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Docket No. EPA–HQ–OW–2021–0302

August 2, 2021

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule

The Interstate Natural Gas Association of America ("INGAA") and the American Gas Association ("AGA") respectfully submit these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") notice of intention to reconsider and revise the Clean Water Act Section 401 Certification Rule.

INGAA is a non-profit trade association that advocates for regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's 26 member companies transport the vast majority 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.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 76 million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent — more than 72 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than thirty percent of the United States' energy needs. AGA members rely on interstate natural gas pipelines for the natural gas supply they need in order to provide affordable, reliable natural gas distribution service to homes and businesses.

Natural gas plays an important role in American society, particularly with respect to the nation's ongoing transition to clean energy. But in order to maintain the United States' modern and reliable pipeline system, to complement the growing number of renewable energy resources, and to displace higher emitting fuels, EPA must establish an effective and uniform

approach to state reviews of consistency with water quality standards.[1] To ensure that any revised rule will be legally durable and consistent with the Clean Water Act's cooperative federalism scheme, however, EPA must limit any revisions to the 2020 Certification Rule to minor clarifications until EPA has sufficient data to determine the effectiveness of the current rule.

I. An Effective and Consistent Section 401 Process Is Critical to Advancing Infrastructure Projects

The environmental review and permitting of interstate natural gas pipelines is complex and comprehensive, often spanning years and requiring authorizations from multiple federal, state, and local entities, each with unique and sometimes competing authorities and processes. Comprehensive permitting reviews ensure that agencies evaluate potential impacts under the proper statutory standards set forth by Congress and minimize or mitigate those impacts where appropriate.

Clean Water Act Section 401 provides states and tribes an important role in connection with federal permitting of the construction, modernization, and maintenance of infrastructure, including roads, bridges, transmission lines carrying electricity from renewable generators, natural gas pipelines, and the wide range of activities authorized pursuant to the Army Corps of Engineers' Clean Water Act Section 404 and/or Nationwide Permits. Review under Section 401 must be efficient and predictable both to ensure that developers have the certainty needed to develop these critical infrastructure projects and that states have the ability to oversee the quality of their waters without undermining important national objectives. For infrastructure projects that cross state lines and require multiple Section 401 certifications, like interstate natural gas pipelines, hydrogen pipelines, and electric transmission lines, consistent implementation of Section 401 across states is necessary to prevent local interests from obstructing development of infrastructure that furthers national priorities and the wider public interest and keeping energy prices from overburdening lower income communities.

Prior to the EPA's issuance of the 2020 Certification Rule,[2] the Section 401 regulations were nearly 50 years old and promulgated in response to a prior version of the Section 401 statute.[3] These outdated regulations not only failed to account for the evolution of the scope

[1] President Biden has recognized the value of "coordinated infrastructure permitting to expedite federal decisions." The White House, The American Jobs Plan, Mar. 31, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

[2] Clean Water Act Section 401, Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020) ("2020 Certification Rule") (codified at 40 C.F.R. pt 121).

[3] 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. 32880 (June 7, 1979).

and complexity of infrastructure projects over the last half century but also enabled states to misuse of EPA's Section 401 program as a means of dictating federal energy policy. These deficiencies led to the delay or cancelation of much-needed infrastructure projects,[4] thereby depriving consumers of the projects' benefits, disrupting interstate commerce, and undermining the nation's prosperity and security.

The 2020 Certification Rule aligned EPA's Section 401 program with the statutory text of Section 401 and appellate courts' interpretation of that text. The result is a workable process that should—and, based on some INGAA and AGA members' experience, did—reduce the potential for conflicting interpretations of the certifying authority's role in the implementation of Section 401 and strengthen permitting and licensing programs within the framework of complementary federal and state responsibilities.

It will take time for federal agencies and certifying authorities to implement the 2020 Certification Rule and to gather the data necessary to evaluate the 2020 Certification Rule's effectiveness. Absent this data, there is no justification for the EPA's conclusions about the effectiveness of the 2020 Certification Rule in protecting water quality. Refinement of the rule is appropriate only *after* EPA and regulated entities have had sufficient time for the rule to be in effect and applied. If EPA chooses now to make revisions, they should be minimal until federal agencies have had adequate time to adjust their regulatory frameworks and EPA, states, tribes, and developers have a sound record of experience with the rule on which to base any further revisions.[5]

In the meantime, EPA's clear and consistent action on Section 401 is necessary to give federal agencies the appropriate direction to implement Section 401 in a manner that aligns with the statute and allows for the efficient and predictable review of infrastructure projects. Consistency in the permitting process is essential for investing capital to support major infrastructure projects that serve national needs.

II. Response to Notice of Intention

As EPA considers the 2020 Certification Rule and potential revisions, INGAA and AGA appreciate the opportunity to provide EPA with the following comments for consideration, organized by EPA's questions in the NOI. Our comments are informed directly by Section 401's statutory language, recent appellate case law interpreting that statutory language, and its

[4] *See* July 1, 2019 Letter from INGAA to U.S. EPA at 2-3, listing major energy infrastructure projects that have experienced delays resulting from the Section 401 process (Attached).

[5] Federal agencies like the Federal Energy Regulatory Commission ("FERC") and the Army Corps of Engineers have already made adjustments to their regulatory process to incorporate the 2020 Certification Rule. *See* FERC, Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, Docket No. RM20-18-000, 174 FERC ¶ 61,196 (2021); Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2852 (Jan. 13, 2021) ("For this issuance of these NWPs, the Corps complied with EPA's final rule, which was published in the Federal Register on July 13, 2020, and went into effect on September 11, 2020.").

members' experience with the Section 401 process.

