



**US Army Corps  
of Engineers®**

**INTERAGENCY UNDERSTANDING BETWEEN  
THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 8  
AND  
THE DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS,  
ALBUQUERQUE, SACRAMENTO AND OMAHA DISTRICTS:**

**LOCAL PROCEDURES FOR INDIVIDUAL PERMIT DECISIONS UNDER  
SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE  
RIVERS AND HARBORS ACT OF 1899  
IN ACCORDANCE WITH THE 1992 SECTION 404(q) MEMORANDUM OF  
AGREEMENT BETWEEN THE U.S. ENVIRONMENTAL PROTECTION  
AGENCY AND  
THE DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS**

**1. Purpose:**

a. The purpose of these local procedures is to set forth coordination and consultation procedures between the Corps of Engineers, Albuquerque, Omaha and Sacramento Districts (“Corps”) and the Environmental Protection Agency, Region 8 (“EPA”), consistent with the national 1992 Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Regarding Section 404(q) of the Clean Water Act (“CWA”) dated August 11, 1992 (hereinafter “national MOA”). The Corps and EPA are also referred to as “Agency (ies)” in this Interagency Understanding.

b. These procedures are allowed under the provisions of Part II, paragraph 2 of the national MOA and do not revise or rescind any provision of the national MOA. The overall goal is to improve the efficiency of the regulatory process and coordination between the two Agencies, and to foster strong professional and cooperative working relationships through complete information exchange and discussion during the permit evaluation process. These professional partnerships are based on EPA providing substantive, project specific comments and the Corps giving full consideration to EPA’s recommendations as the Corps makes its determination of compliance with the Section 404(b)(1) Guidelines and the decision on the permit application. Further, the Corps and EPA regulations include policies and procedures for evaluating permit applications

(33 CFR 320.4 and 40 CFR 230.5 respectively). Every effort to comply with these policies and procedures will be made by the Agencies to effectively implement these governing regulations. Both regulations clearly require application of the Section 404(b)(1) Guidelines and the requirement to sequentially avoid, minimize, and compensate for unavoidable impacts to waters of the U.S., including special aquatic sites. Specific dispute resolution procedures are developed to further resolve issues not resolved after the receipt of the national MOA, Part IV paragraph 3(a) and/or 3(b) letters.

c. The Agencies intend to accomplish these local procedures with the key objective of providing the applicant and public with prompt, carefully reasoned, and environmentally sound decisions.

## **2. Applicability:**

These local procedures are for any Standard Individual Permit or proposed Regional General Permit involving Section 404 of the CWA and/or Section 10 of the Rivers and Harbors Act of 1899 (Section 10) wherein the EPA has issued letters required by Part IV, sections 3(a) and 3(b) of the national MOA but prior to the Corps issuing a Notice of Intent to Proceed under Part IV, Section 3(c) of the national MOA. Procedures for Dispute Resolution Processes are found in Appendix A. These procedures also contain clarifying information concerning actions that can be taken prior to the issuance of the 3(a) and 3(b) letter.

## **3. Scope:**

These local procedures apply to the implementation of the regulatory program in the Corps' Albuquerque, Omaha and Sacramento Districts within EPA, Region 8's, area of responsibility.

## **4. References/Prior MOAs**

August 11, 1992 Memorandum of Agreement between EPA and Department of the Army Establishing Procedures to Implement Section 404(q) of the CWA.

## **5. General Guidance on MOA Implementation:**

a. Both Agencies resolve to proactively strive to identify those projects which might have significant impacts and prioritize efforts to resolve issues identified pursuant to the terms of this Interagency Understanding.

b. Electronic mail or facsimile, with appropriate level of electronic signature will be considered the equivalent of formal correspondence. All electronic messages or facsimiles requiring a signature will be signed prior to transmission. The receiving Agency will consider the electronic message or the facsimile to be the action message.

c. The signature of the person acting for the Regional Administrator or District Commander shall satisfy the signature requirement of the national MOA. All persons acting for the District Commander or Regional Administrator, or their official designees, shall sign correspondence by including the word “Acting” in the signature block. This procedure is recognized by both Agencies as fulfilling the signature requirements of the MOA.

d. The day that a signed document is transmitted electronically or by facsimile shall be day zero in every case where time constraints are imposed by the national MOA and the attached Dispute Resolution Process (Appendix A). Documents received after the close of normal business hours (5:00 pm local time) shall be considered as being received on the following business day.

