**DEPARTMENT OF THE ARMY**
U.S. ARMY CORPS OF ENGINEERS
441 G ST. NW
WASHINGTON DC 20314-1000

REPLY TO
ATTENTION OF

CECC-G

13 August 2015

MEMORANDUM FOR ALL DIVISION, DISTRICT, CENTER, LABORATORY, AND FIELD OPERATING ACTIVITY COUNSELS

SUBJECT: CECC-G Bulletin No. 15-03, Follow-up Guidance on the Use of "Troop Labor" at Corps Civil Works Projects

1. Background and Purpose. On March 24, 2015, our office issued a bulletin (enclosed) regarding the use of National Guard and Reserve military personnel to conduct no-cost or reduced-cost support (*i.e.*, "troop labor" services) at U.S. Army Corps of Engineers ("Corps") Civil Works projects. In that bulletin, we provided our interim view that the acceptance of such "troop labor" services is legally impermissible unless expressly authorized by statute or Department of Defense (DoD) and/or Department of the Army (DA) regulations. The bulletin further provided that our office was in the process of seeking the views of the Army Office of General Counsel ("Army OGC") to gain further clarification on the issue. The purpose of this email is to convey Army OGC's recent response and to provide further guidance to the Corps Legal Services Community of Practice.

2. Discussion.

a. Army OGC has confirmed that the acceptance of "troop labor" services at Civil Works projects is legally impermissible unless expressly authorized by statute or DoD/DA regulations. Army OGC further directed that to pursue no-cost or reduced cost National Guard or Reserve support at Civil Works projects, the Corps should staff guidance that clearly identifies appropriate authorities and establishes guidelines and conditions under which such services may be accepted.

b. Our office is currently aware of three existing authorities that could potentially support the use of "troop labor" at Civil Works projects:

i. 10 U.S.C. § 2571: This authority authorizes the Secretaries of DoD components and the heads of other major DoD activities to exchange goods and services on a non-reimbursable basis. Army OGC has indicated that, unless an Army organization has received a specific delegation of this authority, all section 2571 actions must be approved by the Secretary of the Army. The Corps currently has not received a delegation of section 2571 authority and, thus, all requests to utilize the authority must be staffed for Secretary of the Army approval. All such actions should include a detailed description of the factual circumstances and justifications for the use of the authority and a legal sufficiency review. Request packets should be forwarded via command channels through the Corps and then the Office of the Assistant Secretary for Civil Works (OASA (CW)) to the Secretary of the Army for approval. It is our understanding that the Corps is not required to implement Corps-specific guidance before seeking approval to utilize this authority. However, it appears that the Secretary of the Army has used the authority sparingly in the past. [1]

[1] Army OGC also indicated that they are aware of only one delegation of the section 2571 authority, which was for a specific set of unidentified equipment.

ii. 33 U.S.C. § 2325: Originally enacted as section 205 of the Water Resources Development Act (WRDA) of 1992, this authority authorizes the Secretary of the Army "[i]n connection with carrying out a water resources project for *environmental protection and restoration* or a water resources project for *recreation*, . . . to accept contributions of cash, funds, materials, and services from persons, *including governmental entities* . . . ."[2] The term "governmental entities" is not defined in section 205 or any other section of WRDA 1992. Although a plain reading of section 205 could arguably support the conclusion that the term includes both federal and non-federal governmental entities, the legislative history indicates that Congress only intended the authority to apply to non-federal entities.[3] Thus, this authority is not applicable to Active, Reserve or federally-activated National Guard units. However, the authority could potential apply to National Guard units when such units are operating as State entities in a Title 32 status. Although we question whether Congress intended such a broad reading of section 205, we can find nothing in the legislative history that would preclude the possibility of applying the authority to National Guard units that are operating in their State/Title 32 capacities; and, in our view, the plain language of section 205 could arguably be read to include such 'State-activated' National Guard units. However, current Corps implementation guidance for section 205 does not specifically include National Guard units or provide specific guidelines for the acceptance of services and materials from such units as Army OGC has directed.[4] Thus, before the Corps could utilize section 205 to accept materials or services from 'State-activated' National Guard units, the Corps must first develop clear guidance and seek the approval of the ASA (CW). Additionally, once/if implemented, the Corps could only use section 205 to accept assistance from 'State-activated' National Guard units for *environmental protection and restoration* and *recreation* activities.