A. Response to Question 2: The Definition of Certification Request Must Provide Certainty as to When the Statutory Review Period Has Been Initiated

Section 401 states clearly that the period for the certifying authority to act on a Section 401 request begins upon receipt of the "certification request."[6] The 2020 Certification Rule defines "certification request" appropriately, balancing the certifying authority's need for sufficient information to initiate a meaningful review and the permit applicant's ability to obtain and submit additional information as it becomes available. Any changes to the current definition would need to maintain this balance and continue to provide certainty as to when the Section 401 review begins, as discussed further below.

The current definition of certification request effectuates the time limits imposed by Congress—"within a reasonable period of time (which shall not exceed one year) after receipt of such request"[7]—and prevents certifying authorities from exceeding the one year maximum time limitation and using Section 401 to delay projects.[8] The lead federal agency—not the certifying authority—determines matters of waiver under Section 401, which includes determining when the reasonable period of time for review begins.[9] Events subsequent to the certifying authority's receipt, such as the state's validation of the completeness of the request, cannot delay the start of the time period for review.[10] Neither can the applicant and the certifying authority agree to

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[6] 33 U.S.C. § 1341(a)(1) ("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.") (emphasis added).

[7] *Id*.

[8] National Fuel Gas Supply Corporation and Empire Pipeline, Inc.'s (collectively, "National Fuel") experience with its Northern Access 2016 Project is illustrative of the significant delays caused by certifying authorities attempting to extend the statutory one-year deadline. On March 2, 2016, the New York State Department of Environmental Quality ("NYSDEC") received National Fuel's Section 401 request. *NY Dep't of Envtl. Conservation v. FERC*, 991 F.3d 439, 443 (2d Cir. 2021). In January 2017, the NYSDEC asked National Fuel to agree to revise the date on which the application was "deemed received" by the NYSDEC to April 8, 2016; this was memorialized in a letter agreement. *Id.* at 443, 447-48. On April 7, 2017, NYSDEC denied National Fuel's certification request, which led to litigation related to the timeliness of the denial. *Id*. at 444. FERC concluded that the denial came too late, because it occurred more than one year after the NYSDEC received the Section 401 request. *National Fuel Gas Supply Corp*., 167 FERC ¶ 61,007, at P 9 (Apr. 2, 2019). On March 23, 2021, the U.S. Court of Appeals for the Second Circuit upheld that decision. *NY Dep't of Envtl. Conservation,* 991 F.3d at 450.

[9] *See Millennium Pipeline v. Seggos*, 860 F.3d 696, 699 (D.C. Cir. 2017) (project applicants are to present evidence of waiver to federal agency).

[10] *NY Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) ("If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.").

delay the start of the review period or otherwise extend the review period.[11]

It is appropriate for EPA, as the federal agency charged with administering the Clean Water Act,[12] to define "certification request" and the information to be contained within. Allowing the certifying authority to decide what information must be included in the certification request would be tantamount to determining whether a request is "complete"—thereby starting the maximum one-year period for review—and an end-run on the statutory time limit.[13]

INGAA and AGA recommend that EPA clarify that a "certification request"—and the commencement of the reasonable time period for review—only requires the best information reasonably available to the project proponent at the time the request is made. For example, project proponents may rely on remote sensing and database information to determine the "location and nature of any potential discharge that may result from the proposed project"[14] at the time of the request and confirm these locations through field verification once the proponent landowner permission to access all properties along the proposed route. The proponent's use of the best information reasonably available in this manner need not delay the certifying agency's review of the request.

This clarification will not frustrate a certifying agency's ability to review the certification request. For interstate natural gas pipelines seeking a certificate of public convenience and necessity under the Natural Gas Act, the Section 401 certification request is typically filed within 30 days of filing a certificate application with the FERC, which itself must contain complete resource reports offering extensive analysis of water quality impacts and other impacts.[15] Thus, at the time of the certification request, there are ample analytical and technical studies available for the certifying authority's review. If a certifying authority needs additional information to complete its Section 401 review, it can request that information from the project proponent during the reasonable period of time for review.

INGAA and AGA members have found the pre-filing meetings with the certifying agencies helpful to discuss the proposed project and identify what information the pipeline shall provide and what additional information the certifying agency may be seeking. Although helpful, scheduling difficulties can frustrate the certifying agency's and the developer's efforts to hold the meeting. INGAA and AGA recommend that EPA clarify that the occurrence of a pre-filing meeting is not a prerequisite for filing a certification request.

Neither the submission of additional information nor agency requests for additional information during the pendency of the certifying authority's review invalidates the certification

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[11] *See NY Dep't of Envtl. Conservation*, 991 F.3d at 450 ("Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period[.]").

[12] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

[13] *See NY Dep't of Envtl. Conservation*, 884 F.3d at 455.

[14] 40 C.F.R. § 121.5(b)(4).

[15] *See, e.g.*, 18 C.F.R. § 380.12 (Environmental reports for Natural Gas Act applications).

request or restarts or extends the reasonable period of time for review. Section 401 provides no exception for such matters. Rather, the statute adopts a practical approach towards balancing the interests of federal authorities, certifying authorities, and developers of national infrastructure that does not require developers to possess complete and total information at the time of its request.

Attempts by a certifying authority to delay the commencement of its time period for review or extend the time period of review beyond one year is in violation of the Clean Water Act.[16] Instead, if a certifying authority determines that it cannot issue the requested certification based on the available information, "it can simply deny the application without prejudice."[17] EPA should clarify that such denial without prejudice shall include a statement explaining why the project will not comply with water quality requirements and the specific water quality data or information that would be needed to grant certification. This clarification will help ensure that the state's decision has a sound basis in fact and law and is not the product of abuse of the Section 401 program.

B. Response to Question 3: The Lead Federal Agency Has the Authority to Set the "Reasonable Period of Time"

Section 401 balances the certifying authority's interest in a thorough evaluation of potential water quality impacts with the federal government's obligation to act promptly on permit applications by imposing a clear time limit on the certifying authority's action before waiver occurs.[18] As set out in the 2020 Certification Rule, it is the lead federal agency's responsibility and obligation to determine whether waiver has occurred,[19] a determination that must include setting the reasonable period of time.[20]

The statute provides a full year as the absolute maximum amount of time.[21] The lead federal agency may determine a reasonable period of time to be less than one year.[22] Certifying authorities and project proponents may and should provide input to the lead federal agency in setting or modifying the reasonable period of time, but they have no authority to set the reasonable period of time under Section 401. The review period begins with a state's receipt of

[16] *Hoopa Valley*, 913 F.3d at 1104.

[17] *NY Dep't of Envtl. Conservation*, 884 F.3d at 456.

[18] 33 U.S.C. § 1341(a)(1) ("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.") (emphasis added).

[19] *See Millennium Pipeline*, 860 F.3d at 696 (holding that the lead federal agency decides whether waiver has occurred as a result of exceeding the statutory review period).

[20] Both EPA and the Army Corps of Engineers have defined the reasonable period by regulations. *See* 40 C.F.R. § 124.53(c)(3) (60 day time period); 33 C.F.R. § 325.2(b)(ii) (60 day time period).

[21] 33 U.S.C. § 1341(a)(1).

[22] *See Hoopa Valley*, 913 F.3d at 1103-04.

the request and ends at the point in time designated by the lead federal agency as a reasonable period of time for the state's review. Under no circumstances can the reasonable period of time exceed one year from the date of receipt of the certification request.[23]

Many projects require multiple federal permits or approvals of some form. For example, an interstate natural gas pipeline project proponent seeking project-specific authorization under Section 7(c) of the Natural Gas Act must obtain a certificate of public convenience and necessity from FERC; this certificate authorizes the construction and operation of the pipeline. Where a project requires multiple federal authorizations, the "lead" federal agency is responsible for carrying out Section 401 responsibilities (i.e., setting the reasonable period of time for the certifying agency to make a decision, determining waiver, etc.)—and all other federal agencies should defer accordingly.[24] Otherwise, as recognized by EPA, a situation could arise where multiple federal agencies are determining the reasonable period of time, reviewing the certifying authority's Section 401 action, incorporating conditions into federal licenses or permits, and determining whether waiver has occurred without coordination and with possibly conflicting determinations.[25]

The Army Corps of Engineers has recognized this potential for conflict and has incorporated the lead federal agency concept into its policies.[26] Thus, for projects that require an environmental assessment or environmental impact statement under National Environmental Policy Act ("NEPA"), and where the Corps is not the lead federal agency, which is the case for interstate natural gas pipelines requiring FERC approval, the Corps has committed to "defer to the determination of the lead agency, determine that the certification has been waived, and proceed accordingly."[27]

C. Response Question 4: The Scope of Section 401 Review by Certifying Agencies is Properly Limited to Water Quality

Section 401 provides certifying authorities the opportunity to certify whether a proposed discharge will comply with applicable water quality provisions. The certifying authority's review

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[23] *See Millennium Pipeline*, 860 F.3d at 700 ("waiver occurs after one year of agency inaction" and "[o]nce the Clean Water Act's requirements have been waived, the Act falls out of the equation").

[24] *See id.* at 698 (D.C. Cir. 2017) ("For any company desiring to construct a natural gas pipeline, all roads lead to FERC.").

[25] Clean Water Act Section 401 Certification Rule Response to Comments, May 28, 2020 at 48 ("Although not required in the final rule, the EPA encourages non-lead federal agencies to coordinate with and, where appropriate, defer to lead federal agencies on decisions concerning the reasonable period of time for a particular project, and whether waiver has occurred. Close coordination on these important procedural issues will provide greater clarity and reduce confusion and uncertainty for all participants in the certification process.").

[26] U.S. Army Corps of Engineers, Memorandum, Implementation Guidance for Regulatory Compliance with Executive Order (EO) 13807 and One Federal Decision (OFD) within Civil Works Programs (Sept. 26, 2018). (Attached).

[27] *Id*. at 8.

and conditioning authority is not unbounded and is instead limited by the text of Section 401.[28] The statute, however, contains variations in language related to the scope of review that have led to divergent legal interpretations related to two key points: (a) the relationship between Section 401(a)(1) and 401(d), and (b) the meaning of the phrase "any other appropriate requirement of state law." The 2020 Certification Rule resolves these divergent interpretations through a holistic reading of the statute and offers a practical approach for implementing Section 401. Given the practical importance of the 2020 Certification Rule's changes, EPA should continue to apply the 2020 Certification Rule, and gather data and information to assess the impacts of the rule, across multiple projects and states before considering any adjustments to the Rule.

1. The relationship between Section 401(a)(1) and Section 401(d) supports a single scope for Section 401 review.

Section 401(a)(1) directs the certifying authority's inquiry into whether to grant or deny the certification. The provision focuses on whether the "discharge" will comply with certain enumerated "applicable provisions" of the Clean Water Act.[29] Section 401(d) authorizes certifying agencies to include appropriate conditions in the grant of a certification. The conditioning authority described in Section 401(d) is expressed in somewhat different terms than the scope to grant or deny a certification request under Section 401(a)(1).[30] When read in isolation, Section 401(a) and Section 401(d) exhibit a facial incongruity that has created significant challenges in implementing Section 401 uniformly and fairly across the nation.[31]

Critically, Section 401(a)(1) and Section 401(d) are not isolated provisions of Section 401, like pebbles on the sand. The Supreme Court has explained:

> [T]he cardinal rule is that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .[32]

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[28] *See PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994).

[29] 33 U.S.C. § 1341(a)(1) (enumerating Sections 301, 302, 303, 306, and 307 of the Clean Water Act as the "applicable provisions").

[30] 33 U.S.C. § 1341(d) (enumerating Sections 301, 302, 306, and 307 of the Clean Water Act and "any other appropriate requirement of State law").

