DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON, D.C. 20314-1000

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CECW-CO

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS AND DISTRICT COMMANDS

SUBJECT: Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program

1. Purpose and Background:

a. The Standard Operating Procedures (SOPs) for the U.S. Army Corps of Engineers Regulatory Program provide a summary of current policies and procedures and should be used as day-to-day informal guidance by regulatory project managers as they implement the program. This document is responsive to changes, including new regulations, policy and guidance, that have occurred in the Regulatory Program since the first publication of this document in 1999. In addition, this document responds to Management/Internal Control requirements and also to an audit from the Government Accountability Office (GAO). In their audit, GAO requested that guidance be provided concerning the Corps' oversight of compensatory mitigation and therefore the SOP provides highlights of the mitigation rule found at 33 CFR Part 332.

b. The SOPs highlight existing policies and procedures to be used in reviewing applications for Department of the Army (DA) permits under Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act (RHA) of 1899, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972. It is not intended to be comprehensive or to replace or alter the implementing regulations for the U.S. Army Corps of Engineers Regulatory Program (33 CFR 320-332) or other official policy guidance. This document is intended to be used as a tool for project managers to provide clarification of regulations and to re-emphasize important aspects of the regulations and Regulatory Guidance Letters. Implementing regulations at 33 CFR Parts 320-332, the current Nationwide Permits and any other general permits in your districts should be provided as an attachment to this SOP for all incoming Project Managers.

c. The Regulatory Program has also seen recent changes dealing with program goals and performance measures. These changes were in response to the President's Management Initiative "Budget and Performance Integration" and the Program Assessment Rating Tool (PART) and are considered necessary to link program procedures, performance and results to budget. The Regulatory program is now being evaluated on eight performance measures, which include not only permit processing, but compliance efforts on permits and mitigation and enforcement. Another Regulatory SOP will provide guidance on the program goals and performance measures upon which the program is being evaluated. That SOP will also

incorporate the latest information on quarterly reporting requirements and database standards and procedures. Permit information tracking and the analysis of program statistics (permit decisions, jurisdictional determinations, evaluation times, etc.) is critical to measuring program performance, which is a factor in all budget decisions. That SOP will continue to change as the OMBIL Regulatory Module (ORM 2) and G-ORM (ORM with enhanced geographic information system capability) are implemented and modified.

2. Implementation:

a. This document is not intended to provide all-encompassing guidance for every aspect of the Regulatory Program. For example, for further explanation regarding jurisdictional determinations, project managers should refer to the "Jurisdictional Determination Instructional Guidebook" developed to aid field staff in making and documenting post-*Rapanos* jurisdictional determinations, as well as December 2, 2008, headquarters guidance titled "Revised Guidance on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States and Carabell v. United States" and Regulatory Guidance Letters 07-01 and 08-02. Further, the final compensatory mitigation rule (73 FR 19594) was published on April 10, 2008, and provides new and updated implementing regulations for the program, including 33 CFR Parts 325 and 332.

b. Many of the regulations, guidance documents, and related materials cited in this SOP can be found at the Headquarters regulatory home page at: http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx or the Regulatory Information Exchange (RIX) at: http://155.79.114.198/RIX/index.htm. As the program is constantly incorporating the best science and new policy, every Regulatory SOP is a living document that will be updated regularly. Expect to see periodic changes when program changes warrant.

3. POC for this action is Meg Gaffney-Smith at (202) 761-4663.

STEVEN L. STOCKTON, P.E.
Director of Civil Works

Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program

Introduction

Regulatory Program Goals

The Corps' Regulatory Program has developed program goals associated with the linkage between performance, budget and mission. These goals are critical to providing overarching guidance on where the program is heading and will be used to judge how we are doing.

Program Goals:

- **Protect the aquatic environment**
- **Enhance regulatory program efficiency**
- **Make fair, reasonable, and timely decisions**
- **Achieve No Net Loss of Aquatic Resources**

We are managing a program that includes permit processing, compliance, and enforcement. We must continue to balance development with environmental protection, especially protection of aquatic resources, always striving to find ways to make decisions on permit applications in a timely manner, while providing improved environmental review, documentation, predictability, and transparency to the public.

Public Service Commitment

In December 1994, the Corps Regulatory Program first issued its public service commitment, which has since been revised (May 2007):

"Public service is a public trust. We, as Corps Regulators, must earn this trust, and to keep this trust, we must conduct ourselves in a manner that reflects the following principles:

- Professional – We will conduct ourselves in a professional manner in dealings with all our customers, including applicants, agencies, stakeholders, interest groups and the general public.
- Fair and Reasonable – We will be open-minded, impartial, and consistent in our interactions with all our customers to ensure that all actions and decisions are free from bias and are not arbitrary or capricious. Customers will be treated equally and with respect.

- Knowledgeable – We will remain knowledgeable of applicable laws, regulations, and scientific and technical advances which affect our program.
- Honest – We will be truthful, straightforward, transparent, and candid in all dealings with our customers.
- Timely – We will strive to provide our customers with timely regulatory responses regardless of whether those responses are favorable or adverse.
- Accountable – We will be decisive in all actions and accept responsibility for any of our decisions and resultant consequences. All decisions will be factual and properly documented.

Standard Operating Procedures for the U.S. Army Corps of Engineers
Regulatory Program

This SOP focuses on current policies and procedures for administering a consistent program nationwide. Consistency with these procedures will be a factor in responding to division and district requests for additional resources.

1. Data Entry

- ***Information important for:***
  - ***Program performance***
  - ***Workload and budgeting***
  - ***Evaluation tools (e.g., geographic information systems and cumulative effects assessment)***

The purpose of maintaining an automated information system for the Regulatory Program is to accurately represent the status of regulatory actions and to report on program performance and workload. To achieve this, project managers are required to enter project information on a timely basis, as the review of the regulatory action proceeds. With few exceptions, data entry will be completed concurrent with the review, not after final signature on the permit document. Data entered in the automated information system will be used by MSCs for reporting district performance workload to headquarters for development of fiscal year allocations and budget requests. A separate SOP has been developed outlining proper data entry policies and methods in ORM2.

2. File Maintenance

- ***Organize files chronologically***
- ***Purge drafts and unnecessary documents***

The administrative record for projects should be organized chronologically once the district has made its decision on the action. The administrative record should include all documents and materials directly or indirectly considered by the decision-maker. It should include documents and materials that are pertinent to the merits of the decision, as well as those that are relevant to the decision making process. Use memoranda to the file to record important telephone conversations and meeting minutes. It is important to keep this information in the file, particularly if that information was used in the decision making process. All non-essential items not relevant to the decision-making process (e.g., personal notes, phone messages, e-mails not relevant to the final decision, old plans, draft documents, and duplicate documents) should be discarded. If keeping outdated plans or project descriptions in the administrative record is necessary, the plans and descriptions that were authorized by the issued permit should be clearly identified as "Permitted Plans." Files should be purged of unnecessary data/forms/notes to save on storage and to aid in future inquiries that might occur, such as a request for modification or a compliance investigation. Copies of readily available policy documents, guidelines, directives, and manuals utilized in the decision making process should not be provided in the record.

Proper file maintenance is critical should copies of the administrative record be required for such reasons including litigation, Freedom of Information Act requests, or

administrative appeals. District Counsel should be consulted to identify and redact/remove materials subject to privilege and prohibitions against disclosure.

3. Pre-application Meetings

- ***Corps determines need***
- ***Not for minor impact projects***
- ***Be candid with applicants***
- ***Conducted in person or virtually***
- ***Must be documented***

Pre-application meetings (see 33 CFR 325.1(b)), whether arranged by the Corps or requested by permit applicants, are encouraged to facilitate the review of many types of projects, including those that could have significant impacts on the human environment. Pre-application meetings can help streamline the permit process by alerting the applicant to potentially time-consuming concerns that are likely to arise during the evaluation of their project (e.g., compensatory mitigation requirements, historic properties, endangered species, essential fish habitat, dredging contaminated sediments). The district should document results of a pre-application meeting in the file for the project and complete appropriate data entry in ORM. General telephone calls from potential applicants or telephone calls with other agencies do not constitute pre-application meetings for the purposes of data collection and workload assessments.

4. Jurisdiction

The Secretary of the Army, acting through the U.S. Army Corps of Engineers (Corps), has authority to permit the discharge of dredged or fill material in waters of the U.S. under Section 404 of the Clean Water Act (CWA). The Corps also has authority to permit work and the placement of structures in navigable waters of the U.S. under Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA) (see 33 CFR 320.2).

- ***Navigable waters of the United States (Section 10 waters)***
- ***Waters of the United States (Section 404 waters)***
- ***Clean Water Act jurisdiction after SWANCC and Rapanos-Carabell***
- ***Identifying Regulated Discharges***

Navigable waters of the United States subject to regulation under the RHA are defined at 33 CFR Part 329. In the regulations, the term "navigable waters of the U.S." is defined to include all those waters that are subject to the ebb and flow of the tide, and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Waters of the United States subject to Corps jurisdiction under the CWA are defined at 33 CFR Part 328, as supplemented by guidance issued by the Army and EPA, after the Rapanos-Carabell[1] and SWANCC[2] U.S. Supreme Court Decisions. The latest Rapanos-Carabell guidance is the *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S.* dated December 2, 2008. The SWANCC guidance consists of Appendix A of the January 15, 2003, Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (68 FR 1991).

Implementation of the Rapanos-Carabell guidance usually requires identifying CWA traditional navigable waters (i.e., those waters subject to Clean Water Act jurisdiction under 33 CFR 328.3(a)(1)). The limits of CWA traditional navigable waters may extend beyond the reach of waters subject to regulation under the Rivers and Harbors Act. The revised Rapanos-Carabell guidance defines "traditional navigable waters" in footnote 20.

In the preamble to the November 13, 1986 rule (51 FR 41206, 41217), there is clarification regarding certain types of water bodies that are generally not considered to be "waters of the United States," although the Corps and EPA reserve the right to determine, on a case-by-case basis, that a particular water body is a water of the United States. Districts should consult more recent guidance, such as the Corps/EPA guidance issued in response to the SWANCC and Rapanos-Carabell U.S. Supreme Court decisions prior to making case-specific jurisdictional determinations for water bodies that fall into the categories listed on page 41217 of the preamble to the November 13, 1986 rule.

Districts will make case-by-case jurisdictional determinations, except when EPA declares a "special case" on either a case-specific or generic basis (see the January 18, 1989, "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act"). A special case is a circumstance where EPA makes the final determination of the geographic jurisdictional scope of waters of the United States for purposes of Section 404 of the Clean Water Act. EPA jurisdictional determinations cannot be appealed under the Corps' administrative appeal process at 33 CFR Part 331.

5. Wetland Delineations and Jurisdictional Determinations

- ***Respond to all JD requests in a timely manner***
- ***Advise public of regional procedures to conduct delineations via public notice***

Wetland delineations and jurisdictional determinations (JDs) are essential to timely and accurate processing of permit applications and evaluation of proposed activities in wetlands and other waters. Districts should advise the public of their regional delineation procedures with a public notice. When a landowner or other "affected party" (as defined at 33 CFR 331.2) requests that the Corps provide a JD, then, to the maximum extent practicable and consistent with district completion of other regulatory program responsibilities, the Corps should make every effort to complete that JD in a timely manner. Per RGL 08-02, it is the Corps' goal to process both preliminary JDs and approved JDs within 60 days. The Corps should strive to provide a timely JD regardless of whether or not the JD request accompanies a permit application or is submitted as an independent action. Please see RGL 08-02 for guidance concerning when to use preliminary JDs and approved JDs.

