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construction elevations. The affected areas must be revegetated, as appropriate.

14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.

15. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

16. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

17. Endangered Species. (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal

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applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWP.

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide Web pages at <http://www.fws.gov/> and <http://www.noaa.gov/fisheries.html> respectively.

18. Historic Properties. (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field

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investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR §800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

19. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the district engineer after notice and opportunity for public comment. The district engineer may also designate additional critical resource waters after notice and opportunity for comment.

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(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 27, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

20. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. For wetland losses of 1/10 acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2 acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2 acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already

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meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

21. Water Quality. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

22. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

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23. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

24. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

25. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

"When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

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(Transferee)

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(Date)

26. Compliance Certification. Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

(a) A statement that the authorized work was done in accordance with the NWP authorization, including any general or specific conditions;

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(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

27. Pre-Construction Notification. (a) Timing. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) If 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 17 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 18 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) is completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee cannot begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Pre-Construction Notification: The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

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(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, where appropriate;

(5) If the proposed activity will result in the loss of greater than 1/10 acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

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(d) Agency Coordination: (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWP's and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP 48 activities requiring pre-construction notification and for other NWP activities requiring pre-construction notification to the district engineer that result in the loss of greater than 1/2-acre of waters of the United States, the district engineer will immediately provide (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

(5) For NWP 48 activities that require reporting, the district engineer will provide a copy of each report within 10 calendar days of receipt to the appropriate regional office of the NMFS.

(e) District Engineer's Decision: In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the

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proposed activity requires a PCN and will result in a loss of greater than 1/10 acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

28. Single and Complete Project. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

D. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project.

**MEMORANDUM OF AGREEMENT  
BETWEEN  
The Department of the Army AND  
The Environmental Protection Agency  
CONCERNING  
Federal Enforcement for the Section 404 Program of the Clean Water Act**

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**I. PURPOSE AND SCOPE**

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

**II. POLICY**

**A. General.**

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

**B. Geographic Jurisdictional Determinations.**

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

**C. Violation Determinations.**

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

**D. Lead Enforcement Agency.**

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

**E. Environmental Protection Measures.**

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

**III. PROCEDURES**

**A. Flow chart.**

The attached flow chart provides an outline of the procedures EPA and the Corps will follow in enforcement cases involving unpermitted discharges. The procedures in (B.),

(C.), (D.), (E.) and (F.) below are in a sequence in which they could occur. However, these procedures may be combined in an effort to expedite the enforcement process.

**B. Investigation.**

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

**C. Immediate Enforcement Action.**

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

**D. Lead Enforcement Agency Selection.**

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

1. EPA will act as the lead enforcement agency when an unpermitted activity involves the following:
  - a. Repeat Violator(s);
  - b. Flagrant Violation(s);
  - c. Where EPA requests a class of cases or a particular case; or
  - d. The Corps recommends that an EPA administrative penalty action may be warranted.

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

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

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

#### **E. Enforcement Response.**

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

#### **F. Resolution.**

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

#### **G. After-the-Fact Permits.**

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

### **IV. RELATED MATTERS**

#### **A. Interagency Agreements.**

The Army and EPA are encouraged to enter into interagency agreements with other federal, state, tribal and local agencies which will provide assistance to the Corps and EPA in pursuit of Section 404 enforcement activities. For example, the preliminary enforcement site investigations or post-case monitoring activities required to ensure

compliance with any enforcement order can be delegated to third parties (e.g., FWS) who agree to assist Corps/EPA in compliance efforts. However, only the Corps or EPA may make a violation determination and/or pursue an appropriate enforcement response based upon information received from a third party.

**B. Corps/EPA Field Agreements.**

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

**C. Data Information Exchange.**

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

**V. GENERAL**

**A.** The procedures and responsibilities of each agency specified in this MOA may be delegated to subordinates consistent with established agency procedures.

**B.** The policy and procedures contained within this MOA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the U.S. Deviation or variance from these MOA procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.

**C.** Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of either agency. All formal guidance interpreting this MOA shall be issued jointly.

**D.** This agreement shall take effect 60 days after the date of the last signature below and will continue in effect for five years unless extended, modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice, prior to that time.

