DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

18 NOV 1999

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS AND DISTRICT COMMANDS

SUBJECT: Endangered Species Act Compliance

1. The current revised version of the Standard Operating Procedure (SOP) does not contain any discussion on determining the scope of analysis for Endangered Species Act (ESA) compliance. The discussion concerning using the National Environmental Policy Act or National Historic Preservation Act language/criteria for determining ESA scope of analysis was specifically removed and should no longer be cited. The following guidance will be use for ensuring compliance with section 7 of the ESA, including consideration of direct and indirect effects (formally identified as ESA scope of analysis).

2. The Corps of Engineers Regulatory Program will use the Endangered Species Act Interagency Consultation Regulations at 50 CFR Part 402, when determining compliance with Section 7 of the ESA. Further, the Section 7 Consultation Handbook generally provides useful guidance for compliance with the consultation requirements of the ESA and the ESA regulations. The Corps and the Services agree that the handbook should be used to govern the application of the consultation regulations to specific permit actions.

3. Nevertheless, we anticipate that in a small percentage of cases there may continue to be differences in agency interpretation regarding application of the consultation handbook and its examples to specific circumstances. To facilitate agreement in such cases, we have agreed with the Services to initiate a conflict resolution process for addressing disagreements on how to apply the regulations in a specific case regarding indirect effects/scope of analysis. The enclosed conflict resolution process is designed to resolve issues and to identify and document those situations where we and the Services are unable to reach agreement. The conflict resolution process will apply to all pending permit actions, as of the date of this letter. We plan to use this process for one year and then use that record to develop additional national guidance, if necessary.

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4. Any questions regarding this guidance may be directed to Sam Collinson, at 202-761-1782.

FOR THE COMMANDER

CHARLES M. HESS
Chief, Operations Division
Directorate of Civil Works

Encl

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(SEE PG 3)

Conflict Resolution Process for Determination of Indirect Effects/Scope of Analysis

The U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) will work cooperatively to achieve mutually shared objectives of ensuring that listed species will not be jeopardized nor designated critical habitat destroyed. The Corps and the Services staff working at the local level will discuss any disagreement concerning case-specific determinations of the indirect effects/scope of analysis for that case, with an attempt to resolve them without elevation. The Services will notify the Corps of any disagreement concerning indirect effects/scope of analysis during the appropriate comment period. If those differences among the local staff cannot be resolved within 60 days, for individual permits, or 30 days, for nationwide or regional general permits, of the receipt of notification of the disagreement by the Corps, they will be raised to the level I review team. Local staff will prepare a written statement summarizing the issues to be resolved and agency positions, then notifying level I personnel of their intent to initiate elevation within 10 days of the close of the 60 or 30 day-period. To ensure timely resolution of any differences that may occur, the following tiered elevation procedure and timeframes will be used.

Level I: Level I personnel will consist of FWS field office supervisor, NMFS branch/division chief, and the Corps District branch chief. Level I personnel will review the summary to ensure staff have adequately attempted resolution and the elevation is appropriate. Level I will attempt to resolve the differences. If no resolution can be reached at level I within 20 days of having received notification from staff, it shall be elevated to level II. Level I personnel will provide a written description of the differences and each agencies' position within 10 days of the close of the 20-day period.

Level II: Level II personnel will consist of the FWS Regional Director or designee, the NMFS Regional administrator or designee, and the Corps District Engineer or designee. They will review the material submitted and attempt to resolve the differences within 30 days of receiving the elevation. If they cannot reach resolution, the issues will be elevated to level III. Level II personnel will provide a written description of the differences and each agencies' position within 10 days of the close of the 30-day period.

Level III: Level III personnel will be the Director of the FWS, the Assistant Administrator for Fisheries, NOAA (NMFS), and the Deputy Commander for Civil Works. After review and full consideration of all comments and each agencies' position, the Deputy Commander for Civil Works will make a final decision on the Corps position within 30 days. However, the Services may determine the final decision is not in compliance with section 7 of the ESA and would complete the consultation process according to the ESA regulations and the Section 7 Consultation Handbook.