



INTERAGENCY QUESTIONS AND ANSWERS

CONCERNING THE 1992 404(q) MEMORANDA OF AGREEMENTS

1. Q. Do the 1992 MOAs allow for the coordination and resolution of interagency issues at the field level?

A. Yes. We believe that efficient and effective communication is a vital component to the success of the regulatory program. Further, we expect agency field personnel to develop and foster good working relationships - recognizing the responsibilities and limits of each agency.

2. Q. Will the Corps consider additional information forwarded by an agency after the Part IV paragraph 3(a) and/or 3(b) letter is received? (See Part II, paragraphs 5 and 6 (EPA and Commerce), Part II, paragraphs 6 and 7 (Interior))

A. Yes. The Corps will consider all information received until a permit decision has been made. This also applies to additional information obtained by an agency where no Part IV paragraph 3(a) or paragraph 3(b) letter was sent. The level of consideration of such comments by the Corps will be commensurate with the technical substance of the comments.

3. Q. Part II, paragraph 4 (EPA and Commerce) and Part II, Paragraph 5 (Interior). Does an "electronically transmitted request" include a telephone request?

A. Yes.

4. Q. Can local procedures developed pursuant to Part II change the signature levels, time frames or other procedures established in Parts III and IV?

A. No.

5. Q. Can local coordination and resolution procedures established pursuant to Part II apply to issues and permit cases subject to Parts III and IV?

A. Yes. Local procedures under Part II may address approaches to resolving, at the field level, issues eligible for elevation under Part III before such issues are elevated to the headquarters level. Furthermore, local procedures under Part II may address coordination of permit cases and resolution of issues that are subject to a Part IV elevation up until a Part IV paragraph 3(c) "notice of intent" letter is sent by the Corps. Such procedures should include a mechanism to facilitate discussions between the District Engineer and the Regional Director/Regional Administrator. Specifically, local procedures should establish a process where the District will provide the Regional Director/Regional Administrator a copy of the draft permit and special conditions at least 10 days prior to the Part IV, paragraph 3(c) "notice of intent" letter.

6. Q. Should local procedures developed pursuant to Part II be implemented through a local MOA?

A. No. Local procedures should be developed by the field staff representing each agency and agreed to by senior field management through an exchange of letters. Such letters agreeing to local procedures must be signed by the Regional Director/Administrator and the Corps District or Division Engineer depending on whether the local procedures apply to a specific district or to all districts within the division. Corps divisions and resource agencies should consider developing standard local procedures for all resource agencies and Corps districts within a particular division.

7. Q. What should be contained in local procedures?

A. Part II outlines specific guidance that should ensure effective interagency coordination and allow for discussion of issues, expedite comments, and foster strong professional partnerships and cooperative relationships. The local procedures should include the five specific areas that are outlined in Part II, paragraph 2 (EPA and Commerce) and Part II, paragraph 3 (Interior). Developing procedures for these specific areas will promote effective interagency relationships. Through local procedures, agencies are encouraged to communicate continually with each other, by telephone, meetings or written communication, in order to ensure an effective exchange of information, a mutual understanding of various viewpoints, and discussion of the issues, including communications concerning the Part IV, paragraph 3(a) and 3(b) letters. While such communication is a positive approach to ensure discussion of issues, it is not a

mechanism to delay the Corps from taking final action on a permit application. In addition to the five specific areas, the local procedures may, as appropriate, specify:

(1) that an agency Part IV, paragraph 3(a) and 3(b) letter include the agency representative the Corps should contact to discuss the agency concerns;

(2) that the Corps project manager will telephone the specific agency representative, during the permit application evaluation period, to make sure the project manager understands the agency's concerns contained in their Part IV, paragraph 3(a) and 3(b) letter;

(3) that the Corps, if requested, will send as information, a copy of the district Notice of Intent to Proceed letter, draft permit and decision document (Part IV, paragraph 3(c)) to the contact identified pursuant to (1) above;

(4) that the resource agencies, if requested, will send the District Engineer a copy of the correspondence forwarded under Part IV, paragraph 3(d)(2);

(5) that the Corps, upon a request as prescribed in Part II, paragraphs 4 or 5, will extend the public notice comment period if delays in printing have resulted in delays in the agencies receipt of the public notice. The comment period would be extended for as many days as had been lost due to printing delays;

(6) that in cases involving another Federal agency's EIS, the resource agencies will only provide the Corps with comments on the adequacy of the portion of the environmental documentation which concerns impacts from the activity the Corps is evaluating, including secondary impacts. In cases where the Corps is considering adopting (40 CFR 1506.3) or incorporating by reference (40 CFR 1502.21) another Federal agency's environmental document in part, or in its entirety, the resource agencies may provide comments on the adequacy of that document or relevant portions thereof.

