



Office of Inspector General

Report of Audit

WETLANDS:

EPA's Implementation and Management of the Section 404 Wetlands Program

Audit Report Number E1hWEO-04-0291-1100434

September 30, 1991



**Inspector General Division
Conducting the Audit:**

**Southern Audit Division
Atlanta, Georgia
(Audit Control Point)**

**Central Audit Division
Kansas City, Missouri**

Regions Covered:

**Region 4
Atlanta, Georgia**

**Region 6
Dallas, Texas**

**Region 7
Kansas City, Missouri**

Program Office Involved:

Office of Water



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

September 30, 1991

OFFICE OF
THE INSPECTOR GENERAL

MEMORANDUM

SUBJECT: EPA's Implementation and Management of the Section
404 Wetlands Program
Audit Report No. E1HWE0-04-0291-1100434

FROM: Kenneth A. Konz *Kenneth A. Konz*
Assistant Inspector General for Audit

TO: Lajuana S. Wilcher
Assistant Administrator for Water

Attached is the final report entitled "EPA's Implementation and Management of the Section 404 Wetlands Program." Our overall audit objective was to determine if EPA was fulfilling its basic legislative and program responsibilities under Section 404 as set forth in the Clean Water Act and the Agency's Annual Operating Guidance for FYs 1988, 1989, and 1990. This report contains substantive findings and recommendations regarding the operations of EPA's wetlands program.

Action Required

In accordance with EPA Order 2750, you, as the action official are required to provide this office a written response to the audit report within 90 days of the final audit report date. For corrective actions planned but not completed by your response date, reference to specific milestone dates will assist this office in closing the report. We have no objections to the further release of this report to the public.

This audit report contains findings that describe problems the Office of Inspector General has identified and corrective actions the OIG recommends. This audit represents the opinion of the OIG. Final determinations on matters in this report will be made by EPA managers in accordance with established EPA audit resolution procedures. Accordingly, the findings described in this report do not necessarily represent the final EPA position.

If you have any questions or need additional information regarding this report, please contact Mary Boyer, Divisional Inspector General, Southern Audit Division, at FTS 257-3623.

Attachment

EXECUTIVE SUMMARY

PURPOSE

Until enactment of Section 404 of the Clean Water Act (CWA) in 1972, wetlands historically had been considered unimportant and routinely filled or drained for various commercial uses. Over half of our nation's original wetland acreage had been destroyed at the time Section 404 was enacted and current wetland losses continue at an estimated rate of 300,000 acres annually. Wetlands generally include swamps, marshes, bogs, and similar wet areas. Scientific research and studies have shown that wetlands provide many essential and economically valuable services to include buffering the impact of floods/storms, serving as groundwater recharge areas, maintaining water quality of adjacent rivers and streams as well as providing habitat for many species of fish and wildlife. Section 404 prohibited the draining and filling of regulated wetlands without a prior Federal regulatory review of the activity and issuance of a permit.

Because of the Agency's (EPA) significant statutory and regulatory role in wetlands protection and public concern over continuing wetland destruction, the Office of Inspector General (OIG) initiated a review of EPA's implementation and administration of the Agency's basic statutory responsibilities under Section 404 of the CWA and the wetlands program responsibilities established in the Agency's Annual Operating Guidance. Specific areas of audit emphasis were: (1) EPA's enforcement against unpermitted discharges into wetlands; (2) EPA's implementation of its responsibilities under the Section 404 regulatory program; and (3) EPA's use of strategic initiatives, including advanced wetland identification and other public outreach activities to enhance the regulatory effectiveness of the wetlands program.

BACKGROUND

Under Section 404 the EPA and the COE have primary roles in implementing and managing the Section 404 wetlands program. Although the COE has responsibility for issuing Section 404 permits and ensuring permit compliance, both the COE and EPA under Section 404 and various memorandums of agreement share certain responsibilities for: development of program guidelines; wetland identification and jurisdictional determinations; permit review; and enforcement. Other Federal¹ and affected State resource agencies may also participate in the Section 404

¹ Federal resource agencies involved in Section 404 permit reviews include Department of Interior's Fish and Wildlife Service and Department of Commerce's National Marine and Fisheries Service.

Executive Summary

permitting process by reviewing and commenting on COE public notices of proposed permit issuances.

The EPA's Office of Wetland Protection (OWP) has overall responsibility for the nationwide implementation and management of EPA's Section 404 wetlands program through individual regional programs. Each EPA region has a wetlands program staff responsible for implementing and managing the Section 404 program within regional boundaries. However, because of the Agency's limited resources and the large resource demands of other EPA programs related to public health and safety, EPA's wetlands activities were not designated as a high priority function until 1984. Since 1984, the wetlands program's resources and organizational status have steadily increased. For FYs 1990 and 1991, EPA's wetlands program had a staff of 105 and 155 permanent employees, respectively, and budgets of \$10.4 and 18.8 million. Regulations related to the EPA's Section 404 wetlands program are contained in applicable subparts of the Code of Federal Regulations (CFR) Title 40. Each fiscal year the program's goals and objectives are provided in the Agency's Annual Operating Guidance.

From its inception, the EPA's Section 404 program has been described by program managers as "difficult to administer and beset by conflict and controversy" concerning the extent to which Section 404 was to function in overall wetlands protection efforts. Many interagency conflicts over program direction and implementation have required resolution. These conflicts included methodologies for Section 404 jurisdictional determinations and the need for sequential mitigation. Subsequent Federal attempts at resolving these issues, such as the interagency wetlands delineation manual issued in January 1989, have resulted in increased criticism of Federal wetland protection efforts by the regulated public which viewed the interagency manual (to clarify Section 404 jurisdiction) a change in Federal policy. While many interagency wetland issues have been resolved to some degree, many significant questions related to EPA's wetland protection efforts still require action.

RESULTS IN BRIEF

Although the Administrator through the Office of Wetlands Protection (OWP) established Agency priorities and objectives for the Section 404 program, Agency management did not ensure that the plan was accomplished by Headquarters staff and regional program operations. Some program goals related to unresolved wetland issues continue to affect the Government's overall ability to adequately protect valuable wetland resources. Other program objectives were approached inconsistently or ignored by

regional management resulting in a wetlands program that was unpredictable to the regulated public and, therefore, subject to public distrust and criticism.

PRINCIPAL FINDINGS

IMPROVEMENT NEEDED IN MANAGEMENT DIRECTION, CONTROL, AND ACCOUNTABILITY FOR THE SECTION 404 PROGRAM

Management controls over implementation of EPA's Section 404 program did not ensure that regions prioritized and accomplished the Agency's wetlands objectives and established effective and efficient wetland protection programs. Internal controls, that should have been established under the FMFIA, to provide reasonable assurance that program objectives were accomplished, were either not established or not fully implemented. Instead, regional wetland programs were permitted to respond to the agenda of regional management rather than commit to the Administrator's and the Office of Water's program objectives. This condition contradicts EPA's organizational accountability as stated in 40 CFR 1.61 which holds each Regional Administrator accountable to the Administrator for accomplishing national program objectives as established by EPA Headquarters program offices. As a result of inadequate management control and accountability, wetlands as a whole were not afforded the protection under Section 404 as envisioned by the Administrator and as detailed in findings presented in Chapters 3 through 5 of this report.

EPA'S SECTION 404 ENFORCEMENT PROGRAM IS NOT CONTROLLING AND DETERRING ILLEGAL DISCHARGES INTO PRIORITY WETLANDS

Although enforcement is a key wetlands program objective, the three EPA regions included in our audit had not developed effective, consistent enforcement programs and had not adequately monitored and coordinated Section 404 enforcement against unpermitted discharges of dredged and fill material into regulated wetlands. The ineffective and inadequate control over program implementation and direction by national program management permitted regions to establish their own enforcement priorities which contributed substantially to inconsistent, ineffective, and sometimes controversial enforcement against Section 404 violators. In addition, regional enforcement deficiencies could be attributed to a lack of measurable regional goals and commitments for enforcement activities as well as insufficient resources to accomplish enforcement program objectives. As a result, EPA's Section 404 enforcement has not effectively reduced or deterred unpermitted/illegal wetland discharges and the backlog of reported illegal dredge and fill activities steadily increased (over 32 percent) during our audit

period, 1988 through 1990.

SECTION 404 REGULATORY PROGRAM NEEDS BETTER OVERSIGHT, GUIDANCE, AND INTERAGENCY COORDINATION TO PROPERLY FULFILL STATUTORY RESPONSIBILITIES

Regional wetland programs did not: (1) maintain sufficient, viable data on which to base Section 404 regulatory decisions; (2) implement consistent, controlled approaches to Section 404 public notice reviews; and (3) properly exercise EPA's statutory authorities related to jurisdictional determinations and interagency disputes concerning Section 404 permitting. Limited program resources restricted the effectiveness of regulatory actions under the Section 404 program; however, the quality and consistency of the Section 404 regulatory process could have been enhanced through improved national and regional program controls and guidance. National and regional program oversight was minimal with national management providing only general Section 404 goals and objectives in annual Agency Operating Guidance and minimum definitive guidance. Because regional regulatory processes and use of statutory authorities were inconsistent and uncontrolled, important program responsibilities were not effectively administered and regional permit review processes were often viewed by the COE and regulated public as unpredictable and ineffective, occasionally placing EPA and COE in adversarial roles.

STRATEGIC INITIATIVES WERE NOT EFFECTIVELY IMPLEMENTED TO PRODUCE LONG-TERM IMPROVEMENTS IN WETLANDS PROTECTION

Limited by resources and insufficient national direction and oversight, the Regions did not: (1) identify and prioritize wetlands as to value and vulnerability in order to target limited program resources and inform the regulated public; and (2) implement strategic initiatives within established program guidelines as established by OWP. Therefore, the strategic initiatives initiated by Regions 4, 6, and 7 during the audit period did not target limited resources to the most valuable and threatened wetlands within each region. Also, the Regions' approaches toward strategic initiatives, specifically advanced identification were generally inconsistent and unfocused, did not demonstrate a leadership role in improving wetland protection over the long run, and sometimes sent a negative message to other government entities and the regulated public regarding EPA's commitment to the preservation and restoration of the most valuable wetlands experiencing continued conversion and cumulative wetland losses.

RECOMMENDATIONS

Significant improvements are needed in the management of EPA's Section 404 wetlands program if legislative and Agency goals and objectives are to be achieved. The Agency needs a long-term program strategy with measurable management commitments and improved national oversight to maximize the effectiveness of available program resources and related wetland protection. In addition, better use of available wetland regulatory statutes, improved program coordination, and increased program resources, where possible, must be obtained if EPA is to effectively implement a comprehensive wetland protection program and preclude further losses of the nation's valuable and vulnerable wetlands.

AGENCY COMMENTS

In general, the Agency did not agree with many of the report's findings and some of the recommendations; however, the Agency did not provide specific criteria, sources, or specific documents to support many of its disagreements. In some instances, the Agency's response did not address specific findings or recommendations. The Agency did basically agree with our findings and/or recommendations concerning the need for better implementation of FMFIA requirements for the Section 404 wetlands program, regular Headquarters reviews of regional wetland programs, integrating EPA's wetland database with COE's database, inadequate regulation and enforcement of solid waste discharges into wetlands, and the need for regional compliance with advance wetlands identification guidance and Headquarters monitoring of this compliance. The Agency did not agree to the need for establishing definitive, measurable goals and staff commitments for program objectives, EPA monitoring of COE's Section 404 enforcement actions taken on EPA's behalf, better controls over regional permit review activities, and certain recommended improvements in implementation of strategic wetland initiatives. More detailed Agency comments have been incorporated into appropriate report chapters and Appendix I along with OIG's evaluation of these comments.

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CHAPTER 1

INTRODUCTION

AUDIT PURPOSE

Section 404 of the CWA was intended to regulate and reduce the destruction or degradation of U.S. waters, including valuable wetlands, from dredging and filling. EPA's involvement in the regulation of wetland dredging and filling under Section 404 of the CWA has been part of Agency's statutory responsibilities since 1972. However, 18 years after Section 404's enactment, significant wetland losses continue to be reported at the rate of approximately 300,000 acres annually. Our overall audit objective was to determine if EPA was fulfilling its basic statutory and program responsibilities under Section 404 and the Agency's Annual Operating Guidance for FYs 1988, 1989, and 1990. Specific objectives were to:

1. Determine if EPA was effectively coordinating enforcement activity with the COE under the related 1989 memorandum of agreement (MOA)¹. Also, that Agency enforcement actions served as a deterrent against unauthorized discharges into regulated wetlands.
2. Evaluate EPA's implementation of the Section 404 regulatory program through the review of dredge or fill permit applications to include: program controls to assure compliance with Section 404(b)(1) Guidelines; oversight of COE jurisdictional determinations; and use of the interagency dispute resolution process outlined under the Section 404(q) MOA² between EPA and COE or the use of EPA's Section 404(c) authority to prohibit or restrict use of specified wetlands for the discharge of dredged or fill material.
3. Evaluate the effectiveness of strategic initiatives, including advanced wetlands identification, and other public outreach activities designed to enhance the effectiveness of the Section 404 regulatory process.

¹ Federal Enforcement of Section 404 Program of the CWA, effective January 19, 1989.

² Elevating Permitting Decisions Within the COE under Section 404(q) of the CWA, effective November 12, 1985.

BACKGROUND

Section 404 of the CWA was originally enacted in October 1972 as an amendment to the Federal Water Pollution Control Act (thereafter known as the Clean Water Act), Public Law 92-500³. The CWA of 1977 changed Section 404 into its current form. Section 404 was intended to regulate the discharge of dredge or fill material into the waters of the United States. "Waters of the United States" include rivers, streams, estuaries, the territorial seas, along with most ponds, lakes, and wetlands. The term "wetlands" includes swamps, marshes, bogs and similar areas. Although Section 404 regulates the discharge of dredge or fill materials into all waters of the United States, EPA's regulatory program has become commonly known as a "wetlands program."

Regulatory Responsibilities

Section 404 provides the basic legislative authority for Federal regulation of wetlands by establishing a permitting program to ensure that dredge or fill discharges comply with environmental requirements. The COE is the Federal agency responsible for regulating wetlands development under Section 404. However, EPA has a primary role in several aspects of the Section 404 permitting program. EPA, in conjunction with the COE, developed the Section 404 guidelines against which the COE evaluates all dredge and fill permit applications. EPA can make advisory comments to the COE on proposed permits and has the authority to specifically prohibit discharges that it believes will result in unacceptable adverse environmental impacts. EPA also has the authority to make wetland jurisdictional determinations and identify those activities exempt from Section 404 requirements. However, under a 1989 MOA⁴, the COE is authorized to make Section 404 jurisdictional determinations for EPA during the permit application review process.

Enforcement authority is shared between EPA and the COE. Under Section 404 the COE, as the permitting authority, has primary responsibility for enforcing against Section 404 permit

³ Appendix III outlines the statutory evolution of the Section 404 regulatory program.

⁴ Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemption Under Section 404(f) of the CWA, effective January 19, 1989.

violations; however, under Section 309, EPA and the COE have joint authority for permit violations. Under Section 301, EPA is the authority to enforce against unpermitted dredge or fill discharges through the Agency's Section 309 administrative, civil, or criminal authorities. Again, under a January 1989 MOA, the COE is authorized by EPA to enforce against certain categories of illegal, unpermitted dischargers on EPA's behalf.

Finally, in advance of any permit applications, EPA and the COE are authorized to jointly participate in initiatives to study wetland resources and specify wetland areas as either suitable or unsuitable for the discharge of dredge and fill material. The COE may perform similar studies (Special Area Management Plans) of wetlands under authority it was granted by the Coastal Zone Management Act.⁵

Wetland Values and Historical Losses

Scientific research and studies have shown that wetlands are a particularly important and sensitive segment of the country's aquatic ecosystems. Wetlands provide critical habitat for many important species of fish and wildlife, and provide a source of food for aquatic organisms in adjacent waters. Peak flood waters are absorbed by wetlands, sheltering downstream property, often farms and municipalities. In addition, wetlands also improve water quality as a result of a number of natural processes that filter pollutants and recharge groundwater as water flows through wetland areas.

Studies and reports document that over half of the nation's original wetland acreage has been lost. Between 1950 and 1980 wetland conversions accelerated with over 11 million acres lost. This acreage does not include degraded wetlands that can no longer function ecologically. Current studies continue to show wetland losses at an estimated 300,000 acres annually⁶. Much greater losses of particular types of wetlands have occurred in specific geographical regions, such as in coastal Louisiana where 40-50 square miles of wetlands disappear each year, or in California or Iowa where over 90 percent of their original

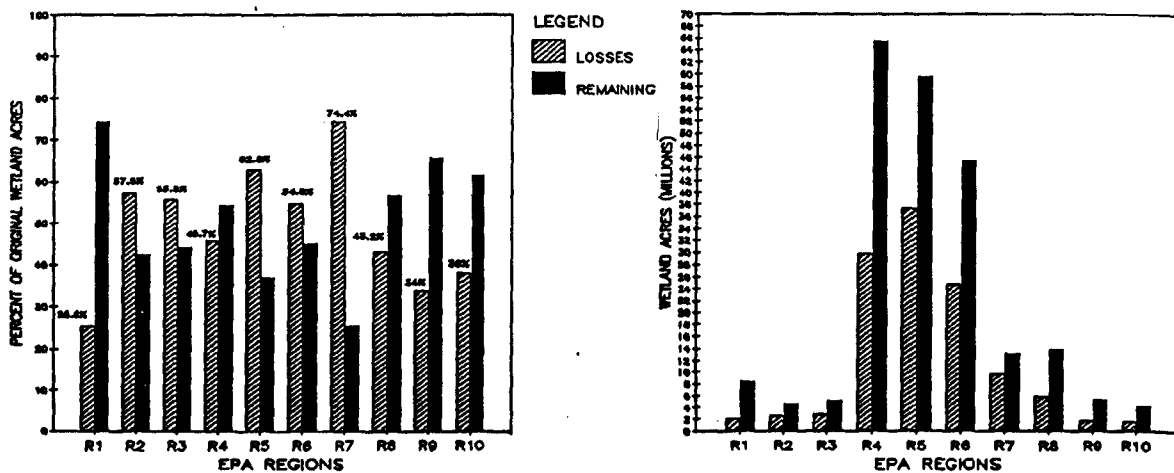
⁵ Appendix IV provides additional detail on EPA and COE Section 404 responsibilities.

⁶ Section 404 regulates only direct conversions of wetlands resulting from the discharge of dredge and fill material into U.S. waters.

wetland acreage have already been lost. While wetlands are being destroyed bit by bit, additional unknown numbers of wetlands are steadily being degraded by pollution, and by hydrological and physical alteration. In addition, examples of wetland destruction have been found in the Federal wildlife refuges and parks. Two examples are the documented destructive effects water diversions are having on the Florida Everglades National Park and the chemical contamination of the Kesterson Wildlife Refuge from agricultural runoff.

According to November 1990 statistics issued by the Fish and Wildlife Service (FWS), of the original 225.9 million acres of wetlands in the contiguous United States, only 105.5 million acres (47 percent) remain. Over 120 million acres (53 percent) have been destroyed. The acreage and percent of wetland loss by EPA region are illustrated in the charts below.

HISTORICAL WETLAND LOSSES
BY REGION FOR CONTIGUOUS U.S.



EPA's "Wetlands" Program

Because of the Agency's limited resources and the large resource demands of other EPA program's related to public health and safety, EPA's wetlands activities were not designated as a high priority function until 1984. Since 1984, the wetlands program's

resources and organizational status have steadily increased. For FYs 1990 and 1991, EPA's wetlands program had a staff of 105 and 155 FTEs, respectively, and budgets of \$10.4 and \$18.8 million. The 1991 staffing represents an 82 percent increase over the 85 FTEs authorized for the Section 404 program in 1988, the start of our audit period.⁷

From its inception, EPA's Section 404 program has been described by program managers as "difficult to administer and beset by conflict and controversy" concerning the extent to which Section 404 was to function in overall Federal wetlands protection efforts. Many interagency conflicts over program direction and implementation have required resolution. These conflicts included methodologies for Section 404 jurisdictional determinations and the need for sequential mitigation. Subsequent Federal attempts at resolving these issues, such as the interagency wetlands delineation manual issued in January 1989⁸, have resulted in increased criticism of Federal wetland protection efforts by the regulated public which viewed the interagency manual (to clarify Section 404 jurisdiction) a change in Federal policy. While many interagency wetland issues have been resolved to some degree, many significant questions related to EPA's wetland protection efforts still require action.

Organizational Changes In EPA's Wetlands Program

On May 1, 1991, the Office of Water (OW) reorganized its Headquarters offices and combined the Office of Wetlands Protection (OWP) with other water programs involving ecological risk management. The new Office of Wetlands, Oceans, and Watersheds will be responsible for the EPA's Section 404 wetlands program. The Section 404 program has been reduced from an "Office" to a "Division" level program within the Office of Water.

⁷ Although Section 404's inadequate program resources was a contributing factor to the program deficiencies cited in this report, we made no recommendations in this regard. EPA has limited control over current budget restrictions and the Agency and individual regions have strived to improve and allocate additional resources to the Section 404 program whenever possible.

⁸ Federal Manual for Identifying and Delineating Jurisdictional Wetlands, dated January 10, 1989.

SCOPE AND METHODOLOGY

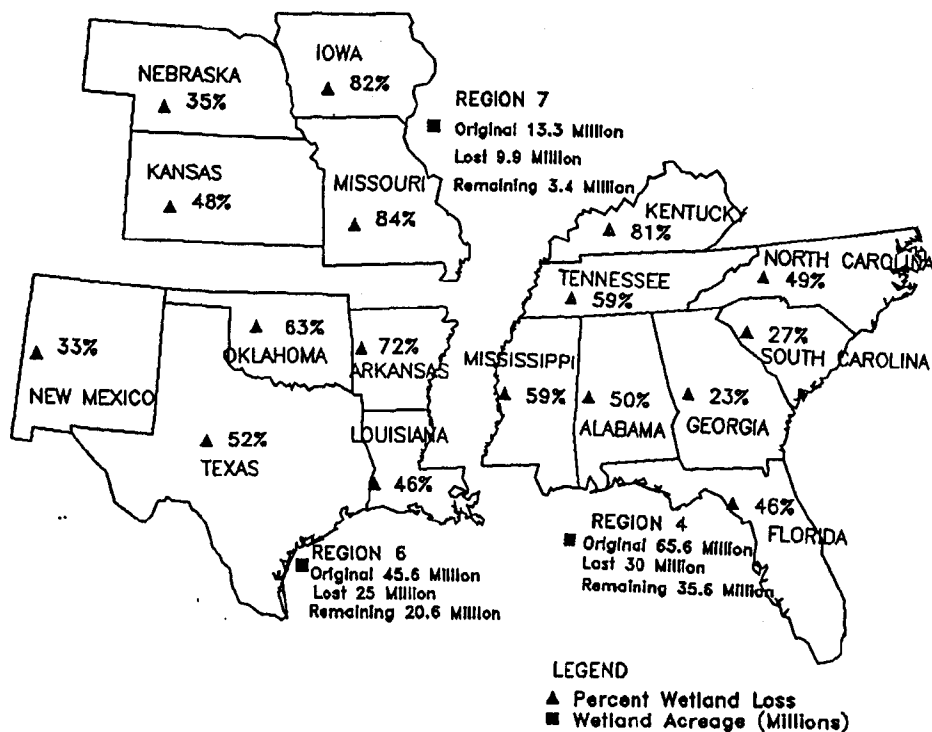
Because of its large wetlands acreage⁹ and significant Section 404 activity, EPA's Region 4 was selected as the "pilot" audit region. The Region 4 audit was conducted from June 1988 to November 1989. The pilot audit report WETLANDS: Region 4 Implementation and Management of the Section 404 Wetlands Program, Audit No. E1h7F8-04-0331-0100208 was issued on March 23, 1990. Based on the significance of program deficiencies found in Region 4, this EPA-wide audit was initiated to determine if similar problems existed in other EPA regions. This audit includes the results of our review of Section 404 program operations at the Office of Wetlands Protection, EPA Headquarters, and a judgmental sample of 3 regional wetland programs. In addition to Region 4 (Atlanta, Georgia) which was included in the pilot audit, we selected Regions 6 (Dallas, Texas) and Region 7 (Kansas City, Kansas).

Many program variables exist between individual EPA regions including the geographic area of responsibility, different wetland types, amount of jurisdictional wetlands, and type of impacts to wetlands. Therefore, because of these program variables, lack of EPA-wide databases for program activity, and absence of a defined universe, regional wetland programs were judgementally selected for review. Region 4 and Region 6 were selected because of the size and importance of their wetland acreage and the significant volume of Section 404 activity in the regions. Region 7 was chosen because its smaller wetlands program would provide a contrast and balance to the larger programs in Regions 4 and 6. In addition, Region 7 would offer a more extensive evaluation of inland wetland protection activities. We therefore considered these programs to be basically representative of the Section 404 programs in all EPA regions. However, because of the decentralized structure of EPA and the resulting variables between regional programs, common wetland program deficiencies for these three regions may not necessarily reflect the program operations in other EPA regions.

According to FWS wetland data as of November 1990, Regions 4, 6, and 7 had 59.6 of 105.5 (56.5 percent) million acres of remaining wetlands in the contiguous United States. The following regional maps illustrate the current wetland acreage and the historical

⁹ Region 4 contains over one third (36 million acres) of the remaining natural wetlands in the contiguous United States.

wetland losses in these three regions.



We conducted this multi-regional audit from June 1990 to July 1991. The audit was performed in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States. The fieldwork performed included tests of only those management controls and procedures specifically related to the audit objectives. We did not evaluate all internal controls related to EPA's wetlands program. Therefore, the findings in this report address only the material internal control weaknesses we identified within the limited scope of the audit. However, we did examine the procedures and results of EPA's management accountability system and methods for documenting Section 404 program controls to assess compliance under the Federal Managers Financial Integrity Act (FMFIA). Recommendations have been made where appropriate to improve management control through the FMFIA process (see Chapter 1). No other issues came to our attention during the audit which we believed were sufficiently material to warrant expanding the scope of our review.

In conducting this audit, we examined various records of and held discussions with: wetlands program staff at EPA and the other Federal resource agencies¹⁰; COE District offices; and various State agencies and related county program offices. We also reviewed applicable documentation including: laws and regulations; EPA goals and objectives for the wetlands program; wetlands program policies, procedures, and budgetary/staffing processes (including documented FMFIA controls and reports for Section 404 activities); Congressional testimony; and prior audits and special reviews related to the Section 404 program. Information obtained from prior audit reports and special reviews was used only as additional support for findings. A detailed list of the special reviews and audit reports included as part of this review are presented in Appendix VI.

To assess regional Section 404 permit review processes, enforcement against unauthorized discharges into wetlands, and initiation of strategic type activities, we selected random and judgmental samples from three program universes in each selected region. The three samples addressed: COE Section 404 and Section 10/404 public notices; enforcement actions taken against unpermitted discharges; and regional strategic initiatives and other actions, such as advanced wetland identification studies.

Sample of Section 404 Permit Reviews

To evaluate Region 4's effectiveness in protecting jurisdictional wetlands using Section 404 regulatory authorities, we selected a random statistical sample of 508 Section 404 public notices issued by six of the nine COE districts in Region 4. Using a 95 percent confidence level and a 5 percent precision rate for the population, we initially selected the required minimum sample of 345 Section 404 records from the National Marine Fisheries Service (NMFS) database for the test period (October 1, 1985 through December 31, 1987). While all of the public notices in the NMFS database should have been documented in Region 4's records, we randomly selected an additional 163 records under the assumption that a substantial number of the public notices would not be documented in Region 4's files. Our sample was generated from a computerized database of 3,276 Section 404 records maintained by the NMFS Southeast Region.

¹⁰ Major federal resource agencies involved in the Section 404 program: Department of Commerce's National Marine Fisheries Service (NMFS); Interior Department's Fish and Wildlife Service (FWS); and EPA's, Office of Wetlands Protection (OWP).

The NMFS database was the most comprehensive computer based information available on Section 404 permitting activity in Region 4. This database provided data on Section 404 public notices issued by the COE in Region 4 with the exception of the inland States of Kentucky and Tennessee. Region 4 did not have a comparable information source for the pilot audit test period.

The sampling methodology used in Regions 6 and 7 to test the Section 404 permit public notice review process was also a stratified, random selection to include proposed permits for both large and small Section 404 dredge or fill activities. We selected samples of 25 and 35 permit public notices, respectively, from Region 6 and 7's records of public notices received during the audit period (October 1, 1987 through July 17, 1990 for Region 6 and October 1, 1987 through August 23, 1990 for Region 7). There were approximately 3,795 Section 404 public notice records documented in Region 6 and 1,043 in Region 7 for the audit period. Additional wetland projects that came to our attention during regional staff interviews were also subjected to a detailed file review.

Each regional sample of individual permits was analyzed to determine if EPA had fulfilled its regulatory and oversight responsibilities during the permit review process. Because of the technical nature of the permitting process, we did not generally make value judgments concerning EPA regional recommendations on individual permits or whether these recommendations were appropriately considered by the COE prior to permit issuance. However, we did evaluate the appropriateness of EPA's response when major permit recommendations were ignored by the COE and adverse environmental impacts apparently resulted.

Because the regions' Section 404 public notice records did not routinely contain documentation of the COE's final actions on permit applications, COE's final permit decisions had to be obtained directly from COE district files. We visited eight COE Districts and contacted several others to obtain the needed documentation. We visited COE districts in Jacksonville, Florida; Savannah, Georgia; Charleston, South Carolina; Wilmington, North Carolina; Mobile, Alabama; Rock Island, Illinois; Kansas City, Missouri; and Omaha, Nebraska. These visits not only provided essential information on our sample of Section 404 permits that we needed to complete our analysis of each regions' public notice review process, but also allowed discussion of key wetland issues with COE personnel to include mitigation of wetland discharges, nonregulatory initiatives including advanced identification of vulnerable wetlands, and

enforcement of unpermitted discharges.

Sample of Section 404 Enforcement Actions

We reviewed a judgmental sample of 39 of approximately 80 EPA enforcement actions taken against unpermitted discharges in Regions 4 (17 actions reviewed), Region 6 (21 actions reviewed), and Region 7 (1 action reviewed), to evaluate EPA's identification and investigative process for these actions and to determine the conditions under which EPA imposed legal sanctions against Section 404 violators and the extent of the action. We also contacted the COE to obtain regulatory reports summarizing the number of alleged illegal Section 404 wetland discharges reported and the type of corrective action taken. We also interviewed EPA and COE personnel to determine the extent of EPA's oversight of the COE actions and the appropriateness of EPA enforcement actions. We used this information not only to determine compliance with the enforcement MOA and related enforcement policies but to ensure that violations are consistently and timely enforced.

Sample of Strategic Initiatives

For our audit period, approximately 24 strategic initiatives were initiated in Regions 4 (7 initiatives), 6 (7 initiatives), and 7 (10 initiatives). We reviewed all 14 initiatives reported for Regions 4 and 6 and 1 of the 10 initiatives in Region 7. The 15 strategic initiatives reviewed represented 100 percent of the advance identification studies initiated by the regions. We reviewed the selected strategic initiatives to determine if the regional initiatives and related actions complied with Agency program goals and objectives. We also interviewed personnel to establish existing policies and long-term plans for strategic initiatives and other activities designed to complement the regulatory process.

Sample selections and certain data used in this report were extracted from various regional wetland databases. In addition, the sample of Section 404 permits used to evaluate Region 4's permit review process was taken from a NMFS Section 404 database. No audit tests were performed to evaluate the adequacy of controls over these database systems and only limited tests, related to our sampling units, were performed concerning the accuracy and integrity of the data in these systems.

Our findings were discussed with personnel during audit fieldwork and comments were obtained from Regions 4, 6, and 7. The draft

report was provided to the Assistant Administrator for Water and each Regional Administrator in Regions 4, 6, and 7 for comment. The Office of Water's (OW) comments to the draft report and OIG's evaluation of these comments have been incorporated into appropriate report chapters and Appendix I.

PRIOR AUDIT COVERAGE

In March 1990 we issued the pilot audit report on Region 4's Section 404 wetlands program. The audit was entitled WETLANDS: Region 4 Implementation and Management of the Section 404 Wetlands Program (Audit Report No. E1h7F8-04-0331-0100208, 3/23/90). The results of the pilot audit were incorporated into this national report; therefore, no separate evaluation was made of the Agency's implementation of the pilot report recommendations. No other prior audit reports had been issued on EPA's Section 404 wetlands program.

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CHAPTER 2

IMPROVEMENT NEEDED IN MANAGEMENT DIRECTION, CONTROL, AND ACCOUNTABILITY FOR THE SECTION 404 PROGRAM

Management controls over implementation of EPA's Section 404 program did not ensure that regions prioritized and accomplished the Agency's wetlands objectives and established effective and efficient wetland protection programs. Internal controls, that should have been established under the FMFIA, to provide reasonable assurance that program objectives were accomplished, were either not established or not fully implemented. Instead, regional wetland programs were permitted to respond to the agenda of regional management rather than commit to the Administrator's and the Office of Water's program objectives. This condition contradicts EPA's organizational accountability as stated in 40 CFR 1.61 which holds each Regional Administrator accountable to the Administrator for accomplishing national program objectives as established by EPA Headquarters program offices. As a result of inadequate management control and accountability, wetlands as a whole were not afforded the protection under Section 404 as envisioned by the Administrator and as detailed in findings presented in Chapters 3 through 5 of this report.

BACKGROUND

Agency regulations in 40 CFR 1.49, charged the Office of Water, through the Office of Wetlands Protection (OWP), with administering the Section 404 wetlands program and developing specific Agency policies, procedures, regulations, and strategies addressing the protection of the nation's wetlands. Since OWP's organization in October 1986, it has established three essential elements for a viable wetlands program: Section 404 permit reviews, enforcement against unpermitted wetland discharges of dredge and fill material, and strategic initiatives such as advanced identification wetland studies. These program elements were codified in 40 CFR 230.

In 1982, Congress passed the Federal Manager's Financial Integrity Act (FMFIA). FMFIA required that each executive agency establish internal accounting and administrative controls in accordance with standards prescribed by the Controller General. Under EPA Order 1000.24, EPA designated the Deputy Administrator, Assistant Administrator for Water, and the Regional Administrators as "primary organization heads" responsible for overall development and maintenance of effective systems of internal control under FMFIA. OMB Circular A-123 and EPA Resources Management Directive 2560 prescribed the policies and procedures for Agency implementation of FMFIA requirements. These policies and procedures specifically stated that one of the

major objectives of the FMFIA internal control requirements was to provide management with reasonable assurance that "programs are efficiently and effectively carried out in accordance with applicable law and management policy."

WETLANDS PROGRAM NEEDS MEASURABLE PROGRAM GOALS, STAFF COMMITMENTS, AND NATIONAL GUIDANCE FOR IMPLEMENTING PROGRAM OBJECTIVES

While OWP has established basic, general missions and objectives for the Section 404 wetlands program in the annual Agency Operating Guidance, the Headquarters program management has never established definitive, measurable goals (measurable as to quality as well as quantity) and priorities or obtained measurable commitments for regional wetland operations for each of the program elements established by OWP with the exception of strategic initiatives. In addition, the OWP has not issued detailed guidance for regional activities to ensure effective and consistent implementation of the wetland program elements/missions. The absence of definitive, measurable program goals and priorities, regional commitments to these goals, and measurement of regional accomplishments versus commitments has resulted in a lack of management accountability for program results, inconsistent program implementation, no assurance of an effective and efficient wetlands program, and inadequate support for program budgets contributing to the program's resource limitations.

a. Agency Operating Guidance Contained No Quantifiable Goals

EPA management for the various Agency programs normally use the SPMS/STARS¹ management accountability system for establishing individual program objectives, setting measurable goals or commitments for individual program offices, and measuring performance in relation to the goals and commitments. The SPMS/STARS process has three primary phases. The first phase involves the development of the annual operating guidance. This guidance includes identifying annual program objectives/functions and the establishment of program goals. The goals are usually

¹ Strategic Planning Management System (SPMS) recently renamed Strategic Targeted Activities for Results (STARS). Additional goals/commitments could also be established under the Office of Water Accountability System (OWAS). Reference to SPMS/STARS in the report infers those additional goals/commitments obtained through the OWAS.

established through program management's negotiation of commitments from regional and Headquarters staffs. While program management has established annual operating guidance for the Section 404 wetlands program, this guidance has been a general restatement of the three primary elements or missions of the wetlands program (permit review, enforcement, and strategic initiatives) with no measurable goals (measurable by quality or quantity) or commitments for regional programs (except strategic initiatives) and no detailed guidance to regions as to the establishment of effective permit review, enforcement, or strategic initiative activities.

For example, the FY 1990 Agency Operating Guidance for wetlands (only four pages) included the FY 1990 objectives for permit review and enforcement as follows:

Regions will continue to actively address wetlands loss problems through implementation of the section 404 regulatory program [permit reviews].

Regions will continue to actively utilize EPA's civil and criminal enforcement authorities in order to ensure deterrence of inappropriate behavior and where possible, remediation of environmental damage....

Neither this FY 1990 annual program guidance nor any other program guidance contained detailed operational instructions as to what constituted an effective permit review or enforcement program for wetlands or what level of performance was expected from individual regional staffs.

b. Long-term Operating Plans Were Never Finalized

The second phase of the SPMS/STARS process involved the establishment of "two year" or long-term operating plans for implementing program objectives set forth in the annual operating guidance. These plans were to serve as a basis for negotiating annual program commitments for accomplishment and for supporting program budget requests. However, wetlands program management has never been able to finalize such long-term operating plans. This inability to develop long-term program goals and related operational levels has contributed, at least in part, to the Section 404 program's poor operational performance and inadequate budgets and related staffing.

Wetlands program managers made several attempts at developing long-term guidance and goals for the Section 404 program. However, Headquarters and regional program management could never

agree on a strategic plan. Therefore, the program remains without any comprehensive long-term guidance on how EPA's managers are to approach wetlands protection. The Office of Federal Activities (predecessor to OWP) first attempted to develop a "two year" operating plan for FYs 1986 and 1987. However, it was not well received at the regional level. National and regional program managers apparently could not agree on the program strategies which would comprise the main body of the guidance and it was never finalized. In 1986/87, OWP initiated another attempt at developing a long-term wetlands strategic plan which was referred to in the 1988 Agency Operating Guidance as the Wetlands Protection Strategy. However, according to program managers, this document was again never finalized. According to OWP's response to regional comments on the draft FY 1988 operating guidance, regions were concerned with the "...pattern of increasing responsibilities and priorities being required of regional programs in FY 1988, in the absence of any additional regional resources."

For 1988/89, OWP issued a wetlands planning document entitled Program Agenda which described goals and on-going or planned activities for the FYs 1988 and 1989. However, the plan did not specify any regional commitments to the stated goals or indicate any regional responsibility for implementing the plan's provisions. The document was prefaced as follows:

In reading and using this document, the reader should note that the activities outlined apply only to the Headquarters program office. They do not in and of themselves create any direction or obligations for wetland units in EPA's Regional Offices.

Therefore, this operating plan, as such, still did not specify any measurable goals for regional wetland programs and required no regional commitments toward accomplishing the plan's objectives.

In January 1989, OWP issued the Wetlands Action Plan in response to the Wetlands Policy Forum's recommendations. This latest document was referenced in the 1990 Agency Operating Guidance, however, it did not provide specific direction to the regions or set measurable goals. The document only restated objectives and recommended activities, many of which, had been emphasized by the Office of Federal Activities almost five years earlier. Overall, this and the earlier planning documents had little impact on regional commitments for Section 404 programs and fell far short of fulfilling the requirements of the SPMS/STARS management accountability system.

c. Lack of Specific Program Goals and Detailed Implementation Guidance Resulted In Inconsistent and Unpredictable Wetland Regulation

In a 1987 OWP assessment and planning document for the wetlands program entitled "Wetlands Strategic Planning Initiative", OWP stated that the regional wetlands programs were "inconsistently administered across Regional offices" with a tendency to take on the "personalities of their leadership rather than emphasize the Agency's plan to protect the Nation's wetlands." OWP attributed this condition to a "lack of specific [program] goals and a detailed implementation manual." Without established goals with a consistent management approach toward the Section 404 program, OWP indicated that the wetlands program had become "... unpredictable to the regulated public while significant differences in results and approach exist across Regions." Our reviews of wetland programs in three EPA regions support OWP's statements and indicated that these inconsistencies between regional programs still exist (see Chapters 3 - 5). We concluded that until the Office of Water (OW) requires the program to develop long-term definitive guidance along with measurable commitments to include quality as well as quantity of program results, EPA regions will continue to follow their own agendas.

