DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

30 JUL 2001

CECW-PM

MEMORANDUM FOR Commander, Great Lakes and Ohio River Division,
ATTN: CELRD-CM

SUBJECT: Ohio Environmental Infrastructure and Resource Protection and Development Program – Program Implementation Guidance

Implementation of the subject program, authorized by Section 594 of the Water Resources Development Act of 1999, has been proceeding based on interim Headquarters guidance provided in conjunction with the process for implementing the provisions of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act for Fiscal Year 2001 (P.L.106-377). Enclosed is the final program implementation guidance.

FOR THE COMMANDER:

James F. Johnson

Encl

JAMES F. JOHNSON
Chief, Planning and Policy Division
Directorate of Civil Works

OHIO ENVIRONMENTAL INFRASTRUCTURE AND RESOURCE PROTECTION AND DEVELOPMENT PROGRAM

PROGRAM IMPLEMENTATION GUIDANCE

1. **PROGRAM OBJECTIVE**. The primary objective of this program is to provide design and construction assistance to non-Federal interests for carrying out water-related environmental infrastructure and resource protection and development projects in the State of Ohio. Projects may include wastewater treatment and related facilities; combined sewer overflow, water supply, storage, treatment, and related facilities; mine drainage; environmental restoration; and surface water resource protection and development. The program shall be known as the "Ohio Environmental Infrastructure and Resource Protection and Development Program" and/or the "Section 594 Program".

2. **AUTHORITY**. The Ohio Environmental Infrastructure and Resource Protection and Development Program was authorized by Section 594 of the Water Resources Development Act (WRDA) of 1999 (Public Law 106-53, 113 STAT 381). The language of Section 594 is provided at Attachment 1.

3. **APPROPRIATIONS AND USE OF FUNDS**.

The Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act for Fiscal Year 2001 (P.L.106-377, October 27, 2000) included funds in the amount of $1,500,000 for the Corps of Engineers to initiate the program. Congress did not provide any direction for use of the appropriated funds.

As agreed during the process for implementing Fiscal Year 2001 congressional adds, $200,000 will be used to produce a Program Management Plan (PMP) at 100% Federal cost. The PMP will define the scope of the problem, prioritize potential projects, and establish policies and procedures for project development and implementation. Headquarters, USACE will issue program implementation guidance and draft Project Cooperation Agreements (PCAs). Concurrent with development of the PMP, projects at Belle Center and Randolph Township, identified by the Ohio Environmental Protection Agency as its top priorities for Federal assistance, will be initiated with the execution of PCAs at 75 percent Federal and 25% percent non-Federal cost sharing.

On 29 March 2001, Headquarters (CECW-PM) provided approval to initiate negotiations for the design phase of the Randolph Township project and provided a draft model PCA. The negotiated PCA package will be submitted to Headquarters (CECW-PC) for review and approval by the Assistant Secretary of the Army (Civil Works) [ASA(CW)] prior to execution.

Encl

4. **PROGRAM MANAGEMENT**.

a. **Activities**. USACE activities necessary to effectively manage the implementation of Section 594 program include the preparation of a Program Management Plan, program management, and reporting.

(1) Program Management Plan. The purpose of the Program Management Plan (PMP) is to establish the framework for development of projects for implementation under the authority of Section 594 of the WRDA of 1999. Development of the PMP will involve coordination with other Federal, State, regional, and local agencies and a review of existing information to identify the type and magnitude of environmental infrastructure and resource problems in the study area and to develop a list of potential design and construction assistance projects. The PMP will establish the procedures for nomination of projects and criteria for prioritization and selection of specific projects for implementation. Prioritization criteria should be based on appropriate factors such as the benefits of the project (e.g.; number of persons served, significance of the affected resources), economic and environmental conditions in the project area, relationship of the project to Federal and State compliance requirements, and readiness of the project. The PMP will be updated over the life of the program as necessary. A copy of the PMP and future updates will be provided to Headquarters (CECW-PM) for information.