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Robert W. Page  
Assistant Secretary of the Army (Civil Works)  
January 19, 1989

Complainant's Ex. 49

Rebecca W. Hanmer  
Acting Assistant Administrator for Water  
U.S. Environmental Protection Agency  
January 19, 1989

Draft - For Attorney Review - Do Not Release

**CONFIDENTIAL**

**PENALTY CALCULATION FOR 404 VIOLATION**

STEP	No Action	Notes/Assumptions	Restored	Notes/Assumptions
<b>ECONOMIC BENEFIT</b>				
1. Use BEN to calculate econ. benefit =			site <sup>1/4</sup> restored	assuming restoration
<b>GRAVITY</b>				
Set Multiplier (500/1,500/3k - 10k)			1,500/3k	
<b>A Factors (Scale 0-20)</b>				
Harm to Human Health or Welfare			0 or 1	ask Corps re: Culverts & hydro connection
Extent of Aquatic Env Impact			2	
Severity of Impacts to Aquatic Env			0	
Unique/Severity of Affected Resource			1	
Secondary or Off-Site Impacts			0	
Duration of Violation			4	3 yrs of violation. ask Corps re: timing
<b>B Factors (0-20)</b>				
Degree of Culpability			12.6	guidance
Compliance History of the Violator			6	long history since 1991 w/ Corps
Need for Deterrence			10.5	visible to developer com. in area
2. Preliminary Gravity (A + B) x M			25 x 1500	\$54,000 - 37,500
<b>ADJUSTMENTS TO GRAVITY</b>				
a. Recalcitrance (+ 0 - 200%)			—	
b. Quick Settlement (-10%)	-10%	-10%	-10%	-10% - 3,750
c. Other Factors As Justice May Require				
3 d. FINAL ADJUSTMENTS (3a+3b+3c)				<del>39,750</del> - 3,750
4. PRELIMINARY PENALTY (1+2+3d)			33,750	
Litigation Considerations (-10%)			3,375	
Inability to Pay			N/A	
Penalty Settlement Bottom-Line			30,375	
Proposed Penalty (To start negotiations)			32,500	

If restored, penalty in CE I

2007 CE I may.

CE I - Region.

Ask Corps

Corps permit conditions - does it require Culverts? what

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

In re:

Henry R. Stevenson, Jr. &  
Parkwood Land Co.

Respondents

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Docket No. CWA-06-2011-2709

**DECLARATION OF BARBARA J. ALDRIDGE**

Pursuant to the Regional Judicial Officer's Partial Accelerated Decision issued on April 17, 2012, and subsequent communications, the Complainant, Environmental Protection Agency ("EPA") Region 6, hereby supplements the record with the following Declaration from Barbara J. Aldridge, EPA Region 6 Environmental Protection Specialist, with regard to the penalty calculated in this matter.

I, Barbara J. Aldridge, declare as follows:

1. I am employed as an Environmental Protection Specialist and credentialed Wetlands Inspector in the Marine & Coastal Section of the Ecosystems Protection Branch, Water Quality Protection Division, EPA Region 6, Dallas, Texas.
2. I have 24 years of federal service. I have been employed with EPA since 1990. From 1995 to 2010, I was an enforcement officer in the EPA Region 6 Superfund Division. As an enforcement officer, I developed Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") enforcement cases by gathering, analyzing, and managing evidence to support cleanup and cost recovery actions related to CERCLA "Superfund" Sites. I performed litigation development and support activities in partnership with the Department of Justice in referred cases.

3. In February of 2010, I was assigned to the Wetlands Section of the Water Quality Protection Division. I perform wetland inspections, document evidence for case development and enforcement actions, and manage enforcement data for Clean Water Act ("the Act" or "CWA") compliance and enforcement actions.

4. I have a current credential as a duly commissioned enforcement officer, authorized to conduct official investigations and inspections pursuant to all federal laws administered by the EPA.

5. As the EPA representative responsible for calculating the proposed penalty in this matter, I have personal knowledge of the matters set forth in this Declaration.

6. On July 18, 2011, the Complainant filed an Administrative Complaint under 309(g) of the Act, alleging that the Respondents violated Section 301(a) of the Act by discharging pollutants from a point source into waters of the United States without an authorized permit issued by the U.S. Army Corps of Engineers ("Corps of Engineers"). The complaint proposes a Class I penalty of \$32,500.00.

7. A Public Notice of the proposed penalty was published on July 21, 2011. On July 20, 2011, EPA notified the State of Texas of the proposed penalty. The EPA received no comments on the proposed penalty.

8. In calculating a penalty, Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), requires that EPA take into account (1) the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, (2) ability to pay, (3) any prior history of violations, (4) the degree of culpability, (5) economic benefit or savings (if any) resulting from the violation, and (6) such other matters as justice may require.

9. The proposed penalty in this matter is consistent with these statutory factors.

A discussion of the application of each of the Act's statutory factors in this manner follows.

10. I followed the guidance as noted in the document, "Issuance of Revised CWA Section 404 Settlement Penalty Policy," issued December 21, 2001, in the penalty calculation process.