Regional Commitments to Major Program Goals Were Almost Nonexistent

Commitment to measurable program accomplishments by wetlands program management was critical to the success of the Agency's management accountability systems (SPMS/STARS); however, such commitment had never been obtained from regional program management with the exception of strategic initiatives. Therefore, no level or quality of performance had been quantified for the major program elements to gauge program efficiency and effectiveness and/or identify program successes and failures. Without measurable regional commitments and related performance standards for program managers, the establishment of generic program goals and long-term plans will have little impact on program operations.

Under SPMS/STARS systems third phase (Management Tracking and Followup), performance commitments for each program year were to be negotiated between EPA regions and the applicable national program office with the Deputy Administrator giving final approval. The regions were to report actual program accomplishments each quarter during the program year for measurement against commitments. Essentially, the commitments

were intended as performance agreements designed to achieve the objectives spelled out in the Agency's annual operating guidance. However, under SPMS/STARS, we found that regional managers had made few commitments for the Section 404 program.

Under the SPMS/STARS systems, wetlands program managers for FY 1990 committed to: (1) protect the most important wetlands and other special aquatic sites; and (2) manage an effective Section 404 compliance and enforcement program. These commitments contained no measurable targets or goals other than the initiation of one or two (Regions 1, 2, and 4) new strategic initiatives (such as an advanced identification study). The strategic initiative commitment was basically the same for all regional programs regardless of program staffing or workload. Therefore, we question whether this goal would accurately measure the efficiency of individual regional programs. In addition, these commitments did not address all of the program responsibilities and related objectives outlined in the 1990 Agency Operation Guidance (EPA Wetlands Action Plan) such as: enhancing State participation in the wetlands program; improving consistency between Federal agencies on wetland policy; and building a wetlands database to track changes in wetland ecosystems over time. Furthermore, the SPMS/STARS program reporting requirements for FY 1990 were: (1) the number of strategic initiatives started and completed; (2) the number of compliance orders and administrative penalty complaints issued; (3) the number of civil and criminal cases referred to DOJ; and (4) number of enforcement cases resolved. OWAS tracked permit review statistics and other selected enforcement activity. However, there was no way to measure program performance except for strategic initiatives because program commitments had not been quantified and "acceptable performance" had not been defined. Also, the expected quality of program actions had not been established.

For example, the SPMS/STARS for FY 1990 enforcement activity showed that the 10 EPA regions reported the resolution of 222 enforcement cases. The cases were resolved either voluntarily or through formal administrative, civil, or criminal actions. Since no quantifiable enforcement resolution goal was established for FY 1990, it is difficult to assess the regional performance. Averaged per region, the number of enforcement resolutions equaled 22.2 cases. Compared to regional wetlands FTEs, this activity equaled 2.5 cases per FTE. If the 1990 enforcement resolution activity was compared to 1988 when only 43 cases were resolved, the increase was significant. However, if this activity was compared to the 1990 COE statistic reporting almost 6,000 backlogged allegations of illegal discharges into wetlands,

the number resolved by EPA in FY 1990 does not appear significant (see finding in Chapter 3). However, acceptable performance was subject to broad interpretation because "acceptable performance" could not be determined until management defined it. Therefore, without adequately defined and measurable commitments, each region could do as much or as little as they wished toward protecting wetland resources and rationalize the results.

Our audit also disclosed indications that regions were not using consistent criteria in reporting program accomplishments. For example, the 1990 instructions for strategic initiative (SI) commitments indicated that: "At a minimum, an SI should constitute a program component that represents one-tenth [10 percent] or more of the Region's wetlands program attention." According to Headquarters program management, each project, in order to be considered a strategic initiative for the SPMS/STARS commitment, would have to be significant enough to require a 10 percent commitment of the current year's resources. Region 4 committed for two initiatives and reported 4. Regions 6 and 7 committed for one each and reported one. Region 3, however, committed for one strategic initiative but reported 16 (160 percent commitment of wetland resources?) in SPMS/STARS. EPA Headquarters personnel expressed doubts about the accuracy and comparability of the regional information reported. However, the statistics accumulated in SPMS/STARS was crucial to each region's program development because this data was used in OWP's annual workload model which determined regional resource allocations. While we did not audit the specific information reported in SPMS/STARS, our reviews of selected program documentation during reviews in Regions 4, 6, and 7 relative to wetlands enforcement (see Chapter 3), permit review processes (see Chapter 4), and strategic initiative (see Chapter 5) indicated that the program accomplishments/statistics included the SPMS/STARS reports were, to some degree, questionable.

Agency Comments On Management Accountability/Controls And OIG Evaluation

Agency Comment

"We disagree with the statement...that 'EPA's organizational accountability . . . holds each Regional Administrator accountable for accomplishing national program objectives as established by EPA Headquarters program offices.'" The Administrator himself has said that the Regional Administrators work for him and for the President, not for the program offices."

OIG Evaluation

EPA's Statement Of Organization And General Information in 40 CFR 1 describes the Agency's organizational hierarchy and basic responsibilities. According to 40 CFR 1.61: "Regional Administrators are responsible to the Administrator, ... for the execution of the Regional Programs of the Agency" However, this subpart continues by outlining one of the Regional Administrators' responsibilities as "Accomplishing national program objectives within the Regions as established by the Administrator, Deputy Administrator, Assistant Administrators [emphasis added], Associate Administrators, and Heads of Headquarters Staff Offices." EPA's program offices, through the Administrator, established program objectives, goals, and performance measures through the Agency Operating Guidance. Therefore, Regional Administrators are accountable to the Administrator for the accomplishment of the national program objectives and goals as established by the program offices and presented in the annual Agency Operating Guidance. The CFR reference was added to the report and other revisions were made to clarify this issue.

Agency Comment

"By criticizing Headquarters for failing to set definitive, measurable goals or measurable commitments for the Regional wetlands programs, the draft report is promoting a management philosophy that is at odds with the Administrator's and Deputy Administrator's management approach and goals."

"We strongly disagree with the summary conclusion (page 14) that a lack of definitive, measurable program goals and Regional commitments resulted in inconsistent program implementation, no assurance of an effective and efficient program, and inadequate budgetary support. To the contrary, the draft report appears to ignore the fact that, prior to FY 1989, Headquarters did establish 'definitive, measurable goals' and obtain 'measurable commitments for regional wetland operations.' However, this 'bean counting' approach proved to be unsuccessful, given the need for flexibility in a program that required very limited regional staffs to address a wide variety of responsibilities and environmental challenges."

"The draft report...incorrectly states that Headquarters has never obtained measurable commitments from Regional program management, with the exception of strategic initiatives. As explained above, prior to FY 1989, Headquarters set targets for both enforcement actions and advance identification (ADID)

OIG Evaluation

OW indicates that establishing management controls through definitive measurable program goals and commitments was done prior to FY 1989 and found to be only a form of "bean counting" and is considered contrary to current management philosophy. However, OW provided no sources or documentation in its response to support its disagreement.

We were unaware of any new EPA management philosophy until our preliminary exit with national wetlands program managers when a November 1, 1989 memorandum and task force report were brought to our attention. We subsequently reviewed these documents and found that they present similar concepts as those we are recommending in this report. The memorandum and task force report document concepts such as: putting program accountability into strategic planning; making the management accountability systems convey a strong sense of the Administrator's priorities; creating a more meaningful balance between performance and the quality of products; continuing to develop joint targets or estimates of each Region's activity levels in support of national program objectives; and tracking key program activities. Therefore, none of the information provided or eluded to by the Regions or OWP supports OW's statement that measurable commitments are not required under current management philosophy. In addition, none of the information provided to us by the Regions or OWP support OW's statement that measurable commitments were ever established for the Section 404 program in the areas of public notice review or enforcement. There were regional reporting requirements under SPMS/STARS or OWAS but no established targets/commitments with the exception of advanced identification. Regions negotiated an FY 1987 target level of performance for advanced identification which continued under the strategic initiative element introduced in FY 1989. Also, nowhere in the draft report did we state that program accomplishments should be evaluated exclusively on the level of program activity. We stated, consistent with the SPMS/STARS guidance, that commitments should be measurable, whether numerically or qualitatively, and designed to assure the achievement of established program goals and objectives. In addition, the Agency's SPMS/STARS management accountability system emphasizes the importance of commitments whether they are quantifiable outputs, deadlines associated with a specific product, or some other means of measuring accomplishment toward achieving pre-established program goals and objectives. Negotiating meaningful commitments and measuring accomplishment of those commitments is the primary management control within

these management accountability systems.

Furthermore, other Agency programs, including other water programs, make reference to targets (measurable commitments) in the FY 1992 Agency Operating Guidance. Until a level of performance was established in FY 1987, limited progress had been made toward performing advanced identifications. If establishing meaningful goals and objectives with commitments to measure program effectiveness is not considered a valid control mechanism under current management philosophy, then the SPMS/STARS systems will have no real function or purpose for evaluating the Section 404 program.

The FY 1992 measures for Section 404 enforcement demonstrates the continued inadequacies of the wetlands SPMS/STARS goals in evaluating progress toward accomplishment of program objectives. The FY 1992 enforcement objective is to "Enforce the Section 404 program to improve rates of compliance with program requirements." While this is a necessary goal, the performance measures in STARS include reporting only the numbers of regional actions taken, referred, and resolved and these statistics will not demonstrate achievement of the goal to improve rates of compliance. Only evaluating current rates of noncompliance (illegal activities) and demonstrating reductions in this level of noncompliance will indicate accomplishment of that goal.

OW's remarks concerning the use of "bean counting" conflicts with later statements that lack of "bean counting", i.e., measurable goals and staff commitments, has increased the program's success as evidenced by the increase in Section 404 enforcement actions from a low of 63 in FY 1987 to 146 in FY 1990. Such evidence of successes appears to be the same bean counting OW takes exception to. The numbers do not reflect the quality and consistency of the actions taken. As stated in the report, our audit in three regions found that enforcement actions were generally inconsistent and ineffective. In addition, the memorandum and task force study which OW indicated represented the new management philosophy was dated November 1989. An FY 1990 policy cannot effect 3 to 4 prior years of enforcement actions. Furthermore, according to the chart included in OW's response, enforcement actions increased from 63 in 1987 to 120 (almost 100 percent increase) in FY 1988 when, according to OW, "bean counting" was still in effect. Between FYs 1988 and 1989, enforcement actions increased by only 30 or 25 percent over 1988 and actually decreased in 1990. Finally, the Section 404 program staff increased over 82 percent (from 85 to 155 FTEs) between 1988 and 1991. This would also impact the number of enforcement actions initiated. Therefore, we can not conclude, as OW has

done, that "bean counting" was unsuccessful and that the lack of measurable program goals and regional commitments contributed to the increase in Section 404 enforcement actions.

Agency Comment

"The draft report fails to credit Headquarters for the various "program" guidance documents and memoranda of agreement that have been developed in recent years, some of which have been issued jointly with the Corps. The Corps has also issued its own program guidance documents, known as Regulatory Guidance Letters, with input from and review by the EPA wetlands program."

OIG Evaluation

We disagree with OW's comment. The draft report cites all of the MOAs between EPA and COE in effect and the guidance applicable to the various report topics. These documents were not all specifically referenced in Section B of Chapter 2, because they did not relate to the needs of a long-term overall program operating plan or specific guidance for use by the Regions in designing programs to accomplish individual program objectives. OW does not list the "various program guidance documents and memoranda" we "failed to credit" to the program. Also, program management's input into COE's regulatory guidance, was not an objective of our audit and has little relationship to this finding concerning Agency guidance for internal program operations.

Agency Comment

"The SPMS/STARS data on enforcement (bottom of page 18), is meaningful and significant as a measure of the continuing increase in EPA Section 404 enforcement activity nationwide. It is inappropriate to compare the number of EPA enforcement resolutions for FY 1990 to the number of Corps backlogged cases; the trend of increased enforcement resolutions is a more significant fact."

OIG Evaluation

OW does not state why this comparison is inappropriate and we see no reason for not using the comparison. In our opinion, the comparison demonstrates that while the enforcement program shows growth, there was a growing problem with Section 404 compliance.

WETLANDS PROGRAM'S FMFIA IMPLEMENTATION INCONSISTENT WITH CG STANDARDS AND OMB POLICY

FMFIA and Comptroller General (CG) standards² require complete documentation of program objectives and identification or establishment of internal control techniques to ensure accomplishment of these objectives. Our audit generally disclosed a lack of understanding by program management of FMFIA requirements and related processes. As a result, FMFIA requirements relative to the Section 404 program had not been properly implemented. Many critical event cycles applicable to wetland program activities and related control processes had not been properly established and incorporated into the FMFIA process. This included the SPMS/STARS management accountability system and OW's annual program evaluations. Also, program assessments and management accountability systems, that should have been identified as primary FMFIA control techniques for wetland activities, had not been properly implemented and did not adequately evaluate the efficiency and effectiveness of EPA's wetlands program and its compliance with applicable law and management policy as required by EPA Resource Management Directive 2560, OMB Circular A-123, and the FMFIA.

Similar conditions were previously reported by the Office of Inspector General (OIG) in its 1989 assessment of the Agency's FMFIA internal control program³. While OWP was not included in OIG's prior audit of EPA's FMFIA implementation, this audit disclosed that similar deficiencies existed in the Section 404 program's FMFIA process.

a. Critical Cyclical Program Events and Controls Not Included in FMFIA Documentation

OWP listed only three event cycles: implement annual extramural budget administration process; issue Section 404(c) determinations; and work with State programs for wetlands protection as in its prior years' FMFIA documentation. However, national program responsibilities and functions were much more extensive than these three program events as evidenced in program regulations and the Agency Operating Guidance. For example, OWP

² Comptroller General publication Standards for Internal Controls in the Federal Government issued in June 1983.

³ EPA's 1989 Federal Managers' Financial Integrity Act Activity, Audit Report Number E1LMF0-11-0012-0100357, issued June 22, 1990.

was also responsible for: (1) overall program direction, planning, and budget processes along with establishing regional and national goals/commitments, overseeing the effectiveness of regional programs, and measurement of program accomplishments (regionally and nationally) in relation to goals (SPMS/STARS); (2) interagency coordination with the COE and other resource agencies to develop joint wetland program guidance and implement other Federal statutes affecting wetlands; (3) intra-agency coordination of Section 404 responsibilities with related/overlapping EPA programs; (4) development of internal program guidance and strategies addressing the overall maintenance, enhancement, and protection of the nation's wetlands; and (5) large-scale ecosystem strategic initiatives. None of these critical, recurrent events and related program objectives were included in OWP's FMFIA documentation along with management control techniques for the Headquarters and regional programs designed to ensure accomplishment of these tasks.

Region 4, 6, and 7's approach to the FMFIA internal control process was not only inconsistent with the national program process but equally deficient. The regions listed the Section 404 program as the only cyclical program event, with a limited list of control objectives. For example, Region 4's 1990 FMFIA documentation for the wetlands program listed: apply guidance and issue regulations; encourage the transfer of Section 404 permit programs to the States; and provide guidance/litigation support regarding non-compliance with permit conditions as FMFIA control objectives. Region 4's 1988 FMFIA documentation included the same incomplete list of program objectives as control objectives. However, Agency Operating Guidance for FYs 1988 through 1990 revealed completely different regional program objectives, i.e., permit review, enforcement of unpermitted discharges, etc. Similar deficiencies in the FMFIA process were also found in Regions 6 and 7. Like OWP, the regions' Section 404 responsibilities and functions were much more extensive than reported in their FMFIA internal control documentation.

b. Critical Program Controls Have Not Been Properly Implemented

The SPMS/STARS management accountability system is intended to serve as a crucial program control. Program direction, goals, and budgets are supported by this process. Proper commitments to measurable goals by national and regional staffs and proper measurement of goal accomplishment would represent the paramount program management control as intended by FMFIA. However, as previously detailed in the first section of this finding, this system has not been sufficiently implemented for the Section 404 program. Adequate national direction/guidance has not been

provided, measurable program goals have not been established, regional program commitments have not been obtained, and reported program accomplishments are of questionable value.

CG standards for internal controls supports our conclusion that management accountability systems are an integral part of FMFIA controls.⁴

...[internal controls] should be recognized as an integral part of each system that management uses to regulate and guide its operations. In this sense, internal controls are management controls. Good internal controls are essential to achieving the proper conduct of Government business with full accountability for the resources made available. They also facilitate the achievement of management objectives by serving as checks and balances against undesired actions....

Annual Program Evaluations

In addition, OW's annual program evaluations were not performed in sufficient detail to adequately assess the performance of individual programs including the Section 404 wetlands program. Even when program deficiencies were noted, the identified weaknesses were not emphasized and regional management commitments or actions were not modified to correct deficiencies or redirect regional priorities. As a result, program deficiencies went undetected or uncorrected.

EPA regulation 40 CFR 1.49 listed one of the functions of the Office of Water as: "evaluation of Regional water activities." OW fulfilled this responsibility through its Water Program Mid-Year Review. However, the mid-year review process has been inconsistently performed with a mixture of on-site reviews by national program managers, discussions with regional management, or, more recently, regional self-evaluations. The last documented national program assessment (FY 1989) was based primarily on regional self-evaluations and information provided during the SPMS/STARS quarterly reporting process. This type of information develops levels of reported activity, but the accuracy, consistency, and quality of the activity reported could not be sufficiently assessed without analyzing the supporting regional documentation. The FY 1990 OW mid-year review was an

⁴ Standards for Internal Controls in the Federal Government, published by the Comptroller General, June 1, 1983.

abbreviated assessment which apparently consisted of one regional wetlands program evaluation (Region 8). This evaluation was based primarily on the national program director's discussions with the Regional wetlands staff rather than an indepth review of program documentation.

The FY 1989 Water Program Mid-Year Review - National Assessment outlined the strengths (but not necessarily the weaknesses) of each OW program and a brief response to issues resolved or where follow-up action were required. Any weaknesses found were de-emphasized and not necessarily identified as a program deficiency. However, this mid-year review clearly documented the inconsistent regional approaches to the Section 404 program and the disparity in program results obtained. Also, the assessment emphasized the quantity of actions (without indepth verification) rather than the quality.

For example, the Region 4 report states that: "Region 4 continues to be the most active and effective EPA Region in the use of our veto authority under Section 404(c)." This conclusion was based exclusively upon the number of Region 4 Section 404(c) actions in relation to other regions. The 1989 Agency Operating Guidance encouraged the regions to use 404(c) to veto permits in cases where a wetland discharge would result in significant adverse environmental impact. Therefore, without an evaluation of the quality of Region 4's Section 404(c) activities, the meaning and significance of the mid-year review's statement about Region 4's 404(c) actions is unclear. Does it mean that Region 4, when compared to other regions: was doing a better job protecting its wetlands from significant impacts; had more significant impacts; had more resources to contest improper permitting decisions using 404(c); better management support for 404(c) actions; or that Region 4 was doing more than expected? Also, Region 4 may have had other significant dredge and fill proposals that should have been vetoed but were not (see Chapter 4). Without analyzing the individual actions which support the reported activities, national program managers could not effectively use the mid-year program evaluations to verify the accuracy, consistency, or quality of reported actions.

In Region 6, as another example, OW reported on the Region's 1989 advanced wetlands identification initiatives listing them individually. Our review of the Region 6 wetlands program disclosed that the COE refused to participate in two of the three advanced identifications listed (see Chapter 5). Under regulations in 40 CFR 230.80, joint participation by both the COE and EPA was a prerequisite for an advanced identification study. These actions may provide some benefit to Region 6's wetlands

program; however, without COE support, the completed projects will lack the impact on the regulatory process of a joint advanced identification since COE's cooperation is essential in excluding particular areas from permitting and dredge and fill activities.

Even when wetland program deficiencies were documented during past OW reviews, national program managers did not direct regions to make appropriate program adjustments (i.e., through more measurable commitments) to achieve Agency goals and objectives. For example, the 1989 mid-year review categorized Region 7 as "...one of the least aggressive Regions in terms of implementation of EPA's responsibilities under Section 404." OW encouraged "...Regional management to take a hard look at their reasons for not using EPA's explicit regulatory authorities." However, there were no resulting changes in Region 7's SPMS/STARS commitments for program results to commit Region 7's management to the objectives established in the Agency Operating Guidance. Our audit of the Region 7 wetlands program in late FY 1990 disclosed no apparent changes in Regional management's approach toward protecting its wetlands resources including the use of the EPA authorities emphasized in the 1989 Mid-Year Review.

OW's superficial approach to mid-year program evaluations can be attributed directly to the SPMS/STARS deficiencies discussed earlier. Without detailed program guidance, measurable program goals, and definite regional commitments, program performance can not be properly evaluated. OW's assessment of Region 4's use of EPA's 404(c) authority, Region 6's advanced identification initiatives, or any other region's activity has little meaning in the absence of definitive program goals against which these accomplishments or nonaccomplishments can be measured.

Agency Comments On FMFIA Process And OIG Evaluation

Agency Comment

"The draft report unfairly criticizes the wetlands program's implementation of FMFIA requirements since the IG's office itself has apparently approved our FMFIA documentation, although it apparently has also acknowledged that there is an Agency-wide problem in this area. Moreover, we disagree with the conclusion that the wetlands program has not sufficiently implemented the STARS system since, as stated above, our approach comports with existing Agency management philosophy and has produced positive results."

OIG Evaluation

We have no knowledge or evidence that OIG has ever specifically reviewed and approved FMFIA implementation for the Section 404 wetlands program. OW did not provide a source or other support for this statement.

We found no management philosophy documented in the criteria and requirements for the SPMS/STARS management accountability system against "bean counting" for our audit period and OW provided no adequate documentation of such a philosophy. Therefore, we continue to conclude that OWP had not implemented the management accountability system as recommended by Agency procedures. In addition, establishment of program goals that can be measured by quality, as well as quantity, as stated in the report, does not necessarily entail "bean counting" as OW contends. Furthermore, OW states that eliminating "bean counting" has produced positive results. The example of the success of this management philosophy emphasized by OW is the increase in EPA enforcement actions between FYs 1989 and 1990. As previously stated this appears to be "bean counting" in itself and provides no measurement of the quality of the actions or their ability to accomplish program goals and objectives.

Agency Comment

"The draft report's determination that annual program evaluations should emphasize Regional weaknesses is inconsistent with modern management theory, which provides that people are motivated by positive feedback."

OIG Evaluation

OW did not provide documentation of this current management theory and we are unaware of the theory referenced by OW. However, we are aware of the intent of the FMFIA and related program controls/evaluations to identify internal control weaknesses and resolve such weaknesses to protect Government resources from fraud, waste, and abuse and ensure accomplishment of program objectives.

Agency Comment

"Contrary to statements in the draft report, Regions did initiate changes and redirect priorities in response to the annual program evaluations undertaken by Headquarters."

OIG Evaluation

OW contends that, contrary to statements in the draft report, Regions did initiate changes and redirect program priorities in response to Headquarters annual program evaluations. Our audit of three Regions disclosed that annual program evaluations did not identify some weaknesses and some identified were not corrected. While changes may have been made in regional emphasis, we could not attribute the shift to the annual evaluations or subsequent changes in requirements under the management accountability system. Since OW provided no specifics as to sources or other evidence to support their statement, we have no basis for changing the report's conclusion.

CONCLUSION

Our review of three EPA regions' implementation of the Section 404 program indicated that none were sufficiently committed to achieving all the program objectives set-forth by OWP. While the regions recognized the Agency's goals and objectives, they continued to expend most of their resources reviewing COE public notices. It was not until enforcement and advanced identification program elements became a measure of performance under SPMS/STARS in FYs 1987 and 1988 did the regions' make any progress in these areas.

Considering the inconsistencies and deficiencies our audit disclosed in the regional wetlands programs (detailed in Chapters 3 through 5), measurable performance commitments under the SPMS/STARS management accountability system, based on the program objectives in the Agency Operating Guidance, would have been a valuable control mechanism over both national and regional operations. Measurable commitments would have provided a benchmark against which national program managers could have evaluated program performance and progress, and, if necessary, made adjustments to achieve established goals and objectives. If OW had developed long-term operating guidance, established measurable goals and related commitments, performed indepth program reviews, and developed and documented program internal controls to ensure that objectives were met, regional program implementation would have been more consistent and the Agency's Section 404 program might be viewed more favorably by the regulated public.

As recognized by Congress in the FMFIA, a sound internal control system was essential to ensure accomplishment of program objectives as well as safeguard Agency resources from fraud,

waste, and abuse. EPA's management accountability systems were the Agency's primary control over program implementation and attainment of program goals. Therefore, the integration of the Agency's management accountability systems into the FMFIA process was crucial to the establishment of a foundation for a sound internal control system over wetland program operations.

RECOMMENDATIONS

We recommend that the Assistant Administrator for Water require proper implementation of EPA's management accountability systems and FMFIA internal control process to ensure that Section 404 program objectives are accomplished in an efficient and effective manner and that a consistent, uniform regulatory approach to wetlands protection is established. This should include:

- Establishing measurable Section 404 program goals and obtaining management commitments to these goals to enhance evaluations of program accomplishments and attainment of program objectives on both a regional and national basis.
- Developing long-term guidance and plans for the wetlands program that will provide uniform, consistent implementation of program objectives by regional and national wetlands staffs.
- Documenting all significant program events on a consistent basis and identifying or establishing related internal controls to fully comply with FMFIA requirements and ensure the establishment of an adequate system of internal controls.
- Integrating the SPMS/STARS management accountability system into the FMFIA event cycles for the Section 404 program to enhance program direction and implementation and the identification of material weaknesses in management controls.
- Performing indepth annual program reviews which evaluate the quality and consistency of program performance as well as the levels of performance of program staffs. Regional program reviews should emphasize the identification of program weaknesses and recommendations for program improvement rather than emphasizing self assessed program strengths as is currently done.

Agency Comments On Recommendations And OIG Evaluation

Agency Comment

"For the reasons stated above, the wetlands program opposes the recommendation that we establish measurable goals and obtain Regional staff commitments."

OIG Evaluation

OW's position against establishing meaningful goals is contrary to the purpose of the SPMS/STARS management accountability systems. Without goals related to program objectives that are measurable in quality and/or quantity, there is no basis for evaluating the consistency, efficiency, or effectiveness of regional programs. This results in insufficient management controls to assure the accomplishment of management objectives as required by the FMFIA and CG standards for internal controls. Therefore, our recommendation related the establishment of measurable program goals and commitments remains unchanged.

Agency Comment

"The program has developed program guidance, although this fact is not well-documented in the draft report. Moreover, EPA cannot always commit to develop future programmatic guidance documents ourselves since we frequently need to work jointly with the Corps to develop "effective" programmatic guidance for the Section 404 program."

OIG Evaluation

During the audit we identified all the program guidance related to EPA's internal program operations as provided by OWP and the Regions. This guidance is referenced as appropriate throughout the report. OW alludes that certain program guidance issued by EPA Headquarters was not recognized in the draft report, but OW presented no specifics as to what this unrecognized guidance consists of. The recommendation was for developing long-term (internal) guidance and plans (strategies) in conjunction with the Regions to implement a wetlands program designed to accomplish program objectives. We see no requirement for joint interagency coordination to produce such internal program guidance as recommended by the report. Therefore, our recommendation remains as stated in the draft report.

Agency Comment

"We are willing to examine the adequacy of our implementation of the FMFIA internal control process, and in particular, will consider adding our SPMS/STARS measures and annual program evaluations to that process. The office of Water also agrees that there should be regular reviews of the Regional wetlands programs, although not necessarily on an annual cycle."

OIG Evaluation

OW agreed to evaluate the wetlands program's implementation of FMFIA requirements, to include adding the SPMS/STARS measures, and to the need for regular reviews of regional wetlands programs. Although OW has indicated that positive actions will be taken on improving the FMFIA process, the inclusion of the SPMS/STARS measures will have little effect without first establishing meaningful annual program goals and commitments in such systems.

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CHAPTER 3

EPA'S SECTION 404 ENFORCEMENT PROGRAM IS NOT CONTROLLING AND DETERRING ILLEGAL DISCHARGES INTO PRIORITY WETLANDS

Although enforcement is a key wetlands program objective, the three EPA regions included in our audit had not developed effective, consistent enforcement programs and had not adequately monitored and coordinated COE enforcement against unpermitted discharges of dredged and fill material into regulated wetlands. The ineffective and inadequate control over program implementation and direction by national program management (see Chapter 2) permitted regions to establish their own enforcement priorities which contributed substantially to inconsistent, ineffective, and sometimes controversial enforcement against Section 404 violators. In addition, regional enforcement deficiencies could be attributed to a lack of measurable regional goals and commitments for enforcement activities as well as insufficient resources to accomplish enforcement program objectives (see Chapter 1, Background). As a result, EPA's Section 404 enforcement has not effectively reduced or deterred unpermitted/illegal wetland discharges and the backlog of reported illegal dredge and fill activities steadily increased (over 32 percent) during our audit period, 1988 through 1990.

CRITERIA

Under Sections 301 and 309 of the Clean Water Act (CWA), Congress gave EPA the responsibility and authority to deter illegal/unpermitted discharges into wetlands. Section 301 made it unlawful to discharge dredged or fill material into the waters of the United States except in compliance with the permit provisions of Section 404. Section 309 gave EPA administrative, civil, and criminal enforcement authority over any illegal act. However, because of resource limitations, EPA's Section 404 program could not effectively perform its statutory enforcement responsibilities. Therefore, under a 1976 enforcement Memorandum of Agreement (MOA), revised in January 1989¹, the COE agreed to assist EPA in fulfilling its enforcement responsibility. Because the COE had more field resources, it agreed to be the lead agency for the majority of enforcement actions taken against unpermitted discharge violations. According to the MOA, EPA retained the enforcement lead in actions where repeat or flagrant violations occurred, where EPA requested the lead, or where EPA wished to apply its administrative penalty provisions under Section 309.

¹ MOA revised in 1989 to incorporate guidelines for EPA's new administrative penalty authority.

EPA entered into the 1989 MOA with the COE primarily to "allocate" enforcement responsibility for illegal actions between the agencies. However, under Section 404, EPA remained statutorily responsible for effective enforcement of unpermitted wetland discharges. EPA could assign its Section 404 enforcement authority, but it could not delegate its responsibility for performing an effective enforcement program under the CWA. Therefore, it was incumbent on EPA to design a system of controls to ensure implementation of an effective Section 404 enforcement program. Without appropriate oversight of and coordination with the COE, EPA could not fulfill its statutory responsibility to assure that all significant violations were adequately addressed and priority wetlands were protected.

Our audit disclosed that regional enforcement deficiencies were segregated into two broad categories, monitoring of the COE enforcement program under the MOA and the regions' direct enforcement against Section 404 violations. These two problem areas are addressed as separate findings below.

INSUFFICIENT OVERSIGHT OF AND COORDINATION WITH THE COE ON MOA ENFORCEMENT ACTIONS

Neither Region 4, 6, or 7 had a system for monitoring COE enforcement determinations pursuant to the MOA nor did they develop procedures and controls in conjunction with COE to consistently coordinate enforcement actions as provided in the MOA. Instead, the regions relied almost totally on the COE districts to coordinate enforcement actions and fulfill EPA's statutory responsibility to detect and deter illegal discharges. Consequently, the regions had little knowledge of the COE enforcement process, COE compliance with MOA requirements, or the effectiveness of COE enforcement actions.

None of the regions considered the monitoring of COE enforcement a wetlands program priority. Some regional managers felt that regional oversight of COE enforcement activities would provide little benefit because the regions did not possess the program resources to process their own enforcement cases and those currently being referred to the regions by the COE. The audit disclosed that all three regions audited were returning referred enforcement cases to the COE for action that EPA had agreed to enforce under the MOA. However, without a monitoring system, EPA had no assurance that COE actions were properly fulfilling EPA's statutory responsibility to deter the unpermitted destruction and degradation of wetlands, and no opportunity to review all reported violations and select those cases for EPA enforcement-

lead that would provide the maximum deterrent effect on the regulated public.

Background

Under the enforcement MOA between EPA and the COE², the enforcement process contained different stages of decision making: 1) determining jurisdiction and existence of a violation; 2) case notification and consultation between EPA and COE; 3) determining the lead agency by the criteria in the MOA; 4) establishing the appropriate enforcement response; and 5) determining violator compliance with enforcement conditions including proper monitoring for any remedy, removal, compensatory mitigation or other corrective measure.

a. Regions Did Not Adequately Oversee COE Enforcement Determinations Under the MOA

Violation Determinations - The regions had no knowledge of how COE districts were making illegal discharge determinations or if the reported wetland destructive activities that COE determined were not subject to Section 404 enforcement, could be regulated or controlled under other Federal statutes. EPA regions and OWP were unaware that from 1988 through 1990, the COE determined an average of 56 percent (7,656 cases) of the reported illegal wetland discharges as not qualifying for Section 404 enforcement. Regional program management speculated that some of the cases could be illegal fills occurring in conjunction with an authorized permit which the COE elected to enforce as permit violations rather than as illegal fills. However, regional staffs admitted that some of these actions could have qualified as "flagrant" under the MOA and enforceable by EPA because of the violators prior knowledge of the law established during the permitting process. Still other cases not pursued by COE under Section 404, could represent solid waste disposal which EPA could have regulated under Section 402.

The audit did not evaluate COE's determination of Section 404 violations; however, we concluded from past GAO and COE regulatory reports, interviews of EPA and COE staff, Section 404 file reviews, and related Congressional testimony that the potential existed for violations that should have been critically addressed by EPA going unnoticed. For example, in Region 6 the COE was aware of an illegal solid waste discharge into a wetland

² MOA, Federal Enforcement for the Section 404 Program of the CWA, effective March 20, 1989.

for months before the Region was notified. In Region 4, there was an old land clearing case where the COE incorrectly determined that a Section 404 discharge had not occurred when the trees were bulldozed and stumps removed as part of a planned agricultural conversion.

Case Notification and Consultation - Most applicable COE districts did not provide the EPA regions in our audit with notifications of violations or request consultation on potential enforcement actions as prescribed in the MOA and required under COE regulations. Regional staffs were aware of this situation, but no efforts were made by the staffs to resolve the problem. The notification and consultation provision was important because it provided for the consideration of each agency's views and recommendations on a case and a uniform, consistent approach to enforcement initiatives. In addition, any decision made by the lead enforcement agency in a particular case, including a decision that no enforcement action be taken, was final.

For example, Region 6's wetlands data system indicated the Region provided some type of support for 52 COE enforcement actions during 1988 through 1990. For FY 1989 alone, the COE's Lower Mississippi Valley Division and the Southwestern Division, which serve Region 6, reported 729 Section 404 enforcement resolutions. Annualized, Region 6's support for COE actions would be less than 3 percent. Only one COE district routinely sent a monthly summary of COE enforcement actions to Region 6 along with information on violation letters issued. One other COE district routinely requested Regional input on its enforcement actions but only on those illegal discharges determined by the district as not qualifying for an after-the-fact permit. The other seven COE Districts serving Region 6 apparently sent only sporadic information.

Regions 4 and 7 experienced similar problems with its COE districts. Therefore, the extent of coordination and consultation was either nonexistent, inconsistent, or sporadic at best varying by region and COE district.

Lead Agency Determination and Enforcement Response - Without the capacity to track, monitor, and evaluate COE notifications of violations, the regions could not determine that the COE properly referred repeat offenders and severe violations for EPA lead in accordance with the enforcement MOA. The MOA clearly divided enforcement lead responsibility for unauthorized discharges between EPA and COE. Following this hierarchy was important to ensure a consistent enforcement approach since EPA and COE had different enforcement authorities under Section 404 and different

enforcement policies. However, there were cases which should have been referred for EPA enforcement that were retained by the COE. Since the COE's enforcement policies were not as stringent as EPA's, there were enforcement inconsistencies and controversial cases which might have been avoided with better EPA and COE coordination as required under the MOA.

For example, identifying repeat violators was apparently a problem in all three regions. In one case Region 6 personnel identified a repeat violator that was under investigation by the COE for a Section 404 violation. The COE's cease and desist order (possibly unaware of past violations) did not identify the illegal fill as a repeat violation. Fortunately, a Region 6 employee, who reviewed the subject cease and desist order, had worked for the COE and recognized the violating company as a repeat offender. Region 6 informed the COE of this fact and requested the enforcement lead. Without the EPA employee's personal knowledge of the violator, this repeat offence may have gone undetected.

In Region 4, our review of a wetlands database obtained from the National Marine Fisheries Service disclosed 9 violators that had received two or more COE cease and desist orders (potentially repeat violators). However, we found no documentation in Region 4's enforcement files that any of these potential repeat offenders had been referred to EPA for enforcement lead by the COE. If the regions had been consistently tracking COE enforcement actions, identifying repeat violators would have been enhanced and a more consistent enforcement approach to such violations would have been established.

b. Differences in EPA and COE Enforcement Policies Caused Regulatory Inconsistencies and Supported the Need for EPA Oversight of COE Enforcement Actions

Despite EPA's resource limitations, enforcement against illegal discharges into waters of the United States was, by statute, EPA's responsibility. This was emphasized in a General Accounting Office (GAO) report (GAO/RCED-88-110), dated July 28, 1988. GAO reported that COE districts had not placed a high priority on detecting and enforcing against unauthorized Section 404 activities. According to GAO, the COE rarely used available administrative, civil, or criminal remedies when violations were detected. Instead, the COE preferred to rely on the voluntary actions of violators to rectify the problems, and/or issued after-the-fact permits. In response to the report, the Department of the Army concurred with GAO's criticisms but, despite the EPA and COE Enforcement MOA, rebutted:

... the Clean Water Act vests the Administrator of EPA with enforcement authority for unpermitted discharges, not the Secretary of the Army, who is empowered to enforce only against permit violations.

Apparently, the COE took enforcement against illegal Section 404 discharges only as a courtesy to EPA. Therefore, to rely on COE enforcement without adequate oversight was not a very prudent approach for EPA management.

Based on the COE enforcement deficiencies cited in GAO's 1988 report and the lack of participation by EPA regions in overall COE enforcement, we question if COE's enforcement actions supported the Agency's program objective to strengthen enforcement for priority wetlands and ensure that significant violators were returned to compliance or a formal action taken against them. Allowing violators to get "after-the-fact" permits without additional penalty assessments did little as a deterrent or to resolve environmental problems. While restoring an illegal wetland fill could have been a financial burden to a violator and, therefore considered punitive, the end result was still a degraded wetland that could take years, if ever, to regenerate. Furthermore, issuance of after-the-fact permits without penalty, could encourage developers and other applicable parties to illegally discharge first, then apply for a permit or risk detection.

