



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
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JUL 24 2008

Mr. Michael Johnson
Director, Office of New Reactors
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Mail Stop O-16-E-15

Dear Mr. Johnson:

Thank you for your strong commitment to work with us to update the Memorandum of Understanding between the U.S. Army Corps of Engineers (Corps) and the U.S. Nuclear Regulatory Commission for Regulation of Nuclear Power Projects, of July 2, 1975 (MOU). The updates would address changes to your new Limited Work Authorization and the agencies' responsibilities under the National Environmental Policy Act (NEPA). The Corps has met with members of your staff as well as with other key Federal agencies to discuss each agencies' NEPA implementing regulations and our respective permitting processes. We truly appreciate your agency's willingness to meet and discuss these complex issues. I believe the discussions we have had to date have been worthwhile and extremely productive.

To that end, the Corps has drafted the enclosed MOU for your consideration and comments. We hope to continue to work closely and collaboratively with your agency, in coordination with the Office of Management and Budget and the Council for Environmental Quality, to develop an agreed-upon document that takes into consideration each agency's mission and works at the field level.

I look forward to continuing working with you and your staff to revise the existing MOU. If you have any questions please contact Mr. Chip Smith, Assistant for Environment, Tribal and Regulatory Affairs, at (703) 693-3655 or Chip.Smith@hqda.army.mil. You may also contact Ms. Kimberly McLaughlin, Corps Headquarters Regulatory Community of Practice, at (202) 761-4663 or Kimberly.S.McLaughlin@usace.army.mil. Thank you for your attention and support of this important effort.

Sincerely,

George S. Dunlop
Principal Deputy Assistant Secretary of the Army
(Civil Works)

Enclosure

MEMORANDUM OF UNDERSTANDING
Between
UNITED STATES ARMY CORPS OF ENGINEERS
And
THE NUCLEAR REGULATORY COMMISSION
On
EARLY COORDINATION OF REQUIRED ENVIRONMENTAL REVIEWS
CONDUCTED IN CONJUNCTION WITH THE ISSUANCE OF AUTHORIZATIONS
TO CONSTRUCT AND OPERATE NUCLEAR ENERGY FACILITIES LICENSED BY
THE NUCLEAR REGULATORY COMMISSION

The United States Army Corps of Engineers (Corps) and the Nuclear Regulatory Commission (NRC), as parties to this Memorandum of Understanding (MOU), hereby acknowledge and declare as follows:

I. Introduction

The United States Army Corps of Engineers (Corps) and the Nuclear Regulatory Commission (NRC) developed this Memorandum of Understanding to streamline the respective regulatory processes associated with the authorizations required to construct and operate nuclear energy facilities.

Through Executive Order 13212 issued on May 18, 2001, (the Executive Order) the President declared that it is the policy of his Administration that executive departments and agencies shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy. In the Executive Order, the President directed federal agencies to expedite their reviews of authorizations for energy related projects and to take other action necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. Consistent with the Executive Order and in recognition of the fact that timely authorization of new and upgraded nuclear energy projects are essential to facilitate the nation's ability to meet the goal of sufficient availability and use of electricity, the Corps and NRC enter into this agreement.

II. Purpose

The purpose of this MOU is to establish a framework for early coordination and participation among the signatories to this agreement to ensure the timely review of proposed nuclear energy related projects. Cooperation among the MOU signatories will ensure each agency's review responsibilities under the National Environmental Policy Act (NEPA) and other related statutes are met in

connection with the authorizations required to construct and operate nuclear energy facilities licensed by the NRC.

