**Interstate Natural Gas Association of America**

Submitted via www.regulations.gov
Docket No. EPA-HQ-OW-2018-0855

May 24, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Constitution Ave., N.W.
Washington, D.C. 20460

**Re: Clean Water Act Section 401 Water Quality Certification Pre-Proposal Recommendations**

Dear Administrator Wheeler:

The Interstate Natural Gas Association of America ("INGAA") respectfully submits these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") request for pre-proposal recommendations on EPA's forthcoming Clean Water Act Section 401 Water Quality Certification rulemaking and guidance efforts, in accordance with Executive Order 13868.[1]

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's member companies transport over 95% of the nation's natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

INGAA supports effective implementation of the Clean Water Act and the protection of water quality and respects the important role that states and tribes play in ensuring these shared objectives. Section 401 provides states an important and distinct role in the environmental review

[1] Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, Sec. 3, Apr. 10, 2019, 84 Fed. Reg. 15495 Apr. 15, 2019, https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07656.pdf.

of interstate natural gas pipelines by federal agencies. INGAA's members are frequent participants in Section 401 processes and continue to be significantly affected by the implementation of Section 401. Accordingly, INGAA and its members can provide concrete input to inform the Agency's efforts pursuant to Executive Order 13868. EPA's work to clarify and guide the administration of Section 401 can materially support the integrity and effectiveness of the Section 401 program.

## I. EPA Needs to Take Action to Improve the Efficiency and Consistency of Section 401 Reviews of Interstate Pipeline Projects

Cooperative federalism is best served by clear and harmonious federal and state roles. Section 401 embodies the principle of cooperative federalism, where federal and state governments have distinctive roles appropriate to each. Congress charged EPA with administering the Clean Water Act, including overseeing implementation of the Section 401 program by federal agencies whose permits or authorizations of interstate natural gas pipelines trigger Section 401.[2] States have the opportunity to certify whether discharges from interstate pipelines will comply with federally approved state water quality standards and in doing so can condition the activity to ensure that the discharge will comply with applicable water quality standards.[3]

Recently the federal-state balance has been altered where some states have viewed Section 401 as means of determining which interstate pipeline projects are in the public interest and which are not. This in effect interferes with federal jurisdiction over projects in interstate commerce. For example:

- The State of New York denied water quality certification for the $683 million Constitution Pipeline, nearly three years after receiving the project's initial application, and after Constitution withdrew and resubmitted its request for certification twice.

- The state of New Jersey denied certification for the PennEast pipeline, deeming the application incomplete until the company provided surveys of the entire pipeline route. Landowners and the state itself, however, denied the company access to their property to conduct the required surveys, which forced the company to begin eminent domain proceedings.

- New York denied certification for the Millennium Valley Lateral pipeline project, based on the lack of an analysis by FERC of the downstream greenhouse gas emissions, not water quality concerns.

[2] *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.). The Agency, therefore, has a responsibility to define a common framework for Section 401 reviews; *see also* 40 C.F.R. Part 121 (EPA's regulations addressing federal agency implementation of water quality certifications).

[3] Courts have consistently recognized that state participation in the Section 401 process is important, yet bounded. *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (recognizing that the state participation in Section 401 is essential to a scheme of cooperative federalism); *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

- The State of Oregon denied water quality certification for the Jordan Cove liquefied natural gas export terminal and its feeder pipeline following the company's responses to multiple requests for additional information.

In other instances, stakeholders opposed to energy infrastructure have pointed to EPA's outdated regulations[4] and guidance that is not consistent with the statute[5] in their litigation, thus adding further confusion to the regulatory process.

Therefore, clarification is needed to provide more predictable and efficient permitting for these vital infrastructure projects.

## II. EPA Should Ensure That Implementation of Section 401 Is Consistent With the Statutory Principles and Purpose of Section 401

The language of Section 401 dictates EPA's approach towards critical aspects of the Section 401 program, including the time period for a state's review, the proper scope of review for acting on a Section 401 request, and how the Section 401 certification requirement is waived. EPA's new guidance and rulemaking should address the following points based on the statutory language of Section 401. As EPA leads its upcoming interagency review on Section 401, EPA should work with the other federal agencies to ensure their regulations, guidance, and implementation of Section 401 are consistent with these statutory principles.[6]

[4] In 1970, Congress enacted Section 21 of the Federal Water Pollution Control Act ("FWPCA"), which contained a state certification requirement that predated Section 401. In 1971, EPA promulgated 40 C.F.R. Part 121 to implement Section 21 of FWPCA. 36 Fed. Reg. 2516 (Feb. 5, 1971) (proposed rule); 36 Fed. Reg. 8563 (May 8, 1971) (final rule). In a rulemaking to revise EPA's Section 401 procedures related to Section 402 of the Clean Water Act, EPA recognized that the regulations now found in Part 121 needed revision because the "[t]he substance of these regulations predates the 1972 amendments to the Clean Water Act and has never been updated." 44 Fed. Reg. 3265, 32880 (June 7, 1979).

[5] For example, EPA's Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (April 2010 Interim) suggests that the time period for review begins with the state's determination that the request is "complete," a concept that is not supported by the statute and that was recently rejected by the courts. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

[6] For example, the Assistant Secretary of the Army (Civil Works) recently confirmed that when the U.S. Army Corps of Engineers is the lead federal agency, the Corps determines the time period for review and that time period begins upon receipt of the request. *See* Memorandum for the Chief of Engineers, USAGE Regulatory Policy Directives Memorandum on Duration of Permits and Jurisdictional Determinations, Timeframes for Clean Water Act Section 401 Water Quality Certifications, and Application of the 404(b)(1) Guidelines (Dec. 13, 2018) (attached as Exhibit 1).

*A. The time period for review begins with the "receipt" of the request and runs for a reasonable period of time (at most up to one year).*

Section 401 balances the state's interest in a thorough evaluation of potential water quality impacts with the federal government's obligation to act promptly on permit applications. It does so in part by imposing a clear time limit for the state's action:

> If the State . . . fails or refuses to act on a request for certification, **within a reasonable period of time (which shall not exceed one year) after receipt of such request**, the certification requirements of this subsection shall be waived with respect to such Federal application.

33 U.S.C. § 1341(a)(1) (emphasis added). "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

The statutory language creates a "bright-line rule" that the "receipt" of a Section 401 request is the beginning of review. *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018). Events subsequent to the state's receipt, such as the state's validation of the completeness of the request, cannot delay the start of the time period for review. *See id*. Neither can the applicant and the state agree to delay the start of the review period. *See Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084 at P 41 (2018) ("The execution of an agreement between an applicant and a certifying agency does not entail a 'receipt' by the agency.").[7]

Following the "receipt of the request," states have a "reasonable period of time (which shall not exceed one year)" to act on a request before waiver occurs. 33 U.S.C. § 1341(a)(1). The lead federal agency determines the reasonable period of time.[8] *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017) (holding that the lead federal agency decides whether waiver has occurred). Although the statute provides a full year as the absolute maximum amount of time, the lead federal agency could determine a reasonable period of time to be less than one year.[9] *See Hoopa Valley Tribe v. FERC,* 913 F.3d 1099, 1103-04 (D.C. Cir. 2019).

---

[7] In the case of the Northern Access Pipeline, the State of New York received the request for water quality certification on March 2, 2016. The applicant and the state later agreed in a letter that April 8, 2016 would serve as the date "on which the application was deemed received" by the state. The state denied the water quality certification request on April 7, 2017. FERC, in its capacity as the federal lead agency, determined that New York failed to act on the water quality certification within the immutable one-year period established by the statute as the maximum period of time for state action on a request for certification—in this case, one year from the request received on March 2, 2016—and that the Section 401 obligation was therefore waived. *See Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084 at PP 35, 42 (2018).

[8] A similar approach is taken in the Administration's One Federal Decision Implementation Memorandum, which instructs the lead federal agency to coordinates all pertinent schedules. *See* Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018).

[9] Both EPA and the Army Corps of Engineers have determined that a reasonable period of time should generally be less than one year. *See* 40 C.F.R. § 121.16(b) (6 month time period); 40 C.F.R. § 124.53(c)(3) (60 day time period); 33 C.F.R. § 325.2(b)(ii) (60 day time period).

The statutory review period begins with a state's receipt of the request and ends when the lead federal agency determines a reasonable period of time has occurred—a time limit that cannot be circumvented or avoided. Just recently, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the practice of withdrawing and refiling the same Section 401 request in an attempt to restart the review period for the same project. *See Hoopa Valley*, 913 F.3d at 1104 (holding that the withdrawal and resubmission scheme "serves to circumvent a congressionally granted authority"). Imposing pre-consultation or pre-filing requirements before a state will consider an application is similarly flawed, since it purports to control when the review period begins, rather than following the statute's direction.

In providing the states a role during the federal permitting process, Congress was clear that the states' role was temporally limited to a reasonable period of time, not to exceed one year, from the date of receipt of the certification request. EPA should provide clear direction on this point.

*B. A state's review under Section 401 is properly focused on whether the discharge will comply with applicable water quality standards.*

Section 401 focuses the state's role on protecting water quality under the Clean Water Act. Specifically, under Section 401(a)(1), the scope of the state's inquiry into whether to grant or deny the certification is whether the "discharge" will comply with the "applicable provisions" of Sections 301, 302, 303, 306, and 307 of the Clean Water Act:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . **that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title**.

33 U.S.C. § 1341(a)(1) (emphasis added). The statutory text limits the state's inquiry on whether to grant (or deny) the certification request to the question of whether the *discharge* will comply with the applicable provisions. *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711-12 (1994) ("Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges.").

*C. When imposing conditions, a state may look to the applicable provisions of the Clean Water Act or any other appropriate requirement of state law related to water quality.*

Once the state determines that a certification can be granted under Section 401(a)(1), Section 401(d) of the statute requires that a certification set forth limitations and monitoring requirements necessary to assure that discharges from a federally authorized activity will comply with Sections 301, 302, 303 (as incorporated by Section 301), 306, and 307 of the Clean Water Act, as well as "any other appropriate requirements of State law." *Id*. at § 1341(d). Given the overall focus of the Section 401 statutory program, the phrase "requirements of state law" should be interpreted as referring to a state water quality law that provides a standard or requirement to be met, not a prohibition on action, such as a prohibition on interstate natural gas pipelines. *See Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("This is plainly true. Section 401(d),

reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another.").

*D. EPA should clarify that the lead federal agency has the authority and obligation to make waiver determinations.*

The statutory language of Section 401 prohibits states from indefinitely delaying issuance of a federal permit by requiring a state to act within a reasonable period of time following the receipt of the request:

> **If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time** (which shall not exceed one year) after receipt of such request, **the certification requirements of this subsection shall be waived** with respect to such Federal application. **No license or permit shall be granted until the certification required by this section has been obtained or has been waived** as provided in the preceding sentence.

33 U.S.C. § 1341(a)(1) (emphasis added); *see also Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 698-99 (D.C. Cir. 2017) ("If the State fails to act within that period, the Act's 'certification requirements' are deemed 'waived,' such that the pipeline no longer needs a water-quality certificate to begin construction.").

When a state has not acted upon a request for certification pursuant to its authority under Section 401, the lead federal agency is the entity called to find that the requirement for certification has been waived. *See Millennium Pipeline*, 860 F.3d 696, 700 (D.C. Cir. 2017) (instructing project applicants to "present evidence of waiver" directly to the lead federal agency). A state is considered to have acted upon a request for certification only where it has complied with the terms of Section 401. *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (quoting 33 U.S.C. § 1341(a)(1)) ("FERC . . . may not act based on any certification the state might submit; rather, it has an obligation to determine that the specific certification 'required by [section 401] has been obtained,' and without that certification, FERC lacks authority to issue a license."). Because a federal agency must withhold its license or permit until the state has acted within a reasonable period of time, the lead federal agency must confirm whether the state action has satisfied the express requirements of Section 401—by issuing a decision within a reasonable period of time that focuses on whether the discharge complies with applicable water quality standards. *See City of Tacoma, Washington,* 460 F.3d at 68 (federal agency is required "at least to confirm that the state has facially satisfied the express requirements of section 401").[10]

[10] The obligation to determine whether the state has facially satisfied the express requirements of Section 401 can be contrasted against a federal agency's review of the substantive aspects of a certification. *See Am. Rivers v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) ("While [a Federal agency] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, the [agency] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401").