Additional information on conducting jurisdictional determinations is provided in RGL 07-01 and the January 28, 2008, Memorandum regarding the "Process for Coordinating Jurisdictional Determinations Conducted Pursuant to Section 404 of the Clean Water Act in Light of the *Rapanos* and *SWANCC* Supreme Court Decisions."

The HQ Approved JD Form has been developed to ensure that the basis (and rationale) for the JD is presented to satisfy this condition. Additional guidance on completing the form can be found in the JD Form Instructional Guidebook. The administrative record for the approved JD should include the completed JD Form and any supporting materials required to document the "basis of JD."

Districts should ensure that the notice of appeal process form and request for appeal form and associated cover letter are provided for approved jurisdictional determinations in accordance with the requirements set forth in 33 CFR Part 331 and RGL 06-01.

A permit applicant may choose to use a preliminary JD to voluntarily waive questions regarding CWA/RHA jurisdiction over a site, so that he or she can move ahead expeditiously to obtain a Corps permit authorization. Districts should use the preliminary JD form provided in Regulatory Guidance Letter 08-02 to document the preliminary JD in the Administrative Record. Under a preliminary JD, the applicant agrees that all waters on the site are jurisdictional for the purposes of determining authorized impacts and any compensatory mitigation requirements. A preliminary JD cannot be used to determine that there are no wetlands or other water bodies on a site (or within a review area). A definitive, official determination that there are, or that there are not, jurisdictional "waters of the United States" on a site can only be made through an approved JD. Preliminary JDs cannot be appealed.

6. Exemptions

Activities that are exempt from the permit requirements of Section 404 of the Clean Water Act are listed at 33 CFR 323.4. Activities that are exempt from the permit requirements of Section 10 of the Rivers and Harbors Act of 1899 are listed at 33 CFR 322.4. If temporary discharges of dredged or fill material into waters of the United States, such as cofferdams or temporary access roads, are necessary to conduct exempt activities, Section 404 authorization is needed for those temporary discharges.

Districts will make case-by-case determinations whether particular activities are exempt from requirements for DA permits, except when the EPA declares a "special 404(f) matter" on either a case-specific or generic basis (see the January 19, 1989, "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act"). A special 404(f) matter is a circumstance where EPA makes the final determination of the applicability of exemptions under Section 404(f) of the Clean Water Act. Any EPA final determination regarding jurisdiction, including applicability of exemptions, is not subject to the Corps appeal process.

- ***Corps determines exemptions (if no special case)***
- ***Exemptions do not allow conversions of waters to another use***
- ***Section 404 exemptions defined by EPA***
- ***Site-specific decisions made by Corps***

It is important to remember the 404(f)(1) exemptions differentiate between drainage

ditches and irrigation ditches (see 33 CFR 323.4(a)(3)). For drainage ditches, only maintenance is exempt. For irrigation ditches, both construction and maintenance are exempt. Further clarification on the use of the Section 404(f)(1) exemptions for ditches is provided in RGL 07-02.

The recapture provision under Section 404(f)(2) of the Clean Water Act provides exceptions to the 404(f)(1) exemptions. Those exemptions do not apply, and a section 404 permit is required, if the discharge of dredged or fill material into waters of the United States is part of an activity whose purpose is to convert an area of waters of the United States to a different use, where the flow or circulation of waters of the United States may be impaired or the reach of those waters reduced (see 33 CFR 323.4(c)). The recapture provision is a two-part test: purpose (conversion to a different use) and effect (impairment of circulation or flow, or reduction of reach). If the answers to both parts of the test are "yes," then a section 404 permit is required for the activity (see RGL 07-02). Exceptions must be carefully evaluated to ensure those activities are in fact exempt.

7. Forms of Permits

The Regulatory Program strives to make timely permit decisions while protecting the aquatic environment. Districts should evaluate permit applications using the least extensive and time consuming review process, while still providing protection for the aquatic environment. However, if an applicant proposing to conduct an activity authorized by a general permit specifically requests that the activity be evaluated under the individual permit procedures, instead of the general permit procedures, the district engineer should do so if the reasons cited by the applicant are adequate to support the request (i.e. any permitted work in waters of the U.S. could not be completed before expiration of the general permit under which the project was evaluated). This section describes the different processes used for evaluating applications for Department of the Army permits.

General Permits

General permits are authorizations that are issued on a nationwide, statewide, or regional basis for a category or categories of activities that are similar in nature and do not cause more than minimal individual and cumulative adverse environmental effects. General permits include nationwide permits (NWPs), regional general permits, and programmatic general permits.

- ***Use most efficient permit process (general permits/letters of permission) whenever possible***
- ***General permits must address endangered species/historic properties issues***
- ***Develop general permits for periodic emergencies***

Notification requirements are associated with many NWPs. In addition, regional notification requirements may be added as needed. Pre-construction notification may be required for certain nationwide permit activities before the permittee may begin work in waters of the U.S. Even if notification to the Corps is not required in association with an activity in waters of the United States, when communicating with applicants, the Corps

should advise the applicants they are still responsible for compliance with all applicable terms and conditions of the NWP that would authorize the work in jurisdictional waters.

The use of more than one nationwide permit to authorize a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the nationwide permits does not exceed the acreage limit of the nationwide permit with the highest specified acreage limit (see the nationwide permit general condition 24, "Use of Multiple Nationwide Permits"). An activity can be authorized by more than one general permit, if the activity is a single and complete project (see 33 CFR 330.2(i)), that will result in no more than minimal adverse environmental effects, and that will satisfy the terms and conditions of the applicable general permits.

A delineation of special aquatic sites is required for a complete nationwide permit pre-construction notification. The 45-day pre-construction notification review period will not begin until the delineation is received. The 45-day pre-construction notification period begins when the delineation and other required information is received, regardless of whether the Corps has verified the delineation or not.

Regional and programmatic general permits may be issued by a district or division engineer. Regional general permits can improve regulatory consistency and enhance program efficiency. Programmatic general permits are a type of general permit that can be used to avoid duplication with other agencies, such as state programs regulating discharges of dredged or fill material into wetlands, to simplify the permit process for the regulated public, while protecting the aquatic environment. Programmatic general permits can help districts direct their limited resources to permit applications that may have greater environmental impacts (see 33 CFR 325.5(c)(3)).

The discretionary authority process for general permits is discussed in Section 8 of this SOP.

Letters of Permission

Letters of permission (LOP) are a type of individual permit issued through an abbreviated processing procedure. The procedures and standards for issuing LOPs are developed after coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation. An LOP authorization can be issued without requesting public input via issuance of a public notice.

Standard Permits

A project that does not qualify for general permit or letter of permission authorization is to be reviewed through the standard permit process (see 33 CFR 325.5(b)(1)), which includes a public notice, public interest review, environmental documentation, and, if applicable, a Section 404(b)(1) Guidelines compliance analysis.

Emergency Procedures
Division engineers are authorized to approve special procedures in emergency situations (see 33 CFR 325.2(e)(4)). Each Division should develop emergency permit authorization procedures as well as essential points of contact. These procedures should be updated as needed. Procedures are to be provided to the Headquarters Operations and Regulatory Community of Practice as well as the division and district emergency management offices.

Additionally, division engineers may develop emergency procedures and implement them in the event that a district is not available due to an emergency. In this circumstance, these procedures should be coordinated with the Headquarters Regulatory Community of Practice. Divisions may consider designating another district within its division to process permit requests until the district adversely affected by the emergency circumstance is fully operational. Even in emergency situations, divisions or districts should make a reasonable effort to obtain comments from the involved Federal, Tribal, State, and local agencies, and from the public. In addition, after an emergency permit is issued, divisions or districts should publish a notice describing the action, the special procedures authorized, and the rationale for authorization.

In emergency situations, districts should also maximize, when appropriate, the use of exemptions or available nationwide, regional, or programmatic general permit authorizations. Some districts have developed regional general permits for emergency situations that the district believes will periodically recur. These regional general permits may provide a more efficient, predictable permit mechanism to deal with the emergency when it recurs, as well as an opportunity to efficiently coordinate with the involved agencies and the public. In any event, districts and divisions should establish procedures for the coordination of emergency permits whether or not regional general permits have been developed. See Section 17 of this SOP for Endangered Species Act consultation procedures in emergency situations. Section 19 of this SOP and 33 CFR part 325, Appendix C, discuss emergency procedures for National Historic Preservation Act compliance. Also see 40 CFR 1506.11 for addressing National Environmental Policy Act compliance in emergency situations.

8. Discretionary Authority

- ***Do not use discretionary authority just because the project is controversial***

Discretionary authority is a tool used to conduct more rigorous reviews of activities potentially eligible for a nationwide permit, but where potential adverse effects on the aquatic environment are more than minimal or there are concerns for any other factor of the public interest (see 33 CFR 330.4(e) and 33 CFR 330.5(c) and (d)). It is not necessary to exercise discretionary authority if the proposed activity does not comply with the terms and conditions of a nationwide permit (NWP); instead, the district should notify the project proponent that his or her proposal cannot be authorized as proposed under a NWP, and provide instructions on how to apply for authorization under an individual permit.

Provisions for asserting discretionary authority should be included in regional and programmatic general permits. Those provisions should be similar to the nationwide permit regulations regarding discretionary authority.

Regulatory project managers should carefully consider the need for asserting discretionary authority over a project that would otherwise qualify for authorization under a general permit. It is inappropriate to assert discretionary authority over a project merely because it is controversial (see 33 CFR 330.4(e)(2)). A regional general permit or nationwide permit authorization can be issued quickly and still provide environmental protection through effective permit conditioning. When discretionary authority is asserted, the administrative record should include documentation that clearly explains the Corps decision to require an individual permit for that activity.

It is important to exercise discretionary authority in a timely manner, so that it is not necessary to suspend or revoke a default nationwide permit authorization that occurs 45-days after a complete pre-construction notification is received. This principle also applies to regional general permits that have pre-construction notification time constraints.

9. Complete Application

Individual Permits. The information needed for a complete individual permit application is listed in 33 CFR 325.1(d)(1)-(10). The application must include a complete description of the proposed activity. The application must include all proposed activities that are reasonably related to the same project and that require a permit in the same permit application. An application is complete when sufficient information is received to issue a public notice (see 33 CFR 325.1(d)(10) and 325.3(a)). The regulatory project manager will contact the applicant within 15 days if additional information is necessary for a complete application and clearly define information needed to issue the public notice. While districts can encourage permit applicants to provide additional supplemental information to facilitate the review of permit applications, such as a draft alternatives analysis and detailed mitigation plans, these items are not required and the issuance of public notices must not be delayed if these items are not provided. While additional information may be needed to complete the public interest review or other evaluations for the project (e.g., an alternatives analysis under the 404(b)(1) Guidelines, a biological assessment for Endangered Species Act consultation, sediment evaluations), only that information required by 33 CFR 325.1(d) is required for a complete individual permit application. If an applicant provides, with the permit application, an alternatives analysis or a detailed mitigation proposal, brief summaries of that information should be included in the public notice to facilitate public and agency review of the proposed work.