III. Principal statutory authorities that authorize the NRC / USACE to enter into the MOU.

- A. **National Environmental Policy Act of 1969 (42 USC § 4321 et seq.)** establishes a national policy for the environment, provides for the establishment of a Council on Environmental Quality, and other purposes.
- B. **Section 10 of the Rivers and Harbors Act of 1899 (33 USC § 403)** requires authorization from the Secretary of the Army, acting through the Corps of Engineers, for the construction of any structure in or over any navigable water of the United States. Structures or work outside the limits defined for navigable waters of the United States require a Section 10 permit if the structure or work affects the course, location, or condition of the water body. The law applies to any dredging or disposal of dredged materials, excavation, filling, re-channelization, or any other modification of a navigable water of the United States, and applies to all structures, from the smallest floating dock to the largest commercial undertaking. It further includes, without limitation, any wharf, dolphin, weir, boom breakwater, jetty, groin, bank protection (e.g. riprap, revetment, bulkhead), mooring structures such as pilings, aerial or sub-aqueous power transmission lines, intake or outfall pipes, permanently moored floating vessel, tunnel, artificial canal, boat ramp, aids to navigation, and any other permanent, or semi-permanent obstacle or obstruction.
- C. **Section 404 Clean Water Act (33 USC § 1344)** requires authorization from the Secretary of the Army, acting through the Corps of Engineers, for the discharge of dredged or fill material into all waters of the United States, including wetlands. Discharges of fill material generally include, without limitation: placement of fill that is necessary for the construction of any structure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for intake and outfall pipes and sub-aqueous utility lines; fill associated with the creation of ponds; and any other work involving the discharge of fill or dredged material. A Corps permit is required whether the work is permanent or temporary. Examples of temporary discharges include dewatering of dredged material prior to final disposal, and temporary fills for access roadways, cofferdams, storage and work areas.

- D. **Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 USC § 1413)**, as amended, requires authorization from the Secretary of the Army, acting through the Corps of Engineers, for the transportation of dredged material for the purpose of dumping it in ocean waters. Discharges of dredged or fill materials into territorial seas also requires authorization under Section 404 of the Clean Water Act.
- E. **Outer Continental Shelf Lands Act (43 USC § 1333)** extends the authority of the Secretary of the Army, acting through the Corps of Engineers, to the prevention of obstruction to navigation in the navigable waters of the United States due to the construction of artificial islands and fixed structures on the outer continental shelf beyond the territorial sea.
- F. **Energy Re-organization Act of 1974 and Sections 1-6 Nuclear Regulatory Legislation (NUREG 0980)**
- G. **Other Authorities**

IV. Roles and Responsibilities

Nuclear Regulatory Commission (NRC). Congress established the NRC as an independent agency in January 1975 by passing the Energy Reorganization Act of 1974. This Act, along with provisions in the Atomic Energy Act of 1954, as amended, gave NRC a mandate to assume from the former Atomic Energy Commission the responsibility for regulating the various commercial, industrial, academic, and medical uses of nuclear materials and nuclear energy. The NRC's mission is to regulate the Nation's civilian use of byproduct, source, and special nuclear materials to ensure the adequate protection of public health and safety, to promote the common defense and security, and to protect the environment. The NRC's regulatory mission covers three major areas: nuclear reactors, nuclear materials, and radioactive waste. In this regard, the NRC licenses and inspects commercial nuclear power plants to ensure that they operate safely and securely. NRC continues to regulate nuclear reactors for an additional 60 years after they are permanently shut down and decommissioned.

U.S. Army Corps of Engineers (Corps). The Corps administers a regulatory program to protect the Nation's aquatic resources, including wetlands under Section 10 of the Rives and Harbors Act of 1899 and Section 404 of the Clean Water Act. Proposed nuclear energy facilities may require one or more permits from the Corps under these statutes.

NEPA Lead Federal Agency. NEPA is our basic national charter for protecting the environment. NEPA procedures must insure that environmental information

is available to public officials and citizens before decisions are made and before actions are taken. Each federal agency is responsible for complying with the requirements of NEPA for its respective action. However, a proposed project may require an action from several federal agencies (e.g., federal grant, license, permit). To prevent the duplication of efforts by federal agencies, NEPA provides for the designation of a lead agency for the preparation of an environmental impact statement (EIS).¹ Other agencies that have an action on the same project serve as cooperating agencies on the EIS.

