

**MEMORANDUM OF AGREEMENT
BETWEEN THE DEPARTMENT OF THE ARMY
AND THE ENVIRONMENTAL PROTECTION AGENCY
CONCERNING THE DETERMINATION OF THE SECTION 404 PROGRAM
AND THE APPLICATION OF THE EXEMPTIONS
UNDER SECTION 404(f) OF THE CLEAN WATER ACT**

I. PURPOSE AND SCOPE

The United States Department of the Army (Army) and the United States Environmental Protection Agency (EPA) hereby establish the policy and procedures pursuant to which they will determine the geographic jurisdictional scope of waters of the United States for purposes of section 404 and the application of the exemptions under section 404(f) of the Clean Water Act (CWA).

The Attorney General of the United States issued an opinion on September 5, 1979, that the Administrator of EPA (Administrator) has the ultimate authority under the CWA to determine the geographic jurisdictional scope of section 404 waters of the United States and the application of section 404(f) exemptions. Pursuant to this authority and for purposes and effective administration of the 404 program, this Memorandum of Agreement (MOA) sets forth an appropriate allocation of responsibilities between the EPA and U.S. Army Corps of Engineers (Corps) to determine the geographic jurisdiction of the Section 404 program and the applicability of the exemptions under section 404(f) of the CWA.

II. POLICY

It shall be the policy of the Army and EPA for the Corps to continue to perform the majority of the geographic jurisdictional determinations and determinations of the applicability of the exemptions under section 404(f) as part of the Corps role in administering the section 404 regulatory program. It shall also be the policy of the Army and EPA that the Corps shall fully implement EPA guidance on determining the geographic extent of section 404 jurisdiction and applicability of the 404(f) exemptions.

Case-specific determinations made pursuant to the terms of this MOA will be binding on the Government and represent the Government's position in any subsequent federal action or litigation regarding the case. In making its determinations, the Corps will implement and adhere to the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," EPA guidance on isolated waters, and other guidance, interpretations, and regulations issued by EPA to clarify EPA positions on geographic jurisdiction and exemptions. All future programmatic guidance, interpretations, and exemptions shall be developed by

EPA with input from the Corps; however, EPA will be considered the lead agency and will make the final decision if the agencies disagree.

III. DEFINITIONS

- A. Special Case. A special case is a circumstance where EPA makes the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404.

Special cases may be designated in generic or project-specific situations where significant issues or technical difficulties are anticipated or exist, concerning the determinations of the geographical jurisdictional scope of waters of the United States for purposes of section 404 and where clarifying guidance is or is likely to be needed. Generic special cases will be designated by easily identifiable political or geographic subdivisions such as township, county, parish, state, EPA region, or Corps division or district. EPA will ensure that generic special cases are marked on maps or some other clear format and provided to the appropriate District Engineer (DE).

- B. Special 404(f) Matters. A special 404(f) matter is a circumstance where EPA makes the final determination of the applicability of exemptions under section 404(f) of the CWA.

A special 404(f) matter may be designated in generic or project-specific situations where significant issues or technical difficulties are anticipated or exist, concerning the applicability of exemptions under section 404(f), and where clarifying guidance is, or is likely, to be needed. Generic special 404(f) matters will be designated by easily identifiable political or geographic subdivisions such as township, county, parish, state, EPA region, or Corps division or district and by specific 404(f) exemption (e.g., 404(f)(1)(A)).

IV. PROCEDURES

- A. Regional Lists. Each regional administrator (RA) shall maintain a regional list of current designated special cases and special 404(f) matters within each region, including documentation, if appropriate that there are no current designated special cases or special 404(f) matters in the region. The RA shall create an initial regional list and transmit it to the appropriate DE within 30 days of the date of the last signature of this MOA. In order to be eligible for a regional list, the designated special cases and special 404(f) matter must be approved by the Administrator. (NOTE: Those geographic areas designated as current special cases pursuant to the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program, may be incorporated into the initial regional lists without additional approval by the Administrator

based on township, county, parish, state, or other appropriate designation, as described in paragraph III.A. of this MOA but will no longer be designated by forest cover type.)

- B. Changes to the Regional Lists. Changes to the regional lists shall be proposed by the RA and approved by the Administrator and may include additions to, amendments to, or deletions from the regional lists. When the RA proposes an addition, amendment, or deletion to the regional list, the RA shall forward the proposal to EPA Headquarters for review and approval. When the RA proposes an addition or amendment in writing or by phone to the appropriate Corps DE, the Corps will not make a final geographic jurisdictional determination within the proposed special case area for a period of ten working days from the date of the RA notification. The Corps may proceed to make determinations in the proposed special case area after the ten day period if it has not been provided final notification of EPA Headquarters approval of the RA's proposed changes. Deletions to the regional list do not become effective until a revised regional list, approved by EPA Headquarters, is provided to the appropriate DE.
- C. Project Reviews. The DE shall review section 404 preapplication inquiries, permit applications, and other matters brought to his attention, which involves the discharge of dredged or fill material into waters of the United States to determine if a current designated special case or special 404(f) matter is involved.