- ***Refer to 33 CFR 325.1(d)***
- ***15 days to request information***
- ***15 days to publish a PN***

General Permits. For nationwide permits, the requirements for a complete pre-construction notification are listed in the "Notification" general condition. Similar conditions should be incorporated into regional and programmatic general permits, so that prospective permittees can understand what information they need to submit to the

district when requesting verification that their projects qualify for authorization under those general permits.

10. Public Notices

- ***Refer to 33 CFR 325.3(a)***
- ***Include required information***
- ***No environmental assessments or other extraneous information***

The information that must be provided in a public notice is defined in 33 CFR 325.3(a). The public notice should contain a concise description of the project, the overall project purpose, and its anticipated impacts on the aquatic environment. It should contain the minimum number of exhibits needed to adequately illustrate the project plan. The public notice should be the smallest number of pages necessary, to minimize printing and mailing costs (see RGL 88-01). To improve efficiency and reduce costs, districts will make full use of electronic mailings to distribute public notices. Districts should coordinate via public notice, prior to removing anyone from established mailing lists. Current public notices should be available on the district's Regulatory website.

A permit applicant is not required to provide an alternatives analysis for the public notice. If the applicant provides that information with the permit application, then a brief summary of the alternatives analysis should be included in the public notice, to help generate meaningful comments. Districts should not publish an environmental assessment in a public notice. Inclusion of an environmental assessment in a public notice is not required by the regulations, and does not represent prudent use of resources, since an environmental assessment must be completed once public comments and the applicant's responses to those comments are received by the Corps.

The public notice should include a mitigation statement (33 CFR 332.4(b)(1)). Also, the public notice should include a preliminary statement on the project's potential effects on resources protected under the Endangered Species Act, and the National Historic Preservation Act, and, if applicable, the Magnuson-Stevens Fishery Conservation and Management Act (i.e., essential fish habitat). Public notices are insufficient means to initiate government-to-government consultation with Indian tribes (see section 19 of this SOP).

The public notice comment period should be no more than 30 days, with potential for a 30 day extension, if warranted, and not less than 15 days (33 CFR 325.2(d)(2)). Districts should carefully consider all requests for a time extension of the public notice comment period, whether the request comes from an agency or from a private individual. These requests must be received prior to the expiration of the public notice and must contain sufficient justification for the time extension. Districts should not issue recurring extensions for resource agency workload issues provided that the comment period is at least 30 days.

If the applicant substantially modifies the project so that either the project or its reasonably foreseeable impacts to the aquatic environment are substantially different from those described in the original public notice, then a new public notice may be

appropriate or necessary for proper evaluation of the proposal. Significant increases in the scope of a proposed activity should be processed as a new application in accordance with 33 CFR 325.2 (see 33 CFR 325.7(a)). If project impacts are similar to or less than the original submittal (e.g., if expected impacts are reduced as a result of modifications to the project through efforts to avoid and minimize a proposed project's adverse effects), as a general rule the district should proceed with a decision without issuing another public notice.

If an applicant withdraws an application for which the district engineer has issued a public notice but has not made a final decision on the application, then a new public notice will not necessarily be issued if the applicant reapplies, so long as the re-submitted application is essentially for the same work to be conducted under the same conditions and is submitted within a reasonable period of time (generally 6 months, but the district engineer has discretion to consider longer periods of time) and provided that the public has had sufficient opportunity to comment during the previous public notice period.

Districts must also provide opportunity for public comment by advertising notices for Public Hearings (33 CFR 327.11), proposed Class I Administrative penalties (33 CFR 326.6(c)), proposed mitigation banks and in-lieu fee programs (33 CFR 332.8), and for draft and/or final Environmental Impact Statements (40 CFR 1506.6). In addition, when substantial changes are made to the regulatory program because of new policy or regulations, the public should be advised of these changes with the issuance of a Public Notice.

11. Internal Coordination

- ***Conduct routine, cost - effective coordination with other Corps elements***

Public notices and general permit pre-construction notifications should routinely be coordinated with other district elements (e.g., Operations, Engineering, or Planning) to determine if the proposed action could affect an authorized Federal project (e.g., Corps recreation areas, flood control, or navigation projects). Other district elements should only be notified of projects near or potentially affecting authorized Federal projects or Federal resources. Although the district element contacted may not have any concerns, it may be able to provide advice regarding other parties interested in the proposed work (e.g., marine trade groups, recreation associations). However, the district Regulatory Chief should ensure that any added cost of this coordination is both legitimate and reasonable. Not all internal coordination should be funded from General Regulatory Funds. For example, other district elements should use project funds to determine if a proposed action that is the subject of a permit application could affect a Federal project. Regulatory project managers should consider using district expertise to facilitate identification and evaluation of impacts such as historic resources and local hydrology.

12. Project Purpose

- ***Basic project purpose used for water dependency***
- ***Overall project purpose used for alternatives analysis***
- ***Corps defines each purpose***

Defining the project purpose is critical to the evaluation of any project and in evaluating project compliance with the Section 404(b)(1) Guidelines. Defining the basic project purpose enables the Corps to determine if the activity is water dependent (see 40 CFR 230.10(a)(3)). The overall project purpose is used to identify and evaluate practicable alternatives (see 40 CFR 230.10(a)(2)). Decision documents should clearly define the basic and overall project purpose for each activity requiring a section 404 permit.

Basic Project Purpose and Water Dependency

The district is responsible for defining the basic project purpose. The basic purpose of the project must be known to determine if a given project is "water dependent" and requires access or proximity to, or siting within, a special aquatic site in order to fulfill its basic purpose. For example, the basic project purpose of any residential development is to provide housing for people. Houses do not require access or proximity to a special aquatic site and they do not have to be located in a special aquatic site to fulfill their basic purpose of housing people. Therefore, a residential development is not water dependent. If a project is not water dependent, alternatives that do not involve impacts to special aquatic sites are presumed to be available to the applicant, unless it is clearly demonstrated that such alternatives are not available (see 40 CFR 230.10(a)(3)). An activity that is not water dependent may still be authorized, as long as the 404(b)(1) Guidelines presumption against such discharges is successfully rebutted, the discharge meets the other criteria of the 404(b)(1) Guidelines, the activity is not contrary to the public interest, and it satisfies all other statutory and regulatory requirements.

Overall Project Purpose and Alternatives Analysis

The overall project purpose is used to evaluate less environmentally damaging practicable alternatives. The 404(b)(1) Guidelines state that an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes (40 CFR 230.10(a)(2)). This evaluation applies to all waters of the United States, not just special aquatic sites. Defining the overall project purpose is the district's responsibility. However, the applicant's needs and the type of project being proposed should be considered. The overall project purpose should be specific enough to define the applicant's needs, but not so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines.

Purpose and Need

Defining purpose and need is discussed in Section 9(b)(4) of Appendix B to 33 CFR part 325, as well as the Council on Environmental Quality's regulations at 40 CFR 1502.13. The district should use a reasonably and objectively formulated and stated project purpose, after taking into account the "purpose and need" provided by the applicant. The district should not allow the applicant to improperly limit the project's "purpose and

need", because a reasonably defined purpose and need is needed to conduct the alternatives analysis.

For transportation projects, guidance for the lead federal agency to define "purpose and need" for environmental impact statements was provided by the Council on Environmental Quality in a letter dated May 12, 2003. The guidance states that joint lead or cooperating agencies should afford substantial deference to the Department of Transportation's articulation of purpose and need for NEPA purposes and encourages lead and cooperating agencies to work together to develop acceptable joint statements which satisfy all applicable statutes. For interstate natural gas pipeline projects authorized by the Federal Energy Regulatory Commission, the Corps is to "give deference, to the maximum extent allowable by law, to the project purpose, project need, and project alternatives that FERC determines to be appropriate for the project." (See "Memorandum of Understanding between the Army Corps of Engineers and the Federal Energy Regulatory Commission for Interstate Natural Gas Pipeline Projects" dated July 11, 2005.)

13. Scope of Analysis

- ***Corps determines scope***
- ***Use 33 CFR 325, Appendix B***

The scope of analysis for the Regulatory Program has two distinct elements: determining the Corps Federal action area, and how the district will evaluate direct and indirect (secondary) adverse environmental effects. The district determines the Corps' area of responsibility under 33 CFR 325 Appendix B. For the purposes of the National Environmental Policy Act (NEPA), the scope of analysis should be limited to the specific activity requiring a Department of the Army permit and any additional portions of the entire project over which there is sufficient Federal control and responsibility to warrant NEPA review. Factors to consider in determining whether sufficient "control and responsibility" exist include: 1) whether or not the regulated activity comprises "merely a link" in a corridor type project (e. g., a transportation or utility transmission project); 2) whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity; 3) the extent to which the entire project will be within Corps jurisdiction; and 4) the extent of cumulative Federal control and responsibility.

Generally, the Corps' area of responsibility includes all waters of the United States, as well as any additional areas of non-jurisdictional waters or uplands where the district determines there is adequate Federal control and responsibility to justify including those areas within the Corps' NEPA scope of analysis. The Corps' area of responsibility for purposes of the Corps' NEPA scope of analysis normally includes upland areas in the immediate vicinity of the waters of the United States where the regulated activity occurs. For example, the Corps' NEPA area of responsibility for a road crossing to uplands for a residential development is normally limited to the road crossing of waters of the United States and the upland area in the immediate vicinity of the road crossing. In another example of a residential development, where there is not only the road crossing, but also considerable additional impacts to waters within the boundaries of the residential

development (such as interior road crossings, house fills, stormwater control berms/dams, etc.), then the Corps' area of responsibility might be the whole residential development. Under most circumstances, dredged material disposal sites, borrow areas used to provide fill material for the regulated activity, and compensatory mitigation areas should also be included in the Corps' area of responsibility and evaluated for compliance with applicable laws and regulations.

The district must consider the direct and indirect effects of the proposed project needing the Corps' permit authorization (see Council on Environmental Quality regulations at 40 CFR 1508.8). A direct effect is caused by the activity needing the Corps' permit authorization, which occurs at the same time and place (e.g., the direct effects of dam construction include the loss of habitat in the dam footprint). Indirect effects are those caused by the activity needing the Corps permit authorization, but which take place later in time or farther removed in distance (e.g., the indirect effects of dam construction include the inundation of the area behind the dam, and habitat and/or fisheries impacts downstream of the dam associated with hydroperiod changes). The regulations that implement Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act, respectively, also address the subject of direct, indirect, and cumulative effects, using approaches different from the Corps' NEPA scope of analysis. The district should evaluate all of these categories of potential impacts and make final permit decisions and, to the extent appropriate, mitigation decisions based on this evaluation.