(2) Program Management. Program management activities are those actions leading up to the negotiation of design and construction agreements for specific projects. Program management involves coordination with non-Federal interests to identify (i.e., nominate) specific projects, and review and selection of projects for development of negotiated agreements and supporting documentation. Project nomination, review, and selection will follow the procedures established in the PMP. Projects selected in any fiscal year are subject to the availability of funds and should reflect any direction received from Congress via the Appropriations Committees.

(3) Reporting. Reporting requirements for the Section 594 program are described in paragraph 7 of this document.

b. **Funding**. Funding for USACE program management activities will be within available Federal appropriations for the Section 594 program and will be at 100 percent Federal expense(i.e.; not subject to cost sharing).

5. **APPLICABLE POLICY**. Design and construction assistance projects implemented under the Section 594 Program shall be developed consistent with the following requirements:

a. **Project Purposes**. Section 594 authorizes Federal assistance for projects for wastewater treatment and related facilities; combined sewer overflow, water supply, storage, treatment, and related facilities; mine drainage; environmental restoration; and surface water resource protection and development. Projects solely for the purpose of removing or remediating

contamination related to any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. Sections 9601-9675] are not eligible for Federal assistance.

b. **Public Ownership**. Design and construction assistance may be provided only for projects that are owned by public entities. A public entity is one that is legally constituted with full authority and capability to perform the terms of a project cooperation agreement and to pay damages, if necessary, in the event of failure to perform.

c. **Cost Sharing**. Federal assistance for design and construction of Section 594 projects may be in the form of grants or reimbursements. The non-Federal sponsor will contribute 25 percent of the total project cost. The non-Federal sponsor shall receive credit for the reasonable costs of design work completed prior to entering into an agreement with the Government. The non-Federal sponsor shall receive credit for interest and other associated financing costs incurred as a result of a delay in reimbursement of the Federal share of the design or construction assistance project. The non-Federal sponsor is responsible for providing all lands, easements, rights-of-way, and relocations (LERR) required for the project and for obtaining any necessary permits. The non-Federal sponsor shall receive credit for the value of such LERR's and the cost of obtaining permits toward its share of project costs, but not to exceed 25% percent of the total costs of the project. The non-Federal sponsor will be responsible for 100% percent of the operation and maintenance costs associated with a completed construction project.

(1) Grants. Non-Federal sponsors may elect to receive Federal assistance for design and construction of projects under the Section 594 program in the form of a grant. Formal guidance has been established for administering programs involving grants to state and local governments. Districts shall follow the existing policies and procedures contained in *OMB Circular A-102*, entitled, "Grants and Cooperative Agreements with State and Local Governments" and the Department of Defense Grants Regulations (DOD-GRS) for administering grants under the Section 594 program. *OMB Circular A-102* established consistency and uniformity among Federal agencies in the management of grants and provides detailed information, procedures, and guidance on grants management. Additional information about *OMB Circular A-102* and its applications can be obtained from the Office of Federal Financial Management, Office of Management and Budget, Room 6025, New Executive Office Building, Washington, D.C. 20532, telephone (202) 395-3993. The DOD-GRS provides additional guidance on grants programs. The approval and signature authority for grants documentation is the Assistant Secretary of the Army (Civil Works). Grants documentation will be submitted, in draft form, to Headquarters (CECW-PC) for review and approval. The model agreements for providing design and construction assistance under the Section 594 program will not be used for the issuance of grants.

(2) Reimbursements. Subject to the availability of Federal funding, the requirements of Section 102 of the Energy and Water Development Appropriations Act for Fiscal Year 2000 (see paragraph 5.c.(4)), and execution of an agreement between the non-Federal sponsor and the Government, the non-Federal sponsor will be reimbursed for the Federal share of previous design, future design, or future construction work performed by the non-Federal

sponsor, to the extent the credited value of the non-Federal sponsor's total contributions to the project exceed its required cost share. **Reimbursement for past construction is not authorized.** The amount of the credit to be afforded for non-Federal work shall be determined as discussed below and shall be presented in the documentation that supports the assistance agreement. The Government will process reimbursement payments based on proper invoices submitted by the non-Federal sponsor. If there are unforeseen delays in making reimbursement, reasonable interest and financing charges will be credited to the non-Federal sponsor by the Government. The amount of the interest and financing charges creditable shall be limited to the amount computed in accordance with the provisions of the Prompt Payment Act.

