

MEMORANDUM OF AGREEMENT BETWEEN  
THE DEPARTMENT OF COMMERCE AND  
THE DEPARTMENT OF THE ARMY

1. Authority: Section 404(q) of the Clean Water Act.  
(33 USC 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 EPA established ocean dumping criteria.
4. General rules: Policy and procedures for review of permit applications are established in 33 CFR 320 through 330.
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, National Oceanic and Atmospheric Administration (NOAA) will request review of a district engineer's decision only when the Administrator finds that (1) the case involves the development of significant new information, (2) there is necessity for policy-level review of issues of national significance, or (3) there has been insufficient interagency coordination at the district level.

If full consideration to the recommendations of NOAA, including recommended permit conditions, is not given by the DE, it will constitute insufficient coordination at the district level. This may result in a request for elevation when, in the opinion of the Administrator, NOAA, the project would result in sufficient adverse environmental effects to warrant such a request.

In all these instances, the Administrator, NOAA will state how the matters of concern are clearly within the Department of Commerce's (DOC) authority.

- c. For projects of other Federal agencies, Army and DOC will accept, where appropriate and legally permissible, the environmental documentation and decisions of those agencies.
- d. Where DOC is the applicant, DOC will be the lead agency for environmental documentation. Both agencies will cooperate fully in early and continuing coordination during development of projects, environmental documentation, and public involvement processes, including joint public notices and, if required, joint hearings. As referenced in paragraph .c., the Army will, where appropriate and legally permissible, accept DOC's findings on all environmental and regulatory matters or activities requiring an Army permit.

6. Procedures at the initial decisionmaking levels:

- a. The National Marine Fisheries Service (NMFS) will be the point of contact for initial level coordination at DOC.
- b. In order to be eligible for referral under the procedures provided for under paragraph 7, DOC comment letters including recommended permit denial letters, letters recommending project modifications, or requests for extensions of the comment period, shall be signed by the Regional Director (RD) or a specified designee (such designee will not be below the level of Division Director). Where the RD has delegated such signature authority to a regional official, the RD shall provide in writing, to each Division and District Engineer in the region, the title of the designated official.

- c. The DE will take reasonable steps to ensure that public notices are promptly transmitted to the appropriate NMFS office. NMFS will submit its comments, if any, during the basic comment period specified in the public notice. NMFS will comment only on matters clearly and directly within its authority. Where the basic comment period is less than 30 calendar days, the DE shall upon request of the RD or designee extend the comment period to 30 calendar days. Otherwise, extensions of the basic or extended comment period will be authorized only upon written request to the DE from the RD or designee. The request must be received during the comment period sought to be extended and must provide the reason for the extension. The DE will respond in writing to the request within five calendar days of the date of the letter of request. Transmittal provisions of paragraph 7.f. will apply to this response.
- d. The DE's and RD's will develop local procedures at the field level to resolve differences, where possible, prior to the Notice of Intent to Issue. These local procedures will include informal consultation, initiated by the DE, after the close of the comment period to alert the RD or designee of an upcoming decision which will be contrary to a recommendation by NMFS for permit or project modification. At the request of the RD or designee, consultations will consist of such actions as telephone calls, electronic mail messages, visits, meetings, or other actions. The consultation period should not exceed 10 working days from the time the DE initiates the consultation unless the DE extends it and will include a discussion of the anticipated decision and of the rationale leading to that decision. It is incumbent on NMFS 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 RD 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 or designee will inform the applicant of the substance of the consultation and will provide the opportunity for the applicant to comment. This consultation will not affect the time requirements specified in other parts of this MOA or in 33 CFR 320-330.

