



**FIELD LEVEL AGREEMENT  
BETWEEN  
THE U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT  
AND  
THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4  
CONCERNING ENFORCEMENT FOR THE SECTION 404 PROGRAM OF THE  
CLEAN WATER ACT**

**A. PURPOSE, SCOPE AND AUTHORITY.**

1. The January 19, 1989, Memorandum of Agreement, (National MOA) between the Department of the Army and the U.S. Environmental Protection Agency (EPA) concerning enforcement of the Section 404 program encourages the US Army Corps of Engineers (USACE) districts and EPA regions to enter into field level interagency enforcement agreements. The USACE, Savannah District (SAS), and EPA Region 4 established a Field Level Agreement (FLA) in June 2005 to more efficiently utilize their Section 404 enforcement resources to address unauthorized discharges within the SAS regulatory boundaries. The purpose of this FLA is to enable the SAS and EPA to more effectively and efficiently utilize their Section 404 enforcement resources by establishing a framework that will strengthen the enforcement program and reduce overlapping interagency work efforts.

2. The USACE and EPA have enforcement authorities for the Section 404 program, as specified in the Clean Water Act (CWA). This agreement supplements the above referenced January 19, 1989, National MOA and replaces the 2005 FLA for the purpose of establishing policies and procedures for implementation of this agreement. Nothing in this agreement is intended to diminish, modify, or otherwise affect the policies and procedures established in the National MOA.

**B. POLICY.**

1. EPA Region 4 will act as the lead enforcement agency throughout the State of Georgia for unauthorized discharges which meet any of the four criteria listed in Section III.D.1 of the National MOA as clarified below:

a. **Repeat violator(s).** For the purpose of this FLA, a repeat violator is a person (as defined in Section 502(5) of the Clean Water Act) who engages in the unauthorized discharge of dredged or fill material and who has been subject to a previous Section 404 enforcement action. Such actions include, but are not limited to, Cease and Desist (C&D) Orders and documented "voluntary" restorations.

b. **Flagrant violation(s).** For the purpose of this FLA, a flagrant violation has occurred if the party responsible for the unauthorized discharge has documented prior knowledge that a Section 404 permit is required for the discharge of fill into waters of the United States. Examples of documented prior knowledge include, but are not limited to: (1) Jurisdictional Determinations (JDs) performed on the site in question or on other sites known to the violator; (2) notice that a Department of Army (DA) permit would be required for proposed discharges on the site;



(3) previously issued Section 404 permits; (4) applications for permits; (5) warning letters; or (6) violations (including voluntary restorations) on other jurisdictional sites.

**c. Where EPA requests a class of cases or a particular case.** EPA Region 4 will also act as the lead enforcement agency on the following unauthorized activities: (1) freshwater wetland impacts greater than three (3) acres or tidal wetlands impacts greater than one (1) acre; and/or (2) stream (or water body) impacts greater than 750 feet or greater than 500 feet in trout-designated streams (or water bodies). For additional classes and cases not listed above, EPA must request lead enforcement agency status for a particular class of cases or a particular case, in writing, within 25 days from EPA's receipt of the notification letter issued by the SAS (e.g., Cease and Desist). An example of a class of cases for which EPA may seek lead enforcement agency status, might include unauthorized activities in EPA priority watersheds. EPA has identified watersheds throughout Region 4 where the agency has invested resources with the goal of restoring and protecting valuable water resources (see attachment 1). EPA requests that the SAS notify EPA of any unauthorized activities that occur in these watersheds so that EPA can determine whether or not it has, or intends to seek, lead enforcement agency status.

**d. Where the SAS recommends in writing that an EPA administrative penalty action may be the most appropriate way to resolve the violation.** EPA has 25 days from receipt of the SAS recommendation to notify the SAS whether they agree or disagree with the recommendation. If EPA agrees with the recommendation, EPA assumes the lead enforcement agency status regarding the administrative penalty. If EPA disagrees with the recommendation, the SAS will remain the lead enforcement agency. In all cases, the SAS will retain lead status for pursuing restoration activities or mitigation while EPA pursues the administrative penalty.

2. The SAS may act as lead investigative and enforcement agency for all noncompliance cases, and unauthorized activities that do not qualify under category B.1 above.

