

Regulatory Guidance Letter 90-09

SUBJECT: Wetlands Enforcement Initiative

DATE: December 17, 1990

EXPIRES: December 31, 1993

1. Enclosed is a joint Environmental Protection Agency/Army memorandum which establishes a wetlands enforcement initiative, and provides guidance on judicial civil and criminal enforcement priorities.
2. The memorandum describes the level of participation and schedule that will be followed during the initiative. As stated in the memo, Corps Headquarters will not be involved in decisions about filing suits, but will select the Corps cases for the initiative.
3. The guidance on priorities will be followed as standard operating practice for judicial civil and criminal cases. The guidance was developed to promote consistency in the manner in which the provisions of the Clean Water Act are enforced. Those enforcement actions outside the purview of the Clean Water Act (i.e. Section 10 only cases) should continue, and are to be included in the prioritization process using the general concepts provided in the guidance.
4. This guidance expires on 31 December 1993 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

JOHN P. ELMORE
Chief, Operations, Construction and Readiness Division
Directorate of Civil Works

MEMORANDUM

SUBJECT: Wetlands Enforcement Initiative

FROM: James M. Strock
Assistant Administrator for Enforcement

LaJuana S. Wilcher
Assistant Administrator for Water

G. Edward Dickey
Acting Assistant Secretary of the Army (Civil Works)

TO: Regional Administrators
Director of Civil Works

We are seeking the participation of EPA Regions and Corps Districts in an enforcement initiative to protect wetlands. The Wetlands Enforcement Initiative is designed to emphasize the Federal government's commitment to Clean Water Act Section 404 enforcement, to generally educate the regulated community and the public at large about the requirements of the Section 404 program and the importance of wetlands, and to publicize Clean Water Act violations involving the unauthorized discharge of dredged or fill material. EPA and the Department of the Army have placed high priority on protecting this Nation's wetlands and recognize that an active Section 404 enforcement program is one important wetlands protection tool.

The Wetlands Enforcement Initiative will be similar to EPA's FY89 municipal pretreatment enforcement initiative under the Clean Water Act. That initiative concluded with the filing of several important cases and a major Agency press release and press conference. We are proposing to publicize the Wetlands Enforcement Initiative in two phases. The first "wave" of publicity is planned for April 1991. It will announce the Initiative and highlight appropriate Section 404 enforcement actions initiated or resolved over the previous 12 months. We also hope to file a "cluster" of Section 404 cases at that time if such a filing does not unduly interfere with the normal flow of cases.

By alerting the regulated community, as well as the general public, to the Federal government's commitment to Section 404 enforcement, this Spring announcement is also intended to provide an early deterrent to potential violations which might otherwise occur during the 1991 Spring and Summer construction season. The second "wave" of publicity is scheduled for October 1991 and will highlight appropriate Section 404 enforcement actions initiated or resolved during FY91, including cases resulting from investigations conducted during the Spring field season. We also hope to have a second "cluster" filing at that time. Each announcement will consist of a joint EPA/Army/Department of Justice (DOJ) press release and press conference. In the press release, we will acknowledge Section 404 administrative compliance orders, cease and desist orders, administrative penalty orders and judicial cases initiated or resolved by the Regions and Districts during the covered time period. At the press conferences, we will highlight those administrative and judicial cases that best serve to illustrate the Initiative's goals.

The Wetlands Enforcement Initiative will include cases involving both un-permitted discharges of dredged or fill material into wetlands and discharges in violation of the conditions in a Section 404 permit. Regions and Districts will have flexibility to decide which enforcement actions are most appropriate to support the Initiative. In making enforcement decisions, Regions and Districts should consider: The "EPA/Army Guidance on Judicial Civil and Criminal Enforcement Priorities;" the "Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance and Appendices;" the Clean Water Act

Section 404 Enforcement Memorandum of Agreement; and the additional guidance discussed below, and should focus on the most significant violators/violations in each of the Regions or Districts.

While this Initiative focuses on wetlands protection, Section 404 enforcement actions involving un-permitted discharges and violations of 404 permit conditions to other waters of the United States can be included. We suggest, however, that, where possible, the Regions and Districts focus on enforcement actions which have one or more of the following elements:

- a discharge into a wetland that is identified on the Region's Priority Wetland List or is an important and/or threatened area in the Region or District;
- a case which will have high deterrence value in the Region, District or Nation, e.g., a particular industry, business or land development entity which engaged in unauthorized discharges of dredged or fill material.
- a discharge by a repeat or flagrant violator, e.g., someone who engaged in an unauthorized discharge activity after being denied a Section 404 permit or withdrawing a permit application for such activity.

