CESAS-RD
REGULATORY DIVISION GUIDELINES
ENFORCEMENT AND COMPLIANCE PROCEDURES

1. Purpose. To establish procedural guidelines for enforcement and compliance actions that involve violations of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and Section 404 of the Clean Water Act (33 U.S.C. § 1344).

2. Applicability. These guidelines apply to all Project Managers and Regulatory Specialists (PM/RS) within the Regulatory Division who are assigned enforcement cases and are effective until superseded or rescinded.

3. References.

a. Federal Register, 33 CFR Parts 320-330, Regulatory Program of the US Army Corps of Engineers (USACE).

b. The 1987 US Army Corps of Engineers Wetland Delineation Manual.

c. Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual, Atlantic and Gulf Coastal Plain Region.

d. Savannah District, Regulatory Division Characterization Of Jurisdictional Determination: Preliminary JDs, Expanded Preliminary JDs, and Approved JD's.

e. Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 CFR Parts 325 and 332; and 40 CFR Part 230.

f. USACE/USEPA Section 404 Enforcement Memorandum of Agreement (MOA).

g. Savannah District's "Standard Operating Procedure: Compensatory Mitigation (Wetlands, Openwater, & Streams)," latest edition, dated March 2004.

h. Memorandum for Regulatory Division, Signature and Delegation Authority, February 26, 2007.

4. Definitions.

a. *Unauthorized Activity*: Activities conducted within the jurisdiction of the Department of the Army's Section 404 authority without required Department of the Army permits and activities not in compliance with the terms and conditions of issued Department of the Army permits (33 CFR 326.1).

b. *Enforcement*: A policy to discourage activities that have not been properly authorized, compel observance of the Clean Water Act and Rivers and Harbors Act, require corrective measures, where appropriate, to ensure those regulated waters are not misused, and maintain the integrity of the Regulatory Program (33 CFR 326.2).

c. *Fill*: Material placed in waters of the US where the material has the effect of either replacing any portion of a water of the US with dry land or changing the bottom elevation of any portion of the water. Examples of fill material include rock, sand, soil, clay, plastic, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the US. Examples of material excluded as fill material include car bodies, trash, or garbage (33 CFR 323.2(f)).

5. Enforcement Procedures. PM/RS are required to follow the procedures set forth in this policy memorandum.

a. Report of alleged violation

(1) Alleged Violation or Observed Activity Requiring Permit.

(a) At a minimum, complaints received via telephone should be documented by completing a Telephonic Report of Alleged Violation (TRAV) form (use current OMBIL Regulatory Module (ORM) Template); specifically, obtaining the location of the alleged violation and type of waters allegedly impacted (i.e. river, wetland, tidal area etc.), name of the property owner, description and physical address of the property and alleged violation. If alleged violation is communicated to USACE by other means, including email, the same form should be completed. If the alleged violation is identified in the field by USACE personnel, the discovering PM/RS should draft a Memorandum for Record (MFR) documenting the same information.

(b) Conduct an ORM database search to determine if a permit has been issued for the reported activity. If a permit has been issued, contact the permittee and conduct a compliance inspection, if necessary. Note any previous violation(s) or any after-the-fact permit(s) issued as a result of any previous violation(s) as evidenced by ORM records on the TRAV form or in the MFR referenced above.

(c) If unable to identify the owner, contact the County Property Tax Records Office, the Natural Resource Conservation Service (NRCS), the Georgia Forestry Commission, or other agencies for assistance in identifying the owner. In many Georgia counties, the Tax Assessor's Offices have searchable property records on-line which may be used as an additional resource for identifying a property owner. When requesting the assistance of one of the offices identified above, first explain the situation. Obtain, if possible, information pertaining to the responsible party such as property or business address and phone number. In cases where the work may be associated with an agricultural or forestry activity, contact the NRCS or the Georgia Forestry Commission for assistance in determining whether the activity may be exempt under Section 404(f) of the CWA. While these agencies may be consulted in order to gather sufficient information for the PM/RS to verify an exemption, it should be noted that the USACE and/or USEPA are the only agencies who

may verify an exemption. For specific instances in which the USEPA should be consulted, please refer to the latest field level agreements and/or supplements governing Silviculture and Agriculture activities.

(d) Once a TRAV form or MFR has been completed, it should be routed to the appropriate Section Chief for assignment to a PM/RS for further investigation. The PM/RS should, within 72 hours of receipt of the file, make contact with the alleged violator by calling, emailing, or sending an "Intend To" letter (use current ORM Template).

(2) Contact Property Owner. Once property owner is identified, the PM/RS should confirm that waters are jurisdictional waters covered under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act, hereafter referred to as "jurisdictional waters," and unauthorized impacts are occurring or have occurred. In order to do this, contact should be made with the alleged violator or property owner to inquire about the activities and nature of the waters on the property. In most instances, first contact with an alleged violator may be made by sending the alleged violator an "Intend To" letter requesting information within 10 days of receipt of the letter. An "Intend To" letter notifies an individual that his/her property may contain jurisdictional waters and the work they are performing, or intending to perform, may impact those waters. The word *violation* should not be used unless you have made a site visit and/or confirmed waters that have been impacted are subject to USACE jurisdiction, and were impacted without prior Department of the Army authorization.

(3) Site Inspection (if possible). Once it is determined that a site inspection should be conducted, the PM/RS should obtain consent from the property owner to conduct the site inspection. If consent is not provided, a visual inspection of the alleged violation may be conducted, if it is visible from public roads, parks, adjacent properties, etc. Do not enter the property, if consent from the property owner is not obtained. Unless a PM/RS knows that an area is publicly owned property, a site should not be entered without the owner's permission, regardless of the presence or absence of "No Trespassing" or other similar signage. Following any site visit, the PM/RS should prepare an inspection report, including photographs of the site and a detailed narrative of site inspection findings, demonstrating clearly that waters are jurisdictional (use current ORM Template). If USACE jurisdiction is established and a violation clearly exists, the PM/RS may post a Notice of Inspection Sign (these signs may be obtained by contacting your Branch Chief) at the site and follow procedures under section b, "Violation Confirmed." A Notice of Inspection Sign discretely warns property owners that the on-going work is likely an un-permitted activity in jurisdictional waters, and provides the property owner with the opportunity to contact the Corps and voluntarily cease the unpermitted work.

****NOTE: You may not enter private property to post a Notice of Inspection Sign without the permission of the property owner. If no violation is found, send a "No Violation" letter to the property owner (use current ORM Template).**

(4) No Response. If no response to the "Intend To" letter is received within 10 days, the PM/RS may send a second "Intend To" letter to the violator via Certified Mail, or EPA or EPD may be contacted to request assistance in gaining access to the property (who, in most cases, will have

"right of entry," and may access the property without being granted express permission by the property owner). Coordinate any site visit with EPD or EPA to ensure sufficient information is gathered to support a jurisdictional determination and confirm impacts. If a violation is confirmed, follow procedures in Section b.

b. Violation Confirmed

(1) Nationwide Determination. Determine if the activity constituting a violation qualifies for a Nationwide Permit (NWP).

(a) If the activity constituting a violation qualifies for a NWP, the PM/RS should coordinate with the violator and his or her consultant (if one has been hired) to process an after-the-fact NWP in accordance with 33 C.F.R. 331. See Section D. below for the after-the-fact permit procedure.

(b) If the activity is confirmed to be a violation and does not qualify for a NWP, the PM/RS should provide written notification to the responsible party in the form of a Cease and Desist Letter (use current ORM Template) if work is ongoing. If the owner agrees to stop the unauthorized work, or work appears to have been completed based on discussion or observation during the site visit, the PM/RS should issue a "Modified Cease and Desist Order" (use current ORM Template). Modified Cease and Desist and formal Cease and Desist letters should always be sent via Certified Mail. The letter should request information relevant to the alleged or unauthorized work, summarize the site inspection findings and any discussions that were had with the owner during a site visit, and give a deadline for providing the requested information (usually 10 business days).

(2) Forward to EPA. Determine whether the violation meets the criteria for forwarding to EPA for further action. If the owner has a previous violation documented, the violation is flagrant, there is a misapplication of one or more of the exemptions provided at 33 CFR 323.4, or if the violation meets any of the criteria outlined in the local USACE/USEPA, Section 404, Enforcement Field Level Agreement (Enforcement FLA), dated June 2005, the PM/RS may coordinate through his or her Section Chief, to the appropriate Branch Chief, and potentially refer to EPA for further enforcement action.

(3) No Response to Cease and Desist. In cases where the party has failed to comply with the Cease and Desist and information request, the PM/RS may send an "Intended Action" letter (use current ORM Template) to give the violator a final opportunity to provide information necessary to begin resolution of the enforcement action. An "Intended Action" letter is used to promote voluntary compliance through an information request, as well as to advise an individual of our intention to forward the file to our Office of Counsel, or to refer the case to the EPA. An "Intended Action" letter should be sent only when sufficient information has been independently gathered to support prosecution of the violator. This letter should be discussed with Office of Counsel prior to mailing and should be sent via Certified Mail.

c. Remedial Action/Restoration

(1) Restoration Plan. In cases requiring restoration, or cases in which restoration is the best or only resolution, a restoration plan will be required prior to starting restoration activities. The plan is subject to USACE approval and must include the proposed start and completion dates, a monitoring plan, and an adaptive management plan to correct deficiencies if restoration measures fail to meet the objectives of the restoration plan. The breadth of detail in the plan should be commensurate with the size and nature of the resource impacted.

(2) Compensatory Mitigation. In addition to the possible requirement of restoration, failure to obtain a permit prior to impacts may require purchase of compensatory mitigation credits to offset temporary functional loss. The compensatory mitigation proposal must be in accordance with the Savannah District's "Standard Operating Procedure: Compensatory Mitigation (Wetlands, Openwater, & Streams)," latest edition (Enclosure 2), and Mitigation Rule. If restoration of an impact is not going to be completed, but impacts are going to remain in place, purchase of compensatory mitigation may be required in conjunction with an after-the-fact permit to offset the full functional loss. See Section D. below for the after-the-fact permit procedure.

(3) Impact to Mitigation Property. For impacts to mitigation property and/or property protected by a restrictive covenant, where the permittee has failed to comply with the policy of "Amendments to Declaration of Covenants and Restrictions" as set out on the Savannah District web site, restoration may be required. If fill is allowed to remain, the permittee may be required to mitigate at higher ratios, as per the policy referenced above. Additionally, should unauthorized impacts occur to property that is within an approved mitigation bank, credit sales will be immediately suspended from that bank. The PM/RS should coordinate with all other involved PM/RS, as well as with the appropriate Section Chief, Branch Chief, and ultimately the Division Chief, to determine if the bank will be allowed to sell additional credits in the future. The permittee shall be required to provide an Amendment to the Restrictive Covenant, which will be subject to Office of Counsel review and approval, to show the alteration to the protected property.

d. After-the-Fact Permit.

(1) If it is determined that an after-the-fact permit is appropriate, the PM/RS should create the appropriate action in ORM.

(2) Before an after-the-fact application is accepted for an unauthorized action, a Tolling Agreement (use current ORM Template) must be drafted by the PM/RS, reviewed through the proper chain of command, and by Office of Counsel, and sent to the applicant. Once the applicant has signed, notarized, and returned the Tolling Agreement, along with a copy of the warranty deed for the property (required to establish ownership by the violator), Office of Counsel will sign the document and have it notarized. The signed copy should then be placed in the file. Please note: These documents may NOT be transmitted to the violator digitally. They MUST be routed through the above process for signature.

(3) In cases where NWP 32 is used to authorize unpermitted work, the party will be required to sign a Settlement Agreement (use current ORM Template). A Settlement Agreement Transmittal Letter (use current ORM Template) should be completed and routed for review, along with the Settlement Agreement. Both documents should be routed from the PM/RS to the appropriate Section Chief, the appropriate Branch Chief, Office of Counsel, the Deputy Division Chief, and then to the Division Chief for his or her signature. Documents must be routed through the appropriate parties in the order listed above. Once approved, the violator should be sent the Settlement Agreement Transmittal Letter, along with two unsigned copies of the Settlement Agreement. Please note: These documents may NOT be transmitted to the violator digitally. They MUST be routed through the above process for signature. The violator must sign and notarize both copies of the Settlement Agreement and mail both copies back to this office. Once received, the Settlement Agreements will be signed by the Branch Chief and notarized. Subsequently, one original signed document should be placed in the administrative file, and one original signed document should be mailed back to the violator. Once the terms and conditions of the Settlement Agreement have been met, the PM/RS shall put the project out with the weekly PCN coordination email. After the comment period has ended, and if no adverse comments have been received, the PM/RS will send a NWP 32 letter (use current ORM Template), or after-the-fact Individual Permit (after completing all necessary supporting documentation, to include a Case Document and 404(b)(1) analysis), authorizing the un-permitted activity.

(4) In cases where the unpermitted work has caused less than 5 acres of impact to waters of the United States, NWP 32 may be used to authorize the work, provided it meets the terms and conditions of that permit.

