

BPA Policy 140-4

Memorandum of Understanding (MOU) and Memorandum of Agreement (MOA)

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1. Purpose & Background

In the course of operations, Bonneville Power Administration (BPA or Bonneville) enters into a wide variety of arrangements with outside entities, including federal partners. Some of these arrangements create affirmative responsibilities or require that Bonneville perform specific actions. Other arrangements are limited to memorializing the parties' understanding or intent and are not intended to create legally enforceable duties in the same manner as contracts. Two types of arrangements that BPA enters into with a variety of parties including customers, contractors, service providers, vendors, suppliers, other federal agencies, tribes, and state and local governmental entities are Memorandums of Understanding (MOUs) and Memorandums of Agreement (MOAs). It is important to note that the content of the memorandum, not its title, determines whether or not it contains legally binding commitments.

This policy establishes guidance for Bonneville's use of either an MOU or MOA. Compliance with this policy ensures all MOUs and MOAs meet minimum standards for legal sufficiency, compliance, performance, and administration.

Note: Other entities may not define these terms in the same manner as Bonneville, so it is imperative that staff obtain legal review from the Office of General Counsel (OGC) before an MOU or MOA is signed by Bonneville.

2. Policy Owner

The Executive Vice President of Compliance, Audit, Risk Management, and Equal Opportunity Employment (EVP CAR) owns this policy. The Chief Compliance Officer/CG is responsible for its implementation and administration.

3. Applicability

This policy applies to the development, internal review, formation, execution, administration, and implementation of MOUs and MOAs. Notwithstanding this policy, MOUs or MOAs that predate the effective date of this policy are required to be reviewed by the program office and filed in BPA's Customer Contract Management System (CCM), the official source of record.

4. Terms & Definitions

- A. **Memorandum of Understanding (MOU)**: An MOU is intended to document a written understanding between two or more parties that identifies common goals, shared intent, or areas of action. It is not intended to create contractually binding promises or commitments. For example, an MOU may memorialize non-binding intent or general

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policy direction, or signal alignment on specific issues before the parties enter into a formal contractual arrangement.

- B. **Memorandum of Agreement (MOA):** An MOA is intended to document contractually binding commitments. It identifies and documents core terms and conditions, and memorializes parties' respective duties and promises. The implementation of the terms and conditions may require an additional document be executed. For example, an MOA that commits funds or commit resources for fish restoration results in a contract to build a fish hatchery. An MOA is subject to all applicable contract-related policies of Bonneville (See BPA Policy 140-1, Delegations of Authority to Bind the Bonneville Power Administration).

5. Policy

A. Memorandum of Understanding

1. An MOU outlines a common goal, general policy direction, shared intent, or course of action, rather than establishing legal or financial commitment(s).
2. In general, the following principles apply to MOUs:
 - a) MOUs may be used to outline the parties' intent to use their best efforts for a program's processes, policies, and procedures or to perform functions in a particular manner or attempt to obtain certain results.
 - b) MOUs should contain a clear statement that it does not create an enforceable obligation, e.g., "This MOU does not create any binding obligations between or among the parties; it does not obligate any funds," or "By signing this Memorandum the parties are not bound to take any action or fund any initiative."
 - c) MOUs are not used to create a financial obligation, transfer funds or to make commitments to provide services.

B. Memorandum of Agreement

1. An MOA memorializes the terms of a legally enforceable agreement between two or more parties. Although an MOA can be used to commit funds or commit to certain services, it must abide by all applicable Bonneville contracting policies.
2. In general, the following principles apply to MOAs:
 - a) MOAs can memorialize promises and establish duties where other policy guidance is not already provided. For example, MOAs could describe duties of the parties with respect to specific work activities, basis for reimbursement, billing and payment processes, and other terms and conditions.
 - b) MOAs cannot be used to directly purchase goods or services.

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- C. **OGC, Finance and Program Office Involvement.** Entering into a memorandum (MOU or MOA) has the risk of creating unintended obligations between the parties, regardless of its characterization as either an MOU or MOA. Additionally, the impact of potential financial obligations must be taken into consideration to ensure they are accounted for in rates, budgets, forecasts and financial reporting of actual transactions. To minimize these risks, all memorandums must be reviewed by OGC and Finance early in the drafting process and before sharing a draft with external parties. Early coordination and communication with OGC and Finance is critical to mitigating the risk of creating unintended obligations.

Prior to submitting a memorandum to the approving authority for signature, the originating office is responsible for ensuring that the memorandum does not conflict with any preexisting commitments or policies. The originating office is also responsible for ensuring that all interested program offices have reviewed the memorandum and receiving concurrences from OGC and Finance.

- D. **MOU/MOA Limitations.** Every Bonneville MOU and MOA must be consistent with Bonneville's mission and must be consistent with federal law and applicable regulations.
1. An MOA must identify the funding source if funds are expected to be obligated.
 2. The existence of an MOU or MOA does not necessarily eliminate or diminish the need for additional documentation or agreements to memorialize the intent of the parties.
- E. **Authority.** Authority to enter into and sign a memorandum is limited to Senior Executive Service (SES) members with a specifically granted Delegation of Authority. Delegations of Authority are located in Bonneville's Customer Contract Management (CCM) system pursuant to BPA Policy 482-1, Customer Contract Lifecycle Management.
- F. **Indemnification Clauses in Memorandums of Agreement.** A commitment to indemnify is a commitment to assume financial, legal, or other liabilities on behalf of another party. If a party to a proposed MOU or MOA requests the inclusion of an indemnification clause, contact OGC for legal advice and assistance.

