HIGHLIGHTS OF SECTION 404[1]

FEDERAL REGULATORY PROGRAM TO PROTECT WATERS OF THE UNITED STATES

INTRODUCTION

The U.S. Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 404 of the Clean Water Act establishes a permit program to ensure that such discharges comply with environmental requirements. The Section 404 program is administered at the federal level by the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA). The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Servcie (NMFS) have important advisory roles. The Corps has the primary responsibility for the permit program and is authorized, after notice and opportunity for public hearing to issue permits for the discharge of dredged or fill material. States can assume a portion of the permitting program from the federal government (for some waters only), but there has been limited interest by the States. EPA has primary roles in several aspects of the Section 404 program including development of the environmental guidelines by which permit applications must be evaluated; review of proposed permits; prohibition of discharges with unacceptable adverse impacts; approval and oversight of State assumption of the program; establishment of jurisdictional scope of waters of the United States; and interpretation of Section 404 exemptions. Enforcement authority is shared between EPA and the Corps.

Waters of the United States protected by the Clean Water Act include rivers, streams, estuaries, the territorial seas, and most ponds, lakes, and wetlands. The term wetlands includes swamps, marshes bogs, and similar areas. Wetlands are a particularly important and sensitive segment of our waters, and therefore merit special attention. Wetlands provide critical habitat for many important species of fish and wildlife, and export plant particles (called detritus) that serve as food for aquatic organisms in adjacent waters. Peak floodwaters are absorbed by wetlands, reducing damage to downstream property, often farms and municipalities. Water quality is improved as a result of a number of natural processes that remove pollutants from water flowing through wetlands. In addition, aesthetic, recreational, scientific, and educational values are provided by these natural

[1]The information contained in this document is intended to provide a basic understanding of the Section 404 program. It is not a form of policy or guidance and should not be relied on as such. For official guidance on Section 404 policy, the reader should go to the specific documents (such as the Clean Water Act and the MOA's between EPA and the Army Corps of Engineers) or contact the appropriate EPA or Corps office.

aquatic areas. While not every wetland performs all of these functions, healthy wetlands provide one or more of these other valuable services.

Throughout history, wetlands have been misunderstood as "wastelands" to be drained or filled for conversion to other uses. Within the last 200 years, over half of the wetlands in the lower 48 States have been lost to agriculture, mining, forestry, oil, and gas production, water resource development and urbanization. High rates of loss are continuing; about ten percent of remaining wetlands are lost in a recent 20 year interval.

The Section 404 Program is broadly recognized as the most significant regulatory program affecting wetlands; it does not regulate all activities that harm or affect wetlands (see Appendix 1 for details on Section 404).

GEOGRAPHIC SCOPE OF SECTION 404

Like other Clean Water Act programs, the jurisdiction of Section 404 extends to all waters of the United States. This phrase includes waters which are currently used, were used in the past, or may be used in interstate or foreign commerce, including:

- all waters which are subject to the ebb and flow of the tide;
- the territorial sea;
- interstate waters and wetlands;
- all other waters (such as intrastate lakes, rivers, streams and wetlands), if their use, degradation or destruction could affect interstate or foreign commerce;
- tributaries to waters or wetlands identified above; and
- wetlands adjacent to waters identified above.

In determining waters that are within the scope of the Clean Water Act, Congress intended to assert federal jurisdiction to the broadest extent permissible under the commerce clause of the Constitution. One factor that establishes a commerce connection is the use or potential use of waters for navigation. Other factors include (but are not limited t) use of a wetland (or other water) as a habitat by migratory birds, including waterfowl, use by federally listed endangered species or recreation by interstate visitors.

As defined in Section 404 program regulations, wetlands are "those areas that are inundated or saturated with surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." In applying this definition in the field, government agency scientists use indicators of vegetation, soils and hydrology to identify wetlands and to establish their boundaries. Wetlands can be coastal or inland; saltwater or freshwater. Around the country, wetlands may be known by a variety of names, including swamps, marshes, bogs, potholes, sloughs, fens, mangroves, pocosins, wet meadows, savannahs, wet tundra, play lakes and vernal pools.

ACTIVITIES REGULATED BY SECTION 404

Discharges of dredged and fill material are commonly associated with activities such as port development, channel construction and maintenance, fills to create development sites, transportation improvements, and water resource projects (such as dams, jetties, and levees). Other kinds of activities such as landclearing, are regulated as Section 404 discharges if they involve discharges of dredged or fill material (e.g. soil) into waters of the United States. However, some activities which can adversely affect and even destroy wetlands, such as drainage and groundwater pumping, are often conducted without discharging of dredged or fill material into waters of the United States, and in those circumstances, are not regulated under Section 404.

