

UNAUTHORIZED ACTIVITIES

Ethan Schindler
Regulatory Project Manager
Nevada Section

Ethan.W.Schindler@usace.army.mil
775-799-8235



U.S. ARMY



US Army Corps
of Engineers®

SUMMARY

- Clean Water Act
- Enforcement Policy
- USACE and USEPA Agreements
- Resolution
- Lead Agencies
- Penalties



U.S. ARMY



US Army Corps
of Engineers®



CLEAN WATER ACT

CWA § 301(a), “Except as in compliance with this section and sections 302, 306, 307, 318, 402, and **404** of this Act, the discharge of any pollutant by any person shall be unlawful.”

CWA § 404, “Any discharge of **dredged or fill material** into the **navigable waters** incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.”

Note:

- **Dredged and fill material** are defined as pollutants under the Clean Water Act
- **Navigable Waters:** “Waters of the U.S.” + the Territorial Seas. Wetlands and other special aquatic sites can be WOTUS.
- Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.





POLICY

33 CFR § 326.2 - Enforcement, as part of the overall regulatory program of the Corps, is based on a policy of regulating the waters of the United States by discouraging activities that have not been properly authorized and by requiring corrective measures, where appropriate, to ensure those waters are not misused and **to maintain the integrity of the program**... As EPA has independent enforcement authority under the Clean Water Act for unauthorized discharges, the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved.

