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

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1. **Authority:** Section 404(q) of the Clean Water Act, 33 U.S.C. 1344(q).

2. **Purpose:** Establish policies and procedures to implement Section 404(q) of the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits."

3. **Applicability:** This agreement shall apply to Regulatory authorities under: a) Section 10 of the Rivers and Harbors Act of 1899; b) Section 404 of the Clean Water Act; and c) Section 103 of the Marine Protection, Research and Sanctuaries Act.

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

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

PART I - BACKGROUND

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

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

2. It is recognized that the DOI has an important role in the Department of the Army Regulatory Program under the Fish and Wildlife Coordination Act, the Clean Water Act, National Environmental Policy Act, Endangered Species Act, and other relevant statutes. When providing comments, only substantive, project-related information (within DOI's area of expertise and authority) on the impacts of activities being evaluated by the Corps and appropriate and practicable measures to mitigate adverse impacts will be submitted. The comments will be submitted within the time frames established in this agreement and applicable regulations.

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

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

5. This agreement does not diminish Army's authority to decide whether a particular individual permit should be granted, including determining whether the project is in compliance with the Section 404(b)(1) Guidelines.

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

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

8. This agreement is effective immediately upon the date of the last signature and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon 30 calendar days written notice.

9. The Memorandum of Agreement between the Secretary of the Interior and the Secretary of the Army on Section 404(q) of the Clean Water Act dated November 8, 1985, is terminated. Those permit applications which have been elevated to the Assistant Secretary of the Army for Civil Works (ASA(CW)) under the November 8, 1985, MOA shall be processed according to its terms. Those permit applications for which Notices of Intent to Issue have been sent by the District Engineer in accordance with paragraph 7.b. of the November 8, 1985, MOA shall be governed by that MOA. All other permit applications shall be governed by this agreement. For permit applications where the basic or extended comment period has closed before the signature date of this MOA the Fish and Wildlife Service (FWS) Regional Director has 15 calendar days from the date of the last signature below to indicate which individual permit cases will be governed under Part IV by sending the District Engineer the letter required in Part IV, paragraph 3(b).

PART II - COORDINATION PROCEDURES

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

2. The Assistant Secretary for Fish and Wildlife and Parks, at the direction of the Secretary of the Interior, will be the point of contact for coordination with DOI and will provide comments, through the Director of the Fish and Wildlife Service, on behalf of DOI on permit applications evaluated through the Army Regulatory Program.

3. District Engineers and the FWS Regional Directors as representatives of DOI will direct the development, and approve, within six months of the date of this MOA, written procedures to ensure effective interagency coordination and to discuss issues, expedite comments, and foster strong professional partnerships and cooperative working

relationships. These professional partnerships will be based on DOI providing substantive, project specific comments and the Corps giving full consideration to FWS recommendations as the Corps makes its determination of compliance with the Section 404(b)(1) Guidelines and the decision on the permit application. The procedures will encourage, to the extent appropriate:

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

4. The FWS Regional Director will inform the District Engineer, in writing, of the FWS officials who are authorized to provide official DOI comments, including, where appropriate, by category of activity or geographic area. All official DOI comments will be signed by either the FWS Regional Director or the designated official. Comments signed by any of the above mentioned officials will be considered DOI's response in accordance with Part II of this MOA. Notwithstanding the above, certain actions described in Part IV require the actual signature of the FWS Regional Director.

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

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

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

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

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

9. Notwithstanding any other provision of this agreement, nothing in this agreement shall be construed to affect the responsibility of the Corps of Engineers to comply with the provisions of Section 7(a)(2) of the Endangered Species Act, including the procedural provisions for interagency consultation established in 50 CFR 402.

