DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
441 G Street N.W.
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-CO

DEC 17 2004

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS AND DISTRICT COMMANDS

SUBJECT: Regulatory Standard Operating Procedures for Processing Liquefied Natural Gas Projects

1. In order to ensure that proposed liquefied natural gas (LNG) projects are being reviewed consistently and in accordance with reference documents and other laws and regulations, as applicable, Headquarters U.S. Army Corps of Engineers has developed regulatory standard operating procedures for processing LNG projects (see Enclosure).

2. This guidance applies to all LNG projects proposed for authorization under the Deepwater Port Act, requiring U.S. Coast Guard, Maritime Administration or Federal Energy Regulatory Commission action under the National Environmental Policy Act and a Department of the Army permit from the USACE under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act, and it further supplements the Memorandum of Understanding Related to the Licensing of Deepwater Ports. The goal of this guidance is to facilitate concurrent processing and issuing of NEPA and CWA/RHA decision documents.

3. This procedural guidance clarifies existing regulation and policy with respect to LNG permit applications and is not intended to modify existing regulations or guidance. This procedural guidance is effective upon execution.

4. If you have any questions regarding the guidance presented in the enclosed guidance paper, the Headquarters Regulatory Community of Practice point of contact is Mr. Russell Kaiser at (202) 761-4614.

FOR THE COMMANDER:

Encl

Michael B. White
Chief, Operations
Directorate of Civil Works

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U.S. ARMY CORPS OF ENGINEERS

REGULATORY STANDARD OPERATING PROCEDURES FOR PROCESSING LIQUEFIED NATURAL GAS PROJECTS

I. PURPOSE AND APPLICABILITY

This U.S. Army Corps of Engineers (USACE) guidance paper is to ensure: (1) that proposed liquefied natural gas (LNG) projects are being reviewed consistently and in accordance with the reference documents listed in Section II below and other laws and regulations, as applicable, and (2) that the review process expedites and streamlines permit reviews in a consistent, efficient and legally defensible manner. This guidance applies to all LNG projects proposed for authorization under the Deepwater Port Act (DWPA), requiring U.S. Coast Guard (USCG), Maritime Administration (MARAD) or Federal Energy Regulatory Commission (FERC) action under the National Environmental Policy Act (NEPA) and a Department of the Army (DA) permit from the USACE under Section 404 of the Clean Water Act (CWA) or Section 10 of the Rivers and Harbors Act (RHA), as identified in Section II (g, h and i, respectively), and it further supplements the Memorandum of Understanding Related to the Licensing of Deepwater Ports (Section II (f)). The goal of this guidance is to facilitate concurrent processing and issuing of NEPA and CWA/RHA decision documents. This procedural guidance clarifies existing regulation and policy with respect to LNG permit applications and is not intended to modify existing regulations or guidance.

II. SUPPORTING REFERENCES

a. Executive Order (E.O.) 13212, Actions to Expedite Energy-Related Projects, issued on May 18, 2001 and amended by E.O. 13302, May 15, 2003.

b. Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted in Conjunction with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the FERC issued by the Council on Environmental Quality (CEQ) on August 20, 2002.

c. Implementation Plan, November 2002, for Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted in Conjunction with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the FERC.

d. DWPA of 1974, as amended by the Maritime Transportation Security Act of 2002.

e. Section 3 of the Natural Gas Act of 1938.

f. Memorandum of Understanding Related to the Licensing of Deepwater Ports Among the USACE, U.S. Department of Commerce, U.S. Department of Defense, U.S. Department of Energy, U.S. Department of Homeland Security, U.S. Department of Interior, U.S. Department of State, U.S. Department of Transportation, U.S. Environmental Protection Agency, Federal Energy Regulatory Commission, and Council on Environmental Quality, March 1, 2004.

g. NEPA of 1969 [40 CFR Sections 1500-1508] and other supporting Acts, including but not limited to: Endangered Species Act (ESA), CWA Section 401, Coastal Zone Management Act (CZMA), National Historic Preservation Act (NHPA) Section 106, and the Essential Fish Habitat (EFH) clause of the Magnuson-Stevens Fishery Conservation and Management Act provisions.

h. Section 404, CWA [33USC 1344; 33 CFR Parts 320-331] and Section 404(b)(1) Guidelines [40 CFR Part 230].

i. Section 10, RHA [33USC 403; 33 CFR Part 329].

j. Letter, James Connaughton, Chairman, CEQ, re: guidance on purpose and need to Honorable Norman Y. Minetta, Secretary, Department of Transportation, May 12, 2003.