(3) Amount of Credit for Non-Federal Work. The amount of credit to be afforded to the non-Federal sponsor for design and construction work shall be based on the actual costs incurred by the non-Federal sponsor in completing the work. Costs shall be examined for reasonableness, and when previously completed design work requires updates, the cost of updates will be subtracted from the design costs creditable. If design costs are expressed as fixed costs plus a percentage of construction, these costs shall be renegotiated and the amount of credit shall be limited to the reasonable cost of completing design. Costs to investigate and document the presence of hazardous substances are eligible for credit. Costs to remove or remediate CERCLA regulated substances are a non-Federal responsibility and are not creditable.

(4) Limits on Credit and Reimbursements. Assistance provided under Section 594 that involves credits or reimbursements to non-Federal interests is subject to the requirements of Section 102 of the Energy and Water Development Appropriations Act for Fiscal Year 2000. In accordance with Headquarters guidance (Memorandum, CECW-B/CECW-A, 30 May 2000, subject: Implementation of Section 102 of the Energy and Water Development Appropriations Act, 2000, Public Law 106-60), the total amount of credits or reimbursements to non-Federal interests under the Section 594 program may not exceed $10,000,000 per fiscal year and the total amount of credits or reimbursements to non-Federal interests for all applicable USACE activities may not exceed $50,000,000 per fiscal year. Procedures for reporting and managing all USACE projects subject to Section 102 will be established by Headquarters (CECW-B) in the near future.

(5) Voluntary Contributions. If, subsequent to execution of a design or construction agreement, USACE fails to receive sufficient appropriations to meet its share of total costs, the non-Federal sponsor may terminate the agreement, suspend work until additional Federal funds are appropriated, or continue work with its own funds. If the non-Federal sponsor elects to continue work with its own funds, these funds will be considered a voluntary contribution to the project for which the non-Federal sponsor will not receive any credit or reimbursement. Prior to continuation of work with contributed funds, USACE must notify Congress. Notification procedures are described in Headquarters Section 102 guidance.

(6) Betterments. Betterments are defined as a change in the design or construction of an element of the project resulting from the application of standards that the Government determines exceed those that the Government would otherwise apply for accomplishing the design or construction of that element. The non-Federal sponsor is

responsible for all costs due to betterments, including costs associated with obtaining permits therefor, and shall pay all such costs without reimbursement by the Government.

(7) Use of Federal Funds. If non-Federal interests used, or plan to use, funds from another Federal agency to perform work for which Federal assistance under Section 594 is proposed, the non-Federal interest must first obtain a letter from the Federal granting agency verifying that the use of such funds toward the non-Federal share of the project is expressly authorized by statute.

c. **Scope of Design**. Project scope shall be determined during the design phase. The scope of design investigations to be conducted will be determined jointly by the Corps and the non-Federal sponsor to include sufficient engineering, economic, environmental, and institutional analyses and public involvement activities necessary to implement the project in compliance with applicable Federal and state laws. Districts are encouraged to use private sources for any necessary design or engineering assistance or related services associated with this program.

(1) Engineering Analysis.

(a) Projects should utilize readily available technology and industry-accepted design and construction practices.

(b) ETL-2-361, Life Cycle Design and Performance of Structures for Local Flood Protection dated 31 January 1994, (paragraph A-2b, "Technical Criteria") states " . . . [T]he Corps of Engineers has issued design criteria for Civil Works. These criteria are intended to ensure reliable designs for high risk projects such as local flood protection, flood control dams, and major navigation projects. ...[T]hese criteria are more stringent than related to commercial criteria." Corps criteria are waived for projects that are not high risk in nature, as defined in ETL 1110-2-361.

(c) Corps civil works cost estimating requirements, defined in ER 1110-2-1302 (Civil Works Cost Engineering), will not be applied to projects where the design and cost estimate has been substantially completed by others.

(2) Economic Analysis.

