

Reference: RGL 86-05

Subject: INTERAGENCY AGREEMENT-GUIDANCE

**Title: IMPLEMENTATION OF SEC 404(q) MOAs WITH DOI, EPA, &
DOC**

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**Description: GUIDANCE ON 1985 MOAs INCLUDING FURTHER
NEGOTIATION, LOCAL PROCEDURES, FULL CONSIDERATION OF VIEWS,
COMMENT PERIOD, FORMAL NOTIFICATION, DIV ENG ROLE, AND
404(b)(1) GUIDELINES**

1. The Section 404(q) MOAs of 1985 were negotiated in a renewed spirit of agency cooperation. The agencies have agreed that permit decisions must be made effectively and efficiently. The district engineer is in charge of the decision making process. The MOAs provide additional assurances that EPA, DOI, and DOC comments will be given full and fair consideration.
2. Because MOAs were designed to assure the agencies that their concerns will be fully considered by the decision makers, the district and division commanders will be more personally involved in the regulatory process. Delegation of authority and duties below the officials named in the MOAs can be made only if so specified in the MOA.
3. MOAs have changes in paragraph 5. In the EPA MOA, a provision has been added to allow an elevation request (paragraph 7) if there is a "failure to resolve stated EPA concerns regarding compliance with the Section 404(b)(1) Guidelines." This should be regarded in the same spirit as the provision for "full consideration," as added to paragraph 5 of the DOI and DOC MOA. These additions are intended to assure the agencies that their views and recommendations are important and receive full and fair consideration. There has always been the need to consider EPA views about factors involved in determining 404(b)(1) compliance. However, the statutory responsibility for determining compliance with the guidelines clearly rests with the Corps of Engineers. A resolution, as called for in the MOA, may even be an "agreement to disagree" as has often occurred in the past. The provision for "full consideration" has always been required by our regulations and the Fish and Wildlife Coordination Act. Both of these additions are formal acknowledgement of existing steps in the process.
4. The MOAs no longer require the agencies to give an early signal regarding their intent to seek elevation. There is a new provision for informal consultation between the district

engineer and the FWS Field Supervisor, EPA Division Director, or the NMFS Division Director after the district engineer reaches a decision. The process is intended to provide a two-way communication opportunity. The district engineer should be able to give assurances that the other agency views have been fully understood and have been given full and fair consideration. The other agency should be able to provide any clarification of its views which it believes may not have been properly understood or fully considered. It is clearly not intended to be a further "negotiating" session. The term "negotiation" was expressly rejected in favor of "consultation" in order to connote information exchange rather than bargaining to modify the permit decision. However, on the basis of the consultation, if the district engineer determines that the other agency views had not been properly understood or given full and fair consideration, the permit decision should be reviewed in accordance with the clarified understanding of the other agency position. The same principle applies to the informal consultation between the Division Engineer and the Regional Director or Regional Administrator.

5. Some specific items in paragraph 6 should be noted.

a. The extension to 30 days of public notice comment periods less than 30 days is automatic upon request of the specified agency official. No specific mechanism for this request is required, but there should be assurances provided that the specified officials are involved in the extension request. With respect to extensions beyond 30 days, the MOAs are clear that the specified/official must provide a letter with reasons. The district engineer decides whether to extend the comment period and replies to the agency official by letter.

b. The informal Corps and agency field techniques or local procedures developed in response to paragraph 6 must provide a mechanism for the district engineer to notify the agencies that the Corps intends to issue a permit that is contrary to agency recommendations. The informal consultation process which follows that notification is described in paragraph 6 of the MOA and discussed in paragraph 4 above. The process should minimize higher level involvement. The locally developed coordination techniques should allow for termination of the paragraph 6 procedures if as a result of the informal coordination the other agency agrees that its views have been properly understood and have been given full and fair consideration. In such a case, there would be no reason to issue a formal Notice of Intent to Issue (NII) letter, but the agency objections may stay on record.

c. If the other agency requests that the applicant not be involved during informal consultation, the district engineer will honor that request. However, district engineers are encouraged to include applicants and must in any case consult with applicants if the informal consultation results in a reevaluation of the decision.

d. The second notification must be more formal because specific actions are triggered which have specific time limits. A phone call is not appropriate. Once the regional official asks for a delay of any NII, the officials specified must discuss (meeting/conference call) the application within 14 days of the request. If the discussions

are not held, the district engineer issues his NII or, if the jointly developed local procedures allow, terminates the coordination process. As a result of discussions which are held, the division engineer should determine whether the views of the other agency have been understood and have received full and fair consideration. If he determines that the other agency views have been understood and have received full and fair consideration, he should direct the district engineer to proceed with the NII, unless local procedures allow termination of the process. Should he determine to the contrary, he should direct the district engineer to review his decision in light of the clarified and full views of the other agency. In unusual cases, he may also request that the case be forwarded to division for decision pursuant to 33 CFR 325.8(b) (4).

6. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS: