



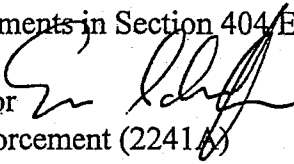
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

SEP 29 1999

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Injunctive Relief Requirements in Section 404 Enforcement Actions

**FROM:** Eric V. Schaeffer, Director   
Office of Regulatory Enforcement (22414)

**TO:** Water Protection/Management Division Directors, Regions I-X  
Director, Office of Environmental Stewardship, Region I  
Director, Division of Environmental Protection and Planning, Region II  
Enforcement and Compliance Assistance Directors, Regions II, VI, and VIII  
Water, Wetlands, and Pesticides Division Director, Region VII  
Regional Counsels

Recently, several regions have asked for clarification on what factors EPA should consider when deciding whether to seek complete on-site restoration of waters of the United States as injunctive relief for an EPA Clean Water Act (CWA) Section 404 enforcement action. This memorandum emphasizes the Environmental Protection Agency's (EPA) enforcement policy that, in cases involving unauthorized discharges of dredged or fill material to waters of the United States which would not qualify for a section 404 permit, the complete restoration of such waters should be sought except in limited circumstances as discussed below. In addition, this memorandum will also advance the Administration's Clean Water Action Plan, which includes an emphasis on wetlands restoration in resolving section 404 enforcement actions

**Preference for Restoration**

Specifically, in deciding whether to seek complete restoration, EPA personnel working on the case should consider whether the violator has adequately demonstrated that the unauthorized discharge of dredged or fill material at the site in question meets the section 404(b)(1) guidelines, and whether restoration is achievable as a practical matter. The 404(b)(1) guidelines are used for evaluating projects and determining whether a project will have an unacceptable adverse impact (either individually or cumulatively) on the aquatic ecosystem. After examining the section 404(b)(1) guidelines and the practicability of achieving restoration, EPA personnel should

document their decision on whether the site should be restored, partially restored, or whether the discharges should remain in place. In cases where the 404(b)(1) guidelines have not been satisfied, and thus the discharges would not qualify for an after-the-fact permit, complete restoration is almost always preferable to partial restoration and/or compensatory mitigation. Complete restoration is preferable because it would (1) achieve compliance with the CWA (a fundamental goal of EPA's enforcement program), (2) replace the lost functions and values of the impacted waters, and (3) maintain a level playing field within the regulated community by ensuring that all discharges are evaluated using the same guidelines.

#### **404(b)(1) Guidelines**

In considering whether the violator has adequately demonstrated that the discharges at a given site meet the section 404 (b)(1) guidelines<sup>1</sup>, EPA personnel must first consider, under the alternatives test, whether the impacts of the discharges could have been avoided or minimized, and if so, the best way to achieve this avoidance and minimization. There is a rebuttable presumption that, in the case of non-water-dependent projects, there are (or were, in the case of illegal discharges) practicable alternatives available that would be less damaging to the aquatic environment. This presumption should be considered in any evaluation of whether the discharges satisfied the alternatives test of the guidelines. The violator must also adequately demonstrate that all the independent tests of the guidelines have been met. Among these tests, EPA personnel should consider whether the discharge caused or contributed to significant degradation of waters of the United States, violated water quality standards, or otherwise failed to comply with the guidelines. Waters that have been impacted by unauthorized discharges of dredged or fill material that do not meet the section 404(b)(1) guidelines should, in almost all circumstances, be restored.

#### **Injunctive Relief Factors**

In formulating a restoration plan, EPA personnel should consider the likelihood that a court would grant the injunctive relief sought by the government. Specifically, the injunctive relief sought by the government must: (1) confer maximum environmental benefits; (2) be achievable as a practical matter; and (3) bear an equitable relationship to the degree and kind of wrong which it is intended to remedy. See e.g., United States v. Cumberland Farms, 826 F.2d 1151, 1164 (1st Cir. 1987); United States v. Sexton Cove, 526 F.2d 1293, 1301 (5th Cir. 1976). The underlying goal of injunctive relief should be to "restore and maintain the chemical, physical and biological integrity of the nation's waters." This is the objective of the Clean Water Act as declared by Congress in 33 U.S.C. § 1251(a).

Consideration of the injunctive relief factors identified above may lead EPA personnel to consider compensatory mitigation in lieu of on-site restoration in the following limited

---

<sup>1</sup>The guidelines are found at 40 CFR Part 230. There are four independent tests that must be satisfied, found at § 230.10(a)-(d).

circumstances: (1) where substantial or meaningful restoration is not ecologically possible or when restoration attempts may cause more ecological harm than compensatory mitigation (e.g., impacts to Critical Habitat for Threatened or Endangered Species), (2) when there is no practicable way to require restoration (e.g., when a "large" or "substantial" structure has been built on the discharged material, it is agreed that, ecologically speaking, the system will never return to the functional equivalent as the system prior to the discharge), and (3) where the property is now owned by a good-faith<sup>2</sup> purchaser and the equities strongly favor allowing the new owner to retain the fill (such as where severe economic harm would result which could not otherwise be recompensed). These determinations must be made on a case-by-case basis considering all the relevant facts and circumstances of the case and must be documented in the case file. Finally, there may be cases in which the litigation risks of proceeding to require full restoration are so severe that a settlement involving less than complete restoration may be necessary. Such litigation risks should be clearly identified in the file.

Often, particularly in the case of illegal discharges that have remained in place for several months or years, there is an extended time period when the aquatic system has been impaired. This "temporal loss" of a functioning system must be compensated. To compensate for this loss, the compensatory mitigation ratio must be greater than normally required under a typical non-violation permit scenario. This increased ratio will be necessary to account for the period of time when no mitigation had been provided and to address the risk that compensatory mitigation may not be successful. In the limited circumstances when discharges are allowed to remain in place, that material must be authorized through a permit action (e.g., after-the-fact permit, NWP 32 or other applicable general permit) and the final settlement agreement and/or after-the-fact permit should ensure that adequate mitigation takes place to compensate for the impacts of those unauthorized discharges. Moreover, particularly where unauthorized discharges are allowed to remain in place, enforcement personnel should assess penalties which prevent violators from gaining a competitive advantage over entities that do not violate the law and which are sufficient to deter future non-compliance with the section 404 permitting procedures.

### Legal Disclaimer

This memorandum is not intended to create any rights, duties or obligations, either implied or otherwise, in any third parties. Deviation or variance from the principles outlined in this memorandum will not constitute a defense for violators or others concerned with any section 404 enforcement action. Agency determinations in any case will be made by applying the laws and regulations to the specific facts of the case. EPA reserves the right to change this policy at any time, without prior notice, or to act at variance to this policy. In addition, nothing in this guidance is intended to diminish, modify, or otherwise affect the statutory or regulatory

---

<sup>2</sup>A person who was not aware, nor reasonably should have known, that waters of the U.S. were filled and/or did not benefit from the action.

authorities of EPA or the Army Corps of Engineers, nor does it modify the "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency concerning Federal Enforcement for the Section 404 Program of the Clean Water Act."

cc: Regional Sec. 404 Contacts  
Steve Neugeboren, OGC  
John Goodin, OWOW