(a) Where project design has not been previously accomplished by non-Federal interests, life-cycle costs will be considered to identify the most cost-effective solution to the problem.

(b) Market interest rates and inflation factors which are appropriate and relevant to the study area will be used for evaluating and comparing alternatives.

(3) Environmental Compliance. Sufficient analysis, coordination, and documentation shall be accomplished to comply with applicable Federal environmental laws,

statutes, and Executive Orders and to provide a basis for obtaining the necessary permits and licenses for project implementation. Using information developed by the non-Federal sponsor, the Government shall develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision in accordance with the National Environmental Policy Act (NEPA) of 1969. The non-Federal sponsor is responsible for obtaining all necessary permits and licenses.

(4) Institutional Analysis. Each non-Federal sponsor must prepare a financing plan, evidencing its ability to assure financing of the project commensurate with the Federal commitment, and the district shall prepare an assessment of the non-Federal sponsor's financial capability consistent with the principles established in ER 1105-2-100, Appendix D, paragraph D-5. The non-Federal sponsor is also responsible for establishing the legal and institutional structures necessary to ensure the effective long-term operation of the project.

d. **Project Scope.** Experience with other regional environmental infrastructure assistance programs reveals that, for some projects, non-Federal interests have already secured most of the funding for the project and are seeking Federal assistance for the remaining amount which constitutes less than 75 percent of the total project costs. In such cases, optional contributed funds language must be included in the assistance agreement and congressional notification is required prior to negotiating the agreement with the non-Federal sponsor. Alternatively, the scope of the project for which Federal assistance is to be provided under Section 594 may be defined as a separable element(s) or feature(s) of a larger project such that the amount of Federal assistance shall be 75 percent of the total Section 594 project costs.

6. **PROCEDURES.**

a. **Model Agreements.** Model agreements will be used as a basis for developing the project-specific agreements to be executed by the Government and the sponsor prior to providing assistance under this program. Based on experience with other environmental infrastructure programs the majority of projects will involve reimbursement of the Federal share of design and construction performed by non-Federal interests. Attached are draft model agreements for partial cost-reimbursement of design performed by non-Federal interests (Attachment 2), partial cost-reimbursement of construction performed by non-Federal interests (Attachment 3), and partial cost-reimbursement of combined design and construction performed by non-Federal interests (Attachment 5). Additional model agreements will be developed as needed. As projects utilizing the draft models are submitted, Headquarters will submit the draft model agreements and recommendations concerning delegation of execution authority to the Assistant Secretary of the Army (Civil Works) [ASA(CW)] for approval. It is anticipated that the District Engineer will be delegated the authority to execute project-specific agreements that do not deviate from the approved model agreements and that streamlined procedures for approval of deviations to the approved model agreements will be established. Until notified of the ASA(CW)'s approval of the model agreements and delegation of authority, all project-specific agreements must be submitted to Headquarters (CECW-PC) for review and ASA(CW) approval in accordance with

the procedures established in EC 1165-2-204, Processing Project Cooperation Agreements for Specifically Authorized Projects and Separable Elements.

b. **Design Phase.**

(1) Design Agreement. Initiation of the design phase for a specific project is contingent upon the availability of funds and execution of a design agreement. Each design agreement will be supported by a scope of work defining the scope, schedule, and cost of the work to be accomplished, including an itemized breakdown of each party's responsibilities; a non-Federal financing plan; and the District's assessment of the non-Federal sponsor's financial capability. The design agreement and scope of work will be negotiated with the non-Federal sponsor. District Counsel must certify legal sufficiency of all agreements. Until notified of the ASA(CW)'s approval of the model agreements and delegation of authority, all project-specific design agreements will be submitted to Headquarters (CECW-PC) for review and ASA(CW) approval in accordance with EC 1165-2-204.

(2) Products and Approvals. Whether the design phase of the project takes the form of a grant, design assistance, or partial cost-reimbursement for design performed by non-Federal interests, the end product should be a set of plans and specifications suitable for the advertisement and award of a construction contract for the identified project. The design phase will also produce documentation of the engineering, economic, environmental, and institutional analyses and public involvement activities necessary to implement the project. Requirements include preparation of either an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement for NEPA compliance and obtaining all the necessary permits required for project implementation. Districts are responsible for assuring technical and legal adequacy and approval of all design phase products.

