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DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 320

33 CFR Part 325

33 CFR Part 333

[Docket ID: COE-2025-0006]

RIN 0710-AB20

Procedures for Implementing NEPA; Processing of Department of the Army Permits

AGENCY: Army Corps of Engineers, Department of Defense (DoD).

ACTION: Interim final rule; request for comment.

SUMMARY: This interim final rule removes the U.S. Army Corps of Engineers (Corps) National Environmental Policy Act (NEPA) implementing regulations, used for evaluating permit applications, which were promulgated to supplement now-rescinded Council on Environmental Quality (CEQ) regulations, and replaces them with a new regulation that also address requests for permission under Section 14 of the Rivers and Harbors Act of 1899. Further, the Army is also making conforming changes to its regulations to eliminate references to Appendix B and other NEPA implementation regulations. In addition, this interim final rule requests comments on this action and related matters to inform Army's decision making.

DATES: This interim rule is effective [insert date of publication in the Federal Register]. Comments must be received on or before [insert date 30 days from publication in the Federal Register].

ADDRESSES: You may submit comments, identified by docket number COE-2025-0006 and/or 0710-AB20, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: CEHQ-NEPA@usace.army.mil. Include the docket number, COE-2025-0006, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW-CO-R, 441 G Street NW, Washington, DC 20314-1000.

Hand Delivery / Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: If submitting comments through the Federal eRulemaking Portal, direct your comments to docket number COE-2025-0006. All comments received will be included in the public docket without change and may be made available on-line at http://www.regulations.gov, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov your e-mail address will be automatically captured and

included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any compact disc you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Mr. Milt Boyd, 703-459-6026

SUPPLEMENTARY INFORMATION:

I. Background

A. The Army Civil Works Regulatory Program is authorized to issue permits for certain activities in jurisdictional waters and wetlands under the following statutory authorities: 33 U.S.C. 1344 (Clean Water Act (CWA), section 404); 33 U.S.C. 401 (Rivers and Harbors Act (RHA) of 1899, section 9); 33 U.S.C. 403 (RHA of 1899, section 10); and 33 U.S.C. 1413 (Marine Protection, Research, and Sanctuaries Act of 1972, section 103). Title 33 Code of Federal Regulations (CFR) part 325, appendix B, outlines the NEPA implementation procedures for the Regulatory Program of the Corps. Appendix B supplements the Council for Environmental Quality (CEQ) NEPA regulations, 40 CFR §§ 1500-1508, as well as relying on the Corps NEPA regulation at 33 CFR part 230 "[f]or additional guidance." Appendix B.2. Part 230 in turn also rested on, and supplemented, the CEQ NEPA regulations. Appendix B also provides guidance on public involvement, the preparation of Environmental Assessments (EA), Findings of No Significant Impact (FONSI), and Environmental Impact Statements (EIS). The appendix also addresses the scope of analysis for NEPA documents, including the determination of lead and cooperating agencies.

B. CEQ's NEPA regulations been repealed, effective April 11. *See Removal of National Environmental Policy Act Implementing Regulations*, (90 FR 10610; Feb. 25, 2025). This action was necessitated by and consistent with Executive Order (E.O.) 14154, *Unleashing American Energy* (90 FR 8353; January 20, 2025), in which President Trump rescinded President Carter's E.O. 11991, *Relating to Protection and Enhancement of Environmental Quality* (42 FR 26967; May 24, 1977), which was the basis CEQ had invoked for its authority to make rules to begin with. The Corps' regulations, which were a supplement to those CEQ regulations, thus stand in obvious need of fundamental revision. President Trump in E.O. 14154 further directed agencies to revise their NEPA implementing procedures consistent with the E.O., including its direction to CEQ to rescind its regulations.

In addition, Congress recently amended NEPA in significant part, in the Fiscal Responsibility Act of 2023 (FRA), Public Law 118-5, signed on June 3, 2023, in which Congress added substantial detail and direction in Title I of NEPA, including in particular on procedural issues that CEQ and individual acting agencies had previously addressed in their own procedures. The Corps recognized the need to update is regulations in light of these significant legislative changes. Since the Corps' regulations were originally designed as a supplement to CEQ's NEPA regulations, the Corps had been awaiting CEQ action before revising its regulations, consistent with CEQ direction. *See* 40 C.F.R. 1507.3(b) (2024); *see also* 86 FR 34154 (June 29, 2021). However, with CEQ's regulations now rescinded, and with the Corps' NEPA implementing procedures still unmodified more than two years after this significant legislative overhaul, it is exigent that the Army move quickly to conform its procedures to the statute as amended.

Finally, the Supreme Court on May 29, 2025 issued a landmark decision,

Seven County Infrastructure Coalition v. Eagle County, Colorado, 145 S. Ct. 1497 (2025), in

which it decried the "transform[ation]" of NEPA from its roots as "a modest procedural requirement" into a significant "substantive roadblock" that "paralyze[s]" "agency decisionmaking." *Id.* at 1507, 1513 (quotations omitted). The Supreme Court explained that part of that problem had been caused by decisions of lower courts, which it rejected, issuing a "course correction" mandating that courts give "substantial deference" to reasonable agency conclusions underlying its NEPA process. *Id.* at 1513-14. But the Court also acknowledged, and through its course correction sought to address, the effect on "litigation-averse agencies" which, in light of judicial "micromanage[ment]," had been "tak[ing] ever more time and [] preparing ever longer EISs for future projects." *Id.* at 1513. The Corps, thus, is issuing this IFR to align its actions with the Supreme Court's decision and streamline its process of ensuring reasonable NEPA decision. This revision has thus been called for, authorized, and directed by all three branches of government at the highest possible levels.

C. Therefore, the Corps is replacing 33 CFR part 325, appendix B with 33 CFR part 333 – Procedures for Complying with the National Environmental Policy Act. Title 33 CFR part 333 will provide the implementation procedures for the Army Civil Works Regulatory Program and for the Army Civil Works, 33 U.S.C. 408, permission process. In addition to the Regulatory program authorities originally covered by appendix B, Congress also authorized the Corps to provide permission for "the temporary occupation or use of [Civil Works projects] . . .when . . . such occupation or uses will not be injurious to the public interest" and for "the alteration or permanent occupation or use of any [Civil Works project] . . . when . . . such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. 408(a). The 33 U.S.C. 408 permission program had relied on NEPA implementation procedures in 33 CFR part 230. While appendix B did not apply to 33 U.S.C.408 authorizations,

33 CFR part 333 will be the NEPA procedures the Corps will follow when deciding whether to grant permission under 33 U.S.C.408(a) because the procedural aspects of NEPA analysis supporting evaluations of requests for section 408 permissions are more like the regulatory program than other aspects of the Civil Works program covered by part 230. The Corps is publishing NEPA implementing procedures consistent with NEPA as amended by the Fiscal Responsibility Act of 2023.

The Army's new NEPA implementing procedures, as adopted via this interim final rule, are a more faithful implementation of the statute as amended in 2023 than its old procedures. They implement major structural features of the 2023 amendments, such as deadlines and page limits for environmental assessments and environmental impact statements, as directed at NEPA Section 107(g), and provide that the Corps will complete preparation of these documents within the maximum length and on the timeline that Congress intends. They incorporate Congress's definition of "major Federal action" and the exclusions thereto, as codified at NEPA Section 111(10). They incorporate Congress's mandated procedure for determining the appropriate level of review under NEPA, as codified in NEPA Section 106. They incorporate Congress's direction with respect to establishment, adoption, and application of categorical exclusions, as codified at NEPA Section 111(10). They provide procedures governing project-sponsor-prepared environmental assessments and environmental impact statements, as directed at NEPA Section 107(f). And they incorporate Congress's revision to the requirements for what an agency must address in its environmental impact statements, as codified at NEPA Section 102(2)(C), and Congress's requirement that public notice and solicitation of comment be provided when issuing a notice of intent to prepare an environmental impact statement, as directed at NEPA Section 107(c). All of these are crucial

features of Congress's policy design and its purpose in the 2023 amendments that NEPA review be more efficient and certain.

Moreover, all of these respond to the President's directive in E.O. 14154; and all of these reflect the Supreme Court's recent and unequivocal statement that NEPA is a purely procedural statute. The Army is conscious of the Supreme Court's admonition that NEPA review has grown out of all proportion to its origins of a "modest procedural requirement," creating, "under the guise of just a little more process," "[d]elay upon delay, so much so that the process seems to 'borde[r] on the Kafkaesque.'" *Seven County*, 145 S. Ct. at 1513 (internal quotation omitted). These new procedures, therefore, are intended to align NEPA with its Congressionally mandated dimensions, reflecting the guidance given also by the President and the Supreme Court, and making review under it faster, more flexible, and more efficient.

The Army acknowledges that third parties may claim to have reliance interests in the Corps' existing NEPA procedures. But revised agency procedures will have no effect on ongoing NEPA reviews, where the Army, following CEQ guidance, has determined it will continue to apply to existing applications. Moreover, as the Supreme Court just explained, NEPA "is a purely procedural statute" that "imposes no substantive environmental obligations or restrictions." *Seven County*, 145 S. Ct. at 1507. Any asserted reliance interests grounded in substantive environmental concerns are not in accord with the best meaning of the law and are entitled to "no… weight." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914 (2020).

Because reliance interests are inherently backward-looking, it is unclear how any party could assert reliance interests in *prospective* procedures. To the extent such interests exist, the Army concludes that they are outweighed by other interests and policy concerns. The Army's new NEPA procedures, is necessary to ensure efficient and predictable reviews, with significant upsides

for the economy and for projects with activities needing Corps authorization. This set of policy considerations drastically outweighs any claimed reliance interests in the preexisting procedures.

The Army has taken this action as part of DoD's broader approach to revising its implementation of NEPA, in which DoD and its components have revised their NEPA implementing procedures to conform to the 2023 statutory amendments, to respond to President Trump's direction in E.O. 14154 to, "[c]onsistent with applicable law, prioritize efficiency and certainty over any other objectives, including those of activist groups, that do not align with the policy goals set forth in section 2 of [that] order or that could otherwise add delays and ambiguity to the permitting process," and to address the pathologies of the NEPA process and NEPA litigation as identified by the Supreme Court. Where Army has retained an aspect of their preexisting NEPA implementing procedures, it is because that aspect is compatible with these guiding principles; where the Army has revised or removed an aspect, it is because that aspect is not so compatible.

1. The Army is making conforming amendments to various provisions in 33 CFR part 320, 33 CFR part 325, and appendix C to that part to reference the new location for NEPA implementing procedures.

2. Section-by-section overview of part 333

Subpart A—Purpose and Policy

Section 333.1 Purpose and Policy

This section outlines the integration of NEPA into the Corps' decision-making processes for evaluating applications from other entities for authorization by the Corps, ensuring that impacts to the human environment are considered early to facilitate informed decision-making and timely reviews. It establishes procedures for Corps District Engineers to fulfill NEPA requirements and

clarifies that it does not govern individual rights but sets forth the Corps' practices for implementing NEPA.

Section 333.2 Applicability

This section states that the procedures apply to all Corps elements processing Department of the Army Permit applications under 33 U.S.C. 1344 (Clean Water Act (CWA), section 404); 33 U.S.C. 401 (Rivers and Harbors Act (RHA) of 1899, section 9); 33 U.S.C. 403 (RHA of 1899, section 10); and 33 U.S.C. 1413 (Marine Protection, Research, and Sanctuaries Act of 1972, section 103) and when granting permissions under 33 U.S.C. 408 (RHA of 1899, section 14). This section clarifies that NEPA imposes procedural requirements and is supplementary to the Corps' other existing legal authorities or responsibilities. This section discusses the responsibilities of satisfying NEPA requirement as resting with the District Engineer. This is because for most permitting actions decision making authority has been delegated to the District Engineer (see e.g., 33 CFR 325.8(b)). However, some decisions are required to be elevated to the Division Engineer or other higher authority (see e.g., 33 CFR 325.8(c)). In cases in which decision making authority is elevated to a higher authority, the responsibilities ascribed to the District Engineer in this Part are similarly elevated to that higher authority making the decision.

