



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL



# EPA Needs to Clarify Its Claim of “No Net Loss” of Wetlands

Report No. 14-P-0191

April 16, 2014



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## Report Contributors:

Stacey Banks  
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## Abbreviations

CFR	Code of Federal Regulations
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
OIG	Office of Inspector General
USACE	U.S. Army Corps of Engineers

**Cover photo:** Peat mining in a wetlands area in Region 8. (EPA photo)

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# At a Glance

## Why We Did This Review

Our objective was to determine how the U.S. Environmental Protection Agency (EPA) verifies that the application of the wetlands protection and restoration guidelines achieves “no net loss” of wetlands. The Clean Water Act Section 404 regulatory program addresses the discharge of dredged or fill materials in the waters and wetlands of the United States.

One of the EPA’s roles in this program is to review and comment on individual permit applications submitted to the U.S. Army Corps of Engineers. In its fiscal year 2013 Annual Plan, under the Section 404 regulatory program, EPA reported “no net loss” of wetlands for fiscal years 2009 through 2011.

### This report addresses the following EPA theme:

- *Protecting water: A precious, limited resource.*

For further information, contact our public affairs office at (202) 566-2391.

The full report is at:  
[www.epa.gov/oig/reports/2014/20140416-14-P-0191.pdf](http://www.epa.gov/oig/reports/2014/20140416-14-P-0191.pdf)

## EPA Needs to Clarify Its Claim of “No Net Loss” of Wetlands

### What We Found

The EPA needs to clarify that its claim of “no net loss” of wetlands is based on projections of future results from mitigation projects, because not all mitigation projects succeed.

The EPA attempts to verify that the application of the wetlands protection and restoration guidelines furthers the goal of “no net loss” by comparing the total acres of wetland impacts to the total acres planned for mitigation in the U.S. Army Corps of Engineers’ Section 404 permits. However, performance reporting in the EPA’s 2013 annual plan does not inform readers of the assumption that all mitigation projects meet performance standards. Performance standards are the ecologically-based standards that the U.S. Army Corps of Engineers personnel will use to determine whether a compensatory mitigation project is achieving its objectives. Not clearly communicating such assumptions hampers the public’s understanding of the EPA’s actual performance in protecting wetlands.

**The EPA can improve performance reports by indicating that achieving “no net loss” is based on the assumption that all mitigation projects will meet performance standards.**

### Recommendation and Planned Corrective Actions

We recommend that the Assistant Administrator for Water clarify on the wetlands measure definitions webpage and in future annual performance reporting that “no net loss” of wetlands is based upon an assumption that mitigation projects contained in Clean Water Act Section 404 permits will meet performance standards. The agency agreed with the recommendation and provided acceptable corrective actions. The recommendation is resolved.



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

THE INSPECTOR GENERAL

April 16, 2014

**MEMORANDUM**

**SUBJECT:** EPA Needs to Clarify Its Claim of “No Net Loss” of Wetlands  
Report No. 14-P-0191

**FROM:** Arthur A. Elkins Jr.

A handwritten signature in blue ink that reads "Arthur A. Elkins Jr." with a stylized flourish at the end.

**TO:** Nancy K. Stoner, Acting Assistant Administrator  
Office of Water

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

The EPA office having primary responsibility for the issues evaluated in this report is the Office of Water’s Office of Wetlands, Oceans and Watersheds.

**Action Required**

This report’s recommendation was agreed to and resolved. Therefore, no final response to this report is needed. If you wish to provide a final response to this report, it should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification. We will post this report to our website at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Carolyn Copper, Assistant Inspector General for Program Evaluation, at (202) 566-0829 or [copper.carolyn@epa.gov](mailto:copper.carolyn@epa.gov); or Dan Engelberg, Director, Water Evaluations, at (202) 566-0830 or [engelberg.dan@epa.gov](mailto:engelberg.dan@epa.gov).

## Purpose

The purpose of this review was to determine how the U.S. Environmental Protection Agency (EPA) verifies that the application of the wetlands protection and restoration guidelines achieves “no net loss” of wetlands.