iii. 33 U.S.C. § 2328: Originally enacted as section 225 of WRDA 1992, this authority authorizes the Secretary of the Army ". . . to develop and implement a program to share the cost of managing *recreation facilities* and *natural resources* at water resource development projects under the Secretary's jurisdiction."[5] Section 225 further authorizes the Secretary to ". . . accept contributions of funds, materials, and services from *non-Federal public and private entities*." Similar to the above discussion of section 205 of WRDA 1992, 'State-activated' National Guard units could arguably qualify as *non-Federal public entities* under section 225, which would potentially allow the Corps to accept materials and services from such National Guard units for *recreation* and *natural resource* activities. However, in our view, section 225 differs from section 203 in that it appears to be directed

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[2] 33 U.S.C. § 2325(a) (emphasis added).

[3] See S. Rep. No. 102-283, at 79-80 (1992) (referring to section 203 and other contributions authorities and providing that "[the Congressional Budget Office] estimates that additional contributions from *nonfederal entities* would total about $5 million annually") (emphasis added).

[4] See ER 1130-2-500, Ch. 11.

[5] 33 U.S.C. § 2328(a).

at ongoing relationships where the Corps and a non-federal partner would "share" the operation and management costs and responsibilities of a particular project. We find it difficult to envision a situation where a National Guard unit would be interested or capable of committing to such an ongoing relationship with the Corps and, thus, we suspect that section 205 would be the more appropriate authority.[6]

c. With regard to the WRDA 1992 authorities discussed in paragraphs 2.b.ii. and 2.b.iii. of this memorandum, our office intends to share this opinion and consult with the HQUSACE Chief of Natural Resources Management to determine whether the Natural Resources Community of Practice desires to seek approval of implementation guidance that would potentially allow the Corps to accept services from 'State-activated' National Guard units for the limited purposes described in section 205 and/or section 225 of WRDA 1992.

d. If desired by Corps and Army leadership, our office would also support an effort for the Corps to seek express legislative authority that would authorize the acceptance of "troop labor" services in a broader context. As provided in our initial bulletin, the Corps could potentially obtain such authority by seeking an amendment to 10 U.S.C. § 2012 that would include the Army Civil Works program among the activities eligible to receive support from military units.

e. It should also be noted that the Corps could currently seek the services of Active, Reserve, and federally-activated National Guard units by utilizing reimbursable authorities such as the Economy Act. Although such reimbursable arrangements do not offer the same cost savings to the Corps, the use of military units on a reimbursable basis would likely be a cost-effective option in many instances.

3. Conclusion. The acceptance of "troop labor" services at Civil Works projects is legally impermissible unless expressly authorized by statute or at least DoD/DA regulations. We are currently aware of only three existing authorities that could potentially authorize the acceptance of "troop labor" services.

4. The point of contact for this bulletin is Zach Jacobson, who may be contacted at (202) 761- 202-761-0029 or zachary.f.jacobson@usace.army.mil.

Nancy Williams

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Enclosure

[6] Current implementation guidance for section 225 makes no mention of accepting materials and services from National Guard units. See ER 1130-2-500, Ch. 12.

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REPLY TO
ATTENTION OF

CECC-G

March 24, 2015

MEMORANDUM FOR ALL DIVISION, DISTRICT, CENTER, LABORATORY, AND FIELD OPERATING ACTIVITY COUNSELS

SUBJECT: CECC-G Bulletin No. 15-01; Use of "Troop Labor" at Corps Civil Works Projects

1. Background and Purpose. Our office has received several inquiries regarding the use of "troop labor" to conduct construction activities at Corps Civil Works projects. Although the inquiries have varied, the general concept is to have military engineer units (typically units from the Army National Guard or the U.S. Army Reserve) participate in the execution of construction activities at Corps Civil Works projects as part of the engineer units' training exercises. Under these proposed arrangements, it is our understanding that the engineer units would fund their soldiers' pay and allowances, and the Corps would provide the necessary supervision and materials to execute the project. The rationale given for these arrangements is that both parties benefit: the Corps would receive free labor, thereby reducing the Corps' project execution costs, and the engineer units would receive hands-on training related to their assigned engineering missions. The purpose of this memorandum is to provide this office's analysis of the fiscal law implications of these arrangements and to provide interim guidance to field attorneys while we seek further clarification from the Army Office of General Counsel.