The Federal Clean Water Act also includes specific exemptions from permitting requirements for certain activities (§404(f)(1)). These activities include:

1. Normal farming, silviculture and ranching practices;

2. Maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, rip rap, breakwaters, causeways, bridge abutments or approaches, and transportation structures;

3. Construction of maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches;

4. Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States; and

5. Construction or maintenance of farm or forest roads or temporary roads for moving mining equipment if best management practices are followed.

Section 404(f)(1) is applied narrowly and is not intended to exempt activities with more than minor impacts on aquatic resources. Under the recapture provision at Section 404(f)(2), the exemptions do not apply if the discharge is part of, or incidental to, an activity whose purpose is to convert an area of the waters of the United States into a use which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters is reduced. This limitation on the Section 404(f) exemptions would, for example, require a farmer to obtain a permit for a discharge to convert a wetland area to produce upland crops.

The Clean Water Act provides another limited exemption under Section 404(r) for projects specifically authorized by Congress. To be covered under this exemption, an Environmental Impact Statement under the National Environmental Policy Act must be prepared on the project and submitted to Congress. The Statement must contain information on the effects of the discharge on environmental values protected by Section 404, including consideration of the Section 404(b)(1) Guidelines.

INTRODUCTION TO THE PERMIT PROCESS

Discharges can be authorized by either individual or general permits. If an individual permit is required, an application form describing the proposed activity is submitted to the Corps (or a State agency if the program has been assumed from the federal government). Once a complete application is received, the permitting agency issues a public notice containing the information needed to evaluate the likely impact of the proposed activity. Notice is sent to all interested parties including adjacent property owners, appropriate government agencies at the Federal, State, and local level, and others as requested. Any person may request that a public hearing be held to consider the application.

General permits eliminate the need for individual permits for some activities which conform to specified terms and conditions. General permits may be used on a State, regional, or nationwide basis. Section 404(e) authorizes general permits for activities which are similar in nature and will cause minimal adverse environmental effects individually or cumulatively. General permits are developed through the same public notice and opportunity for public hearing that is used for an individual permit. Once issued, a general permit may be modified or revoked if the permitted activities are found to have an adverse environmental impact. In some instances, the discharger must notify the Corps prior to discharging

Advance Identification of Disposal Sites

The individual permit process under Section 404 is sometimes an intensive, time consuming and controversial case-by case evaluation process. Section 230.80 of the Section 404(b)(1) Guidelines provides for a planning process that can results in a more predictable decision making process. In this planning process, information is developed that can be used by the regulated and general public to plan and consider potential projects. Such information can include general locations and values of waters of the U.S. and potential threats and impacts to those values. This process usually results in maps which provide information on where discharges to waters of the U.S. including wetlands, may be generally suitable or unsuitable.

The Advance Identification (ADID) process is conducted by the EPA and Corps of Engineers (or any State that has assumed the Section 404 permitting responsibilities) and includes consultation with the affected State. Active State and local involvement result in a much better product and are encouraged by both EPA and the Corps.

Since the ADID process can require a substantial amount of staff time and funds, it is usually conducted for areas that have important resource value and are under development pressure. Further, the area that is studied and mapped is usually a very limited portion of a watershed. Attempts are made to limit the geographic extent of the ADID to a manageable size.

The ADID process may include collecting existing data and generating new data on the aquatic system and its value to surrounding and downstream aquatic ecosystems. This information is then used to determine which areas are the most valuable, and therefore, in need of the highest level of protection.

The products that result from the ADID process include, at a minimum, designation of areas as generally suitable or unsuitable for use as a discharge site. Additional actions quite often result, such as some anticipatory method of processing the most valuable areas. For example, ADIDs may result in State or local land use or regulatory restrictions, or use of EPA's Section 404(c) authority to restrict or prohibit discharge to a defined area. The Corps may issue general permits for certain activities in portions of the area designated as suitable for disposal.

under the authority of the general permit. On a case-by-case basis, the permitting agency may invoke discretionary authority and require a discharger that would otherwise be covered by a general permit to apply for an individual permit.

MAKING THE PERMIT DECISION

The Corps' evaluation of a Section 404 permit application is a two part test which involves determining whether the project complies with the Section 404(b)(1) Guidelines and a public interest review. A permit must be denied if the project fails to comply with the Guidelines or is found to be contrary to the public interest.

