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

DEC 13 2013

MEMORANDUM FOR THE CHIEF OF ENGINEERS

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

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

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

2. **DISCUSSION**

a. Duration of permits and jurisdictional determinations

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

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

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

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

b. Timeframes for CWA Section 401 Water Quality Certifications

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

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

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

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

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

c. Application of 404(b)1 Guidelines

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

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

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

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

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

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

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

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

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

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

Sincerely,

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