



**CLEAN WATER ACT
GOAL:**

“Restore and maintain the **physical, chemical, and biological** integrity of the nation’s waters...”

(emphases and colors added)

Little Tommy on the Clean Water Act Goal

Physical Integrity = reach and extent
Chemical Integrity = water quality
Biological Integrity = habitat

Whaddaya know! It’s about acreage AND functions, folks!!

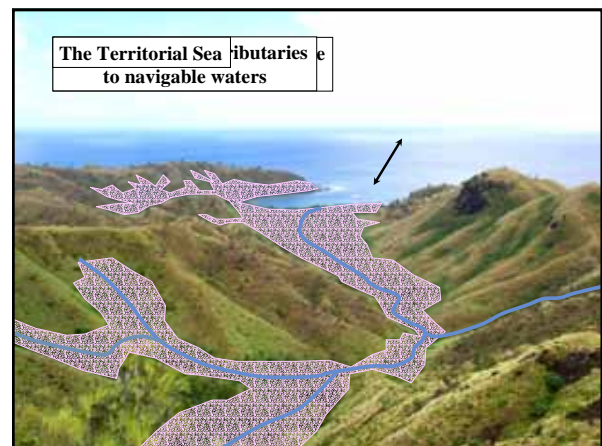
A small black and white photograph of a young boy with short hair, smiling broadly. He is wearing a dark t-shirt with a light-colored graphic.

CWA §404 Regulatory


According to §404 of the Clean Water Act:
Activities that result in a point-source discharge of dredged or fill material into areas considered "waters of the United States," including wetlands, must receive prior authorization via a Department of the Army permit, unless exempt [404(f)].

The U.S. Army Corps of Engineers is the permitting authority. EPA Region IX overlaps the San Francisco, Sacramento, Los Angeles, and Honolulu Corps Districts.

- What are
“Waters of the United States”?**
- The Territorial Sea
 - Lakes, rivers, and tributaries to navigable waters
 - Wetlands adjacent to navigable waters and their tributaries
 - Interstate waters
 - "Other" waters
(excluding some isolated waters pursuant to SWANCC vs U.S. Army Corps of Engineers)




The Corps of Engineers Responsibilities



- Permit issuance pursuant to §404 of the Clean Water Act and §10 of the Rivers and Harbors Act
- Enforcement, particularly permit conditions
- Public Interest Determinations
- EA's and EIS's
- Construction & maintenance of Civil Works Projects including navigation and flood control projects

EPA's 404 Responsibilities



- 404(b)(1) Guidelines
 - Permit review (EA, EIS)
- 404(c) Veto
- 404 Enforcement
- 404(f) Exemptions
- Geographic reach of jurisdiction MOA
- 404(q) MOA -- including "ARNI" designations
- 404 Mitigation MOA
- NEPA-404 MOA

EPA's §404(b)(1) Guidelines

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No such permit may be issued unless it complies with EPA's 404 (b)(1) Guidelines (see 40 CFR 230).

EPA's §404(b)(1) Guidelines

1. No permit may be issued if there is a less environmentally damaging practicable alternative to achieve the basic project purpose.
2. No permit may be issued if it violates State water-quality standards, the Coastal Zone Management Act, or would jeopardize a threatened or endangered species.
3. No permit may be issued if it causes or contributes to significant degradation of the aquatic ecosystem.
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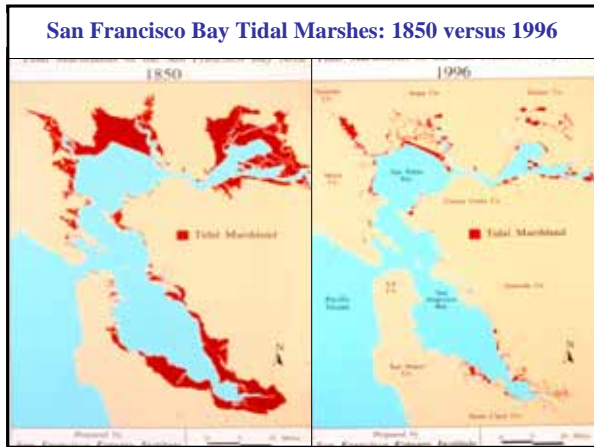
EPA's 404(b)(1) GUIDELINES

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NATIONAL RESTORATION

Whose Daddy thought THAT up??