## **C. PROCEDURES.**

### **1. Investigation.**

a. As resources allow, the SAS and EPA may conduct routine investigations of unauthorized discharges and prepare field reports in accordance with established enforcement procedures. If one agency discovers an unauthorized discharge, the discovering agency should become the investigating agency and collect the preliminary field information necessary to document the existence of the violation.

b. For violations reported by other agencies or citizens, the SAS shall determine the permit status of any alleged violation. EPA will work with complainants to forward accurate information to the SAS to render a determination. In some cases EPA may refer the complainants directly to the appropriate SAS regulatory enforcement liaison for assistance.

c. If the violation involves an unauthorized discharge, a CWA Section 309(a) Order or voluntary compliance letter, (i.e., intend to letter) will be prepared by the investigating agency and sent to the violator, in the most expeditious manner, with a copy forwarded to the other agency. In all cases, the investigating agency will copy the other agency after issuing any



309(a) Order or voluntary compliance letter, (i.e., intend to letter) accompanied by appropriate field notes.

d. If the activity was permitted, but is not in compliance with a CWA Section 404 permit, a Notice of Permit Non-compliance, or CWA Section 309(a) Order may be prepared by the SAS and sent to the permittee, in the most expeditious manner, with a copy forwarded to the EPA.

e. A voluntary compliance letter may be an appropriate means to resolve an unauthorized violation when the respondent wishes to restore the violation and EPA and/or the SAS determine that formal enforcement action is not warranted. Such determination may be made when the respondent does not meet the definition of a flagrant or repeat violator, or when the respondent is a third party who either unknowingly purchases property with an existing 404 violation, or acquires the property through a bankruptcy hearing. It may be appropriate to use an informal enforcement response for violations where there is little environmental impact or where the degree of culpability exhibited by the violator and the potential deterrent effect is low. The investigating agency will copy the other agency on any voluntary compliance letter.

f. Once an agency initiates an investigation, the other agency will not be considered the investigating agency. Only one agency typically will be the lead investigating agency. The investigation period will generally not exceed 25 business days before a determination is rendered as to which agency should be the lead enforcement agency (see C.2. below).

g. If the SAS investigation results in a finding that the investigator cannot exert Section 404 authority over a particular discharge of dredged or fill material into waters of the United States, especially in situations where there is mechanical site preparation or Tulloch-related excavation activities, the SAS field investigator is encouraged to contact EPA to discuss the issue before making a final determination.

## **2. Lead Agency Selection.**

a. A violation is a candidate for referral to EPA when:

(1) EPA receives a copy of the SAS C&D Order (with all relevant information enclosed) and a cover letter documenting the referral to EPA, and

(2) The activity is covered under section B.1 above.

b. The SAS may act as lead investigative and enforcement agency for all noncompliance cases as well as those unpermitted cases that do not qualify under category B.1.c above. Where EPA requests the SAS take an action on a permit condition violation, this FLA establishes a "right of first refusal" for the SAS. EPA will make the request in writing and provide relevant information. The SAS will have 25 days in which to respond. If the SAS notifies that they concur with the finding of non-compliance on a permit condition and that SAS will not take an enforcement action against the permittee, the EPA may take an action. Notification of a determination by the SAS that the activity is in compliance with the permit will represent a final enforcement decision for that case.



c. Where an agency has been identified as lead enforcement agency on a specific case and is unable to take action, that agency (requesting agency) will notify the other agency by letter within 25 days of receipt of the original referral of the case. The other agency may accept or decline lead enforcement status and will notify the requesting agency of its decision within 25 days of receipt of the requesting agency's notification letter. If the other agency declines lead enforcement on the specific case, the requesting agency will retain lead enforcement status.

d. Once an agency has been identified as the lead enforcement agency, the other non-lead agency will forward to the lead a legible copy of all information and originals of any photos in its enforcement file and close its case and will cooperate with the other agency in its enforcement efforts. Once the lead agency has concluded its enforcement action, it will provide the non-lead agency with a copy of the final action.

e. In accordance with the National MOA, the lead enforcement agency will inform the responsible parties of the violation and instruct them that all illegal activity should cease pending further federal action.

f. The lead enforcement agency shall determine whether additional remedial actions are required, as well as render the final determination that a violation is resolved.

(1) After discovery of any unauthorized discharge and during the investigation period, both the SAS and EPA shall solicit the views of the other agency branch chief regarding appropriate remedial actions (i.e., restoration, and/or compensatory mitigation). In addition, the views of other federal, state, and local agencies should be solicited, if time and resources allow, for incorporation into initial environmental protection measures. The lead enforcement agency shall determine what, if any, remedial actions are required. The placement of necessary erosion control measures can be directed by either agency. These environmental protection measures shall be imposed as an enforceable requirement upon the violator as authorized by law.

