

Compliance with the USEPAs Section 404(b)(1) Guidelines

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Regulatory Program Workshop

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Section 404(b)(1) Guidelines

- History of the Clean Water Act
- Organization of the 404(b)(1) Guidelines
- Purpose and Policy, Applicability, Definitions, Adaptability (Subpart A)
- Compliance with the Guidelines (Subpart B)
 - Restrictions on Discharge (230.10)
 - Restrictions Related to Alternatives (230.10(a))
 - Basic and Overall Project Purpose
 - Alternatives
 - Significant Degradation



Section 404(b)(1) Guidelines

- Restrictions on Discharge (230.10) (cont'd)
 - Restrictions Related to water quality, effluent, ESA, marine sanctuaries (230.10(b))
 - Restrictions Related to significant degradation (230.10(c))
 - Restrictions related to minimization (230.10(d))
- Factual determinations
 - Cumulative
 - Secondary
- Findings of Compliance/Non Compliance
- Take Home



History

- 1948: Federal Water Pollution Control Act (FWPCA) passed
- 1972: FWPCA Amendments: Sweeping amendments. Authority for implementation to EPA (33 USC § 1251(d))
- 1977: Clean Water Act of 1977 signed – corrections to 1972 FWPCA
 - Section 404 of the Clean Water Act (33 USC § 1344)
 - 404(a) (33 USC § 1344(a)): Authority to issue permits
 - 404(b)(1) of the Clean Water Act (33 USC § 1344(b)(1)): Guidelines developed by the Administrator (EPA), in conjunction with the Secretary (USACE) - 40 CFR 230
- 1980: Section 404(b)(1) Guidelines released by USEPA



Organization of 404(b)(1) Guidelines

- **Preamble**
- **Subpart A:** Policy, Definitions, Procedures
- **Subpart B:** Compliance with the Guidelines
- **Subparts C-F:** Potential Impacts
- **Subpart G:** Evaluation and Testing
- **Subpart H:** Actions to Minimize Adverse Effects
- **Subpart I:** Planning to Shorten Permit Processing Time
- **Subpart J:** Compensatory Mitigation



Subpart A

- 230.1: Purpose and Policy
- 230.2: Applicability
- 230.3: Definitions
- 230.4: Organization
- 230.5: Procedures
- 230.6: Adaptability
- 230.7: General Permits



230.1 – Purpose and Policy

Restore and maintain the chemical, physical, and biological integrity of waters of the U.S. through the control of discharges of dredged or fill material.



230.2 - Applicability

- USACE Regulatory Program under Section 404(a) and (e) of the Clean Water Act (CWA)
- USACE Civil Works Program
- State 404 Permit Programs approved by USEPA under Section 404(g) of the CWA
- Statewide dredged or fill material regulatory programs with BMPs approved under Section 208(b)(4)(B) and (C) of the CWA
- Federal construction projects meeting criteria specified in Section 404(r) of the CWA



230.3 - Definitions

- Act
- Adjacent
- Aquatic environment/aquatic ecosystem
- Carrier of contaminant
- Contaminant
- Discharge point
- Disposal site
- Extraction site
- Mixing Zone
- Permitting authority
- Pollutant
- Pollution
- Practicable
- Special aquatic sites
- Territorial sea
- Waters of the United States
- Wetlands



230.6 - Adaptability

- Unlikely that Guidelines will apply in entirety to any one activity, no matter how complex
- Evaluation commensurate with impacts
- Regulatory Guidance Letter 95-01: *Guidance on Individual Permit Flexibility for Small Landowners*



RGL 95-01: Flexibility for Small Landowners

- March 6, 1995, Memorandum to the Field
- Applies to discharges affecting up to 2 acres of non-tidal wetlands for:
 - Construction/expansion of a single family home/attendant features
 - Construction/expansion of a barn/farm building
 - Expansion of a small business facility
- Presumes that alternatives on property not currently owned by an applicant are not practicable under the Guidelines.
- Purpose tied closely to an applicant's property. In the case of expansion of a facility, the off-site analysis rarely identifies a practicable site.