- e. If, at the conclusion of the consultation identified at 6.d. above, the DE intends to issue the permit over NMFS's objections or to issue it without conditions recommended by NMFS, the DE will formally notify the RD. When requested by the RD within 7 calendar days of such notification, the DE will not issue a Notice of Intent until after the RD has had the opportunity to discuss the application with the appropriate Division Engineer during a mutually agreed to meeting. If no meeting has been scheduled within 14 calendar days of the RD's request to delay the Notice of Intent letter and no conference call occurs where there has been a reasonable opportunity for discussion within such 14 days, the DE may proceed to issue the Notice of Intent letter pursuant to subparagraph 7.c.
- f. Meetings may be scheduled between the RD and Division Engineer as necessary to discuss issues of mutual interest including problems involving individual permit decisions or patterns of concern such as the consistency and appropriateness of comment letters, to ensure proper coordination on enforcement matters, to review the nature and frequency of elevation requests, 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 RD/Division Engineer level during the permit process thereby shortening or eliminating the time required for additional consultation and review.
- g. 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 requiring copying of voluminous documentation, the parties shall make mutually agreeable arrangements to ensure prompt and effective transfer of required information.
- h. Both parties will transmit this document to their DE's and RD's and will take the internal measures necessary to assure that the letter and spirit of this agreement are understood at all levels within their agency.

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 elevation process exceed 120 calendar days.
- b. If during the comment period, NMFS 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.f. above, the DE will so notify the RD 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 RD will include a brief summary of how NMFS comments were considered, together with a copy of the Statement of Findings of the DE in support of his 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 Administrator, NOAA and the Administrator determines that it meets the criteria in paragraph 5.b., the Administrator, NOAA 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. The Administrator, NOAA will identify those items of the district engineer's statement of findings with which NOAA takes issue including items relating to:
  - (1) the affected fish and wildlife resources;
  - (2) the impacts of the applicant's proposed project on such resources;
  - (3) the net resource losses expected by project implementation as proposed by the district engineer and why the DE's proposals will not offset environmental losses;
  - (4) the mitigation proposed by the NMFS and how NMFS's proposal will offset environmental losses.

- (5) specify in what ways the mitigation recommended by the NMFS did not receive full consideration in the DE's decision.

The Administrator, NOAA will also state the way in which acceptance of the Administrator's, NOAA, recommendations would result in a better decision.

- d. Within 15 working days of the date of the letter of the Administrator, NOAA, 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. The ASA(CW) 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, the ASA(CW) will respond to the Administrator, NOAA, in writing presenting the results of the evaluation. The ASA(CW) notification will include specific discussions of each of the items with which the Administrator, NOAA took issue. The ASA(CW) will state Army's position (concurrence or nonconcurrence) with the Administrator, NOAA's positions on each of these items, and will include relevant supporting data. The parties acknowledge that the final determination of mitigation is the responsibility of the Corps.
- e. The official designated by the ASA(CW) to decide a referred case will reach a decision within the time specified in paragraph 7.a. above and will immediately notify the applicant and appropriate officials of both agencies. The Statement of Findings of the deciding official will include a discussion of items raised by the Administrator and will be furnished to the Administrator by the ASA(CW).
- f. Each agency will ensure that all letters and other notifications to the other agency as required by this paragraph will be received within one day of signature using messenger, electronic transmittal or other appropriate means.
- g. DOC and Army desire to avoid the use of duplicative review mechanisms. A permit decision will not be subject to the elevation process when Army and DOC agree in advance that an adequate separate review mechanism exists and has been invoked.

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 30 days written notice.

9. The Memorandum of Agreement between the Secretary of DOC and the Secretary of the Army on permit processing dated July 2, 1982, is terminated. Those permit applications which have already been referred to the ASA(CW) under the July 2, 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 within 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/\_\_\_\_\_  
Secretary of Commerce

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

\_\_\_\_\_MAR 03 1986\_\_\_\_\_  
Date

\_\_\_\_\_25 March '86\_\_\_\_\_  
Date

\_\_\_\_\_/s/\_\_\_\_\_  
Administrator, National  
Oceanic and Atmospheric  
Administration

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Secretary  
of the Army (Civil  
Works)

\_\_\_\_\_2/18/86\_\_\_\_\_  
Date

\_\_\_\_\_1/17/86\_\_\_\_\_  
Date