Once the lead federal agency determines that waiver has occurred the certification requirement "falls out of the equation," *Millennium Pipeline Co.,* 860 F.3d at 700, and all other federal agencies can and should move forward with processing their reviews and authorizations.

This approach is consistent with Executive Order 13807 and the One Federal Decision Memorandum of Understanding, which commit the Executive Branch to a single, coordinated approach to project reviews on an agreed timetable under direction of a lead federal agency.[11] The U.S. Army Corps of Engineers has already incorporated this concept into its One Federal Decision Implementation Plan. Thus, where the Army Corps of Engineers is not the lead federal agency, which is the case for interstate natural gas pipelines requiring FERC approval, the Army Corps will "defer to the determination of the lead agency, determine that the certification has been waived, and proceed accordingly." U.S. Army Corps of Engineers, Memorandum, Implementation Guidance for Regulatory Compliance With Executive Order 13807, page 8, Sept. 26, 2018 (attached as Exhibit 2).

## III. Conclusion

Following the direction of the statute itself, EPA should set clear guideposts for federal, state and tribal authorities to implement Section 401 in a manner that respects and supports the important and distinctive roles of each participant in the balance of cooperative federalism. Each of the points noted above merits specific inclusion in EPA's efforts under Executive Order 13868 and will inure to the benefit of the nation's waterways as well as the public's vital interest in interstate natural gas pipelines.

INGAA appreciates your consideration of these comments and we welcome additional dialogue. Please contact me at 202-216-5955 or ssnyder@ingaa.org if you have any questions. Thank you.

Sincerely,

Sandra Y. Snyder
Senior Regulatory Attorney, EH&S
Interstate Natural Gas Association of America

[11] *See* Executive Order 13807, *Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*, Aug. 15, 2017, 82 Fed. Reg. 40463 (Aug. 24, 2017); Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018).

# Exhibit 1

Memorandum for the Chief of Engineers, USAGE Regulatory Policy Directives Memorandum on Duration of Permits and Jurisdictional Determinations, Timeframes for Clean Water Act Section 401 Water Quality Certifications, and Application of the 404(b)(1) Guidelines (Dec. 13, 2018)

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

DEC 13 2013

MEMORANDUM FOR THE CHIEF OF ENGINEERS

SUBJECT: USACE Regulatory Policy Directives Memorandum on Duration of Permits and Jurisdictional Determinations, Timeframes for Clean Water Act Section 401 Water Quality Certifications, and Application of the 404(b)(1) Guidelines

1. **BACKGROUND:** I am conducting a thorough review of the Army's Civil Works Program, in coordination with my staff and the Office of the Army General Counsel, to ensure that the Army is executing its program consistent with existing policies and legal authorities. Section 10 of the Rivers and Harbors Act of 1899 (RHA) (33 USC § 403) requires authorization from the Secretary of the Army, acting through the Chief of Engineers, for work in and the construction of any structure in or over any navigable water of the United States. Section 404 of the Clean Water Act (CWA) (33 USC § 1344) authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into navigable waters. The Secretary of the Army, acting through the Chief of Engineers, works closely with the Administrator of the Environmental Protection Agency (EPA) in developing policy and guidelines to effectuate the Section 404 program. The Army and EPA work together to provide certainty for the general public in the process.

As part of reviewing the Army's program, I have identified three areas in which guidance to United States Army Corps of Engineers (USACE) districts and divisions can help achieve nationwide consistency and adherence to our existing regulations, policy, and guidance: (i) the duration of permits and jurisdictional determinations; (ii) setting reasonable timeframes for states issuing water quality certifications under section 401 of the CWA; and (iii) the application of the 404(b)(1) guidelines (Guidelines) to proposed development projects.

2. **DISCUSSION**

**a. Duration of permits and jurisdictional determinations**

I understand that there are situations in which USACE districts have issued individual permits with expiration dates that did not coincide with the proposed dredged and fill activity being authorized. An example would be if the proposed single and complete development project would take fifteen years to construct, yet the proffered permit is only for a five-year period. The expiration of a permit prior to the completion of the proposed activity may be inconsistent with our existing regulations and can cause undue hardship on permittees by requiring them to submit a request for a time extension or in some cases a new application prior to the completion of the authorized project.

District Engineers or their designees (all such persons referred to hereinafter as "District Engineer") are authorized and required to issue or deny permits in accordance with the requirements of the relevant statutory authorities and USACE regulations. This authority includes the ability to determine the duration of the permit based on the proposed activity being authorized (33 CFR § 325.6). Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with a permit of indefinite duration...will specify time limits for completing the work or activity (33 CFR § 325.6(c)), thereby limiting the duration for which a permit is valid. The regulation also states that the date established by the issuing official will be for a reasonable time based on the scope and nature of the work involved. Considerations under this guidance may include the overall impacts associated with the project, ease of accessibility and construction methods, work type, and other factors. Pursuant to this guidance, the District Engineer, shall ensure that each permit is granted for a time period sufficient for the permittee to complete the work specified in the application. In making this determination, District Engineers shall ensure they consider the materials provided by the applicant and any request by the applicant for a permit timeframe. This guidance does not apply to general permits, which are limited by the Clean Water Act to a five-year duration (33 USC § 1344(e)). Additionally, this directive does not apply to permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters.

Pursuant to existing guidance and policy, jurisdictional determinations and delineations shall remain valid for the duration of a permit (including any time extensions). Regulatory Guidance Letter (RGL) 16-01 states, among other things, that approved jurisdictional determinations will remain valid for a period of five years (RGL 16-01 ¶ 3(b)). However, Paragraph 3(g) of RGL 05-02 instructs that "jurisdictional delineations associated with issued permits and/or authorization are valid until the expiration date of the authorization/permit." Therefore, District Engineers shall align the duration of all jurisdictional determinations and delineations with the duration of the issued authorization or permit. In the event an extension is requested for a permit pursuant to 33 CFR § 325.6(d), any previously granted jurisdictional determination or delineation concurrence associated with the issued permit shall remain valid for the duration of any subsequent permit time extension and no new jurisdictional determination or delineation will be required unless the permittee fails to obtain an extension before expiration of the permit. This policy shall apply to all permit extension requests pending when the final USACE guidance is issued. USACE shall immediately draft guidance based on this directive. Such draft guidance shall be submitted to this office for review within 45 days from the date of this issuance.

USACE shall also immediately begin evaluating the five-year period for which stand-alone approved jurisdictional determinations remain valid as stated in RGL 16-01 ¶ 3(b)(3). Specifically, USACE shall evaluate and provide an analysis based upon the best available science and its recommendation as to whether it would be appropriate to extend the five-year period and, if an extension is determined to not be appropriate, what the reasons are for such a conclusion. Such analysis could include a consideration for how long a change in site conditions may take to modify the extent of wetlands, timeframe practices used by Regulatory for other purposes, and other agency delineation practices for timeframes, such as USDA. Such recommendation shall be submitted to this office for review within 45 days from the date of this issuance.

**b. Timeframes for CWA Section 401 Water Quality Certifications**

Section 401 of the CWA requires any applicant for a license or permit to conduct any activity that will result in any discharge into navigable waters provide the permitting agency a certification for the state in which the proposed activity will take place. The certification should state that the proposed discharge will comply with certain provisions of the CWA related to state water quality effluent limitations (CWA Sections 301, 302, 303, 306, and 307). If the state fails or refuses to act on such a request for certification within a reasonable period of time (not to exceed one year), after receipt of such request, the certification requirements of Section 401 shall be waived. With regard to the Army's issuance of CWA Section 404 permits, no permit shall be issued unless the required certification has been obtained or waived.

33 CFR § 325.2 sets forth procedures for incorporating this requirement into the Army's permitting process. If a CWA Section 401 certification is required, the District Engineer shall notify the applicant and obtain from the applicant or the certifying agency a copy of such certification, unless the requirement is waived. Section (b)(ii) provides that a waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty (60) days after receipt of such a request unless the District Engineer determines a shorter or longer period is reasonable for the state to act. I emphasize the fact that, absent special circumstances identified by the District Engineer, Army regulations provide that the certifying agency has sixty (60) days to act on a request for a Section 401 water quality certification upon *receipt* of such request. Only in special circumstances should a District Engineer determine a longer timeframe than sixty (60) days is reasonable (but not to exceed one year).

I understand that it has been standard practice in some USACE districts to give states an entire year to act on a Section 401 request. Such an approach is inconsistent with our existing Army regulations. The one-year period set forth in the CWA sets forth the

outer bounds of a time period on a decision by the state and should not be used as a default timeframe for a state's decision. Additionally, District Engineers are reminded that under Section 401, the time period for a state's review begins upon receipt of the request by the applicant.

The default time period will be sixty (60) days unless the District Engineer establishes that circumstances reasonably require a period of time longer than sixty (60) days. USACE shall immediately draft guidance based on this directive establishing criteria to provide District Engineers for identifying reasonable timeframes for requiring states to provide Section 401 water quality certification decisions. The reasonableness of the timeframe may be based on the type of proposed activity, complexity of the site that will be impacted, or other factors as determined by the District Engineer. I note that the regulation states that the District Engineer will base the determination of a longer reasonable period of time on information provided by the certifying agency. However, that does not require the District Engineer to automatically accept such information and approve a longer timeframe. The District Engineer will take the information provided by the certifying agency into consideration, along with the other factors identified under this effort, but the ultimate decision on timeframe rests with the District Engineer. A certifying agency's request for additional time that is based on workload or resource issues or that they do not have enough information to proceed would not be valid reasons for consideration. Such draft guidance shall be submitted to this office for review within 45 days from the date of this issuance.

**c. Application of 404(b)1 Guidelines**

Section 404(b)(1) of the CWA requires the EPA Administrator to, in conjunction with the Secretary of the Army, develop guidelines for evaluating the specification of disposal sites associated with discharges of dredged or fill material into jurisdictional waters. These guidelines, set forth in 40 CFR § 230, are designed to avoid the unnecessary filling of wetlands and other aquatic resources and prohibit discharges where less environmentally damaging practicable alternatives exist. The Guidelines specifically provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem" (33 CFR § 230.10(a)). Part 230.1(c) provides that "[f]undamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." Based on these criteria, USACE is required to conduct an alternatives analysis on permit applications.

To accomplish this, the applicant must establish the project purpose and need from which the overall project purpose will be identified by USACE. The overall project purpose should be defined specifically enough to address the applicant's needs and geographic area of consideration for the proposed project, but not so narrow as to preclude a proper evaluation of alternatives. USACE uses a sequential approach in evaluating alternatives, including off-site and on-site alternatives to avoid aquatic impacts to the extent practicable; alternatives and modifications to minimize remaining impacts; and then compensatory mitigation to replace the functions and values of aquatic resources that are unavoidably impacted. USACE must identify and evaluate practicable alternatives to the proposed project that achieves the overall project purpose while avoiding/minimizing impacts to waters of the United States. This approach and the application of this criteria can be challenging in situations where the project purpose is not clearly defined because a proposed development activity may not have all relevant information identified yet.

Joint EPA and Army guidance makes clear that although the Guidelines are regulatory in nature, a certain amount of flexibility is reserved for the decision-maker in applying these Guidelines and making a determination to whether the requirements have been satisfied.[1] Therefore, a certain level of unknown regarding proposed project specifics may be acceptable based on such flexibility, as long as an appropriate alternatives analysis may be accomplished.

