

Clean Water Act Section 404 : *Introduction/Overview*

U.S. Nuclear Power Plant Life Extension Research and Development
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PURPOSE

To provide an overview of Section 404 of the Clean Water Act for Federal, State, and Tribal persons seeking permits to dredge or fill waters of the U.S.





Background

- Rivers and Harbors Act of 1899
- EPA established in 1970
- Water Pollution Control Act Amendments of 1972
 - “...to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
- 1977 Clean Water Act
 - Reauthorized and expanded ’72 Act



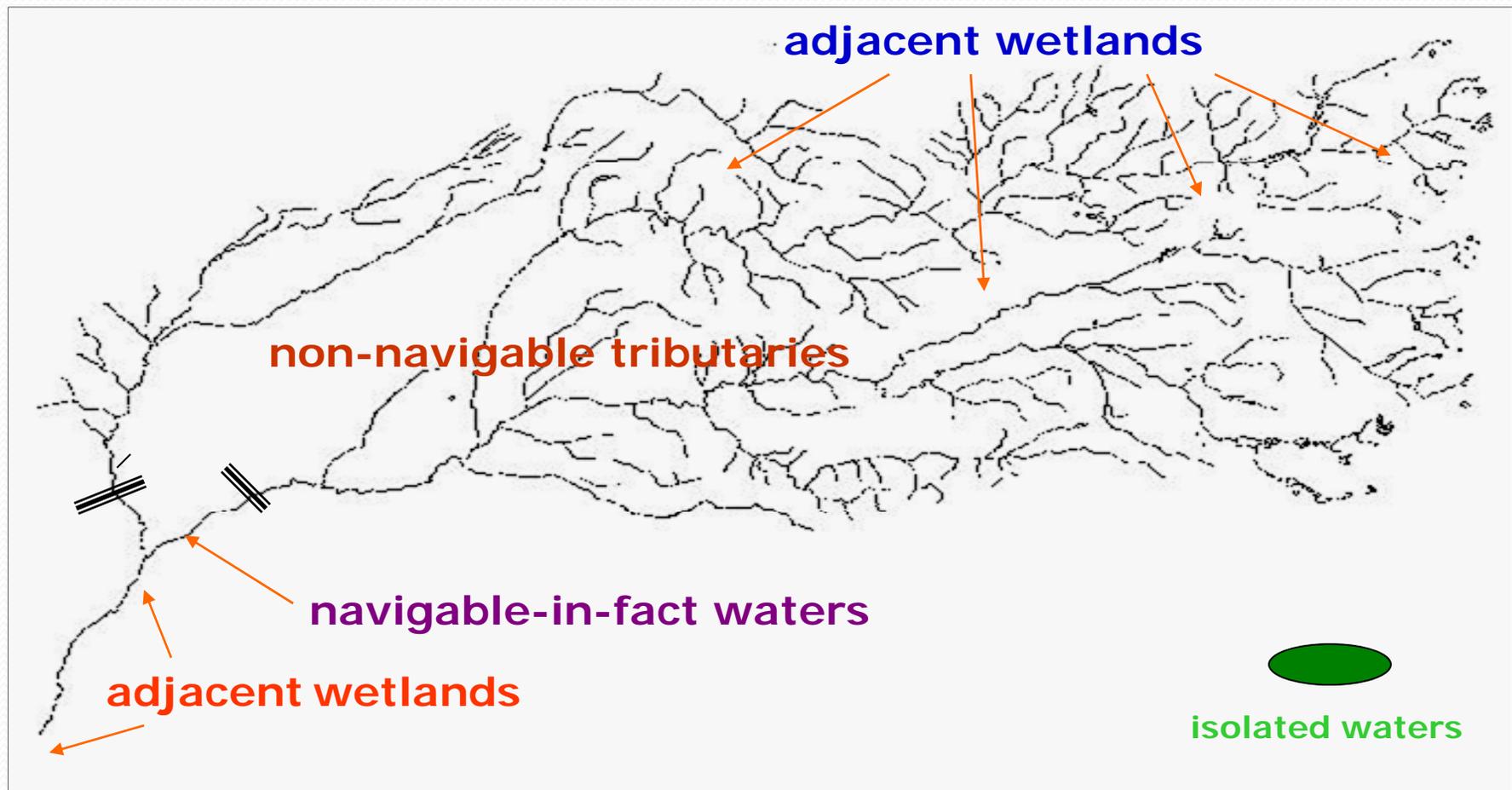
CWA SECTION 404 PROGRAM

- Section 404 establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands.
- Basic premise of the program is that no discharge of dredged or fill material can be permitted
 - if a practicable alternative exists that is less damaging to the aquatic environment or
 - if the Nation's waters would be significantly degraded.