The Corps' public interest review is a balancing test in which the public and private benefits of a project are weighed against its adverse impacts to the environment. It includes such considerations as aesthetics, recreation, historic values, economics, water supply, water quality, energy needs, and flood damage prevention. The Corps also considers all comments received in the permit process, whether in the response to a public notice or a public hearing, in arriving at a final permit decision. As part of this evaluation, the Corps conducts an environmental assessment under the National Environmental Policy Act (NEPA) to determine whether the project has significant environmental impacts.

The Section 404(b)(1) Guidelines (Guidelines), published by EPA in conjunction with the Corps, contain substantive environmental criteria used in evaluating discharges of dredged or fill material. Reflecting the goals of the Clean Water Act, the Guidelines establish key policies for the Section 404 Program:

· Dredged or fill material should not be discharged into waters of the United States unless it can be demonstrated that such discharge will not have an unacceptable adverse impact (individually or cumulatively) on the aquatic ecosystem.

· From a national perspective, the degradation or destruction of special aquatic site, such as filling operations in wetlands, is considered to be among the most severe environmental impacts addressed by Section 404.

To implement these policies, the Guidelines include a number of key requirements. One of them states that no discharge can be permitted if there is a practicable alternative with less adverse impact on the aquatic environment (unless the identified alternative poses other significant environmental problems). This alternatives test is applied more rigorously (i.e., alternatives are presumed to exist) for projects that are proposed to be located in special aquatic sites when the project is not water dependent. For example, boat docks in a marina require water access and are water dependent; a restaurant is not. Special aquatic sites include: wetlands, coral reefs, mud flats, riffle and pool complexes in streams, vegetated shallows and sanctuaries and refuges. However, the Guidelines require a demonstration that no practicable alternatives exist (as discussed above) for

Enforcement

Enforcement is a necessary component of an effective regulatory program. EPA and the Corps share Section 404 enforcement authority. Section 309 of the Clean Water act gives EPA the authority to act against persons who discharge without a permit and also to enforce against violations of Section 404 permit conditions. Section 309 also provides EPA with a variety of enforcement mechanisms. For example, an administrative compliance order issued pursuant to Section 309(a) generally requires a violator to stop an all illegal discharges and, where appropriate, to remove the fill and/or restore the site. Section 309(g) authorizes EPA to assess administrative civil penalties for, among other things, violations of Section 404. A third enforcement mechanism allows EPA to seek monetary penalties, injunctive relief, and even prison sentences through judicial action pursuant to Section 309(b) and (c). Under these Sections, EPA may refer cases to the Department of Justice for criminal and/or civil litigation.

EPA has focused its resources on identifying and enforcing against unpermitted discharges of dredged or fill material. The Corps has the lead on acting against violations of Corps-issued permits, and has also been responsible for a significant amount of the enforcement efforts against unauthorized discharges.

A Section 404 enforcement case frequently begins with EPA receiving information regarding a potential violator from a citizen or local official. Violations are also discovered by State, EPA or Corps staff, or other Federal personnel while in the field on other routine business. Thus, state and local officials/residents can serve as the "eyes and ears" of EPA in recognizing and reporting potential Section 404 violations. States may also assume the Section 404 program, including enforcement; however, even where States assume the program, the Corps maintains permitting authority in traditionally navigable waters.

both water dependent and non-dependent projects.

No discharge can be permitted under the Guidelines if it would violate other applicable laws, such as State water quality standards, toxic effluent standards, or the Endangered Species Act. The Guidelines also prohibit any discharge that would cause or contribute to significant degradation of waters of the United States. In addition, discharges can be permitted under the Guidelines only if all appropriate and practicable steps are taken to minimize (i.e., mitigate) the adverse impacts of the discharge on the aquatics ecosystem, including compensating for unavoidable impacts (see Appendix 2 for details on the Section 404(b)(1) Guidelines).

In addition to the evaluation conducted by the Corps under the Guidelines and their public interest review, Section 401 of the Clean Water Act must be complied with before a permit can be issued. Section 401 requires that the Sate in which an activity occurs must certify that the activity complies with the State's water quality standards or waive its rights to so certify by not taking actions within a specified time. Similarly, coastal States must concur that the activity meets the requirements of the coastal zone management program (CZMP) of the State or waive their right to concur by not taking action within a specified time. CZMP's are developed by States under the Coastal Zone Management Act of 1972.

ADDRESSING UNACCEPTABLE ADVERSE IMPACTS

Under the authority of Section 404(c), EPA may prohibit, withdraw, or restrict the discharge of dredged or fill material into waters of the United States if the discharge would have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas

(including spawning and breeding areas), wildlife, or recreational areas. This authority may be used before, during or after Corps action on a permit application. EPA may also exercise this authority in absence of a specified permit application or Corps regulatory action. In this instance, EPA may conduct a 404(c) action in conjunction with an Advance Identification or a Special Area Management Plan, or where otherwise appropriate.