2. Discussion.

a. The use of engineer troop labor to conduct construction activities at Civil Works projects raises two primary fiscal law concerns. First, it is unclear whether the troop labor arrangements comply with the requirements of the Purpose Statute (31 U.S.C. § 1301). Second, there is concern that the Corps' acceptance of "free" troop labor would improperly augment the Corps' Civil Works appropriations.

b. The Purpose Statute requires that appropriations ". . . be applied only to the objects for which the appropriations were made, except as otherwise provided by law." 31 U.S.C. § 1301(a). In the context of the troop labor activities in question, the appropriations to be "applied" for the engineer units' labor are likely the units' available military personnel appropriations (*e.g.*, appropriations for National Guard Personnel, Army; Reserve Personnel, Army). Although military personnel appropriations are not directly available for Civil Works purposes, an argument could be made that the military personnel appropriations are available for legitimate military training exercises that happen to occur at, and provide a benefit to, Civil Works projects. For such training activities to be considered legitimate, related Department of Defense (DoD) and Department of the Army (DA) guidance suggests that the activities must be similar to activities that the unit would perform in a deployed environment, and the services

provided must be incidental to the training activity.[1] Thus, assuming an engineer unit could demonstrate that support provided to a Civil Works project is part of a "legitimate" training activity (*i.e.*, that the proposed training activity is directly related to activities the unit would perform when deployed, and the benefit provided to the Civil Works project is only incidental to the training), it is at least arguable that the unit could appropriately expend military appropriations at Civil Works projects without violating the Purpose Statute.

c. The Corps would have to make a similar argument for the use of Civil Works funds to provide the materials/support necessary for the engineer units to execute the project. The Corps would have to demonstrate that any materials/support provided to the engineer units using Civil Works funds were solely for the purposes of executing the project. If the Corps provided materials/support to engineer units beyond what the Corps would otherwise use to execute the project, the result would likely be a violation of the Purpose Statute because Civil Works funds are not available for the purpose of conducting military training for the engineer units. Thus, assuming the acceptance of troop labor services is otherwise permissible, the Corps would have to monitor closely all Corps-provided materials/support. In our view, this would require the Corps to develop clear funding and implementation guidance for the activities.

d. The second issue is more problematic. "As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority."[2] This rule is derived from Congress' constitutional "power of the purse," and serves to prevent agencies from avoiding or usurping that power by operating beyond congressionally authorized funding limits.[3] By its own admission, the Government Accountability Office (GAO) recognizes that Comptroller General decisions have not been "entirely consistent" in applying the restrictions against augmentation to instances where agencies receive free services as opposed to receipts of money.[4] For example, in B-287738, the Comptroller General determined that an agency was prohibited from accepting direct payment from a contractor for repairs to a damaged building, but suggested that in-kind replacement by the contractor would not result in an improper augmentation.[5] However, in apparent opposition to this decision, the Comptroller suggested in B-211079.2 that an agency's acceptance of uncompensated services for work that ". . . would

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[1] See DOD Directive 1100.20 (April 12, 2004) (implementing the authority provided under 10 U.S.C. § 2012, which authorizes military units and members to provide support to non-Department of Defense organizations when ". . . the provision of such assistance is incidental to military training"); AR 415-32, para. 2-2.d.(1) ("MILCON projects assigned to engineer troop units will be similar to those which the unit will be required to accomplish in a theater of operation").

[2] Government Accountability Office, Principles of Federal Appropriations Law ("GOA Redbook"), Vol. II, ch. 6, at 6-162 (3d ed. 2006).

[3] See id. at 6-162 through 6-163.

[4] See id. at 6-164.

[5] Mar. Admin. - Disposition of Funds Recovered from Private Party for Damage to Gov't Bldg., B-287738 (May 16, 2002).

normally be performed by the sponsoring agency with its own personnel and appropriated funds . . . would augment the agency's appropriation impermissibly."[6] After reviewing these and other relevant Comptroller General decisions, we have not identified a clear distinction between instances where the Comptroller advised that the receipt of uncompensated services would result in an improper augmentation, and instances where the receipt of such services would not. The current edition of the GAO's *Principles of Federal Appropriations Law* provides at least some indication that the Comptroller is inclined to follow the logic presented in B-211079.2 and applies the restrictions against augmentation to receipts of services.[7]

e. Given this lack of clarity from Comptroller General decisions, and the potential Antideficiency Act violations that could result if it were later confirmed that the acceptance of troop labor services improperly augments Civil Works appropriations, we are currently seeking the position of the Army Office of General Counsel as to whether the acceptance of troop labor services is legally permissible without express authorization. In the interim, it is our view that the Corps can only accept troop labor services at Civil Works projects when the acceptance of such services is expressly authorized by statute or at least DoD/DA regulations. This view is based on the fundamental principle of fiscal law that there must be affirmative authority for actions involving the use of federal appropriations.