General Prohibition: Bonneville Policy 140-3 outlines individuals authorized to obligate funds on behalf of Bonneville. Federal law, 31 USC § 1341(a), commonly referred to as the Antideficiency Act (ADA), prohibits all officers and employees of the United States from making or authorizing expenditures or obligations exceeding appropriated funding and from obligating payment of money before it is appropriated. Bonneville follows the principles of the ADA that prohibit an employee from committing or obligating funds without clear authority and the required monies to fully fund the obligation. A standard commercial indemnification clause could violate both provisions of the ADA because it potentially obligates the payment of an unspecified, unlimited, and unappropriated amount of money to compensate for someone else's property loss, injury, death, or

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legal expenses. It is imperative to contact OGC to obtain legal advice with respect to all indemnification provisions.

- G. **Records Management.** BPA's Customer Contracts Management System (CCM) is the source of record for MOUs and MOAs. The program office who owns the MOU/MOA is responsible for ensuring compliance and storage of it into CCM.
- H. **Guidance on Basic Terms.** Subject to advice from OGC, the following basic terms should be included in MOUs and MOAs:
1. Parties. The parties to the memorandum must be identified.
 2. Authority. The legal authority for the memorandum must be cited. Federal law, applicable Department of Energy Orders, or other directives.
 3. Purpose. The purpose or reason for entering into the memorandum must be stated.
 4. Reporting and Documentation. The memorandum should specify whether follow-up reports or documentation of actions taken are required and state how often and to whom they are to be submitted.
 5. Points of Contact. Points of contact for all parties are provided, including title, official office, addresses, and phone numbers. Fax numbers and e-mail and internet addresses should also be provided if available.
 6. Effective Date. The date the memorandum becomes effective must be stated. This may be a specified date after it is signed by all parties, or it may be the date the last party signs the memorandum.
 7. Termination. The memorandum should indicate that it will terminate upon a certain date, upon the accomplishment of identified task or goals, or upon the parties' mutual agreement. The memorandum should also contain a provision addressing whether the term of the memorandum may be extended and the appropriate mechanism to do so (e.g., by written agreement of the parties). Conversely, the agreement should also indicate whether a party may terminate it early, and the appropriate mechanism for doing so (usually by written notice to the other parties).

6. Policy Exceptions

- A. If an outside entity objects to Bonneville's memorandum naming convention, modifications can be made with the concurrence of OGC.
- B. MOUs/MOAs with unions are exempt from this policy.

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7. Responsibilities

A. Executives

1. Ensure all memorandum acceptance, approval, and termination activities, within the scope of their responsibility, are performed by appropriate personnel.
2. Ensure all memorandum-related administration, performance, and information management activities within the scope of their responsibility are performed in accordance with this policy.
3. Investigate any irregularities in memorandum execution or administration and take appropriate action.
4. Ensure review of memorandum by the appropriate transaction oversight bodies.

B. Manager of the Primary Office of Responsibility

Before advising that Bonneville commit to a memorandum:

1. Verify that the proposed signatory possesses delegated authority to bind Bonneville to each commitment contained within the memorandum;
2. Verify that Bonneville can legally, operationally, and financially (within the department's budget) fulfill each commitment contained within the memorandum;
3. Verify the memorandum can be managed appropriately for its administration, performance, and audit purposes;
4. Verify the memorandum is filed within CCM; and
5. Ensures review of the memorandum by the appropriate transaction oversight bodies per applicable business line procedures.

C. Office of General Counsel

Provides legal review of the appropriateness of the proposed MOU or MOA and legal risk assessment of the contents.

D. Office of Finance

Reviews memorandum for potential financial impacts on rates, budgets, forecasts and financial reporting of actual transactions.

E. Transaction Oversight Bodies

These compliance organizations are responsible for identifying and closing gaps in policies, processes, and standards documentation implementing this policy's requirements.

1. Audit, Compliance & Governance Committee (ACGC)
2. Internal Audit

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3. Purchasing & Property Governance (CP)

8. Standards & Procedures

Executives or managers of the primary office of responsibility are responsible for developing and implementing internal operational procedures best suited for their business processes, and assuring that their organization complies with their respective responsibilities under this policy.

9. Performance & Monitoring

Purchasing & Property Governance (CP) has responsibility for monitoring compliance with this policy and periodically evaluating its continuing effectiveness.

10. Authorities & References

10.1 Authorities

A. BPA Policy 236-1, *Information Governance & Lifecycle Management* references

B. Requirements Sources

1. *Asset Management Instructions* (October 2017)
2. *Bonneville Financial Assistance Instructions* (July 2017)
3. *Bonneville Purchasing Instructions* (March 2018)
4. BPA Policy 130-10, *Management of Business Unit Functional Statements* (2020)
5. BPA Policy 140-1, *Delegations of Authority to Bind the Bonneville Power Administration* (2020)
6. BPA Policy 140-2, *Administrative Designations* (2015)
7. BPA Policy 250-5, *Sponsoring or Co-Sponsoring Public Events Requested by Outside Entities* (2012)
8. BPA Policy 440-72, *Printing and Reproduction* (2019)
9. BPA Policy 461-1, *Acquisition of Real Property* (2017)
10. BPA Policy 473-1, *Acquisition of Information Technology Assets* (2014)
11. BPA Policy 482-1, *Customer Contract Lifecycle Management* (2019)
12. BPA Policy 490-1, *Basic Travel Policy, Responsibility, and Authority* (2016)

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11. Review

- A. CP will review this newly adopted policy before the end of 2nd quarter of 2021.
- B. The 5-year sunset review standard applies to this policy.

12. Revision History

Version Number	Issue Date	Brief Description of Change or Review
1.0	4/14/2021	Initial publication of new policy

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