(5) In cases where the impact exceeds 5 acres, or has occurred in a highly unique or high functional value special aquatic site, or if the project is highly controversial, an after-the-fact Individual Permit may be required to authorize the unpermitted work. If an after-the-fact Individual Permit is used to authorize the work, the permit should be conditioned to specify any required remedial action and/or mitigation and monitoring requirements.

(6) In all cases where an after-the-fact action is taken (i.e. after-the-fact permit, restoration required), each PM/RS must document USACE jurisdiction. In some instances, an Expanded Preliminary JD may be used to provide guidance as to what may be jurisdictional, if the violator agrees to concede that waters on site are jurisdictional. However, if the violator will not agree to concede that waters on site are jurisdictional, the PM/RS must document jurisdiction by completing an Approved JD, and all associated forms.

e. Referrals to Environmental Protection Agency or Office of Counsel

(1) Criteria for Referral to USEPA. Referral of violations to the USEPA should be based on the guidelines identified in the local Enforcement FLA, latest edition. A copy of this document is included as Enclosure 1. Please refer to this document for specific types of violations which should be referred to the USEPA. Once the decision has been made to refer the case to the USEPA, the PM/RS should prepare an "EPA Referral" letter (ORM Master Letter). These letters

must be routed through the appropriate Section Chief before being transmitted to the USEPA. Once a case is referred to USEPA, the USEPA becomes the lead agency and PM/RS should have no further communication with the violator or issue a permit until they have received written notice from USEPA that the violation has been resolved.

(2) Criteria for Office of Counsel Involvement. The following cases should be referred to or discussed with Office of Counsel prior to any further action on the file after issuance of the Cease and Desist letter: (1) violation impacts greater than 2 acres, (2) violation highly visible to public, (3) violation caused egregious impacts to special aquatic site, (4) resolution of violation could have widespread deterrent value, or (5) any case referred to USEPA that USEPA declines to pursue. Additionally, in cases where the party refuses to cooperate in resolving the violation, but the case does not meet the criteria for referral to the USEPA per the Enforcement FLA or meet the criteria identified above for referral to Office of Counsel, the case shall be referred to Office of Counsel.

The PM/RS will coordinate with the Office of Counsel to determine which enforcement measure (33 C.F.R. Section 326.5) is the most appropriate method to resolve the violation and deter future violations. If the Office of Counsel determines that litigation is the best avenue to resolution, then the PM/RS shall prepare a "Litigation Case Document" (use current ORM Template). If Office of Counsel declines to accept the case, they will prepare an Office of Counsel Memorandum documenting the reasoning behind the decision. Based on this document, the PM/RS will document Office of Counsel's action by preparing an MFR for the Branch Chief's approval. Once approved, the enforcement action will be administratively closed in ORM.

f. Administrative Penalties

(1) While the USACE does not have the authority to assess administrative penalties for violations of Section 404 of the Clean Water Act (USACE has authority to assess penalties in cases of permit non-compliance), USEPA does. USEPA's assessment of Administrative Penalties may occur concurrently with any restoration activities required by the USACE. In these cases, USACE may remain the lead agency while USEPA assesses the penalty.

(2) Administrative penalties are most appropriate for repeat violators, violators who have documented prior knowledge of the need to obtain a permit, and where the need for deterrence of similar actions is high.

(3) If a PM/RS believes that a case he or she has would benefit from referral to the USEPA for an administrative penalty, he or she must coordinate with his or her Section Chief. Once the decision to refer for a penalty has been made, a summary email should be submitted to the USEPA, including the background of the site, history of the violator, and evidence that the impact occurred in jurisdictional waters. Additionally, prior to referral, each factor outlined in USEPA's penalty policy (Enclosure 3) should be addressed and this information should be included with the referral email. It should be noted that penalties may be assessed against property owners and those directing work on the site (i.e., contractors).

g. Mitigation Bank and Permit Applications Submitted by Confirmed Violators Undergoing an Enforcement Action

(1) Upon receiving a mitigation bank proposal or permit application, the PM/RS should search the ORM database to determine if the bank sponsor or bank property owner has any active, unresolved violations.

(2) If the bank sponsor or bank property owner is subject to an active enforcement action, then the PM/RS should:

(a) Coordinate with any other involved Regulatory staff or coordinating agencies; and

(b) Notify the bank sponsor or bank property owner that the proposed bank will still be processed; however, no credits may be released until any active violations are resolved.

(3) If a permit applicant is subject to an active enforcement action, then the PM/RS should:

(a) Coordinate with any other involved Regulatory staff or coordinating agencies;

(b) Notify the applicant that the permit application will be held in abeyance until any violation has been satisfactorily resolved.

Russell L Kaiser

RUSSELL L.KAISER
Chief, Regulatory Division

Enclosures

Enclosure 1

US Army Corps
of Engineers®

FIELD LEVEL AGREEMENT
BETWEEN
THE US ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT
AND
THE US ENVIRONMENTAL PROTECTION AGENCY, REGION 4
CONCERNING ENFORCEMENT ACTIONS UNDER SECTION 404 OF THE CLEAN WATER ACT

1. Purpose Scope and Authority

a. The January 19, 1989, Memorandum of Agreement (National MOA) between the Department of the Army and the US Environmental Protection Agency (USEPA) concerning enforcement of the Section 404 program encourages the US Army Corps of Engineers (USACE) and USEPA to enter into field level interagency enforcement agreements. The Savannah District of the USACE and USEPA,Region 4, hereby establish policy and procedures to undertake enforcement of Section 404 unpermitted discharges within the Savannah District. The purpose of this Field Level Agreement (FLA) is to enable the USACE and USEPA 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.

b. The USACE and USEPA have enforcement authorities for the Section 404 program, as specified in Sections 301(a), 308, 309, 404(n), and 404(s) of the Clean Water Act. This agreement supplements the above referenced January 19, 1989, National MOA and establishes the policy 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.

2. Policy

a. USEPA will act as the lead enforcement agency throughout the Savannah District for unauthorized discharges which meet any of the four criteria listed in Section III.D. of the National MOA. These criteria are as follows:

(1) **Repeat violator(s)**. For the purpose of this FLA, determination of a repeat violator will be made when an unpermitted discharge of dredged or fill material has been undertaken by a party who has had a previously documented enforcement action for a Section 404 discharge in waters of the US. Such actions include Cease and Desist Orders and documented "voluntary" restorations.

(2) **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 in waters of the US. Examples of documented prior knowledge include, but are not limited to, previous Section 404 permits, jurisdictional delineations performed on the site in question or other sites known to the violator, applications for permits, and violations on other wetland sites.

(3) **Where USEPA requests a class of cases or a particular case**. For a class of cases, USEPA must formally identify such as class in a letter signed by the Division Director. Once requested, all subsequent similar unauthorized activities will be automatically referred to USEPA until the request is formally rescinded. For a particular case, USEPA must request the case in writing within 30 days from the receipt of the letter of notification (e.g., Cease and Desist) issued by the USACE; or

(4) **The USACE recommends in writing that a USEPA administrative penalty action may be the most appropriate way to resolve the violation**. USEPA has 30 days from receipt of the USACE recommendation to notify the USACE whether they agree or disagree with the recommendation. If USEPA disagrees with the recommendation, the USACE will remain lead enforcement agency.

Upon discovery of a Section 404 violation, the discovering agency will conduct an initial on-site investigation. In the majority of enforcement cases, the USACE will serve as the primary investigator in the Savannah District boundaries because the USACE has more field resources.

Except for violations which meet any of the four criteria above for USEPA's lead, the USACE will act as lead enforcement agency for unauthorized discharges. The investigating agency will advise the other agency of its determination of appropriate lead enforcement agency by letter. Each agency will have 30 days from the receipt of that letter to advise the other agency if it disagrees with such a determination.

3. **Procedures**

a. **Investigation**. The USACE and USEPA will 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, if resources allow, become the investigating agency and collect the preliminary field information necessary to document the existence of the violation. If the unauthorized discharge would qualify for a nationwide permit, or is ½ acre or less in size, the criteria for lead enforcement agency as described in the FLA do not apply and the investigating agency may remain the lead enforcement agency. In all cases, the investigating agency will copy the other agency after issuing any Cease and Desist Order, voluntary compliance letter, or information request letter, accompanied by appropriate field notes. The investigation period will normally not exceed 30 days before a determination is reached as to which agency should be the lead enforcement agency.

If the violation involves a project which is not complete, normally a Cease and Desist or Administrative Order will be prepared by the investigating agency and sent to the violator in the most expeditious manner with a copy being forwarded to the other agency.

Once an agency initiates an investigation, the other agency will not be considered the investigating agency. Only one agency will be the lead investigating agency and only one agency will be the lead enforcement agency.

If the USACE's 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 US, especially in situations where there are Solid Waste Agency for Northern Cook County (SWANCC) or incidental fallback of dredged material scenarios involved, or where questions arise over the Section 404 authority over abandoned crops fields, the USACE field investigator should contact USEPA to discuss the issue before making a final determination.

b. **Environmental Protection Measures**. After discovery of any unauthorized discharge and during the investigation period, both the USACE and USEPA will solicit the views of the other agency regarding appropriate remedial actions (i.e., restoration, and/or compensatory mitigation). In addition, the views of other Federal, state, and local agencies should also be solicited if time and resources allow for incorporation into initial environmental protection measures. The lead enforcement agency will determine what, if any, remedial actions are required. These environmental protection measures shall be placed as an enforceable requirement upon the violator as authorized by law.

c. **Lead Agency Selection**

(1) A violation case, unless it would be covered under a nationwide permit or is ½ acre or less in size, will automatically be referred to USEPA by copy of the USACE's Cease and Desist Order (with all relevant information enclosed) and a cover letter documenting the referral to USEPA, when;

(a) the project involves a repeat violator;

(b) the project is considered a "flagrant" violation;

(c) USEPA requests a class of cases or a particular case; or

(d) the USACE recommends that an administrative penalty action by USEPA may be warranted.

(2) The issuance by USEPA of a 308 letter or a letter to the USACE requesting lead investigating agency status will constitute USEPA's notification of their desire to act as lead investigating agency. If USEPA intends to request a particular case, after receiving a copy of the USACE's letter of notification, they will make such a request in writing within 30 days of the receipt of the USACE's letter. This letter will formally notify the USACE of USEPA's desire to act as lead enforcement agency.

(3) Where USEPA has been identified as lead enforcement agency on a specific case, but because of limited staff resources or other reasons is unable to take action, the USEPA will so notify the USACE by letter within 30 days of the receipt of the USACE's original referral of the case. USACE may accept or decline lead enforcement status and will notify USEPA of their decision within 30 days of receipt of USEPA's notification letter. If the USACE declines lead enforcement on the specific case, USEPA will retain lead enforcement status and take action commensurate with resource availability.

Once USEPA has been identified as the lead enforcement agency, the USACE will forward a copy of all information and originals of any photos in its enforcement file and close their case. No further action will be required from the USACE regarding the unauthorized work. Once USEPA has concluded their enforcement action, USEPA will provide the USACE with a copy of its final action.

(4) The lead enforcement agency shall make the determination whether remedial actions are required, as well as the final determination that a violation is resolved. The agency shall notify, in writing, interested parties so that concurrent enforcement files within another agency can be closed. The agency shall make arrangements for proper monitoring of all remedial actions (i.e., restoration, compensatory mitigation), and coordinate with another agencies involved in any enforcement action resolutions. In addition, the agency shall coordinate with the US Fish and Wildlife Service and/or the National Marine Fisheries Service.

(5) If the USACE is the lead enforcement agency, they may decide to accept an application for an after-the-fact (ATF) permit and conduct an appropriate evaluation. During the AFT permit evaluation process, USEPA 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 AFT permit be denied, the USACE may seek restoration. If the USACE is unable to seek restoration due to limited resources or other factors, USEPA may seek restoration or other enforcement remedies.

(6) It is recognized that there may be some situations where, upon agreement by the initial lead agency, the USACE and USEPA share enforcement responsibility. For example, the USACE may be lead on a site restoration and USEPA may be lead on assessment of a monetary penalty. The USACE and USEPA will work closely to coordinate these actions for a single case.

4. **Special Conditions**. The following special conditions supplement the National MOA and this FLA and apply only to the enforcement situations described below.

a. The USEPA will act as lead on all enforcement cases involving unauthorized impacts to more than 100 acres of wetlands or 5000 linear feet of other waters of the United States.

b. The USACE will offer the USEPA an opportunity to act as lead on all enforcement cases involving discharges of fill related to an agricultural or silvicultural activity where there is a question regarding the exemption status of the project.

c. All Section 404 violations resulting from actions of a state or local governing body will be considered flagrant violations and will be forwarded to USEPA for resolution.

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

e. The USACE will coordinate proposed after-the-fact permit applications with the USEPA, to determine if they have a pending enforcement action against the same party, prior to proceeding with the permit process.

f. The USACE will notify the USEPA of non-compliance with major Section 404 permits, actions the USACE has taken to resolve such non-compliance, and refer such actions to the USEPA, as appropriate.