[31] The Supreme Court's decision in *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dep't of Ecology* exemplifies the incongruity in the text, with some Justices concluding that Section 401(d) must be read in support of Section 401(a) and others concluding that Section 401(d) expands the authority. 511 U.S. 700, 711 and 726-27. The Court's interpretation of Section 401(d) does not bind EPA, however, and does not require revision of the 2020 Certification Rule. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*, 545 U.S. 967, 982-83 (2005).

[32] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citations omitted).

In Section 401, the authority to condition a certification under Section 401(d) is in support of the certifying authority's right (and responsibility) to grant or deny a certification request under Section 401(a)(1). Together, the certification and any conditions form an integrated whole whose overarching purpose is to assure water quality by affording certifying authorities a reasonable opportunity for review. The 2020 Certification Rule recognizes the interrelation of these provisions by establishing a single, clear articulation of the scope of review. This scope reflects both Section 401(a)(1) and Section 401(d), giving meaning to and effectuating each.

Not only is this approach supported by the statute, it is also consistent with the practical implementation of Section 401. In evaluating a certification request, the certifying authority assesses whether the proposed discharge will comply with applicable water quality provisions and whether appropriate conditions are necessary to ensure such compliance. It is a comprehensive evaluation with a single determination. Had EPA established two different scopes of review—one for the grant or denial of a certification request and one for conditioning certifications—EPA would be requiring certifying authorities to bifurcate their reviews and sequentially consider the question of whether to grant or deny and then the question of conditioning. This would lead to further uncertainties about the reach of conditioning authority apart from certification authority. Such uncertainties frustrate efficient review of certification requests, invite divergent approaches by tribes and states (even on the same multi-state development project), and confound efforts by project proponents to develop an appropriate record upon which certifying agencies can confidently act within the prescribed reasonable time.

2. "Any other requirement of state law" is properly limited to water quality.

Section 401(d) authorizes the certifying authority to condition the grant of a certification to ensure compliance with enumerated provisions of the Clean Water Act and "with any other appropriate requirement of State law set forth in such certification."[33] Certifying authorities have attempted to expand the scope of Section 401 beyond water quality based on an erroneous interpretation of the phrase "any other appropriate requirement of state law" that is untethered to the Clean Water Act. For example, certifying authorities have used this phrase to include conditions in Section 401 certifications related to the odorization of gas, mitigation measures to address past contamination, construction at the site, and requirements to adjust herbaceous stratum at the site. EPA itself has found that certifying authorities have included conditions not related to water quality, including requiring construction of biking and hiking trails.[34] States have also inappropriately denied Section 401 certifications on grounds unrelated to clean water.[35]

[33] 33 U.S.C. § 1341(d).

[34] 84 Fed. Reg. 44,080, 44,081 (Aug. 22, 2019).

[35] *See* e.g., Millennium Pipeline Co., LLC, Notice of Decision, NYSDEC, Permit ID 3-3399-00071/00001, August 30, 2017, which denied Millennium's certification request because "FERC failed to consider or quantify the downstream greenhouse gas from the combustion of the natural gas transported by the Project as part of [its] NEPA [environmental] review".

This single phrase must be read in the context in which it is found.[36] The statutory language throughout Section 401—and the Clean Water Act generally—is focused on water quality.[37] Section 401(a)(1) limits the scope of the certifying authority's actions to enumerated provisions of the Clean Water Act.[38] Other sections are similarly focused on water quality and provide no suggestion that non-water quality considerations or conditions are appropriate under Section 401.[39] There is no evidence that Congress intended this phrase to convey broader conditioning authority under Section 401(d) than necessary to support the focus of the state's review stated in Section 401(a).

D. Response to Question 5: Federal Agencies Have the Authority to Evaluate Certification Actions

Section 401(a)(1) makes clear that a federal agency must withhold the authorization of activities that affect water quality until the applicant obtains the applicable water quality certifications or the obligation is waived and that, upon denial, a federal agency may not grant the license or permit.[40] By making the issuance of a federal license contingent on action from the certifying authority, the statute requires that the federal agency make a threshold determination as to whether or not the water quality certification has been obtained or denied or whether waiver has occurred.[41] This includes setting the reasonable period of time and the date by which a state needs to act to avoid waiver.

In order to make this determination, federal agencies look to federal law—the provisions of Section 401—to fulfill their duty to assure that a certifying authority's action has facially satisfied the express requirements of Section 401.[42] The nuances and application of state law are not part of this inquiry and lie outside the authority of the federal agency to evaluate in

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[36] *See King v. Burwell*, 576 U.S. 473, 475 (2015) (internal citations omitted) (noting the "fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

[37] *See* 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

[38] *See id*. at § 1341(a)(1) ("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.").

[39] *See*, *e.g., id.* at § 1341(a)(2) ("Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters").

[40] *See id.* at § 1341(a)(1) ("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. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.").

[41] *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (federal agencies have "an obligation to determine that the specific certification required by Section 401 has been obtained") (internal citations omitted).

[42] *See id.*

detail.[43]

Similarly, to avoid waiver, a certifying authority must take timely final action on a certification request—grant, grant with conditions, or deny. The U.S. Court of Appeals for the Fourth Circuit recently suggested in dicta that a certifying authority could avoid waiver by taking "significant and meaningful action on a certification request within a year of its filing, even if the state does not finally grant or deny certification within that year."[44] This suggestion is incorrect and should not be adopted for multiple reasons.

