

FIELD LEVEL AGREEMENT
BETWEEN
THE U.S. ARMY CORPS OF ENGINEERS, SOUTH PACIFIC DIVISION
AND
THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IX
CONCERNING FEDERAL ENFORCEMENT FOR THE SECTION 404 PROGRAM OF THE
CLEAN WATER ACT

1. Purpose and Scope

The U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) have enforcement authorities for the Section 404 program, specified in Sections 301(a), 308, 309, 404(n), and 404(s) of the Clean Water Act. The January 19, 1989, National Memorandum of Agreement (MOA) (see Appendix A) between the Corps and EPA concerning enforcement of the Section 404 program encourages the Corps and EPA to enter into local field level interagency enforcement agreements (MOA Section IV. B.). The South Pacific Division of the Corps and EPA Region IX hereby establish policy and procedures to undertake enforcement of Section 404 unauthorized discharges within the boundaries of Arizona, California and Nevada. The purpose of this Field Level Agreement (FLA) is to enable the Corps and EPA to more effectively and efficiently use their Section 404 enforcement resources by establishing a framework that will strengthen the enforcement program and reduce overlapping interagency work efforts. Nothing in this FLA is intended to diminish, modify or otherwise affect the policies and procedures established in the MOA.

2. Definitions

- a. Investigating Agency (IA): the agency that issues the initial contact letter (e.g., Cease and Desist Order, Notice of Violation, Administrative Order or Section 308 Information Request) and collects the field information necessary to complete the referral package and determine the lead enforcement agency.
- b. Lead Enforcement Agency (LEA): the agency responsible for pursuing an enforcement action to its legal conclusion.
- c. Repeat Violator: a party who has more than one documented instance of discharging dredged or fill material into waters of the United States without a Section 404 permit or who has more than one documented instance of being out of compliance with a previously issued Section 404 permit. Documentation may include Cease and Desist Orders, Notices of Violation, Administrative Orders, Notices of Non-Compliance, after-the-fact permits, field investigation records, and other internal memoranda as appropriate.
- d. Flagrant Violator: a party who is responsible for the unauthorized discharge and has documented prior knowledge that a Section 404 permit is required for discharging fill in waters of the United States. Examples of documented prior knowledge include previous

Section 404 permits; jurisdictional delineations performed on the site in question (or other sites known to the violator); previous Section 404 permit applications; applicable communication records; and previous Section 404 violations.

- e. Referral Package: the package of information submitted by one agency to the other when requesting that the other agency assume LEA status. The package shall include at a minimum: an Investigation Report, a preliminary or approved jurisdictional determination form, records of any pertinent communications with the violator or associated parties (including e-mails, conversation records and letters), photographic records (if available), copies of any Section 404 authorizations or permits issued to the violator, related jurisdictional determinations and any other documents deemed necessary.
- f. Investigation Report: a report that provides a detailed description of the illegal activity, the existing environmental setting, initial view on potential impacts, and a recommendation on the need for initial corrective measures.
- g. Notification Letter: for the Corps, the notification letter is typically a Cease and Desist Order or Notice of Violation. For EPA, this letter is often a Section 308 Request for Information or Section 309 Administrative Order.

3. Procedures: The following section elaborates on MOA Section III.

a. Investigation

Upon discovery of a potential Section 404 violation and throughout the investigation, the agencies are encouraged to conduct informal communications to coordinate site visits and other actions as resources allow. The IA will conduct an initial investigation to confirm whether a violation exists. Once confirmed, an Investigation Report will be prepared, and a Notification Letter shall be sent to the violator. If time allows and if conditions warrant, an order for initial corrective measures described in 3.b., below, may be included with the Notification Letter.

