# MEMORANDUM OF UNDERSTANDING
# BETWEEN
# U.S. ARMY CORPS OF ENGINEERS
# AND
# U.S. NUCLEAR REGULATORY COMMISSION
# ON
# ENVIRONMENTAL REVIEWS RELATED TO THE ISSUANCE OF AUTHORIZATIONS TO CONSTRUCT AND OPERATE NUCLEAR POWER PLANTS

The U.S. Army Corps of Engineers (Corps) and the U.S. Nuclear Regulatory Commission (NRC), as parties to this Memorandum of Understanding (MOU), hereby acknowledge and declare as follows:

## I. Introduction

The Corps and the NRC developed this MOU to streamline the respective regulatory processes associated with the authorizations required to construct and operate nuclear power plants.

## II. Purpose

The purpose of this MOU is to establish a framework for early coordination and participation among the signatories to this agreement to ensure the timely review of proposed nuclear power plant applications. Cooperation among the MOU signatories will ensure each agency's review responsibilities under the National Environmental Policy Act (NEPA) and other related statutes are met in connection with the authorizations required to construct and operate nuclear power plants licensed by the NRC. Both parties anticipate that the Corps will act as a cooperating agency in most circumstances. However, there may be some circumstances where both agencies will be better served by a different form of coordination. This MOU does not preclude such arrangements.

## III. Statutory Background

A. **National Environmental Policy Act of 1969 (42 USC § 4321 et seq.)** requires all agencies of the Federal Government to use a systematic, interdisciplinary approach that will insure the integrated use of the natural and social sciences in planning and decisionmaking that may have an impact on man's environment. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved.

B. **Section 10 of the Rivers and Harbors Act of 1899 (33 USC § 403)** requires authorization from the Secretary of the Army, acting through the Corps, for the construction of any structure in or over any navigable water of the United States. Structures or work outside the limits defined for navigable waters of the United States require a Section 10 permit if the structure or work affects the course, location, or condition of the water body. The law applies to any dredging or disposal of dredged materials, excavation, filling, re-channelization, or any other modification of a navigable water of the United States, and it applies to all

structures, from the smallest floating dock to the largest commercial undertaking. It further includes, without limitation, any wharf, dolphin, weir, boom breakwater, jetty, groin, bank protection (e.g., riprap, revetment, bulkhead), mooring structure such as a piling, aerial or sub-aqueous power transmission line, intake or outfall pipe, permanently moored floating vessel, tunnel, artificial canal, boat ramp, aid to navigation, and any other permanent or semipermanent obstacle or obstruction.

C. **Section 404 Clean Water Act (CWA) (33 USC § 1344)** requires authorization from the Secretary of the Army, acting through the Corps, for the discharge of dredged or fill material into all waters of the United States, including wetlands. Discharges of fill material generally include, without limitation, placement of fill that is necessary for the construction of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for intake and outfall pipes and sub-aqueous utility lines; fill associated with the creation of ponds; and any other work involving the discharge of fill or dredged material. A Corps permit is required whether the work is permanent or temporary. Examples of temporary discharges include dewatering of dredged material prior to final disposal, and temporary fills for access roadways, cofferdams, and storage and work areas.

D. **Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 USC § 1413)**, as amended, requires authorization from the Secretary of the Army, acting through the Corps, for the transportation of dredged material for the purpose of dumping it in ocean waters. Discharges of dredged or fill materials into territorial seas also require authorization under Section 404 of the CWA.

E. **Outer Continental Shelf Lands Act (43 USC § 1333)** extends the authority of the Secretary of the Army, acting through the Corps, to the prevention of obstruction to navigation in the navigable waters of the United States due to the construction of artificial islands and fixed structures on the outer continental shelf beyond the territorial sea.

F. **Energy Reorganization Act of 1974 (Pub. Law 93-438(88 Stat. 1233)** abolished the Atomic Energy Commission, and Section 201 of that Act created the NRC and transferred to the NRC all the licensing and related regulatory functions of the Atomic Energy Commission. Pursuant to the Energy Reorganization Act of 1974; Chapters 6, 7, 8, 10, and 16 of the Atomic Energy Act of 1954, as amended, 42 U.S.C 2011 et. Seq.; and the rules and regulations issued pursuant thereto, the NRC is authorized to license and regulate the construction and operation of, among other things, nuclear power plants from the standpoint of the common defense and security and public health and safety.

## IV. Roles and Responsibilities

**NRC.** The NRC licenses nuclear power plants in accordance with its regulations such that the utilization of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public.

**Corps.** The Corps administers a regulatory program to protect the Nation's aquatic resources, including wetlands, under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the CWA. Proposed nuclear power plants may require one or more permits from the Corps under these statutes.