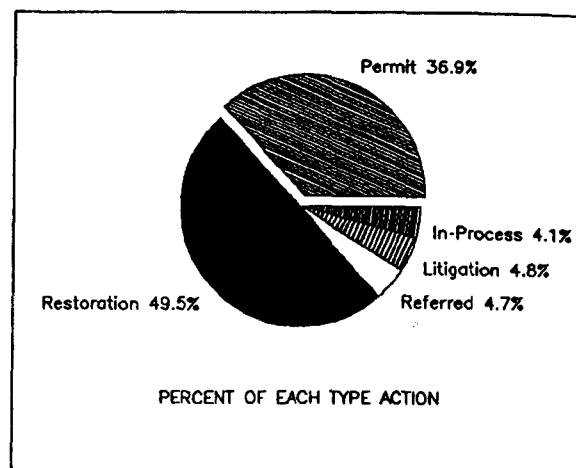
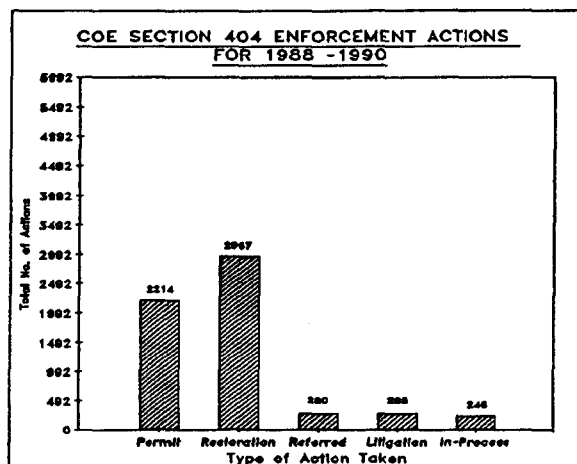
EPA's General Enforcement Policy, GM-21 which governed enforcement against illegal Section 404 discharges considered penalties necessary to deter illegal wetland discharges. The policy also promoted the fair and equitable treatment of the regulated public and swift resolution of environmental problems. Conversely, the COE's enforcement approach, as shown in the GAO report, focused on voluntary rehabilitation of degraded wetlands rather than punishment of violators through penalties. These conflicting enforcement approaches were conducive to inconsistent enforcement actions and unnecessary criticism from the regulated public. While EPA cannot force its enforcement policy on the COE, national program managers should have addressed the risk inherent in the differing agency enforcement approaches by directing the EPA regions, through the management accountability system, to perform adequate oversight of COE enforcement activities.

c. Regions Could Have Received Other Benefits From Oversight Of COE Enforcement

EPA oversight of COE enforcement decisions under the MOA would have provided benefits other than identifying additional enforcement cases for an EPA lead. With EPA's limited resources, broad national wetland goals, and heavy program workload, oversight could have provided data needed to develop a national enforcement strategy, target limited enforcement resources for maximum deterrent effect, and optimize the overall effectiveness of Section 404 enforcement programs. However, to formulate an enforcement strategy and target limited resources, the regions must identify the types, location, and frequencies of violations by tracking and evaluating all enforcement activity. This would be a more proactive approach to protecting priority wetlands than the current approach of reacting to COE referrals and ignoring the overall enforcement picture. EPA oversight of all Section 404 enforcement actions would give the regions the opportunity to strategically select cases for EPA lead enforcement and maximize enforcement effectiveness through a measured and predictable program instead of reacting only to COE referrals or "problem cases".

Implementation of adequate controls by the national and regional wetlands programs to monitor and track COE enforcement actions under the MOA would have made EPA cognizant of and provided EPA the opportunity to evaluate and control the 5,992 enforcement actions taken by COE from 1988 through 1990. Between 1988 and 1990, the COE identified nationwide, 13,648 potential unpermitted discharges of which 7,656 were determined by the COE not to be violations enforceable under Section 404³. Of the 5,992 discharges involving COE Section 404 enforcement actions, 2,214 represented illegal fills being permitted without penalty; 2,967 violations required restoration with no other penalty; only 280 cases referred to EPA for enforcement; 285 being litigated (civil/criminal actions) by the COE; and 246 others under study. The following charts reflect the percentages of each type of COE enforcement response.

³ Since EPA regions did not monitor or maintain COE enforcement statistics and COE divisional/district boundaries sometimes overlapped multiple EPA regions, we reported national COE enforcement actions in lieu of COE actions taken on a regional basis.



d. Field Level MOAs Could Improve Coordination Between EPA and COE

The 1989 Section 404 enforcement MOA between EPA and the COE encouraged COE divisions/districts and respective EPA regions to enter into field level agreements to more specifically implement the MOA. Adequate oversight of COE enforcement coupled with field level MOAs could lead to better enforcement coordination with the COE, identify or resolve problem areas in implementation of the MOA; and provide for more effective use of existing EPA resources. However, regions have not developed appropriate field agreements with the COE as provided for under the MOA to formally define regional enforcement programs. With the COE's highly decentralized organization, field level MOAs were needed to coordinate an effective and consistent enforcement program. Without field level agreements, EPA regions and COE districts have continued to follow their own independent enforcement agendas.

In addition, field level MOAs between EPA regions and COE districts provide a method for establishing the uniform, comprehensive guidelines needed to resolve differences in enforcement policies. For example, the types of cases to be referred to EPA could have been more clearly defined along with the identification of priority wetlands that should receive special enforcement emphasis. Also, the types of violations

eligible for after-the-fact permits or which required administrative penalties and the appropriate procedures for pre-enforcement consultation with EPA could have been established. However, at the time of our Region 4 pilot audit, no field level MOA's existed between Region 4 and its respective COE divisions/districts. Region 4 subsequently negotiated a field level MOA with one of its nine COE districts in FY 1991. Region 6 and Region 7 did not have any field level MOAs.

Agency Comments On Inadequate Monitoring Of COE Enforcement And OIG Evaluation

Agency Comment

"The draft report demonstrates a continuing misunderstanding of Section 404 enforcement on the part of the IG's office. The statute gives both EPA and the Corps authority to enforce Section 404; the Corps' authority is not derived from an EPA delegation."

"Similarly, the Enforcement MOA, as first negotiated in 1976 and later revised in 1989, is intended as a mechanism for ensuring that this joint enforcement authority is efficiently and effectively implemented. under the terms of the 1989 Enforcement MOA, EPA is lead enforcement agency for what it views as the most important unpermitted discharge violations."

"Since each Agency has independent enforcement authority, both EPA and the Corps are responsible for effectively enforcing Section 404, and it is not EPA's job to "oversee" the Corps' enforcement efforts, although we agree that coordination between the two agencies is important. The Office of Water is concerned that the IG's office, in an attempt to address perceived deficiencies in the Corps' enforcement program, is instead attempting to place even greater demands on the Regional wetlands programs, with a potential for increasing inefficiency."

OIG Evaluation

OW's response states that "the statute" gives both the COE and EPA the authority to enforce Section 404. We are not sure to what statute OW references. Section 404 only provided for the COE to enforce against permit violations not unpermitted discharges. There are no other enforcement authorities provided in Section 404. Section 309 provides EPA and COE with joint authority to enforce against permit violations. Section 301, in concert with enforcement authorities under Section 309, provides EPA with enforcement responsibility for unpermitted discharges.

We could not find a CWA reference that gave the COE any enforcement authority for illegal discharges. Therefore, the COE's authority for enforcement against unpermitted discharges can not be statutorily derived and can only be based on the enforcement MOA between the COE and EPA. The report's criteria regarding statutory responsibility for enforcement against unpermitted discharges agrees with COE's understanding of this authority. As pointed out by GAO in its 1988 report and by COE in its response:

...the Clean Water Act vests the Administrator of EPA with enforcement authority for unpermitted discharges, not the Secretary of the Army, who is empowered to enforces against permit violations.

Current COE regulations at 33 CFR 326.2, also state that unauthorized discharges are EPA's independent responsibility. In addition, we did not indicate in the report that EPA "delegated" its authority to COE but said that it "allocated" it through the joint MOA.

As stated in the MOA, its prime goal was to strengthen the Section 404 enforcement program by using the expertise, resources and initiative of both agencies in a manner which is effective and efficient in achieving the goals of the CWA. The MOA established an "allocation of enforcement responsibilities." However, as explained above, EPA has independent statutory authority for unauthorized discharges. The Agency may allocate its authority for enforcing against such illegal discharges under the MOA but not its overall statutory responsibility for a viable enforcement program.

OW also states that the 1989 enforcement MOA provided the mechanism for implementing the joint enforcement authority and under the terms of the MOA, "EPA is lead enforcement agency for what it views as the most important unpermitted discharge violations." However, the MOA states that "EPA will act as the lead enforcement agency on all unpermitted discharge violations ..." which meet the criteria listed in Section III.D. Section III.D. lists repeat, flagrant violators, where EPA requests a case or COE recommends that an administrative penalty action may be warranted. As such, EPA has first refusal. COE may take the action against the violator once EPA notifies that it will not take action. However, as reported, we found that the regions were not taking actions against what they viewed as the most important unpermitted discharge violations but what the COE viewed should be referred. We also noted that not all COE districts were making referrals. Because EPA does not monitor

COE enforcement actions under the MOA and primarily enforces only against the cases referred by the COE, the regions had no assurance that they were cognizant of all significant unpermitted violations within the context of the MOA.

Agency Comment

"The draft report's statement...that the 'MOA clearly divided enforcement lead responsibility for unauthorized discharges between EPA and [the Corps]' fails to recognize that the MOA envisions that EPA will have the opportunity to take the enforcement lead on unpermitted discharge violations falling within the four listed categories, but that due to staffing constraints and other factors, the EPA Regions would not be able to take the lead on all cases falling within these categories and that the Corps would continue to handle a substantial number of unpermitted discharge violations."

OIG Evaluation

We recognized the program's staffing limitations and did not recommend that OW take the lead in all these cases. We did recommend that OW ensure that all violations subject to EPA's lead under the enforcement MOA are timely referred by the COE. The purpose of this, as pointed out in the report, was to identify all significant violations that will yield the optimum benefit or deterrence effect from EPA's limited enforcement resources. Being able to pick-and-choose enforcement cases from the entire population subject to EPA's lead would present an enforcement program that would be more consistent as well as fair and equitable. As far as the COE handling a substantial number of unpermitted discharges, we see no problem with this as long as they are not repeat, flagrant, violations in priority wetlands, or in some other way "significant" that should be subjected to EPA's administrative penalty authority.

Agency Comment

"As already stated above, it is EPA's position that EPA and the Corps share Section 404 enforcement authority. Therefore, the statement at the bottom of page 30 that unpermitted discharge enforcement 'was, by statute, EPA's responsibility' is wrong. Moreover, the statement of the Corps' position at the top of page 32 pre-dates the 1989 Enforcement MOA, and is inconsistent with the Corps' practice over the past 15 years of enforcing against unpermitted discharges, and with the fact that the courts have not questioned the Corps' authority to enforce against such violations."

OIG Evaluation

As stated previously, we found no statute that vested joint and equal enforcement authority for unpermitted discharges to both the COE and EPA. EPA now states that it is EPA's position that EPA and COE share Section 404 authority. This contradicts OW's previous statements that "the statute" vested this joint authority. We can not conclude that EPA's position takes precedent over statutory authorities and that the report's conclusion is wrong. Also, we are unaware of any change in the COE's position relative to enforcement authority. COE personnel contacted on September 24, 1991, indicated that its regulations at 33 CFR 326.2, that state that Section 404 enforcement authority for unpermitted discharges is vested with the EPA Administrator, are still effective and have not been changed since the final rule was published in 1986. Even if the COE's official position has changed since the 1988 GAO report, interagency agreements cannot transfer statutory responsibility. Finally, the COE's practice of enforcing against unpermitted discharges for the past 15 years is based upon the 1976 enforcement MOA which was later revised in 1989 and is not based on any statutory responsibility. Therefore, the COE's past enforcement practices is not inconsistent with the report's statement that EPA is statutorily responsible for Section 404 enforcement against unpermitted discharges. We do not challenge the decision to jointly enforce against unlawful discharges under the MOA. We only question managements position that the Agency has no oversight responsibility.

Agency Comments

"The Office of Water agrees that some of the Regions could be focusing more effort on attempting to negotiate field level Enforcement MOAs with their respective corps districts."

OIG Evaluation

Considering the apparent benefit derived from the one field level MOA negotiated to date, especially the significant increase in COE referrals, additional agreements with other COE divisions or districts would not only increase MOA compliance but provide more stability and consistency to the overall enforcement program.

EPA SECTION 404 ENFORCEMENT ACTIONS DID NOT COMPLY WITH AGENCY POLICY AND EFFECTIVELY DETER VIOLATIONS

The EPA enforcement actions against illegal Section 404

discharges were reactive and generally failed to comply with interagency agreements and EPA's enforcement policy. Specifically, the three regions included in our review did not: (1) design enforcement programs to fulfill agency objectives and comply with the enforcement MOA and EPA policy; (2) actively enforce against solid waste wetland discharges under an MOA with the COE; (3) follow-up on violator corrective actions to ensure compliance with consent agreements; and (4) use available resources to increase effectiveness of the enforcement program through detection of Section 404 violations. Again, national program managers provided very little definitive guidance and direction. These deficiencies were directly attributable to insufficient national program direction/guidance and regional resources to properly implement the enforcement activity. As a result, the regions' Section 404 enforcement programs did not adequately accomplish the Agency's enforcement objectives, did not comply with interagency agreements and EPA's enforcement policy, and did not deter future violations.

Background

The 1988 Agency Operating Guidance instructed regions to focus and intensify their Section 404 enforcement efforts on unauthorized discharges in priority wetlands and to ensure that significant violators were swiftly returned to compliance and formal enforcement actions were taken against them. A "significant violator" required an enforcement response. A "significant violation" could represent an illegal discharge into a wetland or other waters of the United States that: (1) was included on a region's priority list; (2) would jeopardize the habitat of an endangered species; (3) was specified under an advanced identification as unsuitable for disposal; (4) was included as part of an enforcement initiative to achieve broader compliance through deterrence; (5) was performed by a person with prior knowledge of Section 404 requirements; and/or (6) would result in significant individual or cumulative adverse impacts on regulated wetlands. For 1989 and 1990, the Agency Operating Guidance continued to emphasize enforcement for priority wetlands, but did not instruct the regions to focus on "significant" violators. Instead, the regions were expected to coordinate the specifics of enforcement actions with individual COE districts under the MOA. In addition, regions were expected to apply administrative penalties where warranted and consider the use of criminal action against repeat violators. The regions were told to strengthen the surveillance and monitoring component of the enforcement program through their activities and utilization of information and data from the COE and other resource agencies.

Through omission, the 1989 and 1990 Agency Operating Guidance left it up to each region to determine the types of enforcement actions or areas to emphasize in its enforcement program. However, the criteria for determining the lead enforcement agency under the 1989 enforcement MOA provided for COE referrals of violations similar to those defined as "significant violations" in the 1988 Agency Operating Guidance. Therefore, national program emphasis on enforcement did not actually change from 1988 to 1990.

a. Regions' Enforcement Programs Reactive Rather Than Proactive

Without national program direction and measurable regional commitments, the regions did not implement their enforcement programs as an integral part of overall EPA and COE enforcement to fulfill Agency objectives. Instead, the regions established their own enforcement agendas which lead to programs with varied emphases and less effective than that implied in the Agency Operating Guidance. This occurred because OW did not provide detailed guidance to the regions on accomplishing the enforcement objectives identified in the Agency Operating Guidance. Also, while the OW tracked statistics on enforcement actions taken against significant violators (SPMS/STARS), OW did not use the system to negotiate measurable commitments against which regional enforcement performance could be evaluated. As a result, comprehensive regional enforcement programs which deterred illegal discharges and, where possible, remedied environmental damage, were not accomplished.

Lacking national direction, Regions 4, 6, and 7 took different approaches toward Section 404 enforcement. Region 7 ranked enforcement as a low priority completing only two administrative orders and referring only two violations to the Department of Justice (DOJ) for civil action during our three-year audit period. Region 4 and 6 had more active enforcement programs; however, their enforcement actions primarily represented staff reactions to violations detected and referred by COE under the MOA.

Contrary to national program emphasis in the Agency Operating Guidance, Region 7 expended over 60 percent of its program resources on Section 404 public outreach strategic initiatives and discounted the benefits of other program objectives, including enforcement. However, based on a review of Region 7 records and interviews of COE district personnel, there were illegal discharges occurring that should have been enforced by Region 7 under the MOA, but were not. One primary COE district

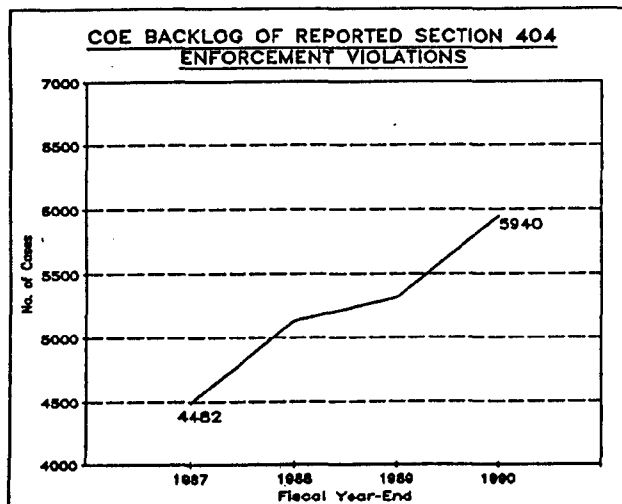
informed us that they had stopped referring violations to Region 7 because of regional inaction on the referrals. The Region's permit documentation showed a significant number of "after-the-fact" permits issued. (After-the-fact permits were issued by the COE to legalize an unauthorized discharge made without a Section 404 permit.) One COE district in Region 7 had a 20 percent after-the-fact permit rate. Also, of the 68 permit applications Region 7 identified as significant illegal fills in its permit public notice database, 33 (49 percent) were for after-the-fact permits.

While issuing after-the-fact permits does not necessarily mean that a formal enforcement action should have been taken, the number of after-the-fact permits issued was an indicator that significant violations could exist and continued undeterred. Some of these violations may have been repeat or flagrant violations in priority wetlands which would qualify for an EPA lead under the MOA. We were unable to identify all qualified cases because Region 7 did not have a case tracking system to monitor COE enforcement actions. However, with the number of wetland discharges that were apparently occurring outside the regulatory process, Region 7 should have taken a more active enforcement role.

Regions 4 and 6 had more aggressive enforcement programs than Region 7, but their enforcement approach was reactive not proactive. The two regions screened referrals made by COE districts and primarily addressed those cases for which COE recommended penalties under Section 309(g) and solid waste discharges or land clearing activities which the COE refused to regulate under Section 404.⁴ The regions also reviewed notices of enforcement action (violation letters) when submitted by COE districts, direct complaints from the public, and potential violations identified during EPA field trips for additional EPA enforcement cases. On a limited basis, the regions also requested the enforcement lead for unauthorized discharge violations involving repeat or flagrant violators or minor violations which came to their attention during these reviews. However, the regions' actions were not the result of direct enforcement planning and monitoring of COE enforcement decisions, but a reaction to violations referred to the regions at the discretion of the COE districts.

⁴ In July 1990, COE issued a Regulatory Guidance Letter on land clearing under which COE Districts were to regulate these activities.

By limiting their enforcement approach, the regions ignored the real possibility that continual oversight and analysis of EPA and COE enforcement initiatives might bring by identifying the types, location, and frequencies of violations. Without formal planning and program design, regional enforcement programs that deter and reduce future violations and, where possible, remedy environmental damage were not a reality and the number of reported violations continued to grow. During our audit period, reported Section 404 violations steadily increased and, as a result, COE's backlog of reported violations increased. At the end of FY 1990, COE documentation showed a backlog of 5,940 reported violations as opposed to the 4,482 case backlog at the end of FY 1987, a 32.5 percent increase.



b. Regions' Enforcement Actions Were Not Effective

Based on our review of Section 404 enforcement programs and 39 enforcement actions in Regions 4, 6, and 7, the regions did not establish the necessary controls to implement a consistent enforcement program against illegal Section 404 discharges in accordance with the Agency's General Enforcement Policy and the Enforcement MOA. Instead, regions developed their own enforcement programs based on broad headquarters guidance and little knowledge of the overall enforcement problem. As a result, regional enforcement emphasis and results varied and generally were not effective as a deterrent to future violations and, therefore, protective of vulnerable wetlands.

Regional Enforcement Approach Inconsistent with MOA - Regions did not implement proper controls (i.e., COE oversight) to ensure

that EPA's basic enforcement responsibilities under the MOA were fulfilled. As a result, the regions were not assuring consistent and stringent enforcement against all repeat and flagrant violations as established under the MOA.

Not only were the regions not actively identifying cases which qualified for more stringent EPA enforcement under the MOA, but were remanding back to COE cases referred for EPA action. Because of lack of resources, Region 4 was forced to screen and prioritize COE referrals pursuing only the worst violations and remanding the remainder to the COE. For example, as a result of a field level enforcement MOA, Region 4 staff estimated⁵ they were receiving about 16 enforcement referrals per month from the Jacksonville (Florida) COE district. However, resource limitations permitted regional action on only 3 to 4 of the 16 referrals. The remaining cases were remanded back to the COE district for action.

Region 4 personnel informed us that their COE districts feared that EPA's returning cases to the COE would undermine district enforcement because COE management would conclude that a case must be weak if EPA elected not to take the lead. However, the Region rationalized that COE actions on these illegal discharges were more than EPA could accomplish with its limited resources.

Region 7 was also receiving COE referrals and taking no formal action because of the Region's low priority for Section 404 enforcement. During the previous 12 months, Regional staff estimated that the Region had received 25 COE referrals under the MOA described by staff as problem cases. Most of the cases were returned to the applicable COE districts for action. Region 7 had not issued any penalty orders as of June 1991.

Region 6 staff estimated that the Region received an average of 18 COE referrals annually. During our audit period, Region 6 returned two enforcement referrals to the COE for action. Our follow-up on the two referral cases returned to the COE by Region 6 disclosed that the COE district took minimal or no action on the cases. One violator was provided an after-the-fact permit without any mitigation. The other case was still unresolved 24 months after it was referred to Region 6 and 49 months after the violation was first reported to the COE.

⁵ Regional estimates of COE enforcement referrals were used because the regions maintained no referral log or other controls to track receipt and actions on referrals.

One regional wetlands manager stated that little could be accomplished by overseeing COE Section 404 enforcement to identify additional cases subject to EPA lead. He estimated that he would need three to five additional FTEs to adequately oversee COE enforcement against unauthorized discharges and to identify and pursue all those violations subject to referral. Without adequate regional resources, serious violations requiring administrative penalties or judicial action will continue to be returned to the COE without EPA action. In addition, returning cases qualified for EPA lead under the MOA without enforcement action could discourage COE efforts and continue to display an inconsistent enforcement approach to significant illegal discharges. This condition existed in all three regions and will continue to get worse as COE referrals increase.

Regional Programs Did Not Support Agency Policy - Regional civil and criminal judicial referrals and administrative actions, including penalty orders, did not always accomplish enforcement program objectives. Civil and criminal actions have been untimely with unnecessary delays in settlement. In addition, administrative penalty orders (AOs with penalties) have had little effect as a deterrent to future violations because economic benefits attained by violators were not completely eradicated by the enforcement action. In addition, case resolution was usually slow, untimely, and did not necessarily represent fair and equitable treatment of the regulated public.

General Enforcement Policy, GM-21, dated February 1984, governed EPA's enforcement of illegal Section 404 discharges. The policy established enforcement objectives for the: (1) fair and equitable treatment of the regulated public; (2) swift resolution of environmental problems; and (3) deterrence against future violations. For the fair and equitable treatment of the regulated public, the Agency's enforcement policy supported consistent and flexible penalties. The consistent application of the penalties was critical to preclude litigation and ensure quick resolution of environmental problems. To achieve deterrence, the EPA's General Enforcement Policy stated that both the violator and the public must be convinced that Section 404 enforcement will place the violator in a worse position than those who have complied. Permitting a violator to benefit from noncompliance places those who have complied at a regulatory disadvantage, thereby, creating a disincentive for compliance. Under Section 309, anyone in violation of the Section 404 dredge and fill provisions were subject to civil or criminal action, or both and, as of February 1987, violators could be assessed administrative penalties (up to \$125,000) by EPA under Section 309(g) of the CWA in lieu of civil/judicial action.

EPA enforcement activity prior to 1988 and for 1988 through 1990 (our audit period) for the three regions included in our review is presented below:

<u>Pre-1988 Actions</u>					<u>1988-1990 Actions</u>				
<u>Region</u>	<u>AOs</u>	<u>AOs w/ Penalties</u>	<u>Civil/Criminal Referrals</u>		<u>AOs</u>	<u>AOs w/ Penalties</u>	<u>Referrals Civil Criminal</u>	<u>Under Invest.</u>	
4	1/	8	0	2	49	12	3 2	9	
6	2/	3	0	2	20	6	5 2	22	
7		0	0	0	2	0	2 0	9	

1/ Region 4's enforcement activity increased dramatically subsequent to our pilot audit of the Region's Section 404 program.

2/ Region 6's wetlands data base listed 101 enforcement records; however, 52 records represented support for COE enforcement actions such as site visits, consultation with COE, etc. Only 49 actions represented direct EPA enforcement activities including 22 cases still under investigation.

Region 7's FY 1988 Self Evaluation Report recognized past Section 404 enforcement deficiencies and pledged a renewed enforcement emphasis with six significant violations under investigation. However, all six cases were closed by June 1990 because they had become "too stale" to pursue. Staff at one major COE district in Region 7 informed us that they no longer referred violations to Region 7 because of the region's history of inaction. The district had previously referred cases to Region 7, each involving over 200 acres of wetlands that were cleared and filled, that languished at the Region with no action. As shown above, the Region had nine cases under investigation at the time of our audit; however, on January 16, 1991, the Region could not assure us that the nine proposed administrative actions would be processed. The national program office had not been informed of any enforcement actions pending at Region 7.

The current enforcement activity in Regions 4 and 6 represent a significant increase over prior years. However, without specific knowledge of COE enforcement activity in each region and, therefore, the ability to assess the overall enforcement problem, the adequacy of this level of performance cannot be determined. In addition, the quality of the reported enforcement accomplishments often did not fulfill the objectives of EPA's General Enforcement Policy. The regions generally avoided civil and criminal actions and related penalties for Section 404 violators because of past DOJ disinterest in prosecuting these cases. Region 4's past civil actions under Section 309 of the CWA took years to prosecute and resulted in little benefit to the Federal government. The two civil cases Region 4 initiated prior to 1988, took nine and ten years to close. While all three regions have had more recent civil and criminal experiences, the cases still required significant regional resources and national program commitment to obtain prosecution.

Once a case was recommended for judicial action, the Section 404 enforcement staff only provided support to EPA's Criminal Enforcement/General Counsel staffs and/or the DOJ. Of the two criminal referrals we reviewed in Region 6, one was processed relatively fast - 18 months from violation discovery in May 1989; to guilty verdict in October 1990. However, the second Region 6 criminal referral was still under review 35 months after discovery in February 1988.

Because of the significant resources, delays, and Agency commitment involved in civil and criminal actions, the regions preferred to use administrative remedies, including EPA's administrative penalty authority, to resolve the majority of unpermitted discharge violations and related environmental problems. However, administrative enforcement was also inconsistent and sometimes controversial because EPA required some significant violators to restore wetlands and pay penalties while others went unpunished for similar acts due to alternative COE actions such as after-the-fact permits or partial restoration without penalty.

For example, most of the 15 Region 4 administrative actions (issued between March 1985 and February 1988) we reviewed during the pilot audit recommended full restoration. However, the Region usually settled for much less. Of the 15 administrative orders reviewed, five were essentially dropped (one violator voluntarily restored wetland area), four were resolved through consent orders, and six were still pending. Penalties were nonexistent. The first penalty order was issued in February 1989 (two years after EPA was given penalty authority). However,

administrative actions, including penalty orders, taken subsequent to our pilot audit in 1988 and 1989 have been much more aggressive and successful with higher initial penalty assessments, many at the \$125,000 statutory maximum.

Region 6 assessed lower penalties with final settlements unnecessarily delayed, similar to Region 4's settlements we reviewed during the pilot audit. For example, COE referred to Region 6 a repeat violator who ignored after-the-fact permit conditions and constructed numerous unauthorized channels and boat slips for a proposed residential development. Region 6 required partial restoration under an administrative order, but allowed the violator to keep in tack the majority of unauthorized work. The violator was assessed a "lenient" \$9,000 penalty under a February 1989 order, however, the violator requested an administrative hearing to contest the penalty which was never conducted⁶. The Region 6 penalty order remained outstanding over two years later. Based on our review, we concluded that administrative action was not timely, unauthorized wetland impacts that resulted from permit noncompliance remained with a penalty outstanding, and the penalty calculation ignored the economic benefit that accrued to the violator. As a result, the action did not act as a deterrent by placing the violator in a worse position than if he had complied.

In another Region 6 case, the COE allowed the violator to apply for an after-the-fact permit. However, the violator continued to fill the wetland without a permit and after a COE warning. The COE subsequently denied the violator a permit and referred the case to Region 6 for administrative penalty assessment. The COE referral stated that the violator had accrued economic benefit, was aware of the Section 404 requirements, and that compensatory mitigation should be considered because restoration of the impacted wetland might not be possible. However, Region 6 only fined the violator \$1,850 without any mitigation. According to file documentation, the violator indicated that the property needed for previously proposed compensatory mitigation was worth far more than the fine. The Region thought the penalty was sufficient to compensate for the environmental loss; however, the COE did not. The COE personnel sympathized with EPA's resource constraints, but stated that nominal enforcement undermines the

⁶ Violator later claimed financial hardship and the Regional hearing officer put the case on hold. The Region subsequently attempted to adjust the penalty to \$3,500 but the violator continued to refuse to pay any penalty. After a change in Regional personnel, the case "fell through the cracks."

regulatory program and wetland owners may decide to ignore regulatory requirements and take their chances. In fact, this same violator was subsequently under investigation for another illegal discharge. Therefore, this EPA enforcement action failed to advance the Section 404 regulatory effort and fulfill the deterrent intent of EPA's general enforcement policy.

EPA's General Enforcement Policy indicates that the purpose of an administrative penalty is to remove economic benefit and place the violators in a worse position than if they had complied. The examples previously cited and other enforcement actions we reviewed during the audit did not always accomplish this objective. Neither were the cases timely processed or fair and equitable because substantial inconsistencies existed from case to case and region to region. For the two Region 6 examples above, the COE refused to permit the illegal discharges but the Region's enforcement actions had the effect of legitimizing the illegal fills with only minor concessions from the violators. These actions would not convince the general public to comply with Section 404 regulatory requirements.

c. Inadequate Enforcement Against Solid Waste Discharges

The national program office did not provide adequate direction to the regions on how to resolve the environmental impacts of unauthorized solid waste discharges into regulated wetlands. Under an 1986 MOA⁷ with the COE, EPA agreed to take the lead in permitting solid and semi-solid waste discharges and enforcing against such unauthorized discharges into wetlands and other United States waters under its Section 402, National Pollutant Discharge Elimination System (NPDES) authority. However, our audit in Regions 4, 6, and 7 disclosed that neither EPA Headquarters or the regions had developed the procedures needed to effectively coordinate the enforcement of these Section 404 violations using its Section 402 authority as agreed under the MOA. As a result, most illegal Section 404 discharges of solid waste reported to EPA went unenforced.

All three regions received COE referrals involving solid waste discharges under the subject MOA. The regions' Section 404 programs made attempts to coordinate enforcement through the Section 402 program but with little success. The regional NPDES programs primarily regulated, through permits, point source discharges of liquid wastes into U. S. waters from facilities

⁷ Regulation of Discharge of Solid Waste Under the CWA, effective April 23, 1986.

such as sewage treatment plants. While technically possessing jurisdiction over the illegal point source discharges of solid waste (a "pollutant"), the regional NPDES programs have considered the use of its resources to pursue such wetlands violations an inefficient use of Section 402 authority.

In one Region 4 case, the Section 402 program would not force the removal of 47,000 cubic yards of wood chips from a seven acre wetland because the violation lacked "substance" to warrant a Section 402 enforcement action. Instead, the NPDES program proposed to monitor the runoff (a liquid) from the wood chips into an adjacent creek to assess the effect on water quality. Meanwhile, seven acres of wetlands that could be restored were left covered with four feet of wood waste. Subsequent to our pilot audit, Region 4 successfully had the site cleared during the owner's ordinary course of business and received the owner's promise to allow the area to revegetate. The region used an administrative order citing a Section 301 violation but the order remained silent regarding its specific authority under Sections 404 or 402. Since the region's NPDES program had refused to enforce under Section 402 against this illegal discharge and the MOA with the COE precluded the use of Section 404 enforcement authority, the violator could have refused to comply and the Region would have had little recourse.

Solid waste discharges in wetlands is an issue that EPA Headquarters needs to address. Both Regions 4 and 6 expressed concern that no specific guidance was provided by OW on how to proceed with enforcement against such illegal discharges. Meanwhile solid waste violations are continuing to be referred to EPA by the COE with little recourse from the regions (see Chapter 4, page 71 for further details on Section 404 solid waste discharges).

d. Inadequate Follow-up of Violator Corrective Actions

Regions did not routinely follow-up on consent decrees obtained as a result of enforcement against Section 404 violations to ensure that violators complied with corrective actions. Under the enforcement MOA with the COE, the lead enforcement agency was to ensure proper monitoring of any remedy, removal, compensatory mitigation, or other corrective measure required under consent decrees to determine that violations had been effectively resolved. However, our file reviews in both Region 4 and 6 showed that follow-up on enforcement actions were not routinely or effectively accomplished. Region 7 had only two administrative actions during the audit period. Without evaluating compliance, Regions 4 and 6 were not assured that

enforcement actions adequately corrected the environmental damage or acted as a deterrent to future violations.

In Region 6, the wetlands program staff could provide only limited information on the status of corrective actions at some sites. In Region 4 we found indicators of noncompliance as reported in the pilot audit. Subsequent to the pilot audit, Region 4 performed some follow-up on prior cases to ascertain violator compliance. According to Region 4's wetlands staff, problems were found particularly in the area of compensatory mitigation where violators did not maintain the sites as required in the consent decrees. However, Region 4 personnel believed that further enforcement of these provisions was unlikely because of the weak wording used in the old consent decrees. In the future, Region 4 planned to systematically review cases for compliance and carefully word enforcement conditions in consent decrees.

Enforcement follow-up is important not only to determine initial compliance with the administrative order, but to ensure long-term compliance and success of the mitigative measures. Each region should have a formal program for routine follow-up on prior enforcement actions.

e. Detection of Violations Was A Low Regional Priority

The regions included in the audit did not routinely search for unauthorized dredge and fill activities in regulated wetlands using available methods such as aerial surveillance. Regions 6 and 7 made no provision for aerial surveillance. Region 4 recognized the need for detection and funded an aerial surveillance activity. However, the funds were not effectively used to identify existing or ongoing violations. Regional managers' reasoned that since their Section 404 enforcement programs could not handle the current enforcement workload being generated from COE, FWS, NMFS, State agencies, and the general public, the active identification of additional unpermitted discharges was counter-productive. Regional staff believed that identifying additional violations would only be beneficial with enough resources to handle the workload. However, wetlands personnel agreed that aerial surveillance was the best method for systematically identifying illegal dredge or fill discharges.

Starting in 1986, Region 4 did set aside contract funds to use for aerial surveillance (\$16,650 in 1988). However, a coordinated schedule of surveillance flights was never developed and about 50 percent of the funds allocated to the contracts each year was not expended. In addition, some of the surveillance

contract services that were used by the Region appeared to be for transportation purposes, not surveillance. One Region 4 manager explained that existing program workloads precluded routine aerial surveillance by his limited staff. Therefore, Region 4's plan was to reduce the amount of future extramural funds devoted to aerial surveillance and attempt to negotiate interagency or cooperative agreements with other Federal and State agencies for aerial surveillance of wetlands in coordination with their flights over priority wetland areas.

The COE previously used aerial surveillance for its Section 404 enforcement program, but in July 1988 the GAO reported (GAO/RCED-88-110) that the COE had curtailed aerial surveillance due to budget limitations. Without COE surveillance, the regions had no alternative method to independently detect Section 404 violations. Both Region 4 and 6 had identified remote wetland areas where they suspected unauthorized activities were occurring. But with other enforcement obligations pending, the coordinators believed they had no time to allocate for surveillance. Without the advantage of aerial surveillance, the COE and EPA became dependent on other Federal, State, or local government entities and the general public to report suspected violations.

Agency Comments On Inadequate EPA Enforcement Actions And OIG Evaluation

Agency Comment

"The draft report fails to credit both Headquarters and the Regional wetlands programs for the significant growth in wetlands enforcement, which has been accomplished in a relatively short timeframe and with a very limited field presence."

"For purposes of clarification, the explanation of after-the-fact permits...is incomplete and fails to explain that issuance of an ATF permit is appropriate where the discharge would have received a Section 404 permit if an application had been submitted prior to the discharge activity (the discharge complies with the Section 404(b)(1) guidelines)."

"The draft report misconstrues the purpose and scope of the 1989 Enforcement MOA. It did not envision EPA enforcement against 'all repeat and flagrant violations'.... Nor could it since a variety of factors must be weighed before EPA - or any Federal agency - decides whether to exercise the enforcement discretion provided by Congress. Also, the MOA did not envision that EPA would accept all cases referred by the Corps for enforcement

action; in fact, the MOA explicitly provided for those instances where EPA would not accept referred cases."

"The draft report's assumption...that issuance of administrative compliance orders (AO) seeking removal of the illegal discharge and restoration of the wetlands have little deterrent effect because of a failure to recoup all economic benefit is wrong since such removal/restoration will generally eliminate any permanent economic benefit accruing to the violator. Not only will the violator generally not recoup any economic gain, but they will have to incur the costs associated with the removal/restoration required under the AO. Furthermore, this approach generally yields significant environmental results."

"We disagree with the draft report's conclusion that the Regional enforcement programs did not support Agency policy. We believe that the Regions have been complying with the Section 404 administrative penalty policy, which became final in December 1990. Also, the discussion of Regional enforcement activity fails to acknowledge that the various types of enforcement responses differ with regard to complexity and the amount of time needed for successful resolution."

"The discussion about recent enforcement trends in Regions 4 and 6...is especially troubling because all the facts indicate that these two Regions have made substantial progress in a relatively short amount of time, and yet the draft report persists in trying to cast this success in a negative light."

OIG Evaluation

We can only attest to the enforcement actions in regions included in our audit. The increases in EPA enforcement actions from 1988 to 1990 for these three regions are included in the report. With the exception of Region 7, there was a noticeable increase in enforcement activity. However, Region 4 did not start concentrating on enforcement actions until after our arrival. Region 6 claimed 101 enforcement actions over the three-year period. However, as reported, under half (49) could be considered enforcement cases with 20 of those currently under investigation with no orders pending. So while there was an increase over the period it was far from "significant." Also, based on our review, the quality of many actions taken were questionable. Therefore, the increase in numbers of enforcement actions did not necessarily equate to a more consistent and effective enforcement program. Our review of enforcement actions in the three EPA regions disclosed several deficiencies which are covered in the report.

An after-the-fact permit does not excuse the violation before the permit was issued. We can not interpret what was envisioned by the 1989 enforcement MOA but must rely on the written provisions of the MOA which states that EPA will be the lead enforcement agency against all repeat, flagrant violators, etc. By being the lead agency, EPA should have the opportunity to enforce against all repeat, flagrant violators, etc. The statement "... consistent and flagrant violators ..." does not mean that every case referred by COE or otherwise coming under its lead will result in a formal EPA action. What we do state is that EPA should be made aware or should make itself aware of "significant" violations. Enforcement is a "discretion" and not all cases warrant a formal enforcement approach. However, it should not be so discretionary that significant violators go unpunished. Enforcement consistency is not only important for its deterrent effect but for the fair and equitable treatment of the regulated public. This can be achieved only if the Agency ensures that all significant violations are evaluated by the lead agency (EPA) using uniform guidelines.

We recognize that removal and restoration may act as an appropriate deterrent. However, as reported, we found cases in Region 4 where full restoration was recommended but settlement was for much less, dropped, or pending without further action. The restoration of a degraded area can only be a deterrent and beneficial if it is done.

From copies provided by regional enforcement coordinators, the administrative penalty policy has been in draft and used since at least September 1987. Our review showed a disparity in enforcement approach between the regions, especially for administrative penalties. Cases we reviewed and presented in the report did not always remove economic benefit as a deterrent or result in swift resolution of environmental problems. We do acknowledge that various types of enforcement responses differ with regard to the complexity and the amount of time needed for successful resolution. However, the approach for implementing those enforcement responses should not differ from region to region.

OW states that Regions 4 and 6 have made substantial progress in their Section 404 enforcement programs in a short period of time. Again, OW is apparently relying on numbers of actions to evaluate a region's enforcement program. However, success is relative and these numbers do not indicate the quality, effectiveness, and consistency of these actions which would be a better measure of program effectiveness in meeting enforcement goals. Neither does

it consider the growing enforcement problem as reported by the COE. The adequacy of enforcement activity cannot be effectively evaluated until there is an understanding of the overall enforcement problem and OW defines what quality enforcement is through internal program guidance and establishes measurable commitments designed to accomplish program goals.