230.7 – General Permits

- General Permit complies with Guidelines if it meets applicable restrictions on discharge (40 CFR 230.10) and:
 - Similar in nature and similar in impact
 - Only minimal adverse effects when performed separately
 - Minimal cumulative adverse effects

- Evaluation Process
 - Set forth evaluation of individual & cumulative effects
 - Consider prohibitions in 40 CFR 230.10(b) and factors in 230.10(c) and information supporting factual determination in 230.11
 - Precise description of activities and why similar in nature and environmental impact
 - Cumulative effects – include the number of individual discharge activities likely to be regulated until expiration, including repetitions of discharges at a single location



Subpart B

- **230.10: Restrictions on Discharge**
- 230.11: Factual Determinations
- 230.12: Findings of Compliance or Non-Compliance with the Guidelines



230.10(a)

Except as provided under Section 404(b)(2) no discharge shall be permitted if :

- there is a practicable alternative
- which would have less adverse impacts on the aquatic ecosystem
- so long as the alternative does not have other significant adverse environmental consequences



230.10(a)(1)

Practicable alternatives include

- Activities which do not involve discharge of dredged/fill material into WOUS
- Discharges at other locations in WOUS



230.10(a)(2)

An alternative practicable if:

- It is capable of being done after taking into consideration
 - Cost (not economics)
 - Existing technology
 - Logistics
 - in light of the **overall project purpose**



230.10(a)(3)

Where the activity associated with a discharge is proposed for special aquatic site **does not** require access or proximity to or sighting within the special aquatic site to fulfill its **basic** purpose

- Practicable alternatives that do not involve special aquatic sites are **presumed** available, unless demonstrated otherwise
- Practicable alternatives which do not involve discharge in special aquatic site **presumed** to have less adverse impacts unless demonstrated otherwise



Water Dependency

- Project requires access or proximity to or sighting within a **special aquatic site** to fulfill its basic purpose.
 - Special aquatic sites: Sanctuaries, refuges, wetlands, mud flats, vegetated shallows, coral reefs, riffle and pool complexes.
- If activity is not water dependent, alternatives presumed available unless demonstrated otherwise
- Even if water dependent, have to demonstrate that proposed activity is the least environmentally damaging practicable alternative
- Regulatory Guidance Letter 92-00: *Water Dependency and Cranberry Production*



Alternatives

- Information commensurate with impacts
- Should consider on-site and off-site alternatives
- Develop appropriate screening criteria used to determine practicability based on overall project purpose, costs, logistics, existing technology, and environmental effects
- Generally would not consider alternatives with greater impacts to the proposed action



Cost

- Consider those alternatives reasonable in terms of overall scope/cost of the proposed project. Not economics (preamble to 404(b)(1) Guidelines)
 - Not applicants financial standing, investment, or market share
- If cost is unreasonably expensive to applicant, it is not practicable (preamble to 404(b)(1) Guidelines)
- Not currently any guidance or regulations related to consideration of cost in an alternatives analysis
 - SPD working on a SOP for consideration of costs
- Provide overall costs for the construction of each alternative.



Logistics

- Not currently any guidance or regulations related to consideration of logistics in an alternatives analysis
- Identify any constraints to development
 - Location
 - Infrastructure
 - Local/state/federal laws, regulations, ordinances, requirements
 - Topography



Existing Technology

- Not currently any guidance or regulations related to consideration of existing technology in an alternatives analysis
- Are there ways to meet the overall project purpose that are not currently technologically practicable?



Off-site Alternatives

- Use overall project purpose to define geographic boundary of off-site alternatives and screening criteria (e.g. Development of a large-scale, mixed-use development, with associated infrastructure, in southwestern Yolo County)
- Determine availability
 - Pending application/existing permit?
 - For sale?
- Determine additional screening criteria related to cost, logistics, and existing technology
- Determine environmental effects of each alternative – not just WOUS



On-site Alternatives

- Use overall project purpose to define screening criteria
- Determine additional screening criteria related to cost, logistics, and existing technology
- Determine environmental effects of each alternative – not just WOUS



230.10(a)(4) – (5)

- Analysis required by NEPA will in most cases provide information for evaluation of alternatives under Guidelines
 - NEPA documents may contain broader range of alternatives than required
 - NEPA documents may not consider alternative in sufficient detail to meet Guidelines
 - NEPA documents may need to be supplemented
- To extent that practicable alternatives identified in Coastal Zone Management Program, Section 208 Program, or other planning process, such evaluation shall be considered, and supplemented



Tips for Alternatives Information

- Information provided by applicant/consultant is alternatives information, alternatives analysis completed by USACE
- Work with project manager to develop alternatives to the proposed action to be analyzed
- Do not assume that that project manager knows other local/state/federal laws, policies, requirements, ordinances, etc. Provide all information required to substantiate alternatives information
- Provide all of the information required to back up each statement made in the alternatives information submitted.