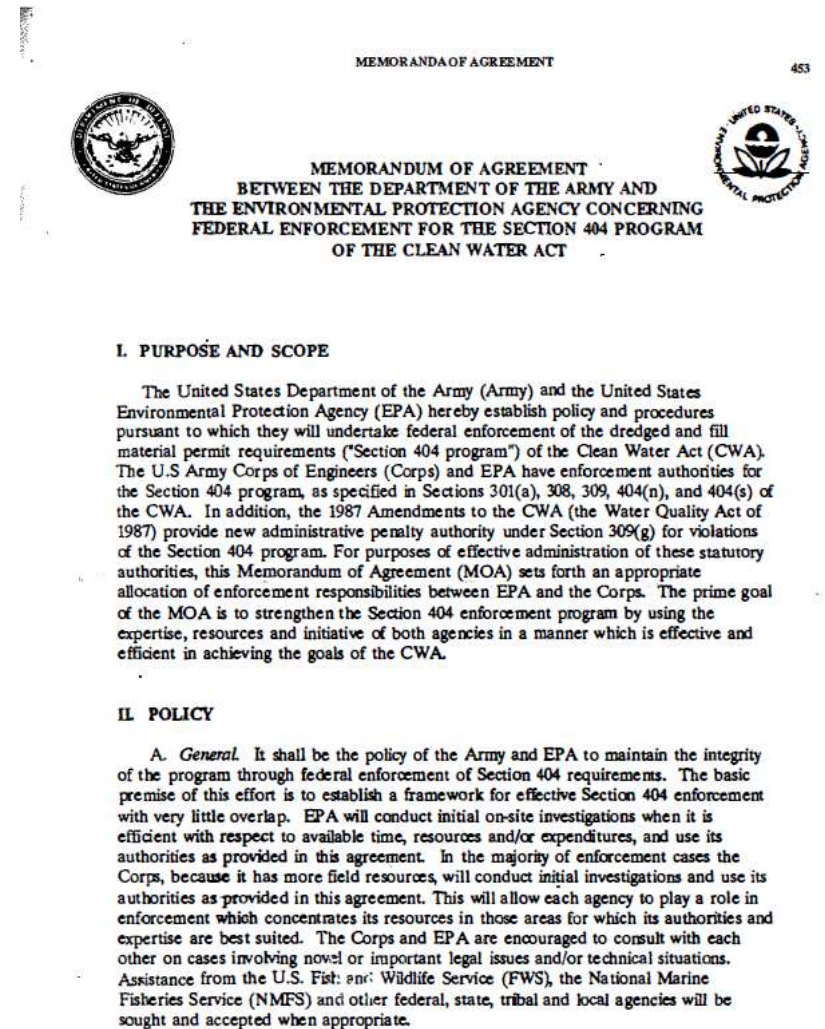


**US Army Corps
of Engineers**®



1989 MEMORANDUM OF AGREEMENT

- Prime goal of the 1989 MOA is to strengthen the Section 404 enforcement program by coordination between both agencies.
- Distinguishes between an “investigating agency” and an “enforcement agency”.
- Establishes the Corps will act as the lead enforcement agency for all non-compliance actions while EPA will act as the lead enforcement agency for all unpermitted discharges.
- The goal is to avoid permanent environmental harm caused by a violator’s activities by requiring remedial actions or ordering removal and restoration (unless otherwise not feasible)
- States no after-the-fact (ATF) permit application shall be accepted until resolution has been reached through an appropriate enforcement response as determined by the lead enforcement agency.





FIELD LEVEL AGREEMENT

- USACE South Pacific Division (SPD) and USEPA Region 9
- Supplements and clarifies the original 1989 MOA by establishing procedures
- Screening Agency
- Investigating Agency
- Enforcement Agency
- Supporting Agency

**FIRST AMENDED
FIELD LEVEL AGREEMENT
BETWEEN
THE U.S. ARMY CORPS OF ENGINEERS, SOUTH PACIFIC DIVISION
AND
THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 9
CONCERNING THE COORDINATION OF ENFORCEMENT ACTIONS UNDER
SECTION 404 OF THE CLEAN WATER ACT
IN ARIZONA, CALIFORNIA, AND NEVADA, INCLUDING TRIBAL LANDS**

Table of Contents

- I. Purpose, Scope, and Authority
- II. General Coordination
- III. Procedures
 - A. Preliminary Screening
 - B. Initial Investigation and Report
 - C. Lead Enforcement Agency Selection
 - D. Case Referral
 - 1. SPD Corps District Referral to Region 9
 - 2. Recalcitrance of Responsible Party(ies).
 - 3. Region 9 Referral to the SPD Corps District
 - E. Support Agency Procedures
- IV. General Provisions

