EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
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November 17, 1980

MEMORANDUM FOR HEADS OF AGENCIES

SUBJECT: Guidance on Applying Section 404(r) of the Clean Water Act To Federal Projects Which Involve the Discharge of Dredged or Fill Materials into Waters of the U.S., Including Wetlands

## I. Introduction

This memorandum establishes procedures for coordinating agency views and formulating Administration policy prior to requesting Congressional action on projects that may be subject to Section 404(r) of the Clean Water Act (Federal Water Pollution Control Act, as amended). The memorandum is also in furtherance of Executive Order 12088, Federal Compliance with Pollution Control Standards. The Order establishes a policy that the heads of federal agencies will ensure that all necessary actions are taken for the prevention, control and abatement of environmental pollution with respect to federal facilities and activities under the control of the agency.

The above procedures will ensure that timely and adequate environmental information is available and is considered by an agency before an agency requests authorization or funding from the Congress for federal projects involving the discharge of dredged or fill material and before an agency actually discharges any dredged or fill material. These procedures will also ensure that the Corps and EPA, the two agencies with special expertise and jurisdiction over Section 404 of the Clean Water Act, will carefully review each proposed project which may be subject to the provisions of Section 404(r) of the Clean Water Act, and that the written views of these two agencies will be transmitted to OMB and to the Congress. Finally, these procedures will ensure that a coordinated Administration position can be developed prior to initiating projects which may be subject to Section 404(r), in part through CEQ's predecision referral process for environmentally unsatisfactory proposals and OMB's legislative and budget processes.

## II. Section 404(r)

Section 404(r) provides that federal construction projects which are specifically authorized by Congress must comply with Section 307 effluent standards or prohibitions but are not subject to regulation under Sections 301, 402, or 404 of the Act (the U.S. Army Corps of Engineers permit program for the discharge of dredged or fill material) if:

"...information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction."

In order to satisfy this provision, it is important that the environmental impact statement process be completed before requests for authorizations and appropriations are approved by Congress for federal projects which will involve the discharge of dredged or fill material in waters of the United States, including wetlands, and before actual discharges occur. Completion of the environmental impact statement process includes resolution of any predecision referrals under the NEPA Regulations (40 C.F.R. 1504), E.O. 11514, as amended, and related policies and procedures.

Federal projects not specifically authorized by Congress are not candidates for exemption under Section 404(r) and can be prohibited by or otherwise subject to regulation under nationwide, general, or individual permit requirements.

III. Guidance

Agencies shall therefore take the following actions, where applicable, to meet requirements of the Clean Water Act and the National Environmental Policy Act:

1. As part of their responsibilities under the National Environmental Policy Act (NEPA), the Army Corps of Engineers and the Environmental Protection Agency shall review all environmental impact statements on direct federal proposals involving discharge of dredged or fill material to examine: (a) whether the environmental impact statement contains the requisite information on proposed discharges; and (b) whether the proposal is consistent with the guidelines developed by EPA in conjunction with the Corps under subsection 404(b)(1) of the Clean Water Act. In addition to filing draft and final environmental impact statements with the Office of Environmental Review of EPA, therefore, each agency shall also send copies of the relevant impact statements directly to the appropriate EPA Regional Administrator(s) and Corps of Engineers District Engineer(s) and request a review. Finally, EPA Regional Administrator(s) shall be consulted regarding Section 404 matters during preparation of an EIS by a District or Division Engineer, and both the Regional Administrator(s) and District Engineer(s) shall be consulted concerning such matters during preparation of an EIS by another Federal agency.

2. If an agency wishes to apply Section 404(r) to a proposal which has been the subject of an environmental impact statement filed prior to the date of this memorandum, the agency shall, prior to requesting any further OMB clearance or Congressional approval, request EPA and the Corps of Engineers to review the environmental impact statement (for adequacy and consistency as specified in Paragraph 1 above). EPA and Corps officials shall normally transmit their comments within 15 days of receiving the statement for this purpose. Upon completion of the review and before seeking further OMB clearance or Congressional action on the proposal, the requesting agency shall allow an additional 15 days for either EPA or the Corps to refer any environmentally unsatisfactory proposals or parts thereof to CEQ for its predecision referral process under 40 C.F.R. Part 1504.

3. If, in the judgment of the EPA or the Corps, or both agencies, an impact statement (draft, final, or supplement) does not contain the requisite information or is inconsistent with the Section 404(b)(1) guidelines, these conclusions shall be forwarded in writing to the agency proposing the project. These conclusions should be included in EPA's or the Corps's overall comments on the environmental impact statement. The proponent agency shall consider and address these written conclusions and, if appropriate, reevaluate or revise its proposed action and alternatives.

   In some cases, the environmental impact statement contains adequate information on the effects of the discharge, but EPA or the Corps state in their comments that the proposal is not consistent or otherwise in compliance with Section 404(b)(1) guidelines. In such cases, for statements filed after the date of this memorandum, the Cover Sheet and Summary of the environmental impact statement shall contain the following sentence:

   > "The EPA/the Corps [as appropriate] has determined that this project as proposed is not consistent or otherwise in compliance with the Section 404(b)(1) guidelines of the Clean Water Act."

   In all cases, the proponent agency shall ensure that the written conclusions of EPA or the Corps are included in or attached to the environmental impact statment, clearly identified, circulated with the statement, and submitted to the Congress prior to requesting either authorization or appropriation of funds and prior to actual discharge.

4. In some cases, an environmental impact statement will not provide a sufficient basis to determine whether the Section 404(r) exemption applies to a proposal (for example, an authorization proposal which occurs long before the project is designed). In other cases the proponent agency does not intend for the requisite Section 404(r) information to be included in the EIS, or the proponent agency agrees with EPA or the Corps that impact statement does not include adequate information about or otherwise comply with the Section 404(b)(1) guidelines. In all such cases, for statements filed after the date of this memorandum, the Cover Sheet and the Summary of the environmental impact statement shall contain the following sentence:

> "The information in this environmental impact statement does not constitute adequate information on the effects of such discharge, within the meaning of Section 404(r) of the Clean Water Act, including consideration of the guidelines developed under subsection 404(b)(1)."

When this sentence is made part of an EIS, discharges are subject to the Section 404 permit requirements or to future authorizations or appropriations with the application of Section 404(r). If the agency plans to utilize Section 404(r) to obtain an exemption from the Section 404 permit process for such discharge, the EIS shall provide an estimate of when such authorization will be sought. The possibility of a project becoming exempt under Section 404(r) remains open in such cases as long as the discharge has not occurred, provided that the EIS can be revised to contain adequate information within the meaning of Section 404(r) related to the Section 404(b)(1) guidelines and that the project is consistent with the Section 404(b)(1) guidelines.

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Chairman