

Issue: A/D analysis of projects with CWA § 404 permits.

Before the ACOE can issue a 404 permit, it must first complete an analysis under the '404(b)(1) Guidelines,' codified at 40 CFR Part 230. The guidelines prescribe in detail the analysis the COE must undertake to decide which project design represents the 'least environmentally damaging practicable alternative,' or LEDPA. The A/D work-group has asked what additional A/D analysis ADEC must perform for projects that have already gone through the COE's permitting process.

EPA has answered this question, at least in the context of wetlands fill projects, in its guidance on antidegradation. According to EPA's Water Quality Handbook, a state may rely upon the COE's finding of no significant degradation, resulting from its 404(b)(1) evaluation, to satisfy the required antidegradation analysis.¹

The work-group has posed two related issues: (1) is the state's reliance on the COE's analysis limited to the footprint of the fill area, or can it extend to the effects of the fill on adjacent waters of the U.S.; and (2) can the state also rely on the COE's analysis for projects where the fill is placed in surface waters other than wetlands. Discussion of those two issues follows.

On the footprint question: the EPA guidance does not address this point, but the scope of the COE's analysis under the 404(b)(1) guidelines clearly goes outside the footprint of the permitted fill itself, to consider effects on adjacent waters. The focus of the required analysis is on possible effects on the aquatic ecosystem, and includes waters that lie outside of the permitted disposal site itself.² Since the 404(b)(1) analysis is not restricted to the footprint of the permitted fill, neither should ADEC's ability to rely upon and incorporate that analysis be so restricted.

On the issue of non-wetlands fill projects: EPA guidance is not as clear on the extent of a state's ability to rely upon the COE's 404(b)(1) evaluation in the context of CWA §404 permits for fill in surface waters. Yet the rationale underlying EPA's guidance on wetlands fill issue would also seem applicable to fill projects in surface waters. The scope of the COE's required analysis, whenever it issues any §404 permit, is broad enough to encompass the same sorts of issues that the state's anti-degradation policy raises. In addition to the detailed analysis of the environmental effects of the proposed fill project, the COE's regulations also require that the agency assess the public benefits associated with the project.³ It seems consistent with EPA's guidance, and with common sense, for the COE's analysis to inform the state's decision in either context.

Presumably, the regulations should also preserve ADEC's authority to require or perform additional analysis whenever it determines that reliance on the COE's 404(b)(1) evaluation is not a sufficient basis for its antidegradation determination. Circumstances requiring such an approach, while hard to predict, could arise.

¹ See Water Quality Handbook at sec. 4.4.3; Appendix D at chapter 5, sec. 5.1; and Appendix G at Q # 13.

² See 40 CFR § 230.10(c)(2); and 40 CFR § 230.11(h).

³ See 33 CFR § 320.4(a); and 33 CFR § 325.2(a)(6).