Subpart B—NEPA and General Concepts

Section 333.11 Determining When NEPA Applies

This section outlines the circumstances under which NEPA does not apply to proposed agency permitting actions. NEPA is not applicable when activities do not result in final agency action, are exempted by law, conflict with other legal requirements, or when Congress has prescribed decisional criteria that leave no discretion for environmental considerations. Additionally, NEPA

does not apply if another statute fulfills its function, if the action is not a "major Federal action," or if it involves non-Federal actions with minimal Federal involvement.

This section identifies a number of Corps activities that are not subject to NEPA: preliminary jurisdictional determinations; approved jurisdictional determinations; determination on whether an activity requires a Corps permit or permission; aquatic resource delineation concurrence or non-concurrence determinations; or determinations that the modification of unimproved real estate of a project would not affect the function and usefulness of the project. These determinations are not permits; they answer jurisdictional questions about whether specific regulatory regimes apply to an area or activity. Specifically, they address whether an area or activity is subject to Corps jurisdiction, which is made through the application of a standard established in statute or regulation to the physical circumstances of the site. In each of those cases, the law or regulation limits the factors that the Corps can use in making these determinations and does not give the Corps authority or discretion to consider the effects on the environment when making the determination, or to formulate and weigh decision alternatives based upon their comparative environmental effects. Because the Corps does not have authority or discretion to take environmental factors into account when making these determinations, the Corps is not required to prepare a NEPA document (42 U.S.C. 4336(a)(4)) and 4336e(10)(vii)) when conducting these actions.

Preliminary jurisdictional determination. A preliminary jurisdictional determination is a written indication that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel (33 CFR 331.2). A preliminary jurisdictional determination identifies the limits of all aquatic resources on a parcel without determining the jurisdictional status of such aquatic resources (Regulatory Guidance Letter 16-

01, Subject: Jurisdictional Determinations (October 2016)). A preliminary jurisdictional determination is a purely technical evaluation of what constitutes an aquatic resource. There is no discretion to consider the environmental effects of decisions about what constitutes an aquatic resource.

Approved jurisdictional determination. An approved jurisdictional determination is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel (33 CFR 331.2). What constitutes waters of the United States is defined in regulation (33 CFR 328.3(a)) and that regulation does not allow for any discretion to consider the environmental effects of the determination. The regulations require a strict application of the technical standard to the facts on the ground.

Determination of whether an activity requires a permit. The determination whether an activity requires a Corps permit or permission requires applying jurisdictional standards including whether an activity constitutes a discharge of dredged material or fill material (33 CFR 323.3), is exempted by subsection 404(f) of the Clean Water Act, is a structure or work in or affecting navigable waters of the United States (33 CFR 322.3), involves the transportation of dredged material for the purpose of dumping it in ocean waters (33 CFR 324.3), or constitutes an alteration of a Civil Works project (Engineer Circular 1165-2-220, paragraph 9). Each of these determinations is an evaluation of a jurisdictional standard rooted in law against the facts of a specific circumstance. The standards do not provide for the consideration of environmental effects. That consideration of environmental effects occurs only after it's determined that the activity is jurisdictional and the Corps is determining whether to authorize the work. When a

determination has been made that the activity is not jurisdictional, the Corps can issue a letter documenting that determination and that no permit is required.

Aquatic resource delineation. During the Corps' coordination with potential permit applicants the Corps is sometimes asked to review aquatic resource delineations prepared by landowners or their consultations. Aquatic resource delineation reports identify and map the extent of aquatic resources (such as rivers, streams, and wetlands) within a specified review area using scientific methods. This is similar to what is documented in a preliminary jurisdictional determination but in a different, less formal, format. Just like a preliminary jurisdictional determination, this is a purely technical evaluation of what constitutes an aquatic resource. There is no discretion to consider the environmental effects of decisions about what constitutes an aquatic resource. Any feedback provided by the Corps, including concurrence or non-concurrence with the report, is not subject to NEPA.

Modification of unimproved real estate. The Section 408 statute provides that "the term 'work' shall not include unimproved real estate owned or operated by the Secretary as part of a water resources development project if the Secretary determines that modification of such real estate would not affect the function and usefulness of the project" (33 U.S.C. 408(e)). If an activity is determined to not constitute "work," then it is not subject to review and approval under the Section 408 authority. It is a jurisdictional standard to determine whether Section 408 applies to an activity. The law provides that determining whether an activity is "work" is determined solely on the basis of whether the activity occurs on unimproved real estate owned or operated by the Secretary as part of a water resources development project and whether the activity would affect the function and usefulness of the project. The law does not give the Corps discretion to consider the environmental effects of the activity when determining whether it constitutes "work."

Section 333.12 Determining the Appropriate Level of NEPA Review

This section describes the process for determining the appropriate level of NEPA review if NEPA applies. The District Engineer will consider whether a particular proposed activity is excluded pursuant to a categorical exclusion, and, if not, whether to prepare an environmental assessment or an environmental impact statement based on the proposed activity's potential effects. The section also details the analysis of the affected environment and the degree of effects to determine significance.

Section 333.13 NEPA and Agency Decision-Making

This section explains how the District Engineer incorporates public input and existing environmental analyses into the NEPA process. It also outlines limitations on actions during the NEPA process and coordination with applicants to ensure compliance and information gathering.

Section 333.14 Categorical Exclusions

This section outlines the process used by the Corps to establish, revise, and apply categorical exclusions, including adopting exclusions from other agencies. To establish or revise a categorical exclusion, the Chief of Engineers must determine that the actions do not significantly affect the human environment, and this process involves consultation with the CEQ and public notice. The Corps can rely on a determination from other Federal agencies that a proposed action is excluded pursuant to a categorical exclusion if the proposed action before the Corps and the proposed action before the other agency or agencies are substantially the same, and this reliance must be documented. The section also details the removal process of categorical exclusions, which requires justification, consultation, and public notice. This section recodifies the existing categorical exclusions from Appendix B and includes a reference to the list of categorical exclusions that the Corps relies on when evaluating requests for permissions. Finally, it describes

how the District Engineer evaluates proposed actions for extraordinary circumstances and documents the applicability of categorical exclusions to exclude a particular proposed activity from the obligation to prepare an environmental document.

Section 333.15 Environmental Assessments

This section outlines the procedures for preparing environmental assessments under NEPA, specifying that if an activity is not excluded pursuant to a categorical exclusion from the requirement to prepare an EA or EIS, the District Engineer must prepare an assessment unless an environmental impact statement is clearly required. The assessment should discuss the purpose, need, and alternatives for the proposed activity, and conclude with a finding of no significant impact or a determination that an environmental impact statement is necessary. Environmental assessments are typically required for activities not excluded pursuant to categorical exclusions or involving extraordinary circumstances where the District Engineer does not determine and document that, notwithstanding the presence of extraordinary circumstances, it is appropriate to exclude the proposed activity pursuant to a categorical exclusion, and they must adhere to specific page limits and formatting guidelines. The District Engineer is responsible for certifying that the assessment meets NEPA's requirements. This section also provides deadlines for preparing environmental assessments. These deadlines derive from Congress's establishment of deadlines in the 2023 revision of NEPA, which supplied the measure of the "rule of reason" which the Supreme Court has repeatedly held must govern NEPA analysis.

Section 333.16 Findings of No Significant Impact

This section details the preparation of a finding of no significant impact when an environmental assessment indicates no significant effects. It includes documentation requirements and the conclusion of the NEPA process if no environmental impact statement is needed.

Section 333.17 Lead and Cooperating Agencies

This section discusses the roles of the Corps as a lead or cooperating agency in the NEPA process. It outlines responsibilities for managing the NEPA process and providing environmental information, as well as coordination with other agencies.

Section 333.18 Notices of Intent and Scoping

This section describes the publication of a notice of intent for an environmental impact statement and the scoping process to determine the scope of issues for analysis. It emphasizes the District Engineer's responsibility to define the scope based on legal authority and control over the proposed activity. This section details what factors District Engineers will use to determine the proper scope for NEPA documents. The rescinded Appendix B contained a provision addressing "scope of analysis" and that provision has been recodified in this section. The "scope of analysis" provision in the revised Corps Regulatory Program NEPA regulations is essentially identical with the provision that has existed in the Corps' NEPA regulations since 1988. The Corps does not have legal authority to regulate activities outside jurisdictional water bodies. The limited extent of the Corps' authority is an essential consideration in determining what scope of analysis to use. Therefore, the Corps is adding the expression "legal authority" to the list of considerations that Corps officials must consider as they determine the appropriate NEPA scope of analysis to use for any particular permit application. The section also includes language to reflect that it applies to requests for permission under 33 U.S.C. 408.

Subpart C—Environmental Impact Statements

Section 333.20 Significance Determination

This section outlines the process for determining if an environmental impact statement is required based on the likelihood of significant effects. It emphasizes the timing of this determination and the notification process to the applicant.

Section 333.21 Preparation of Environmental Impact Statements

This section details the process of preparing an environmental impact statement, including obtaining comments from relevant agencies. It ensures that the process does not violate deadlines and addresses significant comments received.

Section 333.22 Purpose and Need

This section explains the requirement to state the purpose and need for the proposed agency action, informed by the applicant's goals and the Corps' statutory authority.

Section 333.23 Analysis Within the Environmental Impact Statement

This section specifies that the environmental impact statement must include a detailed analysis of the reasonably foreseeable environmental effects, reasonably foreseeable unavoidable adverse effects, and a reasonable range of alternatives to the proposed agency action. It also addresses the relationship between short-term uses and long-term productivity, any irreversible commitments of resources, and potential mitigation measures, while emphasizing the need for concise and significant-focused discussions.

Section 333.24 Page Limits

This section sets page limits for environmental impact statements, including the availability of an extended page limit for complex actions, and outlines formatting requirements.

Section 333.25 Deadlines

This section provides deadlines for preparing environmental impact statements. These deadlines derive from Congress's establishment of deadlines in the 2023 revision of NEPA, which supplied

the measure of the "rule of reason" which the Supreme Court has repeatedly held must govern NEPA analysis.

Section 333.26 Publication of the Environmental Documents

This section requires the publication of the environmental impact statement on a public website. This section also allows District Engineers to publish predecisional drafts where appropriate to assist in fulfilling NEPA responsibilities, but publication of a draft is not required.

Section 333.27 Public Hearing

This section provides guidelines for holding any public hearings related to environmental impact statements and coordinating with other agencies when necessary.

Section 333.28 Comments Received on the Environmental Impact Statement

This section requires the District Engineer to consider and respond to any substantive comments on any published predecisional draft of environmental impact statements, forwarding them to higher authorities if needed.

Section 333.29 Review of Other Agencies' Environmental Impact Statements.

This section addresses the Corps' review of another agencies' environmental impact statements.

Subpart D—Efficient Environmental Reviews

Section 333.31 Tiered Environmental Documents

This section allows for tiered environmental documents for multi-phased reviews under 33 U.S.C. 408. Multi-phased reviews are used to analyze complex proposed alterations through successive levels of review through an iterative process established for the particular activity. The goal of the process is to identify larger-scale issues, such as with project siting or basic design, early in the project development process before investments are made in more detailed levels of design. In this multi-phased process, the Corps evaluates each successive level of

design to determine if there are issues with the design that would prevent authorization of the alteration. If no impediments are identified at a given phase, the proponent is allowed to move to the next milestone and level of development. (Approval of earlier phases does not guarantee approval of a subsequent alteration or further level of development.) A key consideration of the evaluation of each phase is the likely impacts on the environment given the level of planning and detail, and tiered levels of NEPA would be conducted for each phase of the multi-phase review. Just as the level of design increases with each successive phase of the multi-phase review, the level of detail in the environmental analysis would increase and build off earlier tiers. This multi-phase review, and the inclusion of environmental consideration at each phase, allows the parties to identify and avoid unnecessary impacts on the environment and better build-in environmental considerations into the development path of the project while acknowledging financing, scheduling, and informational constraints along the way.

Section 333.32 Reliance on Existing Environmental Documents

This section permits the District Engineer to rely on existing environmental documents if they meet NEPA standards, with modifications as necessary. This section replaces the concept of adopting other NEPA documents by using the term “reliance,” to avoid confusion with Congress’s use in the 2023 NEPA amendments of the term “adoption” in new Section 109 in the special context of an agency adopting a categorical exclusion established by another agency.

Section 333.33 Incorporation

This section allows for the incorporation of relevant materials into environmental documents by reference to reduce bulk while ensuring accessibility for review. The District Engineer will not use incorporation as a means to evade the statutory page limits.