- No overall net loss of wetland resources (acreage gain)
- Long-term
 - 50% Net gain in wetland resources

The Federal Mitigation Hierarchy
 (similar under 404 and NEPA)

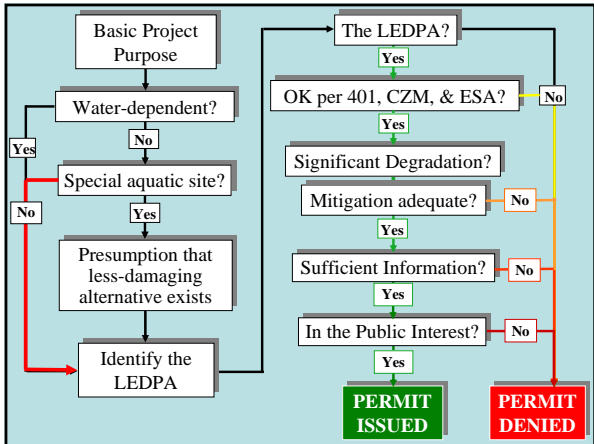
- Avoid
- Minimize
- Compensate/Offset
 - Rectify/Restore
 - Enhance
 - Create
 - Preserve

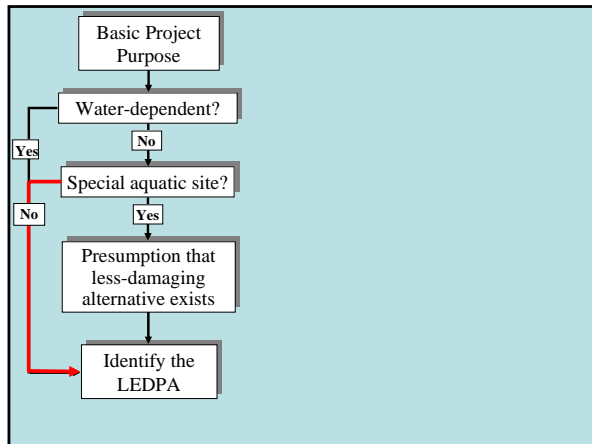
**Compensatory Mitigation for Wetland Losses:
 National Academy of Sciences Recommendations**

1. Avoid wetlands that cannot be restored
2. Maintain watershed diversity, connectivity, etc.
3. Ensure that mitigation sites become self-sustaining
4. Mitigate before or concurrent with impacts
5. Develop clear, enforceable compliance requirements
6. Give authority and funding to third-party stewards

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- ### BASIC PROJECT PURPOSE:
- **Is Generic.**
 - Commercial Development
 - Residential Development (i.e., Shelter)
 - Transportation Safety
 - Disposal of Dredged Material
 - **Is Adjective-free. No phrases like:**
 - "Water Oriented" or "Mixed Use"
 - "World-Class" or "Jack Nicklaus Designed"
 - "Cognitive Ocean Experience"
 - **Is Applicant-Neutral**
 - Looks at what is reasonable for a **typical** applicant in that industry/market, not the financial standing of the individual applicant

- ### MULTI-PURPOSE PROJECTS:
- **Multiple purposes may be legitimate, BUT:**
 - Each purpose must be evaluated separately
 - Some may not be integral to the Basic Purpose
 - Some may not be water dependent
 - **Consider whether there are legitimate functional linkages, or simply financial ones**



PROJECT PURPOSE:

Unsure?



Follow the Money!

APPLICANT'S BURDEN OF PROOF

When the basic project purpose is not water-dependent, and the project would result in a discharge of dredged or fill material into a **special aquatic site**

the regulations **presume** the existence of a Less Environmentally-Damaging Practicable Alternative (LEDPA) unless the applicant clearly demonstrates otherwise.

What Are Special Aquatic Sites?

- Wetlands
- Mudflats
- Riffle and Pool Complexes
- Vegetated Shallows
- Coral Reefs
- Sanctuaries and Refuges





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**THE
DREADED
LEDPA**

LEDPA
NO DISCHARGE SHALL BE
PERMITTED IF THERE IS A
**LESS ENVIRONMENTALLY-
DAMAGING PRACTICABLE
ALTERNATIVE**
TO ACHIEVE THE **BASIC
PROJECT PURPOSE**

WHAT IS "PRACTICABLE"?