14. Permit Application Evaluation

- ***Corps determines what is relevant***
- ***No duplicate requests for information***
- ***Corps determines when information is sufficient for decision***

The Corps administers its Regulatory Program and is responsible and accountable for all aspects of its implementation, as well as the quality and efficiency of its administration. This is particularly true for projects that generate considerable controversy and/or comments from Federal, Tribal, State, and local resource agencies and the public. The Corps Regulatory Program does not rely on reaching consensus, but relies on gathering sufficient information to support and make its decisions. The Corps determines the project purpose, the extent of the alternatives analysis, determination of which alternatives are practicable, the least environmentally damaging practicable alternative, the amount and type of mitigation that is to be required, and all other aspects of the decision making process. Once the appropriate information is gathered, the Corps must move in a timely manner to make a decision. The Corps is solely responsible for reaching a decision on the merits of any permit application (see 33 CFR 325.2(a)(3)). The Corps decides what is relevant in evaluating projects. This responsibility cannot be transferred to another agency or the public. Additional coordination after the close of the public notice period should focus on substantive issues in the Corps area of responsibility, be managed by the regulatory project manager and be concluded as soon as is practicable.

Evaluating the Public Notice Comments
Evaluating public notice comments can be one of the more difficult and time-consuming tasks associated with completing evaluation of an application. The issues raised in comment letters can vary widely, and may or may not be relevant to the Corps scope of analysis, or to the public interest factors. The farther an issue is removed from the Corps' area of responsibility or from its public interest review factors (e.g., water quality, wetlands, endangered species, economics, navigable waters, historic resources, fish and wildlife values, consideration of property ownership), the less weight it will have in the decision making process. The level of importance each issue receives in the decision process should be proportional to its association with the regulated activity. Not all issues are equally important; the focus should be on the major issues that form the basis for the district's final permit decision. Consider comments from other Federal, Tribal, and State agencies carefully, keeping in mind that these comments presumably reflect the mandated interests of that agency and should be focused on the agencies' expertise (e.g., fish and wildlife values from the U.S. Fish and Wildlife Service). Comments that are unrelated to the Corps' regulatory authority can be grouped together, and briefly discussed in the decision document, with emphasis that they are beyond the scope of Corps review. Remember, it is the district's responsibility to establish a point in the evaluation process when there is sufficient information on the major issues to proceed with a decision. Individually received comments will be individually acknowledged, as appropriate, and the acknowledgment may be done in the same form (e.g., acknowledging an e-mail comment by sending an e-mail) (see 33 CFR 325.2(a)(3)) and RGL 86-11).

Coordinating Public Notice Comments with the Applicant
The district may seek the views of the applicant on a particular issue raised through the public notice process to make a public interest determination (see 33 CFR 325.2(a)(3)). Other substantive comments will also be furnished to the applicant, and the applicant may choose to contact objectors to attempt to resolve issues.

In a letter to the applicant, the district will summarize the comments raised in response to the public notice and clearly identify those issues that the applicant must address. The letter will also clearly identify any additional information the district needs to make a decision on the permit application. A request for additional information should be clear and directed at resolving specific issues, and regulatory project managers should strive to make a single request for additional information to resolve issues raised during the review process. This letter is also a good opportunity to reiterate program requirements. If agency comments have identified special conditions that need to be included in the permit to ensure compliance with Section 401 of the Clean Water Act, the letter should also inform the applicant of those special conditions. The letter should not be delayed if special conditions have not yet been developed.

Evaluating the Applicant's Response
It is the Corps' responsibility to determine the adequacy of the applicant's responses. If the applicant's responses do not adequately address the issues, the regulatory project manager must respond accordingly and in a timely manner. A telephone call can

generally suffice for one or two deficiencies; however, a letter reiterating the unresolved issues should follow for more controversial applications. The regulatory project manager should clearly articulate what information is required and the questions that need to be answered. The regulatory project manager must not bargain with the applicant about the type of information needed, or the nature of the response. Applicants are responsible for providing all information that the district determines is essential for making the decision on the permit application (see 33 CFR 325.1(e)). There may be situations, however, based on the applicant's capabilities and/or the ease with which the district or another agency could provide the needed information, where it would be appropriate for the district or other agency to provide the essential information on behalf of the applicant.

If necessary, the applicant is to be advised that if the required information is not provided, the permit application will be withdrawn or the district will take a final action on the application based on the information that is available, which may include permit denial. If the applicant asks for additional time to complete the response, the request should normally be granted. Should the applicant's response generate additional substantial concerns or questions, the regulatory project manager may request additional information from the applicant, and re-coordinate the project with interested agencies. However, the district should not revisit issues that it believes the applicant has addressed adequately unless new information is presented that would lead the district to believe that the previously submitted information is no longer valid or sufficient. The Corps determines when there is sufficient information to make a permit decision.

Compliance with the Section 404(b)(1) Guidelines (40 CFR part 230)
The Section 404(b)(1) Guidelines are mandatory criteria used for evaluating discharges of dredged or fill material into waters of the United States. Evaluation of compliance with the 404(b)(1) Guidelines is not required for Section 10 activities only, including dredging and/or placement of structures in Section 10 waters.

A project specific determination of compliance with the 404(b)(1) Guidelines is not required for general permits because this analysis is completed as part of the development and approval of the general permit.

Although all requirements in 40 CFR 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse effects on the aquatic ecosystem. The regulatory project manager should first determine whether adverse effects on the aquatic ecosystem can be avoided, then whether potential practicable alternatives would result in less adverse effects on the aquatic ecosystem. Proposed compensatory mitigation is not considered during the evaluation of potentially practicable alternatives and mitigation may not be considered in lieu of impact avoidance and minimization. Those alternatives that do not result in less adverse effects may be eliminated from the analysis since section 230.10(a) of the 404(b)(1) Guidelines only prohibits discharges when a practicable alternative exists that would have less adverse effects on the environment, so long as the alternative does not have other significant adverse environmental consequences. This includes consideration of impacts of the

proposed project and alternatives on aquatic ecosystems, and consideration of other environmental consequences, such as impacts to significant uplands ecosystems.

Alternatives Analysis

The district should formulate the project's purpose and need reasonably, and then evaluate those practicable alternatives available to the applicant that would meet the purpose and need. As the Section 404(b)(1) Guidelines state: "If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered." (40 CFR 230.10(a)(2)).

It is also sometimes necessary, under NEPA, to analyze reasonable alternatives beyond the applicant's capability in order to make an informed public interest decision. Those alternatives that are not available to the applicant should normally be included in the category of "no-Federal-action alternative" (i.e., denial). The "no Federal action alternative" should be considered to the extent necessary for a complete and objective evaluation of the public interest and to make a fully informed decision on the permit application (see section 9(b)(5)(a) of 33 CFR 325, Appendix B).

The level of analysis required for determining which alternatives are practicable will vary depending on the type of project proposed. Under the 404(b)(1) Guidelines, the only alternatives that need to be considered are practicable alternatives. In addition, a practicable alternative must be capable of achieving the overall project purpose, as reasonably and objectively determined by the Corps. Under the 404(b)(1) Guidelines, if an alternative is unreasonably expensive to the applicant that alternative is not considered to be practicable (45 FR 85343).

Districts should not conduct or document separate alternatives analyses for NEPA and the 404(b)(1) Guidelines. The fundamental difference between alternatives analyses for NEPA and the 404(b)(1) Guidelines is that under NEPA, alternatives that are not available to the applicant may be considered. If such an analysis is conducted, simply document the findings in the appropriate section in the combined alternatives discussion.

Other Federal agencies (e.g., Federal Highway Administration, Federal Energy Regulatory Commission) routinely prepare NEPA documentation, containing alternatives analyses, for projects that also require Corps permits. Districts should strive to communicate the 404(b)(1) Guidelines alternatives analysis requirements to the lead Federal agency to enable that agency to conduct an analysis of alternatives that will satisfy the 404(b)(1) Guidelines requirements and avoid the need for the district to conduct a separate analysis. For example, the Federal Highways Administration or the State Department of Transportation prepares NEPA documents to analyze alternative corridor alignments for new highways. To the extent that any of these proposed alignments involve waters of the United States and require a standard permit, the NEPA document should incorporate the 404(b)(1) Guidelines alternatives analysis requirements into the analysis of corridor alternatives.

Determination of cumulative impacts (40 CFR 230.11 (g) and 40 CFR 1508.7):
A cumulative impact analysis (CIA) is required pursuant to NEPA and the Section 404(b)(1) Guidelines. Under NEPA, an analysis of cumulative effects requires consideration of the impact on the environment which results from the incremental impact of the activity when added to other past, present, and reasonably foreseeable future actions (see 40 CFR 1508.7). Establishing appropriate geographic and temporal boundaries is important for effective cumulative effects analyses (see Chapter 2 of the Council on Environmental Quality's "Considering Cumulative Effects Under the National Policy Act" dated January 1997). These boundaries are dependent on the types of resources that may be affected by the activity. The cumulative effects analysis should consider only those past actions that have continuing, additive, and significant relationships to the effects of the proposed action and its alternatives (see the Council on Environmental Quality's "Guidance on the Consideration of Past Actions in Cumulative Effects Analysis" dated June 24, 2005). Federal agencies have substantial discretion as to which past actions to consider in its cumulative effects analyses. In addition, the cumulative effects analysis should focus on aggregate effects of relevant past actions, rather than details of the individual past actions. Regulatory project managers should identify the present effects of past actions that warrant consideration, and then assess the extent to which the effects of the proposed activity will add to, modify, or mitigate those effects. Regarding incomplete and unavailable information that is relevant to reasonably foreseeable significant adverse impacts, factors such as the overall costs of obtaining that information must be considered (see also 40 CFR 1502.22).

General Policies for Evaluating Permit Applications (33 CFR Part 320.4)
The public interest determination involves more than an evaluation of impacts to the aquatic environment. Once the project has been determined to comply with the 404(b)(1) Guidelines, the project must also be evaluated to ensure that it is not contrary to the public interest. There are 20 public interest factors listed in 33 CFR 320.4(a)(1). A project may have an adverse effect, a beneficial effect, a negligible effect, or no effect on any or all of these factors. The district must evaluate the project in light of these factors, other relevant public interest factors, and the interests of the applicant to determine the overall balance of the project with respect to the public interest.

The public interest review is a balancing test by the Corps of the foreseeable benefits and detriments of proposed projects on an individual and cumulative basis. The following general criteria of the public interest review must be considered in the evaluation of every permit application (see 33 CFR 320.4(a)(2)):

i. The relative extent of the public and private need for the proposed structure or work.

ii. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work.

iii. The extent and permanence of the beneficial and/or detrimental effect(s) that the proposed structure or work is likely to have on the public and private uses to which the area is suited.

The decision whether to issue or deny the permit is determined by the outcome of this evaluation. The specific weight each factor is given is determined by its relevance to the particular proposal. It is important to remember that the Corps can perform an alternatives analysis, and may require compensatory mitigation, or other conditions to address environmental impacts for all permits, including section 10 permits. For each application, a permit will be granted unless the district engineer makes any of the following determinations: (1) the activity would be contrary to the public interest, and/or (2) if a section 404 permit is required, the activity does not comply with the 404(b)(1) Guidelines, and/or (3) the activity does not comply with any applicable legal requirements cited at 33 CFR 320.2 and 320.3.

