



U.S. ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF INSPECTOR GENERAL

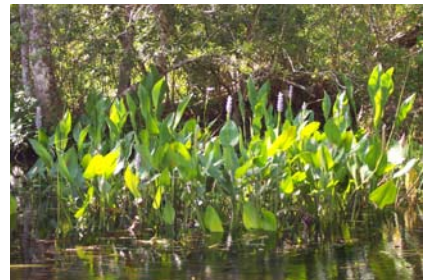
*Catalyst for Improving the Environment*

## Evaluation Report

# EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act

Report No. 10-P-0009

October 26, 2009



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**Abbreviations**

§404	Section 404 of the Clean Water Act
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
FLA	Field Level Agreement
FWS	U.S. Fish and Wildlife Service
FY	Fiscal Year
MOA	Memorandum of Agreement
NRCS	Natural Resources Conservation Service
OECA	Office of Enforcement and Compliance Assurance
OIG	Office of Inspector General
OWOW	Office of Wetlands, Oceans, and Watersheds

**Cover photos:** *From left to right:* A cooter turtle in Juniper Creek, Ocala National Forest, Florida; a great egret in Robinson Bayou, Panama City, Florida; and pickerelweeds in Juniper Creek, Ocala National Forest, Florida.  
(EPA OIG photos)



# At a Glance

*Catalyst for Improving the Environment*

## Why We Did This Review

We conducted this evaluation to assess the U.S. Environmental Protection Agency's (EPA's) effectiveness at identifying violations of the Clean Water Act (CWA) Section 404 (§404) that fall under its enforcement authority. CWA §404 regulates the discharge of dredged or fill material into wetlands and surface waters.

## Background

Wetlands, lakes, streams, and other surface waters provide a variety of benefits, including pollution reduction, flood protection, erosion control, and critical habitat for wildlife. EPA has the lead enforcement role for flagrant or repeat violations involving cases where the violator has not applied for a valid §404 permit from the U.S. Army Corps of Engineers.

**For further information, contact our Office of Congressional, Public Affairs and Management at (202) 566-2391.**

**To view the full report, click on the following link:**  
[www.epa.gov/oig/reports/2010/20091026-10-P-0009.pdf](http://www.epa.gov/oig/reports/2010/20091026-10-P-0009.pdf)

## ***EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act***

### **What We Found**

EPA lacks a systematic framework for identifying the §404 violations for which it is responsible under a 1989 Memorandum of Agreement. Primarily because of its limited field presence related to §404 violations, EPA identifies violations through a passive, reactive method of relying on complaints and referrals from external sources. An incomplete national data system and sporadic coordination with federal and State partners further impair EPA's ability to maintain an effective §404 enforcement program.

EPA must develop a framework that includes a §404 enforcement strategy that includes such elements as: increased communication/coordination with enforcement partners, a system to track repeat and flagrant violators, performance measures, and cross-training. Without an effective framework or strategy, EPA cannot be assured that it is sufficiently protecting wetlands and other surface waters from §404 violations involving dredged or fill activity. Further, the current system does not provide EPA with the necessary inputs to make informed decisions about the allocation of resources for §404 enforcement.

### **What We Recommend**

We recommend that the Assistant Administrator for Enforcement and Compliance Assurance, in consultation with the Assistant Administrator for Water, develop and implement a comprehensive CWA §404 enforcement strategy addressing issues discussed in this report (such as communication with enforcement partners and a system to track violations). We also recommend that the Deputy Administrator revise the 1989 Memorandum of Agreement in collaboration with the Assistant Secretary of the Army for Civil Works.

The Agency agreed to develop and implement a comprehensive CWA §404 enforcement strategy. Although the Agency believes the enforcement strategy will clarify how it collaborates with the U.S. Army Corps of Engineers and processes referrals, and therefore may not require the 1989 Memorandum of Agreement be revised, we retained the second recommendation because we still believe this agreement should be revised. We consider both recommendations undecided.



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

OFFICE OF  
INSPECTOR GENERAL

October 26, 2009

**MEMORANDUM**

**SUBJECT:** EPA Needs a Better Strategy to Identify Violations of Section 404  
of the Clean Water Act  
Report No. 10-P-0009

**FROM:** Wade T. Najjum  
Assistant Inspector General for Program Evaluation

A handwritten signature in black ink, appearing to read "Wade T. Najjum", is written over the typed name.

**TO:** Scott C. Fulton  
Acting Deputy Administrator

Cynthia Giles  
Assistant Administrator for Enforcement and Compliance Assurance

Peter S. Silva  
Assistant Administrator for 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 resolution procedures.

The estimated cost of this report – calculated by multiplying the project's staff days by the applicable daily full cost billing rates in effect at the time – is \$998,055.

**Action Required**

In accordance with EPA Manual 2750, you are required to provide a written response to this report within 90 calendar days. You should include a corrective actions plan for agreed-upon actions, including milestone dates. We have no objections to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions, please contact Dan Engelberg at (202) 566-0830 or [engelberg.dan@epa.gov](mailto:engelberg.dan@epa.gov), or Ira Brass at (212) 637-3057 or [brass.ira@epa.gov](mailto:brass.ira@epa.gov).

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# Chapter 1 Introduction

## Purpose

We conducted this review to assess the U.S. Environmental Protection Agency’s (EPA’s) enforcement role in protecting federally regulated wetlands, streams, and other surface waters under Section 404 (§404) of the Clean Water Act (CWA). CWA §404 regulates the discharge of dredged or fill material into “waters of the United States,” including wetlands and other surface waters. We focused on §404 enforcement because EPA has direct responsibility for certain types of §404 violations. We sought to answer the following question: How effective is EPA at identifying violations of §404 of the CWA that fall under its enforcement authority?