III. USACE COMMITMENTS TO STREAMLINE LNG PROJECTS

We are committed to:

a. Concurrently integrate the requirements of the NEPA and the CWA/RHA for DWPA LNG actions that require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) and evaluation under the USACE Standard Permit process.

b. Address the RHA/CWA Section 404(b)(1) Guidelines, as required, in the NEPA document, pursuant with Section II (g, h and i). We agree to ensure the earliest possible consideration of environmental concerns in the planning, programming, and development of DWPA LNG project stages by supporting interagency cooperation and consultation throughout the process and by conducting early coordination to ensure concurrent processing of NEPA/CWA/RHA requirements. In addition, subject to resource availability and as appropriate to statutory responsibilities and expertise, we agree to the following actions to further encourage and assist LNG project Sponsors/Applicants and the Federal Lead NEPA Agency, as designated in the DWPA and the MOU in Section II (f) in addressing environmental issues early in the planning process. We agree to:

(1) Post this document on our Headquarters (HQ), Division and District Regulatory websites.

(2) Provide copies of this guidance paper to all project Sponsors/Applicants and the Federal Lead NEPA Agency, and encourage them to adhere to this guidance.

(3) Request that project Sponsor/Applicant and the Federal Lead NEPA Agency provide preliminary designs and associated environmental and practicability analyses to all appropriate Federal Regulatory/Resource Agencies involved with review of the proposed LNG project. Practicability data shall include information on logistics, feasibility, and economics of avoiding, minimizing and compensating for impacts to waters of the U.S.

(4) Conduct early coordination with the Federal Lead NEPA Agency and other Regulatory/Resource Agencies involved with review of the proposed LNG project to identify potential concerns and opportunities for expediting the process with respect to Section II (g, h and i).

(5) Provide existing environmental resource data to project Sponsor/Applicant and the Federal Lead NEPA Agency for the development of inventories of waters of the U.S., if available. For example, the USACE will identify aquatic resources that have high ecological function that require special attention or avoidance, if known.

(6) Provide information to project Sponsor/Applicant and the Federal Lead NEPA Agency related to known ongoing activities that may have a bearing on LNG construction and related-land use decisions.

(7) Provide timely review of environmental elements of programming/planning documents and input to Project Sponsor/Applicant and the Federal Lead NEPA Agency during project and permit development stage on issues. This review will focus on: purpose and need, development and selection of project alternatives, and environmental impacts of those alternatives. When environmental impact analysis identifies potential for direct, indirect and cumulative impacts, and opportunities for avoidance, minimization and compensatory mitigation, provide that information to the Project Sponsor/Applicant and the Federal Lead NEPA Agency.

c. Process only one DA permit application, decision document and permit for each single and complete LNG project. A single and complete project application shall include information on the LNG facilities and/or structures, including but not limited to the associated pipelines and graving dock(s). One complete project application is needed to provide the Federal Lead NEPA Agency adequate input on environmental impacts on the proposed project and satisfy the USACE responsibilities as a cooperating agency, as required by the DWPA. Where more than one company is involved in construction of an LNG project, the companies will be listed as joint authorized permit agents for the applicant. Ensure that each NEPA document is developed to address all requirements of the RHA/CWA Section 404(b)(1) Guidelines, as applicable. [To support that effort, analysis of the purpose and need statement, and alternatives in the NEPA document shall be shared with the Federal Lead NEPA Agency. This joint process shall identify alternatives for analysis determined by the USACE as necessary to render a decision on

the "least environmentally damaging, practicable alternative" (LEDPA), if applicable. As a consequence, NEPA and RHA/CWA Section 404 requirements shall be processed concurrently, as identified in Section IV.] At a minimum, we shall provide information/guidance on project purpose and need, project alternatives, alternative analyses, content of material in draft and final EIS/EA and record of decision (ROD)/finding of no significant impact (FONSI)/Certificate to the Federal Lead NEPA Agency in a timely manner (Section IV).

d. Where the proposed action crosses multiple USACE District regulatory boundaries, implement the Lead District concept for determining jurisdiction, processing the permit application and completing the permit decision:

(1) The District with the majority of the LNG project will take the lead in permit review coordination, preparing the ROD/FONSI for all parts of the project and rendering a decision. If a LNG project is located equally in one or more Districts, then the one with the most complex permitting issues will be designated as the Lead District. The geographic location of the operating LNG facilities and or structures should be a factor relevant in the selection of the Lead District. For example the construction site (graving dock) for an offshore LNG Gravity Based Structure (GBS) is located in one District but the actual offshore location of the GBS, terminal and pipelines are in another the District. In this case, the District where the offshore LNG operating facilities are located should be selected as the Lead District. Part of the rationale for this approach lies in the fact that the graving dock aspect of the permitted activities is actually temporary in nature (unlike the permanent location of the offshore GBS and associated pipelines). Once the graving dock facility is constructed and the GBS is built and floated offshore, that portion of the permitted activity is complete. If the Districts cannot reach concurrence on an issue involved in the review of the LNG project, it will be referred to the appropriate Division or Divisions (MSCs) or HQ for resolution.

(2) The non-Lead Districts will provide necessary support to the Lead District for those portions of a project that are located within their District boundaries. Workload and expenses incurred, as part of permit review will be shared as much as possible between all Districts. For example, the Lead District will prepare the public notice, but the non-Lead Districts will pay for mailing costs associated with distribution of the public notice within their geographic area. In addition, the non-Lead Districts shall provide the Lead District with a copy of the mailing labels for the public notice for inclusion in the permit record.

(3) The Lead District will ensure that the ROD/FONSI is coordinated with the non-Lead Districts and that there is concurrence on the final permit decision. If concurrence cannot be reached among the Districts, the Districts will advise the appropriate Division(s) (MSCs) or HQ point of contact who will resolve any disagreements on the final permit decision. All appropriate District Engineers or those to whom approval has been delegated will approve the ROD/FONSI. The Lead District will provide the other non-Lead Districts with copies of the final permit decision for their files. Each District shall be responsible for enforcement and compliance on portions of

the project within their respective geographic boundaries. To ensure adequate exchange of information, such information on activities will be provided to the other District(s) involved in the LNG authorization.

(4) The Lead District will assign a permit number to the application, be responsible for recording and reporting the permit status, and in concurrence with the other District(s) issue the permit decision for the entire LNG project.

e. Expeditiously resolve disagreements with the Federal Lead and Co-Lead NEPA Agencies and project Sponsors/Applicants for project-specific disputes. Disputes shall be resolved at the lowest possible level, using a hierarchical approach (i.e., District, Division, then HQ). If a dispute cannot be informally resolved at the HQ level, the dispute resolution process, as identified in paragraph IV (D) of the MOU referenced in Section II (f) of this document may be invoked.

IV. NEPA AND CWA/RHA INTEGRATION PROCESS FOR LNG PROJECTS

In accordance with existing interagency guidance, early coordination should be ongoing with the project Sponsor/Applicant and the Federal Lead NEPA Agency, in accordance with Section III above. The Process described herein formally establishes internal USACE District roles and responsibilities to further streamline the NEPA and CWA/RHA process and facilitate concurrent processing of the Federal Lead NEPA Agency requirements with the USACE requirements. The following is a summary of the key milestones and decision points (called "Checkpoints").

a. Checkpoint #1 – Process Initiation & Responsibilities.

(1) Checkpoint #1 is to initiate the coordination process with the Federal Lead NEPA Agency and ensure that information presented in the NEPA document is adequate to fulfill the requirements of the Public Interest Review and 404(b)(1) guideline demonstration (per Section II (f and g) to make a permit decision concurrent and consistent with the Federal Lead NEPA Agency certificate findings.

(2) To complete Checkpoint #1, the USACE will determine the Lead District for the proposed DWPA LNG project, and the Lead District will request information within 15 days of notification of a project application in writing from the Federal Lead NEPA Agency on: the type of NEPA document to be prepared for the action, a generic project description, the project area, identification of waters of the U.S., potential impacts on waters of the U.S., schedule for review and authorization of the project, and other relevant material required for a complete USACE application, as identified in 33 CFR 325, as well as to comply with other requirements at Section II (g, h and I).

b. Checkpoint #2 - Project Purpose and Need; Project Alternatives.