(7) that the Corps will provide the designated resource agency representative with the monthly listing of permits issued pursuant to 33 CFR 325.2(a)(8).

*8. Q. Can a policy issue be elevated pursuant to Part III based on a single individual permit decision?

A. Yes. Furthermore, if an individual permit decision involves both policy issues/procedures and, in the agency's opinion, substantial and unacceptable impacts to aquatic resources of national importance, then the agency may simultaneously use the elevation procedures under Part III and Part IV, respectively. If, however, elevation of the policy issue/procedure is elevated only under Part III, the individual permit decision will not be delayed pending resolution under Part III.

*9. Q. What kinds of issues can be elevated under Part III?

A. Under Part III, agencies (including the Corps) are not limited to issues associated with a particular individual permit -- agencies may also raise general concerns regarding application of existing policy and procedures. The advantage of Part III is that it provides agencies with a mechanism to address issues where the resolution does not warrant delaying an individual permit decision. Examples of Part III issues include, but are not limited to: 1) procedural weaknesses in interagency coordination procedures; 2) a trend in impacts to a particular resource type or ecoregion; 3) unresponsive resource agency comment letters; 4) unreconciled trends in permit decisionmaking where individual cases do not warrant elevation under Part IV; or 5) adequacy of the documentation required under Part IV, paragraph 3(b).

*10. Q. Can the Corps District/Division Engineer (or designee) and the agency Regional Director/Administrator (or designee) develop policy under Part III?

A. No. Regulatory policy is developed at agency headquarters offices and implemented by field offices. The Corps and the agencies often have the latitude to interpret policy as it is applied at a regional level. Field offices should, however, obtain headquarters level approval before adopting final agreements on regional policy interpretation.

11. Q. Who may sign the comment letter submitted during the public notice comment period pursuant to Part IV, paragraph 3(a)?

A. The required signature level for official agency comments is discussed in Part II, paragraph 3 (EPA and Commerce) and in Part II, paragraph 4 (Interior). Pursuant to these Part II provisions, the Regional Director/Administrator may designate officials (e.g., FWS field supervisor, EPA wetlands chief) who are authorized to provide

official agency comments to public notices, including the 3(a) letter. The Regional Director/Administrator should have already informed the District Engineer, in writing, of such agency officials. These individuals would, therefore, be authorized to sign a Part IV, paragraph 3(a) letter.

12. **Q.** After an agency sends the Corps comments in accordance with Part IV, paragraph 3(a) ["may result" letter] and/or paragraph 3(b) ["will have" letter], can the agency representative and the Corps project manager communicate with each other before the Corps makes its determination pursuant to Part IV, paragraph 3(c) ["Notice of Intent to Proceed"]?

A. Yes. The agency representative and the Corps project manager must communicate, by telephone and/or meeting, between the time the agency sends the Part IV, paragraph 3(a) letter and the Corps sends the Part IV, paragraph 3(c) letter. Such communication need not be by the signatories of these letters. Effective communication is the key to avoiding misunderstanding and conflicts. The Corps project manager will take the lead and contact the other agencies to discuss the case-specific agency comments. Resource agency representatives may also contact the Corps representative to determine the status of pending applications, to ensure their comments are properly understood or to make arrangements for additional coordination.

13. **Q.** May an agency send a letter under Part IV, paragraph 3(b) ["will have"], without first sending a letter under Part IV, paragraph 3(a) ["may result"]?

A. Yes. If an agency believes, based on information available during the public notice comment period, that the proposed discharge of dredged or fill material will have a substantial and unacceptable impact on aquatic resources of national importance, then the agency may send the "will have" letter. The "will have" letter must, however, be sent within the basic public notice comment period, unless the comment period is extended pursuant to Part II, and fully comply with the provisions of Part IV, paragraph 3(b). The public notice comment period will not be extended to allow the agency to prepare a "will have" letter.

14. **Q.** What level of documentation is required for a Part IV, paragraph 3(b) letter?

A. First, it is recognized that projects often evolve throughout the permit evaluation process and that most projects are ultimately modified by final permit conditions and mitigation plans. Therefore, it is understood that the resource agency Part IV, paragraph 3(b) letter can only reflect the project-specific information available at the

time the letter is written (e.g., proposed project location, mitigation proposed at the time) and that the resource agency's 3(b) letter conclusions may change based on the availability of additional information. The Corps will provide, through the public notice, an accurate location map and description of the proposed project. Agencies are encouraged to develop local procedures pursuant to Part II that assure effective and timely interagency exchanges before, during, and after the public comment period. See question 15 for additional information on this issue.

15. **Q.** Can the District Engineer reject a Part IV, paragraph 3(b) letter, if the agency meets the Part IV, paragraph 3(b) requirements?