## Background

Wetlands are among the Nation’s most important natural resources. They provide a variety of benefits, such as pollutant reduction/removal, flood protection, shoreline erosion control, carbon sequestration, and ground water recharge. As primary habitats for fish, waterfowl, and wildlife, they are economically important and provide numerous opportunities for education, recreation, and research.



Little blue heron in Juniper Creek, Ocala National Forest, Florida. (EPA OIG photo)

The U.S. Fish and Wildlife Service (FWS) estimated that the continental United States had approximately 221 million acres of wetlands in the 1780s. By the mid-1980s, 117 million wetland acres had been lost; only approximately 104 million acres remained (a 53 percent loss of original wetlands area). Within this timeframe, 22 States lost more than 50 percent of their wetlands area; 10 of these States lost more than 70 percent (see Table 1-1).

**Table 1-1: Wetland Loss by State, 1780s–1980s**

State	% Original Wetlands Lost	State	% Original Wetlands Lost	State	% Original Wetlands Lost
Alabama	50	Louisiana	46	Ohio	90
Alaska	0.1	Maine	20	Oklahoma	67
Arizona	36	Maryland	73	Oregon	38
Arkansas	72	Massachusetts	28	Pennsylvania	56
California	91	Michigan	50	Rhode Island	37
Colorado	50	Minnesota	42	South Carolina	27
Connecticut	74	Mississippi	59	South Dakota	35
Delaware	54	Missouri	87	Tennessee	59
Florida	46	Montana	27	Texas	52
Georgia	23	Nebraska	35	Utah	30
Hawaii	12	Nevada	52	Vermont	35
Idaho	56	New Hampshire	9	Virginia	42
Illinois	85	New Jersey	39	Washington	31
Indiana	87	New Mexico	33	West Virginia	24
Iowa	89	New York	60	Wisconsin	46
Kansas	48	North Carolina	49	Wyoming	38
Kentucky	81	North Dakota	49		

Source: Dahl, T.E. 1990. *Wetlands Loses in the United States 1780's to 1980's*. U.S. Department of the Interior, FWS.

**Federal Regulation and Enforcement**

With the 1972 passage of the CWA, the Federal Government began to regulate the discharge of dredged or fill material into navigable waters, including wetlands and other surface waters. Discharges of dredged or fill material occur most frequently from development activities (e.g., residential, commercial, or municipal), infrastructure improvements (e.g., highways, dams, and airports), mining projects, and nonexempt agricultural activities. The CWA gives EPA and the U.S. Army Corps of Engineers (Corps) the ability to take enforcement actions against those who violate §404. The Assistant Secretary of the Army for Civil Works oversees the Corps’ regulatory program.



Fill from surface mining operations may be discharged into surface waters or wetlands. (EPA Region 3 photo)

Within EPA, two offices share responsibilities for protecting wetlands. EPA’s Office of Water, through its Office of Wetlands, Oceans, and Watersheds (OWOW), makes determinations on the scope of geographic jurisdiction and exemptions, develops regulations governing the environmental factors the Corps must consider when evaluating permit applications, and approves State and tribal

assumption of the §404 program. EPA's Office of Enforcement and Compliance Assurance (OECA) enforces violations of the CWA, including violations of §404. The Corps makes most §404 permit decisions, but in certain instances OWOW can elevate or veto these decisions.

EPA shares §404 enforcement responsibilities with the Corps under a 1989 Memorandum of Agreement (MOA). EPA has the lead enforcement role in a limited number of cases, including: (1) unpermitted activities that involve repeat violators, (2) flagrant violations, (3) where EPA requests a class of cases or a particular case, or (4) where the Corps determines that an EPA administrative penalty action is warranted. The Corps has the lead enforcement role in all other unpermitted cases and in all cases where there is a violation of a §404 permit. In the 1989 MOA, EPA and the Corps agreed to:

- Enter into interagency agreements with other federal, State, tribal, and local agencies that will provide assistance to the Corps and EPA in pursuit of §404 enforcement activities.
- Enter into field level agreements (FLAs) between Corps division or district offices and their respective EPA regional offices to more specifically implement the 1989 MOA's provisions.
- Where available, exchange data that would enhance either agency's enforcement efforts.
- Begin developing a computerized list of persons who have received after-the-fact permits or been subject to a §404 enforcement action.

Although OECA Headquarters formally administers and manages EPA's portion of the federal §404 enforcement program, enforcement work is performed by regional staff. OECA states in its National Program Managers Guidance that regions should:

- Have a process for identifying, targeting, inspecting, and otherwise responding to illegal activities in wetlands; and
- Coordinate, as appropriate, with other federal agencies that have significant roles in wetlands protection through the use of memoranda of understanding and memoranda of agreement (e.g., the Corps, FWS, etc.).

The regions learn of possible §404 violations in various ways, including referrals from the Corps or other regulatory agencies and tips from concerned citizens. Once the regions receive a complaint, they must determine whether it actually involves an activity that would be regulated under §404. If they find the activity to be a §404 violation, they will then work with the Corps to determine which agency will take the lead for that particular case. Once that determination is made, the lead agency will initiate an enforcement action.

### **State-level Enforcement**

Michigan and New Jersey are the only States that are authorized to implement the §404 program; they may prosecute §404 violations under State law. In addition, 29 States supplement federal §404 enforcement with varying degrees of State-level wetlands enforcement. The remaining 19 States lack State-level enforcement and rely on the Federal Government for wetlands enforcement. States have indicated they have not pursued program authorization because their programs are not equivalent to the federal program and they lack federal funds for implementation. States are also concerned about coordinating with FWS and the National Marine Fisheries Service on threatened/endangered species issues.

### **Noteworthy Achievements**

Individual EPA regions have made some strides toward better identification of §404 violations. For example, during regular meetings with the St. Paul Corps District, Region 5 staff discuss which violations would be good candidates for referral to the Region under the 1989 MOA. By tracking the Corps' enforcement actions (notably Notices of Violation or Cease and Desist Orders), Region 5 officials also find out about potential repeat violators in districts that do not typically refer §404 violations to EPA. Region 3, meanwhile, uses the Civil Air Patrol to provide aerial support services for the §404 program.