(1) Checkpoint #2 is to identify and mutually agree on the purpose and need statement and the alternative analysis process. *"Although the Federal Lead NEPA Agency has the authority for and responsibility to define the "purpose and need" for purposes of the NEPA analysis, in situations involving two or more agencies that have a decision to make for the same proposed action and responsibility to comply with NEPA or a similar statute, it is prudent to jointly develop a purpose and need statement that can be utilized by both agencies."* [Section II (j)]. In accordance with the referenced guidance, the USACE Lead District shall appropriately coordinate with the Federal Lead NEPA Agency in the development of the purpose and need statement for the proposed project and the alternative analysis process. Pursuant to the CEQ regulations implementing NEPA, the alternative analysis process shall identify a reasonable range of alternatives and the criteria to evaluate the alternatives to be addressed in the draft NEPA document. The suite of alternatives will include alternatives that the USACE may require in order to determine the LEDPA and an array of co-equally analyzed alternatives sufficient to address the public interest review and the requirements of 404(b)(1) Guidelines, per Section II (h and i).

(2) To complete Checkpoint #2, the USACE Lead District will provide a written letter with USACE comments and concurrence or non-concurrence to the Federal Lead NEPA Agency on the purpose and need statement, and the development of, and the criteria for, the alternatives addressed in the Preliminary Draft NEPA document within 10 calendar days of receipt of the preliminary document. All comments provided on the NEPA document shall include supporting rationale for comments. In addition, the Lead District shall identify in its letter the Section 404 basic and overall project purpose to be included in the draft NEPA document, if applicable.

c. Checkpoint #3 – Publication and Circulation of NEPA/CWA Documents.

(1) Checkpoint #3 provides guidance on the USACE public notice (PN), the preparation and circulation of the draft NEPA document and the supporting public notice (PN) for the CWA/RHA project action (Checkpoint #3a) and the final (Checkpoint #3b) NEPA document.

(2) Checkpoint # 3(a): Preparation and Circulation of the Draft NEPA Document and the supporting PN for the CWA/RHA project action.

(a) Information developed from Checkpoint #2 shall be presented in the draft NEPA document. The draft document, at a minimum, shall identify all waters of the U.S., and those potentially avoided, minimized and impacted within the project area. The document also shall present a summary that clearly identifies the predicted environmental impacts on the public interest factors and practicability factors to further support a preliminary LEDPA analysis, if applicable. In addition, technical analyses

supporting a functional assessment of the aquatic losses and a conceptual compensatory mitigation plan shall be summarized in the draft NEPA document. The Lead District also shall prepare the PN to accompany the scheduled release of the Notice of Availability (NOA) for the draft NEPA document.

(b) To complete Checkpoint #3(a), the USACE Lead District will provide a written letter with USACE comments and concurrence or non-concurrence with the NEPA document to the Federal Lead NEPA Agency on the: (1) Interim Draft NEPA document within 10 calendar days of receipt, and (2) Draft NEPA document within 45 calendar days of receipt of the document. All comments provided on the NEPA document shall include supporting rationale for comments. In addition, the Lead District will issue a PN for the proposed project concurrent with the NOA for the draft NEPA document, providing the Lead District has received all required information for a complete application for the proposed project 15-days prior to the scheduled release of the NOA.

(3) Checkpoint # 3(b): Preparation and Circulation of the Final NEPA Document.

(a) After the public review period closes for the draft NEPA document and the PN, the Lead District shall engage in discussion with the Federal Lead NEPA Agency regarding the public and agency comments received and the process for addressing them. Following the review, the Federal Lead NEPA Agency in coordination with the USACE, shall prepare the final NEPA document, which shall include a detailed mitigation plan.

(b) To complete Checkpoint #3(b), the USACE Lead District will provide a written letter with USACE comments and concurrence or non-concurrence with the NEPA document to the Federal Lead NEPA Agency on the: (1) Preliminary Final NEPA document within 7 calendar days of receipt, (2) Interim Final NEPA document within 7 calendar days of receipt, and (3) Final NEPA document within 30 calendar days of receipt of the document. All comments provided on the NEPA document shall include supporting rationale for comments.

(4) If the NEPA document is determined to be inadequate for the USACE Lead District to make a permit decision, the Lead District shall request the Federal Lead NEPA Agency to modify the EIS/EA to include the information needed by the USACE to render a DA permit decision. If the Federal Lead NEPA Agency does not appropriately modify the EIS/EA, then the Lead District will request the information from the applicant and the USACE permit decision will be held in abeyance until such time as the information is received or the permit application is withdrawn as provided in 33 CFR 325.2(d)(5).

d. Checkpoint #4 - Completion of Integration Process.