Environmental Impact Statement

The Corps determines if an Environmental Impact Statement is required for an individual permit application. An Environmental Impact Statement should only be prepared when it is legally required; that is, when the district concludes that the proposal would significantly adversely affect the quality of the human environment after consideration of any mitigation the Corps would require. The Council on Environmental Quality's (CEQ) Forty Most Asked Questions Concerning CEQ NEPA Regulations, and numerous decisions of the Federal Courts, support the Corps approach of preparing Findings of No Significant Impact (FONSIs) based on requiring mitigation measures that will ensure that adverse environmental effects of a proposal will be reduced below the "significant" level, where that approach is practicable and appropriate. The determination of significance of potential adverse effects is done after considering all mitigation measures that will be required by the terms and conditions of the Corps permit.

Lead Federal Agencies and Concurrent Reviews

The Corps Regulatory Program supports efforts to improve coordination for projects that also require the approval of other federal agencies. For regulated activities that require other federal approvals, districts should conduct concurrent reviews with those other federal agencies when it is practicable to do so. When another federal agency other than the Corps has authority over the activity, a determination of lead federal agency must be made. The lead federal agency should be the federal agency with greater jurisdiction. Concurrent review can also be accomplished by coordinating the issuance of the Corps public notice with the lead federal agency, but districts are still responsible for complying with the requirement to issue a public notice within 15 days of receipt of a complete permit application (see 33 CFR 325.2(d)).. The lead federal agency will be responsible for documenting compliance with Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act. The Corps should not be undertaking determinations of compliance with Section 7 and Section 106 for other federal agencies that have greater jurisdiction. The Corps remains responsible for compliance with all other applicable regulations that implement the regulatory program.

It is important to note that per the implementing regulations of NEPA at 40 CFR 1501.6, upon request of the lead agency, any Federal agency with jurisdiction by law, such as the Corps within our Regulatory program, shall be a cooperating agency.

15. Public Hearings

- ***Held at discretion of the district engineer***
- ***Public meetings more informal***

Public hearings are held at the discretion of the district engineer when a hearing would provide additional information that is necessary for a thorough evaluation of pertinent issues but is not otherwise available. Districts often receive numerous requests for public hearings, especially in connection with controversial projects with high public visibility. District engineers generally will grant requests for public hearings if the issues raised are substantial or there is a valid interest to be served by a hearing. When evaluating the need for a public hearing the Districts should consider: (1) the extent to which the issues identified in conjunction with a request for a public hearing are consistent with the Corps need to make its 404(b)(1) Guidelines and public interest determinations (i.e., the extent to which the issues are within the Corps scope of analysis); (2) the extent to which the issues identified in conjunction with a request for a public hearing represent information not otherwise available to the Corps; and (3) whether the issues identified are already addressed by comments submitted in response to the public notice. District engineers are to determine, in writing, whether or not a public hearing will be held, and to notify all requesting parties of that determination (see 33 CFR 327.4(b)).

Districts should also consider alternate means of obtaining necessary information, such as public meetings or workshops to help gather information to make permit decisions. These are more informal and less expensive forums that can provide a more effective interaction with the public than public hearings. Districts may also use information gathered from public meetings held by other agencies or entities to assist in decision-making.

16. Section 401 Water Quality Certification and Coastal Zone Management Act Consistency

- ***Water quality certification normally required only for section 404 activities***
- ***Water quality certification/Coastal Zone Management Act consistency determination conditions are not appealable***

Section 401(a)(1) of the Clean Water Act requires a water quality certification or waiver before any Federal permit can be issued "to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge." The Clean Water Act further defines a "discharge" (see Section 502(16)) to include a "discharge of a pollutant" (which is defined at Section 502(12)). The certifying agency determines whether a specific discharge resulting from an activity (e.g., dredging) that requires a Federal permit or license needs a water quality certification (see below). Section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA) requires that any request for a Federal permit to conduct an activity that affects any land or water use or natural resource of the coastal zone, be accompanied by a

certification that the proposed activity complies with the enforceable policies of the state's approved coastal zone management program and that the proposed activity will be conducted in a manner consistent with that program.

Agency Responsibilities

The maximum amount of time allowed by statute for a water quality certification agency to reach a decision is one year (see 33 CFR 325.2(b)(1)(ii)). The maximum amount of time by statute for a coastal zone consistency certifying agency to reach a decision is six months (see 33 CFR 325.2(b)(2)(ii)). For nationwide permits where water quality certification or CZMA concurrence has been denied, the date of the provisional nationwide permit verification generally identifies the date from which the agencies have to provide case-specific water quality certification or CZMA concurrence. In the interest of expediting the review of permit applications, districts are encouraged to establish deadlines for reaching certification or issuing/assuming waiver of certification with the appropriate agencies. The recommended deadlines are 60 days for water quality certifications (see 33 CFR 325.2(b)(1)(ii)) and six months for CZMA consistency determinations (see 33 CFR 325.2(b)(2)(ii)).

For water quality certifications, local agreements between the district and the certifying agency may be established to presume waivers of water quality certification for certain actions or non-actions (see RGL 87-03 and 33 CFR 325.2(1)(2)(ii)).

Conditions

The Corps should work closely and cooperatively with the certifying agencies to develop reasonable water quality certification and CZMA concurrence conditions for both individual and general permits. For the nationwide permits, the division engineer is responsible for determining, on a generic basis, whether water quality certification or CZMA concurrence conditions are acceptable and comply with the provisions of 33 CFR 325.4; if they are not, then they are to be treated as a denial without prejudice and permittees will be required to obtain individual water quality certifications or CZMA concurrences (see RGL 92-04).

For activities that require water quality certification and/or CZMA consistency determinations, all special conditions of the water quality certification and CZMA consistency determination must be incorporated into the DA permit. The incorporation of water quality certification and CZMA conditions is a necessary part of the Corps permit program, although these conditions are subject to discretionary enforcement by the Corps. Some conditions of a State CZMA consistency determination or water quality certification may not be reasonably enforceable by the Corps (e.g., a condition requiring compliance with the specific terms of another State or local permit).

A copy of the water quality certification and CZMA consistency determination must be attached to the permit. Neither water quality certification conditions nor CZMA consistency conditions may be appealed pursuant to the administrative appeals process at 33 CFR part 331 (see 33 CFR 331.5(b)(4)).

The Corps may issue provisional permits or general permit verifications pending the receipt of water quality certification or Coastal Zone Management Act consistency concurrence or presumption of concurrence.

Section 10 Activities and Section 401 Water Quality Certification
An activity needing only a Section 10 permit may require a Section 401 water quality certification, if that activity can reasonably be expected to result in any discharge, either during construction or operation of the facility. Thus, the State has the discretion to require a water quality certification for a section 10 activity, if the state determines that the activity is likely to result in a discharge, during construction or operation. For example, a state can require a section 401 water quality certification for a Section 10 permit for a proposed pier to be used for the loading or unloading of oil tankers, because of the possibility of oil spills from that pier. The Corps will advise a section 10 permit applicant that he may need a water quality certification if there is a reasonable expectation that a discharge will occur either during the construction or operation of the project. If the State issues a water quality certification for a section 10-only activity, those conditions become part of the DA permit.

17. Endangered Species Act

- ***Lead Federal agency is responsible for Section 7 consultation***
- ***Corps makes "may affect" determination***

Section 7(a)(2) of the Endangered Species Act requires Federal agencies to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any Federally listed species or result in the destruction or adverse modification of designated critical habitat. If another federal agency other than the Corps has been designated as the lead federal agency for the activity, that agency is responsible for conducting Section 7 consultation. If a threatened or endangered species or its designated critical habitat is present, it is the lead federal agency's responsibility to determine whether or not the proposed project may have an effect on the species or its designated critical habitat.

If the district determines there would be no effect on a listed species or designated critical habitat, consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (collectively referred to as the Services) is not required. The rationale for this determination must be clearly stated in the decision document. Documentation for compliance with ESA should be completed for all individual permits and general permits.

Informal Consultation
The district may pursue informal consultation pursuant to 50 CFR 402.13 where an initial determination is made that the project is not likely to adversely affect a listed species or adversely modify designated critical habitat. If informal consultation is pursued, the district will provide to the Service a detailed project description, potential effects of the project, and conditions the Corps would require to reduce or remove adverse effects to listed species or designated critical habitat. A biological assessment is not required to initiate informal consultation. During informal consultation, the Service may suggest

modifications to the proposed activity that the Corps and applicant could implement (e.g. minimization measures required and enforced with special conditions) to avoid the likelihood of adverse effects to listed species or designated critical habitat.

If the Service concurs that the project is not likely to adversely affect the species or its designated critical habitat, and if their concurrence is based on conditions proposed by the district or the applicant, these conditions must be included as conditions of the Corps permit. The rationale for the Corps' determination as well as the conclusion of informal consultation must be clearly stated in the decision document (see 33 CFR 325.2(b)(5)).

Formal Consultation

Formal consultation with the Services must be initiated when a project may affect a listed species or designated critical habitat, except in cases where informal consultation is completed. Districts are encouraged to develop programmatic formal consultations to provide for more timely permit decisions in association with projects that may be small in nature but require formal consultation due to ESA concerns. A biological assessment is required for major construction activities that will have a significant effect on the quality of the human environment (i.e., those activities that require the preparation of an environmental impact statement) (see 50 CFR 402.02). The required content for a biological assessment is described at 50 CFR 402.12(f). In most instances, the applicant will prepare the biological assessment (in collaboration with the district and the Services) and the district will review it to insure the information is complete and provides best scientific and commercially available data.

In cases where a biological assessment is not required, the written request for formal consultation must include the information listed at 50 CFR 402.14(c). The extent and level of detail of the information will vary with the degree of effects from the proposed project. It is the district's responsibility to decide whether the best scientific and commercially available data has been provided to the Service(s) for an adequate review of the effects of the proposed project during formal consultation. Early coordination can improve the efficiency of formal consultation.

The ultimate responsibility for compliance with Section 7 remains with the Corps. However, applicants should be encouraged to provide the information necessary for formal consultation.

The district will initiate formal consultation with the Services within 15 days of receipt of a complete biological assessment or its written request for formal consultation. The Service(s) has 90 days to complete its analysis and 45 days in which to formulate their biological opinion/incidental take statement and provide this document to the district to complete formal consultation. The Service(s) can request from the district a 60-day extension to the process without consent from the applicant. Any additional requests for time extensions must be approved by the applicant.

All elements of the incidental take statement must be included by reference in the DA permit, with a condition indicating that the applicant must comply with the incidental

take statement (see guidance memorandum "Incidental Take Statements with Case-Specific Requirements Imposed on the Applicant through the U.S. Army Corps of Engineers by Biological Opinions" dated September 9, 2002). The permit condition referencing the biological opinion will further indicate that the Service(s) will be informed of, and enforce, any known violations of the incidental take statement. When requested by the applicant, reasonable and prudent measures in the biological opinion, and/or the terms and conditions for implementing those measures, may be added as special conditions to the DA permit (see 33 CFR 325.4(b)). The district will decide what, if any, of the conservation recommendations are appropriate for inclusion into the DA permit. Conservation recommendations will only be included as permit conditions at the request of the applicant, since they are advisory and are not intended to carry any legally binding force (see 50 CFR 402.14(j)). The permit conditions directly related to the biological opinion may not be appealed.