5. **General**

a. The policies 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.

b. This agreement shall take effect thirty (30) days after the date of the last signature below and will continue until revoked by any party alone upon written notice or until modified by joint written agreement of the parties. Revocation of this agreement can be initiated by either party alone upon written notice and will be effective thirty (30) days following such notice.

c. The Savannah District of the US Army Corps of Engineers and the US Environmental Protection Agency, Region 4, will review this FLA on an annual basis, and will decide to either modify, extend, or revoke the FLA at least every three years. If the FLA is not modified or revoked within three years of the date of the last signature below, it will automatically be extended.

Mark S Held

Mark S. Held
Colonel, US Army
District Engineer

20 april 2005
Date

J. I. Palmer, Jr.
Regional Administrator
US Environmental Protection Agency, Region 4

16 June 2005
Date

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) that 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. Additionally, all Section 404 violations resulting from actions of a state or local governing body will be considered flagrant violations.

c. Where **EPA requests a class of cases or a particular case**. EPA Region 4 will act as the lead enforcement agency for all unauthorized wetland and stream (or water body) impacts caused by misapplication of one (or more) of the exemptions provided at 33 CFR 323.4. 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, in writing, within 25 days from the receipt of the notification letter issued by the SAS (e.g., Cease and Desist). Once EPA requests a class of cases, all subsequent similar unauthorized activities will be automatically referred to EPA until the request is formally rescinded.

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, they assume the lead enforcement agency. If EPA disagrees with the recommendation, the SAS will remain the lead enforcement agency. Under any case, the SAS will retain lead status for pursuing restoration activities.

2. The SAS may act as lead investigative and enforcement agency for all noncompliance cases and unauthorized activities that do not qualify under categories B1 and 2 above.

3. EPA has identified priority watersheds within Region 4 where the agency has invested resources with the goal of restoring and protecting valuable water resources (see attachment 1). EPA requests SAS notify EPA of significant activities that occur in these watersheds. If appropriate, EPA would be the lead enforcement agency on any cases involving jurisdictional waters within the priority watersheds.

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 project manager/specialist for

assistance.

c. If the violation involves an unauthorized project, a C&D Order or a consensual administrative order as appropriate, 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 C&D Order, administrative order, voluntary compliance letter, or information request letter, accompanied by appropriate field notes.

d. If the activity was permitted, but is not in compliance with a DA permit, a Notice of Permit Non-compliance, C&D Order or consensual administrative 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 is 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 will be the lead investigating agency. The investigation period will normally 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 EPA disagrees with an isolated (SWANCC) or Rapanos-related jurisdictional call, EPA has 20 days to review and comment on the decision before the SAS decision becomes final. If EPA disagrees with the regulatory determination, EPA has the discretion to request lead enforcement agency in accordance with the procedures outlined in Section B.1.c.

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 categories B.1. and 2. above. Additionally, the SAS will notify EPA of noncompliance with substantial Section 404 permits, actions the SAS has taken to resolve such noncompliance, and refer such actions to EPA, as SAS deems appropriate. 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. If EPA disagrees with the SAS determination, EPA can invoke Section 404(c) of the Clean Water Act.

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 so notify the other agency by letter within 25 days of receipt of the original referral of the case. The requested 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 requested 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. No further action will be required from the non-lead agency regarding the unauthorized work. 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 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 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. If mitigation is required to obtain an ATF permit, EPA will include this as a condition of the settlement but the exact number of mitigation credits required for the ATF permit will be determined by the Corps at the time the permit application is processed. EPA would not send a respondent back to the Corps for an ATF permit if a nationwide permit is a condition of a Consent Decree.

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. Neither agency will close their enforcement case until all agencies have received resolution. 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 indicating that the monetary penalty will be paid.

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 alone upon written notice.

_____ _____

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

Date

_____ _____

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

Date

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

HUC-8	HUC-8 Name	Priority (see note 1)
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

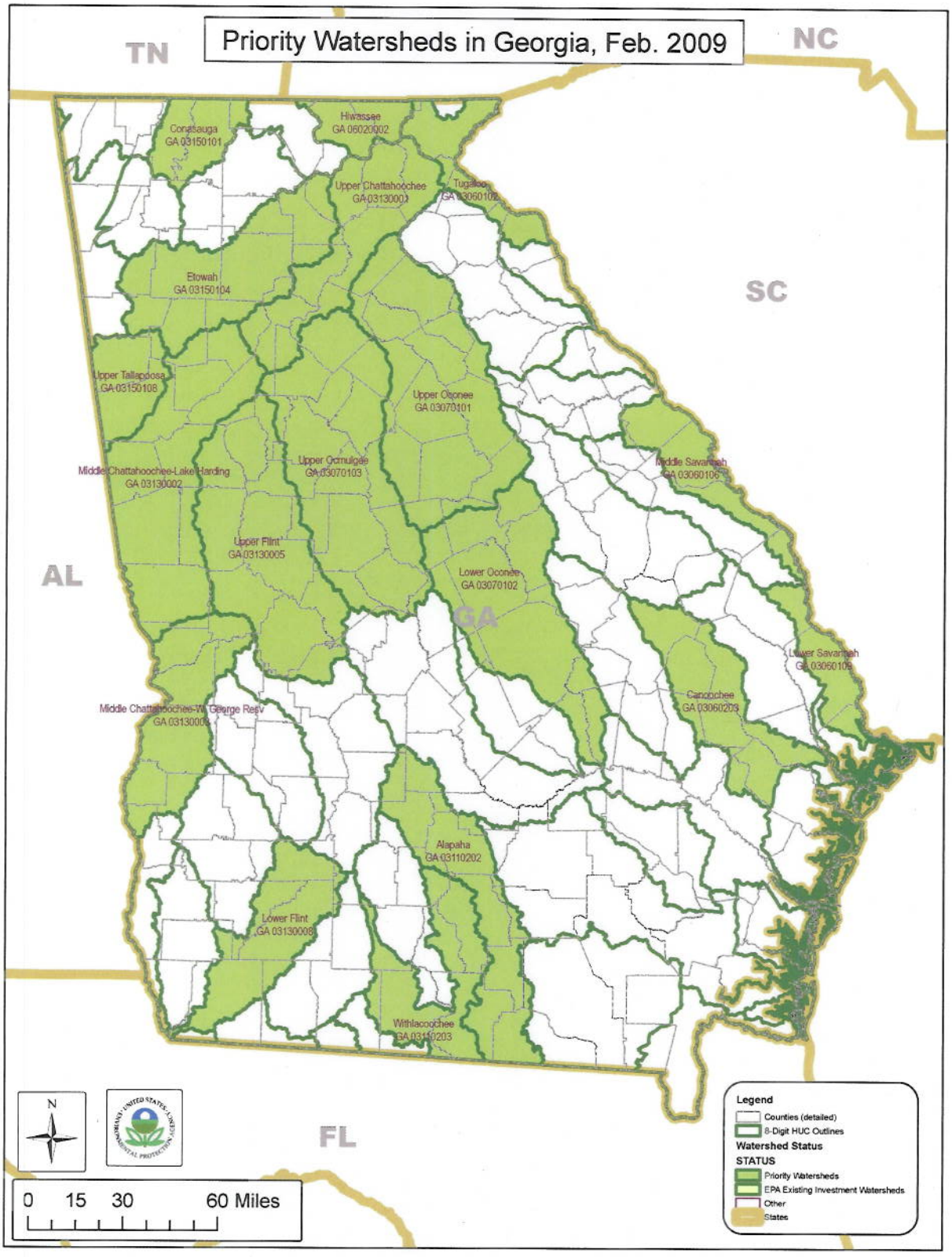

Figure 1. Location of Priority Watersheds in the State of Georgia

Enclosure 2

Department of the Army
Savannah District, Corps of Engineers
PO Box 889
Savannah, Georgia 31402-0889

Standard Operating Procedure
Compensatory Mitigation
WETLANDS, OPENWATER & STREAMS

Table of Contents

1. Applicability. This Standard Operating Procedure (SOP) is applicable to regulatory actions requiring compensatory mitigation for adverse impacts to 10 acres or less of wetland or other open waters, and/or 5000 linear feet or less of intermittent and/or perennial stream (Definitions, 65 FR Vol. 47, Page 12898). This SOP may be used as a guide in determining compensatory mitigation requirements for projects with impacts greater than the above wetland and stream limits, or for enforcement actions, however, higher than calculated credit requirements would likely be applicable to larger impacts. In instances where it is unclear whether the jurisdictional area proposed to be impacted is a wetland, a stream, or other waters, the US Army Corps of Engineers (USACE) will make the final determination. This SOP does not address mitigation for categories of effects other than ecological (e.g., historic, cultural, aesthetic). Types of mitigation other than compensation (e.g., avoidance, minimization, reduction) are not addressed by this SOP. As an alternative to proposing a site specific mitigation plan, you may consider purchasing the required mitigation credits from a wetland or stream mitigation bank. For impacts in areas not serviced by approved wetland or stream banks, wetland or stream in-lieu-fee banking, as appropriate, may be proposed.

When this SOP is used in the establishment of a Mitigation Bank, the USACE will consult with the Mitigation Bank Review Team (MBRT), with the goal of achieving a consensus of the MBRT regarding the factors, elements, and design of the Mitigation Bank Plan. Once a mitigation bank receives final approval using a dated version of this SOP, that version would remain valid for that bank unless the bank is amended or substantially modified. In other words, an approved bank cannot use a later version of this SOP to possibly generate more credit, unless the Banking Instrument (BI) for the approved bank is amended for use a later version of the SOP, and this amendment of the BI is approved by the MBRT.

Also, note that this document is subject to periodic review and modification, and consultation with the local USACE office is necessary to ensure utilization of the latest approved version. However, once a project is permitted using a dated version of this SOP, that version would remain applicable to the project, unless the project is substantially modified. With regard to approved mitigation banks, the version of the SOP used to calculate credits generated by the bank would remain applicable to that bank for the purpose of re-calculating credits associated with proposed minor modifications to the bank. If a substantial modification is proposed for an approved mitigation bank, the last approved version may be required for use in re-calculating credits. Regardless of which version of the SOP might have been used to calculate credits for an approved mitigation bank, permit applicants intending to purchase mitigation bank credits are required to use the latest approved version of the SOP when calculating credit requirements. All decisions on which version of this SOP are applicable to any given situation will be made by the USACE, and are final.

2. Purpose. The intent of this SOP is to provide a basic written framework, which will provides predictability and consistency for the development, review, and approval of compensatory mitigation

plans. A key element of this SOP is the establishment of a method for calculating mitigation credits. While this method is not intended for use as project design criteria, appropriate application of the method should minimize uncertainty in the development and approval of mitigation plans and allow expeditious review of applications. However, nothing in this SOP should be interpreted as a promise or guarantee that a project which satisfies the criteria or guidelines given herein will be assured of a permit. The District Engineer (DE) has a responsibility to consider each project on a case by case basis and may determine in any specific situation that authorization should be denied, modified, suspended, or revoked. This SOP does not obviate or modify any requirements given in the 404(b)(1) Guidelines or other applicable documents regarding avoidance, sequencing, minimization, etc. Such requirements shall be evaluated during consideration of permit applications.

3. Other Guidance.

3.1. *Mitigation Thresholds.* Projects impacting less than 0.1 acre of wetland or open water and/or less than 100 linear feet of stream will be required to provide mitigation on a case-by-case basis. Projects impacting greater than 0.1 acre of wetlands or open water and/or more than 100 linear feet of stream will usually have to at least satisfy the requirements of this SOP.

3.2 *Minimal Impacts.* Permit applicants with projects impacting more than 0.1 and less than 1.0 acres of wetland and/or more than 100 and less than 300 linear feet of stream may choose to use the following abbreviated methodology for calculating mitigation credit requirements:

- Multiply the acres of impact by 8 to arrive at the required number of wetland mitigation credits (eg, 0.5 acres of wetland impact x 8 = 4 wetland credits).
- Multiply the linear feet of stream impact by 6.5 to arrive at the required number of stream mitigation credits (eg, 100 linear feet of stream x 6.5 = 650 stream credits).

3.3 *Regulatory Guidance Letter 02-02.* On December 24, 2002, the USACE issued Regulatory Guidance Letter 02-02 (RGL 02-02). Guidance provided in RGL 02-02 is applicable to all compensatory mitigation proposals associated with permit applications submitted for approval after it's date of issuance. If a discrepancy is discovered between this SOP and RGL 02-02, or any other relevant guidance, the applicant should notify the USACE of the discrepancy and request clarification before incorporating any such guidance into a proposed mitigation plan.

3.4 *National Research Council's (NRC) Mitigation Guidelines.* In its comprehensive report entitled *"Compensating for Wetland Losses Under the Clean Water Act,"* the National Research Council (NRC) provided ten guidelines to aid in planning and implementing successful mitigation projects ("Operational Guidelines for Creating or Restoring Wetlands that are Ecologically Self-Sustaining"; NRC, 2001). Please note that these guidelines also pertain to restoration and enhancement of other aquatic resource systems, such as streams. Each of the ten guidelines can generally be described as A) basic requirement for mitigation success, or B) guide for mitigation site selection. A copy of the NRC Mitigation Guidelines is enclosed. The NRC Guidelines are referenced throughout this document.