There is inconsistency between districts as to whether a proposed project is considered "speculative" in nature. I understand that various USACE districts take differing approaches to performing the required alternatives analysis for proposed projects and require varying levels of specificity. In some instances, once a project purpose has been identified, districts may require additional information that may be unnecessary to complete an alternatives analysis. The absence of such additional information, which an applicant may reasonably not yet have during the review process, should not preclude the district's review if such information is unnecessary for completing an adequate alternatives analysis pursuant to the Guidelines. For example, knowing that a proposed project is for construction of a department store should be sufficient without needing to know which company's store it would be.

Consistent with this guidance, District Engineers shall ensure that in performing required alternatives analyses under the Guidelines that they are using the flexibility envisioned in the Guidelines in making determinations on the scope of alternatives that

[1] EPA and Army Memorandum: Appropriate Level of analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements.

should be considered and the specificity of information required in performing the analysis. Additionally, the amount and detail of information in an alternatives analysis and the level of scrutiny required by the Guidelines is commensurate with the severity of the environmental impact and the scope/cost of the project. Analysis of projects proposing greater adverse environmental effects need to be more detailed and explore a wider range of alternatives than projects proposing lesser effects.

USACE shall immediately draft guidance based on this directive. Such draft guidance shall ensure consistency across the districts on application of the Guidelines and be submitted to this office for review within 45 days from the date of this issuance.

**3.** I look forward to receiving your draft guidance on each of these issues and after this office performs its review and approval, issuance of the guidance to ensure continued consistency and predictability as we perform our vital mission to protect our nation's waters.

Questions regarding this delegation may be directed to Stacey M. Jensen, Office of the Assistant Secretary of the Army for Civil Works at stacey.m.jensen.civ@mail.mil or 703-695-6791.

Sincerely,

R.D. James
Assistant Secretary of the Army
(Civil Works)

# Exhibit 2

U.S. Army Corps of Engineers, Memorandum, Implementation Guidance for Regulatory Compliance With Executive Order 13807, Sep. 26, 2018

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

SEP 26 2018

CECW-ZB

26 September 2018

DIRECTOR'S POLICY MEMORANDUM 2018-12

SUBJECT: Implementation of Executive Order (EO) 13807 and One Federal Decision (OFD) within Civil Works Programs

1. References.

a. Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. *Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807* (MOU), 9 April 2018.

2. Background. Executive Order 13807 requires federal agencies to process environmental reviews and authorization decisions for "major infrastructure projects" as One Federal Decision. One of the criteria for a "major infrastructure project" is that the lead agency has determined the need to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The goals of One Federal Decision are to:

a. Reduce average time for environmental reviews, authorization decisions and consultations to an average of two years for all federal agencies;

b. Achieve One Federal Decision through preparation of a single EIS and single ROD for covered projects; and

c. Provide greater transparency, predictability and timeliness for federal review and authorization processes for major infrastructure projects.

3. Purpose. To establish policy pertaining to EO 13807 and "One Federal Decision" across all Civil Works functional areas, and direct broad implementation of the EO's concepts.

4. Applicability. This memorandum is applicable to all HQUSACE, Major Subordinate Commands (MSC), districts, and field operating activities with Civil Works functions which may include, but are not limited to feasibility studies, dam safety modification

studies, Section 408 permissions, and Regulatory permit decisions associated with major infrastructure projects.

5. Policy. EO 13807 applies to a variety of Civil Works actions which may include, but are not limited to, feasibility studies, dam safety modification studies, Section 408 permissions, and Regulatory permit decisions associated with major infrastructure projects. The EO applies to those actions that require the preparation of an EIS under NEPA, and for which a Notice of Intent was issued after 15 August 2017. USACE Civil Works will comply with EO 13807 across its functional areas and responsibilities.

a. Ongoing Civil Works lines of effort such as embracing and operationalizing risk-informed decision making; justifying, and documenting decisions at the most appropriate levels; and synchronizing Headquarters functions to support MSC and district project delivery further advance the goals of EO 13807.

b. EO 13807 is directed at improving accountability within environmental reviews for major infrastructure projects, its effects are broad reaching across multiple disciplines. All Civil Works functional areas including Planning, Engineering and Construction, Operations, and Programs and Project Management will coordinate and apply risk-informed decision making in order to better integrate environmental requirements and conduct environmental reviews to achieve the two-year timeline goal in EO 13807.

c. One of the foundational concepts behind EO 13807 is early, frequent, and meaningful coordination with federal agencies, state agencies, and tribes that may have special expertise or authority for review of major infrastructure projects. Meaningful engagement is an important tenet within SMART Planning and within the Regulatory Program and will be implemented broadly, including for those infrastructure projects requiring preparation of an Environmental Assessment.

6. Direction. USACE will pursue a variety of specific actions to fully implement EO 13807. Guidance attached to this memorandum will be aligned and conducted concurrently with the implementation plan developed for risk-informed decision making per the Director's Policy Memorandum issued on 3 May 2018.

a. Implementation guidance has been prepared for EO 13807 specific to Civil Works Programs, including the Regulatory Program. A memorandum providing guidance for Regulatory permit actions is attached to this memorandum as enclosure 1. Implementation guidance specific to feasibility and other planning studies is attached to this memorandum as enclosure 2.

b. EO 13807 directs the Chief Environmental Review and Permitting Officer (CERPO) to serve as the agency official responsible for compliance with EO 13807. To facilitate implementation and compliance for Regulatory Permit actions, each MSC will designate a Senior Environmental Review Officer for the respective USACE MSC (i.e.,

senior agency official) for the purposes of elevation procedures, functional understanding and oversight of the application of this guidance, and interaction with the USACE CERPO.

c. Districts are responsible for identifying which Civil Works actions are "major infrastructure projects" in the context of EO 13807 and then notifying the MSC and HQUSACE of the determination. Districts are also primarily responsible for monitoring and executing project schedules consistent with EO 13807 requirements and reporting the status of milestones through the appropriate MSC to HQUSACE. Further guidance will be forthcoming from the Office of Management and Budget on how agencies will track major infrastructure projects on the Federal Agency Portal of the Permitting Dashboard and how OMB will review agency performance on a quarterly basis.

7. Proponent. The proponents for this memorandum are Thomas P. Smith, P.E., Chief, Operations and Regulatory Division, at (202) 761-1983 and Joseph Redican, Acting Chief of Planning and Policy Division, at 202-761-4523.

Encls

JAMES C. DALTON, P.E.
Director of Civil Works

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

SEP 26 2018

CECW-CO-R

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

## 1. References

a. Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (MOU), 9 April 2018.

c. 40 CFR 1500-1508, CEQ Regulations for Implementing the Procedural Provisions of NEPA.

d. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1986).

## 2. Purpose

This memorandum provides guidance to MSCs and districts on implementing EO 13807 for projects where USACE District Regulatory is a lead or cooperating agency involved in preparing an EIS and ROD for a covered major infrastructure project. This guidance does not replace or contradict requirements of the National Environmental Policy Act (NEPA) or USACE regulations.

## 3. USACE Involvement

Districts will be involved in projects subject to EO 13807 in two ways: 1) as a cooperating agency when another federal agency has determined to the applicability of EO 13807 for a project that includes regulated work in waters of the U.S., and 2) where USACE is the lead agency for the preparation of an EIS subject to EO 13807 for a major infrastructure project. Lead agencies make the determination whether to prepare an EIS, as well as whether a proposed project is a "major infrastructure project." Districts must carefully consider whether infrastructure projects will be subject to EO 13807, including a two-year Permitting Timetable and/or One Federal Decision that includes a single ROD prepared jointly by all involved Federal agencies. Note that when an infrastructure project has been determined subject to EO

13807 the two-year Permitting Timetable applies. One Federal Decision will also apply[1], unless the required permit type is a Nationwide or Regional General Permit where the USACE NEPA obligation has already been met. USACE involvement and role will be based on the criteria below for lead and cooperating agency status.

Pre-application discussions with prospective applicants are likely and appropriate prior to a formal determination that a project is subject to EO 13807. For this reason, the pre-application phase is specifically identified below as an important environmental review process activity.

A. **USACE as lead agency:** Only major infrastructure projects are subject to EO 13807. To determine whether a project meets the definition of major infrastructure project, the criteria below must be met:

   (1) USACE as lead agency has received, or expects to receive, a complete permit application for an infrastructure project (see Definitions section) and determined that an EIS will be prepared;

   (2) USACE as lead agency has determined that multiple federal agency authorizations are required. Required Federal agency consultations to comply with ESA and EFH meet the definition of authorization;

   (3) USACE as lead agency has determined the permit applicant/project sponsor has identified the reasonable availability of funds to prepare the EIS and to construct the project. The burden of demonstrating the reasonable availability of funds is on the project sponsor. Project sponsors may meet this burden by submitting a finance plan showing the estimated costs of the project and the available sources[2] from which the project sponsor anticipates meeting the costs.

B. **USACE as cooperating agency:** When another federal agency has made a determination to prepare an EIS, has identified itself as the lead agency, has determined the project is subject to EO 13807, has requested USACE serve as a cooperating agency[3], and when USACE has jurisdiction and/or special expertise:

   (1) USACE will agree to serve as a cooperating agency[4], regardless of whether a complete application has been received;

---

[1] Exceptions to the single ROD for multiple agencies are described in Section XIII of the MOU.

[2] Districts will accept at face value project sponsors' demonstration of the reasonable availability of funds, including consideration of sponsors' information regarding any 'specific' funds for construction as well as 'fund sources' likely to be available for construction.

[3] In the event that a district receives an application for a major infrastructure project that will require an Individual Permit, but for which the lead agency has not requested USACE to serve as a cooperating agency, districts must consult with the lead agency pursuant to the MOU (Section VI. Determination of Lead and Cooperating Agencies).

[4] The EO and MOU reference "participating" agency as established in surface transportation law (P.L. 6002 §139) and referenced in FAST-41. The Corps will be involved in preparation of an EIS only when the agency has jurisdiction by law and/or special expertise (40 CFR §1501.5 and §1501.6). On this basis, USACE will serve as lead or cooperating, but not participating agency.

(2) Districts will recognize that the lead federal agency has already considered criteria to determine the project represents a major infrastructure project subject to EO 13807;

(3) The level of engagement as a cooperating agency should be commensurate with the scope of impacts subject to USACE authorities. When the applicant's proposed impacts to Waters of the U.S. will qualify for an existing Nationwide or Regional General Permit, USACE Regulatory obligations under NEPA have already been satisfied. On this basis, USACE contributions as a cooperating agency on the preparation of the EIS should be sufficient to assist the lead agency with accurate information concerning Waters of the U.S. to be presented in the EIS.

As described in the MOU and as applicable to requests from all Federal agencies, USACE will serve as a cooperating agency for Federal Energy Regulatory Commission (FERC) proceedings when requested, and may only decline a request when USACE has no jurisdiction by law.

For major infrastructure projects where Federal Highway Administration (FHWA) is the lead agency, USACE will serve as a cooperating agency pursuant to NEPA, the EO, and the MOU. On February 15, 2018, USACE entered in a Working Agreement[5] with FHWA which included a coordination process designed to meet the requirements of EO 13807. For such projects, USACE will cooperate with FHWA according to the process outlined in the Working Agreement.

**4. Environmental Review Process Activities: Define and Control Scope to Support Risk-Informed Decision Making**

One of the fundamental goals of EO 13807 is to reduce average time for environmental reviews and authorization decisions to an average of two years for all Federal agencies involved. To consistently achieve this goal, districts will incorporate risk-informed decision making processes in all phases of environmental review, including pre-application preparation, scoping, impact analyses and permit decisions. Risk-informed decision making does not mean simply accepting heightened legal risk as a way to hasten the overall process without careful consideration of agency obligation. Rather, it means critically considering the portions of a proposal that are within USACE authority, determining information needs and requesting information relevant to agency authority(s), and performing sufficient and timely analyses directly relevant to required USACE decisions. Importantly, this means making decisions not to undertake detailed analyses[6] that do not affect or relate to USACE permit decision

[5] Working Agreement Among The United States Coast Guard, The United States Army Corps of Engineers, The United States Environmental Protection Agency, The United States Fish and Wildlife Service, The National Oceanic and Atmospheric Administration and The Federal Highway Administration To Coordinate and Improve Planning, Project Development, and the National Environmental Policy Act Review and Permitting for Major Infrastructure Projects Requiring the Preparation of an Environmental Impact Statement.