## Background

The environmental and human health value of wetlands is significant. Wetlands provide ecosystem services such as reducing damage caused by flooding; moderating global climate conditions; and functioning as natural filtration for sources of drinking water. The U.S. Fish and Wildlife Service estimates that up to 43 percent of threatened and endangered species rely directly or indirectly on wetlands for survival. The Service’s most recent 5-year wetlands inventory report<sup>1</sup> indicates that the United States lost approximately 62,300 acres of wetlands between 2004 and 2009.

The Clean Water Act (CWA) Section 404 regulatory program addresses the disposal of dredged or fill materials in the waters and wetlands of the United States. In 1980, the EPA and the U.S. Army Corps of Engineers (USACE) issued wetlands guidelines<sup>2</sup> to provide the substantive environmental standards for evaluating Section 404 permit applications. The USACE implements the guidelines as part of its authority to issue or deny permits. Under the guidelines, the USACE is also responsible for monitoring compensatory mitigation plans within Section 404 permits. As part of the permitting process, a permittee must obtain USACE approval of “performance standards” for mitigation projects before a Section 404 permit is issued. These are the ecologically-based standards that USACE personnel will use to determine whether a compensatory mitigation project is achieving its objectives.

The EPA may review the public notices issued by the USACE and provide comments, as appropriate, to the USACE. In 2008, the USACE and EPA issued revised regulations, establishing standards and criteria to be used for all types of compensatory mitigation. Compensatory mitigation refers to the restoration, establishment, enhancement, or in certain circumstances preservation of wetlands, streams or other aquatic resources for the purpose of offsetting unavoidable adverse impacts.

Since 1989, the EPA’s goal in this program has been to achieve “no net loss” of wetlands. In the fiscal year 2013 Annual Plan, the EPA reported “no net loss” of wetlands in the 404 regulatory program for fiscal years 2009 through 2011.

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<sup>1</sup> U.S. Department of Interior, U.S. Fish and Wildlife Service, *Status and Trends of Wetlands in the Conterminous United States 2004 to 2009*, September 2011.

<sup>2</sup> The guidelines are published in Title 40 of the Code of Federal Regulations (CFR), Part 230 - Section 404(b)(1), Guidelines For Specification Of Disposal Sites For Dredged Or Fill Material.

The EPA office having primary responsibility for the issues evaluated in this report is the Office of Water's Office of Wetlands, Oceans and Watersheds.

## Scope and Methodology

We reviewed Section 404 of the CWA, regulations, performance reporting under the EPA's 2013 Annual Plan, and the EPA's National Water Program Guidance. We also reviewed memorandums of agreement between the USACE and EPA to gain an understanding of how regulations and guidance are implemented. We also interviewed staff and managers from the EPA's Office of Water and EPA Regions 2 and 5 about the EPA's activities under Section 404. We selected these regions because they contain states that have a variety of wetlands and some of the highest percentages of wetland losses. We also interviewed managers in the USACE's Section 404 program and staff from the Environmental Law Institute.

We conducted our review from January 2013 to February 2014 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform our review to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our objective.

## Results of Review

The EPA attempts to verify that the application of the wetlands protection and restoration guidelines furthers the goal of "no net loss" by comparing the total acres of wetland impacts to the total acres planned for mitigation in the USACE's Section 404 permits. However, this comparison is based on the EPA's assumption that all wetlands mitigation projects will meet performance standards. Not all mitigation projects meet these standards. For example, in a 2011 report about North Carolina wetlands mitigation projects<sup>3</sup>, it was reported that "... no single mitigation provider, mitigation type or geographic region achieved complete success according to the standards approved in mitigation plans." Specifically, the report noted that 74 percent of the mitigation projects attained the mitigation goals established in the Section 404 permits. Because the EPA's performance reporting<sup>4</sup> does not inform readers of this assumption, the Office of Inspector General concluded that the EPA's reporting of "no net loss" of wetlands hampers the public's understanding of the EPA's actual performance in protecting wetlands. The EPA should indicate in its wetlands measure definitions webpage and in future annual plan performance reporting that achieving "no net loss" is based upon an assumption that wetlands mitigation projects meet performance standards.

