US Army Corps of Engineers®

REGULATORY GUIDANCE LETTER

No. 05-08 **Date: 7 December 2005**

SUBJECT: Environmental Impact Statements – Third Party Contracting

1. Purpose and Applicability

a. **Purpose.** To issue guidance regarding the use of the third party contracts for preparing Environmental Impact Statements. This guidance consolidates elements of expired Regulatory Guidance Letters 87-05 and 88-15.

b. **Applicability.** This guidance applies to all permit applications that require preparation of an EIS.

2. General Considerations

a. **Background.** 40 CFR 1506.5(c) provides for use of third party contracts in the preparation of agency Environmental Impact Statements (EISs). In its "Forty Questions" issued in the Federal Register on 23 March 1981, CEQ indicated the term "third party contract" referred to contractors paid by the applicant but selected by the agency. 40 CFR 1506.5(c) further stipulates that the contractor must execute a disclosure statement prepared by the agency to avoid any conflict of interest. If the document is prepared under contract, the responsible agency must participate in the preparation and shall independently evaluate the statement prior to its approval. The agency must also take full responsibility for the scope and contents of the document.

Corps Headquarters (HQUSACE) issued Regulatory Guidance Letters (RGLs) 87-05 and 88-15 to address questions about applicant costs, information, and third party contracts for preparing EISs. In 1988, HQUSACE also published its *NEPA Implementation Procedures for the Regulatory Program* (Appendix B, 33 CFR 325) addressing "contracting" and information needs. More recently, in a memorandum dated 17 December 1997, to Commanders, MSCs and District Commands, Subject: *Guidance on Environmental Impact Statement Preparation, Corps Regulatory Program,* the HQUSACE Director of Civil Works established third party contractors as the primary method for EIS preparation.

b. **Practice.** While RGLs 87-05 and 88-15 have expired, HQUSACE has instructed Corps districts that the guidance provided therein remains generally valid since neither of the expired RGLs has been superseded by regulations or other RGLs. Districts currently use these expired RGLs, Appendix B, and the 1997 memorandum as guidance for third party contracting to prepare EISs.

3. Guidance.

a. Third party contracting is the primary method for preparing all or part of our project-specific EISs. Programmatic EISs may involve a third party contract; however, any decision to a programmatic EIS must be reviewed and approved by CECW-OR before a commitment is made.

b. The district will identify the required information for the EIS and specify the necessary qualifications of the third-party contractor. However, a district will not become involved in the specifics of non-federal contracting procedures. For example, a district should not review a bid list, specifying requirements for competition, or choose the actual method of procurement (i.e. bidding vs. negotiation). Using the applicant's order of preference, the district will select from the applicant's list the first contractor that is fully acceptable to the District.

c. The district will approve in writing the third-party contractor and a scope of work. Approval of the contractor and scope of work should occur before the award of the third-party contract. To avoid any conflict of interest, and before the selected third party contractor can work on the EIS, the contractor must also execute a disclosure statement, prepared by the district, specifying that the contractor has no financial or other interest in the outcome of the project.

d. The district is responsible for ensuring that the information provided by the contractor is consistent with Corps statutory requirements to take a hard, objective look at the public interest and environmental factors. The district will also take full responsibility for the scope and contents of the EIS, directing the contractor as necessary to make certain that its work is acceptable. The district will regularly participate in the preparation of the document and independently evaluate the information to ensure that it is technically adequate and not biased. The district has the final determination whether the data provided is adequate and accurate.

e. This guidance replaces RGLs 87-05 and 88-15 and is to be used in conjunction with 40 CFR 1500-1508, Appendix B of 33 of CFR 325, and the Memorandum to Commanders, MSCs and District Commands, Subject: *Guidance on Environmental Impact Statement Preparation, Corps Regulatory Program*, dated 17 December 1997.

4. Duration. This guidance remains in effect unless revised or rescinded.

for DON T. RILEY
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Director of Civil Works