First, by including a "one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding *without making a decision on the certification request*."[45] The Fourth Circuit's dicta suggesting that partial action is sufficient contradicts what "is clear from the plain text": Section 401 requires states to take final action within a reasonable period of time, not to exceed one year.[46]

Second, an interpretation of Section 401 that permits states to take only partial action within a reasonable period of time contravenes Congress' intent in passing Section 401. "Congress intended Section 401 to curb a state's dalliance or unreasonable delay," and, as a result, courts have "repeatedly recognized that the waiver provision was created to prevent a State from indefinitely delaying a federal licensing proceeding."[47] By allowing certifying authorities to take less than final action on a certification request, certifying authorities would be able to extend the reasonable period of time indefinitely, "blur[ring] the bright-line rule into a subjective standard" and frustrating Congress' intent to protect against state inaction.[48] Moreover, if a certifying authority can avoid the Clean Water Act's outer statutory deadline of one year and can continue to act on its own timeline, it would also run afoul of the goal of Congress' revisions to the Natural Gas Act that require FERC to establish a schedule for all federal

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[43] *See id*. ("This obligation does not require FERC to inquire into every nuance of the state law proceeding, especially to the extent doing so would place FERC in the position of applying state law standards."); *see also Am. Rivers v. FERC*, 129 F.3d 99, 110 (2d Cir. 1997) (FERC may not "second-guess the imposition of conditions") (relying on *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians*, 466 U.S. 765 (1984)).

[44] *N.C. Dep't of Envtl. Quality v. FERC*, __ F.4th ___; 2021 U.S. App. LEXIS 19841 *28-30 (4th Cir. July 2, 2021 Nos 20-1655, 20-1671).

[45] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (emphasis added).

[46] *Id*.; *see also Hoopa Valley*, 913 F.3d at 1104 ("Now, more than a decade later, the states still have not rendered *certification decisions*.") (emphasis added); *N.Y. State Dep't of Envtl. Conservation*, 884 F.3d at 456 (rejecting argument that "requiring state agencies to act on a request within one year will force it to render premature decisions").

[47] *Hoopa Valley Tribe* 913 F.3d at 1105-06; *see also N.Y. State Dep't of Envtl. Conservation*, 884 F.3d at 456 (rejecting interpretation of Section 401 under which "state agencies could . . . theoretically request supplemental information indefinitely").

[48] *NY Dep't of Envtl. Conservation*, 991 F.3d at 448.

authorizations[49] and the Commission's own regulations, which state that it shall deem waiver if the state certifying authority has not acted within one year of the receipt of the certification request.[50]

Third, the Fourth Circuit's suggested interpretation of Section 401 needlessly replaces a clear term—"act"—with an ambiguous standard. Under this standard, federal agencies and project developers must determine whether the certifying authority's action was "significant and meaningful" enough to satisfy Section 401's requirement "to act." As a threshold matter, courts have rejected federal agencies making this type of substantive inquiry of a certification action.[51] More fundamentally, this interpretation will force federal agencies and developers to waste significant resources evaluating the "significance" of the certifying authority's actions and needlessly introduce substantial uncertainty into the Section 401 review process.

Fourth, the Fourth Circuit's interpretation of "act" is dicta and not binding. Although the Court expressed "reservations about FERC's reading of [Section 401] and its approach to the waiver question," the Court held that it "need not definitively resolve those questions in this appeal" because it could resolve the case based a review of "FERC's key factual findings."[52] Accordingly, the Court "le[ft] the statutory-interpretation question for resolution in a case where the outcome depends on the precise meaning of the statute."[53] Because the Fourth Circuit did not "definitely resolve" questions regarding the "precise meaning" of Section 401, the Court's discussion of that provision should not serve as a basis for revisions to the Section 401 Certification Rule.

Pursuant to Section 401, certifying authorities may grant certifications with conditions, which then become a condition on any federal license or permit.[54] Inherent in the authority to condition a certification is the limitation that the certifying authority's action must be in compliance with Section 401.[55] The 2020 Certification Rule provides certifying authorities with clear procedures for documenting and including conditions in their grants of certifications. This clarity is necessary to prevent certifying authorities from imposing conditions that are untethered to the Clean Water Act.[56]

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[49] 15 U.S.C. § 717n(c)(1).

[50] 48 C.F.R. § 157.22(b).

[51] *See City of Tacoma*, 460 F.3d at 68 (federal agencies are not to judge the substance of the certifying authority's actions).

[52] *N.C. Dep't of Envtl. Quality v. FERC,* Nos. 20-1655, 20-1671, 2021 U.S. App. LEXIS 19841, at *30 (4th Cir. July 2, 2021).

[53] *Id.* at 31.

[54] 33 U.S.C. §1341(d).

[55] *PUD No. 1*, 511 U.S. at 712 ("Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded.").

[56] *See supra* Section II.C.2.

E. Response to Question 6: Section 401 Does Not Provide Independent Enforcement Authority

When a certifying authority conditions the grant of a certification, those conditions ''shall become a condition on any Federal license or permit'' subject to Section 401.[57] The 2020 Certification Rule takes the next step and declares that federal agencies are responsible for enforcing conditions included in a certification that are incorporated into a federal permit or license.

INGAA and AGA recommend that EPA clarify that Section 401 does not provide federal agencies with independent authority to enforce those conditions.[58] Rather, federal agencies have only their customary authority to enforce permits, which contain conditions arising from the Section 401 certification conditions. A federal agency draws on its own licensing or permitting authority to enforce any provision of the federal license or permit.[59] Moreover, where a condition is predicated on state or tribal regulatory requirement, the certifying authority, which would have the requisite expertise to apply the state law, may have independent authority to enforce the applicable water quality requirements upon which the condition is based.

F. Response to Question 7: Modification of Certifications Should be Limited

INGAA and AGA agree with EPA that the 2020 Certification Rule's prohibition on modifications limits the flexibility of permits and certifications to adapt to changing circumstances. INGAA and AGA recommend that EPA reinstate the modification provision, but clarify that modification may only occur in such a manner as may be agreed upon by the project proponent and the federal agency.

