

U.S. Environmental Protection Agency

**MEMORANDUM OF AGREEMENT BETWEEN THE
ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS AND WATER
U.S. ENVIRONMENTAL PROTECTION AGENCY
AND THE ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS
CONCERNING REGULATION OF DISCHARGES OF
SOLID WASTE UNDER THE CLEAN WATER ACT**

A. Basis of Agreement

1. Whereas the Clean Water Act has as its principal objective the requirement "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters; and,
2. Whereas Section 301 of the Clean Water Act prohibits the discharge of any pollutant into waters of the United States except in compliance with Sections 301, 302, 303, 306, 307, 318, 402, and 404 of the Act; and
3. Whereas EPA, and States approved by EPA, have been vested with authority to permit discharges of pollutants, other than dredged or fill material, into the waters of the United States pursuant to Section 402 of the Clean Water Act that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 40 CFR 122-125; and
4. Whereas the Army, and States approved by EPA, have been vested with authority to permit discharges of dredged or fill material into waters of the United States that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 33 CFR 320 et seq. and 40 CFR 230 et seq.; and
5. Whereas the definitions of the term "fill material" contained in the aforementioned regulations have created uncertainty as to whether Section 402 of the Act or Section 404 is intended to regulate discharges of solid waste materials into waters of the United States for the purpose of disposal of waste; and
6. Whereas the Resource Conservation and Recovery Act Amendments of 1984 (RCRA) require that certain steps be taken to improve the control of solid waste; and
7. Whereas interim control of such discharges is necessary to ensure sound management of the Nation's waters and to avoid complications in enforcement actions taken against persons discharging pollutants into waters of the United States without a permit;
8. The undersigned agencies do hereby agree to use their respective abilities cooperatively in an interim program to control the discharges of solid waste material into waters of the United States.

B. Procedures

1. When either agency is aware of a proposed or an unpermitted discharge of solid waste into waters of the United States, the agency will notify the discharger of the prohibition against such discharges as provided in Section 301 of the Clean Water Act. Such notice is not a prerequisite for an enforcement action by either agency.

2. Normally, if an activity in B.1 above warrants action, EPA will issue an administrative order or file a complaint under Section 309 to control the discharge.
3. In issuing a notice of violation or administrative order or in filing a complaint, it is not necessary in order to demonstrate a violation of Section 301(a) of the Clean Water Act to identify which permit a permitless discharge should have had. However, after an enforcement action has commenced, a question may be raised by the court, discharger, or other party as to whether a particular discharge having the effect of replacing an aquatic area with dry land or of changing the bottom elevation of a water body meets the primary purpose test for "fill material" in the Corps definition (33 CFR 323.2(k)). For example, such question may be raised in connection with a defense or it may be relevant to the relief to be granted or the terms of a settlement.
4. To avoid any impediment to prompt resolution of the enforcement action, if such a question arises, a discharge normally will be considered to meet the definition of "fill material" in 33 CFR 323.2(k) for each specific case by consideration of the following factors:
 - a. The discharge has as its primary purpose or has one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation.
 - b. The discharge results from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities.
 - c. A principal effect of the discharge is physical loss or physical modification of waters of the United States, including smothering of aquatic life or habitat.
 - d. The discharge is heterogeneous in nature and of the type normally associated with sanitary landfill discharges.
5. On the other hand, in the situation in paragraph B.3., a pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to Section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials.
6. While this document addresses enforcement cases, prospective dischargers who apply for a permit will be encouraged to use the above criteria for purposes of project planning. If a prospective discharger applies for a Section 404 permit based on the considerations in paragraph B.4, or for a Section 402 permit based on the considerations in paragraph B.5, the application will normally be accepted for processing. If a prospective discharger applies for a 404 permit for discharge of materials that might be hazardous, he shall be advised that the discharges of wastes to waters of the United States that are hazardous under RCRA are unlikely to comply with the Section 404(b)(1) Guidelines. To facilitate processing of applications for permits under Sections 402 or 404 for discharges covered by this agreement, an application for such discharge shall not be accepted for processing until the applicant has provided a determination signed by the State or appropriate interstate agency that the proposed discharge will comply with applicable provisions of State law including

applicable water quality standards, or evidence of waiver by the State or interstate agency. As mandated under the Clean Water Act, neither a 402 nor a 404 permit will be issued for a discharge of toxic pollutants in toxic amounts. Prospective applicants for a 402 permits shall be advised that the proposed discharge will be evaluated for compliance with the Act, in particular with Sections 101(a), 301, 303, 304, 307, 402, and 405 of the Act.

C. Determination of Permit

1. In enforcement cases, where a question arises under paragraph B.3 as to which permit would be required for a permitless discharge, the enforcing agency will determine whether the criteria in paragraph B.4 or B.5, if either, have been satisfied, with concurrence from the other agency. If the enforcing agency concludes that neither set of the criteria has been met and additional analysis is required to determine which Section applies, or if the necessary concurrence is not forthcoming promptly, the Division Engineer and the Regional Administrator (or designees) will consult and determine which permit program is applicable.
2. In non-enforcement situations, the agency receiving an application shall determine whether it meets the criteria in paragraphs 4 or 5, as the case may be. If the agency determines that the criteria applicable to its permit program have not been met, it will ask the other agency to determine whether the criteria for the latter's permit have been met. If neither agency determines that the criteria for its permit program have been met, the Division Engineer and the RA (or their designee) shall consult and determine which agency shall process the application in question.

D. Publication in the Federal Register

Since this Memorandum of Agreement clarifies the definition of fill material with respect to discharges of solid waste into waters of the United States, the parties in this agreement shall jointly publish it in the Federal Register within 45 days after it has been signed.

E. Effective Date

1. This agreement shall take effect 90 days after the date of the last signature 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.
2. This agreement automatically expires at such time as EPA has submitted its Report to Congress on the Results of Study of the Adequacy of the Existing Subtitle D Criteria and has published a Notice of Proposed Revisions to the Subtitle D Criteria in the Federal Register, unless the agencies mutually agree that extension of this agreement is needed.

Jennifer Joy Manson /s/
Assistant Administrator for External Affairs,
U.S. Environmental Protection Agency
January 22, 1986

Robert K. Dawson /s/
Assistant Secretary of the Army (Civil Works)
January 17, 1986

Larry Jensen /s/
Assistant Administrator for Water
U.S. Environmental Protection Agency
January 23, 1986