EPA staff in Regions 1, 3, 4, 7, and 8 reported that they have used construction stormwater (CWA §402) inspections to identify §404 violations. Regions 1 and 7 use inspection checklists that allow their inspectors to identify violations of both §402 and §404. Stormwater inspectors' reports were the foundation for two of the §404 enforcement actions that Region 7 pursued in 2008.

### **Scope and Methodology**

We conducted this review in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the evaluation 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 objectives. We performed our review from May 2008 to August 2009.

We used a variety of methods to evaluate EPA's effectiveness at identifying unauthorized violations of §404 under its enforcement authority as outlined in the 1989 MOA. We reviewed CWA §§309, 401, and 404; EPA and Corps policies and guidance documents; and current FLAs between EPA regions and Corps districts. We also reviewed the MOAs between EPA Regions 2 and 5 and the two States that can implement the §404 program (New Jersey and Michigan).

We sent a brief information request to all 10 EPA regions. We conducted interviews with personnel from EPA Headquarters and six regions, Corps Headquarters and eight districts, FWS Headquarters, and the Natural Resources Conservation Service (NRCS) Headquarters. We visited six States, two water management districts in Florida, and a State association for conservation commissioners. During our interviews, we discussed internal controls regarding identification and tracking of unauthorized violations, as well as communication and collaboration with federal and State partners.

We also judgmentally selected 59 final enforcement actions from EPA's Enforcement and Compliance History Online database for further review during interviews with EPA regional staff. We did not independently verify the accuracy or reliability of data provided by the database. We did not review the selected final enforcement actions in EPA's internal enforcement database, the Integrated Compliance Information System.

There have been no recent OIG reports on §404 enforcement issues.

Further details on our scope and methodology are in Appendix A.

## Chapter 2

### EPA Lacks a Unified Framework to Manage the Section 404 Enforcement Program

EPA lacks a systematic framework for identifying §404 violations for which it is responsible under the 1989 MOA. Primarily because of a limited field presence related to §404 violations, EPA identifies violations through a passive, reactive method of relying on complaints and referrals from external sources. An incomplete national data system and sporadic coordination with federal and State partners further impair EPA's ability to maintain an effective §404 enforcement program. EPA must develop a framework that includes a §404 enforcement strategy that includes increased communication/coordination with enforcement partners, a system to track repeat and flagrant violators, performance measures, and cross-training. Without an effective framework or strategy, EPA cannot be assured that it is sufficiently protecting wetlands and other surface waters from §404 violations involving dredged or fill activity. Further, the current system does not provide EPA with the necessary inputs to make informed decisions about the allocation of resources for §404 enforcement.

#### **EPA's Identification of §404 Violators Needs to Be More Systematic**

Although OECA's Fiscal Year (FY) 2010 National Program Managers Guidance states that EPA should have a process for identifying illegal activities in wetlands, EPA has no strategy beyond the 1989 MOA. This is in contrast with other CWA programs – such as stormwater and combined/sanitary sewer overflows – for which OECA has developed specific enforcement strategies. In the absence of a §404-specific strategy, EPA relies on external sources for information about violations, particularly the Corps. The Corps also only primarily learns about §404 violations through external sources, often from private citizens. Additionally, current reporting mechanisms do not always inform EPA of whether someone has repeatedly violated State-level wetlands protection laws.

#### ***EPA Relies on External Sources for Violation Knowledge***

In part because of its limited field presence, all of the regions interviewed primarily relied on complaints, tips, and referrals to learn about §404 violations. For example, for Region 1 during FYs 2004-2008, citizen complaints accounted for 59 percent of reported violations, other government sources accounted for 28 percent, unknown sources accounted for 10 percent, and EPA itself only accounted for 3 percent.

EPA receives more referrals from the Corps than any other regulatory agency. For example, the Corps supplied Region 4 with 86 percent of the §404 violations the Region pursued in FYs 2004-2008. During the same period, every Region 8

§404 enforcement action was the result of a Corps referral. The Corps itself takes a reactive approach toward identifying violations, relying primarily on complaints and referrals from external sources. Citizen complaints are the primary source for violation information in six of the eight Corps districts interviewed and a major source of information in the other two districts. If the Corps identifies a violation itself, it tends to occur randomly while checking for permit compliance.

Only those States that implement the CWA §404 program (Michigan and New Jersey) must report their wetlands compliance and enforcement activities to EPA. Michigan lists violations of greater than 1 acre (including the violator's name) in its annual report to EPA. For FYs 2006-2008, Michigan reported 2,236 violations of Parts 301 and 303 of its Natural Resources and Environmental Protection Act, the State equivalent of §404.

The 29 States that supplement §404 with State enforcement are not authorized to implement the CWA §404 program or obligated to report their program activities to either EPA or the Corps. Nevertheless, several States publish their annual wetland enforcement statistics. Some State annual reports, such as those for Maryland, New Hampshire, and Maine, list wetland violators by name, providing both EPA and the Corps with a list of potential repeat violators. However, during field work interviews, no EPA regional staff stated they use these reports to identify possible §404 cases.

While the Corps' regulatory database may contain a violator's past history, that history may not include all State-level enforcement activity. In April 2009, the Corps' Green Bay field office was notified of a possible violation. However, it was only after the Corps had consulted with the Wisconsin Department of Natural Resources that it learned the State had already pursued an enforcement action in 2005 against the responsible party. There was no record of the State enforcement action in the Corps' regulatory database.

### ***EPA Lacks Processes and Tools to Identify Repeat §404 Violators***

EPA's enforcement database does not provide complete §404 violation histories. Because EPA lacks a systematic approach to assessing a violator's prior §404 enforcement history, it may not be able to identify all repeat §404 violators, especially if they are smaller operators. To confirm whether violators have been subject to §404 orders in other regions, staff in Regions 3 and 8 have had to contact staff in other regions.