PART III - ELEVATION OF POLICY ISSUES

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

2. If either agency considers that the nature of an action or series of actions raises concerns regarding the application of existing policy or procedure, or procedural failures in agency coordination, the District or Division Engineer, or FWS Regional Director acting on behalf of DOI, may initiate policy implementation review between the District and/or Division Engineer (or designee) and the FWS Regional Director, Deputy Regional Director, or Assistant Regional Director/Enhancement, through written notification. The written notification will describe the issue in sufficient detail and provide recommendations for resolving the issue. The District Engineer or Division Engineer (or

designee), depending on the level of the issue, or the Regional Director, Deputy Regional Director, or Assistant Regional Director/Enhancement, will resolve the issue within 60 calendar days of receipt of written notification to initiate policy implementation review.

3. In the context of Part III of this MOA, "resolve" means to review the issue, obtain the views of the requesting party, discuss those views as appropriate, fully consider those views, and then make the final determination, in writing, regarding the particular resource, policy, procedure, or regulation interpretation.

4. If during consultation, the FWS Regional Director, Deputy Regional Director, or Assistant Regional Director/Enhancement, or the Corps (District Engineer or Division Engineer, or designee) determine the issue cannot or should not be resolved at the field level, or that an issue has broader implications beyond the Division, the FWS Regional Director and Division Engineer will so notify the Assistant Secretary for Fish and Wildlife and Parks (A/S-FWP) and the ASA(CW), through the Director of Fish and Wildlife Service and the Director of Civil Works, respectively, in writing. Such notification will describe the nature of the issue and the reasons why the issue cannot, or should not, be resolved at the District or Division level or Regional level (e.g., national policy issue).

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

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

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

PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS

1. Purpose: The purpose of PART IV is to provide the exclusive procedures for the elevation of specific individual permit cases. The elevation of specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. For example, cases that do not meet this resource value threshold cannot be elevated under this Part over a dispute concerning practicable alternatives. More specifically, the elevation of individual permit cases should be limited to those cases where the net loss (i.e., after considering mitigation) from the project (i.e., within the scope of impacts being evaluated by the Corps), will result in unacceptable adverse effects to aquatic resources of national importance. The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest solely with the ASA(CW).

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

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

FIELD LEVEL PROCEDURES

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

(b) For those individual permit cases identified in paragraph 3(a), within 25 calendar days after the end of the basic or extended comment period the FWS Regional Director must notify the District Engineer by letter (signed by the FWS Regional Director) that in the DOI's opinion the discharge will have a substantial and unacceptable impact on aquatic resources of national importance. The opinion will clearly state in detail: (1) why there will be substantial and unacceptable impacts to aquatic resource of national importance as defined in paragraph 1 of this Part and; (2) why the specific permit must be modified, conditioned, or denied to protect the aquatic resource of

national importance. The opinion, which should explain how the agency determination was made, should be based on site specific information and relate directly to matters within DOI's authority and expertise. A signed copy of the FWS Regional Director's letter should be immediately faxed to the Corps regulatory project manager.

(c) Notice of Intent to Proceed:

(1) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer's proposed permit decision is contrary to the stated DOI written recommendation in paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the draft permit and decision document by overnight mail to the FWS Regional Director.

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

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

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

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

(2) the FWS Regional Director has forwarded the issue to the A/S-FWP,

through the Director of the Fish and Wildlife Service with a recommendation to request review by the ASA(CW).

(e) When the FWS Regional Director requests elevation pursuant to paragraph 3(d)(2) of this Part the District Engineer will hold in abeyance the issuance of a permit pending completion of the Headquarters level review outlined below. Further, the District Engineer will provide CECW-OR and ASA(CW) a copy of the FWS Regional Director's letter notifying the District Engineer of the intent to request higher level review.

AGENCY HEADQUARTERS REVIEW (AS NECESSARY)

(f) Within 20 calendar days from the FWS Regional Director's letter notifying the District Engineer of the intent to request higher level review (paragraph 3(d)(2)), the A/S-FWP will either:

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

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

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

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

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

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

(h) The ASA(CW) will immediately notify the A/S-FWP in writing of its decision in paragraph 3(g) above.

Assistant Secretary for Fish and Wildlife and Parks
Department of Interior

21 Dec 92
Date

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

18 Dec 92
Date