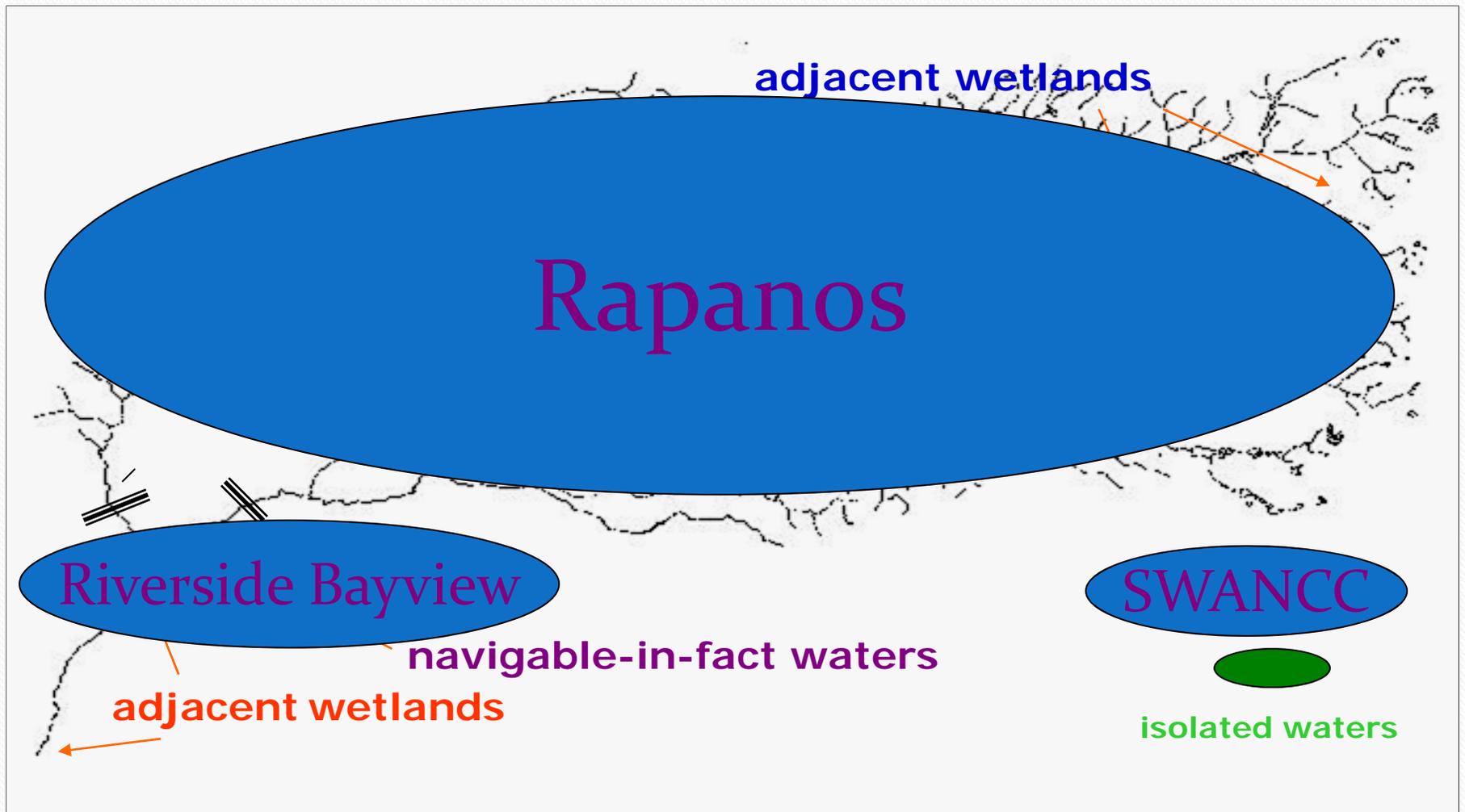
Regulatory Definition of “Waters of the United States”