(1) Checkpoint #4 is to identify and reach agreement on the LEDPA, the status of the applicant's proposed alternative and the mitigation plan, and complete the permit process. The LEDPA is the alternative that has the fewest direct, secondary, and cumulative impacts to aquatic resources, based on aquatic function, and that is practicable and meets the project purpose so long as the alternative does not have other significant adverse environmental consequences (Section II (g, h and i)). This process is a sequential approach, in which formal agreement on the LEDPA is reached before consideration of the mitigation plan. After the 404(b)(1) Guidelines sequencing process has been fulfilled, whenever avoidance of waters of the US is not practicable, minimization of impacts will be required and unavoidable impacts will be mitigated to the extent reasonable and practicable. The mitigation plan shall include enough information to determine if the proposed compensatory mitigation is appropriate, practicable and reasonable, and if the proposed mitigation is likely to be successful.

(2) To complete Checkpoint #4, the USACE Lead District will provide a written letter with USACE comments and concurrence or non-concurrence with the lead agency ROD/FONSI/Certificate to the Federal Lead NEPA Agency on the: (1) Administrative Draft within 15 calendar days of receipt, and (2) Final within 30 calendar days of receipt of the ROD/FONSI/Certificate. All comments provided on the ROD/FONSI/Certificate shall include supporting rationale for comments.

(3) The USACE Lead District will prepare the ROD/FONSI for the DA permit decision. The Lead District in the ROD/FONSI will determine if the proposed project complies with the RHA/CWA Section 404(b)(1) Guidelines and will make a public interest decision on issuance of the permit. Provided the Corps determines that these and other applicable requirements are met, the Lead District shall complete the decision document and make the permit decision. For most LNG projects, water quality certification or CZM consistency will be required from the state before a permit issued by the USACE is valid. In instances where the state has not made a decision on certification or consistency within the time frames allowed for the USCG/MARAD/FERC license, the USACE Lead District may issue a provisional permit, providing all other legal requirements for DA authorization have been fulfilled. The permit will be conditioned such that it is not valid and work cannot begin until certification or consistency is received from the state.

V. GUIDANCE IMPLEMENTATION AND MODIFICATIONS

a. The guidance presented herein will become effective upon execution and shall remain in effect until it is amended in accordance with this Section.

b. Modifications to this guidance paper may be proposed to the HQ point of contact for review and action (Section VII). Approval of such proposals will be indicated by written acceptance, with a revised guidance paper or amendment issued and circulated for execution.

VI. SPECIAL UNDERSTANDINGS

a. The District Regulatory Division/Branch Chiefs shall make every effort to ensure continuity of staff representation on a project, as well as participation in meetings and decisions at the appropriate level. In addition, Regulatory project managers shall not revisit previous agreements or the decisions made during the development of the NEPA document unless there is significant new information or a significant change to the project, the environment, or laws and regulations.

b. The USACE Lead District may defer to the Lead Federal Agency in the evaluation of facility security and project economics. The Lead District is not required to review proprietary information regarding these issues but may, as deemed appropriate in specific cases. In such cases the USACE Lead District Official, having adequate security clearance in the case of security information, may request from the Federal Lead NEPA Agency the appropriate portions of the LNG security plan and other proprietary information for review. Following the review, the USACE shall return the security plan to the Federal Lead NEPA Agency and summarize, using appropriate language so as not compromise proprietary information, in the ROD/FONSI.

c. Following the process identified herein does not imply endorsement of a specific LNG plan or project. Nothing in this guidance paper is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities guiding the LNG process.

d. This guidance paper is not a fiscal or funds obligation instrument. Nothing in this guidance paper will be construed as affecting the authorities to act as provided by statute or regulation or as binding beyond the USACE authorities or as requiring the Districts to obligate or expend funds in excess of available appropriations.

e. This guidance paper does not confer any right or benefit, substantive or procedural, enforceable at law or equity, by a party against the United States its agencies, its officers, or any person.

VII. HQ POINT OF CONTACT

The Headquarters Regulatory Community of Practice point of contact is Mr. Russell Kaiser at (202) 761-4614.