Agency Comment

"The issues surrounding regulation of solid waste discharges to wetlands are not enforcement issues per se, but a broader programmatic problem that merits resolution."

OIG Evaluation

Regulation of illegal solid waste discharges is an enforcement issue. We agree that regulation of solid waste discharges into wetlands involves broader issues across multiple programs; however, the problem persists. The discharge of solid waste (a pollutant) into waters of the U.S. without complying with the permitting provisions of either Section 402 or 404 is unlawful and comes under EPA's jurisdiction. EPA has consistently maintained that solid waste discharges can be regulated under 404. However, since the COE makes the determination of a "discharge" for Section 404 under its definition, which excludes discharges for the purpose of waste disposal, and EPA, under an MOA, agreed to enforce such discharges as Section 402 violations, it is incumbent on EPA to ensure that these violations are enforced and brought under compliance through Section 402, 404, or any other mechanism available to the Agency. The "broader programmatic problems" need to be resolved.

Agency Comment

"The Office of Water agrees that monitoring compliance with administrative and judicial consent decrees is important. We also agree that there is a need for carefully worded conditions in consent decrees and that the Regions should place as much of the burden as possible on the violator, as opposed to the Agency.

The failure of the Regions to focus on systematic monitoring of unpermitted discharges is understandable given that they have very limited staffs; learn about unpermitted violations from private citizens, the Corps, and other Federal and state agencies; and already know about more violations than those limited staffs are capable of handling. Nevertheless, the wetlands program agrees that this issue warrants further examination."

OIG Evaluation

No evaluation of these comments was necessary since Agency basically agreed with report's conclusions.

CONCLUSION

EPA did not fulfill its statutory responsibility of ensuring that appropriate enforcement actions were taken against illegal discharge of pollutants into wetlands and other waters of the United States. While we recognize that regional staffing limitations adversely impacted the number of successful enforcement actions initiated, the quality of enforcement actions taken should be constant. We found that standards of quality and consistency were not maintained in regional enforcement programs which presented an inequitable, controversial enforcement approach to the regulated public. The lack of specific national program direction and measurable regional commitments to Section 404 enforcement also contributed to the regions' inadequate enforcement implementation and controls to assure achievement of program objectives.

Effective detection of Section 404 violations and successful prosecutions and/or sanctions against violators, provide the best deterrence and protection against future unauthorized discharges into the wetlands environment. In addition, effective deterrence can reduce the resources necessary to administer Section 404 enforcement responsibilities by addressing noncompliance before it occurs. However, to achieve successful deterrence, the potential wetlands developer must be convinced that any Section 404 violation will subject him to stringent enforcement actions, including appropriate penalties, and that these actions will place him in a worse position than those who have complied.

Recognizing that program resource limitations may not be resolved by the Agency in the near future, it is incumbent upon EPA and its regions to establish proper controls over both EPA and COE Section 404 enforcement programs in order to: (1) assess and resolve interagency enforcement problems; (2) effectively target Federal enforcement initiatives; and (3) identify those significant violations that will yield the optimum benefit or deterrence effect from EPA's limited enforcement resources. Without a proactive approach toward enforcement through oversight of COE actions, consistent EPA reactions to its enforcement lead responsibilities under the MOA, and strategic targeting of limited enforcement resources, EPA's enforcement authority under

the CWA will not serve as a successful deterrent to the unregulated degradation and destruction of the nation's valuable wetland resource.

RECOMMENDATIONS

We recommend that the Assistant Administrator for Water promulgate specific Section 404 enforcement guidance, obtain meaningful regional commitments to enforcement objectives, and establish adequate controls over regional enforcement activities to ensure that regions properly implement comprehensive, strategic enforcement programs that provide consistent, substantive enforcement actions against illegal wetland discharges consistent with EPA's enforcement authority and responsibilities under the CWA. This should include:

- establishment of regional systems to monitor COE enforcement actions to ensure: (1) COE actions comply with interagency agreements and accomplish the Agency's enforcement objectives, (2) all violations subject to EPA's lead under the enforcement MOA are timely referred by the COE and controlled and tracked by regional management (i.e., referral logs) for proper disposition, and (3) identification of all substantive violations for EPA enforcement that would provide maximum effectiveness for the program's limited enforcement resources.
- assessment of appropriate administrative penalties to deter future violations, reallocation of available resources to Section 404 enforcement activities where possible, and compliance of EPA's enforcement actions with the Agency's General Enforcement Policy.
- establishment of national wetlands protection strategies for regional enforcement programs that would provide comprehensive oversight of the Federal Section 404 enforcement effort to (1) assess and resolve interagency enforcement issues (through field level MOAs where possible), (2) effectively target limited Federal enforcement resources to priority wetlands and significant violations, (3) identify substantial violations for Agency enforcement that would provide the maximum deterrent effect from EPA's limited staff and program resources, and (4) provide a consistent and equitable nationwide enforcement program to the regulated public to include consistent application of the administrative penalty authority between regions.

-requirements for enforcement follow-up and detection initiatives that would incorporate compliance inspections to determine violator compliance with the terms of administrative, civil, and/or criminal actions and aerial surveillance by EPA or other cooperating agencies to monitor vulnerable wetland areas for unpermitted discharges.

The significant shortage of regional wetlands staff was reported in our pilot audit report on Region 4's wetlands program (Audit Report No. E1h7F8-04-0331-0100208, issued March 23, 1990). Because of budget restraints over which the Agency has limited control and because EPA has continued to increase allocations of its limited resources to the wetlands protection effort, we have included no recommendations concerning regional wetlands staffing deficiencies and their effect on the Section 404 enforcement initiatives. Further details on the wetlands staffing problem and the Agency's efforts to improve program resources are shown in the Background section in Chapter 1.

Agency Comments On Recommendations And OIG Evaluation

Agency Comment

"As already noted above, the Office of Water disagrees with any suggestion that EPA should be monitoring Corps enforcement actions.

"With regard to the remaining draft recommendations on enforcement, as stated above, Headquarters has issued several enforcement guidance documents to the Regions within recent years and will respond as needed on follow-up issues."

OIG Evaluation

As we have previously stated, we found that statutory responsibility for enforcement against unpermitted discharges is vested with EPA and, therefore, it is incumbent upon EPA to monitor the COE's implementation of its statutory authorities. In addition, monitoring would produce a more effective EPA enforcement program by assuring consistent approach for all significant violations. The Regions would have the opportunity to review violations received by the COE and make its own determination of unlawful violations subject to EPA enforcement lead. This would make EPA the decision-maker, as the Agency with statutory authority, by allowing it to consistently select cases that produce the most impact and effective use of its limited program resources.

Chapter 3
Enforcement Program Is Not Controlling And Deterring Illegal Discharges

OW offered no specific comments on the remaining recommendations in Chapter 3.

CHAPTER 4

SECTION 404 REGULATORY PROGRAM NEEDS BETTER CONTROLS, GUIDANCE, AND INTERAGENCY COORDINATION TO PROPERLY FULFILL STATUTORY RESPONSIBILITIES

Regional wetland programs did not: (1) maintain sufficient, viable data on which to base Section 404 regulatory decisions; (2) implement consistent, controlled approaches to Section 404 public notice reviews; and (3) properly exercise EPA's statutory authorities related to jurisdictional determinations and interagency disputes concerning Section 404 permitting. Limited program resources restricted the effectiveness of regulatory actions under the Section 404 program; however, the quality and consistency of the Section 404 regulatory process could have been enhanced through improved national and regional program controls and guidance. National and regional program oversight was minimal with national management providing only general Section 404 goals and objectives in annual Agency Operating Guidance with minimum definitive guidance. Because regional regulatory processes and use of statutory authorities were inconsistent and uncontrolled, important program responsibilities were not effectively administered and regional permit review processes were sometimes viewed by the COE and regulated public as unpredictable and ineffective, occasionally placing EPA and COE in adversarial roles.

BACKGROUND

Historically, regions have been instructed through the annual Agency Operating Guidance to screen and review proposed Section 404 permits to effectively prevent or modify unacceptable wetland discharges. During review of proposed permits (through public notices), regions may make advisory comments to the COE on proposed permits. Agency Operating Guidance recommended the use of preapplication consultation with the permitting authority (COE or delegated State), permit negotiation, and use of scientifically sound, timely and well documented Section 404(q) elevations and 404(c) veto¹ actions as the national program's regulatory approach. Regions were instructed to actively address wetlands losses through the regulatory process and by invoking Section 404(q) and 404(c) dispute resolution processes on significant cases. The national program also emphasized the

¹ Section 404(q) of the CWA and the MOA gives the EPA Administrator the authority to elevate, within the COE, COE district decisions on specific Section 404 permit approvals. Section 404(c) gives the EPA Administrator the authority to "veto" COE permit approvals whenever an unacceptable, adverse environmental impact is determined by EPA.

Chapter 4

Regulatory Program Needs Better Controls, Guidance, And Interagency Coordination

proactive use of EPA's jurisdictional and related authorities to protect wetland areas. The overall program goal was to raise the level of protection for wetlands, and other special aquatic sites, by: (1) avoiding losses whenever there was a practicable alternative; (2) preventing significant degradation; and (3) achieving no net loss of wetlands and other special aquatic sites where losses would result from unavoidable wetland discharges.

While the review of COE "dredge or fill" public notices remained the primary emphasis of regional wetlands programs, national program management never established measurable regulatory goals and detailed guidance to ensure uniform and consistent regional public notice review. Neither did program management obtain measurable regional commitments to achieve the various objectives of the public notice review process. Instead, the public notice review was often driven by the individual initiatives of regional program management or wetland scientists emphasizing individual goals and priorities.

Nationally, the COE processed in 1989 approximately 5,400 individual Section 404 permit applications and authorized over 28,000 other dredge or fill actions under various general permits. According to OWP workload factors for allocation of regional program resources, 35 percent of Section 404 public notices issued on proposed individual permits would require a significant review, estimated at 50 staff hours per public notice. Another 30 percent of public notices would require minor reviews estimated at 8 staff hours each. The remaining 35 percent of public notices would require no detail review but a no comment notification would be submitted to the COE. Based on the OWP workload factors, the 5,400 proposed permits processed by the COE in FY 1989 would require over 52 EPA FTEs nationwide to perform the review of public notices.

	<u>Total Permits</u>	<u>Staff Hours</u>	<u>Total Hours</u>
<i>Significant Permits (35%)</i>	1,890	50	94,500
<i>Minor Permits (30%)</i>	1,620	8	12,960
<i>Other Permit Review Actions</i>	<u>1,890</u>	<u>1</u>	<u>1,890</u>
<i>Total</i>	<u>5,400</u>	<u>59</u>	<u>109,350</u>
			(52.6 FTEs)

With only 79.5 FTEs allocated to all elements of regional programs in FY 1989, this analysis of permit review demonstrates the severe shortage of wetland program resources, especially considering other program workloads such as 404(c) actions estimated to require 2,080 hours each, advanced identifications consuming 3,160 hours each, and enforcement actions taking 200 hours or more to complete. Therefore, our evaluations of Section 404 public notice reviews performed in Regions 4, 6, and 7 disclosed that the percentage of permits reviewed by the regions was much less than expected in OWP's workload analysis. Region 4 provided written comments on only 15 percent of the public notices received while Regions 6 and 7 reviewed and commented on 26 and 23 percent, respectively.

The regional responses to proposed permits also varied reflecting inconsistent management approaches to permit review. While Region 6 and 7 placed high emphasis on public notice reviews, Region 4 expended more staff time on enforcement and strategic initiatives, in particular advanced identifications. However, Region 4 took stronger stands on permits its staff found unnecessary or undesirable.

Program management's ability to adequately assess the needs and accomplishments of the public notice review process and make related management decisions depends heavily on the quality of information available on prior Section 404 permit actions. In Regions 4, 6, and 7 reliable information on Section 404 program activities was not properly maintained or given adequate emphasis.

REGIONS DID NOT ADEQUATELY TRACK, MONITOR, AND REPORT PROGRAM ACTIVITIES

National and regional program managers could not adequately assess and measure program performance and program staff could not maximize the effectiveness of public notice permit reviews because regions did not maintain standardized, historical Section 404 permit and enforcement (see Chapter 3) data. Although EPA management formally recognized the need for wetland databases, neither nationwide nor adequate regional capabilities to accurately track, monitor and report Section 404 activities have been developed. Neither did program managers establish adequate internal controls over existing information systems to ensure that wetland program events were adequately documented and recorded in a timely manner. As a result, program management and

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staff did not have access to valuable data essential for effective direction and control of program operations, and for making informed and timely decisions.

a. Need For Section 404 Management Information System Recognized But Not Accomplished

Although a comprehensive management information system was proposed by program management in 1985, for completion in 1987, little was accomplished toward this goal. Instead, program managers allowed regions to develop their own individual, independent systems which resulted in inadequate, incompatible computer-based systems containing inconsistent, inaccurate, and incomplete data. Therefore, six years after a wetlands management information system was proposed, little progress has been made toward development of a consistent, comprehensive wetlands information database on either a nationwide or regional basis.

In the 1985 Draft Wetlands Protection Strategy, the Office of Federal Activities (OFA) announced that a management information system for wetlands permit tracking was nearing completion. OFA recognized that: "Because of the large number of permit requests and other actions in the Section 404 program, development of a management information system is essential to assure efficient program operation." OFA acknowledged a growing need for comparable information and national statistics on the Section 404 program that could be provided through a uniform computerized management information system.

OFA's proposed system was to track and monitor pending permit applications requiring EPA comments, permit applications previously commented upon but not yet issued, status of all permit applications and permits which would have impact in areas identified as priority wetlands, and the amounts of wetlands and water acreage the Section 404 program had both protected and permitted for development. The system was to provide program managers a source for acreage, wetlands types, and specific geographic locations being consistently impacted by dredge and fill activities. This information would be used to measure the program's success in protecting wetlands and maximize the use of the program's limited resources by concentrating efforts in those wetland areas most vulnerable to loss.

In the 1986 Agency Operating Guidance, OFA was committed to provide the software and training needed to install a computerized management information system in each region during

FY 1987. However, this system never materialized. We were told that the Regions were provided the software, but it proved to be too complex for an effective application. OWP and regional management told us that, while computerization of wetlands data was encouraged, no formal guidance had been subsequently issued or received on establishing a Section 404 management information system.

Limited reviews of regional wetland information systems implemented in Regions 4, 6, and 7 disclosed that these systems did not meet the requirements OFA established for a national system in 1985. While similarities existed in the types of data collected in the regional systems, the systems were designed for individual regional needs without consideration for requirements of a unified, national Section 404 management information system. The individual regional databases were not used for control and management of the Section 404 program but rather as a simple log to track receipt of the permit notices and to record data at the conclusion of the process (if available). The primary system objective was the annual "bean count" needed for reporting under the Agency's management accountability system (SPMS/STARS or OWAS) while other needed program information was not obtained.

For example, the 1977 amendments to Section 404 of the CWA added the requirement for consideration of "cumulative impact" from wetland discharges which EPA later made a condition of permitting under the Section 404(b)(1) Guidelines. Cumulative effect was critical to the public notice review process because wetland impacts, regardless of size, could collectively alter a wetlands ecology or function. However, the cumulative effect of past permitting on wetland ecosystems and potential cumulative impact of proposed permits while considered by regional staffs in the permitting process could rarely be supported because neither the regions nor the COE districts tracked and monitored all wetland impacts or establish definitive criteria necessary to evaluate cumulative effect. Evaluating wetland impacts on a permit by permit basis without assessing cumulative effect contradicts criteria in EPA's Section 404(b)(1) Guidelines for evaluating the ultimate impact of proposed wetland discharges and is contrary to requirements of the CWA to prevent wetland ecosystems from declining to a point where extreme degradation or elimination could result.

Without historical COE permitting data or advanced identification studies, regions had to consider each proposed discharge within a priority wetland individually rather than address the cumulative impacts of such discharges. When commenting to the COE on

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proposed Section 404 permits, regions often claimed an unacceptable adverse environmental impact which would preclude permit issuance under the Section 404(b)(1) Guidelines. However, only rarely could regional wetlands staffs successfully demonstrate to the COE district's satisfaction an adverse environmental impact, either isolated or cumulative.

Also, Regions 4, 6, and 7 generally ignored wetland impacts from general permits in their review of specific permit proposals. Assessing the cumulative effect of general permits is essential, not only for their environmental impact but because general permits must be reauthorized every five years under the CWA. In the reauthorization process, the COE can revoke or modify a general permit if it determines that the activities authorized had more than a minimal adverse impact on the environment and, therefore, would be more appropriately addressed by individual permits. For the regions to effectively participate in this reauthorization process, a system for collecting and tracking general permit activities would be required; however, none of the regions included in the audit collected or tracked general permit data.

Currently, the COE has 26 nationwide general permits with additional general permits authorized at the district level. During 1990 alone, the COE categorized over 30,000 actions as qualifying under a nationwide or regional Section 404 general permit. Actions authorized under general permits could constitute a significant cumulative impact on region's wetlands without the benefit of public comment. Therefore, tracking these activities to measure impact should be a priority. However, as previously stated, Regions 4, 6, and 7 made no attempt to track general permit activity. Therefore, the Regions had no means to evaluate the cumulative environmental impact of these activities or to estimate future impacts, if reauthorized.

While national program management did not ensure that the Regions developed comprehensive, consistent information systems to track and monitor permit and enforcement activity, it encouraged regions to experiment with the Geographic Information System (GIS). The GIS provides for the entry, storage, manipulation, analysis, and display of geographic and other data in a common area on computerized maps. Regions 4, 6, and 7 were all involved in GIS projects. With the availability of ample historical data on activities impacting specific wetland areas, the GIS system could be very beneficial to the program in visualizing and analyzing wetland impacts on a watershed basis or identifying geographical areas showing increased permit activity or

unauthorized fills needing more regulatory effort or proactive initiatives. However, the use of the GIS for current wetland analyses relies totally on accurate, complete historical information on past wetland inventories and subsequent activities (individual permits, general permits, 404(f) exemptions, federally funded projects, and required mitigation) which the regions have not maintained. While experimentation with the GIS can be beneficial, OWP should put more immediate emphasis on developing the management systems necessary to support such a system and at the same time provide the information program managers and staff currently need for effective program operation.

b. Wetland Database Systems Lacked Controls and Contained Incomplete/Inaccurate Documentation

Section 404 database systems maintained by Regions 4, 6, and 7 contained incomplete, inaccurate, and untimely data. The regions' failure to include critical program information or to input the information on a timely basis precluded the effective use of the systems for program management or the day-to-day performance of public notice permit reviews.

The primary deficiency in the databases was incomplete records. For example, the three regional wetlands information systems provided assigned data fields for tracking individual permit data related to wetland acreage initially proposed for filling, the acreage EPA recommended for filling, and the acreage the COE actually permitted plus any mitigation acreage proposed, recommended, and permitted. With this information, regional program management would be able to assess COE's acceptance of regional recommendations, the ability of EPA through the public notice review process to impact permitting decisions, and the amount of mitigation required to offset impacts. However, not all public notices and resulting permits contained the detailed acreage information and other data the regions wanted to track. The form and content of public notices varied by COE district and some districts were reluctant to provide final decision documents and copies of COE permits. Therefore, regional database records routinely contained vacant fields making any analysis of the data totally unreliable and unusable for the intended purposes.

Also, wetlands information was not always recorded when received, and a variety of data entry errors were evidenced during our sample file review. Control over data assimilation and entry was almost nonexistent. There were no edit checks in the system or supervisory reviews of data input to prevent or detect data entry

errors or ensure timely recording of data received. All information systems, whether computerized or manual, require adequate controls over recording and assimilating data to ensure a reliable information base that will be beneficial to and provide a basis for management analysis and related decisions.

In 1988, GAO reported (Audit Report GAO/RCED-88-110) COE's lack of definitive data for evaluating the COE's Section 404 regulatory program and recommended that a data system be developed to provide baseline information on the extent to which Section 404 permits were protecting or resulting in the filling of wetlands and otherwise restoring and maintaining the integrity of the nation's waters. Subsequently, COE developed and officially approved a computerized Section 404 information system called the "Regulatory Analysis Management System (RAMS)" which was designed to provide the baseline permitting information recommended by GAO. We were told that about 10 COE Districts are currently using the new system.

The COE's RAMS tracks much of the same information required in the EPA regional databases and databases maintained by other Federal resource agencies. The National Marine Fisheries Service's computerized system has been accumulating permitting data for coastal states, at least in its Southeast Region, since 1981. Fish and Wildlife Service also tracks permitting data. However, these systems, like EPA's individual regional systems, were developed independently and were not designed to be interactive or compatible.

EPA's wetlands information needs correspond closely with much of the data being recorded, tracked, and monitored in the systems of these three agencies. Once the COE fully implements its RAMS system, the systems data could be down loaded by EPA and the other resource agencies for use in management of the individual agency programs. Data sharing could also present the potential for cost sharing which could reduce the individual program expenditures of the user agencies.

Agency Comments On Inadequate Monitoring And Reporting Of Program Activities And OIG Evaluation

Agency Comment

"Contrary to statements in the draft report, and as explained below, Headquarters has issued programmatic guidance related to Regional public notice review. Moreover, the criticism of Headquarters for not obtaining 'measurable commitments' from the

Regions is inconsistent with the goals of the STARS system and the Agency's current management approach."

OIG Evaluation

The Section 404(b)(1) Guidelines and the mitigation MOA with the COE mentioned by OW relate to COE technical review and evaluation of individual permit applications which are not directly relevant to the findings in this Chapter. The related findings in this Chapter involve establishing standards of performance for regional internal permit review processes, regional monitoring and reporting on public notice reviews, establishing control and consistency in processing of public notice reviews to ensure the most significant permit applications receive proper attention and that comment deadlines and related requirements, as agreed to with the COE, are met.

Agency Comment

"Statements in the draft report to the effect that the Regions should be tracking general permit data is misplaced and unrealistic in light of the fact that most general permit discharges proceed without any notification to the Corps."

OIG Evaluation

Based on our interviews with COE district personnel and regional staff, the COE is informed in advance of many general permit discharges (for Nationwide 26, notification is required). The COE reviews many other discharges to determine whether the discharge qualifies under a general permit and so notifies the general permittee on request. We were told repeatedly by regional wetland staff that general permits in particular Nationwide 26 could have significant adverse environmental impacts and that prior discharges authorized under both individual and general permits were not routinely considered when evaluating proposed fills because the information was just not available to them. The important issue here is not whether general permits can be effectively tracked, but how can wetland impacts be clearly evaluated without accurately maintaining historical information on prior wetland discharges. Accumulating information on wetland impacts was one of the goals of establishing a wetlands management information system as described by EPA's national program office in 1985. However, although Regional systems provide for tracking impacts in Regional databases, the systems are not compatible between regions and the information was not adequately maintained. In

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addition, we mentioned general permits to establish that their total impact cannot be effectively evaluated, as in the case of the Nationwide General Permit 26, without having some tracking mechanism.

Agency Comment

"The draft report's criticism that Regional databases contained incomplete records is unfair to the extent that the Regions are generally dependent upon the Corps to provide them with this data and that, without Corps cooperation, it is unrealistic to expect the Regions to be able to independently obtain all this data."

OIG Evaluation

Regional wetland database systems were established primarily at the behest of Headquarters program management. If this information was not available to regions, we can not understand Headquarters emphasis on collecting such information in 1985 and requesting that the regions, through SPMS, report wetland impact information. In addition, our reviews in three regions found that the COE usually supplied information in individual permit actions either on the public notice or when requested; however, we were told that the extent of cooperation depended on the COE district involved. Regional staffs stated that the overriding problem was that public notices were not consistent from one COE district to another. The solution, which would resolve the Agency's information requirements plus speed up its review of public notices, would be to reach an agreement with the COE on a national level for standardized permit information in Section 404 public notices. Information that wetlands staffs indicated was routinely needed anyway for an accurate assessment of impacts and for determining compliance with the Section 404(b)(1) Guidelines.

Agency Comment

"The Office of Water agrees with the draft report's suggestion that EPA coordinate with the Corps on database development and consider using the Corps' computerized information system, known as the 'Regulatory Analysis Management System' (RAMS), once that system is fully implemented by the Corps."

OIG Evaluation

The time to coordinate the sharing of database information is during system development and implementation not once the system is completely designed and implemented. Getting the necessary

changes that may be required to enable EPA to use COE's RAMS data collection once fully implemented could be difficult.

REGIONS DID NOT IMPLEMENT CONSISTENT/CONTROLLED PUBLIC NOTICE REVIEW PROCESSES

The Agency's program objective of assuring that COE districts administered their Section 404 permitting activities in compliance with Section 404(b)(1) Guidelines was inadequately planned and controlled by regional staffs. While review of COE "dredge or fill" public notices received primary regional emphasis, neither the national program nor Regions 4, 6, or 7 established a formal implementation plan for the public notice review program element with detailed operating guidance to ensure a uniform and consistent public notice review process. Instead, regional public notice review processes were driven by individual initiatives of regional wetland scientists and program management, emphasizing individual goals and priorities. Without an overall strategy and management direction, regional permit review results, approaches, and recommendations were inconsistent and sometimes contradictory. Consequently, EPA's regional permit review process became viewed by the COE and regulated public as unpredictable and ineffective.

a. No Formal Policies/Procedures for Public Notice Reviews

No formal system or process existed in any region visited for prioritizing permit public notices received to assure that the most significant projects, considering both size and functional value, were selected for review. In addition, none of the regions we visited had established regional guidance for the public notice review process or developed a list of regional wetlands prioritized by value and vulnerability (see Chapter 5), as recommended by national program management, to be used in selecting proposed projects for review. Instead, regional staffs were left to determine what to review and what should receive official comment.

Lacking defined policies, procedures, and priorities, wetlands scientists were allowed to plan and implement their own wetlands protection efforts. Decisions to review a permit, make a site visit, coordinate with other agencies, provide written comment with recommendations to the COE, initiate a 404(q) action, or make a 404(c) determination, were all initiated at the wetland scientist level.

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In Region 6, certain permit review "guidelines" were written, but were limited to oil and gas exploration and the guidelines were never formally approved by regional management. Region 6 also prepared a public notice review checklist, but the checklist was not widely used except as a training document and was considered too time consuming by program staff. Regions 4 and 7 provided no formal internal guidance other than a general classification system for categorizing public notices by size but with no consideration of wetland functions and values. Guidance on when to implement the 404(q) dispute resolution process or the 404(c) permit veto process was also informal. The Agency Operating Guidance only provided that the regions "may" use these authorities for "significant" cases. Overall, detailed operating guidance designed to assist regional staff in performing a consistent and effective public notice review and achieve program objectives was nonexistent. Therefore, the effectiveness of a region's oversight of COE implementation of Section 404(b)(1) Guidelines in its permit program depended entirely on the dedication of individual permit reviewers. Occasionally, this resulted in scientists or regional program management taking positions on Section 404 permits that were not subsequently supported by upper management. This situation wasted resources and projected an unpredictable program image to the COE and regulated public.

For example, in a COE beach renourishment project, Region 4 expended significant resources in an attempt to reduce the proposed project's environmental impact. The project involved pumping 980,000 cubic yards of sandy material from offshore to expand the existing 1.45 mile beach 250 feet waterward (part of a 23.6 mile long Federally sponsored project). Region 4's immediate environmental concern was for elevated levels of turbidity on near shore water quality and coral patch reefs, possible siltation and mechanical damage to offshore coral reefs, and burial of several acres of limestone outcrops at the shoreline (outcrops which provided habitat for juvenile fish and recreational areas for divers). The Region's long-term concern was for the precedent of this permit and the cumulative effect of the future parts of this project, which if approved as designed, would eventually destroy 147 acres of limestone outcrops along the 23.6 miles of shoreline. Region 4 did not object to COE rebuilding the beach but did object to the size of the COE project as originally designed.

File reviews and interviews of Region 4 wetlands staff established that significant staff and travel resources were spent studying the project and attending meetings over a nine-

month period. In addition, Region 4 spent \$12,000 in extramural funds evaluating long-term shoreline changes to support its major contention that the COE had designed a project much bigger than needed to replenish past beach erosion. When the COE decided over the Region's objections to issue the permit, Region 4 requested COE elevation of the decision under Section 404(q) citing "... an environmental issue of national importance", only to have regional management later acquiesce to the COE's original permit decision with minor modifications.

In this case and others, the regional wetland scientists and programs lost credibility with the COE and other resource agencies as a result of regional indecision or inaction. During interviews at various COE districts and with FWS and NMFS personnel, we received repeated complaints about EPA's inconsistent approach to Section 404 dredge and fill projects. The COE district and resource agency staffs identified Section 404 permits that EPA regions would adamantly oppose while other similar projects would go apparently unnoticed. In Region 7, one resource agency complained that quite often it would consider a proposed project significant enough to comment, often recommending denial, only to find out later that Region 7 did not provide any objection. For example, a proposed conversion of an existing 35-40 acre wetland into a recreational lake was opposed by FWS because the Agency considered the existing wetlands to be valuable. Region 7 ranked it a "major" project with high environmental risk, however, staff did not submit any comments or recommendations to the COE. Region 7 rarely made site visits as part of its Section 404 public notice, permit review. Both the COE and FWS personnel stated that EPA could not assess or comprehend wetland values without making site visits. Also, in all three Regions audited, there were many instances where the regions steadfastly recommended permit denial to the COE only for the permit to be issued over EPA's objection without the regions invoking either the Section 404(q) dispute resolution process or the Section 404(c) permit veto process. If a case was considered significant enough by regional staff to expend the time and resources to support a recommendation for permit denial then EPA's dispute resolution authorities should have been pursued. Otherwise, the resources expended were wasted. The failure of the regions to present consistent positions on proposed permits and then defend their positions apparently confused resource agencies and the regulated public as to EPA's official wetlands policy.

For example, our review of 354 Section 404 public notices received by Region 4 during our pilot audit period disclosed that

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the Region issued comment letters on 55 (15 percent) of these public notices. The Region recommended absolute permit denial in 25 cases (45 percent of comment letters), denial without project modifications in 17 cases (31 percent), and project modifications only in 13 cases (24 percent). Of the 25 denial recommendations, the COE issued permits over Region 4's recommendations for absolute denial in 11 instances, rejected 9 permit applications, and 5 permit applications were withdrawn. No Section 404(q) and Section 404(c) actions were initiated by the Region concerning any of these projects.

b. Public Notice Review Process Not Supervised

Supervisory involvement in the public notice review process usually did not begin until a comment letter on a proposed permit was prepared by program staff for review. No routine oversight of staff work existed at other critical decision stages in the review process. For example, no documented evidence was found of: (1) management oversight of public notice/site selection for review and comment; (2) instructions for follow-up to assure regional comments were adequately considered by the COE; or (3) documentation of decisions to allow the COE to issue a permits over regional objections without invoking the Agency's 404(q) or 404(c) authorities. In addition, there were no standardized file documentation requirements for public notice reviews. Official files varied not only between regions but between individual reviewers. No basic requirements existed as to what should be included in the public notice review file before it was considered complete. Therefore, management had no documentation to support many of the decisions made by individual staff members or to evaluate program performance. From our file reviews, we could not always determine what decisions were made during the public notice review process or how regions arrived at their decisions.

Agency Comments On Deficient Regional Public Notice Review Processes And OIG Evaluation

Agency Comment

"The draft report's conclusion that there is a lack of programmatic guidance on regional public notice review ignores the fact that such review is guided by the principles set forth in the Section 404(b)(1) Guidelines themselves. It also fails to mention the EPA/Army Mitigation MOA, which was finalized in February 1990 and provides a procedural framework for regarding the level of mitigation needed to demonstrate compliance with the

Guidelines. Moreover, Headquarters has established a Section 404 regulatory training course for Regional staff which addresses Guidelines interpretation and related permit review issues."

OIG Evaluation

Section 404(b)(1) Guidelines and the mitigation MOA with COE are basic to the evaluation of Section 404 permit applications. However, their existence is unrelated to the finding which is the regional internal public notice review processes. The finding relates to the need for national guidance and controls in the regional permit review process to ensure consistent use of available authorities, proper review of significant permits, compliance with MOA requirements on permit comments, followup on recommended denials, etc. A staff training course would be a good addition, but it alone will not correct the deficiencies pointed out in this Chapter.

Agency Comment

"The Office of Water strongly disagrees with the draft report's conclusion that Regions should be invoking Section 404(q) in every case where a Regional recommendation of permit denial is not accepted by the Corps. As explained below, such a conclusion is indicative of a lack of understanding of the appropriate role of Section 404(q) in the Section 404 permit review process and of the resource-intensive nature of these actions."

OIG Evaluation

Regional staff explained to us the resource-intensive nature of a 404(q) action. The report does not emphatically require the invocation of Section 404(q) each time a recommendation for permit denial is not accepted by the COE. The report basically states that EPA should not be routinely recommending permit denial if it is not serious in its convictions that a significant adverse environmental impact will result from a Section 404 discharge. At a minimum, denial recommendations should comply with the requirements of the 404(q) MOA so there is no question as to EPA's resolve. We found examples of comment letters where permit denial was recommended by a region based on substantial environmental harm but the comment letters had inappropriate signatures or were filed late. Other permit denial recommendations complied with the 404(q) MOA but with no apparent follow-up. We concluded from our review that recommendations for permit denial without the serious intent to invoke dispute resolution or failing to comply with 404(q) requirements sends a

message to the COE that the Agency either lacks resolve or support for its position which ultimately wastes EPA and COE resources with little benefit to the permitting process. It also presents an unpredictable regulatory approach to the COE who may not be able to distinguish when EPA is serious and when its not. Therefore, cooperation in acceptance of EPA's permit recommendations may be degraded. The report concludes that if EPA only submits serious recommendations for denial, then a 404(q) would be invoked in every case and the COE would be aware that rejection of EPA recommendations would be backed up with 404(q) or 404(c) actions.

INTERAGENCY DISPUTE RESOLUTION AUTHORITIES UNDER SECTION 404
RARELY USED BY REGIONS

Regions 4, 6, and 7 did not consistently and effectively exercise authorities granted EPA under the Section 404((q) MOA² with the COE and provided under Section 404(c) of the CWA to resolve disputes and override COE permit decisions where wetland losses could be avoided or reduced. Although the COE districts did issue Section 404 "dredge and fill" permits over the objection of EPA and other resource agencies, the regions generally elected not to invoke their Section 404(q) authority to elevate the permitting decision. Neither did the Regions initiate Section 404(c) determination actions in applicable cases to prevent or restrict the proposed discharge. The regions were reluctant to initiate Section 404(q) actions because, historically, these actions had provided little benefit to the Agency and Section 404(c) actions because of the tremendous administrative process, staff time, cost, and documentation required to support such actions³. As a result, wetland areas were degraded or destroyed through COE permitting contrary to the regional recommendations to deny permits or modify "dredge and fill" projects. Because of the regional reluctance to use Section 404(q) and Section 404(c) authorities to support their permit recommendations, EPA's public notice review process lost credibility and had little influence on COE permitting decisions.

² MOA, Elevating Permitting Decisions Within the COE under Section 404(q) of the CWA, effective November 12, 1985.

³ Administrative processes required for Section 404(q) and 404(c) actions are describe in detail in Appendix V.

Background

The objective for the Section 404 public notice review, as stated in the Agency Operating Guidance, was to actively screen and review proposed Section 404 permit applications, and COE civil works projects and associated environmental assessment documents to effectively prevent or modify unacceptable discharges. Resolution of environmental concerns would be addressed initially through preapplication consultation with the COE or applicant, or through subsequent negotiation during the public notice review process. When necessary, regions were expected to resolve significant environmental problems through the dispute resolution process outlined in the Section 404(q) MOA between COE and EPA or use EPA's Section 404(c) authority to "override" COE permit authority and prohibit or restrict the use of a wetland site for discharge of dredged or fill material.

From the signing of 404(q) MOA in 1985 and the promulgation of the Section 404(c) regulations in 1979, EPA has requested only 27 404(q) elevations and completed only 11 404(c) actions on an estimated 150,000 permit applications received through January 1991. Although encouraged by national program management to use 404(q) elevations and 404(c) vetoes to prohibit or restrict discharges causing significant environmental problems, our review disclosed that Region 7 had never used these authorities and Region 6 completed only one 404(c) action under court order in 1985 and used 404(q) elevation in one other case. Since 1984, Region 4 has used Section 404(q) nine times and completed four 404(c) actions. Section 404(q) elevations and 404(c) actions were internally difficult to process because of stringent MOA requirements and 404(q) actions rarely resulted in the COE division overturning the district's decision. Therefore, Section 404(q) and 404(c) actions were not consistently used by the regions. During FYs 1988 through 1990, Regions 4, 6, and 7 reported a total of 215 significant cases where the COE issued permits over EPA recommendations for denial or substantial permit modifications; however, Regions 4 and 6 only used 404(q) authority four times and 404(c) authority once during the same period.

a. Controls Needed to Ensure Follow-up on COE Permit Decisions and Comment Letter Compliance With 404(q) Requirements

Regions had no formal requirements to follow-up on public notice comments or recommendations to determine COE's permit decision and regional comment letters on COE public notices usually did not meet the 404(q) MOA's timeliness and signature requirements.

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To qualify for elevation under the EPA and COE 404(q) MOA, the regions' comment letters must have been received by the COE district within the comment period as established in the public notice. Also, the letters must be signed by the Regional Administrator or his designee (no less than a division director).

Our reviews in Regions 4, 6, and 7 indicated that program management needed to establish adequate controls over public notice review comments to the COE to ensure that appropriate signatures were obtained, comment deadlines were met, or extension requests were processed in accordance with requirements in the Section 404(q) MOA. Also, controls were needed to ensure that regions followed up on comments letters, especially where permit denial was recommended, to document the COE's permit decision so that 404(q) and 404(c) actions can be initiated when appropriate.

Very few comment letters we reviewed qualified under the signature requirement and the letters were sometimes provided late. For example, in Region 7, the Regional Administrator had not delegated his signature authority. All the comment letters we reviewed were signed by the Section Chief and approximately 50 percent of those were not issued within the comment period. By not adhering to the MOA requirements, the Regions were precluded from exercising dispute resolution under 404(q). Even though signature authority in Region 4 and 6 was at the division director level, routinely obtaining signatures at this level was impractical and many comment letters went out under inappropriate signatures. In Region 6, we were told that the Division Director would not sign a comment letter concerning less than 5 acres of wetlands. Over half of the Region 6 public notices receiving comment did not have the required signature even though notices receiving comment were described as significant. Region 6 reported 63 instances in SPMS/STARS over FYs 1988 through 1990 where the COE issued permits over the Region's recommendation for denial or permit modification.

Timely comments and extension requests with appropriate signatures are critical because under the Section 404(q) MOA EPA's Assistant Administrator for Water cannot make a 404(q) referral (elevation) to the Assistant Secretary of the Army for Civil Works if the initial comments do not comply with the MOA. If Regions were commenting primarily on projects considered significant by size and/or adverse environmental effect then elevation rights under the MOA should be protected through proper signatures and a timely response.

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EPA's 404(q) MOA requirements were more stringent than those imposed by COE on the other resource agencies. Qualifying signatures for the FWS were at the section chief level. EPA's signature requirements made it difficult, at best, for regional staffs to get elevation letters to the COE within normal public notice timeframes. Since the 404(q) dispute resolution process must be initiated at the Assistant Administrator level (see Appendix V), there is no reason to have the comment letter qualifications set higher for EPA than the other Federal resource agencies. During regional file reviews, we noted where COE Districts routinely identified whether resource agency comment letters were in compliance with the MOA and documentation indicated that letters not in compliance may not be given the same consideration as those that complied.

None of the regions included in the audit systematically followed up on permit comment letters to ascertain COE's final decision on the permit. As a result, we found that the regions did not always have knowledge or documentation of COE permitting even when the regions recommended permit denial. For example, Region 6 could not document final action in 10 of 16 public notices they commented on during the audit period. Since, under the 404(q) MOA, COE districts are not required to notify the regions that it intends to issue a permit over EPA objections when regional comment letters do not comply with MOA requirements, the regions cannot ensure that their recommendations were adequately addressed without an adequate follow-up process.

b. Section 404(c) Actions Difficult to Process and Infrequently Used

Eleven Section 404(c) actions over a ten-year period appears to be insignificant. With approximately 150,000 public notices received during the ten-year period, only 11 404(c) actions completed nationwide for projects with unacceptable wetland impacts seems implausible. Especially, when our audit of Region 4's public notice review process showed that this Region alone recommended absolute permit denial in 45 percent of its public notice comment letters because of adverse environmental impact and that two-thirds of all the permit applications receiving comment, recommending denial or denial without significant modification, were subsequently permitted over Region 4 objections. However, Region 4 was reluctant to use its 404(c) authority because the action was so resource intensive. Regional experience had shown that, under existing regulatory procedures, a 404(c) action would take approximately one staff year to complete. The large resource commitment required for just one

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action indicated the need for simplification and clarification of the process.