(2) The lead enforcement agency shall notify interested parties, in writing, so that concurrent enforcement files within the non-lead agency can be closed. The lead enforcement agency shall make arrangements for proper monitoring of all remedial actions (i.e., restoration, compensatory mitigation), and coordinate with any other agencies involved in any enforcement action resolutions. In addition, the lead enforcement agency shall conduct all required coordination with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service pursuant to Section 7 of the Endangered Species Act.

g. If the SAS is the lead enforcement agency, it may accept an application for an after-the-fact (ATF) permit and conduct an appropriate evaluation. Prior to proceeding with the ATF permit process, the SAS will coordinate proposed ATF permit applications with EPA via weekly pre-construction notifications to determine if EPA has a pending enforcement action against the same violation. During the ATF permit evaluation process, EPA can submit comments consistent with the requirements of the 404(q) MOA. Issuance of the permit will constitute resolution of the unauthorized work and any remedial actions such as restoration or mitigation will be incorporated as a special condition(s) of the permit. Should the ATF permit be denied, the SAS may seek full restoration. If the SAS is unable to achieve restoration, EPA may seek restoration or other enforcement remedies.

h. If EPA is the lead enforcement agency and issuance of an ATF permit is a component of the settlement agreement, EPA will obtain concurrence with SAS on merits of granting an ATF permit (e.g., nationwide or individual permit) before the settlement agreement is signed by the respondent and EPA. The ATF permit with any necessary mitigation will be included by EPA as a condition of the settlement.

i. For cases that would involve a future SAS permit, EPA will coordinate proposed Section 404 Settlement Agreements with the appropriate SAS Section Chief prior to its submittal to the violator for signature.

j. Generally, only one agency will be the lead enforcement agency. However, it is recognized that there may be some situations where, upon agreement by the initial lead agency, the SAS and EPA share enforcement responsibility. For example, EPA, on behalf of the SAS, may use its authority under Section 308 of the CWA to gather information on a site when the respondents are non-responsive to SAS inquiries. In other instances, the SAS may be the lead on a site restoration and EPA may be lead on assessment of an administrative penalty. The SAS and EPA will work closely to coordinate these actions for a single case. If issuance of an ATF permit is part of the settlement agreement, the ATF permit will not be issued until EPA has a signed agreement from the respondent requiring that the monetary penalty will be paid. Neither agency will close their enforcement case until all agencies have received resolution.

#### **D. GENERAL**

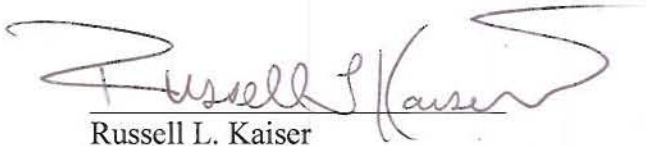
1. The policy and procedures contained in this FLA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the United States. Deviation or variance from these FLA procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.

2. This updated FLA is not intended to impose any obligations upon the SAS or EPA to pursue enforcement. The decision to pursue enforcement remains discretionary.

3. The USACE, SAS, and EPA Region 4 will review this FLA on an annual basis, and may decide to modify, extend or revoke the FLA at least every three years. EPA will notify the SAS whenever changes occur to locations of priority watersheds. If the FLA is not modified or revoked within three years of the date of the last signature below, it will automatically be extended.

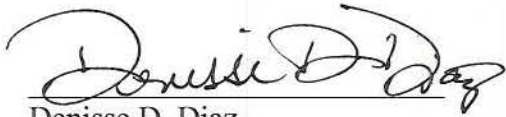


4. This agreement will take effect ten days after the date of the last signature below and will continue until modified or revoked by agreement of any of the parties or until revoked by any party upon written notice



Russell L. Kaiser  
Chief, Regulatory Division  
U.S. Army Corps of Engineers  
Savannah District

29 Oct 2010  
Date



Denisse D. Diaz  
Acting Chief, Clean Water Enforcement Branch  
Water Protection Division  
U.S. Environmental Protection Agency  
Region 4