Re-initiation of formal consultation is required if the amount or extent of taking specified in the incidental take statement is exceeded, new information reveals effects not previously considered, modification of the permitted activity causes an effect not previously considered, or a new species is listed or critical habitat designated that may be affected by the identified action.

Jeopardy Biological Opinions
Regulatory project managers should work closely with the Service(s) on projects that may lead to a jeopardy biological opinion. If the Service(s) intend to issue a jeopardy biological opinion, regulatory project managers should request a draft of this document for comment before the Service(s) finalize it. The district should coordinate with the applicant to discuss potential modification of the project through adoption of a reasonable and prudent alternative or through other measures to reduce project impacts. If the applicant is unable to modify the project to reduce impacts to the listed species or critical habitat, final comments on the draft biological opinion will be provided to the Service(s) by the district. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection a(2) and can be taken by the Federal agency or applicant in implementing the agency action.

Conference Biological Opinions
The district will request a conference opinion through the conference process when a project may jeopardize the continued existence of a species <u>proposed</u> for listing as threatened or endangered under the Endangered Species Act or destroy or adversely modify <u>proposed</u> critical habitat. A conference opinion is normally adopted if the species or critical habitat is listed, no new significant information is developed, and no significant changes have been made to the proposed project.

Emergency Procedures
Emergencies are unforeseen incidents that require immediate action to protect life or significant loss of property and include situations involving natural disasters, casualties, or national defense or security emergencies (see 50 CFR 402.05). If it is determined that

an emergency action may affect a listed species or critical habitat, the Corps will coordinate with the Service(s) to ascertain measures which will ensure that the emergency actions will not jeopardize the continued existence of the listed species or destroy or adversely modify critical habitat. The Corps will initiate Section 7 consultation as soon as practicable after the emergency is under control. Information submitted by the Corps will include a description of the emergency action and why it was needed, justification for the expedited consultation prior to implementation of the action, and impacts of the action on listed species or critical habitat. Endangered Species Act regulations at 50 CFR 402.05(b) require the Service(s) to issue a biological opinion after implementation of the emergency action. The biological opinion will include the information and recommendations provided during the emergency consultation.

General permits
Activities authorized by nationwide permits are subject to the "Endangered Species" general condition and 33 CFR 330.4(f), which require compliance with the Endangered Species Act. Regional and programmatic general permits should be similarly conditioned. Section 7 consultation must be conducted for activities when a project may affect a listed species or designated critical habitat.

Timing of permit issuance
General permit verifications and individual permits cannot be issued until Section 7 consultation is complete. The Corps cannot issue provisional authorizations pending the completion of Section 7 consultation. If general permit time frames cannot be met because of the amount of time necessary to resolve issues concerning endangered species, the District shall notify the applicant that the activity cannot begin until Section 7 consultation has been completed and a verification letter issued.

Conditions
A condition indicating that the permittee shall comply with the terms and conditions of the incidental take statement must be incorporated into the final authorization if an incidental take has been determined. In addition, when requested by the applicant, the Corps may include conservation recommendations as permit conditions. Such conditions are enforceable by the Service(s).

18. Essential Fish Habitat (EFH)

- ***Must consult if activity may adversely affect EFH***
- ***Combine with ESA consultation, when appropriate***

Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act requires all "Federal agencies to consult with NMFS on all actions or proposed actions authorized, funded, or undertaken by the agency that may adversely affect [essential fish habitat (EFH)]." Only those species managed under a federal fisheries management plan have EFH. An adverse effect, as defined at 50 CFR 600.810(a), is "any impact that reduces quality or quantity of [essential fish habitat]" and may include "direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat,

and other ecosystem components." It is important to note that adverse effects may result from activities that are not regulated by the Corps, such as impacts to downstream water quality caused by construction activities in uplands. If it is determined that the Corps is the lead federal agency for the proposed project, regulatory project managers must determine whether or not an activity requiring a DA permit would adversely affect essential fish habitat. If an adverse affect is anticipated, the district will initiate consultation with NMFS.

If both Endangered Species Act Section 7 consultation and EFH consultation are necessary for a proposed activity, they should be conducted concurrently (see National Marine Fisheries Service "Essential Fish Habitat Consultation Guidance", dated April 2004). An EFH assessment, containing a description of the action, analysis of potential adverse effects, the agency's conclusions regarding the effects, and proposed mitigation, if applicable, is provided to NMFS with a letter requesting consultation under Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act. The assessment used for ESA consultation will often satisfy the EFH assessment requirements. Although not required, regulatory project managers may provide results of site visits, opinions from recognized experts on the affected habitat or species, pertinent literature reviews, an alternatives analysis, and other relevant information.

Under the abbreviated EFH consultation procedures (50 CFR 600.920(h)), where the permit action does not have the potential to result in substantial adverse effects to EFH, the district will submit a request for consultation as soon as practicable. NMFS must provide a response to the district within 30 days of submittal of a complete assessment, unless extended by mutual agreement between the district and NMFS.

Where the permit action may result in substantial adverse effects to EFH, expanded essential fish habitat consultation procedures (see 50 CFR 600.920(i)) are to be used. The district will submit a request for consultation as soon as practicable, but not less than 90 days prior to a final decision on the permit action. NMFS must provide conservation recommendations to the district within 60 days of submittal of a complete EFH assessment, unless extended by mutual agreement between the district and NMFS. The district must provide a written response to EFH conservation recommendations provided by NMFS within 30 days of receipt of the recommendations (See Section 305(b)(4) of the Magnuson-Stevens Fishery Conservation and Management Act). If the district decides not to incorporate one or more of the EFH conservation recommendations, the district must provide NMFS at least 10 days to respond prior to taking final action.

Timing of permit issuance

The Corps cannot issue provisional authorizations pending the completion of Essential Fish Habitat consultation. Consultation must be concluded prior issuance of an individual permit or verification of a general permit.

19. National Historic Preservation Act

- Consult with Indian Tribes
- District engineer makes the final decision for section 106 compliance

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. All districts should follow the procedures in 33 CFR part 325, Appendix C, the Corps' "Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800" dated April 25, 2005, and the Corps' January 31, 2007 "Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800 dated April 25, 2005." The district engineer is the party responsible for making the final decision regarding compliance with the NHPA.

Initiation of Section 106 review

Before a district begins their documentation to demonstrate compliance with Section 106, a determination of lead federal agency should be made. If another federal agency has greater jurisdiction over an activity, that agency should be designated as lead and appropriate documentation should be prepared for the district's administrative record to demonstrate that another agency is lead and will be responsible for compliance with Section 106 obligations. Districts should not undertake Section 106 compliance for other federal agencies with greater jurisdiction.

Once the district has determined that it is responsible for Section 106 consultation, it should follow the procedures in 33 CFR Part 325 Appendix C, the Revised Interim Guidance dated April 25, 2005 and the Clarification of Revised Interim Guidance dated January 31, 2007.

Public notice and review procedures

For a public notice, complete information concerning effects of the activity on historic properties is not necessary, but the district should describe as accurately as possible the undertaking's effects on historic properties and the knowledge of the types of historic properties potentially affected. The public notice should not contain location or sensitive information related to archeological sites, to protect those sites from harm, theft, or destruction; such information should be provided to the SHPO/THPO by separate notice. If the undertaking will have no effect on historic properties, there should be a "no potential to cause effect" or "no effect" statement in the public notice. While Appendix C describes compliance with Section 106 in the context of standard permit review, full consideration to effects of the activity on historic properties must be considered during the processing of all permit requests. Therefore, while a public notice may or may not be necessary to describe proposed effects to historic properties in association with the evaluation of a project under a general permit, appropriate notification to other parties, including the SHPO/THPO, ACHP and other potentially interested parties, must take place as further described below.

Consultation with Federally Recognized Tribes
Districts are required to consult with Federally recognized Indian tribes, Alaska Native villages (which may be represented by traditional councils or IRA Council – see Department of Defense American Indian/Alaskan Native Policy: Alaska Implementation Guidance, dated May 11, 2001), and Native Hawaiian organizations that attach historic and cultural significance to properties, including traditional cultural properties that may be affected by an undertaking, even if those properties are located on private lands. Public notices alone are insufficient means to initiate government-to-government consultation. Districts are encouraged to develop agreements with Indian tribes on appropriate consultation protocols and approaches to coordinating proposed activities with Indian tribes. Development of programmatic agreements can provide a framework for conducting consultation with Indian tribes.

Investigations
When initial review by the district, additional submissions by the applicant, or response to the Public Notice indicates the existence of propert(ies) that may be eligible for listing on the Register, the district will examine the information to determine the need for further investigation. District engineers cannot require permit applicants to conduct cultural resource surveys outside of the Corps' area of responsibility. While the district is not responsible for identifying or assessing potentially eligible historic properties outside the "permit area", the district will consider the effect of an undertaking on any known historic properties that may occur outside the permit area.

Eligibility determinations
The district should apply National Register criteria to all sites identified in the "permit area." If the district determines a property is eligible for listing and the SHPO/THPO agree, the property will be considered eligible for the National Register. If the district determines a property is not eligible for listing and the SHPO/THPO agree, the property will be considered not eligible. If the district and the SHPO/THPO do not agree, the district will obtain a determination of eligibility from the Secretary of the Interior pursuant to 36 CFR 63.

Effect determinations
Effect determinations are made by the district engineer after soliciting the views of the consulting parties (e.g., ACHP, SHPO/THPO, Indian tribes and applicants). District engineers will consider indirect (e.g., visual, noise) effects resulting from the undertaking on known historic properties located outside of the Corps' area of responsibility. There are four types of effect determinations (please see the Revised Interim Guidance dated April 25, 2005). They are: "no potential to cause effects"; "no effect"; "no adverse effect" and "adverse effect."

Disagreement with determinations
If there are disagreements with the district engineer's "no effect" or "no adverse effect" determination, the district engineer may either continue consultation to resolve the disagreement or request an opinion from the ACHP. If the district engineer requests an

opinion from the ACHP, he will notify the other consulting parties (e.g., SHPO/THPO, Indian tribes, and applicants) and make the documentation available to the public. Please see the Revised Interim Guidance dated April 25, 2005 for procedures to address these disagreements.

Mitigation measures
If there are adverse effects on historic properties, the consultation process will include consideration of alternatives that will avoid, minimize, or mitigate those adverse effects. In cases where there are adverse effects on historic properties, the district engineer is required to notify the ACHP. The ACHP may elect to participate in the consultation process. Mitigation measures may be required through permit conditions for activities resulting in "no adverse effect" determinations, and through a memorandum of agreement (MOA) for activities with adverse effects.

General permits
Activities authorized by nationwide permits are subject to the "Historic Properties" general condition and 33 CFR 330.4(g), which require compliance with the Section 106 of the National Historic Preservation Act. Regional and programmatic general permits should be similarly conditioned. Section 106 consultation must be conducted for activities when a project may affect a historic property.

Timing of permit issuance
General permit verifications and individual permits cannot be issued until section 106 consultation is complete. The Corps cannot issue provisional authorizations pending the completion of section 106 consultation. If general permit time frames cannot be met because of the amount of time necessary to resolve issues concerning historic properties, the District shall notify the applicant that the activity cannot begin until section 106 consultation has been completed and a verification letter issued.