11. As to the statutory factor (1) the nature, circumstances, extent and gravity of the violation: the Respondents discharged dredged and fill material, including dirt, wire, chunks of cement, rebar and other debris, into approximately 1.26 acres of waters of the United States, specifically jurisdictional wetlands, without a permit. The impacted area is forested wetlands immediately adjacent to and within the 100-year floodplain of the Neches River, a navigable water of the United States. I considered this violation to be serious, for the reasons outlined below.

12. One reason to consider this violation serious is that it involves a discharge without a permit. Unpermitted discharges present major challenges to the federal government's responsibility under the Act for regulating discharges to waters of the United States. The Corps of Engineers has the responsibility under the Clean Water Act to evaluate a proposed discharge of dredged or fill material to waters of the United States and the opportunity to allow it, to prohibit it, or to allow it with conditions. The permitting process also allows for public and agency input, including EPA review of proposed discharge permits. When a discharger fails to apply for a permit, the opportunity to protect the nation's waters through permit denial or permit condition is lost.

13. The unauthorized activity circumvented the permitting process under Section 404 of the Act and resulted in avoidable impacts to tidal waters of the United States, in this instant

case, segment 0601, Neches River Tidal, as identified by the Texas Commission on Environmental Quality, 2004. Specifically, the applicant has precluded the environmental protection process afforded by the EPA's *404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR Part 230)*, regulations which require that a less environmentally damaging practicable alternative be permitted and that all practicable measures to avoid, minimize, and mitigate impacts have been identified.

14. Another reason to consider this violation serious is the extent of impact to the aquatic environment. Wetlands provide beneficial functions to the human environment, including fish and wildlife habitat, flood protection and floodwater storage, water filtration and water quality improvement, carbon sequestration, aesthetics, recreational and educational benefits and biological productivity. According to the Fish and Wildlife Service's Report, "Status and Trends of Wetlands in the Conterminous United States, 2004-2009," forested wetlands sustained their largest losses since the 1974 to 1985 time period. An estimated 392,600 acres (158,950 ha) of forested wetland area was lost between 2004 and 2009. The loss of the forested wetlands in this case adds to the direct, indirect, and cumulative impacts to wetlands.

15. The duration of the violation is another consideration that I gave to calculating the penalty. The violation occurred from 2007 to 2010. I considered the need for deterrence and the Respondent's lack of cooperation. The Corps of Engineers included information in the case file which reported the violation by an anonymous informant. The violation is visible to the developer community in the area. Accordingly, the EPA's goal with this penalty action is to send a message of deterrence to the regulated community that these types of activities require authorization under a CWA Section 404 permit. The EPA therefore considered deterrence as a factor for increasing the penalty. On January 31, 2011, the EPA issued an Administrative

Order ("Order") for injunctive relief to the Respondents requiring them to submit a plan for the restoration of the unauthorized fill. The Respondents refused to comply with the Order. I also considered the Respondents' lack of compliance and cooperation with the Order in increasing the penalty.

16. As to the statutory factor (2) ability to pay: Respondents have not indicated an issue of inability to pay the penalty, and therefore EPA did not reduce the penalty based upon this statutory factor.

17. As to the statutory factor (3), prior history of violations: Respondents have a long history of involvement with the Corps of Engineers and the Act's Section 404 application process. The Corps has documented an extensive compliance history with the Respondents since April of 1991, including four confirmed unauthorized activities (excluding the current violation), two after-the-fact issued permits, four issued permits, three withdrawn permit applications and 12 jurisdictional determination requests.

18. As to the statutory factor (4), degree of culpability: Respondents have a long history of involvement with the Corps of Engineers and the Act's Section 404 application process. The Corps has documented an extensive history with the Respondents since April of 1991, including four confirmed unauthorized activities (excluding the current violation), two after-the-fact issued permits, four issued permits, three withdrawn permit applications and 12 jurisdictional determination requests. The Respondents cannot claim ignorance of permitting requirements.

19. As to the statutory factor (5), economic benefit or savings resulting from the violation, none was estimated.

Declaration of Barbara J. Aldridge

In re: Henry R. Stevenson, Jr. & Parkwood Land Co., CWA-06-2011-2709

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20. As to statutory factor (6), such other matters as justice may require, EPA is unaware of any such matters and did not make any adjustments to the proposed penalty based on this statutory factor.

21. The facts related to the statutory factors discussed in paragraphs above support the proposed penalty of \$32,500.00 for the discharge of pollutants from a point source into waters of the United States without an authorized permit issued by the U.S. Army Corps of Engineers.

22. I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

Dated: June 6, 2012

  
Barbara J. Aldridge  
U.S. EPA, Region 6