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January 17, 1986

MEMORANDUM OF AGREEMENT BETWEEN THE  
ASSISTANT ADMINISTRATORS FOR EXTERNAL AFFAIRS AND WATER  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
AND THE ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS  
CONCERNING REGULATION OF DISCHARGES OF  
SOLID WASTE UNDER THE CLEAN WATER ACT

A. Basis of Agreement

1. Whereas the Clean Water Act has as its principal objective the requirement "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters; and,

2. Whereas Section 301 of the Clean Water Act prohibits the discharge of any pollutant into waters of the United States except in compliance with Sections 301, 302, 306, 307, 318, 402, and 404 of the Act; and

3. Whereas EPA, and States approved by EPA, have been vested with authority to permit discharges of pollutants, other than dredged or fill material, into waters of the United States pursuant to Section 402 of the Clean Water Act that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 40 CFR 122-125; and

4. Whereas the Army, and States approved by EPA, have been vested with authority to permit discharges of dredged or fill material into waters of the United States that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 33 CFR 320 et seq. and 40 CFR 230 et seq.; and

5. Whereas the definitions of the term "fill material" contained in the aforementioned regulations have created uncertainty as to whether Section 402 of the Act or Section 401 is intended to regulate discharges of solid waste materials into waters of the United States for the purpose of disposal of waste; and

4. To avoid any impediment to prompt resolution of the enforcement action, if such a question arises, a discharge will normally be considered to meet the definition of "fill material" in 33 CFR 323.2(k) for each specific case by consideration of the following factors:

a. The discharge has as its primary purpose or has as one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation.

b. The discharge results from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities.

c. A principal effect of the discharge is physical loss or physical modification of waters of the United States, including smothering of aquatic life or habitat.

d. The discharge is heterogeneous in nature and of the type normally associated with sanitary landfill discharges.

5. On the other hand, in the situation in paragraph B.3., a pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to Section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials.

6. While this document addresses enforcement cases, prospective dischargers who apply for a permit will be encouraged to use the above criteria for purposes of project planning. If a prospective discharger applies for a Section 404 permit based on the considerations in paragraph B.4., or for a Section 402 permit based on the considerations in paragraph

If neither agency determines that the criteria for its permit program have been met, the Division Engineer and the RA (or their designees) shall consult and determine which agency shall process the application in question.

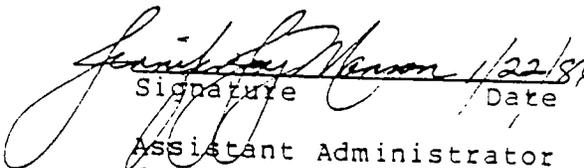
D. Publication in the Federal Register

Since this Memorandum of Agreement clarifies the definition of fill material with respect to discharges of solid waste into waters of the United States, the parties in this agreement shall jointly publish it in the Federal Register within 45 days after it has been signed.

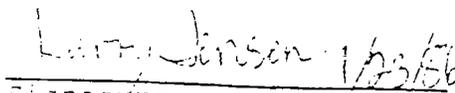
E. Effective Dates

1. This agreement shall take effect 90 days after the date of the last signature below and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice.

2. This agreement automatically expires at such time as EPA has submitted its Report to Congress on the Results of Study of the Adequacy of the Existing Subtitle D Criteria and has published a Notice of Proposed Revisions to the Subtitle D Criteria in the Federal Register, unless the agencies mutually agree that extension of this agreement is needed.

  
Signature \_\_\_\_\_ Date 1/22/86  
Assistant Administrator  
for External Affairs,  
U.S. Environmental Protection  
Agency

  
Signature \_\_\_\_\_ Date 11/17/86  
Assistant Secretary of  
the Army (Civil Works)

  
Signature \_\_\_\_\_ Date 1/23/86  
Assistant Administrator  
for Water  
U. S. Environmental Protection  
Agency