**6. Staff level coordination for permit actions with potential to warrant elevation under Clean Water Act Section 404(q):**

a. The Corps resolves to request EPA attendance at pre-application meetings on those actions that involve resources and activities that are likely to be of the level and degree to potentially affect resources that could be considered ‘resources of national importance’. The Corps intends to advise applicants and EPA of expected substantial resource issues as early as possible in the permit process. Concerted efforts will be made by both Agencies to resolve identified issues prior to submittal of a permit application. The Corps resolves to invite EPA to site visits prior to or during the public notice comment period to assist in determining issues and concerns associated with potentially affected aquatic resources and proposed activities. EPA staff will strive to prioritize resources to support Agency participation in pre-application meetings and site visits.

b. Both Agencies intend to provide and share permit file information and, to the maximum extent practicable, identify the location and availability of all applicable substantive supplemental information (e.g., existing Environmental Assessment, Environmental Impact Statement, mitigation plans, basin studies, alternatives analysis, delineation/jurisdictional data, and workload tracking database information [e.g., ORM/DARTER database information]). Such information should be provided by either Agency if it is readily available and if it is case specific. Where the Corps has received 404 permit applications/reports that are complete and contain information relevant to a determination of compliance with the Section 404(b)(1) Guidelines, the Corps will make every effort to send copies of these applications/reports to EPA and other appropriate resource agencies.

c. The EPA intends to provide written requests for extension of a public notice comment period up to 30 days (where that period is less than 30 calendar days) and for extension requests for comment period greater than 30 days.

d. The Agencies intend to hold face-to-face or video conference management meetings quarterly involving EPA's Ecosystem Protection Program/NEPA Program Directors, Deputy Director, and Unit Chief and Corps' Regulatory management staff (first and second level supervisors) to review the status of projects and identify new issues. When State-specific issues (i.e. North Dakota Oil and Gas permitting issues) are on the agenda to be addressed, the appropriate first line supervisor will attend. The hosting Agency will be responsible for meeting arrangements and preparation of meeting notes. Each Agency should notify other Agency before field staff is included in the meetings.

e. The Corps will invite EPA to participate in conference calls, meetings or field visits for projects in which EPA has demonstrated substantial interest through public notice comments or other communication.

f. After the permit decision is made, the Corps will provide EPA copies of all requested documents, including permits, decision documents (including 404(b)(1) evaluations) within a reasonable time after the request is made.

**7. Procedures after receipt of national MOA, Part IV paragraph 3(a) and/or 3(b) letters:**

a. If permit-specific issues are not resolved at the staff level, both Agencies intend to follow the Dispute Resolution Process (DRP) detailed in Appendix A. This DRP does not replace the national MOA 404(q) elevation process but is a means for both Agencies to articulate issues and supplement field staff's efforts in resolving issues prior to elevation to Headquarters under the national MOA 404(q) process.

b. After following the DRP described in Appendix A, where the Corps' decision will be contrary to EPA's recommendation, the Corps will inform EPA how its concerns were considered and/or addressed by providing a copy of the proposed permit and decision document to the appropriate EPA, Region 8, representative at least 5 days prior to sending the Notice of Intent to Proceed letter to EPA, Headquarters. The Corps will then send a Notice of Intent to Proceed letter, as described in Part IV, paragraph 3(c) of the national MOA, to the EPA Wetlands Division Director.

c. For projects where EPA has sent a letter under Part IV, paragraph 3(b) of the national MOA, but which the Agency concludes, after implementing the DRP and/or reviewing additional information, it is no longer appropriate for elevation under Part IV of the national MOA, EPA shall immediately notify the Corps in writing and thus remove the case from potential elevation.

d. Days in the DRP are work (business) days. If one party misses a deadline that was not extended by mutual agreement the DRP process will be terminated and EPA and the Corps will follow the procedures in the national MOU.

## **8. Policy Issues**

a. Elevation of policy issues pursuant to Part III of the national MOA is not limited to issues associated with a particular permit, but may also include general concerns regarding application of existing policy and procedures. Examples of Part III issues include, but are not limited to: 1) procedural weakness in interagency coordination; 2) a trend in impacts to a particular resource type or eco-region; and 3) trends in permit decision making where individual cases do not warrant elevation under Part IV.

b. For those policy issues which may require elevation under Part III of the national MOA, EPA and the Corps intend to make reasonable efforts, including meetings between staff of each Agency and meetings between the Regional Administrator and the District Commander, to resolve the policy questions at the District/Region level before undertaking the elevation process.

## **9. No Private Right of Action:**

This Interagency Understanding does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this Interagency Understanding, against the Corps or EPA, their officers or employees, or any other person. This Interagency Understanding does not direct or apply to any person outside of the Corps and EPA.

## **10. Non-Fund-Obligation Document:**

As required by the Antideficiency Act, 31 U.S.C. §§ 1341 and 1342, all commitments made by EPA and the Corps in this Interagency Understanding are subject to the availability of appropriated funds and budget priorities. Nothing in this Interagency Understanding, in and of itself, obligates EPA or the Corps to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. Any transaction involving transfers of funds between the Agencies will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

## **11. Effective Date**

These local procedures are effective immediately upon the last signature date of this Interagency Understanding. These local procedures may be extended or modified at any time by mutual written consent of both Agencies. Additionally, either Agency may revoke these local procedures after providing the other agency written notice thirty days before revocation.