The above list is not intended to exclude other cases of importance.

As noted above, the Wetlands Enforcement Initiative will consist of cease and desist orders, administrative compliance orders, administrative penalty actions and civil judicial referrals. In addition, appropriate criminal actions, which have been approved in accordance with each agency's procedures for criminal referrals, may also be included in the press announcements. Because Regions and Districts follow different procedures in initiating enforcement responses, we have provided two separate schedules for implementing this Initiative.

EPA Regions

We propose that the Regions issue Section 309(a) administrative compliance orders and Section 309(g) administrative penalty complaints on the schedule described below. Administrative compliance orders and administrative penalty orders are not subject to Headquarters concurrence (with the exception of those Regions that have not fulfilled Headquarters concurrence requirements concerning the requisite number of Section 309(g) complaints and consent agreements). Headquarters will review Section 309(g) complaints and consent agreements, however, for the purpose of determining whether such orders should be highlighted in Initiative press activities.

We ask that the Regions submit case referrals by no later than February 15, 1991, for the April announcement and by August 1, 1991 for the October 1991 announcement. We do not intend, however, to delay the processing of referrals submitted earlier. Each Region should submit one or more civil judicial referrals and should also issue administrative compliance orders and administrative penalty

orders as appropriate. After receipt of the referral packages, the Regions, Headquarters and DOJ, in consultation with the Army, will decide if suits should be filed simultaneously or in some other coordinated manner, as indicated in the following schedule:

1. Dec. 18, 1990 - Headquarters/Regional conference calls to discuss Call Letter.
2. Jan. 8, 1991 - Regions submit to Headquarters a list and brief description and schedule for candidate enforcement actions.
3. Jan. 22, 1991 - Headquarters/Regional conference call to discuss candidate cases and confirm schedules for candidate enforcement actions.
4. Feb. 15, 1991 - Deadline for Regions to submit referrals to Headquarters for April filing.
5. Mar. 23, 1991 - Deadline for Regions to issue administrative compliance orders, administrative consent orders and administrative penalty complaints (copies of issued compliance orders, consent orders and administrative penalty complaints should be supplied to Headquarters after issuance).
6. April 1, 1991 - Headquarters completes coordination of national communications strategy with Regions, Army and DOJ for April announcement.
7. April 23, 1991 - Likely judicial case filing dates.
8. April 23, 1991 - Joint press release and/or joint press conference held.
9. June 14, 1991 - Regions submit to Headquarters a list and brief description and schedule for candidate enforcement actions for October announcement.
10. July 1, 1991 - Headquarters coordinates with Regions and confirms schedules for candidate enforcement actions.
11. Aug. 1, 1991 - Deadline for Regions to submit civil judicial referrals to Headquarters for October filing.
12. Sept. 13, 1991 - Deadline for Regions to issue administrative compliance orders, administrative consent orders and administrative penalty complaints (copies of issued compliance and consent orders and administrative penalty complaints should be supplied to Headquarters after issuance).
13. Sept. 20, 1991 - Headquarters completes coordination of national communications strategy with Regions, Corps and DOJ for October announcement.
14. Oct. 15, 1991 - Likely judicial case filing date.
15. Oct. 15, 1991 - Joint press release and/or joint press conference held.

We request that each Region complete the attached form on cases that are candidates for inclusion in the Wetlands Enforcement Initiative, and submit the forms to Hazel Groman of the Office of Wetlands Protection and Elyse DiBiagio-Wood of the Office of Enforcement by January 8, 1991 or June 14, 1991, as appropriate. Headquarters staff assigned to the Initiative and available to answer

questions include Hazel Groman, OWP, FTS 475- 8798, and Elyse DiBiagio-Wood, OE-Water, FTS 475-8187.

Corps Districts

Unlike EPA, Corps Headquarters will not participate in the decision as to which suits should be filed. The Initiative is not intended to affect ongoing Corps enforcement activities. Districts should continue to employ all enforcement options, as discussed in the attached joint guidance letter. For purposes of the Initiative, however, we ask that each District submit two planned or pending enforcement actions for each phase of the Initiative which, in the District's opinion, target particularly egregious violations. We will then decide which cases are proper candidates to be publicized at the joint press conference. The Districts should submit their actions in accordance with the following schedule:

16. Feb. 4, 1991 - Districts submit to Headquarters two planned or pending enforcement actions to be included in the April announcement.
17. March 5, 1991 - Headquarters coordinates with Districts and confirms schedules for enforcement actions.
18. April 1, 1991 - Headquarters completes coordination of national communications strategy with EPA and DOJ.
19. April 23, 1991 - Joint press release and/or joint press conference.
20. July 2, 1991 - Districts submit to Headquarters two planned or pending enforcement actions to be included in the October announcement.
21. Aug. 20, 1991 - Headquarters coordinates with Districts and confirms schedules for enforcement actions.
22. Sept. 20, 1991 - Headquarters completes coordination of national communications strategy with EPA and DOJ.
23. Oct. 15, 1991 - Joint press release and/or joint press conference.