Glossary of Terms

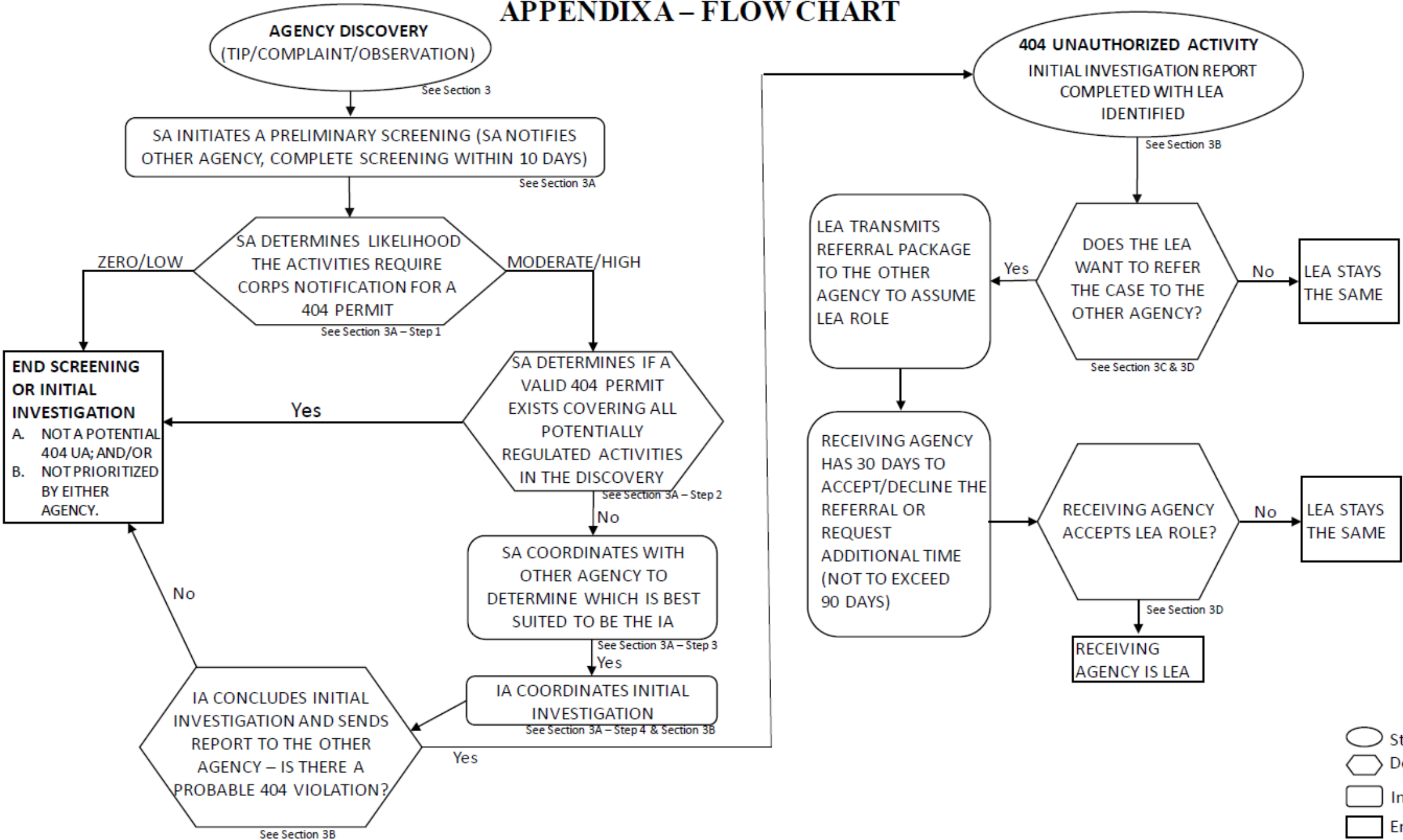
Appendix A – Flow Chart





Appendix B – Time-Frame Table

Appendix C - Transmittal Forms

Appendix D – 1989 Memorandum of Agreement between the Department of the Army and the U.S. Environmental Protection Agency

APPENDIX A – FLOW CHART



-  Start
-  Decision Point
-  Interim Step
-  End



RESOLUTION

- Voluntary Restoration
- After-the-fact permit initiated
- “No further action”
- No Permit Required
- EPA Referral
- Referred to Chief Counsel/USA Attorney
- Restoration Order
- Withdrawn



U S Army Corps of Engineers
Sacramento District

2021 Nationwide Permit Summary

33 CFR Part 330; Issuance of Nationwide Permits – February 25, 2022

32. Completed Enforcement Actions. Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds





LEAD INVESTIGATING AGENCY

- Already a determination from Screening Agency that the activity had a moderate to high likelihood of requiring notification.
- **Data Collection:**
 - Request for Information Letter (RFI)
 - Site Visit
 - Impact Mapping
 - Remote Sensing
 - Aquatic Resources Delineation
- **Initial Investigation Form**
 - Summarizes information collected during investigation
 - Preliminary evaluation of jurisdiction (EPA has final authority over determining jurisdiction)
- **Evaluate Resolution Strategies**





LEAD ENFORCEMENT AGENCY

- Corps tends to take LEA for violations where voluntary restoration is practicable.
- Restoration Plan
- Tolling Agreement
- **EPA will act as the Lead Enforcement Agency when an unpermitted activity involves the following:**
 - Repeat Violator(s);
 - Flagrant Violation(s);
 - Where EPA requests a class of cases or a particular case; or
 - The Corps recommends that an EPA administrative penalty may be warranted.
- EPA is not a permitting agency. All permit requests after an enforcement action is resolved go back to the Corps.



PENALTIES

Section 404 (33 USC § 1344) states in part:

“(a) The ...Chief of Engineers, may issue permits, ... for the discharge of dredged or fill material into the navigable waters...”

Section 301 (33 USC § 1311) states in part:

“(a) Except as in compliance with this section and sections ... 1344... the discharge of any pollutant by any person shall be unlawful.”

Note: Dredged or fill material is considered a pollutant under the Clean Water Act.





PENALTIES

Section 309 (33 USC § 1319) states in part:

(c) Criminal penalties –

(1) ... (A) Any person who negligently violates Section ... 1311 ... shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both ...

(2) (A) Any person who knowingly violates section ... 1311 ... shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both ...

(d) Civil penalties; ... any person who violates section ...1311...and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$ 25,848 per day for each violation. In determining the amount of a civil penalty, the court shall consider 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. ...



QUESTIONS?



U.S. ARMY



US Army Corps
of Engineers®