

EPA's Roles Under Section 404 of the Clean Water Act (CWA)

Region 4 Regional
Response Team
Meeting

-February 2006-



U.S. EPA REGION 4 WATER MANAGEMENT DIVISION

OUR MISSION:

To maintain, enhance, protect, and restore the quality and quantity of all water resources for the furtherance of healthy, sustainable ecosystems and the human environment. We agree to pursue this mission in partnership with each other, the States, Tribal governments, local governments, other federal agencies, and stakeholders.

WETLANDS REGULATORY SECTION

- The Wetlands Regulatory Section manages the regional EPA responsibilities of the Clean Water Act Section 404 Wetlands Protection Program which includes permit review activity, planning, enforcement, grants, outreach and education

OVERVIEW OF CWA SECTION 404 PROGRAM

- Section 404 establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands.
- Basic premise of the program: No discharge of dredged or fill material can be permitted if a *practicable alternative* exists that is *less damaging to the aquatic environment* or if the Nation's waters would be *significantly degraded*.

Scope of Section 404

- Navigable Waters
 - 1972 CWA defined “navigable waters” as “waters of the United States”
 - 1977 CWA reauthorization recognized broad jurisdiction over wetlands
- EPA is the ultimate authority on geographic jurisdiction of waters of the U.S. under CWA
 - “Civilletti” opinion & 1989 MOA
- January 9, 2001: Supreme Court finds CWA does not extend to isolated non-navigable waters solely on basis of migratory bird use

404 Permitting

- ***General Permits:*** Have minimal individual and cumulative impacts:
 - Include nationwide, state, regional and programmatic permits
- ***Individual Permits:*** Have greater than minimal impacts:
 - Public notice & agency review

404 Permitting Process (cont)

- Review performed in context of **404(b)(1) Guidelines** (EPA), Public Interest Review (COE), and 401 Water Quality Certification (State)
- Section **404(q)** elevation and/or Section **404(c)** "veto" (*discretionary*)
- Permit issued, modified, or denied by the COE



Factors in EPA's review of 404 Projects:

- Compliance with the Guidelines
 - Alternatives analysis
 - Sequencing: avoidance/minimization
 - Mitigation
 - Significant degradation
- Water quality issues
- Significance/value of the resource
- Significance of the impacts
- Inter-agency or public interest

Section 404(q) 1992 MOA

- Elevation of Individual Permit Decisions
 - Limited to those cases that involve **aquatic resources of national importance** (ARNI) (i.e., where the net loss from a project (after mitigation) will result in **unacceptable adverse impacts** to an ARNI)
 - Field Level Procedures leading to Inter-Agency HQs Review, if needed

Section 404(q) 1992 MOA (cont)

What is an ARNI?

- The MOA establishes a threshold that must be met, though the term ARNI is not specifically defined (i.e., as a basis for comparison, these cases will cause resource damages similar in magnitude to cases evaluated under Section 404(c) of the Clean Water Act)
- Special aquatic sites under the 404(b)(1) Guidelines are **sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes**
- Though not a comprehensive list, past 404(q) evaluations have identified vernal pools (including the California variety), bottomland hardwoods and coastal marsh areas as ARNIs

Section 404(c) - Veto

- Section 404(c) of the Clean Water Act authorizes EPA to **restrict or prohibit** the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on:
 - municipal water supplies,
 - shellfish beds and fishery areas,
 - wildlife,
 - or recreational areas.



404 Enforcement

- EPA and the Corps share Section 404 enforcement authority.
- Section 404 violations fall into two broad categories:
 - **failure to comply with the terms or conditions of a Section 404 permit (Corps)**
 - **discharging dredged or fill material to waters of the United States without a permit (EPA)**

404 Enforcement (cont)

- In 1989, EPA and the Corps entered into a Memorandum of Agreement (MOA) on enforcement
- Under the MOA, the Corps, as the Federal agency that issues permits, has the lead on Corps-issued permit violation cases.
- For un-permitted discharges, EPA and the Corps determine the appropriate lead agency based on criteria in the MOA.

404 Enforcement (cont)

- MOA Lead Enforcement Agency Criteria
 - EPA will act as lead when an un-permitted activity involves the following:
 - Repeat violator(s)
 - Flagrant violator(s)
 - Where EPA requests a class of cases or a particular case
 - The Corps recommends that an EPA administrative penalty action may be warranted
 - The Corps will act as lead in:
 - All other un-permitted cases
 - For Corps-issued permit condition violations
 - Where EPA requests the Corps to take action on a permit condition violation

For more information, please visit our website at <http://www.epa.gov/owow/wetlands/>

The screenshot shows a Netscape browser window displaying the EPA Wetlands website. The browser title bar reads "EPA > Wetlands - Netscape". The website header features the EPA logo and the text "U.S. Environmental Protection Agency" in green. Below the header is a dark blue banner with the word "Wetlands" in white. A search bar with a "GO" button is located to the right of the banner. The main content area is divided into several sections:

- Recent Additions | Contact Us | Print Version** with a search input field.
- EPA Home > Water > Wetlands, Oceans and Watersheds > Wetlands** breadcrumb trail.
- What are Wetlands?** section with sub-links: [Definitions](#), [Types](#), and [Status & Trends](#).
- Why Protect Wetlands?** section with sub-links: [Functions and Values](#), [Fish & Wildlife](#), [Flood Protection](#), [Shoreline Erosion](#), [Water Quality and Hydrology](#), [Economics](#), and [Recreation and Aesthetics](#).
- How are Wetlands Protected?** section with sub-links: [Watershed Planning](#), [Water Quality Standards](#), [404 Permitting](#), [Financial Assistance](#), [Mitigation](#), and [Restoration](#).
- What You Can Do to Protect our Vital Resource** section.
- In the News** section with links: [FY03 Wetlands Program Development Grant Guidelines](#), [INSIGHTS Volume 1, Number 2 - Spring/Summer 2002](#), [Section 404 Regulatory Training Available](#), [Definition of Fill Material - Final Rule](#), and [Wetland Fact Sheets](#).

A photograph of a wetland landscape is positioned between the "What are Wetlands?" and "Why Protect Wetlands?" sections. The browser's status bar at the bottom shows "Connect: Host www.epa.gov contacted. Waiting for reply...". The Windows taskbar at the very bottom displays the Start button, several application icons, and the system clock showing "11:33 AM".