The Corps will send a copy of all Notification Letters to EPA Region IX, Clean Water Act Compliance Office Supervisor for Wetlands Enforcement, and other relevant federal, state, tribal and local agencies, regardless of whether they meet the criteria in MOA Section III. D. 1. EPA shall send a copy of all Notification Letters to the Corps District, Regulatory Division/Branch Chief, which oversees the geographic area in which the violation is located, and other relevant federal, state, tribal and local agencies regardless of whether they meet the criteria in MOA Section III. D. 2.

b. Initial Corrective Measures

In cases where a serious jeopardy to life, property, or important public resources is anticipated to occur before the violation can be resolved, the Corps as IA or LEA may issue an order of initial corrective measures to the parties responsible for the violation.

In determining whether or not to order initial corrective measures, the Corps will solicit the views of EPA, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and other federal, tribal, state, and local agencies as appropriate. Any order of initial corrective measures will specify the measures required and a timeline for completing the work. The order will specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or require the submission of a permit application.

c. Lead Enforcement Agency

- (1) EPA will be the LEA for unauthorized discharge cases meeting the criteria in MOA Section III. D. 1. To request a class of cases, EPA must formally identify such a class in a letter from the Director of the Water Division to the Corps District or Division Engineers. Once requested, all subsequent cases involving similar unauthorized activities will be referred to EPA until the request is formally rescinded in a letter from the Director of the Water Division to the District or Division Engineers. If EPA intends to request a particular case after receiving a copy of the Corps' Notification Letter, including those cases for which the MOA would ordinarily designate the Corps as the LEA, EPA must make such a request in writing within **45 calendar days** of the date of the Corps' Notification Letter. EPA's written request will formally notify the Corps of EPA's desire to act as the LEA. This written notification may be through a formal letter or email from the EPA Clean Water Act Compliance Office Supervisor for Wetlands Enforcement to the applicable Corps Regulatory Division Chief.
- (2) The Corps will be the LEA in all other unpermitted cases not identified in MOA Section III.D.1. and for Corps-issued permit condition violations. Where EPA requests that the Corps take action on a permit condition violation, and the Corps provides written notification to EPA that, because of limited staff resources or other reasons, the Corps will not take action on a permit condition violation case, the EPA may take action commensurate with resource availability. Provided, however, if the Corps determines that the activity in question is in compliance with an applicable Clean Water Act Section 404 permit, that determination shall be binding on EPA.
- (3) When serving as the IA, the Corps shall notify EPA - by sending a Referral Package by electronic mail or postal service - of all cases for which MOA Section III.D.1. designates EPA as the LEA. Where EPA provides written notification¹ to the Corps that, because of limited staff resources or other reasons, it will not take action on a specific case, the Corps may take action commensurate with resource availability.
- (4) If, when acting as the IA, EPA determines the Corps should be the LEA, EPA shall submit a Referral Package to the Corps. Where Corps provides written

¹ For the purposes of this agreement, "in writing" or "written notification" may include electronic mail.

notification to the EPA that, because of limited staff resources or other reasons, it will not take action on a specific case, the EPA may take action commensurate with resource availability.

- (5) If the IA deems an alleged violation to be urgent (an on-going violation with pressing and probable continued loss of important aquatic resources, serious loss of property, or serious public safety hazard if not immediately pursued), the IA can use "Expedited LEA Determination Procedures." Expedited LEA Determination Procedures require the IA to phone the other agency to alert them of the need for expedited LEA determination. The IA will then send the Referral Package by electronic mail or postal service to the other agency, with a clearly marked subject line, requesting expedited review. The other agency shall respond, via electronic mail, fax or phone call, within 2 working days of receipt of the referral package. If the other agency declines LEA status, the IA may elect to assume LEA status. During the expedited LEA Determination Procedures, the IA may issue a Cease and Desist Order, Section 308 letter or Administrative Order. This provision in no way limits the discretion of EPA to take action pursuant to section 504 of the Clean Water Act (Emergency Powers).
- (6) Once an LEA is determined, the IA will forward a copy of any and all remaining file information not included in the Referral Package, including originals of any photos (for purposes of digital photography, *original* means saved in electronic form directly from the memory card without alteration in any form) in its enforcement file, and a correspondence letter. The IA will then close its enforcement case and no further action will be required from the IA regarding the unauthorized discharge. Once the LEA has concluded its enforcement action, it will notify the other agency of its final action.
- (7) The LEA shall determine whether remedial actions (e.g., restoration, compensatory mitigation) are required and determine when the Section 404 violation is resolved. The LEA shall make arrangements for proper monitoring of all remedial actions, and coordinate with other agencies involved in any related enforcement action resolutions as described below in 3.d. Environmental Protection Measures.
- (8) If the Corps is the LEA, it may decide to accept an application for an after-the-fact (ATF) permit and conduct an appropriate evaluation as provided for by 33 C.F.R. § 326.3(e). During the ATF permit-evaluation process, EPA can submit comments consistent with the requirements of the Section 404(q) MOA and/or during the Public Notice comment period, if required. Issuance of the permit will constitute resolution of the unauthorized work and any compensatory mitigation will be incorporated as a special condition(s) of the permit. Should an ATF permit be denied, the Corps may seek restoration or order removal and restoration.
- (9) If EPA is the LEA, the Corps will follow the procedures in the MOA Section III.G. concerning acceptance of ATF permit applications.

