

Memorandum of Understanding
Between
The U.S. Army Corps of Engineers, St. Paul District
and
The U.S. Environmental Protection Agency, Region 5

Enforcement Coordination Procedures

1) Purpose, Scope and Authority

- a) The January 19, 1989, Memorandum of Agreement (National MOA) between the Department of the Army and the U.S. Environmental Protection Agency (EPA) concerning enforcement of the Section 404 program encourages the Corps of Engineers (Corps) and EPA to enter into field level interagency enforcement agreements. The St. Paul District of the Corps and EPA Region 5 established local Enforcement Coordination Procedures (ECP) on April 8, 1993, which emphasized early, continual and effective communication between the District and the Region in order to ensure consistent, efficient and effective enforcement action on violations. This Memorandum of Understanding (MOU) hereby revises the April 1993 ECP to enable the Corps and EPA to more effectively and efficiently utilize their Section 404 enforcement resources by establishing a framework that will strengthen the enforcement program and thereby improve wetland protection.
- b) The Corps and 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 (CWA). This MOU supplements the above referenced January 19, 1989, National MOA and local ECP and establishes the policy and procedures for implementation of this agreement. Nothing in this MOU is intended to diminish, modify or otherwise affect the policies and procedures established in the National MOA.
- c) To carry out the enforcement authorities for Section 404 of the CWA, both the Corps and EPA have developed separate enforcement procedures, e.g., standard operating procedures (SOP's) for their respective staff to follow in developing and coordinating enforcement cases. This MOU seeks to coordinate those activities to maximize an efficient use of staff resources and above all the protection of the environment. The current SOP's are attached to the MOU.

2) Policy

a) Lead Enforcement Agency

- i) EPA will follow its Regional SOP's and act as the lead enforcement agency throughout the St. Paul District for unauthorized discharges that meet any of the four criteria listed in Section III.D. of the National MOA. These criteria are as follows:

- (1) Repeat violator(s). For the purpose of this MOU, determination of a repeat violator will be made when an unpermitted discharge of dredge or fill material has been undertaken by a party who has had a documented previous enforcement action for a Section 404 discharge in waters of the U.S. Such actions include Notices of Violation, Cease and Desist Orders and documented "voluntary" restorations.
- (2) Flagrant violations(s). For the purpose of this MOU, a flagrant violation has occurred if the party responsible for the unauthorized discharge has documented prior knowledge that a Section 404 permit is required for the discharge of fill in waters of the U.S. Examples of documented prior knowledge are previous Section 404 permits, jurisdictional determinations performed on the site in question or other sites known to the violator, applications for permits, and violations on other wetland sites.
- (3) Where EPA requests a class of cases or a particular case. For a class of cases, EPA must formally identify such a class in a letter signed by the Division Director. Once requested, all subsequent similar unauthorized activities will be automatically referred to EPA until the request is formally rescinded;
- (4) The Corps recommends in writing that an EPA administrative penalty action may be the most appropriate way to resolve the violation.

ii) In addition, EPA will act as the lead enforcement agency when the Corps and EPA agree that EPA's authority under the CWA §308 and §309 provide the most effective means of acquiring information about the violation and/or resolving it through §309 Compliance Orders.

b) Except for violations that meet any of the five criteria above for EPA to become the lead enforcement agency, the Corps will act as lead enforcement agency for unauthorized discharges.

3) Procedures

c) Investigation

- i) The Corps and EPA will conduct routine field investigations of unauthorized discharges and prepare field reports, in accordance with established enforcement procedures, necessary to determine the nature, extent and circumstances surrounding the unauthorized activity. The investigation must include a Federal jurisdictional determination, including rationale, and identify the potential responsible parties, i.e., landowners and contractors. If one agency discovers an unauthorized discharge, the discovering agency should, if resources allow, become the investigating agency and collect the preliminary field information, required under the 1987 Corps delineation manual, to document the existence of the violation. In the majority of enforcement cases the Corps, because it has more field resources, will serve as the primary investigator in the St. Paul District boundaries. In all cases, the investigating agency will copy the other agency on the Notice of Violation, Cease and Desist order, voluntary compliance letter or information request letter. The investigation period will normally not exceed 30 days before a recommendation is made as to which agency should be

the lead enforcement agency. In instances when additional information is needed to establish the nature, extent and circumstance surrounding the violation activity, the Corps and EPA may agree to extend the period to 134 days and issue information requests, in accordance with their respective SOP's.