Conditions
If an MOA is necessary to address adverse effects on historic properties, then the terms of the MOA should be incorporated into the general permit verification as special conditions. The MOA, itself, should also be referenced in the special conditions.

Provisions for inadvertent discoveries
Pursuant to 33 CFR Part 325 Appendix A, general condition number 3 addresses inadvertent discoveries of archaeological or cultural resources. This condition must be included in all standard permits to address inadvertent discoveries of archaeological or cultural resources. A similar condition should be added to regional or programmatic general permits.

Completion of the section 106 process
The section 106 process is fulfilled when:

- It is determined there is no potential to cause effects on historic properties, or
- It is determined there are no historic properties present, with no objection from the SHPO/THPO, or

- It is determined there are no historic properties affected, with no objection from the SHPO/THPO, or
- The properties are determined not eligible, with SHPO/THPO concurrence, or
- An MOA and permit conditions resolve the adverse effect.

No permit authorization can be finalized until all components of the 106 process have been fulfilled. In the event of an "adverse effect" determination, the permit may not be issued until the effect has been resolved, which is normally formalized by an MOA and permit conditions with which the SHPO/THPO (and ACHP if applicable) have concurred.

20. Compensatory Mitigation

- ***Corps determines mitigation***
- ***Replace lost functions***
- ***Require permittee reporting***
- ***Compliance inspections essential***
- ***Provide clear objectives and explicit, enforceable permit conditions***
- ***Use best professional judgment***

Compensatory mitigation is a critical part of the Corps Regulatory Program. In general terms, the objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. Compensatory mitigation requirements will be established in accordance with 33 CFR 320.4(r) and 33 CFR Part 332.

Compensatory mitigation requirements should be based on a watershed approach and consideration of what is best for the aquatic environment. The watershed approach, along with consolidated mitigation such as mitigation banks and in-lieu-fee programs, usually provides proportionately higher ecological gains where the aquatic resource functions are most needed. A watershed approach involves the selection of compensatory mitigation sites that will help maintain and improve the quality and quantity of aquatic resources within the watershed. Special conditions in DA permits should clearly and concisely describe the amount and type of compensatory mitigation that is to be provided by the permittee. Special conditions of DA permits should also include ecological performance standards, to ensure that the compensatory mitigation project accomplishes its objectives.

Compensatory mitigation must be directly related to the impacts of the authorized activity, appropriate to the degree and scope of those impacts, and reasonably enforceable. The amount of mitigation required must be commensurate with the authorized impacts of the project. The goal of compensatory mitigation is to replace aquatic resource functions lost as a result of the permitted activity. Compensatory mitigation may also be required to ensure that the authorized work is not contrary to the public interest (see 33 CFR 320.4(r)).

When considering options for successfully providing the required compensatory mitigation, the district shall consider options for the mitigation type and location in the following order: available mitigation bank credits; available in-lieu fee program credits; permittee-responsible mitigation under a watershed approach; permittee-responsible

mitigation through on-site and in-kind mitigation; permittee-responsible mitigation through off-site and/or out-of-kind mitigation (see 33 CFR 332.3(b)). When evaluating these compensatory mitigation options, the district will consider what is environmentally preferable (see 33 CFR 332.3(a)(1)). In general, the required compensatory mitigation should be located within the same watershed as the impact site and should be located where it is most likely to successfully replace lost functions and services as a result of the authorized impacts.

The Corps decides what appropriate and practicable mitigation is for a particular permit action. The district may consult with other agencies, but the Corps makes the final decision.

Mitigation objectives and performance standards are integral components of mitigation plans and monitoring requirements. Performance standards should be ecologically based and enforceable. In general, performance standards using vegetation alone are inadequate, because the plant community is not necessarily a good indicator of the ecological functions being provided by a compensatory mitigation project. An example of an exception would be the restoration of submerged aquatic vegetation beds, for which performance standards may be based only on vegetation assessments.

When compensatory mitigation is required, permittees will be required to submit periodic monitoring reports to certify that the compensatory mitigation has been accomplished and to assess the development and conditions of the mitigation project. Failure to submit required monitoring reports on time, when required by the permit special conditions, may result in compliance action by the district. A letter from the Corps is required to confirm the mitigation site has met its performance standards and no further monitoring is necessary.

The "no overall net loss" goal for wetlands may not be achieved for each permit action, but the Corps will strive to achieve this goal on a programmatic basis. Attaining this goal is to be accomplished through the replacement of lost functions.

21. Permit Conditions

- ***Reasonable and enforceable***
- ***Must relate to the public interest, the 404(b)(1) Guidelines, and legal requirements***
- ***Must be justified in documentation***
- ***Include 401/CZMA conditions***

District engineers will add special conditions to permits when necessary to satisfy legal requirements or to otherwise satisfy the public interest requirements. Permit conditions must be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable (see 33 CFR 325.4). District engineers may also add special conditions at the applicant's request or to clarify the permit application (33 CFR 325.4(b)). Legal requirements that may be satisfied by means of Corps permit conditions include compliance with the CWA 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on section 401 water quality certifications. Special conditions may also be used to

require appropriate and practicable compensatory mitigation to offset impacts to the aquatic environment. Under the Corps administrative appeal process, an individual permit decision, including its terms and special conditions, may be appealed to the division engineer.

Permit conditions should be clear, concise, easily understood, and enforceable. Such permit conditions will assist in compliance efforts, by making the permit requirements understandable by the permittee and by any reviewing court.

As a general rule, permit conditions should be directly related to those aspects of a permitted activity or portions of the permitted project over which the Corps has reasonable control and responsibility (i.e., that are within the appropriate scope of analysis), unless the applicant requests permit conditions that relate to other matters. In addition, districts should not impose special conditions on Corps permits relating to matters that are beyond reasonable Federal control (e.g., posting signs for hours of operation of a boat ramp, or upland lighting requirements), unless requested to do so by the applicant (see 33 CFR 325.4(b)).

Water quality certification and Coastal Zone Management Act (CZMA) consistency determination conditions should be incorporated by reference into the DA permit, unless those conditions are unacceptable (see RGL 92-04). State water quality certification and CZMA concurrence conditions may not be appealed through the Corps administrative appeals process (see 33 CFR 331.5(b)(4)).

It is essential that all section 10 permits include a special condition that notifies the permittee that permitted structures or work may need to be removed at the permittee's expense, if the Corps determines that the authorized work interferes with navigation or any existing or future operation of the United States. The following special condition must be included as a condition of all Department of the Army permits that provide authorization under Section 10 of the Rivers and Harbors Act, regardless whether the permit provides such authorization under section 10 alone, or in combination with authorization under other laws:

> The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the U.S. Army Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

(Reference: Memorandum dated April 18, 2000 and entitled "Required Special Condition of Department of the Army Permits Involving Corps of Engineers Authority Under Section 10 of the Rivers and Harbors Act of 1899.")

22. Documentation

- ***Connection between record and decision***
- ***Environmental Assessment/Statement of Findings for most standard individual permits***
- ***Abbreviated decision documents for most letters of permission***
- ***Memorandum for the Record for a general permit***

Individual Permits. The decision document for the individual permit evaluation process is referred to as an Environmental Assessment/Statement of Findings or a combined decision document. The decision document should describe the proposed activity, including any important on-site environmental features directly affected by the activity, including a baseline description of aquatic resources proposed to be impacted, the authorities under which the proposal is being reviewed (i.e., Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and/or Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended), any other reviews required by statute (e.g., the National Environmental Policy Act, Endangered Species Act, Section 106 of the National Historic Preservation Act, the Magnuson-Stevens Fishery Conservation and Management Act), purpose and need of the activity, scope of analysis, impacts that are expected to result from the activity, a discussion of alternatives that were considered (including alternatives available to the Corps and alternatives available to the applicant), an analysis of the activity's impacts on the public interest, and a final decision. If the proposed activity involves a discharge of dredged or fill material into waters of the United States, the decision document must include a Section 404(b)(1) Guidelines compliance analysis. An abbreviated decision document may be used for activities authorized by letters of permission, since the Corps has established a categorical exclusion for applications that qualify for authorization under letters of permission (see section 6(a)(5) of Appendix B to 33 CFR part 325).

All comments received in response to the public notice must be addressed in the decision document, including those that are irrelevant or that do not recognize the limitations of the Corps jurisdiction or responsibility. The level of importance each issue receives in the decision-making process, and therefore, the amount of attention in the decision document, should be proportional to its association with the regulated activity.

Statement of Findings Standard Compliance Statements

The decision document must include a Statement of Findings that supports the decision. The Statement of Findings will be either a finding of no significant impact (FONSI) or a finding of significant impact necessitating the preparation of an Environmental Impact Statement. The following items must be included in all Statements of Findings:

Section 176 (c) of the Clean Air Act General Conformity Rule Review

In geographic areas designated as "non-attainment" and "maintenance" areas under the Clean Air Act, a statement must be included that indicates that the proposed project has been analyzed for conformity applicability, pursuant to regulations implementing Section 176(c) of the Clean Air Act. For most projects and activities that the Corps permits, the Corps determines that the activities

proposed under the permit will not exceed de minimis levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR 93.153. The statement also indicates that any later indirect emissions are generally not within the Corps' continuing program responsibility, that these emissions generally cannot be practicably controlled by the Corps, and, for these reasons, a conformity determination is not required for the permit. If those criteria are not met, the Corps will provide an appropriate CAA conformity determination.

(Reference: Guidance memorandum "EPA's Clean Air Act (CAA) General Conformity Rule" dated April 20, 1994.)

Public Hearing Request
A statement must be included in the Statement of Findings as to whether a public hearing was requested and by whom. This statement should be followed by the district engineer's decision on whether to hold a public hearing and the summary rationale. It may be sufficient to state: "I have reviewed and evaluated the requests for a public hearing. The issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing (e.g., there is sufficient information available to evaluate the proposed activity and a public hearing would not result in information that is not already available), therefore, the requests for a public hearing were denied." However, there may be a need to elaborate on this decision in the Environmental Assessment.

Compliance with the 404(b)(1) Guidelines
If the proposed activity requires a section 404 permit, a statement must be included that indicates that the activity has been evaluated for compliance with the 404(b)(1) Guidelines. This statement should reference the section of the decision document that contains the 404(b)(1) Guidelines compliance analysis. A determination that the activity complies or does not comply with the 404(b)(1) Guidelines should also be included.

Public Interest Determination
A statement discussing whether the project is (or is not) contrary to the public interest is required. This statement should reference the appropriate section of the decision document where the public interest evaluation is discussed in detail.

Determination of compliance with relevant Presidential Executive Orders
A statement discussing the project's compliance with relevant EOs, including EO 13175: Consultation with Indian Tribes, Alaska Natives, and Native Hawaiians; EO 11988, Floodplain Management; EO 12898, Environmental Justice; EO 13112, Invasive Species; and EOs 13212 and 13302, Energy Supply and Availability.

Finding of No Significant Impact or *Finding that an EIS is Required*
A statement that discusses whether or not the project will result in significant adverse effects on the quality of the human environment and, therefore, whether the preparation of an Environmental Impact Statement is required.