Existing 404(c) regulations (40 CFR 231, dated October 9, 1979) were considered by national and regional program management as early as 1985 as vague with unclear criteria for implementation. The regulations established lengthy and detailed procedural requirements which prolonged the process. Therefore, in FY 1985 an Agency work group was established to develop revisions to the regulations. Revision of 404(c) procedures was also mentioned in the FY 1986 Agency Operating Guidance and, again, in October 1988, by the Director of OWP in a letter to Regional Administrators. A recommendation for revision of 404(c) procedures was included in our pilot audit report on Region 4's wetlands program issued in March 1990. Although OW in its July 13, 1990 response to the recommendation indicated that Section 404(c) guidance was being developed to enhance coordination between EPA Headquarters and the regions and that it would continue to evaluate the need to revise the Section 404(c) regulations, we found that no substantive action had been taken to revise 404(c) regulations as of June 1991. While the need to revise the regulations has been well recognized by wetland program managers, EPA continues to operate under the burdensome Section 404(c) regulations promulgated October 9, 1979.

As stated above, Region 4 recommended project denial 45 percent of the time when commenting according to our permit sample. After expending large amounts of time and money defending its position, the Region frequently allowed the COE to issue the permits without any apparent project modification. Not consistently responding with 404(q) and 404(c) actions against unacceptable permits reduced the impact of Region 4's oversight on the COE permitting process. We did not consistently find file documentation to explain the Region's basis for not pursuing all available authorities to preclude or reduce the impact of unacceptable permitting. Regions 6 and 7 recommended permit denial less frequently than Region 4, nonetheless, the regions rarely, if ever, used 404(q) and 404(c) authorities to address unacceptable COE permitting practices.

For example in the beach renourishment example on page 60, the COE rejected Region 4's recommendations and indicated that the permit would be issued as designed. Region 4 responded by requesting that the Assistant Administrator for Water initiate a Section 404(q) elevation request to the Assistant Secretary of the Army as authorized under the MOA. The 404(q) request was signed by the Assistant Administrator for Water; however, the

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Army concurred with the COE district's original decision. Region 4 had already obtained much of the extensive evidence and documentation needed for a Section 404(c) action to override the COE's permit decision. However, after spending \$12,000 in extramural funds to study the historical beach patterns in the effected area; using an untold amount of staff and management time over a six-month period; and expending limited travel funds; the Region elected not to initiate a 404(c) action and the project was allowed to proceed. We found no documentation to explain the Region's decision not to proceed with the Section 404(c) action.

Our reviews in Regions 4, 6, and 7 revealed that the regions generally tried to resolve conflicts with the COE on unacceptable Section 404 permits informally by negotiating mitigation to lessen wetland impact. For example, Region 4 management contended that it was better to negotiate mitigation on 1,000 acres than to use the same resources to save 100 acres with a Section 404(c) action. OWP recognized this problem in its 1989 mid-year review at Region 4:

We are concerned with an apparent management reliance, in at least some cases, on the application of compensatory mitigation as a substitute for a thorough alternatives analysis to identify impacts which are avoidable.

When asked about EPA criticism of some COE permit decisions, COE personnel generally took the position that if a Region considered a wetland area environmentally pertinent and disagreed with a COE district permit decision, the Region had the authority to express their concerns through formal comments, elevate the district's decision as provided for under the 404(q) MOA, or prevent permit issuance under EPA's Section 404(c) authority. Since the Regions almost always elected not to take the preventative measures, the COE districts perceived the Region's original opposition to permit issuance as either lacking conviction or a sound environmental basis. Therefore, the COE districts while considering the Region's recommendations for project denial or modification, did not take the threat of a 404(q) or 404(c) action seriously.

Agency Comments On Insufficient Use Of Section 404(c) and 404(q)
Authorities And OIG Evaluation

Agency Comment

"As with enforcement, the IG's office continues to misperceive the appropriate role of EPA's Section 404(q) and (c) authorities within the Section 404 program. These continue to be very resource-intensive, high-visibility tools and initiation of either Section 404(q) or (c) authority is likely to continue to be infrequent, as compared to the number of permits being issued by the Corps."

OIG Evaluation

We recognize that invocation of Section 404(c) and 404(q) authorities will be infrequent in relation to permit issuances because of limited program staff and because such authorities should be reserved for the most serious environmental impacts. However, our audits of regional permit reviews disclosed cases where the regions expended substantial resources to support a 404(q) or 404(c) action because of perceived severe environmental harm only to drop the action without explanation. Also, cases were found where recommendations for permit denial were made on the basis of unacceptable adverse environmental effects, but 404(q) and 404(c) actions were not pursued and reasons not documented. We are not asking OW to do any more than was stated in the Agency Operating Guidance: "... prohibition or restriction of discharge sites under Section 404(c) where unacceptable adverse environmental effects are projected" especially for those cases defined as significant. According to the definition of a "significant issue" in the FY 1988 Agency Operating Guidance for SPMS/STARS reporting: "Significant signifies an EPA recommendation for permit denial, or modification, or conditions" and requires resolution to bring the discharge into compliance with the Section 404(b)(1) Guidelines. Between 1988 and 1990 the three regions reported in SPMS/STARS that the COE had issued permits over their recommendations for denial or substantial permit modifications in 215 "significant" cases. In these cases, Agency resources used to document and support EPA's position were essentially wasted without exercising the dispute resolution process, or wasted the time of the COE because the EPA's original position lacked substance. What we recommended in the report was consistency.

Agency Comment

"The draft report fails to indicate that, within recent years, EPA has had increasing success with its Section 404(q) elevations and the Corps, in response to such elevation requests, has been increasingly willing to issue programmatic guidance reversing a Corps District permit decision contrary to the Region's recommendation. Moreover, recent Section 404(q) and (c) actions have been effective in a broader programmatic sense by serving to define issues of national significance."

OIG Evaluation

While recent successes are noted, the amount of such activity has been limited compared with the apparent need. In conversations with COE personnel over failing to deny or modify permits as recommended by EPA, we were basically told that EPA has the option to use its 404(q) and 404(c) authorities to stop any undesirable action and since the regions elected not to use those authorities, their original recommendations must have lacked merit or conviction. COE should believe that every recommendation made by EPA's regions has not only merit but management support. As described in OIG comment 48 above, the restrictions on using these authorities on a consistent basis are regulatory not statutory.

Agency Comment

"The draft report's observation that few of the Regional comment letters satisfy the signature and time requirements of the Section 404(q) MOA is somewhat misplaced since the Regions generally meet those requirements when commenting on permits for which they are likely to seek elevation under the MOA."

OIG Evaluation

As stated above, EPA recommendations for permit denial or significant permit modifications should not be arbitrarily made. Any recommendation made by EPA, especially ones for denial or major project modification, should be considered serious. We did not find this to be consistently the case. In addition, OW presented no facts to support their broad statement that all serious permit recommendations comply with MOA requirements.

Agency Comment

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"For purposes of clarification, in our July 1990, comments on the final Region 4 wetlands program audit, the Office of Water stated that we would continue to evaluate the need to revise the Section 404(c) regulations. That process is ongoing, although a final decision has not yet been made."

OIG Evaluation

Problems with the 404(c) regulations have been documented in the program's literature since at least 1985 indicating the need for revision. In fact, the 1988 Agency Operating Guidance indicated that revised 404(c) regulations would be proposed. We point out in this chapter that the problems with the 404(q) and 404(c) processes remain. Hence our recommendation for timely revision of the 404(c) regulations and necessary modifications to the 404(q) MOA.

REGIONS DID NOT ALWAYS FULFILL JURISDICTIONAL RESPONSIBILITIES

Section 404 of the CWA gave EPA the ultimate responsibility for jurisdictional determinations related to the identification of wetlands, but limited staff forced EPA to allocate its jurisdictional responsibility, except in special cases, to the COE under an MOA. However, regional wetlands staffs did not always fulfill their jurisdictional responsibilities or ensure that the COE wetland identifications and delineation complied with the interagency wetlands identification manual. In addition, differing definitions of "dredge and fill" activities caused interagency conflicts between EPA and the COE concerning solid waste discharges and resulted in certain destructive wetland discharges not being regulated under either Section 404 or 402⁴. As a result, wetlands, which EPA considered jurisdictional, were significantly altered or destroyed without review or permit.

Background

Historically, EPA and COE have often disputed the extent of Section 404 jurisdictional authority. COE and EPA disagreement over a jurisdictional determination prompted a 1979 legal opinion from the U.S. Attorney General which stated that EPA had the

⁴ Section 402 of the CWA, National Pollutant Discharge Elimination System (NPDES), regulates pollutants including solid waste discharges into waters of the United States.

ultimate authority to determine geographical jurisdiction under the CWA. However, EPA did not possess the resources required to make the jurisdictional determinations for over 5,400 individual and over 28,000 general permit applications received by the COE each year. As a result, EPA and the COE entered into a MOA in 1980 under which the COE was allocated authority to identify and delineate jurisdictional wetlands, except in "special case" designations by EPA, and to determine whether activities in regulated wetlands represented a discharge of dredged or fill material. In 1989 a joint agency wetlands delineation manual (Federal Manual for Identifying and Delineating Jurisdictional Wetlands, January 1989) was issued to resolve interagency conflicts on Section 404 jurisdiction. Also, a new MOA⁵ was negotiated between the COE and EPA to reflect the new policies on jurisdictional determinations. Under the MOA, EPA was responsible for monitoring COE's Section 404 jurisdictional determinations to ensure that the COE's determinations complied with EPA Guidelines.

Two inter-related jurisdictional determinations are made under Section 404. The first determines Section 404 geographical jurisdiction which is the identification and delineation of specific areas that meet the criteria of a wetland. The second establishes Section 404 jurisdiction over the activities occurring in these identified wetland areas. If an activity results in a "discharge of dredged or fill material" then Section 404 regulation applies unless the discharge is specifically exempted under the Act. However, other non-exempt activities, such as solid waste discharges, which may degrade or destroy wetlands, have not been regulated by the COE under Section 404. Instead, COE refers solid waste discharges under a 1986 MOA to EPA for regulation under CWA, Section 402. However, regional Section 402 staffs have been reluctant to regulate such discharges.

a. Interagency Conflicts On Wetland Identification and Delineation

⁵ MOA, Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemption Under Section 404(f) of the CWA, effective March 20, 1989.

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GAO⁶ reported in 1988 that the COE and EPA sometimes delineated wetland boundaries differently, resulting in wetland determinations that could vary by thousands of acres. These boundary differences affected the degree to which the COE assumed Section 404 program jurisdiction in an area. GAO attributed this condition to the different manner in which COE districts and resource agencies delineated wetlands. We found this evidenced in Regions 4 and 6 where large areas of pocosin and bottomland hardwood jurisdictions were actively disputed. During our audit period, Regions 4 and 6 had assumed responsibility for jurisdictional determinations in these disputed areas under the 1980 MOA's "special case" provisions⁷.

The 1980 Section 404 jurisdictional MOA contained no specifics on methodologies for delineating wetlands or definitive guidance on activities that constituted a discharge of dredge or fill material. As a result, EPA and COE continued to disagree over some wetland determinations and the activities that should be regulated under Section 404.

To eliminate Federal inconsistencies in Section 404 jurisdictional determinations, GAO, in the 1988 report, recommended that the COE work with resource agencies to develop consistent definitions and procedures for making wetland determinations. Subsequently, during our audit period, EPA, along with the COE, FWS, and the Soil Conservation Service (SCS) agreed on a consistent approach for determining wetlands under the jurisdiction of various related Federal programs, and adopted a single manual as the technical basis for wetland identification and delineation. Under the revised January 1989 Jurisdictional MOA, the COE agreed to adhere to the new delineation manual. Therefore, the special cases previously administered by Regions 4 and 6 under the 1980 MOA were not redesignated under the 1989 MOA.

Subsequently, there have been no special case areas designated or

⁶ Wetlands: The Corps of Engineers' Administration of the Section 404 Program (GAO/RCED-88-110), U.S. General Accounting Office, July 1988

⁷ Region 4 declared special case status for pocosin wetlands in 19 North Carolina counties and bottomland hardwoods in 72 counties in Kentucky, Mississippi, and Tennessee. Region 6 declared special status for in 129 counties/parishes in Arkansas, Louisiana, Oklahoma, and Texas.

planned in Regions 4, 6, and 7. While some jurisdictional disputes have occurred, the disputes did not represent persistent problems but isolated instances. Therefore, we concluded that the joint delineation manual has substantially resolved the interagency jurisdictional conflicts.

b. Inadequate Monitoring of COE Jurisdictional Determinations

Although EPA was statutorily responsible for delineation of jurisdictional wetland areas under Section 404, none of the regions audited had established adequate systems for monitoring all COE geographic jurisdictional determinations to ensure that these complied with the 1989 MOA and wetlands delineation manual. The Regions relied primarily on their public notice review alone to monitor COE geographic jurisdictional determinations. However, public notices include only COE boundary determinations for individual permits. They do not include COE determinations that regulate a discharge under a general permit, exempt a discharge under Section 404(f), or establish an area as having "no geographic" jurisdiction.

Section IV. F. of the 1989 MOA, entitled "Compliance Tracking", provides that copies of COE final geographic jurisdictional determinations and related supporting documentation and files shall be made available for inspection by the applicable EPA Regional Administrator. Section IV also requires COE to notify EPA of final "no geographic" jurisdiction and Section 404(f) exemption determinations which are outside the public notice process. However, according to Regional personnel, not all COE districts in the regions furnished them jurisdictional determination notices as required by the MOA. For example, in Region 4, only 3 of 9 COE districts in the Region furnished EPA jurisdictional determination notices. In addition, those COE determination notices received were sporadic and normally for specific permits and did not always contain sufficient information to properly evaluate COE actions. Therefore, reviews of COE district files, as authorized under Section IV of the MOA, would be necessary to adequately monitor COE actions in these cases. However, the regions generally had made no provision for inspecting the jurisdictional determination files in COE district offices. At the time of our audit in Region 4, the Region had inspected the jurisdictional determination files in one of its nine COE districts but only on a one-time basis. We found no evidence of inspections of COE files during our reviews in Regions 6 and 7. The only jurisdictional oversight performed was during reviews of individual public notices.

c. Disposal of Waste Into Wetlands Not Regulated

As with geographical determinations, interagency conflicts have also resulted from differences in EPA's and COE's definition of a "discharge of dredged or fill material." This jurisdictional definition is critical because it identifies those wetland discharges that will be regulated under Section 404. Neither the CWA nor related legislative history defined the term. EPA and the COE were left with the task⁸ of determining what constituted a regulated discharge under Section 404. COE subsequently defined "dredge and fill" materials in 33 CFR 323; however, the COE excluded pollutants and fill materials discharged primarily for waste disposal. EPA disagreed with the COE's definition and has consistently considered all "dredge and fill" discharges, regardless of purpose, as Section 404 activities. Since the COE was the permitting authority, the differing definitions created situations where actions EPA considered jurisdictional under Section 404 were not being regulated by the COE.

- Solid Waste Discharges Into Wetlands

In 1986, EPA and the COE entered into a MOA⁹ for controlling solid and semi-solid wetland discharges for waste disposal purposes. The MOA provided that EPA would normally take the lead in permitting solid and semi-solid waste discharges and enforcing against any related unauthorized discharges into wetlands under Section 402. COE districts have generally followed this agreement by referring unauthorized solid waste discharges to Regions 4, 6 and 7; however, the regions have experience little success in enforcing against such illegal discharges under Section 402.

Even though EPA has maintained that solid waste discharges could be regulated under Section 404, the regions have been reluctant to pursue Section 404 enforcement actions in these cases, Region 4 on advice from regional counsel, because the MOA specifies that these unauthorized discharges will be enforced under Section 402. However, regional Section 402 programs have generally refused to

⁸ The Clean Water Act, Section 404 charged the Administrator of EPA with the responsibility of developing guidelines [404(b)(1) Guidelines] in conjunction with the Secretary of the Army for implementing the Section 404 permitting program.

⁹ MOA, Regulation of Discharge of Solid Waste Under the CWA, effective April 23, 1986.

enforce against these discharges because past emphasis of the Section 402 program has been regulation of point source discharges into surface waters. While the disposal of solid waste into wetlands was recognized by EPA and the OW agreed under the MOA to regulate such discharges under Section 402, the Agency Operating Guidance for the Section 402 program made no reference to 402 regulation or enforcement of unauthorized wetland discharges. Neither did the Section 402 program have a commitment under the management accountability system to address unauthorized solid waste discharges into wetlands. Therefore, when illegal solid waste wetland discharges were referred by the Section 404 program, the Section 402 staffs considered these discharges low priority and an ineffective use of Section 402 resources. As a result solid waste discharges, which have significantly damaged or destroyed valuable wetland areas, have not been effectively regulated by EPA.

In Region 7, the Section 404 program had as many as 20 solid waste enforcement cases pending. Region 7's FY 1989 Midyear Self Evaluation summarized the solid waste problem by stating that:

The issue of solid waste disposal is a troublesome one in Region 7 as it is in all other Regions. We have between 15 and 20 enforcement cases currently referred to us which involve fill generally classified by the COE as solid waste. ... we have been unable to reach any comprehensive agreements with our COE Districts for handling after-the-fact permits if required in conjunction with an enforcement action in these [solid waste] cases.

For example, based on Region 7 files, a COE district discovered an unauthorized disposal of nonmetallic portions of shredded car bodies ("auto shredder fluff") into wetlands. The COE District considered the fill to be solid waste as described under the MOA and would not accept a Section 404 after-the-fact permit application from the violator. As provided for under the MOA, the violation was reported to Region 7 for appropriate enforcement under Section 402. The Region's Section 404 Program pursued regulation under Section 402. However, the Region's Section 402 Program did not consider the sites an effective use of its authority and resources. Superfund statutes were also considered but tests of the surrounding sites disclosed no hazardous substances. Regulation under RCRA was also determined inappropriate because the fill was classified as a household waste.

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Region 7 finally contacted the State Department of Natural Resources but the State responded that its new solid waste law did not exclude wetlands from being converted into a landfill. Since the State did not have a wetlands protection statute or water quality standards for wetlands, it could only regulate the site as an unpermitted landfill. However, under a State administrative order, the violator applied for a state landfill permit which required dewatering and filling of the wetland area. The COE district was subsequently petitioned by the State for a determination as to whether the sites were still considered regulated wetlands. The COE responded that the majority of the area in question was wetlands and that the auto shredder fluff was considered to be a homogeneous waste (as defined in the EPA/COE MOA) which should be regulated by EPA or the State under Section 402 of the CWA. COE added, however, that if there was a placement of clean fill material over the solid waste to bring the site into compliance with State solid waste regulations, a regulated discharge would occur which would require authorization under Section 404. The State was disturbed by the incongruous nature of the COE determination and informed us during our review that:

EPA and the COE had the opportunity years ago to resolve these site conditions, but did nothing. COE didn't care that trash was dumped in the wetlands for years, but now they want to regulate our cleanup after we have spent considerable time and effort to develop a corrective action plan.

Region 6 had 9 solid waste enforcement cases pending at the time of our audit. We found almost identical problems in Region 6's regulation of such discharges as those found in Region 7. For example, the COE, according to Regional files, was aware for over a year of construction waste being deposited in wetlands without a Section 402 or 404 permit. In this case, however, the State had apparently authorized the landfill under State statutes without considering the wetland impact. The COE district would not regulate the discharge under Section 404 because it represented solid waste disposal. The COE subsequently issued a Section 404 cease and desist order when the landfill operator later began to cap the ten-acre site.

In Region 4, we noted only a few COE enforcement referrals involving regulatory actions for solid waste discharges; however, these cases usually represented significant degradation or destruction of wetlands. For instance, as previously cited in Chapter 3, an illegal discharge of 47,000 cubic yards of wood

chips into seven acres of wetlands was referred to Region 4 by the COE for regulatory action. The wetland had been forested but the area had been cleared and the wetlands buried to a depth of about four feet in wood chips. The COE concluded that the wetlands were filled to dispose of waste and should clearly be regulated under Section 402. Region 4 disagreed with the COE's conclusion but took no enforcement action under Section 404 because of the MOA requirements. The case was referred to the regional Section 402 program for enforcement but the Section 402 staff refused to take action because the violation lacked "substance" even though a Region 4 Office of Regional Counsel attorney concluded that Section 402, rather than Section 404, was the most plausible statutory basis for enforcement.

- Secondary Discharges Resulting From Permitted Construction In Wetlands

Our audit also disclosed Section 404 permitting of wetland fills without first considering all the secondary discharges of the proposed wetlands project (i.e., Section 402 point source discharges). An OIG special review conducted in Region 10¹⁰ disclosed where the COE demonstrated its intent to issue a Section 404 permit to build a Federally funded fish hatchery before completion of the necessary Section 402 review governing the hatchery discharge. File reviews at Region 10 disclosed considerable Regional concern over the ability to control hatchery effluent under the proposed design. COE considered this a Section 402 issue and not germane to the Section 404 permitting process. In Region 6, Section 404 permits were issued to build roads and drilling pads for oil and gas exploration without considering the effect of drilling discharges. The COE districts routinely refused to condition oil and gas Section 404 permits to limit and control discharges of drilling mud and other contaminants because under the MOA solid and semi-solid waste discharges were an EPA responsibility under Section 402. However, according to an OIG Region 6 special review¹¹, EPA had not adequately addressed these secondary discharges under Section

¹⁰ Special Review of Region 10 Employee Allegations on the Region's Handling of Air and Water Issues, Report No. EGAWG0-10-0022-0400015, issued May 3, 1990.

¹¹ Special Review Report: EPA Is Not Adequately Controlling The Negative Impacts Of Oil and Gas Activities On Louisiana's Coastal Wetlands, Report No. E1HWG9-13-9024-0400018, issued June 14, 1990.

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402 individual or general (NPDES) permits (a general permit was under consideration). As a result, secondary wetland impacts from a project were not being adequately addressed before issuance of a Section 404 permit authorizing construction.

Agency Comments On Noncompliance With Jurisdictional Responsibilities And OIG Evaluation

Agency Comment

"The draft report's criticisms of Regional monitoring of Corps jurisdictional determinations are unwarranted to the extent that the Jurisdiction MOA did indeed envision that the Regions would rely primarily on review of Corps public notices, which generally provide sufficient information on wetland identification and geographic jurisdiction. The Jurisdiction MOA itself provides that, "to ensure that EPA is aware of determinations being made for which notification is not forwarded through the public notice process," the Corps should provide EPA with copies of all final determinations of no geographic jurisdiction and of application of a Section 404(f) exemption.

"We acknowledge the problems associated with EPA/Corps disagreements regarding discharges of solid waste, and will continue to try to work with the Corps and the EPA Section 402 program to resolve the issue."

OIG Evaluation

The report does not state that EPA should not rely on public notices for monitoring COE jurisdictional determinations on individual proposed permits and the MOA does imply that EPA will use the public notice process for monitoring individual permit determinations. However, as only partially quoted by OW, the MOA provides:

In order to track the DE's [COE District Engineer] compliance with EPA guidance, the DE shall make his files available for inspection by the RA at the district office....

To ensure that EPA is aware of determinations being made for which notification is not forwarded through the public review process, the Corps will provide copies to EPA of all final determinations of no geographic jurisdiction and all final determinations that an exemption under Section 404(f) is applicable.

Contrary to OW's statement, the MOA does provide for EPA monitoring and inspection of COE geographic jurisdictional determinations and Section 404 notices do not include information on "no geographic jurisdiction" determinations or Section 404(f) exemptions since no permit would be involved in these decisions. Also, according to regional staffs actually reviewing public notices, the documents are not consistently prepared by COE districts and do not always include the information needed to adequately assess jurisdictional determinations.

CONCLUSION

Effective program implementation depends on adequate program planning, management commitments to program objectives, and the ability to accurately assess program accomplishments and failures against commitments. However, OWP did not formally plan, coordinate, and control the various regional public notice review processes to ensure the implementation of an effective Section 404 regulatory process and accomplishment of program objectives. In addition, the regions did not possess adequate program resources and did not develop appropriate strategies, operational guidance, and management controls to properly direct their public notice review process and fulfill regional program commitments and responsibilities as illustrated in this Chapter. As a result, an unpredictable, inconsistent, and relatively weak regulatory process existed in EPA's Section 404 program which did not afford valuable wetland resources the effective protection intended under the CWA.

Developing consistent regional approaches to public notice reviews and effective use of related Section 404 authorities would present a more predictable, congruous regulatory program to the COE and the regulated public. The development and implementation of an effective program is directly related to management's access to reliable information. However, the Agency has not developed a unified, reliable system for wetlands data. Instead, regions are independently establishing incomplete and inaccurate databases using incompatible systems that are poorly controlled.

RECOMMENDATIONS

We recommend that the Assistant Administrator for Water ensure the implementation of a national unified, controlled approach to public notice reviews that will maximize the use of EPA's

statutory authorities to achieve an effective Section 404 regulatory process that will promulgate consistent, predictable regulatory actions for the COE and regulated public. Specifically, this should include:

- establishment of regional controls over public notice reviews and related comments/recommendations to ensure effective and efficient use of available program resources.
- development of a uniform wetlands management information system designed to track the basic program information needed to assess program performance and evaluate permit impacts, individually and cumulatively, on wetland ecosystems. The system should be compatible and integrated between regions and the COE RAMS system with adequate database controls and standardized file documentation that supports regional regulatory decisions.
- establishment of national direction and controls to ensure effective accomplishment of EPA's jurisdictional responsibilities and adequate oversight of COE jurisdictional determinations made under the MOA. This should also include the review of COE final geographic determinations and related supporting documentation for general permits, exempt discharges under Section 404(f), "no geographic" determinations as well as individual permit determinations.
- promulgation of formal guidance to the regions on the required procedures for regulating solid and semi-solid waste discharges into wetlands. This guidance should specify when such discharges are to be regulated under Section 402 and when regulation should occur under Section 404. Also, through Agency Operating Guidance and management accountability systems, commit regional Section 402 programs to enforcement against unauthorized solid waste discharges into wetlands.
- negotiating revisions to the 404(q) MOA requirement that comment letters be signed at no less than the Division Director level to qualify for the dispute resolution process. EPA should seek the same signature level as required of other resource agencies.
- finalizing guidance on regional use of Section 404(q) and 404(c) authorities to ensure consistent and optimum implementation in all regions and the fair and equitable

treatment of the regulated public (eg., when regions recommend permit denial or significant project modification and the COE intends permit issuance over regional objections).

- negotiate with COE for inclusion of standardized permit information in COE public notices to facilitate more efficient and effective EPA permit review and tracking of key permit data.

Agency Comments On Recommendations And OIG Evaluation

Agency Comment

"The Office of Water has no plans to establish "controls" over public notice reviews. We have issued programmatic guidance relating to public notice review and will continue to do so as warranted. Currently, we are working with the Corps to develop joint mitigation banking guidance."

OIG Evaluation

As previously stated, we believe OW misconstrued the focus of the finding related to inadequate guidance on regional public notice review processes. Based on our audit evidence, we continue to conclude that additional regional guidance and controls related to regional permit processing are needed to ensure consistent, effective permit reviews, meaningful permit recommendations, and compliance with applicable MOA requirements.

Agency Comment

"Consistent with the suggestion in the draft report, upon final implementation of the RAMS system, we will work with the Corps and consider adapting the system for use by EPA."

OIG Evaluation

OW accepted recommendation.

Agency Comment

"We do not believe that, at this time, any additional 'national direction or controls' are needed with regard to the Jurisdiction MOA, including EPA review of Corps jurisdictional and Section 404(f) determinations.

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"Resolution of the issues surrounding regulation of solid waste to wetlands requires the cooperation of the Corps and the EPA Section 402 program. The Wetlands Division will continue its efforts to work with both entities on this matter."

OIG Evaluation

These OW comments were previously addressed by OIG.

Agency Comment

"The Office of Water does not contemplate seeking revisions to the Section 404(q) MOA signature requirements since, as stated above, such requirements have not been problematic."

OIG Evaluation

The recommendation only proposes that the required signature level for EPA comment letters be made equal with requirements imposed on the other resource agencies. Lowering the signature requirement for comment letters from the Division Director's level would have no effect on management's control over the actual elevation process. Elevations would still have to be approved at the Assistant Administrator level. However, having personnel at the section chief level (similar to FWS) authorized under 404(q) to sign comments would mean that EPA's resolve in a particular permitting situation could not be determined by who signs the comment letter. That would mean that all EPA comments would carry equal weight. Regional staff indicated to us that this small change in the MOA would help them in their negotiations with the COE over recommended permit modifications and denials. Therefore, we continue to recommend the subject change in the 404(q) MOA.

Agency Comment

"EPA has issued interim Section 404(q) procedural guidance which is now in effect; EPA also is in the process of developing Section 404(c) guidance."

OIG Evaluation

OW has or is in the process of taking the recommended action.

CHAPTER 5

STRATEGIC INITIATIVES WERE NOT EFFECTIVELY IMPLEMENTED TO PRODUCE LONG-TERM IMPROVEMENTS IN WETLANDS PROTECTION

Limited by resources and insufficient national direction and oversight the Regions did not: (1) identify and prioritize wetlands as to value and vulnerability in order to target limited program resources and inform the regulated public; and (2) implement strategic initiatives within established program guidelines as established by OWP. Therefore, the strategic initiatives initiated by Regions 4, 6, and 7 during the audit period did not target limited resources to the most valuable and threatened wetlands within each region. Also, the Regions' approaches toward strategic initiatives, specifically advanced identification were generally inconsistent and unfocused, did not demonstrate a leadership role in improving wetland protection over the long run, and sometimes sent a negative message to other government entities and the regulated public regarding EPA's commitment to the preservation and restoration of the most valuable wetlands experiencing continued conversion and cumulative wetland losses.

BACKGROUND

Section 404 strategic initiatives was one of the three base or core wetlands program elements established by the Agency. The purpose of this program element was to develop more efficient and effective program approaches to wetland regulation. The primary strategic initiative utilized by the Section 404 program is advanced wetland identification which identifies the suitability of vulnerable wetland areas for dredge and fill activities and informs the regulated public in advance of wetlands unsuitable for dredge and fill discharges.

Section 404(b)(1) Guidelines in 40 CFR 230.80, effective March 23, 1981, authorized EPA, in conjunction with the COE, to perform advanced identification studies; however, advanced identification of vulnerable wetlands was not emphasized as a Section 404 program objective until FY 1987 when OWP instructed regions to prioritize jurisdictional wetlands and utilize the established priorities in implementing subsequent program activities including advanced identification efforts. Advanced identification studies were also emphasized as an essential proactive wetlands protection approach in draft Headquarter's guidance, EPA Strategy for Wetlands Protection Under Section 404

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of the Clean Water Act, dated August 22, 1985¹. This guidance indicated that the Section 404 program's effectiveness could be improved by:

[using] ... EPA's statutory authorities to protect the most important wetlands from the most significant impacts."

... anticipating and preventing wetland losses before the permit request stage. By more clearly and consistently anticipating significant threats to wetlands, EPA can improve wetlands protection and also provide better guidance to the regulated public.

On March 23, 1989, OWP proposed further guidance for performing advanced identifications: Guidance To EPA Regional Offices On The Use Of Advanced Identification Authorities Under Section 404 Of The Clean Water Act (a draft which was never finalized). This document emphasized that advanced identification was considered a proactive approach to Section 404's permitting process.

While advanced identification was the focal point of OWP's strategic initiatives, the 1988 and subsequent FYs operating guidance also emphasized public information and outreach programs with special emphasis on priority wetlands. The FYs 1989 and 1990 Agency Operating Guidance expanded the recommended strategic activities to include other "strategic initiatives" such as participation in comprehensive, natural resource planning efforts, ecosystem/geographic initiatives (may include advanced identification), targeted enforcement initiatives, public education campaigns, or support of critical research and development activities.

REGIONS DID NOT IDENTIFY AND PRIORITIZE THE MOST VALUABLE, VULNERABLE WETLANDS

Regions 4, 6, and 7 did not formally identify and prioritize their region's wetlands resources as requested by Headquarters program management. Regional response to this Headquarters guidance varied from region to region. Some regions solicited input from the public and government agencies and compiled lists of hundreds of wetlands that these sources believed were valuable natural resources while other regions, including Region 6, did not identify specific wetlands but only listed valuable wetland

¹ This guidance was to supplement the FY 1987 Agency Operating Guidance but was never finalized (see Chapter 2).

types that were under significant development pressure. Region 4 prepared a wetlands inventory list which generally identified the wetland types by State and the relative threats to each. Region 7 mapped major areas of wetlands within the Region. However, none of the three regions included in the audit prioritized their wetlands by value or vulnerability and then utilized these wetland priorities for developing regional program implementation and public outreach. Furthermore, none of the regions provided any further guidance to regional permit reviewers on wetland priorities. There were no regional listings or detailed strategy which delineated wetland areas of specific concern because of value or vulnerability; types of fills for which reviewers should take particular notice; and recommended actions. In addition, there was no apparent agreement between EPA and the COE on how those wetlands or wetland types that were identified by the regions would be treated for permitting purposes or even a consensus on the value of these areas.

Background

A May 27, 1986, EPA Headquarters memorandum to the regions detailed how the regions were to approach the development of regional priority wetland lists. The memorandum emphasized that preparation of the priority list was to include extensive coordination with other Federal, State, and local agencies and careful professional analysis by EPA staff. Each list was to contain a background statement explaining each region's rationale for making its determinations, a list of specifically identified wetlands or wetland types or areas, and a list of contributors and references. The purpose was to focus the Section 404 program's limited resource on the protection of priority wetlands (proactive approach) by concentrating efforts in those areas through increased use of available authorities, including advanced identification, Section 404(c) actions, and enforcement. EPA Headquarters stressed that the list was not intended as a basis for "writing off" the lower value wetlands but only to be used as a planning tool to guide the Section 404 wetland protection efforts. Prioritizing wetlands would, overall, make each Region's regulatory response more objective, consistent, and more predictable to the regulated sector while protecting the most important wetlands from the most significant impacts. The priority lists were to be made available to the general public in early FY 1987.

However, our audit disclosed that Regions were reluctant to prioritize wetlands. We were told that wetlands could be inaccurately ranked since the functional values of various types of wetlands were not yet fully developed by the scientific

community. Regional staffs feared that those wetlands identified as lower priority would be written off, not because they were considered unimportant, but because the regions limited staff would concentrate their efforts on the higher priority wetland areas and would ignore the others which may be just as important ecologically.

In addition, regional efforts to develop wetland priority lists lacked the interagency coordination and evaluation necessary to produce a consensus listing that would be accepted by other regulatory agencies and the regulated public. While there were some regional discussions with other interested agencies concerning priority wetlands no consensus was obtained from the other agencies. Without adequate collaboration and joint acceptance of these lists by regulators and the regulated public, they could not be used for a more structured and consistent Section 404 effort nor could they be used by potential permittees and others to identify wetlands and wetland areas requiring careful analysis of dredge and fill activities. Consequently, permit review, enforcement, and strategic initiatives continued to be pursued case by case based solely on the program staffs' knowledge and experience not necessarily focusing on the protection of priority wetlands to make the regulatory process objective, consistent, and predictable.

Subsequent to our pilot audit, Region 4 began the necessary steps to prioritize its wetlands. The Region contracted to acquire needed information on projected urban growth, and the expansion of silviculture and agriculture in the Region. These demographics coupled with available data on the value of particular wetland systems developed internally and from other sources such as: the Fish and Wildlife Service; state water quality agencies; state game and fish agencies; state planning and water resource agencies; and conservation groups, the Region was able to identify priority wetland areas under intense development pressures. However, this prioritizing was initiated solely for the purpose of targeting areas for future Region 4 advanced identifications. There were no immediate plans to use the priority list to direct other resources in reviewing public notices or conducting enforcement actions. Also, while the COE Districts and other resource agencies were asked to provide their thoughts on high risk wetland areas, the final priorities will be Region 4's. There was no provision made to get COE or other agency concurrence to jointly emphasize the stringent regulation of these valuable areas. Notwithstanding, this prioritizing effort was a commendable beginning toward developing a dynamic priority wetland system to guide all Region 4 wetland activities. The Region expects to have its priority wetlands report entitled,

"High Risk Geographic Areas Targeted for Wetlands ADID (advanced identification)," completed and publicly available by September 30, 1991.

Identifying and publicizing the most vulnerable and valuable wetlands in each region and developing a strategy for dealing with the particular impacts on these priority wetlands will be necessary to ensure effective wetland management. The Regions have to get away from relying on a case-by-case review, driven by the priorities established by individual permit reviewers and their managers, for protecting the wetlands resource.

Agency Comments On Regional Prioritization of Wetlands And OIG Evaluation

Agency Comment

"The introductory paragraph at the top of page 79 makes several broad conclusions that are not supported by the subsequent information in the draft report itself. For one thing, the Regions did identify priority wetlands, based on value and vulnerability, in accordance with the May 1986, Headquarters memorandum. Second, the bold conclusion that 'the Regions' approaches to strategic initiatives . . . sometimes sent a negative message to other government entities and the regulated public regarding EPA's commitment' to wetlands protection is not substantiated in the draft report.

"We are concerned that IG staff misconstrued the intent of the May 1986 memo on priority wetlands. Headquarters did not ask the Regions to rank and categorize wetlands..., but instead to identify and list priority wetland types and areas based on value and vulnerability.

"This draft finding is incorrect. As the draft report itself indicates, the Regions did identify priority wetlands. Headquarters did not ask the Regions to rank and categorize wetlands which, as the Regions themselves noted, would be a difficult process.

"We disagree with the statement..., to the effect that priority wetlands lists, unless developed with 'adequate collaboration and joint acceptance of these lists by regulators and the regulated public,' were not very useful. These lists have strengthened the Regions' ability to focus their wetland protection efforts, and in fact were intended primarily to assist the Regions in setting priorities for use of their limited staffs."

OIG Evaluation

The regions we visited did not identify priority wetlands as requested by EPA Headquarters. A May 27, 1986 memorandum from a Headquarters wetlands manager to regional Section 404 coordinators stated:

In February, 1985, I requested that each Region identify and list the most valuable and vulnerable wetlands located in your region. ...Fundamentally, we should identify geographic areas, wetland types and wetland impacts meriting special attention. Then, we must focus more of our authorities and resources on those areas and impact.

...The Regional priority lists identify the most important and the most vulnerable wetlands in a region. Appropriate application of these criteria will contribute to the most effective allocation of limited Agency resources to wetlands protection. In general wetlands on your lists should clearly be among the most ecologically valuable and most susceptible to conversion pressure.

...Preparation of the priority list will require extensive contact with other Federal, State, and local agencies....

...The resulting document should be more than a simple list....

...(2) Specifically identified wetlands: The more detailed the lists the more helpful they will be. ...the list should indicate those [wetlands] that appear to stand out as most important and should state why.

As shown in the report, each region did produce some type of wetlands list; however, the lists were inconsistent and did not conform to the Headquarters requirements reflected above. Not all of the regions solicited input from the public and other government agencies in compiling wetland lists as requested by Headquarters while others did. Region 6 identified wetland types. Region 4 generally identified all of its wetlands types by State and vulnerability but the Region did not identify its most valuable and vulnerable wetland resources as requested by Headquarters. Region 7 generally mapped large wetland areas in the Region. None of the regions prioritized the value and vulnerability of their wetlands and made these lists available to the public as reflected in Headquarters guidance. In addition, the lists as prepared fell short of helping "...alert EPA, other agencies and potential permittees concerning individual wetlands

and wetlands systems that will require especially careful analysis before any permits can be granted" as stated in Headquarters guidance. Neither could they be used to "focus" authorities and limited resources on those valuable and vulnerable areas.