[6] Consistent with requirements in NEPA, the EIS must fulfill the obligation to identify and disclose any significant effects that are likely to result from the proposed project. However, identification and disclosure of likely effects

processes. Therefore, even when the "single EIS" scope of analysis for all combined cooperating agencies extends to the applicant's entire project, USACE will focus on addressing scoping items relevant to agency responsibility.

The environmental review process activities in this section are broadly applicable when the applicant's proposed work will require an Individual Permit, and specifically when USACE is the lead agency. When acting in a cooperating agency role, districts will defer to the lead agency to accomplish NEPA process activities, while USACE-specific requirements for General and Individual Permits will remain district responsibilities.

A. Pre-application phase – the pre-application phase is the appropriate time to consider whether the prospective project is likely to require an EIS, require multiple federal authorization decisions, and will have the reasonable availability of funds to be constructed should a favorable permit decision result. If these criteria are likely to be met, USACE should consider requesting relevant Federal agencies to be included in further pre-application meetings to facilitate the environmental review.

   As part of pre-application meetings with the prospective applicant, district Regulatory will indicate USACE authorities based on the prospective applicant's description of the work to be proposed. After establishing a mutual project-specific understanding of the agency's authority and environmental review responsibilities, USACE should advise the prospective applicant of the type of information and level of detail required to fully inform the USACE evaluation. This important phase of information sharing will lead to applications being complete upon receipt, fewer information requests, and more efficient Permitting Timetables. Regulatory project managers will advise prospective applicants that proposed alterations or temporary or permanent occupation or use of any USACE federally authorized Civil Works project will require review and permission pursuant to Section 14 of the Rivers and Harbors Act (a.k.a. Section 408 review), and must engage district Section 408 counterparts to ensure their involvement in project review[7]. Similarly, if a project will involve Federal property owned or managed by USACE, review and approval for encroachment/ involvement will be required by the USACE Real Estate Division.

B. Initial application review and scoping preparation phase – a public notice must be issued within 15 days after receipt of a complete permit application. The public notice does not have to state whether USACE has made a determination to prepare a Draft EIS. Rather, the public notice may state that the district engineer is considering whether an EIS should be prepared and will consider public comments in making the determination.

   When USACE has agreed to serve as a cooperating agency on the preparation of an EIS and a complete application is received at the district, the public notice for an

---

outside agency authority should be only briefly summarized, with no further detailed studies or analyses performed or included in the EIS.

[7] Regulatory and 408 Program coordination is required pursuant to the Director's Policy Memo #2018-10, "Strategy for Synchronization of the Regulatory and 408 Programs", dated 17 August 2018.

Individual Permit can identify the lead agency and state that USACE is already cooperating. If the proposed work will qualify for a General Permit, Districts will review the application and finalize qualifying authorizations according to existing timeline requirements for Nationwide and Regional General Permits.

C. Determination to Prepare an EIS – this determination will be made consistent with NEPA regulations at 40 CFR 1501.4 and USACE regulations at 33 CFR 325 Appendix B. After a determination has been made to prepare an EIS as the lead agency, USACE must notify the applicant in writing, including notification that the project is subject to EO 13807 and establishing that third party contract procedures described at 33 CFR 325 Appendix B apply[8].

When USACE is a cooperating agency, the decision to prepare an EIS is a lead agency responsibility.

D. Select Third Party Contractor – USACE regulations[9] provide for use of third party contractor assistance for the preparation of an EIS. Districts must work closely with applicants to identify candidate contractors and then must fulfill the agency responsibility of solely selecting the contractor to avoid any conflict of interest.

When USACE is a cooperating agency, USACE does not have a role in selecting the third party contractor.

E. Prepare Draft Permitting Timetable – A draft Permitting Timetable will be prepared for use in coordinating cooperating agency requests and preparing for scoping, as well as for identifying and scheduling additional information needs. An example two-year Permitting Timetable with required milestones is attached.

When USACE is a cooperating agency, the lead agency will be responsible for preparing and distributing the Permitting Timetable.

F. Request cooperating agency involvement – USACE will request other federal agencies with required authorization decisions and/or special expertise to serve as cooperating agencies. This request will be in writing and should include the draft Permitting Timetable for cooperating agency use. Districts will allow cooperating agencies reasonable time to review the draft Permitting Timetable and attach their respective agency tasks with required timelines. This will allow the lead agency (USACE) to complete the draft Permitting Timetable for use in scoping[10].

---

[8] Districts should consider whether project-specific MOAs will be executed with the applicant to clearly establish communication/coordination protocols that maximize information exchanges and preserve the third party contract arrangement.

[9] 33 CFR 325 Appendix B; 40 CFR 1506.5(c).

[10] Pursuant to Section VII A.2. of the MOU, lead agencies must initially consult cooperating agencies for input to the Permitting Timetable. After the Permitting Timetable includes the tasks and timelines for each Federal agency with a required authorization decision, cooperating agencies must respond within 10 days.

When USACE is a cooperating agency, USACE will receive the lead agency's request to contribute USACE environmental review tasks and timelines to the draft Permitting Timetable prepared by the lead agency.

G. Perform Data Gap Analysis – Following selection of a third party contractor, a data gap analysis should be conducted to identify and request additional applicant information to inform the environmental review[11]. Upon receipt of requested information directly relevant to agency decision authority(s), the draft Permitting Timetable will be revised as necessary to include any additional tasks identified in the data gap analysis.

When USACE is a cooperating agency, USACE will contribute to lead agency efforts for identification of information needs to inform the EIS. The USACE contribution should be confined to the area of USACE jurisdiction and authority.

H. Prepare Purpose and Need statement – As the foundation for the development and analysis of alternatives under NEPA, the Purpose and Need statement will be prepared prior to issuing the NOI and undertaking scoping. This will assist the public in providing scoping comments that focus on likely impacts of the proposed project as well as identifying alternatives to the proposed project that may result in fewer impacts. The Purpose and Need statement is Concurrence Point #1 (see Concurrence Points and Permitting Timetable below).

When USACE is a cooperating agency, USACE will review and respond to the lead agency request on this concurrence point, considering the Purpose and Need based on regulatory requirements.

I. Issue Notice of Intent to prepare the Draft EIS – the NOI should be issued after receipt of complete application, receipt of applicant response(s) to requested additional information, selection of third party contractor, designation of cooperating agencies, preparation of Permitting Timetable, and concurrence on Project Purpose and Need statement. The NOI will clearly indicate the permit authority(s) and the portions of the proposed project subject to Corps permit authority(s), as well as project elements subject to relevant cooperating agency authorities. The NOI will advise the public that comments are most helpful to the lead and cooperating agencies with Federal authorization decisions when the comments focus on issues (impacts and alternatives) relevant to agency authorities. Completion of these process steps will best inform the NOI and thus best assist the public in providing relevant and focused scoping comments, particularly important for meaningful scoping in the targeted 30-day timeframe.

When USACE is a cooperating agency, USACE does not have a role as the NOI is a lead agency responsibility.

[11] Pursuant to 33 CFR 325.1(d)(10) and 33 CFR 325.1(e).

J. NEPA scoping phase – the scoping period should be 30 days. If a district commander determines that an extension of the scoping period is warranted based on project complexity or controversy, an extension of up to an additional 30 days may be granted. These timeframes also apply to cooperating agency requests to extend the scoping period. Note that extending the scoping period cannot result in extending any major milestone in the Permitting Timetable, particularly the 14 months scheduled to prepare the Draft EIS.

When USACE is a cooperating agency, USACE districts will limit their project involvement to scoping issues directly relevant to agency authorities.

K. Complete the Permitting Timetable – the draft Permitting Timetable prepared prior to issuing the NOI may need to be revised based on issues raised during scoping. Revisions required to finalize the Permitting Timetable should include any additional information needs brought to the attention of the lead or cooperating agencies as a result of scoping. Information needs that require the lead agency to request additional information from the applicant may affect the timing of milestones in the Permitting Timetable. ['Pauses' outside agency control, such as delayed applicant information, are described below in Reporting and Accountability, Item 3.] If revised, the draft Permitting Timetable must be provided to cooperating agencies for comment[12]. If a cooperating agency with Federal authorization responsibility objects, that agency must include an alternative proposed milestone consistent with the two-year timeline. If no objections are received in writing within 10 business days, the lead agency will finalize the Permitting Timetable.

When USACE is a cooperating agency, the lead agency will be responsible for completing and distributing the Permitting Timetable.

L. Impact analysis phase – analyses for all alternatives to be carried through the Draft EIS must address impacts and issues related to agency authorities (see Concurrence Point #2 below). These include likely impacts to waters subject to CWA Section 404 and RHA Section 10, including impacts related to public interest factors. Note that additional analyses required to satisfy the NEPA obligations of cooperating agencies must also be included; however, it will be the responsibility of the respective cooperating agencies to identify and perform those impact/issue analyses[13].

When USACE is a cooperating agency: USACE will be responsible for identifying and performing impact analyses directly related to agency authorities and obligations (and that will enable USACE to determine whether the applicant's proposed alternative represents the least environmentally damaging practicable alternative (LEDPA) for permit application decision purposes.

---

[12] Section VII A.2. of the MOU.

[13] When a cooperating agency requests assistance with impact analyses, USACE can direct the Third Party Contractor to assist with such analyses provided the contract Statement of Work includes or is amended to include such efforts.

M. Permit decision phase – permit application decisions must be based on careful consideration of environmental information in project NEPA documents; the USACE public interest review; the proposed project's compliance with the 404(b)(1) Guidelines; and all other relevant laws and regulations. Likely impacts outside USACE regulatory authority, and particularly impacts which are clearly within another agency's authority, should be described as such as part of the public interest review where appropriate. The USACE permit decision will address those activities subject to USACE authority and the determination of whether the applicant's proposed alternative represents the LEDPA, as well as attaching any permit conditions intended to avoid, minimize and/or compensate for USACE-regulated project impacts. Districts may include identification of the LEDPA in the Final EIS, and must identify the LEDPA in the ROD. Balancing the need to make timely permit decisions while minimizing legal risk is the essence of risk-informed decision making, and will be most effective when USACE carefully and strategically pursues a scope of analysis clearly based on agency authorities.

When USACE is a cooperating agency and an Individual Permit is required, the USACE decision will be made as described above.

N. Water Quality Certification – In certain instances, a project sponsor (applicant) must apply for certification pursuant to Section 401(a)(1) of the Clean Water Act from the certifying agency. Federal agencies cannot issue federal licenses or permits unless such certification has been granted or waived. For the purposes of EO 13807 and consistent with all other projects, in instances where the lead agency determines that certification requirements have been waived, e.g. the certifying agency has not acted within the time period allowed by law, USACE will defer to the determination of the lead agency, determine that the certification requirement has been waived, and proceed accordingly.

O. Record of Decision – the lead agency is responsible for preparing and publishing a single ROD for all Federal agencies with required authorization decisions. The ROD will incorporate the independent decisions of each cooperating agency, and will necessarily be prepared in consultation with the relevant cooperating agencies. While the EO and MOU allow for agency authorization decisions to be completed as much as 90 days after the ROD is completed, districts must note that the Record of Decision must be completed within 60 days after the Notice of Availability (NOA) for the Final EIS. Therefore, cooperating agencies will be responsible for providing their authorization decision information to the lead agency in a timeframe that supports timely preparation of the ROD.

When USACE is a cooperating agency and an Individual Permit is required, USACE will contribute text relevant to the USACE permit decision to the lead agency for incorporation into the single ROD.

