



United States Environmental Protection Agency

United States Department of the Army



GUIDANCE ON JUDICIAL CIVIL AND CRIMINAL ENFORCEMENT PRIORITIES

BACKGROUND

This document provides guidance to the Environmental Protection Agency (EPA) Regions and Army Corps of Engineers Districts on enforcement priorities for unauthorized discharges of dredged or fill material in waters of the United States in violation of section 301 of the Clean Water Act (CWA). Unauthorized discharges include both discharges that are unpermitted and discharges that violate permit terms or conditions. The guidance enumerates factors enforcement personnel should consider when deciding whether to refer a case for judicial action. By providing this guidance, EPA and the Army intend to encourage consistency in the manner in which we enforce the CWA's requirements nationally, protect the integrity of the section 404 regulatory program, and direct limited program resources in a manner that produces the most beneficial environmental results.

Options to address CWA violations include: no action, voluntary compliance, cease and desist orders, EPA administrative compliance orders, interim measures designed to protect the aquatic ecosystem from further damage, after-the-fact permits, administrative penalty orders, and civil and criminal judicial actions. This guidance discusses priorities for civil and criminal judicial actions only. By defining priorities for judicial actions, EPA and the Army do not intend to suggest that the agencies limit their use of these or any other enforcement options. In fact, the agencies should continue the use of all enforcement options whether in conjunction with or instead of civil and criminal proceedings.

CIVIL AND CRIMINAL ENFORCEMENT PRIORITIES

A. *Civil judicial cases*

Decisions on whether to refer a civil action to the Department of Justice must be on a case-by-case basis, and the absence or presence of one or more of the following factors should not necessarily dictate a decision regarding a particular case. Nevertheless, enforcement personnel should consider the following factors when deciding whether to refer a civil action:

1. Quality of the waters affected. Enforcement personnel should determine, to the

extent practicable, what functions and values the waters performed prior to the unauthorized discharge. Regions and Districts should give priority to violations that affect wetlands and other special aquatic sites.

2. Impact of the discharge. Enforcement personnel should determine, to the extent practicable, the amount and content of the discharge, the number of acres affected by the discharge, and the discharge's direct and indirect effects. Priority should be given to those discharges that have an especially deleterious effect on wetlands functions or values, that affect a large area of wetlands or other waters, or that are widespread and have significant cumulative effects. These would include unauthorized discharges with significant adverse effects on aquatic ecosystem diversity, productivity, and stability such as loss of fish or wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy. Judicial enforcement action would normally be appropriate, for example, for unauthorized discharges that cause or contribute to violations of state water quality standards; violate any applicable toxic effluent standard or prohibition under Section 307 of the CWA; or jeopardize endangered or threatened species and their designated critical habitat. Judicial enforcement action should be considered for any case where unauthorized discharges did or may cause or contribute to significant adverse environmental impacts.

3. Culpability of violator. Enforcement personnel should consider the violator's prior compliance history when determining what type of enforcement action is appropriate. Priority should be given to violators with a history of noncompliance and those who commit knowing violations. The violator's experience with the program and whether he or she had been the subject of previous enforcement actions are considerations. In general, repeat violators warrant judicial action, regardless of whether the violations occurred on the same site or on different sites. Repeat violations, however, are not a prerequisite for referring a civil case to the Department of Justice.

4. Deterrence value. Enforcement personnel should consider the extent to which the violation is flagrant, visible, and well-publicized. If there are a number of violations within a particular geographic area or industry, civil judicial action against one or more of the violators can provide excellent deterrence. The agencies should refer for civil action a case against any violator whose actions, if left unpunished, would have the effect of jeopardizing the integrity of the section 404 program in the area where the violation occurred.

5. Benefit from the violation. Enforcement personnel should consider the economic benefit a violator derived from the unauthorized discharge. Because administrative penalties are limited, when a violator has obtained a significant economic benefit from the discharge, a civil judicial action may be the only enforcement option that can effectively recover that benefit.

6. Equitable considerations. In addition to the above five factors, the Regions and Districts will want to anticipate and evaluate the strength of any equitable considerations likely to be raised by potential defendants. Priority should be given to recent and ongoing violations. Regions and Districts should also take into account, as appropriate, when the Region and/or District learned of the violation, and whether timely administrative attempts to achieve compliance were unsuccessful and a civil referral is the only available means to obtain needed injunctive relief.

Another equitable consideration is whether the violator received misinformation from the federal government as to whether the discharge required a section 404 permit. Based on existing case law, the federal government can only rarely and in very limited circumstances be barred from enforcing its laws. At the same time, an important goal of federal enforcement, including section 404 enforcement, is fair and equitable treatment of the regulated community. As a result, the Regions and Districts will need to carefully consider the appropriateness of initiating a civil suit in cases where the violator may have reasonably relied on a federal official's misrepresentations regarding the need for a section 404 permit. This includes situations where the violator was led to believe that the activity did not constitute a discharge, that the discharge did not take place in waters of the United States, or that a general permit covered the discharge. When determining whether the violator's reliance was reasonable, enforcement personnel should assess such factors as whether the misrepresentations were made by EPA or the Corps, the two federal agencies charged with implementing the section 404 program, or another federal agency; whether the misrepresentations were communicated to the violator in writing or were merely oral statements; the extent of the violator's familiarity with the section 404 program; and whether the violator knew, should have known, or with reasonable diligence could have determined, that the representations were erroneous.

The first two factors listed above center upon the environmental effects of the violation. Special attention should be paid both to violations that damage large areas of wetlands and those that impair valuable wetlands, no matter what their size. The next three factors are intended to protect the integrity of the section 404 program by focusing enforcement priorities first on individuals or violations which show disdain for the law and on those who seek to benefit from circumvention of the law.

B. Criminal cases

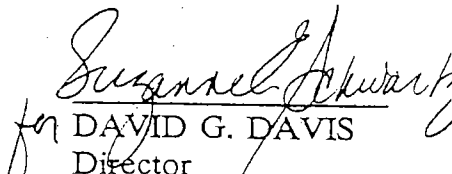
With regard to the discharge of dredged or fill material, section 309(c) of the CWA provides criminal penalties for four separate offenses. First, anyone who negligently violates section 301 (e.g., engaging in unauthorized discharges) or who negligently violates the requirements of a section 404 permit may be criminally liable. Second, anyone who knowingly violates section 301 or the requirements of a section 404 permit may also be subject to criminal liability. Third, any person who violates section 301 or

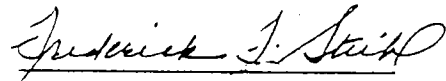
the conditions of a section 404 permit and, in doing so, knowingly endangers another person may be subject to criminal penalties. Finally, section 309(c) provides criminal sanctions for persons who knowingly make false material statements regarding a section 404 permit.

In some instances a violation will involve circumstances which indicate that a criminal prosecution may be in order. Such circumstances should be underscored when the case is referred to the Department of Justice. Ultimately, Justice must exercise its discretion as to whether or not to proceed criminally in any case. If there is a possibility of criminal prosecution, field personnel should pay special attention to evidentiary matters such as sample preservation, content of statements to and from any potential defendant, good photographs, and chain of custody.

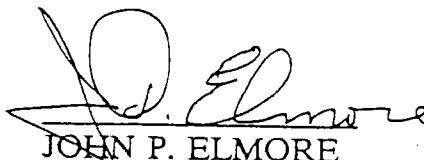
This document provides internal guidance for field personnel regarding the exercise of their enforcement discretion. Accordingly, this document creates no rights in third parties.

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