Moreover, EPA staff cannot directly access the Corps' enforcement records. While OWOW is developing an interface with the Corps' national regulatory database, that interface will provide EPA staff with CWA permit and jurisdictional data. EPA enforcement staff will still need to ask Corps staff to query respondent violation histories on their behalf.

## **EPA Must Improve Coordination with Enforcement Partners**

EPA must improve its coordination with its §404 enforcement partners. In the absence of detailed national guidance on §404 referrals, EPA regions rely on FLAs with Corps districts. The FLAs vary both in content and the degree to which they are implemented, creating inconsistencies in the referral process. When EPA has agreements with other federal agencies, such as FWS and NRCS, they are often temporary or unclear. Additionally, the enormous variation in State wetlands enforcement programs complicates coordination efforts.

### ***EPA Needs to Increase Coordination with the Corps***

EPA and the Corps lack detailed procedural guidance on §404 case referrals. The 1989 MOA provides only general details on which cases should be referred to EPA – specifically, “repeat or flagrant” violations where the violator is not covered by a §404 permit. Most regions have not developed a standard referral process with their corresponding Corps districts. Instead, the current process consists of informal collaboration agreements and personal relationships between EPA and Corps staff. As a result, the rationale for referring cases to EPA, as well as the quality of referral packages, varies from district to district.

Officials in four of the eight interviewed Corps districts said that while the criteria in the 1989 MOA are evaluated and considered in referral decisions, they generally only refer violations to EPA if in-house resolution fails. When there is a violation of a permitted project, three of the interviewed districts determine whether to refer the violation to EPA based on the impact compared with the project’s original scope, while two other districts regard these activities strictly as violations of the §404 permit and resolve them in-house.

In an effort to more specifically implement the 1989 MOA’s limited referral guidance, EPA regions have finalized supplemental FLAs with 21 of the 38 Corps districts (Region 1 is included but abides by an unsigned FLA). Region 4’s FLA with the Jacksonville Corps District requires that the lead agency status be determined within 15 days of the original notification of violation letter. In contrast, according to the Memorandum of Understanding between Region 5 and the St. Paul Corps District, the Region has 134 days to determine whether it wants to accept a referral. If a violator applies for an after-the-fact permit during this period when it is unclear which agency has lead enforcement status, the District may need to initiate a review of the permit application.

EPA and the Corps differ in how they implement their FLAs. For example, in Region 4, the quantity and quality of enforcement referrals vary significantly between the five Corps districts with which it has FLAs. Some of the FLAs lack a requirement for Corps districts to report unauthorized violations to EPA regions and a standardized explanation of the referral process. Although the Region has

FLAs with the Vicksburg and Mobile Corps Districts, Region 4 staff reported that both Districts have essentially stopped sending referrals.

### ***EPA Needs to Increase Coordination with Other Federal Agencies***

Coordination with federal agencies other than the Corps that have wetlands-related programs would provide EPA with additional resources in the field and save resources when developing enforcement cases. For example, Region 3 has an interagency agreement with one FWS field office on identifying wetlands violations. The FWS field office reports any potential violations to the Region and inspects violations reported to the field office by EPA, the State, the public, and other organizations. In one case, FWS employees discovered and investigated two different violations on the same property. Other regions have entered into similar interagency agreements with FWS, but they are often temporary and expire when funding to support the agreements runs out.

Lack of coordination with NRCS has created uncertainty about the types of information the agency can share with EPA. As part of a 1994 MOA between EPA, the Corps, FWS, and NRCS, the agencies agreed that EPA and the Corps would rely on wetlands determinations made by NRCS on agricultural lands for the purposes of determining §404 jurisdiction. A 2002 amendment of the Farm Security and Rural Investment Act prohibited NRCS from sharing confidential producer information, including wetlands delineations and determinations, to agencies outside the U.S. Department of Agriculture. As a result of these amendments, NRCS and the Corps both withdrew from this MOA in January 2005 and signed a separate bilateral agreement in February 2005. In November 2005, NRCS issued a directive indicating its staff could release the following information to the public and federal, State, and local agencies or entities:

- Maps or aerial photographs showing wetland locations/boundaries;
- Site visit reports and documentation of site conditions prepared by NRCS;
- Wetland determination data sheets prepared by NRCS; and
- Technical determinations (e.g., functional assessments) made by NRCS.

Recent changes in legislation and NRCS policy created additional uncertainty about whether NRCS field offices can share this information. NRCS currently interprets the 2008 Farm Bill as prohibiting the release of wetlands delineations and determinations to agencies outside the U.S. Department of Agriculture.<sup>1</sup> EPA must now contact the landowner directly for this information. The landowner can either give NRCS permission to release this information to EPA, release the information directly to EPA, or deny permission to release the information. Enforcement staff from Regions 1, 4, and 7 said information about wetlands determinations and delineations made by NRCS would still be useful to §404 enforcement efforts. In one instance, Region 1 developed an enforcement action

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<sup>1</sup> National Bulletin 130.9.2 – Processing Freedom of Information Act Requests Under Section 1619 of the Farm Bill (December 30, 2008). This National Bulletin expires September 30, 2009.

against a farm owner only to later learn that NRCS had classified the farmland as exempt from §404 requirements.

### ***Improved Coordination with State Agencies Would Be Beneficial***

EPA's formal agreements with States are limited to New Jersey and Michigan. New Jersey's and Michigan's MOAs with Regions 2 and 5, respectively, enable them to carry out the policies, regulations, and procedures necessary to administer the permit program established under §404. The MOAs outline how the Regions will coordinate wetlands-related enforcement activities with those States.