P. Consolidated Project File and Administrative Record – the consolidated project file is all of the information assembled and utilized by the lead and cooperating Federal agencies during the environmental review and Federal authorization decision processes.

Pursuant to Section VII A.8. and B.7. of the MOU, the lead agency will maintain the consolidated project file. Cooperating agencies will independently maintain their respective administrative records in support of their authorization decision(s), and then will provide such information as the lead agency may request to complete the consolidated project file.

Q. Best Practices – The EO and the MOU each require implementation of best practices (see Definitions) as part of project-specific process techniques and strategies, as appropriate. The environmental review process activities and chronology described above should assist districts in utilizing best practices, particularly when USACE is the lead agency. Current versions of *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* can be found at https://www.permits.performance.gov/tools.

## 5. Transparency

Efficient timelines for major infrastructure projects as reflected in the two-year Permitting Timetable, measured from NOI to ROD, will rely on enhanced transparency to maximize effective public involvement. When USACE is the lead agency, web pages, project-specific web sites, social media, and other means of disseminating information must be used to inform the public about the process and status of the environmental review. This may include establishing and periodically updating project news, milestones, Permitting Timetables, upcoming public forum events via:

A. District web pages,
B. Project-specific web pages maintained by USACE Regulatory and/or the third party contractor. This transparency is strongly encouraged as a best practice because it can be dedicated solely to the project under review and it can make virtually all publicly accessible documents readily available. Permitting Timetables should be maintained on the site throughout the environmental review,
C. District Twitter and Facebook accounts, in coordination with and physically posted by district Public Affairs/Corporate Communications Offices.

## 6. Concurrence Points

Concurrence points are opportunities for lead and cooperating agencies to assess mutual understanding and agreement on fundamental elements of the EIS. Concurrence among lead and cooperating agencies establishes that agencies agree to a given decision described in the concurrence point, and to abide by the decision as analyses and EIS preparation progress. Three specific concurrence points are required per Section XI of the MOU, and are milestones that must be included in the Permitting Timetable. Non-concurrence issues should be identified as early as possible and resolved either before a dispute arises, or resolved via the Dispute Resolution process described in this guidance.

The District Commander is the regulatory decisionmaker for permit decisions that are not elevated to the Division Commander. On this basis, the District Commander retains the

responsibility and authority for concurrence point decisions. Authority to concur with a required concurrence point may be delegated to the Regulatory Chief at the District Commander's discretion. Authority to non-concur with a required concurrence point cannot be delegated. A District Commander intending to provide written non-concurrence will inform the USACE CERPO (Chief Environmental Review and Permitting Officer), through MSC SERO (Senior Environmental Review Officer) and HQ environmental review POC of the intent to non-concur.

When acting as the lead agency, the District will provide cooperating agencies with written requests for concurrence, including any information necessary for cooperating agencies to consider in providing their concurrence and/or resolving any points of disagreement that may affect concurrence. As a cooperating agency, the District must receive written requests for concurrence and must respond to such requests in writing. Note that the MOU establishes that cooperating agencies will respond to lead agency requests within 10 business days, and that failure to respond may be treated as concurrence, at the discretion of the lead agency.

**A. Concurrence Point #1 – Purpose and Need**

As discussed above in the context of risk-informed decision making, the Purpose and Need statement serves as the basis for developing and evaluating alternatives. For this reason, all cooperating agencies with required authorization decisions must review and concur on the Purpose and Need statement drafted by the lead agency, indicating their concurrence in writing. For lead or cooperating agency roles, respectively, districts must draft or concur with a Purpose and Need that reasonably and objectively describes the proposal without inappropriately constraining the range of alternatives that ultimately must be considered. Districts should consider whether to seek additional written agreement/concurrence with lead/cooperating agencies regarding the preliminary scope of analysis for the proposed project. The scope of analysis for the EIS will be defined following scoping, will ultimately reflect the cumulative control and responsibility of all Federal agencies with required authorization decisions, and may be the subject of a separate concurrence point in addition to the three concurrence points required by the MOU.

**B. Concurrence Point #2 – Alternatives to be Carried Forward for Evaluation**

This concurrence point will occur after completion of scoping and consideration of alternatives screening criteria, ultimately identifying the range of reasonable alternatives to be evaluated in the Draft EIS. The lead agency must gain cooperating agency concurrence(s) on this point prior to making results of alternatives screening available to the public (i.e. via newsletters or public meetings). Lead agency requests for concurrence must include a description of alternatives screening criteria and alternatives considered as part of screening, as well as a description of all alternatives to be further evaluated in the Draft EIS. In a lead agency role, districts are encouraged to present this information in Technical Memorandum format to support the Administrative Record.

**C. Concurrence Point #3 – Preferred Alternative**

NEPA requires agencies to identify the preferred alternative(s), if one exists, in the Draft and Final EIS[14]. The MOU recommends identifying the preferred alternative in the Draft EIS and requires it in the Final EIS. Corps regulations at 33 CFR 325 Appendix B clarify that the Corps is neither an opponent nor proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the "applicant's preferred alternative." To comply with NEPA, Corps regulations, and the MOU, when the Corps is lead agency, the Draft and Final EIS will identify the Applicant's Preferred Alternative, and will include text identifying the Preferred Alternative of any cooperating agency (with a required federal authorization) with regulations that prevent their concurrence with "applicant's preferred alternative."

When the Corps is a cooperating agency, the Corps will respond to lead agency request stating the Corps does not have a preferred alternative, and the Draft and Final EIS should identify the lead agency's Preferred Alternative as well as the Applicant's Preferred Alternative, including when these are the same alternative. Coordination among agencies on this concurrence point must be written, including lead agency request and cooperating agency response/concurrence, in support of the Administrative Record.

## 7. Permitting Timetable

The Permitting Timetable is the schedule for Federal agency environmental reviews, consultations and authorization decisions for major infrastructure projects. The lead agency is responsible for preparing the Permitting Timetable with required input from cooperating agencies and in consultation with participating agencies according to their agency roles and involvement. The Permitting Timetable should be drafted[15] by the lead agency prior to the NOI, and must include milestones critical to the completion of the environmental review and issuance of a single EIS and single ROD that meet the needs and obligations of each agency with a required authorization decision. The Permitting Timetable should include and account for:

A. required Federal decisions and authorizations;

B. required Federal decisions and authorizations delegated to state, tribal, or local agencies (when these are pre-requisite to issuance of a decision or authorization by a Federal agency);

C. a complete inclusion of the environmental review and authorization requirements for a project (see attached example Permitting Timetable);

---

[14] 40 CFR 1502.14(a).

[15] The Permitting Timetable should be drafted as soon as practicable for use in cooperating agency requests, applicant information requests, and for informing the public regarding the overall project timeline. An example two-year Permitting Timetable is attached to this Appendix.

D. specific focus to those reviews and authorizations that are complex, require extensive coordination, or might significantly extend the overall project review schedule;

E. cooperating agencies that are required by law to develop schedules for environmental review or authorization processes should provide such schedules to the lead agency for integration into the Permitting Timetable;

F. estimated milestones for any review or authorization decision processes for which the project design has not sufficiently advanced to more accurately determine dates to inform the Permitting Timetable;

G. Times for completion of environmental review and authorization decision subtasks are:

(1) Formal scoping and preparation of a Draft EIS within 14 months, beginning on the date of publication of the NOI to publish an EIS and ending on the date of the NOA for the Draft EIS;

(2) Completion of the formal public comment period and development of the Final EIS within eight (8) months of the date of the NOA for the Draft EIS;

(3) Publication of the ROD within two (2) months of the publication of the NOA for the Final EIS, noting that USACE regulations at 33 CFR 325 Appendix B require that no ROD can be signed until at least 30 days following the NOA for the Final EIS.

A Permitting Timetable shall be prepared in a suitable format to identify project tasks, durations and dependencies to maximize effectiveness in managing and meeting the EO 13807 goal of two years on average for covered major infrastructure projects.

Permitting Timetable milestones are listed in the table below. These are milestones that must be included in the lead agency's Permitting Timetable. Additional project-specific tasks and milestones may also be necessary depending on the type of project proposed and the cooperating agencies that are involved.

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

| **Milestone*** | **Target Date** | **Actual Date** |
|---|---|---|
| Pre-application meeting(s) | | Date of 1st agency involvement |
| **Initial Application Received** | | Date received |
| **Complete Application Received** | | Date received |
| **Public Notice** for application | | Within 15 days of complete application |
| Notify applicant EIS is required and subject to EO 13807 | | Within 7 days of determination |
| 3rd Party Contractor selection | | Date of selection |
| SOW approval/3rd party contract executed | | Date of approval |
| Cooperating agency requests and agreements | | Date(s) as applicable |
| Determine additional required information (e.g. 404(b)(1) compliance, alternatives, Public Interest Review) | | Date of information request |
| **Concurrence Point #1: Purpose & Need** preliminary scope of analysis can also be addressed | | Date of concurrence must precede NOI |
| **Publish NOI / Initiate Scoping / Public Notice** | | **Date initiates 2-year timeline** |
| Scoping Meeting | | Date(s) of meeting(s) held |
| Revise SOW (as necessary) | | Date as applicable |
| **Concurrence Point #2: Alternatives to be Analyzed** Review project scope of analysis, EIS Table of Contents (issues to be analyzed) | | Date of concurrence |
| **Concurrence Point #3: (Applicant's) Preferred Alternative** | | Date of concurrence |
| **NOA DEIS/Supplemental** | | **Date of NOI + 14 months** |
| Public Hearing/Meeting | | Date of event |
| **NOA FEIS/Supplemental** | | **Date of DEIS NOA + 8 months** |
| ESA Section 7 process begin/end** | | Date(s) determined in coordination with Services |
| EFH process begin/end** | | Date(s) determined in coordination with NMFS |
| NHPA Section 106 process begin/end** | | Date(s) determined in coordination with ACHP/SHPO |
| Tribal consultation** | | Date(s) determined/estimated |
| Government-to-Government consultation** | | Dates(s) as applicable |
| **ROD/Amended ROD** | | **Date of FEIS NOA + 2 months** |
| **Permit Issuance/Denial** | | **Date of ROD** |

*Major milestones required by the MOU are shown in bold type. Target Dates and Actual Dates must be reported in ORM for use in populating the Federal Agency Portal.

**Milestone to begin this process would occur during or near the timing of scoping.
Milestone to end this process would occur near the timing of FEIS NOA, prior to ROD.

## 8. Elevation Procedures for Dispute Resolution and Prevention of Delays

The USACE CERPO will serve as the USACE senior agency official and will be made aware of disputes that have the potential to result in a missed Permitting Timetable milestone or delay, including elevated issues or disputes brought by cooperating or participating agencies.

Concurrence points are intended to promote process efficiency and minimize disputes between cooperating agencies, particularly cooperating agencies for which authorization decisions are required. As required by the MOU, three specific concurrence points must be included in the Permitting Timetable to facilitate major milestones: 1) Purpose and Need; 2) Alternatives to be Carried Forward for Evaluation, and; 3) Preferred Alternative (Applicant's Preferred Alternative). Per the MOU, lead and cooperating agencies may choose to include additional concurrence points in the Permitting Timetable to accommodate specific project circumstances.

Districts should strive to resolve all issues and disputes at the earliest time and lowest level possible, including issues and disputes raised by other agencies. Should agency staff identify an issue or dispute that, if not resolved, may result in missing a milestone (delay) and/or a decision inconsistent with law, regulation or agency policy, the district regulatory project manager must notify the District Commander, or designee, via the district Regulatory supervisory chain of command. This written notice should clearly state in detail the specific issue or dispute; the consequence, including potential delay, of failing to resolve the issue or dispute; and the recommended resolution.