(3) Cost Accounting. Federal costs for review of existing design performed by non-Federal interests, developing the scope of work, financial analysis, and negotiating the design agreement will be included in the total project cost that is subject to cost sharing. All Federal and non-Federal costs incurred subsequent to execution of the agreement will be included in total project costs and subject to cost sharing, crediting, and reimbursement under the terms of the design agreement.

c. **Construction Phase.**

(1) Construction Agreements. Initiation of the construction phase for a specific project is contingent upon availability of funds and execution of a construction agreement. Each construction agreement will be supported by a scope of work defining the scope, schedule, and cost of the work to be accomplished, including an itemized breakdown of each party's responsibilities; a non-Federal financing plan; and the District's assessment of the non-Federal sponsor's financial capability. The construction agreement and scope of work will be negotiated with the non-Federal sponsor. District Counsel must certify legal sufficiency of all construction agreements. Until notified of the ASA(CW)'s approval of the model agreements and delegation of authority, all project-specific construction agreements will be submitted to Headquarters (CECW-PC) for review and ASA(CW) approval in accordance with EC 1165-2-204. The

construction agreement may not be executed until NEPA compliance has been completed by USACE by preparation of either an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and all the necessary permits required for project implementation have been obtained by the non-Federal sponsor.

(2) Products and Approvals. For construction phase work for which the non-Federal sponsor will be responsible, the non-Federal sponsor is responsible for development and approval of all products pertaining to the performance of work (whether performed under contract or by non-Federal sponsor personnel) and will provide the Government an opportunity to review such products. The non-Federal sponsor shall also prepare and furnish to the Government for review a proposed Operation, Maintenance, Repair, Rehabilitation and Replacement (OMRR&R) Manual. When the Government will be responsible for construction, the Government is responsible for development and approval of all contract products and the OMRR&R Manual and will provide the non-Federal sponsor an opportunity to review such products.

(3) Cost Accounting. Federal costs for review of existing design performed by non-Federal interests, developing the scope of work, financial analysis, NEPA compliance, and negotiating the construction agreement will be included in the total project cost that is subject to cost sharing. All Federal and non-Federal costs incurred subsequent to execution of the agreement will be included in total project costs and subject to cost sharing, crediting, and reimbursement under the terms of the construction agreement.

d. **Combined Design and Construction Phase Agreements.** Where the District and non-Federal sponsor propose to perform the design and construction phases under one combined agreement, the District will follow the approved model for design and construction performed by non-Federal interests as well as a combination of procedures set forth in paragraphs b. and c., above. Particular attention must be paid to NEPA compliance and water quality certification, if required, as the construction phase may not begin until these requirements are satisfied.

7. **REPORTING REQUIREMENTS.**

a. **Semi-Annual Status Reports.** CELRD will submit semi-annual status reports to Headquarters (CECW-B) summarizing program accomplishments as of the mid-point (31 March) and end (30 September) of the fiscal year. The status report will include a narrative description of program management activities (e.g., coordination, GMP development), a narrative description of each project, and a summary display of the schedule and allocation of Federal and non-Federal funds to program management and project-specific activities (see Attachment 5).

b. **Report to Congress.** Section 594(f) of the WRDA of 1999 directs the ASA(CW) to transmit to Congress by 31 December 2001 a report on the results of the program carried out under this section, together with recommendations concerning whether or not such program should be implemented on a national basis. The report should be submitted through CELRD to reach Headquarters no later than 30 September 2001. Report format and content should be

similar to the report prepared for the Southern West Virginia environmental assistance program authorized by Section 340 of WRDA 1992, as amended.

Attachments

1. Section 594 WRDA 1999
2. Draft model agreement for partial cost-reimbursement of design performed by non-Federal interests
3. Draft model agreement for partial cost-reimbursement of construction performed by non-Federal interests
4. Draft model agreement for partial cost-reimbursement of design and construction performed by non-Federal interests
5. Semi-annual status report display

Attachment 1

Ohio Environmental Infrastructure and Resource Protection and Development Program

Section 594 of the Water Resources Development Act of 1999 (Public Law 106-53, 113 STAT 381)

SEC. 594. OHIO.

