APPENDIX H

FEDERAL SUPREMACY FOR PROFESSIONAL LICENSING

H-1. Federal Supremacy. An extensive USACE effort to address professional registration issues began in the early 1990s. This effort was essentially completed with the issuance of the CECC-ZA legal opinion (November 1992, subject: State Regulation of Corps "In-House" Engineering Work). The legal opinion concluded that, under the doctrine of Federal Supremacy, generally the USACE is not required to comply with state registration requirements. The Chief Counsel's legal opinion drew the following conclusions, which form the basis for the policy adopted by USACE senior management in this regulation: a.

a. The Supreme Court has specifically ruled that no state may legally require Federal employees to be licensed by the state.

b. The Supreme Court has also generally ruled that no state has the legal authority to require the Federal Government to submit permit applications, certifications and designs for state review or approval. These general principles are true except in areas where Congress has waived the Federal Government's Supremacy. In six environmental statutes, Congress has waived Federal Supremacy as to state substantive requirements, permits and certifications. The six environmental statues are the Clean Water Act, Safe Drinking Water Act, Clean Air Act, Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and Noise Control Act. Accordingly, the USACE must submit permit applications, certifications and designs for state review and approval for projects falling under these six statutes. Licenses and professional registration however, are not specified in any of the environmental waivers. Therefore, a state rule requiring licensing of USACE engineers or other team members in that state (or in any state), or requiring execution of documents by professional engineers or other team members licensed in the particular state where the work is located (or in any state), is not enforceable by the state against USACE. This is true whether or not the state professional registration statute exempts Federal employees from its requirements.

H-2. Federal Agency Requirements. USACE is, however, obliged to comply with Federal agency requirements, such as the Environmental Protection Agency's (EPA) regulations, which require submission to EPA of certifications signed by registered professional engineers. The policy and guidance in this regulation require supervisors to exercise "responsible charge" over work they supervise, that is, exercise effective direct control and personal supervision, resulting in control over and detailed professional knowledge of, that work. Supervisors have this responsibility whether or not they indicate their professional credentials, and/or stamp or seal work performed under their supervision. Using a private sector registered architect or engineer to seal in-house designs and other documents is unacceptable as a matter of policy and will not relieve the USACE from liability in the case of, for example, a design deficiency. This practice would be a violation of the required Direct Supervisory Control required for use of a professional stamp.

H-3. Partnering with States. In order to resolve state specific registration matters, Districts should convey the USACE commitment to work with each state, while not unduly compromising Federal Supremacy. Districts are encouraged to identify state officials and agencies responsible for environmental and other professional registration matters, and initiate partnering dialogues and build relationships to address and satisfy public interest issues.