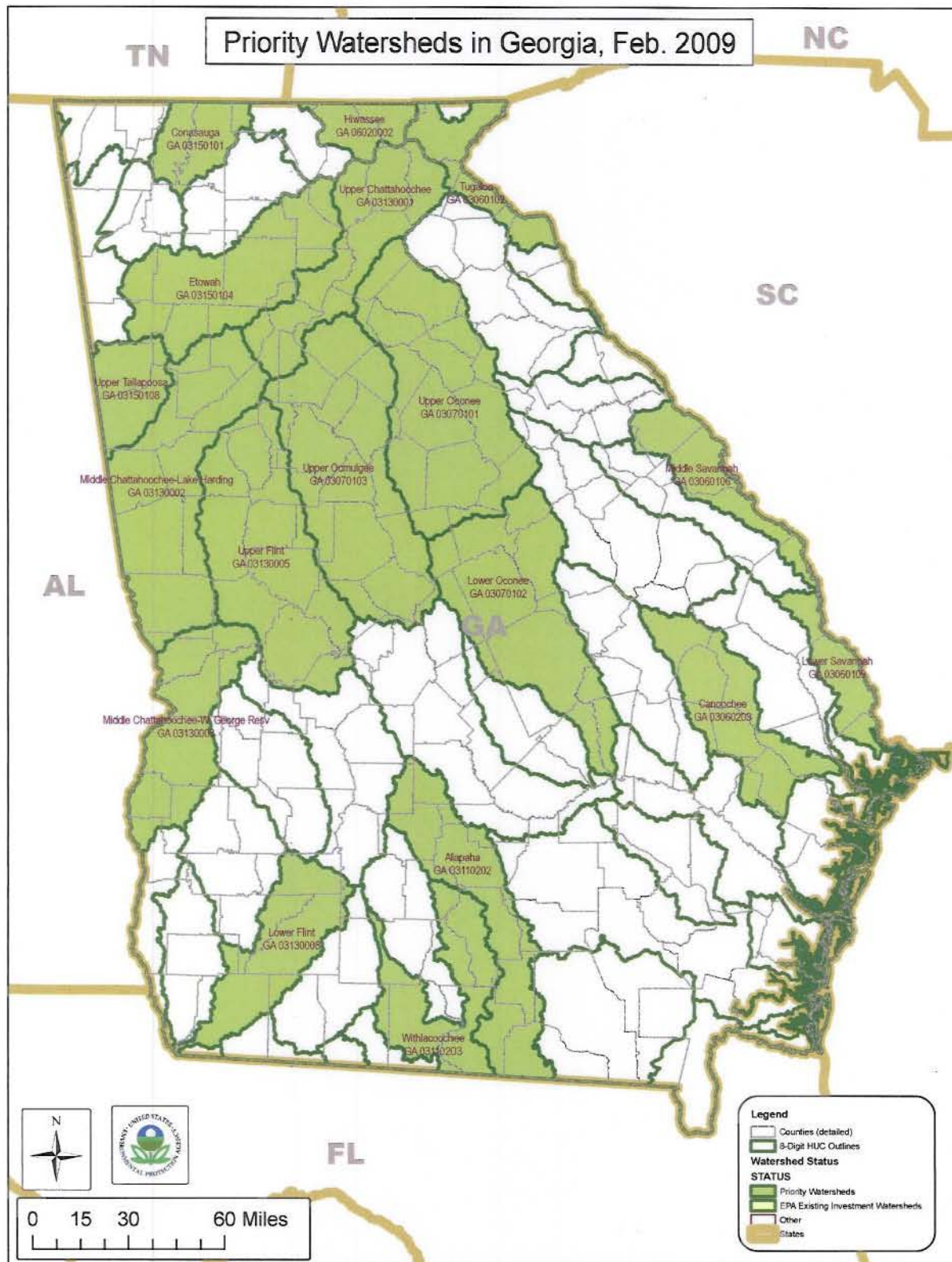
12 Nov. 2010  
Date

**Attachment #1: Region 4 Priority Watersheds in the State of Georgia**

<b>HUC-8</b>	<b>HUC-8 Name</b>	<b>Priority (see note 1)</b>
GA 03060102	Tugaloo	PW
GA 03060106	Middle Savannah	PW
GA 03060109	Lower Savannah	PW
GA 03060203	Canoochee	PW
GA 03070101	Upper Oconee	PW
GA 03070102	Lower Oconee	PW
GA 03070103	Upper Ocmulgee	PW
GA 03110202	Alapaha	PW
GA 03110203	Withlacoochee	PW
GA 03130001	Upper Chattahoochee	PW
GA 03130002	Middle Chattahoochee-Lake Harding	PW
GA 03130003	Middle Chattahoochee-W. George Resv	PW
GA 03130005	Upper Flint	PW
GA 03130008	Lower Flint	PW
GA 03150101	Conasauga	PW
GA 03150104	Etowah	PW
GA 03150108	Upper Tallapoosa	PW
GA 06020002	Hiwassee	PW

**Notes:**

1. EEIW = EPA Existing Investment Watershed (e.g., 319 grant, targeted watershed grant, etc); and PW = priority watershed



**Figure 1. Location of Priority Watersheds in the State of Georgia**