4. Mitigation Plans. The following information will typically be required for consideration of a mitigation proposal. Proposals will be reviewed and the applicant will be advised if additional

information will be required to make the proposal adequate for consideration. See attached Mitigation Plan Checklist for more details.

- Plans and detailed information regarding the work for which the mitigation is required.
- Drawings in accordance with the requirements given in this SOP.
- A narrative discussion of the key elements of the proposed mitigation plan.
- A narrative description of any proposed functional assessment methodology (HGM, WRAP, etc.).
- A proposed monitoring plan and a plan for documenting baseline conditions of the mitigation site.
- Names, addresses, and phone numbers for all parties responsible for mitigation and monitoring.
- A description of the existing conditions of all areas to be affected by the proposed mitigation.
- A description of the existing vegetative communities to be affected by the proposed mitigation.
- Native vegetation proposed for planting and/or allowances for natural regeneration.
- Plans for control of exotic invasive vegetation.
- Elevation(s) and slope(s) of the proposed mitigation area to ensure they conform with required elevation and hydrologic requirements, if practicable, for target plant species.
- Source of water supply and connections to existing waters and proximity to uplands.
- Stream or other open water geomorphology and features such as riffles and pools, bends, etc.
- An erosion and sedimentation control plan.
- A schedule showing earliest start and latest completion dates for all significant activities.
- A listing of measurable success factors with quantifiable criteria for determining success.
- Definitions for all success factors and other significant terms used in the plan.
- Description of the equipment, materials, and methods required for execution of the plan.
- A management plan, if necessary, for any maintenance of the mitigation.
- A contingency plan, in the event that the mitigation fails to meet success factors.
- Copy of deed to property showing owner(s) of property.
- List of all easements and right-of-ways on the property.

5. General Guidelines. Mitigation must be designed in accordance with the following guidelines.

5.1. *Adverse Effects Area.* The area of adverse effects as used in this document includes aquatic areas impacted by filling, excavating, flooding, draining, clearing, or other adverse ecological effects. Impacts to wetlands and other open waters will be calculated in acres and impacts to streams will be calculated in linear feet as measured along the centerline of the channel. Other categories of effects such as aesthetic, cultural, historic, health, etc., are not addressed by this document. As explained in Attachments A and C, direct effects are caused by the action and occur at the same time and place; and indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.

5.2. *Mitigation Area.* In general, the adverse impacts and compensatory mitigation are geographically distinct areas. The aquatic area in which the adverse effects occur will generally not be given credits as part of the compensatory mitigation area. For example, if a pond is excavated in wetlands with a resulting wetland fringe, the wetland fringe is generally not considered compensation for the excavation impacts. Similarly, an impoundment of a riverine system with a resulting increase in open surface water area or wetland fringe is not considered compensatory mitigation for the adverse impacts to the impounded riverine system. Certain exceptions may be allowed on a case-by-case basis. For example, a temporary construction impact (e.g., cofferdams, access roads, staging areas) might be mitigated by restoration or preservation of the area, depending on the nature, severity, and duration of the impacts.
A compensatory mitigation area may not be given credits under more than one mitigation category nor credited more than once under any category. However, it is acceptable to subdivide a given area into sub-areas and calculate credits for each sub-area separately. For example, a restored aquatic area donated to a

conservancy organization may be credited as either restoration or preservation, but not both. An aquatic area that contains some restoration (e.g., plugging canals in a drained wetland) and some enhancement (e.g., plugging shallow ditches in an impaired wetland) could either be subdivided into a restoration area component and an enhancement area component, or the entire area could be lumped together and given one net enhancement/restoration credit calculation. Whether or not an area is subdivided or lumped for the purpose of credit calculations is a case-by-case decision based on what is reasonable and appropriate for the given mitigation proposal. All decisions on whether a proposed mitigation action would be considered restoration, enhancement or a combination of both, will be made by the USACE, and these decisions are final.

5.3 *Restrictive Covenants (RC)*. In most cases, mitigation sites must be perpetually protected by a Declaration of Covenants and Restrictions, whereby the owner of the property places permanent conservation restrictions on identified mitigation property. The restrictive covenant restricts development and requires that the land be managed for its conservation values. The draft model and instructions for use with the Declaration of Covenants and Restrictions is located on the USACE, Savannah District, web site located at www.sas.usace.army.mil. The web site should be viewed in order to assure that the latest version is used. Select the yellow box titled, "Permitting Info." Under the bold paragraph titled, "Savannah District Regulatory Publications," scroll down to find the Declaration of Covenants and Restrictions draft and instructions. The restrictive covenant is prepared by an attorney for the property owner in consultation with the environmental consultant. Property owners should make allowances for any foreseeable circumstances (e.g., utility lines, power lines, road crossings, ditch maintenance, etc.) that may conflict with recording a restrictive covenant on mitigation property. Once a property is protected by restrictive covenant, further impacts to that property are strongly discouraged by the USACE. The procedure for modifying a restrictive covenant is also located on the above web site.

5.4. *Conservation Easement (CE)*. In addition to the restrictive covenant requirement, additional credit may be obtained by the granting of a conservation easement by the owner of the property, to a qualified third party grantee. The grantee must be a holder as defined by the Georgia Uniform Conservation Easement Act, O.C.G.A. § 44-10-1 et seq. In addition, the conservation easement is required to have certain language and meet the standards set out in the guidance. The guidance on conservation easements accepted for credit is located on the Savannah District web site under the file titled, "Conservation Easements." The conservation easement is prepared by the attorney for the owner of the property in consultation with the grantee and reviewed by the USACE.

5.5 *Government/Public Protection (GPP)*. In addition to the restrictive covenant requirement, extra credit may be given if the property is conveyed to and/or held or managed by a governmental/public entity and the property is further protected for its conservation and environmental functions by legislation, resolution, environmental designation or zoning for the benefit of the public and the citizens of Georgia. The governmental entity may be an agency or department of the United States charged with protection and management of the environment; a state agency or department charged with protection and management of the environment such as the Department of Natural Resources; an authority created by the legislature such as a Greenway Authority; or property held by a county and/or municipality where the property qualifies for and is listed as a Community Greenspace Program property, or is designated for use by the public as a park or greenway and is used only for passive recreational/educational purposes; and property held by an accredited university in Georgia for the stated purpose of environmental management, education and training.

5.6 *Buffers*. In most circumstances, wetland, open water and stream mitigation areas must include the establishment and maintenance of buffers to ensure that the overall mitigation project performs as expected. Buffers are upland or riparian areas that separate aquatic resources from developed areas and

agricultural lands. Buffers typically consist of native plant communities (i.e., indigenous species) that reflect the local landscape and ecology. Buffers enhance or provide a variety of aquatic habitat functions including habitat for wildlife and other organisms, runoff filtration, moderation of water temperature changes, and detritus for aquatic food webs.

5.6.1 *Upland Buffer*. Upland buffers serve to enhance aquatic functions and increases the overall ecological functioning of wetland and open water mitigation areas. Upland buffers are necessary for wetlands or open water mitigation areas that perform important physical, chemical, or biological functions, the protection and maintenance of which is important to the region where those aquatic resources are located; and are under demonstrable threat of loss or substantial degradation from human activities that might not otherwise be avoided. Therefore, unless it can be demonstrated that an upland buffer is not necessary or practicable, wetland and openwater mitigation plans must include a minimum 25' wide upland buffer on at least 95% of the jurisdictional boundary of the mitigation area (i.e., verified wetland/upland boundary on the mitigation area). Mitigation areas will generally not be considered acceptable if they do not include a minimum 25' upland buffer. This required 25' minimum width upland buffer receives no mitigation credit. Only the area of a proposed upland buffer in excess of the minimum 25', which meets the width required at *Attachment B*, "Minimum Upland Buffer Widths for Mitigation Credit," will receive consideration for mitigation credit. Portions of buffers may be excluded from calculation of credits if they have been compromised or are of questionable protection value due to shape, condition, location, excessive width, excessive proportion of the total mitigation area, or other factors. Wetlands or other aquatic areas cannot be used as buffers on wetlands or open waters. Wetland buffer credit can be calculated using the Upland Buffer Worksheet.

5.6.2 *Riparian Buffer*. Riparian Buffers serve to enhance aquatic functions and increases the overall ecological functioning of stream mitigation. Riparian Buffers are necessary for streams that: 1) perform important physical, chemical, or biological functions, the protection and maintenance of which is important to the region where those aquatic resources are located; and 2) are under demonstrable threat of loss or substantial degradation from human activities that might not otherwise be avoided. Therefore, in most cases stream restoration plans must include a vegetated buffer. Riparian buffers that do not meet the appropriate minimum width requirements cannot be included in calculating credits (*Attachment D*, Riparian Enhancement and Preservation). Wetlands or other aquatic areas used to generate wetland mitigation credits cannot be used to generate stream buffer credits (i.e., multiple mitigation cannot be generated from one area).

5.7. *No Net Loss*. To assist in meeting the national policies of "no net loss" of wetlands and/or aquatic function, at least 50% of the wetland mitigation credits required for an authorized project must be generated from mitigation activities that result in a net gain in acres and/or aquatic function (i.e., wetland restoration, enhancement or creation), and at least 50% of the stream mitigation credits required for an authorized project must be from stream and/or riparian restoration. Wetland and stream bank credits are considered functional replacement. Conversely, no more than 50% of the wetland mitigation credits required for an authorized project can be generated from wetland preservation and/or upland buffering, and no more that 50% of the stream mitigation credits required for an authorized project can be generated from riparian buffer and/or stream preservation. In-lieu-fee bank credits are considered preservation. On a case-by-case basis, 100% of the wetland and/or stream mitigation credits required for an authorized project may be in the form of in-lieu-fee banking, but only if no commercial mitigation bank services the project area and site specific mitigation would be impractical.

5.8. *Goals and Objectives*. Compensatory mitigation plans should discuss environmental goals and objectives, the aquatic resource type(s), e.g., hydrogeomorphic (HGM) regional wetland subclass, Rosgen stream type, Cowardin classification, and functions that will be impacted by the authorized work, and the aquatic resource type(s) and functions proposed at the compensatory mitigation site(s). For example, for

impacts to tidal fringe wetlands the mitigation goal may be to replace lost finfish and shellfish habitat, lost estuarine habitat, or lost water quality functions associated with tidal backwater flooding. The objective statement should describe the amount, i.e., acres, linear feet, or functional changes, of aquatic habitat that the authorized work will impact and the amount of compensatory mitigation needed to offset those impacts, by aquatic resource type.

5.9. *Site Selection (See NRC # B 1-5).* Compensatory mitigation plans should describe the factors considered during the site selection process and plan formulation including, but not limited to:

5.9.1 *Location.* Mitigation is required to be, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). On-site mitigation generally compensates for locally important functions, e.g., local flood control functions or unusual wildlife habitat. However, off-site mitigation may be used when there is no practicable opportunity for on-site mitigation, or when off-site mitigation provides more watershed benefit than on-site mitigation, e.g., is of greater ecological importance to the region of impact. Off-site mitigation will be in the same geographic area, i.e., in close proximity to the authorized impacts and, to the extent practicable, in the same watershed. The following factors that should be considered when choosing between on-site or off-site compensatory mitigation: likelihood for success; ecological sustainability; practicability of long-term monitoring and maintenance or operation and maintenance; and relative costs of mitigation alternatives. See NRC # A 1-4.

5.9.2. *Watershed Considerations.* Mitigation plans should describe how the site chosen for a mitigation project contributes to the specific aquatic resource needs of the impacted watershed. A compensatory mitigation project generally should be located in the same "State of Georgia Hydrologic Map Cataloging Unit (i.e., 8-Digit Unit)" as the impact site. The further removed geographically that the mitigation is, the greater is the need to demonstrate that the proposed mitigation will reasonably offset authorized impacts. For guidance on service areas for mitigation banks, see *Attachment E* "Mitigation Bank Service Areas."

5.9.3. *Practicability.* The mitigation plan should describe site selection in terms of cost, existing technology, and logistics.

5.9.4. *Air Traffic.* Compensatory mitigation projects that have the potential to attract waterfowl and other bird species that might pose a threat to aircraft will be sited consistent with the Federal Aviation Administration Advisory Circular on Hazardous Wildlife Attractants on or near Airports (AC No: 150/5200-33, *5/1/97).*

5.10. *Scheduling.* In most cases, mitigation should be completed concurrent with authorized impacts to the extent practicable. Advance or concurrent mitigation can reduce temporal losses of aquatic functions and facilitate compliance. However, it is recognized that because of equipment utilization it may be necessary to perform the mitigation concurrent with the overall project. This is usually acceptable provided the time lag between the impacts and mitigation is minimized and the mitigation is completed within one growing season following commencement of the adverse impacts. In general, when impacts to aquatic resources are authorized to proceed before an approved mitigation plan can be initiated, the permittee will be required to secure the mitigation site and record a restrictive covenant.