(a) ESTABLISHMENT OF PROGRAM.—The Secretary shall establish a program to provide environmental assistance to non-Federal interests in Ohio.

(b) FORM OF ASSISTANCE.—Assistance under this section may be in the form of design and construction assistance for water-related environmental infrastructure and resource protection and development projects in Ohio, including projects for—

(1) wastewater treatment and related facilities;
(2) combined sewer overflow, water supply, storage, treatment, and related facilities;
(3) mine drainage;
(4) environmental restoration; and
(5) surface water resource protection and development.

(c) PUBLIC OWNERSHIP REQUIREMENT.—The Secretary may provide assistance for a project under this section only if the project is publicly owned.

(d) PROJECT COOPERATION AGREEMENTS.—

(1) IN GENERAL.—Before providing assistance under this section, the Secretary shall enter into a project cooperation agreement with a non-Federal interest to provide for design and construction of the project to be carried out with the assistance.

(2) REQUIREMENTS.—Each project cooperation agreement entered into under this subsection shall provide for the following:

(A) PLAN.—Development by the Secretary, in consultation with appropriate Federal and State officials, of a facilities development plan or resource protection plan, including appropriate plans and specifications.

(B) LEGAL AND INSTITUTIONAL STRUCTURES.—Establishment of such legal and institutional structures as are necessary to ensure the effective long-term operation of the project by the non-Federal interest.

(3) COST SHARING.—

(A) IN GENERAL.—The Federal share of project costs under each project cooperation agreement entered into under this subsection shall be 75 percent. The Federal share may be in the form of grants or reimbursements of project costs.

(B) CREDIT FOR DESIGN WORK.—The non-Federal interest shall receive credit for the reasonable costs of design work completed by the non-Federal interest before entering into a project cooperation agreement with the Secretary.

(C) CREDIT FOR CERTAIN FINANCING COSTS.—In case of a delay in the reimbursement of the non-Federal share of the costs of a project, the non-Federal interest shall receive credit for reasonable interest and other associated financing costs necessary for the non-Federal interest to provide the non-Federal share of the project costs.

(D) LAND, EASEMENTS, RIGHTS-OF-WAY, AND RELOCATIONS.— The non-Federal interest shall receive credit for land, easements, rights-of-way, and relocations provided by the non-Federal interest toward the non-Federal share of project costs (including costs associated with obtaining permits necessary for the placement of the project on publicly owned or controlled land), but not to exceed 25 percent of total project costs.

(E) OPERATION AND MAINTENANCE.—The non-Federal share of operation and maintenance costs for projects constructed under an agreement entered into under this sub-section shall be 100 percent.

(e) APPLICABILITY OF OTHER FEDERAL AND STATE LAWS.— Nothing in this section waives, limits, or otherwise affects the applicability of any provision of Federal or State law that would otherwise apply to a project to be carried out with assistance provided under this section.

(f) REPORT.—Not later than December 31, 2001, the Secretary shall submit to Congress a report on the results of the program carried out under this section, including recommendations concerning whether the program should be implemented on a national basis.

(g) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section $60,000,000.

ATTACHMENT 5

OHIO ENVIRONMENTAL INFRASTRUCTURE AND RESOURCE PROTECTION AND DEVELOPMENT PROGRAM

SEMI-ANNUAL STATUS REPORT
SCHEDULE AND FUNDING SUMMARY

PROJECT NAME	NON-FEDERAL SPONSOR	PHASE / TYPE OF ASSISTANCE	SCHEDULED/ ACTUAL DATE OF AGREEMENT	SCHEDULED/ ACTUAL COMPLETION	NON-FEDERAL COST	FEDERAL COST	TOTAL COST	REMARKS
SUBTOTAL PROJECT COSTS								
SUBTOTAL FEDERAL PROGRAM MANAGEMENT COSTS								
TOTAL PROGRAM COSTS								