Section 333.34 Supplemental Environmental Documents

This section provides the process for the preparation of supplemental environmental documents if significant changes to the proposed action occur or if new relevant information arises. It specifies that supplements are necessary only if a major Federal action is still pending.

Section 333.35 Integrity and Completeness of Information

This section states that the District Engineer will rely on existing data for analyses unless new research is essential and cost-effective. It also requires the disclosure of any incomplete or unavailable information in environmental documents.

Section 333.36 Integrating NEPA with other Environmental Requirements

This section emphasizes the integration of NEPA documents with other federal environmental requirements to minimize duplication. It allows for the combination of NEPA documents with other agency documents and includes a section for listing necessary consultations and permits.

Section 333.37 Elimination of Duplication with State, Tribal, and Local Procedures

This section encourages cooperation with State, Tribal, and local agencies to reduce duplication in environmental documentation. It outlines potential collaborative efforts, such as joint planning and public hearings, to streamline processes.

Section 333.38 Unique Identification Numbers

This section requires the assignment of unique identification numbers to all environmental documents for tracking purposes. It ensures coordination with the CEQ and other Federal agencies for uniformity in identification numbers.

Section 333.39 Emergency Procedures

This section outlines procedures for proposed agency actions related to emergency response without observance of full NEPA documentation as otherwise applicable under the provisions of these NEPA implementing procedures, considering environmental consequences and consulting

with CEQ for actions with likely significant impacts. This does not provide an exception from compliance with the NEPA statute, but rather an alternative means of complying with the statute in emergency situations.

Subpart E—Agency Decision Making

Section 333.41 Decision Documents

This section describes the preparation and publication of decision documents at the conclusion of the NEPA process, certifying that all relevant information has been considered. It clarifies that the record of decision is separate from the final EIS and informs the final agency action but is not the final action itself.

Section 333.42 Filing Requirements

This section outlines the responsibility of the District Engineer to file environmental impact statements, along with comments and responses, with the U.S. Environmental Protection Agency (EPA) for publication in the Federal Register.

Subpart F—Procedures for Applicant-Prepared NEPA Documents

Section 333.51 Procedures for Applicant-Prepared Environmental Documents

This section describes the procedures for the preparation of environmental documents by applicants or contractors under the supervision of the District Engineer, in accordance with NEPA section 107(f). The District Engineer is responsible for independently evaluating the environmental document and providing guidance to applicants and contractors. The section also details the collaboration between the District Engineer and the applicant in defining the purpose and need, developing alternatives, and scheduling the preparation of the draft environmental document. Additionally, the District Engineer may request environmental information from the

applicant and require resubmission with adequate or accurate data, documenting the Corps' independent evaluation.

Subpart G—Definitions

Section 333.61 Definitions

This section provides definitions of terms used in this part.

Subpart H—Severability

Section 333.71 Severability

The section address severability should a court invalidate a section of this part.

II. Publication as an Interim Final Rule

A. Notice-and-Comment Rulemaking Is Not Required

The Army is repealing, revising, and replacing its procedures and practices for implementing NEPA, a "purely procedural statute" which "'simply prescribes the necessary process' for an agency's environmental review of a project"—a review that is, even in its most rigorous form, "only one input into an agency's decision and does not itself require any particular substantive outcome." *Seven County*, 145 S. Ct. at 1511. "NEPA imposes no *substantive* constraints on the agency's ultimate decision to build, fund, or approve a proposed project," and "is relevant only to the question of whether an agency's final decision"–i.e., that decision to authorize, fund, or otherwise carry out a particular proposed project or activity—"was reasonably explained." *Id*. As such, notice and comment procedures are not required because this revision falls within the Administrative Procedure Act (APA) exception for "rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). Procedures for implementing a purely procedural statute must be, by their nature, procedural rules. Surely they cannot be legislative rules; as such, they do not

need to be promulgated via notice-and-comment rulemaking. *See* 5 U.S.C. 553(b)(A). And even if that were not universally true, the new rules adopted in this notice *are* purely procedural.

Thus, unsurprisingly, both the prior portions of part 325 and the new part 333 do not dictate what outcomes the Corps' consideration of information analyzed under NEPA must produce, nor do they impose binding legal obligations on private citizens. Rather, the Army's NEPA-implementing regulations for the Corps Regulatory Program and the section 408 permission program, including Appendix B and, now, part 333, are procedural, outlining how District Engineers or Division Engineers conduct NEPA reviews. These regulations describe the structure of environmental documents, specify procedures, and guide District Engineer decision-making, rather than establishing substantive requirements binding the public. These are procedural provisions, not substantive environmental ones. As such, they do not require notice and comment for removal or replacement. *See* 5 U.S.C. 553(b)(A).

Moreover, even if (and to the extent that) the regulations were not procedural rules, they may be characterized as interpretative rules or general statements of policy, neither of which necessitates notice and comment under 5 U.S.C. 553(b)(A). They offer the Corps' interpretations of NEPA, a procedural statute itself, and guidance on agency practice, without creating enforceable rights or obligations for the regulated public. General statements of policy provide notice of an agency's intentions as to how it will enforce statutory requirements, again without creating enforceable rights or obligations for regulated parties under delegated congressional authority. The former Appendix B contains many paragraph-length explanations of the Corps' interpretations of NEPA and/or policies that the Corps considers in applying it. Similarly, the definitions and policy sections of the new Part 333 are clearly interpretive and policy statements,

respectively. All such material is expressly exempted from notice and comment by statute, 5 U.S.C. 553(b)(A), and does not require notice and comment for removal or replacement.

Accordingly, although the Army is voluntarily providing notice and an opportunity to comment on this interim final rule, the agency has determined that notice-and-comment procedures are not required. The fact that the Corps previously undertook notice-and-comment rulemaking in promulgating these regulations is immaterial: As the Supreme Court has held, where notice-and-comment procedures are not required, prior use of them in promulgating a rule does not bind the agency to use such procedures in repealing it. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

B. The Corps Has Good Cause for Proceeding with an Interim Final Rule.

Moreover, the Army also finds that, to the extent that prior notice and solicitation of public comment would otherwise be required or this action could not immediately take effect, the need to expeditiously replace its existing rules satisfies the "good cause" exceptions in 5 U.S.C. 553(b)(B) and (d). The APA authorizes agencies to issue regulations without notice and public comment when an agency finds, for good cause, that notice and comment is "impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. 553(b)(B), and to make the rule effective immediately for good cause. 5 U.S.C. 553(d)(3). As discussed in Section I, above, the Corps' prior rules were promulgated to supplement the Council on Environmental Quality's (CEQ's) NEPA regulations. Following the rescission of CEQ's regulations, the Corps' current rules are left hanging in air, supplementing a NEPA regime that no longer exists. The Corps, thus far and as a temporary, emergency measure, has been continuing to operate under its prior procedures *as if* the CEQ NEPA regime still existed. This is not, however, tenable. As soon as proper procedures are available—which they now are, in the form of Part 333—this makeshift regime needs to be

rescinded immediately. The section 408 permission program will also now follow a set of up-to-date NEPA implementing procedures and not 33 CFR part 230. The status of 33 CFR part 230 will be addressed in a separate action, but the section 408 program will follow 33 CFR part 333. Because of this need for speed and certainty in replacing a defunct NEPA regime, notice-and-comment is, to the extent it was required at all, impracticable and contrary to the public interest.

For the same reasons stated in the present section, above, the Army finds that "good cause" exists under 5 U.S.C.§ 553(d)(3) to waive the 30-day delay of the effective date that would otherwise be required.

III. Request for Comments

As explained above, comment is not required because the Corps' NEPA procedures were procedural and because, even if comment were required under the APA, good cause exists to forego it. Nevertheless, the Corps has elected voluntarily to solicit comment. The Army is soliciting comment on this interim final rule, and may make further revisions to its NEPA implementing procedures, if the Army's review of any comments submitted suggests that further revisions are warranted. Commenters have 30 days from publication of this interim final rule to submit comments.

IV. Effective Date

This rule becomes effective on the date of publication in the Federal Register and applies to permit applications or requests for permission submitted on or after the effective date. Permit applications or requests for permission submitted before the effective date of this rule will continue to use the rule in place at the time the application or request was submitted. In situations where the Corps has not published a notice of intent to prepare an environmental impact statement or a public notice under 33 CFR 325.3 for applications or requests ongoing before the

effective date of these regulations, the District Engineer may elect to follow these procedures with the agreement of the applicant.

V. Executive Orders 12866 and 13563

This interim final rule is a significant regulatory action and, therefore, was reviewed under E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 14192

This interim final rule is not subject to E.O. 14192, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the "good cause" exemption in 5 U.S.C. 553(b), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. In any event, this interim final rule is not subject to that Act because it will not have a significant impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required, and none has been prepared. *See* 5 USC 603(a), 604(a).

VIII. Paperwork Reduction Act

The interim final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects

33 CFR Part 320

Administrative practice and procedure, Dams, Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 325

Administrative practice and procedure, Dams, Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 333

Administrative practice and procedure, Dams, Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

For the reasons stated in the preamble, the Corps amends 33 CFR chapter II as set forth below:

PART 320 – GENERAL REGULATORY POLICIES

1. The authority citation for part 320 is revised to read as follows:

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.: 33 U.S.C. 1344; 33 U.S.C. 1413.

2. Amend § 320.3 by revising paragraph (d)(2) to read as follows:

§ 320.3 Related laws.

* * * * *

(d)* * *

(2) All agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations * * *". (See 33 CFR part 333.)

* * * * *

PART 325–PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

3. The authority citation for part 325 is revised to read as follows:

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.: 33 U.S.C. 1344; 33 U.S.C. 1413.

4. Amend § 325.1 by revising paragraph (b) to read as follows:

§ 325.1 Applications for permits.

* * * * *

(b) Pre-application consultation for major applications. The district staff element having responsibility for administering, processing, and enforcing federal laws and regulations relating to the Corps of Engineers regulatory program shall be available to advise potential applicants of studies or other information foreseeably required for later federal action. The district engineer will establish local procedures and policies including appropriate publicity programs which will allow potential applicants to contact the district engineer or the regulatory staff element to request pre-application consultation. Upon receipt of such request, the district engineer will assure the conduct of an orderly process which may involve other staff elements and affected agencies (Federal, state, or local) and the public. This early process should be brief but thorough so that the potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application. The district engineer will endeavor, at this stage, to provide the potential applicant with all helpful information necessary in pursuing the application, including factors which the Corps must consider in its permit decision making process. Whenever the district engineer becomes aware of planning for work which may require a DA permit and which may involve the preparation of an environmental document, they shall contact the principals involved to advise them of the requirement for the permit(s) and the attendant public interest review including the development of an environmental document. Whenever a potential applicant indicates the intent to submit an application for work which may require the preparation of an environmental document, a single point of contact shall be designated within the district's regulatory staff to effectively coordinate the regulatory process, including the

National Environmental Policy Act (NEPA) procedures and all attendant reviews, meetings, hearings, and other actions, including the scoping process if appropriate, leading to a decision by the district engineer. Effort devoted to this process should be commensurate with the likelihood of a permit application actually being submitted to the Corps. The regulatory staff coordinator shall maintain an open relationship with each potential applicant or their consultants so as to assure that the potential applicant is fully aware of the substance (both quantitative and qualitative) of the data required by the district engineer for use in preparing an environmental assessment (EA) or an environmental impact statement (EIS) in accordance with 33 CFR part 333.

* * * * *

5. Amend § 325.2 by revising paragraph (a) to read as follows:

§ 325.2 Processing of applications.

* * * * *

(a) * * *

(4) The district engineer will follow 33 CFR part 333 for environmental procedures and documentation required by the National Environmental Policy Act of 1969, as amended. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.

* * * * *

6. Amend § 325.3 by revising paragraph (a)(9) to read as follows:

§ 325.3 Public notice.

* * * * *

(a) * * *

(9) If appropriate, a statement that the activity is included within a categorical exclusion for purposes of NEPA;

* * * * *

7. Remove and reserve Appendix B to Part 325.

Appendix B to Part 325–[Removed and Reserved]

Accordingly, by the authority of 5 U.S.C. 301, Appendix B to Part 325 is removed.