**NEPA Lead Federal Agency.** NEPA is the overarching environmental statute requiring the identification of impacts to the quality of the human environment, consideration of alternatives, and public involvement in the process. A primary objective of NEPA is to ensure that environmental information is available to public officials and citizens before irretrievable commitments of resources are made. This agreement supports these principles, and the signatory Federal agencies acknowledge their respective responsibilities for complying with the requirements of NEPA. To prevent the duplication of efforts by Federal agencies and to encourage information sharing and integration of agency processes, NEPA allows for the designation of a lead Federal agency for the preparation of environmental impact statements (EISs) when EISs are required. Other agencies that have an action on the same project may serve as cooperating agencies on the EIS.[1]

The issuance by the NRC of a license to construct and operate a nuclear power plant is an action that normally requires the preparation of an EIS.[2] As the agency with the approval/disapproval authority for the licensing of nuclear power plants, the NRC shall serve as the lead agency for the preparation of the EIS. This MOU encourages early involvement between the NRC and the Corps and with the public and other government agencies during the NEPA evaluation process.

This MOU acknowledges that it is critically important that the NRC receive project-specific information on waters of the United States, including wetlands, from the Corps at key stages of project development to foster an efficient procedure to develop documentation to meet both agencies' disclosure and decisionmaking requirements. This Agreement establishes a process to facilitate the timely licensing and permitting of nuclear power plants, whereby both agencies will do the following:

- Work together and with applicants and other stakeholders, as appropriate, including before complete applications for the necessary authorizations are filed.
- Identify and resolve issues as quickly as possible.
- Attempt to build a consensus among governmental agencies and their stakeholders.

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1 10 CFR 51.10, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions—Scope"; 40 CFR 1501.5, "NEPA and Agency Planning—Lead Agencies"; 40 CFR 1501.6, "NEPA and Agency Planning—Cooperating Agencies"

2 10 CFR 51.20, "Criteria for and Identification of Licensing and Regulatory Actions Requiring Environmental Impact Statements"

- Provide for the effective and efficient environmental review for nuclear power plants.

**Project purpose and need coordination.** As the lead agency under NEPA responsible for the preparation of the analysis and decisions for the approval of new and expanded nuclear power plants, the NRC is responsible for determining the purpose and need of the energy project for purposes of the NRC's NEPA document and the NRC licensing process.[3] The NRC should coordinate early on the scope of the NEPA analysis for all activities under Federal purview and ensure that the purpose and need, the suite of alternatives, and the evaluation presented in the NEPA document consider the views of the Corps (e.g., defining project purpose per Section 404 of the CWA ["basic" for water dependency and "overall" for geographic scope of alternative analysis], conducting the Corps' public interest review, determining the least environmentally damaging practicable alternative under the CWA Section 404 (b)(1) Guidelines). The Corps will complete an independent permit decision in carrying out its regulatory responsibilities.

The signatory agencies may develop additional guidance to ensure that the Corps' permit documentation is prepared concurrently with the NEPA process to the maximum extent practicable. When the NRC provides to the Corps its preliminary draft NEPA documents, the Corps shall review and provide written comments on the relevant portions of those documents, as appropriate, in accordance with the timelines established under this MOU. Preliminary draft NRC NEPA documents include advance copies of the purpose, need, and alternatives sections of the NRC NEPA documents, as well as advance copies of the draft and final NEPA documents. Corps reviews of NRC NEPA documents will be completed and coordinated with the NRC as stated in the NRC EIS schedule for that project.

The Corps and the NRC hereby agree to work with each other and with other participating agencies or entities, as appropriate, to ensure that timely decisions are made and that the responsibilities of each agency are met. Specifically, each agency agrees to do the following:

**A.** Commit to Early Involvement

1. Conduct an early initial review. As soon as practicable when a prospective applicant or an agency makes a request for involvement in connection with a project under development, each agency will assess its role in the review and issuance of approvals for the project.

    a. Identify agency contacts for the proposed project. If a prospective applicant or agency needs assistance in determining regional, local, or project specific contacts, then the identified contacts will assist in identifying additional contacts. The initial agency contacts are the following:

[3] 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," Subpart A, "National Environmental Policy Act—Regulations Implementing Section 102(2)"

Department of the Army
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon 2E641
Washington, DC 20310-0108

Regulatory Branch
Headquarters, U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

Nuclear Regulatory Commission
Office of New Reactors
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Division of Site and Environmental Reviews
Office of New Reactors
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

b. Meet with prospective applicants and other agencies, when requested by the prospective applicant, the lead agency, or at its own initiative, to identify areas of potential concern to other agencies and to assess the need for and availability of agency resources to address issues related to the proposed project.

c. Consult with the NRC, as the lead agency, in establishing a schedule. The NRC will notify the Corps as early as possible of upcoming applications for the construction and operation of nuclear power plants and identify those projects that will be subject to this agreement. The lead agency will then, taking into consideration the relative priorities of other projects subject to this agreement, establish a commensurate schedule for the project review process. In establishing this schedule, the NRC and the Corps will strive to ensure that the individual permitting processes and related permit review activities occur on a concurrent, rather than sequential, basis, with the objective of avoiding unnecessary delays in the process and the schedule established by the NRC. If at any point during the consultation process the Corps or the NRC anticipates an inability to comply with the agreed-upon schedule, it will communicate the reason for this inability as soon as possible. The agencies will then work together to help avoid the anticipated delay when appropriate. The NRC will include in any Notice of Intent to Prepare an EIS guidance to the public regarding the process set forth in this Agreement.

