

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE EASTERN BAND OF CHEROKEE INDIANS
AND THE UNITED STATES ARMY CORPS OF ENGINEERS,
WILMINGTON DISTRICT,
CONCERNING ACTIVITIES REGULATED PURSUANT TO
SECTION 404 OF THE CLEAN WATER ACT AND
SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899
ON TRUST LAND OF THE
EASTERN BAND OF CHEROKEE INDIANS
IN NORTH CAROLINA**

As parties to this Memorandum of Understanding (MOU), the U.S. Army Corps of Engineers, Wilmington District (USACE) and the Eastern Band of Cherokee Indians (EBCI) hereby agree to the following:

I. Purpose

The purpose of this agreement is to establish procedures between the parties to ensure that activities regulated pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 (i.e., permitting, compliance, and enforcement), which are located on trust land of the EBCI in North Carolina (NC), are processed efficiently and in an agreed upon manner.

II. Statutory Requirements and Authorities

A. Section 404 Clean Water Act (CWA) (33 USC § 1344) requires authorization from the Secretary of the Army, acting through the USACE, for the discharge of dredged or fill material into all waters of the United States (WOUS), including wetlands. Discharges of fill material generally include, without limitation, placement of fill that is necessary for the construction of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for intake and outfall pipes and sub-aqueous utility lines; fill associated with the creation of ponds; and any other work involving the discharge of fill or dredged material. A USACE permit is required whether the work is permanent or temporary. Examples of temporary discharges include dewatering of dredged material prior to final disposal and temporary fills for access roadways, cofferdams, and storage and work areas.

B. Section 10 of the Rivers and Harbors Act (RHA) of 1899 (33 USC § 403) requires authorization from the Secretary of the Army, acting through the USACE, for the construction of any structure in, under, or over navigable WOUS. Work or structures outside the limits defined for navigable WOUS require a Section 10 permit if the work or structure affects the course, location, or condition of the water body. The law applies to any dredging or disposal of dredged materials, excavation, filling, re-channelization, or any other modification of a navigable WOUS, and it applies to all structures, from the smallest floating dock to the largest commercial undertaking. It further includes, without limitation, any wharf, dolphin, weir, boom breakwater, jetty, groin, bank protection (e.g., riprap, revetment, bulkhead), mooring structure such as a piling, aerial or sub-aqueous power transmission line, intake or outfall pipe, permanently moored floating vessel, tunnel, artificial canal, boat ramp, aid to navigation, and any other permanent or semi-permanent obstacle or obstruction.

C. National Environmental Policy Act (NEPA) of 1969 (42 USC § 4321 *et seq.*) requires all agencies of the Federal Government to use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences in planning and decision making that may have an impact on the environment. Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved.

D. Section 106 National Historic Preservation Act (NHPA) of 1966 (16 USC § 470) requires that the head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking in any state and the head of any federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in, or eligible for inclusion in, the National Register of Historic Places (NRHP).

E. Endangered Species Act (ESA) (16 USC § 1531 *et seq.*) Section 7(a)(2) of the Act requires that federal agencies, in consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service, take such actions as necessary to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical.

F. Regulatory requirements of the USACE Regulatory Program
In order to implement the requirements of Section 404 of the CWA and Section 10 of the RHA, and to ensure compliance with Section 106 of the NHPA, federal regulations have been promulgated and guidance has been issued for the USACE Regulatory Program, to include:

- 33 Code of Federal Regulations (CFR) Parts 320-332 – USACE Regulatory Program implementing regulations.
 - 33 CFR Part 325, Appendix B (“Appendix B”) – USACE Regulatory Program NEPA procedures.
 - 33 CFR Part 325, Appendix C (“Appendix C”) - USACE Regulatory Program procedures for the protection of historic properties.
 - 2005 Revised Interim Guidance for use of Appendix C
 - 2007 Clarification of Revised Interim Guidance for use of Appendix C
- 40 CFR Part 230 – Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material.

III. Roles and Responsibilities

A. USACE

The USACE administers a regulatory program to protect the Nation’s aquatic resources, including wetlands, while allowing reasonable development through fair, flexible and balanced permit decisions in accordance with the requirements of Section 404 of the CWA and Section 10 of the RHA. Development activities in WOUS on trust land in NC may require one or more permits from the USACE under these statutes. The USACE is also responsible for determining compliance with permit terms and conditions, determining which activities constitute unauthorized activities in WOUS, and pursuing enforcement activities, when appropriate.