8. Amend Appendix C to Part 325 by revising paragraph 2.b. to read as follows:

Appendix C to Part 325—Procedures for the Protection of Historic Properties

* * * * *

2. * * *

b. In addition to the requirements of the NHPA, all historic properties may be subject to consideration under the National Environmental Policy Act, (33 CFR part 333), and the Corps' public interest review requirements contained in 33 CFR 320.4. Therefore, historic properties may be included as a factor in the district engineer's decision on a permit application.

* * * * *

9. Add 33 CFR part 333 to read as follows:

PART 333–PROCESSING OF DEPARTMENT OF THE ARMY PERMITS AND 33 U.S.C. 408 PERMISSIONS, NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES

Sec.

Subpart A—Purpose and Policy

333.1 Purpose and policy.

333.2 Applicability.

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

Subpart A—Purpose and Policy

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.1 Purpose and policy.

(a) The purpose of these procedures is to integrate the National Environmental Policy Act (NEPA) into the U.S. Army Corps of Engineers' (Corps) decision-making processes for evaluating applications from other, non-Corps entities for authorization by the Corps.

Specifically, the procedures: describe the process by which a District or Division Engineer determines what actions are subject to NEPA's procedural requirements and the applicable level of NEPA review; ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making; enable District Engineers to conduct coordinated, consistent, predictable and timely environmental reviews; reduce unnecessary burdens and delays; and implement NEPA's mandates regarding lead and cooperating agency roles, page and time limits, and sponsor preparation of environmental documents.

(b) This part sets forth the Corps procedures and practices for implementing NEPA when considering Department of the Army permit applications under 33 U.S.C. 1344 (Clean Water Act, section 404); 33 U.S.C. 401 (Rivers and Harbors Act of 1899, section 9); 33 U.S.C. 403 (Rivers and Harbors Act of 1899, section 10); and 33 U.S.C. 1413 (Marine Protection, Research, and Sanctuaries Act of 1972, section 103) and requests for permission under 33 U.S.C. 408 (Rivers and Harbors Act of 1899, section 14). The Regulatory Program of the Corps implements 33 U.S.C. 1344, 33 U.S.C. 401, and 33 U.S.C. 1413 and references to the Regulatory Program in this part refer to the processing of permit applications under those authorities. As used in this part, "permit" means an authorization under any of the authorities in this paragraph, and "application" means any request for authorization under any of the above identified authorities. This part further explains the Corps' interpretation of certain key terms in NEPA. It does not, nor does it intend to, govern the rights and obligations of any party outside the government. It does, however, establish the procedures under which Corps District Engineers will typically fulfill requirements under NEPA for decisions under the authorities in this paragraph. The responsibilities of the District Engineer, as described in this part, may be elevated to a higher

authority consistent with existing delegations and authorities and in such cases the role of the District Engineer described in the part will be assumed by the entity with decision making authority.

(c) Consultation with the Council on Environmental Quality ("CEQ"). In addition to the process for establishing or revising categorical exclusions set forth in § 333.14(b) and (d), the Corps will consult with CEQ while developing or revising their proposed NEPA implementing procedures, in accord with NEPA section 102(2)(B), 42 U.S.C. 4332(B).

§ 333.2 Applicability.

(a) *Applicability.* This Part applies to all Corps elements processing applications for Department of the Army Permits or requests for permission under the authorities listed in 33 CFR 333.1(b).

(b) *Authority.* NEPA imposes certain procedural requirements on the exercise of the Corps' existing legal authority in relevant circumstances. Nothing contained in these procedures is intended or should be construed to limit the Corps' other authorities or legal responsibilities.

Subpart B—NEPA and General Concepts

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.11 Determining when NEPA applies.

District Engineers will determine that NEPA does not apply to a proposed agency permitting action when:

(a) The activities or decision do not result in final agency action under the Administrative Procedure Act, 5 U.S.C. 704, or any other relevant statute that includes a finality requirement;

(b) The proposed activity or decision is exempted from NEPA by law;

(c) Compliance with NEPA would clearly and fundamentally conflict with the requirements of another provision of law;

(d) In circumstances where Congress by statute has prescribed decisional criteria with sufficient completeness and precision such that the Corps retains no residual discretion to alter its action based on the consideration of environmental factors, then that function of the Corps is nondiscretionary within the meaning of NEPA section 106(a)(4) and/or section 111(10)(B)(vii) (42 U.S.C. 4336(a)(4) and 4336e(10)(B)(vii), respectively), and NEPA does not apply to the action in question;

(e) The proposed action is an action for which another statute's requirements serve the function of agency compliance with the Act; or

(f) The proposed action is not a "major Federal action," which is defined at 42 U.S.C. 4336e(10). Additionally, the terms "major" and "Federal action" each have independent force. NEPA applies only when both of these two criteria are met. Such a determination is specific to the facts and circumstances of each individual situation and is reserved to the judgment of the District Engineer in each instance. In addition to the illustrative general categories in NEPA section 111(10), 42 U.S.C. 4336e(10), the Corps has determined that the following non-exhaustive list of Corps activities related to the Regulatory Program and 33 U.S.C. 408 are presumptively not subject to NEPA as not meeting the definition of a major Federal action:

(1) Preliminary Jurisdictional Determinations;

(2) Approved Jurisdictional Determinations;

(3) Determination of whether an activity requires a Corps permit or permission;

(4) Aquatic resource delineation concurrence or non-concurrence determinations; or

(5) Determination that the modification of unimproved real estate of a project would not affect the function and usefulness of the project.

(g) NEPA does not apply to "non-Federal actions."

Therefore, under the terms of the statute, NEPA does not apply to actions with no or minimal Federal funding, or with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project. NEPA §111(10)(B)(i), 42 U.S.C. §4336e(10)(B)(i). A but-for causal relationship is insufficient to make the Corps responsible for a particular action under NEPA.

(h) The issuance or update of the Corps' NEPA procedures is not subject to NEPA review.

(i) In determining whether NEPA applies to a proposed action, the Corps will consider only the project at hand.

§ 333.12 Determine the appropriate level of NEPA review.

(a) If the District Engineer determines under § 333.11 that NEPA applies to a proposed activity or decision, the District Engineer will then determine the appropriate level of NEPA review in the following sequence and manner. At all steps in the following process, the Corps will consider the proposed activity and *its* effects.

(1) If the Corps has established, or adopted pursuant to NEPA section 109, 42 U.S.C. 4336c, a categorical exclusion that covers the proposed activity, the District Engineer will analyze whether to apply the categorical exclusion to the proposed activity and apply the categorical exclusion, if appropriate, pursuant to § 333.14(e).

(2) If another agency has already established a categorical exclusion that covers the proposed activity, the District Engineer will consider whether to recommend that the Headquarters, U.S. Army Corps of Engineers adopt that exclusion pursuant to § 333.14(c) so that it can be applied to

the proposed activity at issue, and so that Headquarters may consider applying to future activities of that type.

(3) If the proposed activity warrants the establishment of a new categorical exclusion, or the revision of an existing categorical exclusion, pursuant to § 333.14(b), the Chief of Engineers will consider whether to so establish or revise, and then apply the categorical exclusion to the proposed action pursuant to § 333.14(e).

(4) If the District Engineer cannot apply a categorical exclusion to the proposed activity consistent with paragraphs (a)(1)-(3), the District Engineer will determine the appropriate level of review, i.e., whether the proposed activity warrants preparation of an environmental assessment or an environmental impact statement. Most activities requiring a Corps permit that are not otherwise covered by a categorical exclusion normally require only an environmental assessment. In determining the level of review, the District Engineer will consider the proposed action's reasonably foreseeable effects consistent with paragraph (b), and then will:

(i) develop an environmental assessment, as described in § 333.15, if the proposed activity is not likely to have reasonably foreseeable significant effects or the significance of the effects is unknown; or

(ii) develop an environmental impact statement, as described in § 333.21, if the proposed activity is likely to have reasonably foreseeable significant effects.

(b) When considering whether the reasonably foreseeable effects of the proposed activity are significant, the District Engineer will analyze the potentially affected environment and degree of the effects of the activity within their jurisdiction or control. The District Engineer may use any reliable data source, but will not undertake new research of any type unless it is essential to evaluating alternatives and the cost and time of obtaining it are not unreasonable. District

Engineers should not determine that a proposed activity is significant based solely on public interest or opposition.

(1) In considering the potentially affected environment, the District Engineer may consider, as appropriate to the specific activity, the affected area (national, regional, or local) and its resources. The District Engineer may, as appropriate, consider the regulated activity's effect on factors such as conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

(2) In considering the degree of the effects, the District Engineer may consider the following, as appropriate to the specific action:

(i) Both short- and long-term effects.

(ii) Both beneficial and adverse effects.

(iii) Effects on public health and safety.

(iv) Economic effects.

§ 333.13 NEPA and agency decision-making.

(a) *Process.* The District Engineer will consider input received in response to the public notice, where public notice is required by the legal authority governing the proposed activity for which authorization is sought, advising interested parties of the proposed activity for which authorization is sought when determining the environmental effects that should be considered in the NEPA analysis. District Engineers will promote efficiency through the adoption or incorporation of existing applicable EAs and EISs and other relevant environmental analysis to

the extent practicable. Information developed through the NEPA process will inform the District Engineer's decision on the permit application or request for permission.

(b) *Limitations on actions during the NEPA process*. Except as provided in paragraph (c) of this section, until the Corps issues a record of decision or a finding of no significant impact, or makes a categorical exclusion determination, as applicable, the permit applicant should take no action concerning their application that would:

(1) have an adverse environmental effect within an area under the jurisdiction of the Corps; or

(2) limit the choice of reasonable alternatives.

(c) If the Corps is considering an application from a non-Federal entity and becomes aware that the applicant is about to take an action within the Corps' jurisdiction that would meet either of the criteria in § 333.13(b), the Corps will promptly notify the applicant that the Corps will take appropriate action to ensure that the objectives and procedures of NEPA are achieved.

(d) *Coordination with the Applicant.*

(1) The District Engineer will:

(i) coordinate at the earliest reasonable time in the application review process to inform the applicant what information the District Engineer might need to comply with NEPA and, if the lead agency, establish a schedule for completing steps in the NEPA review process, consistent with NEPA's statutory deadlines and any internal agency NEPA schedule requirements; and

(ii) begin the NEPA process by determining whether NEPA applies, as described in § 333.11, and if it does, determine the appropriate level of NEPA review, as described in § 333.12, as soon as practicable after receiving the complete application

(2) The District Engineer may require the applicant to furnish appropriate information that the District Engineer considers necessary for the preparation of an EA or EIS. An applicant or a

contractor hired by the applicant may prepare an environmental assessment or environmental impact statement under the District Engineer's supervision. The Corps procedures for applicant-prepared environmental assessments and environmental impact statement are included in § 333.51 of this part.

§ 333.14 Categorical exclusions.

(a) *Generally.* This section describes the process the Corps uses for establishing and revising categorical exclusions, for adopting other agencies' categorical exclusions, and for applying categorical exclusions to a proposed agency action. The Corps categorical exclusions, including Corps categorical exclusions specifically applicable to evaluating applications from other entities for authorization by the Corps established consistent with its NEPA procedures, any legislative categorical exclusions, and categorical exclusions adopted from other agencies, are listed in paragraph (g) in this section.

(b) *Establishing and revising categorical exclusions.* To establish or revise a categorical exclusion, the Chief of Engineers will determine that the category of actions normally does not significantly affect the quality of the human environment. In making this determination, the Headquarters, U.S. Army Corps of Engineers will:

(1) Develop a written record containing information to substantiate its determination;

(2) Consult with CEQ on its proposed categorical exclusion, including the written record, for a period not to exceed 30 days prior to providing public notice as described in paragraph (b)(3) of this section;

(3) Provide public notice in the Federal Register of the Corps' establishment or revisions of the categorical exclusion and where the record is available; and

(4) Document the establishment or revision of the categorical exclusion in the Corps' implementing procedures at § 333.14(g).