**B.** Proactive participation. After an application is submitted to the NRC, the Corps will do the following:

1. Identify and inform the NRC and the applicant which statutes, regulations, and policies apply to each permit evaluation.

2. Identify the issues and concerns related to the proposed project that need to be addressed in order for the Corps to meet its obligations.

3. Provide the prospective applicant, the applicant, and/or other agency with relevant studies, data (such as maps showing features over which the agency may have jurisdiction), and any other information concerning the status of matters the agency considers relevant (including matters that may be under consideration, such as the results of threatened and endangered species consultation, or essential fish habitat consultation).

4. Identify issues and concerns and attempt to resolve them while draft documentation is being developed.

C. Sharing of data. The agencies will share the information gathered, considered, and relied upon by each of them with all other relevant agencies. Specifically, the NRC and the Corps agree to do the following:

1. Cooperate in the preparation of requests for additional studies or data to avoid duplicative requests and to compile a consistent set of information on which all of the agencies will rely.

2. Cooperate in identifying and developing the information at the level of detail required to complete environmental and cultural resources project review.

The NRC will be responsible for drafting sections and requesting additional information to the extent that the NRC believes the analysis is needed and would normally be required by the NRC if the Corps were not involved. If the Corps believes that additional analysis is needed, but the NRC does not agree that such analysis would be required under the regulatory procedures of the NRC, such analysis will be the responsibility of the Corps.

D. Communicate informally. The agencies agree to informally communicate with each other and other relevant agencies throughout the process to ensure that issues are raised as soon as possible and shared among all agencies. The lead agency will coordinate and share information with all relevant participating agencies.

E. Hearings. On request, each agency will participate in any public hearings[4,5] held by the other agency. Particularly in the case of NRC hearings, the Corps may provide expert testimony, as required, in those areas or sections covered in the NRC EIS in whose preparation the Corps participated and in those areas of special Corps expertise. The Corps' participation in the NRC hearing process

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4 33 CFR 327.3(a)—Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed Department of the Army permit action, or Federal project, and which affords the public an opportunity to present their views, opinions, and information on such permit actions or Federal projects.

5 The Atomic Energy Act requires that a public hearing be held before a construction permit is issued for a nuclear power plant. The hearing will be conducted by the Commission or by a presiding officer designated by the Commission pursuant to 10 CFR 2.313, "Designation of Presiding Officer, Disqualification, Unavailability, and Substitution."

will be consistent with all relevant laws and regulations and coordinated with appropriate District and Division Commanders or their representatives.

## V. Administration of the MOU

A. While retaining ultimate responsibility for making determinations and exercising their individual responsibilities in accordance with existing statutory responsibilities, the NRC and the Corps will consult with one another to resolve disputes using existing dispute resolution methods and in accordance with this agreement. If no agreement can be reached, either agency may refer the matter to the Council on Environmental Quality in accordance with 40 CFR 1504, "Predecision Referrals to the Council of Proposed Federal Actions Determined To Be Environmentally Unsatisfactory." Notwithstanding any such referral, the NRC reserves the right to make a final decision on any matter within the NRC's regulatory authority.

B. This MOU may be modified, amended, or terminated upon written request of any party hereto and the subsequent written concurrence of all other participating agencies. Participation in this agreement may be terminated 60 days after providing written notice of such termination to other participating agencies.

C. Acknowledgement that the authority and responsibilities of the parties under their respective jurisdictions are not altered by the MOU.

1. This MOU is intended only to improve the working relationships of the participating agencies in connection with expeditious decisions with regard to nuclear power plant authorizations and is not intended to, nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any person or party against the United States, its agencies, its officers, or any other person.

2. This MOU is to be construed in a manner consistent with all effective existing laws and regulations.

3. The MOU neither expands nor is in derogation of those powers and authorities vested in the participating agencies by applicable laws, statutes, or regulations.

4. The terms of this MOU are not intended to be enforceable by any party other than the signatories hereto.

5. The participating agencies intend to fully carry out the terms of this MOU. All provisions in this MOU, however, are subject to available resources. In addition, this MOU does not limit the ability of any of the participating agencies to review and respond to final applications.

6. If an applicant, prospective applicant, or other person requests a correction of information disseminated pursuant to this MOU, as authorized by Section 515 of the Treasury and General Government Appropriations Act for Fiscal

Year 2001 (P.L. 106-554), the process by which such request will be addressed will be that established by the agency that disseminated the information.

7. This MOU cannot be used to obligate or commit funds or as the basis for the transfer of funds.

8. Nothing in this MOU, in and of itself, requires any signatory agency to enter into any contract, grant, or interagency agreement.

9. All provisions in this MOU are subject to the availability of funds.

ACCORDINGLY, the parties have signed this MOU on the dates set forth below, to be effective for all purposes as of the date last signed. The signatures may be executed using counterpart original documents.

John Paul Woodley, Jr.

John Paul Woodley, Jr.
Assistant Secretary
of the Army (Civil Works)

September 12, 2008
Date

R. W. Borchardt

R. W. Borchardt
Executive Director for Operations
U.S. Nuclear Regulatory Commission

9-12-08
Date