- ii) If the violation involves a project that has not been completed, a Cease and Desist or Administrative Order will be prepared by the investigating agency and sent to the violator in the most expeditious manner with a copy forwarded to the other agency.

b) Initial Corrective Measures (ICMs)

After discovery of any unauthorized discharge and during the investigation period, both the Corps and EPA will solicit the views of the other agency regarding ICMs and appropriate remedial actions (i.e., restoration, and/or compensatory mitigation). The lead enforcement agency will determine what, if any, ICMs or remedial actions are required.

c) Lead Enforcement Agency Selection and Procedures

i) The Corps will automatically act as lead enforcement agency for cases involving a first time violator with no previous involvement in the 404 Program, where after-the-fact permitting or voluntary restoration is determined to be the appropriate remedy. Repeat or flagrant violators or violations involving substantial environmental harm will be discussed with EPA to determine the lead enforcement agency.

ii) In other cases, the lead enforcement agency determination will be made in one of two ways:

(1) The Corps project manager and EPA's wetland enforcement specialist will hold informal discussions to reach consensus on the recommendation for lead enforcement agency. If the EPA wetland enforcement specialist and the Corps project manager are unable to reach consensus on the recommendation for lead enforcement agency determination, the District Enforcement Coordinator and Region 5 Senior Enforcement Officer, consistent with the respective SOP's, will be consulted and will attempt to resolve issues without further elevation. Any unresolved issue regarding lead enforcement authority will be elevated to the Corps and EPA program managers, i.e., the Branch Chief's). Routinely, the determination of lead enforcement agency should be made within 120 days. The investigating agency will copy the other agency on the Notice of Violation or Cease and Desist order and will follow up with a phone call or email to the other agency. The final decision regarding lead enforcement agency designation shall not be delegated below the Branch Chief.

(2) Alternatively, the investigating agency will send a letter, email or fax to the other agency with a recommendation and supporting information. The Corps will send the Notice of Violation or Cease and Desist Order, the Enforcement Site Investigation Form and Violation Evaluation Document, along with data sheets and supporting documentation. The correspondence will include a recommendation on which agency should become the lead enforcement agency. The recipient agency will have up to 134 days to concur or disagree with the recommendation. This timeframe is dependant on the amount and

quality of information contained in the referral. Routinely, the Corps and EPA will strive to make decisions on referrals as expeditiously as possible and supplement information needed through issuance of information requests to obtain documentation not included within the file. If EPA declines to become lead enforcement agency, the Corps will become lead enforcement agency and will determine the ultimate disposition of the case.

- iii) For cases that are referred to EPA by the Corps, the Corps will send a cover letter documenting the referral along with the project file with the Administrative Record Cover Sheet and all relevant information. Once EPA has concluded its enforcement action, it will provide the Corps a copy of its final action.
- iv) The lead enforcement agency shall make the determination whether remedial actions are required as well as the final determination that a violation is resolved. They shall notify, in writing, interested parties so that concurrent enforcement files within another agency can be closed. They shall make arrangements for proper monitoring of all remedial actions (i.e., restoration, compensatory mitigation), and coordinate with any other agencies involved in any enforcement action resolutions.
- v) If the Corps is the lead enforcement agency, it may decide to accept an application for an after-the-fact (ATF) permit and conduct an appropriate evaluation. During the ATF permit evaluation process, EPA can submit comments consistent with the requirements of the 404(q) MOA. Issuance of the permit will constitute resolution of the unauthorized work and any remedial actions such as restoration or mitigation will be incorporated as special conditions(s) of the permit. Should the ATF permit be denied, the Corps may seek restoration. Once the Corps has concluded its enforcement action it will provide EPA with a copy of its final action. If the Corps is unable to seek restoration due to limited resources or other factors, EPA may seek restoration or other enforcement remedies.

d) Litigation

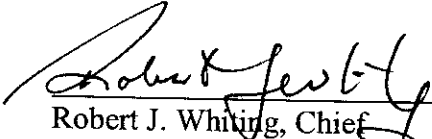
Enforcement cases can be referred to the Department of Justice (DOJ) by EPA or to the regional U.S. Attorney's Office by the Corps. EPA and the Corps will consult before either agency makes a referral, and each will assist the lead enforcement agency with any resulting litigation, as appropriate. Both the Corps and EPA will, to the extent that resources allow, support and provide technical assistance to DOJ regarding scheduling of site inspections, preparation of factual and technical testimony, analytical review of scientific and technical reports and preparation of settlement positions, including civil penalties and supplemental environmental projects (SEP's).

- e) Records will be kept consistent with applicable SOPs.

2) General

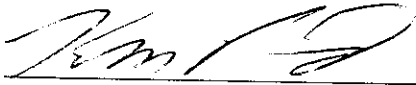
- a) The policy and procedures contained in this MOU do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the United States. Deviation or variance from these MOU procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.