General Permits
A one to two page Memorandum for the Record should be prepared for general permit verifications, especially those that include compensatory mitigation requirements or require consultation or coordination with other agencies (e.g., activities involving consultation under Section 7 of the Endangered Species Act or Section 106 of the National Historic Preservation Act). This document should summarize the basis for the decision, including the results of agency coordination (if required) and compliance with other Federal laws (e.g., the Endangered Species Act or the National Historic Preservation Act). A brief rationale for adding any special conditions to the general permit authorization should also be provided.

- ***Timely decision-making is essential***
- ***Types of decisions***
- ***Provisional permits***

23. Permit Decisions
An essential practice that maintains and improves the efficiency and effectiveness of the Corps Regulatory Program is to provide timely decisions on permit applications. It is important to notify permit applicants as early as is practicable if procedural and substantive measures must be taken to comply with other laws, such as the Endangered Species Act or the National Historic Preservation Act. By actively communicating with the permit applicant regarding the status of his or her permit application, the amount of non-compliance is likely to be reduced (see 33 CFR 325.2(d)).

General Permits
A proposed activity that meets the terms and conditions for a general permit should be verified under that general permit unless the project would have more than minimal individual or cumulative adverse effects on the aquatic environment or other public interest factors, after consideration of required mitigation measures and other project-specific conditions. The district will promptly notify the applicant if the proposed project does qualify for authorization under the general permit and specify which general permit(s) the district considered. The general permit verification will include special conditions that the district determines are necessary to ensure compliance with the terms and conditions of the general permit and to ensure that the activity will not result in more than minimal individual or cumulative adverse effects to the aquatic environment or other public interest factors.

Individual Permits
The district will issue an individual permit for a proposed project if, after consideration of required mitigation measures and other special conditions, the project is not contrary to the public interest, it satisfies the 404(b)(1) Guidelines (if applicable), it does not

jeopardize the continued existence of a species listed as threatened or endangered under the Endangered Species Act, and all other applicable requirements of the relevant Federal statutes and regulations have been met. If water quality certification and/or Coastal Zone Management Act (CZMA) concurrence are required, then the permit should not be issued until the water quality certification or CZMA concurrence is issued or waived, unless the district determines that a provisional permit should be issued.

Denials

Denied without Prejudice

The district should deny without prejudice any application for an activity that requires another Federal, state, and/or local authorization or certification, such as water quality certification or CZMA concurrence, where that authorization has been denied. However, the district also has the option of continuing to process the permit application to its conclusion in cases where the water quality certification or CZMA concurrence for an activity has been denied. In those cases, the district will continue to process the application and reach a decision on the merits of the permit. The district will then deny the permit without prejudice, unless there is a substantive reason to deny the permit with prejudice. A statement of findings should not be completed prior to sending the denial without prejudice letter (see 33 CFR 320.4(j)).

Denied with Prejudice

The Corps will deny with prejudice the permit for a project that is contrary to the public interest and/or does not satisfy the 404(b)(1) Guidelines (if applicable). Prior to denial, the district will notify the applicant why the proposal is inconsistent with regulatory requirements and discuss measures that could lead to project approval. The district will also provide the applicant with a general description of any project or projects that it has identified and believes could be authorized by a DA permit. The reasons for denial must be clearly documented in and supported by the administrative record for the permit application. A Takings Implication Assessment must be prepared in accordance with Corps memorandum dated May 10, 1989 for all denials with prejudice.

Provisional Permits

When the district reaches a decision on a proposed activity before the water quality certification or CZMA concurrence has been issued or waived, a provisional permit should be issued to accurately reflect the district's processing time and the district's position on the proposed activity (see RGL 93-01). Provisional permits notify permit applicants when the district has made its decision and at what point the applicant should contact the certifying agency regarding resolution of any water quality or coastal zone management issues. To avoid unreasonable delays in processing DA permits, the following actions are recommended where water quality certification and/or CZMA concurrence has been denied:

Nationwide Permits
Where the certifying agency has generically or case-specifically denied water quality certification or CZMA concurrence for a nationwide permit, the Corps will review PCNs and verification requests. The Corps will then inform the applicant in writing if the proposed activity complies with the terms and conditions of the nationwide permit, including activity-specific conditions, and that the certifying agency must make a case-specific determination for water quality certification or CZMA concurrence. This letter constitutes a provisional nationwide permit verification. The date the provisional nationwide permit verification is issued should be entered in the database to accurately reflect the Corps processing time (see 33 CFR 330.4(c)(5) and 330.4(d)(5)).

The Corps must state in the letter that the applicant must furnish a completed water quality certification or CZMA concurrence to the district before the activity is authorized and work in regulated waters is initiated. If water quality certification and/or CZMA concurrence is subsequently issued or waived, a letter indicating that the activity qualifies for nationwide permit authorization should be sent to the applicant.

Individual Permits
If the Corps concludes its review of the application prior to water quality certification and/or CZMA concurrence being issued, denied, or waived, the district will issue a letter stating that the Corps has completed its review of the application and is prepared to issue a Department of the Army permit.

(Reference: RGL 93-01 and guidance memorandum "Provisional Permits" dated March 1, 1999)

24. Duration of Construction Periods for Permits
Individual permits must specify timelines for completing the activity in jurisdictional waters (see 33 CFR 325.6(c)). The construction period is the time period during which activities regulated under the Corps' various permitting authorities can occur. For an individual permit, the duration of the construction period is from the date of permit issuance to the expiration date. After the individual permit's expiration date, the completed work continues to be authorized. In accordance with general condition 2 of 33 CFR part 325, Appendix A the authorized work must be maintained in good condition and comply with the permit terms and conditions. If additional work in navigable waters of the United States or discharges of dredged or fill material into jurisdictional waters are necessary for the continued operation or maintenance of an activity or to change the authorized structures or fills, then another DA permit is required.

The expiration date of the construction period for an individual permit is, with two exceptions, at the discretion of the district. The first exception is for permits issued for the transport and disposal of dredged material in ocean waters, which can be valid for no more than 3 years (see 33 CFR 325.6(c)). The second exception is for maintenance dredging permits, which can be valid for a maximum of 10 years from date of issuance of

the permit authorizing the dredging (see 33 CFR 325.6(e)). For all other individual permits, the duration of the construction period, "will provide reasonable times based on the scope and nature of the work involved." The time limit of the construction period commonly used for individual permits is three to five years. Use of five year construction periods reduces the need to extend permits.

For nationwide permits, the construction period is dependent on whether pre-construction notification is required. If pre-construction notification is not required, then the construction period lasts from the date the nationwide permit is issued until the date the nationwide permit expires, or the nationwide permit is modified, suspended, or revoked. If the activity qualifies for the grandfathering provision at 33 CFR 330.6(b), the permittee has up to one year to complete the authorized activity.

If pre-construction notification is required, the construction period lasts from the date the nationwide permit verification is issued until: (1) the date the nationwide permit expires, (2) the date the nationwide permit verification letter expires, or (3) the date the nationwide permit is modified, suspended, or revoked. In general, it is not necessary to reverify a nationwide permit if the verification letter expires before the nationwide permit itself expires, since the activity continues to be authorized until that nationwide permit expires (see the Nationwide Permit Qs and As issued on September 25, 1991). If the activity qualifies for the grandfathering provision at 33 CFR 330.6(b), the permittee has up to one year to complete the authorized activity.

25. Permit Modifications and Time Extensions

- ***Extend/modify permits to the extent practicable***
- ***Requests for time extensions must precede expiration date***

Districts are encouraged to use time extensions and permit modifications to the extent practicable to increase efficiency. Requests for time extensions for the construction periods for existing permits will normally be granted where the project has not changed, and the regulations and policy framework are substantively the same as existed for the original decision. However, if site conditions have changed substantially, then a new permit should generally be required. While time extension requests are generally reviewed favorably, it is imperative that written requests for the extension are received prior to the expiration of the permit in question (preferably within 30 days prior to their expiration). As long as the request for extension is received prior to expiration of the permit, the district's decision may be made after the original expiration date.

Agency coordination may not be necessary for projects where the agencies have not expressed resource-specific comments or concerns on the original project, unless the district believes the net overall changes are substantial and that potential adverse effects on the aquatic environment will result in such concerns. Modifications of projects that do involve resource impacts of interest to the agencies should be coordinated. A brief supplemental decision document is required for permit modifications, because these are final permit decisions. (See 33 CFR 325.7)

26. Enforcement/Compliance

- ***Maintain a viable enforcement and compliance program***
- ***Prioritize workload***
- ***Require compliance reports from permittees***

Ensuring that permittees are in compliance with permit terms and conditions and taking enforcement actions over unauthorized activities are necessary components of the Regulatory Program. The EPA has independent authority under the Clean Water Act for unauthorized discharges and the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved. There is a national memorandum of agreement between EPA and the Corps (dated 19 January 1989) regarding lead agency for investigating unauthorized activities. Additionally, it is encouraged that districts work with their appropriate EPA regions on field level agreements to further define the lead agency role for investigations of unauthorized activities in section 404 waters. The Corps is the lead agency for investigations of unauthorized activities within section 10 waters and for investigations of noncompliance of permitted activities. Districts will prioritize compliance inspections and actions to resolve non-compliance based on compensatory mitigation requirements, regional areas of concern, threatened and endangered species, historic properties, navigation concerns, or other controversial issues that the district considers important. Corps enforcement of water quality certification or CZMA consistency conditions is discretionary. National performance measures have been created to ensure that districts are providing adequate oversight of compensatory mitigation projects so that the goal of no net loss of wetland functions is achieved. Districts will require permittees to supply monitoring reports on compensatory mitigation projects to assist in the district's compliance efforts as detailed in section 20 of this SOP. Districts will inspect a pre-determined percentage of mitigation banks to ensure compliance with their mitigation banking instruments. Districts with in-lieu fee programs will also monitor those programs on a regular basis to ensure that the in-lieu fee sponsor is providing the compensatory mitigation credits secured by permittees.

For those projects that are in noncompliance and legal action is appropriate, Class I Administrative Penalties cannot exceed the amount stated within regulation (33 CFR 326.6(a)). As of 2009, Class I Administrative Penalties cannot exceed $27,500. If the penalty amount exceeds the Class I Administrative Penalty, then the Corps will recommend a civil penalty to the U.S. Attorney. The assessment of Class I Administrative Penalty or the recommendation of a civil penalty for noncompliance does not close the action. Rather, a penalty is for failure to follow the permit and all of the national, regional, and special conditions of said permit.

For unauthorized activities, the alleged violation can be resolved through initial corrective measures (33 CFR 326.3(d)), voluntary restoration, or submittal of an after-the-fact permit application. For actions that are in noncompliance, the alleged violation can be resolved through restoration or modification of the existing permit.

As a general rule, districts should not pursue enforcement actions for unauthorized activities that were completed more than five years prior to their discovery by the Corps. There will be cases where legal action is necessary, or where enforcement actions are appropriate for violations that occurred more than five years prior to their discovery, and this SOP is not intended to bar enforcement of those actions. When the Corps becomes aware of an unauthorized activity the accrual date starts. From the accrual date, the Corps has five years to recommend a civil penalty. The federal government has a statute of limitations of five years for seeking civil penalties (28 U.S.C. Section 2462).