

MEMORANDUM OF AGREEMENT BETWEEN THE  
ENVIRONMENTAL PROTECTION AGENCY AND  
THE DEPARTMENT OF THE ARMY

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1. Authority: Section 404(q) of the Clean Water Act, 33 U.S.C. §1344(q).
2. Purpose: The purpose of this agreement is to establish policies and procedures to implement Section 404(q) of the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits."
3. Applicability: This agreement shall apply to applications for permits to be issued by the Department of the Army under:
  - a. Section 10 of the River and Harbor Act of 1899.
  - b. Section 404 of the Clean Water Act.
  - c. Section 103 of the Marine Protection, Research and Sanctuaries Act, except as pertains to compliance with the Environmental Protection Agency (EPA) established ocean dumping criteria.
4. General Rules: Policy and procedures for review of permit applications are established in 33 CFR 320 through 330, and 40 CFR 230.
5. Policy for Interagency Coordination:
  - a. The final permit decision will be made by the District Engineer (DE) in the vast majority of cases, and the need for reopening the record of a case developed by the DE will be minimized.
  - b. The Administrator has designated the Assistant Administrator, Office of External Affairs (AAEA), as the EPA official having authority to request that the Army review a DE's decision to issue a permit under Section 404. It is agreed that EPA will request such review only if the AAEA finds the following instances:
    - (1) That there has been insufficient interagency coordination at the District and Division levels including a procedural failure to coordinate or a failure to resolve stated EPA concerns regarding compliance with the Section 404(b) (1) Guidelines; or
    - (2) That significant new information has been developed which was not previously available; or
    - (3) That the project raises environmental issues of national importance requiring policy level review.

In all these instances, the AAEA will state how the matters of concern are clearly within the Agency's authority.

- c. For projects of other Federal agencies, Army and EPA will accept, where appropriate and legally permissible, the environmental documentation and decisions of those agencies.
- d. This agreement does not diminish either Army's authority to decide whether a particular permit application should be granted, including determining whether the project is in compliance with the Section 404(b)(1) Guidelines, or the Administrator's authority under Section 404<sup>c</sup> of the Clean Water Act.

6. Procedures at the initial decision-making levels:

- a. In order to be eligible for referral under the procedures provided for under paragraph 7, EPA comment letters including recommended permit denial letters, letters recommending project modification, or requests for extensions of the comment period, shall be signed by the Regional Administrator (RA) or his specified designee (such designee will not be below the level of Division Director; two officials will be designated in Region X to provide for special circumstances in Alaska). Where the RA has delegated such signature authority to a regional official, the RA shall provide in writing, to each Division and District Engineer in his Region, the title of the designated official.
- b. The DE will take reasonable steps to ensure that public notices are promptly transmitted to the appropriate EPA office. EPA will submit its comments, if any, during the basic comment period specified in the public notice. Where the basic comment period is less than 30 calendar days, the DE shall upon request of the EPA extend the comment period to 30 calendar days. Otherwise, extensions of the basic or extended comment period will not exceed 30 calendar days and will be authorized only upon written request to the DE from the EPA. The request must be received during the period sought to be extended and must demonstrate the reason for the extension. The DE will respond to the request in writing within five calendar days of the letter of request. Transmittal provisions of subparagraph 7.e. will apply to this response.
- c. The agencies will develop techniques at the field level to ensure that formal referral procedures are started only when warranted. These techniques will include an informal consultation procedure initiated by the DE after the close of the comment period to alert the RA (or designee) of an upcoming decision which will be contrary to a recommendation by EPA for permit denial or project modification. The consultation will consist of such actions as telephone calls, electronic mail messages, visits, or other informal techniques. It should include a discussion of the anticipated decision and

of the rationale leading to that decision. It is incumbent on EPA to ensure that any additional views regarding the action are finalized and communicated to the DE as expeditiously as possible. In specific cases, the DE and RA (or designee) may determine that the informal consultation should include the applicant. If the applicant is not included, and the consultation results in any substantive action on the application, the DE will inform the applicant of the substance of the consultation and will provide the opportunity for the applicant to comment. Such consultation will occur immediately after the close of the comment period and prior to the DE's Notice of Intent to Issue a permit. This consultation will not affect the time requirements specified in other parts of this MOA or in 33 CFR 320-330.