Certifying authorities have the necessary authority under the Clean Water Act to modify water quality certifications. Although Section 401 does not expressly provide such authority, federal agencies have modified permits issued under other sections of the Clean Water Act that similarly lack an express grant of authority so long as the agencies provide notice and follows their procedures.[60] Section 401, however, restricts the time that certifying authorities have to act on certification requests. Thus, certifying authorities that seek to add certification conditions after the review period has ended and without the project proponent's agreement—like a "reopener" condition—should be prevented from taking such action.

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[57] 33 U.S.C. § 1341(d).

[58] Section 401 limits the enforcement authority conferred to the federal agency to suspend or revoke the federal license or permit after the "entering of a judgment" under the Clean Water Act that the licensed facility or activity "has been operated in violation of" the enumerated provisions of the Clean Water Act. *See* 33 U.S.C. § 1341(a)(5).

[59] In the case of proposed interstate natural gas pipelines, the federal agency (FERC) draws on its authority under the Natural Gas Act to enforce the provisions of its certificate authorizations. *See, e.g.*, 15 U.S.C. § 717f(c).

[60] For example, the Clean Water Act also does not provide express authority for EPA to modify permits issued under Section 402 or for the Corps to modify Section 404 permits. However, both agencies assume the authority to modify permits issued under these sections.

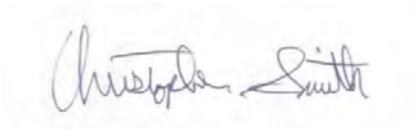
III. Conclusion

INGAA and AGA appreciate your consideration of these comments, and we welcome additional dialogue.

Sincerely,

Joan Dreskin
Sr. Vice President and General Counsel
Interstate Natural Gas Association of America
25 Massachusetts Ave NW
Suite 500N
Washington, DC 20001
202.216.5928
jdreskin@ingaa.org

Pamela Lacey
Chief Regulatory Counsel
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
202.824.7340
placey@aga.org



Christopher Smith
Regulatory Attorney
csmith@ingaa.org

Interstate Natural Gas Association of America

July 1, 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 Guidance For Federal Agencies, States and Authorized Tribes

Dear Administrator Wheeler:

The Interstate Natural Gas Association of America ("INGAA") appreciates your efforts to promote effective implementation of Clean Water Act Section 401 and welcomes the release of new Section 401 guidance.[1]

Section 401 is a critical component of the Clean Water Act's framework for protecting water quality. By providing states and tribes an important and distinct role in the environmental review of projects requiring federal approval, Congress recognized the value of cooperative federalism in protecting water resources. EPA's new Section 401 guidance is a critical first step in ensuring that Section 401 continues to play this vital role. By aligning implementation of Section 401 with statutory principles and restoring the federal-state balance of authority, EPA has taken meaningful steps to ensure that Section 401 is implemented as Congress intended. EPA should consider codifying concepts from the guidance as it considers revisions to its regulations.[2] Codification of these concepts will support durability and the continued alignment of Section 401 implementation with the statute.

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.

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[1] U.S. Environmental Protection Agency, *Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes*, June 7, 2019.
[2] Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, Sec. 3, Apr. 10, 2019, 84 Fed. Reg. 15945, Apr. 15, 2019.

I. EPA Action is Necessary to Clarify and Improve the Implementation of Section 401

INGAA supports the protection of water quality and respects the important role that states and tribes play in ensuring shared objectives through the Section 401 process, which is meant to be implemented in the spirit of cooperative federalism that Congress intended. Section 401 implementation recently has become strained for energy projects that some stakeholders believe are not in the public interest. However, when projects are delayed or even halted from misuse of Section 401, consumers are denied the benefit of these projects and interstate commerce is disrupted resulting in significant regional and national impacts.

The following projects are major energy infrastructure projects that over the past several years have experienced delays resulting from the Section 401 process:

- On May 15, 2019, New York denied the Section 401 certification for the Northeast Supply Enhancement Project. This is a $1 billion project intended to displace the use of fuel oil in New York City. New Jersey denied the Section 401 certification on June 5, 2019.

- On June 3, 2019, North Carolina denied Mountain Valley Pipeline, LLC's ("MVP") application for a Section 401 certification for the MVP Southgate Project. The MVP Southgate Project is a new pipeline expansion approximately 73 miles in length that will serve the growing demand for natural gas in North Carolina. The state's denial was based on the application being deemed incomplete more than six months after the application was filed because FERC has not issued a draft environmental impact statement for the Southgate Project.

- 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 at the request of the state agency.

- The state of New Jersey denied certification for the $1 million 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.

- Two years after submitting a Section 401 request to the state, New York denied certification for the $40 million Millennium Valley Lateral pipeline project, based on the lack of an analysis by FERC of the downstream greenhouse gas emissions, not water quality concerns.

- The State of Oregon denied water quality certification for the $7.5 billion Jordan Cove liquefied natural gas export terminal and its feeder pipeline following the company's responses to multiple requests for additional information.

- The state of New York denied certification for the $500 million Northern Access project without providing sufficient rationale and record citations for the denial more than two years after the initial request for certification was submitted to the state.

- In July 2016, the Millennium Bulk Terminal, a $680 million coal export facility, requested a certification from the State of Washington. On September 26, 2017, just 3 business days after submitting 240 pages of additional information in response to the state's requests and questions, the state denied "with prejudice" the certification request.

- On December 8, 2015, Algonquin Gas Transmission Co. submitted a certification request for a compressor station in Massachusetts, a key part of the larger $450 million Atlantic Bridge project. FERC approved the Atlantic Bridge project in January 2017. On May 17, 2017, the state issued a draft permit indicating its intent to approve the compressor station subject to special conditions. An administrative appeal of the draft permit is ongoing.

Although many of Section 401 requests are processed in a timely and collaborative process, the delays associated with these projects demonstrate that EPA action to improve the implementation of Section 401 is warranted.