EPA generally exercises its Section 404(c) "veto" authority when the regulatory process results in a permit decision that would have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas. In those cases, EPA's Section 404(c) decision process may include data collection and analysis, consultation with the applicant and the Corps, and public notice with opportunity for a hearing. EPA is increasing its use of Section 404(c) authority, but to date has used it infrequently.

EPA works with the Corps during the permit decision process whenever possible to ensure unacceptable adverse impacts are avoided and most concerns are resolved through its interagency consultation. The Corps and EPA have developed a process through a Memorandum of Agreement (MOA) to quickly resolve any differences over permit decisions. In instances where there has been either insufficient interagency coordination, information, or where the proposed project raises environmental issues of national importance, this MOA allows for EPA's Assistant Administrator for Water to request that the Army's Assistant Secretary for Civil Works elevate the proposed permit decision to higher authority for review. The Fish and Wildlife Service and the National Marine Fisheries Service have similar agreements with the Corps.

ENFORCEMENT

As a jointly administered program, the Corps and EPA share responsibility for enforcing the Section 404 program. The Corps, as the permitting agency, has primary responsibility for monitoring and enforcement of compliance with Section 404 conditions. EPA can also enforce against non-compliance with permit conditions; however, EPA generally focuses its resources towards discovering and enforcing against unpermitted (unauthorized) discharges. Anyone in violation of the Section 404 program, either by conducting an unauthorized activity or by violating permit conditions, is subject to civil or criminal action or both. Penalties can be imposed by the agencies administratively, that is, without use of judicial procedures. When judicial action is pursued, the violator may be required to restore the site and may be subject to payment of fines, imprisonment or both. The agencies and the courts also frequently require restoration of the site/and or mitigation at the expense of the violator, often in addition to other penalties.

STATE PROGRAMS

The Clean Water Act provides that States may assume a portion of the Section 404 permitting responsibility. EPA is responsible for approval or denial of State program assumption requests and for oversight of State programs subsequent to approval. States may assume the program in all waters within the State except (1) those which are subject to the ebb and flow of the tide, plus adjacent wetlands and (2) waters which are presently used or may be susceptible to use

(through reasonable improvement) to transport interstate or foreign commerce, plus adjacent wetlands. The Corps retains jurisdiction over all waters which the States cannot assume.

States must meet specific statutory and regulatory requirements for an approvable State program. Some of these requirements are that the States must: establish jurisdictional limits equivalent to the federal rules; regulate at least the full scope of activities regulated by Section 404; deny permits which do not comply with the Section 404(b)(1) Guidelines; provide sufficient notice and opportunity for public hearing; have the authority to enforce compliance with the program through civil and criminal penalties and other means; and be able to terminate and modify permits for cause. In addition to the States and territories, Indian tribes may be considered a "State" for purposes of the Clean Water Act, including Section 404, if they meet certain requirements.

A number of States actively exercise their authority under Section 401 of the Clean Water Act, and coastal states under Section 307 of the Coastal Zone Management Act, to certify whether a proposed activity complies with State Water quality standards, or is consistent with the State's coastal zone management plan, respectively. Both of these actions by the State apply to activities regulated by the federal government and give the State an effective veto of the proposed activity.

THE CITIZEN'S ROLE IN SECTION 404

Aquatic resources, including wetlands, play an important role in our lives. They perform valuable ecological, water quality, hydrologic and economic functions. Yet these areas are rapidly disappearing or being degraded to the point that their important benefits can no longer be realized. Increased awareness and appreciation of the values of these natural areas can lead to a greater willingness and ability to protect what is left.

The concerned and informed citizen can play an important role in the protection of wetlands in American communities. Once familiar with nearby wetlands and other aquatic resources citizens can provide meaningful comments on public notices on applications for Section 404 permits. In addition, one of the most effective enforcement mechanisms for the Corps and EPA is notification of either agency when citizens believe wetland filling is not permitted or the permit conditions are being violated. Comments are also encouraged on proposed regulations implementing environmental programs at the Federal, State, or local level.

Citizens can also form activist groups to protect and possibly even purchase sensitive aquatic environments such as wetlands, free flowing streams, lakes, or estuaries that are subject to development pressure. Once formed, the group can work with local governments to establish protective zoning or State government to use water quality laws for protection of these aquatic ecosystems. In addition to these efforts, a citizens group can encourage EPA and the Corps to help the protection effort through advance planning such as advance identification or special area management planning.