A. When the Corps of Engineers is the lead federal agency (the elevation and resolution process is shown in flow diagram format in Figure 1): The District Commander or designee should coordinate with the cooperating or participating agency's locally-responsible senior official (e.g. DOI Regional Administrator) or designee, and decide whether the issue can be expeditiously resolved. Coordinating the dispute with the cooperating or participating agency shall consist of a written notice describing in detail the specific issue or dispute, the consequence(s) to the project timeline of failing to resolve the issue or dispute, and the recommended resolution. If the issue or dispute is not resolved within 15 days from the written coordination, the District Commander will notify the SERO. Depending on the nature of the dispute, the District Commander may notify the SERO of an issue or dispute prior to 15 days, particularly important if a milestone or concurrence point is near. If a dispute is not resolved within 15 days following notification of the SERO, the USACE CERPO will be notified to facilitate interagency coordination at the HQ level.

B. When the Corps of Engineers is a cooperating agency: The same procedure described for Corps as lead agency should be used, unless the Corps has agreed with the lead agency on a project-specific dispute resolution that achieves the same goal. The District Commander will notify and coordinate with the SERO and CERPO prior to signing and transmitting a non-concurrence to the lead agency.

C. Elevation information package: Upon a decision to elevate an issue or dispute, the responsible district senior official shall transmit an elevation package. The elevation package must contain a fact sheet with project details and nature of dispute, timeline and milestones, the initial dispute notification, any subsequent formal written correspondence between the disputing agency and the lead federal agency, and recommended resolution.

D. Disputes Related to Developing the Permitting Timetable: Section VII. A.2. of the MOU describes the specific process that will apply if any dispute arises regarding the lead agency's proposed Permitting Timetable.

E. Unresolved Non-Concurrence (USACE as a cooperating agency): If a dispute associated with a required concurrence point cannot be resolved, including through additional meetings intended to seek resolution, USACE districts must follow one of the following approaches:

(1) incorporate additional necessary information into the USACE section of the ROD (in coordination with the lead agency) to satisfy decision-making needs;

(2) CERPO requests CEQ to mediate the unresolved dispute pursuant to the MOU (Section 5(e)(ii)).

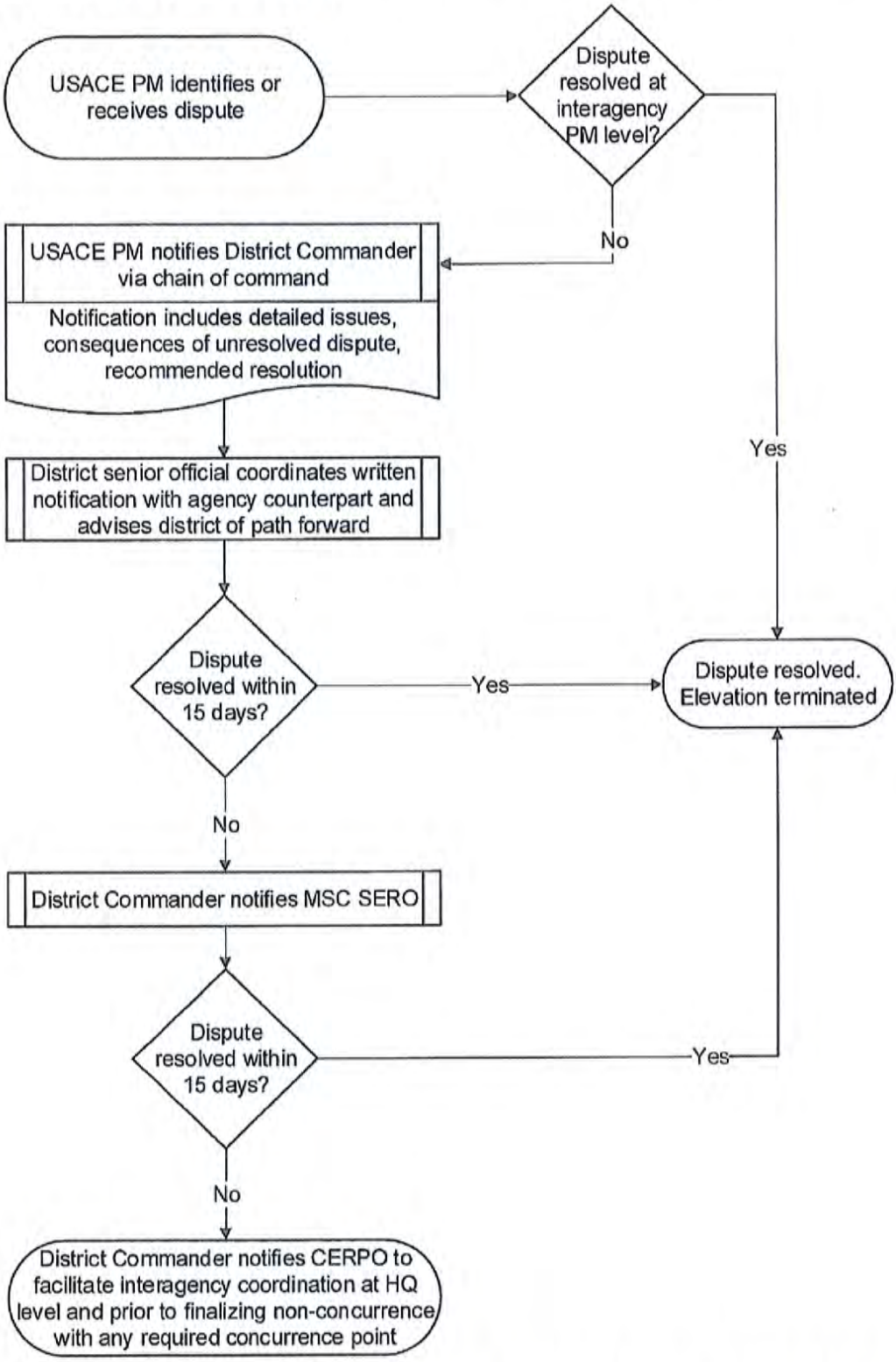



Figure 1. Flow diagram of the USACE Regulatory Elevation and Resolution Process.

## 9. Reporting and Accountability

The Office of Management and Budget will establish a Federal Agency Portal where project information will be posted and used to track agency compliance via the Permitting Dashboard[16]. The OMB will review accountability system performance at least once per quarter, and will produce a scorecard of agency performance. Therefore, districts must update and maintain current project information to reflect progress and any revisions from the previous quarter. Districts will enter project information into ORM at the EIS data entry screen, including all lead and cooperating agency EIS efforts subject to EO 13807. Data prompts on the ORM EIS screen are designed to report the information required. Subject to future revised procedures, when USACE is the lead agency HQUSACE will use ORM Reports to populate the Federal Agency Portal in six information areas.

A. **Whether major infrastructure projects are processed as OFD.** Lead agencies are required to verify on the Federal Agency Portal whether each major infrastructure project is being processed in accordance with One Federal Decision, and if not, specify the reason the project should not be processed using OFD.

   The lead agency should update these entries at least quarterly, to ensure that each entry corresponds to an active environmental review process and accurately indicates whether each such project is being processed using OFD. Additionally, lead agencies must submit a quarterly report of all infrastructure projects that published an NOI to prepare an EIS under NEPA in the previous quarter to OMB. OMB will use this information to assess the extent to which the agency is processing major infrastructure projects under OFD as appropriate.

   Guidance note: this information will be collected from the ORM EIS screen when USACE is the lead agency. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

B. **Whether major infrastructure projects have a Permitting Timetable.** Lead agencies are responsible for uploading to the Federal Agency Portal the content of each Permitting Timetable. The lead agency, in consultation with cooperating and participating agencies, should enter target dates in the milestone fields for all applicable agency actions as soon as practicable after the project is sufficiently advanced to allow the determination of relevant milestones. Permitting Timetables for major infrastructure projects must be uploaded onto the Federal Agency Portal no later than 30 days after the publication of the NOI. The Federal Agency Portal is pre-populated with the major milestones for each kind of major agency action. The major milestones correspond to the milestones set forth in the most current version of Appendix B of the OMB/CEQ "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects" (M-17-14). To have a complete Permitting Timetable, agencies must enter the target completion dates of the milestones (and

[16] The Permitting Dashboard was established to track infrastructure projects subject to FAST-41. The Permitting Dashboard will be expanded to include reporting and accountability for major infrastructure projects subject to EO 13807.

actual completion dates for already completed milestones) for each of the relevant agency actions. OMB will use this information to assess the extent to which major infrastructure projects have complete Permitting Timetables.

Guidance note: When USACE is the lead agency, Permitting Timetables must be provided to HQUSACE along with notification that the NOI has been published in the Federal Register. HQUSACE will use the Permitting Timetable along with the ORM Report to update the Federal Agency Portal. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

C. **Whether agencies are meeting major milestones.** Lead agencies, in consultation with cooperating and participating agencies, are responsible for updating the status of major milestones for all applicable agency actions. Lead agencies may delegate the responsibility of updating milestones for specific environmental reviews and authorization decisions to the cooperating or participating agencies, but will be responsible for approving any changes to the Permitting Timetable. Any changes in milestone target dates should be notated in the entry for that milestone, along with the reason(s) for the change in target date. The Federal Agency Portal allows the agency to select from among the following reasons: (a) ahead of schedule, (b) data entry error, (c) dependency delay, (d) interagency coordination issue, and (e) internal agency factor. Additionally, in the event of delays outside of the Federal government's control, agencies can list the status of an environmental review or authorization decision as "paused." For example, if an agency is waiting on the project sponsor to submit additional information to complete an authorization decision, the agency can mark the status of the action as "paused." Once the additional information is received, the agency can change the status of the action back to "in progress" and update the relevant milestone target dates.[17] OMB will use this information to track each agency's progress in meeting milestones for each action.[18]

Guidance note: Districts must maintain current and accurate data on the ORM EIS screen for milestones (refer to table above), including providing relevant reasons for any changes in milestone target dates as described above, as well as any applicant-dependent pauses that may affect interim and/or final milestones. Changes to the Permitting Timetable must be documented via MFRs in the project's Administrative Record. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

---

[17] On the Federal Agency Portal, agencies will be able to indicate whether the status of an environmental review or authorization decision is "Planned," "In Progress," "Paused," "Cancelled," or "Complete." OMB will only apply this performance indicator to milestones in which the action status is "In Progress." OMB will not consider the milestone missed for this performance indicator, if the reason for moving the milestone to a later date is outside of the agency's control (e.g. project sponsor issue, date was dependent on another milestone outside of the agency's control that was not met).

[18] Agencies will have up to five business days to update a milestone target date that has passed (e.g. mark the milestone as complete, change the target completion date) before it is considered a missed milestone.

D. **Whether delays follow a process of elevation to senior agency officials.** This information will be used by OMB to determine the extent to which agencies have established and are following, as necessary, a process that elevates to senior agency officials, instances in which Permitting Timetable milestones are missed or extended, or are anticipated to be missed or extended.

For major infrastructure projects, agencies are required to establish and implement a process that elevates to senior agency officials instances in which they anticipate missing or needing to extend a Permitting Timetable major milestone or when a major milestone is missed or extended to a date more than 30 days after the final target completion date[19].

For each such delay or extension, agencies will be required to indicate in the Federal Agency Portal whether the agency used its elevation process to refer the matter to a senior agency official. The entry should be made in the relevant milestone field. OMB will use this information to assess agency performance on elevation procedures.

Guidance note: When USACE is the lead agency, HQUSACE will use the elevation information package prepared by the district to enter 'Notes' in the Federal Agency Portal for any Permitting Timetable milestones subject to dispute. If any dispute results in a missed/delayed milestone that would require changes in subsequent milestone Target Dates, the district must identify these to HQUSACE before making changes (in coordination with cooperating and participating agencies) to the Permitting Timetable and the ORM database. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

E. **Time required to complete processing of environmental reviews and authorizations for major infrastructure projects.** Agencies will not be required to report any additional information in order to comply with this criteria. OMB will track completion times on the basis of the data reported quarterly for other assessment areas, including the number of days from the NOI to the ROD, and the number of days from the ROD to the date of issuance of the final authorization decisions for the project. OMB will use this information to assess agency performance on completion times.