5.11. *Maintenance.* Mitigation plans which require perpetual or long-term human intervention will usually not be acceptable. Mitigation areas should be designed to be naturally sustaining following the completion of the mitigation. Hydrology must be adequately considered since plans requiring an energy subsidy (pumping, intensive management, etc.) will normally not be acceptable. The goal is to achieve a natural state that does not depend upon maintenance. Plans with maintenance will be discouraged. See NRC # A2 and 3.

5.12. *Pre-project Consultation.* To minimize delays and objections during the permit review process, applicants are encouraged to seek the advice of resource and regulatory agencies during the planning and design of mitigation plans. For complex mitigation projects, such consultation may improve the likelihood of mitigation success and reduce permit processing time. Furthermore, developers should typically seek advice from consultants on complicated mitigation projects.

5.13. *Lakes, Ponds, and Impoundments.* Mitigation using lakes, ponds, and impoundments may be allowed as compensation for impacts to similar waterbodies. Mitigation using lakes, ponds, or impoundments will generally not be acceptable as compensatory mitigation for adverse impacts to wetlands. Additionally mitigation using wetlands, lakes, ponds, or impoundments will generally not be acceptable as compensatory mitigation for adverse impacts to riverine systems. It is understood that open surface waterbodies provide some valuable public interest factors such as storm water storage, fisheries habitat, or ground water recharge. Therefore, in recognition of this fact, the adverse effect factors for flooding and impounding have been adjusted relative to other factors.

6. Monitoring and Contingency Plans. The applicant will normally be required to monitor the mitigation area for success and to provide written reports describing the findings of the monitoring efforts. Such reports will normally involve photographic documentation, information on survival rates of planted vegetation, and information on the monitored hydrology. Because of the many variables involved, no specific standards are set forth as a part of this policy. Instead, a monitoring plan should be submitted as a part of the mitigation proposal for review. Monitoring efforts should usually include periodic reviews in the first year and annually thereafter (See NRC # A5). For major mitigation projects, the plan should include contingency measures specifying remediation procedures which will be followed should the success criteria or scheduled performance criteria not be fully satisfied. Monitoring and contingency plans typically address the following items, as applicable:

- A narrative discussion of the key elements of the proposed monitoring and contingencies plan.
- Names of party(s) responsible for the monitoring and contingencies plan.
- A description of the baseline conditions (e.g., soils, hydrology, vegetation, and wildlife).
- A schedule for monitoring activities and reporting.
- A listing of measurable success factors with quantifiable criteria for determining success.
- Definitions for success factors and other terms used in the plan.
- Descriptions of equipment, materials, and methods to be used.
- Proposed protective measures (e.g., restrictive covenants or conservation easements).
- Vegetation monitoring and contingency plan.
- Hydrological monitoring and contingency plan.
- Designation of reference site.
- For stream mitigation, monitoring of physical parameters.

7. Performance Standards. Compensatory mitigation plans will contain written performance standards for assessing whether mitigation is achieving planned goals. Performance standards will become part of individual permits as special conditions and be used for performance monitoring. Project performance evaluations will be performed by the USACE, as specified in the permits or special conditions, based upon monitoring reports. Adaptive management activities may be required to adjust to unforeseen or changing circumstances, and responsible parties may be required to adjust mitigation projects or rectify

deficiencies. The project performance evaluations will be used to determine whether the environmental benefits or "credit(s)" for the entire project equal or exceed the environmental impact(s) or "debit(s)" of authorized activities. Performance standards for compensatory mitigation sites will be based on quantitative or qualitative characteristics that can be practicably measured. The performance standards will be indicators that demonstrate that the mitigation is developing or has developed into the desired habitat. Performance standards will vary by geographic region and aquatic habitat type, and may be developed through interagency coordination at the regional level. Performance standards for wetlands can be derived from the criteria in the 1987 Corps of Engineers Wetlands Delineation Manual, such as the duration of soil saturation required to meet the wetland hydrology criterion, or variables and associated functional capacity indices in hydrogeomorphic assessment method regional guidebooks. Performance standards may also be based on reference sites.

8. Drawings. Mitigation plans should include drawings in conformance with the following.

a. Drawings must be provided on 8.5 x 11" paper. For larger mitigation projects, 11 x 17" or larger drawings should be submitted, in addition to 8.5 x 11" drawings. Generally, all drawings should have a scale no smaller than 1"=200'. Drawings must be clear, readable, and reproducible on standard, non-color office copiers. Each drawing sheet should include the following:

- An unused margin of no less than ½".
- An appropriate graphic scale (when reasonable).
- All significant dimensions clearly indicated and annotated.
- Title block with applicant's name, project title, site location, drawing date, and sheet number.
- A directional arrow indicating north.
- A clear, legible plan view indicating area sizes (e.g., square feet, acres) for all mitigation sites.

b. Location maps for the proposed activity must be included. Two maps are desired. A County road map and a US Geological Quadrangle map are preferred as sources. The location maps must show roads leading to the site and must include the name or number of these roads. The project latitude and longitude should be annotated on the maps. Each map should include a title block.

c. Plan views of the proposed mitigation must be included. These drawings must show the general and specific site location and character of all proposed activities, including the relationship of all proposed work to Waters of the United States in the vicinity of the project.

d. For ground-disturbing mitigation work, cross section views must be submitted depicting the existing ground contours and the proposed finished contours.

e. **All** aquatic areas within the project boundaries (avoided, impacted, or mitigated) must be shown.

f. Each restoration, enhancement, preservation, creation and upland buffer area must be shown.

g. A legend must be shown identifying cross-hatching, shading, or other marking techniques used.
h. A summary table with the quantity of each category of impact and mitigation must be provided.

i. Show the ordinary high water line of affected and adjacent non-tidal open surface waterbodies.

j. Show the mean high tide line and spring high tide line of affected and adjacent tidal waterbodies.

k. For mitigation plans with more than ten acres of wetland restoration, enhancement, creation and upland buffer, or a combination thereof, certified topographic drawings showing the contours and elevations of the completed mitigation area may be required. The drawings should show types of plantings, locations of plantings, and all structures and work that are a significant part of the mitigation.

9. Mitigation Banking. Proposals to establish mitigation banks will be processed in accordance with "Guidelines on the Establishment and Operation of Wetland Mitigation Banks in Georgia." Proposals which include use of credits from a mitigation bank must normally comply with the requirements given in this SOP as well as any conditions or restrictions applicable to the bank. Guidance on the appropriate use of mitigation bank credits is contained in the document titled "Addendum 1 - Guidelines on the Establishment and Operation of Wetland Mitigation Banks in Georgia," dated January 16, 1996. This document is available on the Savannah District web site.

10. Point of Contact. Copies of this document are available at Savannah District's Regulatory Office. Questions regarding use of this policy for specific projects must be addressed to the Project Manager handling the action. Other inquiries or comments regarding this document should be addressed to:

Southern Section:

US Army Corps of Engineers, Savannah District
Regulatory Branch
Post Office Box 889
Savannah, Georgia 31402-0889
POC: Richard Morgan: 912-652-5139,
richard.w.morgan@sas02.usace.army.mil

Northern Section:

US Army Corps of Engineers, Savannah District
1590 Adamson Parkway, Suite 200
Morrow, Georgia 30260
POC: Alan Miller: 678-422-2729,
alan.miller@sas02.usace.army.mil

11. Authorizing Signature. By the signature given below, this draft SOP is authorized for use.

Mirian Magwood
Chief, Regulatory Branch

ATTACHMENTS:

A. Wetland Mitigation Definition of Factors
B. Wetland/Openwater Mitigation Worksheets
C. Stream Mitigation Definition of Factors
D. Stream Mitigation Worksheets
E. Draft Wetland and Stream Mitigation Bank Service Areas
F. Incorporation of the National Research Council's Mitigation Guidelines into the CWA Section 404 Program
G. Mitigation Plan Checklist and Supplement

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

DEC 21 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of Revised CWA Section 404 Settlement Penalty Policy

FROM: Sylvia K. Lowrance
Acting Assistant Administrator

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, Regions I-X

Attached is the Agency's new Clean Water Act Section 404 Settlement Penalty Policy. This Policy is intended to be used by EPA in calculating the penalty that the Federal government will generally seek in settlement of judicial and administrative actions for Section 404 violations (i.e., violations resulting from the discharge of dredged or fill material into wetlands or other waters of the United States without Section 404 permit authorization, or in violation of a Section 404 permit.) This policy establishes a framework which EPA expects to use in exercising its enforcement discretion in determining appropriate settlement amounts for such cases.

This guidance is intended to promote a more consistent national approach to assessing settlement penalty amounts in CWA Section 404 enforcement actions, while allowing EPA staff flexibility in arriving at specific penalty settlement amounts in

a given case. This policy is effective immediately and supersedes the December 14, 1990 Guidance, "Clean Water Act Section 404 Civil Administrative Penalty Actions: Guidance on Calculating Settlement Amounts." This policy applies to all CWA Section 404 civil judicial and administrative actions filed after this date, and to all pending cases in which the government has not yet transmitted to the defendant or respondent a proposed settlement penalty amount. This policy may be applied in pending cases in which penalty negotiations have commenced, if application of this Policy would not be disruptive to the negotiations.

We would like to take this opportunity to thank all those in the Regions, the Office of General Counsel, and Department of Justice who commented on drafts of this policy. Your comments were very helpful in making this a more complete and useful document.

If you have questions or comments with respect to this Policy please contact Joe Theis in the Water Enforcement Division at (202)564-0024.

Attachment

cc: Susan Lepow, OGC
Leti Grishaw, DOJ-EDS
Mary Beth Ward, DOJ-EDS

CLEAN WATER ACT SECTION 404
SETTLEMENT PENALTY POLICY

TABLE OF CONTENTS

CLEAN WATER ACT SECTION 404
SETTLEMENT PENALTY POLICY

I. INTRODUCTION

This document sets forth the policy of the U.S. Environmental Protection Agency ("EPA" or "Agency") for establishing appropriate penalties in settlement of an administrative or civil judicial penalty proceeding against a person who has violated Sections 301 and 404 of the Clean Water Act ("CWA" or "Act")[1] by discharging dredged or fill material into wetlands or other waters of the United States without Section 404 permit authorization, or in violation of a Section 404 permit.[2] This policy implements the Agency's *Policy on Civil Penalties* and the companion document, *A Framework for Statute Specific Approaches to Penalty Assessments*, both issued on February 16, 1984, with respect to these types of violations. This settlement penalty policy should be read in conjunction with other applicable policies, such as the *Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act* (SBREFA Policy) (May 28, 1996), *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (EPA Audit Policy) (April 11, 2000), and the *EPA Supplemental Environmental Projects Policy* (SEP Policy) (May 1, 1998).

EPA brings enforcement actions to require alleged violators to promptly correct their violations and to remedy any harm caused by those violations.[3] As part of an enforcement action, EPA also seeks substantial monetary penalties, that recover the economic benefit of the violations plus an appropriate gravity amount that will deter future violations by the same violator and by other members of the regulated community. Penalties help to ensure a level playing field within the regulated community

---

[1] 33 U.S.C. § 1311(a), 33 U.S.C. § 1344.

[2] EPA may currently seek civil penalties up to $27,500 per day per violation in the federal district courts under Section 309(d), or may seek an administrative assessment of $11,000 per day of violation up to $137,500 before an Agency administrative law judge under Section 309(g) for the unauthorized discharge of dredged or fill material into waters of the United States, or violation of a Section 404 permit. 33 U.S.C. § 1319(d) and (g). These figures reflect a 10% increase from the amounts set forth in the CWA as provided for under the Civil Monetary Penalties Adjustment Rule. The Agency is preparing to issue a revision to the Civil Monetary Penalties Adjustment Rule in the near future. See footnote 10 below for further discussion.

[3] For a discussion of the policy and procedures regarding EPA and Army Corps of Engineers ("Corps") implementation of Section 404 enforcement responsibilities see "Memorandum of Agreement Between the Department of the Army/Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act" (January 19, 1989). This document is available on the Internet at: hhtp://www.epa.gov/OWOW/wetlands/regs/enfmoa.html.

by ensuring that violators do not obtain an unfair economic advantage over competitors who have complied with the Act. At the same time, EPA's policies provide for adjustments based on a violator's good faith efforts to comply (or lack thereof) and inability to pay a penalty.