Furthermore, if you require a region to identify its most important wetland areas as to value and vulnerability, you are by necessity prioritizing wetlands within the region. To prioritize means "to rank." Also, EPA Headquarters requested that the wetlands be identified as to type/function or to "categorize" listed wetlands where possible. Since OW has problems with the terms "ranking" and "categorize," we have substituted the term prioritize for ranking and eliminated the term categorize from the report altogether.

Headquarters guidance for preparing the list of priority wetlands indicated that extensive contact and coordination with the public and other government agencies would be necessary to make the list a valuable tool for focusing resources. The guidance also intended for the priority lists to be made available to the general public in FY 1987. We agree that the lists have some limited internal value; however, if other resource agencies (especially the COE) and the public do not agree with EPA's assessment of a wetlands value and vulnerability, then intensified focus on the wetlands by EPA's program staff may have minimal effect on the regulatory process and, therefore, reduce the effectiveness of EPA's already constrained resources. We agree that a purpose of the lists was to assist the regions in setting priorities for use of their limited resources, but, as we reported, the lists provided to us by the regions were of no use for priority setting. For example, Region 6 told us (could not find it in writing) that its reported priorities were bottomland hardwood wetlands and coastal wetlands. A permit reviewer could not prioritize his work based on such broad wetland categories.

The statement regarding the negative message sent to outside agencies and the public regarding EPA's commitment to the most valuable wetlands is supported by (1) the examples of deficient, uncoordinated strategic initiatives cited in this Chapter, (2) unaddressed outside requests for advanced identification assistance, and (3) the COE's criticism of EPA's failure to use available authorities to protect wetland areas once identified as unsuitable for fill.

STRATEGIC INITIATIVES NEEDED MORE NATIONAL GUIDANCE,
COORDINATION, AND OVERSIGHT

While OWP did provide guidelines for performing advanced identifications and identifying other activities that would qualify as strategic initiatives under annual performance goals, OWP did not provide guidance on implementing the strategic initiatives program element or establish specific goals and objectives for such initiatives. Without adequate direction and control, individual regional strategic initiatives did not appear to fit an overall scheme or plan but, instead, tended to follow the individual agenda of regional staff or management. In addition, some advanced identifications appeared poorly planned, coordinated, and controlled. As a result, not only did each regions' commitment and approach toward strategic initiatives vary, some individual actions did not meet program standards.

Background

By 1988, advanced identification was well established in Agency Operating Guidance as the primary Section 404 proactive approach to wetland regulation. Performance of advanced identifications became an annual regional program commitment. While the national program provided for some flexibility by allowing various combinations of advanced identifications and other program initiatives to count toward each region's SPMS/STARS commitments, the regions argued that the advanced identification commitment did not allow the regions to address other wetland problems while seeking to meet national objectives. Therefore, for FY 1989, national program management made the FY 1988 advanced identification commitment even more flexible by establishing "strategic initiatives" as a program element so that regions could count a broader range of activities other than advanced identifications against their program goals.

Activities recommended in the 1989 operating guidance as strategic initiatives included: advanced identification; special area management plans; other comprehensive or multi-objective planning; intensive enforcement activity; significant jurisdiction delineation; nonroutine public outreach and education; significant active participation in a resource planning activity of another agency; joint activity with a State, tribal or local government; and wetland restoration and/or enhancement. However, to qualify as a strategic initiative under the region's SPMS/STARS commitment, each activity had to be a major task comprising 10 percent or more of the region's wetlands program resources and subject to OWP approval. At a minimum, each strategic initiative would involve problem analysis,

identification of goals for the targeted wetlands, evaluation of options to achieve goals, an action plan to achieve the selected option, implementation, and evaluation of results.

Strategic Initiatives Needed Control and Direction

The Agency's performance management system (SPMS/STARS), provided for national program managers to develop definitive operating guidance to implement long-term program strategies to include strategic initiatives. However, as stated in Chapter 2, OWP has never successfully issued any official long-term strategy and related operational guidance for the Section 404 program. Neither did OWP require regions to develop plans, with measurable commitments, to guide their strategic initiatives. The only direction regions received for implementing strategic initiatives was the general objectives outlined in the annual Agency Operating Guidance and a guidance document for advanced identifications issued in 1989 (three years after advanced identification was first emphasized in the Agency Operating Guidance). The only measurable requirement placed on regions, starting in 1988, was to perform a least one advanced identification. In 1989 this was changed to a qualifying "strategic initiative." As a result, regional commitments to the strategic initiative program objective were varied and inconsistent.

In the 1989 Agency Operating Guidance, OW recognized the importance of senior management support for strategic initiatives because these activities would require considerable amounts of regional resources (staff and management time, travel funds, and sometimes extramural funds for outside contracting). OW also recognized the need to carefully target and plan the Regions' initiatives. However, this realization was not followed by a planning commitment in the form of an overall national or regional strategy, or a region action plan for individual initiatives with measurable objectives and controls. The only control was to provide a brief summary of proposed strategic initiatives for OWP's review and advance approval. However, this requirement was not put in place until FY 1989.

During our reviews at Regions 4, 6, and 7, we found no evidence of regional planning for strategic initiatives, including advanced identifications, and how they were to benefit the regions' Section 404 regulatory programs. In addition, from our review of strategic initiatives proposed and performed (in particular advanced identifications), regional commitments and approaches varied depending on individual regional emphasis.

As of November 20, 1990, the regions strategic initiatives were summarized by an OWP report as follows:

Region 4 reported 12 advanced identifications in process across the region, two areas in Florida proposed for an advance 404(c), and an environmental planning study underway in the Florida Keys.

Region 6 reported one completed advanced identification, three additional advanced identifications underway, and two planning initiatives: one for Coastal Louisiana; another for a wetland area on the Texas coast.

Region 7 reported one advanced identification (Rainwater Basin) and a variety of other activities such as: a Central Flyway Master Plan; two mitigation/restoration studies; two GIS projects, one involving the Rainwater Basin; three public outreach projects including a television documentary on the Rainwater Basin, and a video for the agricultural community.

All three Regions were also involved in other activities which could be considered valuable for the enhancement of state programs, public outreach and education. However, we could not attribute the strategic initiatives and other outreach activities to a well-devised plan but, more realistically, to a take-it-as-it-comes environment. As shown above, the regions' approaches to implementing the advance planning (strategic initiative) program were very divergent lacking a common scheme. Now that regions have more flexibility under the strategic initiative commitment the inconsistencies will become more acute. For instance, Regions 6 and 7 program management stated they were not considering any advanced identification studies for the near future contrary to national program emphasis on such studies. However, without a formal strategy and performance commitments to direct the regions approach, this was an elective decision. In contrast, Region 4 with a separate Section 404 planning unit has a long-term commitment to an aggressive advanced identification program starting five new advanced identifications since our pilot audit for a total of 12 since 1988. However, without national direction and control, Region 4's, advanced planning and related resource commitment depends entirely on Regional management support for the initiatives.

Agency Comments On Need For More National Guidance On Strategic Initiatives And OIG Evaluation

Agency Comment

"The draft report appears to contradict itself by stating...that Headquarters failed to 'provide guidance on implementing the strategic initiatives program element,' and then...stating that the Regions 'did not always comply with national guidance for advanced identification. . . .'"

OIG Evaluation

Contrary to OW's comment, there is no contradiction in the report related to inadequate guidance for strategic initiatives. There is guidance for advanced wetlands identification. However, strategic initiatives are much broader in scope than advanced identifications as shown in the report. Advanced identification is just one activity under the strategic initiatives program element although it is an important part of this element. Therefore, we continue to conclude that guidance for implementing and measuring the broad scope of activities under the strategic initiatives element was inadequate.

ADVANCED IDENTIFICATIONS NEED TO BE ADEQUATELY PLANNED, COORDINATED, AND CONTROLLED TO ENSURE EFFECTIVENESS AND COMPLIANCE WITH GUIDANCE

Since we concentrated our detailed review on advanced identifications, we could not conclude as to the effectiveness or propriety of all strategic-type activities performed in Regions 4, 6, and 7. However, the advanced identifications we reviewed, while possibly beneficial, did not always comply with national guidance for advanced identification and may not have been the best use of scarce regional resources.

Our review of 15 strategic initiatives, including 12 advanced identification studies, in Regions 4, 6, and 7 disclosed evidence of poor planning/performance and/or noncompliance with national guidance for advanced identifications. The studies were not initiated as part of an overall plan on a priority wetlands basis related to value and vulnerability, but represented individual regional reactions to outside organizations and staff recommendations based on their individual program knowledge and experience. However, in 10 of the 12 advanced identifications we reviewed there were apparent questions as to the value and vulnerability of the study areas, extent of COE and community

support, and study objectives. Therefore, the majority of the these regional strategic actions appeared not to comply with the advanced identification guidance being poorly planned and coordinated with goals inconsistent with the stated purpose of a strategic initiative according to Agency Operating Guidance, "... to improve levels of protection for wetlands and/or other critical aquatic habitats on a broad scale."

The purpose of advanced identification was to specify wetland areas in advance of a permit application as suitable or unsuitable for fill to aid regulators and the regulated public through advance notice of wetlands subject to Section 404 restrictions. This advance notification would reduce permit applications and facilitate permit processing where appropriate. Identifying valuable and vulnerable wetlands to the general public would also preclude large investments in specific wetland sites subject to Section 404 restrictions and the unknowing destruction of valuable wetlands. In addition, advanced identifications were to provide a database addressing wetland values and functions for the study area, increased public knowledge and participation in the Section 404 permitting process, and improved coordination between the permitting authority (COE), EPA, and affected States regarding wetland issues.

OWP's advanced identification guidance² also stressed the importance of site selection (targeting), setting study goals (planning), and interagency coordination. Site selection was to take into consideration: (1) the ecological and societal values of the wetlands; (2) the vulnerability of the wetland from filling or other degrading activities; and (3) the administrative, interagency coordination, and/or community relations factors that could affect the ability of the region to complete the advanced identification study. Goals established for each advanced identification were not to be generic but specific goals for the wetlands under study such as development of regulatory actions (e.g., advance Section 404(c) actions), initiation of State or local regulations to protect wetlands, or the development of a public outreach program. Because advanced identifications required the participation of the COE (or State permitting authorities), OWP guidance stated that no substantial work should begin on any advanced identification until the

² Guidance to EPA Regional Offices On the Use Of Advanced Identification Authorities Under Section 404 Of The Clean Water Act (draft), March 23, 1989

applicable COE district formally agreed to the proposed study with the understanding that a joint public notice would be issued at completion of the study.

Some of the 12 advanced identifications we reviewed in Regions 4, 6, and 7 did not clearly comply with OWP's standards for targeting, planning, and coordination for such studies. For example, in Region 6, an advanced identification was initiated at the request of the Fish and Wildlife Service (FWS) who indicated the subject wetlands was under potential development pressure and contained valuable wildlife habitat. The COE district subsequently declined to participate because it did not consider the study area currently threatened. Therefore, the study did not qualify under OWP guidelines for site selection and interagency coordination. Also, the stated goals were very general: "Delineate the wetlands, conduct special studies [avian, fisheries, recreation], conduct Wet II functional analysis [wetland delineation]." The requirement for specific goals specified in OWP guidance was never formalized. As a result, Regional management expended substantial program resources on an advanced identification study without first gaining COE support and assurance that a final joint public notice would be issued. Without the permitting authority's cooperation and support, the studies findings will not provide the benefits intended in OWP guidance.

After a five-year Region 7 advanced identification study involving, approximately 54,000 acres of valuable wetlands that remained in an extremely important river complex, EPA and the COE issued a public notice identifying around 34,000 of the remaining acres as unsuitable for fill. However, the Region proposed to use the results of the advanced identification study as a public information document only. COE staff involved were critical of the Region because it would not proactively using its 404(c) veto authority to protect the most valuable areas identified in the study. COE staff encouraged that EPA's Section 404(c) authority be used more effectively once areas are identified as "unsuitable" for fill. Advance 404(c), in the COE District's opinion, could greatly reduce the workload of COE and the other resource agencies while providing greater protection to wetlands.

As reported in Chapter 4, however, the Regions found it difficult to take 404(c) actions against proposed individual permits when significant environmental impacts were anticipated. To initiate a 404(c) action in advance of a permit application was described by Regional staff as an unrealistic possibility. Although the authority does exist, regulatory requirements all but prevent its use. We were told that the main obstacle was the regulatory

requirement that owners of record be mailed public notices. This would require a search of property records which could be very resource intensive. For an area like the 34,000 acres identified in the Region 7 study, providing personal notification of wetland designations and planned public hearings could be a massive undertaking.

While Region 7 refrained from using advance 404(c) to protect the most valuable wetland areas, the Agency was encouraging its use and underlining the proactive benefits of advance 404(c) to the Section 404 program. As EPA explained when it issued the final Section 404(c) regulations, advance protection under 404(c)

... will facilitate planning by developers and industry. It will eliminate frustrating situations in which someone spends time and money developing a project for an inappropriate site and learns at an advance stage that he must start over. In addition, advance prohibition will facilitate comprehensive rather than piecemeal protection of wetlands.

The 1989 draft advanced identification guidance document continued to promote the use of 404(c) for basically the same reasons.

If the COE district was anticipating that Region 7 would use its 404(c) authority proactively, there was a need to better coordinate with the COE to formalize study objectives in advance so each participants' goals and objectives were realized. Also, if there was an expectation by OWP that Regions pursue the use of advance 404(c) during advanced identifications then additional management direction and possible modification of restrictive provisions in the 404(c) regulations may be warranted.

In contrast, on one Region 4 advanced identification which was near completion, the COE district and the Region could not agree on the content of the final joint public notice. In this case, the COE district was reluctant to specify the wetland areas as unsuitable for fill. The COE district initially agreed to participate in the Region's study and to issue a joint public notice. However, the study did not have community support from the beginning of the project and the COE subsequently became concerned about adverse public reaction to the final document.

As indicated, COE support is essential to maximize the effectiveness and value of advanced identifications. However, some COE Districts were more willing to cooperate than others.

Generally, we found that COE districts refused to participate in advanced identification studies because the respective regions lacked commitment toward COE's regulatory interests, i.e., regions were reluctant to commit to specific objectives, such as general permits, or using its 404(c) authority before initiating the study which would have the effect of reducing COE's regulatory burden. Other districts were reluctant to designate areas and set them aside as more valuable as required under advanced identification criteria. Also, contributing to the coordination problem between regions and COE districts was the COE's Section 404 planning program, the Special Area Management Plan (SAMP), authorized under the 1980 amendments to the Coastal Zone Management Act and COE's Regulatory Guidance Letter (RGL 86-10).

Because the SAMP process was labor intensive, the RGL encouraged district engineers to participate in a SAMP study only if the wetland area was environmentally sensitive and under strong development pressure and the proposed study was sponsored by a State or local agency, included public involvement and concluded with a definitive regulatory product.

Advanced identification while having similar objectives as a SAMP, do not always provide a regulatory product or have a sponsoring local agency. Therefore, EPA's advanced identification guidance conflicts with basic COE guidance for proactive wetlands planning. While both EPA and COE recognized the importance of proactive initiatives, the separate guidance sometimes resulted in the COE and EPA wanting wetlands planning but on different levels. Recently, COE districts in Region 6 have shown a reluctance to participate in advanced identification initiatives that designate wetland areas as suitable or unsuitable for fill unless Region 6 agrees up front to some type of resulting regulatory product [eg., general permits, advanced 404(c), etc.]. Without this commitment, some COE districts seem determined to emphasize their SAMP process and avoid the Region's advanced identification studies.

The benefits of proactive wetlands identification and planning, as a tool to reduce the problems associated with the traditional permit-by-permit review, will not be realized without interagency coordination and cooperation. Also, advanced identification projects need to be adequately controlled to ensure they meet Agency standards, especially during the initial targeting, planning, and coordinating phase of the review, and, therefore, provide the maximum effectiveness for the resources expended.

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Agency Comments On Need For Better Planning, Coordination, And Control For Advance Wetland Identifications And OIG Evaluation

Agency Comment

"Contrary to the statement..., Region 7 has issued a public notice proposing to designate wetlands within the Rainwater Basin as suitable or unsuitable for fill and thus will be fulfilling a basic objective of the ADID approach."

OIG Evaluation

We agree with OW's comment on the Region 7 advanced identification. The cited public notice was issued and this notice did identify areas as suitable and unsuitable for fill. Region 7's comments on the position papers addressed this discrepancy in the draft report. However, the comments were not received in time to be adequately addressed prior to issuance of the draft report. We have made changes in the report to reflect this information.

CONCLUSION

Because of ever-increasing conversion and development of the nation's wetlands and Federal budget restraints, EPA may never attain the program resources necessary to properly regulate wetland degradation and destruction on an individual permit basis. Strategic initiatives, especially advanced identification studies, were intended to improve EPA's protection of wetlands through delineating for the regulated public, large wetland areas as suitable or unsuitable for dredge and fill activities so that EPA could more effectively focus its limited Section 404 resources on the most valuable and vulnerable wetlands. The program's past regulatory emphasis on individual permit reviews was resource intensive, represented a nearsighted approach, and, as program management recognized, may not have necessarily afforded the best protection of our most valuable wetland resources. If EPA is to maximize wetland protection with continued limited resources, the Agency will have to approach wetlands protection on a larger scale than permit-by-permit reviews. This can only be accomplished through identifying the most valuable and vulnerable wetland resources and delineating those areas within these priority wetlands as suitable or unsuitable for permitting. This approach could reduce the number of permits and allow EPA to intensify its regulation of areas where permitting will continue. Therefore, it is incumbent upon

program management to establish long-term goals for proactive wetland initiatives and then control and direct regional accomplishments in a consistent, expeditious attainment of these goals to ensure a viable wetlands protection program for the future.

As wetlands planning initiatives evolve and public knowledge of the process grows, the Regions will begin to get increased requests from individuals, local governments, corporations, and conservation/environmental groups to conduct advanced identifications and other planning initiatives as encountered in Regions 4 and 6. Increased interest will make it more and more difficult for the Regions to evaluate the merit of these proposals without needed information to assess wetland values and vulnerability. In addition, a strategy based on risk will be necessary not only to prioritize planning initiatives but direct their implementation.

For 1992, OW has proposed a watershed management approach to protect and maintain water quality and preserve wetland values and functions over large geographic areas. This will require a watershed assessment of wetland value possibly through advanced identification or other strategic initiatives. Since 1986, the Section 404 program has emphasized large ecosystem strategic initiatives similar to OW's watershed management approach. However, regional accomplishments of the large ecosystem initiatives, as with other Section 404 strategic initiatives, have been limited in scope. Unless the Agency provides adequate control and direction to the watershed initiative along with sufficient program resources and regional commitments, the watershed approach will, most likely, not achieve any more success in protecting wetlands than the Section 404 program's current proactive initiatives.

RECOMMENDATIONS

We recommend that the Assistant Administrator for Water establish measurable national goals and definitive program guidance for regional Section 404 strategic initiatives, obtain substantive regional commitments to these goals, and provide sufficient national oversight and direction to ensure, consistent attainment of these goals. Specific recommendations include:

- ensure that the regional programs properly identify and prioritize their wetland areas and adequately coordinate with the permitting authority (COE or delegated State) for

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agreement on a priority wetland list for use in targeting the program's limited resources in regulatory and proactive elements of the Section 404 program.

- negotiate a strategic initiative MOA(s) with the COE, on a national or field level basis, to establish methods of interagency cooperation on specified proactive initiatives and agreement on the effective use and integration of advanced identification and SAMP processes to improve protection of the most valuable and vulnerable wetlands and enhance the regulatory process.
- ensure that regions initiate future advanced identifications in accordance with national guidelines and in close coordination with the COE on site selection, objectives, and individual agency responsibilities in order to maximize the effectiveness of these resource intensive studies. These studies should optimize the use of EPA's and COE's available regulatory authorities and public/State participation to include general permitting for suitable dredge and fill areas and Section 404(c) action to protect the most valuable/unsuitable areas.
- provide the necessary follow-up and direction to ensure that regions accomplish approved strategic initiatives on a consistent and timely basis in accordance with national program goals and objectives.

Agency Comments On Recommendations and OIG Evaluation

Agency Comment

"We believe it is inappropriate for EPA to proceed independently with regards to wetlands ranking in light of the recent White House announcement that the Administration will be establishing an interagency technical panel on wetlands categorization."

OIG Evaluation

The recommendation only requested that the program prioritize wetlands for the purposes previously provided in Headquarters guidance. If program management wishes to delay action until the interagency technical panel on wetland categorization has concluded its study, we have no objections. We can resolve the recommendation based on Headquarters intent that the recommended action will be taken when the technical panel concludes its work.

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Agency Comment

"At this time, the Office of Water has no plans to negotiate an MOA on ADID with the Corps at the national level."

OIG Evaluation

OW disagrees with this recommendation but gives no reason for its objection. Based on the problems noted during the audit with COE cooperation on advanced identification studies, the pressing need for advanced planning initiatives to identify valuable and vulnerable wetland areas needing protection, and the need to gain COE support for these determinations in the permitting process indicates that a national MOA would be the most simple, effective method of resolving this problem. The COE should also have a mutual interest in resolving this problem because advanced identifications, COE's special area management plans (SAMP), and other Section 404 planning initiatives have the potential to provide regulatory relief. With the COE and EPA possessing mutual goals and objectives in wetlands planning, the two agencies should confer on how to jointly proceed in prioritizing and accomplishing the same planning initiatives that each often ends up doing alone. However, we have added the option of negotiating field level agreements with the COE for advanced identification cooperation to the recommendation to provide more flexibility to program management.

Agency Comment

"We agree that the Regions should initiate ADID projects in accordance with existing national guidance and that Headquarters should ensure that ADIDs are consistent with such guidance."

OIG Evaluation

OW basically agreed with recommendation.

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COMMENTS FROM THE ENVIRONMENTAL PROTECTION
AGENCY, OFFICE OF WATER

DRAFT IG REPORT - OFFICE OF WATER COMMENTS¹

I. Introduction

A. Audit Purpose

* The initial statement of the purpose and scope of Section 404 of the Clean Water Act is misleading. Section 404 is not limited to regulating activities in wetlands. It establishes a permit program to regulate the "discharge" of "dredged and fill material" into all "waters of the United States," which include but are not limited to "wetlands."

- (1) We have revised the report to reflect Section 404's intent to regulate all U.S. waters, including wetlands.

* According to recent wetlands trends data, the annual rate of wetlands loss stated in the draft report is too high. The current loss rate is approximately 300,000 acres per year.

- (2) During our review of various wetland articles, reports, congressional testimony, etc., we came across various estimates of annual wetland loss ranging from 300,000 to 500,000 acres. We elected to use the most common reference of 300,000 to 450,000. OW does not clearly identify the source of its revised estimate. However, since OW believes that 300,000 acres is a better appraisal of wetland losses, we have revised the report accordingly.

B. Background

* The description of Section 404 enforcement authorities (top of page 1) is incorrect. As explained in more detail below, the statute gives EPA and the Corps joint authority to enforce against unauthorized Section 404 discharges.

- (3) Our review of the CWA did not provide a reference supporting OW's position that EPA and COE have joint statutory responsibility to enforce against unauthorized Section 404 discharges. We agree that Section 309(g) of the CWA does give both the COE and EPA (over delegated state programs) administrative penalty authority over permit violations. However, Section 404 only refers to COE enforcement against permit violations with section 404(n) emphasizing that: "Nothing in this section shall be construed to limit the

¹ The Office of Water transmittal letter which accompanied these official comments is located at the end of this appendix.

authority of the Administrator to take action pursuant to section 309 of this Act." Section 301, in concert with Section 309, gives EPA the statutory authority to enforce against unlawful (unpermitted) Section 404 discharges and we found no statute reference that gave the COE joint enforcement authority for such illegal activities as stated in OW's comments. To the contrary, COE's own regulations at 33 CFR, Part 326.2 emphasize EPA's responsibility by stating that: "As EPA has independent enforcement authority under the Clean Water Act for unauthorized discharges, the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved." The COE did agree, under the Enforcement MOA, to enforce against unpermitted discharges on EPA's behalf, but we have found no instance where the COE has recognized statutory responsibility for such enforcement actions. As reported, we maintain that EPA has independent statutory authority and, therefore, sole responsibility for ensuring effective enforcement against illegal Section 404 discharges.

* In the short discussion of wetlands loss, the attempt to distinguish between direct conversions by physical alteration, on the one hand, and wetlands degradation through chemical contamination, on the other hand, should be clarified to state that only direct conversions involving discharges are regulated under Section 404.

(4) We agree and have added a footnote to the report to clarify this fact.

* Contrary to the statement at the bottom of page 5, EPA's wetlands program encompasses more than implementing the Agency's Section 404 authorities and responsibilities. The Wetlands Division - and previously, the Office of Wetlands Protection - has an entire branch devoted to protecting wetlands through nonregulatory approaches.

(5) We could not locate the draft audit report statement corresponding to OW's reference or a statement that would have initiated the OW response. Therefore, no OIG evaluation could be presented.

II. Improvement Needed in Management Direction, Control, and Accountability

* We disagree with the statement at the top of page 13 that "EPA's organizational accountability . . . holds each Regional Administrator accountable for accomplishing national program objectives as established by EPA Headquarters program offices." The Administrator himself has said that the Regional

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Administrators work for him and for the President, not for the program offices.

- (6) According to 40 CFR 1.61: "Regional Administrators are responsible to the Administrator, ... for the execution of the Regional Programs of the Agency" However, this subpart continues by outlining one of the Regional Administrators' responsibilities as "Accomplishing national program objectives within the Regions as established by the Administrator, Deputy Administrator, Assistant Administrators [emphasis added], Associate Administrators, and Heads of Headquarters Staff Offices." EPA's program offices, through the Administrator, established program objectives, goals, and performance measures through the Agency Operating Guidance. Therefore, Regional Administrators are accountable to the Administrator for the accomplishment of the national program objectives and goals as established by the program offices and presented in the annual Agency Operating Guidance. The CFR reference and other revisions were added to clarify this issue.

A. Background

* The three Section 404 program areas (permit review, enforcement, and strategic initiatives) identified in the draft report are important elements of EPA's wetlands protection program, but by no means the only components of our program.

- (7) The draft report did not state that permit review, enforcement, and strategic initiatives were the only elements of the EPA's Section 404 program. The report only stated that these were readily recognized as three essential program elements by OWP and identified as "basic" in documents such as the Agency Operating Guidance and continually emphasized by management throughout the audit period. Because these activities were either based on statutory or regulatory requirements and identified by management as "basic" to any regional wetlands program, we elected to limit the scope of our review to these three elements. We recognize that there are other components of the OW program, however, we chose to concentrate our efforts on program activities that could not be considered elective.

B. IG Draft Finding - Wetlands Program Lacks Measurable Program Goals, Staff Commitments, and National Guidance for Implementing Program Objectives

* By criticizing Headquarters for failing to set definitive, measurable goals or measurable commitments for the Regional wetlands programs, the draft report is promoting a management philosophy that is at odds with the Administrator's and Deputy Administrator's management approach and goals.

- (8) We were not aware of any new management philosophy until our exit conference when a November 1, 1989 memorandum and task force report were brought to our attention. We subsequently reviewed these documents and found that they present similar concepts as those we are recommending in this report. The memorandum and task force report document concepts such as: putting program accountability into strategic planning; making the management accountability systems convey a strong sense of the Administrator's priorities; creating a more meaningful balance between performance and the quality of products; continuing to develop joint targets or estimates of each Region's activity levels in support of national program objectives; and tracking key program activities.

Therefore, none of the information provided by the Regions or OWP and now eluded to by OW supports OW's statement that measurable commitments are not required under current management philosophy. In addition, none of the information provided to us by the Regions or OWP support OW's statement that measurable commitments were ever established for the Section 404 program in the areas of public notice review or enforcement. There were regional reporting requirements under SPMS/STARS or OWAS but no established targets/commitments with the exception of advanced identification. Regions negotiated an FY 1987 target level of performance for advanced identification which continued under the strategic initiative element which was introduced in FY 1989.

Also, nowhere in the draft report did we state that program accomplishments should be evaluated exclusively on the level of program activity. We stated, consistent with the SPMS/STARS guidance, that commitments should be measurable, whether numerically or qualitatively, and designed to assure the achievement of established program goals and objectives. The intent was to establish a quality program designed to consistently use authorities to accomplish statutory as well as environmental objectives. However, the definization of what constitutes a "quality" national and regional program and the establishment of definitive, measurable goals within such a defined program is essential in measuring any functions effectiveness and to ensure the best use of Agency resources in accomplishing program goals and objectives. Without such management controls, regional programs are left to establish their own priorities and goals which may lead to program operations that are inconsistent with national program goals and objectives. While some flexibility can be included in the system, the approach of total regional flexibility directly contradicts the intent of the FMFIA which required the establishment of management controls to ensure accomplishment of program objectives. In addition, the Agency's SPMS/STARS management accountability system

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emphasized the importance of commitments whether they are quantifiable outputs, deadlines associated with a specific product, or some other means of measuring accomplishment toward achieving pre-established program goals and objectives. Negotiating meaningful commitments and measuring accomplishment of those commitments is the primary control within the management accountability system (SPMS/STARS or OWAS).

OW's position that establishing measurable commitments for the wetlands program is contrary to current management philosophy contradicts what is being done in other Agency programs. Other Agency programs, including other water programs, make reference to targets (measurable commitments) in the FY 1992 Agency Operating Guidance. Until a level of performance was established in FY 1987, limited progress had been made toward performing advanced identifications. If establishing meaningful goals and objectives with commitments to measure program effectiveness is not considered a valid control mechanism under current management philosophy, then the SPMS/STARS systems will have no real function or purpose for evaluating the Section 404 program. The FY 1992 measures for Section 404 enforcement demonstrates the inadequacies of the Wetlands SPMS/STARS in evaluating progress toward accomplishment of program objectives. The FY 1992 enforcement objective is to "Enforce the Section 404 program to improve rates of compliance with program requirements." While this is a necessary goal, the performance measures in STARS include reporting only the numbers of regional actions taken, referred, and resolved and these statistics will not demonstrate achievement of the goal to improve rates of compliance. Only evaluating current rates of noncompliance (illegal activities) and demonstrating reductions in this level of noncompliance will indicate accomplishment of that goal. As recommended by the Deputy Administrator in the November 1, 1991 memorandum and as we recommend, Region and Program officials should develop joint targets or estimates of each Region's activity levels necessary to support and eventually achieve national program objectives and goals.

OW's remarks concerning the use of "bean counting" conflicts with its later statements that lack of "bean counting", i.e., measurable goals and staff commitments, has increased the program's success as evidenced by the increase in Section 404 enforcement actions from a low of 63 in FY 1987 to 146 in FY 1990. Such evidence of success appears to be the same bean counting OW takes exception to. The numbers do not reflect the quality and consistency of the actions taken. As stated in the report, our audit in three regions found that enforcement actions were generally inconsistent and ineffective. In addition, the memorandum and task force

study which OW indicated represented the new management philosophy was dated November 1989. An FY 1990 policy cannot effect 3 to 4 prior years of enforcement actions. Furthermore, according to the chart included in OW's response, enforcement actions increased from 63 in 1987 to 120 (almost 100 percent increase) in FY 1988 when, according to OW, "bean counting" was still in effect. Between FYs 1988 and 1989, enforcement actions increased by only 30 or 25 percent over 1988 and actually decreased in 1990. Finally, the Section 404 program staff increased over 82 percent (from 85 to 155 FTEs) between 1988 and 1991. This would also impact the number of enforcement actions initiated. Therefore, we can not conclude, as OW has done, that "bean counting" was unsuccessful and that the lack of measurable program goals and regional commitments contributed to the increase in Section 404 enforcement actions.

* We strongly disagree with the summary conclusion (page 14) that a lack of definitive, measurable program goals and Regional commitments resulted in inconsistent program implementation, no assurance of an effective and efficient program, and inadequate budgetary support. To the contrary, the draft report appears to ignore the fact that, prior to FY 1989, Headquarters did establish "definitive, measurable goals" and obtain "measurable commitments for regional wetland operations." However, this "bean counting" approach proved to be unsuccessful, given the need for flexibility in a program that required very limited regional staffs to address a wide variety of responsibilities and environmental challenges.

(9) See OIG comment (8).

* The draft report fails to credit Headquarters for the various "program" guidance documents and memoranda of agreement that have been developed in recent years, some of which have been issued jointly with the Corps. The Corps has also issued its own program guidance documents, known as Regulatory Guidance Letters, with input from and review by the EPA wetlands program.

(10) We disagree. The draft report cites all of the MOAs between EPA and COE in effect and the guidance applicable to the various report topics. These documents were not all specifically referenced in Section B, Chapter 2, because they did not relate to the needs of a long-term overall program operating plan with specific guidance for use by the Regions in designing programs to accomplish individual program objectives.

OW does not list the "various program guidance documents and memoranda" we "failed to credit" to the program. However, since the start of this audit, we have tried to get a

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comprehensive list of program guidance for the regional wetlands programs. We were told that a listing was not available. We subsequently found guidance references in reviewing various documents and during interviews at OWP and the regions. OWP had at least two opportunities to review the criteria we were using for this audit. First, when we provided a copy of our audit guide listing various guidance we would use in Regions 6 and 7. Again, after completion of regional fieldwork when we asked OWP staff to review the criteria (guidance) we were using. There were no recommended additions other than one document recently finalized on calculating administrative penalties and another on referring cases to DOJ. These documents were not relative to findings in Chapter 2. Also, program management's input into COE's regulatory guidance, was not an objective of our audit and has little relationship to this finding concerning Agency guidance for internal program operations.

* The draft report, at the bottom of page 17, incorrectly states that Headquarters has never obtained measurable commitments from Regional program management, with the exception of strategic initiatives. As explained above, prior to FY 1989, Headquarters set targets for both enforcement actions and advance identification (ADID) projects.

(11) See comment (8).

* The SPMS/STARS data on enforcement (bottom of page 18), is meaningful and significant as a measure of the continuing increase in EPA Section 404 enforcement activity nationwide. It is inappropriate to compare the number of EPA enforcement resolutions for FY 1990 to the number of Corps backlogged cases; the trend of increased enforcement resolutions is a more significant fact.

(12) OW does not state why this comparison is inappropriate and we see no reason for not using the comparison. In our opinion, the comparison demonstrates that while the enforcement program shows growth, there was a growing problem with Section 404 compliance.

* For purposes of clarification, the statistics accumulated in SPMS/STARS are no longer used to help determine Regional resource allocations.

(13) The SPMS/STARS statistics were used to allocate regional resources during our audit period and, therefore, we conclude that no change to the report is warranted.

C. IG Draft Finding - Wetlands Program's FMFIA Implementation Inconsistent With CG Standards and OMB Policy

* The draft report unfairly criticizes the wetlands program's implementation of FMFIA requirements since the IG's office itself has apparently approved our FMFIA documentation, although it apparently has also acknowledged that there is an Agency-wide problem in this area. Moreover, we disagree with the conclusion that the wetlands program has not sufficiently implemented the STARS system since, as stated above, our approach comports with existing Agency management philosophy and has produced positive results.

- (14) We have no knowledge or evidence that OIG has ever specifically reviewed and approved FMFIA implementation for the Section 404 wetlands program. OW did not provide a source of support for this statement.

OW also disagrees that the wetlands program has never sufficiently implemented the STARS management accountability system since the program's approach agrees with current Agency management philosophy [against "bean counting"]. We found no such management philosophy documented in the criteria and requirements for the SPMS/STARS management accountability system for our audit period and OW provided no adequate documentation of such a philosophy. Therefore, we continue to conclude that OWP had not implemented the management accountability system as recommended by Agency procedures. In addition, establishment of program goals that can be measured by quality, as well as quantity, as stated in the report, does not necessarily entail "bean counting" as OW contends. Furthermore, OW states that eliminating "bean counting" has produced positive results. The example of the success of this management philosophy emphasized by OW is the increase in EPA enforcement actions between FYs 1989 and 1990. As previously stated this appears to be "bean counting" in itself and provides no measurement of the quality of the actions or their ability to accomplish program goals and objectives (also see Comment 8 above).

* The draft report's determination that annual program evaluations should emphasize Regional weaknesses is inconsistent with modern management theory, which provides that people are motivated by positive feedback.

- (15) FMFIA requires related program controls/evaluations to identify internal control weaknesses and resolve such weaknesses to protect Government resources from fraud, waste, and abuse and ensure accomplishment of program objectives.

* Contrary to statements in the draft report, Regions did

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initiate changes and redirect priorities in response to the annual program evaluations undertaken by Headquarters.

- (16) Our audit of three Regions disclosed that annual program evaluations did not identify some weaknesses and some identified were not corrected. While changes may have been made in regional emphasis, we could not attribute the shift to the annual evaluations or subsequent changes in requirements under the management accountability system. Since OW provided no specifics as to sources or other evidence to support their statement, we have no basis for changing the report's conclusion.

* There is no stated basis for the draft report's conclusion, at the top of page 23, that Headquarters' characterization of Region 4 as the "most active and effective Region" in using Section 404(c) "was based exclusively upon the number" of Region 4 actions in relation to other Regions. This "hypothesis" ignores the fact that, under Section 404(c), the Region submits a recommended Section 404(c) determination to Headquarters, and that Headquarters thoroughly reviews the Regional recommendation and administrative record and then develops a final determination for signature by the Assistant Administrator for Water accepting, rejecting, or revising the Regional recommendation.

- (17) The purpose of the example was to demonstrate that the mid-year report was making an assessment on the quantity not necessarily the quality of the actions taken. Without additional information provided, management can not effectively use the mid-year program evaluations to verify the accuracy, consistency, or quality of reported actions.

* For purposes of clarification, a reference to Region 6 ADID efforts (page 23) incorrectly equates Corps support in an ADID project with a definitive impact on the permitting process. Irrespective of Corps participation, ADID designations are never "binding" on the Corps for the purpose of acceptance or denial of a permit application. Despite this fact, these ADID efforts may have had other positive results, such as fostering cooperation and coordination between the relevant federal, state, and local agencies.

- (18) The report does not state that no benefits are derived from an advance wetland identification or any other well planned initiative without COE participation. However, considering that advance identifications are resource intensive, COE participation would be crucial to maximize the effectiveness of the resources involved. Although COE participation in an advance identification study does not bind the COE to the study's conclusions regarding Section 404 permitting, COE's cooperation would have more of an effect on future

permitting decisions than any study performed exclusive of COE involvement. Hence, the requirement in 40 CFR 230.80 and OWP guidance on advanced identification which require joint COE participation.

* Contrary to the statement at the top of page 24, Region 7 management has changed its approach to wetlands protection. For example, the Region has increased its Section 404 enforcement efforts.

(19) OW provided no documentation or statistics to support this statement. Our audit in Region 7 disclosed no substantial change in management's approach to wetlands protection. Although we were told that the Region had nine COE referrals "under review" for possible enforcement action, we were informed in June 1991 that no enforcement action had been taken.

D. IG Draft Recommendations

* For the reasons stated above, the wetlands program opposes the recommendation that we establish measurable goals and obtain Regional staff commitments.

(20) This position is contrary to the purpose of the SPMS/STARS management accountability systems. Without goals related to program objectives that are measurable in quality and/or quantity, there is no basis for evaluating the consistency, efficiency, or effectiveness of regional programs. This results in insufficient management controls to assure the accomplishment of management objectives as required by the FMFIA and CG standards for internal controls. Therefore, our recommendation related the establishment of measurable program goals and commitments remains unchanged. (see also comment 8)

* As noted above, the program has developed program guidance, although this fact is not well-documented in the draft report. Moreover, EPA cannot always commit to develop future programmatic guidance documents ourselves since we frequently need to work jointly with the Corps to develop "effective" programmatic guidance for the Section 404 program.

(21) During the audit we identified all the program guidance related to EPA's internal program operations as provided by OWP and the Regions. This guidance is referenced as appropriate throughout the report. OW alludes that certain program guidance issued by EPA Headquarters was not recognized in the draft report, but OW presented no specifics as to what this unrecognized guidance consists of. The recommendation was for developing long-term (internal) guidance and plans (strategies) in conjunction with the

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Regions to implement a wetlands program designed to accomplish program objectives. We see no requirement for joint interagency coordination to produce such internal program guidance as recommended by the report. Therefore, our recommendation remains as stated in the draft report.