- **Waters used in interstate commerce in the past, present, or future with reasonable improvements**
- **Interstate waters and wetlands**
- **All other waters such as intrastate lakes, rivers, streams, wetlands, etc., the use, degradation, or destruction of which could affect interstate commerce**
 - **Presence of interstate travelers**
 - **Extraction of fish or shellfish**
 - **Use for industrial purposes**
- **Impoundments of waters of the US**
- **Tributaries of above waters**
- **Territorial seas**
- **Wetlands adjacent to above waters**

“Waters of the United States”: The Regulations in Graphic Form



CWA Geographic Jurisdiction: The Regulations Addressed by the Supremes





Reach and Scope of Section 404

- Section 301: generally prohibits the "discharge of a pollutant" unless authorized by Section 404 or by Section 402
- Section 502(12): discharge of a pollutant consists of 4 elements:
 - 1) "addition" of
 - 2) "any pollutant" to
 - 3) "navigable waters" from a
 - 4) "point source"



“Pollutant”

- **Key issue** for deciding 404 vs 402:
Is it fill material or waste?
- **Broadly defined in § 502(6)**
 - Sewage
 - Garbage
 - Munitions
 - Cellar dirt
 - Agricultural waste
 - Incinerator residue
 - Dredged spoil
 - Biological materials



Fill Rule: 404 versus 402

Preamble:

- “EPA has never sought to regulate fill material under effluent guidelines”
- Discharges subject to an ELG “will continue to be regulated under section 402 of the CWA”

Rule Language:

- Silent on ELGs
- Specifically calls out mining related materials (with effect of fill) as fill material



Types of Section 404 Permits

- ***General Permits*** (minimal individual & cumulative impacts)
 - Include nationwide, state, regional and programmatic permits
- ***Individual Permits*** (>minimal impacts)
 - Public notice & agency review
 - Include standard permits and Letters of Permission



404(b)(1) Guidelines

- Purpose is to restore chemical, physical, and biological integrity
- Prohibit discharges that result in unacceptable adverse environmental effects
- Binding substantive rules
- The burden to demonstrate compliance with the Guidelines rests with the permit applicant
- Applicable to Section 404 Program, Corps' Civil Works Program and State-assumed 404 programs



Section 404(b)(1) Guidelines

- Sequencing:
 - *Avoid* (select least environmentally damaging practicable alternative)
 - *Minimize* (reduce on-site project impacts)
 - *Compensate* (restore, create, enhance, or, in exceptional circumstances, preserve wetlands to offset impacts)
- Significant degradation
- Section 401 water quality certification, ESA
- Corps public interest review

General Restrictions established by Guidelines

- Alternatives Analysis
 - LEDPA required
- Significant degradation
- Measures to minimize adverse effects
- Must not:
 - violate WQ standards,
 - jeopardize T&E species
 - violate requirements protecting marine sanctuaries





Agency Roles and Responsibilities

U.S. Army Corps of Engineers

- administers day-to-day program
- makes individual and general permit decisions
- develops regulatory policy and guidance
- conducts or verifies jurisdictional determinations
- shares enforcement role with EPA
- ensures permits comply with 404(b)(1) Guidelines, NEPA, Historic Preservation Act, ESA, etc.



Agency Roles and Responsibilities

U.S. EPA

- develops environmental guidelines, policy, and guidance
- determines geographic scope of jurisdiction
- approves and oversees State assumption
- reviews permits
- maintains Section 404(q) “elevation” and (c) “veto” authority
- identifies exempt activities
- shares enforcement role with Corps



Permitting Process

- Application received by the Corps District, reviewed for completeness, and processed
- Public Notice Comment Period (typically 30 days)
- Comments evaluated and an EA or EIS prepared and/or public hearing scheduled if necessary
 - Sometimes, a 404 permit comes well after the NEPA process has begun. If appropriate, raise 404 issues in NEPA comments



Permitting Process

- Comments evaluated in context of 404(b)(1) Guidelines and public interest
- Permit decision
- Section 404(q) elevation and/or Section 404(c) “veto” (*optional*)
- Permit issued, revised or denied



Sections 404(q) & 404(c)

- 1992 MOA establishes a process to resolve differences and elevates permit decisions and policy issues to HQ level under Section 404(q)
 - For cases that involve unacceptable adverse effects on an aquatic resources of national importance (ARNIs)
 - Cause resource damages similar in magnitude to cases evaluated under 404(c)
 - The final decision on the need to elevate a specific individual permit case rests solely with the ASA(CW).
- Section 404(c) prohibits or restricts specification of defined area as disposal site

CWA Section 404(q)

...the Secretary shall enter into an agreement with the Administrator, the Secretaries of the Departments of Agriculture, Interior, and Transportation, and the heads of other appropriate federal agencies to minimize, the maximum extent practicable, duplication, needless paperwork, and delays in the issuance or permits under this section....