B. Tribes

The three federally recognized Cherokee Tribes are the EBCI, the Cherokee Nation, and the United Keetoowah Band of Cherokee Indians in Oklahoma. The EBCI is the only federally recognized resident tribe in NC. The home of the EBCI is known as Qualla Boundary, which is land held in trust by the U.S. government. Activities that occur on-boundary, and on other parcels in NC which are held in trust, are not subject to state regulation. The EBCI also own tracts of land in NC in fee simple title; activities on these tracts of land are subject to regulation by the state. This MOU concerns only those activities that are located on trust land of the EBCI in NC. See Attachment A for a map of trust and fee simple lands of the EBCI in NC.

The EBCI will be the applicant for the majority of projects located on trust land and agree to submit all requests for USACE action [e.g., applications, Pre-Construction Notifications (PCNs), jurisdictional determination (JD) requests, requests for USACE participation in pre-application

meetings, etc.] in accordance with this MOU to ensure that sufficient and complete information is provided to the USACE so that requests are processed as efficiently as possible. There may also be instances where an external entity [e.g., the Federal Highway Administration (FHWA), the North Carolina Department of Transportation (NCDOT), etc.], is the applicant for a proposed project on trust land; when this occurs, all information will be processed in accordance with Section IV below. If a proposed project is located on both fee simple land and trust land, the portion located on trust land will be processed in accordance with Section IV below.

IV. Permitting, Compliance and Enforcement on Trust Land

A. Requests for USACE Action

1) All requests for USACE action on trust land will only be accepted by the USACE when those requests are reviewed and/or submitted by the EBCI Natural Resources Program (NRP). If the request is submitted by another EBCI program or office, or by an external entity, a written notice of EBCI NRP review shall be attached to the application or PCN. This will ensure that consistent information is submitted and will minimize the USACE's requests for additional information. A point of contact (POC) for the Tribal action office, if it is not the EBCI NRP, should be noted in the application.

2) All applications and PCNs for projects on trust land must include an EBCI site review inspection form ("long form"), or a letter from the EBCI Tribal Historic Preservation Office (THPO). This documentation demonstrates that the EBCI THPO has reviewed each proposed project and has made recommendations concerning (a) the presence or absence of properties that are included in, or eligible for inclusion in, the NRHP; (b) the necessity of a survey, and; (c) the need for additional information. The USACE will not issue authorization to impact any WOUS on trust land without written EBCI THPO review.

Additionally, all applications and PCNs for projects on trust land shall indicate if a federal agency, other than the USACE, is involved in a particular project. If so, the application or PCN for that project shall identify and detail that agency's involvement (e.g., funding, NEPA document preparation, etc.).

If another federal agency (other than the USACE) is involved in a particular project, and that agency has prepared NEPA documentation and/or made determinations pursuant to Section 106 of the NHPA, copies of the NEPA document and Section 106 documentation (i.e., determinations of effect and concurrence from the EBCI THPO, or the long form) shall be included in the application or PCN.

If the USACE is the only federal agency and/or is the lead federal agency involved in a particular project, the USACE shall make determinations pursuant to Section 106 of the NHPA. If the USACE determines that additional information and/or a survey is necessary, authorization to

impact WOUS will not be issued until the USACE makes a final determination and the EBCI THPO concurs, if necessary (i.e., if the determination is anything other than “no potential to cause effects”).

3) As noted above in number 2, if a federal agency, other than the USACE, is involved in a particular project, the application or PCN shall identify and detail that agency’s involvement.

If another federal agency has prepared NEPA documentation and/or made determinations pursuant to Section 7(a)(2) of the ESA for a particular project, copies of the NEPA document and Section 7(a)(2) ESA documentation [i.e., determinations of effect and concurrence from the USFWS, if necessary (if the determination is anything other than “no effect”)] shall be included in the application or PCN.

If the USACE is the only federal agency and/or is the lead federal agency involved in a particular project, the USACE shall make determinations pursuant to Section 7(a)(2) of the ESA for the USACE defined action area. This does not preclude the EBCI from coordinating or consulting with the USFWS for any project on trust land, as the USACE defined action area may be a subset of the larger project and the EBCI must ensure that all activities are in compliance with the requirements of the ESA; however, this MOU does not provide for the delegation of USACE responsibility for determining Section 404/Section 10 permit area(s) and determinations of effect concerning the USACE defined action area for ESA Section 7(a)(2) compliance.