(c) *Adopting categorical exclusions from other Federal agencies.*

(1) Consistent with NEPA section 109, 42 U.S.C. 4336c, the Corps may adopt a categorical exclusion listed in another agency's NEPA procedures. When adopting a categorical exclusion, the Headquarters, U.S. Army Corps of Engineers, in coordination with any recommending Districts, will:

(i) Identify the categorical exclusion listed in another agency's NEPA procedures that covers its category of proposed or related actions;

(ii) Consult with the agency that established the categorical exclusion to ensure that the proposed adoption of the categorical exclusion is appropriate;

(iii) Provide public notification of the categorical exclusion that the Corps is adopting, including a brief description of the proposed action or category of proposed actions to which the Corps intends to apply the adopted categorical exclusion; and

(iv) Document the adoption of the categorical exclusion in the Corps' implementing procedures at § 333.14(g).

(2) The Corps may rely on another agency's determination that a categorical exclusion applies to a specific proposed activity if the specific activity covered by the original categorical exclusion determination and the Corps' proposed regulatory activity are substantially the same. For the Corps, actions occurring at essentially the same time and place are considered substantially the same when a proposed action would result in a categorical exclusion determination by one agency and an environmental assessment and a finding of no significant impact by another agency. For example, this would be the case when another agency's action may be a funding

decision for a proposed project covered by a categorical exclusion established by the funding agency, and the Corps' proposed regulatory action is to consider a permit for construction activities with less than significant adverse environmental effects for that same project. When relying on another agency's determination that a categorical exclusion applies to a specific proposed Corps regulatory activity, the District Engineer will document the reliance on the agency's categorical exclusion determination in the administrative record for the proposal under Corps review.

(d) *Removal of categorical exclusions.* The Assistant Secretary of the Army for Civil Works must approve the removal of a categorical exclusion from § 333.14(g) and, in coordination with the Corps, will:

(1) Develop a written justification for the removal;

(2) Consult with CEQ on its proposed removal of the categorical exclusion, including a description of the rationale for the removal, for a period not to exceed 30 days prior to providing public notice as described in paragraph (d)(3) of this section;

(3) Provide public notice of the Corps' removal of the categorical exclusion and a summary of the justification in the Federal Register; and

(4) Document the removal of the categorical exclusion in the Corps' implementing procedures at § 333.14(g).

(e) *Applying categorical exclusions.*

(1) If the District Engineer determines that a categorical exclusion covers a proposed agency action, they should evaluate the presence of extraordinary circumstances where normally excluded actions could have reasonably foreseeable significant environmental effects. If an

extraordinary circumstance is not present, the District Engineer will determine that the categorical exclusion applies to the proposed agency action and conclude review.

(2) If an extraordinary circumstance is present, the District Engineer will determine that the categorical exclusion applies to the proposed agency action and conclude review if the permit applicant modifies the proposed agency action to avoid those effects or if the District Engineer determines that, notwithstanding the extraordinary circumstance, the proposed action is not likely to result in reasonably foreseeable significant effects. If the District Engineer determines that they cannot apply the categorical exclusion to the proposed action, the District Engineer will prepare an environmental assessment or environmental impact statement, as appropriate.

(3) In cases where a single action's constituent parts are covered by multiple categorical exclusions, the District Engineer may conclude the entire action is categorically excluded when there are no extraordinary circumstances present that are likely to result in reasonably foreseeable significant effects, or there are extraordinary circumstances present, but the District Engineer determines that applying a categorical exclusion is appropriate consistent with paragraph (e)(2) of this section.

(4) Documentation of categorical exclusion determinations. The District Engineer will document its evaluation of the applicability of a categorical exclusion in the statement of findings supporting the permit or permission decision.

(5) The documentation of evaluation of the applicability of a categorical exclusion does not have a prescribed format but should briefly address consideration of any potential extraordinary circumstances and any mitigation measures that reduce the level of impact. The level of analysis should reflect the sensitivity of the resources being impacted and the scale of the activity.

(f) *Reliance on categorical exclusion determinations of other agencies.* The District Engineer may also rely on another agency's determination that a categorical exclusion applies to a particular proposed activity if the agency action covered by that determination and the proposed activity are substantially the same. The District Engineer will document its reliance on another agency's categorical exclusion determination in the statement of findings supporting the permit or permission decision.

(g) *List of categorical exclusions.* The following activities normally do not significantly affect the quality of the human environment t and are therefore categorically excluded from NEPA documentation:

(1) For permit applications for Clean Water Act, Section 404, River and Harbors Act of 1899, Section 10, and Marine Protection, Research, and Sanctuaries Act of 1972, section 103:

(i) Fixed or floating small private piers, small docks, boat hoists and boathouses.

(ii) Minor utility distribution and collection lines including irrigation;

(iii) Minor maintenance dredging using existing disposal sites;

(iv) Boat launching ramps;

(v) All applications which qualify as letters of permission (as described at 33 CFR 325.5(b)(2)).

(2) In addition to those listed for other permit applications in this section, the District Engineer can rely on the categorical exclusions at 33 CFR 230.9 for requests for permission under 33 U.S.C. 408.

§ 333.15 Environmental assessments.

(a) *Generally.* If an activity is subject to NEPA, as determined following the procedures in § 333.11, and unless the District Engineer finds that the proposed activity is excluded from having to prepare an environmental assessment or environmental impact statement pursuant to a

categorical exclusion as determined following the procedures in § 333.14, or by another provision of law, the District Engineer will prepare an environmental assessment with respect to the proposed activity that does not have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of such effect is unknown. District Engineers must follow Congress' direction that environmental assessments are to be "concise." NEPA section 106(b)(2); 42 U.S.C. 4336(b)(2). The environmental assessment should normally be combined with any other required documents including Clean Water Act, section 404(b)(1) guidelines documentation, any applicable public interest review, any statement of findings, a finding of no significant impact or a determination that an environmental impact statement is required. Environmental assessment as used throughout this part normally refers to this combined document. When the environmental assessment is a separate document, it must be completed prior to completion of the statement of finding. The District Engineer may delegate the signing of the NEPA document. Should the environmental assessment demonstrate that an environmental impact statement is necessary, the District Engineer shall follow the procedures outlined in subpart C of this part. In those cases where an environmental impact statement is required, an environmental assessment is not required. However, the District Engineer must document their reasons for requiring an environmental impact statement.

(b) *Elements.* For the purpose of providing evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact, environmental assessments will:

(1) Briefly discuss the:

(i) Purpose and need for the proposed activity based on the Corps' statutory authority. The purpose and need for the proposed activity will also be informed by the applicant's goals (See 33 CFR 333.22 for considerations in developing purpose and need);

(ii) Alternatives to the extent required by NEPA section 102(2)(H), 42 U.S.C. 4332(2)(H).

(A) If the EA confirms that the impact of the applicant's proposal is not significant and there are no unresolved conflicts concerning alternative uses of available resources, and, for activities evaluated under section 404 of the Clean Water Act, the proposed activity is a "water dependent" activity as defined in 40 CFR 230.10(a)(3), the EA need not include a discussion on alternatives.

(B) In all other cases where the district engineer determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications, or deny the permit. Modifications are limited to those project modifications within the scope of established permit conditioning policy (see 33 CFR 325.4) or within the scope of authority under Section 408. The decision option to deny the permit results in the "no action" alternative (i.e. no activity requiring a Corps permit).

(iii) The reasonably foreseeable effects of the proposed activity and the alternatives considered.

(iv) The combined document shall conclude with a finding of no significant impact or a determination that an environmental impact statement is required.

(c) *Agency actions normally requiring an environmental assessment.* Most permits or permissions under the authorities identified in § 333.1(b) normally require environmental assessments, but likely do not require an environmental impact statement.

(d) *Page limits.*

(1) The text of an environmental assessment is strictly prohibited from exceeding 75 pages, not including citations or appendices.

(2) Appendices are to be used for voluminous materials, such as scientific tables, collections of data, statistical calculations, and the like, which substantiate the analysis provided in the environmental assessment. Appendices are not to be used to provide additional substantive analysis, because that would circumvent the Congressionally mandated page limits.

(3) Environmental assessments will be formatted for an 8.5”x11” page with one-inch margins using a word processor with 12-point proportionally spaced font, single spaced. Footnotes may be in 10-point font. Such size restrictions do not apply to explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information, although pages containing such material do count towards the page limit. When an item of graphical material is larger than 8.5”x11”, each such item will count as one page.

(4) Certification related to page limits. The breadth and depth of analysis in an environmental assessment will be tailored to ensure that the environmental analysis does not exceed this page limit. As part of the finalization of the environmental assessment, the District Engineer will certify (and the certification will be incorporated into the environmental assessment) that the District Engineer has considered the factors mandated by NEPA; that the environmental assessment represents the Corps’ good-faith effort to prioritize documentation of the most important considerations required by the statute within the congressionally mandated page limits; that this prioritization reflects the District Engineer’s expert judgment; and that any considerations addressed briefly or left unaddressed were, in the District Engineer’s judgment, comparatively not of a substantive nature that meaningfully informed the consideration of environmental effects and the resulting decision on how to proceed.

(e) *Deadlines.*

(1) NEPA is governed by a rule of reason. Congress supplied the measure of that reason in the 2003 revision of NEPA by setting the deadlines in NEPA 107(g), 42 U.S.C. 4336a(g). These deadlines indicate Congress's determination that an agency has presumptively spent a reasonable amount of time on analysis and the document should issue, absent very unusual circumstances. In such circumstances, an extension will be given only for such time as is *necessary* to complete the analysis. Thus, unless otherwise specified in statute, the District Engineer will complete the environmental assessment not later than the date that is one year after the date on which they determine the preparation of an environmental assessment for the proposed activity is required. The District Engineer will typically make this decision at the start of the comment period for the public notice of the permit application, request for permission, or proposed general permit.

(2) The end date is either:

(i)When the District Engineer reaches a permit decision and initially proffers the permit to the applicant or provides permission to the requestor under 33 U.S.C. 408;

(ii) When the District Engineer denies the permit or denies permission under 33 U.S.C. 408 with or without prejudice; or

(iii) When the District Engineer publishes a general permit or categorical permission; or

(iv) When the District Engineer reaches a decision on the mitigation instrument and provides the bank or in-lieu fee program sponsor with an instrument signed by the Corps.

(3) The District Engineer may publish notification of the environmental assessment (unless the deadline is extended pursuant to the provision below), within a reasonable time after the deadline elapses or the completion of the document, whichever comes first.

(4) Deadline extensions. If the District Engineer determines they are not able to meet the deadline prescribed by NEPA section 107(g)(1)(B), 42 U.S.C. 4336a(g)(1)(B), they must consult with the applicant pursuant to NEPA section 107(g)(2), 42 U.S.C. 4336a(g)(2). After such consultation, if needed, and for cause stated, the District Engineer may establish a new deadline. Cause for establishing a new deadline is only established if the environmental assessment is so incomplete, at the time at which the District Engineer determines it is not able to meet the statutory deadline, that issuance pursuant to § 333.15(e)(3) above would, in the Corps' view, result in an inadequate analysis. Such new deadline must provide only so much additional time as is necessary to complete such environmental assessment. The District Engineer will document in the administrative record for the proposed action the new deadline the reason why the environmental assessment was not able to be completed under the statutory deadline and whether the applicant consented to the new deadline.

(5) Certification related to deadline. When the environmental assessment is complete, the District Engineer will certify (and the certification will be incorporated into the environmental assessment) that the resulting environmental assessment represents the Corps' good-faith effort to fulfill NEPA's requirements within the Congressional timeline; that such effort is substantially complete; that, in the District Engineer's expert opinion, they have thoroughly considered the factors mandated by NEPA; and that, in the District Engineer's judgment, the analysis contained therein is adequate to inform and reasonably explain the District Engineer's final decision regarding the proposed Federal activity.

§ 333.16 Findings of no significant impact.

(a) The District Engineer will prepare a finding of no significant impact if the District Engineer determines, based on the environmental assessment, not to prepare an environmental impact

statement because the proposed activity will not have significant effects. The finding of no significant impact will:

(1) Be included in the environmental assessment;

(2) Document the reasons why the District Engineer has determined that the selected alternative will not have a significant effect on the quality of the human environment;

(3) If the District Engineer finds no significant effects based on mitigation, the mitigated finding of no significant impact will state any mitigation requirements enforceable by the agency or voluntary mitigation commitments that will be undertaken by the applicant to avoid significant effects;

(4) Identify any other documents related to the finding of no significant impact; and

(5) State that the District Engineer will not prepare an environmental impact statement, concluding the NEPA process for that permit application, request for permission, or mitigation instrument.