The need to deter violations and remedy any harm caused by such violations is especially evident with respect to the discharge of dredged and/or fill material into waters of the U.S., particularly wetlands and other special aquatic sites.[4] Wetlands are a vital yet increasingly threatened natural resource.[5] Wetlands act as natural sponges, providing flood protection and storm damage control and facilitating groundwater recharge. They furnish habitat for myriad plants and animals, including many endangered species, and provide billions of dollars to the national economy each year from fisheries and recreational activities such as hunting and bird watching.[6] Wetlands also perform a vital role in maintaining water quality by trapping sediments and other pollutants before they reach streams, rivers, and other open-water bodies.[7] Other special aquatic sites, such as mud flats and vegetated shallows, as well as open bodies of waters such as rivers, lakes, and streams also provide important functions and values. Discharges of dredged or fill material into waters of the U.S. may result in destruction of, or serious degradation to such waters. Given the significant values provided by such waters, it is all the more important to assess adequate penalties to deter future Section 404 violations and thereby help to achieve the goal of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[8]

This policy sets forth how the Agency generally expects to determine an appropriate settlement penalty in CWA Section 404 cases. In some cases, the calculation methodology set forth here may not be appropriate, in whole or in part. In such cases, with the advance approval of the Office of Enforcement and Compliance Assurance ("OECA"), an alternative or modified approach may be used.

A. Purpose

This policy is intended to provide guidance to EPA staff in calculating an appropriate penalty amount in settlement of civil judicial and administrative actions involving Section 404 violations and

---

[4] See 40 C.F.R. 230.2(q-1) (Special aquatic sites include sanctuaries and refuges, wetlands, mudflats, vegetative shallows, coral reefs and riffle and pool complexes).

[5] See e.g., U.S. Fish and Wildlife Service: Report to Congress: Wetlands Losses in the United States 1780's to 1980's (1990).

[6] See e.g., U.S. Fish and Wildlife Service: Wetlands of the United States: Current Status and Recent Trends (1984).

[7] See e.g., U.S. v. Deaton, 209 F.3d 331 (4th Cir. 2000).

[8] 33 U.S.C. § 1251(a).

related violations (e.g., failure to comply with a Section 308 request or a Section 309(a) order with respect to such a violation). The guidance is designed to promote a more consistent national approach to assessing settlement penalty amounts, while allowing EPA staff flexibility in arriving at specific penalty settlement amounts in a given case. Subject to the circumstances of a particular case, this policy provides the lowest penalty figure that the Federal Government should accept in settlement. The Federal Government reserves the right to seek any amount up to the statutory maximum where settlement is not possible, as well as where circumstances warrant application of a higher penalty than what would be provided for under this settlement policy.

This policy is meant to accomplish the following four objectives in the assessment of penalties for Section 404 violations. First, penalties should be large enough to deter noncompliance, both by the violator and others similarly situated. Second, the penalties should help ensure a level playing field by making certain that violators do not obtain an economic advantage over others who have complied in a timely fashion. Third, penalties should generally be consistent across the country to promote fair and equitable treatment of the regulated community. Finally, settlement penalties should be based on a fair and logical calculation methodology to promote expeditious resolution of Section 404 enforcement actions and their underlying violations.

B. Applicability

This policy applies to all CWA Section 404 civil judicial and administrative actions filed after the signature date of the policy, and to all such pending cases in which the government has not yet transmitted to the defendant or respondent a proposed settlement penalty amount. This policy revises and hereby supersedes the December 14, 1990 Guidance, "Clean Water Act Section 404 Civil Administrative Penalty Actions: Guidance on Calculating Settlement Amounts." Except as provided in Section II below, this policy is not intended for use by EPA, violators, administrative judges or courts in determining penalties at hearing or trial. This policy does not affect the discretion of Agency enforcement staff to request any amount up to the statutory maximum allowed by law.[9] Finally, this policy does not apply to criminal cases that may be brought for the unauthorized discharge of dredged or fill material in violation of the CWA.

---

[9] Because of the requirements of 40 C.F.R. §22.14(a) (4), administrative complaints filed under Part 22 must have either the amount of the civil penalty that the Agency is proposing to assess, and a brief explanation of the proposed penalty, or where a specific penalty demand is not made, a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority in Section 309(g)(3) applicable for each violation alleged in the complaint. Regional enforcement staff should follow the guidance provided on this subject in "Guidance on the Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act," issued January 19, 1989, and in "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act," issued May 28, 1996.

C. Statutory Authorities

The Clean Water Act provides EPA with various enforcement mechanisms for responding to violations of Sections 301(a) and 404 for discharging without, or in violation of, a Section 404 permit. Under Section 309(a), the Agency is authorized to issue an administrative compliance order (AO) requiring a violator to cease an ongoing unauthorized discharge, to refrain from future illegal discharge activity, and to remove unauthorized fill and/or otherwise restore the site. Section 309(g) of the Act authorizes EPA to assess administrative penalties for, among other things, discharging dredged or fill material into waters of the United States without a Section 404 permit or in violation of a Section 404 permit. Section 309(g) establishes two classes of administrative penalties, which differ with respect to procedure and maximum assessment, for such violations. A Class I penalty, provided for under Section 309(g)(2)(A), may not exceed $11,000 per violation, or a maximum amount of $27,500. A Class II penalty under Section 309(g)(2)(B) may not exceed $11,000 per day for each day during which the violation continues, or a maximum amount of $137,500.[10]

EPA may also seek injunctive relief, criminal penalties (fines and/or imprisonment), and civil penalties through judicial action under CWA Sections 309(b), (c) and (d), respectively. Under these provisions, the Agency may refer cases to the Department of Justice (DOJ) for civil and/or criminal enforcement. Under Section 309(d), EPA may seek civil penalties of up to $27,500 per day per violation in the federal district courts, for CWA violations including the unauthorized discharge of dredged or fill material into waters of the United States, violation of a Section 404 permit, or violation of a Section 309(a) administrative compliance order.

For purposes of calculating a penalty under Sections 309(d) or (g), a violation begins when dredged or fill material is discharged into waters of the United States without a Section 404 permit and continues to occur each day that the illegal discharge remains in place. With respect to a violation of a Section 309(a) compliance order, a violation begins when the order is violated and continues each day until the order is complied with.

---

[10] The Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat.1321), mandates that EPA adjust its civil monetary penalties for inflation every four years. Thus, the maximum penalty figures cited in this guidance reflect the initial ten percent increase from the amounts set forth in the Act. For violations occurring before January 30, 1997, the maximum penalty amounts the Agency may seek are those specified in the Act. The Agency is preparing to issue a revision to the Civil Monetary Adjustment Rule in the near future. After the effective date of the rule, the maximum penalties available are expected to be as follows: for civil judicial penalties under 309(d) - $30,500 per day per violation, for Class I administrative penalties -$12,000 per day per violation, $30,000 maximum; for Class II penalties - $12,000 per violation, $152,500 maximum.

D. Statutory and Settlement Penalty Factors

Section 309(d) of the CWA sets forth the following penalty factors that district court judges are to use when determining an appropriate civil penalty: "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. Section 1319(d).

Section 309(g)(3) addresses the factors to be considered when determining an appropriate administrative penalty amount. It states that the Agency "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require," 33 U.S.C. Section 1319(g)(3).

The penalty assessment factors in Sections 309(d) and 309(g) are substantively the same, and not in conflict. The references in Section 309(d) to "good faith efforts" and in Section 309(g)(3) to "culpability," for example, although oriented to different types of behavior, both measure the non-compliant conduct of the violator. Other factors, such as economic benefit, history of violations, and such other matters as justice may require, are essentially identical, and the remaining factors are just restatements of each other. Consequently, the penalty calculation methodology drawn from the statutory factors and set forth below can be applied to both administrative and judicial civil enforcement cases.

E. Choice of Forum

The application of this penalty settlement policy, through the calculation of an appropriate bottom-line penalty amount, is one factor for Agency personnel to consider when choosing an appropriate forum.[11] The case development team[12] should apply this policy to help determine whether to seek a penalty administratively or judicially. If the bottom-line penalty calculated under this policy exceeds the maximum penalty that can be achieved in an administrative proceeding, EPA should refer the matter to the Department of Justice for judicial enforcement.[13] Cases should also be referred to

---

[11] OECA intends to issue additional guidance in the near future on determining the appropriate response for Section 404 violations.

[12] For purposes of this guidance, the case development team refers to the Agency 404 technical and legal staff responsible for developing and pursuing a particular administrative or judicial enforcement action.

[13] For further guidance on choosing between administrative and judicial enforcement options, see "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies," (August 28, 1987), which was attachment 2 to the August 28, 1987 “Guidance Documents and Delegations for

DOJ where court ordered injunctive relief is necessary to remedy a violation, or where the violator has failed to comply with an administrative compliance order or consent order.

II. ADMINISTRATIVE PENALTY PLEADING GUIDANCE

In complaints filed in civil judicial cases, the United States' general practice is not to request a specific proposed penalty, but instead to paraphrase the Clean Water Act in reciting a request for a penalty "up to" the statutory maximum. This is sometimes referred to as "notice pleading" for penalties. In contrast, in administrative complaints the Agency may use either a form of notice pleading or make a specific penalty request. See 40 C.F.R. 22.14(a)(4) (64 Fed. Reg. 40138, 40181 (July 23, 1999)). When including a specific penalty request in an administrative complaint, the Agency litigation team may elect to adapt the settlement methodology in Part III of this policy (Minimum Settlement Penalty Calculation) to establish a definitive penalty request in an administrative complaint.[14]

In using Part III of this policy to establish a specific penalty request in an administrative complaint, the litigation team should, after reasonable examination of the relevant facts and circumstances of the case (including any known defenses), make the most favorable factual assumptions, legal arguments, and judgments possible on behalf of the Agency. Because the specific penalty amount proposed in an administrative complaint will, for all practical purposes, be the most the Agency will be able to seek at a hearing (unless the complaint is subsequently amended) and will provide a starting point for settlement negotiations, such an administrative penalty request should be higher than the bottom-line settlement penalty amount calculated under Part III of this policy. Although appropriate for settlement calculations, the Adjustments in Part III.C. should not be applied to reduce the specific penalty amount requested in an administrative complaint.

The proposed administrative penalty amount should be consistent with the statutory factors identified in Section 309(g), because those factors would ultimately provide the basis for the penalty assessment of the presiding officer or administrative law judge.[15] In any Class II administrative complaint under Section 309(g)(2)(B), the Agency litigation team should take into account the requirements of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), P.L. 104-121 (1996), if the respondent qualifies as a small business under that statute. SBREFA by its terms does

---

Implementation of Administrative Penalty Authorities Contained in 1987 Clean Water Act Amendments."

[14] Although this policy provides general guidelines on how EPA may select an appropriate penalty amount in an administrative complaint, it does not direct when an Agency litigation team should use penalty notice pleading and when it should plead for a sum certain.

[15] In administrative cases under Part 22, the Agency is required to provide "[t]he amount of the civil penalty which is proposed and a brief explanation of the proposed penalty." 40 C.F.R. §22.14(a)(4)(i). In contrast, a settlement figure calculated under this policy and its supporting documentation are not subject to such disclosure requirements.

not apply to non-Administrative Procedures Act ("non-APA") cases, and thus would not apply to Class I cases brought under Section 309(g)(2)(B).[16]

III. MINIMUM SETTLEMENT PENALTY CALCULATION

The case development team shall calculate the minimum settlement penalty for a Section 404 enforcement action consistent with the following formula (set forth in more detail in Attachment 1), and the factors described in this section:

Penalty = Economic Benefit + (Preliminary Gravity Amount +/- Gravity Adjustment Factors) - Litigation Considerations - Ability to Pay - Mitigation Credit for SEPs

The result of this calculation will be the minimum penalty amount that the government will accept in settlement of the case, in other words, the "bottom-line penalty" amount. As new or better information is obtained in the course of litigation or settlement negotiations, or if protracted litigation or settlement discussions unduly extend the final compliance date and/or the penalty payment date, the "bottom-line" penalty should be adjusted, either upwards or downwards as necessary, consistent with the factors laid out in this policy, and subject to Headquarters concurrence in appropriate cases. Each component of the penalty is discussed below. The results of these calculations should be documented as dollar amounts on the "Worksheet for Calculating Section 404 Settlement Penalty," included as Appendix A. This calculation should be supported by a memorandum describing the rationale and basis for the data. As a general matter, the Agency should always seek a penalty that, at a minimum, recovers the economic benefit of noncompliance plus some amount reflecting the gravity of the violation.

A. Determining the Economic Benefit Component

Consistent with EPA's February 1984 *Policy on Civil Penalties*, every effort should be made to calculate and recover the economic benefit of noncompliance.[17] Persons who violate the CWA by discharging dredged and/or fill material without Section 404 permit authorization or in violation of a permit may have obtained an economic benefit by obtaining an illegal competitive advantage ("ICA"), or as the result of delayed or avoided costs, or by a combination of these or other factors. Taking into account ICA may be particularly appropriate in situations where on-site restoration is not feasible (e.g., where restoration would result in greater environmental damage), and a permit would not likely have been issued for the project in question. In such cases, the Agency may consider recovering the commercial gain the violator realized from illegally filling in the wetland or other water. The objective of

---

[16] For a more extended discussion of SBREFA, see "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act" (May 28, 1996).

[17] See *Policy on Civil Penalties*, February 16, 1984, at 3.

calculating and recovering economic benefit is to place violators in no better financial position than they would have been had they complied with the law.