- b) This agreement shall take effect ten (10) days after the date of the last signature below and will continue until modified or revoked by agreement of the parties or until revoked by any party alone upon written notice.
- c) The St. Paul District of the Corps and EPA Region 5 will review this MOU on an annual basis, and will decide to either modify, extend or revoke the MOU at least every three years. If the MOU is not modified or revoked within three years of the date of the last signature below, it will automatically be extended.



Robert J. Whiting, Chief
Regulatory Branch
Corps of Engineers, St. Paul District

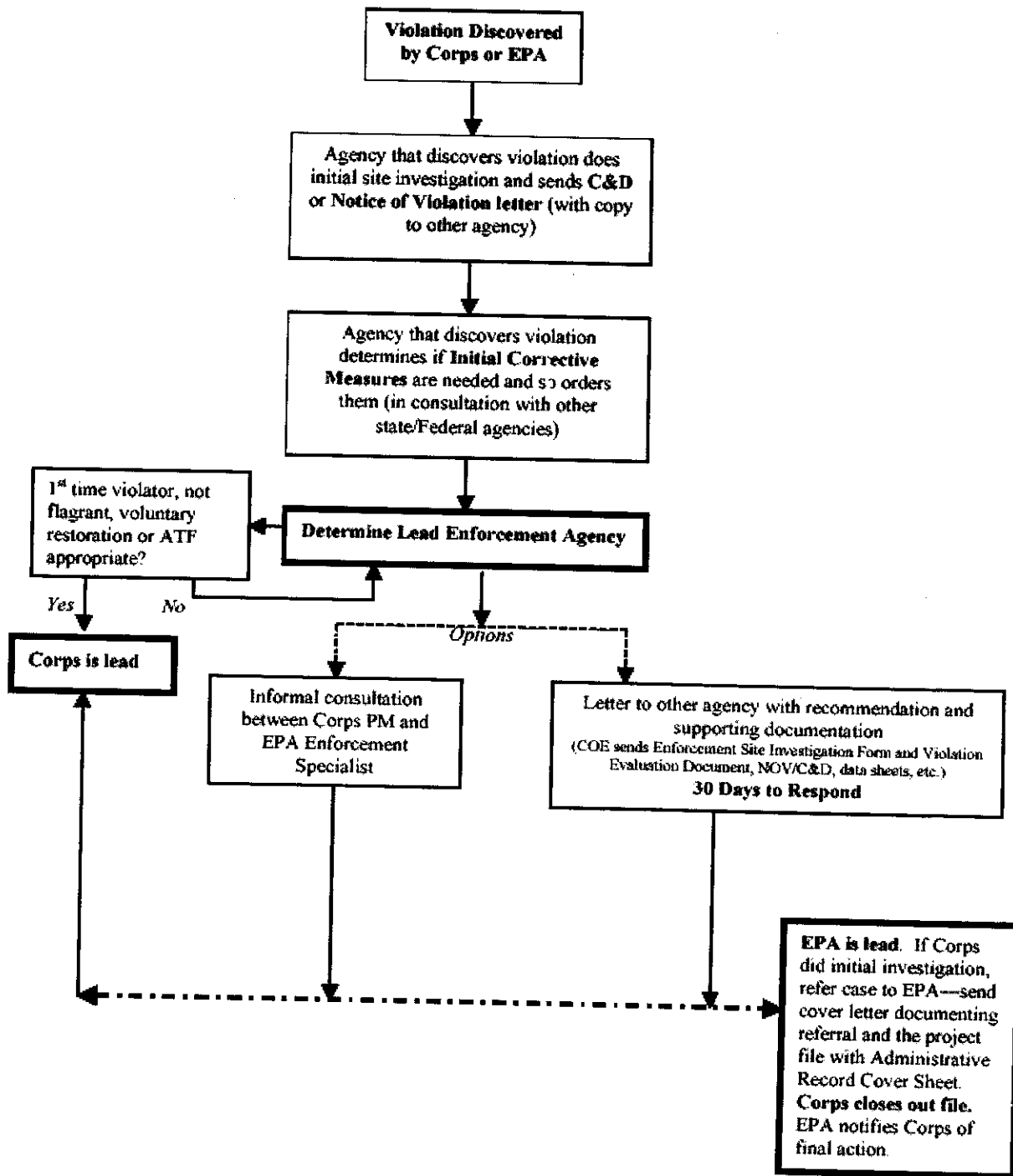
Date: August 19, 2005



Kevin M. Pierard, Chief
Watersheds & Wetlands Branch
U.S. EPA, Region 5

Date: April 13, 2005

Determination of Lead Enforcement Agency



Determination of Lead Enforcement Agency