A. No. The Corps may not reject a Part IV, paragraph 3(b) letter. However, in order for the letter to be consistent with the substantive requirements of Part IV, paragraph 3(b) and be eligible for ASA(CW) review under paragraph 3(g), the letter must:

- (1) include a statement that in the opinion of the agency, the discharge will have a substantial and unacceptable impact on aquatic resources of national importance;
- (2) state in detail why there will be substantial and unacceptable impacts to aquatic resource of national importance as defined in paragraph 1 of Part IV;
- (3) state in detail why the specific permit must be modified, conditioned, or denied to protect the aquatic resource of national importance;
- (4) the letter is signed by the proper agency official; and
- (5) the letter is received within the required time frames.

The Corps district will not reject resource agency Part IV, paragraph 3(b) letters over disagreements on the substantive conclusions of the resource agency (points 1, 2, and 3). Corps districts can only decline a resource agency Part IV, paragraph 3(b) letter if the letter is signed by an individual not authorized under Part IV or the letter is not received within the required time frame (points 4 and 5) or the letter does not contain the statement required in Part IV, paragraph 3(b) (point 1). Under these circumstances, the district will notify the resource agency that they have not met the procedural requirements of Part IV, paragraph 3(b). General concerns regarding the adequacy of the documentation required under Part IV, paragraph 3(b), may be raised by any MOA signatory agency under Part III.

16. Q. If an agency, after sending a Part IV, paragraph 3(b) letter, believes that the project would no longer have a substantial and unacceptable impact on aquatic resources of national importance, should the agency notify the Corps and thus remove the case from potential elevation under Part IV rather than wait for the Corps to send a Part IV paragraph 3(c) "Notice of Intent to Proceed" letter?

A. Yes. As soon as an agency makes such a determination it should so notify the Corps. Furthermore, even though Part IV would no longer be applicable, the Corps would continue to coordinate under Part II and Part III, as appropriate. In addition, the Corps will inform the resource agency how its concerns were considered and/or addressed by providing a copy of the decision document, or by sending a letter as soon as practical in the case of Part IV, paragraph 3(c)(3), to the agency.

17. Q. Will the Corps accept Part IV, paragraph 3(b) letters signed by an Acting Regional Director or Acting Regional Administrator?

A. Yes. Federal rules and regulations recognize that individuals serving in an acting capacity have the same authorities and responsibilities as the permanent individual in a particular position. An individual, however, must be "acting" for the Regional Director or Regional Administrator.

18. Q. What are the differences between the three options a District Engineer has when issuing a Notice of Intent to Proceed under Part IV, paragraph 3(c)?

A. The first option, (3(c)(1)), applies to situations where the District Engineer intends to issue a permit contrary to agency recommendations. In the second option, (3(c)(2)), the District Engineer is also ready to issue the permit, but believes it will not be contrary to agency recommendations (i.e., the Corps believes agency concerns have been addressed). The third option, (3(c)(3)), applies to cases where other factor(s) (e.g., Section 401 water quality certification, Section 106 of the National Historic Preservation Act, Section 7 of the Endangered Species Act, etc.) is/are delaying permit issuance, and the District Engineer is not ready to proceed but has reached a final determination regarding agency concerns raised in the Part IV, paragraph 3(b) letter. In such cases, the District Engineer will notify the Regional Director/Administrator of his determination relating to the agency's 3(b) letter concerns, but will not proceed with a final permit decision until the other issues have been resolved and the procedures of Part IV have been completed. Notwithstanding any delay in the Corps final decision due to other factors, upon receipt of the 3(c)(3) letter, the agency must initiate the procedures in Part IV, paragraph 3(d).

19. Q. Does Part IV apply to modifications to permits?

A. Yes, but only in cases where the Corps provides written notification to the resource agency in the form of a public notice or letter. The Corps will notify the agencies when the proposed modification involves a substantial change, a measurable increase in adverse impacts, or it is otherwise required in accordance with 33 CFR 325.7.

20. Q. Can regional general permits be elevated under Part IV?

A. Yes. However, the provisions of Part IV apply only to development of the proposed regional general permit itself (i.e., the document that the district publicizes which identifies the conditions and terms that projects must meet in order to be considered for authorization under the general permit). The authorization of specific activities under any general permit (i.e., regional, programmatic or nationwide) is not subject to Part IV elevation. In situations where the Corps exercises its authority to require an individual permit for a particular project, the procedures in Part IV will apply to that particular project.

21. Q. Does Part IV restrict elevations of individual permits to those authorized under Section 404?

A. No. The MOA clearly states on page 1 that the agreement is applicable to Section 10 and Section 103 permits, as well as those issued under Section 404. The use of the term "discharge" in Part IV was not intended to further limit the applicability of the MOA to Section 404 only.