4) In order to be considered complete, all applications and PCNs for projects on trust land must include a comment letter from the EBCI NRP’s Supervisory Fish and Wildlife Biologist. The USACE may incorporate EBCI NRP’s comments as special conditions in permits and verification letters.

B. EBCI NRP and THPO Review of Non-notifying/Non-reporting Permits/Activities

Nationwide Permits (NWP) and Regional General Permits (RGPs) are issued respectively at the USACE Headquarters and District levels prior to becoming available for use by the public. If a particular activity is designated as “non-notifying” or “non-reporting”, an applicant is not required to submit a PCN to the USACE prior to conducting that work in WOUS under a NWP or RGP. Non-notifying/non-reporting activities typically involve minor impacts to WOUS, such as certain maintenance, bank stabilization, or road activities.

Regardless of whether an activity is designated as “notifying” (PCN to the USACE) or “non-notifying” (no PCN to the USACE), the work must be conducted in accordance with the terms of the specific NWP used, the NWP general conditions, and the Wilmington District NWP Regional Conditions (when using a NWP); if using an RGP, all work must be conducted in accordance with the terms of the specific RGP used and the RGP general and special conditions. Compliance with

the permit terms and applicable conditions will ensure that all applicable federal requirements have been met, such as the requirements of Section 106 of the NHPA and Section 7(a)(2) of the ESA.

In order for an individual or other entity to conduct earth work on trust land of the EBCI, including those projects that would involve the discharge of dredged or fill material into WOUS, the EBCI requires that proposed projects are reviewed by a number of Tribal departments and offices, to include the EBCI NRP and THPO. In order for the Tribe to allow the use of non-notifying permits on EBCI trust land in NC, and to ensure that those activities comply with the NWP terms, NWP general conditions, and Wilmington District NWP regional conditions (or, if an RGP is used, with the RGP terms and RGP general and special conditions), the EBCI NRP and THPO will continue to review all projects on EBCI trust land that involve the potential discharge of dredged or fill material into WOUS.

All commercial and multi-family construction will continue to be reviewed by the EBCI NRP and THPO in accordance with the most current version of EBCI Tribal Code Sec. 47-2. All single-family housing developments will continue to be reviewed by the EBCI NRP and THPO in accordance with the most current version of the “long-form” process. Any additional projects planned by EBCI Tribal government programs, EBCI Tribal members, and/or external entities that could potentially impact WOUS shall continue to file a separate Tribal application with the EBCI NRP for review by the NRP and the THPO.

Because proposed earth work on trust land must be reviewed by a number of Tribal departments and offices, prior to any work being conducted in WOUS on EBCI trust land, the EBCI NRP (with THPO comment) will review each proposed activity that would impact a WOUS and determine if:

- the proposed activity is eligible for non-notification/non-reporting (no PCN to the USACE), in accordance with the NWP terms, NWP general conditions, and Wilmington District NWP regional conditions (or, if an RGP is used, with the RGP terms and RGP general and special conditions); **OR**
- the proposed activity requires submission of a PCN or application to the USACE for verification/approval.

For those activities that qualify as non-notifying/non-reporting on trust land, the EBCI NRP will notify the applicant/permittee via a Tribal approval letter. A letter from the EBCI THPO, pursuant to Section 106 of the NHPA, will be attached to each approval letter. All activities that require notification to the USACE via a PCN or application will follow the process outlined in Section IV.A. of this MOU.

Note that all activities in WOUS that require authorization by an Individual Permit are “notifying” activities and require submission of an application to the USACE.

C. USACE Site Visits

1) When the USACE determines that a site visit is necessary to conduct permit compliance, investigate reports of a potential unauthorized activity, or for any other reason(s), the USACE will contact the EBCI NRP to coordinate a site visit. The USACE will notify the EBCI NRP no later than 5 working days in advance of the visit. The USACE will conduct the site visit with Tribal staff, if they choose to be present.

2) If the Tribe, or an authorized agent of the Tribe, requests a site visit by the USACE, the notification requirements outlined in number 1 above will not apply. If an authorized agent requests the site visit, they will provide an agent authorization letter signed by the EBCI NRP, or an email from the EBCI NRP to that effect, to the USACE no later than 2 days prior to the site visit.