II. Concepts Contained In The Guidance That Should Be Codified

EPA can best ensure the continued effective implementation of Section 401 by codifying the statutory principles contained in its Section 401 guidance. As EPA recognized in the guidance document and on prior occasions, EPA's existing regulations on Section 401 implementation are outdated and ripe for modernization.[3] INGAA suggests that EPA incorporate the following concepts from the guidance document into its modernization of its regulations:

- The timeline for action on a Section 401 certification begins upon receipt of a certification request. Federal agencies should have a procedure in place to ensure they are properly notified of the date a certification request is received by the state or tribe.

- The lead federal permitting agency has the authority and discretion to establish certification timelines so long as they are reasonable and do not exceed one year. The lead federal agency may modify its established reasonable timeline, provided

[3] *See* Section 401 Guidance at 2. EPA's existing regulations implementing Section 401, 40 C.F.R. Part 121, were promulgated to implement Section 21 of the Federal Water Pollution Control Act, which contained a precursor state certification program to Section 401. *See* 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 "[t]he substance of these regulations predates the 1972 amendments to the Clean Water Act and ha[d] never been updated." 44 Fed. Reg. 3265, 3280 (June 7, 1979).

the modified timeline remains reasonable and does not exceed one year from receipt of the request.

- If a state or tribe does not act on a Section 401 request within the established reasonable timeline, the lead federal permitting agency is authorized to determine that the Section 401 certification requirement has been waived so that federal permits or license can be issued. The lead federal permitting agency should notify states or tribes in writing of waiver determinations once made, with sufficient explanation to support the determination

- If a state or tribe intends to deny a Section 401 certification, the notice of denial should be in writing and identify with specificity the reasons related to water quality and any outstanding data or information gaps that preclude achieving reasonable assurance of compliance with applicable water quality requirements.

- States and tribes should identify conditions that are clear, specific, and directly related to a state or tribal water quality requirement and should include citations to such relevant state or tribal law requirement.

- Federal permitting agencies should notify states and tribes of projects that may require Section 401 certification as soon as possible.

III. EPA Should Provide Additional Clarity in the Regulations on Other Challenging Aspects of Section 401 Implementation

In addition to the clear principles described above, the Section 401 Guidance also provides instruction on aspects of Section 401 implementation related to the appropriate scope of Section 401 review and conditions and triggers for the time period for review. EPA recognizes that it may provide further clarity on some of these topics through the regulatory process. INGAA encourages EPA to provide such additional clarity on the topics identified below and include these clarifications when modernizing the regulations:

- Clarification that the timeline for action begins when a state receives a certification request accompanied by the materials submitted in support of the federal permit.

- Clarification on what it means to be the "same request," such that the withdrawal and submission of the same Section 401 request does not restart the time period for review.

- The types of water quality impacts that states and tribes can consider in determining whether to issue or deny a water quality certification.

- The standard by which states and tribes evaluate information or data gaps.

- The definition of "any other appropriate requirement of state law" for which conditions can be imposed in a certification.

- The process by which federal permitting agencies evaluate whether actions are beyond the scope of Section 401 and the impact of actions that are determined to be beyond the scope of Section 401.

- The process by which a certification is modified.

Congress charged EPA with administering the Clean Water Act, including overseeing implementation of the Section 401 program by federal agencies whose permits or authorizations trigger Section 401.[4] By providing further guidance on these topics, EPA will be taking meaningful steps to ensure implementation of Section 401 is effective and consistent across federal agencies.

IV. Conclusion

EPA's 401 Guidance 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. Codification of each of the points noted above merits specific inclusion in EPA's efforts to update its Section 401 regulations.

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

[4] *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).

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;

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[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

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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].

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[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.

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[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);

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[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)).

