

The 404(b)(1) Guidelines: Implications for CAD Disposal in the Los Angeles Region

Note: This is not intended to be a detailed discussion of the 404(b)(1) guidelines from top to bottom; rather, it is intended to introduce the 404(b)(1) guidelines and related regulations, and discuss the ramifications of the guidelines for our purposes in the CSTF

I. Overview of the Corps' Statutory Authority to Regulate Dredging and Disposal

The Corps of Engineers Regulatory Program has substantial statutory authority concerning dredging in navigable waters of the U.S., and disposal of dredged material within waters of the U.S. The Corps derives its statutory authority from the following regulations:

- Section 404 of the Clean Water Act
- Section 10 of the Rivers and Harbors Act
- Section 103 of the Marine Protection, Research, and Sanctuaries Act

Section 10 of the Rivers and Harbors Act regulates all work in navigable waters of the U.S. that “may affect the navigable capacity” of such waters. This includes temporary and permanent impacts, construction, dredging, and all structures within navigable waters. Section 404 of the Clean Water Act regulates the discharge of fill material in waters of the U.S. (navigable or not), whereby the discharge has the effect of raising the bottom elevation (new fill rule). Section 103 of the MPRSA regulates the transport of dredged material for discharge. These regulations can overlap, and provide multiple regulatory “hooks” for dredging projects (see attached figure).

Once the Corps establishes its jurisdiction over a project, and an applicant applies for a permit, the Corps makes a permit decision according to its NEPA regulations, a public interest review, and the CWA Section 404(b)(1) guidelines. In brief, the Corps' NEPA regulations require the Corps to proceed along a defined path in making its decision, including (where appropriate) public involvement, etc. The NEPA regulations also require the Corps to consider all “reasonable” alternatives, even if they may not generally be considered available to the applicant. The public interest review requires the Corps to weigh the need of the project and the extent of the benefit of the proposed project against the perceived impact to the public interest. In dredging situations, where navigation, navigation safety, economics, and recreation are at issue, meeting the public interest burden is not generally at issue.

The 404(b)(1) guidelines establish a framework whereby the Corps must determine the basic and overall project purpose, the water dependency of the project, evaluate alternatives (including offsite and alternative methods), and determine the Least Environmentally Damaging Practicable Alternative (LEDPA). Important sections of the 404(b)(1) guidelines are:

- 40 CFR 230.10(a): “For all waters of the United States, only the least environmentally damaging practicable alternative can be permitted.”
- 40 CFR 230.10(c): Discharge cannot result in significant degradation of waters of the U.S. (result of impacts analyses as part of 404 review)
- 40 CFR 230.10(d): All appropriate and practicable steps to minimize adverse impacts are required.
- 40 CFR 230.12: Requires a 404(b)(1) compliance determination
- Section 404(b)(2) provides a limited exclusion from the guidelines for navigation projects. To paraphrase from 33 CFR 320.2(f): “If the guidelines prohibit the selection of a disposal site, the Chief of Engineers shall consider the economic impact of such a prohibition in reaching his decision.”

II. Alternatives Analysis

The discussion of alternatives is the key component of the 404(b)(1) guidelines. 40 CFR 230.10(a) states: “No discharge will be permitted if there is a **practicable** alternative to the discharge which would have less adverse impact on the aquatic ecosystem provided the alternative does not have other significant adverse environmental consequences.” To be **practicable**, an alternative must be generally available, achieve the overall project purpose, and be feasible in terms of cost, technology, and logistics. Therefore, in combination with the NEPA requirement to evaluate reasonable alternatives and the no federal action alternative, the Corps ultimately evaluates: the proposed project, off-site alternatives (relative to the disposal site), a no federal action alternative, and at least one reduced fill (less damaging alternative). These alternatives are evaluated in terms of their impact to the aquatic environment and whether or not they meet the overall project purpose. The scale of the required analyses and information required from the applicant is project dependent and at the discretion of the Corps; however, it is generally regional in nature, meaning that for the disposal of dredged material, the applicant must analyze the availability of regional disposal sites that are less damaging, which would include beneficial reuse opportunities.

It is also very important to note that the Corps/EPA mitigation MOA precludes consideration of compensatory mitigation during the consideration of alternatives (the MOA expects a sequence of mitigation, involving avoidance, minimization, and compensation; avoidance and minimization can be considered in the LEDPA selection). An alternative can ultimately fail to comply with the guidelines if appropriate and practicable mitigation measures (mitigation sequence) are not undertaken; however, this same mitigation cannot be used to influence the alternatives decision.

Finally, Section 103 of the MPRSA also requires this analyses of alternatives, and gives EPA veto authority even in inland situations.

III. Relevance to CAD Disposal

Bluntly stated, a proposed discharge at a CAD site would be found not to comply

with the 404(b)(1) guidelines, as well as Section 103 of MPRSA, if the applicant did not undertake a search for regionally available alternatives meeting the guidelines. Thus, for a hypothetical disposal at a CAD site, the applicant would have had to analyze the availability and practicability of regionally available sites (off-site), including upland sites and perhaps Port fills, beneficial reuse (which is generally considered available), reduced fills, and the no federal action alternative. Therefore, while a CAD site might be generally available, both the Corps (pursuant to its NEPA regulations and 404(b)(1), and EPA (pursuant to its MPRSA Section 103 authority) would have to agree with the site selection and alternatives analysis.