The issuance by the NRC of a license to site and operate a nuclear energy facility is an action that normally requires the preparation of an EIS.² As the agency with the approval/disapproval authority for the licensing of nuclear energy projects, the NRC shall serve as the lead agency for the preparation of an EIS. Consistent with NEPA and the Council on Environmental Quality's (the CEQ) regulations, this MOU encourages early involvement with the public and relevant government agencies during the NEPA evaluation process.³

This MOU emphasizes the importance for the lead agency to receive specific information from other participating agencies at key stages of project development to foster an efficient procedure to develop documentation to meet all agencies' requirements. Specifically, the intent of this Agreement is to establish a process to facilitate the timely development of needed nuclear energy facility projects, whereby participating agencies will:

- Work together and with applicants and other stakeholders, as appropriate, including before complete applications for the necessary authorizations are filed;
- Identify and resolve issues quickly as possible;
- Attempt to build a consensus among governmental agencies and their stakeholders;
- Expedite the environmental review for nuclear energy facilities.

Project purpose and need coordination. The evaluation of a proposed project under the NEPA and CWA requires an agency to determine the project purpose and need. As the lead agency under NEPA responsible for the preparation of the analysis and decisions for the approval of new and expanded nuclear energy facilities, the NRC is responsible for determining the purpose and need of the project for purposes of the NRC NEPA document and of the NRC licensing process.⁴ The NRC shall coordinate early with the Corps to ensure that

¹ 40 CFR § 1501.5 – Lead Agency

² 10 CFR § 51.25 - Determination to prepare environmental impact statement or environmental assessment; eligibility for categorical exclusion

³ 40 CFR § 1501 – National Environmental Policy Act and Agency Planning

⁴ 10 CFR § 51 Subpart A - National Environmental Policy Act--Regulations Implementing Section 102(2)

the scope of the NEPA analysis includes all activities under Federal purview and that the purpose and need, the suite of alternatives, and evaluation criteria presented in the NEPA document are acceptable by the Corps in carrying out the Corps' legal responsibilities under binding statutes and regulations (e.g., conducting the Corps' public interest review, determining the least environmentally damaging practicable alternative under the CWA Section 404 (b)(1) Guidelines, and fulfilling other applicable legal requirements such as Endangered Species Consultation with U.S. Fish and Wildlife Service or Cultural Resource Coordination with the Advisory Council on Historic Preservation/State Historic Preservation Officer). The NRC and the Corps will work together and will implement their respective legal authorities to ensure that the proposal, with or without modifications, and the selected alternative will mitigate to the maximum extent practicable, any adverse effects on aquatic resources.

The Corps must complete an independent permit decision in carrying out its regulatory responsibilities; however, the Corps will give deference, to the maximum extent allowable by law, to the project purpose, project need, and project alternatives that NRC determines to be appropriate for the project. In according NRC such appropriate deference, the Corps must identify and use a project's basic purpose⁵, plus overall project purpose⁶, to satisfy the requirements of Section 404(b)(1) Guidelines, and specifically to identify the least environmentally damaging practicable alternative⁷, the only alternative that can be permitted by the Corps under Section 404 of the Clean Water Act. In addition, the Corps must identify and use a project's public and private need and a project's objective to determine whether or not a proposed project satisfies the Corps' public interest review for both Section 404 and Section 10 permits.

If the Corps cannot concur nor conditionally concur with NRC determinations as to purpose, need, alternatives, etc., such disputes shall be resolved at the lowest level possible and in accordance with the dispute resolution process outlined in Section V (A) of the MOU. In such instances, districts and divisions may sequentially elevate the matter to the Office of the Assistant Secretary of the

⁵ Basic Purpose is defined as the essential purpose of a given project and is used to determine whether or not the project is water dependent. In determining whether or not a project is water dependent, the Corps must consider 1) when a discharge does not require siting within a special aquatic site and 2) that practicable alternatives not involving special aquatic sites are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise. Special Aquatic Sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes (40 CFR § 230 Subpart E).

⁶ The Overall Project Purpose is determined by the Corps from the applicant's perspective and is defined to determine the range of practicable alternatives. The overall project purpose directly relates to the analysis of the alternatives considered.

⁷ 40 CFR § 230.10(a) Restrictions on Discharge – No discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem (Waters of the United States) so long as the alternative does not have other significant adverse environmental consequences. Practicable is defined as available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose.