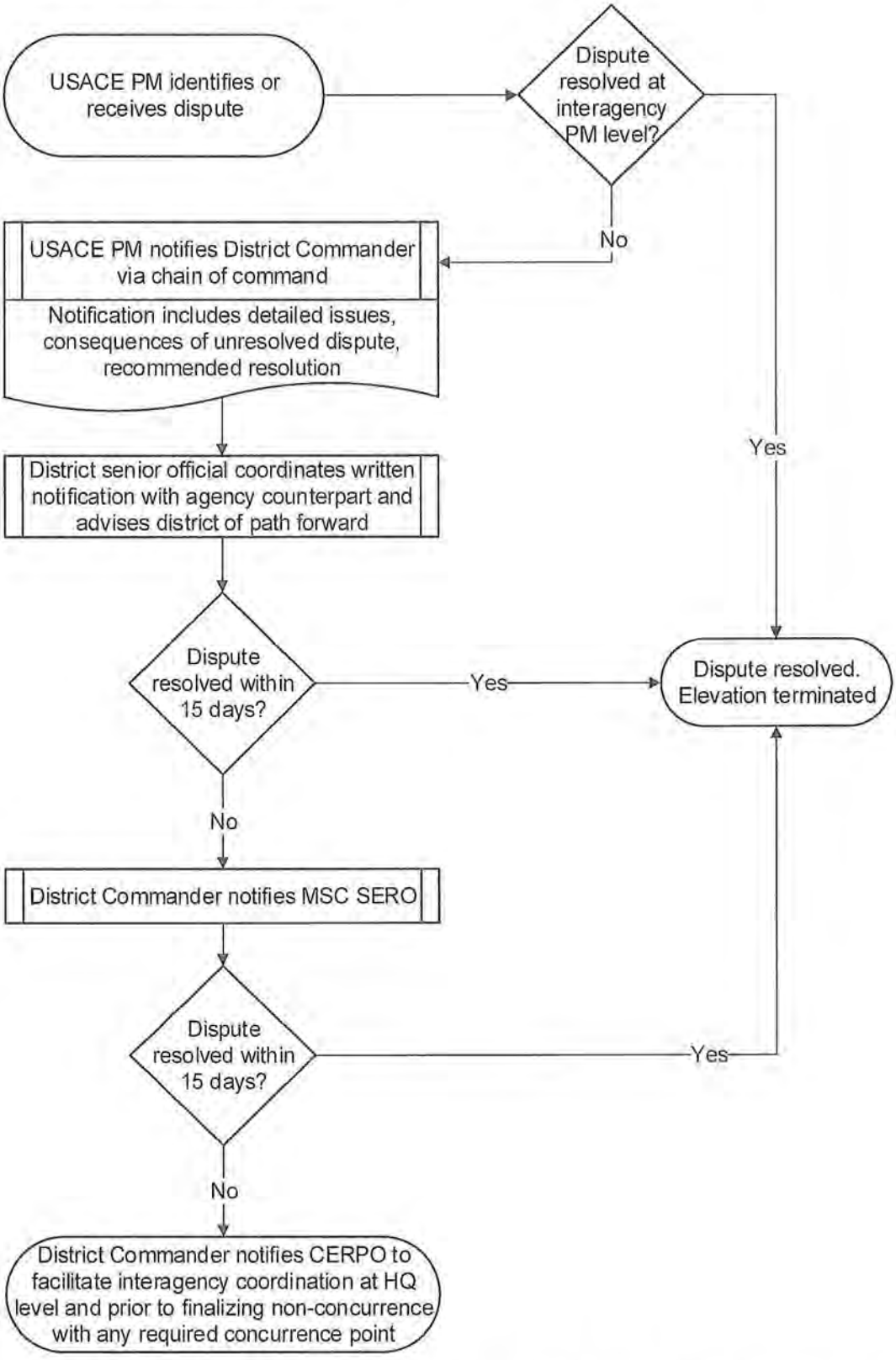

Figure 1. Flow diagram of the USACE Regulatory Elevation and Resolution Process.

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.

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[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

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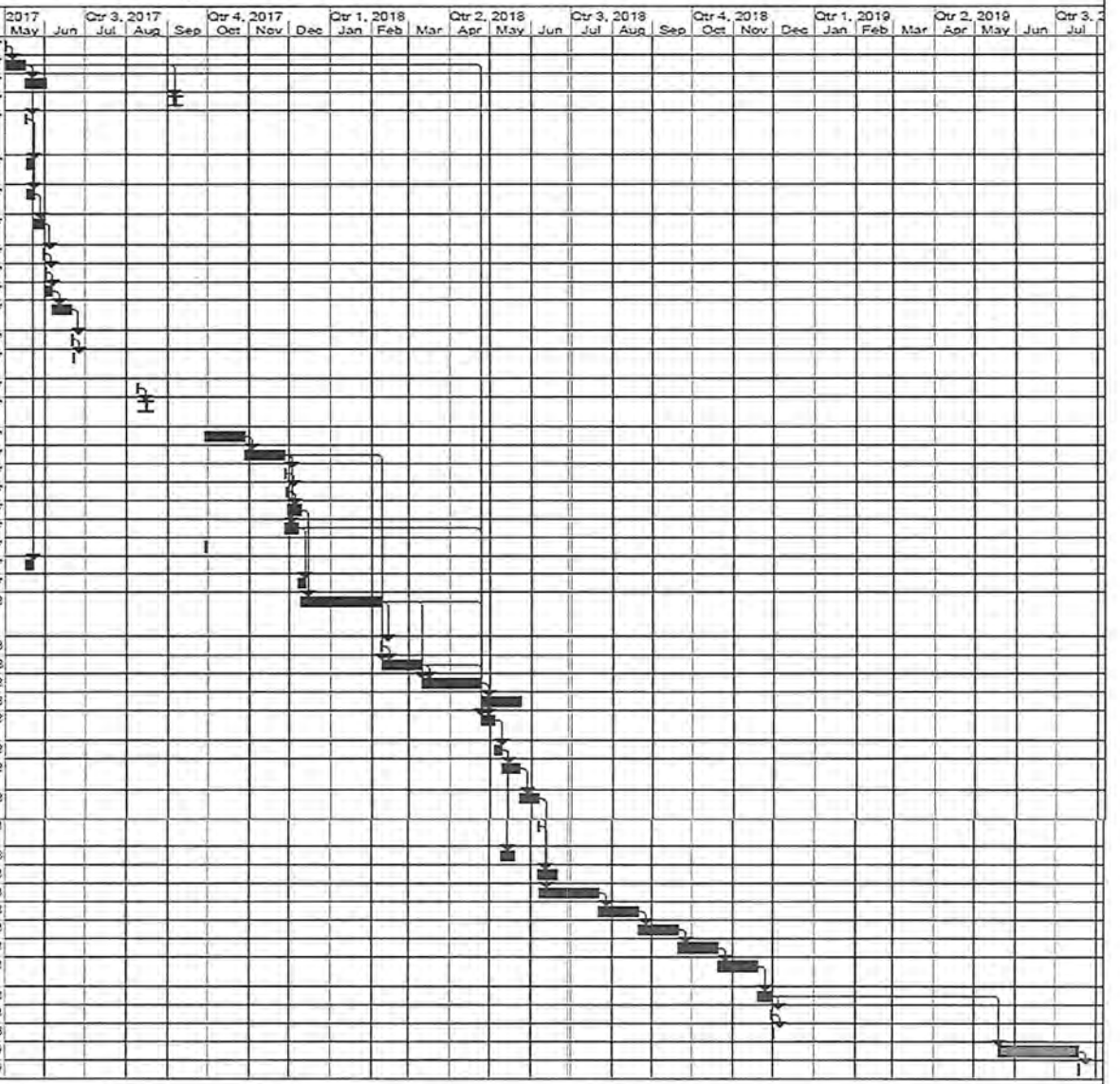
SOUTH PACIFIC DIVISION, CESPD
SOUTHWESTERN DIVISION, CESWD

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

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

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