We request that each District complete the attached form on cases that it believes should be publicized in the Enforcement Initiative, and submit the form, in duplicate, to Jack Chowning, HQUSACE, CECW-OR by February 4, 1991 and July 2, 1991. Headquarters staff available to answer questions regarding the Initiative include Jack Chowning, 272-1781, and Martin Cohen, HQUSACE, CECC-K, 272-0027.

We realize that the above schedule will require a large effort by Regional and District offices. However, we believe that the Initiative is critical to the priority goal of the agencies to protect wetlands, and greatly appreciate your continued support of the Initiative. We will make Headquarters personnel available to assist the Regions and Districts.

cc: Regional Counsels

Directors, Water Mgmt Div., Regs. I, II, IV, V, VIII, IX and X

Directors, Env'l Services Div., Regs. III and VI

Asst Regional Administrator, Policy and Management, Reg. VII
Margaret Strand, Chief, Environmental Defense Sec., DOJ
John Studt, Chief, Regulatory Branch, COE
Pat Alberico, OCE
Fred Stiehl, OE-Water
Dave Davis, OWP
Martin Cohen, Assistant Chief Counsel for Litigation, Office of the Chief
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United States Environmental Protection Agency

United States Department of the Army

GUIDANCE ON JUDICIAL CIVIL AND CRIMINAL ENFORCEMENT PRIORITIES

BACKGROUND

This document provides guidance to the Environmental Protection Agency (EPA) Regions and Army Corps of Engineers Districts on enforcement priorities for unauthorized discharges of dredged or fill material in waters of the United States in violation of section 301 of the Clean Water Act (CWA). Unauthorized discharges include both discharges that are un-permitted and discharges that violate permit terms or conditions. The guidance enumerates factors enforcement personnel should consider when deciding whether to refer a case for judicial action. By providing this guidance, EPA and the Army intend to encourage consistency in the manner in which we enforce the CWA's requirements nationally, protect the integrity of the section 404 regulatory program, and direct limited program resources in a manner that produces the most beneficial environmental results.

Options to address CWA violations include: no action, voluntary compliance, cease and desist orders, EPA administrative compliance orders, interim measures designed to protect the aquatic ecosystem from further damage, after-the-fact permits, administrative penalty orders, and civil and criminal judicial actions. This guidance discusses priorities for civil and criminal judicial actions only. By defining priorities for judicial actions, EPA and the Army do not intend to suggest that the agencies limit their use of these or any other enforcement options. In fact, the agencies should continue the use of all enforcement options whether in conjunction with or instead of civil and criminal proceedings.

CIVIL AND CRIMINAL ENFORCEMENT PRIORITIES

X. Civil judicial cases

Decisions on whether to refer a civil action to the Department of Justice must be on a case-by-case basis, and the absence or presence of one or more of the following factors should not necessarily dictate a decision regarding a particular case. Nevertheless, enforcement personnel should consider the following factors when deciding whether to refer a civil action:

1. **Quality of the waters affected.** Enforcement personnel should determine, to the extent practicable, what functions and values the waters performed prior to the unauthorized discharge. Regions and Districts should give priority to violations that affect wetlands and other special aquatic sites.
2. **Impact of the discharge.** Enforcement personnel should determine, to the extent practicable, the amount and content of the discharge, the number of acres affected by the discharge, and the discharge's direct and indirect effects. Priority should be given to those discharges that have an especially deleterious effect on wetlands functions or values, that affect a large area of wetlands or other waters, or that are widespread and have significant cumulative effects. These would include unauthorized discharges with significant adverse effects on aquatic ecosystem diversity, productivity, and stability such as loss of fish or wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy. Judicial enforcement action would normally be appropriate, for example, for unauthorized discharges that cause or contribute to violations of state water quality standards; violate any applicable toxic effluent standard or prohibition under Section 307 of the CWA; or jeopardize endangered or threatened species and their designated critical habitat. Judicial enforcement action should be considered for any case where unauthorized discharges did or may cause or contribute to significant adverse environmental impacts.
3. **Culpability of violator.** Enforcement personnel should consider the violator's prior compliance history when determining what type of enforcement action is appropriate. Priority should be given to violators with a history of noncompliance and those who commit knowing violations. The violator's experience with the program and whether he or she had been the subject of previous enforcement actions are considerations. In general, repeat violators warrant judicial action, regardless of whether the violations occurred on the same site or on different sites. Repeat violations, however, are not a prerequisite for referring a civil case to the Department of Justice.
4. **Deterrence value.** Enforcement personnel should consider the extent to which the violation is flagrant, visible, and well-publicized. If there are a number of violations within a particular