* We are willing to examine the adequacy of our implementation of the FMFIA internal control process, and in particular, will consider adding our SPMS/STARS measures and annual program evaluations to that process.

(22) Although OW has indicated that positive actions will be taken on improving the FMFIA process, the inclusion of the SPMS/STARS measures will have little effect without first establishing meaningful annual program goals and commitments in such systems.

* The office of Water also agrees that there should be regular reviews of the Regional wetlands programs, although not necessarily on an annual cycle.

(23) No comment necessary. OW fundamentally accepted the recommendation

II. EPA's Section 404 Enforcement Program is Not Controlling and Deterring Illegal Discharges Into Priority Wetlands

A. Criteria

* The draft report demonstrates a continuing misunderstanding of Section 404 enforcement on the part of the IG's office. The statute gives both EPA and the Corps authority to enforce Section 404; the Corps' authority is not derived from an EPA delegation.

(24) OW's response states that "the statute" gives both the COE and EPA the authority to enforce Section 404. We are not sure to what statute OW references. Section 404 only provided for the COE to enforce against permit violations not unpermitted discharges. There are no other enforcement authorities provided in Section 404. Section 309 provides EPA (over delegated state programs) and COE with joint authority to enforce against permit violations. Section 301, in concert with enforcement authorities under Section 309, provides EPA with enforcement responsibility for unpermitted discharges. We could not find a CWA reference that gave the COE any enforcement authority for illegal discharges. (also see comment 3). Therefore, the COE's authority for enforcement against unpermitted discharges can not be statutorily derived and can only be based on the enforcement MOA between the COE and EPA. The report's

criteria regarding statutory responsibility for enforcement against unpermitted discharges agrees with COE's understanding of this authority. As pointed out by GAO in its 1988 report and by COE in its response:

...the Clean Water Act vests the Administrator of EPA with enforcement authority for unpermitted discharges, not the Secretary of the Army, who is empowered to enforce against permit violations.

Current COE regulations at 33 CFR 326.2, also state that unauthorized discharges are EPA's independent responsibility. In addition, we did not indicate in the report that EPA "delegated" its authority to COE but said that it was "allocated" through the joint MOA.

* Similarly, the Enforcement MOA, as first negotiated in 1976 and later revised in 1989, is intended as a mechanism for ensuring that this joint enforcement authority is efficiently and effectively implemented. Under the terms of the 1989 Enforcement MOA, EPA is lead enforcement agency for what it views as the most important unpermitted discharge violations.

(25) As stated in the MOA, its prime goal was to strengthen the Section 404 enforcement program by using the expertise, resources and initiative of both agencies in a manner which is effective and efficient in achieving the goals of the CWA. The MOA established an "allocation of enforcement responsibilities." However, as explained above (comment number 3), EPA has independent statutory authority for unauthorized discharges. The Agency may allocate its authority for enforcing against such illegal discharges under the MOA but not its overall statutory responsibility for a viable enforcement program.

OW also states that the 1989 enforcement MOA provided the mechanism for implementing the joint enforcement authority and under the terms of the MOA, "EPA is lead enforcement agency for what it views as the most important unpermitted discharge violations." However, the MOA states that "EPA will act as the lead enforcement agency on all unpermitted discharge violations ..." which meet the criteria listed in Section III.D. Section III.D. lists repeat, flagrant violators, where EPA requests a case or COE recommends that an administrative penalty action may be warranted. As such, EPA has first refusal. COE may take the action against the violator once EPA notifies that it will not take action. However, as reported, we found that the regions were not taking actions against what they viewed as the most important unpermitted discharge violations but what the COE viewed should be referred. We also noted that not all COE districts were making referrals. Because EPA does not

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monitor COE enforcement actions under the MOA and primarily enforces only against the cases referred by the COE, the regions had no assurance that they were cognizant of all significant unpermitted violations within the context of the MOA.

* Since each Agency has independent enforcement authority, both EPA and the Corps are responsible for effectively enforcing Section 404, and it is not EPA's job to "oversee" the Corps' enforcement efforts, although we agree that coordination between the two agencies is important. The Office of Water is concerned that the IG's office, in an attempt to address perceived deficiencies in the Corps' enforcement program, is instead attempting to place even greater demands on the Regional wetlands programs, with a potential for increasing inefficiency.

- (26) The CWA provides only EPA with authority to enforce against unpermitted discharges (see comment 3). Therefore, since EPA is statutorily responsible it would be incumbent upon the Agency to monitor the enforcement process against unpermitted discharges to ensure proper implementation of EPA's statutory authority. It appears that OW is attempting to avoid this responsibility by stating that COE shares statutory enforcement authority over all Section 404 violations, permitted and unpermitted.

If the COE wishes to assist EPA in its enforcement efforts through an interagency agreement, we support this interagency cooperation. However, if there are deficiencies in COE's enforcement of unpermitted violations, it would be incumbent on EPA to assure effective enforcement. In addition, either through field level MOA's or some other means, EPA needs to ensure that significant violators are routinely referred to EPA so its part of the enforcement agreement is consistently implemented. This does put greater demands on EPA's regions, but the enforcement of unlawful discharges is EPA's statutory responsibility.

* The draft report fails to credit Headquarters with issuance of two important wetlands enforcement guidance documents, which were finalized and distributed to the Regions during FY 1991: Section 404 administrative penalty guidance issued jointly with the Office of Enforcement; and joint EPA/Army judicial enforcement guidance.

- (27) Our audit period included wetland program operations for FYs 1988 through 1990. Therefore, any guidance issued after the end of our audit period or completion of the audit fieldwork may not be cited in the report. We reviewed the two guidance document referenced by OW, but found they had little relevance to the issues addressed in the draft report. The referenced documents related to calculation of

administrative penalties and the types of cases to be referred to DOJ.

B. IG Draft Finding - Insufficient Oversight of and Coordination With the Corps on MOA Enforcement Actions

* The draft report's emphasis on EPA monitoring of Corps enforcement is misplaced. EPA and the Corps have joint and equal enforcement authority. It is not EPA's role to determine whether Corps enforcement is "properly fulfilling EPA's statutory responsibility to deter [unpermitted violations] (bottom of page 28)."

(28) Again, OW reiterates that EPA and COE have joint and equal enforcement authority against Section violations without citing any statute that gives such equal authority over unpermitted discharges.

* Under the discussion of "Case Notification and Consultation," (page 30) there is a reference to Corps failure to "request consultation on potential enforcement actions as prescribed in the MOA and required under [Corps] regulations." We are unclear as to exactly what consultation process the draft report is referring to.

(29) The Enforcement MOA, paragraph IIIc instructs: "In all cases the COE will provide EPA a copy of its violation letters and EPA will provide the COE copies of its 308 letters and/or 309 administrative orders. These communications will include language requesting the other agency's views and recommendations on the case." In addition, COE regulations at 33 CFR, Part 326.2 (Policy) states: "As EPA has independent enforcement authority under the Clean Water Act for unauthorized discharges, the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved." This is the consultation process we refer to in the report.

* The draft report's statement (bottom of page 30) that the "MOA clearly divided enforcement lead responsibility for unauthorized discharges between EPA and [the Corps]" fails to recognize that the MOA envisions that EPA will have the opportunity to take the enforcement lead on unpermitted discharge violations falling within the four listed categories, but that due to staffing constraints and other factors, the EPA Regions would not be able to take the lead on all cases falling within these categories and that the Corps would continue to handle a substantial number of unpermitted discharge violations.

(30) We recognized the program's staffing limitations and did not recommend that OW take the lead in all these cases. We did

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recommend that OW ensure that all violations subject to EPA's lead under the Enforcement MOA are timely referred by the COE. The purpose of this, as pointed out in the report, was to identify all significant violations that will yield the optimum benefit or deterrence effect from EPA's limited enforcement resources. Being able to pick-and-choose enforcement cases from the entire population subject to EPA's lead would present an enforcement program that would be more consistent as well as fair and equitable. As far as the COE handling a substantial number of unpermitted discharges, we see no problem with this as long as they are not repeat, flagrant, violations in priority wetlands, or in some other way "significant."

* As already stated above, it is EPA's position that EPA and the Corps share Section 404 enforcement authority. Therefore, the statement at the bottom of page 30 that unpermitted discharge enforcement "was, by statute, EPA's responsibility" is wrong. Moreover, the statement of the Corps' position at the top of page 32 pre-dates the 1989 Enforcement MOA, and is inconsistent with the Corps' practice over the past 15 years of enforcing against unpermitted discharges, and with the fact that the courts have not questioned the Corps' authority to enforce against such violations.

- (31) OW states that EPA's position is that: (1) EPA and the COE share Section 404 enforcement authority and, therefore, the report's conclusion that, by statute, EPA is responsible for enforcement against unpermitted discharges is wrong; (2) COE's position on enforcement authority, as cited in the report, pre-dates the 1989 enforcement MOA; and (3) the report's conclusion is inconsistent with COE's practice of enforcing against unpermitted discharges for the last 15 years. As stated previously we found no statute that vested joint and equal enforcement authority for unpermitted discharges to both the COE and EPA. EPA now states that it is EPA's position that EPA and COE share Section 404 authority. This contradicts OW's previous statements that "the statute" vested this joint authority. We can not conclude that EPA's position takes precedent over statutory authorities and that the report's conclusion is wrong. Also, we are unaware of any change in the COE's position relative to enforcement authority. COE personnel contacted on September 24, 1991, indicated that its regulations at 33 CFR, Part 326.2, that state that Section 404 enforcement authority for unpermitted discharges is vested with the EPA Administrator, are still effective and have not been changed since the final rule was published in 1986. Even if the COE's official position has changed since the 1988 GAO report, interagency agreements cannot transfer statutory responsibility. Finally, the COE's practice of enforcing against unpermitted discharges for the past 15 years is

based upon the 1976 enforcement MOA which was later revised in 1989 and is not based on any statutory responsibility. Therefore, the COE's past enforcement practices is not inconsistent with the report's statement that EPA is statutorily responsible for Section 404 enforcement against unpermitted discharges. We do not challenge the decision to jointly enforce against unlawful discharges under the MOA. We only question managements position that the Agency has no oversight responsibility.

* Contrary to the statement in the middle of page 32, it is inappropriate to direct EPA to impose upon the Corps a requirement that they conduct their enforcement program so as to meet EPA program objectives.

(32) The draft report never stated that EPA should or could impose its enforcement policy on the COE. We conclude that EPA should monitor the COE's implementation under the MOA to enhance its own enforcement efforts. EPA needs to devise an enforcement approach that ensures national objectives are met through a combined enforcement effort. If situations arise where COE's enforcement methods are not accomplishing program objectives or meeting enforcement standards, EPA has the option to take the lead for a particular case or a class of cases.

* The second complete paragraph on page 32 also suggests a misunderstanding of the role of wetlands restoration in EPA's wetlands enforcement program. Restoration of the illegally filled wetland is a primary enforcement goal. Contrary to the discussion in the draft IG report, this goal frequently can be achieved by requiring a violator to remove illegal fill and restore the wetland; in many cases, it will not take years to achieve such restoration. In addition, removal/restoration eliminates the possibility of permanent gain accruing to the violator as a result of the illegal activity, as well as maximizing environmental results.

(33) We recognize that restoration is a primary enforcement goal and, in many cases, it will not take years to achieve restoration. However, in other cases it will. Also, we recognized in the report that removal and restoration may put a financial burden on the violator, however, the result is still a degraded wetland which may never fully recover. OW makes a blanket statement that restoration eliminates any permanent gain by the violators, but this would have to be determined on a case by case basis. Without oversight of COE's actions, EPA can only speculate that requiring removal and restoration or issuing after-the-fact permits was the appropriate action to take and that the violator was indeed placed in a worse position than those who complied. EPA's own penalty guidance recommends that the Regions quantify

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any economic benefit obtained from the violator's failure to obtain the appropriate permit before discharging. An after-the-fact permit does not excuse the violation. As EPA's General Enforcement Policy states: "... allowing a violator to benefit from noncompliance punishes those who have complied ...," placing them at a competitive disadvantage which creates a disincentive for compliance. Failure to remove economic benefit at a minimum might encourage developers and other applicable parties to illegally discharge and risk detection. Therefore, it is incumbent on OW to ensure that enforcement inequities do not occur. If enforcement authority is inconsistently applied, the Agency's program is at risk of being viewed as arbitrary and, as pointed out in EPA's General Enforcement Policy, could result in increased litigation which will make it more difficult to gain swift resolution of the environmental problems.

* The Office of Water agrees that some of the Regions could be focusing more effort on attempting to negotiate field level Enforcement MOAs with their respective corps districts.

- 34) Considering the apparent benefit derived from the one field level MOA negotiated to date, especially the significant increase in COE referrals, additional agreements with other COE divisions or districts would not only increase MOA compliance but provide more stability and consistency to the overall enforcement program.

c. IG Finding - EPA Section 404 Enforcement Actions Did Not Comply with Agency Policy and Effectively Deter Violations

* The draft report fails to credit both Headquarters and the Regional wetlands programs for the significant growth in wetlands enforcement, which has been accomplished in a relatively short timeframe and with a very limited field presence.

- (35) We can only attest to the enforcement actions in regions included in our audit. The increases in EPA enforcement actions from 1988 to 1990 for these three regions are included in the report. With the exception of Region 7, there was a noticeable increase in enforcement activity. However, Region 4 did not start concentrating on enforcement actions until after our arrival. Region 6 claimed 101 enforcement actions over the three-year period. However, as reported, under half (49) could be considered enforcement cases with 20 of those currently under investigation with no orders pending. So while there was an increase over the period it was far from "significant." Also, based on our review, the quality of many actions taken were questionable. Therefore, the increase in numbers of enforcement actions did not necessarily equate to a more consistent and

effective enforcement program. Our review of enforcement actions in the three EPA regions disclosed several deficiencies which are covered in the report.

* For purposes of clarification, the explanation of after-the-fact permits (page 37) is incomplete and fails to explain that issuance of an ATF permit is appropriate where the discharge would have received a Section 404 permit if an application had been submitted prior to the discharge activity (the discharge complies with the Section 404(b)(1) guidelines).

(36) An after-the-fact permit does not excuse the violation before the permit was issued (see comment 33).

* The draft report misconstrues the purpose and scope of the 1989 Enforcement MOA. It did not envision EPA enforcement against "all repeat and flagrant violations" (middle of page 39). Nor could it since a variety of factors must be weighed before EPA - or any Federal agency - decides whether to exercise the enforcement discretion provided by Congress. Also, the MOA did not envision that EPA would accept all cases referred by the Corps for enforcement action; in fact, the MOA explicitly provided for those instances where EPA would not accept referred cases.

(37) We can not interpret what was "envisioned" by the 1989 enforcement MOA but must rely on the written provisions of the MOA which states that EPA will be the lead enforcement agency against all repeat, flagrant violators, etc. By being the lead agency, EPA should have the opportunity to enforce against all repeat, flagrant violators, etc. The statement "... consistent and flagrant violators ..." does not mean that every case referred by COE or otherwise coming under its lead will result in a formal EPA action. What we do state is that EPA should be made aware or should make itself aware of "significant" violations. Enforcement is a "discretion" and not all cases warrant a formal enforcement approach. However, it should not be so discretionary that significant violators go unpunished. Enforcement consistency is not only important for its deterrent effect but for the fair and equitable treatment of the regulated public. This can be achieved only if the Agency ensures that all significant violations are evaluated by the lead agency (EPA) using uniform guidelines.

* The draft report's assumption (bottom of page 40) that issuance of administrative compliance orders (AO) seeking removal of the illegal discharge and restoration of the wetlands have little deterrent effect because of a failure to recoup all economic benefit is wrong since such removal/restoration will generally eliminate any permanent economic benefit accruing to the violator. Not only will the violator generally not recoup

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any economic gain, but they will have to incur the costs associated with the removal/restoration required under the AO. Furthermore, this approach generally yields significant environmental results.

(38) As stated at 33 above, we recognize that removal and restoration may act as an appropriate deterrent. However, as reported, we found cases in Region 4 where full restoration was recommended but settlement was for much less, dropped, or pending without further action. The restoration of a degraded area can only be a deterrent and beneficial if it is done.

* We disagree with the draft report's conclusion that the Regional enforcement programs did not support Agency policy. We believe that the Regions have been complying with the Section 404 administrative penalty policy, which became final in December 1990. Also, the discussion of Regional enforcement activity fails to acknowledge that the various types of enforcement responses differ with regard to complexity and the amount of time needed for successful resolution.

(39) From copies provided by regional enforcement coordinators, the administrative penalty policy has been in draft and used since at least September 1987. Our review showed a disparity in enforcement approach between the regions, especially for administrative penalties. Cases we reviewed and presented in the report did not remove economic benefit as a deterrent or result in swift resolution of environmental problems. We do acknowledge that various types of enforcement responses differ with regard to the complexity and the amount of time needed for successful resolution. However, the approach for implementing those enforcement responses should not differ from region to region.

* The discussion about recent enforcement trends in Regions 4 and 6 (middle of page 42) is especially troubling because all the facts indicate that these two Regions have made substantial progress in a relatively short amount of time, and yet the draft report persists in trying to cast this success in a negative light.

(40) Again, OW is apparently relying on numbers of actions to evaluate a region's enforcement program. However, success is relative and these numbers do not indicate the quality, effectiveness, and consistency of these actions which would be a better measure of program effectiveness in meeting enforcement goals. Neither does it consider the growing enforcement problem as reported by the COE. The adequacy of enforcement activity cannot be effectively evaluated until there is an understanding of the overall enforcement problem

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and OW defines what quality enforcement is through internal program guidelines and meaningful commitments for accomplishing program goals and objectives.

* The reference, at the top of page 43, to inconsistent enforcement action ignores the fact that, in some situations, it may be appropriate to seek restoration and a penalty from a violator, while in other cases, it may be equally appropriate to issue an ATF permit or seek partial restoration without a penalty, but possibly with mitigation.

(41) We agree. However, in the cases we reviewed (some of which are presented in the report), the enforcement actions taken did not always appear to be appropriate given the circumstances. Consistency is the main issue and we found that enforcement actions varied greatly in approach and result from region to region.

* The issues surrounding regulation of solid waste discharges to wetlands are not enforcement issues per se, but a broader programmatic problem that merits resolution.

(42) Regulation of illegal solid waste discharges is an enforcement issue. We agree that regulation of solid waste discharges into wetlands involves broader issues across multiple programs; however, the problem persists. The discharge of solid waste (a pollutant) into waters of the U.S. without complying with the permitting provisions of either Section 402 or 404 is unlawful and comes under EPA's jurisdiction. EPA has consistently maintained that solid waste discharges can be regulated under 404. However, since the COE makes the determination of a "discharge" for Section 404 under its definition which excludes discharges for the purpose of waste disposal, and EPA, under an MOA, agreed to enforce such discharges as Section 402 violations, it is incumbent on EPA to ensure that these violations are enforced and brought into compliance through Section 402, 404, or any other mechanism available to the Agency. The "broader programmatic problems" need to be resolved.

* The Office of Water agrees that monitoring compliance with administrative and judicial consent decrees is important. We also agree that there is a need for carefully worded conditions in consent decrees and that the Regions should place as much of the burden as possible on the violator, as opposed to the Agency.

(43) No comment necessary.

* The failure of the Regions to focus on systematic monitoring of unpermitted discharges is understandable given that they have very limited staffs; learn about unpermitted violations

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from private citizens, the Corps, and other Federal and state agencies; and already know about more violations than those limited staffs are capable of handling. Nevertheless, the wetlands program agrees that this issue warrants further examination.

(44) *No comment necessary.*

D. IG Draft Recommendations

* As already noted above, the Office of Water disagrees with any suggestion that EPA should be monitoring Corps enforcement actions.

(45) *As we have previously stated, we found that statutory responsibility for enforcement against unpermitted discharges is vested with EPA and, therefore, it is incumbent upon EPA to monitor the COE's implementation of its statutory authorities. In addition, monitoring would produce a more effective EPA enforcement program by assuring consistent approach for all significant violations. The Regions would have the opportunity to review violations received by the COE and make its own determination of unlawful violations subject to EPA enforcement lead. This would make EPA the decision-maker, as the Agency with statutory authority, by allowing it to consistently select cases that produce the most impact and effective use of its limited program resources.*

* With regard to the remaining draft recommendations on enforcement, as stated above, Headquarters has issued several enforcement guidance documents to the Regions within recent years and will respond as needed on follow-up issues.

(46) *OW offered no specific comments on the remaining recommendations in Chapter 3.*

Section 404 Regulatory Program Needs Better Controls, Guidance, and Interagency coordination to Properly Fulfill Statutory Responsibilities

A. Background

* Contrary to statements in the draft report, and as explained below, Headquarters has issued programmatic guidance related to Regional public notice review. Moreover, the criticism of Headquarters for not obtaining "measurable commitments" from the Regions is inconsistent with the goals of the STARS system and the Agency's current management approach.

- (47) OW indicates that the report incorrectly states that EPA Headquarters had not issued programmatic guidance on Regional public notice review. However, the Section 404(b)(1) Guidelines and the mitigation MOA with the COE mentioned by OW relate to COE technical review and evaluation of individual permit applications which are not directly relevant to the findings in this Chapter. The related findings in this Chapter involve establishing standards of performance for regional internal permit review processes, regional monitoring and reporting on public notice reviews, establishing control and consistency in processing of public notice reviews to ensure the most significant permit applications receive proper attention and that comment deadlines and related requirements, as agreed to with the COE, are met.

* The data on page 52 on the number of Section 404 individual permit applications (5,400) and the number of other actions authorized under general permits (28,000) conflict with national Corps data and should be reevaluated. Also, the draft report underestimates the amount of staff time needed to complete a Section 404(c) action. We believe that a Section 404(c) action takes at least 5,000 hours to complete.

- (48) COE permit actions, individual and general, were taken from a compilation of applicable COE Regulatory Reports for FY 1989. Based on these COE reports, the numbers in our draft report are correct. OW did not provide the source of COE national data referred to in their response or the correct statistics according to their source. In addition, OW provided no support or source for the 5,000 staff hours cited as needed to complete Section 404(c) actions. The 2,080 hours cited in the report was taken from the Wetlands Protection Workload Model for FY 1990 (draft) - the latest information made available to us for our audit period. We have not been provided any additional documentation that would support OW's 5,000 hour estimate.

We were informed during our review that the large amount of time it takes to implement a 404(c) action, whether 2,080 or 5,000 hours, was generally caused by the lengthy and detailed procedural requirements of the 404(c) regulations. It seems unrealistic that Congress intended to make it this difficult for EPA to impose a protective authority provided to protect sensitive areas from dredge or fill activities when determined to be cause an unacceptable adverse effect. The only statutory requirements in Section 404(c) were that the Administrator (1) before making the unacceptable impact determination, consult with the Secretary of the Army, and (2) set forth in writing and make public his findings and reasons for making any determination under this subsection.

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If the process is cumbersome, it is due to the Agency's regulations not the statute.

B. IG Draft Finding - Regions Did Not Adequately Track, Monitor, and Report Program Activities

* Statements in the draft report to the effect that the Regions should be tracking general permit data is misplaced and unrealistic in light of the fact that most general permit discharges proceed without any notification to the Corps.

(49) Based on our interviews with COE district personnel and regional staff, the COE is informed in advance of many general permit discharges (for Nationwide 26, notification is required). The COE reviews many other discharges to determine whether the discharge qualifies under a general permit and so notifies the general permittee on request. We were told repeatedly by regional wetland staff that general permits in particular Nationwide 26 could have significant adverse environmental impacts and that prior discharges authorized under both individual and general permits were not routinely considered when evaluating proposed fills because the information was just not available to them. The important issue here is not whether general permits can be effectively tracked, but how can wetland impacts be clearly evaluated without accurately maintaining historical information on prior wetland discharges. Accumulating information on wetland impacts was one of the goals of establishing a wetlands management information system as described by EPA's national program office in 1985. However, although Regional systems provide for tracking impacts in Regional databases, the systems are not compatible between regions and the information was not adequately maintained. In addition, we mentioned general permits to establish that their total impact cannot be effectively evaluated, as in the case of the Nationwide General Permit 26, without having some tracking mechanism.

* The draft report's criticism that Regional databases contained incomplete records is unfair to the extent that the Regions are generally dependent upon the Corps to provide them with this data and that, without Corps cooperation, it is unrealistic to expect the Regions to be able to independently obtain all this data.

(50) Regional wetland database systems were established primarily at the behest of Headquarters program management. If this information was not available to regions, we can not understand Headquarters emphasis on collecting such information in 1985 and requesting that the regions, through SPMS, report wetland impact information. In addition, our reviews in three regions found that the COE usually supplied

information in individual permit actions either on the public notice or when requested; however, we were told that the extent of cooperation depended on the COE district involved. Regional staffs stated that the overriding problem was that public notices were not consistent from one COE district to another. The solution, which would resolve the Agency's information requirements plus speed up its review of public notices, would be to reach an agreement with the COE on a national level for standardized permit information in Section 404 public notices. Information that wetlands staffs indicated was routinely needed anyway for an accurate assessment of impacts and for determining compliance with the Section 404(b)(1) Guidelines.

* The Office of Water agrees with the draft report's suggestion that EPA coordinate with the Corps on database development and consider using the Corps' computerized information system, known as the "Regulatory Analysis Management System" (RAMS), once that system is fully implemented by the Corps.

(51) The time to coordinate the sharing of database information is during system development and implementation not once the system is completely designed and implemented. Getting the necessary changes that may be required to enable EPA to use COE's RAMS data collection once fully implemented could be difficult.

C. IG Draft Finding - Regions Did Not Implement Consistent/Controlled Public Notice Review Processes

* The draft report's conclusion that there is a lack of programmatic guidance on regional public notice review ignores the fact that such review is guided by the principles set forth in the Section 404(b)(1) Guidelines themselves. It also fails to mention the EPA/Army Mitigation MOA, which was finalized in February 1990 and provides a procedural framework for regarding the level of mitigation needed to demonstrate compliance with the Guidelines. Moreover, Headquarters has established a Section 404 regulatory training course for Regional staff which addresses Guidelines interpretation and related permit review issues.

(52) Section 404(b)(1) Guidelines and the mitigation MOA with COE are basic to the evaluation of Section 404 permit applications. However, their existence is unrelated to the finding which is the regional internal public notice review processes. The finding relates to the need for national guidance and controls in the regional permit review process to ensure consistent use of available authorities, proper review of significant permits, compliance with MOA requirements on permit comments, followup on recommended denials, etc. A staff training course would be a good

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addition, but it alone will not correct the deficiencies pointed out in this chapter.

* For purposes of clarification, the Corps beach nourishment project described on page 60 did not impact wetlands, but instead sandy beaches and coral patch reefs.

(53) We agree. Beaches and coral reefs are U.S. waters under Section 404 and not within the regulatory definition of a "wetland." We have reworded the report to accurately describe the resource.

* The Office of Water strongly disagrees with the draft report's conclusion that Regions should be invoking Section 404(q) in every case where a Regional recommendation of permit denial is not accepted by the Corps. As explained below, such a conclusion is indicative of a lack of understanding of the appropriate role of Section 404(q) in the Section 404 permit review process and of the resource-intensive nature of these actions.

(54) Regional staff explained to us the resource-intensive nature of a 404(q) action. The report does not emphatically require the invocation of Section 404(q) each time a recommendation for permit denial is not accepted by the COE. The report basically states that EPA should not be routinely recommending permit denial if it is not serious in its convictions that a significant adverse environmental impact will result from a Section 404 discharge. At a minimum, denial recommendations should comply with the requirements of the 404(q) MOA so there is no question as to EPA's resolve. We found examples of comment letters where permit denial was recommended by a region based on substantial environmental harm but the comment letters had inappropriate signatures or were filed late. Other permit denial recommendations complied with the 404(q) MOA but with no apparent follow-up. We concluded from our review that recommendations for permit denial without the serious intent to invoke dispute resolution or failing to comply with 404(q) requirements sends a message to the COE that the Agency either lacks resolve or support for its position which ultimately wastes EPA and COE resources with little benefit to the permitting process. It also presents an unpredictable regulatory approach to the COE who may not be able to distinguish when EPA is serious and when its not. Therefore, cooperation in acceptance of EPA's permit recommendations may be degraded. If EPA only submits serious recommendations for denial, then a 404(q) would be invoked in every case and the COE would be aware that rejection of EPA recommendations would be backed up with 404(q) or 404(c) actions.

D. IG Draft Finding - Interagency Dispute Resolution
Authorities Under Section 404 Rarely Used by Regions

* As with enforcement, the IG's office continues to misperceive the appropriate role of EPA's Section 404(q) and (c) authorities within the Section 404 program. These continue to be very resource-intensive, high-visibility tools and initiation of either Section 404(q) or (c) authority is likely to continue to be infrequent, as compared to the number of permits being issued by the Corps.

(55) We recognize that invocation of Section 404(c) and 404(q) authorities will be infrequent in relation to permit issuances because of limited program staff and because such authorities should be reserved for the most serious environmental impacts. However, our audits of regional permit reviews disclosed cases where the regions expended substantial resources to support a 404(q) or 404(c) action because of perceived severe environmental harm only to drop the action without explanation. Also, cases were found where recommendations for permit denial were made on the basis of unacceptable adverse environmental effects, but 404(q) and 404(c) actions were not pursued and reasons not documented. We are not asking OW to do any more than was stated in the Agency Operating Guidance: "... prohibition or restriction of discharge sites under section 404(c) where unacceptable adverse environmental effects are projected" especially for those cases defined as significant. According to the definition of a "significant issue" in the FY 1988 Agency Operating Guidance for SPMS/STARS reporting: "Significant signifies an EPA recommendation for permit denial, or modification, or conditions" and requires resolution to bring the discharge into compliance with the Section 404(b)(1) Guidelines. Between 1988 and 1990 the three regions reported in SPMS/STARS that the COE had issued permits over their recommendations for denial or substantial permit modifications in 215 "significant" cases. In these cases, Agency resources used to document and support EPA's position were essentially wasted without exercising the dispute resolution process, or possibly wasted the time of the COE because the EPA's original position lacked substance. What we recommended in the report was consistency.

* The draft report fails to indicate that, within recent years, EPA has had increasing success with its Section 404(q) elevations and the Corps, in response to such elevation requests, has been increasingly willing to issue programmatic guidance reversing a Corps District permit decision contrary to the Region's recommendation. Moreover, recent Section 404(q) and (c) actions have been effective in a broader programmatic sense by serving to define issues of national significance.

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(56) While there may have been recent successes, the amount of such activity has been limited compared to the apparent need. In conversations with COE personnel over failing to deny or modify permits as recommended by EPA, we were basically told that EPA has the option to use its 404(q) and 404(c) authorities to stop any undesirable action and since the regions elected not to use those authorities, their original recommendations must have lacked merit or conviction. COE should believe that every recommendation made by EPA's regions has not only merit but management support. As described in OIG comment 48 above, the restrictions on using these authorities on a consistent basis are regulatory not statutory.

* The draft report's observation that few of the Regional comment letters satisfy the signature and time requirements of the Section 404(q) MOA is somewhat misplaced since the Regions generally meet those requirements when commenting on permits for which they are likely to seek elevation under the MOA.

(57) As stated above, EPA recommendations for permit denial or significant permit modifications should not be arbitrarily made. Any recommendation made by EPA, especially ones for denial or major project modification, should be considered serious. We did not find this to be consistently the case. In addition, OW presented no facts to support their broad statement that all serious permit recommendations comply with MOA requirements.

* For purposes of clarification (see page 66), in our July 1990, comments on the final Region 4 wetlands program audit, the Office of Water stated that we would continue to evaluate the need to revise the Section 404(c) regulations. That process is ongoing, although a final decision has not yet been made.

(58) Problems with the 404(c) regulations have been documented in the program's literature since at least 1985 indicating the need for revision. In fact, the 1988 Agency Operating Guidance indicated that revised 404(c) regulations would be proposed. We point out in this chapter that the problems with the 404(q) and 404(c) processes remain. Hence our recommendation for timely revision of the 404(c) regulations and necessary modifications to the 404(q) MOA.

E. IG Draft Finding - Regions Did Not Always Fulfill Jurisdictional Responsibilities

* The introductory and background discussions under this draft finding contain some inaccurate information. EPA does have the ultimate authority to determine the scope of "waters of the United States," but not necessarily of "discharges of dredged or fill material." The 1980 MOA covered geographical jurisdiction

determinations only and not determinations of the existence of a "discharge." The Section 404(b)(1) Guidelines contain the environmental criteria that the Corps must apply when deciding whether to issue a permit. Thus, the statement on page 68 that Corps wetlands identifications and delineations should comply with the Guidelines is wrong, as is the statement at the top of page 69 that the purpose of both Geographic Jurisdiction MOAs is to have EPA monitor Corps jurisdictional determinations to ensure compliance with the Guidelines.

- (59) *We agree that incorrect jurisdictional authority has been implied and that the wetland delineation manual should be the basis for wetland identification rather than Section 404(b)(1) Guidelines. Changes have been made in the report to reference the correct guiding document. However, as recognized under the 1989 MOA, EPA does have a monitoring responsibility for COE jurisdictional determinations.*

* The draft report's criticisms of Regional monitoring of Corps jurisdictional determinations are unwarranted to the extent that the Jurisdiction MOA did indeed envision that the Regions would rely primarily on review of Corps public notices, which generally provide sufficient information on wetland identification and geographic jurisdiction. The Jurisdiction MOA itself provides that, "to ensure that EPA is aware of determinations being made for which notification is not forwarded through the public notice process," the Corps should provide EPA with copies of all final determinations of no geographic jurisdiction and of application of a Section 404(f) exemption.

- (60) *The report does not state that EPA should not rely on public notices for monitoring COE jurisdictional determinations on individual proposed permits and the MOA does imply that EPA will use the public notice process for monitoring individual permit determinations. However, as only partially quoted by OW, the MOA provides:*

In order to track the DE's [COE District Engineer] compliance with EPA guidance, the DE shall make his files available for inspection by the RA at the district office....

To ensure that EPA is aware of determinations being made for which notification is not forwarded through the public review process, the Corps will provide copies to EPA of all final determinations of no geographic jurisdiction and all final determinations that an exemption under Section 404(f) is applicable.

Contrary to OW's statement, the MOA does provide for EPA monitoring and inspection of COE geographic jurisdictional determinations and Section 404 notices do not include

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information on "no geographic jurisdiction" determinations or Section 404(f) exemptions since no permit would be involved in these decisions. Also, according to regional staffs actually reviewing public notices, the documents are not consistently prepared by COE districts and do not always include the information needed to adequately assess jurisdictional determinations.

* We acknowledge the problems associated with EPA/Corps disagreements regarding discharges of solid waste, and will continue to try to work with the Corps and the EPA Section 402 program to resolve the issue.

(61) See OIG comments (42).

F. IG Draft Recommendations

* The office of Water has no plans to establish "controls" over public notice reviews. We have issued programmatic guidance relating to public notice review and will continue to do so as warranted. Currently, we are working with the Corps to develop joint mitigation banking guidance.

(62) As previously stated, we believe OW misconstrued the focus of the finding related to inadequate guidance on regional public notice review processes. Based on our audit evidence, we continue to conclude that additional regional guidance and controls related to regional permit processing are needed to ensure consistent, effective permit reviews, meaningful permit recommendations, and compliance with applicable MOA requirements.

* Consistent with the suggestion in the draft report, upon final implementation of the RAMS system, we will work with the Corps and consider adapting the system for use by EPA.

(63) OW accepted recommendation. See OIG comment (51).

* We do not believe that, at this time, any additional "national direction or controls" are needed with regard to the Jurisdiction MOA, including EPA review of Corps jurisdictional and Section 404(f) determinations.

(64) See OIG comment (60).

* Resolution of the issues surrounding regulation of solid waste to wetlands requires the cooperation of the Corps and the EPA Section 402 program. The Wetlands Division will continue its efforts to work with both entities on this matter.

(65) See OIG comment (42).

* The Office of Water does not contemplate seeking revisions to the Section 404(q) MOA signature requirements since, as stated above, such requirements have not been problematic.

(66) *The recommendation only proposes that the required signature level for EPA comment letters be made equal with requirements imposed on the other resource agencies. Lowering the signature requirement for comment letters from the Division Director's level would have no effect on management's control over the actual elevation process. Elevations would still have to be approved at the Assistant Administrator level. However, having personnel at the section chief level (similar to FWS) authorized under 404(q) to sign comments would mean that EPA's resolve in a particular permitting situation could not be determined by who signs the comment letter. That would mean that all EPA comments would carry equal weight. Regional staff indicated to us that this small change in the MOA would help them in their negotiations with the COE over recommended permit modifications and denials. Therefore, we continue to recommend the subject change in the 404(q) MOA.*

* EPA has issued interim Section 404(q) procedural guidance which is now in effect; EPA also is in the process of developing Section 404(c) guidance.

(67) *No comment necessary. OW has or is in the process of taking the recommended action.*

V. Strategic Initiatives Were Not Effectively Implemented to Produce Long-Term Improvements in Wetlands Protection

* The introductory paragraph at the top of page 79 makes several broad conclusions that are not supported by the subsequent information in the draft report itself. For one thing, the Regions did identify priority wetlands, based on value and vulnerability, in accordance with the May 1986, Headquarters memorandum. Second, the bold conclusion that "the Regions' approaches to strategic initiatives . . . sometimes sent a negative message to other government entities and the regulated public regarding EPA's commitment" to wetlands protection is not substantiated in the draft report.

(68) *The three regions we visited did not identify priority wetlands as requested by EPA Headquarters. A May 27, 1986 memorandum from a Headquarters wetlands manager to regional Section 404 coordinators stated:*

In February, 1985, I requested that each Region identify and list the most valuable and vulnerable wetlands located in your region. ...Fundamentally, we

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should identify geographic areas, wetland types and wetland impacts meriting special attention. Then, we must focus more of our authorities and resources on those areas and impact.

...The Regional priority lists identify the most important and the most vulnerable wetlands in a region. Appropriate application of these criteria will contribute to the most effective allocation of limited Agency resources to wetlands protection. In general wetlands on your lists should clearly be among the most ecologically valuable and most susceptible to conversion pressure.

...Preparation of the priority list will require extensive contact with other Federal, State, and local agencies....

...The resulting document should be more than a simple list....

...(2) Specifically identified wetlands: The more detailed the lists the more helpful they will be. ...the list should indicate those [wetlands] that appear to stand out as most important and should state why.

As shown in the report, each region did produce some type of wetlands list; however, the lists were inconsistent and did not conform to the Headquarters requirements reflected above. Not all of the regions solicited input from the public and other government agencies in compiling wetland lists as requested by Headquarters while others did. Region 6 identified wetland types. Region 4 generally identified all of its wetlands types by State and vulnerability but the Region did not identify its most valuable and vulnerable wetland resources as requested by Headquarters. Region 7 generally mapped large wetland areas in the Region. None of the regions prioritized the value and vulnerability of their wetlands and made these lists available to the public as reflected in Headquarters guidance. In addition, the lists as prepared fell short of helping "...alert EPA, other agencies and potential permittees concerning individual wetlands and wetlands systems that will require especially careful analysis before any permits can be granted" as stated in Headquarters guidance. Neither could they be used to "focus" authorities and limited resources on those valuable and vulnerable areas.

The statement regarding the negative message sent to outside agencies and the public regarding EPA's commitment to the most valuable wetlands is supported by (1) the examples of

deficient, uncoordinated strategic initiatives cited in this Chapter, (2) unaddressed outside requests for advanced identification assistance, and (3) the COE's criticism of EPA's failure to use available authorities to protect wetland areas once identified as unsuitable for fill.

A. Background

* The draft report incorrectly states that Headquarters identified Section 404 strategic initiatives as one of only three essential wetlands program elements. As stated above, there are certainly more than three "essential elements" to EPA's Section 404 program, which includes both the Section 404 regulatory program and nonregulatory protection approaches.