Better coordination between EPA and States that do not implement the §404 program would help send a more consistent message to §404 violators. Staff in Minnesota's Department of Natural Resources said they would like to see EPA or the Corps take the lead in prosecuting more of the wetland fills that are exempt under State law but not under §404, and better coordination could facilitate such action. While no EPA regional staff reported using State wetland violation reports to identify possible §404 cases, some State violation reports include information on wetland fills that are exempt under State law. If EPA reviewed these reports regularly, it might be better positioned to take the lead in prosecuting wetland fills that are exempt under State law but not under §404.

## **Jurisdictional Uncertainty Has Further Impaired EPA's Ability to Address §404 Violations**

Even when EPA and its partners are aware of §404 violations, they may be unsure whether they have the legal authority to bring enforcement actions. Prior to 2001, the scope of the CWA was fairly straightforward and could be interpreted to be more expansive. In 2001, the U.S. Supreme Court's *SWANCC*<sup>2</sup> decision effectively removed from CWA jurisdiction isolated waters that had previously been found to be jurisdictional based solely on the presence of migratory birds. The limits of CWA jurisdiction became more uncertain in 2006 after the Court's split decision in the *Rapanos*<sup>3</sup> case. In a March 2008 memo, EPA reported that it dropped 77 potential CWA §404 enforcement actions between July 2006 and December 2007 because it was uncertain it could establish jurisdiction under the CWA. In some cases, the jurisdictional uncertainty that resulted from the *Rapanos* and *SWANCC* cases makes it unclear whether a §404 violation has even occurred. In response to our draft report, EPA maintained that the effect of the *Rapanos* and *SWANCC* decisions on its §404 enforcement program cannot be overstated.

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<sup>2</sup> *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001).

<sup>3</sup> *Rapanos et ux., et al. v. United States*, 547 U.S. 715 (2006).

## Conclusion

EPA has not established a comprehensive, unified framework for its portion of the §404 enforcement program. EPA must develop a strategy for a comprehensive framework that includes guidance and controls that will allow it to effectively identify and resolve violations. Improved coordination with the Corps, other federal agencies, and the States should allow EPA to enforce §404 more efficiently. Without an effective framework or strategy, EPA cannot be assured that it is sufficiently protecting wetlands and other surface waters from §404 violations involving dredged or fill activity. Further, the current system does not provide EPA with the necessary inputs to make informed decisions about the allocation of resources for §404 enforcement.

## Recommendations

We recommend that the Assistant Administrator for Enforcement and Compliance Assurance, in consultation with the Assistant Administrator for Water:

- 2-1 Develop and implement a comprehensive CWA §404 enforcement strategy that should address, but not be limited to, the following areas:
  - a. Creation of a national tracking system for complaints and referrals from the Corps, as well as repeat and flagrant §404 violators;
  - b. Improved communication and coordination between EPA Headquarters/regions and Corps Headquarters/districts;
  - c. Barriers to enhanced interagency communication (and mechanisms to overcome these barriers) with the Corps, as well as other federal agencies (e.g., NRCS, FWS, and Civil Air Patrol);
  - d. The feasibility of leveraging other CWA program resources to more systematically identify §404 violations;
  - e. The adequacy of EPA's current performance measurement system for the §404 enforcement program; and
  - f. Cross-training opportunities with federal, State, and other stakeholders.

We recommend that the Deputy Administrator:

- 2-2 Revise, in collaboration with the Assistant Secretary of the Army for Civil Works, the 1989 MOA to clarify the types of cases that should be referred to EPA or the Corps; the revised MOA should update the procedures for case referrals.

## Agency Response and OIG Evaluation

The Assistant Administrator, Office of Enforcement and Compliance Assurance, responded to our draft report on October 9, 2009 (see Appendix B). Overall, EPA

agreed that it could improve the effectiveness of its §404 enforcement program by taking a more proactive approach to detecting and enforcing violations.

EPA agreed with our first recommendation to develop and implement a comprehensive §404 enforcement strategy. In its response, EPA indicated that it plans to comprehensively evaluate the wetlands program and each of the subrecommendations (a) through (f) to determine which elements are essential to an effective enforcement strategy. For example, EPA stated that the role of field inspections conducted by other CWA programs to discover §404 violations should be expanded as part of the enforcement strategy. EPA indicated it may initially pilot the developed enforcement strategy in a specific watershed, such as the Chesapeake Bay, to determine which elements should be included in the national strategy.

In response to our second recommendation, EPA believed that any decision about revisions to the existing 1989 MOA with the Corps should be informed by the implementation of the enforcement strategy. It provided alternative language for this recommendation.

In its response, EPA explained that it often learns of §404 violations from external sources, such as tips, complaints, or the Corps, because the CWA does not require the public to self-report their wetlands activities to the Agency. However, EPA agreed that while these sources can be an important part of an enforcement strategy, they should not be the sole foundation of an effective enforcement program. EPA also stressed that the *Rapanos* and *SWANCC* decisions greatly impacted the amount of resources needed to determine jurisdiction. As a result, EPA may choose to devote already limited resources to cases where jurisdiction is less uncertain and, therefore, easier to establish.

While we commend EPA for its willingness to develop a national-level enforcement strategy for the §404 program, it is imperative that the Agency also implement the strategy. The Agency's response does not address implementation issues, nor does it provide reasonable assurance that the strategy will address subrecommendations (a) through (f). In addition, given the wide variability in wetlands characteristics, we are also concerned that focusing the pilot study in a single watershed will not provide EPA with a comprehensive evaluation of the strategy. We believe that EPA should expand the scope of its pilot study to additional geographical areas. We encourage EPA to conduct these pilots within defined and reasonable timeframes.

We acknowledge that the strategy development process will provide the Agency with additional insight regarding what changes are needed to the current case referral process. Given our findings, we still believe the 1989 MOA will need to be revised once EPA completes the §404 enforcement strategy. Therefore, we consider both recommendations undecided.

