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: 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 Regulatory authorities under: a) Section 10 of the Rivers and Harbors Act of 1899; b) Section 404 of the Clean Water Act; and c) Section 103 of the Marine Protection, Research and Sanctuaries Act.

4. General Rules: Policy and procedures for the Department of the Army Regulatory Program are established in 33 CFR Parts 320 through 330, and 40 CFR Part 230.

5. Organization: This Memorandum of Agreement (MOA) is subdivided into four distinct parts. The procedures for each part are specific to that part and do not necessarily relate to other parts. For example, different signature levels are established for Parts II, III, and IV.

PART I - BACKGROUND

1. The Army Corps of Engineers is solely responsible for making final permit decisions pursuant to Section 10, Section 404(a), and Section 103, including final determinations of compliance with the Corps permit regulations, the Section 404(b)(1) Guidelines, and Section 7(a)(2) of the Endangered Species Act. As such, the Corps will act as the project manager for the evaluation of all permit applications. As the project manager, the Corps is responsible for requesting and evaluating information concerning all permit applications. The Corps will obtain and utilize this information in a manner that moves, as rapidly as practical, the regulatory process towards a final permit decision. The Corps

will not evaluate applications as a project opponent or advocate -- but instead will maintain an objective evaluation, fully considering all relevant factors. The Corps will fully consider EPA's comments when determining compliance with the National Environmental Policy Act, the 404(b)(1) Guidelines, and other relevant statutes, regulations, and policies. The Corps will also fully consider the EPA's views when determining whether to issue the permit, to issue the permit with conditions and/or mitigation, or to deny the permit.

2. It is recognized that the EPA has an important role in the Department of the Army Regulatory Program under the Clean Water Act, National Environmental Policy Act, and other relevant statutes. When providing comments, only substantive, project-related information (within EPA's area of expertise and authority) on the impacts of activities being evaluated by the Corps and appropriate and practicable measures to mitigate adverse impacts will be submitted. Pursuant to its authority under Section 404(b)(1) of the Clean Water Act, the EPA may provide comments to the Corps identifying its views regarding compliance with the Section 404(b)(1) Guidelines. The comments will be submitted within the time frames established in this agreement and applicable regulations.

3. National or regional issues relating to resources, policy, procedures, and regulation interpretation, can be elevated by either agency to their respective Washington Headquarters for resolution as prescribed in Part III - ELEVATION OF POLICY ISSUES. Individual permit decisions will not be delayed during the policy issue elevation process. Elevation of issues related to specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. Procedures for elevation of such specific cases are provided in PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS.

4. For projects of other Federal agencies and Federally assisted projects for which a Federal agency takes responsibility for environmental analysis and documentation, Army will accept, where appropriate and legally permissible, the environmental documentation and decisions of those agencies.

5. This agreement does not diminish either Army's authority to decide whether a particular individual permit 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(c) of the Clean Water Act.

6. The officials identified in this MOA cannot delegate their responsibilities unless specifically provided for in this MOA.

7. Days referred to in this MOA are calendar days. If the end of the specified time period falls on a weekend or holiday, the last calendar day will be the first business day following the weekend or holiday. The end of the specified time period shall mean the close of the business day on the last day of the specified time period.

8. This agreement is effective immediately upon the date of the last signature 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.

9. The Memorandum of Agreement between the Administrator of the Environmental Protection Agency and the Secretary of the Army on Section 404(q) of the Clean Water Act dated November 12, 1985, is terminated. Those permit applications which have been elevated to the Assistant Secretary of the Army for Civil Works (ASA(CW)) under the November 12, 1985, MOA shall be processed according to its terms. Those permit applications for which Notices of Intent to Issue have been sent by the District Engineer in accordance with paragraph 7.b. of the November 12, 1985, MOA shall be governed by that MOA. All other permit applications shall be governed by this agreement. For permit applications where the basic or extended comment period has closed before the signature date of this MOA the Regional Administrator has 15 calendar days from the date of the last signature below to indicate which individual permit cases will be governed under Part IV by sending the District Engineer the letter required in Part IV, paragraph 3(b).

PART II - COORDINATION PROCEDURES

1. Purpose: The purpose of Part II is to provide and encourage communication and full consideration of each agencies' views concerning proposed projects within the resource limits of each agency and the time constraints of the regulatory process.

2. District Engineers and the Regional Administrators are encouraged to develop, within six months of the date of this MOA, written procedures to ensure effective interagency coordination and to discuss issues, expedite comments, foster strong professional partnerships and cooperative working relationships. These professional partnerships will be based on EPA providing substantive, project specific comments and the Corps giving

full consideration to EPA's recommendations as the Corps makes its determination of compliance with the Section 404(b)(1) Guidelines and the decision on the permit application. The procedures will encourage, to the extent appropriate:

a. interagency pre-application consultation with prospective applicants;
b. interagency site visits;
c. interagency meeting(s) with applicants;
d. cooperation in acquiring and conveying site specific information needed by either agency to fulfill its responsibilities;
e. consistent with the time frames setforth in this MOA, an informal process for the timely resolution of issues at the field level to ensure that the permit evaluation proceeds as rapidly as practical.

3. The Regional Administrator will inform the District Engineer, in writing, of the EPA officials who are authorized to provide official EPA comments, including, where appropriate, by category of activity or geographic area. All official EPA comments will be signed by either the Regional Administrator or the designated official or an individual acting for the Regional Administrator or acting for the designated EPA official. Two officials will be designated in EPA Region X to provide for special circumstances in Alaska. Comments signed by any of the above mentioned officials will be considered EPA's response in accordance with Part II of this MOA. Notwithstanding the above, certain actions described in Part IV require the actual signature of the Regional Administrator or Acting Regional Administrator.

4. The Corps will ensure the timely receipt (within 2-3 days from the date of issuance) of public notices by EPA. EPA comments will be submitted in writing during the basic comment period specified in the public notice. To the maximum extent practical, EPA will immediately provide the Corps project manager with a faxed copy of its signed comments. Where the basic comment period is less than 30 calendar days and the situation is not an emergency, the District Engineer (or designee) shall, upon written or electronically transmitted request of an official authorized to provide official EPA comments, extend the comment period to 30 calendar days. An extension beyond 30 calendar days from the date of the public notice, must be requested in writing by the Regional Administrator or designee. The written request must be received three calendar days prior to the end of the basic comment period and must demonstrate the reason for the extension (e.g., a joint coordination meeting occurs near the end of the comment period and EPA needs additional time to prepare substantive comments). The District Engineer or his designee will respond, in writing, within three calendar days of receipt

of the request letter. If the District Engineer or his designee denies the request for extension within three calendar days prior to the end of the basic comment period, the EPA will have five calendar days from the receipt of the denial letter to submit final EPA comments. The maximum comment period, including extension, will not exceed 60 calendar days, unless sought by the applicant.

5. Consistent with the procedures in Part IV, at the conclusion of the comment period, the Corps will proceed to final action on the permit application. The Corps will consider all comments submitted by EPA pursuant to Part IV, paragraphs 3(a) and 3(b).

6. The Corps may, in certain cases, request additional comments from or discuss issues relevant to the project with EPA after the close of the comment period to either clarify matters or obtain information relevant to the permit decision.

7. Consistent with Part IV, if the District Engineer's decision is to issue the permit over the objections of the EPA Regional Administrator or to issue the permit without conditions recommended by the EPA Regional Administrator, the District Engineer will send a copy of the decision document to the EPA commenting official.

PART III - ELEVATION OF POLICY ISSUES

1. Purpose: The purpose of Part III is to provide procedures for policy issue coordination and resolution.

2. If either agency considers that the nature of an action or series of actions raises concerns regarding the application of existing policy or procedure, or procedural failures in agency coordination, the District or Division Engineer, or Regional Administrator (or designee) may initiate policy implementation review between the District and/or Division Engineer (or designee) and the EPA Regional Administrator (or designee) through written notification. The written notification will describe the issue in sufficient detail and provide recommendations for resolving the issue. The District Engineer or Division Engineer (or designee), depending on the level of the issue, or the Regional Administrator (or designee) will resolve the issue within 60 calendar days of receipt of written notification to initiate policy implementation review.

3. In the context of Part III of this MOA, "resolve" means to review the issue, obtain the views of the requesting party, discuss those views as appropriate, fully consider those

views, and then make the final determination, in writing, regarding the particular resource, policy, procedure, or regulation interpretation.

4. If during consultation, the Regional Administrator (or designee) or the Corps (District Engineer or Division Engineer, or designee) determine the issue cannot or should not be resolved at the field level, or that an issue has broader implications beyond the Division, the RA and Division Engineer will so notify the Assistant Administrator, Office of Water (AAOW) and the ASA(CW), through the Director of Civil Works, respectively, in writing. Such notification will describe the nature of the issue and the reasons why the issue cannot, or should not, be resolved at the District or Division level or Regional level. (e.g., national policy issue)

5. Either the AAOW or the ASA(CW) may initiate informal or formal consultation concerning unresolved regional issues or national issues by meeting within 30 calendar days of receipt of notification under paragraph 4. above, or within 30 calendar days of receipt of notification of a policy or procedural issue or issues raised directly at Headquarters level. Within 60 calendar days of that meeting, the agencies will agree to provide direction, guidance, or joint guidance (e.g., general guidance on the Section 404(b)(1) Guidelines), where appropriate in response to the issues raised in 4., above.

6. At no time should individual permit decisions be delayed pending resolution of policy issues pursuant to PART III of this MOA. Similarly, changes in policy (i.e., new policies) that occur as a result of PART III should not affect applicants who have submitted a complete permit application prior to implementation of such policy change.

7. Upon resolving a particular policy or procedure, the Corps will determine if the policy is of sufficient importance to warrant public comment. All decisions will be implemented pursuant to the requirements of the Administrative Procedures Act, including public notice and comment rulemaking as necessary.

PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS

1. Purpose: The purpose of PART IV is to provide the exclusive procedures for the elevation of specific individual permit cases. The elevation of specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. For example, cases that do not meet this resource value threshold cannot be elevated under this Part over a dispute concerning practicable alternatives. More specifically, the

elevation of individual permit cases should be limited to those cases where the net loss (i.e., after considering mitigation) from the project (i.e., within the scope of impacts being evaluated by the Corps), will result in unacceptable adverse effects to aquatic resources of national importance. As a basis for comparison, these cases will cause resource damages similar in magnitude to cases evaluated under Section 404(c) of the Clean Water Act. The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest solely with the ASA(CW).

2. Because delays associated with the process described within this Part IV can be costly to the regulated public, every effort will be taken to ensure that the process under paragraph 3(b) of this Part will be initiated only when absolutely necessary. Generic issues concerning the use of this Part IV may be elevated by either party using the procedures in Part III.

3. The following procedures will be utilized for the elevation of specific individual permit cases:

FIELD LEVEL PROCEDURES

(a) Within the basic or extended comment period the Regional Administrator (or designee) must notify the District Engineer by letter that in the opinion of EPA the project may result in substantial and unacceptable impacts to aquatic resources of national importance as defined in paragraph 1 of this Part.

(b) For those individual permit cases identified in paragraph 3(a), within 25 calendar days after the end of the basic or extended comment period the Regional Administrator must notify the District Engineer by letter (signed by the Regional Administrator) that in EPA's opinion the discharge will have a substantial and unacceptable impact on aquatic resources of national importance. The opinion will clearly state in detail: (1) why there will be substantial and unacceptable impacts to aquatic resource of national importance as defined in paragraph 1 of this Part and; (2) why the specific permit must be modified, conditioned, or denied to protect the aquatic resource of national importance. The opinion, which should explain how the agency determination was made, should be based on site specific information and relate directly to matters within EPA's authority and expertise. A signed copy of the EPA letter should be immediately faxed to the Corps regulatory project manager.

(c) Notice of Intent to Proceed:

(1) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer's proposed permit decision is contrary to the stated EPA written recommendation in paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the

draft permit and decision document by overnight mail to the Wetlands Division Director.

(2) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer believes that his proposed decision resolves the written concerns raised by EPA pursuant to paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the draft permit and decision document by overnight mail to the Wetlands Division Director.

(3) Alternatively, if the District Engineer, prior to reaching a decision on the permit (e.g., the final decision is pending resolution of issues not related to the concerns raised by EPA), determines that the project has been modified or conditioned sufficiently so there are no longer substantial adverse impacts on aquatic resources of national importance, the District Engineer will notify the Wetlands Division Director, by letter including such project modifications and/or conditions that resolve EPA's concerns raised in paragraph 3(b).

(d) Within 15 calendar days from receipt of the draft permit under paragraphs 3(c)(1) or 3(c)(2) or notification under paragraph 3(c)(3), the Regional Administrator will notify the District Engineer by faxed letter (signed by the Regional Administrator or the Acting Regional Administrator) that:

(1) the Regional Administrator will not request higher level review; or

(2) the Regional Administrator has forwarded the issue to the AAOW with a recommendation to request review by the ASA(CW).

(e) When the Regional Administrator requests elevation pursuant to paragraph 3(d)(2) of this Part the District Engineer will hold in abeyance the issuance of a permit

pending completion of the Headquarters level review outlined below. Further, the District Engineer will provide CECW-OR and ASA(CW) a copy of the Regional Administrator's letter notifying the District Engineer of the intent to request higher level review.

AGENCY HEADQUARTERS REVIEW (AS NECESSARY)

(f) Within 20 calendar days from the Regional Administrator's letter notifying the District Engineer of the intent to request higher level review (paragraph 3(d)(2)), the AAOW will either:

(1) notify the ASA(CW) that the AAOW will not request further review (the ASA(CW) will immediately notify CECW-OR of the AAOW's decision, CECW-OR will immediately notify the district regulatory chief); or

(2) request the ASA(CW) to review the permit decision document.

(g) Within 30 calendar days from the AAOW's request for review, the ASA(CW), through the Director of Civil Works, will review the permit decision document and either:

(1) inform the District Engineer to proceed with final action on the permit decision; or

(2) inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or

(3) make the final permit decision in accordance with 33 CFR 325.8.

(h) The ASA(CW) will immediately notify the AAOW in writing of its decision in paragraph 3(g) above. The EPA reserves the right to proceed with Section 404(c). To assist the EPA in reaching a decision on whether to exercise its Section 404(c) authority, the District Engineer will provide EPA a copy of the Statement of Findings/Record of Decision prepared in support of a permit decision after the ASA(CW) review. The permit shall not be issued during a period of 10 calendar 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 the 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.

Acting Assistant Administrator for Water
Environmental Protection Agency

11 August 1992
Date

Assistant Secretary of the Army
for Civil Works
Department of the Army

11 August 1992
Date