- d. If at the conclusion of the consultation identified at 6.c. above, the DE subsequently finds the proposed permit is in the public interest and complies with the Section 404(b)(1) Guidelines, and intends to issue the permit over EPA objections or to issue it without conditions specified by EPA, he will so notify EPA. When requested by the DA within 7 calendar days of such notification, the DE will not issue a Notice of Intent letter until after the RA has had the opportunity to discuss the application with the appropriate Division Engineer during the regular meetings identified at subparagraph 6.e. If no regular meeting has been scheduled within 14 calendar days of the RA's request to delay the Notice of Intent letter and no special meeting or conference call occurs where there has been a reasonable opportunity for discussion within such 14 days, the DE may proceed to issue his Notice of Intent letter pursuant to subparagraph 7.c.
- e. Frequent and regular meetings (it is suggested they be monthly, but sooner if appropriate to expedite the permit process) will be scheduled between the RA and Division Engineer by mutual agreement, to discuss issues of mutual interest including problems involving individual permit decisions or patterns of concern such as consistently inappropriate comment letters or regular misinterpretation of the Section 404(b)(1) Guidelines, to ensure proper coordination on enforcement matters, to review the nature and frequency of letters of intent to elevate, and to monitor program implementation to minimize duplication and red tape. This consultation is intended to reduce potential delays in the permit process by raising major issues to the RA/Division Engineer level during the permit process, thereby shortening or eliminating the time required for additional consultation and review.
- f. The agencies agree to cooperate fully in the transfer of all

information necessary for the agencies to carry out their respective responsibilities. In special cases involving copying of voluminous documentation the parties shall make mutually agreeable arrangements to ensure prompt and effective transfer of required information.

- g. Both parties will take the internal measures necessary to assure that the letter and spirit of this agreement are understood at all levels within their agency.

7. Procedures for Referral

- a. General: In the vast majority of cases, the entire process of consultation and referral outlined in this paragraph, when activated, should be completed within 90 calendar days of the DE's notice of Intent to Issue a permit; in no cases should the process exceed 120 calendar days.
- b. If during the comment period EPA recommends that a proposed permit be denied or that the activity be modified as a condition of the permit and the matter has not been resolved under the consultation process provided at subparagraphs 6.c. through 6.e. above, the DE will so notify the RA by letter (Notice of Intent to Issue) and will defer final action pending completion of the procedures in subparagraphs 7.c. and 7.d. The DE's letter to the RA will include a brief summary of how EPA's comments were considered, together with a copy of the DE's findings in support of the decision.
- c. Within 20 working days of the DE's Notice of Intent to Issue, if the case has not been resolved to the satisfaction of the AAEA and he determines that it meets the criteria in paragraph 5.b., the AAEA may request of the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that the permit decision be made at a higher level in the Department of the Army. This request will be written, cite the issues involved as stated at subparagraph 5.b., and describe:
  - 1) the affected natural resource;
  - 2) the impacts of the applicants proposed project on such resources; and
  - 3) where the request is based on insufficient interagency coordination, the coordination problem, including when applicable, a discussion of why he believes the DE's response is inadequate with respect to project compliance with the Section 404(b)(1) Guidelines.
- d. Within 15 working days of the date of the letter of the AAEA, the ASA(CW) will decide whether or not the permit decision will be made at a level higher than the DE and, if so, at what level the final decision will be made. He will notify in writing the agency officials involved. Should the ASA(CW) decide that the permit decision will not be made at a higher level, he will respond to the AAEA in writing presenting the results of his evaluation which will include a discussion of the following:
  - 1) the issues raised by the AAEA under subparagraph 7.c.;
  - 2) his position on these issues and supporting bases; and
  - 3) any administrative action taken by the ASA(CW) to improve program implementation which resulted from the AAEA request.

- e. Each agency will ensure that all letters to the other agency required by this paragraph will be received within one day of signature using messenger, electronic transmittal or other appropriate means.
  - f. EPA and the Department of the Army desire to avoid the use of duplicative review mechanisms. A permit decision will not be subject to the referral process when the Department of the Army and EPA agree in advance that an adequate separate review mechanism exists and has been invoked.
8. For any permit where EPA has invoked the referral procedures of paragraph 7 and where at the end of such procedures Army intends to issue the permit in a form that does not meet all of EPA's objections, the ASA(CW) will so notify the AAEA in writing. This letter will include the discussion required in subparagraph 7.d. To assist the EPA in reaching a decision on whether to exercise its Section 404(c) authority, the ASA(CW) will also provide a copy of the Statement of Findings/Record of Decision prepared in support of the permit decision. The permit shall not be issued during a period of 10 working days after such notice unless it contains a condition that no activity may take place pursuant to the permit until such 10th day or, if EPA has initiated a Section 404(c) proceeding during such 10 day period, until the Section 404(c) proceeding is concluded and subject to the final determination in such proceeding.
9. This agreement is effective immediately upon the last signature date below and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice.
10. The Memorandum of Agreement between the Administrator of EPA and the Secretary of the Army on permit processing dated July 7, 1982 is terminated. Those permit applications which have already been referred to the ASA(CW) under the July 7, 1982 MOA shall be processed according to its terms. Those permit applications for which Notices of Intent to Issue have been sent by the DE since 20 days prior to the effective date of this MOA, but which have not yet been referred to the ASA(CW) shall be governed by this agreement, except that the time periods specified in subparagraphs 7.c. and 7.d. shall run from the date of this agreement rather than from the date of the DE's letter.

\_\_\_\_\_/s/\_\_\_\_\_  
Administrator of the  
Environmental Protection Agency

\_\_\_\_\_/s/\_\_\_\_\_  
Secretary of the Army

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Nov. 6, 1985  
Date

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12 NOV 1985  
Date