

Clean Water Act

Section 404(q) Dispute Resolution Process

The Clean Water Act (Section 404(a)) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for discharges of dredge or fill material at specified sites in waters of the United States. In making a permit decision, the U.S. Army Corps of Engineers (Corps) solicits and considers the views of the public as well as State and Federal resource agencies. At times, EPA may oppose the Corps' intent to issue a Section 404 permit for a particular project. This fact sheet describes the process to resolve these differences.



Section 404(q) Memorandum of Agreement

Section 404(q) of the Clean Water Act establishes a requirement that the Secretary of the Army and the Administrator of EPA enter into an agreement assuring that delays in the issuance of permits under Section 404 are minimized. In August 1992, Army and EPA entered into such an agreement. The 1992 Section 404(q) Memorandum of Agreement (MOA) outlines the current process and time frames for resolving disputes, in an effort to issue timely permit decisions.

Under this MOA, EPA may request that certain permit applications receive a higher level of review within the Department of Army. In these cases EPA determines that issuance of the permit will result in unacceptable adverse effects to Aquatic Resources of National Importance. Alternately, EPA may raise concerns over Section 404 program policies and procedures. Because this kind of review does not directly relate to a specific permit, it does not delay the review of pending permit applications.

Aquatic Resources of National Importance

An **Aquatic Resource of National Importance** (ARNI) is a resource-based threshold used to determine whether a dispute between EPA and the Corps regarding individual permit cases are eligible for elevation under the 1992 MOA. Factors used in identifying ARNIs include: economic importance of the aquatic resource, rarity or uniqueness, and/or importance of the aquatic resource to the protection, maintenance, or enhancement of the quality of the Nation's waters. Past 404(q) elevations have identified the Chesapeake Bay, vernal pools, bottomland hardwoods, sub-alpine fens, bogs, and coastal marshes as ARNIs.

Photo by Mark Bright



Vernal pools have been identified as Aquatic Resources of National Importance (ARNIs) in past Section 404(q) elevations.

Section 404(q) Case Statistics

EPA has requested higher level of review by the Department of Army on 11 permit cases under the 1992 404(q) MOA as of January 2011, a modest number in light of the fact that the Corps processes approximately 60,000 permit actions per year.¹ Eight (8) additional permit cases were elevated to EPA Headquarters by an EPA regional office, but were resolved with the Department of Army before a final elevation package was transmitted.

¹ Source: Corps permit data 1988-2010, U.S. Army Corps of Engineers Headquarters, Regulatory Branch.



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Selected References

EPA Clean Water Act Section 404(q) Dispute Resolution Process Factsheet:

<http://water.epa.gov/type/wetlands/outreach/upload/404q.pdf>

1992 Section 404(q) Memorandum of Agreement:

<http://water.epa.gov/lawsregs/guidance/wetlands/dispmoa.cfm> or
http://www.usace.army.mil/CECW/Documents/cecwo/reg/mou/moa_epa404q.pdf

EPA Wetlands Division website:

<http://water.epa.gov/type/wetlands/index.cfm>

U.S. Army Corps of Engineers Headquarters Regulatory website:

http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx

Section 404(q) Dispute Resolution Process for Individual Permits

EPA “May Affect” Letter

(within the Comment Period for the Public Notice)

EPA Region must notify Corps District Engineer by letter that the project may result in substantial and unacceptable impacts to Aquatic Resources of National Importance (ARNIs).

EPA “Will Affect” Letter

(within 25 days of the end of the Public Notice comment period)

If the issues raised in the “may affect” letter remain unresolved, the Region issues a letter stating that the project will have substantial and unacceptable impacts to an ARNI. The “will affect” letter must be signed by the EPA Regional Administrator.

Notice of Intent to Proceed

(within 5 calendar days prior to the issuance of a permit)

The Corps District Engineer notifies EPA Regional Administrator if the Corps intends to issue the permit contrary to EPA’s recommendations in the “will affect” letter. The Corps must provide the EPA Region with a copy of the draft permit and decision document.

Case Elevation

(within 15 calendar days from receipt of the notice of intent to proceed)

The EPA Regional Administrator must decide whether to request Headquarters to seek Department of the Army level review of the District’s permit decision, and subsequently notifies the Corps District of this decision. The permit is held in abeyance pending Headquarters review.

Review of Corps Decision

(within 20 calendar days of receiving the EPA Regional Administrator’s request for elevation)

The EPA Assistant Administrator decides whether to seek higher level review of the District’s permit decision by the Assistant Secretary of the Army (Civil Works).

Army Review

(within 30 calendar days from the EPA Assistant Administrator’s request for review)

EPA Headquarters case elevation is reviewed by the Assistant Secretary of the Army (Civil Works). The Assistant Secretary may either inform the District Engineer to proceed with the permit, proceed with the permit in accordance with policy guidance specific to the case, or make a final permit decision. The Assistant Secretary of the Army (Civil Works) must notify the EPA Assistant Administrator immediately of his/her decision.

Section 404(c) “Veto Process”

(within 10 calendar days from Assistant Secretary of the Army (Civil Works) decision)

If the Assistant Secretary decides to proceed with the issuance of the permit over EPA’s objections, EPA decides whether to initiate a Section 404(c) “veto” action.