(b) The District Engineer may publish notification of the environmental assessment and finding of no significant impact on a public website.

§ 333.17 Lead and cooperating agencies.

(a) *Corps as lead agency.* In many instances, a proposed activity or decision is undertaken in the context which entails activities or decisions undertaken by other Federal agencies (e.g., where multiple Federal authorizations are required with respect to a project sponsor's overall purpose and goal). These activities and decisions may be "related actions," in that they are each the responsibility of a particular agency and they may be all related in a matter relevant to NEPA, e.g., by their relationship with one overarching project. In such instances, Congress has provided that the multiple agencies involved shall determine which of them will be the lead agency

pursuant to the criteria identified in NEPA section 107(a)(1)(A), 42 U.S.C. 4336a(a)(1)(A), or any other applicable statute. When serving as the lead agency, the Corps is responsible for managing the NEPA process, including those portions of a non-Federal applicant's proposed project which come under the jurisdiction of other Federal agencies. When serving as the lead agency, the Corps will also determine and document the scope of analysis. When a joint lead relationship is established pursuant to NEPA section 107(a)(1)(B), 42 U.S.C. 4336a(a)(1)(B), the Corps and the other joint lead agency or agencies are collectively responsible for completing the NEPA process. The Corps may reimburse, under agreement, staff support from other Federal agencies beyond the immediate jurisdiction of those agencies.

(b) *Corps as cooperating agency.* As a cooperating agency the Corps will be responsible to the lead agency for providing environmental information which is directly related to the regulatory matter involved and which is required for the preparation of the NEPA documentation. This in no way shall be construed as lessening the District Engineer's ability to request the applicant to furnish appropriate information as discussed in § 333.51 of this part. The District Engineer will identify to the lead agency the information and analysis that is required to be included in the resulting NEPA documentation so that it can be relied on by the Corps for purposes of exercising its permitting authority. When the Corps is a cooperating agency because of a regulatory responsibility, the district engineer should make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability provided the request pertains to the Corps regulatory action covered by the NEPA document, to the extent this is practicable. Beyond this, Corps staff support will generally be made available to the lead agency to the extent practicable within its own responsibility and available resources. Any assistance to a lead agency beyond this will normally be by written agreement with the lead agency providing for the Corps

expenses on a cost reimbursable basis. If the District Engineer believes a public hearing should be held and another agency is lead agency, the District Engineer should request such a hearing and provide their reasoning for the request. The District Engineer should suggest a joint hearing and offer to take an active part in the hearing and ensure coverage of the Corps concerns. When the applicant's proposed activities qualify for an existing general permit or categorical permission, the Corps' obligations under NEPA were satisfied when the Corps issued the general permit or categorical permission. On this basis, Corps contributions as a cooperating agency on an environmental impact statement or environmental assessment should be limited to assisting the lead agency with accurate information pertaining to the proposed impacts under Corps authorities.

§ 333.18 Notices of intent and scoping.

(a) *Notice of intent.* As soon as practicable after determining that a proposed activity for which Corps authorization is sought is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the District Engineer will publish a notice of intent to prepare an environmental impact statement.

(1) The notice of intent for an environmental impact statement will include a request for public comment on alternatives or effects and on relevant information, studies, or analyses with respect to the proposed agency action.

(2) In addition to a request for comment required for notices of intent for environmental impact statements, notice of intent for any environmental document may include:

(i) The purpose and need for the proposed action;

(ii) A preliminary description of the proposed action and alternatives the environmental impact statement will consider;

(iii) A brief summary of expected effects;

(iv) Anticipated permits and other authorizations (i.e., anticipated related actions);

(v) A schedule for the decision-making process;

(vi) A description of the public scoping process, including any scoping meeting(s);

(vii) Contact information for the project manager handling the permit application, who can answer questions about the proposed action and the environmental impact statement; and

(viii) Identification of any cooperating and participating agencies (i.e., agencies responsible for related actions), and any information that such agencies require in the notice to facilitate their decisions or authorizations

(b) *Scoping.* In addition to the notice of intent process described above, the District Engineer may also use other early and open processes to determine the scope of issues for analysis in an environmental document, including substantive issues that meaningfully inform the consideration of environmental effects and the resulting decision on how to proceed, eliminating from further study non-substantive issues, and determining whether connected actions should be addressed in the same environmental document. Scoping may begin as soon as practicable after the proposal for action is sufficiently developed for consideration. Scoping may include appropriate pre-application procedures, public meetings, or work conducted prior to publication of the notice of intent.

(c) *Scope of analysis.* It is the exclusive responsibility of the District Engineer to determine the appropriate scope of analysis for the applicant's proposed activity based on the Corps' legal authority over the activity and whether the Corps has sufficient control and responsibility over any aspect of the applicant's proposed activity beyond the Corps' limited statutory authorities.

When determining the scope of an environmental assessment or an environmental impact statement, the District Engineer must consider the following:

(1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States), which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the Corps' NEPA review to address the impacts of the specific activity requiring a DA permit or 33 U.S.C. 408 permission and those portions of the entire project over which the district engineer has sufficient control, responsibility, and legal authority to warrant Federal review.

(2) The District Engineer is considered to have control, responsibility, and legal authority for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action, consistent with Congress's exclusions from the definition of "major Federal action" at NEPA Section 111(10) and the Supreme Court's holding in *Seven County* that NEPA does not require an agency to analyze effects from actions beyond the action the agency itself is taking or authorizing.. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit or 33 U.S.C. 408 permission action. Typical factors to be considered in determining whether sufficient control, responsibility, and legal authority exist to turn an essentially private action occurring outside of Corps jurisdiction into a Federal action include:

(i) Whether or not the regulated activity comprises merely a link in a corridor type project (e.g., a transportation or utility transmission project).

(ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

(iii) The extent to which the entire project will be within Corps jurisdiction.

(iv) The extent of cumulative Federal control, responsibility, and legal authority.

(A) Federal control, responsibility, and legal authority will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).

(B) In determining whether sufficient cumulative Federal involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under their statutory authorities, and/or other environmental review laws and executive orders.

(C) The District Engineer should also refer to § 333.17 of this part for guidance on determining whether the Corps should be the lead or a cooperating agency in these situations.

(3) Examples:

(i) If a non-Federal oil refinery, electric generating plant, or industrial facility is proposed to be built on an upland site and the only DA permit or 33 U.S.C. 408 permission requirement relates to a connecting pipeline, supply loading terminal, or fill road, that pipeline, terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland

portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would affect the location and configuration of the regulated activity.

Similarly, if an applicant seeks a DA permit to fill waters or wetlands or 33 U.S.C. 408 permission to alter a covered project on which other construction or work is proposed, the control, responsibility, and legal authority of the Corps, as well as its overall Federal involvement, would extend to the portions of the project to be located on the permitted fill or within the boundary of the project covered by 33 U.S.C. 408. However, the NEPA review would be extended to the entire project, including portions outside waters of the United States or the project area covered by 33 U.S.C. 408, only if sufficient Federal control, responsibility, and legal authority over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc., by other Federal agencies, comprise a substantial portion of the overall project. In any case, once the scope of analysis has been defined, the NEPA analysis for that action should include the effects or impacts from the proposed action or alternatives on all Federal interests within the purview of the NEPA statute. The District Engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal, State, Tribal, and local agencies.

(ii) For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the Federal action, i.e., the specific activity requiring a DA permit or 33 U.S.C. 408 permission and any other portion of the project that is within the control, responsibility, and legal authority of the Corps of Engineers (or other Federal agencies).

For example, a 50-mile electrical transmission cable crossing a 1 ¼ mile-wide river that is a navigable water of the United States requires a DA permit. Neither the origin nor the destination

of the cable, nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control, responsibility, or legal authority of the Corps. Those matters would not be included in the Corps' scope of analysis which, in this case, would address the impacts of the specific cable crossing.

As another example, the same 50-mile electrical transmission cable crossing a Corps civil works project requires a 33 U.S.C. 408 permission. As with the previous example, neither the origin nor the destination of the cable, nor its route to and from the civil works project, except as the route applies to the location and configuration of the crossing within the civil works project, are within the control, responsibility, or legal authority of the Corps. Those matters would not be included in the Corps' scope of analysis which, in this case, would address the impacts of the specific cable crossing on the Corps civil works project.

Conversely, for those activities that require a DA permit or 33 U.S.C. 408 permission for a major portion of a transportation or utility transmission project, such that the Corps permit or 33 U.S.C. 408 permission bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries (including those covered by 33 U.S.C. 408), the scope of analysis should include those portions of the project outside the boundaries of the Corps jurisdiction. To use the same example, if 30 miles of the 50-mile transmission line would cross jurisdictional wetlands, other "waters of the United States," or Corps civil works boundaries covered by 33 U.S.C. 408, the scope of analysis should reflect impacts of the whole 50-mile transmission line.

(iii) For those activities that require a DA permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas, and disposal of

dredged material in order to function. Permits for such activities are normally considered sufficient Federal control, responsibility, and legal authority to warrant extending the scope of analysis to include the upland portions of the facility.

(4) In all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.

(5) In preparing the environmental assessment or environmental impact statement, the District Engineer will focus its analysis on whether the environmental effects of the regulated activity are significant.

(i) Similarly, the District Engineer will document in the environmental assessment or environmental impact statement where and how it drew a reasonable and manageable line relating to its consideration of any environmental effects from the regulated activity that extend outside the geographical territory of the project or might materialize later in time.

(ii) To the extent it assists in reasoned decision-making, the District Engineer may, but is not required to by NEPA, analyze environmental effects from other projects separate in time, or separate in place, or that fall outside of the Corps' regulatory authority, or that would have to be initiated by a third party. If the District Engineer determines that such analysis would assist it in reasoned decisionmaking, it will document this determination in the environmental assessment and explain where it drew a reasonable and manageable line relating to the consideration of such effects from such separate projects.

Subpart C—Environmental Impact Statements

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.20 Significance determination.

(a) *General*. Prior to initiating an environmental impact statement, the District Engineer must determine the proposed activity is likely to have reasonably foreseeable significant effects on the quality of the human environment, after consideration of any mitigation the Corps may require. As described in § 333.12(a)(5)(i) and § 333.15 of this part, this determination can be made following the completion of an environmental assessment in cases where that environmental assessment cannot conclude in a finding of no significant impact; in other situations, it can be made without first preparing an environmental assessment in instances where initial consideration as to the appropriate level of review as described indicates that the proposed activity is likely to have reasonably foreseeable significant effects. In cases where it is obvious that the proposed activity is likely to result in reasonably foreseeable significant effects and an environmental assessment terminating in a finding of no significant impact is therefore not prepared, the District Engineer must make a determination that an environmental impact statement is required due to the likely significant effects of the activity. This determination will be made in accordance with § 333.12(b) and documented. Whether an impact rises to the level of significant is a matter of the District Engineer's expert judgment.

(b) *Timing*. The determination to prepare an environmental impact statement should be made as soon as the Corps has sufficient information to consider on whether the project would result in significant effects on the human environment, after consideration of any mitigation the Corps would require. In many cases this is soon after the receipt of a complete DA permit application or request for permission, although in some cases a determination may not be made until after an environmental assessment has been prepared. After a determination has been made to prepare an environmental impact statement as the lead agency, the Corps will notify the applicant in writing as soon as practicable.

§ 333.21 Preparation of environmental impact statements.

(a) During the process of preparing an environmental impact statement, the District Engineer:

(1) Will contact all appropriate Federal agencies to determine their respective role(s), i.e., that of lead agency or cooperating agency consistent with § 333.17 of this part.

(2) Will obtain the comments of:

(i) Any Federal agency that has specific statutory jurisdiction or special expertise identified in statute with respect to any environmental impact involved or is authorized to develop and enforce environmental standards. The District Engineer shall only consider comments directly tied to the commenting Federal agency's specific statutory jurisdiction or special expertise identified in statute and relevant to impacts or issues within the scope of analysis as determined by the District Engineer. The District Engineer shall only include those comments in the permit or 33 U.S.C. 408 permission administrative file and record.

(ii) Appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards.

(3) May request the comments of:

(i) State, Tribal, or local governments that may be affected by the proposed action;

(ii) Any Federal agency that has requested it receive statements on actions of the kind proposed to the extent the comments are directly tied to that agency's statutory jurisdiction or special expertise as identified in statute;

(iii) The applicant, and

(iv) The public, including by affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.