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<sup>3</sup> *Compensatory stream and wetland mitigation in North Carolina: An evaluation of regulatory success.* North Carolina Department of Environment and Natural Resources Division of Water Quality, March 2011.

<sup>4</sup> United States Environmental Protection Agency, FY2013 Annual Plan, p. 107, Performance Measure 4E.

## **Recommendation**

We recommend that the Assistant Administrator for Water:

1. Clarify on the wetlands measure definitions webpage and in future annual plan performance reporting that “no net loss” of wetlands is based upon an assumption that mitigation projects contained in CWA Section 404 permits will meet performance standards.

## **Agency Response and OIG Comment**

The agency agreed with our recommendation. The agency said it updated its National Water Program Guidance for the fiscal year 2015 Proposed Program Measure, so that the text now reads: “In partnership with the U.S. Army Corps of Engineers, states and tribes achieve 'no net loss' of wetlands each year under the Clean Water Act Section 404 regulatory program. ('No net loss' of wetlands is based on requirements for mitigation in CWA 404 permits and not the actual mitigation attained).” In addition, the agency committed to clarifying the wetlands measure on the Office of Water’s performance webpage when the 2013 End of Year report is posted on March 31, 2014. The Office of Water later revised the completion date to May 12, 2014. The recommendation is resolved.

## **Status of Recommendations and Potential Monetary Benefits**

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status <sup>1</sup>	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	3	Clarify on the wetlands measure definitions webpage and in future annual plan performance reporting that "no net loss" of wetlands is based upon an assumption that mitigation projects contained in CWA Section 404 permits will meet performance standards.	O	Assistant Administrator for Water	05/12/14		

<sup>1</sup> O = Recommendation is open with agreed-to corrective actions pending.  
 C = Recommendation is closed with all agreed-to actions completed.  
 U = Recommendation is unresolved with resolution efforts in progress.

## ***Agency Response to Draft Report***

### **MEMORANDUM**

**SUBJECT:** Response to Office of Inspector General Draft Report/Project  
No. OPE-FY13-0008  
“EPA Needs to Clarify Its Claim of ‘No Net Loss’ of Wetlands,” dated March 3,  
2014

**FROM:** Nancy K. Stoner  
Acting Assistant Administrator

**TO:** Arthur A. Elkins, Jr.  
Inspector General

Thank you for the opportunity to respond to the issues and recommendation in the subject audit report. Following is a summary of the U.S. Environmental Protection Agency’s overall position, along with its position in agreement on each of the report recommendations. We have provided high-level planned corrective actions and estimated completion dates.

### **AGENCY’S OVERALL POSITION**

**Factual accuracy of the Draft Report:** The draft report is factually accurate. “No net loss” of wetlands is based upon an assumption that mitigation projects contained in CWA Section 404 permits will meet performance standards. The Office of Water concurs with the finding.

#### **Corrective actions already initiated or planned:**

- A clarification was made under the National Water Program Guidance for FY2015 Proposed Program Measure, so that the text now reads: “In partnership with the U.S. Army Corps of Engineers, states and tribes, achieve 'no net loss' of wetlands each year under the Clean Water Act Section 404 regulatory program. (‘No net loss’ of wetlands is based on requirements for mitigation in CWA 404 permits and not the actual mitigation attained.)”
- Clarify measure on OW performance web page: Measure will be clarified when the 2013 End of Year report is posted on March 31, 2014

AGENCY'S RESPONSE TO REPORT RECOMMENDATIONS

Agreements

No	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by FY
1	Clarification under FY15 NWPG	Add clarifying statement	Complete
2	Clarification on OW performance web page	Add clarifying statement	Mar. 31, 2014

CONTACT INFORMATION

If you have any questions regarding this response, please contact Jim Pendergast, Acting Director, Wetlands Division, Office of Wetlands, Oceans, and Watersheds on (202) 566-0398 or Sineta Brown on (202) 564-3666.

Attachments

cc: Michael H. Shapiro  
Gregory Peck  
Timothy Fontaine  
Macara Lousberg  
Marilyn Ramos  
Michael Mason

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