f. We are not aware of any statute or regulation currently in effect that expressly authorizes the use of troop labor at Civil Works projects. However, we are currently looking into the possibility of accepting troop labor services under the Corps' contributions authorities (*e.g.*, section 203 and 225 of the Water Resource Development Act of 1996, as amended, 33 U.S.C. §§ 2325 and 2328). Assuming that the acceptance of troop labor is permissible under those authorities, we presume that additional implementation guidance and approval by the Assistant Secretary of the Army (Civil Works) will be necessary.

g. Thus, until such time as (i) further guidance is issued regarding the applicability of the Corps contributions authorities to the acceptance of troop labor services, (ii) appropriate authorizing legislation is enacted, (iii) DoD/DA issues regulations that expressly authorize the Corps to accept troop labor services at Civil Works projects, or (iv) the Army Office of General Counsel provides written confirmation that the acceptance of such services is appropriate without express authorization, it is our view that the acceptance of such services is not legally permissible.

h. We have received inquiries regarding the applicability of Army Regulation (AR) 415-32 to Civil Works projects. Pursuant to AR 415-32, engineer unit training projects are currently

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[6] Cmty. Work Experience Program-State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2 (Jan. 2, 1987).

[7] See GAO Redbook, Vol. II, ch. 6 at 6-165 ("Logic would seem to support the formulation in B-211079.2. Certainly, if I wash your car without charge or if I give you money to have it washed, the result is the same -- the car gets washed and your own money is free to be used for something else").

authorized for certain military construction, maintenance, and repair projects.[8] However, the current version of AR 415-32 provides no authorization or guidance for the use of troop labor services at Civil Works projects. To our understanding, the Office of the Chief of Engineers is working to revise AR 415-32 to extend engineer training activities to Civil Works projects. If AR 415-32 is revised to provide express authorization of the use of troop labor at Civil Works projects and the appropriate HQDA offices approve the revision, we would likely have no legal objection to the Corps accepting troop labor services at qualifying Civil Works projects.

i. We have also received inquiries regarding the possibility of using the authority provided under 10 U.S.C. § 2012 to accept troop labor services at Civil Works projects. By its express terms, that authority only applies when DoD entities provide support and/or services to "non-Department of Defense organizations," which clearly excludes the Army's Civil Works Program. The existence of a statutory authority such as section 2012 only heightens our concern that the Corps needs express authority to accept troop labor services at Civil Works projects. However, if it is determined that legislative action is necessary, the Corps could potentially resolve the matter by seeking an amendment to section 2012 that would include the Civil Works program among the activities eligible to receive support/services under that authority.

3. Conclusion. The acceptance of troop labor services at Civil Works projects without express authorization could potentially result in violations of the Purpose Statute and improper augmentations of Civil Works appropriations. Because of the lack of clarity from relevant Comptroller General decisions and the potential fiscal law violations that could result from accepting such services, we are currently seeking the position of the Army Office of General Counsel on this issue. We are also looking into the potential applicability of the Corps' contributions authorities to the acceptance of troop labor. In the interim, it is our view that the Corps cannot legally accept troop labor services at Civil Works projects.

4. This bulletin has been approved by the Chief Counsel who has contacted the Army Office of General Counsel for further coordination. The point of contact for this bulletin is Brandon Pitcher, who may be contacted at (202) 761-0025 or brandon.j.pitcher@usace.army.mil.

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[8] Currently, AR 415-32 authorizes the use of troop labor for certain construction, maintenance, and repair projects funded with Military Construction, Unspecified Minor Military Construction, or Operation and Maintenance funds. However, the regulation contains a number of preliminary requirements and approvals/coordination that must occur before troop labor exercises are permissible at a given project. To the extent that a given Corps-executed project satisfies the requirements of AR 415-32, to include approval and/or coordination with the appropriate authorities, the Corps is currently authorized to accept troop labor construction services at applicable military construction, maintenance, and repair projects.