(b) This process of obtaining and requesting comments pursuant to paragraph (a) of this section may be undertaken at any time that is reasonable in the process of preparing the environmental impact statement. The District Engineer will ensure the process of obtaining and request comments pursuant to paragraph (a) of this part, and the District Engineers' analysis of and response to those comments, does not cause the Corps to violate the congressionally mandated deadline for completion of an environmental impact statement.

(c) The District Engineer will address any substantive and significant comments received consistent with paragraph (a) of this section in the environmental impact statement. Such responses to comments will be documented and may include:

(1) Modifying alternatives, including the proposed activity.

(2) Developing and evaluating alternatives not previously given serious consideration.

(3) Supplementing, improving, or modifying analyses, to include consideration of science or literature not previously considered.

(4) Making factual corrections.

(5) No action needed. The agency may provide a brief rationale for taking no action, such as:

(i) The comment is outside the scope of what is being proposed;

(ii) There is no cause-effect relationship between the actions the agency is proposing and the issue raised and/or recommendation made;

(iii) The commenter misinterpreted the information provided; or

(iv) The recommendation made does not comply with applicable laws or regulations and/or are not feasible to implement (technically or economically), etc.

(d) In those instances in which the District Engineer solicits comments from the public, the request for comments will provide clear instructions on how comments should be submitted,

including electronic submission, and the dates during which comments will be accepted. The solicitation of comments should include requests for comments on specific questions or issues or for information that would be helpful in informing the District Engineer's decision.

(e) If the District Engineer determines that an environmental impact statement is not required after a notice of intent has been published, the District Engineer shall terminate the environmental impact statement preparation and withdraw the notice of intent. The District Engineer shall notify in writing the appropriate Division Engineer; Headquarters U.S. Army Corps of Engineers; any appropriate federal agencies; and the public of the determination.

§ 333.22 Purpose and need.

(a) The statement will include the purpose and need for the proposed agency action based on the Corps' statutory authority and independent judgment. The purpose and need for the proposed agency action must be informed by the goals of the applicant. The applicant may provide a statement of the purpose and need from their perspective, but the District Engineer will exercise independent judgment in defining the purpose and need for the project.

(b) If the scope of analysis for the NEPA document (see § 333.18(b) of this part) covers only the proposed specific activity requiring a Department of the Army permit or 33 U.S.C. 408 permission, then the underlying purpose and need for that specific activity should be stated. (For example, "The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.")

(c) If the scope of analysis covers a more extensive project, only part of which may require a DA permit or 33 U.S.C. 408 permission, then the underlying purpose and need for the entire project should be stated. (For example, "The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.")

§ 333.23 Analysis within the environmental impact statement.

(a) The Corps is neither an opponent nor proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the ''applicant's preferred alternative'' in the final EIS. Decision options available to the District Engineer, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or conditions, or deny the permit.

(b) The environmental impact statement will include a detailed statement on:

(1) Reasonably foreseeable environmental effects of the applicant's preferred alternative;

(2) Any reasonably foreseeable adverse environmental effects which cannot be avoided should the applicant's preferred alternative be implemented;

(3) A reasonable range of alternatives to the applicant's preferred alternative, including an analysis of any negative environmental impacts of not implementing the applicant's preferred alternative in the case of a no action alternative.

(i) Only reasonable alternatives need be considered in detail. Reasonable alternatives must be those that are, in the District Engineer's expert judgment, technically, legally, and economically feasible and such feasibility must focus on the accomplishment of the underlying purpose and need.

(ii) The alternatives analysis should be thorough enough to use the 404(b)(1) guidelines (40 CFR part 230) where applicable.

(iii) Those alternatives that are unavailable to the applicant, whether or not they require Federal action (permits), should normally be included in the analysis of the no-Federal-action (denial) alternative.

(iv) The EIS should discuss geographic alternatives, e.g., changes in location and other site-specific variables, and functional alternatives, e.g., project substitutes and design modifications.

(v) The ‘‘no-action’’ alternative is one which results in no construction requiring a Corps permit or permission. It may be brought by either the applicant electing to modify their proposal to eliminate work under the jurisdiction of the Corps or by the denial of the permit or permission. District engineers, when evaluating this alternative, should discuss, when appropriate, the consequences of other likely uses of a project site, should the permit be denied.

(4) The relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and

(5) Any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented; and

(6) Any means identified to mitigate adverse environmental effects of the proposed action. (To note, NEPA itself does not require or authorize the Corps to impose any mitigation measures); and

(7) Such alternatives should be evaluated only to the extent necessary to allow a complete and objective evaluation and a fully informed decision regarding the permit application or request for permission.

(b) Environmental impact statements will discuss effects in proportion to their significance. With respect to issues that are not of a substantive nature and do not meaningfully inform the consideration of environmental effects and the resulting decision on how to proceed, there will be no more than the briefest possible discussion to explain why those issues are not substantive and therefore not worthy of any further analysis. Environmental impact statements will be analytic, concise, and no longer than necessary to comply with NEPA in light of the congressionally mandated page limits and deadlines.

(c) The District Engineer will not include a cost-benefit analysis for projects requiring a Corps permit or permission, but may indicate any cost considerations relevant to the permit decision or 33 U.S.C. 408 permission decision.

§ 333.24 Page limits.

(a) *Page limits.* Except as provided in paragraph (b) of this section, the text of an environmental impact statement will not exceed 150 pages, not including citations or appendices.

(b) An environmental impact statement for a proposed agency action of extraordinary complexity is strictly prohibited from not exceeding 300 pages, not including any citations or appendices. The District Engineer will determine at the earliest possible stage of preparation of an environmental impact statement whether the conditions for exceeding the page limit in paragraph (a) of this section are present. Factors that may indicate extraordinary complexity include: a geographically expansive project that affects multiple resource types; numerous alternatives that must be considered; involves a long time period for implementation; impacts multiple sensitive resources; involve authorization decisions by multiple agencies.

(c) Appendices are to be used for voluminous materials, such as scientific tables, collections of data, statistical calculations, and the like, which substantiate the analysis provided in the environmental assessment. Appendices are not to be used to provide additional substantive analysis, because that would circumvent the Congressionally mandated page limits.

(d) *Format.* Environmental impact statements will be formatted for 8.5”x11” paper with one-inch margins using a word processor with 12-point proportionally spaced font, single spaced. Footnotes may be in 10-point font. Such size restrictions do not apply to explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial

information. When an item of graphical material is larger than 8.5”x11”, each such item will count as one page.

(e) *Certification related to page limits.* The breadth and depth of analysis in an environmental impact statement will be tailored to ensure that the environmental impact statement does not exceed these page limits. In this regard, as part of the finalization of the environmental impact statement, a responsible official will certify that the Corps has considered the factors mandated by NEPA; that the environmental impact statement represents the Corps’ good-faith effort to prioritize documentation of the most important considerations required by the statute within the congressionally mandated page limits; that this prioritization reflects the District Engineer’s expert judgment; and that any considerations addressed briefly or left unaddressed were, in the District Engineer’s judgment, comparatively unimportant or frivolous.

§ 333.25 Deadlines.

(a) NEPA is governed by a “rule of reason.” Congress supplied the measure of that reason in the 2023 revision of NEPA by settling the deadlines in NEPA 107(g), 42 USC 4336a(g). These deadlines indicate Congress’s determination that an agency, working with Congress’s allocation of resources has presumptively spent a reasonable amount of time on analysis and the document should issue, absent very unusual circumstances. In such circumstances, an extension will be given only for such time as is *necessary* to complete the analysis. Thus, unless otherwise specified in statute, the District Engineer will complete the environmental impact statement not later than the date that is two years after the date on which the District Engineer determines that the activity requires the issuance of an environmental impact statement.

(b) The end date is either:

(i) When the District Engineer reaches a decision and initially proffers the permit to the applicant or provides the requestor 33 U.S.C. 408 permission; or

(ii) When the District Engineer denies the permit or denies permission under 33 U.S.C. 408 with or without prejudice.

(c) The District Engineer will publish the environmental impact statement.

(d) If the District Engineer determines they are not able to meet the deadline prescribed by NEPA section 107(g)(1)(A), 42 U.S.C. 4336a(g)(1)(A), they must consult with the applicant pursuant to NEPA section 107(g)(2), 42 U.S.C. 4336a(g)(2). After such consultation, if needed, and for cause stated, the District Engineer may establish a new deadline and must notify the Division Engineer and Headquarters, U.S. Army Corps of Engineers of the deadline extension. Cause for establishing a new deadline is only established if the environmental impact statement is so incomplete, at the time at which the District Engineer determines they are not able to meet the statutory deadline, that issuance pursuant to paragraph (c) of this section above would, in the District Engineer's view, result in an inadequate analysis. Such new deadline must provide only so much additional time as is necessary to complete such environmental impact statement. The District Engineer will document in the administrative record for the proposed action the new deadline, the reason why the environmental impact statement was not able to be completed under the statutory deadline, when the District Engineer consulted with the applicant on the new deadline, and whether the applicant consented to the new deadline.

(e) When the environmental impact statement is published, the District Engineer will certify (and the certification will be incorporated into the environmental impact statement) that the resulting environmental impact statement represents the Corps' good-faith effort to fulfill NEPA's requirements within the Congressional timeline; that such effort is substantially complete; and

that, in the District Engineer's expert opinion, they have thoroughly considered the factors mandated by NEPA; and that, in the District Engineer's judgment, the analysis contained therein is adequate to inform and reasonably explain the District Engineer's decision regarding the proposed Federal activity. .

§ 333.26 Publication of the environmental impact statement.

The District Engineer will publish the entire environmental impact statement on a publicly available website. During the process of preparing the environmental impact statement, the District Engineer may publish a draft statement or other materials that in their judgment may assist in fulfilling their NEPA responsibilities.

§ 333.27 Public hearing.

If a public hearing is to be held pursuant to 33 CFR part 327, or any other authority, for a permit application requiring an environmental impact statement, the actions analyzed by the environmental impact statement should be considered at the public hearing. The District Engineer can, but need not, make a draft of the environmental impact statement available to the public and, in instances where the District Engineer does so, should do so at least 15 days in advance of the hearing. If a hearing request is received from another agency having jurisdiction over an element of the applicant's activity, the district engineer should coordinate a joint hearing with that agency whenever appropriate.

§ 333.28 Comments received on an environmental impact statement.

For permit applications or requests for permissions to be decided at the district level, the District Engineer should consider incoming comments and provide responses in the environmental impact statement when substantive issues are raised. For permit applications or requests for

permissions to be decided at a higher authority, the District Engineer shall forward any comment letters together with appropriate responses to the higher authority.

§ 333.29 Review of other agencies' environmental impact statements.

District Engineers should provide comments directly to the requesting agency specifically related to the Corps jurisdiction by law or special expertise. If the District Engineer determines that another agency's environmental impact statement which involves a Corps permit or permission action is inadequate with respect to the Corps permit or permission action, the district engineer should attempt to resolve the differences concerning the Corps permit or permission action prior to the filing of the environmental impact statement by the other agency.

Subpart D—Efficient Environmental Reviews

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.31 Tiered and programmatic environmental documents.

(a) Activities that require Corps authorization under 33 U.S.C. 1344, 33 U.S.C. 401, 33 U.S.C. 403, and 33 U.S.C. 1413 are reviewed (and when applicable, permitted) on a site-specific basis based upon an application containing a complete description of the proposed activity, and all activities which the applicant plans to undertake which are reasonably related to the same project and for which a Corps permit will be required. See 33 CFR 325.1(d)(1)-(2). However, only for reviews of activities under 33 U.S.C. 408, the District Engineer may prepare tiered environmental documents when conducting multi-phased reviews of proposed alterations or in other appropriate circumstances. Multi-phased reviews under 33 U.S.C. 408 evaluate proposed alterations in multiple successive iterations of progressively greater detail. Each successive review must be accompanied by a NEPA document that considers the potential impacts of the

alteration at the level of detail of the given phase of review to help inform the development of the proposed alteration. The analysis in each environmental document will reflect the level of planning in each tier. For example, the first tier may consider the differing impacts of selecting different sites for the alteration, the second tier may consider different project configurations, and the final tier may consider the impacts from different construction methods. Each successive analysis should build off the previous analysis, formally incorporating the prior environmental documents.