ADDITIONAL INFORMATION

Because the Section 404 program is complex, and application of regulations and policies to

specific cases is often-specif, the reader may want to contact local offices of EPA or the Corps for additional information. For more information on wetlands, contact EPA Headquarters, Office of Wetlands, Oceans and Watersheds, Ariel Rios Building (4502F), 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

APPENDIX 1
Federal Water Pollution Control Act
Renamed Clean Water Act, 1977 Amendments

The 1972 Amendments to the Federal Water Pollution Control Act included the addition of the Section 404 regulatory program.

Section 301(a): States that any discharge of a pollutant (including dredged or fill material) is unlawful unless permitted under other sections of the Act, including Section 404.

Section 309 404(s): Provide that the EPA and Corps may initiate administrative or judicial enforcement action against violations, including discharging dredged or fill material without a Section 404 permit, or violating the conditions of an issued permit.

Section 404(a): Provides that the Corps may issue permits, after public notice and opportunity for a public hearing, for the discharge of dredged or fill material into waters of the United States, at specified disposal sites.

Section 404(b): Each disposal site shall be specified by the Corps through application of guidelines developed by the EPA in conjunction with the Corps. The guidelines (known as the Section 404(b)(1) Guidelines) shall be based upon criteria comparable to those applicable to ocean discharges under Section 402 (National Pollutant Discharge Elimination System) permits defined at Section 403(c).

Section 404(c): EPA is authorized to prohibit the specification (including withdrawal of specification) of any disposal site and to deny or restrict the use of any disposal site. The prohibition or restriction is based, after public notice and opportunity for public hearing, on unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

The 1977 amendments to the FWPCA included additions to Section 404, Subsections (d) thorugh (f) were added; notable changes were:

Section 404(e): Provides authority to the Corps to issue permits for a period of up to 5 years provided the activities covered are similar in nature and will have only minimal adverse environmental effects individually and cumulatively. The general permit may be issued on a nationwide, regional or statewide basis and is subject to application of the Section 404(b)(1) Guidelines and public notice and opportunity for public hearing procedures.

Section 409(f): Exempts discharges associated with certain limited activities, most dealing with minor agricultural or silvicultural activities, from requirements to obtain a permit. Discharges associated with activities that convert a water of the United States to upland use are not exempt.

Section 404(g)-(l): Establishes a mechanism for States to assume administration of the Section 404 regulatory program in certain waters of the United States. Those waters that are subject to tidal action and their adjacent wetlands and waters which are presently used, or with reasonable improvement could be used, to transport interstate or foreign commerce and their adjacent wetlands are not assumable (these waters are the same as those the Corps determines to be subject to Section 10 of the Rivers and Harbors Act of 1899, except for historical Section 10 waters, plus adjacent wetlands).

Section 404(q): Requires that the Corps enter into memoranda of agreement with EPA, Department of Commerce, Department of the Interior, Department of Agriculture, and Department of Transportation to minimize duplication and delay in decisionmaking.

Section 404(r): Provides that the discharge of fill material as part of federal project specifically authorized by Congress is not subject to the requirements of Section 404, provided that information on the effects of the discharge, including consideration of the Section 404(b)(1) Guidelines, is included in the environmental impact statement under the National Environmental Policy Act provided to Congress prior to authorization.

APPENDIX 2
Section 404(b)(1) Guidelines
Restrictions on Discharges

In order to be permitted under Section 404 of the Clean Water Act, an activity must be found to be in compliance with the Section 404(b)(1) Guidelines (40 CFR 230). There are several specific restrictions on discharges listed in 40 CFR 230.10.

40 CFR 230.10(a): States that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." A practicable alternative is defined as one that " is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." An alternative does not have to be owned by an applicant to be considered practicable. The burden of proof is always on the applicant to demonstrate that there are no available practicable alternatives. Moreover, the alternatives test includes two presumptions were discharges are proposed for special aquatic site, including wetlands:

1. for activities which are not water dependent, "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise," and

2. "where a discharge is proposed for a special aquatic site, all practicable alternative to the proposed discharge which do not involve a discharge into a special aquatic site are permitted to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise."

40 CFR 230.10(b): This restriction is based on compliance of the proposed activity with several environmental laws, including: applicable water quality standards, toxic effluent standards, Endangered Species Act, and marine sanctuaries designated under the Marine Protection, Research, and Sanctuaries Act of 1972.

40 CFR 230.10(c): This restriction states that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.: This determination involves a consideration of impacts on human health; aquatic life and wildlife dependent on aquatic ecosystems, aquatic ecosystem diversity, productivity and stability, and recreational, aesthetic, and economic values of the ecosystem.

40 CFR 230.10(d): This restriction states that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize (mitigate) potential adverse impacts of the discharge on the aquatic ecosystem."