The Agency's response also included some suggested editorial revisions to clarify certain factual issues. We have reviewed those suggestions and made changes to the report, as appropriate.

## **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
2-1	11	Develop and implement a comprehensive CWA §404 enforcement strategy that should address, but not be limited to, the following areas: <ol style="list-style-type: none"> <li>a. Creation of a national tracking system for complaints and referrals from the Corps, as well as repeat and flagrant §404 violators;</li> <li>b. Improved communication and coordination between EPA Headquarters/regions and Corps Headquarters/districts;</li> <li>c. Barriers to enhanced interagency communication (and mechanisms to overcome these barriers) with the Corps, as well as other federal agencies (e.g., NRCS, FWS, and Civil Air Patrol);</li> <li>d. The feasibility of leveraging other CWA program resources to more systematically identify §404 violations;</li> <li>e. The adequacy of EPA's current performance measurement system for the §404 enforcement program; and</li> <li>f. Cross-training opportunities with federal, State, and other stakeholders.</li> </ol>	U	Assistant Administrator for Enforcement and Compliance Assurance, in consultation with Assistant Administrator for Water			
2-2	11	Revise, in collaboration with the Assistant Secretary of the Army for Civil Works, the 1989 MOA to clarify the types of cases that should be referred to EPA or the Corps; the revised MOA should update the procedures for case referrals.	U	Deputy Administrator			

<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 undecided with resolution efforts in progress

**Appendix A*****Details on Scope and Methodology*****Wetlands Enforcement Information Request**

We sent a brief information request to all EPA regions about how they identify violations of §404 of the CWA that fall under their enforcement authority as described in the 1989 MOA between EPA and the Corps, including:

- How regions define flagrant and recurring violations of §404.
- What types of policies and guidance regions use to define/identify violations of §404.
- What other types of wetlands-related enforcement policies and guidance regions use, e.g., standard operating procedures and FLAs with Corps districts.
- How regions resolve lower priority violations of §404.

We received and analyzed responses to the information request from all 10 regions.

**Interviews with Federal, State, and Other Organizations**

We interviewed a variety of personnel from federal, State, and other organizations, including EPA and the Corps, as follows:

**EPA**

- OECA
- OWOW
- Office of General Counsel
- Region 1
- Region 3
- Region 4
- Region 5
- Region 7
- Region 8

**State**

- Massachusetts Department of Environmental Protection
- Florida Department of Environmental Protection
- Georgia Department of Natural Resources
- Michigan Department of Environmental Quality
- Minnesota Pollution Control Agency
- Minnesota Department of Natural Resources
- Minnesota Board of Water and Soil Resources
- Nebraska Department of Environmental Quality

**Corps**

- Headquarters, Regulatory Branch
- New England District
- Pittsburgh District
- Savannah District
- Jacksonville District
- St. Paul District
- Detroit District
- Rock Island District
- Omaha District

**Other Agencies and Organizations**

- FWS - Division of Habitat and Resource Conservation
- NRCS
- St. Johns River Water Management District
- Northwest Florida Water Management District
- Association of State Wetland Managers
- Massachusetts Association of Conservation Commissioners

Our purpose during the interviews was to gain a better understanding of how these agencies and organizations identify unauthorized violations of §404 (proactively or reactively), process known violations, and collaborate with other agencies. Generally, the topics covered during an interview included:

- Sources of information about §404 violations, e.g., citizen complaints and Corps personnel.
- Effect of recent changes to jurisdictional determinations and subsequent case development.
- Use of internal and external databases to track violations and case development.
- Use of field-level agreements and other documents to improve collaboration.
- Effectiveness of remote sensing and other surveillance techniques for identifying §404 violations.

### Review of EPA's Enforcement Database and Selection of Final Enforcement Actions

We reviewed EPA's Enforcement and Compliance History Online database for specific information regarding enforcement actions taken by EPA Regions 1, 3, 4, 5, 7, and 8 under CWA §404 between October 1, 2003, and September 30, 2008. During this time, these regions took 340 final enforcement actions under CWA §404. We judgmentally selected 59 actions (see Table A-1) to discuss during regional interviews, including those:

- That were identified as flagrant, egregious, or repeat violations in the case narrative;
- That represented the majority of States located within the region;
- Where violations occurred across more than one EPA region;
- With a variety of wetlands types, impact sizes, and types of violators (e.g., individuals, municipalities, corporations, and developers);
- With high penalty amounts (a proxy for the size of the violation); and
- With high compliance action costs (also a proxy for the size of the violation).

**Table A-1: Section 404-related Final Enforcement Actions Selected for Further Review**

Region 1	Region 3	Region 4	Region 5	Region 7	Region 8
01-2000-0017	03-2004-0309	04-2008-5504	05-2001-0704	07-2007-0144	08-2006-0052
01-2004-2047	03-2005-0270	04-2005-5754	05-2008-8201	07-2007-0125	08-2007-0174
01-2005-2007	03-2006-0085	04-2007-5754	05-2008-8202	07-2005-0163	08-2003-0822
01-2006-2027	03-2006-0173	04-2003-9032	05-2008-8203	07-2004-0332	08-2005-0196
01-2008-2030	03-2007-0203	04-2008-5767	05-2007-0612	07-2007-0159	08-2005-0213
01-2008-2031	03-2000-0281	04-2008-5501	05-1997-0371	07-2007-0206	08-2007-0016
01-2008-2032	03-2005-0357	04-2008-5502	05-2006-2347	07-2007-0122	08-2004-0212
01-2008-2515		04-2008-5503	05-2005-0502	07-2008-0072	08-2005-0164
		04-2004-5751	05-2003-0723	07-2008-0073	08-2004-0209
		04-2004-5752			08-2005-0167
		04-2004-5753			08-2008-0060
		04-2004-5754			08-2007-0173
		04-2002-9008			
		04-2006-5755			

Source: OIG analysis

During interviews with regional wetlands enforcement personnel, the team sought to learn for each case:

- When EPA or the Corps discovered the violation or received a complaint/referral,
- When EPA became the lead enforcement agency,
- Details about the violation, and
- Information sources used to develop the case.