(b) After completing a programmatic environmental assessment or environmental impact statement for a review under 33 U.S.C. 408, the District Engineer may rely on that document for 5 years if there are not substantial new circumstances or information about the significance of adverse effects that bear on the analysis. After 5 years, as long as the District Engineer reevaluates the analysis in the programmatic environmental document and any underlying assumption to ensure reliance on the analysis remains valid and briefly documents its reevaluation and explains why the analysis remains valid considering any new and substantial information or circumstances, the District Engineer may continue to rely on the document.

§ 333.32 Reliance on existing environmental documents.

(a) *Generally.* The District Engineer may rely on an environmental impact statement, environmental assessment, or portion thereof, provided that the statement, assessment, or portion thereof meets the standards for an adequate statement or assessment under these procedures. When relying on an environmental impact statement, environmental assessment, or portion thereof, the District Engineer will cite, briefly describe the content and relevance to the environmental document, and may make modifications that are necessary to render the relied-upon document, or portion thereof, fit for fulfilling NEPA's analytic requirements for the action.

If the District Engineer finds that the other agency's environmental impact statement or environmental assessment is inadequate with respect to the Corps permit or permission action, the District Engineer should incorporate the other agency's NEPA document or a portion thereof and prepare an appropriate and adequate NEPA document to address the Corps involvement with the proposed action.

(b) *Substantial similarity.*

(1) If the actions covered by the original environmental impact statement or environmental assessment and the proposed action are substantially the same, the District Engineer will document their reliance on the statement or assessment.

(2) If the actions are not substantially the same, the District Engineer may modify the statement or assessment as necessary to render the statement fit for fulfilling NEPA's analytic requirements for the action at hand, and document the reliance on the statement or assessment, as modified, or may incorporate relevant portions in the District Engineer's own NEPA document. Where appropriate, the District Engineer may solicit comment to the extent that solicitation of comment will assist the District Engineer in expeditiously adapting the relied-upon statement or assessment so that it is fit for the District Engineer's purposes.

§ 333.33 Incorporation.

The District Engineer may incorporate material, such as planning studies, analyses, or other relevant information, into environmental documents by reference when the effect will be to cut down on bulk without impeding the Corps review of the action. When incorporating material by reference, the District Engineer will cite, briefly describe the content and relevance to the environmental document, and make the materials reasonably available for review by potentially

interested parties. The District Engineer will not use incorporation as a means to evade the statutory page limits.

§ 333.34 Supplements to environmental documents.

The District Engineer will prepare supplements to environmental documents only if a major Federal action remains to occur, and:

(a) The applicant makes substantial changes to the proposed action that are relevant to environmental concerns; or

(b) The District Engineer decides, in their discretion, that there are substantial significant new circumstances or information about the significance of the adverse effects that bear on the proposed action or its effects.

§ 333.35 Integrity and completeness of information.

(a) The District Engineer will not undertake new scientific and technical research to inform their analyses unless that is essential to a reasoned choice among alternatives and the overall costs and time frame of such undertaking are not unreasonable. Rather, the District Engineer will make use of reliable existing data and resources.

(b) When the District Engineer is evaluating an action's reasonably foreseeable effects on the human environment, and there is incomplete or unavailable information that cannot be obtained at a reasonable cost or the means to obtain it are unknown, the District Engineer will make clear in the relevant environmental document that such information is lacking.

§ 333.36 Integrating NEPA with other environmental requirements.

(a) To the fullest extent possible, the District Engineer will prepare environmental documents concurrently with and integrated with analyses and related surveys and studies required by other Federal statutes. In appropriate instances, the District Engineer may participate in preparing

single environmental assessment, finding of no significant impact, environmental impact statement, and Record of Decision documents.

(b) The District Engineer will combine an environmental document prepared in compliance with NEPA with any other agency document to reduce duplication and paperwork. Thus, the District Engineer may combine an environmental document with related plans, rules, or amendments as a single consolidated document.

(c) If comments on a notice of intent or other aspects of a scoping process identify consultations, permits, or licenses necessary under other environmental laws, the environmental document may contain a section briefly listing the applicable requirements and how the applicant has or will meet them (e.g., permits applied for or received, consultations initiated or concluded).

§ 333.37 Elimination of duplication with State, Tribal, and local procedures.

(a) The District Engineer will, where appropriate, cooperate with State, Tribal, and local agencies that are responsible for preparing environmental documents.

(b) To the fullest extent practicable unless specifically prohibited by law, the District Engineer will cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and State, Tribal, and local requirements, including through use of studies, analysis, and decisions developed by State, Tribal, or local agencies. Such cooperation may include:

(1) Joint planning processes;

(2) Joint environmental research and studies;

(3) Joint public hearings (except where otherwise provided by statute); or

(4) Joint environmental documents.

§ 333.38 Unique identification numbers.

For all environmental documents, the District Engineer will provide a unique identification number for tracking purposes, which the District Engineer will reference on all associated environmental review documents prepared for the proposed agency action and in any database or tracking system for such documents. The District Engineer will coordinate with the CEQ and other Federal agencies to ensure uniformity of such identification numbers across Federal agencies.

§ 333.39 Emergency procedures.

In responding to emergency situations to prevent or reduce imminent risk of life, health, property, or severe economic losses, district commanders may proceed without the specific documentation and procedural requirements of other sections of this regulation. District Engineers shall consider the probable environmental consequences in determining appropriate emergency actions and when requesting approval to proceed on emergency actions, will describe proposed NEPA documentation or reasons for exclusion from documentation. NEPA documentation should be accomplished prior to initiation of emergency work if time constraints render this practicable. Such documentation may also be accomplished after the completion of emergency work, if appropriate. When possible, emergency actions considered major in scope with potentially significant environmental impacts shall be referred through the Division Engineers to Headquarters, U.S. Army Corps of Engineers for consultation with CEQ about NEPA alternative arrangements.

Subpart E—Agency Decision Making

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.41 Decision documents.

At the time of its decision on its proposed action, the Corps may prepare and timely publish a concise public decision document notifying the public that the District Engineer has certified that the Corps has considered all relevant information raised in the NEPA process and that the NEPA process has closed. To avoid duplication, a finding of no significant impact may reference the environmental assessment and a record of decision may reference the environmental impact statement. The decision document prepared for NEPA compliance informs the final agency action of making the decision on the permit application or the request for permission under 33 U.S.C. 408(a) but is not the final agency action.

§ 333.42 Filing requirements.

The District Engineer will file environmental impact statements together with comments and any responses with the Environmental Protection Agency (EPA), Office of Federal Activities for publication in the Federal Register.

Subpart F—Procedures for Applicant-Prepared NEPA Documents

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.51 Procedures for applicant-prepared environmental documents.

The District Engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an EA or EIS. The District Engineer may prepare an EA or an EIS, or may obtain information needed to prepare an EA or an EIS, either with Corps staff or by third-party contract. In accordance with NEPA section 107(f), 42 U.S.C. 4336a(f), the Corps has established procedures allowing applicants, or contractors hired by applicants, to prepare environmental assessments and environmental impact statements documents under the District Engineer supervision.

(a) The District Engineer will independently evaluate the environmental document and will take responsibility for its contents. The District Engineer is responsible for ensuring that the information provided by the applicant-hired contractor is consistent with Corps' need to take a hard, objective look at the public interest and environmental factors consistent with its statutory requirements.

(b) The District Engineer will assist applicants and applicant-hired contractors by providing guidance and outlining the types of information required for the preparation of the environmental document. Third party contracting is the primary method for preparing all or part of environmental impact statements covered by this part. The District Engineer may also provide appropriate guidance and assist in environmental document preparation, to the extent that the District Engineer's resources and policy priorities allow. The District Engineer will work with the applicant to define the purpose and need, and, when appropriate, to develop a reasonable range of alternatives to meet that purpose and need.

(c) The District Engineer will work develop and modify, as appropriate, a schedule for preparation of the environmental document. Major changes to the schedule or related matters will be documented through written correspondence.

(d) The District Engineer may request from an applicant environmental information for use by the Corps in preparing or evaluating an environmental document. This may include a decision file consisting of any factual, scientific, or technical information used, developed, or considered by the applicant or applicant-hired contractor in the course of preparing the environmental document, including any correspondence with the Corps or with third parties.

(e) The applicant may accept or reject the District Engineer's guidance. The District Engineer, however, may after specifying the information in contention, require the applicant to resubmit

any previously submitted data which the District Engineer considers inadequate or inaccurate. The District Engineer must document in the record the Corps' independent evaluation of the information and its accuracy.

Subpart G—Definitions

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.61 Definitions.

As used in these implementing procedures, terms have the meanings provided in NEPA section 111, 42 U.S.C. 4336e. In addition:

(a) *NEPA* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, et seq.).

(b) *Authorization* means a permit or permission.

(c) *Connected action* means a separate Federal action within the Corps' authority that is closely related to the proposed agency action and should be addressed in a single environmental document because the proposed agency action:

(1) Automatically triggers the separate Federal action, which independently would require the preparation of additional environmental documents;

(2) Cannot proceed unless the separate Federal action is taken previously or simultaneously; or

(3) Is an interdependent part of a larger Federal action that includes a separate Federal action, which mutually depend on the larger Federal action for their justification.

(d) *Effects or impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives.

(1) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. Effects appropriate for analysis under NEPA may be either beneficial or adverse, or both, with respect to these values.

(2) A "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to the limits of its regulatory authority, or that would occur regardless of the proposed action, or that would need to be initiated by a third party.

(e) *Human environment* means comprehensively the natural and physical environment and the relationship of Americans with that environment. (See also the definition of "effects or impacts" in paragraph (c) of this section.)

(f) *Jurisdiction* means the specific legal authority to approve an activity, such as 33 U.S.C. 1344 (Clean Water Act, section 404); 33 U.S.C. 401 (Rivers and Harbors Act of 1899, section 9); 33 U.S.C. 403 (Rivers and Harbors Act of 1899, section 10); and 33 U.S.C. 1413 (Marine Protection, Research, and Sanctuaries Act of 1972, section 103) or 33 U.S.C. 408 (Rivers and Harbors Act of 1899, section 14).

(g) *Mitigation* for the purposes of NEPA means measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects. While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. Mitigation includes:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action.

(2) Minimizing effects by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the impact by replacing or providing substitute resources or environments.

(h) *NEPA process* means all measures necessary for compliance with the requirements of NEPA section 102(2), 42 U.S.C. 4332(2).

(i) *Notice of intent* means a public notice that an agency will prepare and consider an environmental document.

(j) *Participating agency* means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.

(k) *Permit*, as used in this part, is the authorization described in 33 CFR 325.5 or the document granting Corps permission under 33 U.S.C. 408(a). A permit decision is the final agency action.

(l) *Publish* and *publication* mean methods found by the agency to efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication.

(m) *Reasonable alternatives* means a reasonable range of alternatives that are technically, legally, and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.

(n) *Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.

(o) *Related action* means an action undertaken by an agency, e.g., a permitting action, some other type of authorization action, an analysis required by statute, or the like, that bears a relationship to other actions undertaken by other agencies relevant to NEPA, e.g., that a set of related actions are all related to one overarching project.

(p) *Scope* consists of the range of actions, alternatives, and effects subject to the Corps legal authority or subject to the Corps control and responsibility that should be considered in an environmental document. This part addresses the considerations for use by District Engineers when determining scope for NEPA compliance in § 333.18 of this part.

(q) *Tiering* when used for the purposes of multi-phased reviews of activities under 33 U.S.C. 408, refers to the coverage of general matters in broader environmental impact statements or environmental assessments (such as a general plan to address a need that identifies different conceptual options) with subsequent narrower or more detailed statements or environmental analyses (such as an analysis of how one of those conceptual options could be implemented at a specific site) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

Subpart H—Severability

Authority: 5 U.S.C. 301; 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 42 U.S.C. 4321 et seq.

§ 333.71 Severability.

The sections of this part are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the Corps' intention that the validity of the remainder of those parts

will not be affected. The remaining sections or portions, and all applications thereof, shall continue to be in effect.

Approved by:

D. Lee Forsgren

Acting Assistant Secretary of the Army

(Civil Works)