The BEN computer model should be used to calculate the economic benefit gained from delayed or avoided compliance costs.[18] Economic benefit should be calculated from the date of the initial violation, (i.e., the date of the initial discharge of dredged or fill material). As a general rule, there should be no offset in an economic benefit calculation, in a delayed or avoided cost scenario, for costs the violator incurs as a result of undertaking the illegal activity (i.e., in the context of a 404 violation this would be the amount the violator spent to perform the original unauthorized dredging or filling activities), since, as specified in the BEN User's Manual, credit is only appropriate for cost savings that "are both documented and related to compliance."[19]

Because a violator may have obtained more than one type of economic benefit from its noncompliance, the case development team should ensure that the amount calculated represents the total economic benefit wrongfully obtained.[20] Examples of other types of economic benefit may include delayed or avoided permitting fees and associated costs (e.g., information collection and consultant fees), increased property values, profits from the temporary or permanent use of property, or other illegal competitive advantage to the extent that the gain would not have accrued but for the illegal discharge.[21]

B. Determination of the Gravity Component

---

[18] The BEN model is found on the Agency's web site at hhtp://www.epa.gov/oeca/datasys/dsm2.html along with the BEN User's Manual. EPA currently does not have an economic benefit model for calculating economic benefit from illegal competitive advantage. For further information on the use of the BEN model and guidance in its use, or for help in calculating ICA, contact the Financial Issues Helpline at (888) 326-6778. Since as a general rule all 404 civil judicial cases are deemed nationally significant, Headquarters and the Regions will consult on the appropriate determination of economic benefit in such cases. In administrative cases, when considering under what circumstances various costs may offset economic benefit, the Regions will need to consult with Headquarters.

[19] BEN User's Manual, (September 1999), at 3-11.

[20] If an initial calculation of economic benefit yields a zero or negative result, the case development team should ensure that all possible forms of illegal competitive advantage have been analyzed and included if appropriate. (Where the economic benefit calculation yields a negative number, a zero should be entered in the minimum settlement penalty calculation for the economic benefit component.)

[21] Additional examples include gains generated from such uses as agriculture (e.g., profits from the sale of crops), logging, aquaculture, receipt of a loan, rent or lease payments, mining of sand and gravel, or from the early use of a recreational site (e.g., golf course or ski resort), which the violator gained prior to ceasing operation or removing the unlawful discharge or otherwise restoring the property.

Removal of the economic benefit of noncompliance generally places violators in the same position they would have been in had they complied with the Act. Therefore, both deterrence and fundamental fairness are served by including an additional element to ensure that violators are adequately penalized. [22] The following gravity calculation is based on a methodology that provides a logical scheme and uniform criteria to quantify the gravity component of the penalty based on the environmental and compliance significance of the violation(s) in question.

Preliminary Gravity Amount = (sum of A factors + sum of B factors) x M

M (Multiplier) = $500 for minor violations with low overall environmental and compliance significance, $1,500 for violations with moderate overall environmental and compliance significance, and $3,000-$10,000[23] for major violations with a high degree of either environmental or compliance significance. Given the highly fact specific nature of 404 cases, this policy provides broad ranges for the factors set out below to afford the case development team broad discretion to assess the appropriate penalty in a given circumstance.

"A" FACTORS: ENVIRONMENTAL SIGNIFICANCE

Factors	Value Assigned
1. Harm to Human Health or Welfare	0-20

The case development team should consider whether the discharge of dredged or fill material has adversely impacted drinking water supplies, has resulted in (or is expected to result in) flooding, impaired commercial or sport fisheries or shellfish beds, or otherwise has adversely affected recreational, aesthetic, and economic values. The case development team should also consider whether the discharge has otherwise endangered the health or livelihood of persons by virtue of the chemical nature of the discharge (i.e., has the discharge resulted in a violation of any applicable toxic effluent standard or prohibition under section 307 of the CWA, in the release of a hazardous substance under 40 C.F.R. 117 or Subtitle C of RCRA,[24] or in an imminent and substantial endangerment under Section 504 of the Safe Drinking Water Act, Section 7003 of RCRA, or Section 106 of CERCLA).[25]

---

[22] See *Policy on Civil Penalties*, February 16, 1984, at 3.

[23] Looking at the totality of the circumstances, the case development team should use its best professional judgment to decide what amount to use as a multiplier for a such violations. For egregious violations with extreme environmental consequences, a higher value in this range should be used as a multiplier.

[24] 42 U.S.C. § 6973.

[25] 42 U.S.C. § 9606.

The greater the actual or potential threat to human health or welfare, the higher the value the case development team should assign to this factor. If the discharge has resulted in an imminent and substantial endangerment, the highest value for this factor should be used.

2. Extent of Aquatic Environment Impacted 0 - 20

Although the size (acreage) of a violation is not dispositive of the environmental significance of the violation (i.e., a small impact to a unique or critical water may have high environmental significance), all other factors being equal, the greater the acreage of waters filled or directly impacted, the higher the value the case development team should assign to this factor. Staff should consider how large the acreage impacted is in the case under consideration compared to other violations observed within the same watershed, regionally or nationally.[26]

3. Severity of Impacts to the Aquatic Environment 0 - 20

The case development team should consider the overall impact of a defendant's discharges to waters of the United States.[27] Staff should also consider as part of this factor the extent to which the discharge of dredged or fill material has caused (or has threatened to cause) adverse impacts to, or destruction of waters of the United States, including the extent to which the discharge has impaired the flow or circulation or reduced the reach of waters of the United States, or has caused or contributed to violations of any applicable water quality standard. Under this factor, the case development team should also consider whether the violation has resulted in adverse impacts to life stages of aquatic life and other wildlife dependent on aquatic ecosystems, or has adversely impacted or destroyed wildlife habitat, including aquatic vegetation, waterfowl staging or nesting areas, and fisheries. The greater the risk of harm or actual impact to aquatic ecosystems, the higher the value the case development team should assign to this factor. If a defendant's violation has resulted in harm to an endangered or threatened species, or impacted endangered species habitat, or has otherwise significantly impacted ecosystem diversity, productivity, or stability, a value in the highest end of the range should be used.

4. Uniqueness/Sensitivity of the Affected Resource 0 - 20

The case development team should consider whether the affected ecosystem is nationally or regionally limited, of a type that has become rare due to cumulative impacts (e.g., Poccosin, vernal pools), or is relatively abundant. The more scarce the impacted ecosystem, the higher the value that

---

[26] In areas where there has been a substantial historic cumulative loss of waters of the United States, or in arid areas where acreage of waters is a small portion of the natural landscape, a high value should be assigned to even small acreage fills.

[27] As part of this factor, the case development team should also consider the temporary loss of wetlands functions and values.

staff should assign for this factor. Moreover, if the discharge occurred into any of the following, the case development team should generally assign a higher value to this factor: a site determined to be unsuitable under 40 C.F.R. 230.80; an area identified as having a Section 404(c) prohibition or restriction; a Section 303(d) impaired water; an area within the boundary of an Advance Identification of Disposal Areas (ADID); an outstanding natural resource water under a state anti-degradation policy; areas designated as federal, state, tribal, or local protected lands; or an area established as a restored or enhanced wetland under an approved mitigation plan.

5. Secondary or Off-Site Impacts 0 - 20

The case development team should consider to what extent the discharges caused, or threatened to cause, secondary or off-site impacts such as erosion and downstream sedimentation problems, nuisance species intrusion, wildlife corridor disruption, etc. The greater the amount of secondary impacts, the higher the value that should be assigned.

6. Duration of Violation 0 - 20

The case development team should consider the duration of the violation under this factor. Consideration should be given both to the length of time that the discharge activity occurred in waters of the U.S., and the length of time that dredged or fill material has remained in place in such waters. Generally, the longer the duration of the initial discharge activity, and/or the longer dredged or fill material has remained in place compared to other violations in the same watershed, regionally or nationally, the higher the value that should be assigned to this factor.

Mitigating Factors for Environmental Significance

It is possible in some wetlands cases for a violator to undo, or largely undo, the continuing environmental harm resulting from violations -- although past loss of functions and values cannot be restored. In cases in which the original wetland or other water is restored, or will be restored under an enforceable agreement, Agency enforcement staff may reduce the amount determined from the preliminary gravity calculation for Environmental Significance (i.e., by reducing the values assigned to one or more of the Environmental Significance factors). This offset should generally not be used in cases where off-site mitigation is undertaken in lieu of on-site restoration of the violation.[28] Wherever possible, the case development team should seek complete on-site restoration of the aquatic areas impacted.[29] In determining the gravity amount for environmental significance, the case development

[28] Where an after-the-fact has or will be issued for the discharge, the preliminary gravity amount may be reduced where the loss of waters is fully mitigated.

[29] See "Injunctive Relief Requirements in 404 Enforcement Actions" (September 29, 1999).

team should focus on the net impairment of the wetlands or other waters after remediation is completed, rather than on the costs of the remediation to the violator. In addition, even where complete restoration occurs, the temporary loss of functions and values should still be considered in determining the Environmental Significance amount, unless those temporary losses have already been fully mitigated. Staff should also consider whether there is a risk that restoration may fail or be less than fully successful over time, when considering whether a reduction should be made for this factor.

"B" FACTORS: COMPLIANCE SIGNIFICANCE

Factors	Value Assigned
1. Degree of Culpability	1 - 20

The case development team should evaluate the overall culpability of the defendant (i.e., the degree of negligence, recklessness, intent or responsibility involved in committing the violation). The greater the degree of culpability, the higher the value that should be assigned to this factor.[30] The principal criteria for assessing culpability are the violator's previous experience with or knowledge of the Section 404 regulatory requirements, the degree of the violator's control over the illegal conduct, and the violator's motivation for undertaking the activity resulting in the violation.

The criterion for assessing the violator's experience with or knowledge of the Section 404 program is whether the violator knew or should have known of the need to obtain a Section 404 permit or of the adverse environmental consequences of the discharge prior to proceeding with the discharge activity. The greater the violator's knowledge of, experience with, and capability to understand the Section 404 regulatory requirements, and the greater the violator's ability to avoid the illegal conduct, the greater the culpability. Examples of circumstances demonstrating greater culpability include previous receipt of a Section 404 authorization or a prior independent opinion of the need for a permit or of permit requirements. In such circumstances, a value in the highest end of the range should be used.

With regard to the violator's control over the unlawful conduct, there may be some situations where the violator bears less than full responsibility or may share the liability for the occurrence of a violation. The case development team should assess the degree of culpability of each violator with respect to the violations in question.

---

[30] The case development team should separately consider the violator's "recalcitrance" as specified in the "Additional Adjustments to Gravity" section below, and should adjust the penalty accordingly based on the level of recalcitrance present (i.e., the violators refusal or unjustified delay in preventing, mitigating, or remedying a violation or in otherwise failing to cooperate).

Finally, the motivation for the violation may be a factor evidencing greater culpability. If the violator has sought to obtain a windfall profit by destroying waters of the U.S. (e.g., by converting wetlands to uplands) through conscious or negligent disregard of the Section 404 permitting program, culpability should be considered high even though the violator will not in fact realize those profits and may have had little previous experience with the Section 404 program.

2. Compliance History of the Violator 0 - 20

The case development team should consider whether the defendant has a history of prior Section 404 violations including unpermitted discharge violations, permit violations, or a previous violation of an EPA administrative order. The greater the number of past violations and the more significant the violations were, the higher the value that should be assigned to this factor. The earlier violations need not relate to the same site as the present action. Prior history information may be obtained not only from EPA experience with the violator, but also from appropriate Corps Districts, other federal agencies' knowledge and records, and the violator's responses to Section 308 requests for information.

3. Need for Deterrence: 0-20

The case development team should consider the need to send a specific and/or general deterrence message for the violations at issue. Staff should consider the extent to which the violator appears likely to repeat the types of violations at issue and the prevalence of this type of violation in the regulated community. The greater the apparent likelihood of the violator to repeat the violation, or the more prevalent the violation at issue in the general community, the greater the need for a strong deterrent message and the higher the value that should be assigned to this factor.

ADDITIONAL ADJUSTMENTS TO GRAVITY

After establishing the preliminary gravity amount above, the case development team may adjust this amount to reflect the recalcitrance of the violator and other relevant aspects of the case as provided for below. In addition to the gravity adjustments discussed below, there may be situations where the gravity component may also be adjusted under EPA's Audit Policy.[31]

[31] See "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" 65 Fed. Reg. 19618 (April 11, 2000).

