_04_2017.pdf); *see also* U.S. Army Corps of Engineers New Orleans District, *Public Meeting Graphics*, at 2 (July 2017), *available at* <http://www.mvn.usace.army.mil/Portals/56/docs/regulatory/permits/EIS/graphi20pane1s20portrait20wbleed.pdf> (identifying GEC as EIS contractor).

<sup>60</sup> Mid-Barataria RFP, at 66.

## **B. Assistance with Training Activities**

*Federal agencies covered: all agencies*

Under a provision applicable to all federal government agencies, nonprofit organizations may fund the training of government employees.<sup>63</sup> In addition to paying for the training itself, nonprofit organizations may make “contributions and awards incident to training in non-Government facilities,” and may pay for “travel, subsistence, and other expenses incident to attendance at meetings.”<sup>64</sup> To the extent that a nonprofit pays these expenses, the amount of funds paid by the federal agency will be reduced or eliminated, since an employee cannot be paid twice for the same expenses.<sup>65</sup>

Several ethical rules apply to the acceptance of such payments.<sup>66</sup> Among other requirements, payments are only allowed if they “[w]ould not reflect unfavorably on the employee’s ability to carry out official duties in a fair and objective manner” and “[w]ould not compromise the honesty and integrity of Government programs or of Government employees and their official actions or decisions.”<sup>67</sup>

Within these constraints, there is an opportunity for nonprofit organizations to provide training to employees in agencies involved in environmental compliance activities, where those needs are not already being met. This could facilitate increased efficiency in environmental compliance activities.

## **IV. Closing Thoughts**

As the pace of restoration accelerates in the Gulf, resource constraints are likely to become a barrier to efficient environmental compliance. This paper highlighted some of the ways that federal agencies may be able to accept outside funds or share personnel with other entities. These, along with other mechanisms, may help federal agencies in addressing at least some of their resource constraints as Gulf restoration moves forward.

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<sup>61</sup> Mid-Barataria RFP, at 107.

<sup>62</sup> 40 CFR 1506.5(c); *see also* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-08 Environmental Impact Statements – Third Party Contracting, at 1 (Dec. 7, 2005).

<sup>63</sup> 5 U.S.C. § 4111(a).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* § 4111(b).

<sup>66</sup> 5 C.F.R. § 410.502(a)(2)

<sup>67</sup> *Id.* § 410.502(a)(2)(ii).





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