geographic area or industry, civil judicial action against one or more of the violators can provide excellent deterrence. The agencies should refer for civil action a case against any violator whose actions, if left unpunished, would have the effect of jeopardizing the integrity of the section 404 program in the area where the violation occurred.

5. **Benefit from the violation.** Enforcement personnel should consider the economic benefit a violator derived from the unauthorized discharge. Because administrative penalties are limited, when a violator has obtained a significant economic benefit from the discharge, a civil judicial action may be the only enforcement option that can effectively recover that benefit.
6. **Equitable considerations.** In addition to the above five factors, the Regions and Districts will want to anticipate and evaluate the strength of any equitable considerations likely to be raised by potential defendants. Priority should be given to recent and ongoing violations. Regions and Districts should also take into account, as appropriate, when the Region and/or District learned of the violation, and whether timely administrative attempts to achieve compliance were unsuccessful and a civil referral is the only available means to obtain needed injunctive relief.

Another equitable consideration is whether the violator received misinformation from the federal government as to whether the discharge required a section 404 permit. Based on existing case law, the federal government can only rarely and in very limited circumstances be barred from enforcing its laws. At the same time, an important goal of federal enforcement, including section 404 enforcement, is fair and equitable treatment of the regulated community. As a result, the Regions and Districts will need to carefully consider the appropriateness of initiating a civil suit in cases where the violator may have reasonably relied on a federal official's misrepresentations regarding the need for a section 404 permit. This includes situations where the violator was led to believe that the activity did not constitute a discharge, that the discharge did not take place in waters of the United States, or that a general permit covered the discharge. When determining whether the violator's reliance was reasonable, enforcement personnel should assess such factors as whether the misrepresentations were made by EPA or the Corps, the two federal agencies charged with implementing the section 404 program, or another federal agency; whether the misrepresentations were communicated to the violator in writing or were merely oral statements; the extent of the violator's familiarity with the section 404 program; and whether the violator knew, should have known, or with reasonable

diligence could have determined, that the representations were erroneous.

The first two factors listed above center upon the environmental effects of the violation. Special attention should be paid both to violations that damage large areas of wetlands and those that impair valuable wetlands, no matter what their size. The next three factors are intended to protect the integrity of the section 404 program by focusing enforcement priorities first on individuals or violations which show disdain for the law and on those who seek to benefit from circumvention of the law.

Y. Criminal cases

With regard to the discharge of dredged or fill material, section 309(c) of the CWA provides criminal penalties for four separate offenses. First, anyone who negligently violates section 301 (e.g., engaging in unauthorized discharges) or who negligently violates the requirements of a section 404 permit may be criminally liable. Second, anyone who knowingly violates section 301 or the requirements of a section 404 permit may also be subject to criminal liability. Third, any person who violates section 301 or the conditions of a section 404 permit and, in doing so, knowingly endangers another person may be subject to criminal penalties. Finally, section 309(c) provides criminal sanctions for persons who knowingly make false material statements regarding a section 404 permit.

In some instances a violation will involve circumstances which indicate that a criminal prosecution may be in order. Such circumstances should be underscored when the case is referred to the Department of Justice. Ultimately, Justice must exercise its discretion as to whether or not to proceed criminally in any case. If there is a possibility of criminal prosecution, field personnel should pay special attention to evidentiary matters such as sample preservation, content of statements to and from any potential defendant, good photographs, and chain of custody.

This document provides internal guidance for field personnel regarding the exercise of their enforcement discretion. Accordingly, this document creates no rights in third parties.

For the Environmental Protection Agency:

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Associate Enforcement Counsel for Water
Office of Wetlands Protection

For the Department of the Army:

JOHN P. ELMORE Chief, Operations, Construction, and Readiness Division
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