F. **Costs of environmental reviews and authorizations for each major infrastructure project.** At project completion, the lead agency should report the estimated cost to the government for the environmental review and authorization process. Agencies should report the cost of their Full-Time Equivalent (FTE) hours and contractor costs related to the project.

[19] Agencies will not be required to use the elevation procedure when the missed or extended date is caused by reasons outside of the agency's control (e.g., project sponsor issue, date was dependent on another milestone outside of the agency's control that was not met) or if the milestone is associated with an Action that is in "Planned" or "Paused" status.

When calculating costs, agencies should include subject-matter experts who participate in a portion of the review, managers or supervisors who have direct or indirect oversight of major infrastructure projects, and attorneys who review documents pertaining to the review. Agencies should also include contractors that are directly funded by the agency and third-party contractors that are supervised by the agency, but funded by another party. Agencies will not be required to track and report non-direct staff hours (e.g., administrative support staff, human resources) or other indirect costs (e.g., overhead).

**(1) USACE as lead agency:** Districts must report agency costs to HQUSACE as described above, including costs provided to districts for inclusion of all Federal cooperating and participating agencies with required authorization decisions. Upon receipt of required cost information at project completion, HQUSACE will post to the Federal Agency Portal.

**(2) USACE as cooperating agency:** Districts must report agency costs to the lead agency for input to the Federal Agency Portal.

**(3)** Guidance note: Districts will establish a unique cost code for each subject major infrastructure project for use in cost tracking and reporting. Required staff (as described above) will track time spent on each major infrastructure project such that accounting units (Resource Management) can calculate the total cost based on staff time spent after each major infrastructure project is completed. No reporting is required for projects that do not receive USACE authorization.

## 10. Definitions

The following definitions (A – F) provided in EO 13807 should be applied as part of the implementation of this guidance and EO 13807. Other defintions applicable to NEPA can be found in 40 CFR 1508, 33 CFR 230, and 33 CFR 325, Appendix B.

**A. Authorization** means any license, permit, approval, finding[20], determination, or other administrative decision issued by a Federal department or agency (agency) that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3).

**B. CAP Goals** means Federal Government Priority Goals established by the Government Performance and Results Act (GPRA) Modernization Act of 2010, Public Law 111-352, 124 Stat. 3866, and commonly referred to as Cross-Agency Priority (CAP) Goals.

[20] Required consultations with Federal agencies such as U.S. Fish and Wildlife Service and National Marine Fisheries Service meet the definition of authorization and thus apply to determinations of multiple federal authorizations.

C. **Federal Permitting Improvement Steering Council** or "FPISC" means the entity established under 42 U.S.C. 4370m.

D. **Infrastructure project** means a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband Internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC.

E. **Major infrastructure project** means an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.

F. **Permitting Timetable** means an environmental review and authorization schedule, or other equivalent schedule, for a project or group of projects that identifies milestones--including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a project or group of projects--that is prepared by the lead Federal agency in consultation with all cooperating and participating agencies.

G. **Additional definitions**

(1) **Best Practices** means the techniques and strategies published and updated annually by the Federal Permitting Improvement Steering Council (FPISC) pursuant to 42 U.S.C. 4370m-1(c)(2)(B)[21], and identified in *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018*, or subsequent revisions, as best practices.

(2) **Environmental review** means agency effort toward evaluation of an application from initial receipt until the date of the issuance of the Final EIS.

(3) **Multiple authorizations**, as one of the three criteria defining a major infrastructure project, means 'more than one' Federal agency authorization by 'more than one' Federal agency. When two or more Federal agencies will be required to make authorization decisions to proceed with construction the criterion is met.

[21] Fixing America's Surface Transportation Act, Title 41 (FAST-41)

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

**(4) Senior agency official** means the USACE Chief Environmental Review and Permitting Officer (CERPO) and/or a USACE Division Commander's designated Senior Environmental Review Officer (SERO).

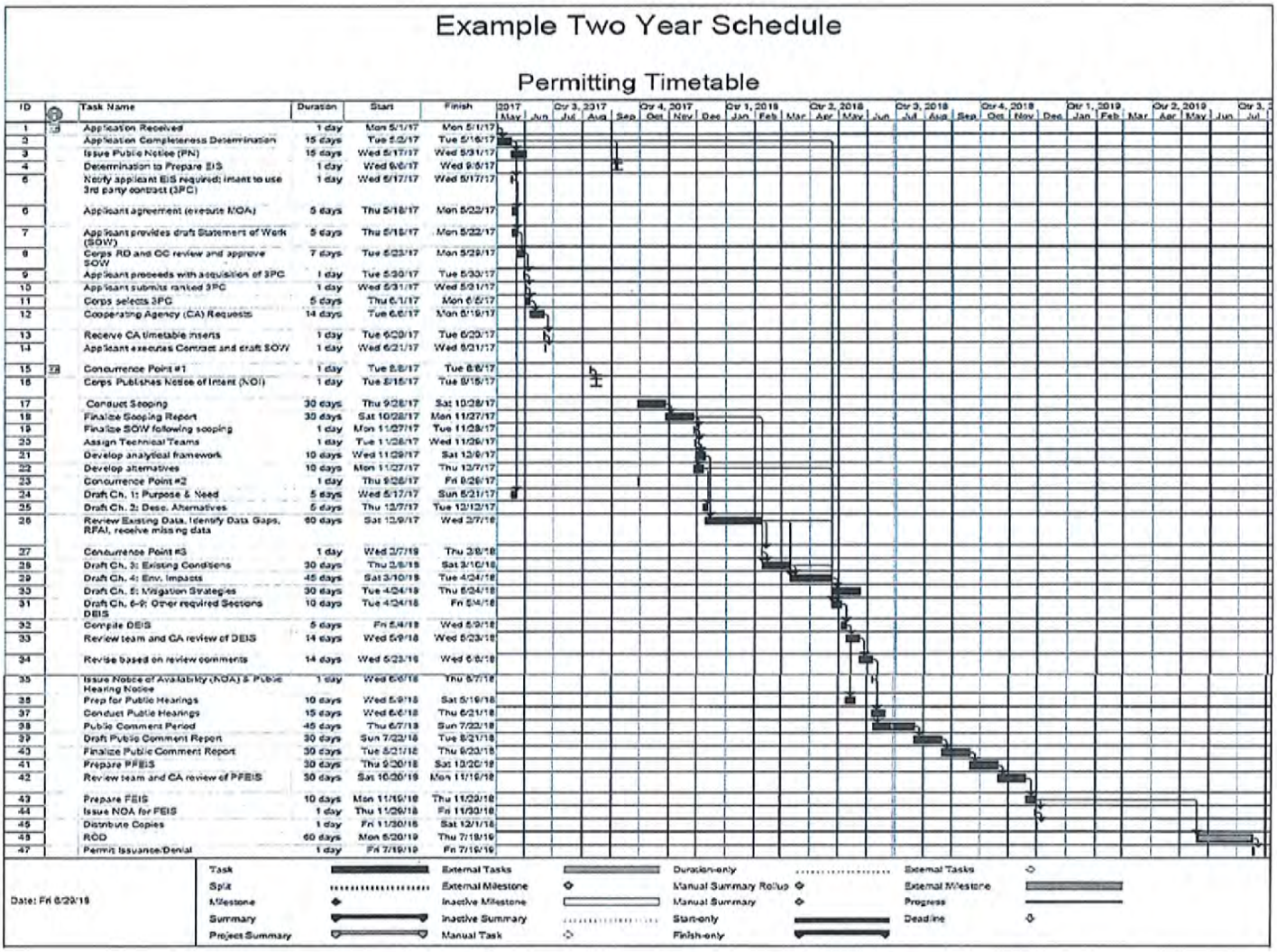
**Attachment:** Example Two Year Schedule

THOMAS P. SMITH, P.E., SES
Chief, Operations and Regulatory Division
Directorate of Civil Works

DISTRIBUTION:
COMMANDERS,
GREAT LAKES AND OHIO RIVER DIVISION, CELRD
MISSISSIPPI VALLEY DIVISION, CEMVD
NORTH ATLANTIC DIVISION, CENAD
NORTHWESTERN DIVISION, CENWD
PACIFIC OCEAN DIVISION, CEPOD
SOUTH ATLANTIC DIVISION, CESAD
SOUTH PACIFIC DIVISION, CESPD
SOUTHWESTERN DIVISION, CESWD

# Example Two Year Schedule

## Permitting Timetable



| ID | Task Name | Duration | Start | Finish |
|---|---|---|---|---|
| 1 | Application Received | 1 day | Mon 5/1/17 | Mon 5/1/17 |
| 2 | Application Completeness Determination | 15 days | Tue 5/2/17 | Tue 5/16/17 |
| 3 | Issue Public Notice (PN) | 15 days | Wed 5/17/17 | Wed 5/31/17 |
| 4 | Determination to Prepare EIS | 1 day | Wed 9/6/17 | Wed 9/6/17 |
| 5 | Notify applicant EIS required; intent to use 3rd party contract (3PC) | 1 day | Wed 5/17/17 | Wed 5/17/17 |
| 6 | Applicant agreement (execute MOA) | 5 days | Thu 5/18/17 | Mon 5/22/17 |
| 7 | Applicant provides draft Statement of Work (SOW) | 5 days | Thu 5/18/17 | Mon 5/22/17 |
| 8 | Corps RD and CC review and approve SOW | 7 days | Tue 5/23/17 | Mon 5/29/17 |
| 9 | Applicant proceeds with acquisition of 3PC | 1 day | Tue 5/30/17 | Tue 5/30/17 |
| 10 | Applicant submits ranked 3PC | 1 day | Wed 5/31/17 | Wed 5/31/17 |
| 11 | Corps selects 3PC | 5 days | Thu 6/1/17 | Mon 6/5/17 |
| 12 | Cooperating Agency (CA) Requests | 14 days | Tue 6/6/17 | Mon 6/19/17 |
| 13 | Receive CA timetable inserts | 1 day | Tue 6/20/17 | Tue 6/20/17 |
| 14 | Applicant executes Contract and draft SOW | 1 day | Wed 6/21/17 | Wed 6/21/17 |
| 15 | Concurrence Point #1 | 1 day | Tue 8/8/17 | Tue 8/8/17 |
| 16 | Corps Publishes Notice of Intent (NOI) | 1 day | Tue 8/15/17 | Tue 8/15/17 |
| 17 | Conduct Scoping | 30 days | Thu 9/28/17 | Sat 10/28/17 |
| 18 | Finalize Scoping Report | 30 days | Sat 10/28/17 | Mon 11/27/17 |
| 19 | Finalize SOW following scoping | 1 day | Mon 11/27/17 | Tue 11/28/17 |
| 20 | Assign Technical Teams | 1 day | Tue 11/28/17 | Wed 11/29/17 |
| 21 | Develop analytical framework | 10 days | Wed 11/29/17 | Sat 12/9/17 |
| 22 | Develop alternatives | 10 days | Mon 11/27/17 | Thu 12/7/17 |
| 23 | Concurrence Point #2 | 1 day | Thu 9/28/17 | Fri 9/29/17 |
| 24 | Draft Ch. 1: Purpose & Need | 5 days | Wed 5/17/17 | Sun 5/21/17 |
| 25 | Draft Ch. 2: Desc. Alternatives | 5 days | Thu 12/7/17 | Tue 12/12/17 |
| 26 | Review Existing Data, Identify Data Gaps, RFAI, receive missing data | 60 days | Sat 12/9/17 | Wed 2/7/18 |
| 27 | Concurrence Point #3 | 1 day | Wed 2/7/18 | Thu 2/8/18 |
| 28 | Draft Ch. 3: Existing Conditions | 30 days | Thu 2/8/18 | Sat 3/10/18 |
| 29 | Draft Ch. 4: Env. Impacts | 45 days | Sat 3/10/18 | Tue 4/24/18 |
| 30 | Draft Ch. 5: Mitigation Strategies | 30 days | Tue 4/24/18 | Thu 5/24/18 |
| 31 | Draft Ch. 6-9: Other required Sections DEIS | 10 days | Tue 4/24/18 | Fri 5/4/18 |
| 32 | Compile DEIS | 5 days | Fri 5/4/18 | Wed 5/9/18 |
| 33 | Review team and CA review of DEIS | 14 days | Wed 5/9/18 | Wed 5/23/18 |
| 34 | Revise based on review comments | 14 days | Wed 5/23/18 | Wed 6/6/18 |
| 35 | Issue Notice of Availability (NOA) & Public Hearing Notice | 1 day | Wed 6/6/18 | Thu 6/7/18 |
| 36 | Prep for Public Hearings | 10 days | Wed 5/9/18 | Sat 5/19/18 |
| 37 | Conduct Public Hearings | 15 days | Wed 6/6/18 | Thu 6/21/18 |
| 38 | Public Comment Period | 45 days | Thu 6/7/18 | Sun 7/22/18 |
| 39 | Draft Public Comment Report | 30 days | Sun 7/22/18 | Tue 8/21/18 |
| 40 | Finalize Public Comment Report | 30 days | Tue 8/21/18 | Thu 9/20/18 |
| 41 | Prepare PFEIS | 30 days | Thu 9/20/18 | Sat 10/20/18 |
| 42 | Review team and CA review of PFEIS | 30 days | Sat 10/20/18 | Mon 11/19/18 |
| 43 | Prepare FEIS | 10 days | Mon 11/19/18 | Thu 11/29/18 |
| 44 | Issue NOA for FEIS | 1 day | Thu 11/29/18 | Fri 11/30/18 |
| 45 | Distribute Copies | 1 day | Fri 11/30/18 | Sat 12/1/18 |
| 46 | ROD | 60 days | Mon 5/20/19 | Thu 7/18/19 |
| 47 | Permit Issuance/Denial | 1 day | Fri 7/19/19 | Fri 7/19/19 |