(69) Wetlands program and annual operating guidance has consistently identified permit review, enforcement, and advanced identification (subsequently changed to strategic initiatives) as the Section 404 program's base or core program elements along with other "nonregulatory" activities. However, these three activities are the primary Section 404 responsibilities reflected in the Clean Water Act, codified in regulations, and established in regional programs. Base or core program elements would represent those elements essential to performance of statutory or regulatory responsibilities. Therefore, we can not understand OW's objection the terms "essential elements." However, we are willing to change the report to reflect base or core program elements rather than "essential."

* We are concerned that IG staff misconstrued the intent of the May 1986 memo on priority wetlands. Headquarters did not ask the Regions to rank and categorize wetlands (page 81), but instead to identify and list priority wetland types and areas based on value and vulnerability.

(70) If you require a region to identify its most important wetland areas as to value and vulnerability, you are by necessity prioritizing wetlands within the region. To prioritize means "to rank." Also, EPA Headquarters requested that the wetlands be identified as to type/function or to "categorize" listed wetlands where possible. Since OW has problems with the terms "ranking" and "categorize," we have substituted the term prioritize for ranking and eliminated the term categorize from the report altogether.

B. IG Draft Finding - Regions Did Not Identify and Prioritize the Most Valuable, Vulnerable Wetlands

* This draft finding is incorrect. As the draft report

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itself indicates, the Regions did identify priority wetlands. Headquarters did not ask the Regions to rank and categorize wetlands which, as the Regions themselves noted, would be a difficult process.

(71) This comment has already been addressed in OIG's response above [see OIG comment at (68)].

* We disagree with the statement, at the top of page 82, to the effect that priority wetlands lists, unless developed with "adequate collaboration and joint acceptance of these lists by regulators and the regulated public," were not very useful. These lists have strengthened the Regions' ability to focus their wetland protection efforts, and in fact were intended primarily to assist the Regions in setting priorities for use of their limited staffs.

(72) As stated above, Headquarters guidance for preparing the list of priority wetlands indicated that extensive contact and coordination with the public and other government agencies would be necessary to make the list a valuable tool for focusing resources. The guidance also intended for the priority lists to be made available to the general public in FY 1987. We agree that the lists have some limited internal value; however, if other resource agencies (especially the COE) and the public do not agree with EPA's assessment of a wetlands value and vulnerability, then intensified focus on the wetlands by EPA's program staff may have minimal effect on the regulatory process and, therefore, reduce the effectiveness of EPA's already constrained resources. We agree that a purpose of the lists was to assist the regions in setting priorities for use of their limited resources, but, as we reported, the lists provided to us by the regions were of no use for priority setting. For example, Region 6 told us (could not find it in writing) that its reported priorities were bottomland hardwood wetlands and coastal wetlands. A permit reviewer could not prioritize his work based on such broad wetland categories.

B. IG Draft Finding - Strategic Initiatives Needed More National Guidance, Coordination, and Oversight

* The draft report appears to contradict itself by stating on page 83 that Headquarters failed to "provide guidance on implementing the strategic initiatives program element," and then on page 86 stating that the Regions "did not always comply with national guidance for advanced identification. . . ."

(73) Contrary to OW's comment, there is no contradiction in the report related to inadequate guidance for strategic initiatives. There is guidance for advanced wetlands identification. However, strategic initiatives are much

broader in scope than advanced identifications as shown in the report. Advanced identification is just one activity under the strategic initiatives program element although it is an important part of this element. Therefore, we continue to conclude that guidance for implementing and measuring the broad scope of activities under the strategic initiatives element was inadequate.

C. IG Draft Finding - Advanced Identifications Need to be Adequately Planned, Coordinated, and Controlled to Ensure Effectiveness and Compliance with Guidance

* Contrary to the statement on page 88, Region 7 has issued a public notice proposing to designate wetlands within the Rainwater Basin as suitable or unsuitable for fill and thus will be fulfilling a basic objective of the ADID approach.

(74) We agree with OW's comment on the Region 7 advanced identification. The cited public notice was issued and this notice did identify areas as suitable and unsuitable for fill. Region 7's comments on the position papers addressed this discrepancy in the draft report. However, the comments were not received in time to be adequately addressed prior to issuance of the draft report. We have made changes in the report to reflect this information.

D. IG Draft Recommendations

* We believe it is inappropriate for EPA to proceed independently with regards to wetlands ranking in light of the recent White House announcement that the Administration will be establishing an interagency technical panel on wetlands categorization.

(75) The recommendation only requested that the program prioritize wetlands to fulfill the purpose as previously provided in Headquarters guidance. If program management wishes to delay action until the interagency technical panel on wetland categorization has concluded its study, we have no objections. We can resolve the recommendation based on Headquarters intent that the recommended action will be taken when the technical panel concludes its work.

* At this time, the Office of Water has no plans to negotiate an MOA on ADID with the Corps at the national level.

(76) OW disagrees with this recommendation but gives no reason for its objection. Based on the problems noted during the audit with COE cooperation on advanced identification studies, the pressing need for advanced planning initiatives to identify valuable and vulnerable wetland areas needing protection, and the need to gain COE support for these

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determinations in the permitting process indicates that a national MOA would be the most simple, effective method of resolving this problem. The COE should also have a mutual interest in resolving this problem because advanced identifications, COE's special area management plans (SAMP), and other Section 404 planning initiatives have the potential to provide regulatory relief. With the COE and EPA possessing mutual goals and objectives in wetlands planning, the two agencies should confer on how to jointly proceed in prioritizing and accomplishing the same planning initiatives that each often ends up doing alone. However, we have added the option of negotiating field level agreements with the COE for advanced identification cooperation to the recommendation to provide more flexibility to program management.

* We agree that the Regions should initiate ADID projects in accordance with existing national guidance and that Headquarters should ensure that ADIDs are consistent with such guidance.

(77) No comment necessary. OW agreed with recommendation.

VI. VI. Appendices

A. Appendix II - Glossary. The following definitions should be deleted from the glossary:

(78) OW provided many changes to the definitions for terms included in Appendix II as presented below. We agree with some of the comments but not all. However, since we do not consider these terms and definitions as a significant contribution to the message of the report, we have removed the terms and definitions from the glossary.

* Bottomland Hardwoods - This seems largely irrelevant to the findings and discussion in the draft report, which does not focus on wetland types. Moreover, it is unclear why the glossary as drafted defines only two wetland types, bottomland hardwoods and pocosins.

* Consent Decree - Since this is a general legal term specific to neither wetlands nor the Section 404 program, we suggest removing it from the glossary. If it is retained, it needs to be clarified to explain that, in a judicial context, such a decree is an agreement of the parties made under the sanction of the court, but is not the result of a judicial determination. Such decrees are not limited to judicial actions, but also occur in the administrative arena, such as consent decrees resolving administrative penalty actions without going to hearing.

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* Functional Wetland - This definition should be eliminated since it contains incorrect information and because we believe it is unnecessary to draw a distinction between "functional" wetlands and wetlands as defined later in the glossary.

* Pocosin - See comments above regarding bottomland hardwoods.

* Regulatory or Regulatory Statutes - This term is a misnomer and should be deleted. To our knowledge, there is no such thing as a "regulatory statute." Moreover, neither statutes nor regulations are unique to wetlands protection.

* Section 309 - This does not necessitate a separate definition. Moreover, as indicated in our comments on the Enforcement discussion, the explanation of enforcement is incorrect.

* Section 404 - Similarly, this does not necessitate a separate definition, especially given that Appendices III and IV define Section 404, its various provisions, and EPA and Corps statutory responsibilities. For the same reason, the following terms should also be deleted from the glossary: Section 404(c); Section 404 Enforcement; and Section 404 Permits.

* Section 404 Jurisdiction - This does not necessitate a separate definition. However, if it is retained, it should be clarified to state that only activities involving a "discharge" of dredged or fill material are regulated under Section 404. Moreover, it would be useful to include the definition of "geographical jurisdiction" (see comments below) here.

* Section 404(g) - This does not necessitate a separate definition. However, if it is retained, it needs to be revised to correctly reflect the statutory language, which directs Army to enter into agreements with EPA and other appropriate agencies for the purpose of minimizing duplication, paperwork, and delays in permit issuance.

* Water Recharge Area - This definition appears irrelevant to the issues covered by the draft report.

* Wetland Conversion - This definition, as well as the definition of "wetland degradation" do not draw a sufficient distinction between destruction through physical conversion contrasted with degradation through chemical contamination.

* Wetland Discharge - See comments below under "Dredge and Fill."

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The following definitions need clarification as explained below:

* Administrative Order - This should be termed "administrative compliance order" and defined as a formal enforcement response authorized pursuant to Section 309(a) of the Clean Water Act under which EPA (and not the Corps) orders the violator to cease any ongoing unauthorized discharge and, where appropriate, to remove unauthorized discharge material and/or otherwise restore the site.

* Administrative Penalty - This is another formal enforcement mechanism authorized under the Clean Water Act. Section 309(g) gives EPA and the Corps authority to assess civil administrative penalties not to exceed \$125,000 per violation for unauthorized discharges in violation of Section 404.

* Advance Identification - The definition should reference the regulatory authority, which is 40 CFR Part 230.80; also, the regulations themselves do not restrict ADID projects to "vulnerable" wetland areas.

* After-the-Fact Permits - The definition should specify that such permits are only to be issued in those situations where the discharge complies with the Section 404(b)(1) Guidelines, and that the permit authorizes the discharge from the date of issuance only, but does not cure the period of violation prior to issuance of the permit.

* Cease and Desist Order - This is more than a "notification" and is not issued by EPA. It is a formal enforcement response issued by the Corps and generally directs an alleged violator to cease any further discharges. Such an order can also direct removal and/or restoration of the violation site. Moreover, contrary to the definition in the draft report, "dredging" is not regulated by Section 404.

* Compensatory Mitigation - We recommend subsuming this definition in the definition of "mitigation," and revising it as provided below.

* Dredge or Fill - Dredged material and fill material are each separate terms that are defined differently in the Section 404 regulations. Dredged material is defined as material that is excavated or dredged from waters of the United-States. Fill material is defined as any "pollutant" which replaces portions of the "waters of the U.S." with dry land or which changes the bottom elevation of a water body for any purpose. Given the significance of the term, there should be a separate definition of "discharge of dredged or fill material," which the regulations define as the addition of dredged material or fill material into waters of the United States.

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* Ecosystem/Ecological Function - This definition should be revised to delete the discussion of "ecological function," which is inaccurate and misleading.

* Geographical Jurisdiction - Again, this definition is inaccurate and somewhat misleading. Geographic jurisdiction deals with whether an area is a wetland within the three-parameter regulatory definition and whether such wetland, or an open water area, constitutes a "water of the United States" within the meaning of the Clean Water Act. Jurisdictional wetlands include "adjacent" wetlands and isolated wetlands where the destruction or degradation of such wetlands could affect interstate commerce.

* Mitigation - The definition should be clarified to explain that mitigation refers to undertaking all appropriate and practicable measures to minimize harm to the aquatic ecosystem. Under the Guidelines, mitigation options must be considered in the following sequence: avoidance; minimization; and compensation, which includes on-site or off-site wetlands restoration, creation, or enhancement.

* Permitting Authority - This needs to be revised to acknowledge that a state may also be the permitting authority if they have assumed the Section 404 program.

* Practicable Alternative - The explanation should be placed in context by stating that the Guidelines include a "practicable alternatives" test under which a permit must be denied if there is a practicable alternative to the proposed discharge. In defining the term "practicable alternative," it is preferable to use the exact regulatory definition found at Section 230.10(a)(2) of the Guidelines themselves.

* Section 404(b)(1) Guidelines - The explanation should be clarified to state that the Corps' decision regarding whether to issue or deny an individual permit is based on the Guidelines and the Corps' public interest review.

* Wetland - The exact regulatory definition needs to be included in the glossary. As presently drafted, there is no reference to "normal circumstances."

B. Appendix III - Federal Response Under the Clean Water Act to Wetlands Destruction.

* Turning to the last sentence in the first paragraph on page 100, when Congress enacted Section 404 in 1972, it did not do so with the two stated purposes explicitly in mind. Moreover, as stated above, Section 404 regulates more than activities in wetlands and covers all waters of the U.S.

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* The note at the middle of page 101 is incomplete and should be revised to be consistent with Section 404(f)(2).

* The explanation of enforcement starting with the discussion of Section 404(s) at the bottom of page 101 misconstrues EPA and Corps Section 404 enforcement authority and should be revised consistent with the numerous comments above on enforcement.

(79) We made changes/additions to this Appendix in accordance on OW's comments where considered appropriate.

C. Appendix IV - EPA and COE Section 404 Responsibilities

* The first sentence under "Dredge and Fill Permitting" (page 103) is inaccurate since EPA and the Corps jointly implement Section 404. The Corps handles the day-to-day administration of the permit program, reviews applications, and decides whether to issue or deny permits.

* The discussion at the middle of page 103 incorrectly defines the public interest review. It does not consist of balancing input from various sources, but instead, as correctly described at the bottom of page 103, involves balancing the impacts of the proposed discharge on the values listed in the regulations.

* The discussion of general permits at the bottom of page 103 should also indicate that certain nationwide permits require predischARGE notification to the Corps.

* The top of page 104 needs to be clarified to state that a permit cannot be issued unless the discharge complies with the Guidelines and is in the public interest.

* In the discussion of general permits at the middle of page 104, the reference to "individual applications for general permit consideration must be qualified by the COE district," is very confusing since the existence of an applicable general permit means that the discharge can proceed without first submitting an individual permit application. Thus, this discussion needs to be clarified.

* The discussion of enforcement at the bottom of page 104 and top of page 105 needs to be revised consistent with previous comments regarding the basis and scope of corps enforcement and the intent and purpose of the enforcement MOA.

* The last sentence in the enforcement discussion on page 105 needs to be clarified. It is EPA's position that EPA and the Corps each have the authority to assess administrative penalties for unpermitted discharges, as well as permit violations.

Moreover, Section 309(g) explicitly refers to assessment of penalties only and does not explicitly authorize corrective measures.

* On page 106, the last sentence under the discussion of the Guidelines needs to be modified to clarify that EPA's determination of unacceptable adverse impact as part of a Section 404(c) veto action can take into consideration compliance with the Guidelines.

* The discussion of geographic jurisdiction at the top of page 107 needs some clarification. The Attorney General's decision was issued in 1979 and stated that EPA has final authority for determining the scope of "waters of the United States" for purposes of the applicability of the entire Clean Water Act, including Section 404. The discussion on the jurisdiction MOA need not discuss the previous agreement, but instead should explain the 1989 MOA which also covers the 404(f) exemptions.

* The discussion of enforcement at the top of page 108 is inaccurate and unclear. The reference to "administrative orders" should specify Section 309(a) as opposed to 309(g) orders, both of which would be applicable to any unauthorized discharge. The reference to EPA's historical use of "administrative orders" is totally inaccurate. Issuance of Section 309(a) orders is certainly not limited to serious violations, but occurs in situations where EPA seeks to get timely removal of an illegal discharge. The reference to Section 404(s) is inaccurate and redundant given the earlier discussion of Corps enforcement authority.

* The discussion of Section 404(c) at the middle of page 108 should be clarified to state that the authority may be used in advance of any permit application or in response to a Corps decision to grant a particular permit application.

(80) *We made changes/additions to this Appendix in accordance on OW's comments where considered appropriate.*

D. Appendix V - EPA Procedures for Section 404(g) and 404(c) Actions

* In the first paragraph at the top of page 109, the third sentence should indicate that such notification is required only if the Regional Administrator (RA) has objected to the permit.

* The discussion at the bottom of page 110 should be clarified to state that the RA must notify both the Corps and the applicant of the intent to issue a public notice for the proposed determination. Also, in addition to failure to commit to corrective action within 15 days, the public notice can also

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issue if the applicant has failed to demonstrate that no unacceptable adverse effects will result from the proposed discharge. The reference to one staff year for each Section 404(c) action applies to Regional aspects of such an action.

(81) We made changes/additions to this Appendix in accordance on OW's comments where considered appropriate.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

SEP 20 1991

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Draft Audit Report, Audit No. E1HWEO-04-0291
EPA's Implementation and Management of the Wetlands
Program

FROM: LaJuana S. Wilcher *LaJuana S. Wilcher*
Assistant Administrator

TO: Kenneth A. Konz
Assistant Inspector General for Audit

Thank you for the opportunity to review and provide comments on the draft audit report on EPA's Implementation and Management of the Wetlands Program. While I recognize and appreciate the time and effort expended by your staff to undertake the audit, I am very concerned that many of the draft findings are based on misconceptions about EPA's wetlands program in general, and the Clean Water Act Section 404 regulatory program in particular. In addition, many of the draft findings and recommendations appear to be inconsistent with recent Administrator/Deputy Administrator management directives. Moreover, I am concerned that the draft report ignores many of the wetlands program "successes" achieved within recent years. An overview of my various concerns about the draft report is provided below, followed by more detailed comments on the draft findings and recommendations. I strongly urge you to review these comments carefully and revise these draft findings and recommendations accordingly.

At the outset, it is important to recognize that EPA's wetlands program encompasses both the Clean Water Act Section 404 regulatory program and nonregulatory approaches to wetlands protection. This latter aspect is virtually ignored in the draft report, even though Headquarters and the Regions continue to spend an increasing amount of time and effort on nonregulatory protection activities.

The draft report also fails to acknowledge that the Section 404 program is jointly implemented by two agencies, EPA and the

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Army Corps of Engineers (Corps). The Corps is the predominant field-level agency because of its role as permitting authority, as well as a larger field presence and resource base, and EPA plays an important supporting role in program administration.

Within recent years, the two agencies have made great strides in strengthening their working relationship, which has led to more efficient and effective implementation of the Section 404 program. Nevertheless, neither agency has total control over all aspects of program policy and implementation.

The draft report's finding that "improvement [is] needed in management direction, control, and accountability" is especially troubling because it is premised on a management philosophy that is inconsistent with current Agency policy and also because it ignores the quantitative and qualitative successes of the Agency's wetlands program over the last six years. In a November 1989 memorandum to all EPA employees, entitled "Improving EPA's Management Systems," the Deputy Administrator announced a number of changes to existing management systems. These old systems tended to emphasize numbers of actions over the quality of, and the results obtained from, these activities. According to the Deputy Administrator, this approach "often conflicts with the generally perceived need for flexibility to address variations in the complexity and severity of environmental problems" The key themes to these improvements include:

- * ensuring that our systems recognize complexity, quality, and environmental benefit in our assessments of Agency performance; and
- * increasing flexibility for Agency managers to focus limited resources on activities with greatest impact.

Even prior to this Agency-wide change, the wetlands program in FY 1989 initiated changes in our approach to tracking Regional commitments and accomplishments. A new strategic initiatives measure was established and the enforcement measures were changed to eliminate Regional commitments to a specified number of enforcement actions, as well as to delete an explicit reference to "significant violators." These changes were intended to provide the Regions with maximum flexibility to address priority Regional wetlands problems while still seeking to meet national objectives. Not only is this approach consistent with the Agency's existing management systems and current management philosophy, it also produced positive results. As the draft report itself acknowledges at the bottom of page 18, "[i]f the 1990 enforcement resolution activity was compared to 1988 . . . , the increase was significant." In light of these two factors, we strongly disagree with the draft report's finding that the wetlands program lacks adequate management control and accountability.

The draft report's findings and recommendations on the wetlands program's implementation of EPA's Section 404 enforcement responsibilities perpetuate many of the same misperceptions contained in the Region 4 audit report about EPA's role in wetlands enforcement and the goals of our enforcement program. The Clean Water Act gives EPA and the Corps joint authority to enforce against violations of Section 404. It is EPA's position that each agency has authority to enforce against unpermitted discharges and against discharges in violation of permit conditions. Moreover, the Corps has been enforcing against unpermitted discharges for many years, and the courts have not challenged the Corps' authority to do so. Given this statutory scheme, EPA believes that it is important to coordinate its enforcement efforts with those of the Corps. However, it is not our job to "oversee" Corps implementation of its enforcement responsibilities, nor would that be an efficient use of our limited resources.

In addition, the draft report seems intent on ignoring the Agency's progress in developing and implementing a nationwide Section 404 enforcement presence. As illustrated in the attached graph, since 1985 the Regions have increased significantly the number of Section 404 enforcement actions initiated and resolved. Not only have these actions sent a message to the regulated community and others that EPA is serious about enforcing the requirements of Section 404, but they also have produced tangible environmental benefits by resulting in the restoration of illegally filled wetlands or, where that was not feasible, requiring compensatory mitigation in the form of restoration of other degraded wetlands or creation of new wetlands. The draft report also fails to credit Headquarters with two valuable wetlands enforcement guidance documents that were finalized and distributed to the Regions in FY 1991: Section 404 administrative penalty guidance, which was issued jointly with the Office of Enforcement; and joint EPA/Army Section 404 judicial enforcement guidance.

Turning briefly to the final two sections of the draft report, as with enforcement, the report continues to overstate the appropriate role of Sections 404(q) and (c) in the Section 404 program, as well as EPA's ability to utilize these sections more frequently. In addition, the draft report ignores the various guidance documents and other tools developed by Headquarters related to the regional permit review process. The final section on Advance Identification underestimates the value of Regional efforts to develop wetland priority lists, which have assisted many of the Regions in focusing on the more valuable and/or vulnerable wetlands.

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Again, thank you for the opportunity to review the draft audit report on the wetlands program. As indicated above, more detailed comments are attached. In closing, I strongly encourage you to carefully consider these comments as you develop a final report.

Attachments

cc: Greer C. Tidwell, Region IV
Robert E. Layton, Jr., Region VI
Morris Kay, Region VII

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS**ACRONYMS/ABBREVIATIONS**

AO	Administrative Order
CFR	Code of Federal Regulations
CG	U.S. Comptroller General
COE	Army Corps of Engineers
CWA	Clean Water Act, as amended
DOJ	Department of Justice
EPA	Environmental Protection Agency
FMFIA	Federal Manager's Financial Integrity Act
FTE	Full Time Equivalent
FWS	Department of Interior's Fish and Wildlife Service
FY	Fiscal Year
GAO	General Accounting Office
GIS	Geographical Information System
GM-21	EPA's General Enforcement Policy
MOA	Memorandum of Agreement
NMFS	Department of Commerce's National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System (CWA, Section 402)
OIG	EPA Office of Inspector General
OFA	EPA Office of Federal Activities
OMB	Office of Management and Budget
OW	EPA Office of Water
OWAS	Office of Water Accountability System
OWP	EPA Office of Wetland Protection
SAMP	COE Special Area Management Plan
SPMS	Strategic Planning Management System
STARS	Strategic Targeted Activities for Results System

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FEDERAL RESPONSE UNDER THE CLEAN WATER ACT TO WETLAND DESTRUCTION

As developmental pressures on wetlands increased for agriculture and silviculture production, highways, residential and commercial building sites, ports, marinas, parking lots, and other industries, Congress acted to limit the disposal of dredged or fill material into navigable waters under the October 18, 1972 amendments to the Federal Water Pollution Control Act, Public Law 92-500 (thereafter called the Clean Water Act). These amendments are commonly known as Section 404 of the Clean Water Act (CWA). The purpose of Section 404 was to control the unnecessary destruction of wetland resources and bring about a degree of coordination between the various agencies involved in wetlands conservation - the Department of Interior's Fish and Wildlife Service, the Department of Commerce's National Marine Fisheries Service, the EPA, the Army Corps of Engineers, and various state agencies.

Section 404 originally had only three subsections:

404(a) authorized the Secretary of the Army to issue permits for discharges of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public hearing;

404(b) provided that disposal sites must be specified through application of guidelines developed by EPA in conjunction with the Army, unless an economic impact on navigation or anchorage exists; and

404(c) authorized EPA to restrict or prohibit disposal in any area, including one previously specified for disposal, if EPA determines that the discharge of dredged or fill material would have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas".

In 1977 Congress amended Section 404 and added following subsections:

404(e) which authorized the Army to issue general permits for any category of activities having minimal adverse effects on the environment;

404(f) which exempted certain activities from this legislation including:

1. Normal farming, silviculture, and ranching

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Federal Response Under the Clean Water Act To Wetland Destruction

practices (as part of established operations);

2. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, and similar specified structures;
3. Construction or 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.

(Note: These exemptions did not apply if the discharge was part of an activity whose purpose was to bring an area of the waters of the United States into a use to which it was not previously subject);

404(g) which established procedures for transferring permitting authority to the states over all waters except navigable waters below the mean high water mark in tidal areas and the ordinary high water mark in freshwater areas and adjacent wetlands;

404(g) which established requirements for agreements between the COE and other agencies, including EPA, directed toward minimizing duplication, paperwork, and delays in permit issuance;

404(r) which exempted discharges of dredged or fill material as part of a Federal project specifically authorized by Congress; and

404(s) which authorized the Army to take civil action against permit violators.

Section 404 does not have a provision for enforcement against unpermitted discharges. Under subsection 301(a), however, the discharge of dredged or fill material without a permit was declared unlawful and EPA was given authority under Section 309

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to take civil action against unauthorized dischargers.

The last amendment to the CWA was Public Law 100-4 passed on February 4, 1987. This amendment added Subsection 309(b) to the CWA, which gave EPA administrative penalty authority over unauthorized discharges. This provision provides for an administrative penalty not to exceed \$125,000 for unpermitted discharges.

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EPA AND COE SECTION 404 RESPONSIBILITIES

Several Federal agencies have roles in implementing the Section 404 program. This participation extends from commenting on various types of permits to the detection of unpermitted activities and enforcement of permit requirements. EPA and COE roles in Section 404 activities are summarized below:

ARMY CORPS OF ENGINEERS RESPONSIBILITIES

The COE has responsibility for the development and maintenance of the nation's waters and related land resources, including construction and operation of projects for navigation, flood control, shore and beach restoration and protection, hurricane and flood protection, hydroelectric power production, water supply, water quality control, fish and wildlife conservation and enhancement, and outdoor recreation.

Dredge or Fill Permitting

The COE is the primary Federal agency¹ responsible for the day-to-day regulation of wetlands development under Section 404. Section 404 authorizes the COE to issue or deny permits for the discharge of dredged or fill materials into U.S. waters. The decision whether to approve a permit and, if so, the conditions under which it will be authorized, is determined by evaluating input from many sources such as the resource agencies, individuals, organizations, and states, among others. This process is referred to as the public interest review and is conducted simultaneously with the 404(b)(1) guideline evaluation. The COE receives approximately 11,000 to 12,000 permit applications each year. Tens of thousands of other discharges are covered by general permits issued on a regional or nationwide basis. The activities covered under the general permit umbrella do not require individual permits as long as the discharger complies with the standard conditions issued by the COE. Some general permits require predischARGE notification to the COE.

The COE must consider many factors during its public interest review, including wetland values, conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood protection, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the public. The COE is required to consult with EPA and the other resource agencies and to give full consideration to their recommendations in evaluating a permit application. Although the

¹ Under Section 404(g), states may assume responsibility for issuing permits in certain waters under their jurisdiction in accordance with criteria developed by EPA.

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EPA And COE Section 404 Responsibilities

comments are advisory, they can be used as a basis for modifying, conditioning, or denying a permit. However, a permit cannot be issued unless the discharge complies with the 404(b)(1) Guidelines and determined by the district engineer to be in the public interest.

COE districts and division engineers have authority to issue alternate types of permits such as letters-of-permission and regional general permits. Letters-of-permission may be issued in lieu of individual permits where, in the opinion of the district engineer, the proposed work would be minor, not have significant individual or cumulative impact on environmental values, and not be expected to encounter appreciable opposition. In such situations, the proposal is coordinated with concerned agencies and adjacent property owners who might be effected by the project, but the general public is not notified.

General permits, which cover activities it has identified as being substantially similar in nature and causing only minimal individual and cumulative environmental impacts, may also be issued. This could include activities such as placement of navigational aids and bank stabilization. These permits may cover a limited geographical area, a particular region of the country, or the nation. Processing the initial general permits includes a public notice period and the opportunity for public hearings. General permits are approved for a period of five years. Some general permits require predischARGE notification with individual applications qualified by the COE district. Non-qualifying applications are processed through the regular permit review process. COE regulations, 33 CFR 330.5, include 26 nationwide general permits.

Dredge or Fill Enforcement

The COE is primarily responsible for violations of permit conditions, but through an MOA with EPA, COE has also been involved in enforcement actions regarding unpermitted discharges. EPA has statutory responsibility for the enforcement against unauthorized wetland discharges by persons failing to obtain the required permit.

On January 19, 1989, EPA entered into a revised MOA with the COE concerning Federal enforcement of Section 404 unpermitted discharge violations. The original agreement had been in place since 1976. The basic premise of the new agreement is to establish a framework for effective Section 404 enforcement with very little overlap. The investigating agency, either the COE or EPA, will determine if a violation exists. The investigating agency will also determine whether the COE or EPA qualifies as the lead enforcement agency.

The COE acts as lead enforcement agency for all permit violations

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and unpermitted discharges which do not meet the MOA criteria for forwarding to EPA. EPA acts as the lead enforcement agency where the unpermitted activity involves repeat or flagrant violators. EPA also takes the lead where a previously specified category of cases or a particular case is requested. The COE can also defer the lead to EPA when an administrative penalty action is warranted or when the COE, either in the case of a unpermitted discharge or a permit condition violation, elects not to take enforcement action. The lead agency determines the appropriate enforcement response taking into consideration any views provided by the other agency.

When COE district engineers become aware of an unauthorized activity, they issue cease-and-desist orders to stop the activity if it is still in progress and then investigate the circumstances involved. If adverse impacts occur that would require corrective measures to protect life, property, or a significant public resource, the district engineer can administratively order remedial measures and decide later whether legal action is necessary. For those cases that do not require legal action and for which restoration is not in order, the district engineer will accept application for "after-the-fact" permits, which must undergo the same public interest review process described for individual permits. However, an after-the-fact permit application shall not be accepted until resolution has been reached through an appropriate enforcement response as determined by the lead agency; e.g., administrative, legal or corrective action has been completed, or a decision has been made that no enforcement action is to be taken. Legal action, civil or criminal, is considered appropriate when violations are willful, repeated, flagrant, or of substantial environmental impact and when it is considered essential to the establishment or maintenance of a viable permit program. Persons convicted under civil or criminal referrals to the U.S. Attorney are subject to fines and imprisonment. EPA has sole statutory authority to issue administrative penalties for unpermitted discharges and, under this authority, can impose corrective measures and monetary penalties up to \$125,000 for unauthorized fill activities.

ENVIRONMENTAL PROTECTION AGENCY'S RESPONSIBILITIES

EPA has primary roles in several aspects of the Section 404 program including development of environmental guidelines, prohibition of discharges with unacceptable adverse impacts, state assumption of Section 404 permitting, establishment of Section 404 geographical jurisdiction, and determination of Section 404(f) exemptions. Section 404 enforcement authority is shared between EPA and the COE.

Development of 404(b)(1) Guidelines

Subsection 404(b) of the CWA states that the COE should specify a disposal site for dredged or fill material through application of guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army. EPA first published interim guidelines on September 5, 1975, for the purpose of providing guidance to be applied in evaluating proposed discharges into navigable waters. The guidelines were finalized and published on December 24, 1980, and appear in CFR, Title 40, Part 230.

A fundamental precept to the guidelines is that dredged or fill material shall not be discharged into the aquatic ecosystem unless it can be demonstrated that the discharge will not have an unacceptable adverse impact, either individually or in combination with known or probable impacts of other activities affecting the ecosystem. In addition, no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. Where the activity is not water dependent, practicable alternatives are presumed to be available, unless clearly demonstrated otherwise. Discharges shall also be prevented if it: causes or contributes to violations of any applicable state water quality standards; breaches any toxic effluent standard; jeopardizes the existence of an endangered or threatened species; violates requirements to protect a marine sanctuary; or causes or contributes to significant degradation of waters of the United States. Even if allowable under the guidelines, all appropriate and practicable steps should be taken to minimize potential adverse impacts on the aquatic ecosystem.

During a 1981 regulatory reform review, the COE questioned whether EPA guidelines were mandatory or advisory. The Office of Management and Budget reviewed the issue and concluded that the guidelines should be treated as mandatory.

There have been disagreements between EPA and the COE over implementation of the guidelines. However, the COE has the responsibility for determining conformance. EPA is not empowered to veto a permit for failure to comply with the guidelines, but may consider compliance when making a determination of unacceptable adverse impact.

Jurisdiction of the Section 404 Program

Since Section 404 did not specifically state which administrative agency had ultimate authority in determining the jurisdictional scope of Section 404, the COE and EPA often disagreed over jurisdictional decisions that were made. The controversy was put to rest when the U.S. Attorney General concluded that Congress intended to confer upon the EPA Administrator final administrative authority to make jurisdictional determinations

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concerning the scope of waters of the United States.

Since EPA lacked the staff to make routine field jurisdictional determinations for all dredge and fill applications, EPA and the COE signed a MOA regarding Section 404 jurisdiction on April 23, 1980. Under the agreement COE's district engineers were authorized to make final jurisdictional determinations for permit and enforcement situations without consultation with EPA. EPA retained the authority to identify "special case" areas where the environmental consequences of jurisdiction are significant. EPA makes jurisdictional determinations in these designated areas.

On January 19, 1989, EPA and the COE signed a revised MOA on geographic jurisdiction to replace the 1980 agreement.

State Delegation of the Section 404 Program

Section 404(g) of the CWA proposed the rationale and criteria for state assumption. The intent was to delegate to the states jurisdictional authority over dredge and fill projects in all waters except those used to transport interstate or foreign commerce². Dredge and fill permitting activities in the exempted waters would remain with the Army COE.

EPA was charged with overseeing state delegation. EPA first promulgated state program regulations in May 1980. The regulations were criticized for having rigid and excessive regulatory guidelines. States complained about excessive reporting requirements and a general lack of program flexibility. As a result, EPA removed the 404(g) regulations from the consolidated permit regulations and reformatted them in April 1983. Revised state assumption regulations were finalized on July 6, 1988.

Enforcement of Section 404

Discharge of a pollutant into waters of the United States without a permit is unlawful under Section 301(a). EPA enforcement options for Section 404 are addressed in Section 309 of the CWA. EPA may issue an administrative order under Section 309 for any unpermitted discharge of pollutants which is a violation of Section 301. Historically, EPA has confined the use of its enforcement authorities to serious violations when the COE was either slow to act, or when EPA wished to take the lead.

Section 404(s) gives the COE authority to enforce permit

² Waters used in interstate and foreign commerce include areas shoreward to the ordinary high water mark, or to the mean high water mark (waters subject to the tides ebb and flow), or higher high water mark on the west coast, including wetlands.

violations including commencement of civil actions, temporary or permanent injunctions, and civil fines.

Section 404(c) Authority to Restrict or Deny Permits

The COE may issue a permit, after consultation with the public and Federal/state resource agencies, even if EPA or the other interested agencies comment adversely. In this case, EPA's Administrator is authorized to prohibit the specification of a discharge site, or restrict its use, by following Section 404(c) procedures. Such action may be initiated if the Administrator determines that the discharge would have an unacceptable adverse effect on fish and shellfish areas, municipal water supplies, and for wildlife or recreation areas. The action may be taken in advance of a planned discharge, while the permit is being evaluated, or even after the issuance of a permit. Once Section 404(c) is evoked, the action may not be overridden under Section 404(b)(2) which allows the COE to make some permit decisions based on economic impact of the site on navigation and anchorage.

EPA PROCEDURES FOR SECTION 404(q) AND 404(c) ACTIONS

The COE is not bound to change or deny a Section 404 permit based on adverse comments and may issue a permit over the resource agencies' objections. If the COE district engineer concludes that a proposed project is in the public interest and complies with the Section 404(b)(1) guidelines, he may issue the permit over the EPA region's objections or issue it without conditioning the permit as specified by EPA. However, if a region has objected to permit issuance in accordance with the 404(q) Memorandum of Agreement, the COE must notify the region of its intent to issue. The Regional Administrator has 7 days from notification to request that the COE district not issue a Notice of Intent Letter until the Regional Administrator has had the opportunity to discuss the permit with the division engineer. If a discussion does not take place within 14 days of the Regional Administrator's request, the district engineer may proceed to issue the permit.

Once the Notice of Intent Letter is issued, the EPA region's next course of action is to request that the COE district's permit decision be reviewed at a higher level in the COE as authorized under Section 404(q) of the CWA.

Prior to 1982, an objecting resource agency could easily elevate a COE district permit decision to a higher COE authority. In the mid and late 1970's, the threat of elevation of a district engineer's decision was usually sufficient to result in modification, withdrawal or denial of a permit application for environmentally unacceptable projects. However, in 1981, the President's Task Force on Regulatory Relief targeted the Section 404 program for reform. As a result, the COE issued new regulations with the intent to expedite the permit issuing process. The 1985 404(q) MOA¹ was a direct result of this reform.

Under the MOA, the Assistant Administrator for Water has 20 days to make an elevation request to the Department of the Army. A review will be requested only if:

- (1) there has been insufficient interagency coordination at the COE district and division levels including a procedural failure to coordinate or a failure to resolve stated EPA concerns regarding compliance with Section 404(b)(1) guidelines; or
- (2) significant new information has been developed which was not previously available; or

¹ Elevating Permitting Decisions Within the COE Under Section 404(q) of the CWA, 11/12/85.

- (3) the project raises environmental issues of national importance requiring policy level review.

To be eligible for referral, the EPA region must have followed all requirements in the MOA. For example, regional comment letters including recommended permit denial letters, letters recommending project modification, or requests for extensions of the comment period, must be signed by the applicable Regional Administrator or his specified designee and received by the applicable COE district during the initial comment period specified in the public notice.

Within 15 days of the Assistant Administrator's request, the Assistant Secretary of the Army (Civil Works) will decide whether or not the permit decision will be made at a level higher than the district engineer. The Assistant Secretary has the sole discretion to grant such requests. For any permit where EPA has invoked the 404(q) referral procedures and the Army subsequently concludes to issue a permit that does not meet all of EPA's objections, the Assistant Administrator for Water will be so notified in writing. In such cases, the permit will not be issued for ten days to allow EPA time to exercise its Section 404(c) determination authority. If EPA initiates a 404(c) action, the permit will be withheld until the 404(c) proceeding is concluded and a final EPA determination is made.

Under Section 404(c), the EPA Regional Administrator may initiate a proposed determination to prohibit, withdraw, or restrict disposal of dredged or fill material into waters of the United States if the discharge could have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreation areas. The Regional Administrator must notify the COE district and the applicant of his intent to issue a public notice for the proposed determination. If within 15 days the EPA region has not received a commitment to take corrective action or the applicant has failed to demonstrate that no unacceptable adverse effects will result from the discharge, the Regional Administrator issues the public notice. The ensuing Section 404(c) decision process includes data collection and analysis, consultation with the applicant and the COE, and the opportunity for public comment and hearings. It normally takes about one EPA staff year for each 404(c) action. Within 15 days after the expiration of the comment period, the Regional Administrator must either withdraw the proposed determination or forward to the EPA Administrator a recommended determination and the administrative record for review. Within 30 days the Administrator must review the proposal, consult with the COE, and provide the Section 404 permit applicant another chance to take corrective action. Notwithstanding, the Administrator must make a final decision affirming, modifying, or rescinding the recommended determination within 60 days from receipt of the Regional Administrators

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EPA Procedures For Section 404(g) And 404(c) Actions

affirming, modifying, or rescinding the recommended determination within 60 days from receipt of the Regional Administrators recommended determination. The EPA Administrator's decision constitutes final agency action under Section 404(c).

Section 404(g) elevations and 404(c) determinations are important to the Section 404 program because they serve as a stopgap measure against permitting unacceptable or avoidable dredge and fill activities in vulnerable wetlands.

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PRIOR AUDIT REPORTS AND SPECIAL REVIEWS

PRIOR AUDIT REPORTS

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- Wetlands: The Corps of Engineers' Administration of the Section 404 Program, U.S. General Accounting Office, Audit Report Number GAO/RCED-88-110, issued July 28, 1988.

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- EPA's 1989 Federal Managers' Financial Integrity Act Activity, EPA Office of Inspector General, Audit Report Number E1LMF0-04-0012-0100357, issued June 22, 1990.

SPECIAL REVIEWS

- Special Review of EPA Region 10 Employee Allegations on the Region's Handling of Air and Water Issues, EPA Office of Inspector General, Report Number EGAWGO-10-0022-0400015, issued May 3, 1990.

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