

# Clean Water Act Section 404 Regulatory Program: EPA's Roles and Efforts

## ISSUE SUMMARY:

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and energy and mining projects. Section 404 requires a permit from the U.S. Army Corps of Engineers (Corps) or an EPA-approved Tribe or state (CWA section 404(g)) before dredged or fill material may be discharged into a water of the United States, unless the activity is exempt from section 404 regulation (e.g., certain farming and forestry activities under section 404(f)). See <https://www.epa.gov/cwa-404/overview-clean-water-act-section-404>.

The EPA has important roles and responsibilities in the administration of the CWA section 404 program. The EPA develops and interprets policy, guidance, and environmental criteria used in evaluating permit applications (40 CFR 230); determines scope of geographic jurisdiction and applicability of exemptions; approves and oversees Tribal and state CWA section 404 assumed programs (40 CFR 233); reviews and comments on individual permit applications; has authority to prohibit, deny, or restrict the use of any defined area as a disposal site (section 404(c)); and participates in the review and oversight of mitigation banks and in-lieu fee mitigation programs used to compensate for unavoidable impacts to wetlands, streams, and other aquatic resources.

## UPCOMING MILESTONES:

- The EPA is working with the Department of Justice to defend challenges to its 2023 CWA Section 404(c) Final Determination regarding the Pebble Deposit in Alaska.
- The EPA is coordinating with the Corps and the Fish and Wildlife Service (FWS) regarding a new water management solution for the Yazoo Backwater Area in the Delta Region of Mississippi. A Final Environmental Impact Statement/Record of Decision and project-specific Memorandum of Agreements are expected by end of 2024. In 2008, EPA issued a CWA Section 404(c) Final Determination regarding the Yazoo Backwater Area.
- The EPA will review and comment on the Corps' 2025 proposed Nationwide Permit (NWP) reissuance package. NWPs are general permits issued by the Corps on a nationwide basis every 5 years to streamline the authorization of activities that result in no more than minimal individual and cumulative adverse environmental effects.
- The EPA Headquarters section 404 program will continue to provide regular training and tools to EPA CWA section 404 regulatory program staff and management on current regulations, policies and procedures to ensure consistent, effective and efficient EPA engagement on the CWA section 404 program. For example, to support the use of the streamflow duration assessment methods developed by EPA and the Corps and anticipated to be finalized in 2024, continued training and publications on regional streamflow duration assessment methods are anticipated in 2025.

## BACKGROUND:

CWA section 404 establishes a framework and provisions for the Corps and the EPA to jointly manage permitting for "discharges of dredge or fill material from a point source into a water of the United States." Pursuant to this framework, EPA developed the substantive environmental criteria used by the Corps to make its permitting decisions; these are known as the Section 404(b)(1) Guidelines (40 CFR 230). The Guidelines require the permit applicant to take all

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appropriate and practicable steps to avoid and minimize adverse impacts to jurisdictional waters and provide compensatory mitigation for unavoidable adverse impacts.

## **CWA Section 404 Specific Roles and Responsibilities of the EPA and the Corps:**

The Corps administers the day-to-day CWA section 404 permitting program, and conducts or verifies CWA section 404 jurisdictional determinations, develops CWA section 404 policy and guidance in collaboration with the EPA, and enforces the conditions and provisions of CWA section 404 permits authorized by the Corps.

The EPA has equally important roles and responsibilities in the administration of the CWA section 404 regulatory program. In addition to the co-responsibility EPA has with the Corps in the development and interpretation of CWA section 404 policy, the EPA determines the scope of CWA section 404 geographic jurisdiction (40 CFR part 120) and the applicability of CWA section 404(f) exemptions, as well as approves and oversees Tribal and state CWA section 404 assumption (CWA section 404(g)). Additionally, the statute (CWA section 404(b)) specifically tasked the EPA with the development of the environmental criteria, known as the CWA Section 404(b)(1) Guidelines (Guidelines) at 40 CFR part 230). These Guidelines are essential in the CWA 404 evaluation and permit decisions conducted by the Corps. To ensure compliance with these Guidelines, the EPA has the responsibility of reviewing and commenting on proposed CWA 404 permits, and identifying, when appropriate, any potential compliance issues. In FY23, the EPA reviewed more than two thousand public notices from Corps and state 404 programs, commenting on approximately 20%. In FY23, the EPA evaluations of final permit decisions on which EPA provided comments found improvements in one or more issue area(s) raised by the comments in 62% of projects showing the effectiveness of the review process to develop improved outcomes.

The EPA also has the authority to prohibit, deny, or restrict the use of any defined area as a disposal site (CWA section 404(c)), and the EPA can request that certain permit or policy decisions receive a higher level of review (CWA section 404(q)).

#### KEY EXTERNAL STAKEHOLDERS:

☒ Congress      ☒ Industry      ☒ States      ☒ Tribes      ☒ Media      ☒ Other Federal Agency  
☒ NGO      ☒ Local Governments      ☒ Other (name of stakeholder) USDA, U.S. Army Corps of Engineers, Department of Defense, Department of the Interior, NOAA

#### MOVING FORWARD:

- The EPA will continue to work with the Department of Justice on challenges to its 2023 CWA section 404(c) Final Determination regarding the Pebble Deposit in Alaska.
- The EPA will continue work with the Corps and the Fish and Wildlife Service regarding a water management solution for the Yazoo Backwater Area.
- The EPA will continue to develop tools and training for program capacity development and perform permit review and mitigation bank responsibilities.