- Goal: minimize duplication and needless paperwork in issuance of permits
- Timely permit decisions



1992 MOA: Part IV Elevation of Individual Permit Decision

- For cases that involve **unacceptable adverse effects** on an **aquatic resources of national importance** (ARNIs)
- What is an ARNI?
 - Cause resource damages similar in magnitude to cases evaluated under 404(c)
 - Previous cases elevated under 404(q)
- Assistant Secretary for Army (Civil Works) (ASA(CW)) has final decision on the elevation request

Individual Permit Decision Elevation Procedures (continued)

Step 1: 3(a) letter (“**may effect**”)

- This letter must be signed by the RA (or designee) within the basic or extended comment period

Step 2: 3(b) letter (“**will effect**”)

- This letter must be signed by the RA and thus requires Regional communication between staff and Regional management
- Within 25 calendar days of end of comment period

Step 3: DE alerts RA

- Notice of Intent (Day 0)
 - Day 0 --- receipt of PN, notification docs
 - if there is any question as to timing, contact Corps
- RA engages in discussion with the DE in an attempt to resolve outstanding issues

Step 4: RA decides whether to request higher level review

- Within 15 calendar days of the NOI
 - if so RA must notify DE by faxed letter if higher level review is sought
- DE holds permit in abeyance pending HQ elevation
- This starts 20 calendar day clock for EPA HQ to complete elevation packet



Individual Permit Decision Elevation Procedures (continued)

Step 5: Assistant Administrator for the Office of Water (AAOW) decides whether to request ASA(CW) review

Step 6: ASA(CW) reviews AAOW request

Step 7: If denied, EPA decides whether to initiate 404(c) action

CWA Section 404(c)

...The Administrator (now delegated to AAOW) is authorized to prohibit the specification (including withdrawal of specification) of any defined area as a disposal site and he/she is authorized to deny or restrict the use of any defined area for specification (including withdrawal of specification) as a disposal site...

- **Prohibit or restrict specification** of defined area as disposal site
- 404(c) process starts in the Regions; ends at HQ
- The ensure avoidance of unacceptable adverse effects
- May be used before, during or after Corps action on a permit application
- May be used in absence of permit application
- **EPA has the final decision and burden of proof**



Section 404(c)

- Under Section 404(c), EPA must determine that the discharge of dredged or fill material will have an **unacceptable adverse effect** on either:
 - Municipal water supplies;
 - Shellfish beds and fishery areas (including spawning and breeding grounds);
 - Wildlife; or
 - Recreational areas.



Section 404(c) Process

- Region's Letter of Initiation (“15-day letter”): intent to issue a public notice
 - RA states intention to issue a Proposed Determination to withdraw, prohibit, deny, or restrict



Section 404(c) Process

- Region's Proposed Determination
 - If within 15 days of LOI no satisfaction; PD can be issued
 - PD must be published in Federal Register
 - PD does not represent a judgment; merely that RA believes issue should be explored (non-conclusive)
 - Public Comment period/public hearing
 - If appropriate, withdraw PD (EPA HQ has option to review)

Section 404(c) Process

- Region's Recommended Determination
 - RA forwards RD and administrative record to AAOW
 - Within 30 days of receipt AAOW initiates action

Section 404(c) Process

- EPA Final Determination
 - Within 60 days of the receipt of RD and administrative records
 - AAOW makes FD affirming, modifying or rescinding RD
 - Notice of FD must be published in Federal Register



Back to the Beginning

- **Section 404 applies when you have:**
 - A discharge
 - More than “incidental fallback”?
 - Of dredged or fill material
 - Fill rather than waste?
 - From a point source
 - Bulldozer or similar equipment, or channelized?
 - Into waters of the United States
 - Meets any of the Supremes’ standards?
- **Consider each of these in turn, to decide if the CWA applies and a section 404 permit needed**

Questions?

Abu Moulta Ali

Environmental Scientist

Wetlands Division

Office of Wetlands, Oceans, and Watersheds

Moulta-ali.abu@epa.gov

(202) 566-1068

<http://www.epa.gov/owow/wetlands/>