Recalcitrance Adjustment Factor: The "recalcitrance" adjustment factor may be used to increase[32] the penalty based on a violator's bad faith, or unjustified delay in preventing, mitigating, or remedying the violation in question. As distinguished from culpability, which relates to the violator's level of knowledge of the regulatory program and responsibility for a given violation, recalcitrance under this policy relates to the violator's delay or refusal to comply with the law, to cease violating, to correct violations, or to otherwise cooperate with regulators once specific notice has been given and/or a violation has occurred. If a violator is, or has been, recalcitrant, the case development team may increase the penalty settlement amount accordingly. This factor applies, for example, to a person who continues violating after having been informed of his violation, fails to provide requested information, or physically threatens government personnel. If the defendant has violated either an Army Corps of Engineers' cease and desist order or an EPA administrative order, or failed to respond to an EPA Section 308 information request, staff may account for this violation by using this factor.[33] The more serious the bad faith demonstrated or unjustified delay engendered by the violator, the higher the recalcitrance adjustment should be. Applying the recalcitrance factor may result in a recalcitrance gravity adjustment of up to 200 percent (200%) of the preliminary gravity amount. This factor is applied by multiplying the total preliminary gravity amount by a percentage between 0 and 200.

Quick Settlement Adjustment Factor: In order to provide an extra incentive for violators who make efforts to achieve an efficient and timely resolution of violations, and in recognition of a violator's cooperativeness, EPA may reduce the preliminary gravity amount by 10 percent (10%) in administrative enforcement actions. This factor may only be applied if the case development team expects the violator to settle promptly and if the violation(s) at issue have or will be fully remediated. As a general rule, for purposes of this penalty reduction, in Class I administrative enforcement actions, a "quick settlement" is one in which the violator signs an administrative penalty order on consent within four months of the date the complaint was issued or within four months of when the government first sent the violator a written offer of settlement, whichever is earlier. For Class II administrative cases the controlling time period is six months. If the violator does not sign the administrative consent agreement within this time period, the adjustment generally should not be made available. If this reduction has been taken but the violator fails to settle quickly, this reduction should be withdrawn and the settlement penalty increased accordingly.

---

[32] Once a violator has been informed of a violation, a prompt return to compliance is the minimum response expected, therefore, no downward adjustment is provided for by this policy for efforts made to come into compliance after being informed of a violation. (As discussed above, a prompt restoration of the violation would be a basis for lowering the gravity amount by reducing the Environmental Significance of the violation). Where a violator has made "good faith efforts to comply with the applicable requirement" prior to being given notice of the violation by the government, see Section 309(d), this fact may be taken into account by providing a lower value for the "Degree of Culpability" factor.

[33] In the alternative, a separate gravity calculation may be performed for such violations.

Other Factors as Justice May Require: This consideration encompasses factors that operate to reduce a penalty settlement amount, as well as factors that operate to increase a penalty settlement amount. Not every relevant circumstance can be anticipated ahead of time. An example of a mitigating factor is a circumstance where a violator has already paid a civil penalty for the same violations at issue in a case brought by another plaintiff. These costs may be considered when determining the appropriate penalty settlement.[34] Of course, the remaining settlement figure should be of a sufficient level to promote deterrence. Litigation considerations should not be double counted here.

C. Additional Reductions for Settlements

Inability to Pay: If the violator has raised the issue of inability to pay the proposed penalty, the Region should request whatever documentation is needed to ascertain the violator's financial condition.[35] Any statements of financial condition should be appropriately certified.[36] In order to promote settlement, EPA personnel should employ the Agency's ability to pay computer programs: ABEL, INDIPAY and MUNIPAY. [37] ABEL analyzes ability to pay claims from corporations and partnerships; INDIPAY analyzes claims from individuals; and MUNIPAY analyzes such claims from municipalities, towns, sewer authorities and drinking water authorities. Where the violations are egregious, or the violator refuses to comply with the law, the team may consider a bottom line that could affect the economic viability of the violator.

---

[34] If the defendant has previously paid civil penalties for the same violations to another plaintiff, this factor may be used to reduce the amount of the settlement penalty by no more than the amount previously paid for the same violations.

[35] For a discussion of what financial documents the Agency should seek, see Guidance on Determining a Violator's Ability to Pay a Civil Penalty, December 16, 1986, codified as General Enforcement Policy Compendium document PT.2-1. For further guidance on this issue and model interrogatories, contact the Financial Issues Helpline at (888) 326-6778.

[36] E.g., tax returns must be signed, and as a precaution, the litigation team should have the defendant/respondent fill out IRS form 8821, which authorizes the IRS to release tax information directly to the EPA. In that way, the Agency can verify the information in the tax returns.

[37] These models are available on the Agency's web site at http://www.epa.gov/oeca/datasys/dsm2.html. Because ABEL, MUNIPAY, and INDIPAY are limited in their approach, many entities that fail the analysis may still be able to afford to achieve full compliance and pay the entire penalty. Therefore, it is essential to examine the violator's other potential resources, such as from liquidation of certificates of deposit and money market funds, before reducing a bottom line penalty for inability to pay. It is recommended that a financial analyst/economist be contacted to review financial information to determine if a violator truly has an inability to pay a penalty. For further guidance in this area, contact the Agency's Financial Issues Helpline at (888) 326-6778.

Litigation Considerations: Certain enforcement cases may have mitigating factors that could be expected to persuade a court to assess a lower penalty amount. The simple existence of weaknesses or limitations in a case, however, should not automatically result in a litigation consideration reduction of the bottom line settlement penalty amount.[38] EPA may reduce the amount of the civil penalty it will accept at settlement to reflect weaknesses in its case where the facts demonstrate a substantial likelihood the government will not achieve a higher penalty at trial.

Adjustments for litigation considerations may be taken on a factual basis specific to the case. Before a complaint is filed, the application of certain litigation considerations may be premature, as the Agency may not have sufficient information to fully evaluate litigation risk including evidentiary matters, witness availability, and equitable defenses. Reductions for these litigation considerations are more likely to be appropriate after the Agency obtains an informed view, through discovery and settlement negotiations, of the strengths and weaknesses in its case. Pre-filing settlement negotiations are often helpful in identifying and evaluating litigation considerations, especially regarding potential equitable defenses, and thus reductions based on such litigation considerations may be appropriately taken before the complaint is filed.

Possible Litigation Considerations: While there is no universal list of litigation considerations, the following factors may be appropriate in evaluating whether the preliminary settlement penalty exceeds the penalty the Agency would likely obtain at trial:

- Troublesome facts and/or uncertain legal arguments such that the Agency faces a significant risk of not prevailing in the case or obtaining a nationally significant negative precedent at trial;

- Known problems with the reliability or admissibility of the government's evidence proving liability or supporting a civil penalty;

- The credibility, reliability, and availability of witnesses;[39]

---

[38] In many situations, the circumstances of a particular case are already accounted for in the penalty calculation. For example, the gravity calculation will be less in those circumstances in which the period of violation was brief, the exceedances of the limitations were small, the pollutants were not toxic, or there is no evidence of environmental harm. The economic benefit calculation will also be smaller when the violator has already returned to compliance, because the period of violation will be shorter. Such mitigating circumstances should not be double counted as reductions for litigation considerations.

[39] The credibility and reliability of witnesses relates to their demeanor, reputation, truthfulness, and impeachability. For instance, if a government witness has made statements significantly contradictory to the position he is to support at trial, his credibility may be impeached by the respondent or the defendant. The availability of a witness will affect the settlement bottom-line if the witness cannot be produced at trial.

- The informed, expressed opinion of the judge assigned to the case, after evaluating the merits of the case;

- The record of the judge in any other environmental enforcement case presenting similar issues;

- Statements made by federal, state or local regulators that may allow the respondent or defendant to credibly argue that it believed it was complying with federal requirements;

- The development of new, relevant case law;

- Penalties awarded in the same judicial district in other Section 404 enforcement cases.

Not Litigation Considerations: In contrast to the above potential litigation considerations, the following factors should not be considered litigation considerations:

- A generalized view to avoid litigation or to avoid potential precedential areas of the law;[40]

- A duplicative use of elements included or assumed elsewhere in the penalty policy, such as inability to pay, "good faith"[41], lack of recalcitrance, or a lack of demonstrated environmental harm;[42]

- Off-the-record statements by the court, before it has had a chance to evaluate the specific merits of the case;

---

[40] A generalized desire to minimize litigation costs is not a litigation consideration.

[41] The efforts of the violator to achieve compliance or minimize the violations after EPA or a state has initiated an enforcement action do not constitute "good faith" efforts. If such efforts are undertaken before the regulatory agency initiates an enforcement response, the settlement penalty calculation already includes such efforts. This penalty policy assumes all members of the regulated community will make good faith efforts to both achieve compliance and remedy violations when they occur. See also f.n. 32.

[42] Courts have considered the extent of environmental harm associated with violations in determining the "seriousness of violations" pursuant to the factors in Section 309(d), and have used the absence of any demonstrated or discrete identified environmental harm to impose less than the statutory maximum penalty. Proof of environmental harm, however, is neither necessary for liability nor for the assessment of penalties.

- The fact that the water of the United States in question is already polluted or that the water can assimilate additional pollution.[43]

[43] See, e.g., Natural Resources Defense Council v. Texaco Refining and Mktg., 800 F. Supp. 1, 24 (D. Del. 1992).

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Supplemental Environmental Projects ("SEPs") are defined by EPA as environmentally beneficial projects that a violator agrees to undertake as part of a settlement, but is not otherwise legally obligated to perform. Favorable penalty consideration is given because the SEP provides an environmental benefit above and beyond what is required to remedy the violation(s) at issue in the enforcement action. In determining whether a proposed SEP is acceptable under Agency policy, as well as the appropriate penalty offset for a SEP, Agency enforcement staff should refer to the "EPA Supplemental Projects Policy."[44] Use of SEPs in a particular case is entirely within the discretion of EPA in administrative cases, and EPA and the Department of Justice in judicial cases. In determining the real cost of a SEP to a violator, the litigation team should use the PROJECT model.[45]

SEPs are particularly encouraged in the Section 404 program if the SEP results in protection of a wetland resource or other special aquatic site. For example, purchase and dedicated use of buffer land around a wetland helps ensure the survival of wetland resources, and is an appropriate and valuable SEP, as is upland land acquisition lying in wetland mosaics. In addition, deeding over wetlands in perpetuity for the purpose of conservation promotes program interests and the goals of the Clean Water Act. It should be noted that restoration of any area of the violation, or any mitigation in the form of injunctive relief to remedy such violations (including mitigation for the temporal loss of wetlands functions and values), does not constitute a SEP.

V. DOCUMENTATION, APPROVALS, AND CONFIDENTIALITY

Each component of the minimum settlement penalty calculation (including all adjustments), as well as subsequent recalculations, should be clearly documented in the case file along with supporting materials and written explanations. In any case not otherwise subject to Headquarters concurrence, in which a settlement penalty in a Section 404 enforcement action may not comply with the provisions of this policy or where application of this policy appears inappropriate, the penalty must be approved in advance by Headquarters.

Except as provided in Section II, documentation and explanation of a particular penalty calculation constitute confidential information that is exempt from disclosure under the Freedom of

---

[44] See "Issuance of Final Supplemental Environmental Projects Policy," Memorandum from Steven A. Herman to Regional Administrators (April 10, 1998). This policy is also available on the Internet at: hhtp://www.epa.gov/oeca/sep/sepfinal.html.

[45] This model is very similar to the BEN computer model, and like the other models, it is available on the Agency's web site at http://www.epa.gov/oeca/datasys/dsm2.html. For further information on the model and guidance in its use, contact the Financial Issues Helpline at (888) 326-6778.

Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client and attorney-work product privileges. While individual settlement penalty calculations under this policy are confidential documents, this policy is a public document that may be released to anyone upon request. In the conduct of settlement negotiations, the Agency may choose to release portions of the case-specific settlement calculations. Such information may only be used for settlement negotiations in the case at hand and may not be admitted into evidence in a trial or hearing, as provided by Rule 408 of the Federal Rules of Civil Procedure.

The policies and procedures set forth in this document and the accompanying attachment are intended for the guidance of government personnel. They are not intended, and cannot be relied on, to create any rights, defenses or claims, substantive or procedural, enforceable by any party in litigation with the United States. The policies set forth in this document do not have the force of law and are not legally binding on Agency personnel. The Agency reserves the right to act at variance with these procedures and to change them at any time without public notice.

ATTACHMENT 1 TO CWA SECTION 404 SETTLEMENT POLICY

Case Name _____ **Date**_____

Prepared by _____

SETTLEMENT PENALTY CALCULATION WORKSHEET

STEP			AMOUNT
1.	Calculate the Economic Benefit (attach BEN printouts, and provide written explanation of calculations)		
2.	Calculate the Preliminary Gravity Amount (sum of A + B factors) x M		
3.	Additional Gravity Adjustments		
	a. Recalcitrance (add 0 to 200% x line 2)		
	b. Quick Settlement Reduction (subtract 10% x line 2)		
	c. Other Factors as Justice May Require		
	d. Total gravity adjustments (negative amount if net gravity reduction) (3.a + 3.b + 3.c)		
4.	Preliminary Penalty Amount (Lines 1 + 2 + 3d.)		
5.	Litigation Considerations (if any)		
6.	Ability to Pay Reduction (if any)		
7.	Reduction for SEPs (if any)		
8.	**Bottom-Line Cash Settlement Penalty** (Line 4 less lines 5, 6, and 7)		