Date: Fri 6/29/18

Task · Split · Milestone · Summary · Project Summary · External Tasks · External Milestone · Inactive Milestone · Inactive Summary · Manual Task · Duration-only · Manual Summary Rollup · Manual Summary · Start-only · Finish-only · Deadline · Progress

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

SEP 26 2018

CECW-P

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Feasibility Studies for Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects

1. References

a. Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. ER 200-2-2, Procedures for Implementing NEPA, 4 March 1988.

c. 40 CFR 1500-1508, CEQ Regulations for Implementing the Procedural Provisions of NEPA.

d. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1986).

e. Implementation Guidance for Section 1005 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Project Acceleration, 20 March 2018.

f. SMART Planning Feasibility Studies: A Guide to Coordination and Engagement with the Services, September 2015.

2. Applicability. EO 13807 applies a number of concepts to environmental review and permitting associated with "infrastructure projects," as defined in the EO. Sections 4 and 5 of Executive Order (EO) 13807 also apply specific performance accountability measures and process enhancements to projects meeting the EO's definition of "major infrastructure projects." This guidance applies to feasibility studies where the USACE planning decision document could lead to a recommendation for project authorization or modification to a project authorization, including general re-evaluation studies, post authorization change reports, and other reports supporting project authorization or budget decisions that result in a Chief's Report or Director's Report.

a. Section 3.(d) of EO 13807 defines "infrastructure project" as "a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation,

including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC [Federal Permitting Improvement Steering Council]."

b. Section 3.(e) defines "major infrastructure project" (a subclass of infrastructure project as defined above) as "an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project."

c. Section 3.(a) of EO 13807 defines "authorization" as "any license, permit, approval, finding, determination, or other administrative decision issued by a Federal department or agency that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3)." As so defined in the EO, this term is not synonymous with Congressional authorization, or any other approval, finding, determination, or decision issued by Congress or any other entity or organization that is not a Federal department or agency.

d. Districts should apply the concepts applicable to "infrastructure projects," as well as future process improvements, to planning studies that don't otherwise meet the definition of "major infrastructure projects," particularly those feasibility studies with Environmental Assessments (EAs).

3. Purpose. The EO sets out several policies of the Federal Government related to infrastructure projects including, but not limited to, a policy to develop environmentally sensitive infrastructure; a policy to conduct coordinated, consistent, predictable, and timely environmental reviews; and a policy to make timely decisions with the goal of completing all federal environmental reviews and authorization decisions for "major infrastructure projects" within two years. The purpose of this guidance is to clarify and reinforce those Civil Works project development processes and procedures that will provide for compliance with the EO.

4. Environmental Stewardship. The Federal objective for water resources planning is to contribute to national economic development, consistent with protecting the Nation's environment, pursuant to national environmental statutes, applicable executive orders,

and other Federal planning requirements. Provisions for environmental considerations are integrated throughout the Principles & Guidelines and are specifically addressed in discussion of the Environmental Quality (EQ) Account and the EQ procedures. The EQ procedures should be applied early in the planning process so that significant natural and cultural resources of the study area can be identified and inventoried, used in developing planning objectives, and accommodated in a reasonable set of alternative plans, which achieve the planning objectives. Further, USACE's Environmental Operating Principles were developed to ensure that USACE missions include totally integrated sustainable environmental practices. The Environmental Operating Principles provide corporate direction to ensure that the workforce recognizes the USACE role in, and responsibility for, sustainable use, stewardship, and restoration of natural resources across the Nation.

5. Coordinated Environmental Reviews. The EO states it is the policy of the Federal Government to conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner. 33 U.S.C. 2348(c)(2) and (e)(8) require agencies to conduct environmental reviews of water resource development projects concurrently to the extent practicable for feasibility studies, providing compliance with this policy. References 1.e. and 1.f. provide detailed guidance on conducting concurrent and coordinated environmental reviews for feasibility studies.

a. All Federal, Tribal, and State agencies required to conduct or issue a review for the study should be invited to serve as either a cooperating agency or a participating agency for the environmental review process. The coordinated environmental review process stresses promoting transparency, including of the analyses and data used in the environmental review process, the treatment of any deferred issues raised by Federal, State, and local governmental agencies, Tribes, or the public, and the temporal and spatial scales to be used to analyze those issues.

b. Districts will use principles of risk-informed decision making to conduct environmental compliance concurrently with the feasibility study process. Risk-informed decision making within the environmental discipline does not mean deferring environmental compliance until later during the study or during preconstruction engineering and design (PED) solely to avoid data gathering early in the study. Each iteration of the planning process progresses in level of detail for environmental analysis and review. Consistent with Reference 1.c., study teams should focus on issues which are significant to decision making and reduce emphasis on information which is not. Study teams should use readily available information, and proxies when appropriate, to gather only the information necessary for the next planning decision based on feedback from

coordinating with cooperating and participating agencies and to manage decision risks. Study teams should utilize public and agency coordination to assist in focusing on those most significant issues for decision making and better characterize what key uncertainties exist within the environmental discipline. Study teams can manage those associated instrumental risks using a risk register. The point of risk-informed planning is not to focus on those universal risks that would apply across the portfolio, such as the risk that a cooperating agency will not support a recommended plan, but instead to focus on those critical risks that are unique to a given study and have the potential to significantly affect decision making.

6. Permitting Timetable. Section 5.a.(ii) of the EO requires agencies to develop and follow a permitting timetable for "major infrastructure projects." The permitting timetable is an environmental review and authorization schedule, or other equivalent schedule, for a major infrastructure project or group of major infrastructure projects that identifies milestones, including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a major infrastructure project or group of major infrastructure projects. Study teams will use the schedule developed in accordance with Paragraph 5.d. of Reference 1.e., conducting the required coordination and concurrence with the cooperating and participating agencies, as the permitting timetable for major water resources infrastructure projects under the EO. Study schedules must have sufficient detail to demonstrate utilization of a coordinated review.

7. Notice of Intent. References 1.b. and 1.c. indicate that as soon as practicable after a decision is made to prepare an EIS or supplement, the scoping process for the draft EIS or supplement will be announced in a NOI. Changes in WRRDA 2014 included elimination of the reconnaissance phase, but added a requirement for a meeting within 90 days of the start of the study with all Federal, Tribal, and State agencies (see Reference 1.e.). Without the reconnaissance phase and much of the early information obtained during that phase, the decision regarding the appropriate NEPA document (categorical exclusion, EA, or EIS) would be better informed by the interagency meeting within 90 days of the study start in Reference 1.e. Therefore, the NOI may be issued between the Alternatives Milestone Meeting (AMM), which typically occurs within the first 90 days of the study, and before the Tentatively Selected Plan (TSP) Milestone, allowing the interagency meeting and one or more iterations of the six step planning process to occur, in order to make a risk-informed decision on the appropriate NEPA document (categorical exclusion, EA, or EIS) for the study. Consistent with References 1.b. and 1.c., districts will issue the NOI as soon as practicable after making the determination of the need to prepare an EIS, which is likely to occur close to the AMM.

8. NEPA Scoping. Reference 1.c. directs that the NEPA scoping process be announced in a NOI. However, CEQ guidance in Reference 1.d. does not prohibit early scoping prior to a NOI. Scoping may be initiated early in the feasibility study, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively. However, early scoping cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered. Any information received from the public or other agencies during this early scoping is expected to help reduce uncertainty regarding the appropriate type of NEPA document for the feasibility study.

9. One Federal Decision. Civil Works studies and proposed projects are required to be in compliance with all applicable Federal environmental statutes and regulations and with applicable State laws and regulations where the Federal government has clearly waived sovereign immunity. It is also expected that project recommendations made by district commanders within a final integrated feasibility report/NEPA document are informed by the results of a coordinated and transparent environmental review process. Lastly, under Reference 1.b., the Assistant Secretary of the Army for Civil Works [ASA(CW)] retains authority for signature of the Record of Decision (ROD), after completion of a Chief's Report. Therefore, for water resources development projects meeting the definition of "major infrastructure project" under EO 13807, the district commander's transmittal of a final feasibility report will also include the findings of all applicable environmental compliance requirements to comply with One Federal Decision in Section 5.(b) of the EO. For water resources development projects meeting the definition of "major infrastructure project" under EO 13807, requests to defer an environmental requirement after the district commander's transmittal of the final feasibility report must describe the risk and uncertainty of the request and must be endorsed by the policy and legal compliance review team at the Agency Decision Milestone in order to comply with Section 5(b)(ii) of the EO.

10. For water resources development projects meeting the definition of "major infrastructure project" under EO 13807, the length of the environmental review process for determining compliance with the EO will be calculated from the date of the NOI to the date of the district commander's transmittal of the final feasibility report or other decision document.

11. Issue Resolution. To comply with Section 5.(a)(iii) of the EO, study teams will inform the vertical team of any instances where a permitting timetable milestone for a water resources development project meeting the definition of "major infrastructure project" under EO 13807 is missed or extended, or is anticipated to be missed or extended. In

addition, study teams should keep the vertical team informed of any issues in the environmental review process that may affect the team's ability to meet a feasibility study milestone.

12. Questions regarding this implementation guidance should be directed to Lauren Diaz, Office of Water Project Review, at (202) 761-4663 or Lauren.B.Diaz@usace.army.mil.

JOSEPH H. REDICAN
Acting Chief, Planning and Policy Division
Directorate of Civil Works

DISTRIBUTION:
COMMANDERS,
GREAT LAKES AND OHIO RIVER DIVISION, CELRD
MISSISSIPPI VALLEY DIVISION, CEMVD
NORTH ATLANTIC DIVISION, CENAD
NORTHWESTERN DIVISION, CENWD
PACIFIC OCEAN DIVISION, CEPOD
SOUTH ATLANTIC DIVISION, CESAD
SOUTH PACIFIC DIVISION, CESPD
SOUTHWESTERN DIVISION, CESWD