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MEMORANDUM BETWEEN The Department of the Army and The Environmental Protection Agency

Federal Enforcement for the Section 404 Program of the Clean Water Act

I. PURPOSE AND SCOPE

The United States Department of the Army (Army) and the United States Environmental Protection Agency (EPA) hereby establish policy and procedures pursuant to which they will undertake federal enforcement of the dredged and fill material permit requirements ("Section 404 program") of the Clean Water Act (CWA). The U.S Army Corps of Engineers (Corps) and EPA have enforcement authorities for the Section 404 program, as specified in Sections 301(a), 308, 309, 404(n), and 404(s) of the CWA. In addition, the 1987 Amendments to the CWA (the Water Quality Act of 1987) provide new administrative penalty authority under Section 309(g) for violations of the Section 404 program. For purposes of effective administration of these statutory authorities, this Memorandum of Agreement (MOA) sets forth an appropriate allocation of enforcement responsibilities between EPA and the Corps. The prime goal of the MOA is to strengthen the Section 404 enforcement program by using the expertise, resources and initiative of both agencies in a manner which is effective and efficient in achieving the goals of the CWA.

II. POLICY

A. General.

It shall be the policy of the Army and EPA to maintain the integrity of the program through federal enforcement of Section 404 requirements. The basic premise of this effort is to establish a framework for effective Section 404 enforcement with very little overlap. EPA will conduct initial on-site investigations when it is efficient with respect to available time, resources and/or expenditures, and use its authorities as provided in this agreement. In the majority of enforcement cases the Corps, because it has more field resources, will conduct initial investigations and use its authorities as provided in this agreement. This will allow each agency to play a role in enforcement which concentrates its resources in those areas for which its authorities and expertise are best suited. The Corps and EPA are encouraged to consult with each other on cases involving novel or important legal issues and/or technical situations. Assistance from the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS) and other federal, state, tribal and local agencies will be sought and accepted when appropriate.

B. Geographic Jurisdictional Determinations.

Geographic jurisdictional determinations for a specific case will be made by the investigating agency. If asked for an oral decision, the investigator will caution that oral statements regarding jurisdiction are not an official agency determination. Each agency will advise the other of any problem trends that they become aware of through case by case determinations and initiate interagency discussions or other action to address the issue. (Note: Geographic jurisdictional determinations for "special case" situations and interpretation of Section 404(f) exemptions for "special Section 404(f) matters" will be handled in accordance with the MOA on Geographic

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Jurisdiction and Section 404(f) of the Section 404 Program.)

C. Violation Determinations.

The investigating agency shall be responsible for violation determinations, for example, the need for a permit. Each agency will advise the other of any problem trends that they become aware of through case by case determinations and initiate interagency discussions or other action to address the issue.

D. Lead Enforcement Agency.

The Corps will act as the lead enforcement agency for all violations of Corps-issued permits. The Corps will also act as the lead enforcement agency for unpermitted discharge violations which do not meet the criteria for forwarding to EPA, as listed in Section III.D. of this MOA. EPA will act as the lead enforcement agency on all unpermitted discharge violations which meet those criteria. The lead enforcement agency will complete the enforcement action once an investigation has established that a violation exists. A lead enforcement agency decision with regard to any issue in a particular case, including a decision that no enforcement action be taken, is final for that case. This provision does not preclude the lead enforcement agency from referring the matter to the other agency under Sections III.D.2 and III.D.4 of this MOA.

E. Environmental Protection Measures.

It is the policy of both agencies to avoid permanent environmental harm caused by the violator's activities by requiring remedial actions or ordering removal and restoration. In those cases where a complete remedy/removal is not appropriate, the violator may be required, in addition to other legal remedies which are appropriate (e.g., payment of administrative penalties) to provide compensatory mitigation to compensate for the harm caused by such illegal actions. Such compensatory mitigation activities shall be placed as an enforceable requirement upon a violator as authorized by law.

III. PROCEDURES

A. Flow chart.

The attached flow chart provides an outline of the procedures EPA and the Corps will follow in enforcement cases involving unpermitted discharges. The procedures in (B.), (C.), (D.), (E.) and (F.) below are in a sequence in which they could occur. However, these procedures may be combined in an effort to expedite the enforcement process.

B. Investigation.

EPA, if it so requests and upon prior notification to the Corps, will be the investigating agency for unpermitted activities occurring in specially defined geographic areas (e.g., a particular wetland type, areas declared a "special case" within the meaning of the MOA on Geographical Jurisdiction and Section 404(f) of the Section 404 Program). Timing of investigations will be commensurate with agency resources and potential environmental damage. To reduce the potential for duplicative federal effort, each agency should verify prior to initiating an investigation that the other agency does not intend or has not already begun an investigation of the same reported violation. If a violation exists, a field investigation report will be prepared which at a minimum provides a detailed description of the illegal activity, the existing environmental setting, initial view on potential impacts and a recommendation on the need for initial corrective measures. Both agencies agree that investigations must be conducted in a professional, legal manner that will not prejudice future enforcement action on the case. Investigation reports will be provided to the agency selected as the lead on the case.