**Appendix B*****Agency Response***

October 9, 2009

**MEMORANDUM**

**SUBJECT:** Evaluation Report: "EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act," Project No.OPE-FY08-0006

**FROM:** Cynthia Giles  
Assistant Administrator

**TO:** Wade Najjum  
Assistant Inspector General for Program Evaluation  
Office of Inspector General

On behalf of the Deputy Administrator and the Office of Water (OW), I am writing to transmit EPA's comments on the subject Report. We appreciate the opportunity to respond to the Office of Inspector General's (OIG) findings and recommendations as reported in "EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act." We would like to thank you and your staff for your willingness to meet to resolve comments and to discuss your findings, and for incorporating many of our specific comments and corrections on the discussion draft. We believe that this collaborative approach is important to achieving a more accurate and effective Report. The Agency agrees that it could improve the effectiveness of its Section 404 enforcement program by taking a more proactive approach to detecting and enforcing violations, and that the OIG's suggestions are helpful in identifying areas where the enforcement program could be strengthened.

As your report notes briefly, the recent SWANCC and Rapanos decisions have had a significant impact on enforcement targeting and case development. Because of the increased evidentiary burdens imposed by these cases, EPA is now required to devote significant resources to jurisdictional determinations before it decides whether to pursue an enforcement case. This has had the effect of diverting scarce resources away from activities designed to detect Section 404 violations. This issue will continue to impact any enforcement strategy developed by the agency. We encourage the OIG to consider emphasizing these challenges more fully in the final Report.

EPA agrees with the first recommendation in the Report to develop and implement a comprehensive section 404 enforcement strategy. EPA may initially focus or pilot an enforcement strategy in a particular watershed, such as the Chesapeake Bay. The results of the pilot could then be used to inform the development of a national strategy. An enforcement strategy should include, among other things, a more proactive approach to enforcement, including more effective coordination with the Army Corps of Engineers (the Corps). With

respect to the second recommendation, EPA believes that we should develop and gain experience with a section 404 enforcement strategy before embarking on a revision of the 1989 Memorandum of Agreement (MOA) with the Corps. We recognize that the Corps is a significant source of information to EPA on potential violators and would be collaborating closely with it in implementing a new strategy. Once EPA implements the new enforcement strategy or completes any pilot, it would have a much clearer understanding of whether, and to what extent, the MOA should be revised.

We appreciate the opportunity to review and comment on this draft Report. Please see our attached detailed comments to each of the issues and recommendations. Should you have any questions or concerns regarding this response, please contact EPA's Audit Liaison, Gwendolyn Spriggs, at 202-564-2439.

Attachment

**EPA Response to OIG Draft Report**  
***EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act***  
***Project No. OPE-FY08-0006***

**I. EPA's Response to Report Recommendations**

**Report Recommendation 2-1:**

**Develop and implement a comprehensive CWA Section 404 enforcement strategy that should address, but not be limited to, the following areas:**

- a. Creation of a national tracking system for complaints and referrals from the Corps, as well as repeat and flagrant Section 404 violators;**
- b. Improved communication and coordination between EPA Headquarters/regions and Corps Headquarters/districts;**
- c. Barriers to enhanced interagency communication (and mechanisms to overcome these barriers) with the Corps, as well as other federal agencies (e.g. NRCS, FWS, and Civil Air Patrol);**
- d. The feasibility of leveraging other CWA program resources to more systematically identify Section 404 violations;**
- e. The adequacy of EPA's current performance measurement system for the Section 404 enforcement program;**
- f. Cross-training opportunities with federal, state, and other stakeholders.**

**Comment:**

EPA agrees with Recommendation 2-1 and plans to develop, in consultation with OW and the Regional offices, and in collaboration with the Corps as appropriate, an appropriate enforcement strategy. In developing the strategy, EPA will comprehensively evaluate the program, including each of the sub-recommendations (a)-(f) to determine whether each of these elements is essential to an effective enforcement strategy.

With respect to Recommendation 2-1, EPA would like to retain the discretion to thoroughly evaluate the sub-recommendations (a)-(f) before deciding whether to include all, or only some of, them in the Section 404 enforcement strategy. This opportunity for evaluation will enable EPA to determine which elements are essential to an efficient and effective Section 404 enforcement strategy. EPA might initially pilot or focus such an enforcement strategy in the Chesapeake Bay watershed to determine which elements are most effective. This experience will help EPA to further refine the Section 404 enforcement strategy.

**Report Recommendation 2-2:**

**Revise, in collaboration with the Assistant Secretary of the Army for Civil Works, the 1989 MOA to clarify the types of cases that should be referred to EPA or the Corps; the revised MOA should update the procedures for case referrals.**

**Comment:**

While EPA agrees that improved coordination with the Corps is essential to a more proactive Section 404 enforcement program, EPA believes that implementing an enforcement strategy should inform any decision on revisions to the existing MOA with the Corps. EPA proposes the following language as a substitute:

“After development of a comprehensive enforcement strategy consistent with Recommendation 2-1, EPA will evaluate whether the enforcement strategy has effectively addressed the issues raised in the Report, and, if not, consider whether it is necessary to revise the 1989 MOA to clarify the types of cases that should be referred and the processes for making case referrals.”

**II. EPA's Specific Comments and Corrections on Text of the Report****FINDINGS SECTION****Finding: EPA Lacks a Unified Framework to Manage the Section 404 Enforcement Program**

EPA agrees that a successful Section 404 enforcement program must focus on actively pursuing Section 404 violations through enforcement targeting and other proactive approaches. Approaches such as using field inspections primarily intended to investigate other types of CWA violations (e.g., Section 402 and Section 311) to also discover violations of Section 404 should be expanded as part of a Section 404 enforcement strategy. In addition, the Agency has implemented various initiatives, such as the Tulloch ditching initiative, that have been successful in discovering large numbers of violations involving certain types of activities or located in certain geographic regions. An enforcement initiative, perhaps piloted in a particular watershed such as the Chesapeake Bay, could serve as a template for the development of similar enforcement targeting approaches as part of a new enforcement strategy.