- An alternative is practicable if it is **available** and capable of being done after taking into consideration **cost, existing technology, and logistics** in light of **overall project purposes**.
- If it is otherwise practicable, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic project purpose may be considered.

What's "Available" mean?
 How far in space and time
 do I have to look?

SPACE:

- An appropriate geographic scope for the market. (Follow the Money!)

TIME:

- Since the applicant entered the market.
- May include alternatives that are no longer available.

AVAILABILITY

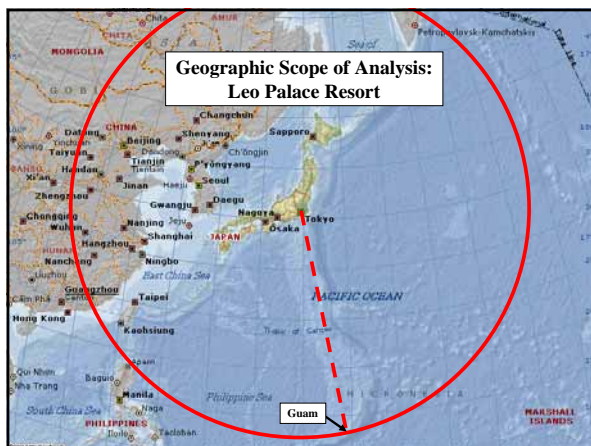
- Look within an appropriate geographic scope for the project purpose, but
- Don't restrict potential alternatives to only those owned or controlled by the applicant. Consider:
 - What's available within the area?
 - In fact, ownership may not be necessary: Consider easements, condemnation, lease/rental, management, etc.
- Identify *unavailable* options, too
 - Restricted lands [4(f) lands, wilderness, mitigation sites, some zoning]
 - Unwilling seller for private projects

AVAILABILITY

"Appropriate geographic scope" varies by type of industry and applicant

•Some Examples:

- Island Resorts = Pacific Rim wide
- Commercial Developments = regional
- Housing = local to regional
- Highway Bypass = local to regional



COSTS

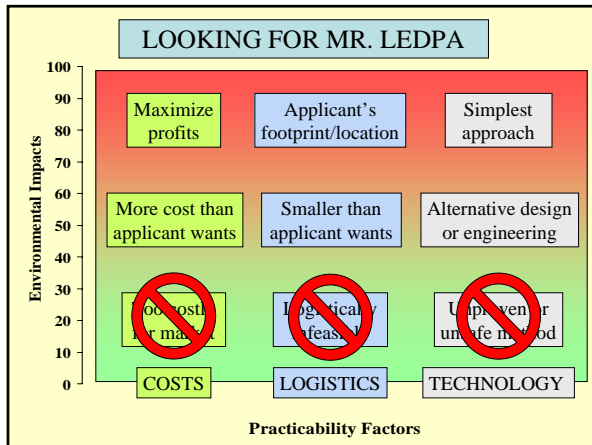
- 404 can consider type of project
 - Maintenance vs expansion vs new project
- 404 can consider type of project proponent
 - Large vs small, commercial vs non-commercial
- 404 can consider type of funding
 - Private proposal vs publicly-funded
- Goal is neither to maximize nor eliminate profit
- **Test:** is it a reasonable cost of doing business, given the nature of the project and the proponent - is it reasonable for its "market"?

LOGISTICS/TECHNOLOGY

- Certain alternatives may drop out early as not practicable, based on such things as:
 - Engineering Feasibility
 - Geology
 - Safety
 - State/Federal minimum design standards
- Local zoning, etc., may be a practicability factor, e.g., if based on a plan that evaluates 404(b)(1) issues, such as a SAMP, etc.

IDENTIFYING THE LEDPA

- **Best Evaluation Approach:**
 - First:
 - Narrow the range based on **Practicability**;
 - Then:
 - Evaluate environmental impacts of the remaining Practicable Alternatives; and
 - Finally:
 - Identify the LEDPA



RANGE OF ALTERNATIVES:

- After eliminating the impracticable, evaluate the environmental impacts of different:
 - On-Site Footprints/Configurations
 - Off-Site Locations/Configurations
 - Acquisition/Condemnation
 - Lease/Rent/Manage
 - Sizes, Levels of Service, etc.
 - Project Phasings