d. Environmental Protection Measures

If the LEA's enforcement action resolution includes either requiring remedial measures or ordering removal and restoration, the Corps and EPA may solicit each other's views regarding appropriate remedial actions. In addition, or as required (e.g. ESA compliance), the views of other federal, state, and local agencies may also be solicited as time and resources allow for incorporation into environmental protection measures. Any environmental protection measures shall be placed as an enforceable requirement upon the violator as authorized by law.

4. General Provisions

- a. Staff from the Corps Districts and EPA shall hold regularly scheduled meetings at least quarterly (in person or via conference call) to discuss all referred cases, existing case updates and Department of Justice referrals. These meetings shall be used to ensure that violations are pursued in a consistent manner, as a means of coordinating enforcement workload within the region and as a forum to discuss appropriate LEA selection in cases that may fall with either agency. Points of Contact for each District and EPA shall be identified and provided to all participants in this FLA.
- b. The Corps' Regulatory Division and Branch Chiefs, EPA's Clean Water Act Compliance Office Supervisor for Wetlands Enforcement and appropriate staff shall have a yearly enforcement program review: (i) to discuss the efficacy of the enforcement program; (ii) to identify areas of special concern; (iii) to evaluate the effectiveness of this FLA; and (iv) to recommend modifications to the FLA and enforcement procedures, where necessary.
- c. 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 variation from these FLA procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.
- d. All documents generated in the course of investigating a possible enforcement action, or in developing the enforcement action itself, may be considered privileged or otherwise exempt from release under the Freedom of Information Act (FOIA) and/or from discovery in litigation. Prior to releasing any such documents pursuant to a FOIA or discovery request, the agency subject to the request will either refer to or consult with the agency that generated the documents proposed to be released.
- e. This FLA may be modified or amended, as necessary, by mutual agreement of both parties, by a written amendment signed and dated by an authorized representative of each party.

- f. Either party may terminate this FLA, without cause, by providing thirty (30) days written notice to the other.

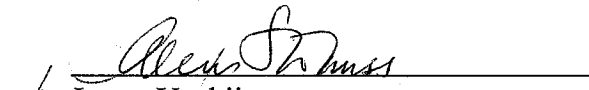
- g. Nothing in this FLA is intended to require an agency to obligate or expend funds in advance of or in excess of available appropriations. In addition, this FLA cannot be used to obligate or commit funds or as the basis for the transfer of funds. Any endeavor involving reimbursement or contribution of funds between the Corps and EPA will be handled in accordance with applicable laws, regulations, and procedures. Such endeavors, if any, will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This FLA does not provide such authority.

- h. This FLA shall take effect ten (10) days after the date of the last signature below and will continue until terminated.



Janice L. Dombi
Colonel, U.S. Army
Commanding
U.S. Army Corps of Engineers
South Pacific Division

17 April 2009
Date



Laura Yoshii
Acting Regional Administrator
U.S. Environmental Protection Agency
Region IX

22 April 2009
Date