(1) Special Cases/Special 404(f) Matters

For those projects involving a current designated special case or special 404(f) matter, the DE shall request that the RA make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404 or applicability of the exemptions under section 404(f). The RA shall make the final determination, subject to, discretionary review by EPA Headquarters, and transmit it to the DE, and to the applicant/inquirer.

(2) Non-Special Cases/Non-Special 404(f) Matters

For those projects not involving a current designated special case of special 404(f) matter, the DE shall make final determinations and communicate those determinations without a requirement for prior consultation with EPA.

- D. Determination of Special Cases or Special 404(f) Matters. When the special case or special 404(f) matter has been designated on a project-specific basis, issuance of the final determination by the RA will serve as a guidance relevant to the specific facts of each particular situation, and will terminate the special case or special 404(f) matter designation. When the

special case or special 404(f) matter has been designated on a generic basis, EPA Headquarters will develop , in consultation with Army, relevant programmatic guidance for determining the geographic jurisdictional scope of waters of the United States for the purpose of section 404 or the applicability of exemptions under section 404(f). Special cases and special 404(f) matters designated on a generic basis remain in effect until (1) a deletion from the regional list is proposed and processed according to paragraph IV-B of this MOA, or (2) EPA Headquarters issues programmatic guidance that addresses the relevant issues and specifically deletes the special case or special 404(f) matter from the regional list(s), whichever occurs first.

- E. Uncertainties Regarding Special Cases/Special 404(f) Matters. Should any uncertainties arise in determining whether a particular action involves a current designated special case or special 404(f) matter, the DE shall consult with the RA. Upon completion of the consultation, the RA will make the final determination as to whether the action involves a current designated special case or special 404(f) matter.
- F. Compliance Tracking. In order to track the DE's compliance with EPA guidance, the DE shall make his files available for inspection by the RA at the district office, including field notes and data sheets utilized in making determinations as well as any photographs of the site that may be available. Copies of final geographic jurisdictional determinations will be provided to the RA upon request at no cost to EPA unless the sample size exceeds 10 percent of the number of determinations for the sample period. Copies in excess of a 10 percent sample will be provided at EPA expense. To ensure that EPA is aware of determinations being made for which notification is not forwarded through the public notice process, the Corps will provide copies to EPA of all final determinations of no geographic jurisdiction and all determinations that an exemption under Section 404(f) is applicable. Should EPA become aware of any problem trends with the DE's implementation of guidance, EPA shall initiate interagency discussions to address the issue.

V. RELATED ACTIONS

- A. Enforcement Situations. For those investigations made pursuant to the 1989 Enforcement MOA between Army and EPA concerning Federal enforcement of section 404 of the CWA, which involve areas that are current designated special cases, the RA shall make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404. The RA's determination is subject to discretionary review by EPA Headquarter's, and will be binding regardless of which agency is subsequently designated lead enforcement agency pursuant to the 1989 Enforcement MOA. For those investigations not involving special cases, the agencies will proceed in accordance with the provisions of the 1989 Enforcement MOA.

For those investigations made pursuant to the 1989 Enforcement MOA between Army and EPA concerning Federal enforcement of section 404(f) matters, which involve current designated special 404(f) matters, the RA shall make the final determination of the applicability of the exemptions under section 404(f). The RA determination is subject to discretionary review by EPA Headquarters, and is binding regardless of which agency is subsequently designated lead enforcement agency pursuant to the 1989 Enforcement MOA. For those investigations not involving special 404(f) matters, the agencies will proceed in accordance with the provisions of the 1989 Enforcement MOA.

- B. Advanced Identification. EPA may elect to make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404, as part of the advanced identification of disposal sites under 40 CFR 230.80, subject to discretionary review by EPA Headquarters, and regardless of whether the areas involved are current designated special cases, unless the DE has already made a final geographic jurisdictional determination. Any determinations under this section shall be completed in accordance with paragraph IV of this MOA.
- C. 404(c) Actions. EPA may elect to make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404(c) of the CWA.

VI. GENERAL PROVISIONS

- A. All final determinations must be in writing and signed by either the DE or RA. Final determinations of the DE or RA made pursuant to this MOA or the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program, will be binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination.
- B. The procedures and responsibilities of each agency specified in this MOA may be delegated to appropriate subordinates consistent with established agency procedure. Headquarters procedures and responsibilities specified in the MOA may only be delegated within headquarters.
- C. Nothing in this document is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of either agency.
- D. . This agreement shall take effect and supersede the April 23, 1980, Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program on the 60th day after the date of the last signature below and will continue in effect for five years, unless extended, modified, or revoked by agreement of both parties, or revoked by either party alone upon six months written notice, prior to this time.

Robert W. Page /s/
Assistant Secretary of the Army, Civil Works
January 19, 1989

Rebecca W. Hammer /s/
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
January 19, 1989