C. Immediate Enforcement Action.

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The investigating or lead enforcement agency should inform the responsible parties of the violation and inform them that all illegal activity should cease pending further federal action. A notification letter or administrative order to that effect will be sent in the most expeditious manner. If time allows, an order for initial corrective measures may be included with the notification letter or administrative order. Also, if time allows, input from other federal, state, tribal and local agencies will be considered when determining the need for such initial corrective measures. In all cases the Corps will provide EPA a copy of its violation letters and EPA will provide the Corps copies of its §308 letters and/or §309 administrative orders. These communications will include language requesting the other agency's views and recommendations on the case. The violator will also be notified that the other agency has been contacted.

D. Lead Enforcement Agency Selection.

Using the following criteria, the investigating agency will determine which agency will complete action on the enforcement case:

1. EPA will act as the lead enforcement agency when an unpermitted activity involves the following:

- a. Repeat Violator(s);
- b. Flagrant Violation(s);
- c. Where EPA requests a class of cases or a particular case; or
- d. The Corps recommends that an EPA administrative penalty action may be warranted.

2. The Corps will act as the lead enforcement agency in all other unpermitted cases not identified in Part III D.1. above. Where EPA notifies the Corps that, because of limited staff resources or other reasons, it will not take action on a specific case, the Corps may take action commensurate with resource availability.

3. The Corps will act as the lead enforcement agency for Corps-issued permit condition violations.

4. Where EPA requests the Corps to take action on a permit condition violation, this MOA establishes a "right of first refusal" for the Corps. Where the Corps notifies EPA that, because of limited staff resources or other reasons, it will not take an action on a permit condition violation case, the EPA may take action commensurate with resource availability. However, a determination by the Corps that the activity is in compliance with the permit will represent a final enforcement decision for that case.

E. Enforcement Response.

The lead enforcement agency shall determine, based on its authority, the appropriate enforcement response taking into consideration any views provided by the other agency. An appropriate enforcement response may include an administrative order, administrative penalty complaint, a civil or criminal judicial referral or other appropriate formal enforcement response.

F. Resolution.

The lead enforcement agency shall make a final determination that a violation is resolved and notify interested parties so that concurrent enforcement files within another agency can be closed. In addition, the lead enforcement agency shall make arrangements for proper monitoring when required for any remedy/removal, compensatory mitigation or other corrective measures.

G. After-the-Fact Permits.

No after-the-fact (ATF) permit application shall be accepted until resolution has been reached through an appropriate enforcement response as determined by the lead enforcement agency (e.g., until all administrative, legal and/or corrective action has been completed, or a decision has been made that no enforcement action is to be

taken).

IV. RELATED MATTERS

A. Interagency Agreements.

The Army and EPA are encouraged to enter into interagency agreements with other federal, state, tribal and local agencies which will provide assistance to the Corps and EPA in pursuit of Section 404 enforcement activities. For example, the preliminary enforcement site investigations or post-case monitoring activities required to ensure compliance with any enforcement order can be delegated to third parties (e.g., FWS) who agree to assist Corps/EPA in compliance efforts. However, only the Corps or EPA may make a violation determination and/or pursue an appropriate enforcement response based upon information received from a third party.

B. Corps/EPA Field Agreements.

Corps Division or District offices and their respective EPA Regional offices are encouraged to enter into field level agreements to more specifically implement the provisions of this MOA.

C. Data Information Exchange.

Data which would enhance either agency's enforcement efforts should be exchanged between the Corps and EPA where available. At a minimum, each agency shall begin to develop a computerized data list of persons receiving ATF permits or that have been subject to a Section 404 enforcement action subsequent to February 4, 1987 (enactment date of the 1987 Clean Water Act Amendments) in order to provide historical compliance data on persons found to have illegally discharged. Such information will help in an administrative penalty action to evaluate the statutory factor concerning history of a violator and will help to determine whether pursuit of a criminal action is appropriate.

V. GENERAL

- A.** The procedures and responsibilities of each agency specified in this MOA may be delegated to subordinates consistent with established agency procedures.
- B.** The policy and procedures contained within this MOA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the U.S. Deviation or variance from these MOA procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.
- C.** Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of either agency. All formal guidance interpreting this MOA shall be issued jointly.
- D.** This agreement shall take effect 60 days after the date of the last signature below and will continue in effect for five years unless extended, modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice, prior to that time.

Robert W. Page
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