Army who will address the matter along with the Executive Director, NRC (or NRC Chairman).

To further support this MOU, the signatory agencies shall develop additional guidance to ensure that the Corps' permit documentation is prepared concurrently with the NEPA process to the maximum extent practicable. To further support the NEPA process, when NRC provides preliminary draft NRC NEPA documents, the Corps shall review and provide written comments on the relevant portions of those documents, as appropriate in accordance with the timelines established under this MOU. Preliminary draft NRC NEPA documents include advance copies of the purpose, need, and alternatives sections of the NRC NEPA documents, as well as advance copies of the draft and final NEPA documents. Corps reviews of NRC NEPA documents will be completed and coordinated with the NRC as stated in the NRC EIS schedule for that project which shall be no more than 30 days [Need to confirm] from receipt of the document.

The Corps and the NRC hereby agree to work with each other and with other participating agencies or entities as appropriate, to ensure that timely decisions are made and that the responsibilities of each agency are met. Specifically, each agency agrees to:

A. Commit to Early Involvement

1. Conduct an early initial review. As soon as practicable when a prospective applicant, or an agency makes a request for involvement in connection with a project under development, each agency will assess its role in the review and issuance of approvals for the project.
 - a. Identify agency contacts for the proposed project. If a prospective applicant or agency needs assistance in determining regional, local or project specific contacts, then the identified contacts will assist in identifying additional contacts. The initial agency contacts are:

Department of the Army

Chip Smith

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Nuclear Regulatory Commission
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- b. Meet with prospective applicants and other agencies when requested by the prospective applicant, the lead agency, or at its own initiative, to identify areas of potential concern to other agencies and to assess the need for and availability of agency resources to address issues related to the proposed project.
2. Consult with NRC, as the lead agency, in establishing a schedule. The lead agency will notify the Corps as early as possible of upcoming projects for construction and operation of nuclear energy facilities and, in conjunction with other involved participating agencies⁸, identify those projects that will be subject to this agreement. The lead agency

⁸ Other participating agencies may include, but not be limited to, U. S. Fish & Wildlife Service (USFWS), U. S. Environmental Protection Agency (USEPA), National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Advisory Council on Historic Preservation (ACHP), and other federal, state and local agencies. These agencies may become signatory to this MOU or a separate agreement in order to facilitate coordination efforts.

will then, taking into consideration the relative priorities of other projects subject to this agreement, establish a commensurate schedule for the project review process, including key times for consultation. Such schedule shall be as expeditious as possible and consistent with the periods for analysis and response that are required by statutes and regulations applicable to the proposed project. In establishing this schedule, the NRC and Corps will strive to ensure that the individual permitting processes and related permit review activities occur on a concurrent, rather than sequential, basis with the objective of avoiding unnecessary delays in the process and the schedule established by the NRC. If at any point during the consultation process a relevant agency anticipates an inability to comply with the agreed-upon schedule, it will communicate the reason for this inability as soon as possible. The agencies will then work together to help avoid the anticipated delay if possible.

- a. In light of its overall responsibility for determining whether projects are consistent with the public convenience and necessity, NRC will be the lead agency for preparation of an EIS or EA on nuclear energy projects, unless, at the request of another agency (or after NRC's own review), NRC, in consultation with that agency, determines that another agency better meets the CEQ lead agency requirements.
 - b. The NRC will encourage prospective applicants to establish and maintain an electronic web-based repository in which all filings by applicants for authorizations, including filings with local, state, and federal agencies, are made available to all agencies involved in their project. The repository should also include others requests and other pertinent documents. Such repository will be completely at the expense of the applicant.
 - c. The NRC will include in any Notice of Intent to Prepare an EIS or EA guidance to the public regarding the process set forth in this Agreement.
- B. Proactive participation. Each agency will, as soon as possible after notification by a prospective applicant, an applicant, another agency, or otherwise:
1. Identify the applicable statutory, regulatory and policy responsibilities of each agency.
 2. Identify the issues and concerns related to the proposed project that need to be addressed in order for the agency to meet its obligations.