230.10(b)

No discharge shall be permitted if it:

- Causes or contributes to violations of State water quality standard
- Violates toxic effluent standard or prohibition under CWA Section 307
- Jeopardizes continued existence of ESA species
- Violates requirement imposed by Secretary of Commerce to protect marine sanctuary designated under Marine Protection Research & Sanctuaries Act



230.10(c)

Except as provided under Section 404(b)(2), no discharge shall be permitted which will cause or contribute to significant degradation of WOUS.

- Based on factual determinations, evaluations, and tests required in Subparts B and C, after consideration of Subparts C – F
- Effects include:
 - Human health and welfare (municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites)
 - Life stages of aquatic life and other wildlife (transfer, concentration, and spread of pollutants or byproducts)
 - Aquatic ecosystem diversity, productivity, and stability (loss of fish and wildlife habitat or capacity of wetland to assimilate nutrients, purify water, or reduce wave energy)
 - Recreational, aesthetic, and economic values



230.10(d)

Except as provided under Section 404(b)(2), no discharge shall be permitted

- Unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem
- Use subpart H to identify possible steps



Subpart B

- 230.10: Restrictions on Discharge
- **230.11: Factual Determinations**
- 230.12: Findings of Compliance or Non-Compliance with the Guidelines



230.11 – Factual Determinations

- Determine potential short-term or long-term effects of discharge on physical, chemical, and biological components of aquatic environment in light of Subparts C-F
- Used in making findings of compliance/non-compliance
- Evaluation and testing procedures in Subpart G used as necessary
- Determine nature and degree of effect that the discharge will have individually and cumulatively
- Consider possible loss of environmental values and actions to minimize impact (Subpart H)



230.11(g) – Determinations of Cumulative Effects on the Aquatic Ecosystem

- Changes in aquatic ecosystem attributable to collective effect of a number of individual discharges
- Cumulative effects attributable to discharge should be predicted to extent reasonable and practical
 - Collect information
 - Solicit information from other sources
 - Information documented and considered in decision making process
- Different than NEPA cumulative impact requirements!



230.11(h) – Determinations of Secondary Effects on the Aquatic Ecosystem

- Effects on aquatic ecosystem that are associated with discharge, but do not result from actual placement of dredged/fill material
- Considered prior to final permit decision
- Examples:
 - Fluctuating water levels in impoundment associated with operation of dam,
 - septic tank leaching and surface runoff from developments on fill
 - Leachate and surface runoff from sanitary landfill in WOUS
- Secondary impacts = Indirect impacts



Subpart B

- 230.10: Restrictions on Discharge
- 230.11: Factual Determinations
- **230.12: Findings of Compliance or Non-Compliance with the Guidelines**



230.12 – Findings

Based on Subparts C-G, disposal sites must be:

- Specified as complying with Guidelines
- Specified as complying with Guidelines, with inclusion of appropriate & practicable conditions to minimize effects (Subpart H)
- Specified as failing to comply with Guidelines where:
 - There is a practicable alternative w/ less adverse effects
 - Will result in significant degradation (230.10(b) or (c))
 - Does not include all appropriate/practicable measure to minimize harm
 - Insufficient information to make a reasonable judgment of compliance
- Findings set forth in writing and made available to applicant and shall
- Include factual determinations required by 230.11 and brief explanation of any adaptation of Guidelines to the activity



Take Home

- The Guidelines are a regulation, not Guidance
- Compliance with Guidelines required only for activities that would result in a discharge of dredged and/or fill material into waters of the United States
- Analysis commensurate with impacts
- The Corps is responsible for determining compliance with the guidelines
- Permit can be issued only for the “LEDPA”
- If a project does not meet all of the restrictions on discharge, the permit application must be denied.



A wide-angle photograph of a rural landscape. The foreground is a field of green grass interspersed with numerous small yellow wildflowers. A dirt path or clearing runs diagonally through the lower left. In the middle ground, a fence line is visible, and a few more trees stand on a slight rise. The background features a line of larger, mature trees against a pale blue sky with soft, white clouds.

QUESTIONS?