## **12. Maintenance of Interagency Understanding**

This Interagency Understanding will be revisited by signatory Agencies every three calendar years to assess its effectiveness and recommend and implement changes, as necessary, to maintain it as a useful working Interagency Understanding.

**By signing this Interagency Understanding, I resolve to work cooperatively to implement the Local Procedures Interagency Understanding process described above.**

Date

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James B. Martin, Regional Administrator, U.S. Environmental Protection Agency,  
Region 8.

**By signing this Interagency Understanding, I resolve to work cooperatively to implement the Local Procedures Interagency Understanding process described above.**

Date

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Lieutenant Colonel Jason D. Williams, U.S. Army Corps of Engineers, Albuquerque District

**By signing this Interagency Understanding, I resolve to work cooperatively to implement the Local Procedures Interagency Understanding process described above.**

Date

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Lieutenant Colonel Andrew B. Kiger, U.S. Army Corps of Engineers, Sacramento District

**By signing this Interagency Understanding, I resolve to work cooperatively to implement the Local Procedures Interagency Understanding process described above.**

Date

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Colonel Robert J. Ruch, U.S. Army Corps of Engineers, Omaha District

## **Appendix A**

### **Dispute Resolution Process (DRP)**

**Goal:** Avoid the necessity for elevation of Clean Water Act (CWA) Section 404 Standard Individual Permit and draft Regional General Permit actions by striving to achieve a mutually satisfactory resolution while preserving the option to complete elevation of the permit decision through the 404(q) elevation procedures.

**Procedures:** Initiation of the Dispute Resolution Process (DRP) will occur after the Corps' receipt of EPA's Part IV Section 3(b) letter under the national MOA. See enclosed line chart depicting the DRP process. The Agencies intend to resolve disputes pursuant to the following 5 step process:

1. The Corps' regulatory project manager (PM) will meet or have a telephone call with the EPA reviewer within 5 business days of the Corps' receipt of the 3(b) letter to discuss and clarify issues identified in both the Part IV Section 3(a) and 3(b) letters under the national MOA and determine if the issues can be resolved. As part of the discussion, the Corps' PM and EPA reviewer will answer 3 questions:
  - What is the issue?
  - What is the significance of the issues for each Agency?
  - What can we do to fix it?
2. If the Corps' PM and the EPA reviewer cannot reach an agreement resolving the issue(s), a staff-level dispute exists and each will notify their first line supervisor. Within 10 work days after notification to the first line supervisors, the PM and EPA reviewer will prepare a white paper to detail the unresolved concern(s) and each party's suggested resolution. The intent of the white paper will be to identify and consolidate areas of resolution and/or continued disagreement.
3. The PM and EPA reviewer will provide the jointly prepared white paper their respective first line supervisors with a request for a meeting or conference call between the EPA Ecosystems Protection Program Unit Chief (Unit Chief) and the Corps' first line supervisor. The conference call/meeting is to be held within 10 work days of receipt of the white paper. Establishment of the conference call/meeting can be accomplished by either an e-mail or telephone call. For purposes of efficiency, the EPA Unit Chief and the Corps' first line supervisor can attend the staff-level meeting described in step 1 above. The purpose of this meeting is for each agency's first line managers to engage in discussions and resolve the disagreement. Additionally, the EPA Ecosystems Protection Program Director and Corps' second line supervisor can attend the meeting described in step 1.
4. If the EPA Unit Chief and Corps' first line supervisor reach agreement during the call/meeting, formal written direction will be provided to staff concerning the resolution. If the EPA Unit Chief and Corps' first line supervisor cannot reach

agreement, they will prepare a joint summary report identifying the reasons the dispute could not be resolved and will provide the joint summary report to the EPA Ecosystems Protection Program Director (Director) and Corps' second line supervisor within 5 work days of the conference call/meeting. Within 10 work days of receiving the joint summary report, the EPA Ecosystems Protection Program Director and Corps' second line supervisor will participate in a conference call/meeting. Scheduling the meeting can be via email or telephone call. This conference call/meeting can include participation by Regulatory staff from EPA, Region 8, Corps or others, if determined necessary. Attendees to the meeting shall be closely coordinated between each Agency.

5. If the Director and Corps' second line supervisor reach agreement, they will provide formal direction to staff to finalize the resolution. If agreement is not reached, the Director and Corps' second line supervisor will discuss next steps that could include completion of the CWA Section 404(q) elevation process in accordance with the national MOA.