3. Provide the prospective applicant, the applicant, and/or other agency, relevant studies, data, (such as maps showing features over which the agency may have jurisdiction), and any other information concerning the status of matters the agency considers relevant (including matters that may be under consideration, such as the results of threatened and endangered species consultation, or essential fish habitat consultation).
 4. Identify issues and concerns and attempt to resolve them while draft documentation is being developed.
- C. Sharing of data. The agencies will share the information gathered, considered and relied upon by each of them with all other relevant agencies. Specifically, the NRC and Corps agree to:
1. Cooperate in the preparation of requests for additional studies or data, to avoid duplicative requests and to compile a consistent set of information on which all of the agencies will rely.
 2. Cooperate in identifying and developing the information at the level of detail required to complete environmental and cultural resources project review.
 3. Cooperate in developing alternative routes and/or actions.
 4. Cooperate in developing mitigation measures.
- D. Communicate informally. The agencies agree to informally communicate with each other and other relevant agencies throughout the process to ensure that issues are raised as soon as possible and shared among all agencies. The lead agency will coordinate and share information with all relevant participating agencies.

V. Administration of the MOU

- A. Dispute Resolution. While retaining ultimate responsibility for making determinations and exercising their individual responsibilities in accordance with existing statutory responsibilities, the NRC and the Corps will consult with one another to resolve disputes using existing dispute resolution methods and in accordance with this agreement. With respect to disputes regarding the procedures set forth in this agreement, the NRC and Corps will consult with the CEQ. If an agency identifies such a dispute, it shall notify the other and attempt to resolve the matter. If the dispute is not resolved within thirty (30) days of the notification of the dispute:
1. Either agency may forward the dispute to the CEQ.

2. CEQ will make a written recommendation on resolution of the dispute within thirty (30) days of receiving the documentation from the agencies, unless there is an agreement from all relevant parties that the period should be extended for a particular reason.
 3. Recommendations received from CEQ will be taken into account by the NRC and Corps, in a manner consistent with applicable law when determining further actions regarding the subject of the dispute. Any recommendation not accepted by the agencies will have to be fully explained in writing to the Chairman of the CEQ.
 4. This opportunity to consult with CEQ shall be separate and apart from the opportunity to do so provided for in the CEQ's regulations at 40 CFR § 1504.
- B. This MOU may be modified, amended, or terminated upon written request of any party hereto and the subsequent written concurrence of all other participating agencies. Participation in this agreement may be terminated sixty (60) days after providing written notice of such termination to other participating agencies.
- C. Acknowledgement that the authority and responsibilities of the parties under their respective jurisdictions are not altered by the MOU.
1. This MOU is intended only to improve the working relationships of the participating agencies in connection with expeditious decisions with regard to nuclear energy facility authorizations and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any person or party against the United States, its agencies, its officers, or any other person.
 2. This MOU is to be construed in a manner consistent with all effective existing laws and regulations.
 3. The MOU neither expands nor is in derogation of those powers and authorities vested in the participating agencies by applicable laws, statutes, or regulations.
 4. The terms of this MOU are not intended to be enforceable by any party other than the signatories hereto.
 5. The participating agencies intend to fully carry out the terms of this MOU. All provisions in this MOU, however, are subject to available resources. In addition, this MOU does not limit the ability of any of the participating agencies to review and respond to final applications.
 6. If a prospective applicant, applicant, or other person requests a correction of information disseminated pursuant to this MOU, as authorized by Section 515 of the Treasury and General Government Appropriations Act for FY 2001 (P.L. 106-554), the process by which

such request will be addressed will be that established by the agency that disseminated the information.

7. This MOU cannot be used to obligate or commit funds or as the basis for the transfer of funds.
8. Nothing in this MOU, in and of itself, requires any signatory agency to enter into any contract, grant, or interagency agreement.
9. All provisions in this MOU are subject to the availability of funds.

ACCORDINGLY, the Parties have signed this Memorandum of Understanding on the dates set forth below, to be effective for all purposes as of the date last signed. The signatures may be executed using counterpart original documents.

John Paul Woodley, Jr.
Assistant Secretary
of the Army (Civil Works)

Dale E. Klein
Chairman
Nuclear Regulatory Commission

Date

Date