D. Enforcement

1) When the USACE receives a report of unauthorized activity or permit non-compliance for activities on trust land, the USACE will coordinate with the EBCI NRP. If the EBCI NRP chooses not to participate in the enforcement activity, the USACE will copy the EBCI NRP on all written external (i.e., outside of the USACE) correspondence regarding the enforcement action. If the EBCI NRP chooses to pursue the enforcement activity separately, the EBCI NRP will copy the USACE on all written external correspondence. In all matters relating to enforcement on trust land, the USACE will not speak for the Tribe and the Tribe will not speak for the USACE (e.g., the USACE will not inform the violator that the matter is resolved for both the Tribe and the USACE, as opposed to noting that the matter is resolved for the USACE only).

2) If the subject of an enforcement action on trust land is the EBCI, the USACE will contact the Manager of the EBCI NRP in order to gather information and determine if resolution of the violation through an informal process is possible. If resolution of the violation through an informal process is not possible, and the USACE determines that the violation warrants elevation, the USACE will process the violation in accordance with the implementing regulations at 33 CFR 326.5(d)(5).

V. Points of Contact

A. USACE

Project Manager, Asheville Regulatory Field Office
151 Patton Avenue, Room 208
Asheville, NC 28801-5006

(828) 271-7980

Supervisor, Asheville Regulatory Field Office
151 Patton Avenue, Room 208
Asheville, NC 28801-5006
(828) 271-7980, ext. 4222

Regulatory Division Supervisor, Wilmington District
69 Darlington Avenue
Wilmington, NC 28403
(910) 251-4630

B. EBCI

THPO

P.O. Box 455
Cherokee, NC 28719
(828) 359-6851 - Tribal Historic Preservation Officer
(828) 359-6852 - POC for projects off trust land
(828) 359-6861 - POC for projects on trust land

EBCI NRP

1840 Painttown Road
Cherokee, NC 28719
(828) 359-6119 - Primary POC
(828) 359-6113 - Manager

VII. Administration of this MOU

A. This MOU may be modified or amended upon written request of either party hereto and the subsequent written concurrence of the other party. Participation in this agreement may be terminated by either party 60 days after providing written notice of such termination to the other participating party.

B. Acknowledgement that the authority and responsibilities of the parties under their respective jurisdictions are not altered by the MOU.

C. This MOU is intended only to improve the working relationships of the participating parties in connection with expeditious decisions with regard to permitting and enforcement actions pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbor Act of 1899. It does not create any right, benefit, or trust responsibility, substantive or procedural,

enforceable by law or equity by any person or party against either the EBCI or the United States, their agencies, officers, or any other person.

D. This MOU is to be interpreted in a manner consistent with all existing laws and regulations.

E. The MOU neither expands nor is in derogation of those powers and authorities vested in the participating parties by applicable laws, statutes, or regulations and is not a waiver of sovereign immunity.

F. The terms of this MOU are not intended to be enforceable by any party other than the signatories hereto.

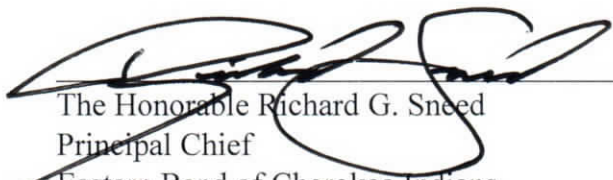
G. The participating parties intend to fully carry out the terms of this MOU. In addition, this MOU does not limit the ability of any of the participating parties to review and respond to final applications.

H. This MOU cannot be used to obligate or commit funds or as the basis for the transfer of funds.

I. Nothing in this MOU, in and of itself, requires either party to enter into any contract, grant, or interagency agreement.


J. All provisions in this MOU are subject to the availability of funds.

ACCORDINGLY, the parties have signed this MOU on the dates set forth below and it shall be effective for all purposes as of the date last signed. The signatures may be executed using counterpart original documents.



The Honorable Richard G. Sneed
Principal Chief
Eastern Band of Cherokee Indians

Date: 8/15/17



Robert J. Clark
Colonel, U.S. Army
District Commander

Date: 25 JUL 2017

Appendix A: Trust and Fee Simple Lands of the EBCI in North Carolina