**Finding: EPA Relies on External Sources for Violation Knowledge**

In earlier discussions with the DIG, the Agency commented that, because Section 404 of the CWA does not provide a statutory requirement for the regulated public to self-report information to the Agency about wetlands activities, EPA has historically relied on external sources such as tips and complaints, and referrals from the Corps, to learn about Section 404 violations. While EPA agrees that tips and complaints should not be the sole foundation of an effective enforcement program, these sources of information can be an

important part of a successful enforcement strategy. When combined with other, more proactive, approaches to discovering violations tips and complaints represent a successful coordination between EPA and its governmental partners and private citizens, and allow for public participation in wetlands enforcement efforts. Tips and complaints can also be a very important source of information about significant Section 404 violations, as well as of smaller, more discrete, violations that may otherwise go undetected. Finally, although the Corps might be viewed as an “external source” of information, EPA believes that it more accurate to characterize its relationship with the Corps as that of “co-regulator.” EPA believes that it is critical that the two agencies freely exchange information so as to improve Section 404 enforcement throughout the federal government.

**Finding: Jurisdictional Uncertainty Has Further Impaired EPA's Ability to Address Section 404 Violations**

We respectfully submit that the effect that the SWANCC and Rapanos decisions have had on the Agency’s Section 404 enforcement program cannot be overstated. The SWANCC and Rapanos decisions, and the inconsistent positions taken by the lower courts in response, have created such uncertainty about the scope of CWA jurisdiction that EPA must carefully evaluate whether it would be an appropriate use of Agency resources to pursue particular Section 404 violations in pans of the arid west, where the violations are located a great distance from a traditional navigable water, or where the costs of proving jurisdiction are disproportionately large. In these circumstances, what would have normally been considered a clear Section 404 violation prior to SWANCC and Rapanos, is no longer certain, and would require the expenditure of additional enforcement resources to support jurisdiction in court.

It is important to recognize that this resource burden begins at the outset of any investigation of alleged wetlands violations. The Agency may expend substantial resources only to determine jurisdiction is problematic, and the case will no longer be pursued. Because of the resources necessary to prove jurisdiction, the Agency may choose to devote its limited resources to cases where jurisdiction is less uncertain. The result is that a large percentage of waters that would have been protected under Section 404 prior to SWANCC and Rapanos, such as headwater or ephemeral streams, streams in arid parts of the country and isolated waters may receive less attention from the Agency because of the costs of proving jurisdiction in these cases. We request that this section even more strongly emphasize the impact of these decisions on the enforcement program. We also request that this section be emphasized in an earlier section of this Report to more accurately capture the significance that these issues have had on the Section 404 enforcement program.

### Technical Corrections

Beyond the substantive issues discussed in the comments, above, EPA would also like to suggest additional editorial revisions to clarify certain factual issues in the Report.

1. The Report states that OWOW is developing an interface with the Corps' national database that will "only provide EPA staff with Corps' permit data." In fact, the computer interface being developed by the OWOW to exchange data with the Corps' national regulatory database will provide access to Corps' permit data as well as data on Clean Water Act jurisdiction. The second-to last sentence at the bottom of page 7 should be modified to reflect this.
  
2. The Report states on page 8 that there is little consistency among the regions and Corps districts regarding the processes and procedures for referral of cases to EPA. The Report notes that, in some cases, this may result in uncertainty or confusion about who should be the lead enforcement agency. While this uncertainty may cause delay in certain enforcement cases, the Agency believes that the characterization that this uncertainty "could force [Corps] District[s] to initiate a review of a violator's application for an after-the-fact permit" is overstated. The Corps is not "forced" to issue or even consider an after-the-fact permit in response to a potential Section 404 violation. Instead, in choosing to issue after-the-fact permits the Corps is making a policy decision. EPA's view is that after-the-fact permits should not be issued in lieu of enforcement actions where an enforcement action is warranted and appropriate. Would ask that the last sentence of the third paragraph in this section be replaced with the following:
 

"Uncertainty about which agency has the lead enforcement status during this period can result in some delay. During this period, the Districts may choose to initiate the review of a violator's application for an after-the-fact permit, although EPA does not believe that after-the-fact permits should be issued in lieu of enforcement action."
  
3. On page 10, the Report refers to an enforcement case in Region 5 against a large coal mine in Indiana as evidence of a lack of coordination between EPA and the state. However, according to Region 5, EPA did, in fact, participate in interagency meetings with the Indiana Department of Environmental Management, Indiana Department of Natural Resources and the Corps as early as April 2007 to share information and coordinate EPA's enforcement response in this particular case. We therefore request that this particular example be deleted.

**Appendix C*****Distribution***

Office of the Administrator  
Acting Deputy Administrator  
Assistant Administrator, Office of Enforcement and Compliance Assurance  
Assistant Administrator, Office of Water  
Principal Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance  
Deputy Assistant Administrator, Office of Water  
Director, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance  
Deputy Director, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance  
Acting Director, Office of Wetlands, Oceans and Watersheds, Office of Water  
Acting Deputy Director, Office of Wetlands, Oceans and Watersheds, Office of Water  
Agency Follow-up Official (the CFO)  
Agency Follow-up Coordinator  
General Counsel  
Associate Administrator for Congressional and Intergovernmental Affairs  
Associate Administrator for Public Affairs  
Audit Follow-up Coordinator, Office of Enforcement and Compliance Assurance  
Audit Follow-up Coordinator, Office of Water  
Acting Inspector General